DISSENTING OPINION OF JUDGE KREĆA

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INTRODUCTION

In spite of my respect for the Court, I am compelled, with deep regret, to avail myself of the right to express a dissenting opinion.

As each objection appears to be designed as a separate whole, I shall treat the objections raised by Yugoslavia separately, in such a way as to ensure that the conclusions drawn therefrom will serve as a proper basis for my general conclusion concerning the jurisdiction of the Court and the admissibility of Bosnia and Herzegovina's claim.

FIRST PRELIMINARY OBJECTION

1. My approach to the meaning of the first preliminary objection is essentially different from that of the Court. Prior to deciding whether *in concreto* there is an international dispute within the terms of Article IX of the Genocide Convention, it is necessary, in my opinion, to resolve the dilemma of whether Bosnia and Herzegovina at the time when the Application, as well as the Memorial, were submitted, and Bosnia and Herzegovina as it exists today when this case is being heard, are actually one and the same State. This question represents, in my opinion, a typical example of what Judge Fitzmaurice in his separate opinion in the *Northern Cameroons* case[1] described as objections "which can and strictly should be taken in *advance* of any question of competence", for it opens the way for the *persona standi in judicio* of Bosnia and Herzegovina.

If they are the same State, then the issue raised by the preliminary objection is in order. In the event that they are not, the situation is in my opinion clear — there is no dispute concerning Article IX of the Convention — hence, *placitum aliud personale*.

In this regard, the issue raised by the first preliminary objection is not an issue of admissibility *stricto sensu*, but a mixture, in its own right, of admissibility and jurisdiction *ratione personae*.

2. The aforementioned question is directly linked with the concept of an international dispute, the substance of which consists of two cumulative elements — the material, and the formal. The generally accepted definition of the dispute which the Court gave in the *Mavrommatis Palestine Concessions* case[2] represents, in fact, only the material element of the concept of "international dispute". In order to qualify "a disagreement over a point of law or fact, a conflict of legal views or of interests", which is evident in this specific case, as an "international dispute", another, formal element is indispensable, i.e., that the parties in the "disagreement or conflict" be States in the sense of international public law.

[1] *I.C.J. Reports 1963*, p. 105.
[2] *P.C.I.J., Series A, No. 2*, p. 11.

Article IX of the Genocide Convention stipulates the competence of the Court for the "disputes between the Parties". The term "Parties", as it obviously results from Article XI of the Convention, means States, either members or non-members of the United Nations.

The term "State" is not used either *in abstracto* in the Genocide Convention, or elsewhere; it means a concrete entity which combines in its personality the constituting elements of a State, determined by the international law. The pretention of an entity to represent a State, and even recognition by other States, is not, in the eyes of the law, sufficient on its own to make it a State within the meaning of international law.

From the very beginning of the proceedings before the Court, Yugoslavia challenged the statehood of Bosnia and Herzegovina. It is true that, as the Court noted, Yugoslavia explicitly withdrew this preliminary objection. However substantial arguments against the statehood of Bosnia and Herzegovina at the relevant time were indicated by Yugoslavia in support of its third objection. *Exempli causa*, Yugoslavia emphasized that "[t]he central organs of the Government of this Republic controlled a very small part of the territory of Bosnia and Herzegovina . . . In fact four states existed in the territory of the former Socialist Republic of Bosnia and Herzegovina . . ."[3]. The third objection of Yugoslavia may in substance be reduced to the assertion that Bosnia and Herzegovina, in the light of relevant legal rules, "has not established its independent statehood" within the administrative boundaries of that former federal unit. This was an additional reason for the Court to take its stand on the aforementioned question, not only in order to be able to take the decision on the first preliminary objection of Yugoslavia, but also in order to decide whether, and to what extent, it was competent in this case.

The response to the question whether Bosnia and Herzegovina, at the relevant points in time, was constituted as a State within the administrative boundaries of the federal unit of Bosnia and Herzegovina has, in my opinion, a definite affect on the succession to the Genocide Convention. To be bound by the Genocide Convention is only one of the forms of "replacement of one State by another in the responsibility for international relations of the territory". The word "territory" refers to the space in which the newly formed State exercises *summa potestas*, the space within which it is constituted as a State in the sense of the relevant norms of international law. It need hardly be said that there is no legal basis that would enable one State to assume contractual obligations in the name of another State or States, whether recognized or not. Bosnia and Herzegovina explicitly claims — and, what is more, its entire Memorial is based on that claim — that it is acting in the name of the whole of the former federal unit of Bosnia and Herzegovina, i.e., that Bosnia and Herze-

[3] CR 96/5, p. 35.

govina is the successor State in relation to the entire territory of that former federal unit. Hence, in my opinion, it is essential that the Court, in defining the factual and legal state of affairs in the territory of Bosnia and Herzegovina at the relevant points in time, should precisely determine the scope of its jurisdiction.

Finally, in its scope, the answer to the question of the State identity of Bosnia and Herzegovina is, in my view, also relevant with regard to the Yugoslav claim stated in the fifth preliminary objection according to which the case "in point is an international conflict between three sides in which FRY was not taking part".

Having in mind the foregoing, and even in the event that Yugoslavia has not made such an assertion, the Court is not relieved of the obligation to do so. As established in the Judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council:*

> "The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu.* The real issue raised by the present case was whether, in the event of a party's failure to put forward a jurisdictional objection as a preliminary one, that party might not thereby be held to have acquiesced in the jurisdiction of the Court."[4]

3. (*The concept of the State* ab intra.) The concept of the State *ab intra* defines the State as an isolated, static phenomenon on the basis of its constituent elements. The State so defined is usually understood to be an entity comprised cumulatively of a permanent population, an established territory and sovereign authority. Not infrequently, other elements of the State are also cited but they do not merit the qualification of constituent elements. They are by their nature either derived elements (*exempli causa*, "capacity to enter into relations with other States") or they reflect exclusivistic concepts which are ontologically in contradiction with the democratic nature of positive international law ("degree of civilization such as enables it to observe the principles of international law", etc.).

As far as the nature of the cited constituent elements of the State are concerned, they are legal facts. As legal facts they have two dimensions.

The qualification "constituent elements of the State" reflects the static, phenomenological dimension of the concept of the State. It proceeds from the State as a fact, i.e., phenomenologically, and focuses on the basic constituent elements of its static being.

In the case of the emergence of new States, the constituent elements of the concept of the State lose their phenomenological characteristics — since in that case, there is no State as an entity — and are transformed into *prerequisites* for the emergence of a State. In other words, for a cer-

[4] *I.C.J. Reports 1972*, p. 52.

tain entity to become a State it must cumulatively fulfil conditions which are, in the material sense, identical with the constituent elements of a State in the static, phenomenological sense.

4. What is the mutual relationship among the basic constituent elements of the State? From the formal standpoint, the question may appear to be superfluous, as by its very wording it suggests the only possible answer and that is that they are elements that function cumulatively. However, the question does have a logic of its own if one views it as relating to the value relationship among the cumulative elements or, in other words, if one views, within the concept of the State comprised of the three cited elements, their mutual relationship *ab intra*.

With the reservation that the value relationship among the cited elements is to some extent determined in advance by the cumulative nature of the elements, some conclusions can nonetheless be drawn. First, there is no doubt that a certain value relationship, if not even a hierarchy, does exist. Suffice it to note that territory and population are immanent to some non-State entities as well. It is also beyond doubt that the element of sovereignty is peculiar to the State alone. Thirdly — and this is the *differentia specifica* between States and other, non-State entities — sovereignty is in a sense a qualifying condition, a condition of special value, for sovereign authority is not only one of the constituent elements of the State, but it is at the same time an element which gives concrete substance to the rather abstract and broad concepts of "territory" and "population" and, in so doing, links them to the concept of the State in the sense of international law. Evidently, for a "territory" to be "State territory" it must be subject to sovereign authority. Without it a "territory" is not a State territory but it is something else (*res nullius*, trusteeship territory, *res communis omnium*, common heritage of mankind and the like).

5. Were the constituent elements of a State in existence in the case of Bosnia and Herzegovina at the relevant point in time?

6. There is no doubt that Bosnia and Herzegovina had a "permanent population" if we use the term in the technical sense, i.e., in the sense of a group of individuals who were linked to the relevant territory by their way of life.

However, within the system of positive international law, the term "permanent population" acquires a different meaning. In a system that recognizes the fundamental significance of the norms of equal rights and self-determination of peoples (see paras. 67-68, 71 below), the concept of a "permanent population", at least when referring to a territory inhabited by several peoples, cannot have only the cited technical meaning. In that case, if one is to be able to speak of a "permanent population" in view of the norm on equal rights and self-determination of peoples, there has to be a minimum of consensus among the peoples regarding the conditions of their life together.

In Bosnia and Herzegovina that minimum did not exist. The Referendum of 29 February and 1 March 1992, in relation to the national plebi-

scite of the Serb people in Bosnia and Herzegovina of 9-10 November 1991, showed that the "permanent population" of the federal unit of Bosnia and Herzegovina was divided into the Muslim-Croat peoples on the one hand and the Serb people on the other. The unification of the communes with a majority Croat population into the Croatian Community of Herceg-Bosna on 19 November 1991 and especially the formation of the independent State community of Herceg-Bosna on 4 July 1992, symbolized the complete divergence of options among the three peoples of Bosnia and Herzegovina. In an entity in which *summa potestas* is a constituent element of special importance and bearing in mind how it was distributed in Bosnia and Herzegovina, there are strong grounds to claim that in Bosnia and Herzegovina there were in fact three "permanent populations".

7. The use of the term "defined territory" implies defined and settled boundaries in accordance with the rules of positive international law. As a condition for the existence of a State, "defined and settled boundaries" do not have absolute value — in practice a State has been considered to have been constituted even when all its boundaries were not defined. However, it is essential that "there is a consistent band of territory which is undeniably controlled by the Government of the alleged State"[5]. The rule is that the boundaries be established by international treaty or, exceptionally, on the basis of the principle of effectiveness.

The question whether Bosnia and Herzegovina had "defined and settled boundaries" has a two-fold meaning: material and in terms of time.

8. In the material sense, the relevant question is whether one can equate administrative-territorial boundaries within a composite State and frontiers between States in the sense of international law?

The answer can only be negative both from the standpoint of the internal law of the Socialist Federal Republic of Yugoslavia (SFRY) and from the standpoint of international law.

As far as the internal law of SFRY is concerned, suffice it to note the provisions of Article 5 (1) of the SFRY Constitution which stipulated *expressis verbis* that the "territory of SFRY is unified" and that it is "composed of the territories of the Socialist Republics". That the "boundaries" between the federal units were merely lines of administrative division is also evidenced by the fact that they were not directly established by any legal act. They were determined indirectly, via the territories of the communes which comprised a certain federal unit so that they were, in a sense, the aggregation of communal borders. Thus, the Constitution of Bosnia and Herzegovina stipulated in Article 5: "[t]he territory of SR Bosnia-Herzegovina is composed of the areas of the communes".

[5] M. N. Shaw, *International Law*, 1986, p. 127.

The administrative nature of the boundaries of the federal units in SFRY was also recognized by the Arbitration Commission of the Conference on Yugoslavia whose opinions are used by the Applicant as its main argument. In Opinion No. 3, it described the boundaries between the Yugoslav federal units as "demarcation lines"[6].

In the light of international law, the terms "frontier" or "State border lines" are reserved for States with international personality. More particularly, whereas the SFRY was a State in terms of public international law and of the United Nations Charter, the republics were the component parts of Yugoslavia and, in the context of the legal nature of a federation, they were the component parts of a single State *in foro externo* and of a composite State *in foro interno* since the federation is distinguished by the parallel existence of a federal and a republican government organization in a manner and on a scale established under the Constitution and the law.

9. From the standpoint of time, the question is posed differently — were the administrative-territorial boundaries of Bosnia and Herzegovina transformed into borders in the sense of international law, *tractu temporis*, from the moment the "sovereignty and independence" of Bosnia and Herzegovina was proclaimed?

The possibility of such a transformation exists in principle. "Non-borders" can become "borders" in the same way in which "borders" are constituted, that is by agreement or, exceptionally, on the basis of the principle of effectiveness.

Examples of such a transformation are the cases of the Soviet Republics and the Czech Republic and Slovakia. In the Yugoslav case, such a transformation implied two things: first, that a decision on the dissolution of SFRY or a state-legal restructuring had been taken by the highest organ of authority through an appropriate procedure and, second, that in either case, the establishment of Bosnia and Herzegovina as an independent State had been envisaged. The relevant facts imposed such a solution. First, Bosnia and Herzegovina was not an authentic constituent of the Yugoslav State. Such a status was enjoyed, among others, by the peoples of Bosnia and Herzegovina (paras. 48-60 below). Further, being a derivative entity of the constitutional law of Yugoslavia without the right to secession, Bosnia and Herzegovina's existence depended on the existence of Yugoslavia. *Consequently, even under the hypothesis that the dissolution of SFRY had taken place, this would not in itself signify the transformation of Bosnia and Herzegovina into an independent State within its administrative boundaries. Legally, the hypothetical dissolution would necessarily have had to result in the political and legal reconstruc-*

[6] The Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 3, para. 2 (3).

tion of the space of Bosnia and Herzegovina on the basis of the norm on equal rights and self-determination of peoples.

Bosnia and Herzegovina did not accept the "Concept for the future organization of the State", proposed by a working group comprising representatives of all the Republics, as a basis for further talks involving the republican presidents and the State Presidency, which, *inter alia*, included a "Proposed Procedure for dissociation from Yugoslavia" on the basis of the self-determination of peoples. This part of the "Concept" which was drawn up to deal with the constitutional crisis in SFRY in a peaceful and democratic manner, respecting the relevant norms of international law and the internal law of SFRY, envisaged a corresponding solution for the borders as well. On the basis of the draft amendment to the SFRY Constitution, the "Concept" stipulated the obligation of the Federal Government to "*c.* prepare proposals for the territorial demarcation and the frontiers of the future states and other issues of importance for formulating the enactment on withdrawal"[7].

What remains therefore, is the principle of effectiveness as a possible basis for the transformation of the administrative-territorial boundaries of the federal unit of Bosnia and Herzegovina into international borders. As this principle implies the effective, actual exercise of sovereign authority, and considering the scope of that authority of the central government in Sarajevo (see para. 18 below), it is beyond doubt that the mentioned transformation of boundaries on the basis of the principle of effectiveness did not occur.

10. The Arbitration Commission of the Conference on Yugoslavia whose opinion Bosnia and Herzegovina uses as argument, states with respect to the relevant question:

> "[e]xcept where otherwise agreed, the former boundaries become borders protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis* . . . [which] though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (*Frontier Dispute*, (1986) *I.C.J. Reports* 554 at 565):
>
> 'Nevertheless the principle is not a special rule which pertains

[7] *Focus*, Special Issue, January 1992, p. 33.

> solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of the new States being endangered by fratricidal struggles.'"[8]

Such reasoning is not legally tenable.

First, the phrase "territorial status quo" in this specific case is a *contraditio in adiecto*. It does have a logical and legal sense in the international order, in the mutual relations between States as persons in international law. The territorial status quo in the United Nations system is a terminological substitute for the principle of respecting a State's territorial integrity, and strictly speaking, it refers to States in the sense of international law and not to the integral parts of a federation. *In foro interno*, the "territorial status quo" is of qualified significance for a State's own territorial organization as a matter which falls within the domain of strictly internal jurisdiction *(domaine réservé)*. So, since the creation of Yugoslavia in 1918, the internal administrative territorial boundaries have been drawn three times: first in 1918 within the Kingdom of the Serbs, Croats and Slovenes with a division of the country into 32 regions; next in 1929, in the Kingdom of Yugoslavia, with the organization of nine *Banovinas* as administrative units; and then in the period between 1943 and the early post-war years during the formation of Federal Yugoslavia and its six republics. *Consequently, the expression "territorial status quo" in municipal law can only be considered as a kind of legal metaphor for a rule of national law which would prohibit changing administrative boundaries.*

Second, reference to the Judgment of the International Court of Justice in the *Frontier Dispute* case cannot have effect in this concrete case not only because the relevant part of the Judgment is not cited *in extenso*[9], but also because the meaning of the Judgment as a whole differs significantly.

Outside the colonial context to which the reasoning of the Court applies in the *Frontier Dispute* case, the principle of *uti possidetis* in positive international law can only have the meaning which corresponds to the original meaning of that principle as expressed in the formula *"uti possidetis, ita posideatur"*, i.e., the meaning of the principle of effectiveness.

11. With regard to the qualification of the borders of Bosnia and Herzegovina, it is interesting to examine the "Framework Agreement for the Federation" concluded on 2 March 1994 in Washington. Chapter I (Establishment) of the "Framework Agreement for the Federation" stipulates, *inter alia*, that:

[8] The Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 3, para. 2 (4).

[9] The part of the Judgment which the Commission has cited ends with the words: *"provoked by the challenging of frontiers following the withdrawal of the administering power"* (para. 20; emphasis added). See paragraphs 19, 20, 23 of the *Frontier Dispute* Judgment, *I.C.J. Reports 1986*, pp. 564-565, 566.

> "Bosniacs and Croats, as constituent peoples (along with others) and citizens of the Republic of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the territories with a majority of Bosniac and Croat population in the Republic of Bosnia and Herzegovina into a Federation, which is composed of federal units with equal rights and responsibilities."

Though the "Framework Agreement" makes no mention of frontiers, there is no doubt that its contents, in the context of relevant norms of international law, has definite implications with respect to the borders of Bosnia and Herzegovina.

The "Framework Agreement" represents a tacit renunciation of the concept of a unified Bosnia and Herzegovina and thereby of the administrative boundaries of Bosnia and Herzegovina as international frontiers. In particular, it is clear that by this Agreement, the political representatives of the Croat and Muslim peoples in Bosnia and Herzegovina agreed to constitute a federal State which would have confederal links with Croatia. The Constitution of the Federation was undoubtedly derived from the norm of equal rights and self-determination of the Muslim and Croat peoples in Bosnia and Herzegovina even though this norm is not explicitly mentioned in the Agreement. Such a conclusion is warranted by the qualification that the Federation was constituted on the basis of "the exercise of sovereign rights . . . [of] Bosniacs and Croats as constituent peoples". True, the Agreement proceeds from the "sovereignty and territorial integrity of the Republic of Bosnia and Herzegovina" but this syntagm in the context of the relevant facts has more of a declarative than a material significance. The "Framework Agreement" defines the territory of Bosnia and Herzegovina as "territories with a majority of Bosniac and Croat populations in the Republic of Bosnia and Herzegovina". In relation to the parts of Bosnia and Herzegovina inhabited by a majority Serb population, the "Framework Agreement" says:

> "[t]he decisions on the constitutional status of the territories of the Republic of Bosnia and Herzegovina with a majority of Serbian population shall be made in the course of negotiations toward a peaceful settlement and at the International Conference on the Former Yugoslavia".

It is therefore beyond question that:

(a) the "Framework Agreement" envisages the constitution of a Muslim-Croat Federation on the territory of Bosnia and Herzegovina;
(b) those territories of Bosnia and Herzegovina that are inhabited by a majority Serb people are left out of the territories of the Federation;
(c) representatives of the Muslim-Croat Federation are acting and are accepted in international affairs, including international organizations, as representatives of an autonomous, independent State;

(d) the "Framework Agreement" links the decision on the status of "territories of Bosnia and Herzegovina with a majority Serb population" to the "course of negotiations toward a peaceful settlement and at the International Conference on the Former Yugoslavia". In view of the rules of general international law on the decision-making procedure which, it goes without saying, apply also to the International Conference on the Former Yugoslavia, the conclusion that imposes itself is that the material-legal meaning of the "Framework Agreement" with respect to the borders of Bosnia and Herzegovina is that the Federation, constituted as a result of the will of two out of the three constituent peoples of Bosnia and Herzegovina, renounced the administrative borders of Bosnia and Herzegovina as State borders of the Federation leaving open the possibility of those borders being changed on the basis of decisions taken "in the course of negotiations toward a peaceful settlement and at the International Conference on the Former Yugoslavia".

12. It was the Dayton Agreement which transformed the administrative Boundaries of Bosnia and Herzegovina into international borders. Article 10 of the Agreement stipulates that "[t]he Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders".

13. Regardless of theoretical definitions of sovereignty and the distinctions based on them regarding its manifestations, it is evident that the sovereignty of States implies:

(i) *suprema potestas* — "by which is meant that the State has over it no other authority than that of international law"[10]. The equals-mark that is being placed between *suprema potestas* and independence[11] is indicative of a substantial fact — that the entity purporting to be a State in the sense of international public law takes vital political decisions autonomously and independently of third States. A State in the international legal sense cannot and must not comply with alien political decisions regardless of whether such compliance has a formal or informal basis. Therein lies the meaning of the qualification according to which "the first condition for statehood is that there must exist a government actually independent of any other State"[12].

(ii) *summa potestas* — in the sense of the exercise of real, factual authority on the territory of the State. The intention to establish genuine authority is no more than a political project, an intellectual construction that has not materialized. That intention has to be realized and this implies, *inter alia*, the existence of an institutional network suit-

[10] *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, separate opinion of Judge Anzilotti, p. 57.

[11] *Island of Las Palmas* case, *Reports of International Arbitral Awards*, Vol. II, p. 838.

[12] H. Lauterpacht, *Recognition in International Law*, 1949, p. 26.

> able for and capable of implementing its decisions throughout the State territory. Hence, *summa potestas* is a mere figure of speech "until a stable political organisation has been created, and until public authorities become strong enough to assert themselves throughout the territory of the State"[13].

These two segments of sovereignty constitute an organic whole. As for their mutual relationship, *summa potestas* has the character of a prior assumption as, for an entity to constitute an independent State, it is essential that it should have come into existence as a State — from the theoretical standpoint *suprema potestas* is the qualifying condition of existence of an independent State, the *differentia specifica* between independent and dependent States.

14. The question whether Bosnia and Herzegovina had *summa potestas* within the administrative boundaries of Bosnia and Herzegovina must be linked to a certain time frame. For the purpose of this specific question, two points in time are relevant:

(a) the moment of the proclamation of a "sovereign and independent Bosnia"; and,

(b) the moment at which proceedings were brought against the Federal Republic of Yugoslavia before the International Court of Justice.

Did the Applicant at these relevant points in time have a "stable political organization" within the administrative boundaries of Bosnia and Herzegovina on the one hand and were its "public authorities strong enough to assert themselves throughout the territory" of Bosnia and Herzegovina on the other?

15. According to the assertions of the Applicant, Bosnia and Herzegovina was proclaimed a "sovereign and independent Bosnia" on 6 March 1992 when the results of the referendum held on 29 February and 1 March 1992 were officially promulgated. *It is beyond dispute that, at that point in time, the Applicant did not have a "stable political organization" throughout the territory of Bosnia and Herzegovina nor were its "public authorities strong enough to assert themselves throughout the territory" of Bosnia and Herzegovina. More particularly, prior to the proclamation of "sovereign and independent Bosnia" within the administrative boundaries of Bosnia and Herzegovina* two *de facto* States — *the Republic of Srpska and the Croatian Community of Herceg-Bosna — had been formed.*

The Croatian Community of Herceg-Bosna was founded on 9 November 1991 (and it was proclaimed an independent State community under the same name on 4 July 1992), whereas the Republic of the Serb people of Bosnia and Herzegovina was formed by a Declaration of the Assembly

[13] Legal Aspects of the Aaland Island Question, Report of the International Committee of Jurists, *Official Journal of the League of Nations*, Special Supp. No. 3, p. 3 (1920).

of the Serb people issued in January 1992 (it changed its name to the Republic of Srpska on 7 April of the same year[14]).

The common denominator of both units is that they represent the institutionalization of authority in regions in which, in the main, the parties of the Serb and Croatian peoples of Bosnia and Herzegovina won a majority at the first multi-party elections held on 18 and 19 November 1990[15] and under the direct influence of the substantive differences that had emerged among the national parties of the three constituent peoples with respect to the future status of the federal unit of Bosnia and Herzegovina. Those differences appeared in a clear and unambiguous form already at the time of the outbreak of the constitutional crisis in SFRY with the proclamation of the "sovereignty and independence" of the federal units of Slovenia and Croatia, and culminated when the "Platform on the Status of Bosnia and Herzegovina and the Future Set-Up of the Yugoslav Community" was adopted by the then rump Assembly of Bosnia and Herzegovina on 14 October 1991.

The "Platform on the Status of Bosnia and Herzegovina" *inter alia* qualified Bosnia and Herzegovina as a "democratic sovereign State" which would advocate the adoption of a "Convention on the mutual recognition of the sovereignty, inviolability and unchangeability of the borders of the present-day republics"[16].

The practical effect of the "Platform on the Status" was the dissolution of the *state-legal body of the federal unit of Bosnia and Herzegovina*, hence the powers vested in its organs according to the federal Constitution and the Constitution of Bosnia and Herzegovina *via facti* were itself taken over by the three ethnic communities.

16. *(Republika Srpska.)* The Assembly of the Serb people of Bosnia and Herzegovina at its session held on 9 January 1992 adopted a "Declaration on the Proclamation of the Republic of the Serb People of Bosnia and Herzegovina" in the areas

> "of the Serb autonomous regions and areas and other ethnic Serb communities in Bosnia-Herzegovina, including the areas where the Serb people has remained a minority as a result of genocide against it during World War Two and further to the outcome of the plebiscite held on November 9 and 10, 1991 at which the Serb people voted to remain in the common State of Yugoslavia"[17].

[14] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 42 of 19 December 1991.
[15] *Ibid.*
[16] *Ibid.*, No. 32 of 16 October 1991.
[17] *Official Gazette of the Serb People of Bosnia and Herzegovina*, No. 2/92.

The Declaration stipulated, *inter alia*, that:

> "[p]ending the election and constitution of new organs and institutions to be established under the Constitution of the Republic, the functions of the State organs in the Republic shall be discharged by the present Assembly of the Serb people in Bosnia-Herzegovina and by the Council of Ministers" (Art. VI);

and that

> "[t]he federal regulations, along with those of the former Bosnia-Herzegovina, except those found by the Serb People's Assembly to be contrary to the Federal Constitution, shall remain in force pending the promulgation of the Republic's Constitution, its laws and other regulations" (Art. VIII).

The Assembly of the Serb People in Bosnia and Herzegovina, at its session held on 29 February 1992, adopted the "Constitution of the Republic of Srpska" on the basis of the

> "inalienable and intransferable natural right of the Serb people to self-determination, self-organization and association, on the basis of which it may freely determine its political status and ensure economic, social and cultural development".

The formal acts were accompanied by the actual assumption of authority in the territories of the communes.

The armed forces of the Republic of Srpska was at first composed of territorial defence units in the communes and of other armed formations. The Army of the Republic of Srpska was formed on 13 May 1992[18].

The Army of the Republic of Srpska, from its formation, operated autonomously as the military force of the proclaimed State. Clear confirmation of this is to be found in the above-mentioned report of the Secretary-General:

> "The Bosnia and Herzegovina Presidency had initially been reluctant to engage in talks . . . with the leadership of the 'Serbian Republic of Bosnia and Herzegovina' and insisted upon direct talks with the Belgrade authorities instead. A senior Yugoslav Peoples' Army (JNA) representative from Belgrade, General Nedeljko Bosković, has conducted discussions with the Bosnia and Herzegovina Presidency, *but it has become clear that his word is not binding on the commander of the army of the 'Serb Republic of Bosnia and Herzegovina', General Mladić — it is also clear that the emergence of General Mladić and the forces under his command as independent actors*

[18] Report of the Secretary-General pursuant to paragraph 4 of the Security Council resolution 752/1992, doc. S/24049, 30 May 1992, para. 2.

> *beyond the control of JNA* greatly complicates the issues raised in paragraph 4 of the Security Council Resolution 752 (1992)."[19]

In addition, Republic Srpska had its own legislative, executive and judicial organs.

17. *(Croatian community of Herceg-Bosna.)* Herceg-Bosna, the State of the Croatian people in Bosnia and Herzegovina, was proclaimed on 4 July 1992. With the exception of certain territorial changes, this act only formalized the situation created in November 1991 when the Croatian Community of Herceg-Bosna was created. From the very beginning, this functioned *de facto* as a State.

Herceg-Bosna had its own armed force. The Decree on the armed forces of the Croatian Community of Herceg-Bosna stipulated that the armed forces constitute a unified whole comprising the "regular and reserve forces"[20]. Confirmation of the existence of the autonomous armed forces of Herceg-Bosna is to be found also in the "Report of the Secretary-General pursuant to paragraph 4 of Security Council resolution 752 (1992)" (see para. 18 below). The Government in Sarajevo did not deny this fact either. A letter addressed by Hadzo Efendić as "Acting Prime Minister" to C. Vance and Lord Owen, the Co-Chairmen of the Conference on Former Yugoslavia on 29 April 1993, says *inter alia*:

> "With the purpose of realizing the agreement from item 5 of the Common Statement made by Messrs Alija Izetbegović and Mato Boban at the meeting held in Zagreb on April 24, 1993 . . . we would like to ask you to undertake activities aimed at establishing a separate, independent international commission for establishing the facts on violations of international humanitarian law and war crimes committed over the civilian population *during the renewed conflicts between the Army of the R B-H and HVO in Central Bosnia and some other parts of the Republic of Bosnia and Herzegovina.*"[21]

In addition to its armed forces, Herceg-Bosna had its own executive, legislative and judicial organs.

Supreme authority was vested in the Presidency, composed of representatives of the Croat people in Bosnia and Herzegovina, headed by the President of the Presidency. The Croatian representatives withdrew from the joint organs of the Applicant and moved to Mostar which was pro

[19] Doc. S/2409, 30 May 1992, paras. 8-9 (emphasis added).

[20] *Borba*, Belgrade, 6 July 1992.

[21] Letter dated 29 April 1993 from Acting Prime Minister Hadzo Efendić addressed to "Cyrus Vance, Lord David Owen, Co-chairmen of The Conference on Former Yugoslavia".

claimed the capital of the State[22]. Herceg-Bosna appropriated all the *matériel* of JNA as well as all the property of the organs and bodies of the former federation. Public, State enterprises were formed in the sectors of agriculture, forestry and mining, the Post, Telegram and Telephone Service (PTT) and publishing[23].

It was determined that the Law on Regular Courts would be applied even under conditions of war, and military tribunals were set up in the zones of military operations, as autonomous departments of the main military tribunals.

18. In my opinion there can be no doubt that at the moment of the proclamation of "sovereign and independent Bosnia" the authorities in Sarajevo which had been recognized by the international community as the authorities of the whole of Bosnia and Herzegovina did not by a long way exercise *summa potestas* on the territories within the administrative demarcation lines of the federal unit of Bosnia and Herzegovina.

A "[s]table political organization of sovereign and independent Bosnia" simply did not exist at either of the relevant points in time. What is more, even *before the proclamation of Bosnia and Herzegovina as a "sovereign and independent" State, the unified administrative, judicial and legislative apparatus of the federal unit of Bosnia and Herzegovina had ceased to function. It follows from the relevant facts that the proclamation of the Republic of the Serb People and of the Croatian Community of Herceg-Bosna merely formalized the dissolution of the state apparatus of the federal unit of Bosnia and Herzegovina and its replacement by the appropriate structures of the three ethnic communities.* That process embraced both the civilian and military structures of authority. This is evidenced also in the Report of the Secretary-General pursuant to paragraph 4 of Security Council resolution 752 (1992). In paragraphs 5 and 10 the Report refers to the existence of "the army of the so-called 'Serbian Republic of Bosnia and Herzegovina'", and the "territorial Defence of Bosnia and Herzegovina which is under the political control of the Presidency of that Republic" and "local [Croat] Territorial Defence". The "[s]table political organization of sovereign and independent Bosnia", was not created even after the proclamation of independence so that it is obvious that the organs of the Applicant were not "strong enough to assert themselves throughout the territory" of Bosnia and Herzegovina.

This obvious fact is confirmed also in the "Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. T. Mazowiecki, Special Rapporteur of the Commission on Human

[22] Letter from the President of the Government of the Republic of Bosnia-Herzegovina to the Secretary-General of the United Nations, 13 May 1993.

[23] *Borba*, Belgrade, 6 July 1992.

Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of August 1992". The "Report" states, *inter alia*, that

> "[m]uch of the territory of Bosnia and Herzegovina is not under the control of the recognized Government. Most observers agree that the Serbian Republic of Bosnia and Herzegovina, an unrecognized government proclaimed *when* Bosnia and Herzegovina declared its independence from Yugoslavia against the wishes of the Serbian population, controls between 50 and 70 per cent of the territory . . . It ['Serbian Republic of Bosnia and Herzegovina'] is comprised of four 'autonomous regions', one of which, Banja Luka, was visited by the Special Rapporteur.
>
> According to the information received, the law applied within the 'Serbian Republic of Bosnia and Herzegovina' is the law of the Federal Republic of Yugoslavia, as modified by the local legislatures." [24]

All that needs to be added is that the "Serbian Republic of Bosnia and Herzegovina" was not proclaimed "when Bosnia and Herzegovina declared its independence" since the "Serbian Republic of Bosnia and Herzegovina" was proclaimed on 9 January 1992 while the rump Parliament of Bosnia and Herzegovina proclaimed the independence of Bosnia and Herzegovina on 6 March of the same year.

The "Report of the Secretary-General pursuant to paragraph 4 of Security Council resolution 752 (1992)" states that:

> "International observers do not, however, doubt that portions of Bosnia and Herzegovina are under the control of Croatian military units, whether belonging to the local Territorial Defence, to paramilitary groups or to the Croatian Army." [25]

This in fact refers to the territories of the communes comprising the Croatian Community of Herceg-Bosna formed on 9 November 1991, that is before the proclamation *of "sovereign and independent Bosnia".*

The territory within which the organs of the Applicant exercised real, effective authority comprised in fact:

> "Three separate regions are under the control of the Government of Bosnia and Herzegovina, namely, part of the capital, Sarajevo; the region known as Bihac, adjacent to the border with Croatia in North-West Bosnia, and parts of central Bosnia and Herzegovina." [26]

[24] Doc. E/CN.4/1992/S-1/9, 9.18 (emphasis added).

