BHY

CR 2006/10 (translation)

CR 2006/10 (traduction)

Monday 6 March 2006 at 3 p.m.

Lundi 6 mars 2006 à 15 heures

10 The PRESIDENT: Please be seated. Professor Condorelli.

Mr. CONDORELLI:

THE GENOCIDE IS ATTRIBUTABLE TO THE RESPONDENT — LEGAL CONCLUSIONS (CONTINUED) (SECOND PART)

3. Republika Srpska and the VRS: attribution of their conduct to the Respondent

The creation of Republika Srpska as "part of the FRY"

1. Madam President, Members of the Court, this morning I raised various points concerning, first, a group of activities attributable to the Yugoslav State in connection with both the groundwork for the genocide and the establishment of the instruments by which it was to be carried out and, second, the active participation of *de jure* organs of that State in the actual perpetration of genocide. There is however no doubt that, from the founding of Republika Srpska (initially under the name Serb Republic of Bosnia and Herzegovina) and the formation of the Bosnian Serb army (VRS), the commission of the great majority of the crimes which together constituted genocide resulted from action by those two entities, assisted by Serb paramilitary militias. The Respondent's argument before the Court in this regard is simple, if not simplistic. That argument is twofold.

2. First aspect: either the crimes alleged by Bosnia and Herzegovina never took place or it has not been proved that they took place to the extent claimed and in the manner alleged or they did not contain the elements necessary — under the 1948 Convention — for them to be characterized as genocide. I am of course not going to reopen this matter, after the detailed showings made to the Court first in writing and then orally last week and this morning.

3. It is the second aspect which must be discussed now: that is the Respondent's denial, not of the criminal acts, but of their attribution to the Federal Republic of Yugoslavia. It is argued that from the time when Bosnia and Herzegovina gained independence and the JNA officially withdrew from Bosnian territory the crimes committed there could not in any way engage the responsibility

11 of the FRY, as the conduct in question cannot be attributed to that State. It is in effect alleged that

the conduct involved either acts by individuals or actions ascribable to entities (Republika Srpska and its army) which were not organs of the FRY and were not *de facto* acting on its behalf.

4. Obviously, the Respondent makes much, in this regard, of the *Tadić* Judgement by the International Criminal Tribunal for the former Yugoslavia, dated 7 May 1997, in which a majority of the Trial Chamber (with a dissenting opinion by the presiding judge) stated its view that:

> "on the evidence presented to it, after 19 May 1992 the armed forces of the Republika Srpska could not be considered as *de facto* organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in *opština* Prijedor or more generally"[1].

And the Respondent accuses Bosnia and Herzegovina — I have already pointed this out — of making selective and improper use of this judgment, by attaching greater importance to the views of the dissenting presiding judge (Judge McDonald) than to the decision itself.

5. Unfortunately (for the Respondent), it knows only too well that its argument based on the 1997 *Tadić* Judgment has in the meantime lost its force, ever since the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in its judgment of 15 July 1999, reversed the earlier judgment on precisely the point quoted. Basing its decision on the same facts — and it is important to note this — the appellate court concluded that the conflict in Bosnia and Herzegovina after 19 May 1992 was an international one because "the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY"[2]. It will be most interesting to hear what the Respondent has to say about this marked change in the case law, which provides striking objective support for Bosnia and Herzegovina's position. That said, the Applicant is well aware of the fact that the Court is not bound by the Tribunal's legal findings, even those which are exactly *in terminis*, especially since the Tribunal's Appeals Chamber stated that it was not following your own earlier jurisprudence. Bosnia and Herzegovina expects that, on a point of law, this Court will come to its decision independently, mindful that the facts on which the Criminal Tribunal relied in the two judgments are to be considered as established and even — as the Court will acknowledge — more firmly and broadly established today, thanks to the evidence gathered and submitted to judicial determination in the

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[1]ICTY, *Prosecutor* v. *Tadić*, case No. IT-94-1-T, Trial Chamber II, Judgement, 7 May 1997, para. 607.

[2]ICTY, *Prosecutor* v. *Tadić*, case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, para. 162.

12 course of more recent trials before the International Criminal Tribunal for the former Yugoslavia and in the course of the present proceedings.

6. Ending this brief digression, I now come to the second aspect. As you saw in our written pleadings, Bosnia and Herzegovina is convinced that all of the acts falling within the scope of genocide which were committed by Republika Srpska and its army must be deemed ascribable to the FRY. As it is not denied that, in Republika Srpska's view, its army is to be considered an organic part of its structure, we should — in order to demonstrate the merit in law of the Applicant's certitude — turn our attention without further delay to Republika Srpska, to examine its essence and to analyse the true nature of its relations with the FRY during the years of genocide. I suggest that we begin the examination of these relations by first adopting the point of view of Republika Srpska; we will then change perspective and will look at the same relations, as it were, from another standpoint: that of the FRY.

7. Madam President, the historical process leading up to the proclamation of Republika Srpska is well known, having been the object of thorough studies and of the presentations last week. I do not intend to enter into detail now on this subject. For the purposes of my analysis, it suffices to observe that the creation of Republika Srpska resulted from the conjunction of two wills. First, the will of the Serbian-Montenegrin State, under the banner of the "Greater Serbia" ideology, to maintain its hold over the Serbs of Bosnia and over the Bosnian territory seen as belonging to them, by preventing at all costs their "abandonment" — so to speak — to control by another independent State with a non-Serb majority historically seen as hostile, if not an enemy; second, the will of the Bosnian Serbs not to be cut off from Serbia and to remain under its protection against the dangers which would arise (according to very widespread fears) from the inclusion of their territory in a State with a non-Serb majority. For my presentation, however, the configuration actually given to Republika Srpska from the time it was formed is of greater importance than the historical process having given rise to it and the motives underlying it. And, in studying that configuration, what better way than to take a look at the founding documents, which should tell us not only how the entity thus formed was going to be shaped but also explain the fundamental

13 choices prompting its structure and functioning: I wish to speak about the Constitution of

Republika Srpska at that time and about several other crucial earlier documents on the basis of which it was shaped.

8. The first document I am going to ask you to consider is the first declaration by the "Assembly of the Serb People in Bosnia-Herzegovina", which was proclaimed and founded on 24 October 1991 by a meeting of Bosnian Serb Members of Parliament determined to take action against the majority decisions taken by the Parliament of the Socialist Republic of Bosnia and Herzegovina leading towards the country's independence. Besides the decision to hold a referendum on the following 9 and 10 November to enable the popular will of the Bosnian Serbs to express itself, the Assembly was on the same day to adopt a declaration containing the following passage:

> "3. The Assembly of the Serb people in Bosnia-Herzegovina solemnly declares that the Serb people has historic rights and interests in living in a single federal State together with other parts of the Serb people as well as with other peoples sharing the same desire. No one can deprive the Serb people of these rights and interests."[3] *[Translation by the Registry.]*

9. Another document from that same day, adopted by the same Assembly, is entitled "Decision of the Serb people of Bosnia-Herzegovina to remain in the common State of Yugoslavia"[4] and notes the determination that "the Serb people in Bosnia-Herzegovina shall remain in the common State of Yugoslavia together with Serbia, Montenegro, the Serb Autonomous Regions of Krajina . . . ".

10. Madam President, it is clear, the will firmly expressed by the representatives of the Bosnian Serbs is not in the least to move towards the founding of a new State through secession from Bosnia and Herzegovina: what is desired, what is decided, is to remain within the State of all the Serbs, even if this could only be achieved at the expense of the territorial integrity of Bosnia and Herzegovina, that is to say in breach of fundamental principles of international law. This resolute will was reiterated and even more vigorously manifested in the declaration of 9 January 1992 whereby that same Assembly proclaimed the "Republic of the Serb People of Bosnia-Herzegovina"[5]. This declaration first sets out a preamble noting, among other things, that

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[3]Declaration by the Assembly of the Serb people in Bosnia-Herzegovina, Sarajevo, 24 October 1991, published in the *Official Gazette of the Serb people in Bosnia-Herzegovina*, No. 1/92 (15 January 1992), p. 5.

[4]*Ibid.,* p. 1.

[5]*Ibid.*, No. 2/92 (27 January 1992).

14 the consent of the Bosnian Serb people to co-exist with other ethnic groups in the Republic of Bosnia and Herzegovina had been given strictly on the condition that Bosnia and Herzegovina remain within the federal State and that, accordingly, imminent independence forced the Serb people "to defend its freedom, sovereignty, the status of a constituent people, its dignity and its future". The operative part of the declaration, referring to the "plebiscite" of 9 and 10 November 1991 and to the will expressed by the Serb people to "remain in the common State of Yugoslavia", and after holding that "it shall hereby be established and proclaimed the Republic of the Serb People of Bosnia-Herzegovina", lays down as the first founding principle: "The Republic shall be part of the Federal State of Yugoslavia as its federal unit."

11. This fundamental principle was again laid down in Article 3 of the Constitution adopted a few weeks later, on 28 January[6]. In that document the principle is fleshed out and applied in various ways. Thus, for example, Article 6 provides that citizens of the Republika Srpska also hold Yugoslav nationality, as well as being entitled (as specified in Article 34) to call themselves Yugoslavs. Article 109 establishes the right and duty of all citizens of Republika Srpska to protect and defend not only the sovereignty and the territorial integrity of Republika Srpska, but also those of Yugoslavia, by co-operating with the JNA and the territorial defence forces. Articles 164 to 167 lay down various procedures for the participation of the competent organs of Republika Srpska in the legislative activity of the Yugoslav Parliament through the presentation of draft laws. Further, Article 180 governs the appointment of representatives of the Bosnian Serbs to various representative bodies in Yugoslavia and Article 181 specifically prescribes the procedures for electing legislative representatives of Republika Srpska to sit in the Yugoslav Parliament.

12. It is easy to see: the portrait which Republika Srpska drew of itself in its own Constitution at its birth does not look anything like the picture of a sovereign State, which the Respondent claims it to be! Has anyone ever seen a sovereign State all of whose nationals are by law citizens of another sovereign State and under a duty to defend that State by force? Has anyone

15 ever seen a State take steps as regards granting or continuing to hold citizenship in another State? Has anyone ever seen a sovereign State whose law arranges for the election of members of

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[6] *Ibid.*, No. 3/92 (16 March 1992).

parliamentary bodies of another sovereign State to represent the interests of the people of the first State in those bodies? In summary, the Respondent's argument that Republika Srpska was a State subject of international law, even without having been recognized (no other State having in fact recognized it, not even the FRY), this argument does not hold up for the various reasons expounded at length in Bosnia and Herzegovina's Reply, but especially because the fundamental law of Republika Srpska, its birth certificate, refutes that argument *expressis verbis*! The fact that later on Republika Srpska, with an eye to the peace agreements being prepared and by way of an amendment to its Constitution[7], was to call itself a sovereign State makes no difference here: it was proclaiming itself independent of Bosnia and Herzegovina, certainly not of the FRY; it openly held itself out at the outset as part of the FRY and was to continue to do so! I repeat the fundamental principle: "The Republic shall be part of the Federal State of Yugoslavia as its federal unit."

13. While the documents I have commented on, in particular the Constitution of 28 January 1992, do antedate the (official) withdrawal of the JNA, which was also supposed to symbolize the withdrawal of the FRY from a territory which had previously lain within its own sphere of sovereignty but had in the meantime become part of the territory of another, newly independent, State, we see from the consolidated version of Republika Srpska's Constitution, dated 17 December 1992[8] (i.e., seven months after the withdrawal) that the version from January was indeed significantly touched up, in an effort to make Republika Srpska look, from the outside, more like a real State. But the substance remained the same: in particular, the principle that "[c]itizens of the Republic shall have the citizenship of Yugoslavia and the citizenship of the Republic" (Article 6) subsisted; but, most importantly, the basic principle (Article 3), "[t]he Republic shall be part of the Federal Republic of Yugoslavia", subsisted. That, Members of the Court, raises the question: can one seriously conceive of a State as sovereign and independent when, in its own Constitution, it itself proclaims that it is not independent, therefore not sovereign? When it officially holds itself out as part of another sovereign State?

[7] *Ibid.*, No. 28/94 (11 November 1994).

[8] *Ibid.*, No. 21/92 (31 December 1992).

14. In the interest of thoroughness, I shall recall that, in any event, subsequently the Dayton Agreements of 21 November 1995 were expressly to answer the question of Republika Srpska's independence in the negative. In the first place, Article X of the Framework Agreement stipulated that the Federal Republic of Yugoslavia and Bosnia and Herzegovina "recognize each other as sovereign independent States within their international borders"[9], the borders of Bosnia and Herzegovina obviously encompassing Republika Srpska's entire territory. Secondly, it should be recalled that Annex 4 of the Framework Agreement lays down the Constitution of Bosnia and Herzegovina, Article III, paragraph 3 *(b)*, of which explicitly states that the Constitution prevails over the constitutions of the entities making up Bosnia and Herzegovina (including Republika Srpska) and supersedes any inconsistent provisions in them[10]: in other words, Bosnia and Herzegovina is a federal State having the status of subject of international law, a status not however enjoyed by the two federated entities, that is, Republika Srpska and the (Croatian-Muslim) Federation of Bosnia and Herzegovina. Moreover, as we know, since Dayton the conformity of the Constitution of Republika Srpska with that of Bosnia and Herzegovina is subject to internal oversight, by the Constitutional Court of Bosnia and Herzegovina, and also to international oversight, under the auspices of the Council of Europe, through opinions issued by the "Venice Commission"; incidentally, these have been largely followed and have led to the adoption of waves of successive amendments[11].

