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International Court
of Justice

THE HAGUE

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de Justice

LA HAYE

YEAR 2006

Public sitting

held on Monday 13 March 2006, at 3 p.m., at the Peace Palace,

President Higgins presiding,

*in the case concerning the Application of the Convention on the Prevention and Punishment
of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le lundi 13 mars 2006, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

*en l'affaire relative à l'Application de la convention pour la prévention et la répression du
crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*

COMPTE RENDU

Present: President Higgins
Vice-President Al-Khasawneh
Judges Ranjeva
Shi
Koroma
Parra-Aranguren
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda
Bennouna
Skotnikov
Judges *ad hoc* Ahmed Mahiou
Milenko Kreća

Registrar Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda
Bennouna
Skotnikov, juges
MM. Ahmed Mahiou,
Milenko Kreća, juges *ad hoc*

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The PRESIDENT: Please be seated. Professor Brownlie.

Mr. BROWNLIE: Thank you, Madam President.

**F. THE NON-INVOLVEMENT OF THE BELGRADE GOVERNMENT:
CONFIRMATORY EVIDENCE**

I. Introduction

162. I am continuing on the theme of the non-involvement of the Belgrade Government and I now wish to present a series of items of confirmatory evidence. The substantial evidence already presented can be enhanced by several significant forms of confirmatory evidence, in particular:

- (a) the decisions of the ICTY relating to genocide;
- (b) the opinions of Lord Owen on the relations between the Bosnian Serb leadership and President Milosevic;
- (c) the opinion of the Netherlands Institute for War Documentation of 2002; and lastly,
- (d) the attitude of Milosevic as President of the Federal Republic of Yugoslavia.

II. Decisions of the ICTY relating to genocide

163. And so, first of all, I shall refer to the decisions of the ICTY. At the present time there are a number of decisions by the ICTY relating to genocide. These decisions involve much effort on the part of the prosecution and substantial reasoning on the part of the Tribunal. And yet in these significant decisions there is no reference to any involvement of the FRY Government, or any command structure — or any command structure — relating to leaders in Belgrade. This silence is very eloquent. It is eloquent because the existence or not of a command structure is a question of fact. It is also a question of fact, which involves what may be called necessary connections. If the situation concerned involved a ladder of command reaching to officials in Belgrade, this would inevitably show up in the evidence. But in these cases, it was not manifested in any form.

164. In chronological order, the relevant decisions are as follows.

165. First, *Prosecutor v Stakic*, Trial Chamber II, 31 July 2003. This decision relates to events in Prijedor in 1992. The accused was found not guilty of genocide or of complicity in

genocide. The analysis of the law and facts in the judgment makes no reference to members of the FRY Government (see pp. 155-60, paras. 546-560).

166. Second, *Prosecutor v. Radislav Krstić*, Trial Chamber, 2 August 2001. This decision relates to crimes committed in Srebrenica and Potocari. The accused was convicted of genocide and other offences. The factual analysis is very detailed and runs from pages 3 to 171. No reference is made to any involvement of the FRY Government.

167. Third, *Prosecutor v Krstić*, Appeals Chamber, 19 April 2004. This decision related to events in Srebrenica and Potocari. The appellant's conviction as a participant in a joint criminal enterprise to commit genocide (Count 1) was set aside, but he was found guilty of aiding and abetting genocide. In spite of the considerable discussion of issues of joint criminal enterprise and the chain of command, no reference was made to the involvement of members of the FRY Government (see pp. 2-54 of the judgment).

168. Similarly, the partial dissenting opinion of Judge Shahabuddeen makes no reference to any involvement of leaders in Belgrade (see this opinion, pp. 89-106).

169. Next, *Prosecutor v. Blagojević*, Trial Chamber 1, 17 January 2005. This decision related to events in Srebrenica. The accused was found guilty of complicity to commit genocide (Count 1B). The judgment involves reference to command structures and, in particular, the functional chain of command and the actions of the Bratunac Brigade. The examination is very detailed. No reference is made to any involvement of the FRY Government. I refer to the decision, pages 149 to 164.

III. The opinion of Lord Owen on the relations between the Bosnian Serb leadership and President Milosevic

170. Next, I shall deal with the opinion of Lord Owen on the relations between the leadership and President Milosevic. Lord Owen, in his role as Co-Chairman of the International Conference on the Former Yugoslavia, had the responsibility for negotiating with the President of the FRY and the Bosnian Serb leadership. The process lasted from September 1992 until 1995. In the negotiations there were three parties, the Croats, the Bosnian Muslims under Izetbegovic, and the Bosnian Serbs led by Karadzic.

171. Milosevic was much involved in the negotiations, as the President of Serbia, but from the evidence, it is clear that he was independent of the Bosnian Serbs and that they were independent of Milosevic and the Belgrade Government. As I have already indicated, from May 1992 onwards, the Bosnian Serbs were independent of Belgrade. The relations between Milosevic and Karadzic are the subject of several passages in Lord Owen's book, *Balkan Odyssey*. (See, in particular, pp. 102-103, 223, 324-326, and 357.)

172. The final rupture between the Bosnian Serbs and Belgrade took place on 4 August 1994. As Lord Owen reports the development in his memoir,

“On 4 August 1994 the following measures were ordered by the government of the FRY, to come into effect the same day: ‘To break off political and economic relations with the Republika Srpska. To prohibit the stay of the members of the leadership of the Republika Srpska (Parliament, Presidency and Government) in the territory of the Federal Republic of Yugoslavia. As of today the border of the Federal Republic of Yugoslavia is closed for all transport towards the Republika Srpska, except food, clothing and medicine.’” (*Balkan Odyssey*, p. 320.)

IV. The report of the Netherlands Institute for War Documentation on Srebrenica published in 2002

173. This report is of considerable quality and reflects the professional approach of the progenitors. In November 1996, the Dutch Government commissioned the Institute to conduct an investigation into “the events before, during and after the fall of Srebrenica”, but this list was not exhaustive. The provenance of the research team was as follows: the investigation was conducted under the direct responsibility of the NIOD Director, J.C.H. Blom, and the Head of Research at the Institute, P. Romijn. In 1996 a research team was formed of experienced historians: A. E. Kersten, specialist in the history of international relations; P. C. M. Koedijk, investigative journalist and media historian; and Mr. D. C. L. Schoonoord, military historian. In 1997 a contemporary historian, T. Frankfort, was appointed as research assistant. Later, she joined the team as a researcher. Three extra researchers were appointed at the start of 1999: N. Bajalica, specialist in Slavonic Studies and regional expert for the Balkans; B. G. J. de Graaff, specialist in political and administrative history; and C. Wiebes, expert in the history of the operating methods of international intelligence and security services.

174. Part III of the report consists of a major account of the Srebrenica murders and the background. The Bosnian Serb strategy is examined in great detail (pp. 1944-1962). Chapters 5 and 6 describe the main episodes. Further aspects are examined in chapters 7 and 8. There is no suggestion at any stage of the discussion that the FRY leadership was involved in planning the attack or inciting the killings of non-Serbs.

175. The report (pp. 2217-2219) includes a careful examination of the question whether the Yugoslav army gave assistance to the armed forces of the Republika Srpska in the period prior to the attack on Srebrenica. The view taken is that there was no hard evidence of such assistance. Moreover, the report does not contain any suggestion that the Belgrade Government had advance knowledge of the attack.

176. In the Epilogue to the report the Institute stated the following conclusion: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable." (Epilogue, point 10).

V. The attitude of Milosevic as President of the Federal Republic of Yugoslavia

177. There is reliable evidence of the conduct of President Milosevic when faced with an humanitarian crisis. The evidence consists of the urgent telephone call made by Milosevic on 16 April 1993 to Lord Owen, who was a Co-Chairman of the International Conference on the Former Yugoslavia.

178. Lord Owen describes the episode in his statement, in written form and dated September 2003, to the ICTY. With reference to the conditions in the Muslim-held enclave at Srebrenica, Lord Owen states:

"General Philippe Morillon's brave attempt to do something has been well chronicled. What that personal initiative demonstrated for the future, however, was that there was no way that we would get the Bosnian Serbs to lift their blockade unless there was true demilitarisation and such demilitarisation was politically unacceptable within the Security Council, largely because of the opposition of the Bosnian Government in Sarajevo and the Muslim commander in Srebrenica."

179. Lord Owen then quotes in his statement to the ICTY the relevant passage from his book, *Balkan Odyssey*. The passage reads as follows:

"On 16 April I spoke on the telephone to President Milosevic about my anxiety that, despite repeated assurances from Dr. Karadzic that he had no intention of taking

Srebrenica, the Bosnian Serb army was now proceeding to do just that. The pocket was greatly reduced in size. I had rarely heard Milosevic so exasperated, but also so worried: he feared that if the Bosnian Serb troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between the two armies. The Bosnian Serbs held the young Muslim commander in Srebrenica, Naser Oric, responsible for a massacre near Bratunac in December 1992 in which many Serb civilians had been killed. Milosevic believed it would be a great mistake for the Bosnian Serbs to take Srebrenica and promised to tell Karadzic so. He did not think we would be able to get Canadian troops into Srebrenica for some time but thought we might be able to negotiate UN monitors. I agreed to meet Milosevic in Belgrade for lunch on Wednesday, 21 April.” (*Balkan Odyssey*, 1995, p. 143; Lord Owen’s *Statement*, pp. 35-36).

180. This exchange with Milosevic was confirmed by Lord Owen during the evidence in the ICTY on 3 November 2003 (Transcript, pp. 28411-28412, 28415-28416).

181. In this same general context, there was a significant exchange in the ICTY on 4 November 2003. The accused Milosevic asked the following question of Lord Owen:

“Q. Well, Lord Owen, I quoted Morillon and said that I too don’t believe that he ordered the massacre, and that is what Morillon says, that he doesn’t believe it either. But let’s move on. Speaking about what you knew from 1993 or, rather, what he knew on the basis of 1993 and Morillon’s testimony in parliament and the amassed hatred, Morillon adds: ‘I informed Belgrade too. I went to see Milosevic and told him this is what is going to happen. He helped me. What I — that I had won that battle then that was thanks to the position taken by Milosevic, but New York was also kept au courant.’ So I assume you know about that as relating to 1993.

