CR 2006/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Monday 13 March 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le lundi 13 mars 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,

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Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

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comme assistants.

The PRESIDENT: Please be seated. Professor Brownlie, you have the floor.

Mr. BROWNLIE: Thank you, Madam President. Madam President, it is a privilege to appear in front of the Court in this extraordinary case.

A. THE QUESTION OF PROOF AND THE EVENTS IN SREBRENICA

1. Madam President, distinguished Members of the Court, may it please the Court: before I move into my analysis of the provisions of the Convention and the related issues of attribution, it is necessary to present a prelude on the question of Srebrenica in the context of imputability.

2. The delegation of Bosnia and Herzegovina have treated the events in Srebrenica as the paradigm case of genocide, planned and organized by the respondent State. The Court has been given a very abbreviated version of the sequence of events. This is not unfortunately recognized by our opponents and Professor Condorelli, on 7 March, declared that Srebrenica has been fully documented.

3. Madam President, that is not the case. The facts are on the public record, and they show that the sequence of connected events involved an armed conflict between the 28th Division of the Bosnian army based in the enclave and the army of the Republika Srpska.

4. The other key facts are:

First, the practice of the Bosnian army in raiding Serbian villages in the Srebrenica-Bratunac region, raids which commenced in December 1992.

Second, even when the Security Council declared Srebrenica to be a safe area in April 1993, the enclave was not demilitarized.

Third, the raids on Serbian villages in the region caused substantial civilian casualties, and those who understood the background feared reprisals if and when the Bosnian armed forces were defeated.

5. I will now indicate to the Court the evidential sources available.

The first item is the CIA study entitled *Balkan Battlegrounds*, published in May 2002.

> "The 1992 war in the Drina valley spilled over into January 1993 when the Bosnian Army's offensive around Srebrenica began in late December. Coming on top of extensive victories throughout the valley in 1992, the offensive impelled the Bosnian Serbs to plan for 1993 a strategic offensive to secure the Drina valley up to

> the border with Serbia. If successful, the campaign would fulfil the Serb Republic's war aim of joining its border with that of Serbia proper. The strategic offensive plan laid out a series of individual operations against the three main enclaves, culminating in an operation to cut the supply line to Gorazde and link Serb-held Herzegovina directly to the rest of the Serb republic. The campaign expanded into an effort to sever the Muslims' only supply route into Sarajevo across Mount Igman. This last attack proved too much for the international community, and the threat of NATO airstrikes forced the Bosnian Serb political leadership to order General Mladic to remove his forces from the mountain.
>
> For Naser Oric — commander of Bosnian Army forces in the Srebrenica enclave — his December 1992 offensive was the climax of a successful year of operations — that had played havoc with the Bosnian Serb Drina Corps and the Serb populated villages throughout the Srebrenica area. His last successful attack cut the tenuous road connection between Serb-held Bratunac and the Zvornik area while linking his own forces to the Muslim-held Cerska-Kamenica pocket south of Zvornik." (*Balkan Battlegrounds*, Vol. 1, p. 184.)

6. The same source, at page 318, states that, according to one estimate, more than 3,000 Serb soldiers and civilians had been killed or wounded by Bosnian soldiers from the Srebrenica area since the war began.

7. The second source is the substantial report prepared on the instructions of the Government of the Netherlands. In the part of the report dealing with the period prior to April 1993, the following assessment appears:

> "It became clear that the Serbs would suffer even greater losses because more and more Serb villages and hamlets were being attacked by the Muslims. Various Serbian commanding officers were killed or were seriously wounded in fighting, for example at Kravica and Konjevic Polje. Given the fact that villages in this region were for the most part ethnically homogenous and small in size, it was easy for large groups of Muslim attackers to distinguish Serb from Muslim villages. If it was a Serb settlement, it was directly and without regard to persons plundered and burned down. In the summer and autumn of 1992, the sallies into the Serbian area became increasingly frequent and violent. Moreover, Muslims who had been driven out of their villages went back to pick up the food and possessions they had had to leave. The food situation in the enclave of Srebrenica became more and more acute, which was a strong incentive for carrying out raids. The Muslim forces were constantly looking for ways to strengthen their strategic positions. Finally, revenge also played a role. The regular troops were often unable to restrain the large groups of civilians who took part in the sallies, although the fear that these caused the Serbs was convenient to them.
>
> After more than half a year of sallies, thirty Serb villages and seventy hamlets had fallen into Muslim hands and there were only a few places left that were Serb, among them Bratunac. Kravica was one of the last to fall into Muslim hands, on Orthodox Christmas (7 January 1993). There were at least a thousand Serb civilian casualties in all. Consequently, it is understandable that the Serbs saw the situation around Srebrenica as a war of aggression by the Muslims. They felt more and more threatened; many people had lost family or friends; and the humiliation and bitterness

> experienced as a result of the Muslim attacks was great. Most Serbs sought revenge if the opportunity presented itself." (*Netherlands Report*, pp. 1277-1278.)

8. The third source is the Judgment of the Trial Chamber in the *Krstić* case. The relevant passage reads as follows:

> "24. The Trial Chamber heard credible and largely uncontested evidence of a consistent refusal by the Bosnian Muslims to abide by the agreement to demilitarise the 'safe area'. Bosnian Muslim helicopters flew in violation of the no-fly zones; the AbiH opened fire toward Bosnian Serb lines and moved through the 'safe area'; the 28th Division was continuously arming itself; and at least some humanitarian aid coming into the enclave was appropriated by the AbiH. To the Bosnian Serbs it appeared that Bosnian Muslim forces in Srebrenica were using the 'safe area' as a convenient base from which to launch offensives against the VRS [that is, the Republika Srpska armed forces] and that UNPROFOR was failing to take any action to prevent it. General Halilović admitted that Bosnian Muslim helicopters had flown in violation of the no-fly zone and that he had personally dispatched eight helicopters with ammunition for the 28th Division. In moral terms, he did not see it as a violation of the 'safe area' agreement given that the Bosnian Muslims were so poorly armed to begin with." (Judgement, pp. 9-10, footnotes omitted.)

9. And so, when the Bosnian army in the region was defeated the results were *in local terms* the taking of revenge. The sequence of events, which began in December 1992, involved the two sets of locally related armed forces, which included many who were themselves the victims of atrocities. No long-term planning was involved and certainly no planning in Belgrade.

10. In this context the factual evidence offered on behalf of the applicant State is unfortunately very limited. If I can refer to the speech of Mr. van den Biesen (CR 2006/4, pp. 37-60). His account covers the period 1991 to July 1995. Madam President, in 20 pages, there is only one reference to the "Bosnian forces"; that is in paragraph 24. At no stage is there a reference to the Bosnian army 28th Division, which contained 6,000 men, and the evidence of prolonged military confrontation. Nor is there any reference to the repeated attacks on Serbian villages in the region of Srebrenica by units of the Bosnian army.

11. Madam President, the treatment of the evidence by our opponents shows a complete indifference to the actual nature of the conflict in the region. This indifference and the serious truncation of the relevant evidence, must entail major reservations in relation to the allegations of prior planning of the murders in Srebrenica in 1995, and any involvement of the FRY Government.

12. Madam President, I have focused upon Srebrenica because it is typical of the monolithic and superficial approach to the question of imputability adopted by the applicant State. I shall now proceed with my general analysis.

B. THE PRECISE CHARACTER OF THE RESPONSIBILITY OF THE STATE UNDER THE GENOCIDE CONVENTION

13. The legal issues can be summarized as follows. The first issue concerns identification of the applicable law. This is important in view of the context in which the Genocide Convention is to be applied. The applicable law is clearly the law of treaties, together with the principles of State responsibility for breaches of the obligations laid down in the treaty instrument.

14. At this point, there is the further problem of the interpretation of the Genocide Convention provisions. Two interpretations are possible: first, the use of the Convention to establish the responsibility of the State, as such, for acts of genocide as, apparently, envisaged in Article IX of the Convention; and second, the exercise by the Court of a competence confined to the giving of a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

15. The first interpretation was preferred by the majority of the Court in the preliminary objections phase of the present case. In the words of the Judgment:

> "32. The Court now comes to the second proposition advanced by Yugoslavia, regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.
>
> The Court would observe that the reference in Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.
>
> Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.
>
> 33. In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including the responsibility of a State for genocide . . .'." (*I.C.J. Reports, 1996*, pp. 616-617, paras. 32 and 33.)