[25] Doc. S/24049, p. 4, para. 10.

[26] Report on the human rights in the territory of the former Yugoslavia, submitted by Mr. T. Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992, doc. E/CN.4/1992/S-1/9, p. 18.

19. *The timing of the constitution of the Republic of Srpska and of Herceg-Bosna, on the one hand, and of the Applicant State, on the other, points to the conclusion that the constitution of the Republic of Srpska and of Herceg-Bosna cannot be qualified as armed rebellion against the central authority, as there simply was no central authority at the time, but only as the emergence of several States in the circumstance of the constitutional and State crisis of the Yugoslav federation.*

The assumed existence of a Muslim-Croat central authority in Bosnia and Herzegovina had no factual grounds from the very beginning of the crisis as convincingly evidenced by the war that broke out between Croat and Muslim forces in 1993. In a letter addressed to the Chairman of the European Affairs Subcommittee of the Senate Foreign Affairs Committee of the United States of America, on 24 February 1993, the Prime Minister of Bosnia and Herzegovina, the Croatian representative in the joint Croat-Muslim Government, M. Akmadzić, described Mr. Izetbegović and Mr. Silajdzić "only as one Muslim member of the Presidency" (see para. 37 below). Indicative of the situation in the joint Croat-Muslim Government in Bosnia and Herzegovina is the letter of the Prime Minister addressed to the Secretary-General of the United Nations on 7 May 1993 which says, *inter alia*:

> "*On 7 May 1993 I was informed by public media that Mr. Hadzo Efendić sent Your Excellency a letter in the capacity of Acting Prime Minister.*
>
> Therefore, I would like to inform Your Excellency that *Mr. Hadzo Efendić was not elected as a member of the Government*, nor as Vice-President of the Government and especially was not elected as Acting President of the Government of the Republic of Bosnia-Herzegovina. Mr. Hadzo Efendić was not elected based upon my proposal. This is the only legal course of election that is in accordance with the valid acts and regulations of the Republic of Bosnia-Herzegovina.
>
> I am informing Your Excellency that *no individual can sign documents of the Government of the Republic of Bosnia-Herzegovina in the capacity of the President of the Government other than myself.* As a result of this, *I request Your Excellency not to consider any document of the President of the Government of the Republic of Bosnia-Herzegovina as valid unless it is signed by myself.*
>
> My office is temporarily in Mostar where I am performing my duties as President of the Government of the Republic of Bosnia-Herzegovina."[27]

Therefore, in the territory of Bosnia and Herzegovina in the relevant period the following institutions were functioning:

[27] Letter dated 7 May 1993 addressed to "United Nations Secretary-General, His Excellency Dr. Boutros-Boutros Ghali from Milo Akmadzić, President of the Government of the Republic of Bosnia-Herzegovina" (emphasis added).

(a) the State organs of the so-called central authorities (Croat-Muslim alliance), which formally collapsed with the outbreak of the armed conflict between the Muslims and the Croats and was transformed into Muslim authority. The latter then split up in September 1993 into the Government in Sarajevo and the authorities of the Autonomous Province of Western Bosnia;
(b) the State organs of the Republic of Srpska;
(c) the State organs of Herceg-Bosna; and
(d) as of March 1994, also the State organs of the newly formed Federation which, however, functioned only on paper.

20. Mr. Jadranko Prlić, Prime Minister of the Croatia Republic of Herceg-Bosna and Hercegovina, testified to the fact that the promotion of Croat-Muslim Federation in Bosnia and Herzegovina was a mere proclamation. In an interview given to the *Slobodna Dalmacija* daily newspaper of 18 December 1995, answering the question about the functions of the Minister of Defence in the Government of the Federation and the Republic, Mr. Prlić, who initialled the Dayton Treaties on behalf of the Croat-Muslim Federation, replied as follows:

> "it should be said that *all the time two states and two armies were in existence*. But, there was a certain form of coordination and a result was achieved, primarily thanks to the support of the Croat army and Croat state" [28].

When asked until when Herceg-Bosna would function he replied as follows:

> "No deadline could be set. That will depend on the overall process. When all the rights of the Croat people are ensured and then the Federation becomes capable of taking over those functions that Herceg-Bosna has, then Herceg-Bosna will be reshaped, probably into a political community." [29]

The words of the Croat President Tudjman, one of the participants in the Dayton Conference, imply that revival of the Federation was one of the aims of the Conference. In the Report on the state of the Croatian State and Nations in 1995, Mr. Tudjman mentioned, *inter alia*, that:

> "The international proponents attach special significance to the Federation, within their concept of peace and new order in this area, as testified by the fact that *the Agreement on implementation of B-H Federation*, signed by the representatives of Croatian and Muslim-

[28] *Slobodna Dalmacija*, Split, 18 December 1995 (emphasis added).
[29] *Ibid.*

> Boshniak people, was endorsed by representatives of USA, European Union and Germany."[30]

It seems that only the Dayton Agreement and the political will that gave birth to them, encouraged serious steps towards actual constitution of the Muslim-Croat Federation.

On 14 January 1996, a couple of months after the signing of the Dayton Agreement and almost two years after the proclamation of the Croat-Muslim Federation, the "Presidency of the Croatian Democratic Union for B-H" adopted a decision on the establishment of the Croatian community of Herceg-Bosna as a political, economic and cultural community of Croatian people in Bosnia and Herzegovina. *Within its option for a thorough implementation of the Dayton Agreement*, the Presidency of the Croat Democratic Community (HDZ) of Bosnia and Herzegovina also passed a resolution on the progressive transfer of the function of executive authority of the Croatian Republic of Herceg-Bosna to the authorities of the Federation of Bosnia and Herzegovina. Members of the HDZ Presidency of Bosnia and Herzegovina also called on *the Muslim counterpart in the Federation to start transferring the authority to the organs of the Federation*[31].

The Government of the Federation was established as late as 31 January 1996. President of the Federation Mr. K. Zubak, in his address to the Constitutional Assembly stressed, *inter alia*, that *"by transferring authority from the Republic to the Government of the Federation the functions of Herceg-Bosna will be transferred to the Federation"*[32].

As *Le Monde* reported:

> "The Croat separatists in Bosnia announced on Saturday 15 June that they were forming a new government for their 'independent State of Herzeg-Bosna'. In principle, all the institutions of this self-proclaimed State should have disappeared with the advent of the institutions of the Croat-Muslim Federation."[33]

Hence, the political project of promotion of Muslim-Croat Federation in Bosnia and Herzegovina, incorporated in the Washington Agreement of 1993, has not materialized. Muslim and Croat State entities continued to function after the agreement as *de facto* States, which from time to time kept entering into a sort of political and military co-ordination for the sake of pragmatic political aims. But that co-operation was, according to its inherent characteristics, a co-operation between State entities.

[30] *Vjesnik*, Zagreb, 2 January 1996 (emphasis added).
[31] *Vecernji List*, Zagreb, 15 January 1996.
[32] *Borba*, Belgrade, 1 February 1996 (emphasis added).
[33] *Le Monde*, Tuesday 18 June 1996/3. *[Translation by the Registry.]*

In the light of the Dayton Agreement, promotion of the Federation is a political and contractual obligation, thus in view of the present state of affairs, it could be said that the Federation is a State entity in statu nascendi.

The qualification "self-proclaimed" which is usually attached to the Republic of Srpska and Herceg-Bosna can hardly have any legal effect. According to its original, grammatical meaning, it denotes the obvious fact that no-one can "proclaim" a newly emerging State except itself — in that sense every newly emerging State is "self-proclaimed". The heart of the matter is therefore, not whether a new State is "self-proclaimed" or is proclaimed by a second or third party, but whether the proclamation is based on fact and the law.

This qualification can have legal meaning only within the reasoning of constitutive theory on the recognition of States as a condition of their emergence or in the neoconstitutive practice of the application of the ruling, declarative theory.

21. Bosnia and Herzegovina as a State within the administrative borders of the former federal administrative unit, bearing the name of the former federal unit, could only be discussed, so to speak, after the enforcement of the Dayton Agreements. A precise qualification of Bosnia and Herzegovina in these terms may be given only after a global analysis of the contents of the above-mentioned Agreements.

22. The "Dayton Agreements" as a collective name for a series of agreements, are endowed with ambivalent legal faculties.

In formal terms, the fundamental part of the Agreements should be the General Framework Agreement for Peace in Bosnia and Herzegovina. Such a conclusion is imposed by the fact that other agreements were qualified as annexes to the General Framework Agreement (Agreement on the Military Aspects of the Peace Settlement; Agreement on Regional Stabilization; Agreement on Inter-Entity Boundary Line and Related Issues; Agreement on Elections; Agreement on Arbitration; Agreement on Human Rights; Agreement on Refugees and Displaced Persons; Agreement on the Commission to Preserve National Monuments; Agreement on the Establishment of Bosnia and Herzegovina Public Corporations; Agreement on Civilian Implementation; Agreement on International Police Task Force), with the exception of the Agreement on Initialling the General Framework Agreement for Peace in Bosnia and Herzegovina. The contents of the General Framework Agreement, on the one hand, and the rest of the Agreements, drawn up in the form of annexes, on the other, suggest that the main commitments conducive to a comprehensive settlement to bring an end to the tragic conflict in the region, as stated in the General Framework Agreement, are contained in those annexes.

The General Framework Agreement, by its nature, is a specific combination of elements of political declarations and elements relative to guarantees which resemble an international treaty, *stricto sensu*, conceived as an act creating reciprocal rights and obligations of the parties thereto. The elements characteristic of political declarations are reflected in

the provisions in a series of the General Framework Agreement Articles (Arts. II, III, IV, V, VI, VII and IX) whereby the parties only welcome and endorse arrangements stipulated in the Annexes to the General Framework Agreement. The only Articles of the General Framework Agreement binding on the parties in a way suitable to international treaties, *stricto sensu*, are Articles I and VII. True, most of the Articles mentioned above include a standard form of words providing that "[t]he parties shall fully respect and promote fulfilment of the commitments made" but the meaning of such a wording, in terms of the contents of Article I of the General Framework Agreement and the nature of those commitments is, at least when SFY and Croatia are referred to, more of a sort of a guarantee that the parties to the Agreements, specified as Annexes, will implement the undertakings, rather than constituting a binding obligation. Particularly significant in that regard, apart from the above-mentioned standard wording in the Annexes, is the Agreement on Initialling the General Framework Agreement for Peace in Bosnia and Herzegovina. By that Agreement, which is not formally an annex to the General Framework Agreement, "[t]he Parties [the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia], and the Entities that they represent, commit themselves to signature of these Agreements" (Art. I). It provides that the very implementation of the General Framework Agreement and its Annexes is to be entrusted to the Joint Interim Commission composed of representatives of the Bosnia and Herzegovina Federation, Republic Srpska, Bosnia-Herzegovina Republic. The position of the Bosnia-Herzegovina Republic, as a contracting party, is specific in this context, as the Republic of Bosnia and Herzegovina, by virtue of Article I (3) of the Constitution "*shall* consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republic Srpska (hereinafter 'the Entities')" (emphasis added). Hence the entities figuring in the structure of the Dayton Agreements, in Annex 4 to the Agreements, are the parties; therefore, in the light of relevant conditions for constitution of the Bosnia-Herzegovina Republic as a State within the administrative borders of that former federal unit, it follows that the Bosnia-Herzegovina Republic guarantees the obligations of the entities to constitute it. This discrepancy results from the premise of an unbroken legal personality of Bosnia and Herzegovina under international law as a State — which is of dubious legal validity (see para. 23 below).

Hence it may be said that the Annexes constitute the essential substance of the Dayton Agreements, while the General Framework Agreement, as implied by its very name, constitutes a legal-political framework integrating the regulatory contents of the Annexes. The parties to the "General Framework Agreement" are, as stated in the Preamble, "[t]he Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia". The parties to the Agreement's Annexes are, however, different. The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republic of Srpska are, either alone or together with Croatia and Yugoslavia, parties to most of

the Annexes. The three aforementioned parties signed the Agreement on the Military Aspects of the Peace Settlement; Agreement on Inter-Entity Boundary Line and Related Issues; Agreement on Elections; Agreement on Refugees and Displaced Persons; Agreement on Commission to Preserve National Monuments; and Agreement on International Police Task Force. Together with the Republic of Croatia and the Federal Republic of Yugoslavia, the three parties figure as parties to the Agreement on Regional Stabilization and the Agreement on Civilian Implementation of the Peace Settlement. The Federation of Bosnia and Herzegovina and the Republic of Srpska are parties to the Agreement on Establishment of Bosnia and Herzegovina Public Corporations and the Agreement on Arbitration. The Constitution of the Republic of Bosnia and Herzegovina is also an integral part of the Dayton Agreements. It is designed in the form of Annex 4 of the Agreement and is approved by respective declarations of the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republic Srpska.

23. *In the light of the contents of the Dayton Agreements and in particular in the light of the current state of affairs, Bosnia and Herzegovina may be qualified in terms of international law as a State* in statu nascendi. At the time of the entry into force of the Dayton Agreements, the Republic of Bosnia and Herzegovina, as a State within the administrative borders of the former Yugoslav federal unit of the same name, possessed literally no relevant attribute of a State in terms of international law. More particularly:

(a) The Republic of Bosnia and Herzegovina has no central State authorities to this day. Annex 4 (Constitution of Bosnia and Herzegovina) to the Dayton Agreements stipulates in Articles IV, V, VI and VII joint authorities in the form of a Parliamentary Assembly, a Presidency, a Council of Ministers, a Constitutional Court and a Central Bank, but the Constitution is conditioned upon "free, fair, and democratic elections" as a basis for a representative government[34]. In keeping with the provision of Article 4 of "Transitional Arrangements", joined in the form of Annex II to the Constitution, "[u]ntil superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law"[35]. Systematically interpreted, the above-mentioned provision implies that governmental offices, institutions and other bodies of the entities in the territory of Bosnia and Herzegovina "will operate in accordance with applicable law";

(b) The Republic of Bosnia and Herzegovina up to the present time has possessed no coherent legislation of its own. True, the Constitution of the Republic as a supreme legal act has come into force but

[34] Preamble of the Agreement on Elections, doc. A/50/790-S/1995/999, p. 53.
[35] *Ibid.*, p. 76.

"[a]ll laws, regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina"[36];

(c) The Republic of Bosnia and Herzegovina has no single judicial system or administrative procedure. This fact is also formally endorsed by Article 3 of the "Transitional Arrangements", which states:

"[a]ll proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies"[37];

(d) The Republic of Bosnia and Herzegovina has no armed force of its own. Moreover, a joint army is not an institution of a central authority, since it does not figure as one of the responsibilities of the Peace Settlement and the Agreement on Regional Stabilization, which are relevant in this matter. By their wording and their content they resemble the agreements among sovereign, independent States on confidence and security building measures, rather than agreements among entities within one State. The main purpose of the obligations entered into under the Agreement on the Military Aspects of the Peace Settlement relate to the establishment of a durable cessation of hostilities, which implies that

"[n]either Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina"

and that "lasting security and arms control measures . . . which aim to promote a permanent reconciliation between all Parties" are to be established[38]. The Agreement on Regional Stabilization, however, provided for a general obligation of establishment of progressive measures for regional stability and arms control by achieving balances and stable defence force levels at the constant numbers consistent with the parties' respective security and the need to avoid an arms race in the region[39];

[36] Doc. A/50/790-S/1995/999, Transitional Arrangements, Art. 2, p. 76.
[37] *Ibid.*, Art. 3.
[38] *Ibid.*, Art. I (2) *(a), (c)*, p. 8.
[39] *Ibid.*, p. 2.

(e) The Republic of Bosnia and Herzegovina does not have its own police force. The competence of the police forces of the entities is limited *ratione loci*. Only the International Police Task Force, established under the corresponding Agreement marked as Annex 11, is authorized, in keeping with its tasks laid down in Article III of the Agreement, to act throughout the Republic of Bosnia and Herzegovina.

Of the relevant conditions for statehood of Bosnia and Herzegovina within its administrative borders, only the condition concerning the contractually determined administrative borders of Bosnia and Herzegovina as the internationally recognized ones, has been fully met[40].

24. *In the light of the foregoing it may be said that the relevant factual and legal status of Bosnia and Herzegovina as a State within the administrative borders of the same ex-federal unit, may be defined as a political project of the organized international community, whose materialization was transformed by the Dayton Agreements into a binding obligation of the parties to the Agreements.* The fact that this is more a contractual obligation to establish Bosnia and Herzegovina as a State than a consecration of the current state of affairs is testified to by the nature of the Constitution of the Republic of Bosnia and Herzegovina. As it stands, it is not, *stricto sensu*, a constitution, that is, an act of the internal constitution-making authority, but is an international treaty incorporating the text of the Constitution. The term "party" denotes a State which has consented to be bound by the treaty and for which the treaty is in force[41]. By virtue of Article 2 *(a)* of the Convention on the Law of Treaties,

> "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

In other words, underlying the title "Constitution of Bosnia and Herzegovina" is a treaty of two State entities — the Federation of Bosnia and Herzegovina and the Republika Srpska — to establish a State within the administrative borders of the former federal unit of Bosnia and Herzegovina, since "[e]very State possesses capacity to conclude treaties"[42].

Moreover, the personality of one of the parties — the Federation of Bosnia and Herzegovina — possesses elements of political fiction that considerably outweigh the real attributes of statehood (see para. 19 above). Hence, in a broader context, the global contractual obligation to establish Bosnia and Herzegovina within its administrative borders also covers the materialization of a separate contractual obligation undertaken by

[40] Article X of the General Framework Agreement for Peace in Bosnia and Herzegovina.
[41] Convention on the Law of Treaties, 1969, Art. 2 (9).
[42] *Ibid.*, Art. 6.

the Croat and Muslim state entities in Bosnia and Herzegovina under the Washington agreement — the obligation to form the Federation of Bosnia and Herzegovina.

At present, an absence of the crucial State elements in terms of international law makes Bosnia and Herzegovina within its administrative borders a State sui generis: *a combination of a contractual relationship of two entities with a strongly installed element of an international protectorate.* This status is expressed at two levels, that is

(a) the factual level, as reflected in the position of IFOR. These forces are, by definition, a "multinational military Implementation Force"[43] deployed to Bosnia and Herzegovina to "help ensure compliance with the provisions of this Agreement"[44]. IFOR is not only one armed force which shall "have complete and unimpeded freedom of movement by ground, air, and water throughout Bosnia and Herzegovina"[45] but is even authorized to "take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection"[46];

(b) the legal level, since particularly relevant provisions of Article VI of the Constitution of Bosnia and Herzegovina (Constitutional Court), which is an inherently adjudicative body which has "exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina"[47]. Paragraph 1 of the above-mentioned Article provides for the composition of the Court in the following way:

> "The Constitutional Court of Bosnia and Herzegovina shall have nine members.
>
> *(a)* Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency."[48]

It is, therefore, beyond any doubt that the election of one-third of the members of the court is not in any way influenced by the Presidency of the Republic of Bosnia and Herzegovina or by any other organ of the

[43] Article 1 of the Agreement on the Military Aspects of the Peace Settlement, doc. A/50/790/S/1995/999, p. 7.
[44] *Ibid.*
[45] *Ibid.*, p. 19.
[46] *Ibid.*, p. 8.
[47] *Ibid.*, p. 71.
[48] *Ibid.*, p. 70.

Republic or Entities, in practical terms, given the fact that consultation *per definitionem* has no binding force.

The provisions relating to the competence of the International Police Task Force can be mentioned among others. The competences of these forces cover, *inter alia*, the "monitoring, observing and inspecting [of] law enforcement activities and facilities, including associated judicial organizations, structures, and proceedings"[49]. The real range of these powers in the context of *suprema potestas* of the Republic of Bosnia and Herzegovina becomes clear in view of the provisions of Article VII of the Agreement which defines law enforcement agencies as those involved in law enforcement, criminal investigations, public and State security, or detention or judicial activities[50].

The elements of international protectorate moreover possess a twofold significance. On the one hand, they are, especially when the composition of the Constitutional Court is concerned, an integral part of the State structure of Bosnia and Herzegovina, construed by the Dayton Agreements, while on the other, they serve to guarantee enforcement obligations entered into by the entities under the agreements.

25. There is an essential analogy between the Republic of Bosnia and Herzegovina and Finland after its proclamation of independence on 4 December 1917. Since the Permanent Court of International Justice did not exist at the time, an opinion on the status of Finland was requested of the International Committee of Jurists. In its Report the Committee noted, *inter alia*, that:

> "Certain elements essential to the existence of a state, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves, civil war was rife; further the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party . . . the armed camps and the police were divided into two opposing forces . . . It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign state. This certainly did not take place until stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops."[51]

As Warren Christopher, the United States Secretary of State, noted:

[49] Article III.1 *(a)* of the Agreement on International Police Task Force, doc. A/50/790/S/1995/999, p. 118.

[50] *Ibid.*, Art. VII, p. 120.

[51] Report by the International Committee of Jurists (Larnoude (President), Struycken, Huber), *Official Journal of the League of Nations*, Spec. Supp. No. 3 (1920), p. 8.

> "Without elections, there will be no unified Bosnia state, no national constitution or judiciary and little hope for greater cooperation among Bosnia's diverse communities." [52]

26. The recognition of Bosnia and Herzegovina is frequently, explicitly or implicitly, used as an argument in support of the existence of Bosnia and Herzegovina as a sovereign and independent State within the administrative boundaries of the former Yugoslav federal unit.

Such an approach is somewhat surprising, since "the State exists by itself *(par lui-même)* and the recognition of a State is nothing else than a declaration of this existence, recognized by the States from which it emanates" [53].

This is specially so, having in mind that "the practice of States shows that the act of recognition is still regarded as essentially a political decision, *which each State decides in accordance with its own free appreciation of the situation*" [54].

It is reasonable to suppose that, merely by relying on these facts, the learned scholar is able to conclude that "[r]ecognition is still in the language of diplomats but it does not belong in the language of law" [55].

It is true that the position of Bosnia and Herzegovina is a specific one, since it has been recognized by practically the whole international community. This fact serves as the basis for the thesis that

> "recognition, along with membership of international organizations, bears witness to these States' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law" [56].

This, in doctrinal terms, elegant thesis highlights among other things, the ambivalent nature of the institute of recognition of States. In the spirit of the ruling, declarative theory, the recognition of States should be a statement of the factual situation formed *leges artis* in harmony with the relevant legal rules on the emergence of new States. The "States' conviction that the political entity . . . is a reality" clearly need not correspond to the factual situation. "Conviction", *per definitionem*, is not a

[52] "Without Elections, There Will Be No Unified Bosnian State", *International Herald Tribune*, 15-16 June 1996, p. 6.

[53] Deutsche Continental Gas-Gesselschaft *v.* Polish State, 5 AD 11 at p. 15 (1929-1930).

[54] United Nations Secretariat Memorandum of February 1950 concerning the question of representation of Members in the United Nations, United Nations doc. S/1466, *SCOR*, 5th Year, Supp. for Jan./May 1950, p. 19.

[55] L. Henkin, "General Course on Public International Law", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 216, 1989, p. 31.

[56] Statement of the Government of the Republic of Bosnia and Herzegovina on Preliminary Objections, para. 4.14.

factual condition but its subjective expression — hence it is necessary *ad casum* to carry out an investigation so as to establish the precise meaning of the phrase "States' conviction" and to see whether or not it is based on fact or law. *A contrario*, the whole problem would be shifted to the domain of the rule of "majority opinion", so that fact would be what the majority considers it to be.

Having that in mind, it is, generally speaking, necessary from the standpoint of law to examine in each individual case whether the relevant legal criteria for recognition are met.

Concerning Bosnia and Herzegovina, it is obvious that, as an assumed State in the administrative boundaries of that former Yugoslav federal unit, it could be ranked among the circle of States only as a new State. Hence, it is necessary to see which criteria are relevant for the recognition of new States.

The essence of those criteria may be taken to be expressed in paragraph 100 (Minimum Requirements for Recognition of New States) of the *Restatement of the Law*:

> "Before recognizing an entity as a new state, the recognizing state is required to make a determination, reasonably based upon fact, that the entity:
>
> *(a)* has a defined territory and population;
> *(b)* is under the control of a regime that satisfies the minimum requirements for recognition as a government under [paragraph] 101;
> *(c)* has the capacity to engage in foreign relations;
> *(d)* shows reasonable indications that the requirements of Clauses *(a)-(c)* will continue to be satisfied." [57]

Paragraph 101 stipulates:

> "Before recognizing a revolutionary regime as a government of a state, the recognizing state is required to make a determination, reasonably based upon fact, that the regime
>
> *(a)* is in control of the territory and population of the state; or
> *(b)* is in control of a substantial part of the territory and population of the state and shows reasonable promise that it will succeed in displacing the previous government in the territory of the state." [58]

The cited criteria are, as a whole, applicable to the case of Bosnia and Herzegovina. In such an assessment, it is decisive that

[57] American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States*, 1965, p. 321.
[58] *Ibid.*, p. 322.

> "Recognition of a government becomes a problem for decision only if an abnormal change of government is involved, i.e., one in violation of the existing constitution of a state."[59]

Bosnia and Herzegovina did not meet the relevant criteria for recognition in the static or dynamic sense. More particularly, at the time of recognition, not only did it not have a "defined territory and population" (see paras. 6-9 above) nor, in particular, "control of a substantial part of the territory and population" (see para. 18 above) but there were no "reasonable indications" that it could fulfil those requirements in the future without active external support. Even Bosnia and Herzegovina itself in the "Second Request for Indication of Provisional Measures of Protection" of 27 July 1993 notes at the end of its submission: "[t]his will be the last opportunity that this Court shall have to save . . . [the] State of Bosnia and Herzegovina" (p. 55). The "Minimum Requirements for the Recognition of New States", as presented, should definitely be complemented with legal requirements as well since "the development of self-determination [is] an additional criterion of statehood, denial of which" would obviate statehood[60].

These additional criteria strengthen the grounds for the conclusion that the recognition of Bosnia and Herzegovina was granted on an exclusively political basis. Also, the "Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union", on the basis of which Bosnia and Herzegovina was recognized by the European Community and its member States, and the discussions in the United Nations Organization at the time of the admission of Bosnia and Herzegovina, indicate that in the realm of law, recognition was granted on the grounds of the right of peoples to self-determination even though, in this particular case, its application is at the very least doubtful (see paras. 44-76 below).

In other words, the recognition of Bosnia and Herzegovina as an independent State was inspired more by the interests of national politics and opportuneness than by the existence of relevant legal principles in regard to this matter. The recognition of Bosnia and Herzegovina was, essentially, one of the instruments for the realization of the political concept on the settlement of the Yugoslav crisis, an instrument which reflected the internal logic of that concept independently of the relevant legal rules. The instrumental nature of the recognition in the Yugoslav case was pointed out by Ambassador Brown:

> "Lord Carrington, who chaired the Conference on Yugoslavia . . . believed that recognition was an important weapon in bringing the

[59] American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States*, p. 323.

[60] M. N. Shaw, *International Law*, 2nd ed., 1986, p. 132.

sides together. Recognition could be an incentive for cooperation or a sanction for lack of cooperation."[61]

This is particularly conspicuous in the "Declaration on Yugoslavia" of 16 December 1991 which together with the "Guidelines on the recognition of new States in Eastern Europe and the Soviet Union", passed on the same day by the EC Ministerial Council, served as a basis for the recognition of Bosnia and Herzegovina by the European Community and its member States.

By their Declaration, the EC and its member States invited

"*all Yugoslav Republics to state by 23 December whether:*

— *they wish to be recognized as independent States;*
— they accept the commitments contained in the above-mentioned guidelines;
— *they accept the provisions laid down in the Draft Convention* — especially those in Chapter II on human rights and rights of national or ethnic groups — *under consideration by the Conference on Yugoslavia.*"[62]

Bosnia and Herzegovina therefore, together with the other federal units of SFRY, *was invited to state whether it wished to be recognized as an independent State*. The invitation was made at a time when the desire for independence had still not been expressed in the appropriate way in Bosnia and Herzegovina. The referendum on the status of Bosnia and Herzegovina at which two out of the three peoples of Bosnia and Herzegovina declared themselves in favour of the "sovereignty and independence of Bosnia and Herzegovina" was not held until March 1992. It is hard to assume that such an invitation, extended by a body which had offered its good services and mediation in dealing with the Yugoslav crisis, could have had no effect on the political options taken in Bosnia and Herzegovina, particularly if the invitation to recognition is linked with the terms for recognition which, *inter alia*, included the acceptance of "the provisions laid down in the Draft Convention . . . under consideration by the Conference on Yugoslavia". The key provision of the "Draft Convention" which the Conference Chairman Lord Carrington presented to the Conference on 23 October 1991 is contained in Article I which reads:

"The new relations between the Republics will be based on the following:

(a) sovereign and independent Republics with an international personality for those which wish it;

[61] E. G. Brown, "Force and Diplomacy in Yugoslavia: the U.S. Interest", *American Foreign Policy Newsletter*, Vol. 15, No. 4, August 1993, p. 2.

[62] European Political Co-operation, Press Release, 17 December 1991 (emphasis added).

(b) a free association of the Republics with an international personality as envisaged in this Convention;

(c) comprehensive arrangements, including supervisory mechanisms for the protection of human rights and special status for certain groups and areas;

. . . . . .

(d) in the framework of general settlement, recognition of the independence, within the existing borders, unless otherwise agreed, of those Republics wishing it."

The relevant circumstances show that there existed a connection between recognition and the dismemberment of the SFRY along the seams of the administrative division into federal units as provided for by Article 1 *(a)* of the Draft Convention. That concept, which included the automatic substitution for the personality of the SFRY of the personality of the federal units, reflected the value judgment of the "Declaration on Yugoslavia" of 16 December 1991, on the basis of which its contents were designed. There can be no other explanation for certain formulations contained in the Declaration — *exempli causa*, those according to which the European Community and its member States "will not recognize entities which are the result of aggression". Aggression *per definitionem* is the

> "use of armed force *by a state* against the sovereignty, territorial integrity or political independence of *another state*, or in any other manner inconsistent with the Charter of the United Nations"[63].

In fact, there are certain indications that the presentation of the Draft Convention by the providers of good offices and mediators was the expression of a political decision on the transformation of Yugoslav federal units into sovereign States. The EPC statement of 6 October 1991 emphasized that

> "it was agreed that a political solution should be sought in the perspective of recognition of the independence of those republics wishing it, at the end of the negotiating process conducted in good faith and involving all parties".

A further indication is the actual title of the document — the term "Convention" denotes an *"agreement between states in the sense of international law"*. The Convention on the Law of Treaties (1969), *lex lata* in this area, stipulates in Article 2 that a "Treaty" represents "an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation". Article 6 of the Convention stipulates that "[e]very State possesses capacity to conclude treaties".

[63] Art. 1, General Assembly resolution 3314 (XXIX) of 14 December 1974 (emphasis added).

Testifying to such a nature of the recognition of independence of the Yugoslav federal units is the linkage of recognition with practical political aims. The United States-European Community Declaration on the recognition of the Yugoslav republics states *inter alia*:

> "The Community and its member States and the United States have agreed to coordinate their approaches to completing the process of recognizing those Yugoslav republics that seek independence.
>
> . . . . . .
>
> (i) that the United States will, in this context, give rapid and positive consideration to the requests for recognition by Croatia and Slovenia *in such a way as to support the dual-track approach based on the deployment of the UN peacekeeping force and the European Community Peace Conference chaired by Lord Carrington.*
>
> (ii) that positive consideration should be given to the requests for recognition of the other two republics, contingent on the resolution of the remaining European Community questions relating to those two republics. In this context, they strongly urge all parties in Bosnia-Herzegovina to adopt without delay constitutional arrangements that will provide for a peaceful and harmonious development of this republic within its existing borders. The Community and its member States and the United States also agree strongly to oppose any effort to undermine the stability and territorial integrity of those two republics."

In connection with the recognition of Bosnia and Herzegovina as an independent State within the administrative boundaries of the former federal unit, at least two conclusions have to be drawn:

(a) phenomenologically, in this case, the recognition of Bosnia and Herzegovina did not follow the natural logic of the legal process of recognition, namely, that it should be a passive acknowledgment of the establishment of the State. In the case of Bosnia and Herzegovina, the recognition, as testified to by developments, was one of the instruments for the establishment of Bosnia and Herzegovina as a State within its administrative boundaries. The recognizing States, by recognizing Bosnia and Herzegovina, actually demonstrated their intention to create it or to participate in its creation;

(b) legally, the recognition of Bosnia and Herzegovina within its administrative boundaries represented the recognition of a non-existent State. It was granted exclusively on the basis of political considerations since, at the moment of recognition, Bosnia and Herzegovina did not fulfil the minimum requirements for recognition as a new State.

Moreover, having in mind the importance of self-determination of peoples as a criterion in the decision regarding statehood[64], it may be concluded that the admission of Bosnia and Herzegovina to the United Nations was an act of diplomacy which runs counter to the established practice of the Organization in that regard.

SECOND PRELIMINARY OBJECTION

27. The position of the Court regarding the second preliminary objection raised by Yugoslavia is based on two premises:

(i) that it "does not, in order to rule on that objection, have to consider the provisions of domestic law which were invoked in the course of the proceedings either in support of or in opposition to that objection", since "[a]ccording to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations", and

(ii) that, "Mr. Izetbegović was recognized, in particular by the United Nations, as the Head of State" and that "his status as Head of State continued subsequently to be recognized in many international bodies and several international agreements" (Judgment, para. 44).