[So that was the 1993 not very articulate question asked by Milosevic. And Lord Owen answers.]

A. Mr. Milosevic, I made it quite clear, and many people don’t like me saying it, but I do believe that you were very helpful in 1993 in stopping General Mladic going in and taking Srebrenica. And I rang you up personally. You were also under many representations of other people, and I believe the record is quite clear that you did intervene and you were of considerable help in that situation. I think you were well aware of the great danger for the reputation of the Serbs. If they had gone into Srebrenica, there would have been very bitter street fighting. The grudge match that existed around Srebrenica between — over Bratunac and others would have spilled over into a very, very nasty scene. And I do not know what representations if any were made to you in 1995 or what were the circumstances. As I say, I was no longer a negotiator. But I think it is the most shameful single episode to have occurred in Bosnia-Herzegovina, the massacre around Srebrenica in 1995 . . .”

And that is the answer Lord Owen gave.

182. The answer from Lord Owen ends with criticism of the safe areas policy as implemented in practice.

183. This evidence of the attitude of the President of Yugoslavia in 1993 is of obvious significance. It is well authenticated and is impossible to deny.

There is further strong evidence of the contemporary view of the role of Milosevic in a key period. It is a matter of public knowledge that President Milosevic played a major role in the negotiations which took place during the Dayton Conference. It is absolutely clear that in that context he was not characterized as a war criminal. Indeed, other participants subsequently indicated the significant role of Milosevic in developing the architecture of the political settlement.

VI. Conclusion

184. That concludes my examination of the evidence which provides substantial confirmation of the non-involvement of the Belgrade Government in events alleged to have occurred in Bosnia. The evidence derives from various independent sources:

- (a) the decisions of the ICTY involving charges of genocide;
- (b) the opinion of Lord Owen on the relations between the Bosnian Serb leadership and Milosevic;
- (c) the very substantial report of the Netherlands Institute for War Documentation on Srebrenica; and lastly,
- (d) the evidence of the attitude of Milosevic as President of Yugoslavia in face of events in Bosnia.

185. Each of these sources is impressive and cogent weighed individually. Taken as a group their probative value is enhanced by the consistency and mutuality the sources exhibit.

G. REBUTTAL: THE EXTERNAL MILITARY ASSISTANCE PROVIDED TO THE REPUBLIKA SRPSKA

I. Introduction

186. The applicant State approaches the issue of attribution on the following basis. According to Bosnia, in spite of the withdrawal of JNA forces from Bosnia and Herzegovina on 19 May 1992, the authorities in Belgrade continued to control Serbian armed forces and institutions in Bosnia and, consequently, the Republika Srpska was merely the agent of the Government of the Federal Republic of Yugoslavia. This thesis is expounded in Chapter 8 of the Reply of Bosnia and was featured of course in the oral argument.

187. The Bosnian argument is based upon a series of related assertions, as follows:

- (a) First, the refusal to recognize the political status and role of the Republika Srpska in the period following the political disintegration of Yugoslavia.

(b) Second, the allegation that the Republika Srpska was represented exclusively by the Belgrade Government in the political negotiations of the International Conference on the Former Yugoslavia and again in the proceedings of the Dayton Conference.

(c) Third, the redeployment of JNA troops within Bosnia.

(d) Fourth, the fact that members of the JNA joined the newly formed army of the Bosnia Serbs.

(e) And last, the assistance given by the JNA to the armed forces of the Republika Srpska.

188. The issues raised in points (a) and (b) have been considered already. I shall now deal with the other issues.

II. The external assistance provided to the Republika Srpska

189. According to the Reply of Bosnia and Herzegovina, the Republika Srpska received the following forms of assistance from the Belgrade authorities.

(a) The provision of military assistance in the form of arms and communications equipment.

(b) The accession to requests by the Bosnian Serbs to provide military units to protect particular communities within Serb inhabited areas.

(c) The seconding of personnel from the JNA to the armed forces of the Republika Srpska.

(d) The provision of financing for the officer corps of the Republika Srpska armed forces, and the provision of the pertinent benefits and promotions.

190. These assertions appear in the Bosnian Reply, Chapter 8, and also in the indictment of Momcilo Perisic dated 22 February 2005. For the purposes of the legal argument, and to assist the Court, I shall proceed on the basis that the assertions of fact are true. However, on behalf of the respondent State, the legal inferences drawn by the other side are rejected.

Madam President, I shall base my argument upon a series of propositions.

(a) *First: In any case, the Belgrade authorities had no control over the Republika Srpska at the material time*

191. The provision of assistance to the Republika Srpska cannot as such prove the existence of external control by the Federal Government of Yugoslavia over the actions of the Republika Srpska. The available evidence, from diverse sources, contradicts the existence of control from Belgrade and this evidence has been reviewed already.

(b) *The second proposition: The circumstances in which the assistance was given included the likelihood of acts of genocide directed against Bosnian Serbs*

192. The progress made by the secessionist armed forces in Croatia and Bosnia gave rise to fears on the part of the Bosnian Serbs which were justified by the recent history of the region.

193. The Bosnian Reply refers to intercepted telephone conversations involving Serb leaders of May and August 1991 (see pp. 475-478, paras. 25-30). The situation is described in the Bosnian Reply as follows: “At that time, the former Yugoslavia still existed as such and the fighting had not broken out yet. The war in Slovenia, for example, erupted one month later, on 27 June 1991.” (P. 475, para. 26.)

194. Consequently, the situation involves leading Serb political figures within a still unified Yugoslavia formulating contingency plans for a future in which Serb communities would be threatened by secessionist forces. It is difficult to see what relevance such evidence has in relation either to the issue of attribution or to the issue of genocide as such.

195. The conversation of 29 May 1991 — referred to in the Reply at page 475 — involves concern for the future of Serbs in Sipovo, Mrkonjic Grad and Kupres. In the region of Kupres attacks by Muslim-Croat forces began in early April 1992 (Yugoslav Counter-Memorial, pp. 447-454, para. 7.1.13.0) and various atrocities resulted. In the region of Mrkonjic Grad and Sipovo Muslim-Croat attacks began in June 1992 and were followed by atrocities against civilians (*ibid.*, pp. 632-633).

196. The simple truth is that the telephone conversation in May 1991 between politicians familiar with the history of the region involved an experienced and intuitive judgment that the Serb communities were under a serious threat if the secessionist tendencies were to develop further. Far from the conversation having a sinister purpose, it prefigured the imminent danger to Serbs in the region.

197. In the same vein, the Bosnian Reply gives prominence to the diary of Petar Jankovic, a member of the Serb political party, SDS, in Bosnia (Reply, pp. 478-482, paras. 31-36). The diary relates to the period from 12 January 1991 to 24 January 1992. The diary was adduced to establish that in this period the lawful Government of Yugoslavia was, at the request of groups of Serbs living in Bosnia who felt threatened by potential developments, willing to supply weapons. There

is not the slightest hint in the material quoted by the Bosnian Government either that the requests for arms, or the decision to supply arms, had any connection with a plan involving genocide.

198. These defensive preparations involve reference to specific places: namely, Kalesija and Tuzla. As the Yugoslav Counter-Memorial shows, Muslim attacks in the Kalesija municipality began on 2 May 1992 (pp. 627-630, para. 7.1.51.0). Many atrocities were committed in the Tuzla region, beginning in May 1992 (Counter-Memorial, pp. 500-504, 927-932, and 995-998). Reference is also made to people from Zvornik seeking arms. In the Zvornik commune Muslim armed forces first attacked in January and April 1992 (see the Yugoslav Counter-Memorial, pp. 505-513, and 897-898).

199. It is thus apparent that the desire to acquire means of defence in 1991 reflected an objective threat. And it also becomes clear that the concerns of the Serb leaders did no more than reflect the justified fears of the Serbs living in Bosnia.

200. The atmosphere of the period is conveyed by the document actually given prominence in the Bosnian Reply. This is a request from a Serbian association, addressed to the Chief of Staff in Belgrade, asking for the provision of military assistance. It is dated 22 January 1992 and reflects the gloomy expectations of Bosnian Serbs in the wake of the disintegration of the Yugoslav Federal State. The document reads as follows.

“ASSOCIATION OF THE SERBS
FROM BOSNIA AND HERZEGOVINA
IN SERBIA
11000 BELGRADE
Terazije 3/9

FEDERAL SECRETARIAT FOR
PEOPLE’S DEFENCE [Yugoslav Ministry
of Defence in Belgrade]
(- attn. Chief of General Staff
major-general Blagoje Adžić)

‘Reference: Placement of a military unit in the territory of municipality of Kupres [central Bosnia], . . . for the prevention of the genocide over the Serbs

‘Municipality of Kupres lies at the farthest south of Bosanska Krajina [region in the northwest of Bosnia and Herzegovina] and is surrounded by the municipalities populated by Catholic and Muslim population: Gugojno, Duvno and Livno.

In the 2nd World War neighbouring Muslim and Catholic population attempted to commit genocide over the Serbs, but, fortunately they succeeded only partly. By

such attempt the number of Serb population was reduced, and after-war colonisation in Vojvodina [north Yugoslavia] contributed to their reduced number as well.

By the beginning of this century 70% of population of Kupres were Serbs, while today there are only 51% of them. *The overall population is some 11,000.*

High percentage of the presence of Catholic and Muslims in the very municipality, its encirclement by such communities as well as close vicinity of Catholic West Herzegovina, speaks in favour of the necessity to protect the Serb population in the municipality of Kupres.

By the protection of Kupres, the care of the periphery villages in the municipalities Livno, Duvno and Bugojno, populated by the Serbs would be provided for, because this population suffered a lot during the second world war.” (Letter to Chief of Staff, Major-General Blagoje Adžić, signed President Gojko Djogo, 22 January 1992, Annex 124; emphasis added.)

And there is then a description of the strategic significance of the Kupres Plateau, the reception of troops by the local population and its relation with the local authorities.