15. But let us return to the era of the genocide: as I have already pointed out, Republika Srpska's self-portrait does not look anything like the picture of a sovereign State. By contrast, it must be said that the self-portrait is perfectly lifelike if credence is given to the proclaimed intention to ensure that Republika Srpska remained a component of the federal State, in short, a

17 territorial unit (or federated state) part of a greater State grouping: exactly the type of entity whose acts are attributable, under the principles of international law governing State responsibility, to the federal State, as indicated in Article 4 of the Articles issued by the International Law Commission.

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[9] A/50/790, p. 4.

[10] *Ibid*., p. 64.

[11] For example, Venice Commission, CDL (1996)070e-restr Strasbourg, 27 September 1996, "Compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia and Herzegovina following the adoption of amendments LIV-LXV by the National Assembly of Republika Srpska".

16. Yet, Madam President, Members of the Court, understanding how Republika Srpska saw its own relations with the FRY is not all there is to it: it takes two to marry! In other words, Republika Srpska's desire to be "a part of the Federal Republic of Yugoslavia" could be fulfilled only on one condition: that it closely matched the desire of the latter.

17. In fact, that desire was a foregone conclusion, because, as we know, the creation of the RS was the product of political impetus within the Government of the Federal Republic of Yugoslavia and could not have succeeded without action and support by it. However, the inclusion of Bosnian Serbs, and of the territory considered to belong to them, as "a part of the FRY" had to be accomplished covertly by the FRY, so as to respect, at least on the face of it, the series of mandatory resolutions of the Security Council, and of the General Assembly, demanding its withdrawal from the territory of Bosnia and Herzegovina. And indeed, the face of compliance was to be maintained by setting up a "State" and an army formally distinct from the Federal Republic of Yugoslavia but in fact totally supported by it and totally incorporated in substance into its own organic structure. The decisions of the International Criminal Tribunal for the former Yugoslavia brim with evidence of this plan, which consisted of an attempt to fool the international community by concealing behind an ostensible separation the continuation of the FRY's stranglehold on the Serb part of Bosnia and Herzegovina: one example, but an especially telling one, to this effect is the *Brdjanin* Judgment of 1 September 2004, of which I shall shortly quote the most significant

18 passage (although I have, Madam President, taken the liberty of reprinting a longer excerpt, also highly relevant, in a footnote)[12].

18. Total support, I said: systemic integration. That is easy to show here before the Court, after the overwhelming, compelling evidence presented in the oral statements made by Bosnia and Herzegovina last week and still today. You have been able to see that in this case the word "support" does not mean backing, even very significant backing, given to an entity in need of outside help to carry out a particular action. Here, "support" means that the entity in question, Republika Srpska, was kept alive from the very beginning by the FRY, that all of its means of action, military and other, were furnished to it by the FRY, that this was entirely a matter of choice by the FRY, as a tool of its policy.

Republika Srpska's dependence on the FRY

19. Madam President, allow me to cite word for word paragraph 15 of United Nations General Assembly resolution 49/10 of 8 November 1994: the Assembly

> "[c]alls upon all parties, in particular the Federal Republic of Yugoslavia (Serbia and Montenegro), to comply fully with all Security Council resolutions regarding the
19 situation in the Republic of Bosnia and Herzegovina and strictly to respect its territorial integrity, and in this regard concludes that their activities aimed at achieving integration of the occupied territories of Bosnia and Herzegovina into the

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[12] *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, not yet available in French.

> "150. From 1991 onwards, the main objective of the SDS, as well as of the authorities in Belgrade, was to preserve SFRY as a State and to ensure that Serbs would continue to live in a single State[381]. The secession of BiH was expected to have a consequential impact on the SFRY and the Bosnian Serbs who would find themselves in a minority and without a unified territory linked to the Republic of Serbia. The importance given to the Posavina Corridor linking the Bosnian Serbs of the Bosnian Krajina to the FRY indicates the significance of the ties between the former and the latter[382].
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> 151. The Trial Chamber is satisfied that, in the months preceding the period covered in the Indictment, the SFRY was already making preparations to cover-up the 'overall control' it planned to exercise on the Bosnian Serb Army once BiH gained independence and that this plan needed to be put in place as international pressure on Belgrade mounted . . .
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> The Trial Chamber is satisfied that while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY:
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> > 'Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationships, may tacitly suggest to groups who are in de facto control that responsibility or the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.'[393]
>
> The Trial Chamber is thus satisfied that the steps taken to create a VRS independent of the JNA were merely a ploy to fend off any potential accusations that the FRY was intervening in the armed conflict taking place on the territory of BiH and to appease the requests of the international community to cease all involvement in the conflict."

> administrative, military, educational, transportation and communication systems of the Federal Republic leading to a *de facto* state of occupation are illegal, null and void and must cease immediately"[13].

20. As you have heard, these words are clear and carry undeniable legal weight. In extremely firm language the General Assembly characterizes the situation created by the FRY in the "occupied" territories (this is the term used) of Bosnia and Herzegovina, as one actually intended to result in a "*de facto* state of occupation". This *de facto* state of occupation, which the General Assembly condemns while demanding that it must cease immediately, is described as resulting from activities *aimed at achieving integration of the territories in question into the administrative, military, educational, transportation and communication systems of the Federal Republic*.

21. I believe, Madam President, that there could be no more cogent summary of the argument presented and demonstrated to you by Bosnia and Herzegovina. Allow me to recall the main elements of that argument.

22. Mr. Torkildsen's address this morning highlighted first of all the fact that Republika Srpska was fully integrated into the economic, financial and monetary structures of the FRY, organized, managed and fully controlled by the latter's governmental institutions. In this connection, it is particularly significant to note that the National Bank of Republika Srpska (NBRS) was totally subordinate to the National Bank of Yugoslavia (NBY) and, in particular, received funds from the latter to cover the budget deficits of Republika Srpska: funds consisting mainly, as you have heard, of money printed in Belgrade. In short, Republika Srpska was encompassed and integrated within a single economic space, governed in all respects by the authorities of the FRY. And it is obviously this total unity of the economic space which explains the integration of the administrative, military, educational, transportation and other systems to which the General Assembly referred.

23. You will observe, Members of the Court, the surprising similarity, in terms of unity and integration, between this analysis and the one expounded on 9 January 1993 by the President of
20 Serbia, Slobodan Milošević himself, before the entire Serb leadership (including the leaders of Republika Srpska) at the meeting of the "Council for Co-ordinating Positions on State Policy"

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[13] A/RES/49/10.

described by the Deputy Agent of Bosnia and Herzegovina, Phon van den Biesen, on 3 March[14]. You were able to hear the remarkable observations of Mr. Milošević when he spoke of the existing *de facto* unity between the FRY, Republika Srpska and Republika Srpska Krajina on the "political, military, economic, cultural and educational" level, and noted that the question to be asked was: "how to legalise that unity . . . how to turn the situation, which *de facto* exists and could not be *de facto* endangered, into being *de facto* and *de jure*".

24. Mr. Torkildsen's address also illustrated the overall budgetary situation of Republika Srpska and showed that, in 1993 for example, 99 per cent of its budget was financed by Belgrade and that, of this 99 per cent, 95 per cent was used for military expenditure. There was no change in that situation throughout the period of the genocide. To this should also be added the salaries of all the officers in the army of Republika Srpska, which were defrayed — and I shall return to this — directly by the FRY. In other words, not only did all the funds needed to perpetrate the genocide come from Belgrade, but Belgrade was in fact responsible at all times for the survival of Republika Srpska, in any and all areas, just as it had been responsible for its establishment.

25. It was therefore no exaggeration to speak of total support on one side and complete dependence on the other! Indeed, the extent of that support and of that dependence is undoubtedly the most decisive confirmation imaginable of the fact that, for the government leadership in Belgrade, the RS represented the *longa manus* of their own policy, the utterly reliable instrument of their efforts to promote "Greater Serbia".

26. Allow me to comment briefly on the expression "complete dependence", which, as I have just shown, precisely epitomizes the relationship between Republika Srpska and the FRY. As I mentioned this morning, this was in fact the expression that your Court used in paragraph 110 of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against*

21 *Nicaragua*: it suggested that, if the "complete dependence" of the *contras* on United States aid had been proved, it would then have been "right to equate the *contras,* for legal purposes, with an organ of the United States Government . . ."[15]

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[14]Phon van den Biesen, "The Respondent's continued presence", CR 2006/8, para. 72.

[15]Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986,* p. 62, para. 109.

27. I intend subsequently to go back over the precise legal consequences to be drawn in this case, in the light of your Court's findings, from the "complete dependence" of the RS (and of its army) on the FRY. For the moment, I shall confine myself to observing how far-fetched it is to speak of Republika Srpska as an independent State which — according to the Respondent[16] — though not recognized, satisfied the "conditions of statehood". Far-fetched, in this instance, not so much because of the language used in the basic texts of Republika Srpska, but because of the reality on the ground: the reality of complete and utter dependence on Belgrade, which provided virtually all necessary means of subsistence. Merely on the basis of the elements cited up to now, Republika Srpska is strikingly reminiscent of the type of situation described by Professor Roberto Ago in his seventh report to the International Law Commission in 1978[17], when he argued that "[s]ometimes the entity which it is desired to represent as a separate State or Government is, in fact, wholly subject in its actions to the State which created it . . ." And he went on to say that "[t]he actions of the organs of the entity in question are then directly attributable to the latter State . . . in the same way as those of its own organs, or even those of a local authority, a region, a dependent colonial territory". You will see how pertinent these words are to our case: the case of Republika Srpska, which proclaims itself to be a component part of another State and which is in fact treated as such by the latter, by being taken fully under its wing in a manner that would be the envy of any territorial authority enjoying such a status *ex jure*!

28. Moreover, the factual data demonstrating Republika Srpska's complete dependence upon the Federal Republic of Yugoslavia render utterly superfluous any further discussion of the question whether the Dayton Agreements imply — as the Respondent claims — recognition of Republika Srpska as a separate and independent State. The Contracting Parties to the Framework Agreement are, as we know, three in number (Bosnia and Herzegovina, Croatia and the FRY); it is
22 true, however, first that the text refers to Republika Srpska in its preamble, taking note of the latter's authorization of the FRY to sign on its behalf the relevant parts of the peace plan[18]; and secondly that the Framework Agreement also refers, in respect of various specific issues, to

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[16]Counter-Memorial, pp. 122 *et seq.*; Rejoinder, p. 578.

[17]*Yearbook of the International Law Commission*, 1978, Vol. II, p. 52, para. 64, footnote 105.

[18]A/50/790, p. 2.

annexes initialled by, among others, Republika Srpska. But the aim of this reference to Republika Srpska, like the reference to the (Croatian-Muslim) Federation of Bosnia and Herzegovina, was clearly not to recognize their status as independent States, since on the contrary the Dayton Agreements expressly defined Republika Srpska and the Federation as component parts of the "independent and sovereign" State constituted by the Republic of Bosnia and Herzegovina: this is a point that I explained a few minutes ago (see above, paragraph 14). The aim was to involve all the actors, whatever their status, in the peace process, in order to maximize its chances of success: this is a routine practice in the Security Council. Moreover, it is well known that, to prevent any misunderstanding about the status of Republika Srpska, the latter was not allowed to come to the negotiating table under its own name, or to sign the Dayton Agreements.

29. Two additional comments should be made on the subject of the negotiation and conclusion of the peace agreements. As regards the negotiation, it is particularly noteworthy that representatives of Republika Srpska were able to participate exclusively as members of the Yugoslav delegation headed by the President of Serbia, Slobodan Milošević: that is an arrangement highly reminiscent of the practice followed by numerous federal States, which, when it comes to participating in international conferences required to negotiate treaties impinging on the spheres of responsibility of their federal entities, agree to include representatives of the latter in the national delegation. Regarding the conclusion of the Dayton Agreements, it was the Federal Republic of Yugoslavia which provided written assurance to the other parties that it would take all necessary steps "to ensure that the Republika Srpska fully respects and complies with commitments . . ."[19]. This was an assurance given wittingly, in view of the plenipotentiary powers

23 available to the Federal Republic of Yugoslavia to make the Republika Srpska do what it had to do! If the FRY agreed to act as absolute guarantor, bluntly declaring itself to be in a position to "ensure" the desired outcome, it was because it possessed (and acknowledged that it possessed) total leverage over the conduct of Republika Srpska! A leverage much more convincing than the reference to a mere promise, of the kind resulting indirectly from the request made by Republika

[19]See Reply, pp. 465 *et seq.*, for references to the different letters from FRY representatives containing this formula, which are reproduced as annexes to the Dayton Agreements (A/50/790).

Srpska to the FRY for the latter to assume "the role of guarantor that Republika Srpska shall fulfil all the obligations it took" (letter of 20 November 1995, annexed to the Dayton Agreements)[20].