My views on the matter are very different. The Application like that of Bosnia and Herzegovina instituting proceedings before the Court constitutes a typical unilateral act of the State producing legal consequences for the mutual relations among the parties to the Genocide Convention. Hence the Court is authorized to consider the relevant provisions of Bosnia and Herzegovina's constitutional law, as well as other cases in which the application of a norm of international law was dependent upon internal law) (*exempli causa*, the *Western Griqualand Diamond Deposits* case (1871) (*2 Recueil des arbitrages internationaux 1856-72*, pp. 676-705 (1923)); *Cleveland Award* (1888) (2 Moore, *International Arbitrations 1945-68)*; the case concerning *Free Zones of Upper Savoy and the District of Gex* (1932) *(P.C.I.J., Series A/B, No. 46)*; the *Fisheries* case (*I.C.J. Reports 1951*, pp . 125-126); the *Nottebohm* case (*I.C.J. Reports 1955*, p. 4); the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants* (*I.C.J. Reports 1958*, pp. 62-66), etc.). In other words, this is not a case of conflict between internal and international law, as, *exempli causa*, in the *Certain German Interests in Polish Upper Silesia* or *S.S. "Wimbledon"* cases, but a matter in which these two laws are in co-ordination, dependent on each other.

In concreto, Yugoslavia claims that Mr. A. Izetbegović could not have issued an authorization for instituting proceedings before the Court in the present case since:

[64] J. Dugard, *Recognition and the United Nations*, 1987, p. 79.

(i) the issue of such authorization was not within the scope of the competence of the President of the Presidency of Bosnia and Herzegovina, and
(ii) at the relevant point in time, Mr. Izetbegović was not, according to the Constitution of Bosnia and Herzegovina, the President of the Presidency.

It is indisputable that both claims are based primarily on the internal law of Bosnia and Herzegovina so that diagnosing solutions established by the constitutional law of Bosnia and Herzegovina with respect to both questions is essential, albeit in different ways, for the application of the relevant norms of international law. This is indirectly recognized by Bosnia and Herzegovina itself in its request to the Court to:

> "take cognizance of the following facts which establish that President Izetbegović *was duly appointed President* of the Presidency of Bosnia and Herzegovina and that *he exercised his functions in accordance with the relevant constitutional procedures*"[65].

In the point under (i) the relevant general legal principle as expressed in Article 46 of the Convention on the Law of Treaties (1969) seeks to strike a relative balance between international and internal law in the form of a modified internationalistic theory (Head of State Theory). The only way for the Court to decide whether this general legal principle is applicable in this specific case is by entering into an examination of the internal law of Bosnia and Herzegovina with a view to establishing whether, when Mr. Izetbegović granted the authorization to institute proceedings before the Court the internal law of Bosnia and Herzegovina was violated.

The point under (ii) also cannot be resolved without an examination of the internal law of Bosnia and Herzegovina.

There is no denying, as is noted by Bosnia and Herzegovina, that "[n]o rule of international law . . . requires the structure of a State to follow any particular pattern"[66]. It is also beyond dispute that international law, being sovereign and independent of internal law, determines the circle of persons that represent the State in international affairs (this holds good regardless of the fact that the circle of persons representing the State *in foro externo* is determined on the basis of virtually identical constitutional regulations). However, *sedes materiae* the point under (ii) raised in the second preliminary objection *does not question the right of Mr. Alija Izetbegović, as Head of State, and in conformity with international law, to issue an authorization for the institution of proceedings before the Court but rather questions whether Mr. Izetbegović was, at the relevant point in time, i.e., at the time of issuing of the authorization in question,*

[65] Statement of the Government of the Republic of Bosnia and Herzegovina, p. 42.
[66] Case concerning the *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 43.

the Head of State. The only way to answer this question raised in the second preliminary objection is by examining the internal, constitutional law of Bosnia and Herzegovina. *A contrario*, the relevant norm of international law would be the one determining not only the pattern of the structure of a State but also the modalities of the Constitution and the duration of that structural pattern.

28. On the second day of the hearing regarding the first request for the indication of provisional measures, the Agent of Bosnia and Herzegovina pointed out *inter alia* that:

> "*President Izetbegović personally accredited* . . . Ambassador Sacirbey, who appeared before you yesterday, and me as General Agents with Extraordinary and Plenipotentiary Powers to the Court on behalf of Bosnia and Herzegovina."[67]

That the statements of the then Agent of Bosnia and Herzegovina correspond to the factual situation is confirmed by the text of the act on the appointment of

> "H.E. Muhamed Sacirbey, our Ambassador and Permanent Representative to the United Nations, and Francis A. Boyle, Professor of International Law at the University of Illinois College . . . to be our General Agents with Extraordinary and Plenipotentiary Powers to institute, conduct and defend against any and all legal proceedings on our behalf before the International Court of Justice."

The text of this act was signed, as stated in the act, by "Alija Izetbegović, President of the Republic of Bosnia and Herzegovina". The title "President of the Republic of Bosnia and Herzegovina" indicates unequivocally the personal nature of President Izetbegović's accreditation — particularly so as, contrary to the practice of the Presidency of Bosnia and Herzegovina, it is not stated in the text that it is an act of the Presidency[68]. The fact that the act was written "on the official stationery of the Presidency" cannot, in my opinion, be taken as proof that the act was issued in the name of the Presidency of Bosnia and Herzegovina. The use of official stationery is only prima facie grounds for the assumption that what is written on it is an act of the organ whose name appears in the heading. The assumption is refutable as official stationery is only the external sign of identification of its owner, incorporates the decision of

[67] CR 93/13, p. 38 (emphasis added).

[68] *Exempli causa*, the Decree on the change of name of the Socialist Republic of Bosnia and Herzegovina (Statement of the Government of the Republic of Bosnia and Herzegovina on Preliminary Objections, Annexes, Vol. I, Ann. 2.12) was issued by the "Presidency of the Socialist Republic of Bosnia and Herzegovina at a session held on April 8, 1992", and signed by the "President of the Presidency of SR B-H Alija Izetbegović". An identical example is the Decision on the proclamation of an imminent threat of war passed on the same day, as well as all the other published acts of the Presidency of Bosnia and Herzegovina.

the organ as well, and depends on whether in each concrete case the formal and material conditions for issuing the act written on the official stationery have been met. *A contrario* it would be absurd to assume that every text written on the official stationery of an organ constitutes *ipso facto* an act of that organ.

In concreto, the question may be posed whether the stationery on which Mr. Izetbegović gave the authorization for instituting proceedings before the Court is without any doubt the only official stationery of the Presidency of the Republic of Bosnia and Herzegovina. The grounds for raising this question are provided by the fact that the word "Presidency" on the stationery heading is found underneath the name of the State — "Republic of Bosnia and Herzegovina" — and above the word "President". The word "Presidency" can also be taken to indicate the headquarters of the President, particularly as Mr. Izetbegović is described as the "President of the Republic of Bosnia and Herzegovina". The name of the collective Head of State, according to the Constitution of Bosnia and Herzegovina, is not the "Presidency" but the "Presidency of the Republic of Bosnia and Herzegovina"[69].

Of particular importance is the fact that in contravention of Article 10 of the Operating Procedure of the Presidency and its customary practice, the letter signed by Mr. Alija Izetbegović does not feature any stamp (either the small or the large one) of the Presidency of Bosnia and Herzegovina.

These several points provide convincing evidence that in this concrete case we are dealing with a "personal accreditation" by Mr. Izetbegović.

Was President Izetbegović authorized on the basis of the internal law of the Applicant to personally accredit a "General Agent with extraordinary and plenipotentiary powers to the Court"?

29. The function of the "President of the Republic of Bosnia and Herzegovina" is not established by the Constitution of Bosnia and Herzegovina. Chapter X of the Constitution speaks of the "Presidency of the Republic of Bosnia and Herzegovina" as the organ "representing the Republic of Bosnia and Herzegovina"[70]. The Presidency of the Republic of Bosnia and Herzegovina is the collective Head of State "that operates and decides collectively at meetings and bears collective responsibility for its work"[71].

The Presidency of the Republic of Bosnia and Herzegovina taken as a whole, as a collegium, is the organ of representation according to the Constitution. The President of the Presidency as the *primus inter pares* does not exercise any independent political powers. The enactments within the terms of reference of the Presidency of the Republic of Bosnia

[69] Chapter X of the Constitution of Bosnia and Herzegovina.

[70] Article 219 (1) of the Constitution of Bosnia and Herzegovina.

[71] Article 3 of the Rules of Procedure of the Presidency of the Socialist Republic of Bosnia and Herzegovina, *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 36 (1990).

and Herzegovina (decrees, decisions and conclusions as well as regulations with the effect of law in cases stipulated by the Constitution) are adopted by the Presidency of the Republic of Bosnia and Herzegovina as a whole[72].

The President of the Presidency, on behalf of the Presidency, represents the Presidency[73]. Of particular interest among the functions of the President of the Presidency listed in Article 22 of the Operating Procedure is the function to "sign acts passed by the Presidency".

Consequently, Mr. Izetbegović, as the President of the Presidency, was not authorized to "personally accredit[ed] . . . [a] General Agent with Extraordinary and Plenipotentiary Powers to the Court on behalf of Bosnia and Herzegovina".

30. Yugoslavia claims in its previous objection that at the time at which the authorization for instituting proceedings before the Court was issued (20 March 1993), Mr. Izetbegović "did not serve as the President of the Republic" and that the "authorization for the initiation and conduct of proceedings was granted in violation of rules of internal law of fundamental significance"[74].

Bosnia and Herzegovina, on the other hand, finds that

> "on 20 March 1993, the time of filing of the present case in the International Court of Justice, the President of the Presidency exercised their functions lawfully, in accordance with the relevant constitutional provisions, including those relating to a state of war or emergency. As President of the Presidency, President Izetbegović is legally entitled to represent the Republic of Bosnia and Herzegovina internationally in this matter."[75]

The dispute is over the question whether Mr. Izetbegović could have performed the function of President of the Presidency *ex constitutione* after 20 December 1992. It is indisputable that Mr. A. Izetbegović assumed the function of President of the Presidency of the Socialist Republic of Bosnia and Herzegovina in December 1990, in conformity with the relevant constitutional provisions. The term of office was extended by a year, also in conformity with Amendment LI (para. 4, point 6) to the Constitution of the Socialist Republic of Bosnia and Herzegovina which stipulated:

> "The President of the Presidency is elected by the Presidency from among its members for a period of one year and he may be re-elected for another, consecutive year on one occasion."

The Constitution therefore prohibited the exercise of the function of the President of the Presidency for more than two years or two consecutive

[72] Article 49 of the Operating Procedure.

[73] Article 21 of the Operating Procedure.

[74] Preliminary Objections of Yugoslavia, p. 141, para. A.2.

[75] Statement of the Government of the Republic of Bosnia and Herzegovina on Preliminary Objections, p. 47, para. 2.19.

terms. This prohibition was absolute in the original text of the Constitution of the Socialist Republic of Bosnia and Herzegovina as, in respect to the President of the Presidency, no exceptions were envisaged even in the case of a "state of war or imminent threat of war". That such an interpretation is correct is corroborated by Article 358 of the Constitution:

> "In the event of a state of war or imminent threat of war *the mandate of the Members of the Presidency of SR B-H shall be continued until such time as the conditions for election of the new Members of the Presidency are met.*" (Emphasis added.)

The prohibition was modified by Amendment LI (par. 4 (8)) to the Constitution of the Socialist Republic of Bosnia and Herzegovina according to which:

> "In the event of a state of war or imminent threat of war, the mandate of Members of the Presidency and the President shall be continued until such time as the conditions for election of new Members of the Presidency are met."[76]

This amendment extends *ratione personae* the range of the exception established for members of the Presidency by Article 358 of the Constitution of the Socialist Republic of Bosnia and Herzegovina to include the President of the Presidency. The main elements of the solutions contained in Amendment LI are:

(a) the continuation of the term of office is linked to the eventuality of a "state of war or imminent threat of war";
(b) the prohibition of a third consecutive mandate is not abolished, but the continuation of a mandate is envisaged in the cited cases;
(c) the continuation of the mandate is limited by appropriate "conditions for the election of new Members of the Presidency", not by the termination of the "state of war or imminent threat of war".

Bosnia and Herzegovina also refers to Article 220 of the Consolidated Constitution of the Republic of Bosnia and Herzegovina adopted on 24 February 1993, which reads:

> "In the event of war or a state of emergency, the mandate of the Members of the Presidency and of the President shall be continued until such time as the conditions for new elections for the Presidency are met."

In my opinion, the consolidated text of the Constitution cannot, in this particular case, be accepted as a relevant legal basis.

More particularly, a consolidated text in Yugoslav constitutional practice was a strictly legal-technical procedure whereby the text of a norma-

[76] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 13 of 21 April 1989, p. 338.

tive act, the Constitution or laws, was adjusted to its purpose and to the requirements of practical implementation. It excluded even minor material-legal changes in the text of the act and was for the most part reduced to a procedure of renumeration of segments of the normative act. Hence, in Yugoslav constitutional practice, the consolidated text of a normative act could not be referred to in formal proceedings including court proceedings.

In comparison with the contents of Amendment LI, Article 220 of the consolidated text of the Constitution of the Republic of Bosnia and Herzegovina constitutes a modification of the Constitution. The prolongation of the term of office of the Members and the President of the Presidency in Amendment LI (para. 4 (8)) is linked to a case "of war or imminent threat of war" whereas in Article 220 of the consolidated text the basis for the prolongation is a case "of war or a state of emergency". Hence, it may be concluded that the form of consolidation of the text actually conceals a modification of the Constitution.

The Presidency of Bosnia and Herzegovina, as stated in the preamble to the Constitution, adopted a decision to establish a consolidated text of the Constitution of the Republic of Bosnia and Herzegovina, and was not authorized by the Constitution to effect any changes to the Constitution, this being within the exclusive competence of the Assembly of Bosnia and Herzegovina[77]. The Presidency as well as the Government of the Republic, each of the Assembly Chambers and at least 30 Assembly Deputies, appear as the only possible proponents of proposals to amend the Constitution[78]. Changes in the Constitution of the Republic of Bosnia and Herzegovina may only be made in the form of Constitutional Amendments or Constitutional Laws[79].

It follows from the above that Article 220 of the Consolidated Constitution of the Republic of Bosnia and Herzegovina, in the section in which the continuation of the term of office of Members and the President of the Presidency is linked also to a "state of emergency", constitutes a modification of the Constitution of the Republic of Bosnia and Herzegovina, and that the change was effected, both formally and materially, *contra constitutionem*.

31. Consequently, what remains to be seen is whether, in the light of the provisions of Article 358 of the Bosnia and Herzegovina Constitution as amended by Amendment LI (4 (8)), the established conditions had been met for the continuation of the mandate of the President of the Presidency of the Republic of Bosnia and Herzegovina after 20 December 1992, i.e., after the expiry of his second consecutive term.

The relevant provision of Bosnia and Herzegovina's Constitution stipulated that the "mandate of the President shall be continued" in the event

[77] Article 268 (3), (4) of the Constitution.
[78] Article 268 (1) of the Constitution.
[79] Article 268 (5) of the Constitution.

of "war or imminent threat of war". In other words, "war or imminent threat of war" constituted the material, constitutional basis for the automatic continuation of the mandate of the President of the Presidency.

The fulfilment of this requirement *ex constitutione* implies that the decision on the existence of "war or imminent threat of war" was taken by the competent organ in line with established constitutional procdure.

32. The Presidency of the Socialist Republic of Bosnia and Herzegovina, at its session of 8 April 1992, passed a "Decision on the proclamation of an imminent threat of war" in the territory of Bosnia and Herzegovina. The decision was taken, as stated in the preamble

> "in conformity with the provisions of Amendments LI and LXXII to the Constitution of the Socialist Republic of Bosnia and Herzegovina and upon the proposal of the Assembly of the Socialist Republic of Bosnia and Herzegovina".

It follows from this statement:

(a) that the "Decision" was taken upon the proposal of the Assembly of the Socialist Republic of Bosnia and Herzegovina, and,
(b) that the Presidency took the "Decision" on the basis of Amendments LI and LXXII to the Constitution of the Socialist Republic of Bosnia and Herzegovina.

33. The competences of the Assembly of the Socialist Republic of Bosnia and Herzegovina were established by Article 314 of the Constitution of the Socialist Republic of Bosnia and Herzegovina (see para. 36 below). The unequivocal conclusion to be drawn from the text of that Article is that the submission of the proposal on the proclamation of the imminent threat of war was not within the terms of reference of the Assembly of the Socialist Republic of Bosnia and Herzegovina. Article 314 was modified by Amendment LXXI adopted on 31 July 1990. In the part relating to the competences of the Assembly adopted at a joint session of all the Assembly Chambers, the Amendment stipulated:

> "5. The Chambers of the Assembly of SR B-H at their joint session may:
>
> — decide on changes to the Constitution of the Socialist Republic of Bosnia and Herzegovina;
> — proclaim the Constitution of the Socialist Republic of Bosnia and Herzegovina and any changes thereto;
> — make proposals, express opinions and approve any changes to the Constitution of the Socialist Federal Republic of Yugoslavia;
>
> — approve changes to the borders of the Socialist Federal Republic of Yugoslavia;

— decide on modifications of the borders of the Socialist Republic of Bosnia and Herzegovina;
— review foreign policy issues;
— decide on the prolongation of the mandates of deputies to the Assembly of SR B-H and those of aldermen serving in the assemblies of the communes and assemblies of municipalities;
— pass the social plan of Bosnia and Herzegovina, the budget and final accounts of the budget of SR B-H;

— call a Republic-wide referendum;
— decide on the floating of Republic-wide public lons;

— decide on debts or other obligations of the Republic;
— decide on whether to entrust affairs within the competence of the Republic to a municipal community as a separate socio-political community;
— elect and relieve of office: the President and Vice-President of the Assembly of SR B-H; the member of the Presidency of SFRY from SR B-H; the President, Vice-President and members of the Government of SR B-H; the President and Judges of the Constitutional Court of Bosnia and Herzegovina; the President and Judges of the Supreme Court of Bosnia and Herzegovina; the President and members of the working bodies of the Assembly of SR B-H;

— elect and relieve of office members of the Delegation of the Assembly of SR B-H in the Chamber of Republics and Provinces of the Assembly of SFRY;

— appoint and relieve of office: ministers; the Governor of the National Bank of Bosnia and Herzegovina; the Public Prosecutor of the Republic, the Public Attorney of the Republic and the Secretary General of the Assembly of SR B-H;
— adopt the Rules of Procedure of the Assembly of SR B-H;

The Chambers of the Assembly of SR B-H may decide to review at a joint session other matters within the common terms of reference of the Assembly of SR B-H." [80]

Consequently, the submission of the proposal to proclaim an "imminent threat of war" was not within the competence of the Assembly of the

[80] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 21 of 31 July 1990.

Socialist Republic of Bosnia and Herzegovina exercised at a joint session of all the Assembly Chambers nor was it envisaged by the amended version of Article 314 of the Applicant's Constitution. *A fortiori*, the same conclusion applies to the competences of the Assembly exercised at sessions of individual Assembly Chambers.

34. It is only the consolidated text of the Constitution of the Republic of Bosnia and Herzegovina that contains a provision according to which the Assembly of the Republic of Bosnia and Herzegovina, *inter alia*, "decides on war and peace"[81]. This provision, however, cannot be considered as relevant in this specific case for two main reasons. Firstly, by its nature it constitutes a revision of the Constitution carried out *contra constitutionem* in the form of a consolidation of the text of the Constitution — hence, the arguments presented in reference to Article 220 of the Consolidated Constitution apply *per analogiam* (see para. 30 above). Secondly, the Consolidated Constitution of the Republic of Bosnia and Herzegovina was passed in February 1993, i.e., almost a year after the adoption of the "Decision on the proclamation of imminent threat of war", so that with respect to this concrete case it is irrelevant.

35. The preamble to the "Decision on the proclamation of an imminent threat of war" states, *inter alia*, that it was taken "in accordance with the provisions of Amendments LI and LXXII to the Constitution of SR B-H". In the wording of this Decision, therefore, Amendments LI and LXXII appear as a concrete constitutional basis. The contents of Amendment LXXII can hardly be linked to the "Decision on the proclamation of imminent threat of war", as this Amendment actually abrogates Amendment XVII to the Constitution of the Socialist Republic of Bosnia and Herzegovina by stipulating that: "The provisions of Amendment XVII to the Constitution of SR B-H on the Council of the Republic shall cease to be valid."[82] Prima facie, there is a link between Amendment LI and the "Decision on the proclamation of imminent threat of war", since the subject of the Amendment was the establishment of the competences of the Presidency of the Socialist Republic of Bosnia and Herzegovina. Amendment LI stipulated that:

> "1. The Presidency of the Socialist Republic of Bosnia and Herzegovina:
>
> (1) represents the Socialist Republic of Bosnia and Herzegovina;
>
> (2) reviews questions relating to the implementation of adopted policies in the areas of all peoples' defence, state security, social self-protection and international co-operation and proposes to the Assembly of SR Bosnia and Herzegovina the passage of appropriate

[81] Article 206 (5) of the consolidated text.

[82] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 21 of 31 July 1990.

measures to implement those policies and, in the event of an emergency preventing or seriously hamering the realization of the social order as established by the Constitution, proposes to the Assembly of SR Bosnia and Herzegovina the adoption of necessary measures to overcome the intervening disturbances;

(3) establishes the defence plan of the Republic and provides appropriate guide-lines in conformity with the law;

(4) in accordance with the positions and proposals of the Assembly of SR Bosnia and Herzegovina reviews matters related to the participation of the Socialist Republic of Bosnia and Herzegovina in the establishment and implementation of the foreign policy of the Socialist Federal Republic of Yugoslavia, to co-operation between the Republic and other Republics and Autonomous Provinces in the area of international co-operation within the framework of the adopted foreign policy of SFRY and international treaties, and, on the basis of prior consultations within the Republic, proposes candidates for appointment as heads of diplomatic missions and informs the Presidency of SFRY and the Assembly of SR Bosnia and Herzegovina of its proposals;

(5) establishes, on the basis of prior consultations within the Republic, proposals for candidates for the appointment as President and Judges of the Constitutional Court of Bosnia and Herzegovina;

(6) establishes on the basis of prior consultations in the Republic, the proposal of candidates for appointment as members of the Council of the Republic;

(7) establishes proposals for decorations conferred by the SFRY Presidency and confers decorations and other marks of honour of the Republic in conformity with the law;

(8) pardons offenders, in conformity with the law;

(9) adopts the Rules of Procedure of the Presidency."[83]

In the light of the established competences of the Presidency of the Socialist Republic of Bosnia and Herzegovina, prima facie, any acceptance of Amendment LI as a possible constitutional basis for passing the "Decision on the proclamation of imminent threat of war" is out of the question. Amendment LI gives no authorization whatsoever to the Presidency to proclaim an imminent threat of war upon its own initiative or upon the proposal of any other organ. In its paragraph 2, the said Amendment establishes the competences of the Presidency "in the event of extraordinary conditions preventing or seriously hampering the reali-

[83] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 21 of 31 July 1990.

zation of the constitutionally established order", but those conditions could hardly include the proclamation of imminent threat of war. On the one hand the term "extraordinary conditions" is far broader than the term "imminent threat of war". In Yugoslav constitutional terminology, the term "extraordinary conditions" served to denote a state of affairs provoked by natural disasters (Article 364 of the Constitution of the Socialist Republic of Bosnia and Herzegovina enunciates as "extraordinary conditions" events like "natural disaster, epidemics"). All powers linked to a state of war or imminent threat of war were entirely in the hands of federal organs. On the other hand, even on the hypothesis that the competences of the Presidency on the basis of paragraph 2 of Amendment LI included the question of "imminent threat of war", the procedure by which the "Decision on the proclamation of imminent threat of war" was passed could only be qualified as formally unconstitutional, as the cited paragraph of Amendment LI stipulates the right of the Presidency in the case of extraordinary conditions "to propose to the Assembly of SR B-H that it take necessary measures to eliminate the existing disturbances". Hence, the Presidency was not authorized to *"take necessary measures to remove the existing disturbances"* (emphasis added) but only *to propose* to the Assembly the taking of such measures. The prerequisites for such a procedure existed as, judging from the text of the preamble of the "Decision", the Assembly had convened when it made the proposal for the proclamation of an imminent threat of war.

36. Consequently, bearing in mind that on the basis of Article 358 of the Constitution of Bosnia and Herzegovina as amended by Amendment LI (4 (8)) "war or imminent threat of war" was the constitutional condition for the automatic continuation of the mandate of the President of the Presidency and that in the light of the relevant provisions of Article 314 of the Constitution of SR Bosnia and Herzegovina as amended by Amendment LXXI and Amendment LI, the "Decision on the proclamation of imminent threat of war" was passed in contravention of the Constitution by an unauthorized organ, the mandate of Mr. Alija Izetbegović as President of the Presidency could not have been automatically continued after 20 December 1992.

37. The letter addressed by the Prime Minister of Bosnia and Herzegovina to the Secretary-General of the United Nations on 1 March 1993, i.e., 20 days before Mr. Alija Izetbegović issued the authorization for the institution of proceedings before the Court, reads *inter alia*:

> "I also advised . . . that the mandate of Mr. Alija Izetbegović as President of the Presidency had expired. This is to demonstrate the immediate need for the international community to assist not only in protecting Bosnia and Herzegovina's sovereignty and territorial integrity but also in assuring that the country is governed in accordance with its democratic and constitutional principles. I should be

> grateful if you would have the text of the present letter and its annex circulated as a document of the General Assembly, under agenda item 143 and of the Security Council."[84]

The Annex of this letter is "Letter dated 24 February 1993 from the Prime Minister of Bosnia and Herzegovina to the Chairman of the European Affairs Subcommittee of the Senate Foreign Affairs Committee of the United States of America", and states *inter alia*:

> "Furthermore, please be advised that the mandate of Mr. Alija Izetbegović as President of the Presidency of the Republic of Bosnia and Herzegovina expired on 20 December 1992. He is presently without constitutional authority to act in that capacity. The Presidency, and not the President alone, is the representative body of the Republic of Bosnia and Herzegovina. Only the Presidency can invoke constitutional emergency powers, not the President alone. The President is merely *primus inter pares*. Like Mr. Silajdzić, Mr. Izetbegović does not speak for the Presidency as a whole with respect to the current stage of the Vance/Owen talks, but only as one Muslim member of the Presidency."[85]

In this connection, Mr. R. Zacklin, Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs, in a letter addressed to the Registrar of the International Court of Justice on 25 March 1993, stressed *inter alia* that:

> "Mr. Izetbegović participated in the general debate of the last session of the General Assembly as President of Bosnia-Herzegovina and no communication has been made to the United Nations since then advising us that he is no longer the President. In the United Nations and in the International Conference on the former Yugoslavia, Mr. Izetbegović has been regarded and continues to be regarded as the President of Bosnia-Herzegovina."[86]

Can the fact that "[i]n the United Nations and in the International Conference on the former Yugoslavia, *Mr. Izetbegović has been regarded and continues to be regarded as the President of Bosnia-Herzegovina*" change the legal order established by the Constitution of Bosnia and Herzegovina?

The answer to this question can only be negative, as if this were not the case, we would find ourselves in the absurd situation of attributing to the institution of recognition, which is in practice an eminently political act, constitutional powers, the power to change the internal political structure of a State. Another conclusion may be drawn however — that the inter-

[84] Doc. A/47/899-S/25360, 5 March 1995.
[85] *Ibid.*
[86] Letter dated 25 March 1993 addressed to E. Valencia-Ospina, Registrar, International Court of Justice, from R. Zacklin, United Nations Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs.

national community organized within the United Nations was in legal error *(error juris)*, judging from the meaning of the formulations used in the aforementioned letter, with regard to the nature of the institution of Head of State in the constitutional system of Bosnia and Herzegovina.

38. In the light of the relevant provisions of Bosnia and Herzegovina's internal law, it is evident that Mr. Alija Izetbegović was without constitutional authority to act in the capacity of President of the Presidency of Bosnia and Herzegovina as of 21 December 1991. The relevance of that fact cannot be denied in the domain of international law, as, in my view, we are faced with a general legal principle according to which:

> "the act of an official cannot juridically be set up as an act of State unless it was within the sphere of competency of that official. The act of an incompetent official is not an act of the State."[87]

39. This general principle is also expressed in Article 8 of the Convention on the Law of Treaties (1969).

A measure taken by an official outside the sphere of competence of that official is by definition a non-existent measure, a measure limited to the factual sphere as it is devoid of legal effect. In that respect the qualification contained in the commentary on Article 8 of the Convention on the Law of Treaties is applicable *per analogiam*:

> "where a person lacking any authority to represent the State in this connection purported to express its consent to be bound by a treaty, the true legal position was that his act was not attributable to the State and that, in consequence, there was no question of any consent having been expressed by it . . . the unauthorized act of the representative is without legal effect"[88].

THIRD PRELIMINARY OBJECTION

40. The *sedes materiae* of the third preliminary objection lies in the statement that Bosnia and Herzegovina's proclamation of sovereignty and independence was effected in an illegal manner in flagrant breach of the principle of equal rights and self-determination of peoples; hence, no succession of the Applicant to the Genocide Convention of 1948 could have been possible.

The Court finds, quite simply, that

> "Bosnia and Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security

[87] The Presiding Commissioner of the France-Mexican Mixed Claims Commission (1924) in the *Caire* case (1929), cited in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 205.

[88] Draft Articles on the Law of Treaties with commentaries adopted by the ILC at its Eighteenth Session, UNCLT, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, *Official Records*, p. 13, para. 1.

> Council and the General Assembly, bodies competent under the Charter",

and indicates that

> "Article XI of the Genocide Convention opens it to 'any Member of the United Nations'; from the time of its admission to the Organization, Bosnia and Herzegovina could thus become a party to the Convention. Hence the circumstances of its accession to independence are of little consequence." (Para. 19 of the Judgment.)

In my opinion, the legality of Bosnia and Herzegovina's birth is far from being a fact in the light of the relevant legal rules. It implicitly relies on the concept of the so-called "process of dissolution" of Yugoslavia, elaborated in the Opinions of the Arbitration Commission of the Conference on Yugoslavia, which is not a legal term *stricto sensu*. This concept is most aptly seen as a sort of metaphor where a State figures as a kind of vessel from which its vital substance is trickling away and which, through the will of an imaginary creator, is being transformed into the tissue of a new State organism.

(This is eloquently shown by the position taken by the Arbitration Commission in relation to the date of succession of States in the Yugoslav case. In its Opinion No. 11, the Commission took the view:

> "That the date upon which the States stemming from the Socialist Federal Republic of Yugoslavia succeeded the Socialist Federal Republic of Yugoslavia are:
>
> — 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia,
> — 17 November 1991 in the case of the former Yugoslav Republic of Macedonia,
> — 6 March 1992 in the case of the Republic of Bosnia and Herzegovina" (International Conference on the Former Yugoslavia, Arbitration Commission, Opinion No. 11, para. 10).

Thus the Commission claims that the succession here occurred in the relations between the SFRY as the predecessor-State and the newly-independent republics as the successor-States. In other words, it did not take place *uno ictu*; rather, what is known as succession is in fact a set of successions which occurred one after another between 8 October 1991 and 27 April 1992. The succession of Slovenia and Croatia has not destroyed the international legal personality of the SFRY as the predecessor-State. *A contrario*, Macedonia could not exit from the SFRY and succeed SFRY at the same time. *The same applies to Bosnia and Herzegovina*, because this former federal unit, in the Commission's view, also succeeded SFRY. Such an approach of the Commission could reasonably be explained by *"the complex interaction between*

the deliberations of the Arbitration Commission and the political decisions of the EC institutions and member States [which] is noteworthy" (Conference on Yugoslav Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Introductory Note by Maurizio Ragazzi, *International Legal Materials,* 1992, p. 1490). In the light of the above, there exists a clear connection between such qualification and the content of Article 1 *(a)* of the Draft Convention submitted by President of the Conference proposing that "[n]ew relations between the Republics will be based on the following: *(a)* sovereign and independent Republics with an international personality for those who wish it, etc.")

Of utmost importance is the fact that there exists a substantial connection, in fact a causal connection, between the legality of the birth of a State and the status of a successor State in legal terms (see paras. 81-88 below).

In order to reach a conclusion as to whether Bosnia and Herzegovina was established in the legal way, it is necessary to examine both the relevant norms of international law and the internal law of SFRY. The relevance of the internal law of SFRY to that effect derives from the specific nature of the norm of equal rights and self-determination of peoples in multi-ethnic States (see paras. 44-46 above).

A. Relevance of International Law to the Birth of States

41. A reply in the matter of relevance is often sought in the option for one of the two mutually exclusive qualifications: birth of States as *questio facti* or as *questio juris.* Neither of these qualifications, taken on its own merits and individually, really corresponds to the actual state of affairs, in view of their oversimplification and untenable segregation. The first suggests that international law is indifferent to the issue of the birth of States, that they are created in a legal vacuum, a sort of legal vacant space, in a free interaction of power and opportunity elements. The second, however, reduces the birth of States to legalistic procedures, to a matter of the mere will of an imaginary international legislator, materialled in the form of a State, independently of real social processes. In the final analysis, the first statement reduces international law relative to the birth of States to an *ex post* rationalization of actual developments and thereby to its own negation, while the second takes a completely opposite course, elevating international law to the level of a maker, a creator of social phenomena.