201. Having sent this letter out the Bosnian Reply then makes a most unfortunate comment:

“The requested placement of a new JNA unit in the Kupres area was thus justified on two grounds. Firstly, the JNA troops had to be deployed to defend the Serb population, which in the view of the author of the request was threatened with genocide, just like the one that had allegedly [allegedly] taken place during the Second World War. Secondly, the ‘Kupres Plateau’ was supposedly of primary strategic importance.” (Reply, pp. 507-508.)

202. But, Madam President, the genocide during the Second World War did take place. The principal victims were Serbs living in Croatia, Jews and gypsies. The leading French authority on the Second World War, Henri Michel, describes the situation in the satellite states of Germany. And he writes:

“On the other hand, in Croatia it was the Fascist Ustashi party that took over power under its leader Ante Pavelić that instituted a reign of terror against the Serbs living in Croatia, the Communists, the Jews and the gypsies. He set up concentration camps at Jasenovac and Stara-Gradiska, in which the inmates were regularly slaughtered. The entire populations of some localities inhabited by Serbs were massacred, such as those of the village of Suvaja in July 1941.” (Henri Michel, *The Second World War*, English translation, 1975, p. 284.)

203. In the *Survey of International Affairs 1939-1945*, published by Chatham House, the historian Elizabeth Wiskemann gives an account of the State of Croatia which includes the following passage:

“The most positive performance of the Ustasa State was an atrocious series of massacres; the Serbs in Bosnia, and Jews, wherever they were found, were the victims of the unbridled fury of the savage Praetorians of Pavelić, ably seconded by groups of Muslims from Bosnia; it was like a new religious war with Catholics and

Muslims allied against the Orthodox and the Jews. It seemed little else but ironical that in the spring of 1942 the Poglavnik [that is the ruler] should establish a Croat Orthodox Church in order to control more tightly those Serbs who had survived the massacre.” (*Survey of International Affairs, 1939-1945, Hitler’s Europe*, ed. by Arnold Toynbee and Veronica M. Toynbee, 1954, pp. 649-650.)

204. This, Madam President, Members of the Court, constitutes the pertinent historical background. In the Bosnian region in the late twentieth century any form of protracted political turbulence was likely to produce inter-communal violence. It was to be expected that the communities newly exposed as a consequence of secessions and civil war would seek to take defensive measures. The letter of 22 January 1992 given prominence in the Bosnian Reply makes express reference to the events during the Second World War and the genocidal threats to the Serbs in that era.

(c) *The Yugoslav military documents, 13 December 1991 to 20 March 1992*

205. My third proposition relates to the rebuttal of Bosnian assertions based upon captured documents. The chapter on the question of attribution in the Bosnian Reply gives emphasis to a series of captured Yugoslav military documents relating, according to their dates, to the period from 13 December 1991 to 20 March 1992 (pp. 484-498, paras. 40-58). These documents, it is asserted, prove the “JNA’s massive involvement in the distribution of arms” (p. 484).

206. The importance of these documents is difficult to see. They tend to confirm the account of the period of transition described in the Yugoslav Counter-Memorial (Chap. III, pp. 245-258). After the loss of Croatia and the clear indications of secessionist tendencies in Bosnia, the JNA was involved in various forms of co-operation with the Serb communities in the relevant areas of Bosnia and Herzegovina. None of these activities involved any preparation for activities contrary to principles of international law and, it is necessary to recall, Bosnia and Herzegovina did not become independent until 6 March 1992.

207. The documents relate exclusively to activities which were lawful and, in all the circumstances, perfectly reasonable.

(d) *The alleged Yugoslav military involvement in Bosnia and Herzegovina before 19 May 1992*

208. A substantial section of Chapter 8 of the Bosnian Reply is concerned with the military involvement of the JNA in Bosnia and Herzegovina prior to the withdrawal of the JNA

(pp. 498-572). In this connection it may be recalled that as a matter of fact the JNA was no longer in general control of Bosnia by May 1992, when Muslim and Croat military formations began attacking JNA units in Bosnia. The final withdrawal of the JNA was completed on 19 May 1992.

209. This lengthy section in Chapter 8 of the Bosnian Reply calls for very cautious evaluation. In particular, the following factors will be found to render the material either irrelevant or seriously unreliable.

210. *First:* The account fails to accept that by March 1992 the Yugoslav Government no longer had control of Bosnia as a whole. Otherwise, on what grounds did the Court and other agencies recognize the independence of Bosnia and Herzegovina on 8 March 1992? And, according to the Bosnian Reply “the genocidal conflict” did not erupt until April 1992 (p. 501, para. 67). The report by General Kukanjac, dated March 1992, shows that the JNA was already withdrawing from the Muslim and Croat areas of Bosnia (Reply of Bosnia, Ann. 120).

211. *Second:* The entire period of the disintegration of former Yugoslavia is caricatured. Every reaction of the JNA to the crisis, which had been engineered externally, is represented as a form of aggression and every redeployment of the JNA is portrayed as a threat. In reality, the JNA was throughout reacting to initiatives, political and military, taken by others.

212. *Third:* There is no evidence of any preparation for genocidal acts. As the Bosnian Reply itself admits: “The main aim of the JNA was, after all, the protection of the Serb people in Bosnia and Herzegovina and ‘the location of the JNA forces was to be adjusted accordingly’.” (Reply, p. 505, para. 73.)

213. In the light of subsequent developments, this policy was fully justified.

214. *Fourth:* The various accounts given in the Bosnian Reply of military activities by JNA units (pp. 518-541, paras. 84-113) relate to episodes in a civil war and nothing more. The numerous documents advanced by the Bosnian Government in this section of the Reply contain no evidence of genocidal intent. In light of the fact that these appear to be official documents of the JNA they constitute direct evidence of the absence of genocidal intent. As the documents make clear, they are concerned exclusively with “combat activities” — see, for example, the document dated 7 April 1992 (Reply, pp. 524-525, para. 91). The hostile documents quoted from

non-Yugoslav sources refer to “Muslim resistance forces” (see the Reply, p. 530, para. 98). The commentary itself constantly refers to “military operations”.

215. Episode after episode recounted in the Bosnian Reply relates to the military activities of the JNA in the chaotic period in April 1992 when the Yugoslav forces were on the defensive and were on the point of withdrawal. In the television interview with a former JNA commander invoked by the Reply, the key point is that the interviewer, speaking on behalf of the Bosnian Serbs, is upbraiding Kukanjac *for the failure of the JNA* to provide adequate protection to the Serb residents of Sarajevo (Reply, p. 540, para. 113). And, in any event no JNA members have been indicted for crimes in respect of the period prior to 19 May 1992.

(e) Conclusion

216. I have completed this part of my argument and by way of conclusion I now present two related propositions. First, in the circumstances it was lawful for the JNA forces to be deployed in Bosnia to provide protection to the long-established Serbian communities in the region. And secondly, as I have argued earlier, the provision of assistance by Belgrade did not establish the existence of control from Belgrade.

217. Madam President, I must now move on to the task of rebutting the Bosnian arguments. And first of all the rebuttal of the allegations that units of the Yugoslav armed forces assisted the armed forces of Republika Srpska after the evacuation of Bosnia by the JNA was completed on 19 May 1992.

H. REBUTTAL: THE ALLEGATIONS THAT UNITS OF THE YUGOSLAV ARMED FORCES ASSISTED THE ARMED FORCES OF REPUBLIKA SRPSKA AFTER 19 MAY 1992

218. The Applicant makes major allegations to the effect that the JNA, that is, the Yugoslav regular armed forces, gave assistance to the Republika Srpska subsequently to 19 May 1992. These allegations, as presented in the Reply, are as follows:

- (a) First, the redeployment of Yugoslav army units within the Republika Srpska (Reply, Chap. 8, pp. 503-515).
- (b) Second, the movement of troops from Yugoslavia (*ibid.*, pp. 515-518).

(c) Third, the merging of Yugoslav units — left within Bosnia by the secessionist process of 1991-1992 — and the armed forces of the Republika Srpska (*ibid.*, pp. 553-573).

(d) Fourth, incidents after 19 May 1992 involving Yugoslav units seconded to the army of the Republika Srpska (*ibid.*, pp. 580-596).

(e) And lastly, assistance to the Republika Srpska by the Yugoslav Air Force (pp. 581-583).

219. Some of these matters I have dealt with already. However, for the present the specific focus is the question of legal responsibility in respect of any armed forces seconded to the army of the Republika Srpska, and the general question of assistance by the FRY to the new State of Republika Srpska.

220. At the outset a clear denial is necessary. There is no evidence that the Republika Srpska was controlled by the Government of the FRY, and it must now follow that the army of the Republika Srpska was not controlled by the army of the FRY. In consequence, the respondent State denies that any action of the army of the Republika Srpska was planned, directed or controlled by the FRY. This denial is significant for many reasons, and not least the nature of Chapter 8 of the Bosnian Reply, which constitutes a farrago of legal and factual confusions and rests upon baseless assumptions.

221. The assumptions made in the Reply exhibit a mixture of naivety and strong prejudice. If the list of allegations made on behalf of Bosnia is perused, it becomes immediately apparent that the episodes and developments rehearsed were *prima facie* lawful. In the circumstances of the disintegration of Yugoslavia, what was to be expected? What were Serbs from Bosnia, who were members of the old FRY armed forces, supposed to do? Was it unlawful or sinister that they should participate in the formation and protection of the Bosnian Serb State? Of course not.

222. Chapter 8 and the Reply as a whole are characterized by the assumption that anything Serbs did, either as individuals, or as a community, was unlawful. And yet the assistance provided by the FRY to the Republika Srpska and its armed forces was perfectly compatible with the principles of general international law and the provisions of the United Nations Charter.

223. Assistance to a State or to irregular forces, such as the *contras*, is not sufficient for the attribution of acts committed by the State or by the irregular forces, unless there is effective control

exercised by the assisting State. This is the principle formulated in the Judgment of this Court in the merits phase of the *Nicaragua* case.