30. It is really not worth elaborating on the allegedly independent status of Republika Srpska. Nor is it worth straying into a detailed discussion of the argument which the Respondent seeks to deploy on the basis of the only case that it cites where Republika Srpska supposedly refused to give in to pressure from the FRY, namely when the "Vance-Owen" plan was under consideration in 1993[21]. A single case of disagreement! But in any federal system, whether in the United States, Canada, Switzerland or the Russian Federation, it would be a dream come true for the federal government to encounter serious opposition from any federal unit on only one occasion! Moreover, the fact that Republika Srpska, despite its refusal to conform, continued to enjoy unconditional support from the FRY, raises serious suspicions!

31. But let us leave that point aside, especially since the Respondent — no doubt realizing the obvious weakness of the argument to the effect that, prior to the Dayton Agreements, the RS was a sovereign State — recognizes that in the final analysis the status of statehood is not of decisive importance for purposes of attribution[22]: and it is right on this point, as we know that it can easily happen that a State engages its international responsibility for the act of another State, as is confirmed by various articles of the International Law Commission text on responsibility, for example, Article 16, etc. On the other hand, what is of decisive importance for the Respondent is

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its claim that, from early March 1992, large parts of the territory of Bosnia and Herzegovina were under the control of the armed forces of Republika Srpska and not (or no longer) those of the FRY. The RS — it is alleged — had its own military apparatus, which was not subordinate to Belgrade.

32. That this was not so has already been conclusively established by the evidence provided by Bosnia and Herzegovina concerning Republika Srpska's complete dependence on Belgrade in all areas, as I have just indicated. However, the matter is readily rebuttable in specific terms, in light of the equally specific evidence placed before the Court concerning the armed forces of Republika Srpska, namely the VRS.

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[20] A/50/790, p. 125.

[21] Counter-Memorial, pp. 287-290; Reply, pp. 805-807.

[22] Rejoinder, p. 579, para. 3.2.3.9.

The armed forces of Republika Srpska and their relationship with the Respondent's military machine

33. Madam President, Members of the Court, allow me to make a non-exhaustive list of the facts proved to you by Bosnia and Herzegovina regarding the military machine of Republika Srpska, the VRS, and its relations with the Yugoslav army (first the JNA, subsequently the VJ).

(1) The army of Republika Srpska was created entirely out of nothing by Belgrade, which had previously intended a part of the Federal Yugoslav Army (JNA) for this: the 2nd military district. This, with its military personnel, its organization, its general officer commanding (General Mladić) and his staff, was given a new name. All the personnel concerned had been carefully chosen so that their loyalty to the Serb cause could be counted on. Extra military personnel from Belgrade were then authorized throughout the period concerned, and there was routine rotation of men between the two armies.

(2) On its formation in 1992 the army of Republika Srpska was fully equipped by the JNA with all the necessary weapons, equipment and materiel for its operations.

(3) *All officers* in the VRS remained under FRY military administration, which continued to deal with all aspects of management of their military careers and their personal circumstances, even after the Dayton Accords. Their salaries, as well as the salaries of all other military personnel

25 under contract, were still paid from Belgrade without a break, including (until 2002) that of the supreme commander of this army, General Mladić. The same applied to retired pay, including such pay for General Mladić (who received it until November 2005). Officers carried out their duties by transferring from the VRS to the JNA (subsequently the VJ) and vice versa according to the needs of the moment. In short, the entire command structure of Republika Srpska during the years of genocide and beyond consisted of officers who retained their status as members of the armed forces of the FRY and were thus *de jure* organs of the latter, intended by their superiors to serve in Bosnia and Herzegovina with the VRS. This is true in particular of members of the staff of this army, including all of the superior officers currently on trial before the Criminal Tribunal for the former Yugoslavia (such as General Dragomir Milosević or Colonel Pandurević), even those already sentenced for crimes relating to the events in Srebrenica in 1995 (such as General Krstić, Lieutenant-colonel Obrenović and Captain Momir Nicolić), even those who are still wanted such as General Mladić, general

officer commanding the VRS since its inception throughout the years of genocide and after, who is accused, as we know, of genocide precisely because of everything that happened in Bosnia and Herzegovina from 1992 until the Srebrenica massacre in 1995.

(4) From 1992 and during the entire period of the genocide, the VRS continued to receive from Belgrade the weapons, materiel, supplies and services required for its operations. Direct channels for sending requests, verifying requirements and the delivery and distribution of military or other materiel remained open and were regularly used according to standardized procedures.

(5) The VRS always took concerted action with the JNA (subsequently the VJ) in the context of overall strategic and operational planning decided upon in Belgrade. During its operations it regularly had the benefit of assistance, support, services (including intelligence) and air surveillance from competent State and federal army agencies. Information on military operations completed was exchanged on a routine basis. Reports giving Belgrade details of various military engagements by the Bosnian Serb armed forces were regularly submitted.

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(6) Many operations were carried out jointly, through the planning and implementation of appropriate task sharing.

34. Madam President, we already know very well why the FRY gave Republika Srpska an army seemingly independent of the JNA (subsequently the VJ): I refer on this subject to the very eloquent passage in the 2004 *Brdjanin* Judgement, in which the Trial Chamber declared itself convinced (I will quote the passage in English because the French text is not available on the Tribunal site) that:

> "the steps taken to create a VRS independent of the JNA were merely a ploy to fend off any potential accusations that the FRY was intervening in the armed conflict taking place on the territory of BiH and to appease the requests of the international community to cease all involvement in the conflict"[23].

35. If now we put together all the facts that I have just systematically set out, it is easy to appreciate the precise technique used by the FRY in order to pretend to comply with the requirements of the international community while actually pursuing its policy and actions with no real change (albeit with purely cosmetic modifications); this was simply an attempt to conceal the

[23]ICTY, *Prosecutor* v.*Brdjanin,* case No. IT-99-36-T, Judgement, 1 September 2004, para. 151.

real situation by severing the formal legal link with a substantial part of its army while keeping the entire substance of that link intact. In short, the JNA (later known as the VJ) and the army of Republika Srpska were two separate armies co-operating *inter se* in appearance only: in fact they formed a single army. In other words, all the constituents of the VRS retained their effective status as organs of the FRY and continued to operate as elements of the "organic structure" of that State, while the appropriate legal label was removed and replaced by another, purely artificial because completely ineffective, as an organ of a different State, Republika Srpska — a Republika Srpska which itself was nothing more than a simple tool in the hands of the FRY, as I have already shown.

36. Madam President, Members of the Court, Bosnia and Herzegovina is convinced that the Court will want to strip away this camouflage, to bring to light the truth that strenuous efforts have
27 been made to conceal, and heartily to condemn the FRY's attempt to deceive the international community. In so doing the Court will bring itself into line with the political organs of the United Nations, which have also recognized the truth that the FRY was trying to conceal behind a false façade, as is shown by the many General Assembly and Security Council resolutions that we have cited during our pleadings. Allow me to suggest that the legal path to follow is a straightforward one, as I observed this morning in my introduction. This is the path that the International Law Commission indicated when it emphasized a principle firmly anchored in the conscience of the international community, namely that: "a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law"[24].

37. As we have shown, during the genocide years the VRS "in truth" acted as an organ of the FRY in all respects. In terms of effective control, it was in all respects integrated into the organic structure of the said State and, through its conduct of a range of military operations, exercised executive functions on that State's behalf. In short — notwithstanding its label — the VRS operated "as a State organ within the organic structure of the State". All of its acts, all of its operations, during the conflict in Bosnia and Herzegovina must be characterized under the

[24]ILC Report, Fifty-third Session, 2001, A/56/10, p. 95, para. 11 of the commentary on Art. 8 (*sic*: Art. 4).

principles of international law, as acts attributable to the FRY and giving rise to its international responsibility.

Republika Srpska and the VRS as organs of the Respondent

38. Madam President, Members of the Court, I have argued that both the RS and the VRS (Republika Srpska and its army) during the genocide years are characterizable under international law as organs of the FRY, although that State modified its internal law at the time so as to deny them that status officially, in order to avoid incurring international responsibility for their actions. In short, I insist that this is exactly the type of situation that the International Law Commission had

28 in mind when it painstakingly drafted Article 4, paragraph 2, of the Articles on the international responsibility of States, in order to make it clear that a State cannot avoid international responsibility for the conduct of its organs by manipulation (fraudulent or otherwise) of its internal law.

39. I would now emphasize — in so far as this is not already clear — that the principle of international law governing attributability that is relevant here, and which Bosnia and Herzegovina asks you to apply, is not, therefore, the one that the Commission sought to codify in its Article 8, on situations where the actions of individuals are to be regarded as acts of a State. In fact none of the actions of the RS and the VRS concern the conduct of private individuals or groups attributable to the State because it resulted from instructions or direction or control by organs of the State. On the contrary, the actions here are to be regarded as carried out directly by organs of the Yugoslav State, which is exactly what both Republika Srpska and its army effectively were.

40. Do I need to stress the point that acceptance of this argument by your Court does not call for any change of jurisprudence by you on the topic dealt with by the International Law Commission in said Article 8? Let me be very clear: Bosnia and Herzegovina is *not* asking you to abandon what has come to be called the "*Nicaragua* test" or to replace it by what is currently called the "*Tadić* test", simply because neither of these, as formulated, is relevant in assessing the validity of the present argument.

41. As regards the "*Nicaragua* test", it is quite obvious that the *de facto* situation that Bosnia and Herzegovina has described to you concerning Republika Srpska and its armed forces is in no

way comparable, even remotely, with the situation of the *contras* in Nicaragua: the *contras* were not American nationals; they did not form part of a hierarchical organic pseudo-State system structurally linked to the United States system; they were not fighting in order to incorporate Nicaragua into the United States; they did not exercise stable and effective control over a part of

29 Nicaraguan territory involving the (obviously illegal) exercise of all the functions of public authority (including the legislative function), and so on. It goes without saying that a situation with characteristics that are so different cannot be assessed by reference to a principle of law designed to determine when the conduct of individuals, acting alone or in groups, is to be regarded as the act of a State.

42. As to the "*Tadić* test" — if I may be allowed to use that expression — as proposed by the ICTY in 1999, it is true that it was formulated with the factual situation currently before you precisely in mind. However, the legal issue before the Tribunal *cannot* be treated in the same way as the question before this Court today: the issue then was whether the conflict in Bosnia and Herzegovina was to be defined as internal or international, in order to identify the rules applicable to individual criminal responsibility for war crimes, not to judge the international responsibility of a State for a wrongful act. Moreover, in the present case the wrongful act at issue is genocide, which is a crime which in no way presupposes the existence of an armed conflict, whether internal or international. Above all, however, the ICTY put the problem of defining the relationship between the armed forces of the FRY and those of Republika Srpska in a context which is not relevant to assessing the validity of Bosnia and Herzegovina's argument that I have just put to you, namely that at the critical time Republika Srpska and its army were organs of the Respondent and not entities outside its organic structure acting on its behalf. In effect, neither the "*Nicaragua* test" nor the "general control" concept (or "*Tadić* test") is of use in relation to the present argument, since they are designed to resolve the problems of attribution to a State of the conduct of individuals or groups not chacterizable as organs of the State. That is not the issue that Bosnia and Herzegovina is asking you to resolve now: it is the very different issue of when and under what conditions entities that a State is avoiding describing as its organs in order to evade international responsibility can be so chacterized.

43. Of course, should it happen that your Court is not convinced by the thesis that I have just put forward regarding the organic nature of the relationship between Republika Srpska and its army on the one hand and the Respondent on the other, the possibility that the actions of the RS and its army could still be attributed to the Respondent on some other basis, to be precise that addressed in Article 8 of the International Law Commission Articles, could still be envisaged. Professor Pellet will shortly be addressing his comments to you on this subject.

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44. I now close my parenthesis and return to the thesis that I have advanced: the RS and its army are to be characterized as organs of the FRY. The Court will doubtless wish to consider that international practice offers instructive precedents on this topic. There is a whole series of well known cases, on the basis of which scholarly opinion has devised concepts focussing on what Professor Brownlie has evocatively described as "The Puppet State Scenario". At the heart of this scenario is the notion that (I use Professor Brownlie's words):

> "[a] State cannot avoid legal responsibility for its illegal acts of invasion, of military occupation, and for subsequent developments, by setting up, or permitting the creation of, forms of local administration, however these are designated"[25].

45. These are concepts that have been applied many times in international practice: thus, for example, the jurisprudence of the European Court of Human Rights in the "Cypriot" cases cited last Friday by Professor Pellet can readily be seen as expressing the idea that the northern Cypriot republic is essentially a puppet State whose acts engage the responsibility of Turkey. These concepts are also generally accepted in legal theory: for example, among the leading sources (as well as Roberto Ago, from whose work I have already given an extract) may be cited Franco Capotorti[26], Krystyna Marek[27] and James Crawford[28]. As regards the International Law Commission, I have already explained that it was, *inter alia*, reflection on these themes that led it to adopt the broad wording of Article 4 of the text on State responsibility — language that is entirely in harmony with the notion that "puppet governments are organs of the occupant and, as such, form

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[25]I. Brownlie, *State Responsibility: The Problem of Delegation*, in *Völkerrecht zwischen normativen Anspruch und politischer Realität. Festschrift Zemanek*, Berlin, 1994, p. 301.

[26]F. Capotorti, *L'occupazione nel diritto di Guerra*, Milan, 1949, p. 92.

[27]K. Marek, *Identity and Continuity of States in Public International Law*, Geneva, 1968, p. 114.