The fundamental defect in the option for either of the two mutually exclusive explanations is the confusion of two dimensions involved in the birth of States: the socio-political and the legal. As it is indisputable that birth of States is a matter of realistic social processes from a socio-political standpoint, so it is that the birth of States takes place in the environment of the international community. Thus, international law cannot abdicate from the regulation of such a crucial issue of international life. Shaw is right in observing that:

> "[t]he relationship . . . between factual and legal criteria is a crucial shifting one. Whether the birth of a new state is primarily a question of fact or law and how the interaction between the criteria of effectiveness and other relevant legal principles may be reconciled are questions of considerable complexity and significance."[89]

42. Since its inception international law has never been or could have been indifferent to the question of the birth of States. The substance and nature of its rules have undergone modifications depending on the achieved degree of advancement of international law. *Grosso modo*, the rules of international law concerning the birth of States may be classified into two groups:

— the first would comprise the rules of international law defining the State *ab intra*, as a legal fact within the system of international law. In other words, these rules of international law define *what a State is*. The very definition is static and narrowed down to an enumeration of the constituent elements of a State. On the whole, such a definition of a State is founded on the principle of effectiveness and by this means international law specifies the static, categorial meaning of the concept of a State.

— the second group would comprise the rules defining a State *ab extra*, from the point of view of other relevant rules of international law. While definition *ab intra* starts from a State as an isolated, static phenomenon, definition *ab extra* locates the State in the system of international law, linking its birth and functioning in the international community to other legal rules. In expressing the dynamic side of a concrete issue concerning a certain State, the notion of a State *ab extra* includes, in fact, principles and norms fundamental to the birth of States. Those principles have accompanied practically the whole period of existence of international law. The birth of States, since the Westphalian Peace Accord in 1648, has been justified by a principle-like balance of power, legitimacy and interpretation of the "Holy Alliance", the quasi-legislative competences of super-powers, the principle of nationality, and, during the twentieth century, the self-determination of peoples.

[89] M. N. Shaw, *International Law*, 2nd ed., 1986, p. 126.

It may be said that the above principles basically derive from the concept of legality.

43. It should be kept in mind, however, that the nature of the legality concept has been changing with the development of international law. That concept was based, for quite some time, upon subjective, eliminatory criteria, which recognized, in a community that tolerated uncontrolled resort to force and even to war, the property of a legislative factor, meaning legality no more than in the formal sense of the word. Determined *ad casum*, on the basis of the fulfilment of formal and procedural requirements, that legality was not *stricto sensu* legality, as measured by the norms of a more developed internal law, but rather a political decision in a more acceptable guise.

A basis for a radical change of attitude to the question of legality is provided by the hierarchical division of international law according to the criterion of the legal merit of its norms. The division of international law into "lower" and "higher" law opened the way towards the conceptualization of peremptory norms of general international law *(jus cogens)*, effected by Articles 53 and 64 of the Convention on the Law of Treaties of 1969. As Judge Ammoun put it in his separate opinion in the *Barcelona Traction* case (Second Phase, 1970):

> "through an already lengthy practice of the United Nations, the concept of *jus cogens* obtained a greater degree of effectiveness, by ratifying, as an imperative norm of international law, the principles appearing in the preamble to the Charter"[90].

Jus cogens creates grounds for a global change in relations of State sovereignty to the legal order in the international community and for the establishment of conditions in which the rule of law can prevail over the free will of States. As an objective, non-eliminatory norm, it constitutes a material basis, a criterion for challenging the legality of individual acts in the international community. Therefore, it essentially limits the impact of effectiveness in international law. Effectiveness in a system with a defined concept of legality may be legally accepted only in cases in which it does not conflict with the norms that serve as criteria of legality. Within the co-ordinates of the *de jure* order *effectiveness versus legality* is an incorrect approach, because to accept effectiveness as a rule

> "would indeed be to apply a hatchet to the very roots of the law of nations and to cover with its spurious authority an infinitive series of international wrongs and disregard for international obligations"[91].

[90] *I.C.J. Reports 1970*, p. 304.
[91] J. H. W. Verzijl, *International Law in Historical Perspective*, I, 1968, p. 293.

44. The concept of a material, homogeneous legality is unavoidably reflected in the matter of the birth of States. This is suggested by an as yet insufficiently advanced and stabilized international practice. Let us take the case of Southern Rhodesia. In that case, the criterion of effectiveness was fully met, as the white, minority government, exercised effective rule over the territory. But, in spite of that, United Nations Security Council resolution 217 of 20 November 1965 established that the declaration of independence had "no legal validity" and national government had been proclaimed by "illegal authorities". Such an attitude towards Southern Rhodesia, which on the basis of the *ab intra* criterion, was a State beyond any doubt, was governed by the intention "to allow the people of Southern Rhodesia to determine their own future consistent with the objectives of General Assembly resolution 1514 (XV)" (1960)[92]. United Nations General Assembly resolution 1514 of 14 December 1960, entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples" established, *inter alia*, that

> "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (Para. 2.)

In that way the practice of States confirmed that:

> "in the case of an entity seeking to become a state and accepted by the international community as being entitled to exercise the right of self-determination, it may well be necessary to demonstrate that the internal requirements of the principle have not been offended. One cannot define this condition too rigorously in view of state practice to date, but it would appear to be a sound proposition that systematic and institutionalised discrimination might invalidate a claim to statehood."[93]

However, it would be an overstatement to assert that the introduction of the concept of material legality created a harmonious unity between the *ab intra* and *ab extra* definitions of a State. This has not been achieved due to the chronic institutional insufficiency of the international order which, acting in the environment of a primarily political community — which is what the international community virtually is — often leads to the prevalence of policy over law. Hence, the discrepancy between international law and international order, since norms have not always been applied as they should have been in view of their substance, but more or less under the influence of non-legal, political views. Indisputably, the achievement of the aforementioned harmony constitutes not only an aim of but also a condition for the establishment of international order as a *de jure* order in this particular context.

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[92] Security Council resolution 217 (1965), 20 November 1965, para. 7.
[93] M. N. Shaw, *op. cit.*, p. 132.

B. The Legality of the Proclamation of Bosnia and Herzegovina's Independence in the Light of the Internal Law of the Socialist Federal Republic of Yugoslavia

1. Relevance of the internal law of the Socialist Federal Republic of Yugoslavia in this particular case

45. The original international legal norm of self-determination of peoples is both incomplete and imperfect, at least when it concerns subjects entitled to self-determination in multi-ethnic States and their exercise of external self-determination infringing upon the territorial integrity of a State. Given its incompleteness, the original norm of self-determination of peoples is rendered inapplicable in its respective parts to certain practical situations and constitutes a sort of decorative, empty normative structure. Interested entities often refer to it, but it can function only outside the legal domain, as a convenient cover for an eminently political strategy, based on opportuneness and the balance of power.

This implies a need to see the norm of the right to external self-determination in the States composed of more than one people as a complex norm consisting of two parts: on the one hand, original international legal norms of the right of peoples to external self-determination, and, on the other, relevant parts of the internal law of the given State. In this context, the original international legal norm of the right of peoples has the role of a general, permissive norm, which assumes an operative character, the property of a norm which may become effective in the event that the internal law of a multi-ethnic State has stipulated the right to external self-determination if it defines the entitlement to it, as well as the procedure for its exercise. In other words, the relevant provisions of internal law are *ad casum* an integral part of the norm of the right of peoples to external self-determination. Only in this way does the original international legal norm of the right to external self-determination become applicable at the level of the fundamental premise of the rule of law.

The necessity for such a relationship between international and internal laws is rightfully suggested by the following:

> "If the rule of law is to be made effective in world affairs it must cover a wide range of increasingly complex transactions which are governed partly by international and partly by municipal law . . . It is therefore important that international courts and tribunals should be in a position, when adjudicating upon complex international transactions, to apply simultaneously the relevant principles and rules of international law and the provisions of any system of municipal law which may be applicable to the particular transaction . . . One of the essential functions of international law and international organisation is to promote the rule of law within as well as among nations, for only on the basis of the rule of law within nations can the rule of law among nations develop and be made

> secure. International courts and tribunals can contribute to this result more effectively if the extent to which the interpretation and application of municipal law in the course of their work is a normal and necessary incident of international adjudication on complex transactions is more fully understood."[94]

Positive international law free of Manicheanism and the antagonistic burden of dualistic-monistic theoretical controversy has firmly embarked upon this course. One can think of a long list of rules of positive international law that rest on the symbiosis of an international norm containing both implicit and explicit references to the internal law and the respective norms of that internal law. To illustrate, Article 46 of the Convention on the Law of Treaties (1969) stipulates that a State may invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent in a case where that "violation was manifest and concerned a rule of its internal law of fundamental importance". Or in the law of the sea, where the subject of protection and preservation of the marine environment is entirely regulated on the basis of a symbiosis of international and internal laws. *Exempli causa*, Article 207 (1) (Pollution from Land-Based Sources) of the Convention on the Law of the Sea stipulates:

> "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources . . ., taking into account internationally agreed rules, standards and recommended practices and procedures."

Reliance on internal law as a criterion for undertaking international acts is not unknown in the diplomatic practice of States. One can mention the practice of the United States inaugurated by President Wilson according to which a new test of "constitutionality" making the "coming into power" of a new government by constitutional means is a prerequisite for recognition of that government by the United States[95].

46. Thus, in the present case, this is not a matter of a conflict between a norm of international and a norm of internal law, a type of case adjudicated by several international courts (*Greco-Bulgarian "Communities", P.C.I.J., Series B, No. 17*, p. 32; *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 22*, p. 167; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, P.C.I.J., Series A/B, No. 44*, p. 24), but rather of the application of an international norm of a complex structure, namely a norm that incorporates relevant norms of internal law relating to external self-

[94] C. Wilfred Jenks, *The Prospects of International Adjudication*, 1964, p. 547.
[95] M. Whiteman, *Digest of International Law*, Vol. 2, p. 69.

determination. I am of the view that, in this case, the reasoning of the Court in the case concerning *Brazilian Loans* (1929) is relevant.

In the *Brazilian Loans* case the Court pointed out, *inter alia*, that

> "[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.
>
> It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstance apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.
>
> Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. To compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law."[96]

2. Constitutional concept of the Yugoslav State — constitutional concept of Bosnia and Herzegovina as a federal unit

47. In order to elucidate the constitutional concept of the Yugoslav State and that of Bosnia and Herzegovina as a federal unit, I will quote some relevant provisions of the constitutions of the Yugoslav State that suggest a conclusion on its nature and, more specifically, on the status of its peoples.

48. The first constitution of the Yugoslav State — the constitution of the Kingdom of Serbs, Croats and Slovenes, promulgated on 28 June 1921, stipulated that the Kingdom "is a state of Serbs, Croats and Slovenes, a constitutional, parliamentary and hereditary monarchy. The official state name is: Kingdom of Serbs, Croats and Slovenes." Article 3 of the Constitution provided that the "official language of the Kingdom will be Serb-Croat-Slovenian".

49. The Constitution of the Kingdom of Yugoslavia of 3 September 1931, did not indicate *expressis verbis* its constitutive peoples. They were

[96] *P.C.I.J., Series A, No. 21*, p. 124.

mentioned only indirectly, as, for example, in the provision of Article 3 of the Constitution stipulating that the "official language of the Kingdom [shall be] Serbian-Croat-Slovenian".

50. The resolution constituting Yugoslavia on the federal principle, approved by the Second Conference of the Anti-Fascist Council of National Liberation of Yugoslavia on 29 November 1943, said, *inter alia*,

> "By virtue of *the right of each people to self-determination including the right to separation or unification with other peoples*, . . . the Anti-Fascist Council of National Liberation of Yugoslavia, passes the following
>
> RESOLUTION
>
> . . . . . .
>
> (2) To effectuate the principle of sovereignty of the peoples of Yugoslavia, . . . Yugoslavia is being constructed and will be constructed on the federal principle which will secure full equality to *Serbs, Croats, Slovenians, Macedonians and Montenegrans, id est peoples of Serbia, Croatia, Slovenia, Macedonia, Montenegro and Bosnia and Herzegovina* . . ."[97]

51. The first Constitution of the federal Yugoslavia of 1946 in its Article 1 defined the Federal Peoples' Republic of Yugoslavia as

> "a federal peoples' State in the form of a Republic, a community of equal peoples, who have expressed their will, based on the right to self-determination, including the right to separation, to live together in a federal State".

52. In the second Constitution of 1963, the Federation was defined as a:

> "Federal state of freely unified and equal peoples and a socialist democratic community based on the rule of working people and self-government."

The Constitution of the Socialist Republic of Bosnia and Herzegovina of 1963, laid down in its Basic Principles, *inter alia*, that,

> "Linked throughout their common history by their living together, by their aspirations and struggle for freedom and social progress, *Serbs, Muslims and Croats*, overcoming the attempts of foreign powers and local reactionary forces, have come together for the first time in freedom, equality and brotherhood in their Republic, which became the political and social form of both their unity and mutual equality and their *equality with the other peoples of Yugoslavia with*

[97] Decision on building up Yugoslavia on the federal principle, *Official Gazette of DFJ*, No. 1/1945 (emphasis added).

> *whom they voluntarily entered a common state on the basis of the right to self-determination, including the right to separation:* the Federal Peoples' Republic of Yugoslavia thereby secured full equality and conditions of comprehensive national development, material and cultural progress for an overall socialist transformation." (Emphasis added.)

Article 1 of the Constitution of Bosnia and Herzegovina qualified it as "a state socialist democratic community of peoples of Bosnia and Herzegovina based on the rule of working people and self-government".

53. The Constitution of the SFRY of 1974 begins with Chapter I of the Basic Principles, which was worded as follows:

> "The peoples of Yugoslavia, starting from the right of each nation to self-determination, including the right to secession, on the grounds of their will freely expressed in the joint struggle of all peoples and nationalities in the national liberation war and socialist revolution . . . have created a socialist federal community of working people — the Socialist Federal Republic of Yugoslavia . . .".

In Chapter VII of the Basic Principles, it is stated, *inter alia*, that the Socialist Federal Republic of Yugoslavia upholds:

> "— the right of each people freely to determine and build its social and political order by ways and means freely chosen;
> — the right of people to self-determination and national independence and the right to wage a liberation war, in pursuit of these causes;
> — regard for generally accepted norms of international law".

The Constitution of the SFRY in its operative part, defined it as a

> "federal State, a state community of freely united peoples and their socialist Republics . . . based on the rule and self-management of the working class and of all working people and the socialist self-managed democratic community of working people and citizens and equal peoples and nationalities" (Art. 1 of the Constitution).

54. The Constitution of 1974 of the Socialist Republic of Bosnia and Herzegovina laid down in its Article 1:

> "The Socialist Republic of Bosnia and Herzegovina is a socialist democratic State and socialist self-managed democratic community of working people and citizens, *peoples of Bosnia and Herzegovina — Muslims, Serbs and Croats*, with the members of other peoples and nationalities, who live in it, *based on* the rule and self-manage-

ment of the working class and all working people and *on sovereignty and equality of the peoples of Bosnia and Herzegovina* and the members of other nations and nationalities, living in it.

The Socialist Republic of Bosnia and Herzegovina is an integral part of the Socialist Federal Republic of Yugoslavia." (Emphasis added.)

Article 2 of the Constitution of Bosnia and Herzegovina stipulates:

"Working people and citizens, *peoples of Bosnia and Herzegovina — Serbs, Croats and Muslims* and members of other nations and nationalities *shall exercise their sovereign rights in the Socialist Republic of Bosnia and Herzegovina*, except for those rights which the Constitution of the SFRY has designated to be exercised in the Socialist Federal Republic of Yugoslavia in the common interest of working people and citizens, peoples and nationalities." (Emphasis added.)

The Preamble says, *inter alia*, that

"peoples of Bosnia and Herzegovina — *Muslims, Serbs and Croats* . . . along with workers and other working people and citizens and peoples and nationalities in other socialist republics and socialist autonomous provinces of the Socialist Republic of Yugoslavia achieved significant success in . . . advancing . . . unity and equality . . ."

and further states that

"the social and political order of Bosnia and Herzegovina is based on the principles laid down in the SFRY constitution by the peoples and nationalities and working people of Yugoslavia".

The Basic Principles of the Constitution stipulate that

"*The peoples of Bosnia and Herzegovina — Serbs, Muslims and Croats* . . . with other peoples and nationalities of Yugoslavia, . . . *based on the right to self-determination including the right to secession, have voluntarily come together in the common State — the Socialist Federal Republic of Yugoslavia*, and have thereby secured full equality and the conditions for comprehensive national development . . ." (Chapter I of the Basic Principles.)

Chapter II of the same Basic Principles stipulates, *inter alia*, that

"*the peoples of Bosnia and Herzegovina — Croats, Serbs and Muslims* and members of other peoples and nationalities shall *exercise within the Socialist Republic of Bosnia and Herzegovina*, as a State and self-managed community, *their sovereign rights and* further their class and *national interests*." (Emphasis added.)

It is made particularly clear that

> "Starting from the principles . . . of respect for freedom and independence of peoples, active peaceful coexistence, openness to the world and the need for the development of comprehensive international cooperation, the Socialist Republic of Bosnia and Herzegovina shall participate, on an equal footing with other republics and autonomous provinces, in the exercise of the foreign policy of the Socialist Republic of Yugoslavia." (Chapter X of the Basic Principles.)

On 31 July 1990 the Assembly of the Socialist Republic of Bosnia and Herzegovina approved Amendments LIX-LXXX to the Constitution of the Socialist Republic of Bosnia and Herzegovina (*Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 21 of 31 July 1990). Amendment LX replaced paragraph 1 of Article 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina and reads as follows:

> "1. The Socialist Republic of Bosnia and Herzegovina is *a democratic sovereign state of equal citizens, peoples of Bosnia and Herzegovina — Muslims, Serbs and Croats* and members of other peoples and nationalities living in it."

Amendment LI stipulates that:

> "All peoples and nationalities will be guaranteed proportionate representation in the assemblies of socio-political communities, bodies elected by them in the Presidency of SR B-H and in other State organs" (this amendment is added to Article 3 of the Constitution of the Socialist Republic of Bosnia and Herzegovina).

Paragraph 10 of Amendment LXX stipulates that:

> "The Assembly of SR Bosnia and Herzegovina shall form a Council to deal with the question of the exercise of the equality of peoples and nationalities of Bosnia and Herzegovina. Members of the Council will be appointed from the ranks of deputies — members of the nations of Bosnia and Herzegovina — Muslims, Serbs and Croats in equal proportion, and respective number of deputies from the ranks of other peoples and nationalities and others who live in Bosnia and Herzegovina. The *Council shall reach its decision by a consensus of the members of all nations and nationalities.* The Council shall specifically discuss the issues relating to the equality of languages and alphabets; the organization and activities of cultural institutions of particular importance for the expression and affirmation of the national specificities of individual peoples and nationalities and *the promulgation of regulations to implement constitutional provisions expressly determining the principles of equality among peoples and nationalities.*" (Emphasis added.)

55. A consistently undeniable fact, underlying the broad spectrum of changes that have affected the Yugoslav State since its inception in 1918, was a point of departure, explicit or implicit, of all constitutional solutions: *that is that Yugoslavia has primarily been a community of peoples since its birth.*

The subject of changes was the number of constitutive, State-making peoples. At the moment of its inception in 1918, Yugoslavia was a community of three constitutive peoples (Serbs, Croats and Slovenes). The Federal Constitution of 1946 recognized the status of constitutive peoples of Macedonians and Montenegrans, who used to be taken to be parts of the Serbian national *corps.* Finally, the Constitution of 1963 included Muslims in the ranks of constitutive peoples.

56. Since the formation of the Yugoslav State as a federation this *constant has governed fully, and without any reservation, the federal unit of Bosnia and Herzegovina.* Hence, the widely used but somewhat literary qualification of Bosnia and Herzegovina as the "small Yugoslavia", where the essential characteristics of the Yugoslav federation are expressed in a narrow margin.

Federal Yugoslavia was formed under the resolution of the Second Conference of the Anti-Fascist Council of National Liberation of Yugoslavia in 1943, as a community of sovereign and equal peoples, while subsequent constitutional intervention created republics, as federal units. Thus, like the rest of the republics, Bosnia and Herzegovina was formally brought into being by its Constitution of 1946, although temporary authorities had been created since the adoption of the resolution establishing Yugoslavia as a federal State.

In the light of both the federal Constitution of 1946 and the republican Constitution promulgated the same year, Bosnia and Herzegovina was formed as a State of Serb and Croat peoples. Muslims participated in the formation of the Yugoslav federation and in Bosnia and Herzegovina itself as an integral part of the Serb or Croat peoples, or more precisely as the Serbs or Croats of Muslim religion, not as a constitutive people, endowed with the right to self-determination.

57. The constitutional solutions of 1963 changed the constitutional position of Muslims, promoting them into a constitutive people. In keeping with this change Bosnia and Herzegovina was defined by its republican Constitution of 1963 as the "state socialist democratic union of peoples of Bosnia and Herzegovina . . .". The Basic Principles of the Constitution named as "peoples of Bosnia and Herzegovina": "the Serbs, Muslims and Croats". This status was reserved for the Muslims in the constitutional regulations of 1974.

In other words, the Muslims were turned into a constitutive nation *ex post,* after Bosnia and Herzegovina had been formed, on the basis of the exercised right to self-determination of Serbs and Croats, as a federal unit

within the Yugoslav federation. Does this fact influence the scope and quality of the rights of Muslims as a constitutive nation? The reply can only be in the negative. Having been granted the status of a constitutive nation, the Muslims came into possession of absolutely equal rights in the same way as Serbs and Croats in Bosnia and Herzegovina. The full equality of rights of constitutive peoples was accentuated *in continuo* by all constitutional solutions, whether federal or in Bosnia and Herzegovina, between 1946 and 1974. This was effected not only by the use of corresponding terms (*exempli causa*, "the right of each people"; "full equality"; "sovereignty and equality of peoples") but by inversion in quoting the names of peoples, strikingly present in the constitutions of Bosnia and Herzegovina, so as to stress both in substance and diction the full equality of constitutive peoples. *In concreto*, equality is both an explicit and implicit reference to the right of "each nation to self-determination including the right to secession or unification with other peoples".

58. *In the light of constitutional solutions and consequent legal and political practice resulting in the qualification of Bosnia and Herzegovina as a federation of nations, personal federation* sui generis *was the closest to the actual state of affairs.* Such a qualification was justified by several facts of fundamental importance.

Firstly, in the light of both norms and facts, Bosnia and Herzegovina was a community of three peoples. The Republic of Bosnia and Herzegovina was not, unlike the rest of the Yugoslav republics, a genuine, original form of the State personality of the Yugoslav State, but was created *ex post*, as a relevant form of internal administrative and territorial division of the State in the federal phase of its existence. *Ratione valorem*, Bosnia and Herzegovina was not only constituted but also functioned, in political and legal terms, as a community of peoples. It suffices to point to the composition of the bodies of authority in the Socialist Republic of Bosnia and Herzegovina. The issue of cadres in Bosnia and Herzegovina was governed by the "Social compact on personal policy in SR of Bosnia and Herzegovina"[98]. Article 7 (3) thereof bound the signatories of the compact to secure:

> "the proportionate and, in particular, adequate representation of peoples and nationalities on the assemblies of socio-political communities, state organs and bodies of socio-political organizations in the Republic and election to posts with a term of office of one or two years from among the ranks of all the peoples".

[98] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 34 of 8 November 1982.

Such a solution was also legally sanctioned. Article 170*a* of the Law on the Changes and Amendments of the Law on State Administration[99] stipulated that any

> "Official as head of an administrative agency and his deputy may be recalled before the end of their respective terms if so required by eligibility criteria for the equal representation of peoples . . . of Bosnia and Herzegovina in State administration and in pursuance of personnel policy".

An identical provision is contained in Article 175*a* of the same law relating to high political officials.

The above facts suggest that Bosnia and Herzegovina was phenomenologically only apparently a federal unit, while substantively and materially it was a union of its constitutive peoples.

Secondly, *the SFRY Constitution of 1974 and the Constitution of the Socialist Republic of Bosnia and Herzegovina promulgated the same year, defined the right to self-determination as a subjective, collective right of peoples.* Such a provision was consigned in earlier constitutions. It derives from the very nature of the matter. The subject entitled to self-determination is, by definition, a people. It is yet another question that, on the one hand, the right to self-determination is exercised on the territory in question, and that, on the other, in the circumstances of a territorialized international community the consequences of the exercised right to self-determination are territorialized. Overlapping of the right to self-determination and territorialization occurs, as a rule, in single-people communities, and it follows that formulations which recognize the right to a territorial entity are colloquial formulations. However, in multi-ethnic communities composed of peoples provided with equal rights, a territory is exclusively an area where equal rights of self-determination are exercised.

Thirdly, *Bosnia and Herzegovina, as a federal unit, was not equipped with a right to self-determination that would include the right to secession.*

Fourthly, *Bosnia and Herzegovina likewise possessed none of the classic attributes of statehood which are characteristic of federal units in modern federations.* Although a "constitutive element of the federation" Bosnia and Herzegovina was, in the structure of Yugoslav federalism like other federal units, designed — both constitutionally and legally — in a specific way. After 1963, it had dichotomic properties: on the one hand, it possessed the powers characteristic of most of the other federal units in contemporary federations, and, on the other, it represented the socialist

[99] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 10 of 28 March 1991.

self-managed democratic community of working people and citizens, peoples of Bosnia and Herzegovina — Muslims, Serbs and Croats — and members of other peoples and nationalities living in it, based on the rule and self-management of the working class and all working people, and the sovereignty and equality of peoples of Bosnia and Herzegovina (Article 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974). That dichotomy of Bosnia and Herzegovina's personality within the Yugoslav constitutional system is a result of a fundamental ideological overtone of the premise that a State, as a class creation, is a passing historical phenomenon, incompatible with the nature of a socialist society and consequently doomed to wither away. "De-etatization" was the main motto of the Yugoslav constitutional approach after the introduction of self-management as a basic social relationship — society *versus* State was the fundamental political orientation which operated even in the domain of legal norms. "De-etatization" gave birth to "working people and peoples" so that federalism was no longer "governmental" but "sociopolitical". Mutual relations between the parts of the dichotomy of Bosnia and Herzegovina attributed more weight to the part representing the self-managing community. This is clearly suggested by the constitutional positioning of self-management and the ensuing social ownership over the means of production, as the basic social relationship (Chapter II of the Basic Principles of the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974). Hence, *exempli causa* Bosnia and Herzegovina itself is defined as the "socialist self-managed democratic community" (Article 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1974), while "the Assembly is an organ of socialist self-management and the highest deliberative body in the domain of rights and obligations of the socio-political community" (Article 136 of the Constitution of Bosnia and Herzegovina).

The fact that Bosnia and Herzegovina is essentially a community of peoples has been confirmed by the consolidated text of the Constitution of Bosnia and Herzegovina adopted in March 1993 after the proclamation of the sovereignty and independence of that federal unit as well as by a series of instruments on the international plane. Article 1 of that consolidated text defines the Republic of Bosnia and Herzegovina as a "sovereign and independent state . . . of the peoples of Bosnia and Herzegovina — Moslems, Serbs, Croats and members of other peoples living in it". The precise sense of that wording may be ascertained when one takes into account the interpretative provision of Article 269 of the refined text of the Constitution (Transitional Final Provisions). Article 269 provides that:

> "The term used in the Constitution 'members of other peoples who live in the Republic' or 'members of other peoples who live in it' denotes the nationalities of national minorities in Bosnia and Herzegovina."

The above-mentioned text of the Constitution likewise conserved the substantial characteristics of Bosnia and Herzegovina as a personal

federation. On the basis of the principle of the "equality of the peoples of Bosnia and Herzegovina" it is stipulated that:

> "In the assemblies of the socio-political communities, and in the bodies elected by them of the Presidency of the Republic of Bosnia and Herzegovina, proportional representation shall be guaranteed to the peoples of Bosnia and Herzegovina and to the other peoples living in it."[100]

All the plans for the constitutional arrangements of Bosnia and Herzegovina submitted during the negotiations about the peaceful solution of the conflict in Bosnia and Herzegovina start from the qualification of Bosnia and Herzegovina as a community of peoples.

In the draft "Constitutional Structure for Bosnia and Hercegovina", submitted by the Co-Chairmen on 27 October 1992, and on 16 November specifically endorsed by the Security Council (resolution 787 (1992) para. 1) (the so-called Vance-Owen Plan), it is said, *inter alia*, that: "*(c)* The constitution is to recognize three 'constituent peoples', as well as groups of 'others'"[101]. Article 1 of Chapter 1 of the "Constitutional Arrangements of the Union of Republic of Bosnia and Hercegovina" submitted by the Co-Chairmen Owen and Stoltenberg in September 1993, envisaged that:

> "[t]he Union of Republic of Bosnia and Hercegovina is composed of three Constituent Republics and encompasses three constituent peoples: the Muslims, Serbs and Croats, as well as a group of other peoples"[102].

In the Preamble to Annex 4 of the Dayton Agreement "Bosniacs, Croats, and Serbs" are qualified as constituent peoples (A/50/790/S/1995/999, p. 59). So it can be said that the fact that Bosnia and Herzegovina is essentially a community of peoples is recognized on an international plane.

3. The promulgation of Bosnia and Herzegovina as a sovereign State

59. In the part of the Memorial entitled: "The International Status of Bosnia and Herzegovina", "*(a)* The alleged absence of statehood of Bosnia and Herzegovina", the Applicant, summing up its views of the subject matter, states:

> "The existence of the main elements in this respect has been summed up by the Arbitration Commission in its Opinion No. 11 of 16 July 1993:

[100] Article 3 (1.3) of the refined text of the Constitution of the Republic of Bosnia and Herzegovina.
[101] ICFY/6, Annex I, S/25403.

[102] Agreement relating to Bosnia and Herzegovina, ICFY, Appendix I.

> 'in a referendum held on 29 February and 1 March 1992, the majority of people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia, the result of the referendum was officially promulgated on 6 March, and since that date, notwithstanding the dramatic events that have occurred in Bosnia and Herzegovina, the constitutional authorities of the Republic have acted like those of sovereign state in order to maintain its territorial integrity and their full and exclusive powers'." [103]

60. Two conditions should have been met to make the promulgation of sovereignty and independence of Bosnia and Herzegovina legally perfect, in the light of internal law of SFRY, as follows:

first, that Yugoslav law should have provided for the right to secession of federal units; and

second, that the procedure prescribed by the Constitution and law should have been observed, for,

> "[w]hether the federation dissolves into two or more states also brings into focus the doctrine of self-determination in the form of secession. Such a dissolution may be the result of an amicable and constitutional agreement or may occur pursuant to a forceful exercise of secession. In the latter case, international legal rules may be pleaded in aid, but the position would seem to be that (apart from recognised colonial situations) there is no right of self-determination applicable to independent states that would justify the resort to secession." [104]

61. The Yugoslav federal units possessed no right to secession *(jus secessionis)*, beyond any doubt. The right to self-determination was absolutely reserved for constitutive nations (see paras. 48-56 above).

In the part relating to external self-determination, the provisions of the SFRY constitution offer the conclusion that the right to external self-determination had been fully exercised.

To begin with "the right to self-determination, including the right to secession" was formulated in the past tense in the SFRY Constitution, as in all previous constitutions of the federal Yugoslavia. Then, the right in question was located in the Basic Principles of the Constitution and there was no mention of it in the operative provisions of the Constitution. Finally, neither the Constitution nor the law envisaged any procedure for an exercise of the right to self-determination. In other words, the constitutive nations of Yugoslavia exercised the right to external self-determination at the time of the formation of the federal Yugoslavia. Once they had decided to live in a common State they dispensed with that right, which from that time on constituted a legal merit of existence of the com-

[103] Memorial, para. 4.2.1.10.
[104] M. N. Shaw, *International Law*, 1986, p. 139.

mon state, its *validus titulus*, but not a living, topical right to be resorted to at will. This does not mean, however, that the issue of the right to external self-determination was closed for good. It could, like other issues, have been redefined in the guaranteed constitutional procedure.

The Constitutional Court of Yugoslavia, as the main agent securing constitutionality and legality in the constitutional system of SFRY, underscored in its decision I U No. 108/1-91 (*Official Gazette of SFRY*, No. 83/91) that, *inter alia*:

> "this right [right to self-determination including the right to secession] may be exercised *only under conditions and in a manner to be determined in conformity with the SFRY constitution and the right of peoples of self-determination including the right to secession* — under an enactment promulgated by the SFRY Assembly or in agreement among the peoples of Yugoslavia and their republics" (emphasis added).

Therefore, in the light of the relevant provisions of the SFRY Constitution, the ruling of the Constitutional Court of Yugoslavia reads as follows:

> "any enactment of a republic that declares the republic to be a sovereign and independent state — is an unconstitutional change of the state order of Yugoslavia, i.e., an act of secession, which, by virtue of the decision of the Constitutional Court of Yugoslavia can have no legal effect" [105].

The proposal to resolve the controversies surrounding the exercise of the right to external self-determination *constitutione artis*, namely via a corresponding constitutional revision, was contained in the "Concept for the Future Organization of the State proposed by a Working Group comprising Representatives of all the Republics as a basis for further Talks between the Republican President and the State Presidency".