224. The substance of Chapter 8 of the Bosnian Reply relates directly to the subject-matter of the key passages in the Judgment. Madam President, let it be assumed for the sake of argument, that the FRY was involved to a certain extent in the financing, organizing, training, supplying and equipping of the army of the Republika Srpska. This would still not be sufficient for the purpose of attributing to the FRY the acts committed by the armed forces of the Republika Srpska.

225. Madam President, the practice of providing such assistance is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional. Moreover, it is a matter of public knowledge that the armed forces of Bosnia received external assistance from friendly sources.

226. I quote the key passage from the *Nicaragua* Judgment as follows:

“The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*” (*I.C.J. Reports 1986*, pp. 64-65, para. 115; emphasis added.)

227. The contents of Chapter 8 of the Reply do not provide sufficient proof for the purpose of attributing acts of the Republika Srpska to the FRY.

228. In examining the question of assistance provided by the FRY certain issues remain to be addressed.

229. First, the role of paramilitary units. The role of paramilitary units in the conflicts of the period 1991 to 1995 varied considerably. Some were volunteers who for certain periods were accountable to no higher authority. In other cases the paramilitaries may have taken part in joint military action with regular armed forces. In some circumstances paramilitary groups were

incorporated into the regular armed forces and thereupon formed a part of the same command structure.

230. The treatment of the role of paramilitary units in the Bosnian Reply is superficial and there is a complete failure to address the key issues of State responsibility. The relevant section of the Bosnian Reply can be analysed in terms of the following segments.

231. First, the Introduction at pages 612 to 616. This Introduction fails to address the issues of State responsibility, and relies principally upon journalistic sources as evidence. The Introduction also appears to make the assumption that the creation of or provision of assistance to paramilitary forces is unlawful *per se*. Much of the material is concerned with political themes.

232. Second, the section on Arkan's Serbian Volunteer Guard at pages 616 to 620. This contains much political information and is not based upon reliable evidence.

233. Third, the section on Seselj's Serbian Cetnik Movement at pages 620 to 625. This section is also devoted to political description and avoids precise legal analysis.

234. Fourth, the section entitled "Arkan and Sesej's Paramilitary Military activities in Bosnia and Herzegovina", pages 625 to 631. The text is not intended to apply the relevant principles of State responsibility and is devoted to a simple description of the activities of the paramilitary groups.

235. Fifth, the section entitled "Yugoslavia's continuing support for and control over Arkan and Seselj" at pages 631 to 636. In spite of the promise of relevant material the content of this section is disappointing and based almost exclusively upon journalistic accounts. If these sources were to be accepted as reliable, they only indicate that, on some occasions, the Serbian armed forces provided weapons and training.

236. Sixth, the section on the publication in the Belgrade press of obituaries of paramilitary casualties at pages 636 to 639. This material shares the common characteristic of this part of the Bosnian Reply in that it is divorced from the relevant principles of State responsibility.

237. Seventh, the next section is entitled "The Yugoslav paramilitary units were responsible for the most evil atrocities" (pp. 639-644). As with previous sections there is no serious effort made to establish that the paramilitaries concerned in the activities reported were a part of the

command structure of the Serbian army or otherwise under instructions from the Government of Belgrade.

238. The treatment of the issue of paramilitary units in the Bosnian Reply leads to the following conclusions.

- (a) First, in general the applicant State has not even begun to satisfy the standard of proof.
- (b) Second, the entire legal perspective is distorted by the assumption that the formation of paramilitary units was unlawful in terms of international law.
- (c) Third, no account is taken of the fact that the Republika Srpska was independent of the Federal Republic of Yugoslavia in the material period.
- (d) And fourth and last, no attempt is made to apply the criteria relevant to the generation of State responsibility. In this connection no single reference is made to the question of effective control or to the existence of a command structure.

239. In any event, there were a limited number of actions by the Serbian MUP in the territory of the Republika Srpska and with the permission of that Government.

240. There is a certain amount of evidence to the effect that Serbian Security Police units of the FRY were seconded to the Republika Srpska for short periods. These units of the Serbian MUP included a Unit for Special Operations. However, the actions of such units could be attributed to the FRY only if, when secondment took place, they remained a part of the command structure of the FRY armed forces.

241. In any event, the actions of such units, seconded to the armed forces of the Republika Srpska, would constitute a form of lawful assistance. Moreover, there were very few occasions when such action by seconded units took place.

242. And in conclusion on the topic of assistance, Madam President, I would point to the egregious double standards adopted by the applicant State. Thus, in the Reply, the appearance of the new State, the Republika Srpska, is presented in exclusively pejorative terms as a form of Serbian subversion, which involved the distribution of arms to Serb volunteers and to members of the Territorial Defence Forces. And yet in the conditions of the time and the appearance of secessionist states in Croatia and Bosnia itself, such activity was a natural response to events.

243. This treatment in the Reply of Serbian responses to the disintegration of Yugoslavia is to be contrasted with the description in the Bosnian Reply of events in Slovenia and elsewhere. The Reply has this to say in paragraph 17:

“17. The 1991 order to hand over all arms under the control of the Territorial Defence was given in all republics of the former Yugoslavia, but with varying result. In Slovenia, for example, the order was generally ignored. In Croatia, it was partly complied with; the Territorial Defence forces in Croatia handed over approximately half of their weapons. In Bosnia and Herzegovina, the order was carried out almost completely, with the exception of those areas in western Herzegovina with predominantly Croatian populations (Dr. Milan Vego, *The Army of Bosnia and Herzegovina, Jane's Intelligence Review*, February 1993, p. 63, Annex 101).

18. The response to the June 1991 order determined the future of the various republics of the former Yugoslavia. Slovenia, as was also explained in the Memorial, gained its independence with relative ease in the first stages of the fighting (Memorial, Section 2.3.2, pp. 62-64, paras. 2.3.2.1-2.3.2.4). There, in the summer of 1991, the JNA suffered a humiliating defeat in ten days. This defeat of the JNA was primarily due to the fact that the Slovenian authorities had succeeded in creating an effective national army. This national army was almost exclusively armed with weapons which had once belonged to the Territorial Defence forces. Croatia was less successful in its struggle for independence, as the JNA, Serbian based [para]military units and the Croatian Serbs succeeded in carving out large parts of the territory of the newly formed independent state of Croatia. Still, the Croatian military managed to offer some resistance, in sharp contrast with the authorities in Bosnia and Herzegovina who were not able to organise any opposition at all.”

244. And thus it can be seen, Madam President, that when the process of separation and the formation of national armed forces occurred in Slovenia and Croatia, this is presented as a foreseeable and entirely natural political development. But, when the newly exposed Serb communities in Bosnia go through an identical process, this is stigmatized by our opponents in these proceedings.

245. In concluding my argument on the question of military assistance, two other issues call for some attention. The first concerns the assertions to be found in the Reply relating to elements of co-operation in banking and monetary matters between the Federal Republic of Yugoslavia and the Republika Srpska (Reply, pp. 274-85). The subject was developed at length by Mr. Torkildsen who proved to be an expert witness presented as counsel (CR 2006/9, pp. 22-49). This speaker introduced a sheaf of documents which conveyed the information that the three Serbian territories had reacted to the political and economic turbulence caused by secessionist activities in the region, and the appearance of separate Serb republics, by making practical arrangements for mutual assistance.

246. The documents confirm the separate existence of the Republika Srpska. The relevant documents include the Decision on the Adoption of the Rebalance of Republika Srpska Budget for 1993, and the Official Note of the Governors of the National Banks of Yugoslavia, Republika Srpska and the Republic of Serbian Krajina, held on 12 May 1994.

247. Madam President, the documents, and the arrangements they envisage, only make sense if these are separate national entities, which agree to a form of co-operation. These arrangements would be normal even in a time of peace. Moreover, it is the monolithic perspective adopted by our opponents which results in the facile assumption that such financial arrangements were illegal. The arrangements were published in the *Official Gazette* and it is not the case, as alleged by Mr. Torkildsen that the financing was done in secrecy.

248. The second issue concerns the military assistance provided to the Government of Bosnia and Herzegovina by third States, which commenced as early as 1991, and to this question I shall now turn.

I. The military balance and the substantial military assistance obtained by the Bosnian Government from third States

249. It would be clear to the Yugoslav authorities that the substantial flow of arms to the Bosnian Muslims in the early stages of the disintegration of Yugoslavia could seriously affect the military balance. In the circumstances, it must be obvious that the provision of assistance to the Serbs of Bosnia and their new State was an inevitable reaction to events.

250. The military and political situation in the Bosnian region was complex and the complexities included a considerable element of mutual assistance between the Bosnian Muslims led by Izetbegovic and the Croatian Government. This assistance involved the use of Zagreb airport as a facility for transport of military supplies, destined for the forces of Mr. Izetbegovic, from friendly third States.

251. The question impinged on the activities of David Owen as the Co-Chairman of the International Conference on the Former Yugoslavia. Referring to the period of September 1992, Lord Owen records his reactions in his book *Balkan Odyssey*:

“In Zagreb President Tudjman told us about the Iranian cargo aircraft, a Boeing 747, that had landed on 4 September with a declaration that it was carrying relief supplies but was found also to hold significant quantities of various kinds of

armaments. Tudjman's motivation in telling us was mixed, for this was not the first or by any means the last Iranian plane to land in Croatia with arms. Already the Croatian government had become skilled at evading the arms embargo which had been applied to them ever since 25 September 1991 by United Nations Security Council resolution 713. They extracted a heavy price for being an arms conduit to Bosnia-Herzegovina, either in terms of money from the Bosnian government or by demanding 50 per cent or more of the arms for themselves; sometimes both. The land-locked Bosnian government forces, mainly Muslim, were dependent on the Croats. Yet when people talked of lifting the arms embargo for the Bosnian Muslim forces, they neglected to say that this could only happen with Zagreb's agreement, and that would mean lifting it for the Croats too. A selective lifting for the Bosnian Muslims was at that stage in the war totally impossible. *Moreover, West European governments and the United States tolerated and indeed in some cases condoned the Croatian government bringing arms and materials in, by road through Hungary and Slovenia and by plane and sea in the early stages of the conflict. Nor did they do anything to stop the Croats then transferring arms on into Bosnia-Herzegovina, for there were no UN or other monitors on the border with Western Herzegovina or Posavina. These rarely acknowledged facts put the discussions surrounding the arms embargo in a better perspective. There was no effective restriction on Croatia building up effective armed forces, and it was Croatia who then controlled the quantity and quality of the arms that moved into Bosnia-Herzegovina to increase the effectiveness of the Bosnian Muslim forces.*" (P. 47; emphasis added.)