16. With respect, this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

17. In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open.

18. Accordingly, it is appropriate to examine the substantial foundations for the position adopted in the joint declaration of Judges Shi and Vereshchetin in the preliminary objections phase. And if I can be permitted to quote the relevant passages, Judges Shi and Vereschchetin said:

> "We have voted in favour of paragraphs 1 *(a)*, *(c)*, 2 and 3 of the *dispositif* because we are persuaded that Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide affords an arguable legal basis for the Court's jurisdiction in this case. However, we regret that we are unable to vote for paragraph 1 *(b)* as we are disquieted by the statement of the Court, in paragraph 32 of the Judgment, that Article IX of the Genocide Convention 'does not exclude any form of State responsibility'. It is this disquiet that we wish briefly to explain.
>
> The Convention on Genocide is essentially and primarily directed towards the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals. The *travaux préparatoires* show that it was during the last stage of the elaboration of the Convention that, by a very slim majority of 19 votes to 17 with 9 abstentions, the provision relating to the responsibility of States for genocide or genocidal acts was included in the dispute settlement clause of Article IX, without the concurrent introduction of necessary modifications into other articles of the Convention.
>
> As can be seen from the authoritative commentary to the Convention, published immediately after its adoption, 'there were many doubts as to the actual meaning' of the reference to the responsibility of States (Nehemiah Robinson, *The Genocide Convention. Its Origin and Interpretation*, [New York,] 1949, p. 42). As to the creation of a separate civil remedy applicable as between States, the same author observes that 'since the Convention does not specifically refer to reparation, the parties to it did not undertake to have accepted the Court's compulsory jurisdiction in this question' (*ibid.*, p. 43).
>
> In substance, the Convention remains an instrument relating to the criminal responsibility of individuals. The Parties undertake to punish persons committing genocide, 'whether they are constitutionally responsible rulers, public officials or private individuals', and to enact the necessary legislation to this effect (Arts. IV and V). Persons charged with genocide or genocidal acts are to be tried 'by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . .' (Art. VI). Such a tribunal was established (after the filing of the Application) specifically for the

> prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991.
>
> The determination of the international community to bring *individual perpetrators* of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action.
>
> . . . . . .
>
> Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.
>
> While we consider that Article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, affords a basis for the jurisdiction of the Court to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, and having, for this reason, voted for this Judgment, we nevertheless find ourselves obliged to express our concern over the above-mentioned substantial elements of this case." (*I.C.J. Reports 1996 (II)*, pp. 631-632.)

19. This interpretation adopted by Judges Shi and Vereshchetin is also preferred by Judge Oda in his declaration (*I.C.J. Reports, 1996 (II)*, pp. 625-629). In addition, this interpretation is espoused by Judge Kreča in his dissenting opinion (*ibid.*, pp.764-772).

20. The elements of this argument can be summarized as follows:

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

Second, the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to "the prevention and punishment of the crime of genocide" when this crime is committed by individuals: and the provisions of Articles V and VI of the Convention, in our submission, make this abundantly clear.

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

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

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

What, then is the correct interpretation of the Convention?

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

25. The genesis of the project to draft a convention on the prevention and punishment of genocide is to be found in General Assembly resolution 96 (I) adopted on 11 December 1946 in which the Economic and Social Council was requested to undertake the necessary studies. The text of the resolution can be seen in the *Yearbook of the United Nations 1946-1947* (p. 254).

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

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

27. In accordance with this resolution the Secretary-General prepared a draft convention for the prevention and punishment of genocide (United Nations, doc. A/AC.10/41, A/AC.10/42/Rev.1). This draft, usually referred to as the Secretariat draft (doc. E/447), provided the basis for the next stage of the project.

28. In response to a further request from the General Assembly, the Economic and Social Council eventually appointed an *Ad Hoc* Committee, composed of the representatives of seven Members, to draft a convention (doc. E/734).

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

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

"**ARTICLE V**

Persons liable

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

ARTICLE VI

Domestic legislation

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

ARTICLE VII

Jurisdiction

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

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

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

Discussions in the Economic and Social Council

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

34. At its Third Session the General Assembly referred the Report of the *Ad Hoc* Committee to the Sixth Committee.

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

35. The Sixth Committee spent 51 meetings discussing the draft convention and a number of amendments were adopted (see Summary Records of the Sixth Committee, 29 October-3 December 1948).

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

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

"Article IV

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

Article VI

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

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

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

40. Madam President, this analysis is perfectly compatible with Article IX of the Convention, which provides:

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

41. Now, of course, this provision includes disputes "relating to the responsibility of a State for genocide". Those words appear in Article IX: no doubt. But of course the wording has to be construed with the other provisions of the Convention. It is individuals who are criminally liable, in accordance with the provisions of domestic law as applied by domestic courts.

42. That, Madam President, is why the Convention is entitled: "Convention on the Prevention and Punishment of the Crime of Genocide". The duties to mobilize the domestic law of Contracting States, and to prevent and punish acts of genocide committed by individuals, are inevitably related to the exercise of legislative and enforcement jurisdiction within State territory, or areas under the control of the State. The principles of State responsibility require an ability to exercise control over the area concerned.

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

44. This was expressly recognized by the United Kingdom representative, Mr. Fitzmaurice, as he then was. The United Kingdom and Belgium were the authors of the joint amendment which

gave rise to the reference "disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV", as the text was at that stage.

45. It is clear that the Sixth Committee did not regard this phrasing as connoting a criminal responsibility of the State. The United Kingdom representative stated that the responsibility envisaged in the joint amendment "was civil responsibility, not criminal responsibility" (General Assembly, Third Session, Part I, Sixth Committee, 103rd Meeting, 12 November 1948, doc. A/C.6/SR.103, p. 440; and see also Fitzmaurice, 104th Meeting, *ibid*., p. 444; and 105th Meeting, *ibid*., p. 460).

46. This was also the position of Charles Chaumont, the French representative at the 103rd Meeting (*ibid.*, p. 431). In the words of the Summary Record*:*

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

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

47. To this account must be added some reference to the debate on Article V of the draft convention during the 93rd Meeting of the Sixth Committee. This was the draft article referring to the categories of individuals who would bear criminal responsibility.

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

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

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

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

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

49. In the first round of these proceedings, Professor Franck failed to clarify the difficulties created by the change introduced at a late stage in Article IX of the Convention. In particular, he provided no indication of the outcome of the relevant concept of State responsibility in the remedial sphere. Finally, my learned opponent appears to assume that the result of the drafting change was to endow the Court with a criminal jurisdiction and not a jurisdiction in respect of disputes between parties to the Genocide Convention (CR 2006/5, pp. 10-13). In the final analysis, the content of Article IX is not consistent with the substantive provisions of the Convention. And, given that Article IX is devoted to the machinery of settlement of disputes, it surely cannot be predominant.

50. So much for the *travaux préparatoires*, and I shall move on to examine the treatment of the question of interpretation in the doctrine.

Interpretation in the doctrine

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

Contemporaneous doctrine

52. One of the first commentaries to appear was Anonymous in the *Yale Law Journal*, Volume 58, 1948-1949 (pp. 1142-1160). This "Commentary" emphasizes that: "Jurisdiction of the offence would be confined to a territorial basis, with States extraditing fleeing offenders in accordance with their laws and treaties currently in force." (P. 1147.)

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

> "The Convention gives criminal jurisdiction under its domestic law to the State in the territory of which the act was committed; in addition, as the Sixth Committee

stated, Article VI 'does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside of the State'.

The legal situation is, therefore, the following one. Each contracting party is bound to try in its domestic courts, under domestic law enacted in carrying out the Convention, any private individual, public official or constitutionally responsible ruler whether a citizen or an alien, for any of the crimes of Articles II and III, committed in the territory of this State, whether against aliens or citizens; every contracting party is, further, entitled to try its own nationals for the same crimes committed abroad." (*American Journal,* Vol. 43 (1949), p. 745.)

54. Jean Graven, in his course at the Hague Academy on "Les Crimes contre l'humanité", analysed the debate in the Sixth Committee on the nature of State responsibility envisaged as in the draft convention. In his opinion, the possibility of a criminal responsibility of the State was excluded (*RCADI*, 1950, Vol. I).

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

"Insofar as this article provides for the settlement of disputes relating to the interpretation, application or fulfilment (in French, *exécution*) of the Convention, it is a stock provision not substantially unlike that found in many multipartite instruments.

The article goes further, however, in 'including' among such disputes 'those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'.

As no other provision in the Convention deals expressly with State responsibility, it is difficult to see how a dispute concerning such responsibility can be included among disputes relating to the interpretation or application or fulfilment of the Convention. In view of the undertaking of the parties in Article I to prevent genocide, it is conceivable that a dispute as to State responsibility may be a dispute as to fulfilment of the Convention.

Yet read as a whole, the Convention refers to the punishment of individuals only; the punishment of a State is not adumbrated in any way, and it is excluded from Article V by which the parties undertake to enact punitive legislation. Hence the 'responsibility of a State' referred to in Article IX is not criminal liability. In the course of the drafting of the Convention by the Sixth Committee of the General Assembly, the Delegation of the United Kingdom withdrew its proposal to impose criminal responsibility on States (United Nations doc. A/C.6/236) and supported the imposition of civil responsibility. (General Assembly, 3rd Sess. Pt. I, *Official Records*, Sixth Committee, pp. 428, 440.) Instead it is limited (that is the Convention) to the civil responsibility of a State, and such responsibility is governed, not by any provisions of the Convention, but by general international law." (*American Journal*, Vol. 45 (1951), p. 3334.)

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

Subsequent doctrine

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

58. The first item is the publication I have already referred to by Nehemiah Robinson, *The Genocide Convention: A Commentary*, which was published by the World Jewish Congress in New York in 1960. This is a meticulous and scholarly account of the preparation of the Convention together with an analysis of its provisions. In the examination of Article IX, Dr. Robinson describes the fate of the original British proposal for the criminal responsibility of States and the appearance of the joint Anglo-Belgian proposal "which was regarded by the members of the Committee as involving civil responsibility" — I refer to pages 99 to 106 of the study by Robinson.

59. The second item of subsequent doctrine is the substantial essay contributed by Professor Malcolm Shaw to the *Essays in Honour of Shabtai Rosenne*, published in 1989 (pp. 797-820). In his view: "The Convention does not directly refer to State responsibility."

60. In moving to the completion of this section of my argument, I would wish to emphasize that the question of the true interpretation of the Convention is by no means an exclusively preliminary matter but forms a necessary part of the merits of this case.