Starting from the basic premise that

> "The Yugoslav state community, seen as a federal state of equal citizens and equal peoples and their republics [footnote commentary: Kasim Trnka from Bosnia and Herzegovina proposed that the republics be placed first] and as a democratic state, will be founded on human and civil rights and liberties, the rule of law and social justice",

[105] Reply of the Constitutional Court of Yugoslavia to the question of Lord Carrington whether it was a matter of dissolution or secession — referred to by the Arbitration Commission of ICFY, No. SU 365/91.

the "Concept" contains a part entitled "Proposed Procedure for Disassociation from Yugoslavia" which reads:

> "In connection with initiatives in certain republics for secession from Yugoslavia, that is, the 'disunion' of the country, and in view of the general demand for a peaceful, democratic and constitutional resolution of the constitutional crisis, the question of procedure arises with regard to the possible realization of these initiatives.
>
> The aim of the initiatives is the withdrawal of certain republics from the Socialist Federal Republic of Yugoslavia. *They are based on the permanent and inalienable right of peoples to self-determination and should be constitutionally regulated.*
>
> The right of peoples to self-determination, as one of the universal rights of modern law, is set out in the basic principles of the SFRY Constitution.
>
> *However, the realization of the right of peoples to secession, which includes the possibility of certain republics' withdrawal from the SFRY, is not regulated by the SFRY Constitution. It is therefore necessary to amend the SFRY Constitution in order to create a basis for exercising this right.*
>
> Revision of the SFRY Constitution on these lines should be based on the democratic nature of the entire process of statement of views, the equality of the Yugoslav nations, the protection of fundamental human and civil rights and freedoms, and the principle of the peaceful resolution of all disputes.
>
> In keeping with the above, appropriate amendments should be made to the SFRY Constitution which would in a general manner regulate the procedure for the execution of the right of peoples to secession and thereby the withdrawal of certain republics from the SFRY.
>
> The amendments to the SFRY Constitution should express the following commitments:
>
> 1. The right to launch the initiative for a certain republic to withdraw from the SFRY is vested in the Assembly of the respective republic, except if otherwise regulated by the republican constitution.
> 2. A decision on the initiative is taken at a referendum at which the free, direct and secret voting of all citizens of the republic is ensured.
> 3. During the preparations for the referendum, the public and voters will be informed objectively and on time of the importance and the consequences of the referendum.
> 4. The referendum will be monitored by representatives of the Assembly of Yugoslavia and, possibly, representatives of other republics and interested international institutions.

5. A decision will be deemed adopted if it receives more than one half of the votes of all registered voters.

6. *In republics populated by members of several Yugoslav nations, the necessary majority will be established for each Yugoslav nation separately. If one nation votes against, all settlements in which this nation is predominant and which border on the remaining territory of Yugoslavia and can constitute its territorial compactness will remain part of the SFRY.*

7. If the result of the referendum is negative, the same initiative may be launched after the expiry of a period of five years.

8. The Assembly of the republic will inform the public and the Assembly of Yugoslavia of the result of the referendum, and will submit to the Assembly of Yugoslavia a proposal to adopt a constitutional enactment on the withdrawal of the respective republic from the SFRY, in accordance with the will of the people expressed at the referendum.

9. The Assembly of Yugoslavia acknowledges the legality and legitimacy of the expressed will of the people and members of nations, and instructs the Federal Government to carry out the necessary preparations for the adoption of the enactment on withdrawal from the SFRY.

In this context, the Federal Government is obligated to:

(a) prepare a proposal for the division of jointly created values and the property of the federation (movable and immovable property) in the country and abroad registered as the property of the federation; international obligations and claims; assets of the National Bank of Yugoslavia; foreign currency, commodity and monetary reserves of the federation, property of the Yugoslav People's Army, archives of Yugoslavia, certain infrastructure facilities, licences and other rights and obligations ensuing from ratified international conventions. The Federal Government proposal would also include issues relating to citizenship, pension and other rights of citizens and the like. This requires the establishment of common responsibility for the obligations and guarantees of the SFRY toward foreign countries;

(b) propose to the Assembly of Yugoslavia the manner of the election and authorization of a parity body or committee which will prepare a proposal for the division of rights and obligations and submit it to the Assembly of Yugoslavia;

(c) prepare proposals for the territorial demarcation and the frontiers of the future states and other issues of importance for formulating the enactment on withdrawal.

10. On the basis of the Federal Government proposals regarding material and territorial issues, the Assembly of Yugoslavia will

formulate, with the consent of the republican assemblies, a constitutional enactment (constitutional law) on withdrawal from the SFRY which, among other things, establishes:

— citizens' right of choice (term and manner in which citizens will state their choice in the event of territorial changes), and the obligation to ensure just compensation for change of residence);

— the obligation to provide judicial protection of the rights of citizens, legal entities and members of certain nations (compensation for damages resulting directly from the execution of the right to withdrawal, etc.);
— the obligation to harmonize certain laws and other enactments with changes in the structure of the SFRY;

— supervision and control of the enforcement of determined obligations;
— other issues which must be resolved by the time of the definitive disassociation (judiciary, environment protection, joint ventures and the like);
— the transitional period and the moment of disassociation from the SFRY."[106]

However, Bosnia and Herzegovina did not accept the proposed "Concept", as clearly demonstrated by the arrangements for the referendum on "sovereign and independent Bosnia".

62. The promulgation of Bosnia and Herzegovina as a "sovereign and independent Bosnia" was, according to item 4.2.1.10 of the Memorial, composed of two elements, two actions:

(1) a referendum held on 29 February and 1 March 1992, when the majority of people of the Republic expressed themselves in favour of a sovereign and independent Bosnia; and
(2) the official promulgation of the results of the referendum on 6 March 1992. The sovereignty and independence of Bosnia were constituted on that date, in view of the fact that according to Bosnia and Herzegovina:

> "*Since that date* notwithstanding the dramatic events that have occurred in Bosnia-Herzegovina, the constitutional authorities of the Republic have acted like those of sovereign State in order to maintain its territorial integrity and thus full and exclusive powers." (Emphasis added.)

A correct interpretation of the above-quoted statement of Bosnia and Herzegovina leads one to the conclusion that Bosnia and Herzegovina

[106] *Focus*, Special Issue, January 1992, pp. 31-33.

has been constituted as "sovereign and independent Bosnia" since the date of promulgation of the referendum results. In other words, the promulgation of the results of the referendum held on 29 February and 1 March had a constitutive, State-making character.

63. The referendum of 29 February and 1 March asked the following:

> "Are you for a sovereign and independent Bosnia and Herzegovina, a State of equal citizens, peoples of Bosnia and Herzegovina — Muslims, Serbs and Croats and members of other peoples living in it?"

The referendum was called in order to "determine the status of Bosnia and Herzegovina". The decision to call the referendum was taken by virtue of Article 152 of the Constitution of the Socialist Republic of Bosnia and Herzegovina, the provision of item 5, line 9, of Amendment LXXI to the Constitution of the Socialist Republic of Bosnia and Herzegovina and the provisions of Articles 3 and 26 of the Law on Referendum [107].

There can be no doubt that the Assembly of the Socialist Republic of Bosnia and Herzegovina had the authority to call a referendum, in the light of the above-mentioned facts — both a preliminary referendum, i.e., a referendum for preliminary voting, and a subsequent one for the confirmation of laws, regulations and other enactments.

64. It is questionable, however, whether the Assembly of the Socialist Republic of Bosnia and Herzegovina was entitled to call a referendum in order to determine the status of Bosnia and Herzegovina.

Starting from a general provision that "the Assembly of SR Bosnia and Herzegovina is exercising its rights and responsibilities on the basis of and within the constitution and law" [108] and abiding by the relevant rule on the relationship between the constitution and law, we now turn to Article 314 of the Constitution of the Socialist Republic of Bosnia and Herzegovina which stipulates the competences of the Assembly of the Socialist Republic of Bosnia and Herzegovina:

> "The Assembly of SR Bosnia and Herzegovina shall:
>
> (1) Decide on the changes of the Constitution of the Socialist Republic of Bosnia and Herzegovina; submit a proposal or opinion, or issue an approval of the changes to the Constitution of the SFRY;
>
> (2) Determine the policy and decide on other fundamental issues of relevance to the political, economic, social and cultural development of the Republic;
>
> (3) Consider the issues of common interest to the organizations of associated labour and other self-managed organizations and com-

[107] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 29 (1977) and 24 (1991).

[108] Article 313 of the Constitution of the Socialist Republic of Bosnia and Herzegovina.

munities and harmonize their relations and interests; encourage self-management agreements and social compacts;

(4) Consider the issues in the sphere of foreign policy and international relations: approve the negotiation of international treaties in cases stipulated by the SFRY Constitution;

(5) Determine the proposals, or approve arrangements for relationships to be decided on by the Assembly of the Socialist Federal Republic of Yugoslavia on the merit of a proposal, namely agreement by the republic assemblies;

(6) Adopt the social plan of Bosnia and Herzegovina, the budget of the Republic, the balance sheet, the republican global balance of resources and the land development plan of Bosnia and Herzegovina; pass the laws and other regulations and general enactments; issue authentic interpretations of republican laws;

(7) Decide on modifications of republican borders;

(8) Determine the system of national defence in the Republic;

(9) Grant amnesty for criminal offences stipulated in the law of the Republic;

(10) Decide on the indebtedness of the Republic and on calling public loans in the Republic;

(11) Establish work organizations;

(12) Call a republican referendum;

(13) Determine the policy of enforcement of republican laws and other regulations and general enactments and obligations of the organs and organizations in the Republic and enforcement of the federal and republican laws;

(14) Supervise politically the performances of the Executive Council and republican bodies of authority and their organizations and issue general guidelines; supervise politically the holders of public and other social functions, reporting to the Assembly;

(15) Hear the opinions and proposals of the Constitutional Court of Bosnia and Herzegovina concerning the protection of constitutionality and legality;

(16) Hear the reports of the republican judiciary on law enforcement and their performance and issue position papers on these reports;

(17) Exercise public surveillance;

(18) Elect and recall the president and members of the Presidency of the Socialist Republic of Bosnia and Herzegovina and the members of the Presidency of the Socialist Federal Republic of Yugoslavia;

(19) Elect and recall the delegation of the Assembly to the Chamber of Republics and Provinces in the SFRY Assembly;

(20) Elect and recall the President and Vice-President of the Assembly, members of commissions, committees and of other bodies of the Assembly;

(21) Elect and recall the President and members of the Executive Council, the President and Judges of the Constitutional Court of Bosnia and Herzegovina, the President and Judges of the Supreme Court of Bosnia and Herzegovina and other courts stipulated by law and members of the Council of the Republic;

(22) Appoint and recall republican Secretaries and other executives of the republican bodies of authority and organizations acting in the spheres of interest of the Republic; the republican Social Attorney of Self-management, the Secretary-General and secretaries of the Assembly, the Republican prosecutor, the Governor of the National Bank of Bosnia and Herzegovina and other officials, members of decision-making bodies and members of managing bodies of the organizations stipulated as such by this constitution and the law;

(23) Decide on the extension of terms of office of the delegates to the assemblies of socio-political communities;

(24) Perform other functions laid down in the present Constitution.

The Assembly may pass declarations, resolutions and recommendations."

The provision of paragraph 12 of Article 134 of the Constitution entitling the Assembly "to call a referendum" means that the Assembly is to call the referendum on issues falling within its competence. The need for such an interpretation is found in the Law on Referendum which says that the "Assembly of SR Bosnia and Herzegovina may call a referendum on issues falling within its purview" (Art. 26 of the Law). The formulation of the referendum question clearly indicates the intention of *changing* the status of Bosnia and Herzegovina in terms of public law. The *ratio* of the referendum was to transform Bosnia and Herzegovina from a federal unit within the Yugoslav federation into "sovereign and independent Bosnia" as the referendum question reads. If this were not the case, the referendum would have been devoid of any purpose in view of the fact that certain elements of statehood inherent to the Yugoslav model of federalism were accorded to Bosnia and Herzegovina at the time when the referendum was called.

The purpose of the referendum question was, in the strictly formal legal context, to determine the status of Bosnia and Herzegovina in terms of public law. Hence, the purpose of referendum was contrary both to the Constitution of Bosnia and Herzegovina and the Constitution of SFRY. More particularly, the Constitution of Bosnia and Herzegovina stipulates in Article 1 (2) that the Socialist Republic of Bosnia and Herzegovina is a part of SFRY. The Constitution of SFRY defined the federation as "a federal state . . . of socialist republics" (Art. 1 of the Constitution), one member of which, besides other republics, was the Republic of Bosnia and Herzegovina (Art. 5 (1) of the Constitution) and provided that the

"frontier of the SFRY cannot be changed without the consent of all the republics" (Art. 5 (3) of the Constitution). Obviously, in terms of the relevant constitutional regulations, the very fact of calling a referendum on the status of Bosnia and Herzegovina constituted a potential threat to the territorial integrity of SFRY protected by the SFRY Constitution, or more particularly, an act incriminated by the Penal Code of SFRY.

The very promulgation of the "sovereignty and independence" of Bosnia and Herzegovina on the basis of the referendum held, constituted a threat to the territorial integrity of the SFRY.

65. The act of launching a referendum in order to "determine the status of Bosnia and Herzegovina" was formally and materially unconstitutional.

Elements of formal unconstitutionality are demonstrated by the fact that the Assembly of the Socialist Republic of Bosnia and Herzegovina called a referendum which fell outside its constitutionally and legally limited jurisdiction. *In concreto*, this is a case of specific non-competence, because the organ otherwise competent to call a referendum, having called a referendum on the "status of Bosnia and Herzegovina", had acted *ultra vires*. At the same time, calling a referendum on the "status of Bosnia and Herzegovina" constituted an unconstitutional act in the material sense (material unconstitutionality), because the building of Bosnia and Herzegovina as a "sovereign and independent" State, taken *per se*, was contrary to the SFRY Constitution. More particularly, the "sovereignty and independence of Bosnia" means an automatic modification of the State frontiers of SFRY, while by virtue of the SFRY Constitution the State territory is but one (Art. 5 (1) of the Constitution) and "the frontier of SFRY cannot be changed without the consent of all republics" (Art. 5 (3) of the Constitution). Moreover, calling a referendum was materially unconstitutional in terms of the Constitution of Bosnia and Herzegovina itself. Amendment LXX to the Constitution of the Socialist Republic of Bosnia and Herzegovina established, in its paragraph 10, a Council entrusted with the exercise of the right to equality of nations and nationalities of Bosnia and Herzegovina. The mandate of the Council is *inter alia* to "consider in particular the questions relating to . . . the promulgation of regulations ensuring the materialization of constitutional provisions which provide explicitly for the principle of equality of peoples and nationalities". The Council is composed of an

> "equal number of deputies from among the ranks of members of peoples of Bosnia and Herzegovina — Muslims, Serbs and Croats, and a corresponding number of deputies members of other people and nationalities and the others who live in Bosnia and Herzegovina",

who are to take decisions "on the merit of agreement of members from among the ranks of all peoples and nationalities".

The *ratio legis* of Amendment LXX (10) certainly lies in ensuring and guaranteeing the equality of peoples. The significance attached to the Council, within the constitutional system of Bosnia and Herzegovina, is amply demonstrated in paragraph 10, which says that

> "in questions of interest to the exercise of equality of peoples and nationalities in B-H, at the proposal of the Council, the Assembly shall decide, by means of a specific procedure set out in the Rules of Order of the Assembly of the Socialist Republic Bosnia and Herzegovina, by a two-thirds majority of the total number of deputes".

The Council was designed by the Constitution as an unavoidable instance, a forum where deliberations were concentrated and proposals originated for the equality of peoples. In view of these facts, the proposal to call a referendum on the "status of Bosnia and Herzegovina" must have been an issue for consideration by the Council, as this is the question that directly infringed upon "the principles of equality among peoples and nationalities".

The circle of formal and material unconstitutionality encompasses also the act of "official promulgation of the results of the referendum on March 6, 1992". The qualification of "official promulgation" invokes, *mutatis mutandis*, the relevance of the facts corroborating the formal and material unconstitutionality of calling the referendum on the status of Bosnia and Herzegovina.

The referendum on the "status of Bosnia and Herzegovina" falls into the category of the so-called preliminary referenda in the constitutional regulation of the Socialist Republic of Bosnia and Herzegovina, since the purpose had been a preliminary voting of citizens on the relevant issue of the status of Bosnia and Herzegovina. That is why the "official promulgation of the results of a referendum" is, actually, a legal act. More particularly, voting of citizens in a referendum is no decision in formal terms, irrespective of whether the result of the voting is or is not binding on the organ which called the referendum. The result of the referendum is a material condition for decision-making in formal terms and this is, in the present case, the nature of the "official promulgation".

Such a legal nature of the "official promulgation" of a federal unit of Bosnia and Herzegovina as a "sovereign and independent" State constitutes an additional aspect of material unconstitutionality in respect to the relevant decisions of the Constitution of the Socialist Republic of Bosnia and Herzegovina. More particularly, Article 252 of that Constitution stipulated that the:

> "[s]acred and inalienable right and responsibility of peoples and nationalities . . . of Bosnia and Herzegovina is to safeguard and foster freedom, independence, sovereignty, *territorial unity and the constitutionally established social system of the SFRY and the Socialist Republic Bosnia and Herzegovina*" (emphasis added).

Item 7 of Amendment LXIX to the Constitution of the Socialist Republic of Bosnia and Herzegovina provided that: "Political organizations and acts aimed at the forceful change of the constitutionally established system, and *threats to the territorial unity and independence of SFRY*" (emphasis added) are prohibited. Both of the constitutional provisions mentioned above include "territorial unity" as a constitutionally protected object while "official promulgation" is a form of direct threat to that object.

66. The referendum for determination of the status of Bosnia and Herzegovina was called in the form of a referendum of citizens. This fact derives from the method of voting at the referendum, which remained undisputed by Bosnia and Herzegovina, as it stated in its Memorial, in the context of the promulgation of its sovereignty and independence (Memorial, para. 4.2.1.10), *inter alia*, that "the majority of the people of the Republic" voted positively on the referendum question. The use of the term "people" in the singular undoubtedly suggests that Bosnia and Herzegovina is also of the view that this was but a civic referendum.

Was a civic referendum, in the form of a direct expression of the will of citizens, quite apart from the questions elaborated in items 5 and 6, a good way in which to decide the "status of Bosnia and Herzegovina"? Civic referendum is, *per definitionem*, a form of the exercise of national sovereignty, that is to say, the rule of the people as *Demos*. Since three peoples exist in Bosnia and Herzegovina and are provided with the right to self-determination, it is indisputable, irrespective of the reasons stated in paragraphs 5 and 27 of this opinion, that the form of civic referendum is absolutely inadequate to express the will of each of the three peoples. In some sort of ultimately strained hypothesis that "sovereign and independent Bosnia" was voted for by such a majority of citizens embodying the majority of each of the members of the three peoples, it might be said that a civic referendum consummated the national referendum, although *per se* it was not such a referendum. But that was not the case, as is known. In view of the fact that all the three peoples of Bosnia and Herzegovina are, by virtue of the Constitution of Bosnia and Herzegovina, "sovereign and equal", a national referendum is only relevant for the direct exercise of the right to self-determination. A separate exercise of the right to self-determination could have been anticipated by means of a corresponding decision taken by elected representatives of the three peoples of Bosnia and Herzegovina, particularly as in 1990, democratic multiparty elections were held in Bosnia and Herzegovina. Maps of constituencies correctly mirrored the ethnic structure of Bosnia and Herzegovina since the national parties of the three peoples individually gathered practically all the votes of their national *corps*.

The referendum was an inadequate form of voting on the "status of Bosnia and Herzegovina" not only because of the reasons relating to its constitutionality and essential inability to express the will of the three peoples of Bosnia and Herzegovina, but because of the very provisions of the Law on Referendum on the basis of which it was held.

The provisions of the Law on Referendum of Bosnia and Herzegovina taken *per se* are certainly not formulated so as to imply the possibility of deciding "on the status of Bosnia and Herzegovina" by means of a referendum, as designed by the Law.

Apart from the general provisions on calling the referendum already discussed in paragraph 5 of this opinion, the provisions concerning the method of decision-making and the individuals participating in the voting are also of relevance.

Article 33 of the Law stipulates that the

> "decision on referendum is to be taken by a majority vote of all working people and citizens registered as voters in the territory or part of the territory of SR of Bosnia and Herzegovina where the referendum is called".

The decision at the referendum is to be taken by majority vote. Leaving aside the issue of the legality of a referendum, a logical question arises, i.e., whether a valid issue, such as "the status of Bosnia and Herzegovina", may possibly be decided by simple majority. The rational reason underlying this question relates to the fact that the Constitution of the Socialist Republic of Bosnia and Herzegovina stipulated voting of at least two-thirds of the total number of voters of the Socialist Republic of Bosnia and Herzegovina on the question of a change of borders of the Socialist Republic of Bosnia and Herzegovina (Amendment LXII to Article 5 of the Constitution[109]). In other words, the constitutional requirement for the correction of indirectly determined lines of administrative division within the federation was a two-thirds majority, while the Law on Referendum required a simple majority for the decision on the status of Bosnia and Herzegovina in terms of public law. This is, in my view, sufficient proof that the legislator did not, when passing the Law on Referendum (either irrespective of the Constitution of the Socialist Republic of Bosnia and Herzegovina or just relying on the Constitution of the Socialist Republic of Bosnia and Herzegovina), have in mind a referendum of that kind. More particularly, it is difficult to imagine that the legislator would lay down much stricter requirements for a referendum on the change of borders, which in the practice of the Yugoslav federal units was nothing but a couple of hectares of pasture lands, forests or villages, than for a referendum on the fateful, existential question of the very federal unit.

The Law on Referendum also stipulated that "all working people and citizens included in voters' lists in the territory, namely that part of territory of SR B-H where referendum shall take place", shall have the right to vote in the referendum (Art. 33 of the Law). Such a provision raises the question about who in fact was voting at the referendum. The provision entitling "all working people and citizens" to vote means that the criterion of eligibility to vote was not citizenship in the republic. The only

[109] *Official Gazette of the Socialist Republic of Bosnia and Herzegovina*, No. 21 (1990).

criterion was residence, since it was a condition of enlistment for voting. Hence, the right to vote in the referendum was, for instance, accorded to Slovenes or Macedonians, who had a residence in Bosnia and Herzegovina, while Muslims or Serbs, citizens of Bosnia and Herzegovina, who resided in another republic were deprived of that right.

67. Finally, from the standpoint of the Constitutional law of SFRY, it would be hard to imagine a more meritorious judgment on the legal evaluation of the referendum on the "status of Bosnia and Herzegovina" than the one handed down by the Constitutional Court of Yugoslavia as the main proponent of constitutionality and legality in the constitutional system of SFRY (Art. 375 of the SFRY Constitution). The Constitutional Court of Yugoslavia never took up the referendum on the status of Bosnia and Herzegovina as a separate issue. However, it made several rulings on the analogous acts of federal units which had promulgated "sovereignty and independence" before Bosnia and Herzegovina. Apart from the actual decisions of the Constitutional Court of Yugoslavia in the concrete cases, we shall quote from relevant parts of the explanations of those decisions since they extend beyond the framework of the concrete issue in formal and material terms, on which the court ruled. In other words they constitute a meritorious legal evaluation of the highest judicial instance in SFRY on the relevant question. In ruling I U No. 108/1-91 (*Official Gazette of SFRY*, No. 83/91), the Constitutional Court pointed out, *inter alia*, that

> "The right of peoples of Yugoslavia to self-determination, including the right to secession, may not, in the view of the Constitutional Court of Yugoslavia, be exercised by unilateral acts of the peoples of Yugoslavia, namely enactments of the Assemblies of the republics within the Socialist Federal Republic of Yugoslavia . . . Although the procedure for the exercise of the right to self-determination including the right to secession is not provided for by the SFRY Constitution, this does not mean that the right can be exercised on the basis of unilateral acts on self-determination and secession. No people and, more particularly, no assembly of a republic can, by means of a unilateral act, decide on the exercise of that right before the procedure and conditions governing the procedure have been jointly determined for the exercise of that right.
>
> A unilateral promulgation of sovereignty and independence of republics making up the Socialist Federal Republic of Yugoslavia implies, in the opinion of the Constitutional Court of Yugoslavia, an infringement upon the provisions of the SFRY Constitution concerning the composition of the Socialist Federal Republic of Yugoslavia and of the frontiers of Yugoslavia as a federal state and state community of voluntarily united peoples and their socialist republics."

It is worth mentioning that the above ruling was approved in the course of the court deliberations in full composition as provided for in Article 381 of the SFRY Constitution and in the presence of both judges from Bosnia and Herzegovina.

C. Legality of the Proclamation of Independence of Bosnia and Herzegovina in the Light of International Law

68. In a series of international instruments starting with the United Nations Charter and continuing via the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), and the Covenants on Human Rights (1966), to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1974), the equal rights and self-determination of peoples has been of essential universal value of the democratic *ordre public* embodied in the United Nations Charter, and raised to a positive norm of general international law with the character of *jus cogens*[110]. In the case concerning *East Timor*, the Court in its Judgment stated *inter alia*:

> "In the Court's view, . . . the right of peoples to self-determination, as it is evolved from the Charter and from United Nations practice, has an *erga omnes* character . . . the principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law."[111]

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[110] J. J. Caicedo Perdomo, "La teoria del *ius cogens* en derecho internacional a la luz de la Convención de Viena sobre el derecho de los tratados", *Revista de la Academia colombina de jurisprudencia*, January-June 1975, pp. 216-274; L. Alexidze, "Legal Nature of *jus cogens* in Contemporary International Law", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 172, 1981, p. 262; Bedjaoui notes that "Among those principles, 'the right of complete independence' and 'the right of self-determination' are considered to be inalienable and must accordingly be recognized immediately and unconditionally" *[translation by the Registry]*: "Non-alignement et droit international", *ibid.*, Vol. 151, 1976, p. 421. M. Šahović, "Codification of the Legal Principles of Coexistence and the Development of Contemporary International Law", in *Principles of International Law Concerning Friendly Relations and Cooperation*, 1972, p. 23; draft rules on International Responsibility; the list of international crimes covers also "*(b)* a serious breach of an international obligation of essential importance of safeguarding the right of self-determination of peoples" (Art. 19), Fifth Report on State Responsibility, *Yearbook of the International Law Commission*, 1976, Vol. II, Part Two, p. 75).

[111] *I.C.J. Reports 1995*, p. 102.

69. Equal rights and self-determination of peoples is a complex norm in terms of structure.

On the one hand, the very phrase "equal rights and self-determination of peoples" is a link, an amalgam of a general legal principle ("equal rights") and the norm on the self-determination of peoples. "Equal rights" in the above phrase, as a normative substitute for "equality of States", has a broader meaning because it defines, in a broader form, the relationship of each people taken individually to the sum of rights recognized to peoples under international law. Its virtual meaning lies in a prohibition of any distinction between peoples and the respective rights recognized to them. In other words, the principle of "equal rights" defines the scope of the norms of international law that relate to the status of peoples. The right to self-determination does, however, have an immediate material substance as

> "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter" (para. 1 of the Declaration on Principles).

On the other hand, the norm on "equal rights and self-determination of peoples" is incomplete, less than full norm in view of its application. More particularly, it contains no definition of the notion of "people" and no such definition, as an institutional mechanism authorized to define what a "people" is, can be found to exist in the international law in force. That is why the only way to make the norms on "equal rights and self-determination of peoples" operational and effective is to take the norms of internal law which define "peoples", as relevant (paras. 44-45 above). The norms of internal law can likewise be relevant in the event of an exercise of external self-determination in States comprising more than one people, in view of the nature of the prohibition of violations of territorial integrity and political unity.

70. Certain strong arguments support the assertation that the proclamation of Bosnia and Herzegovina as a "sovereign and independent" State within its administrative borders was a violation of the fundamental entitlement to equal rights and self-determination of peoples.

On the assumption that other relevant processes and material requirements were in place (paras. 59-63 above), the merit of the proclamation of Bosnia and Herzegovina as a "sovereign and independent" State, could only relate to the converging will of the three peoples in Bosnia and Herzegovina. However, there was an evident divergence in the basic political stances of the representatives of these three peoples. While the will of the Muslim political leadership was expressed in the Draft Declaration on the Sovereign Bosnia and Herzegovina since February 1991, which has been, at least temporarily, accepted by Croat political leaders,

the political leadership of Bosnian Serbs insisted on the preservation of Bosnia and Hezegovina as a federal unit within the Yugoslav federation.

The referendum of 29 February and 1 March 1992 was not an expression of equal rights and self-determination of the three peoples of Bosnia and Herzegovina, whether in terms of its form (see para. 64 above) or its substance. Although absolutely inappropriate in form, its substance could, however, be qualified at best as the *de facto* self-determination of the Muslim and Croat peoples in Bosnia and Herzegovina. A national plebiscite of the Serbian people in Bosnia and Herzegovina was organized in the form of referendum on 9 and 10 November 1991, "in the areas of the Serbian autonomous regions and other Serbian ethnic enclaves in Bosnia and Herzegovina", where 96.4 per cent of citizens voted for an independent State within the Yugoslav federation (*Politika*, 11 and 13 November 1991).

Relevant circumstances concerning the referendum of 29 February and 1 March 1992 reveal the *intention* to have the decision on the legal status of Bosnia and Herzegovina taken independently of the norm on equal rights and self-determination of peoples.

In the first place, Mr. Alija Izetbegović stated the following at a press conference in Sarajevo on 30 January 1991:

> "If Slovenia and Croatia secede from the present Federation, I will consider that I no longer have any authority to conduct further talks on a new Yugoslavia. I will propose *that a referendum* be held of all citizens of Bosnia and Herzegovina — not of individual peoples — to decide on the independence and sovereignty of Bosnia-Herzegovina."[112]

Secondly, Bosnia and Herzegovina's submissions mentioned more than once the *"People of the Republic"* (*exempli causa*, paras. 5, 31, 114, 134, 135, 136 of the Application instituting proceedings filed in the Registry of the Court on 20 March 1993; Memorial, paras. 4.2.1.10; 4.2.2.19). Thus in paragraph 4.2.1.10 it was written that the referendum on the sovereignty of Bosnia and Herzegovina was based on the will of the "majority of *people* of the Republic" (emphasis added).

This proves that the merit of the relevant decision was not the will of the three peoples of Bosnia and Herzegovina to "determine their political status", but was rather the will, in the light of facts and law, of an imaginary "*people* of Bosnia and Herzegovina". The objective meaning of the phrase "people of Bosnia and Herzegovina" in the given context lies in a denial of the existence of the three peoples of Bosnia and Herzegovina,

[112] Referendum on the independence of Bosnia and Herzegovina, *The Politika Daily*, 31 January 1991 (emphasis added).

thereby denying the relevance of the norm on equal rights and self-determination of peoples.

Thirdly, the reference of Bosnia and Herzegovina to the opinion of the Arbitration Commission as advisory body of the Conference on Yugoslavia is reasonably connected to the standpoint of the Commission on the issue of self-determination of Serbian people in Bosnia and Herzegovina. In reply to the question raised by Lord Carrington, Chairman of the Conference on Peace in Yugoslavia: "As a constituent people of Yugoslavia, do the Serbian Populations(s) in . . . Bosnia-Herzegovina enjoy the right to self-determination?", the Commission, *inter alia*, stressed:

> "that the Serbian population of Bosnia-Herzegovina . . . is entitled to all the minority rights accorded to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia-Herzegovina . . . have undertaken to give effect"[113].

In other words, a construction of the Commission on independence of Bosnia and Herzegovina which served as basis for the policy of recognition of Bosnia and Herzegovina has been derived independently of a cogent norm on equal rights and self-determination of peoples, since one of the constituent peoples of Bosnia and Herzegovina has been treated as a "minority and ethnic group".

71. The right to self-determination is composed of two rights: the right to internal and the right to external self-determination. These two rights are an organic unity expressing dialectics in the development of the idea of self-determination.

The right to internal self-determination is materialized in the institutional environment of a sovereign, independent State. It is reduced to the right of each State freely, without external interference, to choose the form of its social system (political self-determination) and the right to free disposal of its natural wealth and resources. So construed, a right to internal self-determination embodies the ideas of sovereignty and democracy.

The right to external self-determination means the right to choose the institutional framework for the continuous exercise of internal self-determination. Statehood is thus not the necessary and automatic outcome of the exercise of the right to external self-determination, since that right could be expressed not only by the "establishment of a sovereign and independent State" but by "free association or integration with an independent State or the emergence into any other political status freely determined by a people".

[113] The Conference on Yugoslavia, Arbitration Commission, Opinion No. 2, para. 4.

72. The question of fundamental importance in this context is whether the right to external self-determination is universal or limited in scope?

It seems indisputable that *in abstracto* the right to self-determination is a norm of universal scope. A limitation of the scope of the right to self-determination would mean tacit partial derogation from it. Universality is an inherent characteristic of both aspects of the right to self-determination — internal and external self-determination. It is clearly and undoubtedly indicated by the wording that self-determination belongs to "all peoples" (Art. 1 of both Covenants on Human Rights (1966) and Declaration on Principles of International Law regarding Friendly Relations and Co-operation among States (1970)). Were that not the case, the right to self-determination would relate not to the "equal rights" of peoples but to an "unequal right".

The fact that in the Court's practice (Advisory Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 31; *Western Sahara* case, *I.C.J. Reports 1975*, pp. 12, 31), the right to external self-determination has been linked to non-self-governing territories cannot be interpreted as a limitation of the scope of the right to self-determination *ratione personae*, but as an application of universal law *ad casum*.

73. However, there is no automatic equation between universality and non-limitation of the right to self-determination. In the exercise of the right to self-determination there are limits determined by the very norm of self-determination of peoples and limitations deriving from other norms in the system of international law.

These limitations affect the right to self-determination in its entirety, i.e., their subject matter is both internal and external self-determination.

Exempli causa, when it comes to internal self-determination, it is evident that in the context of political self-determination, the subject right includes no option for a social system based on racial discrimination or segregation. More particularly, the right to self-determination, *ex definitione*, is a general permissive norm, a norm comprising categorical authorization. The exercise of that authorization is effected, however, within the system of international law, which is to say that it encounters limits in categorical prohibitions contained in other cogent norms (*in concreto*, in the norm prohibiting racial discrimination).

The basic constraint affecting the exercise of external self-determination derives from the very norm on equal rights and self-determination of peoples. The right to self-determination shall not

> "be construed as authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-

> determination of peoples . . . and . . . possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"[114].