252. These questions of fact are dealt with also in an appendix to the Srebrenica report by the Netherlands Institute for War Documentation. The appendix has been prepared by Professor Cees Wiebes, a professor at Amsterdam University and the title is "Intelligence and the war in Bosnia 1992-1995": The role of the intelligence and security services, Chapter 4 — Secret arms supplies and other covert actions; Appendix II to the NIOD Report entitled "Srebrenica a 'safe' area". (Available in English at www.srebrenica.nl/en/a_index.htm)

253. This report confirms the picture provided by Lord Owen, and refers to an agreement concluded by Izetbegovic directly with Teheran in October 1992. In early 1993, both Iran and Turkey supplied arms to Bosnia via Croatia. After an intermission, regular arms supplies from Iran were resumed on 4 May 1994. The report makes clear the fact that by this stage the supply of arms was known to several western governments. Military assistance from unidentified sources took the form of low altitude drops from C-130 transport aircraft. These flights were known as the "Black Flights".

254. There is no need to go into the details. The pattern of foreign assistance is clear and the evidence available is cogent. There can be little doubt that the leaders of the Bosnian Serbs were well aware of the foreign assistance from the early stages of the secessionist conflict.

255. Madam President, in this particular connection it may be recalled that in the original Application in this case, Bosnia requested the Court to affirm the right of self-defence, “including by means of immediately obtaining military weapons, equipment, supplies and troops from other States . . .” This request was accompanied by further requests that the Court should construe the arms embargo resolution so as not to impair the right of individual or collective self-defence. Similar requests were included in the subsequent requests for the indication of provisional measures. The Court, in the pertinent Orders, explained that it only could act in respect of matters falling within the jurisdiction provided for by Article IX of the Convention (*Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, paras 42 and 43). The existence of these requests provides confirmation of the significance of external assistance to the military opponents of the community of Bosnian Serbs.

**J. REBUTTAL: AT NO STAGE DID THE GOVERNMENT OF THE FEDERAL REPUBLIC OF
YUGOSLAVIA FORMULATE OR ADHERE TO A PLAN FOR THE GENOCIDE
OF NON-SERBS IN BOSNIA AND HERZEGOVINA**

256. The Bosnia Memorial and Reply present no adequate evidence of a plan to commit genocide. The Bosnian Reply consists of 993 pages. In spite of this amplitude, no evidence of any kind emerges of a plan to commit genocide on the part of the Yugoslav Government, or of any group within the Government. The Memorial of Bosnia contains a section, pages 59 to 94, concerning “the context of the acts”, which contains no such evidence. The Bosnian Reply, pages 55 to 68, includes a similar section on “the context of the war”. The conclusion of this section of the Reply consists of the following two paragraphs:

“17. The ICTFY (referring to the *Tadic* case) was correct in combining the Greater Serbia rhetoric with the imminent threat-to-the-Serbs rhetoric, because these are two side of the same coin. The right of the Serbian nation to a Serb state was, according to this rhetoric, supported by the need for the Serb people to defend themselves against the outside (non-Serb) world, which, also according to this rhetoric, as usual threatened to commit genocide against the Serbs. This was a key message of the Serb propaganda campaign. It was designed to recall memories of atrocities committed against Serbs in order to arouse fears in Serbs everywhere and prompt them to seek protection with a Greater Serbia.

18. This rhetoric also served to set the tone for the Serb agenda within the context of a disintegrating Socialist Federal Republic of Yugoslavia. The facts clearly reveal that the Serb leadership in Belgrade was indeed engaged in an effort to unite the Serb nation in one Serb State. That this was not just some political programme but, rather a particular course of conduct aimed to achieve a specific result, became clear

as soon as the Serb leadership actually left the stage of rhetoric and entered the stage of armed conflict.” (Reply, p. 68.)

257. These concluding paragraphs present a very distorted picture of the concerns of Serbian politicians. But that is not the most important feature. What is important is that no evidence of any plan to commit genocide is presented. Moreover, at the beginning of the relevant section, the Bosnian Government makes the following admission:

“Of course, *a political programme proposing one nation for one ethnic group cannot in and of itself be considered incitement to genocide*, but such a political programme can easily be used as part of a political propaganda campaign supporting the idea of an ethnically pure State. This is exactly what happened in this case.” (Reply, p. 55, para. 4; emphasis added.)

258. The Final Report of the Commission of Experts established pursuant to Security Council resolution 780 of 1992 makes no reference to a plan for genocide. The Report is dated 27 May 1994 and the final session of the Commission was from 11 to 15 April 1994.

259. The report of the Secretary-General submitted pursuant to Security Council resolution 1010 1995 contains no reference to a plan. The report relates to the events in Srebrenica and Zepa and is dated 30 August 1995.

260. On 15 November 1999 there was published the report of the Secretary-General pursuant to General Assembly resolution 53/35. This report is substantial, running to 117 pages, and is entitled “The Fall of Srebrenica”. There is no reference to the existence of a plan to organize genocide on the part of the authorities in Belgrade. Madam President, Members of the Court, in this type of document, if there had been a plan one would expect it to be referred to.

261. The only material alleged to provide evidence of a plan to commit genocide relates to the “RAM” Plan and the concept of a Greater Serbia. There is no sufficient evidence to establish that either of these projects, assuming they ever existed, related to a plan to organize genocide: these subjects have been examined already by the distinguished Agent and will not be pursued further at this stage.

262. In any event the question of there being a plan is related to the existence of evidence which contradicts the existence of such a plan. Lord Owen in his memoir, *Balkan Odyssey* (1995, pp. 134-135) gives his own description of the reaction of President Milosevic to the possible seizure of Srebrenica by Bosnian Serb forces in April 1993. As we have seen, President Milosevic

had telephoned Owen, the United Nations negotiator. Owen reports that Milosevic was very concerned, and that:

“He feared that if the Bosnian Serb troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between the two armies. The Bosnian Serbs held the young Muslim commander in Srebrenica, Naser Oric, responsible for a massacre near Bratunac in December 1992 in which many Serb civilians had been killed.”

263. And so surely, this conduct on the part of Milosevic is clearly incompatible with the view that the political leadership in Belgrade were adherents to a plan for genocide.

Madam President, I would be grateful if we could take a break there. Thank you very much.

The PRESIDENT: Mr. Brownlie, we will return in 15 minutes.

Mr. BROWNLIE: Thank you.

The Court adjourned from 4.15 to 4.30 p.m.

The PRESIDENT: Please be seated. Professor Brownlie.

Mr. BROWNLIE: Thank you, Madam President. I now move on to the next stage of my rebuttal argument which concerns allegations in the Bosnian Reply of involvement of the Belgrade Government in the events in Srebrenica.

K. REBUTTAL: ALLEGATIONS IN THE BOSNIAN REPLY OF INVOLVEMENT OF THE BELGRADE GOVERNMENT IN THE EVENTS IN SREBRENICA

264. On behalf of the respondent State it has been demonstrated that the Belgrade Government did not have effective control over the Bosnian Serb leadership and, in particular, over Mladic and Karadzic. It has also been shown that at a critical juncture Milosevic was involved in seeking to prevent, in April 1993, precisely the type of event which occurred subsequently in 1995.

265. The impressive pattern of evidence of the non-involvement of the Belgrade Government is not seriously contradicted by the Bosnian Reply. However, more or less in passing, the Bosnian Government in paragraphs 201 to 205 of the Reply makes certain allegations. Paragraph 201 reads as follows:

“The continuing co-operation between the Federal Republic of Yugoslavia and the Bosnian Serbs is also illustrated by the genocidal attack on Srebrenica, which initiated [and that is the way it is put] on 6 July 1995, when the Serbs shelled the town and the surrounding observation posts set up by the United Nations. The attack on the safe area continued through 11 July 1995, when Serb forces entered the town of Srebrenica itself. There is ample evidence that Yugoslav Army units were among those forces. The presence of the Yugoslav Army in Srebrenica was for example acknowledged by the ICTFY in The Hague, which indicted both Ratko Mladić and Radovan Karadžić for their share in the horrendous slaughter of non-Serbs that followed the fall of the enclave.”

266. Madam President, the assertion that “[t]here is ample evidence that Yugoslav Army units were among those forces” is false. It is clear from other sources, and conceded by the Respondent, that the forces of the Republika Srpska included members of the original JNA army prior to the secessionist developments of 1991 and 1992. But the Reply provides no evidence whatsoever of any control, least of all effective control, by the Belgrade Government. The Reply relies heavily upon evidence which cannot be checked, involving briefings to the press by unidentified “western and Bosnian intelligence sources” (para. 203). Moreover, the evidence provided by Bosnia fails to indicate that the forces on the ground formed part of the command structure headed by Mladić.

267. The reality is that the available third party sources do not support the Bosnian hypothesis. The following third party sources make no suggestion that the Belgrade Government was involved in planning or implementing the murders in Srebrenica.

(a) *The report of the Secretary-General pursuant to General Assembly resolution 53/35 dated 15 November 1999 and entitled “The Fall of Srebrenica” (A54/549)*

268. This substantial report contains no indications that the FRY Government had been involved in the events in Srebrenica and Zepa. Moreover, the content of the Report does not indicate that Belgrade had control over the Bosnian Serb leadership. Of particular interest are the following paragraphs:

“292. The delegate of the Special Representative of the Secretary-General in Belgrade telephoned the Special Representative’s office at 2245 hours to indicate that he had seen President Milošević, *who had responded that not much should be expected of him because the Bosnian Serbs ‘did not listen to him’*. At 2300 hours, the Force Commander, having spoken to General Tolimir, who had told him that the offensive action had stopped, requested his team to reconvene at 0600 hours the next morning.