61. In the Judgment on preliminary objections the only issue the Court had to deal with in this context was whether or not there was a dispute concerning the interpretation of the Convention.

62. In conclusion on this question, it is necessary to examine the practical and remedial consequences of the application of the one or the other of the two candidate interpretations.

C. THE TWO INTERPRETATIONS OF THE GENOCIDE CONVENTION: WHAT ARE THE PRACTICAL CONSEQUENCES OF THEIR APPLICATION?

63. First, the view of State responsibility according to which the State bears direct responsibility for genocide: what are the practical consequences of such a view?

(i) First, the condition of intention is that the intention must be that of the State itself.

(ii) Second, imputability in accordance with the principles of State responsibility: here the imputability would depend on the fulfilment of both of the following conditions:

(1) control of the territory concerned.

(2) control of particular operations. An element which is being, broadly speaking, ignored by my colleagues on the other side of the Bar.

(iii) According to this interpretation the usual remedies would be available and, in particular, reparation. However, as I have pointed out, this view is not supported by the *travaux préparatoires* of the Convention.

64. Then we come to the other interpretation — if you will, the narrow interpretation according to which the Genocide Convention provides jurisdiction only for a declaratory judgment relating to violations of the duty to prevent and punish the crime of genocide. This of course is the view of Judges Shi and Vereshchetin. The practical consequences here would be:

(i) First, the condition of intention must apply and it is a *necessary* condition that the State officials knew that acts of genocide had been, or would be, committed.

(ii) Second, there must be control or the means of control over the personnel involved: this is a *necessary* condition.

(iii) And last, the remedy would be confined to that of a declaratory judgment — as indicated in the declaration of Judges Shi and Vereshchetin.

65. As I draw near to my conclusion on the nature of responsibility, two issues call for consideration. In the first place, it is significant to find that the Convention makes no provision for remedies relating to the case of direct responsibility. And there is no reason to assume that such a question would be left to be dealt with by inference either in 1949 or now.

66. The second issue provides the underpinning for the first. In 1949 the legal horizon did not include the criminal responsibility of the State concerned. There is no State practice to support this hypothesis and the question of criminal responsibility has been carefully left aside by the

International Law Commission in its work on State responsibility. Thus, Madam President, the criminal responsibility of the State is still absent from the legal horizon.

67. Against this background, it is not surprising to find that the doctrine as a whole does not recognize the criminal responsibility of the State. Typical is the treatment in the standard francophone authority by Charles Rousseau. In the substantial examination of State responsibility in Volume 5 of the treatise, published in 1983, no reference is made to the possible existence of criminal responsibility; I refer, in particular, to paragraphs 210 to 245. The standard Anglophone authorities adopted the same policy: one can refer, for example, to O'Connell's two-volume work, *International Law*, 2nd edition in 1970.

68. In the period immediately after the conclusion of the Genocide Convention in 1949, several authoritative writers adopted positions excluding the criminal responsibility of the State. The pertinent citations are as follows:

First, Hersch Lauterpacht, in his monograph *International Law and Human Rights,* published in 1950 (p. 44). Hersch Lauterpacht reports the Genocide Convention as follows:

> "The Convention on the Prevention and Punishment of the Crime of Genocide approved by the General Assembly in 1948 lays down that genocide, whether committed in time of peace or war, is a crime under international law which the Parties undertake to prevent and to punish and that the persons responsible for that crime shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'. The Convention thus subjected individuals to the direct obligation and sanction of international law."

Second, writing in 1951 Professor Manley Hudson refers to the provisions of Article IX of the Genocide Convention and offers the following conclusions: "Hence the 'responsibility of a State' referred to in Article IX is not criminal liability."

In addition Hudson observes that:

> "In its ratification of the Convention the Republic of the Philippines stated that it did not consider Article IX 'to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law'. This interpretation is so imperative that the statement of it would seem to have resulted from unnecessary precaution." (Hudson, "The Twenty-Ninth Year of the World Court", 45 *American Journal of International Law (1951) 1*, 33-34.)

And then in his article in the *American Journal*, in a footnote, Hudson added:

> "In presenting the Convention for the advice and consent of the Senate on June 16, 1949, the President of the United States endorsed a recommendation by the Acting Secretary of State that such action be taken 'with the understanding that

article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals'. This understanding was recommended by a subcommittee of the Senate Committee on Foreign Relations on May 23, 1950. In view of the conclusion stated above, no statement of such an understanding would seem to be needed.". (*Ibid.*, 34.) (These statements are reproduced in Whiteman, *Digest*, Vol. 11, pp. 857-58.)

69. In general the more modern authorities do not recognize a concept of criminal responsibility of the State. Some authorities simply make tentative reference to the now superseded draft Articles of the ILC. This approach can be seen in Karl Zemanek's contribution to the Rudolf Bernhardt *Encyclopaedia* (Vol. 4, p. 226). The general opinion was that Article 19 of the 1996 draft Articles represented an anomalous construct and the commentary prepared in 1976 shows a marked degree of hesitancy in presenting Article 19 as positive law.

70. Let us look at the original text of Article 19, because this was the best offer at that time of a thesis involving criminal responsibility.

"Article 19. "International crimes and international delicts"

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia,* from:

   (*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

   (*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

   (*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

   (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas." (*Yearbook* of the Commission, 1996, Vol. II (Part Two), pp. 95-122.)

71. In any event, Article 19 was, as a version of criminal responsibility, a sort of Potemkin village. It was much criticized both within the Commission and elsewhere. The criticism emanated from the following authorities.

1. Krystyna Marek, writing the *Revue Belge*, 1978 to 1979, (Vol. 14, p. 462). Marek states that the ILC

> "itself bears witness to the complete absence of any penal elements in either the theory or practice of international responsibility. The reader can therefore be referred to it for all the abundant material which directly contradicts its main proposition . . ."

2. There is criticism by Pierre-Marie Dupuy in the *Revue Générale* in 1980 (*RGDIP,* Vol. 84, 1980, pp. 468 *et seq*.).
3. Max Gounelle, writing in the *Mélanges offerts à Paul Reuter,* published in 1981 (Paris, 1981, pp. 315-326).
4. Manfred Mohr, in Spinedi and Simma, *United Nations Codification of State Responsibility,* published in 1987 (New York, 1987, pp. 139-141).
5. Bruno Simma, as he then was, Hague Academy lectures (*RCADI,* 1994, Vol. 250 (1994, VI), pp. 301-318).
6. Robert Rosenstock, in *Festschrift fűr Karl Zemanek,* published in 1994 (Berlin, 1994, pp. 319-334).

72. Rosenstock, who is a realist, points out that: "The complete absence of state practice provides no basis for regarding the notion as *lex lata* . . ." (P. 327.)

73. And, Madam President, Members of the Court, it is a striking fact that even the few partisans of the notion of State crime accept that it does not have the character of *lex lata.* This is the position of Jimenez de Aréchaga and Tanzi, in the Unesco *Handbook* edited by former President Bedjaoui, *International Law: Prospects and Achievements,* published in 1994 (Unesco, 1994, pp. 356-58).

74. The change of policy in the International Law Commission was very carefully considered and is explained by the Special Rapporteur in his Introduction to the draft Articles published in book form in 2002 (pp. 16-20). Without going into great detail, it can be reported that Professor Crawford demonstrates, and demonstrates very effectively, that the provisions of

Article 19 of the former draft Articles did not represent a viable régime relating to State crimes, and certainly did not represent positive law.

75. In his Concluding Remarks on the debate concerning Article 19, the Special Rapporteur summed up by making five major points. And if I can just report the fifth point:

> "general agreement had emerged between the two groups of members who had expressed diverse views in the discussion, that Article 19 did not envisage a distinct penal category, and that at the current stage of the development of international law the notion of 'State crimes' in the penal sense was hardly recognised. Both sides had endorsed the proposal, which the Commission had itself approved in 1976, namely that State responsibility was in some sense a unified field, notwithstanding the fact that distinctions were made within it between the obligations of interest to the international community as a whole and obligations of interest to one or several States. The Special Rapporteur retained the firm conviction that, in the future, the international system might develop a genuine form of corporate criminal liability for entities, including States. Most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach which entailed developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the International Criminal Court, acting in complementarity with State courts, on the one hand, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole, on the other." (Report of the International Law Commission on the Work of its Fiftieth Session, 1998, United Nations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 146, para. 329.)

76. Madam President, it is also necessary to emphasize the absence of agreement among States on the viability of the concept of State crime. The marked divergence of opinion has been chronicled by Dr. Jorgensen in her monograph *The Responsibility of States for International Crimes,* published in 2000. Dr. Jorgensen is evidently sympathetic to the concept of State crime and thus her analysis of the opinions of States does not, if I may say so, err on the side of scepticism.

77. Dr. Jorgensen describes the expression of views in the Sixth Committee in 1976. In her words:

> "Upon its adoption by the ILC, Article 19 met with a generally favourable response from developing and East European states in the Sixth Committee of the General Assembly. India felt that the distinction between international crimes and delicts was bound to promote international solidarity because it recognized the fundamental interests of the international community as a whole. Article 19 was also a 'matter of the greatest importance', for the Kenyan delegation. The Soviet Union considered that the distinction made in Article 19 between international crimes and delicts was of 'fundamental importance', and the fact that the members of the ILC adopted its text unanimously on first reading was particularly significant.