The above-mentioned constraint on the exercise of external self-determination in a narrow sense, within the meaning of the norm on equal rights and self-determination of peoples, reveals the relevance of the norm on territorial integrity and political unity of a State. Being linked to the exercise of the right to self-determination to which "peoples" are entitled, this limitation protects the territorial integrity and political unity of a State from any action that might be undertaken *within the State* — unlike the ban on the use of force and threat of force in *international relations among States* which safeguard its territorial integrity and political unity against an *external* action.

74. As Henkin pointed out "[i]t is accepted that self-determination . . . does not include a right of secession for a people from an existing State"[115].

The rule applies equally to federations:

> "[w]hether the federation dissolves into two or more States also brings into focus the doctrine of self-determination in the form of secession. Such a dissolution may be the result of an amicable and constitutional agreement or may occur pursuant to a forceful exercise of secession. In the latter case, international legal rules may be pleaded in aid, but the position would seem to be that (apart from recognised colonial situations) there is no right of self-determination applicable to independent states that would justify the resort to secession."[116]

In other words, that is to say that in the existing States made up of several peoples, the norm of equal rights and self-determination establishes prohibition of the exercise of external self-determination, since it naturally represents an action which "dismembers or impairs totally or in part, the territorial integrity or political unity". The addressee of that prohibition is a people equipped with the right to self-determination; in view of the fact that

> "[s]ecessionist claims *involve*, first and *foremost*, disputed claims to territory . . . The two supposedly competing principles of people and territory actually work in tandem."[117]

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[114] Declaration of Principles, para. 7.

[115] L. Henkin, "General Course of Public International Law", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 216, 1989, p. 243.

[116] M. N. Shaw, *International Law*, 1986, p. 139.

[117] L. Brilmayer, "Secession and Self-Determination", *Yale Journal of International Law*, Vol. 16, 1991, p. 178 (emphasis added).

75. The basis of prohibition lies in the conflict of two norms of the same legal rank — the norm of self-determination and the norm of territorial integrity. The latter, *tractu temporis*, has become an integral ingredient of the sovereign equality of States (point *(d)* of the Principle of Sovereign Equality of States in the Declaration on Principles of International Law), a cogent norm *per se*, so that the aforementioned conflict is impossible to resolve on the grounds of hierarchy of norms of international law. Apart from this practical justification, such a solution has a principled one, i.e., no one is more qualified than a State, as a sovereign political unit, to decide on its fate when it finds itself caught between two substantially opposing norms and when its decision does not affect the rights of third States.

76. According to paragraph 7 of the Declaration on Principles of International Law, the prohibition of dismemberment or impairment in the territorial integrity or political unity concerns the States

> "conducting themselves in compliance with principles of equal rights and self-determination of peoples . . . and possessed of government representing the whole people belonging to the territory without distinction as to race, creed or colour".

The stated provisions contain two criteria: the first is the conduct of the State in compliance with the principle of equal rights and self-determination of peoples, and the second is the criterion of representatives of a government with the view to ensuring the representation of the whole people without discrimination as to race, creed or colour. By its nature, the second criterion is general. In this concrete case, it should also be interpreted as an absence of discrimination among peoples who comprised the SFRY.

How does this relate to the application of the two legal criteria in the case of the Yugoslav federation?

77. The self-determination of peoples has been more than a statement in constitutional and legal documents of the federal Yugoslavia. It was a constitutive principle of the Yugoslav State. Equally, in the Yugoslav constitutional law, "national equality" or "equality of peoples" went hand in hand with the right to self-determination.

The 1974 Constitution of the SFRY qualified equality of peoples explicitly as one of the major constitutional principles (the first section of the Basic Principles) and developed it into several provisions in the operative, normative part of the Constitution (e.g., Arts. 1, 244, 245). Article 245, devoted to the relations within the Federation, stipulated that: "In SFRY peoples . . . enjoy equality."

The equality of peoples in the composition of the State authorities of SFRY was ensured in two ways:

(i) via constitutional provisions on the equal representation of republics and provinces, namely the joint representation of republics in the federal bodies. Both chambers of the SFRY Assembly, the general representation (Federal Chamber) and the federal house (Chamber of Republics and Provinces) were formed according to the classical principle of parity (Arts. 284 and 291 of the SFRY Constitution). The same principle applied to the collective Head of State — Presidency of the SFRY (Amendment XLI, point 1, to the SFRY Constitution). Care was taken, in appointing members of the Federal Executive Council (Government of SFRY) to ensure an equal representation of republics and an adequate representation of provinces (Amendment XLIII to the SFRY Constitution). The principle of equal representation of republics was applied in the courts (Constitutional Court and Federal (Supreme) Court).

(ii) Social compacts on the policy of recruitment of cadres determined eligibility criteria in which national origin was placed high on the list in multi-ethnic communities.

The personnel picture in the highest State bodies in SFRY in 1990, immediately prior to proclamation of declaration of independence in some federal units, was as follows:

President of the Presidency of SFRY: Croat; Vice-President: Serb;
Prime Minister of the Federal Government: Croat; Vice-premiers: Serb and Slovene;
President of the Parliament: Muslim from Bosnia and Herzegovina. The latest Federal cabinet comprised five Croats; three Serbs; one Muslim; one Serb from Bosnia; three Slovenes; one Montenegran; one Yugoslav; one Albanian; one Hungarian; and two Macedonians.

In the light of the aforementioned facts, one cannot but conclude that the State organs of SFRY represented all the Yugoslav peoples.

78. As to Bosnia and Herzegovina's view on the subject-matter, it never questions the representativeness of the SFRY bodies in principle, but points out that, by the proclamation of independence of some federal units, that representativeness had disappeared and, moreover, "the common federal bodies on which all the Yugoslav republics where represented no longer exist; no body of that type has functioned

since" (Memorial, para. 4.2.1.26). The claim rests on a general thesis that

> "in the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power" [118].

In the case of Yugoslavia, "common federal bodies" ceased to exist due to referendum on independence in three republics, and in "Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on October 14th, 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Herzegovina" [119],

> "The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representativeness inherent in a federal state." [120]

This claim could be hardly taken as legally meritorious. The lack of credibility of the above claim, both in its general and in specific meaning, is evidenced by the following.

79. The wording "the federal organs represent the components of the Federation" has two possible meanings. First, that the Federation, via its organs, represents federal units. Such a meaning of the above wording is logically implied by the fact that a federation is, by definition, a higher, superior power in relation to its constituent parts and that the organs of the whole represent the parts constituting it, and, secondly, that federal organs by their very composition represent federal units — in other words they are a sort of institutional aggregate of the representativeness of federal units.

The claim of Bosnia and Herzegovina, supported by the Opinion of the Commission, is evidently aimed in that direction. In the light of the comparative practice of the federation and constitution of the SFRY, those claims are groundless. As a rule, federal organs represent the federal State as a whole (*exempli causa*: United States President; United States House of Representatives; executive and judicial organs in almost all

[118] International Conference on Peace in Yugoslavia, Arbitration Commission, Opinion No. 1, para. 1 *(d)*.
[119] *Ibid.*, para. 2 *(a)*.
[120] *Ibid.*, para. 2 *(b)*.

federal States) and only the federal chamber is *bicameral*, representing parts of the federation (United States Senate, Canada or Brazil, German Bundesrat, National Council in Switzerland, etc.).

Also, the relevant solution in the SFRY Constitution ranged within the framework of that generally accepted practice in federal States. With the exception of the Council of Republics and Provinces, all federal organs in SFRY represented the federation as a whole. Delegates in the Federal Council represented "self-managing organizations and communities and socio-political organizations" and *were elected* in the republics and provinces (Art. 129 of the SFRY Constitution); members of the Federal Executive Council and officials did not, moreover, represent republics/provinces and an explicit constitutional provision prohibited them from accepting guidelines and orders from republics and provinces (Art. 362). The President and Members of the SFRY Presidency, President and Members of the Constitutional Court and other federal officials used to take an oath to the effect that they would foster the sovereignty, independence and integrity of the SFRY, abide by the Constitution of the Federation (Art. 397), so that they were not representatives of the republics/provinces under the Constitution.

80. It follows that there is no legal connection between an actual refusal to participate in the federal organs and the existence of these organs in the eyes of law. This is evidenced by the Yugoslav case. No federal organ has been dissolved or wound up on the grounds of wilful absence and individual resignations on the part of certain federal officials.

The Constitution of the SFRY of 27 April 1992, as well as the constitutional law and its implementation, were approved by the SFRY Assembly. By virtue of that law, all the supreme federal organs continued to act pending the election of new organs (Art. 2 of the Law). The SFRY Presidency acted until the election of the President of the Republic (15 June 1992) and the Federal Executive Council acted until the formation of a new federal government (14 July 1992).

Participation in the activities of federal organs and the duties of the elected representatives were construed with the intention of endowing the resulting decisions of the federation with objective legal personalities in terms of national and international law, in the general interest. The wilful abstention of federal officials elected in Bosnia and Herzegovina was seen

as constituting an abuse of the law[121]. The consequences of an abuse of law affect those who resort to it, in line with the general legal principle *nullus commodum capere de sua injuria propria et ex delicto non oritur actio*.

81. Bosnia and Herzegovina's reasoning has been tacitly based on an inverted liberalistic idea of consent as a fundamental of the legitimacy of a State. The original idea, that a legitimate government must stem from the consent of the governed, is interpreted in Bosnia and Herzegovina's approach as implying that stepping out of the State organs entails a loss of legitimacy of the government and constitutes the right to opt out of an existing State.

In fact,

> "actual consent is not necessary to political legitimacy . . . Separatists cannot base their arguments upon a right to opt out because no such right exists in democratic theory.
>
> Government by the consent of the governed does not necessarily encompass a right to opt out. It only requires that within the existing political unit a right to participate through electoral processes be available. Moreover, participatory rights do not entail a right to secede. On the contrary, they suggest that the appropriate solution for dissatisfied groups rests in their full inclusion in the polity, with full participation in its decision-making processes."[122]

82. Does the "Existence of the state impl[y] that the federal organs . . . yield effective power"?

The exercise of effective power is *per definitionem* the purpose of the existence of State organs irrespective of whether the State is unitary or federal. *In concreto*, the question is whether an evident crisis in the functioning of State organs of the Federation led to their ceasing to exist? To equate the constitutional crisis in SFRY and the non-existence of federal organs is legally unacceptable. The scope of the effectiveness, quantity and quality of State organs is a variable category, because it demonstrates an actual, political state of affairs. In principle, there are situations in which State organs do in fact cease from exercising power (e.g., cases of military occupation, civil war and, to a certain extent, various forms of constitutional crises), but do not cease to exist. State organs as

[121] The Constitutional Court of Yugoslavia stated in its Decision II U. No. 122/91 that the abstention of federal officials from work in federal organs represents "an unconstitutional change of the composition of the common federal state" (*Official Gazette of SFRY*, No. 89/91). That decision was approved by the Constitutional Court in its full composition and with the participation of both judges from Bosnia and Herzegovina.

[122] L. Brilmayer, "Secession and Self-determination: A Territorial Interpretation", *Yale Journal of International Law*, 1991, Vol. 16, pp. 184-185.

elements of State organization cease to exist when the State on whose behalf they are acting ceases to exist.

D. The Relationship between the Legality of the Birth of a State and Succession with Respect to International Treaties

83. Bosnia and Herzegovina claims that it is a "successor State" because:

(a) "succession of States" means the "replacement of one State by another in the responsibility for the international relations of territory", according to the very widely accepted definition given in both Vienna Conventions on Succession of States of 1978 and 1983; and

(b) "it is obvious that Bosnia and Herzegovina has replaced the former SFRY for the international relations of what was the Federal Republic of Bosnia and Herzegovina before the dissolution of former Yugoslavia" (Memorial, para. 4.2.1.26).

On the contrary, the position of Yugoslavia in the subject-matter is that "the so-called Republic of Bosnia and Herzegovina has not become a State party to that 1948 Convention on the Prevention and Punishment of the Crime of Genocide in accordance with the provisions of the Convention itself" (Submissions, B.1) because:

(a) "The Applicant State cannot enter into the international treaties of the predecessor State on the basis of succession because it flagrantly violated the principle of equal rights and self-determination of peoples" (Preliminary Objections, para. B.1.2.39);

(b) "As the Applicant State has violated the obligations deriving from the principle of equal rights and self-determination of peoples, the Vienna Convention on the Succession of States in Respect of Treaties could not apply to this case even if it had come into force" (*ibid.*, para. B.1.3.5); and

(c) "Notification of succession is a manner of entry into treaties of the predecessor State in cases where the new State has based its existence upon the principle of equal rights and self-determination of peoples. In this particular case, the Applicant State has based its existence on the violation of duties deriving from the principle of equal rights and self-determination of peoples, and thus cannot make use of the notification of succession as a method of entry into the international treaties of its predecessor State." (*Ibid.*, para. B.1.4.11.)

The essence of this objection by Yugoslavia is that because of its

"flagrant violation of the principle of equal rights and self-determination of peoples", Bosnia and Herzegovina was not a successor State and hence could not have acquired the capacity of State party to the 1948 Convention on Genocide on the grounds of succession.

To make a valid conclusion on the merits of the objection, it is necessary to answer the question of whether there is a connection between succession of States and legality of territorial changes.

84. The answer to this question implies a precise definition of the concept of succession. The term "succession" is used in a broad, imprecise meaning.

> "Succession of States means both the territorial change itself — in other words, the fact that within a given territory one State replaces another — and the succession of one of those States to the rights and obligations of the other, i.e., the State whose territory has passed to the successor States."[123]

It can be seen that the term "succession" means two things: *(a)* territorial change itself; and *(b)* transmission of rights and obligations from predecessor State to successor State(s).

The distinction between succession taken in terms of territorial change (*de facto* succession) and succession as transmission of derived rights and obligations from predecessor State to successor State(s) (*de jure* succession) is drawn also by the Convention on Succession of States in respect of Treaties, referred to by Bosnia and Herzegovina in order to prove its status of "Successor State". This Convention in its Article 2 *(b)* (Use of Terms) defines "succession of States" as "the replacement of one State by another in the responsibility for the international relations of the territory". At the same time, Article 6 (Cases of Succession of States Covered by the Present Convention) specifies that the Convention "applies only to the effects of a succession of States occurring in conformity with the international law and, in particular, the principles of international law embodied in the Charter of the United Nations". Relations between Article 2 *(b)* and Article 6 of the Convention are precisely defined in the Comment to Article 2 of the Draft Articles on Succession of States in respect of Treaties on the basis of which Article 2 of the Convention on Succession of States in respect of Treaties was adopted. This Comment, *inter alia*, says:

> "the term ['succession'] is used as referring exclusively to *the fact of replacement* of one State by another in the responsibility for inter-

[123] H. Kelsen, *Dictionnaire de la terminologie du droit international*, Vol. 42, p. 314. Thus O'Connell, *The Law of State Succession*, 1956, pp. 3, 6; K. Zemanek, "Die Wiener Konvention über die Staatennachfolge in Veträge", *Festschrift für Alfred Verdross*, 1980, p. 719; M. Jones, "State Succession in Matter of Treaties", *British Year Book of International Law*, 1947, Vol. 24, pp. 360-361.

national relations of territory leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event"[124].

Such a definition of succession corresponds to the basic concept of "succession of States" which emerged from the study of the topic by the International Law Commission. More particularly:

> "The approach to succession adopted by the Commission after its study of the topic of succession in respect of *treaties* is based upon drawing a clear distinction between, on the one hand, the fact of replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State . . .
>
> In order to make clear the distinction between the fact of replacement of one State by another and the transmission of rights and obligations, the Commission inserted in article 2 a provision defining the meaning of the expression 'succession of States' for the purpose of the draft. Under this provision the expression 'succession of States' is used throughout the articles to denote simply a change in the responsibility for the international relations of a territory, thus leaving aside from the definition all questions of the rights and obligations as a legal incident of that change."[125]

This distinction was necessary as

> "the difficulty stemmed from the fact that the expression 'succession' was not qualified in the definitions of it given in art. 2 (1, *b*). From that paragraph it might be deduced that the convention was also intended to apply to unlawful successions"[126].

Because of that,

> "art. 6 was the most important saving clause of the draft articles, since it safeguarded the legality of all provisions of the future conventions by limiting their application to the effects of lawful succession . . . the provisions of the future convention would not apply to

[124] Draft Articles on Succession of States in respect of Treaties, *Yearbook of the International Law Commission*, 1972, Vol. II, p. 231, para. 3; identical interpretation was quoted *in extenso* in the comment to Article 2 of the Draft Articles on Succession of States in respect of State Property, Archives and Debts, *ibid.*, Vol. II, Part Two, p. 21.

[125] *Yearbook of the International Law Commission*, 1972, Vol. II, p. 226, paras. 29-30.

[126] Sette-Camara, *UNCSS*, First Session, p. 53, para. 11.

> unlawful transfers which were contrary to the will of people and to the principle of self-determination"[127].

Therefore, "succession of States" in terms of "replacement of one State by another in the responsibility for the international relations of territory" "does not mean *ipso facto* a juridical substitution of the acquiring State in the complex rights and duties possessed by the previous sovereign"[128] or, in the present case, entry into the international treaties of SFRY as a predecessor State. The condition thereto is that the "replacement of one State by another" occurred "in conformity with international law, in particular, with the principles of international law embodied in the Charter of the United Nations".

85. A provision concerning territorial changes to be effected "in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations" has a declarative impact. So,

> "even if the article did not appear in the convention, that instrument would apply only to lawful succession from the point of view of the principles of international law especially those embodied in the UN Charter, which was the keystone of all international conventions"[129].

The principle underlying the provision of Article 6 of the Convention on Succession of States in respect of Treaties is a self-evident principle, axiomatic to any legal order *stricto sensu*. It is *ratione materiae* a narrowed projection of the general concept of lawfulness of acts, an application of the concept of lawfulness to the questions of succession. In view of the material significance of lawfulness for the very existence of a *de jure* order, the rule making provisions of any codification applicable only to the facts occurring and situations established in conformity with international law is a general presumption, a self-explanatory matter[130]. The reason for a universal provision of legality led the Commission separately to specify the rule limiting the application of the provisions of the Convention to the cases of lawful succession:

> "Other members, however, were of the opinion that in regard, particularly, to transfers of territory it was desirable to underline

[127] Tabibi, *UNCSS*, First Session, p. 54, para. 20.

[128] O'Connell, *op. cit.*, p. 3.

[129] Ushakov, *UNCSS*, First Session, pp. 54-55, para. 24.

[130] "to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer, is to introduce into a legal system a contradiction which cannot be solved except by denial of its legal character. International law does not and cannot form an exception to that imperative alternative." (H. Lauterpacht, *Recognition in International Law*, 1947, p. 421.)

> that only transfers occurring in conformity with international law should fall within the concept of 'succession of States' for the purpose of the present articles. Since, to specify the element of conformity with the international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element on other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law."[131]

86. Notification of succession is only a technical means by which the successor State expresses its consent to be considered bound by the treaty whose original party is the predecessor State. Hence, to make a notification of succession produce its intended legal effects, the actual succession must have been lawful. The criterion of lawfulness of the succession is "international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

In the present case, and with regard to the position of Bosnia and Herzegovina, of special importance are the principles of territorial integrity and political unity, and of equal rights and self-determination of peoples.

The specific relevance of those principles for the matter of succession is a logical consequence of the nature of changes activating the institution of succession and the role of equal rights and self-determination of peoples in constituting new States. Hence, these principles of the United Nations Charter have been particularly accentuated. The Special Rapporteur, Mr. Mohammed Bedjaoui, stated in his proposal concerning lawfulness of succession that,

> "The conditions for succession of States shall include respect for general international law and the provisions of the United Nations Charter concerning the territorial integrity of States and the right of peoples to self-determination."[132]

The Preamble to the Convention on Succession of States in respect of Treaties "recall[s] that respect for the territorial integrity and political independence of any State is required by the Charter of the United

[131] *UNCSS*, First Session, p. 236, para. 1.

[132] Fifth Report on succession in respect of matters other than treaties, doc. A/CN.4/259, *Yearbook of the International Law Commission*, 1972, Vol. II, p. 66, para. 28.

Nations". That wording confirms that the existence of territorial integrity and political independence derive from the United Nations Charter and, hence, binds the States irrespective of the Convention.

87. The proclamation of Bosnia and Herzegovina as a "sovereign and independent state" constitutes, in my view, a substantial breach of the cogent norm on equal rights and self-determination of peoples in both the formal and material sense.

A substantial breach in the formal sense is reflected in the following:

(a) the procedure of proclamation of Bosnia and Herzegovina was conducted in an unconstitutional way, contrary to the relevant provisions of its own Constitution and that of the SFRY;

(b) self-determination in the subject case was *de facto* conceived as a right of a territory within a sovereign, independent State, rather than as a right of peoples.

The breach of the norm on equal rights and self-determination of peoples in a material sense is reflected in the following:

(a) the proclamation of independence of a federal unit of Bosnia and Herzegovina, in violation of relevant provisions of the internal law of the SFRY and of Bosnia and Herzegovina, endangered the territorial integrity and political unity of SFRY, in contravention of the provision of paragraph 7 of the Declaration on Principles;

(b) the proclamation of the independence of Bosnia and Herzegovina within its administrative borders was not based on the equal rights and self-determination of all three peoples of Bosnia and Herzegovina.

Therefore, the proclamation of the independence of Bosnia and Herzegovina was not in conformity with the relevant principles of equal rights and self-determination of peoples, and territorial integrity and political unity and, as such, has no merit for lawful succession in terms of the succession of Bosnia and Herzegovina with respect to the Convention on Prevention and Punishment of the Crime of Genocide.

88. By its nature, the proclamation of Bosnia and Herzegovina's independence was an act of secession. Bosnia and Herzegovina does not contest that assertion of Yugoslavia. It is taken from paragraph 3.22 of the Statement of Bosnia and Herzegovina which reads:

> "whether or not Bosnia, at the time of its secession, had a *right* to self-determination is irrelevant because: (1) it is now a recognized, sovereign State, and (2) even if, *arguendo*, it were supposed that it had no *right* to self-determination in international law, international law certainly did not *prohibit* its achieving the status of an independent State at the occasion of the disintegration of the Former

Socialist Federal Republic of Yugoslavia." (Statement of the Government of the Republic of Bosnia and Herzegovina on Preliminary Objections, p. 60.)

89. Secession is, *per definitionem*, "the creation of a State by the use or threat of force and without the consent of the former sovereign"[133]. Therefore it is understandable that the

> "United Nations Charter does not recognize the term or concept of 'secession', for this concept is profoundly at odds with the spirit and normative principles of the Charter. The Charter raises respect for territorial integrity to the rank of a constitutional norm, a norm of *jus cogens*. On January 1, 1970, the UN Secretary-General made the following statement:
>
> > 'So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept, and I do not believe it will ever accept, the principle of secession of a part of a Member State.'"[134]

The Security Council has characterized secession as illegal. In its resolution 169 (1961) on the Congo, the Security Council, *inter alia*,

> "*strongly deprecate[d]* the secessionist activities illegally carried out by the provincial administration of Katanga with the aid of external resources and manned by foreign mercenaries . . . and
>
> *Declare[d]*,
>
> . . . . . .
>
> *(d)* that all secessionist activities against the Republic of Congo are contrary to the *Loi fondamentale*".

The implicit characterization of secession as an illegal act under international law can be found in paragraph 7 of the "Declaration of Principles of International Law Concerning Friendly Relations among States" which stipulates, *inter alia*, that the right to self-determination shall not be construed as

> "authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".

On the regional, European level, such a characterization of secession is contained in the Declaration on Principles Guiding Relations between

[133] J. Crawford, *The Creation of States in International Law*, 1979, p. 247.
[134] United Nations, *Monthly Chronicle*, Vol. 7, p. 36 (February 1970).

Participating States contained in the Conference on Security and Co-operation in Europe (CSCE) Final Act adopted on 1 August 1975 at Helsinki:

> "[t]he participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in future from assaulting these frontiers".

On the other hand, an explicit condemnation of secession can be found in the general principles of law recognized by civilized nations as a formal source of international law pursuant to Article 38 *(c)* of the Statute of the International Court of Justice. Secession is deemed to be a most serious crime by the national legislations of civilized nations. More particularly, an inside assault on the territorial integrity of a country or an attempted assault, including preparatory actions, are categorized as one of the gravest of crimes in virtually all the criminal codes of civilized nations.

90. The admission of Bosnia and Herzegovina to the United Nations cannot convalidate substantial legal defects in its establishment as an independent State, especially because of the need to draw a sharp distinction between

> "secession in pursuance of, and in violation of, self-determination. Where the territory in question is a self-determination unit it may be presumed that any secessionary government possesses the general support of the people: secession in such a case, where self-determination is forcibly denied, will be presumed to be in furtherance of, or at least not inconsistent with, the application of self-determination to the territory in question."[135]

There is not much doubt that the admission of Bosnia and Herzegovina to the United Nations has given general, political support to Bosnia and Herzegovina. However that political support does not, and could not, be interpreted as a subsequent convalidation of illegality of Bosnia and Herzegovina's birth. Even if the General Assembly had such an intention in mind when admitting Bosnia and Herzegovina to the membership of the United Nations, such an outcome was legally impossible, since such an act implied a derogation from the self-determination of peoples which has the character of *jus cogens*. Norms of *jus cogens* do not tolerate derogation, so any concurrent régime or situation, whether it be established by way of a bilateral or unilateral act, cannot acquire legal force due to the peremptoriness of *jus cogens* — more specifically, this act or acts remains in the sphere of simple facts. One could say that this is a classic example of application of the general principle of law expressed in

[135] J. Crawford, *op. cit.*, p. 258; see also, separate opinion of Judge Ammoun, *Western Sahara, I.C.J. Reports 1975*, pp. 99-100.

the maxim *quidquid ab initio vitiosus est, non potest tractu temporis convalescere.*

In my opinion, therefore, the meaning of the admission of Bosnia and Herzegovina to the United Nations is confined to the recognition of Bosnia and Herzegovina as a fact, and has no impact on the legality of its birth. Such a conclusion corresponds to the fact that

> "[r]ecognition by the UN means that a State (or its government) will be invited to important international conferences, allowed to accede to numerous international treaties and to become a Member of several international organizations and to send observers to others"[136].

91. By rejecting Yugoslavia's third preliminary objection, the Court has responded to one side of the question of its jurisdiction *ratione personae*. The other side of the question relates to the status of Yugoslavia as a party to the Genocide Convention. I am in agreement with the Court's finding that Yugoslavia is a party to the Genocide Convention but I disagree with the Court's reasoning leading to that finding.

With regard to Yugoslavia's status as a party to the Genocide Convention, the Court states that:

> "it has not been contested that Yugoslavia was party to the Genocide Convention [and] . . . was bound by the provisions of the Convention on the date of the filing of the Application in the present case . . ." (para. 17 of the Judgment).

The Court bases this conclusion on the following:

(a) "that it has not been contested that Yugoslavia was party to the Genocide Convention", and

(b) that

> "[a]t the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General." (Para. 17 of the Judgment.)

[136] H. G. Schermers, *International Constitutional Law*, 1980, p. 929.

I agree with the Court that Yugoslavia is a party to the Genocide Convention but its reasoning regarding the effect of the formal declaration issued on 27 April 1992 does not appear to be tenable.

92. A logical meaning of the pronouncement that "it has not been contested that Yugoslavia was party to the Genocide Convention" is that Yugoslavia is a party to the Genocide Convention because its status as a party has not been contested.

It is true that the proceedings on preliminary objections are substantially based on the initiative of the parties. However, that does not mean that the parties have the right to determine the jurisdiction of the Court.

By a decision on preliminary objections, the Court might be said to achieve two mutually connected and interdependent objectives:

(a) the direct objective is that the Court decides on the objection in the form of a judgment "by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character" (Art. 79 (7) of the Rules of Court);

(b) the indirect objective is to ascertain or confirm its jurisdiction. In the light of this objective, preliminary objections raised by a party are only a tool, a procedurally designed instrument for the establishment of the jurisdiction of the Court, *suo nomine et suo vigore*, for according to its Statute it is under an obligation to do so — not *proprio motu* but *ex officio*. For,

> "[t]he Court is the guardian of its Statute. It is not within its power to abandon . . . a function which by virtue of an express provision of the Statute is an essential safeguard of its compulsory jurisdiction. This is so in particular in view of the fact that the principle enshrined in Article 36 (6) of the Statute is declaratory of one of the most firmly established principles of international arbitral and judicial practice. *That principle is that, in the matter of its jurisdiction, an international tribunal, and not the interested party, has the power of decision whether the dispute before it is covered by the instrument creating its jurisdiction.*" [137]

93. The participants in the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro have declared, *inter alia*, by a Declaration made on 27 April 1992:

> "The Federal Republic of Yugoslavia, continuing the State, international, legal and political personality of the Socialist Federal

[137] *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, dissenting opinion of Sir Hersch Lauterpacht, p. 104 (emphasis added).

Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally in the past.

At the same time, it shall be ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed States will follow after all the outstanding questions negotiated within the conference on Yugoslavia have been regulated.

Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed States to join these organizations and institutions, particularly the United Nations and its specialized agencies.

The Diplomatic and Consular Missions of the Federal Republic of Yugoslavia shall continue without interruption to perform their functions of representing and protecting the interests of Yugoslavia.

They shall also extend consular protection to all nationals of the SFR Yugoslavia whenever they request them to do so until a final regulation of their nationality status.

The Federal Republic of Yugoslavia recognized, at the same time, the full continuity of the representation of foreign States by their diplomatic and consular mission in its territory."[138]

This declaration, *per se*, cannot be qualified as a basis for being bound by the Genocide Convention, at least on account of the two basic reasons, one being of a formal and the other of a material nature.

The formal reason resides in the nature of the declarations in the constitutional system of Yugoslavia. The declarations of the Assembly in the constitutional system of Yugoslavia have, since its foundation, represented general political acts of the representative body, which have as their subject the questions which are not subject to legal regulations or are not included within the competence of the representative body[139]. As political acts, they are not binding, so they do not contain legal sanctions for the case of non-observance.

The "Participants to the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, and the Federal Assembly itself" are not organs

[138] Constitution of the Federal Republic of Yugosavia, Belgrade, 1992, pp. 57-58.

[139] M. Snuderl, *Constitutional Law*, Ljubljana, 1957, Vol. II, p. 47; A. Fira, *Constitutional Law*, Belgrade, 1977, p. 381.

of foreign representation authorized to appear on behalf of the State in international relations, so that, the measures they adopt, even when legally binding, cannot be put into effect by one-sided acts of State organs which have such authority. The material reason concerns the content of the Declaration. The statement that the Federal Republic of Yugoslavia "shall strictly abide by all the commitments that the SFR Yugoslavia assumed internationally" is not given in the Declaration *in abstracto*, in the form of an unconditional, generalized acceptance of the commitments that the SFRY assumed internationally in the past, but as a declarative expression of the premise that the FR of Yugoslavia is "continuing the State, international, legal and political personality of the Socialist Federal Republic of Yugoslavia". This fact is not contested by Bosnia and Herzegovina, for it asserts that

> "it is on the basis of this alleged 'continuity' that Yugoslavia (Serbia and Montenegro) considers itself to be bound by all international commitments undertaken by the former SFRY" (Memorial, para. 4.2.2.11).

According to the Declaration, the FR of Yugoslavia does not assume the obligations of the SFRY, but *"remains bound by all obligations to international organizations and institutions of which it is a member"* (emphasis added).

At the meeting of the Federal Chamber of the Assembly of the SFRY held on 27 April 1992, which proclaimed the Constitution of the Federal Republic of Yugoslavia, the President of the Assembly of Serbia emphasized, in his introductory speech, *inter alia*, that:

> "[t]he adoption of one-sided acts by some of the republics on their secession from Yugoslavia and the international recognition of those republics in the administrative borders of the former Yugoslavia republics forced the Yugoslav peoples who want to continue to live in Yugoslavia to rearrange the relations in it"

and that "Serbia and Montenegro do not recognize that Yugoslavia is abolished and does not exist"[140]. Another opening speaker, the President of the Assembly of Montenegro emphasized that Serbia and Montenegro were "the only states which brought their statehood with them on the creation of Yugoslavia, and decided to constitutionally rearrange the former Yugoslavia"[141].

Moreover, even if the intention of the FR of Yugoslavia to assume

[140] *Politika*, Belgrade, 28 April 1992, p. 6.
[141] *Ibid.* (emphasis added).

formally the obligations of the SFRY were built into the Declaration, the Declaration, as the external textual expression of such an intention, could hardly represent anything more than a political proclamation which should be operationalized, in the absence of rules on automatic succession, in accordance with the relevant rules of the Law of Treaties on the expression of consent to be bound by a treaty.

94. Whereas after the adoption of its Constitution on 27 April 1992, Yugoslavia did not express its consent to be bound by the Genocide Convention in the way prescribed by Article XI of the Convention and nor did it send to the Secretary-General of the United Nations the notification of succession, it is obvious that the only possible legal basis on which Yugoslavia could be considered a party to the Genocide Convention is the legal identity and continuity of the SFRY in the domain of multilateral treaties.

In the practice of the Secretary-General as depositary of multilateral treaties, Yugoslavia figures also, after the territorial changes which took place in the period 1991-1992, as a party to the multilateral treaties deposited with the Secretary-General, although the FR of Yugoslavia did not express its acceptance to be bound by concrete treaties in the ways fixed by the treaties, nor did it address to the Secretary-General as depositary the appropriate notifications of succession. The date when the FR of Yugoslavia expressed its acceptance to be bound is mentioned as the day on which it was bound by that specific instrument. *Exempli causa*, in the "Multilateral Treaties Deposited with the Secretary-General" for 1992, and in the list of "Participants" of the Convention on the Prevention and Punishment of the Crime of Genocide, "Yugoslavia" is included, and the 29 August 1950 is mentioned as the date of the acceptance of the obligation — the date on which the SFRY ratified that Convention. Identical dates are also found in the issues of the "Multilateral Treaties Deposited with the Secretary-General" for 1993 and 1994. Such a model is applied, *mutatis mutandis*, to other multilateral conventions deposited with the Secretary-General of the United Nations.