.....

373. On 14 July, the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Gorazde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarejevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, *but also claimed that he did not have control over the matter*. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement."

(b) *The report of the Netherlands Institute for War Documentation (2002)*

269. In this extensive examination of the Srebrenica murders the Epilogue includes the following conclusion: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable" — which I have quoted earlier.

(c) *The judgments of the ICTY relating to events in Srebrenica, namely: Prosecutor v. Radislav Krstić, Trial Chamber; Prosecutor v. Radislav Krstić, Appeals Chamber; Prosecutor v. Blagojević, Trial Chamber I*

270. These judgments make no reference to any involvement of the Government in Belgrade in Srebrenica.

(d) *The evidence of the former FRY President Zoran Lilic in the Milosevic trial*

271. At this trial the former President of the FRY, Zoran Lilic, denied that Milosevic had had any role in the events in Srebrenica. The relevant section of the transcript reads as follows:

"Q. After the fall of Srebrenica and when the details of the massacre were discovered, the accused's reaction was, as you've already told us, but just remind us.

A. Yes. I tried to link that up to the constitution of the centres. And one of the fears was, in which I issued an order for this to be stopped, that President Milosevic himself — actually, I was in a situation in which I could directly at the beginning of August have intensive meetings to discuss other issues and problems within the Federal Republic of Yugoslavia. I know that he was personally very upset and angry, and I think that he was very sincere in his behaviour and conduct, and he even said at one point that that leadership from Pale, that they were mad, if they had actually done that. And I'm quite sure that as far as he is concerned, he could not have issued an order of that kind. I do believe that Srebrenica, unfortunately, is the result of individuals who allowed themselves to perpetrate an act of that kind, and it is my deep conviction that it cannot be placed in the context of any

participation on the part of the Yugoslav army at all, and that is why I said that Mr. Milosevic, which was exceptionally angry, his reaction was very strong, and he considered that this kind of behaviour and conduct would worsen our positions with respect to preparations for the Dayton Conference. I think he even said that at one of the meetings. Of course, nobody would take on this great burden on the side of the Bosnian Serbs, that is.” (Transcript, 17 June 2003, pp. 22616-22617.)

272. And on 18 June 2003, the same Zoran Lilic again referred to the events in Srebrenica. He was asked the following question: “I see. Now I want to turn to another topic. Yesterday you volunteered to us in relation to Srebrenica that certain individuals were responsible. Can you tell us, please, who those individuals were.” And the answer of former President Lilic was:

“It is difficult that you can expect me to name any individual. That would be difficult. I don’t think you can expect to do that. But I think that there is individual responsibility, and I am sure that in the course of this trial, you will be able to show and prove who those individuals were. And I said I was convinced that that kind of order didn’t come from any political or military person from Belgrade, and that I’m complete[ly] sure . . .” (Transcript, 18 June 2003, p. 22668.)

273. This evidence confirms the evidence of Lord Owen, already invoked on behalf of the Respondent, concerning the attitude and the conduct of the President of Yugoslavia at the material time.

(e) *The evidence of Robert Franken, a Dutch officer present at Srebrenica*

274. In giving evidence at the Milosevic trial, this Dutch officer denied the existence of any evidence whatsoever that the operation in the Srebrenica enclave had been initiated in co-operation with Belgrade, either in the military or political sense (Transcript, 13 November 2003, pp. 29053-29054). Colonel Franken was the Deputy Commander of the Dutch battalion in Srebrenica at the material period.

275. His answers to the two questions from Mr. Milosevic appear in the Transcript as follows.

“Mr. Milosevic: [Interpretation]

Q. But anyway, Mr. Franken, do you know that in the last part of the main report of the Dutch government 2001 in point 10 it says literally, ‘There are no indications that the action was launched in cooperation with Belgrade either in respect of political or military coordination.’ Are you are (*sic*) of that?

A. I’ve read that, yes. I’ve read that [Franken is saying], that’s correct.

Q. [From Milosevic] Is that in keeping with what you know from that period of time? Does it coincide with your knowledge?

- A. [From Franken] At least for me, I did not have any evidence that it was launched in cooperation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in cooperation with Belgrade.” [That was the answer from Franken.]

276. Madam President, in my submission, these responses from Colonel Franken constitute reliable and significant evidence.

(f) *The CIA account published in May 2002*

277. I now move to the CIA account, published in May 2002, to which I have already made extensive reference. This is the Central Intelligence Agency military history of the Yugoslav conflict entitled *Balkan Battlegrounds*. In Volume I, under the heading “The Possibility of Yugoslav Involvement”, the following assessment appears:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that VJ or RDB (the Serbian State Security Department) may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (*Balkan Battlegrounds*, p. 353.)

(g) *The intercept evidence presented in the Krstić trial*

278. One of the intercepted telephone conversations, used as evidence in the trial of General Krstić, provides clear indications to the effect that the VRS, the Republika Srpska forces, did not act in co-operation with the authorities in the Republic of Serbia — this is in the context, of course, of Srebrenica. Right after the fall of the two enclaves, about 600 Muslim refugees fled to the territory of Serbia. Colonel Popović, VRS security officer, attempted to take them over, but he was denied access to the refugees by the MUP of the Republic of Serbia. During that time the refugees were visited by Serbian government ministers, together with representatives of the Red Cross. Colonel Popović informed General Krstić of the event by telephone. According to the information received from the Red Cross of Serbia, this group of refugees, who crossed the river Drina after the fall of Srebrenica enclave and entered the territory of the Republic of Serbia, numbered about 600 men. The group was accommodated in the facilities of the Serbian MUP on Mount Goč, where it was visited by the representatives of the Commission on Missing Persons of

the Federal Government of the FRY, the Commission on Missing Persons of BIH, the Red Cross of Serbia and the International Committee of the Red Cross, who provided clothes, footwear and medicines. All persons from that group were enabled to leave for third countries or for the Federation of Bosnia and Herzegovina.

279. The intercept was presented in the Krstić trial as an exhibit number (OTP Exhibit 853A), and appears in the transcript at pages 8809 to 8810.

(h) Conclusion

280. Each of these sources of evidence is cogent when weighed individually. The sources are varied and independent of each other. In these circumstances, the consistency of the sources can only lead to a reliable conclusion. The allegations contained in the Bosnian Reply, and repeated in the first round of these proceedings, have no substance.

L. RESPONSE TO CERTAIN ORAL ARGUMENTS

281. Madam President, I would like to move on now to various responses I need to make to certain of the oral arguments.

282. The first topic is what Mr. van den Biesen describes as “ethnic cleansing in Eastern Bosnia” (CR 2006/4, pp. 37-60). The material is intended to cover Srebrenica and refers to a wide range of activities, such as arms distribution, as though these were all preparations for the events of July 1995 (*ibid.*, pp. 37-40).

283. In response, it is necessary to refer to some further passages from the Netherlands Government report, which do not form part of Mr. van den Biesen’s narrative. If I may quote:

“Throughout the second half of 1992 the Serbs remained on the defensive in this region. Overall, Muslim fighters from Srebrenica attacked 79 Serbian places in the districts of Srebrenica and Bratunac. They followed a certain pattern. Initially, Serbs were driven out of ethnically mixed towns. Then Serbian hamlets surrounded by Muslim towns were attacked and finally the remaining Serbian settlements were overrun. The residents were murdered, their homes were plundered and burnt down or blown up. There was a preference to launch these attacks on Serbian public holidays (those of Saint Joris, Saint Vitus and the Blessed Peter, and Christmas Day), probably because least resistance was expected. Yet it simultaneously contributed to the development of profound Serbian grievances. Many of these attacks were bloody in nature. For example, the victims had their throats slit, they were assaulted with pitchforks or they were set on fire.” (P. 910.)

And in another part of the report:

“It is estimated that between 1,000 and 1,200 Serbs died in these attacks, while about 3,000 of them were wounded. Ultimately, of the original 9,390 Serbian inhabitants of the Srebrenica district, only 860 remained, mainly in the four villages of Skelani, Crvica, Petrica and Lijesce.” (P. 910.)

284. The available sources, which I have quoted already, establish the character of the war in the region and the facts recorded indicate the nature of the local relations of the communities and the local origins of the hatreds generated.

285. In the last quotation, it will be noticed that one of the Serb villages named in the second quotation is Skelani, in which Serbs still remained. Now, what happened in Skelani in January 1993? There is a clear account available in the CIA publication, *Balkan Battlegrounds*, which refers first of all to atrocities by the Bosnian army in various villages east of Bratunac. The narrative then continues as follows — and, Madam President, this is quite a long narrative but it bears a very close relation to a major part of the speech by Mr. van den Biesen but from a completely different angle to the subject-matter. The subject matter is the same, the angle is completely different. So in *Balkan Battlegrounds*, we have the following account:

“On 16 January [this is 1993], Oric followed up this success with an attack toward the village of Skelani, on the Serbian border, some 25 kilometres south east of Srebrenica. The Muslim forces nearly captured it and the entire sector along the border. It was the Yugoslav Army’s Operational Group ‘Drina’ — controlling a combination of local VRS troops from the Skelani Battalion and VJ border guard and territorial defense units from the Uzice Corps, reinforced with regular VJ troops drawn from the 95th Protection Motorized Regiment, the 2nd Mechanized Brigade, and probably the VJ Corps of Special Units — that managed to halt the Muslims within a kilometer of Skelani. The Muslims were so close that one of Oric’s men was able to machine-gun women and children fleeing across the bridge to the Serbian town of Bajina Basta. By 20 January, the VRS and VJ troops had managed to rescue a VRS company cut off at the key Jezero hilltop, some 12 kilometres northwest of Skelani. Nevertheless, the Muslims were able to consolidate their positions and dominate the village and the border. The Bosnian Army troops also took time to mortar Serbia near Bajina Basta and the town of Ljubovija. The VRS lost at least 30 soldiers killed and almost 100 wounded in the fighting.