[28]J. Crawford, *The Criteria for Statehood in International Law, British Year Book of International Law*, 1977, p. 120.

part of his legal order"[29]. The Commission text is also entirely in harmony with the proposition

31 resulting from a paraphrase of the language of this Court in the *Nicaragua* case that we have already cited: in the light of their situation of "total dependence" on the FRY, it is fully justified to regard both RS and the VRS as organs of the Government of the FRY.

4. Paramilitary units operating against non-Serbs in Bosnia and Herzegovina: attributability of their conduct to the Respondent

46. I still have to speak to you, Members of the Court, about the various forces, other than the JNA (VJ) and the army of Republika Srpska, that played a very active role in perpetrating genocide in Bosnia and Herzegovina, with — as you have heard — even more outrageous cruelty. These forces can be grouped under the head of "Serb paramilitary formations". After the overwhelming mass of evidence that Bosnia and Herzegovina has presented to you about them, both in writing and orally, after the legal findings, for which we have to thank the International Criminal Tribunal for the former Yugoslavia (even if it has yet to pass judgment on their leaders), very few words are needed in order to demonstrate that all of their acts must be attributed to the Respondent pursuant to the relevant principles of international law.

47. The paramilitary formations concerned can be divided into two categories: those that were sent from Serbia and those that were set up inside Bosnia and Herzegovina.

48. The first category consisted of groups recruited, trained, armed and organized by Belgrade specifically to take part in this genocidal war. A mass of evidence presented to the Court shows that certain of these groups answered to the Government apparatus of the Federal Republic of Yugoslavia, more precisely, the MUP (Ministry of Internal Affairs) as far as the Scorpions and Red Berets were concerned, and the JNA for Arkan's Tigers (Serbian Volunteer Guard). Another group, Šešelj's Chetnik Movement (or White Eagles) had direct ties to President Milošević. It has been established beyond all doubt that these formations operated on the ground in concert with the regular armies, that is both the JNA (the federal army) and the army of Republika Srpska, on the basis of a planned division of labour which proved horribly effective. In other words, the groups concerned were an integral part of the Serb military machine, were deployed and acted on orders

[29] K. Marek, *op. cit.*

from the military and government authorities of the FRY and often worked in a co-ordinated way
32 with other military corps to achieve the goal conditioning the action of all of them: the elimination by all means of non-Serbs from the areas of the territory of Bosnia and Herzegovina that it had been decided properly belonged to the Serbs.

49. The second category covers local paramilitary groups and formations of all kinds that were formed in Bosnia and Herzegovina following the distribution of weapons by the JNA to the Serbs of Bosnia. In its Rejoinder, the Respondent admitted that the authorities of Republika Srpska incorporated all of these groups into the structures of the VRS, placing them under the command of either the latter or Republika Srpska's Interior Ministry; this was effected by a decision of the presidency of Republika Srpska of 13 June 1992[30]. For your information, I would remind you that the ICTY carried out a specific, highly documented investigation into the incorporation of these groups in an important judgment of 2004 that I have already cited: *Prosecutor* v. *Radoslav Brdjanin* in Trial Chamber II[31]. Obviously, the official inclusion of the groups concerned into the organic structure of Republika Srpska and its army is of decisive importance in terms of the attributability of their conduct: it follows that the acts of these groups cannot be legally differentiated, as far as their attribution is concerned, from those carried out directly by Republika Srpska and its army. I ask the Court to hold that, on the Respondent's own admission, this conclusion is beyond dispute.

50. In short, Madam President, this genocidal undertaking perpetrated upon the non-Serbs of Bosnia and Herzegovina required an enormous effort by the FRY, involving the use of massive material and human resources. In terms of human resources, it was realized that the regular army (the VJ and the VRS, which, as we have seen, were in fact a single force) was insufficient; hence additional forces were needed, prompting the authorities to organize, finance, arm and support armed gangs and groups, which, while "irregular", were led by individuals answerable to the

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[30]Rejoinder, pp. 569-570 , para. 3.2.2.4. The text of the "Decision on Prohibition of Forming and Activities of Armed Groups and Individuals in the Territory of the Republic which are not under the Unique Command of the Army or the Militia", adopted by the Presidency of the Serb Republic of Bosnia and Herzegovina on 13 June 1992 is included in Ann. No. R10 r89-r90 of the Rejoinder.

[31]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement of Trial Chamber II, 1 Sept. 2004, para. 97 and note 218.

strategic and operational command of the Respondent's organs, which ensured the constant
33 co-ordination of their actions with those of the army.

51. Members of the Court, you are well placed to know that the issue of the international responsibility of a State for the acts of groups of armed irregulars and of paramilitary militias sadly arises all too often, and only recently you had just such a case before you. At present, I have no intention of talking in great detail about this subject, with systematic references to the case law, practice and academic literature. My reason for this is based on the particular, if not unique, features of the case before you now. Your Court is, in fact, not concerned in the present instance with one of those frequent examples of armed gangs or mercenaries sent abroad, on a mission of aggression or subversion, in place of units of the regular armed forces which the sending State prefers not to involve in missions of this type. Nor is this an example of local militias, possibly financed and supported from abroad, occupying a part of the territory of a State by taking advantage of the weaknesses of the State apparatus, sometimes with a view to secession. In the present case, by contrast, we have a State refusing to evacuate a territory formerly subject to its sovereignty, but which has become in the meantime an integral part of the territory of another State, and maintaining over this occupied territory, both directly and indirectly, all of its State authority, as well as all of its machinery of power, in order to commit a genocide designed to "cleanse" this territory of the ethnic groups that it views as enemies. The paramilitary formations used to this end by the FRY were not, therefore, substitutes for the organs of the State, but tools chosen to complete the range of means used by the State to achieve its desired goal: tools which were to be, and were indeed, used in a properly co-ordinated manner together with the other means at its disposal.

52. Madam President, in my view, the closest (or least distant) parallels with what I have just described, which could be used as precedents, concern human rights violations committed by paramilitary formations operating on the territory of a State with the complicity, backing and support of the organs of that State, with a view to putting down a rebellion or liquidating the opposition by illegal means. Thus, for example, the Inter-American Commission on Human

34 Rights, in its Third Report on the Human Rights Situation in Colombia of 26 February 1999[32], was prepared to accept the notion of State responsibility in the case of "joint activity between the military and the paramilitary, particularly when carried out with knowledge by superiors": in such cases — the Commission concluded — "the members of the paramilitary groups clearly act as State agents"[33]. But it also came to the same conclusion when the links between military personnel and members of paramilitary groups were sufficiently strong, even if there were no joint operations: it took the example of links which "permit the State's security forces to request that the paramilitary execute certain tasks and the paramilitary may, in turn, demand from the Military Forces the right to undertake criminal activity with impunity"[34]. Later, in the *Riofrio Massacre* case, the Commission held that the members of paramilitary groups responsible for the massacre should be regarded as agents of the Colombian State, having concluded that it was the result of a "joint operation with the knowledge of superior officers"[35]. I hardly need emphasize the extent to which these concepts are relevant to the case before us now.

53. It is also worth noting that the Special Rapporteur for "Extrajudicial, Summary and Arbitrary Executions" for the United Nations Human Rights Commission, Professor Philip Alston, in his 22 December 2004 report[36], came to the same conclusions regarding the criteria for deciding, with respect to the paramilitary groups and various types of militias and death squads which carry out these kinds of summary executions, the conditions under which they can be regarded as State organs or agents, whose conduct engages the international responsibility of the State concerned.

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[32]OEA/Ser.L/V/II.102, doc. 9, Rev. 1, 26 Feb. 1999, paras. 258-262.

[33]*Ibid.* para. 258.

[34]*Ibid.* paras. 259 and 262.

[35]Inter-American Commission on Human Rights, Report No. 62/01 case 11.654, *Riofrio Massacre*, Colombia, of 6 Apr. 2001.

[36]E/CN.4/2005/7, 22 Dec. 2004, paras. 65 and on. See notably para. 69:

> "The most important category of non-State actor within the context of this mandate are those groups which, although not government officials as such, nonetheless operate at the behest of the Government, or with its knowledge or acquiescence, and as a result are not subject to effective investigation, prosecution or punishment. Paramilitary groups, militias, death squads, irregulars and other comparable groups are well known to the readers of the Special Rapporteur's reports. There is no legal complexity in relation to this group because insofar as the Government is directly implicated its legal responsibility is engaged."

5. Conclusion

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54. Madam President, Members of the Court, I will now present my conclusions. I will draw them, if I may, on the basis of what I have just indicated to you.

55. The Applicant has shown you that all of the Serb forces, which by their acts perpetrated the genocide concerning the non-Serbs of Bosnia and Herzegovina, that is to say both forces originating in Yugoslav territory and local forces — not only the regular armies but also paramilitary formations — must be regarded as organs of the FRY, thus making their conduct attributable to the latter and engaging its international responsibility.

56. In support of this overall conclusion, in its Reply, Bosnia and Herzegovina cited a key legal argument, which, in my view, it is worth briefly revisiting. It is an argument based upon the principles of international law relating to the laws and customs of war, as codified in Articles 43 and 91 of Protocol I additional to the 1949 Geneva Conventions, adopted on 8 June 1977. I would remind you — in so far as this is necessary — that both Parties in the present case are Contracting Parties to that Protocol.

57. In your Judgment of 19 December last in the case between the Democratic Republic of the Congo and Uganda, this Court made a notable observation regarding Article 91 of the 1977 Protocol I. You stated:

> "According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces."[37]

58. In the same Judgment, you took the opportunity to emphasize that the responsibility of a State for the conduct of members of its armed forces is engaged regardless of whether those members complied with their instructions or exceeded their authority. You also chose to underscore a notion which has been broadly accepted for some time: namely that "by virtue of the military status and function", the conduct of officers and soldiers must be regarded as the conduct of a State organ even when acting upon their own personal initiative[38]. In the Judgment in

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[37] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 214.

[38] *Ibid.*, para. 213.

36 question, however, you did not need to specify who exactly were "the persons that constitute the armed forces" of a State, the entire conduct of which would therefore be attributable to it.

59. Given the nature of the present case, however, it would be useful to give some consideration to the issue of how the "armed forces" of a State should be defined. Such a definition appears in Article 43 of the same 1977 Protocol I additional to the Geneva Conventions. It reads: "The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party . . ."

60. Madam President, Members of the Court, all of the armed forces and groups actively engaged in the genocide against the non-Serbs of Bosnia and Herzegovina, regardless of whether they were part of the regular forces or of paramilitary formations, correspond fully to this definition. They were all organized along military lines. They were all placed under an appropriate command for this type of organization. For each of them, it is clear that they acted on the orders of commanders under the direction and command of organs of the FRY. For all of them, there can therefore only be one conclusion: that they were State organs of the Respondent and thus all of their conduct is attributable to that State and engages its international responsibility.

61. Madam President, Members of the Court, that is the end of my presentation. I imagine that you would like to take a break of a few minutes, after which, Madam President, I respectfully ask you to give the floor to Professor Alain Pellet. Thank you.

Le PRESIDENT: Merci beaucoup, M. Condorelli. Permettez-moi de vérifier auprès de M. Pellet si cela lui convient, ou est-ce-qu'il préféreait une pause ? M. Pellet, vous préféreriez que la Cour se lève pendant dix minutes ? Merci.

The Court adjourned from 4.20 p.m. to 4.30 p.m.

37 The PRESIDENT: Please be seated. Professor Pellet.

Mr. PELLET: Merci beaucoup, Madam President. Madame *le* president, as that is your wish, Members of the Court,

THE RESPONDENT HAS ENGAGED ITS INTERNATIONAL RESPONSIBILITY (CONTINUATION)

1. My colleague and friend Luigi Condorelli, with his usual mettle and talent, has shown that the Respondent is responsible for the genocide committed against the non-Serb groups in Bosnia and Herzegovina, quite simply because the Respondent was itself the perpetrator. Organs of the Respondent, whether part of the official organizational structure of the FRY — like the JNA or the Yugoslav and Serbian MUPs (Ministries of the Interior) — or fulfilling that function *de facto*, like Republika Srpska and the paramilitary forces, committed the acts constituting genocide (and that is the *actus reus*) with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such — a group defined negatively as being made up of all non-Serb elements in the areas controlled by "Republika Srpska", which was to be made "ethnically pure", that is the *mens rea*, it being understood that the Muslims were the most harshly affected by this genocidal policy.

2. We are now going to turn our attention to the other bases for attributing the crime of genocide to the Respondent and to its responsibility for the other acts listed in Article III of the 1948 Convention. I shall first show that, even if you do not find that the Respondent's responsibility has been incurred as a result of acts by its organs, that responsibility will nevertheless still be established by virtue of the fact that it directed and controlled the genocidal conduct of the persons, groups and entities which committed it. I shall then address the separate question of the "ancillary acts" to genocide, on the subject of which I attempted to "summarize" the legal position last Friday, without however going into detail concerning the actions constituting such acts, those actions also being attributable to the Respondent.

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I. The genocide was perpetrated under the direction or control of Serbia and Montenegro

3. Madam President, as regards the first point, the contention that the genocide was perpetrated under the direction or control of Serbia and Montenegro, I do not close my eyes to the fact that the role I have been assigned on Bosnia and Herzegovina's courtroom team is a rather thankless one: it consists of explaining to you essentially . . . what we are not pleading! In any case, I am a bit like a back or even a goalkeeper on a football or rugby pitch, going into action only when the ball gets too close to the goal — even though, in the present circumstances, we are not quite sure where the ball is, because, thus far, our opponent has been very sparing in its use of legal

arguments in its written pleadings (especially, in its Rejoinder), so that our strategy must be "offensive" and "defensive" at the same time.