In contrast, the reaction of Western states was more cautious, and most spoke against the idea of the criminal responsibility of states. France recognized that Draft Article 19 was one of the most delicate but important articles of the whole study, and its main concern was the fact that this article, with the exception of paragraph 1, contained solely rules of progressive development. In its view [the French view] the ILC had espoused a trend which was far from constituting an established or generally recognized rule, and which was consequently premature. The UK thought that the most crucial issue was whether contemporary international law recognized a distinction between different types of international wrongful acts on the basis of the subject matter of the international obligation breached. The UK delegation stated:

> 'Although there was growing evidence of the existence of such a distinction between civil and criminal responsibility based on the importance attached by the international community as a whole to certain international obligations of a fundamental nature, the difficulty lay in defining such international obligations and assessing the consequences of such a distinction.'

The US could find no compelling argument for the inclusion of the concept of criminal responsibility in the ILC's Draft at the present stage of development of international legal institutions. The US did not feel that the perception that some acts affected a wider class than others compelled the conclusion that an international law of the criminal responsibility of states must be created. What it supported was the need for an analysis of ways to measure damages to the wider class, and if the ILC were determined to ensure that particularly grave breaches gave rise to a level of responsibility which exceeded *restitutio ad integrum,* a mention of exemplary damages would have been significant. Israel agreed with the doubts expressed on the advisability of retaining Draft Article 19, and warned that a document concerned with the objective criteria of state responsibility should not be injected with a political element and be allowed to reflect the deficiencies of the UN system. There was therefore a significant divergence of state opinion concerning the desirability of Article 19, with most Western states doubting the existence of the concept of state criminality as part of positive international law." (Jorgensen, pp. 254-256.)

78. Dr. Jorgensen then examines the views of States expressed in the Sixth Committee, 20 years later, in 1996. In her words:

"It is valuable to compare the views of states in 1976 with their current views. In the Sixth Committee, at the fifty-first session of the General Assembly in 1996, the states of the Southern African Development Community remained in favour of the retention of the distinction between international crimes and delicts. Japan merely stated that it felt 'further debate [was] necessary in such areas as the treatment of international crimes' without questioning the existence of a category as such. Ireland did not reject outright the concept of criminal responsibility of states but argued:

> 'There is not always a neat fit between domestic law concepts and those of international law, and this is clearly one of those cases where the proposed transposition of domestic law concepts into the international law field requires careful thought and reflection.'

Ireland felt that the concept was conceivable as a theoretical construct, it being possible to give a general definition of an international crime and to identify some examples; however, its usefulness was queried. Germany maintained the position it adopted when the distinction between crimes and delicts was first introduced, namely

> 'one of considerable scepticism regarding both the legal feasibility and the political desirability of the concept, combined with a cautious attitude of "wait and see" until not only draft article 19 of Part 1 but the entire system of legal consequences of crimes would be on the table', and [Germany] suggested putting 'the genie of international crimes back into the bottle from where it was released twenty years ago'. The French delegation did not contest the existence of internationally unlawful acts which were more serious than others, but felt that the distinction was still too vague. The US and the UK were typically dismissive of the concept. Thus US had 'fundamental concerns' about the very concept of state crimes. This concept does not find support in state practice. It confuses, rather than clarifies, the analysis of particular situations. Similarly, the UK argued that 'the concept of "state crime" has not gained the broad international acceptance that would be required for the introduction into the law of a new concept with such wide-ranging consequences'. [This in 1996.] The concept was found to be 'inchoate and lacking the modalities of implementation'. In essence, the UK felt that the concept lacked 'an adequate juridical basis and should not be retained'." (Jorgensen, pp. 256-257.)

79. The divergence of opinion continued in subsequent discussion in the Sixth Committee.

80. Overall, the evidence from the Sixth Committee debates demonstrates that there is no consistent opinion of States concerning the existence or content of the very concept of the criminal responsibility of the State.

81. Madam President, these propositions must now be placed within the context of treaty interpretation. The legal principles are set forth in the 1992 edition of *Oppenheim's International Law*, edited by Jennings and Watts. They are as follows:

> "A treaty is to be interpreted in the light of general rules of international law in force at the time of its conclusion — the so-called inter-temporal law. This follows from the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. Similarly, a treaty's terms are normally to be interpreted on the basis of their meaning at the time the treaty was concluded, and in the light of circumstances then prevailing. Nevertheless, in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption. Thus, even though a treaty when concluded did not conflict with any rule of *jus cogens*, it will become void if there subsequently emerges a new rule of *jus cogens* with which it is in conflict. Similarly, the concepts embodied in a treaty may be not static but evolutionary, in which case their 'interpretation cannot remain unaffected by the subsequent development of law . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.' While these considerations may in certain circumstances go some way towards negating the application of the inter-temporal law, that law will still, even in such circumstances, provide at least the starting-point for arriving at the proper interpretation of the treaty." (*Oppenheim*, pp. 1281-1282.)

82. And in my submission, whether these principles are applied according to the strict principle of inter-temporal law — that is, the position in 1949 — or according to the evolutionary principle — that is, the position when this Application was filed in 1993 — the legal result remains

the same. There can be no inference that the Genocide Convention provides a vehicle for the imposition of the criminal responsibility of the State.

Madam President, if it were convenient, that would be a good place to take a break?

The PRESIDENT: Yes, Mr. Brownlie, we will resume at 11.30.

Mr. BROWNLIE: Thank you very much.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Brownlie.

Mr. BROWNLIE: Thank you.

D. BREACHES OF THE GENOCIDE CONVENTION: THE CRITERIA OF STATE RESPONSIBILITY

I. The applicable law

83. I shall now move to the applicable criteria of State responsibility and it is clear that the principles of general international law governing the responsibility of States are "applicable in the relations between the parties" in accordance with the Vienna Convention on the Law of Treaties.

II. The question of attribution of acts to the former Yugoslavia

84. The position of the Government of Serbia and Montenegro is that the acts alleged to constitute genocide are not attributable to the Government or its predecessor, and the relevant circumstances are elaborated in Chapters 2, 3 and 5 of the Counter-Memorial.

85. Three distinct elements call for examination:

(a) First, the withdrawal from the territory of Bosnia-Herzegovina by the JNA, the Yugoslav army, beginning in March 1992.

(b) Second, the appearance of the Republika Srpska as an independent State in the period beginning 28 February 1992. On this date the Assembly of the Serb people in Bosnia adopted the Constitution of the Bosnian Serb Republic.

(c) Third, the absence of control of the Republika Srpska by the Government of the then Yugoslavia.

These three elements will now be analysed.

(a) ***Loss of control by the JNA in March 1992***

86. As the Court has found in its Judgment on preliminary objections, Bosnia and Herzegovina became independent on 6 March 1992 (*I.C.J. Reports, 1996 (II)*, p. 612, para. 23). This event, and the disintegration of the former Socialist Federal Republic of Yugoslavia, produced a critical situation in which the Yugoslav National Army (JNA) found itself, without warning, a visitor on the territory of hostile secessionist entities. No orderly transition was agreed and the public order situation was exacerbated by the appearance of armed militias. A three-sided civil war emerged within Bosnia and on 12 and 23 April 1992 the leaders of the three sides signed two successive ceasefire agreements. The three sides were the Muslims, the Croats and the Serbs of Bosnia.

87. In face of these rapid developments, involving the premature recognition of new political entities, the Government in Belgrade decided that the JNA should withdraw from Bosnia. Once that decision had been taken, it was carried into effect as expeditiously as circumstances allowed. There is ample evidence that the Yugoslav Government made a significant effort to arrange a peaceful transition and this is confirmed by the contents of the Secretary-General's report on 30 May 1992.

88. On 27 April 1992 the new Federal Republic of Yugoslavia was proclaimed consisting of Serbia and Montenegro. On 4 May 1992 the Presidency of the new State adopted a decision to the effect that the Yugoslav army should withdraw from Bosnia and that all citizens of the Federal Republic serving in the Yugoslav army within Bosnia should return to the territory of the Federal Republic by 19 May. It was also decided that citizens of Bosnia and Herzegovina serving in the Yugoslav army should remain on the territory of Bosnia. And it should be noted that 80 per cent of such forces were of Serbian origin. The evacuation of Bosnia was completed on 19 May.

89. The Bosnian Reply constantly distorts the actual circumstances. Given the political reordering of the region then under way, JNA personnel who were associated with the different ethnic groups within Bosnia remained behind and joined the newly formed territorial armed forces.

90. The evidence available confirms that the JNA was no longer in general control of Bosnia in March 1992, when Muslim and Croat military formations commenced attacks on JNA units in Bosnia and Herzegovina (Counter-Memorial, pp. 251-258; Rejoinder, pp. 532-562).

(b) ***The appearance of the Republika Srpska as an independent State***

91. As the Counter-Memorial has shown, the foundations of an independent Serb State were laid on 28 February 1992 (Counter-Memorial, pp. 122-125, paras. 2.4.1-2.4.1.15; Rejoinder, pp. 567-590). Whether or not the new State was recognized, it satisfied the legal conditions of statehood and the withholding of recognition was based on political rather than legal considerations.

(c) ***The absence of control of Republika Srpska by the Government of Yugoslavia***

92. In any event, in the context of attribution, the precise legal status of the Republika Srpska is not decisive. What is decisive is that, commencing in early March 1992, significant areas of Bosnia were under the control of the armed forces of the Republika Srpska and not under the control of the JNA. As a matter of final legal analysis, it does not matter whether the Republika Srpska constituted a State or a State *in statu nascendi*. The Republika Srpska had its own armed forces and was not subordinate to Yugoslavia.