VRS Preliminary Counterattacks, 26 January-10 February 1993

Reacting to these Muslim successes, the VRS and the VJ rushed reinforcements to the Bratunac-Skelanic area to bolster VRS defenses and make some preliminary counterattacks while the VRS Main Staff made preparations for a full counteroffensive to crush the Srebrenica-Cerska enclave. In late January, Ljubisa Savic-Mauzer’s elite Special Brigade ‘Panthers’ arrived in Bratunac via Serbia. Two battalions of the 6th Sanske Infantry Brigade were also on the way. The VJ contributed a military police company from the 95th Protection Regiment and elements of the 2nd Mechanized Brigade. The Serbian State Security Department (RBD) appears to have provided a volunteer reconnaissance-sabotage company from its special operations unit. By 1 February, the ‘Panthers’, elements of the 1st Bratunac

Brigade, and the VJ units were counterattacking towards the south and south east in order to give the VRS elbow room around Bratunac and capture the village of Vojavica so that the town's water supply could be restored. VJ artillery units provided fire support from across the Drina River in Serbia. Despite the reinforcements, it was hard going, and it was not until 10 February that VRS troops were able to storm the important Caus Hill, overlooking both Bratunac and the Muslim-held industrial suburb of Potocari. Vojavica remained untaken.

Serb forces also made counterattacks near Skelani to push the Muslims away from the Serbian border and create some manoeuvring room. A mixed force of VJ and Serbian RDB special operations troops and Serbian Chetnik volunteers provided the main striking power. A mixed artillery battalion of the VJ 152nd Mixed Artillery Brigade backed up the infantry. By 26 January, the joint VRS and VJ/Serbian force managed to create a five-kilometre buffer between Skelani and the frontline. By 30 January, Serb forces had retaken the key Jezero hill. The Serbs then consolidated their positions.”

And that is the rather long quotation from *Balkan Battlegrounds* (pp. 386-387).

286. Madam President, Members of the Court, it is in this context that counsel for the applicant State refers to the village of Skelani (CR 2006/4, pp. 41-45). And it is very instructive to compare the version provided by Mr. van den Biesen with the passages I have just quoted. The argument of counsel for Bosnia relates to the events involving Skelani in January 1993, that are the same subject of the CIA account, and he relies on the documents submitted on 16 January this year. But in his account there is not the slightest indication of the background and the necessity in having co-operation between Serb forces on either side of the Drina River. It would appear that he is indifferent to the real situation and is assuming that even defensive actions by Serbs are somehow culpable.

287. In this framework of co-operation between Republika Srpska and the JNA in January 1993, document 19 of the documents submitted on 16 January of this year is of particular interest. In this document the Commander of the Yugoslav forces involved in defending Skelani informs his counterpart in Republika Srpska of the schedule for withdrawal. The correspondence submitted on 16 January and discussed by Mr. van den Biesen indicates very clearly the existence of two distinct military commands.

288. The second topic is the question of attribution in relation to camps and detention facilities. Ms Karagiannakis gave a flawed account of the facts on 1 March (CR 2006/5, pp. 22-44). Professor Franck revisited the subject very briefly on 2 March. In the context of the

camps, the applicant State has failed to establish that there was an element of control in respect of operations involving genocide as such.

289. I move now to the third topic, namely, the efforts of my opponents to implicate the leadership in Belgrade in the planning of genocide. Two episodes are relied upon quite frequently in these hearings by my learned opponents. The first was described by Professor Franck in the following terms:

“In July 1991, Mr. Babić, a leader of the Serb-breakaway Republika Srpska Krajina, had a conversation with Milosević and Karadžić in which the Bosnian Serb leader develops his plans to bring about their grand design of Greater Serbia, and Milosević warns Babić not to get in Karadžić’s way. He meant: let Karadžić do his dirty work without hindrance. By his own words you will appreciate the total involvement of Milosević and his cohorts in Belgrade’s massacre of non-Serbs in Bosnia.” (CR 2006/3, p. 36.)

290. This interpretation of the words apparently used by Mr. Milosevic is extravagant. The assertion is based upon a highly compressed quotation from the *Milosevic* Decision on Motion for Judgement of Acquittal, on 16 June 2004, paragraph 253. This reads as follows— and this document and the relevant part of the transcript is in the judges’ folder today. Paragraph 253 from the Decision on Motion for Judgement of Acquittal reads:

“In July 1991, Mr. Babić, Radovan Karadzic, and the Accused had a conversation during which Radovan Karadzic stated that he would chase the Muslims into the river valleys in order to link up all Serb territories in Bosnia and Herzegovina. The Accused warned Mr. Babic not to ‘stand in Radovan’s way’.”

291. Madam President, this short text is a very prejudicial summary of a long series of exchanges from the transcript of the testimony of Mr. Babić before the ICTY. There is no justification in the transcript for the language reported by Professor Franck or for the inferences he draws. The Court can appreciate the situation for itself by perusing the passages in the transcript.

292. There is a second episode, referred to on several occasions, which the Bosnian side considers to implicate Mr. Milosevic. Mr. van den Biesen is quoting from the Trial Chamber of the ICTY in the Judgement on Motion for Acquittal in the *Milosevic* case. Paragraph 280 of the judgment states:

“General Clark asked the Accused why, if he had this influence over the Bosnian Serbs, he had allowed Ratko Mladic to kill all those people at Srebrenica. The Accused replied, ‘Well, General Clark, I told him not to do it but he didn’t listen to me.’ General Clark testified that he had regarded the admission as stunning, because it indeed showed foreknowledge of Srebrenica.”

293. Mr. van den Biesen then puts an interpretation on this exchange:

“34. What indeed is not unimportant here is that Milošević, apparently, and not surprisingly I may add, knew what was going to happen in Srebrenica. We do not know where and when exactly the conversation between Mladic and Milošević which General Clark referred to took place, but it cannot be excluded that this was on either 7 or 15 July, when Mladic, as has been confirmed, was in Belgrade at the time of the takeover of Srebrenica and the killings were at the heart of the matter.” (CR 2006/8, pp. 48-99.)

294. Madam President, this is pure conjecture and is typical of Mr. van den Biesen’s resistance to understatement. There is no evidence that Mr. Milosevic knew in advance of the massacre. What he did appreciate, as the evidence shows, was the risk of revenge in the light of the actual history.

295. That is why, as I have already reported to the Court, Mr. Milošević spoke to Lord Owen on the telephone during the crisis in April 1993. If I can remind the Court, once more, of the relevant passage in Lord Owen’s book:

“On 16 April I spoke on the telephone to President Milošević about my anxiety that, despite repeated assurances from Dr. Karadzic that he had no intention of taking Srebrenica, the Bosnian Serb army was not proceeding to do just that. The pocket was greatly reduced in size. I had rarely heard Milošević so exasperated, but also so worried; he feared that if the Bosnian Serb troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between the two armies. The Bosnian Serbs held the young Muslim commander in Srebrenica, Naser Oric, responsible for a massacre near Bratunac in December 1992 in which many Serb civilians had been killed. Milošević believed it would be a great mistake for the Bosnian Serbs to take Srebrenica and promised to tell Karadzic so. He did not think we would be able to get Canadian troops into Srebrenica for some time but thought we might be able to negotiate UN monitors.” (*Balkan Odyssey*, 1995, p. 143; Lord Owen’s Statement to the ICTY, pp. 35-36.)

296. Madam President, Members of the Court, this particular episode confirms the persistent tendency of our opponents to avoid evidence which contradicts their theses about various legal and factual questions. In the context of Srebrenica the gaps left in the Bosnian arguments will, no doubt, be filled during the second round of these proceedings. Then, for example, we can learn whether the applicant State accepts or denies the making of the telephone call by Lord Owen on 16 April 1993 and the response of Mr. Milosevic. And then, for further example, the evidence given by Wesley Clark can be assessed on the basis of appropriate judicial standards.

297. Madam President, I shall now revisit some issues of legal principle, which have been the subject of much comment and no little obfuscation by counsel for Bosnia and Herzegovina.

The first issue, logically, is the interpretation of the Genocide Convention, and I refer here to the arguments of Professor Pellet (CR 2006/8, pp. 10-39, and CR 2006/11, pp. 26-49).

298. Professor Pellet discusses the question whether the responsibility established by the Convention is civil or criminal, and concludes that it is simply an international responsibility of the State. As a consequence Professor Pellet and his colleagues assume that the principles of State responsibility can be applied. These principles are then applied in such a way that the State is made vicariously responsible for the crimes committed by individuals. This involves a failure to apply the provisions of the Convention in accordance with their clear meaning. This approach also fails to understand that the principles of State responsibility must be applied by reference to the pertinent causes of action: they cannot be applied in the abstract.

299. The *Nicaragua* case provides a good illustration. The Court in that case applied the test of effective control rigorously in the context of the acts contrary to principles of humanitarian law and less rigorously to the causes of action relating to the use of force, for example, acts in breach of the obligation of non-intervention.

300. What is also important is the nature of the duty. If, for example, a State party to the Genocide Convention has failed to prevent, or to punish, the commission of genocide, this constitutes a breach of the treaty-based duties concerned. The failure does not involve the responsibility of the State for acts of genocide. This is reasonably clear from the *travaux* of the Convention. Hence the opinion of the United States representative in the Sixth Committee:

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

301. The account of the debate in the monograph of Nehemiah Robinson indicates the existence of serious doubts concerning the payment of reparation (pp. 24 and 102 of Robinson's book). Dr. Robinson points out that the definition of civil responsibility was by no means clear, and no specific provision relating to reparation was adopted (p. 102).

302. The provisions of the Convention are themselves reasonably clear. The crimes as defined in Articles II and IV are crimes committed by individuals. Article V refers to those committing genocide as individuals. Article VII refers to “persons charged with genocide or any of the other acts enumerated in Article IV” and provides that such persons shall be tried by a competent tribunal of a State.

303. If my learned opponents are right in their contention, then either this Court has acquired a criminal jurisdiction, more or less in passing, or the normal principles of State responsibility would have to be applied as if they provided vehicles for the imposition of criminal responsibility of the State. However, it is well known that the introduction of penal elements into the Draft Articles on State responsibility was resisted by the International Law Commission after extensive discussion.