4. Our fundamental thesis was set out this morning and a short while ago by Professor Luigi Condorelli, a centre forward on our team: organs of the Respondent were the perpetrators of the genocide. Thus, it is only in the alternative, "*subsidiarement*", that we are contending that, if you were not convinced by that argument, Serbia and Montenegro's responsibility would nevertheless still have been incurred as a result of the fact that, as Article 8 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts concisely but clearly puts it:

> "The conduct of a person or 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 or control of, that State in carrying out the conduct."

Two preliminary remarks are, however, required.

5. First, and I stressed this last Friday[39], genocide is made up of, or perhaps to put it more precisely, is manifested by, a set of acts — those listed in Article II of the 1948 Convention, but it is a global crime which cannot be broken down into many isolated acts by various people. What so horrifyingly distinguishes it is its mass scale, its systematic character and the intention behind it. Thus, if you consider that one or more organs of the FRY were parties to the genocide as a result of having planned or implemented it, then the Respondent is the perpetrator (or, at any rate, the co-perpetrator if you find that entities considered legally separate under international law participated in it) and it is responsible on that basis, as perpetrator. If so, there is no doubt as to the existence of responsibility; and while we may ask ourselves what impact that might have in respect of the modalities of reparation, I shall show tomorrow morning that such is assuredly not the case.

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6. Second preliminary remark: as my colleague and friend Luigi Condorelli has shown, irrefutably I think, there is obviously no doubt that organs — *de jure* organs — of the FRY participated in the genocide perpetrated against the non-Serbs of Bosnia and Herzegovina: the presidency and, above all, the President of Serbia planned it and continually oversaw the operations implementing it; the JNA, and later the VJ, its army, actively participated in it; and the same is

[39]CR 2006/7, pp. 35-37, paras. 66-70.

true of the Ministries of the Interior and the police forces of both the FRY itself and the Republic of Serbia. My earlier comment thus takes on its full significance: the responsibility of the Respondent is, in any case, incurred through the acts of its organs, defined as such under its domestic law, in accordance with the ironclad rule laid down in Article 4 of the ILC Articles.

7. In respect of the other actors in this appalling tragedy, Republika Srpska and its army, the VRS, on the one hand, and the Serb paramilitary units, on the other, I believe Luigi Condorelli has convincingly demonstrated that they as well must be considered to be organs of the FRY. Moreover, if, "by some remote chance" as the saying goes, you were to remain unconvinced of this, Members of the Court, there would hardly be any practical consequence: the Respondent's responsibility would nevertheless still be engaged under the principle set out, not in Article 4 of the ILC Articles, but in Article 8.

8. To prove this, I shall take as my starting point the Court's Judgment in the *Military and Paramilitary Activities* case. That may strike you as paradoxical, Madam President, because, as I tried to explain on Friday, the *Nicaragua* test is not transposable in all respects to the present case. But there are two clearly separate aspects to be considered in the Court's 1986 decision:

— first, and this is the very substance of the famous "test", beyond doubt the strictest conceivable in regard to attribution, you examined the methods by which the United States exercised its control and found that the contras were not totally dependent on the Americans; as strict as the conditions laid down in the 1986 Judgment may be, it seems to me that, from this perspective, both the paramilitary units having accomplished their sinister task in Bosnia and Herzegovina and Republika Srpska itself and its army, the VRS, easily satisfied them — those conditions;

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— second, there is the issue of determining the degree to which the control in question must be exercised: must it exist over each genocidal act committed by these entities or can we, in the circumstances of the case, satisfy ourselves with a determination that there was overall dependence? It is from this second angle that, I believe, we have to "forget Nicaragua", as I put it, not because that test is a "bad one", but because it is not relevant to genocide, as Luigi Condorelli has just reiterated.

9. I shall return to this second aspect, which I already referred to last week[40], after recalling the elements on the basis of which dependence might be found. I can moreover do this fairly quickly because they are essentially the same as those Professor Condorelli advanced in showing that these entities were indeed *de facto* organs of Yugoslavia at the time.

1. Republika Srpska and the VRS

10. Madam President, the Serbs of Bosnia and Herzegovina proclaimed their "independence" (that word must of course be put in quotation marks) on 28 February 1992 — when the territory which they sought to make ethnically pure was heavily occupied by the Yugoslav army, the JNA[41], and that decidedly is one element clearly justifying the view that, at least at that date, Belgrade exercised a degree of control more than sufficient to ensure that nothing could be done there without its consent[42]. It is true that the JNA purportedly withdrew later, on 19 May 1992, in response to a forceful demand by the Security Council[43]. Bosnia and Herzegovina has shown in

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both its written pleadings[44] and oral argument[45] that this withdrawal — which the Respondent coyly refers to as "relocation"[46] — was purely cosmetic and no reflection of the reality, as my friend Luigi Condorelli has also just shown:

— the reality is that this involved merely a change in name, the army of Republika Srpska, the VRS, a pure "legal fiction" in the words of Judge McDonald of the ICTY[47], having simply

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[40]CR 2006/8, pp. 33-37, paras. 60-71.

[41]See Reply of Bosnia and Herzegovina, p. 790, para. 85 (quoting ICTY *Prosecutor* v. *Duško Tadić*, case No. IT-94-1-T, Trial Chamber, Judgement, 7 May 1997, para. 124).

[42]See ECHR, *Loizidou* v. *Turkey*, *Preliminary Objections*, 23 March 1995, *Reports of Judgments and Decisions, 1995, Series A, No. 310*, para. 62, p. 24 or (Merits), 18 December 1996, *Reports of Judgments and Decisions, Series A, 1996-VI*, pp. 2234-2235, para. 52, and pp. 2235-2236, para. 56; see also *Cyprus* v. *Turkey,* Application No. 25781/94, Judgment, 10 May 2001, *Reports of Judgments and Decisions, Series A, 2001-IV*, p. 261, para. 76. See also, by analogy, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* Judgment of 19 December 2005, para. 178.

[43]S/RES/752 (1992), 15 May 1992.

[44]See Memorial, Sec. 2.3.6, pp. 77-81, or Reply, Chap. 8, Sec. 4, pp. 554-573.

[45]CR 2006/2 (van den Biesen), pp. 40-42, paras. 37-44; CR 2006/4 (Karagiannakis), p. 15, paras. 21-22.

[46]Counter-Memorial, Sec. 3.1, p. 245.

[47]Opinion appended to ICTY, *Prosecutor* v. *Tadić*, case No. IT-94-1-T, Trial Chamber, 7 May 1997, p. 5; see also the majority position, paras. 115-117, and ICTY, *Prosecutor* v. *Karadžić and Mladić*, cases Nos. IT-95-5-R61 and IT-95-5-R61, Trial Chamber, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, paras. 58 or 77. See also *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Trial Chamber, 1 September 2004, paras. 150-151.

succeeded the JNA after it was ethnically "purified", "cleansed" of its non-Serb elements (Madam President, I still have trouble uttering these words: purification, cleansing . . .)[48];

— further to this masquerade — and that is indeed what it was — the entire officer corps of this army continued to receive its pay and promotions from Belgrade (exclusively)[49]; rank-and-file troops — but not all of them — were officially paid by the authorities in Pale but the funds also came exclusively from the FRY, as Mr. Torkildsen showed very clearly in his statement this morning[50]; further, the VRS received its weapons and ammunition supplies from the FRY[51]; moreover, the Security Council was not taken in because, by a new resolution, dated 30 May 1992, resolution 757 (1992), it demanded that "[a]ction be taken as regards units of the Yugoslav People's Army in Bosnia and Herzegovina, including . . . disbanding and disarming . . ." and imposed sanctions on the FRY for having failed to comply with its earlier demands[52], sanctions which were only lifted after the Dayton-Paris Agreements of 1995;

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— and units of the VJ (the new name of the Yugoslav army) continued, massively and systematically, to lend crucial assistance in the ethnic cleansing operations carried out in Bosnia and Herzegovina[53], including (but not only) in Srebrenica, where they played a vital role[54].

The same observations follow from an examination of the role of the Yugoslav and Serbian Ministries of the Interior and the police forces under their authority[55].

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[48]See Memorial, pp. 65-66, paras. 2.3.3.2 and p. 247, para. 6.2.3.1; Reply, pp. 557-562, paras. 147-155; CR 2006/2 (van den Biesen), p. 38, para. 31; CR 2006/4 (Karagiannakis), p. 15, para. 21; CR 2006/8 (van den Biesen), pp. 40-42, paras. 7-11.

[49]Reply, pp. 649-652, paras. 308-311; CR 2006/8 (van den Biesen), p. 42, para. 12 and pp. 44-47, paras. 19-30.

[50]See also: Memorial, pp. 85-93, paras. 2.3.8.1-2.3.8.6; Reply, Chap. 8, Sec. 8, pp. 646-650, paras. 304-307.

[51]See Memorial, pp. 81-83, para. 2.3.7.1; Reply, p. 807, para. 127 and Chap. 8, Sec. 7, pp. 632-636, paras. 279-285; CR 2006/2 (van den Biesen), p. 41, para. 41 and pp. 46-47, paras. 61-66; CR 2006/4 (Karagiannakis), pp. 12-14, paras. 10-17; CR 2006/8 (van den Biesen), pp. 40-42, paras. 7-11 and pp. 54-55, paras. 60-64.

[52]See also General Assembly resolutions 46/242 of 25 August 1992 and 47/121 of 18 December 1992.

[53]See Memorial, p. 31, para. 2.2.2.15, p. 36, para. 2.2.2.18, pp. 48-49, para. 2.2.5.3, pp. 52-53, para. 2.2.5.12, p. 35, para. 2.2.5.7, p. 53, para. 2.2.5.14; Reply, pp. 573-596, paras. 166-205; CR 2006/2 (van den Biesen), p. 36, para. 23; CR 2006/5 (Karagiannakis), p. 24, para. 12, pp. 31-32, paras. 35-37, p. 34, para. 43; CR 2006/8 (van den Biesen), pp. 50-52, paras. 37-47.

[54]See Memorial, p. 35, para. 2.2.2.16; Reply, pp. 594-596, paras. 201-204; CR 2006/4 (van den Biesen), p. 39, para. 11 and pp. 40-43, paras. 16-24.

[55]See Memorial, Sec. 2.3.4, pp. 66-71; Reply, Chap. 8, Sec. 6, pp. 474-478, paras. 24-30 and pp. 597-612, paras. 206-238; CR 2006/2 (van den Biesen), pp. 49-51, paras. 71-74; CR 2006/4 (Karagiannakis), p. 13, paras. 15-16; CR 2006/4 (van den Biesen), p. 46, para. 36; CR 2006/8 (van den Biesen), p. 53, para. 53.

11. But the FRY's control over Republika Srpska was not only military in nature. As Mr. Torkildsen showed this morning, that pseudo-State was entirely dependent on the creation of monetary instruments by the National Bank of Yugoslavia, to which the National Bank of Republika Srpska, whose existence was purely theoretical, was completely subordinate[56]. I shall confine myself to recalling the words of the minutes of the meeting in December 1994 of the Governors of the National Banks of Yugoslavia, Republika Srpska and Republika Srpska Krajina: "Unique control over the operation of the National Bank of Republika Srpska . . . is determined and conducted exclusively by the National Bank of Yugoslavia."[57] The truth, as Milošević proclaimed in a statement to the Yugoslav News press agency on 11 May 1993, was that: "Serbia has lent a great, great deal of assistance to the Serbs in Bosnia. Owing to that assistance they have achieved most of what they wanted."[58]

43 12. More generally, Belgrade provided unceasing impetus and political and ideological direction during the preparations for and throughout the entire "active" period of ethnic cleansing. To cite but a few examples:

— the policy of ethnic cleansing was decided during a meeting in Belgrade chaired by Milošević in July 1991[59];

— it was at another meeting, again in Belgrade, on 30 April 1992 that it was agreed at the most senior level, among the federal President, the President of the Republic of Serbia, the President of the Republic of Montenegro, the JNA Chief of Staff, the President, Vice-President and President of the Assembly of Republika Srpska, and the Serb member of the Presidency of the FRY, that General Mladić should take over command of the army in Bosnia and Herzegovina[60];

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[56]See Reply, Chap. 8, Sec. 9, pp. 674-685, paras. 346-368; CR 2006/4 (Karagiannakis), pp. 20-21, paras. 41-45; CR 2006/8 (van den Biesen), p. 49, para. 35.

[57]Official notice of the meeting of the Governors of the National Bank of Yugoslavia, of the National Bank of Republika Srpska and of the National Bank of Republika Srpska Krajina, 5 December 1994, quoted in the Reply, p. 680, para. 358 and Ann. 226, p. 2.

[58]ICTY, *Prosecutor* v. *Milošević*, case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, Exhibit No. C4721.

[59]See CR 2006/4 (Karagiannakis), p. 11, paras. 5-7.

[60]CR 2006/4 (van den Biesen), pp. 26-27, paras. 17-18.