93. I shall in due course introduce further evidence of the absence of control of the Republika Srpska by the Government of Yugoslavia. However, at this juncture in the argument it is necessary to refer to the relevant criteria of State responsibility.

III. The criteria of State responsibility

94. The leading authority is the *Military and Paramilitary Activities* case, in which the Court, in a majority Judgment of 14 judges, applied the test of effective control. And if I can read the key passages from the Judgment carefully:

> "What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the *Contras* 'constitute[d] an independent force' and that the 'only element of control that

could be exercised by the United States' was 'cessation of aid'. Paradoxically this assessment serves to underline, *a contrario*, the potential for control inherent in the degree of the *contras'* dependence on aid. *Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the* contras *as acting on its behalf*." (*I.C.J. Reports 1986*, p. 62, para. 109.) (Emphasis added.)

"So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of 'humanitarian assistance' as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, *contra* activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* . . . have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the *contra* force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is *a fortiori* unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not . . . suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*. (*Ibid.*, pp. 62-63, para. 110.)

. . . . . .

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

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*.'" (*Ibid.*, pp. 64-65.) (Emphasis added.)

95. Madam President, there is no reason to doubt that the *Nicaragua* Judgment represents the orthodox and unexceptionable application of general international law. When the International Law Commission completed its work on State responsibility neither the Special Rapporteur nor the Commission as a whole questioned the approach of the Court.

96. The relevant provision in the Commission's Articles on State Responsibility is Article 8 as follows:

"Conduct directed or controlled by a State

> The conduct of a person or group or 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."

97. The Commission's Commentary makes these clarifications in paragraph 7:

> "It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act."

98. The Commentary, in paragraph 4, invokes the *Nicaragua* decision and gives emphasis to the following passages:

> "[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf . . . All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

99. The Commission Commentary then summarizes the quotations:

> "Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State."

IV. The decision of the Appeals Chamber in *Prosecutor* v. *Tadić*

100. The decision of the Appeals Chamber in *Prosecutor* v. *Tadić* was considered in the Commentary of the International Law Commission and was distinguished. The significant passage in the Judgement of 15 July 1999 was as follows:

> "In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a 'military organisation', the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving . . . [such] participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law." (Judgement of 15 July 1999, para. 145; emphasis in the original.)

101. On this finding in the *Tadic* case, the Commission makes the following assessment:

> "The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was '*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'. In the course of their reasoning, the majority considered it necessary to disapprove the International Court's approach in *Military and Paramilitary Activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary Activities*. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility, but the applicable rules of international humanitarian law. In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it."

That is the Commentary of the International Law Commission to Article 8 in paragraph 5.

102. Now the Appeals Chamber seeks to challenge the authority of the decision in the *Nicaragua* case, a decision subscribed to by 14 judges, by asserting that: "In cases dealing with members of military or paramilitary groups, Courts have clearly departed from the notion of 'effective control' set out by the International Court . . ." That is the *Tadic* Appeals Chamber Judgement, paragraph 125. To support this proposition four cases are invoked (see the Appeals Chamber Judgement, paras. 124-129).

103. First, *Stephens* v. *United Mexican States*, 1927, decided by the Mexico/United States General Claims Commission (United Nations, *RIAA* IV, p. 265). The circumstances were straightforward. A member of an auxiliary public security force, clearly acting on behalf of the

Mexican Government, recklessly shot and killed an American subject in executing the order of a superior officer. There was no doubt that this involved the responsibility of Mexico. The case was decided nearly 60 years before the *Nicaragua* Judgment and therefore no reference is made to the Judgment or to the test of "effective control" and whether there was any need to depart from such a test. This decision is not concerned with the issue of control and is clearly irrelevant. The two key paragraphs in the decision read as follows:

> "7. Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.
>
> 8. Apart from Mexico's direct liability for the reckless killing of an American by an armed man acting for Mexico, the United States alleges indirect responsibility of Mexico on the ground of denial of justice, since Valenzuela was allowed to escape and since the man who released him, Ortega, never was punished. Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to employ adequate measures to punish wrongdoers." (*Ibid.*, pp. 267-268.)

It does not seem very helpful, with all respect.

104. The second case is *Yeager* v. *Islamic Republic of Iran* decided by the Iran-United States Claims Tribunal. Judgment was signed on 2 November 1987, just a short time after judgment in the *Nicaragua* case in the year before. This Award related to the actions of revolutionary guards performing *de facto* official functions. The Iran-United States Claims Tribunal considered that the guards constituted *de facto* State organs of Iran. No reference was made to the Judgment in the *Nicaragua* case and there was no discussion of the test of "effective control" or the need to depart from such a test (*Iran-United States Claims Tribunal Reports*, Vol. 17 (1987-IV), p. 92, paras. 42-45).

105. And, Madam President, what is striking is that the Tribunal was not deciding on the basis of control as such but primarily on the basis of the toleration and adoption of the exercise of government authority by the revolutionary guards (see the Award, paragraph 45, in particular).

106. And third we have the decision in *Loizidou* v. *Turkey* on the merits, a judgment of the European Court of Human Rights, on 18 December 1996 *(International Law Reports,* 108, p. 443). This judgment is relied upon by the Appeals Chamber to support the so-called "overall control" test. This reliance is surprising. First, the relevant passage applies a test of "effective overall

control", and not "overall control" as the basis of the responsibility of Turkey. This formulation cannot be said to constitute a confirmation of the criterion of "overall control" in preference to the criterion of "effective control". And, secondly, the same test of effective overall control is used to establish the existence of Turkish "jurisdiction" over the Turkish Republic of Northern Cyprus, the TRNC, for the purposes of Article 1 of the European Convention (see paragraph 56 of the judgment). In paragraph 52 of the judgment, the concept of jurisdiction is related to the exercise of effective control by Turkey.

107. The decision of the European Court, with respect, bears no relation to the *Nicaragua* case, which is not mentioned in the judgment and was not cited in the pleadings.

108. Fourth, the *Jorgic* case in the *Oberlandesgericht* of Dusseldorf, decision of 26 September 1997. The account of this case provided by the Appeals Chamber shows that the decision made no reference to the *Nicaragua* case, or to the test of "effective control". Indeed, the issue of control as such was not discussed at all. The issue in the case was whether the conflict in Bosnia-Herzegovina was an international conflict in the sense of the Fourth Geneva Convention.

109. Madam President, these four decisions provide no justification whatsoever for the attitude of the Appeals Chamber toward the Judgment of the Court in the *Nicaragua* case. In addition the decisions provide no support for the test of "overall control" adopted by the Appeals Chamber. Of course, the Appeals Chamber is not bound to follow the decisions of this Court but attempts to eviscerate its decisions should surely be conducted with more convincing materials.

110. In conclusion, it is necessary to revisit first principles. The test of effective control is to be applied as a mode of putting the principles of State responsibility into effect. The connection between the State concerned and the alleged *de facto* organ or agency must be based on control. As this Court has spelled out clearly in the *Nicaragua* Judgment, it must be proved that the respondent State had effective control of the military or paramilitary operations *in the course of which the alleged violations were committed*. The reference here is to paragraph 115 of the Judgment, in particular.

V. The argument of Professor Pellet

111. Madam President, Members of the Court, my distinguished opponent, Professor Pellet has argued strenuously in favour of a low standard of proof in cases of genocide (CR 2006/8, pp. 32-39). Professor Pellet relies upon the relevant paragraphs in the Appeals Chamber's judgment in the *Tadic* case, paragraphs 117 to 120. The Appeals Chamber relates the standard of overall control to the situation which involves an "organized and hierarchically structured group" (see paragraph 120).

112. It may be asked whether this form of words should make any great difference. The applicable law is that of State responsibility. The degree of control must surely be effective, otherwise it is not control. And it is clear that the Appeals Chamber is seeking to apply the normal principles of State responsibility.

113. In any event Professor Pellet deploys various other arguments in seeking to distinguish the *Nicaragua* case.

114. First, there is the *amnesia* argument. Rather sweetly, he asked the Court to "forget" Nicaragua (CR 2006/8, p. 34). Second, he argued that because of its special character, genocide should be accorded a lower standard of proof (CR 2006/8, paras. 67-69).

115. Such reasoning is necessarily incompatible with normal legal reasoning, and also with the principles of State responsibility. In particular, the applicant State ignores the substantial evidence of the status of the Republika Srpska as an independent State, and the clear evidence that as of May 1992 General Mladic no longer accepted instructions from Belgrade.

116. Professor Pellet states that the historical context is completely different from that of the *contras* (CR 2006/8, paras. 57-58). Now that is no doubt true. But the comparison is irrelevant because no account is taken of the actual relations between Pale and Belgrade. Professor Pellet refers to the assistance and support given to Republika Srpska but not to the issue of control. This is precisely the distinction which the Court made in the *Nicaragua* case. The financing, organizing, training, supplying and equipping of the *contras* did not constitute control.

117. It is the independence of Republika Srpska, and its territorial separation, which makes the comparisons with Northern Cyprus and the *contras* inapposite. In the *Loizidou* case the key point was the existence of the sovereignty of the Republic of Cyprus over the island as a whole.

Professor Pellet also states that the *Nicaragua* case can be distinguished because the United States was not the State from which the armed activities commenced (CR 2006/8, paras. 64-66).

118. But, Madam President, Members of the Court, this point flies in the face of the facts involved in the disintegration of Yugoslavia, including the appearance of new States, the operation of insurgent groups and a complex civil war. In any event, Professor Pellet's analogue is inappropriate because he is forgetting that, in the context of the use of force, the Court did accept that the United States had sufficient control.