304. The responsibility of the States parties to the Genocide Convention is limited to responsibility for breaches of the provisions establishing the specific duties of prevention and punishment. The appropriate remedy is a declaratory judgment. This results from the applicable law, which consists of the Convention itself and the law of treaties. There is no evidence that, as a matter of treaty law, the usual array of remedies was expected to be applicable. Article IX provides a basis of jurisdiction for breaches of the duty to prevent and punish the acts of individuals, but even then the jurisdiction is to deal with disputes relating to the interpretation, application or fulfilment of the present Convention. The substantive provisions of the Convention do not deal with the responsibility of the State for acts of genocide, and Article IX is concerned with jurisdiction and not with remedies.

305. I can now return to the question of control and effective control. I refer to the argument of Professor Pellet in CR 2006/8, pages 33 to 39, and CR 2006/10, pages 38 to 40 and 46 to 47. In my submission, this concept must be applied in the context of the actual provisions of the Genocide Convention. The *Nicaragua* case rested for the most part upon customary or general international law and the optional clause. In consequence, the normal principles of State responsibility applied. In the present case the Genocide Convention is not limited territorially and the Court so held in paragraph 31 of the 1996 Judgment. However, the question of control must still be applied contextually and therefore in relation to the obligation to prevent and punish acts of genocide

committed outside the territory of the State. The application of the Convention, if it were to be on the basis of global control, would become chaotic and extra-legal. If one looks at the argument of Professor Pellet (CR 2006/10, pp. 46-47), you will see that he does not explain how the requirements of intention, for example, would apply.

306. In this context we see again the use by our opponents of general principles of State responsibility completely divorced from the applicable law and the provisions of the Convention. Thus, reliance is placed by our opponents upon Articles 4 and 8 of the Articles of the International Law Commission concerning State responsibility. If I can refer to the text of Article 8:

“The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of that State in carrying out the conduct.”

307. If these formulations are to be applied as a means of applying the Convention, then serious difficulties result and Professor Pellet is very frank on this subject. As he admits, relating the specifics of the *mens rea* of genocide to the modalities of attribution and global control leads to serious problems. The solution proposed by counsel for Bosnia and Herzegovina appears to be to recommend a doctrine of strict responsibility.

308. Madam President, my final topic is the Republika Srpska, which was discussed at length by my distinguished opponents and, in particular, by Ms Karagiannakis (CR 2006/4, pp. 10-12); Professor Condorelli (CR 2006/10, pp. 10-27); and Professor Pellet (*ibid.*, pp. 40-44). The theses counsel for the other side propagate call for some brief commentary.

309. As in the Reply (pp. 788-816), the main thesis is to the effect that the Republika Srpska was not a State. My first point— and I know I am repeating myself— is that, for present purposes, the issue of statehood is not conclusive. The central question is that of State responsibility and the question of control. There is substantial evidence that from May 1992 onwards the Republika Srpska was a separate entity with its own armed forces. This is clear from third party sources, including the CIA study, *Balkan Battlegrounds*, and references are provided (*Balkan Battlegrounds* 2002, Vol. I, Chapters 15 and 16 (pp. 122-130), and Vol. II, Annex (pp. 239-253)).

310. The approach of the applicant State tends to veer away from legal analysis as a result of the unattractive exceptionalism, which is applied, to Serbs. Madam President, the appearance of secessionist States was the result of factors in the region which were of general application. The appearance of Republika Srpska as a separate political body was simply a replica of developments in Croatia and elsewhere. But, of course, when the Republika Srpska developed separate institutions counsel for the applicant State tells this Court that this is a preparation for genocide, or for a Greater Serbia.

311. In actual fact, the military arrangements made by the Serbs were clearly defensive as appears from the account in the CIA history, in which the following passage appears:

“Although most of the Serb troops in Bosnia served in the ranks of the JNA, Bosnian Serb Territorial Defense and volunteer units formed an important segment — and, at the start, a . . . heavily engaged one — of the Serb forces. Drawn from the towns and villages now contested between Serbs and Muslim-Croat armed forces, the TO and volunteer units formed the Serbs first line defense (or offence). Although volunteer units were nominally formed separately from the TO, in practice most volunteer troops, as counted by the JNA, appear to have been incorporated by design into the TO when fighting erupted. The JNA had continued the practice begun during the Croatian war of forming separate volunteer units, but in Bosnia its purpose was to legitimise the arming of local Bosnian Serbs. When the budding Serbian Republic of Bosnia and Herzegovina (SRBH) activated its municipal, brigade-level Territorial Defense staffs — which the Serbs had appropriated from the Bosnian Republic TO — most of the volunteer units recruited by the JNA were folded into the local TO formation and ceased to exist as separate entities. In addition to slipping these volunteers into the TO, the JNA supplied some weapons directly to TO headquarters and units.” (*Balkan Battlegrounds*, Vol. 2, p. 240.)

However, in the world of counsel on the other side of the Bar, such preparations are only concerned with genocide and with an alleged programme for a “Greater Serbia”.

312. A remarkable feature of the presentation by the applicant State is the ability displayed to ignore the substantial evidence of the separate political existence of Republika Srpska and the role played by the Bosnian Serbs in the high-level diplomacy of the International Conference for the Former Yugoslavia and the Vance-Owen plan. The diplomacy was based on the three parties, the Croats, Muslims and Serbs, who were treated as equal negotiating partners. All this evidence has been ignored by counsel for the Applicant.

313. Then there is the question of recognition. The other side point out that the Republika Srpska was not *recognized* as a State (for example, see Reply, p. 797, para. 104).

314. This, in the circumstances, cannot be in any way conclusive. As the available documents indicate, it was accepted as a major political player in the Vance-Owen negotiations. Moreover, the Republika Srpska was the object of sanctions imposed by the Security Council.

315. Counsel for the Applicant have made several generalized references to Security Council resolutions but failed to explain their precise relevance in relation to the issues of State responsibility.

316. I turn now to the question of the assistance provided by the FRY to the nascent Republika Srpska. Once again, such assistance cannot provide critical indications for the purposes of State responsibility. Co-ordination and assistance do not constitute evidence of subordination. Indeed, the evidence available shows that at key periods relations between the Republika Srpska and the FRY were very bad.

317. The applicant State continually avoids any reference to the circumstances in which the Serbs in Serbia proper found it necessary to provide assistance to the Serb communities in Bosnia. In particular, counsel for the applicant State have made several references to the Second World War in the context of genocide but have avoided discussion of the events of the Second World War in Croatia and Serbia.

318. And, Madam President, it is absurd to assert that assistance provided by one community to another community of the same national origins and culture is inappropriate and redolent of forms of domination. I recall that in the *Jan Mayen* case (*Denmark v. Norway*) the evidence included a fisheries agreement concluded by Norway with Iceland, which was disproportionately beneficial to Iceland. The background was simply the long historical association between Norwegians and Icelanders. No one would see in such a transaction evidence of domination on the part of Norway, even in light of the significance of fisheries for the economy of both those States.

319. This completes my section relating to the oral arguments. However, some aspects of State responsibility will be examined further later this week.

M. FINAL SUBMISSIONS

320. I come to some submissions. In conclusion, on the question of attribution of breaches of the Genocide Convention to the Federal Republic of Yugoslavia and its successor in the relevant period, the following submissions are presented on behalf of the respondent State.

First: As a matter of fact and law no acts of genocide occurred as alleged in the Application of Bosnia and Herzegovina in the pleadings. And the Court will be addressed on this question by my colleagues.

Second: In the alternative, if, which is not admitted, acts were committed, which, if committed by the agents of a State, would have constituted breaches of the Genocide Convention, there is no basis for the attribution of such acts to the respondent State.

Third: The Government of Bosnia and Herzegovina has failed to prove that the Government of Yugoslavia had effective control over the Republika Srpska (or other areas concerned) at the material time.

Fourth: In particular, the applicant State has failed to prove that Yugoslavia had effective control over the military or paramilitary operations in the course of which the alleged violations were committed.

Fifth: In addition, the Government of Bosnia and Herzegovina has failed to prove the existence of any specific directions or instructions emanating from Yugoslavia and relating to the planning or commission of acts referred to by the applicant State as breaches of the Genocide Convention.

Sixth: In any event the Government of Bosnia and Herzegovina has failed to prove the existence of any plan to commit genocide on the part of the Government of Yugoslavia.

321. Having completed the submissions, I must respectfully remind the Court of two related considerations. The first is the importance of applying the appropriate standard of proof. This should not depend upon theoretical concerns as to whether responsibility for breaches of the Convention is civil or criminal. It must be evident that, given the subject-matter, the standard should be rigorous and not related to a mere preponderance of evidence.

322. The second consideration involves a major issue of substance. If the Court were to adopt the interpretation of the Convention according to which the State itself is responsible for the

crime of genocide, how would the requirement of intention apply? The hypothesis would be that the Court decides that certain acts or omissions are attributable to the Government of Yugoslavia in the period 1992 to 1995. But, of course, the respondent State, in 2006, has a completely different government.

323. Madam President, distinguished Members of the Court, it is now obviously more than ten years later. It must be recalled that in the Judgment in the preliminary objections phase the Court preferred, at least on a provisional basis, the interpretation according to which Article IX of the Convention allows or might allow the imposition of some form of criminal responsibility. Moreover, in the same context the Court observed “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’”.

324. Madam President, at this point the anomalies and vexations of this interpretation of the Convention can be more fully assessed. Is it possible that some form of criminal responsibility can be imposed upon Serbia and Montenegro for the acts of leaders and officials of the Government in a different era? How, in such circumstances, can the criteria of intention be proved? And is such a form of substituted or vicarious responsibility compatible with the normal principles of justice and due process?

Madam President, I have finished my submissions today. I regret the length of those submissions. I seem to have finished early but I doubt if that will be a cause for complaint.

The PRESIDENT: Thank you, Professor Brownlie. So we assume that the Respondent would like to leave it there for day and we shall resume at 10 o'clock tomorrow morning.

The Court rose at 5.30 p.m.