— further, as seen in the minutes of a meeting of the Serb leaders in Serbia, Krajina and Bosnia and Herzegovina on 9 January 1993, which Mr. van den Biesen analysed on Friday, those leaders, Karadžić in particular, were clearly anxious to protect the "mother country"; Karadžić stated that, as agreed, "if we would be in a situation to endanger the position of the mother country — Serbia and Montenegro[, w]e would cut our boat loose"[61] — if you say that you are prepared to cut a boat loose, then it must have been moored to begin with . . .; and

— last but not least, Republika Srpska was represented at the Dayton negotiations in 1995 — Luigi Condorelli referred to this a short time ago — by "President Slobodan Milošević, head of the delegation of the Federal Republic of Yugoslavia", which, by letters to the ministries of foreign affairs of various countries, gave the assurance that the FRY "shall take all necessary steps . . . to ensure that the Republika Srpska fully respects and complies with the provisions of the aforementioned Annexes [concerning it]"[62]. What an avowal, Madam President!

44 13. It is hard to deduce from these manifold ties (of subordination) linking Republika Srpska and its army with the FRY anything other than a position of total dependence justifying the characterization of these entities as organs of the Respondent[63]. But if that is not the conclusion you come to, Members of the Court, you should assuredly infer from this that, unlike the *contras* in the *Military and Paramilitary Activities* case, both the VRS and Republika Srpska were under the control of the Respondent — control which, in accordance with the rule codified in Article 8 of the ILC Articles of 2001, gives rise to the Respondent's responsibility for the conduct of those entities, conduct in breach of the Genocide Convention. Radovan Karadžić's statement at the 40th session of the Assembly of Republika Srpska on 10 and 11 May 1994 also sounds like an admission: "Without Serbia nothing would have happened, we don't have the resources and would not have been able to make war."[64]

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[61]CR 2006/8 (van den Biesen), p. 58, para. 78; testimony by Mr. Lilić, ICTY, *Prosecutor* v. *Milošević*, case No. IT-02-54, transcript of 17 June 2003, p. 2572.

[62]S/1995/999, 30 Nov. 1995, p. 131.

[63]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 62, para. 109.

[64]40th session of the Assembly of Republika Srpska, 10-11 May 1994, Brčo, ERNs 0215-2482-0215-2616, Karadžić : 0215-2533. See also the report by R. Donia, expert, case No. IT-02-54-T, p. 62, transcript p. 23144.

2. The Serbian paramilitary forces operating in Bosnia and Herzegovina

14. A consideration of the links between the Serbian paramilitary forces operating in Bosnia and Herzegovina and the FRY leads to the same conclusions.

15. As Luigi Condorelli mentioned a short while ago, they fall into two distinct categories. Some, formed on the spot, were integrated into the VRS, the Serbian army of Bosnia and Herzegovina; there is therefore no need to concern ourselves particularly about the nature of their legal relationship with the Respondent: they were under the latter's control, in the same way as the VRS. The others were formed in the FRY and carried out their murderous duties in the territories controlled by the Serbs of Bosnia and Herzegovina, where they made a major contribution to "cleansing" the resident non-Serb populations.

16. Magda Kagiannakis showed this morning the vital role played by these paramilitary groups in the genocide committed against the Muslim populations of Bosnia and Herzegovina. However, these "special forces" of evil memory, the "Scorpions", Arkan's "Tigers", Šešelj's "Chetniks", were subservient to Belgrade:

45 — they were formed and placed under the control of the Serbian Ministry of the Interior by virtue of legislation on domestic affairs and national defence adopted by the Serbian national parliament on 17 and 18 July 1991[65];

— they were armed, equipped and trained by the JNA and the MUP (Serbian Ministry of the Interior)[66]; and

— they acted in conjunction with the armed forces and official police force of the FRY and, on such occasions, were placed under the orders of officers of those two forces[67].

17. The existence of these extremely close links was condemned by both the General Assembly, in particular in resolutions 48/88 of 20 December 1993 and 49/10 of 3 November 1994, and the Security Council, which demanded (in vain), in its resolution 819 (1993) of 16 April 1993,

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[65] *Official Gazette of the Republic of Serbia*, 25 and 27 July 1991, *Prosecutor* v. *Milošević,* case No. IT-02-54-T, Exhibit No. P352, tab 24 and Exhibit No. P526, tab 21, see also Reply, p. 616, para. 247.

[66] See Memorial, pp. 67-68, para. 2.3.4.2 and p. 274, para. 6.4.2.1, p. 276, para. 6.4.2.5; Reply, pp. 602-604, paras. 218-221; pp. 615-625, paras. 246-264; pp. 632-636, paras. 279-285 or p. 784, paras. 68-69; CR 2006/2 (van den Biesen), p. 49, para. 72.

[67] Memorial, p. 35, para. 2.2.2.16, p. 48, para. 2.2.5.3; Reply, pp. 602-604, paras. 218-221 or p. 623, para. 263; see also pp. 566-573, paras. 265-278 or pp. 784-785, paras. 70-71; CR 2006/2 (van den Biesen), p. 49, para. 70, CR 2006/9 (Karagiannakis). See also, in particular, ICTY, *Prosecutor* v. *Karadžić and Mladić*, case Nos. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 56.

"that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina".

18. There is no room for doubt, Madam President: the Serbian paramilitary forces were certainly also under the control of the Respondent. And the comparison with the findings made by the Court in the *Nicaragua* case is enlightening:

— in that case, the armed bands opposed to the Sandinista Government were formed, or had been formed, independently of any intervention by the United States and before the latter gave them illegal aid[68]; in the instant case, the Serbian paramilitary forces were created with the active support of the Belgrade Government;

46 — the *contras* were alone in participating in unlawful armed operations on the territory of Nicaragua[69]; the Serbian paramilitary forces acted in conjunction with and under the command of the army or the police force of the Respondent on Bosnian territory;

— in its 1986 Judgment, the Court stated that it was not "satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States"[70]; in the case which concerns us, it is the Belgrade Government which instigated and carried out the ghastly ethnic cleansing, and the paramilitary forces — among others — were merely executants.

19. Like Republika Srpska, like the VJ, the Serbian paramilitary forces, at the time when the genocide was perpetrated, were in reality only organs, auxiliaries of the respondent State. But here again, even if you failed to accept that fact, Members of the Court, there would be no escaping the conclusion that they were nonetheless under the strict overall control of the Respondent, which is enough to engage its responsibility.

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[68]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 53-55, paras. 93-94 and pp. 61-62, para. 108.

[69]*Ibid.*, p. 60, para. 102.

[70]*Ibid.*, p. 61, para. 106.

3. The significance of overall control

20. That said, Madam President, I readily recognize that we have not demonstrated that each and every one of the acts constituting genocide had been ordered in Belgrade — even though some undeniably were, as in the case of the establishment of an exclusively Serb zone 50 km beyond the Drina[71] or the monstrous massacres of Srebrenica[72]. Moreover, it would be impossible to prove, a *probatio diabolica*. First, there were too many genocidal acts, too many murders, rapes, acts of systematic ill-treatment, constituting serious offences against the physical or mental integrity of the non-Serb populations of territories under Serb control. Secondly, and above all, such proof — I sincerely believe — should not be required in this case, given the very specific characteristics of the crime of genocide.

47 21. Thus, since genocide is not an additional entry in a list of distinct violations of international law, but an extremely serious breach of a peremptory norm of general international law manifested in an *ensemble* or, in English, a "pattern" of behaviour [*un* pattern or *une* pattern? We French have gender problems that you don't have in English . . .] contrary to international law and motivated by a single intention, we cannot — and should not — focus on each of these individual instances. By the same token, the subjective element of genocide, the *mens rea*, that is to say the genocidal intent, can only be overarching in scope. And, at the same time, the attributability of such acts and intent can also only be dependent on criteria of an overall scope.

22. It seems to me all the more futile to attempt to divide genocide into component parts in order to engage in the attribution of a multiplicity of acts since, in the present case, the ethnic cleansing was a joint enterprise: conceived and initiated in Belgrade, it was carried to fruition — "miscarried" would surely be more accurate — jointly by the FRY Government and its surrogates — even if the Respondent does not like that word[73] — in Republika Srpska.

23. For all these reasons, Madam President, only one conclusion can be drawn: the Respondent is responsible for the crime of genocide perpetrated against the non-Serb — particularly Muslim — populations of Bosnia and Herzegovina. As Professor Luigi Condorelli has

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[71]ICTY, *Prosecutor* v. *Deronjić*, interrogation of the accused, case No. IT-02-61-S, transcript of 27 January 2004, p. 121.

[72]See Reply, p. 583, para. 185 (newspaper article attesting to orders from Belgrade in the attack on eastern Bosnia), p. 595, para. 203 or CR 2006/4 (van den Biesen), p. 38, para. 9.

[73]See Counter-Memorial, p. 321, para. 5.1.14; see also Reply, p. 782, para. 61.

shown, its responsibility derives from the rule set out in Article 4 of the ILC draft Articles, because it acted through its organs: those indeed recognized as such by its internal law, but also those which, while not defined as such, were so in reality, as in the case of Republika Srpska and its army, on the one hand, and the Serbian paramilitary groups, on the other. However, its responsibility would be engaged in equal measure if you did not accept this interpretation, Members of the Court, and if you relied not on the rule of attribution set forth in Article 4 of the ILC draft Articles, but on the rule contained in Article 8. In substance, moreover, this makes no material difference to the case.

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II. The acts ancillary to genocide are attributable to the Respondent

24. Madam President, I shall now turn to the acts other than genocide as such, as listed in Article III of the 1948 Convention, and I shall deal with them in the following order:

— first, direct and public incitement to commit genocide;

— secondly, conspiracy to commit genocide;

— lastly, complicity in genocide.

25. One problem arises at the outset, however, which I touched upon only briefly in my address on Friday, and that is how these different acts engendering responsibility combine with the principal act, the one that is central to the submissions of Bosnia and Herzegovina, the commission of genocide itself. In reality, the contours of the problem differ in so far as they relate to complicity, on the one hand, and incitement and conspiracy, on the other.

26. The latter two aspects clearly represent two separate counts of responsibility upstream from genocide. That is quite obviously the case with regard to incitement, which may, it is true, continue while the genocide is under way, in order — dare I say it — to "re-energize" the perpetrators, but which may also — and this is more usually the case — precede the "taking of action". Moreover, the ICTR did not hesitate to make genocide, on the one hand, and incitement, on the other, separate counts of indictment and conviction[74]. The same is true of conspiracy, the

[74]Cf. ICTR, *Prosecutor* v. *Eliézer Niyitegeka*, case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 480.

common plan to commit genocide, which, as I have already had occasion to mention[75], also constitutes a separate charge, as is also shown by ICTR practice[76].

27. The same is not true of complicity: according to the International Criminal Tribunal for Rwanda: "an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act of which an accused is charged cannot, therefore, be characterized as both an act of genocide and an act of complicity in genocide."[77] Incidentally, this is again consistent with the position taken by the Court itself in the *Military Activities* case (although,

49 curiously, it appears there to apply the same reasoning to incitement[78] — but in any case, the problem in that regard arises in a different form in the present case, since Article III of the Convention expressly distinguishes between incitement, on the one hand, and complicity, on the other).

28. These differences between the three different categories of offence at issue obviously have consequences with regard to the submissions of Bosnia and Herzegovina — which will, moreover, be slightly amended on this point at the end of the hearings, as those contained in its Reply are not altogether explicit on this subject[79] — whereas it is quite clear from Chapter 10, paragraph 181[80], of the Reply that Bosnia and Herzegovina calls for a finding of Serbia's responsibility for complicity in genocide "only very subsidiarily", in the unlikely event that the Court were unable to find that the Respondent itself committed the genocide against the Muslims and the other non-Serb populations of Bosnia and Herzegovina, either through its organs, or through the acts of persons or groups of persons placed under its control.

29. If I may, Madam President, I shall begin with:

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[75]CR 2006/8, p. 25, para. 43.

[76]Cf. ICTR, *Prosecutor* v. *Kambanda*, case No. ICTR 97-23-S, Judgement, 4 September 1998, para. 40 or *Prosecutor* v. *Eliézer Niyitegeka*, case No. ICTR-94-T, Judgement, 16 May 2003, para. 480.

[77]ICTR, *Prosecutor* v. *Alfred Musema*, case No. ICTR-96-13, Trial Chamber, Judgement and Sentence, 27 January 2000, para. 175.

[78]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 64, para. 114.

[79]See Reply, p. 972, para. 7.2.

[80]Reply, pp. 828-829.

1. Direct and public incitement to commit genocide

30. This is expressly dealt with in Article III *(c)* of the 1948 Convention, to which Article IX moreover expressly refers. However, even if the Convention were silent, such an incitement to commit an internationally wrongful act would still make the Respondent responsible: in the *Nicaragua* case the Court observed that the United States had, under the "general principles of humanitarian law to which the [1949 Geneva] Conventions merely give specific expression", "an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation" of those Conventions' fundamental provisions[81]. It follows that, since the Court has jurisdiction to resolve "disputes between the Contracting Parties relating to the . . . application or fulfilment" of the Convention, it would have jurisdiction, even in the absence of any specific provision, to find Serbia and Montenegro responsible under this head.

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31. As I explained on Friday, it is not to be expected in today's world that a State would openly call for the elimination — even partial — of a human group. This is indeed how the jurisprudence interprets Article III *(c)* of the Convention, including when individuals are involved[82]: it is accepted that the call may be "coded", but fully comprehensible in the cultural context in which the incitement is made.