119. Thus, in paragraph 3 of the *dispositif* the Court holds the United States responsible for a breach of its obligation under customary international law not to intervene in the affairs of another State. The issue of control militated against imputability only in the case of breaches of principles of general humanitarian law: as indicated in paragraph 9 of the *dispositif*. And, Madam President, it must be obvious that the analogue of the breaches of humanitarian law in the present proceedings is genocide.

E. THE REPUBLIKA SRPSKA AND ITS ARMED FORCES WERE NOT UNDER THE EFFECTIVE CONTROL OF THE BELGRADE GOVERNMENT

I. Introduction

120. Madam President, at this stage it is necessary to apply the principles of State responsibility to the evidence. In doing so, the focus will be upon the main submission of the respondent State, namely, that at the material time the Republika Srpska and its armed forces were not under the effective control of the Belgrade Government.

121. The primary evidence on this question is as follows:

(a) the pertinent reports of the United Nations Secretary-General from 30 May 1992 onwards;

(b) the documents and practice of the International Conference on the Former Yugoslavia and the Co-Chairmen of the Steering Committee;

(c) the recognition by the States concerned of the negotiating status of the Bosnian Serb party;

(d) the evidence of the views of Lord Owen, one of the Co-Chairmen, on the relations between Belgrade and Pale; and

(e) the specific character of the political consciousness of the Bosnian Serbs.

II. The United Nations documents

122. The armed forces of the Bosnian Serbs had in fact ceased to be under the control of the Federal Republic of Yugoslavia as early as May 1992 (Report of the Secretary-General dated 30 May 1992 (S/24049), paras. 8 and 9):

> "8. Uncertainty about who exercises political control over the Serb forces in Bosnia and Herzegovina has further complicated the situation. The Bosnia and Herzegovina Presidency had initially been reluctant to engage in talks on these and other issues with the leadership of the 'Serbian Republic of Bosnia and Herzegovina' and insisted upon direct talks with the Belgrade authorities instead. A senior JNA representative from Belgrade, General Nedeljko Boskovic, has conducted discussions with the Bosnia and Herzegovina Presidency, but it has become clear that his word is not binding on the commander of the army of the 'Serbian Republic of Bosnia and Herzegovina', General Mladic. Indeed, as indicated in paragraph 6 *(b)* above, Serb irregulars attacked a JNA convoy withdrawing from a barracks at Sarajevo on 28 May under arrangements negotiated by General Boskovic. It also appears that the heavy shelling of Sarajevo on the night of 28/29 May took place on the orders of General Mladic in direct contravention of instructions issued by General Boskovic and the JNA leadership in Belgrade.
>
> 9. Given the doubts that now exist about the ability of the authorities in Belgrade to influence General Mladic, who has left JNA, efforts have been made by UNPROFOR to appeal to him directly as well as through the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'. As a result of these efforts General Mladic agreed on 30 May 1992 to stop the bombardment of Sarajevo. While it is my hope that the shelling of the city will not be resumed, it is also clear that the emergence of General Mladic and the forces under his command as independent actors apparently beyond the control of JNA greatly complicates the issues raised in paragraph 4 of Security Council resolution 752 (1992). President Izetbegovic has recently indicated to senior UNPROFOR officers at Sarajevo his willingness to deal with General Mladic but not with the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'."

123. The separate political identity of the Bosnian Serbs is evidenced in a series of Reports of the Secretary-General from November 1992 onwards.

First, the Report of the Secretary-General, 24 November 1992, paragraph 38:

> "On the basis of agreements reached with the three Bosnia and Herzegovina parties in Geneva, UNPROFOR has succeeded in setting up a Mixed Military Working Group (MMWG), which held its first meeting in Sarajevo on 23 October 1992. The MMWG is now chaired by the Chief of Staff of BHC and consists of representatives of the three parties (the Presidency of Bosnia and Herzegovina, Bosnian Croats and Bosnian Serbs). This is the first time that the parties have agreed to tripartite meetings in Sarajevo to address major issues of concern. The MMWG has held six meetings so far. Further meetings are to be held every three or four days. The subjects primarily addressed by the MMWG so far have been *(a)* demilitarization of parts or all of Sarajevo, *(b)* opening of routes within and to Sarajevo, and *(c)* establishment of a ceasefire in specified areas or all of Bosnia and Herzegovina. At the sixth meeting on 10 November 1992, the three sides agreed to and signed a cease-fire for all of Bosnia and Herzegovina to be effective at midnight 11/12 November 1992." (Doc. S/24848, 24 November 1992.)

Then there is the report of the Secretary-General dated 18 January 1993, paragraphs 2 to 25 (doc. A/47/869). This report is of particular significance and deals with the work of the International Conference on the Former Yugoslavia. The authorities in Pale are described as the "Bosnian Serb side".

Third, the report of the Secretary-General, dated 26 March 1993 (doc. S/25479). This report describes the progress of peace talks under the aegis of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia. Reference is made to the negotiation of interim governmental arrangements between the "Bosnian Serb side" and (for example) the "Bosnian Croat side". The role of the Bosnian Serbs in the negotiations is described in paragraphs 14 to 21 of this report.

Fourth, report of the Secretary-General, dated 7 January 1994 (doc. A/48/847). This deals with the situation in Bosnia and Herzegovina and, in particular, the International Conference on the Former Yugoslavia. This document refers to "the parties to the conflict". The content of paragraph 5 is of particular significance. Paragraph 5 reads:

> "5. The latest round of efforts by the Co-Chairmen, together with the parties, has met one of the stated objectives of the General Assembly, namely arriving at just and equitable proposals for lasting peace. As the Co-Chairmen reported to the Security Council on 29 December (S/26922), the situation following discussions held at Geneva on 21 December and at Brussels on 22 and 23 December was as follows:
>
> *(a)* There was agreement among all three sides that the Muslim-majority republic should have 33.3 per cent of territory and the Croat majority republic should have 17.5 per cent;
>
> *(b)* There was agreement on the core areas to be allocated to the three republics. The issues remaining to be settled on territorial delimitation affected a small percentage of territory;
>
> *(c)* Working groups were established to look into the following issues and to help achieve agreement on them by 15 January: the definition of the Mostar city area that would be placed under the temporary administration of the European Union; technical arrangements for providing the Muslim-majority republic with road and rail access to Brcko and the Sava river; access of the Muslim-majority republic to the sea around Neum; continued discussions on territorial delimitation."

Fifth, report of the Secretary-General, dated 11 March 1994 (doc. S/1994/291). This report concerns a variety of special questions but in principle is an update on progress towards a peaceful settlement.

Sixth, the final report of the Commission of Experts established pursuant to Security Council resolution 780 of 1992 dated 27 May 1994 (doc. 5/1994/674, Ann.). This report has been the subject of a critical examination by my colleague Mr. Obradovic. In the present context it is necessary to point out that the report is concerned exclusively with the responsibility of individuals for breaches of the Genocide Convention. See paragraphs 87 to 100 of the report and also the General Conclusions and Recommendations, at paragraphs 306 to 321.

Lastly, there are other United Nations documents, and in particular, the report of the Co-Chairmen of the Steering Committee on the Activities of the International Conference on the Former Yugoslavia addressed to the Secretary-General on 5 August 1993 (doc. S/26260, dated 6 August 1993).

124. This document consistently refers to the "Bosnian Serbs" as a negotiating entity, and as a potential element in a confederal solution for Bosnia and Herzegovina. References are also made to "the Serb and Croat sides" and "the Serb and Croat parties". Appendix 1 of the report consists of the Constitutional Agreement of the Union of Republics of Bosnia and Herzegovina, the boundaries of which are defined in Annex A.

125. The report of the Co-Chairmen relates to the negotiations in the period May to early August 1993. The negotiations originally started on 3 September 1992. The political framework within which the talks took place included the premise that the Bosnian Serbs represented a political entity with a status similar to that of the other parties. The Republika Srpska was to be one of the constituent Republics of the Union envisaged in the Constitutional Agreement.

126. These developments were reflected in the contemporaneous sequence of Security Council resolutions affirming and supporting the efforts of the International Conference on the Former Yugoslavia. Thus resolution 787 of 1992, adopted on 16 November 1992, in a series of findings refers to "the parties in the Republic of Bosnia and Herzegovina", and it is clear from the reference to the draft outline constitution that the Bosnian Serbs were one of the parties.

127. In resolution 836, adopted on 4 June 1993, the Security Council again recognized the negotiating parties in the *consideranda* as follows:

"*Commending* the Government of the Republic of Bosnia and Herzegovina and the Bosnian Croat party for having signed the Vance-Owen Plan,

Gravely concerned at the persistent refusal of the Bosnian Serb party to accept the Vance-Owen Plan and *calling upon* that party to accept the Peace Plan for the Republic of Bosnia and Herzegovina in full, . . ."

128. Such references continue to appear, for example, in resolution 908 of 1994, adopted on 31 March.

129. The imposition of sanctions upon the Republika Srpska in September 1994 involved further recognition of the political reality of the entity. After all, one does not impose sanctions on a ghost. Annex 5 of the Statement of Lord Owen provided to the ICTY summarizes the developments in the first few paragraphs. Under the heading "ICFY mission to the FRY" Lord Owen writes: "Operations of the International Conference on the Former Yugoslavia (ICFY) Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro) — Report of the Co-Chairmen of the Steering Committee."