Therefore, it is indisputable that the practice of the Secretary-General as the depositary of the multilateral treaties consistently qualifies Yugoslavia as a party to these multilateral treaties on the basis of the acceptance of those treaties expressed by the SFRY.

95. On the basis of existing practice, the "Summary of Practice of the Secretary-General as depositary of Multilateral Treaties" concludes:

> "The independence of a new successor State, which then exercises its sovereignty on its territory, is of course without effect as concerns the treaty rights and obligations of the predecessor State as concerns it own (remaining) territory. Thus, after the separation of parts of the territory of the Union of Soviet Socialist Republics (which

> became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory . . . The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations (see para. 89 above), was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State."[142]

On the other side, a

> "different situation occurs when the predecessor State disappears. Such was the case when the Czech Republic and Slovakia were formed after the separation of their territories from Czechoslovakia, which ceased to exist. Each of the new States is then in the position of a succeeding State."[143]

Such a practice is completely in accordance with the interpretation of the range of resolution 47/1 of the General Assembly of the United Nations which, otherwise, serves as the basis of the contentions that Yugoslavia, by the mere fact of territorial changes lost, *ipso facto*, the status of party to multilateral conventions.

In the letter from the United Nations Office of Legal Affairs of 16 April 1993, it is stated, *inter alia*, that

> "the status of Yugoslavia as a party to treaties was not affected by the adoption of the General Assembly resolution 47/1 of 22 September 1992. By that resolution, the General Assembly decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It did not address Yugoslavia's status as a party to treaties."

96. Regarding the qualification mentioned in paragraph 297 of the "Summary", the Permanent Representative of the United States to the United Nations in her letter addressed to the Secretary-General dated 5 April 1996 (doc. A/51/95; S/1996/251, 8 April 1996) protested against

[142] ST/LEG.8, p. 89, para. 297 (emphasis added).
[143] *Ibid.*, para. 298.

such a qualification. Four days later, on 9 April 1996, the Legal Counsel of the United Nations issued "Errata" (doc. LA41TR/220) which, *inter alia*, deleted the qualification of the FR of Yugoslavia as a predecessor State contained in paragraph 297 of the "Summary". Protests against such a qualification of Yugoslavia were also expressed in the letters addressed to the Secretary-General by the Permanent Representative of Germany to the United Nations (doc. A/50/929; S/1996/263, 11 April 1996) and by the Chargé d'Affaires *ad interim* of the Permanent Mission of Guinea on behalf of the Organization of the Islamic Conference (OIC) and the Contact Group on Bosnia and Herzegovina (doc. A/50/930; S/1996/260, 12 April 1996). Both of the latter letters were, however, dated 10 April 1996, i.e., after the "Errata" had been prepared and published.

The formal circumstances of this concrete question make, in my opinion, both the objections and the "Errata" of the Legal Counsel of the United Nations irrelevant. More particularly,

(a) The subject-matter of the objections submitted in the letters of the permanent representatives of three member States of the Organization are "views" and "interpretations" of the legal position of Yugoslavia as a predecessor State expressed in the "Summary of Practice of the Secretary-General as depositary of multilateral treaties", or, to put it more precisely, in paragraphs 297 and 298 of that document. In other words, the above-mentioned objections do not concern the practice of the Organization and of its organs in the concrete matter as an objective fact, but relate to the interpretation of that practice presented in the "Summary".

(b) "Errata" *per definitionem* represents "a mis-statement or misprint in something that is published or written"[144].

Leaving aside the question of whether the "errata" are well founded in this specific case, it is obvious that the document concerns the relevant parts of the "*Summary* of Practice of the Secretary-General" (emphasis added). A "Summary" by itself does not have the value of an autonomous document, a document which determines or constitutes something. It is just the condensed expression, the external lapidary assertion of a fact which exists outside it and independently from it. In that sense, the Introduction to the "Summary of the Practice of the Secretary-General as depositary of multilateral treaties" says, *inter alia*, that "the purpose of the present summary is to highlight the main features of the practice followed by the Secretary-General in this field" (p. 1).

Therefore, the errata in this specific case do not question the relevance of the practice of the Secretary-General as the depositary of

[144] *Webster's Third New International Dictionary*, 1966, p. 772.

multilateral treaties. This practice is, in relation to the status of the FR of Yugoslavia as party to the multilateral treaties, uniform and without exceptions, so that it has no pressing need of a "summary" which would "highlight [its] main features";

(c) The fact that the term "Federal Republic" is not used before or after the name "Yugoslavia" cannot, in my opinion, be taken as proof that it does not concern the FR of Yugoslavia. The name "Yugoslavia" designates the Yugoslav State, regardless of the factual and legal changes which it experienced during its existence, which were also reflected in its name. For example, at the time when Yugoslavia entered into the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide — in August 1950 — the full name of the Yugoslav State was "Federal People's Republic of Yugoslavia". Yugoslavia is, on the basis of legal identity and continuity, a party to the conventions which bound — in the era of the League of Nations — the Yugoslav State which was called, at that time, the "Kingdom of Serbs, Croats and Slovenes".

It follows that the terms such as the "former Yugoslavia" or the "Federal Republic of Yugoslavia (Serbia and Montenegro)" *per se* have no other meaning except the epistemiological one. In relation to the SFRY, the Kingdom of Serbs, Croats and Slovenes represents the "former Yugoslavia", just as the "Democratic Federal Yugoslavia", constituted at Session II of the Anti-Fascist Assembly of the People's Liberation of Yugoslavia on 29 November 1943, represents the "former Yugoslavia" in relation to the Federal People's Republic of Yugoslavia established by the 1946 Constitution. The conventional nature of such terms is also seen in the practice of the principal organs of the United Nations with respect to the use of the name "Federal Republic of Yugoslavia (Serbia and Montenegro)". Since 22 November 1995, the Security Council uses in its resolutions 1021 and 1022 the term "Federal Republic of Yugoslavia" instead of the former "Federal Republic of Yugoslavia (Serbia and Montenegro)" without any express decision and in a legally unchanged situation in relation to the one in which it, like other organs of the United Nations, employed the term "Federal Republic of Yugoslavia (Serbia and Montenegro)". The fact that this change in the practice of the Security Council appeared on the day following the initialling of the Peace Agreement in Dayton, gives a strong basis for the conclusion that the concrete practice is not based on objective, legal criteria but rather on political criteria.

97. The practice of the Secretary-General as the depositary of multilateral treaties corresponds to the general legal principle that a diminution of territory does not of itself affect the legal personality of the State.

This principle of international law is deeply rooted in international practice[145]. As early as 1925, the arbitrator, Professor Borel, held in the *Ottaman Debt Arbitration* that, notwithstanding both the territorial losses and the revolution, "in international law, the Turkish Republic was deemed to continue the international personality of the former Turkish Empire"[146]. In the practice of the United Nations, it is expressed in the opinion given by the United Nations Secretariat regarding the secession of Pakistan from India in which it was stated that "[t]he territory which breaks off, Pakistan, will be a new State; . . . the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before"[147]. A possible exception cited is the case in which territorial changes affect the "territorial nucleus" of a State[148], which did not happen in the case of Yugoslavia since the "territorial nucleus" has been preserved[149].

98. It is noteworthy to underline that the practice of the Court is identical to the practice of the Secretary-General as depositary of multilateral treaties. The *Yearbook 1993-1994* of the International Court of Justice says that:

> "On 31 July 1994, the following 184 States were Members of the United Nations:
>
> *State* *Date of Admission*
>
> . . . . . .
>
> Yugoslavia . . . . . Original Member."[150]

An identical formulation is also found in the previous issue[151]. On the basis of Article 93 (1) of the Charter of the United Nations, all Members of the United Nations are *ipso facto* parties to the Statute.

Such a practice of the Court is in full agreement with the interpretation of the scope of resolution 47/1 of the General Assembly given in a letter which the Under-Secretary-General and the Legal Counsel of the United Nations addressed on 29 September 1992 to the permanent representa-

[145] D. Anzilotti, this is one of the most certain rules in international law: "nessun principio più sicuro di questo nel diritto internazionale", "La formazione del Regno d'Italia nei guardi del diritto internazionale", *Revista di diritto internazionale*, 1912, p. 9.

[146] Cited in K. Marek, *Identity and Continuity of States in Public International Law*, 1954, p. 40.

[147] United Nations Press Release PM/473, 12 August 1947 (*Yearbook of the International Law Commission*, Vol. II, p. 101).

[148] Hall, *A Treatise on International Law*, 1924, p. 22; American Society of International Law, Panel on "State Succession and Relations with Federal States", Gold Room, Rayburn House Office Building, Washington, D.C., E. Williamson, United States State Department, 1 April 1992, p. 10.

[149] M. Akehurst, *A Modern Introduction to International Law*, 1984, p. 147.

[150] *I.C.J. Yearbook 1993-1994*, No. 48, p. 67.

[151] *I.C.J. Yearbook 1992-1993*, No. 47, p. 59.

tives of Bosnia and Herzegovina and Croatia to the United Nations and which asserts, *inter alia*, that "the resolution does not terminate nor suspend Yugoslavia's membership in the Organization" [152].

FIFTH PRELIMINARY OBJECTION

99. Three principal legal questions are raised by Yugoslavia's fifth preliminary objection, and relate to:

(a) the qualification of the conflict in Bosnia and Herzegovina;
(b) the territorial or non-territorial nature of the obligations of States under the Genocide Convention; and
(c) the type of the State responsibility referred to in Article IX of the Convention.

100. Having in mind the territorial nature of the obligations of States under the Genocide Convention, the qualification of the conflict in Bosnia and Herzegovina is of considerable importance. Even if this question is closely linked to the merits, this does not prevent the Court from

> "mak[ing] a summary survey of the merits to the extent necessary to satisfy itself that the case discloses claims that are reasonably arguable or issues that are reasonably contestable; in other words, that these claims or issues are rationally grounded on one or more principles of law, the application of which may resolve the dispute. The essence of this preliminary survey of the merits is that the question of jurisdiction or admissibility under consideration is to be determined not on the basis of whether the applicant's claim is right but exclusively on the basis whether it discloses a right to have the claim adjudicated." [153]

In my opinion, the conflict in Bosnia and Herzegovina cannot be qualified as "civil war" or "internal conflict" exclusively as Yugoslavia asserts. That assertion is only partly correct.

The armed conflict in Bosnia and Herzegovina was a special, *sui generis* conflict, in which elements of civil war and international armed conflict were intermingled.

Elements of civil war were obviously present in the armed conflict in Bosnia and Herzegovina; however, according to my opinion, they could in no way be seen as its dominant characteristic. They were especially

[152] United Nations, General Assembly, A/47/485, 30 September 1992, Annex.

[153] *Nuclear Tests, I.C.J. Reports 1974,* joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, p. 364.

expressed in the period of constitutional crisis before the proclamation of the independence of Bosnia and Herzegovina by the incomplete parliament of Bosnia and Herzegovina. The passive, preparatory stage of that war consisted especially of the acts of creation of national militias as early as in 1991, while the active phase of the war started with attacks against the organs of the central federal authorities, especially against the units of the Yugoslav People's Army.

After the proclamation of sovereignty and independence of Bosnia and Herzegovina by the incomplete parliament of Bosnia and Herzegovina, the civil war became, in my opinion, an international armed conflict, in which one side consisted of a fictitious, *de jure* recognized State — the Republic of Bosnia and Herzegovina — and the other side consisted of two *de facto* States not recognized by the international community — Republika Srpska and Herzeg-Bosna. This was *bellum omnium contra omnes*, which is eloquently shown by the war between the Muslim authorities in Sarajevo and Herzeg-Bosna in 1993, and by the war between the authorities in Sarajevo and the alternative Muslim Autonomous Region of Western Bosnia, proclaimed in September 1993.

101. The relevant passage of the Court's Judgment relating to the nature of the rights and obligations of States under the Convention reads as follows:

> "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention." (Para. 31 of the Judgment.)

In my opinion, it is necessary to draw a clear distinction, on the one hand, between the legal nature of the norm prohibiting genocide, and, on the other, the implementation or enforcement of that norm.

The norm prohibiting genocide, as a norm of *jus cogens*, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States. As a norm of *jus cogens* it does not have, nor could it possibly have, a limited territorial application with the effect of excluding its application in any part of the international community. In other words, the norm prohibiting genocide as a universal norm binds States in all parts of the world.

As an absolutely binding norm prohibiting genocide, it binds all subjects of international law even without any conventional obligation. To that effect, and only to that effect, the concrete norm is of universal applicability (a norm *erga omnes*), and hence "non-territorality" as another pole of limited territorial application may be taken as an element of the very being of a cogent norm of genocide prohibition.

The position is different, however, when it comes to the implementation or enforcement of the norm of genocide prohibition. The norm prohibiting genocide, like other international legal norms, is applicable by

States not in an imaginary space, but in an area of the territoralized international community. And, as was pointed out by the Permanent Court of International Justice in the *"Lotus"* case:

> "Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> . . . . . .
>
> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[154]

A territorial jurisdiction conceived in this way suggests, as a general rule, the territorial character of the State's obligation in terms of implementation of an international legal norm, both in prescriptive and enforcement terms. If this were not the case, norm on territorial integrity and sovereignty, also having the character of *jus cogens*, would be violated.

102. What is the status of the Genocide Convention? With respect to the obligation of prevention of the crime of genocide, the Convention does not contain the principle of universal repression. It has firmly opted for the territorial principle of the obligation of prevention and

> "the only action relating to crimes committed outside the territory of the Contracting Party is by organs of the United Nations within the scope of the general competence"[155].

Accordingly,

> "the States are . . . obliged to punish persons charged with the commission of acts coming under the Convention insofar as they were committed in their territory"[156].

Article VII of the draft Genocide Convention, prepared by the Secretary-General, was based on the concept of universal repression[157]. In its draft Convention the *Ad Hoc* Committee on Genocide replaced the text of Article VII, hence "the principle of universal repression was rejected by the Committee by 4 votes (among which were France, the United

[154] *"Lotus", Judgment No. 9, P.C.I.J., Series A, No. 10*, pp. 18-19.
[155] N. Robinson, *The Genocide Convention, Its Origin and Interpretation*, 1949, pp. 13-14.
[156] *Ibid.*, p. 31.
[157] Doc. E1447, p. 8.

States of America and the Union of Soviet Socialist Republics) against 2 with 1 abstention"[158].

An unfavourable position regarding the principle of universal punishment emerges also from declarations and reservations concerning the Genocide Convention[159], Communication of Governments[160] and by non-governmental organizations that have a consultative status with the Economic and Social Council[161].

The Special Rapporteur concluded that

> "since no international criminal court has been established, the question of universal punishment should be reconsidered, if it is decided to prepare new international instruments for the prevention and punishment of genocide"[162].

The intention of the drafters of the Convention to establish territorial obligations of States under the Convention clearly and irrefutably stems from the provisions of Article XII of the Convention which reads:

> "Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, *extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.*" (Emphasis added.)

It is obvious that, if this were not the case, the said Article would be deprived of all sense and logic.

103. Could a State be responsible for genocide? The Court finds, when it refers to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", that Article IX does not exclude any form of State responsibility, nor is

> "the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'" (para. 32 of the Judgment).

Such a position does not appear, in my opinion, to be tenable.

Article IV of the Genocide Convention, which stipulates criminal responsibility for genocide or the other acts enumerated in Article III of the Convention, has a twofold meaning:

(a) a positive meaning, starting from the principle of individual guilt, since Article IV establishes as criminally responsible "persons . . .

[158] See Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by N. Ruhashyankiko, Special Rapporteur, doc. E/CN.4/Sub.2/416, 4 July 1978, p. 49.
[159] *Ibid.*, pp. 51-52.
[160] *Ibid.*, pp. 52-55.
[161] *Ibid.*, p. 55.
[162] *Ibid.*, p. 56.

whether they are constitutionally appointed rulers, public officials or private individuals". This rule represents *lex lata*, because:

> "international practice since the Second World War has constantly applied the principle of individual criminal responsibility for crimes of international law, including those of genocide" [163],

(b) a negative meaning — contained in the exclusion of criminal responsibility of States, governments or State authorities and the rejection of the application of the doctrine of the act of the State in this matter. Such a solution is expressed in the positive international law. The International Law Commission, when elaborating the Draft Code of Offences against the Peace and Security of Mankind, concluded, *inter alia*, in relation to the content *ratione personae* of the Draft Code that:

> "With regard to the content *ratione personae*, the Commission took the view that its efforts at this stage should be devoted exclusively to the criminal responsibility of *individuals*. This approach was dictated by the uncertainty still attaching to the problem of criminal responsibility of States . . . True, the criminal responsibility of individuals does not eliminate the international responsibility of States for the acts committed by persons acting as organs or agents of the State. But, such responsibility is of a different nature and falls within the traditional concept of State responsibility . . . the question of international criminal responsibility should be limited, at least at the present stage, to that of individuals." [164]

The resolution built into Article IV of the Genocide Convention represents an expression of a broader understanding of the inability to establish the criminal responsibility of legal persons *(societas delinquere non potest)*.

The understanding is based on the premise that a criminal offence as a phenomenon is reduced to a human action, that is to say, to a physical act or to its omission. Since States are legal entities of an abstract character, persons without a physical body and incapable of criminal liability, they thus cannot be guilty as perpetrators of criminal acts.

It is hardly necessary to state that the interest of safeguarding the essential values of the international community involves the issue of criminal responsibility of a State as illustrated, *inter alia*, by the Draft

[163] Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Mr. N. Ruhashyankiko, Special Rapporteur, doc. E/CN.4/Sub.2/415, 4 July 1978, p. 36, para. 151.

[164] Report of the International Law Commission on the work of its thirty-sixth session (7 May to 27 July 1984 (doc. A/39/10), *Yearbook of the International Law Commission*, 1984, Vol. II, Part Two, p. 11, para. 32.

Code of Offences against the Peace and Security of Mankind[165]. Theoretically, the issue of criminal responsibility of a State may be situated within the framework of a pure model of a State authority or State as the offender, namely in the framework of collective, simultaneous responsibility of a State as a legal person and physical personality, as its political representative.

However, the above are just projects which, irrespective of their relevance, have not yet found a place within positive international law. This fact *per se*, irrrespective of the circumstances of a concrete case, renders the Court, as an authority implementing *positive law* to subject cases, incapable of taking such projects into account or accepting them as relevant. If this were not the case, the Court would step away from its fundamental judicial function and penetrate into the legislative or quasi-legislative area[166].

104. Even in the hypothesis that, *tractu temporis*, since the Genocide Convention came into force, criminal responsibility for genocide or for any of the other acts enumerated in Article III has been extended to States as well, the relevance of such a change to the subject case could be highly questionable.

The rationale of such a question is the nature of the compromissory clause contained in Article IX of the Genocide Convention. The establishment of jurisdiction of the Court for disputes concerning the interpretation, application or fulfilment of the Convention is undoubtedly precedent to the general rule of an optional character of the Court's jurisdiction in international law. This fact has a dual meaning — legal and meta-legal. In legal terms, precedent has to be strictly interpreted[167], particularly when it comes to the restriction of the sovereign rights of States. In this case, the jurisdiction of the Court is founded in relation to disputes "relating to the interpretation, application or fulfilment of the *present Convention*" (emphasis added). In other words, the Court has, on the basis of Article IX of the Convention, jurisdiction to settle disputes relating to the *relevant provisions of the Convention* but not such disputes concerning the rules as might possibly exist outside its frame.

Meta-legal meaning resides in the fact that the extension of the Court's jurisdiction beyond the provisions of Article IX of the Convention would, in normal reasoning, inhibit the States in other cases. An evident readiness of States to accept the binding jurisdiction of the

[165] *Yearbook of the International Law Commission*, 1976, Vol. II, Part Two, pp. 7-18.

[166] "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation; but the Genocide Convention is an instrument which is intended to produce legal effects by creating legal obligations between the parties to it" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, p. 47).

[167] *P.C.I.J., Series A, No. 7*, p. 76.

Court on a broad basis would be strengthened by such a move on the part of the Court.

105. Article IX of the Convention stipulates that:

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

If one attempts to determine the genuine meaning of the wording "responsibility of a State for genocide or for any of the other acts enumerated in article III", several elements are of crucial importance.

(a) Article IX by its nature is a standard compromissory clause. As a procedural provision, it aims at determining the jurisdiction of the Court within the co-ordinates of "interpretation, application or fulfilment" of the material provisions of the Convention. Hence, interpretations of Article IX of the Convention may not *in concreto* go beyond the provisions on individual criminal responsibility stipulated in Article IV of the Convention (see para. 101 above). As is forcefully expressed in the joint separate opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice in the *South West Africa* case:

> "The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions."[168]

(b) The wording "responsibility of a State for genocide or for any of the other acts enumerated in article III" is abstract and broad in its vagueness, particularly in terms of the convention on criminal law "in which care should be taken to avoid giving the State a fictitious legal character, a procedure which should only be used in civil or commercial matters"[169]. What is more, the wording "responsibility of a State" is incorporated into the procedural provisions of the Genocide Convention. It is not used, however, in the operative part of the Convention to denote a possible consequence of committing the crime of genocide. The reason for such a solution is obviously to be traced in the option for individual criminal responsibility for genocide or related punishable acts.

For, as Manley Hudson concludes:

> "The article goes further, however, in 'including' among such disputes 'those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'. As no other provision in the Convention deals expressly with State responsibility, it is

[168] *I.C.J. Reports 1962*, p. 468.
[169] N. Ruhashyankiko, *op. cit.*, p. 82, para. 314.

> difficult to see how a dispute concerning such responsibility can be *included* among disputes relating to the interpretation or application or fulfilment of the Convention. In view of the undertaking of the parties in Article I to prevent genocide, it is conceivable that a dispute as to State responsibility may be a dispute as to fulfilment of the Convention. Yet read as a whole, the Convention refers to the punishment of individuals only; the punishment of a State is not adumbrated in any way, and it is excluded from Article V by which the parties undertake to enact punitive legislation. Hence the 'responsibility of a State' referred to in Article IX is not criminal liability." [170]

The genuine meaning of the wording "responsibility of a State" should hence be traced within the responsibility for the obligations entered into by the parties under the Convention. Primary responsibilities of the parties have been stipulated in Articles V and VI, and covering:

— an obligation to enact necessary legislation to give effect to the provisions of the Convention; and
— the obligation of instituting legal proceedings for punishable acts provided for by Article III of the Convention against persons charged in a competent tribunal of the State in the territory of which the act was committed.

Obligations of the Contracting Parties "to enact . . . the necessary legislation" and to punish persons who commit genocide and related acts constitute a form of international responsibility of the State, responsibility towards crucial interest of the international community as a whole, built into the norm prohibiting genocide.

Given the nature of these obligations, one could hardly disagree with the Special Rapporteur, Mr. N. Ruhashyankiko, that "at the present stage in the development of international criminal law, the State can bear only political responsibility for international crimes" [171], or perhaps, in more precise terms, the State can bear primarily political responsibility for a failure to perform obligations concerning the prohibition and punishment of international crimes.

(c) The qualification of a State as a responsible entity for the crime of genocide as a primarily political responsibility is not *a priori* exclusive of the civil responsibility of a State. The civil responsibility of a State in the matter of genocide may assume two forms of expression:

[170] M. M. Whiteman, *Digest of International Law*, 1968, p. 857.
[171] Study of the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Mr. N. Ruhashyankiko, Special Rapporteur, doc. E/CN.4/Sub.2/416, 4 July 1978, p. 38, para. 159.

(i) civil responsibility for the crime of genocide committed in its own State territory; and
(ii) civil responsibility for the crime of genocide committed in the territory of another State.

In the eventuality contemplated by (i) above, it would be civil responsibility under internal law which is to be considered and adjudicated in its entirety by the internal judicial authorities of a contracting party.

A case falling under (ii) above would be different in terms of quality. Leaving aside the conditions in which a State may be responsible for genocide perpetrated in the territory of another State, civil responsibility would be characterized by two stages. The first stage would comprise a claim for reparations to the competent authorities of the State responsible for genocide and adjudicated in the procedure established by its own internal law. The second stage would involve an international litigation for the reparation of losses incurred by genocide, the parties to it being the State responsible for genocide and the State on whose territory genocide was perpetrated. In other words, it would be a case of the typical *international* civil responsibility of a State. Given the fact that the national, ethnic, racial or religious group, as an object safeguarded from the crime of genocide, has no *locus standi* in the Court, the State on whose territory the crime has been perpetrated should espouse the cause of the "national, ethnic, racial or religious" group after having exhausted local legal remedies.

I am convinced that the Genocide Convention provided for no international civil responsibility of States for the crime of genocide. Such a standing of the Convention on the matter of international responsibility may of course be qualified in more than one way, but it is difficult to infer any conclusion on the force of the concept of international civil responsibility within the fibre of the Convention, unless one strays into the area of legal construction. It is easy to accept the view that the international civil responsibility of States for the crime of genocide would strengthen the effectiveness of prohibition of the crime of genocide. However, in the present case, the question is reduced to the qualification of positive law concerning responsibility for genocide and not to the qualification of optimal solutions *in abstracto*. As suggested by Special Rapporteur Whitaker

> "when the Convention is revised consideration shall be given to including provisions for a State responsibility for genocide together with reparations" [172].

[172] Review of further development in fields which the sub-commission has been concerned with, revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Mr. V. Whitaker (E/CN.4/Sub.2/1985/6, 2 July 1985, p. 26, para. 54.

SIXTH PRELIMINARY OBJECTION

106. With regard to the sixth preliminary objection raised by Yugoslavia, the Court finds that:

> "Bosnia and Herzegovina could become a party to the Convention through the mechanism of State succession. Moreover, the Secretary-General of the United Nations considered that this had been the case" (para. 20 of the Judgment)

and that

> "the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties. Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result — retroactive or not — of its Notice of Succession of 29 December 1992, at all events it was a party to it on the date of the filing of its Application on 20 March 1993." (Para. 23 of the Judgment.)

107. I must say that, in my view, the opposite is the case. No one denies that Bosnia and Herzegovina "could become a party to the Convention through the mechanism of State succession". *However, the real question is not whether Bosnia and Herzegovina "could have become a party", for every new State has in principle that possibility, but whether it became a party to the Convention through the succession mechanism.* The fact that the Secretary-General "considered that this had been the case" is not of decisive importance, as the scope of depositary functions is clearly defined in positive international law. As stated in the Commentary to Article 77 (Functions of Depositaries) of the Convention on the Law of Treaties:

> a depositary has *a certain duty* to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. *That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an instrument or reservation.*"[173]

In other words it is firmly established that "the depositary *is not invested*

[173] UNCLT, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, *Official Records* Documents of the Conference, p. 89, para. 4 (emphasis added).

with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions" [174].

In my opinion, the Court had to consider whether Bosnia and Herzegovina had become a party to the Convention on the basis of succession, at least vis-à-vis Yugoslavia, for two reasons:

— in the formal sense, there exists a dispute between Bosnia and Herzegovina and Yugoslavia in that the positions of the parties to the dispute in relation to "automatic succession" are radically opposed. While Bosnia and Herzegovina considers automatic succession to be a feature of positive international law and therefore contends that "it *has automatically succeeded* to the Genocide Convention" [175], Yugoslavia denies this, claiming that "the 'clean slate' rule has been and remains in force as a rule of customary international law for new States" [176].

(It should be noted that expressions such as "automatic succession to the Genocide Convention" or "has automatically succeeded to the Genocide Convention" are not sufficiently precise and are, consequently, incorrect. The objects of succession are not treaties as legal acts but concern the status of the parties to the concrete treaty and/or the rights and obligations stipulated by that treaty. If treaties as legal acts were the object of succession, then succession would also apply to treaties whose obligation has been performed, for they are as valid as before, albeit merely of historical interest, which is clearly not the case.)

— in the material sense, as Bosnia and Herzegovina did not express its consent to be bound by the Convention in the way prescribed by Article XI of the Convention, the rules of succession are the only possible basis on which Bosnia and Herzegovina could be considered a party to the Genocide Convention.

108. The Genocide Convention, by its nature, is a convention in the field of international criminal law. This is something which results from the very nature of the matter, and which hardly needs arguing. A convention which has, as its subject, the definition and punishment of genocide as a crime under international law, and whose provisions are implemented through national criminal legislation, could hardly be defined in a different way. Another consideration is that in a community like the international community, many conventions and other international legal acts have a direct or indirect humanitarian meaning. Such a meaning of

[174] UNCLT, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, *Official Records*, Documents of the Conference, p. 89, para. 8 (emphasis added).

[175] Statement of the Government of the Republic of Bosnia and Herzegovina on Preliminary Objections, 14 November 1995, para. 6.9 at p. 111 (emphasis added).

[176] Preliminary Objections of the Federal Republic of Yugoslavia, para. B.1.4.10.

international legal acts results unavoidably from the fact that, in the final analysis, the international community is *genus humanum*, that in a system whose original and basic subjects are abstract beings, the individual represents the final addressee of the legal rules. However, it could not be concluded from that that the Genocide Convention is a humanitarian convention, a convention which belongs to humanitarian law, because that term denotes the rules contained in conventions and international customs whose subject is "to reduce or limit the suffering of individuals, and to circumscribe the area within which the savagery of armed conflicts is permissible"[177] (in that sense it should be noted that the full name of the Geneva Conference of 1974-1977 which adopted Protocols I and II was "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts").

The qualification of a convention or of other international legal acts as "humanitarian", on the basis of the direct or indirect significance of that convention for the legal status of individuals, would make the predominant part of international law a "humanitarian law". *Exempli causa*, the "humanitarian law" understood in such a way would include the instruments which regulate the position of the minorities, the right of peoples to self-determination, the conventions which punish acts of terrorism, and, in general, all conventions in the field of international criminal law.

The term "humanitarian convention" or "convention of humanitarian character" is used, so it seems, in order to stress the importance of the convention. However, terms like "humanitarian convention", "convention on human rights", etc., do not, logically speaking, denote the legal force of the convention, but rather its appurtenance to a *species*, in the system of international law. The importance of a convention may rather be expressed by other qualifications — in this concrete case by the qualification according to which the Genocide Convention represents a "general multilateral convention of universal interest".

109. Article 34 (Succession of States in Cases of Separation of Parts of a State) of the Convention on Succession in respect of Treaties (1978) stipulates *inter alia*:

> "1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> *(a)* any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed".

The relevant provision of the cited Article has been formulated in terms of automatic succession. Theoretically, it corresponds to the concept of

[177] J. G. Starke, *Introduction to International Law*, 1989, p. 553.

universal succession based on a strict analogy with the notion of inheritance in civil law and/or the concept on legal succession (substitution + continuation) according to which "the successor State under international law succeeds to its predecessor's rights and obligations, which become its own" *[translation by the Registry]*[178].

In concreto, the fundamental question is the qualification of the term "automatic succession" as stipulated by Article 34 of the Convention on Succession in respect of Treaties (1978), i.e., does it constitute *lex lata*, a part of positive international law — or not?

110. The answer to the fundamental question thus posed implies:

(a) a qualification of the solution established by Article 34 (1) of the Convention from the standpoint of treaty law;

(b) a qualification of that solution from the standpoint of the practice of States prior to the adoption of the Convention on Succession in respect of Treaties;

(c) a qualification of the practice of States after the Convention was adopted at the diplomatic conference in Vienna in August 1978.

Article 34 (Succession of States in Cases of Separation of Parts of a State) is an integral part of the Convention on Succession in respect of Treaties, hence the rule contained in it is a treaty rule and shares the fate of the Convention itself. Article 49 (Entry into Force) of the Convention stipulates that:

> "1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession."

Since the condition for the coming into force of the Convention has not been fulfilled, the Convention has not become a part of the positive legal milieu. Consequently, the rule contained in Article 34 (1) is in a state of *lex ferenda*.

The rule contained in Article 34 (1) could, naturally, be *lex lata* outside the framework of the Convention as an expression of existing customary law. Does this rule merit the qualification of a customary rule?

The generally held view of customary law, endorsed by this Court[179], is that the creation of a rule of customary international law postulates: "two constitutive elements: (1) a general practice of States, and (2) the acceptance by States of the general practice as law"[180].

An analysis of practice in cases of separation of parts of a State when

[178] "Der Nachfolger des Völkerrechts aber tritt in Rechte und Pflichten seines Vorgängers so ein, als wären es seine eigenen" (H. M. Huber, *Beiträge zu einer Lehre von der Staatensuccession*, Berlin, 1897, p. 14).

[179] *Exempli causa*, *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 44, para. 77.

[180] G. Schwarzenberger, *A Manual of International Law*, 1967, p. 32.

the predecessor State continues to exist suggests two principal conclusions:

(a) In quantitative terms it is difficult, if not impossible, to speak of a generalized practice in this respect. As the ILC loyally notes in its commentary on Article 33 (Succession of States in Cases of Separation of Parts of a State) and Article 34 (Position of a State Continues after Separation of Part of Its Territory) of its Draft: "During the United Nations period cases of separation resulting in the creation of a newly independent State . . . have been comparatively few."[181] Previous practice does not substantively affect the argument because "[b]efore the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial power", hence, "some of the earlier precedents usually cited . . . in cases of secession concerned secession of colonies"[182]. One could rather, and with greater justification, speak of a certain number of precedents;

(b) These precedents in the qualitative sense have in common an identical position regarding treaties of the predecessor State — new States were neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties. In relation to the period prior to the foundation of the United Nations,

> "[t]he majority of writers take the view, supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations"[183].