32. Two aspects should be stressed in this connection. Firstly, the authorities in Belgrade who, as we have noted on several occasions, were anxious to secure a measure of international respectability[83] — however unworthy of respect they may have been at the time — must be regarded as having incited genocide by spreading the ideology of a Greater Serbia and calling for the creation of a "State for all Serbs", where they would be "together", without having to cohabit with non-Serb and non-Orthodox ethnic groups. Secondly, the authorities of Republika Srpska quite openly called for a policy of terror to be applied against these populations, more especially Muslims, in the territory that they controlled, in order to ensure the "ethnic purity" of these areas, and hence to destroy those populations there as a group. In so doing, whether as organs of the FRY

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[81] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 114, para. 220.

[82] CR 2206/8, pp. 23-24, paras. 39-41.

[83] See Memorial, pp. 85-93, Sec. 2.3.8; see also CR 2006/2 (van den Biesen), pp. 46-47, paras. 62-64 or CR 2006/8 (van den Biesen), p. 57, para. 72 and pp. 59-60, para. 82.

or as an entity placed under its control, these authorities engaged the responsibility of the FRY. These two aspects are in fact indissociable.

33. My friend and colleague, Maître van den Biesen, showed a week ago that the genocide had been prepared through dissemination of the ideology of a "Greater Serbia" and the correlated campaign against non-Serb populations in the former Yugoslavia[84]. One of the instruments of this ultranationalist propaganda was the 1986 Memorandum of the Serbian Academy of Arts and Sciences[85]. It stressed the threats looming over the Serbs and the separation among several States from which they suffered, and called for revenge against "the physical, political, legal and cultural

51 genocide of the Serbian population in Kosovo and Metohija", which was presented as "a worse defeat than any experienced in the liberation wars waged by Serbia from the First Serbian Uprising in 1804 to the uprising of 1941"[86].

34. Madam President, this rhetoric of hate was perfectly described by the ICTY Trial Chamber in the *Tadić* Judgement of 7 May 1997. It is useful to cite some excerpts, but I venture to ask you, Madam President, Members of the Court, to reread all the relevant passages: they establish by rigorous reasoning the link between propagation of the ideology of a Greater Serbia and the policy of ethnic cleansing; these passages (in particular paragraphs 85 to 96 of the Judgement) are reproduced in Bosnia and Herzegovina's Reply[87]. Nevertheless I will read the most revealing passages, even if this takes some time:

> "88. The propaganda campaign [in support of a Greater Serbia] that accompanied this movement began as early as 1989, with the celebration of the 600th anniversary of the Battle of Kosovo. During this celebration, the Serb-controlled media declared that Serbs had been let down by others in the area when the Ottoman Turks invaded . . . The danger of a 'fundamentalist, politicised' Muslim community was also represented as a threat. After the disintegration of the former Yugoslavia began, the theme of the Serb-dominated media was that 'if for any one reason Serbs would become a minority population . . . their whole existence could be very perilous and endangered . . . and therefore they had no choice but a full-scale war against everyone else, or to be subjected to the old type concentration camp, the symbol being Jasenovac'.
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> 89. In the early 1990s there were rallies that advocated and promoted the idea, with Serbian leaders in attendance. In 1992 Radoslav Brdanin, President of the Crisis

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[84]CR 2006/2 pp. 28-32. See also Memorial, pp. 59-61, Sec. 2.3.1 and Reply, pp. 55-68, Chap. 4, Sec. 1.

[85]Counter-Memorial, Ann. 92. See Memorial, pp. 60-61, paras. 2.3.1.3-2.3.1.4 and Reply, pp. 56-58, para. 5.

[86]*Ibid*., p. 128.

[87]Pp. 65-68, para. 15.

> Staff of the Serb Autonomous Region of the Banja Luka area, declared that 2 per cent was the upper tolerable limit on the presence of all non-Serbs in this region. Radoslav Brdanin advocated three stages of ridding the area of non-Serbs: (1) creating impossible conditions that would have the effect of encouraging them to leave of their own accord, involving pressure and terror tactics; (2) deportation and banishment; and (3) liquidating those remaining who would not fit into his concept for the region.
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> . . . . . .
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> 91. Over time, the propaganda escalated in intensity and began repeatedly to accuse non-Serbs of being extremists plotting genocide against the Serbs. Periodicals from Belgrade featured stories on the remote history of Serbs intended to inspire nationalistic feelings. Slobodan Kuruzovic, Commander of the Territorial Defence ('TO') of Prijedor, who became the head of the local newspaper *Kozarski Vjesnik* and the commander of the Trnopolje camp, stated that the 'interests of Serbian people in Republika Srpska will be the main guidelines for my editorial policies'. In articles, announcements, television programmes and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat and must arm themselves and that the Croats and Muslims were preparing a plan of genocide against them. Broadcasts from Belgrade caused fear among non-Serbs because only the Serb nation was presented positively, and it was represented that the JNA supported the Serbs. The theme that, for the Serbs, the Second World War had not ended was expressed on television and radio by Vojislav Seselj, Zeljko Raznjatovic, otherwise known as 'Arkan', and other Serb politicians and leaders.
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> . . . . . .
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> 94. This propaganda campaign continued on into 1993 . . ."[88]

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35. You will have noted, Madam President, that the Tribunal's analysis makes no distinction between propaganda coming from Belgrade and the overt calls for genocide by Serb officials in Bosnia and Herzegovina. And rightly so: ethnic cleansing by the planned genocide of non-Serbs (and of Muslims in particular) is an overall plan in which any distinction between those involved is impossible. The language of the leaders in Belgrade is more coded, that of their henchmen in Bosnia and Herzegovina is more blunt, but the meaning is essentially the same.

36. Since its *Tadić* Judgement the ICTY has had occasion to confirm and amplify its analysis. In its *Brdjanin* Judgement of 1 September 2004 — which I propose to cite at some length, still in English because, as I have already observed, unfortunately this decision is still not available in French — the Tribunal carefully analysed the "Six strategic goals" articulated by

[88] ICTY, case No. IT-94-1-T, Trial Chamber, Judgement, 7 May 1997, pp. 30-35.

Karadzic at the Assembly of Serbs of Bosnia, of which we have already spoken at length[89]. It analyses the content thus:

> "77. The Trial Chamber is satisfied beyond reasonable doubt that the first strategic goal entailed the permanent removal of a significant part of the non-Serb population from the territory of the planned Bosnian Serbian state. When the policy discussions at the 16th session of the SerBiH Assembly on the movement of population are seen in connection with the inflammatory, combative and derogatory comments towards the non-Serb population of Bosnia and Herzegovina made during that same session, it becomes evident that non-Serbs were viewed as a constant threat and that significant numbers of them were to be permanently removed from the territory claimed by the Bosnian Serbs. A comment by Dragan Kalinic, a delegate from Sarajevo and later SerBiH Health Minister, is of note:
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> **53**
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> > 'Have we chosen the option of war or the option of negotiation? I say this with a reason, and I must add that, knowing who our enemies are, how perfidious they are, how they cannot be trusted until they are physically, militarily destroyed and crushed, which of course implies eliminating and liquidating their key people.'
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> 78. The 16th session of the SerBiH Assembly represents the culmination of a political process. At this session, not only were the strategic goals of the Serbian people of Bosnia and Herzegovina articulated, but the SerBiH Assembly also took a fundamental step towards the implementation of these goals . . .
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> 79. The Trial Chamber is convinced that the six strategic goals of the Serbian People of Bosnia and Herzegovina articulated at the 16th session of the SerBiH Assembly were far from political rhetoric. They constituted the political manifesto of the Bosnian Serb leadership and turned out to be the driving factor behind the actions of the Bosnian Serb armed forces, shaping the events in BiH from May 1992 onwards."[90]

37. Extending its analysis to the Serb propaganda as a whole, the Tribunal adds:

> "80. Prior to the outbreak of the armed conflict, the SDS started waging a propaganda war which had a disastrous impact on the people of all ethnicities, creating mutual fear and hatred and particularly inciting the Bosnian Serb population against the other ethnicities. Within a short period of time, citizens who had previously lived together peacefully became enemies and many of them, in the present case mainly Bosnian Serbs, became killers, influenced by a media, which by that time, was already under the control of the Bosnian Serb leadership. The use of propaganda was an integral part of the implementation of the Strategic Plan and created a climate where people were prepared to tolerate the commission of crimes and to commit crimes."[91]

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[89]Sixteenth Session of the Assembly of Serbs of Bosnia, 12 May 1992, ERNs 0190-8511-0190-8514, Karadzic, 0190-8517-0190-8526. See CR 2006/4 (Karagiannakis), pp. 18-20, paras. 36-40; CR 2006/5 (Karagiannakis), p. 24, para. 10; CR 2006/5 (Dauban), p. 55, para. 33.

[90]ICTY, *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, paras. 75-79.

[91]*Ibid*., para. 80; see also in particular paragraphs 82 and 83.

38. The same scenario recurred in the north and east of Bosnia and Herzegovina. All this, of course, is duly supported by solid evidence referred to by the wealth of footnotes that pepper the Tribunal's Judgement — like most of its decisions.

39. The role of the authorities of the FRY in these incitements to ethnic hatred and genocide is crucial, as the ICTY again clearly stated in its decision on the motion for judgment of acquittal of Milosevic of 16 June 2004, in which it stressed the control over the media exercised by the President of the Republic of Serbia, the "Leader of all the Serbs":

54 "255. The Accused [that is Milosevic] manipulated the Serbian media to impose nationalist propaganda in order to justify the creation of a Serbian State. The Accused kept the Serbian press under tight surveillance, with independent media channels given less than one-tenth of the national media space in the interest of foreign policy. General Morillon believed that the Accused was responsible for sowing fear of past atrocities in the Yugoslav population, thereby unleashing 'dogs' which escaped his control and contributed to the tragic events.

"256. Mr. Jovic testified that

'for more than a decade, the Accused was the main political figure in Serbia. He held absolute authority within the people and within the party, and he had the possibility of having a decisive role on all decisions made. And by the same token, he was in a way the main actor of everything that came to pass during that period of time.'

Mr. Jovic gave evidence that '[t]his period of our history was marked, without any doubt, by the Accused. In every sense, he was the key figure, the main actor in this Serbian tragedy . . .'. Professor de la Brosse gave evidence that Mr. Jovic, in his book entitled *Last Days of the SFRY*, stated,

'For years, [the Accused] paid the biggest attention to the media, especially television. He personally appointed editors-in-chief of the newspapers and news programmes, especially directors-general of the radio and television . . . He was deeply convinced that citizens formed their view of the political situation on the basis of what they were presented and not on the basis of their real material and political position. What is not published has not happened at all — that was [Milosevic's] motto.'"[92]

40. On the ground — i.e. in the regions of Bosnia and Herzegovina controlled by the Serbs — these diatribes against those "dark forces" "that are destroying both Serbia and Yugoslavia"[93] were passed on even more bluntly by the Bosnian Serbs[94]. The now notorious

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[92]ICTY, *Prosecutor* v. *Milosevic*, case No. IT-02-54-T, 16 June 2004, paras. 255-256. See also *Prosecutor* v. *Tadic*, case No. IT-94-1-T, Judgement, 7 May 1997, para. 130.

[93]Speech by Milosevic on Belgrade Radio, 2 p.m., 10 December 1991, *BBC Summary of World Broadcasts*, 12 December 1991, Reply, Ann. 12 *[translation by the Registry]*.

statement by Radovan Karadzic when he addressed the Bosnian parliament for the last time on 14 October 1991 is the most perfect example of this:

> "You want to take Bosnia and Herzegovina down the same highway of hell and suffering that Slovenia and Croatia are travelling. Do nothing that will lead Bosnia to hell and do nothing that may lead the Muslim people to their annihilation because the Muslim cannot defend themselves if there is war. How will you prevent everyone from being killed in Bosnia?"[95]

55 41. It seems clear, Madam President, that the organs of the Respondent are responsible for very direct and very public incitement to commit genocide. The same applies to intent, which I come to now.

2. Intent to commit genocide

42. As I said last Friday[96], the issue here is whether — irrespective of the close links that united the perpetrators of the genocide, links so close that some: Republika Srpska, its army and its police, and the paramilitary forces let loose in Bosnia and Herzegovina, must be regarded as organs of the other, the FRY, or at least as acting under its control — whether, irrespective of those links, they had a "common plan" to commit genocide. I stress that this specific violation of the 1948 Convention is established even if the plan — as is the case here — was devised by one of the protagonists alone, with the others supporting it by word or by deed[97].

43. It goes without saying that the link between committing genocide and conspiracy to commit is a close one. As the ICTY Appeals Chamber observed in the *Jelisic* case:

> "the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime."[98]

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[94]See, for example, statements by Karadzic and Mladic cited in the Reply, pp. 59-60, para. 7, or those by JNA officers, *ibid*., p. 61, para. 9.

[95]ICTY, *Prosecutor* v. *Karadzic and Mladic*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, p. 24, para. 48.

[96]CR 2006/8, pp. 24-26, paras. 42-44.

[97]See *ibid*., p. 26, para. 44.

[98]ICTY, *Prosecutor* v. *Jelisic*, case No. IT-95-10, Judgement, 5 July 2001, para. 48. See also ICTR, *Prosecutor* v. *Obed Ruzindana and Clément Kayishema*, case No. ICTR-95-1-A, Appeals Chamber, Disposition, 1 June 2001.