And the first section of the report now follows:

"1. This report is submitted pursuant to paragraph three of Security Council resolution 943 (1994) adopted on 23 September. In that resolution the Security Council requested that the Secretary-General submit every 30 days for its review a report from the Co-Chairmen of the steering committee of the International Conference on the Former Yugoslavia on the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro).

2. It will be recalled that on 4 August, 1994 the following measures were ordered by the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to come into effect the same day:

(a) 'to break off political and economic relations with the Republica Srpska'

(b) to prohibit the stay of the members of the leadership of the Republica Srpska (Parliament, Presidency and government) in the territory of the Federal Republic of Yugoslavia'

(c) as of today the border of the Federal Republic of Yugoslavia is closed for all transport towards the Republica Srpska, except food, clothing and medicine'.

3. On 19 September 1994 and on 3 October 1994 the Secretary-General transmitted to the Security Council reports from the Co-Chairmen of the steering committee of the International Conference on the Former Yugoslavia on the state of implementation of the above-mentioned measures (S1994 1074; S1994 1124). The report dated 3 October 1994 contained the following certification from the Co-Chairmen.

> 'Based on the mission's on-site observation, on the advice of the mission coordinator, Mr. Bo Pellnaes, and in the absence of any contrary information from the air, whether airborne reconnaissance system of the North Atlantic Treaty Organisation (NATO), or from national technical means, the Co-Chairmen conclude that the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) is meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the area of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces'."

130. In this same general context — the operations of the International Conference on the Former Yugoslavia — Annex C of the Statement of Lord Owen to the ICTY is also of assistance. Annex C consists of a "Chronology of Meetings between Lord Owen as EU Co-Chairman of the ICFY and Slobodan Milosevic and the leaders of the Federal Republic of Yugoslavia and the Croatian and Bosnian Serbs".

131. This summary covers the period from 28 August 1992 to 5 June 1995. In this period, Lord Owen had 35 meetings with Karadzic, either with Karadzic alone, or with other Bosnian Serb officials. Lord Owen also had seven meetings with Karadzic and Milosevic together, that is, to the exclusion of others.

132. In this period it is clear, especially from the account in Lord Owen's memoir, *Balkan Odyssey*, that Karadzic and the Bosnian Serb leadership were independent of the Belgrade Government. The contemporary sources show that Milosevic had no control over Karadzic and his colleagues in Pale. And, it must be recalled that, in the end, economic sanctions and a bombing campaign were necessary to coerce the Bosnian Serbs.

III. The views of Lord Owen on the relations of Pale and Belgrade

133. I now move on to the views of Lord Owen on the relations of Pale and Belgrade. These are of obvious importance, and three sources are to be considered in this connection.

134. The first is the statement of Lord Owen, dated September 2003, for production to the ICTY. The statement was made on the invitation of the ICTY and on the assumption that it would be made public. Lord Owen was called by the Trial Chamber in the *Milosevic* case as a court witness.

135. In the section on the relations between the accused and General Mladic, Lord Owen offers the following conclusion:

> "The extent to which Mladic was under political control from either Pale or Belgrade is a very difficult question to answer without having evidence from telephone calls, telex messages and access to files in Belgrade. (I doubt there were many files kept in Pale) but my impression was that Mladic, from 1994, did not feel himself under the command of any JNA officer, even though he was reliant on them for ammunition, fuel and spare parts." (Statement, p. 25).

136. The second source of evidence consists of the statements of Lord Owen in the ICTY transcript of the *Milosevi*c case on 3 and 4 November 2003. In his answers to questions from the defendant in the *Milosevi*c case, Lord Owen made a number of significant statements concerning the relations between the authorities in Belgrade and the armed forces of Republika Srpska. During the hearing on 3 November 2003, Judge May asked the following question — I am afraid that the transcript is not always very articulate and I have not presumed to improve its articulation, so some of this is a little rough:

> "*Judge May*: Lord Owen, there is something I want to ask you before you look at the map. The accused put this characterisation — he didn't ask a question, but he put it in what he was saying in his question. 'There is also no doubt, and you can bear this out, that I myself endeavoured to wield my influence to put a stop to all of that, but quite obviously, that influence was not strong enough.' And then he went on to make another point."

And so Judge May says,

> "Could you help the Trial Chamber, please, to say whether you agree with that characterisation, first of all, that the accused, Milosevic, endeavoured to wield his influence to put a stop to it; secondly, that the influence was not strong enough."

> "*The witness* [Lord Owen]: Well, as I've tried to bring out in the evidence so far, within the negotiating chamber and in the direct talks we had and negotiations on the demilitarization of Sarajevo or of the map of Sarajevo and how we could deal with Sarajevo first under the Vance-Owen Peace Plan and then under the European Union action plan, and then the Contact Group plan, it is perfectly true that then President Milosevic did understand most of the issues and argued with his fellow Serbs, Bosnian Serbs, that — for creative solutions to this. And he's right to say that we spent many, many hours with this map. And President Izetbegovic was there as well, and sometimes Mr. Silajdzic. Practically never Mr. Ganic . . .
>
> Now, my puzzlement is that, having seen the logic of the settlement, having, for example, understood that it was not viable for the Serbs to continue to be — position themselves along all the main roads and railway lines coming into Sarajevo, and when Karadzic and Krajisnik refused to move, President Milosevic at that time did not at that time say to them, 'All right, if you continue like this, I cannot allow the Serbian people that I represent in Serbia and Montenegro to be dragged down by international sanctions any longer, and I demand that you either accept it or we will cut off all forms of supplies to you.' And I urged him time after time after time to do this.
>
> And then, a final statement from Lord Owen:

> *"But of his understanding of the issue and the way to solve this problem, which was not easy, there was not much disagreement between himself, President Izetbegovic, myself, and Mr. Stoltenberg or Mr. Vance. There was broad agreement about what needed to be done."* (Transcript, pp. 28467-28469; emphasis added.)

137. These somewhat discursive remarks nonetheless show the essential agreement of Lord Owen with the leading questions put by Judge May. The response confirms that Milosevic was not in a position to control the decision making on the part of the Bosnian Serb politicians.

138. And there is other evidence given by Lord Owen, which shows conclusively that Milosevic did not control the politicians in Pale. Giving evidence before the ICTY, Lord Owen was questioned by Mr. Kay as follows:

> "Q. In your book at page 103, you make it clear it was the pressure by Mr. Milosevic, then-President Milosevic, on Mladic and Karadzic and the other leaders that this plan had to be adopted.
>
> A. Well, he pressurized, and he got them to sign up for it in Athens, but they then denounced, went back on the signature, including, really, Dr. Karadzic in Pale. Dr. Karadzic went nominally in support of the plan in Pale, but I think what reports I've heard of his speech, it was done in such a low key way that he was already [effectively] helping those who were going to vote against it.
>
> Q. You described Karadzic breaking down and caving in at the eleventh hour in relation to the Vance-Owen Peace Plan.
>
> A. In Athens, yes. He — they negotiated through most of the night with him, and that was not just President Milosevic but it was President Cosic and Bulatovic and also Prime Minister Mitsotakis, the Greek Prime Minister. He played a very helpful role.
>
> Q. Again, these were key steps taken by Mr. Milosevic in support of the peace plan to attempt on his side, on the Bosnian Serb side, to get them to that commitment.
>
> A. Yes. No doubt he was — he — well, I have no doubt that he was totally committed to it and that he didn't go to Pale and go through a subterfuge of trying to pretend [that] he was selling them a plan and letting them vote it down. *He suffered quite a humiliation in Belgrade of not being able to get his will through in Pale*. That's my reading of it. There are others who, as I say, have a conspiracy theory about this but I don't think that's the truth.
>
> Q. You describe him at Pale as having been defeated, collecting only two votes and the other party collecting, I think 51 votes or something like that, and him leaving by a side door.
>
> A. Yes. I wasn't there, but yes that's the description in the papers and that fulfilled — I think that was the case, and the crucial intervention came from General Mladic and also Mrs. Plavsic." (Transcript, pp. 28558-28559.)

139. In my submission this evidence clearly reveals the inability of Milosevic to influence the political constituency in the capital of Republika Srpska.

140. The third source of evidence is the contemporary publication by Lord Owen; the book *Balkan Odyssey*, published in 1995. The leading contemporary account of the peace negotiations known as the International Conference for the Former Yugoslavia was published by Lord Owen under that title. The text includes some significant comments on the relationship between the Republika Srpska and Belgrade. The first point of importance is the fact that the Bosnian Serbs were represented by their own delegation.

141. What emerges from the book overall is that the Bosnian Serb Government in Pale was more strongly nationalist than Milosevic and was not under the control of Belgrade in the relevant period, which was from August 1993 onward. The text of the book reveals that Milosevic, as an individual, had some degree of influence over Karadzic in the earlier phase of the negotiations. But it is clear that Milosevic had no control over decision-making by the Bosnian Serbs. Mladic had made his position clear in May 1992. He would not take orders from Belgrade and this emerges from the Report of the Secretary-General dated 30 May 1992.

142. From April 1993 onward there was a serious breach in the relations between Karadzic and Milosevic, which is dealt with in *Balkan Odyssey* (pp. 318-319; 325-326).