The practice in the United Nations era is presented in the commentary on Article 33 of the Draft (Article 34 of the Convention) with the cases of Pakistan and Singapore. The case of Pakistan is qualified as the application of the principle that on separation such a State has a "clean slate" in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties[184]. As far as Singapore is concerned, in spite of the "devolution agreement" of 1965, it "adopted a posture similar to that of other newly independent States", that is, "[w]hile ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent"[185].

[181] Draft Articles on Succession of States in respect of Treaties with commentaries adopted by the International Law Commission at its twenty-sixth session, United Nations Conference on Succession of States in respect of Treaties, 1977 session and resumed session 1978, *Official Records*, Vol. III, Documents of the Conference, p. 92, para. 17.

[182] *Ibid.*, p. 91, para. 12.

[183] *Ibid.*, p. 41, para. 3.

[184] *Ibid.*, p. 92, para. 17.

[185] *Ibid.*, pp. 93-99, para. 18.

The ILC viewed the case of Pakistan as a "special one"[186] probably because it prompted a legal opinion of the United Nations Secretariat. The relevant part of the opinion reads:

> "1. From the viewpoint of international law, the situation is one in which part of an existing State breaks off and becomes a new State. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new State, it will not have the treaty rights and obligations of the old State . . .
>
> In international law the situation is analogous to the separation of the Irish Free State from Britain, and of Belgium from the Netherlands. In these cases the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before."[187]

This legal opinion was given in connection with the concrete issue concerning Pakistan's position in relation to the Charter of the United Nations, but its wording and argumentation clearly indicate that it was designed as an opinion of principle. In any event, there are clear indications that States interpreted it as a principled position of the United Nations with regard to the relationship of a part of a State territory which breaks off and becomes a new State, to the treaty rights and obligations of the old State[188].

111. It would appear that the main methodological approach of the Commission in drafting Article 34 of the Convention was based on the drawing of a distinction between two things:

(a) the obligation of the new State to continue to apply the treaties of its predecessor to its territory after the succession of States; and,

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[186] United Nations Conference on Succession of States in respect of Treaties, 1977 session and resumed session 1978, *Official Records*, Vol. III, Documents of the Conference, p. 92, para. 17.

[187] Legal opinion of 8 August 1947 by the Assistant Secretary-General for Legal Affairs, approved and made public by the Secretary-General in United Nations Press Release PM/473, 12 August 1947 (*Yearbook of the International Law Commission*, 1962, Vol. II, p. 101.

[188] In the *note verbale* of its Permanent Mission to the United Nations received on 11 September 1963, the Government of Afghanistan bases its assertion that "Pakistan is not a successor to British treaty rights because Pakistan is a new State" precisely on the argument that the Secretary-General of the United Nations "denied the right of succession" to Pakistan — United Nations, *Legislative Series*, Materials on Succession of States, 1967 (ST/LEG/SER.B/14), p. 2, para. 3 *(a)* and footnote 1.

(b) the right of the new State to consider itself a party to those treaties in its own name after the succession of States[189].

The Commission proceeded explicitly from this distinction in formulating the provisions of Article 15 of the Draft Convention which stipulates that:

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

If the Commission was guided by the practice of States in formulating the provisions of Articles 15 and 33 of the Draft (Articles 16 and 34 of the Convention) then a complete analogy has to be applied when one is determining the consequences of succession in the case of the creation of a newly independent State by secession from the metropolis and the creation of a State by the separation of parts of an existing State. In particular, in the period prior to the United Nations era, cases of "secession" concerned the "secession of colonies"[190]. In other words this is a virtually uniform practice, the practice in the case of Pakistan and Singapore, the only cases cited in the commentary to Article 33 of the Draft to illustrate the practice during the United Nations period, being characterized as the "clean slate" rule.

Making a distinction between the consequences of succession in the case of a newly independent State the territory of which immediately before the date of succession was a dependent territory, and the case of a new State formed by separation of a part of an existing State, and establishing different rules for these two cases — "clean slate" in the former and "automatic continuity" in the latter — the Convention undoubtedly went beyond the sphere of codification of existing practice and entered the sphere of progressive development.

The provision on "automatic continuity" could hardly be justified in a convention on succession even in the event that the new States, following the logic of the right to consider themselves as parties to the treaties in their own name after the succession of States, had uniformly accepted the rights and obligations stemming from the treaties of the predecessor State.

The very fact that we are dealing with the *right* of the new State "to consider itself a party to the treaties *in its own name*" (emphasis added), a right that has been operationalized in conformity with the rules of

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[189] See Commentary to Article 15, Position in respect of the Treaties of the Predecessor State of the Draft Articles, United Nations Conference on Succession of States in respect of Treaties, 1977 session and resumed session 1978, *Official Records*, Vol. III, Documents of the Conference, p. 40, para. 2.

[190] *Ibid.*, p. 91, para. 12.

treaty law based on the fundamental principle of consent, eliminates, within the logic of codification of existing practice, the construction on "automatic continuity" which is, by its meaning, an *obligation*. What could be open to debate as we are dealing with a right or authorization is whether that right or authorization, depending on the nature of the practice, is an ordinary or categorical authorization *(jus cogens)*. Even the uniform exercise of a right does not provide grounds for transforming the right into an obligation. *Per analogiam*, if on the basis of the authorizing norm contained in Article 33 of the Convention on the Law of the Sea (1982) a large majority of States were to proclaim a contiguous zone, that would not mean that the establishment of the zone would constitute an *obligation* of States. The consequences of such a practice would be the constitution of customary rules on the right of States to proclaim exclusive economic zones or *in concreto* the customary rule on the *right* of the successor State "to consider itself as a party to the predecessor State's treaties in its own name".

It is therefore not difficult to agree with the opinion of the Expert Consultant of the Conference, Sir Francis Vallat, that

> "[t]he rule [in Article 2 — Succession of States in Case of Separation of Parts of a State] was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification" [191].

It was noted that, in the case of Article 34 of the Convention

> "the International Law Commission abandoned the 'clean slate' principle and introduced, on the contrary, a rule of continuity. It was clear that in doing so it had been aware of the fact that it was not simply reflecting the present state of the law, but was proposing progressive development. For 'clean slate' was part of general international law and would continue to be so, whatever solution was adopted in the Convention." [192]

Multilateral law-making conventions do not represent an exception since:

> "Succession to multilateral law-making conventions after separation or secession is a right, not an obligation. Multilateral law-making conventions establish a body of rules of international law. They do not create subjective rights of individual states. In case of succession no acquired right of a third party need be protected, by making it the successor's responsibility to perform it. No automatic change

[191] *Summary Records*, Committee of the Whole, 48th Meeting, 8 August 1978, p. 105, para. 10.

[192] Ritter, *The UN Conference on Succession in Respect of Treaties, Vienna, 31 July-23 August 1978*, pp. 52-55.

> of attribution; in other words: no automatic succession, therefore, takes place."[193]

Finally, it is also worth examining the practice of States following the adoption on 22 August 1978 of the Convention on Succession in respect of Treaties, which was open for signature until 28 February 1979. Article 46 (Signature) of Chapter VII of the Convention stipulates

> "The present Convention shall be open for signature by all States until 28 February 1979 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 31 August 1979, at the United Nations Headquarters in New York."

The position of States regarding the Convention could hardly, even given a maximum degree of benevolence, be described as satisfactory. In the almost twenty years since the Convention was opened to ratification and accession, only 13 States have deposited instruments of ratification, accession or succession, so that not even the obviously modest requirement of 15 instruments of ratification or accession for the Convention to enter into effect has been fulfilled. This fact — *volens nolens* — is indicative of the attitude of States towards the Convention, regardless of the fact that the number of ratifications or accessions cannot, in itself, be considered conclusive with regard to the acceptance of the rules contained in a Convention which has not come into force. The practice of new States which have emerged since 1993 clearly shows that automatic succession is not accepted as a positive rule (Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1993).

112. It follows from the above that the rule on automatic succession of multilateral treaties — *lex ferenda*, as matters now stand — has not been accepted in positive international law. However, it would be wrong to conclude from this that a new State begins life in the international community as a *tabula rasa*, a newborn in a legal vacuum deprived of all treaty rights and obligations. Such a state of affairs would be in contradiction with the very idea of an organized, *de jure* international community, an idea which does not recognize or tolerate the existence of any entity which is not directly or indirectly subject to the rule of law.

Moreover, treaty rights and obligations are subject to the division of rights and obligations effected in the well-known dictum of the Court in the case concerning *Barcelona Traction, Light and Power Company, Limited:*

> "[a]n essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those

[193] K. Zemanek, "State Succession after Decolonization", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 116, 1965, p. 233.

arising vis-à-vis another State . . . By their very nature, the former are the concern of all States."[194]

(Modern international law does not take the classical view according to which only custom, as a formal source, may *originally* constitute a norm of general international law, whereas a rule created by treaty, *per definitionem*, represents a particular norm which may possibly acquire the status of a norm of general international law *tractu temporis* by means of custom. This view played its part when the international community was primitive and undeveloped and when constructions like this were required to fill in the vast gaps in the positive law. Today such a concept is untenable both in theory and from the standpoint of positive law.

Theoretically, if it is rightly considered that the basis of the binding nature of general international law is the "will of the international community as a whole", general custom and comprehensive multilateral treaties are only the instrumentalization of that will. Their mutual relationship in value terms is determined by the inherent capacity of both sources to express that will. Any other approach implicitly introduces dualism into the foundation of the binding nature of international law for it is obvious that neither general custom nor general multilateral treaties imply unanimity, the agreement of all States. Therefore, to recognize custom as having an exclusive role in the generation of general international law is tantamount to a metaphysical joke (Lauterpacht speaks of "the mysterious phenomenon of customary international law which is deemed to be a source of law only on condition that it is in accordance with law" ("Sovereignty over Submarine Areas", 27 *British Year Book of International Law* 376, p. 394 (1950)); he also raises the question of "why custom is binding. The answer, beyond which it is in law not possible to go, is that it is the will of the international community that international law, in its various manifestations, shall be binding" (H. Lauterpacht, *International Law*, Collected Papers, 1, General Works, 1970, p. 58).

In positive legal terms, the capacity of general multilateral treaties to generate norms *jus cogens superveniens* has been established by the Convention on the Law of Treaties. The commentary on Article 50 of the Draft (Article 53 of the Convention) says *inter alia*: "a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty" — *Yearbook of the International Law Commission*, 1966, Vol. II, p. 248, para. 4. If a general multilateral treaty is capable of creating a norm of *jus cogens*, as the most perfect part of international law, then *a fortiori* it is capable of generating a norm of general international law.)

[194] *I.C.J. Reports 1970*, p. 32.

General multilateral treaties adopted in the interest of the international community, being the instrumental form of expression of the will of the international community as a whole, operate *erga omnes* independently of contractual approval. The Genocide Convention is a case in point. As indicated by the International Court of Justice in its Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, proceeding from the qualification of genocide as "a denial of the right of existence of entire human groups" which "is contrary to moral law and to the spirit and aims of the United Nations", "the principles underlying the Convention . . . are recognized by civilized nations as binding on States, *even without any conventional obligation*"[195].

Hence, the principles underlying the Genocide Convention are part of the *corpus juris cogentis*. Any new State is *a priori* subject to these rules since they express the universal interest of the international community as a whole[196].

113. The cited opinion of the Court raises a question of fundamental importance for these concrete proceedings — the question of the relationship between the principles underlying the Genocide Convention and the provisions of the Genocide Convention. This question has two dimensions — a quantitative and a qualitative one. The quantitative dimension of the question has to do with the relationship between underlying principles and the provisions of the Convention, i.e., whether those principles apply to the Convention as a whole. The answer to this question can, in my opinion, only be negative. The fundamental principles of international law underlying the Genocide Convention are manifested only in the substantive provisions of the Convention, the provisions defining its object and purpose. The transitional and final provisions of the Convention, to which should be added the procedural provisions regarding methods of settling disputes, are not such as to warrant being described as expressing the spirit and letter of the fundamental principles of international law. This is corroborated not only by the possibility of expressing reservations regarding these provisions but also by the effect of termination carried out in accordance with Article XIV of the Convention.

In qualitative terms the relationship between the "principles underlying the Convention" and the substantive provisions of the Convention is rele-

[195] *I.C.J. Reports 1951*, p. 23 (emphasis added).

[196] It might be concluded that, having in mind that nature of the principles underlying the Genocide Convention, the then Secretary-General Hammarsjköld warned the Congo authorities during United Nations operations in that country that the principles of the Convention must be held to govern even a new State like the Congo and to apply to subordinate political authorities within the Congo State (Annual Report of the Secretary-General 1960-1961, General Assembly, 16th Sess., Supp. No. 1, p. 11; Waldock, "General Course on Public International Law", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 106, 1962, p. 228).

vant from the standpoint of whether the legal effect of those principles covers the substantive provisions of the Convention. These provisions of the Convention are the normative concretization of the "principles underlying the Convention", the transformation of the general — for practical purposes inoperable — categorical imperative into a series of concrete, particular categorical imperatives in the form of specific substantive provisions of the Convention.

In other words, the substantive provisions of the Genocide Convention, as the concretization of those principles, are interpretative in nature so that they share the cogent nature of the principles underlying the Convention.

If this were not the case, these lofty principles "recognized by civilized States as binding on States" would remain in the air, as a kind of monument to good intentions which never came to fruition.

For, if the provisions of the Genocide Convention were not a concretization of the principles underlying the Convention, the international community would be faced with insurmountable legal obstacles in the pursuit of its intention to eliminate the crime of genocide. Thus, *exempli causa*, non-party States would not be bound by the Convention's provisions which determine the substance of the crime of genocide or by the obligation to prevent and punish the crime of genocide.

114. In other words, Bosnia and Herzegovina as a new State is *a priori* bound by the substantive provisions of the Genocide Convention even without any conventional obligation. By formal accession to the Genocide Convention, with respect to the substantive provisions of the Convention, Bosnia and Herzegovina would merely confirm in contractual form the obligations by which it was bound independently of its will, obligations which are beyond the autonomous will of States.

The legal effect of accession to the Convention lies, primarily, in a commitment to those rules of the Convention which do not have a cogent nature, i.e., rules of a procedural nature such as *exempli causa*, the rules contained in Articles VIII, IX, XIV, XV or XVI of the Convention.

115. "Automatic succession" and "notification of succession" are mutually exclusive. The effect of automatic succession would consist of the automatic, *ipso jure* transfer of treaty rights and obligations from the predecessor State to the successor State. In that case, therefore, the succession does not occur as a result of the will of the successor but on the basis of the norm of international law which stipulates the transfer of treaty rights and obligations as a consequence of the replacement of one State by another in the responsibility for the international relations of territory. "Notification of succession" has a rational and legal justification only in cases in which the transfer of treaty rights and obligations or the modalities of that transfer depend on the will of the successor since, *ex definitione*, it represents "any notification, however phrased or named, made by a successor State *expressing its consent to be considered as*

bound by the treaty"[197]. In other words, it is applied in cases when the successor State is not bound, by norms of objective international law, to continue to apply the treaties of its predecessor to its territory after the succession of States but is entitled, according to the relevant norm, to consider itself as a party to the treaties in its own name.

116. In this connection, the question is whether "notification of succession" is appropriate, *per se*, for expressing consent to be bound by treaty. The legitimacy of this question relies on two facts:

(i) the connection that exists between the rules on succession with respect to international treaties and the rules of treaty law, and
(ii) the meaning of the instrument of "notification of succession".

It is natural that the succession of States with respect to treaties has the closest links with the law of treaties itself and could be regarded as dealing with particular aspects of participation in treaties, the conclusion of treaties and the application of treaties.

Special Rapporteur Humphrey Waldock described these links as follows:

> "the Commission could not do otherwise than examine the topic of succession with respect to treaties within the general framework of the law of treaties . . . the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treatis than any general theories of succession"[198].

Or as stated by O'Connell,

> "The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation."[199]

The determination of "notification of succession" given in Article 2 *(g)* of the Convention on Succession in respect of Treaties, as well as the practice of States in the matter, cast serious doubts as to the possibility of "notification of succession" as an instrument, *per se*, that acts as a means of binding by treaty.

The Convention on the Law of Treaties (1969) stipulates in Article 11 (Means of Expressing Consent To Be Bound by a Treaty):

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratifica-

[197] Article 2 *(g)* of the Convention on Succession of States in respect of Treaties (emphasis added).
[198] *Yearbook of the International Law Commission*, 1968, p. 131, para. 52.
[199] D. P. O'Connell, *The Law of State Succession*, 1956, p. 15.

tion, acceptance, approval or accession, or by any other means if so agreed."

The formulation of Article 11 of the Convention on the Law of Treaties does not exclude the *possibility* of notification of succession being understood as a means of expressing approval to be bound by a treaty. The operationalization of this possibility implies, however, the agreement of the parties for, in the light of treaty law as expressed in Article 11 of the Convention, "notification of succession" undoubtedly comes under *"any other means"* of expressing consent to be bound by a treaty but is conditioned by the phrase "if so agreed". From this viewpoint, *"notification of succession" as a unilateral act of the State, constitutes a basis for a collateral agreement in simplified form between the new State and the individual parties to its predecessor's treaties.* Thus "notification of succession" actually represents an abstract, generalized form of the new State's consent to be bound by the treaties of the predecessor State — a form of consent which is, in each particular case, realized in conformity with the general rule of the law of treaties on expression of consent to be bound by a treaty contained in Article 11 of the Convention on the Law of Treaties and prescribed by provisions of the concrete Treaty.

An exception to the general rule according to which consent of the successor State to be bound by a treaty has to be expressed *ad casum* in conformity with Article 11 of the Convention on the Law of Treaties could be envisaged in the event that, outside and independently of the Convention, there exists a generally accepted rule according to which "notification of succession" is considered a specific means of binding new States by treaties. Grounds for such an interpretation are also provided by Article 73 of the Convention on the Law of Treaties: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States . . ."

There is no real evidence that such a rule exists. The Convention on the Law of Treaties which is, by its nature, a combination of codification and progressive development, does not make any mention in its Article 11 (Means of Expressing Consent To Be Bound by a Treaty) of "notification of succession" as such a means. This is particularly conspicuous in view of the fact that Article 11 is built on the premise of deformalization of the means of expressing consent to be bound by a treaty. The reason for such a state of affairs lies, in my opinion, in the still outstanding basic questions regarding the succession of States with respect to treaties.

"Notification of succession" can only have two basic meanings:

(a) it can represent a confirmation that the new State is bound by treaty and, in that case, it has only a declarative effect; and
(b) it can represent an instrument, however phrased or named, expressing consent of a successor State to be bound by the treaty.

In the case of *(a)* above, the basic norm on the succession of States with respect to treaties is automatic succession — the rights and obligations stemming from treaties *ipso jure*, that are transferred from the predecessor State to the successor State by the very act of territorial change. In this case, "notification of succession" is essentially unnecessary. It would merely be information that a territorial change had occurred and that, as a result, the rule on the automatic transfer of rights and obligations stipulated by treaty had been activated.

In the case under *(b)* above, "notification of succession" is a means of expressing consent to be bound by a treaty. Since succession *per se* is not and cannot be an independent method of expressing consent to be bound by a treaty, except under the hypothesis of automatic succession, it follows that "notification of succession" can only be a descriptive notion, a collective term for various forms of expression of consent of a new State to be bound by a treaty.

The practice of States in the area of succession with respect to treaties is predominantly linked to the gaining of independence of former colonies from the metropolis. It is characterized by diversity and the absence of clear and precise rules. If any tendency can be said to be prevalent, it is that "a great many new States could be classified in a variety of 'pick and choose' categories"[200] which is by its meaning close to the "clean slate" concept. However, regardless of whether they have accepted the Nyerere formula and laid down a specified period for the review of treaties, which period would automatically lapse if not taken up by the new State before its expiry, or the Zambia formula, which assumed the continued application of many pre-independence treaties, but which laid down an unlimited period of review to determine which had lapsed or which had in practice been adopted if the new States considered them suited to their needs. Those new States adopted such treaties by sending appropriate notes to the depositary. The position on specific treaties was expressed in the form of "acceptance", "accession", and the like[201]. There are not many examples of the acceptance of a treaty by a successor expressed in the form of an instrument that could be called a "notification of succession". "Notification of succession" is rather a synthetic, collective term denoting various forms of new States being bound by the treaties of the predecessor State, and was developed primarily in the practice of the United Nations Secretary-General as the depositary of multilateral treaties. The term implies the existence of a rule of general international law on the transfer of rights and obligations stemming from multilateral treaties to which the predecessor State is a party, to the successor State which does not correspond to the actual state of affairs since:

[200] Kearney, *Yearbook of the International Law Commission*, 1968, Vol. I, p. 136.

[201] See *United Nations Legislative Series*, Materials on Succession of States (ST/LEG/SER.B/14), 1967, pp. 42 (11); 181; 224-229.

> "In spite of some evidence to the contrary, emanating mainly from diplomatic rather than legal sources, it is submitted that the general principle is that newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligation, save in so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State."[202]

The practice of new States following the adoption of the Convention on Succession in respect of Treaties is heterogeneous but is clearly not heading in the direction of establishment of "notification of succession" as a specific means of binding new States by the treaties of the predecessor State.

117. Article XI of the Genocide Convention stipulates:

> "The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.
>
> The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
>
> After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.
>
> Instruments of accession shall be deposited with the Secretary-General of the United Nations."

It follows unequivocally from the cited Article that ratification and accession are the relevant means of expressing States' consent to be bound by the Genocide Convention. In its notification of succession of 29 December 199, Bosnia and Herzegovina states:

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

[202] McNair, *Law of Treaties*, 1961, p. 601.

6 March 1992, the date on which the Republic of Bosnia and Herzegovina became independent." (Emphasis added.)

The Secretary-General of the United Nations, acting in his capacity as depositary, communicated the following:

"On 29 December 1992, the *notification of succession* by the Government of Bosnia and Herzegovina to the above-mentioned [Genocide] Convention was deposited with the Secretary-General, with effect from 6 March 1992, the date on which Bosnia and Herzegovina assumed responsibility for its international relations."[203]

On 15 June 1993, the Secretary-General received from the Government of Yugoslavia the following communication:

"Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the [said Convention] but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide."

118. On the basis of the above general considerations as well as those relating directly to the "notification of succession" of Bosnia and Herzegovina, the following relevant conclusions can, in my view, be drawn:

The "notification of succession" of Bosnia and Herzegovina is not fully in harmony with the practice of States as expressed in the relevant provisions of the Convention on Succession in respect of Treaties. More particularly, the concept of "notification of succession" was developed in the practice of States specifically in connection with decolonization.

(The expression itself is rather imprecise. In United Nations practice such notifications are called — "declarations" (see Introduction to the Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1991, and cited by the Court in paragraph 6 of the Order of 8 April 1993, note 4). "Notification" of a function is a rather loose qualification of the practice of States, in the form of a "note" without the suffix "of succession" (see United Nations, *Legislative Series*, Materials on Succession of States (ST/LEG/SER.B/14), 1967, pp. 225-228), to declare themselves bound uninterruptedly by multi-

[203] Communication from the Secretary-General of the United Nations dated 18 March 1993 (reference C.N.451.1992.Treaties-5 (Depositary Notification)), entitled "Succession by Bosnia and Herzegovina" (emphasis added).

lateral treaties concluded on their behalf by the parent State before the new State emerged to full sovereignty or to deposit their own instruments of acceptance of such treaties, effective from the date of deposit of the new instrument. It would therefore be more opportune to speak of a "declaration of entry into the treaty". Furthermore, the mentioned "notes", as a rule, represented a form of realization of conventional obligations assumed by "devolution agreements".)

The Genocide Convention does not envisage "notification of succession" as a means of expression of consent to be bound by the treaty so that in the concrete case at hand agreement would be required between Bosnia and Herzegovina and the individual parties to the Convention on acceptance of a "notification of succession" as a means of expressing consent to be bound by the Convention[204]. Yugoslavia, as a party to the Convention, submitted its reservation stating that it "does not consider the so-called Republic of Bosnia and Herzegovina a party [to the said Convention]" because the "replacement of sovereignty on the part of the territory of SFRY previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law". Yugoslavia, by this reservation, disputed the status of the successor State of Bosnia and Herzegovina because the "replacement of one State by another in the responsibility . . ." constitutes only one, factual aspect of succession or, more precisely, a territorial change which provokes the question of succession in a legal sense. Hence the conclusion that follows is that no appropriate collateral agreement was reached between Bosnia and Herzegovina and Yugoslavia, so that notification of succession by Bosnia and Herzegovina does not have, vis-à-vis Yugoslavia, the legal effect of consent to be bound by the Genocide Convention. This was pointed out at the 965th meeting of the International Law Commission by Tabibi: "Succession with respect to treaties did not take place without an express provision of the treaty or the express consent of the other party."[205]

119. The Court implicitly takes the view that on the basis of the Dayton Agreement the Genocide Convention became applicable as between Bosnia and Herzegovina and Yugoslavia. Such a conclusion stems from its pronouncement that

> "even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the

[204] "In the absence of provisions which set specific conditions for succession or which otherwise restrict succession, the Secretary-General is guided by the participation clauses of the treaties as well as by the general principles governing the participation of States" ("Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties" (ST/LEG.8), p. 89, para. 297).

[205] *Yearbook of the International Law Commission*, 1968, Vol. I, p. 132, para. 64.

> Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*" (para. 26 of the Judgment).

In my opinion, such an interpretation is untenable.

Yugoslavia argues that the "Genocide Convention became applicable between the Parties to this case as from the signature of the Dayton Agreement of 1995" and that "it was only under the Dayton Agreement (particularly Annex 6 . . .) that the Parties in contention accepted the applicability of the Genocide Convention"[206]. It is a fact that in the absence of recognition, the contractual *nexus* between Bosnia and Herzegovina and Yugoslavia could not be established in the framework of the Genocide Convention. A mutual recognition of two States is the general condition for the establishment of the bilateral contractual *nexus*, since a contractual relationship between States represents a relationship *intuitu personae*.

Yugoslavia and Bosnia and Herzegovina recognized each other by Article X of the General Framework Agreement for Peace in Bosnia and Herzegovina[207]. Article X of the General Framework Agreement stipulates, *inter alia*, that

> "The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders."

In normal circumstances, the mutual recognition *per se* results in the establishment of the contractual *nexus* in the framework of a multilateral agreement between the countries which recognize each other, or between the State which extends recognition and the State which is being recognized. For reservations regarding the status of a party to the agreement of a State which is not recognized, are expressed, as a rule, in order not to establish a tacit collateral agreement between that State and the recognizing State, an agreement which represents *per se* a *de facto* recognition.

The circumstances in this concrete case could not be termed normal. In the notification addressed to the Secretary-General of the United Nations on 15 June 1993, Yugoslavia emphasized that "it does not consider the so-called Bosnia and Herzegovina a party to that [Genocide Convention]" since, in its opinion,

> "the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of International Law".

In other words, Yugoslavia challenges, by the notification referred to, the legality of the genesis of Bosnia and Herzegovina as a State. It could, of course, be said that a recognition, as a rule, convalidates the defects in

[206] CR 96/6, p. 23.
[207] Doc. A/50/790, S/1995/999, 30 November 1995, p. 4.

the genesis of a State. Such a conclusion could be drawn from the very nature of the recognition of the new State, since "To recognize a political community as a state is to declare that it fulfils the conditions of statehood as required by International Law."[208] This specific case could be qualified as an exception from the general rule, for two basic reasons:

Primo, Yugoslavia insisted, even after the signature of the Dayton Agreement, that Bosnia and Herzegovina was constituted in an illegal way. A clear and unequivocal proof of that is the content of the third objection. The fact that Yugoslavia withdrew, during the procedure, its fourth preliminary objection which concerned the factual non-existence of Bosnia and Herzegovina in the administrative borders of that former federal unit, but continued to argue that Bosnia and Herzegovina was constituted *contra legem*, leads one to the conclusion that the recognition of Bosnia and Herzegovina by Yugoslavia in the Dayton Agreement had only the function of acknowledging

> "as a fact . . . the independence of the body claiming to be a State and . . . declar[ing] the recognizing State's readiness to accept the normal consequences of that fact, namely, the usual courtesies of international intercourse"[209]

while keeping its attitude towards the legality of the constitution of Bosnia and Herzegovina as an independent State.

Secundo, in its third preliminary objection Yugoslavia claims, *inter alia*, that the norm on the "equal rights and self-determination of peoples" is a peremptory norm of general international law *(jus cogens)*. If that argument could be proved to be correct, then the recognition, even if conceived and designed as convalidation, would be without legal effect, since the norms of *jus cogens* as the absolute, unconditional imperative, cannot be derogated by *inter se* agreements.

Outside the context of recognition, the Dayton Agreement does not touch the relations between the Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina as parties to the Genocide Convention. The allegation that "under the Dayton Agreement (particularly Annex 6 . . .) . . . the Parties in contention accepted the applicability of the Genocide Convention"[210] has no foothold in the text of the Dayton Agreement.

Annex 6 of the Dayton Agreement, which is invoked as the basis of the application of the Genocide Convention in this specific case, represents, in fact, the "Agreement on Human Rights", whose parties are — the

[208] H. Lauterpacht, *Recognition in International Law*, 1947, p. 6.
[209] L. Brierly, *The Law of Nations*, 1963, p. 138.
[210] CR 96/6, p. 24.

Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and Republika Srpska. The only connection between Yugoslavia and Annex 6 consists in the fact that Yugoslavia, together with the Republic of Croatia and the Republic of Bosnia and Herzegovina, by virtue of Article VII of the General Framework Agreement

> "agree to and shall fully comply with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6, as well as the provisions concerning refugees and displaced persons set forth in Chapter One of the Agreement at Annex 7".

Chapter One of the Agreement on Human Rights contains a list of individual, mainly classical, personal and political rights and liberties which the "Parties [the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska] shall secure to all persons within their jurisdiction" (Art. I of the Agreement). Article VII of the General Framework Agreement is the contractual confirmation, phrased in a general way, of the obligation of the respect of basic human rights and freedoms enumerated in Article I of the Agreement on Human Rights, which the parties to the General Framework Agreement are bound to respect as parties to the instruments which contain them, and in some cases as cogent rules, independently of their acceptance. Therefore, the purpose of Article VII of the General Framework Agreement is rather in the field of political reasoning, the reasoning which starts from the need to engage politically the subjects outside Bosnia and Herzegovina in the implementation of the Dayton Agreement, and less as imposing concrete obligations regarding human rights as contained in Chapter One of the Agreement on Human Rights.

In other words, in this specific case, the recognition as a general condition for the establishment of the bilateral contractual *nexus* is not sufficient to enable me to consider the Genocide Convention applicable in the relations between Yugoslavia and Bosnia and Herzegovina. It results from the circumstances of the case that, for that purpose, a qualifactory condition is also indispensable, and that condition would consist of the absence of the notification of Yugoslavia addressed to the Secretary-General of the United Nations on 15 June 1993, which represents, by its material meaning, a reservation made by Yugoslavia with the effect of preventing the establishment of the mentioned *nexus*, and in the absence of the fourth preliminary objection regarding the legality of the constitution of Bosnia and Herzegovina as a State. Therefore, the mutual recognition given in the form of Article 7 of the General Framework Agreement may be qualified as the recognition of the creation of Bosnia and Herzegovina in the factual sense of the word, but with a reservation regarding the legality of its constitution. With respect to the fulfilment of this qualificative condition in the relations between Yugoslavia and Bosnia and Herzegovina, the provision given *in fine* of Article X of the Agreement is relevant, and reads "[f]urther aspects of their mutual recognition will be subject to subsequent discussions".

SEVENTH PRELIMINARY OBJECTION

120. The position of the Court regarding its jurisdiction *ratione temporis* can be summarized by the following part of paragraph 34 of the Judgment, in which it finds:

> "that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts."

Concerning the jurisdiction of the Court *ratione temporis*, the situation is, in my opinion, clear — according to the rule of general international law, expressed in paragraph 3 of Article 24 (Entry into Force) of the Convention on the Law of Treaties:

> "When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides."

Article IX of the Genocide Convention is a procedural provision of the Convention and, being an integral part of it, shares the Convention's destiny or, to put it more precisely, the destiny of its contractual provisions. Consequently, if the Convention does not have a retroactive effect — and it obviously does not — then its Article IX likewise has no such effect. So, as the general rule of non-retroactivity stipulates, the Convention is applied to the events and situations which took place after it had come into effect in relation to Bosnia and Herzegovina or, in the circumstances of the present case, when the Convention became applicable between Bosnia and Herzegovina and Yugoslavia.

The analogy which the Court has drawn between this case and *Mavrommatis Palestine Concessions* (para. 26 of the Judgment) does not seem convincing. One can rather speak of an analogy between this case and the *Ambatielos* case to the effect that:

> "To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states *that the Treaty, which must mean all the provisions of the Treaty*, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. *There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.*"[211]

[211] *Ambatielos, Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 40 (emphasis added).

For, as it is clearly stated in the commentary on Article 24 of the Convention on the Law of Treaties:

> "*when a jurisdictional clause is attached to the substantive clauses of a treaty* as a means of securing their due application, the *non-retroactivity principle may operate to limit* ratione temporis *the application of the jurisdictional clause.* Thus in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights had held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question."[212]

* * *

On the basis of the foregoing, I take the liberty of concluding that, in my opinion, the relevant conditions for the entertainment of the case by the Court, relating both to jurisdiction and to admissibility, have not been met.

(Signed) Milenko KREĆA.

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[212] Draft Articles on the Law of Treaties with commentaries, adopted by the ICL at its Eighteenth Session, UNCLT, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, *Official Records*, p. 32, para. 2.