44. The conspiracy among the Serb leaders of the FRY, Bosnia and Herzegovina and Croatia was doubtless defined most accurately and succinctly in the factual basis underlying the guilty plea of Mrs. Plavšić, former co-President of Republika Srpska, cited by Maître van den Biesen in his presentation last Monday[99] — my citation is again in English:

> "13. Numerous individuals participated in devising and executing the objective of ethnic separation by force, including Slobodan Milosevic, Radovan Karadzic, Momcilo Krajisnik and Ratko Mladic. Among these individuals there were differences as to both their knowledge of the details concerning the conception and implementation of this objective and their participation in conceiving and implementing its execution . . .

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> 14. Certain members of the Bosnian Serb leadership collaborated closely with Slobodan Milosevic in the conception and execution of the objective of ethnic separation by force. The two principal leaders of the Bosnian Serbs, Radovan Karadzic and Momcilo Krajisnik frequently came to Belgrade to consult with, take guidance from or arrange for support from Milosevic in achieving this end. The army of Republika Srpska (VRS) was financed and logistically supported by the political and military leadership in Belgrade, with whom it collaborated and cooperated in order to execute the objective of ethnic separation by force."[100]

45. To be sure, Mrs. Plavšić mentions individuals here, but these are the Presidents of their respective entities: Serbia, the federal State of the FRY, Republika Srpska and Republika Srpska Krajina. This is the basis on which they consulted and conspired with each other.

46. Such consultation and conspiracy were continuous before and throughout the period of "ethnic cleansing". In March 1991, at a secret meeting in Karadjordjevo, Milosevic and Tudjman, the President of Croatia, reached agreement on a division of Bosnia and Herzegovina on ethnic principles, which would find expression in May the following year in the six "strategic goals" to which I referred just now and which confirm that the operations were meticulously planned[101]. The important meeting involving Milosevic, Babic and Karadzic, already described to this Court[102], had taken place previously, in July 1991; during that meeting Milosevic told Mr. Babic, the President of Republika Srpska Krajina, not to "stand in Radovan's way"[103]. Moreover, as the ICTY observed, "by the fall of 1991, the SDS was in contact with the federal authorities dominated by the

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[99]CR 2006/2 (van den Biesen), p. 33, para. 14.

[100]ICTY, case Nos. IT-00-39 and 40-PT, 30 September 2002, paras. 13-14.

[101]On this point, see CR 2006/4 (Karagiannakis), pp. 18-20, paras. 36-40, and the numerous references to the *Milosevic* and *Brdjanin* cases.

[102]CR 2006/4 (Karagiannakis), p. 11, paras. 5-7.

[103]On all these facts, see *inter alia* ICTY, *Prosecutor* v. *Milosevic,* case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, paras. 252-254.

Republic of Serbia and the Yugoslav People's Army (JNA). By arming the Serb population and organizing a more direct JNA intervention, the contacts permitted the SDS to take power in the territory of Bosnia and Herzegovina"[104].

57 47. As the Criminal Tribunal found in the *Brdjanin* Judgement: "Throughout 1991 and into 1992, the Bosnian Serb leadership communicated with the SFRY leadership on strategic policy in the event that BiH would become independent."[105] And the constant contacts between Slobodan Milosevic and Radovan Karadzic, evidenced *inter alia* by the intercepted telephone calls used at the former's trial[106], confirm the conspiracy between the FRY and Republika Srpska[107].

48. But that conspiracy went further. The existence of the "Council for Co-ordinating Positions on State Policy" is a striking illustration of the common plan involving all the elements of the Serb "leadership". This is the Council on which Maître van den Biesen addressed you on Friday, concerning discussion of the Vance-Own plan on 9 January 1993[108]. This Council, which appears to have been created during 1992 and met seven times in 1992 and 1993[109], consisted, under the auspices of the President of the FRY, of the Presidents of Serbia and Montenegro, the leaders of Republika Srpska and Republika Srpska Krajina, the chief of staff of the Yugoslav army and Republika Srpska's army commander, specifically Mladic. We do not have all the minutes of the meetings of this Council, but those we do have speak volumes: what we have here is a conspiracy for the successful achievement of "ethnic cleansing", which in our case is no more than a barely concealed euphemism for genocide.

49. In its decision of 16 June 2004 on the motion for Milosevic's acquittal, the Trial Chamber accepted that:

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[104]ICTY, *Prosecutor* v. *Karadzic and Mladic*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Trial Chamber, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, pp. 31-32, para. 55.

[105]ICTY, *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Trial Chamber II, Judgement, 1 September 2004, para. 151.

[106]ICTY, *Prosecutor* v. *Milosevic*, case No. IT-02-54, document No. P613.

[107]See also Reply, p. 475, para. 25; pp. 478-482, paras. 31-36 or pp. 765-767, paras. 12-18; CR 2006/4 (Karagiannakis), "Political and military preparations", pp. 10 *et seq*.

[108]CR 2006/8 (van den Biesen), pp. 55-60, paras. 65-83; see the minutes made public in the course of the *Krajisnik* trial, case Nos. IT-00-39 and 40-PT, doc. No. P65, index 219 and the testimony of Mr. Lilic in the *Milosevic* trial, case No. IT-02-54-T, 17 June 2003, CR, pp. 22574-22579.

[109]Testimony of Mr. Lilic, *ibid*., p. 22577.

58 "*a Trial Chamber could be satisfied beyond reasonable doubt that there existed* a joint criminal enterprise, *which* included *members of the Bosnian Serb leadership*, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi"[110].

And the Chamber concluded that:

> "a Trial Chamber could be satisfied beyond reasonable doubt that the Accused [that is Milosevic, the President of Serbia] was a participant in the joint criminal enterprise, found by the Trial Chamber . . . to include the Bosnian Serb leadership, and that he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group"[111].

50. Admittedly, Members of the Court, you are not bound by the legal findings of our neighbouring Tribunal, but in the light of the factual evidence that it has gathered and authenticated and of that which we have also sought to present to you, it seems difficult, to say the least, not to consider that the Respondent should be held internationally responsible for breach of its duty not to conspire to commit genocide.

Complicity in genocide

51. I now come, Madam President, to the third and last of the "acts" listed in Article III of the 1948 Convention that are relevant in the present case: "complicity in genocide", referred to in subparagraph *(e)* of that Article.

51. As I have already said, but I repeat it: we rely on this merely as a subsidiary point, as a fall-back position should you not be persuaded, Members of the Court, that the FRY was the principal author of the genocide, a point on which Bosnia and Herzegovina, for its part, has no doubt whatever.

53. Moreover, the difference between the two types of responsibility should not be exaggerated. Firstly, although complicity is sometimes described as "secondary participation", as one author has pointed out: "when applied to genocide there is nothing 'secondary' about it. The 'accomplice' is often the real villain, and the 'principal offender' a small cog in the machine."[112] This is also the opinion of the ICTY Appeals Chamber, which stated in the *Tadić* case:

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[110]Case No. IT-02-54-T, para. 246; emphasis added.

[111]*Ibid*., para. 288.

[112]William A. Schabas, *Genocide in International Law*, Cambridge UP, 2000, p. 286.

> "Although only some members of the group may physically perpetrate the criminal act . . . the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question."[113]

59 54. Secondly, the rules of international responsibility are the same: these are two distinct internationally wrongful acts, but which must nevertheless be established according to the same pattern and which have the same consequences.

55. Lastly, the facts that might make it possible for you, Madam President, Members of the Court, to establish the complicity of the Respondent in genocide are the same as those that Bosnia and Herzegovina has put before you in its written pleadings and throughout the oral pleadings.

56. There can be no doubt that genocide was committed in Serb-controlled areas against non-Serb populations in Bosnia and Herzegovina, especially against Muslims. My colleagues established this at length last week. Neither can there be any doubt that Serbia and Montenegro, under the name of the FRY, took part in it. Anything further is a matter of assessment and degree. Given the impetus supplied by the authorities in Belgrade, their constant and total control over the authorities in Pale, the massive involvement of the JNA and subsequently the VJ and the Yugoslav police in ethnic cleansing in Bosnia and Herzegovina, it seems very difficult not to see the FRY as the principal author of the genocide. But the minimum alternative is to consider — or would be to consider — that it was no more than an accomplice: I repeat, it participated in genocide as a State, on a massive scale, intentionally and with full knowledge of what was happening.

57. This explains, Madam President, why, in contrast to what I did in the case of incitement and conspiracy, which are "cumulative" violations of the Convention in the sense that they involve the responsibility of their authors independently of their participation in genocide, I will not repeat the relevant facts here: they are the same as those that enabled Professor Condorelli to show that the Respondent's responsibility was engaged by the acts of its organs, or enabled me to show that this was so — and this is an alternative position — because the FRY controlled the activities of its loyal henchmen in Bosnia and Herzegovina.

58. However, there is one point on which clarification seems to me to be required. It seems to me that we have demonstrated, beyond all doubt, that the Yugoslav authorities were animated by

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[113] Case No. IT-94-1-A, Judgement, 15 July 1999, para. 191.

a genocidal intent[114]. As I said on Friday, this intent *(mens rea)* is doubtless essential before we

60 can speak of "complicity in genocide" within the meaning of Article III *(e)* of the 1948 Convention[115]. But even if we had not convinced you on this point, Members of the Court, you would still have to consider that the Respondent had become an accomplice *to* genocide because it helped the Serbs of Bosnia and Herzegovina in so many ways to commit that crime[116].

59. Here again we return to the *Nicaragua* case, in which the Court decided that the United States, while not responsible for the acts of the *contras*, was responsible for the various forms of assistance provided to them[117]. The least that can be said is that this diversified and crucial aid is also a factor in our case; the FRY:

— fully armed, equipped and supplied the army of Republika Srpska, the VRS;

— supported that puppet State on a massive scale, financially and economically;

— participated in ethnic cleansing operations, through its own armed forces and its police;

— created or incited the creation of Serb paramilitary groups, trained and commanded by its own military and police, which supported these operations with exceptional brutality.

60. Repeated condemnations by organs of the United Nations testify to the international community's conviction as to the existence and extent of Belgrade's continuing support for the Serbs of Bosnia. These are but two examples (among many others):

— on 16 April 1993 the Security Council "[d]emand[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina"[118];

— for its part the General Assembly, which had already condemned "the direct and indirect support of the Yugoslav People's Army for the aggressive acts in the Republic of Bosnia and

61 Herzegovina"[119], repeated this condemnation in its resolution 48/88 of 20 December 1993,

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[114]See Memorial, pp. 218-231, Sec. 5.3; Reply, pp. 348-373, Chap. 6, paras. 1-63 or CR 2006/6 (Franck), pp. 29-34, paras. 8-20.

[115]See CR 2006/8. p. 27, para. 48.

[116]*Ibid*., p. 28, para. 49.2.

[117]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, *Judgment*, *I.C.J. Reports 1986*, p. 63, para. 110, p. 65, para. 116, or p. 146, para. 292.3.

[118]S/RES/819 (1993); see also S/RES/820 (1993), 17 April 1993 or S/RES/838 (1993), 10 June 1993.

[119]A/RES/47/121.

demanding that "the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to Bosnian Serb paramilitary units".

61. All this, Madam President, amounts at the very least to complicity, and to complicity on a very large scale. And if, by some remote chance, the Court were to consider that this massive aid was given without the *mens rea* specific to genocide, it is at least completely impossible to believe that the FRY did not know that it was being used to commit genocide.

62. I must now recapitulate. Madam President, Members of the Court, we have submitted to you all of the conceivable legal outcomes:

— you might consider that the Respondent became an accomplice *to* genocide because it supplied the Serbs of Bosnia and Herzegovina with a whole range of aid on a massive scale, without sharing their goal of destroying, in whole or in part, non-Serb ethnic groups, and in particular Muslims, in areas controlled by them; this minimal hypothesis seems to us to be anything but credible;

— you might also take the view that Serbia and Montenegro (the FRY at the time) was an accomplice *in* genocide on account of that same aid, given not only in full knowledge of the facts, but also in sharing the goal of eradication of any non-Serb presence in the territory of Republika Srpska; that was certainly so, but this second hypothesis is based on a serious underestimate of the directing role in the genocide of the authorities in Belgrade;

— you might also hold the Respondent responsible for genocide committed by its entities acting on its instructions or its direction or under its control; this also is correct but misrepresents the true factual and legal position: first, organs defined as such by the law of the FRY themselves took part in acts constituting genocide committed in Bosnia and Herzegovina directly, actively and on a massive scale; secondly, this approach underplays the closeness of the links between the Serbian and Montenegrin authorities and the puppet authorities that held sway in the regions controlled by the Serbs;

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— that is why, Madam President, it seems to us that the only reasonable conclusion that can be drawn from the facts submitted by us is to consider that these entities were totally dependent upon the FRY and should be treated as organs of government of the latter; it was in that

capacity that, together with its official organs, they committed the genocide attributable to the Respondent and which engages its responsibility.

63. If you please, Madam President, I will take the floor again tomorrow to spell out the consequences of this finding, after Professor Condorelli has completed our presentation on the violations of the 1948 Convention committed by the Respondent and has shown that it has in fact acknowledged its responsibility. Thank you, Madam *le* président.

The PRESIDENT: Thank you, Professor Pellet. The Court will now rise and will resume at 10 o'clock tomorrow morning.

The Court rose at 5.55 p.m.