143. Lord Owen's assessment of these relations over the long run is as follows:

> "After an initial hesitation in April 1993 I was in little doubt that Milosevic's breach with Karadzic had by August 1994 developed many of the ingredients of a grudge match. They both wanted to be king of the Serbs. Karadzic was trying to be the successful war leader, a non-Communist and a devout Orthodox Christian in the Mihailovic tradition. Milosevic wanted to be the leader who, having fought for and won all the essential Serb interests during the break-up of Yugoslavia, was now bringing peace and prosperity. I saw no reason for us to be involved in their feud, which was why I was opposed to the United States and German line of not talking to the Bosnian Serbs, for I could envisage circumstances where their interests might prove to be closer to ours that Milosevic's. This happened for example over Croatia in the spring of 1995, when the Bosnian Serbs did not attack the Croatian government forces in Western Slavonia who were attacking the Croatian Serbs. President Tudjman perceptively kept up a private dialogue with the Bosnian Serb leadership throughout the time they were [not] talking to President Milosevic." (*Balkan Odyssey*, 1995, pp. 325-326.)

144. Lord Owen was relying upon much direct experience of the events and the leaders and no one reading his memoir could come away believing that the Republika Srpska was under the thumb of Belgrade.

IV. The specific political consciousness of the Bosnian Serbs

145. A very significant element in the tendency of the Bosnian Serbs to maintain an independence of their own is the specific political consciousness of this group. Various sources refer to this spirit of independence, including Lord Owen in his memoir (*Balkan Odyssey*, 1995, pp. 102-103). During his evidence in front of the ICTY, in response to a question from Mr. Kay, Lord Owen also indicated the particular attitudes of the Bosnian Serbs and the Pale Assembly. Lord Owen's statements are in the transcript, with the appropriate reference (4 November 2003, pp. 28562-28564).

146. Referring to the attitude prevailing in the National Assembly of the Republika Srpska in 1993, Lord Owen expressed his opinion in the sequence of questions and answers as follows:

> "Q. The position that you were left with in the May was that Pale could reject Belgrade and get away with it.
>
> A. And buck the rest of the world, yes.
>
> Q. Yes. Because they — they were able to present a substantial force within the area, and they had a cohesive political agenda on their own terms.
>
> A. Yes.
>
> Q. As the vote at the Pale Assembly showed.
>
> A. Yes. *You have to remember these people were not the same political party as the then-President Milosevic*, and they had a different view of Serbian history. I think it's true to say that Karadzic began to see himself as a sort of Mihajlovic Serb, a different tradition from Tito and from the Partisans." (Transcript, p. 28562; emphasis added.)

147. In an historical perspective it was the Serbs in Bosnia who remained longer under foreign rule and were the more exposed to the oppression of other nationalities or religious groups, including "a conservative land-holding aristocracy more fanatical than the central Ottoman authorities in Constantinople" (the British Official Geographical *Handbook on Jugoslavia*, Vol. II, October 1944, p. 53). The conditions of the Christian peasantry in Bosnia and Herzegovina actually became a matter of international concern in the period from 1876 onward.

V. The status of the Republika Srpska: in the Bosnian Reply and oral argument

148. Madam President, I shall now examine the status of the Republika Srpska with particular reference to the assertions on this subject in the Bosnian Reply. At the outset it is

important to recall the general context in which the Bosnian side has prepared the Reply. It is a matter of public knowledge that the Government of Bosnia has had very considerable assistance from foreign intelligence agencies since it was established in 1992. The activities of the CIA are referred to, for example, in the work published by Richard Holbrooke, entitled *To End a War* (New York, 1998). Several references in the book reveal the intelligence role of the CIA in Bosnia, (pp. 73 and 212).

149. Against this background, and given the electronic surveillance available to the Bosnian Muslim authorities, the Court is entitled to draw the inference — our colleagues on the other side are very fond of inferences — that such evidence did not support the contentions of the applicant State, but contradicted them. Otherwise, the evidence would have been presented. It may be noted that evidence of electronic interceptions is utilized but is attributed to the Bosnian Ministry of the Interior (see, for example, Reply of Bosnia, p. 475, para. 26).

150. The Bosnian side invokes the arrangements for the Dayton conference as evidence of an alleged Yugoslav control over Republika Srpska (Reply, pp. 465-466, paras. 2-3). This point has been made on several occasions during the hearings here. The assurances given by President Milosevic were of a political character and their character is in no way incompatible with the separate existence of Republika Srpska. Indeed, the assurances could only make political sense if it be assumed that Republika Srpska was a separate entity.

151. The Dayton Accords themselves confirm the political reality of a separate and independent Republika Srpska which, it was agreed, would become a part of a new State. Within this framework the Republika Srpska in its own capacity signed a series of 11 trilateral agreements including the following:

— Annex 1-A Agreement on Military Aspects of the Peace Settlement;

— Annex 1-B Agreement on Regional Stabilization;

— Annex 2 Agreement on Inter-Entity Boundary Line and Related Issues;

— Annex 3 Agreement on Elections;

— Annex 4 Constitution;

— Annex 5 Agreement on Arbitration;

— Annex 6 Agreement on Human Rights.

152. The outcome of these various trilateral agreements was the General Framework Agreement for Peace concluded in Paris. The basis of these complex arrangements was the assumption that the Republika Srpska was an independent and viable Contracting Party to the 11 trilateral agreements concluded. There is the provision in the Preamble of the General Framework Agreement for Peace in Bosnia and Herzegovina, which reads:

> "Noting the Agreement of August 29, 1995, which authorized the delegation of the Federal Republic of Yugoslavia *to sign, on behalf of the Republic of Srpska*, the parts of the peace plan concerning it, with the obligation to implement the Agreement that is reached strictly and consequently" (emphasis added).

That is the translation I have.

This agreement implies the existence of two independent and equal entities, namely, that one entity authorizes the other to do something on its behalf.

153. The Applicant makes an allegation in paragraph 3, page 465, of the Reply that "before initialling the Dayton Accords, the Federal Republic of Yugoslavia provided written assurances to the negotiating Parties that it would 'ensure that the Republic of Srpska fully respects and complies with the provisions' of the Agreement". However, the Applicant fails to draw attention to the letter which the delegation of the Republic of Srpska, comprised of Momcilo Krajišnik, Nikola Koljević and Aleksa Buha, submitted on 20 November 1995 to the delegation of the Federal Republic of Yugoslavia (doc. A/50/790, S/1995/999, pp. 124-125). This reads as follows:

> "Dear Mr. President,
>
> We write to you regarding the Peace Agreement and the documents which are to be initialled at the conclusion of the peace negotiations in Ohio. Since it is requested, in a number of documents prepared for adoption, that the FR of Yugoslavia be the guarantor of the obligations taken by the RS in the peace process, we kindly ask you to assume, on behalf of the FRY, the role of the guarantor that the Republika Srpska shall fulfil all the obligations it took."

Consequently, Madam President, the obligation of guarantee had been assumed at the request of the delegation of the Republic of Srpska.

154. In fact there was a simple explanation for the absence of Karadzic and Mladic. The senior United States diplomat, Richard Holbrooke, had made it clear that, as indicted war criminals, they would not be permitted to take part in the Dayton talks (R. Holbrooke, *To End a War*, 1998, p. 107).

VI. The standard of proof

155. Madam President, before I conclude on the question of control, it is necessary to examine the standard of proof. The present proceedings concern the most serious issues of State responsibility it is possible to imagine and the standard of proof should, as a matter of the good administration of justice, be appropriately rigorous. In relation to the allegations of Yugoslav collusion with Albania in the *Corfu Channel* case, on the merits, it is useful to recall that the Court required "conclusive evidence", and remarked that: "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here." (*I.C.J. Reports 1949*, p. 17.)

156. In the same Judgment the Court stated that: "The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt." (*I.C.J. Reports 1949*, p. 18; emphasis in the original.) In general the Court in the *Corfu Channel* case adopted a policy of considerable caution in relation to reliance upon indirect or circumstantial evidence.

157. In the recent jurisprudence of arbitral tribunals, the standard of proof in relation to forms of illegality, such as corruption, is formulated as a requirement of "clear and convincing" evidence (*Westinghouse* case, ICC Award of 19 December 1991, p. 34; the *Himpurna* case, UNCITRAL Final Award, 4 May 1999, para. 171).

158. More directly in point are the four Awards adopted recently by the Eritrea-Ethiopia Claims Commission. The Commission considered that the gravity of some of the claims warranted the adoption of a "clear and convincing" standard of proof (*Award ER17*, 42 *ILM* (2003), 1083, para. 46; *Award ET4*, *ibid.*, 1056, para. 37; *Award ERCF*, 43 *ILM* (2004), 1249, para. 6; *Award ET2*, *ibid.*, 1275, para. 7).

159. Madam President, this Court is, of course, in charge of its own procedure and these references are respectfully offered in order to assist the Court by adducing recent practice.

VII. Conclusion: the Republika Srpska was not under the control of the Belgrade Government

160. This consideration of the question of the standard of proof leads naturally to my conclusion on the issue of control. In the light of all the evidence, it is clear that there is no clear and convincing evidence of control of the Republika Srpska by the Belgrade Government. And

thus there is no basis for an attribution of the actions of the Republika Srpska to the Government in Belgrade. The Belgrade leadership had no effective control over the Bosnian Serbs. Moreover, if the criterion espoused in the Appeals Chamber of the ICTY were to be preferred, there is no evidence of "overall control" either.

161. In any case there is a substantial quantity of confirmatory evidence of the non-involvement of the Belgrade Government in the actions of the Republika Srpska to which I shall now turn.

Madam President, if it were convenient, it would be good for my logical presentation to stop there. Thank you.

The PRESIDENT: Thank you, Professor Brownlie. The Court will now rise and resume at 3 o'clock this afternoon.

The Court rose at 12.55 p.m.