*CR 2006/21*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2006**

***Public sitting***

***held on Thursday 16 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)**

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**VERBATIM RECORD**

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**ANNÉE 2006**

***Audience publique***

***tenue le jeudi 16 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)**

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**COMPTE RENDU**

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| *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,

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Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

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Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

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The PRESIDENT: Please be seated. Professor Brownlie.

Mr. BROWNLIE: Thank you, Madam President.

## ISSUES OF STATE RESPONSIBILITY: A FURTHER RECONNAISSANCE

### A. Introduction

Madam President, distinguished Members of the Court, may it please the Court: by way of introduction I would like to refer to the attitudes of our distinguished opponents. They have adopted a mindset which involves applying a principle of exceptionalism to Serbs, according to which all Serb actions and aspirations were illegal and were part of a plan to establish a Greater Serbia.

And yet the truth is very different.

First: Serbia did not take the initiative in the dismemberment of Yugoslavia; others did.

Second: there was substantial external assistance, that is, military assistance, to the Bosnian Muslims.

Third: there was a certain haste on the part of extra-regional powers to recognize the process of secession.

In the result civil war broke out and in the circumstances the policies adopted by the FRY during this turbulence were hardly surprising. The relevant circumstances included: the history of ethnic tensions and atrocities in the region; and secondly, the political problems of organizing the evacuation and redeployment of JNA units in the period March, April and May 1992.

In this context the emergence of Republika Srpska and its armed forces simply mirrored developments in Croatia and elsewhere.

In the circumstances, the assistance given to the Bosnian Serbs and their institutions by the FRY was reasonable and lawful.

The mindset adopted by our opponents to the emergence of Republika Srpska and its separate institutions involves double standards.

In conclusion, on the background to the issue of attribution in these proceedings, it is necessary to record the unfortunate forensic result of the anti-Serb mindset adopted by counsel for the applicant State. This result is a persistent lack of candour in matters of evidence. The more

remarkable examples include the actual régime of the safe areas — which were not demilitarized —, the relevance of the military situation, the role of foreign military assistance and the role of the Bosnia Serbs in the significant processes of international diplomacy in the relevant period.

Madam President, I shall now present my menu of seven special topics.

**B. Was there a plan to commit genocide?**

1. First of all, I shall have to address the question, was there a plan to commit genocide? The oral arguments of the applicant State have been peppered with references to a plan adopted and implemented by the FRY Government to commit genocide. And yet the applicant State has at no stage succeeded in proving the existence of a plan.

2. As I shall demonstrate in the oral argument, various plans are referred to, but there is no coherence in the presentation overall. Moreover, if a plan had been established, it might be expected that it would be referred to at appropriate junctures. But the plan has not surfaced, in spite of the access which the authorities of the applicant State have had to captured documents and to telephone intercepts.

3. The persistent inability of the Applicant to prove the existence of a plan is visible in the Reply. In this large document, only a short section is devoted to the alleged plan: I refer to Chapter 10, paragraphs 11 to 20. The Reply deals with the question of proof in the following passages:

> "The Yugoslav authorities planned, prepared and organised the genocide.
>
> Yugoslav authorities drafted the RAM plan and organised as early as 1990 the transfer of armaments to Serbian populations in areas which were to become part of Greater Serbia [see Reply, Chapter 8, Section 2]. This is evidenced by talks and meetings between high-level officials in Belgrade and local Bosnian Serb leaders. The police and the Ministry of Interior of Yugoslavia and Serbia played a prominent role in the implementation of the plan.
>
> Commenting on the RAM plan, the existence of which it does not deny, the Respondent asserts that it does not amount to planning genocide since it involves '*only* incitement to national and religious hatred' [Counter-Memorial, p. 104, para. 1.3.17.9; emphasis added]. This defence is left to the appreciation of the Court."

Now that is part of the quotation from a statement by counsel.

Madam President, I need to stop reading this quotation from the Reply at this point because the Reply is wrong in its attribution of the statement about incitement to the respondent State. Those drafting the Reply are misapplying the source. If reference is made to the Counter-Memorial, it will be found that the statement was made by a United Nations source and not the respondent State. Then the quotation from the Reply continues:

> "The preparation and execution of the plan was enabled by the transformation of the JNA into an instrument of the nationalist policy of Belgrade [see above, Chapter 8, Section 3]. General Veljko Kadijević, former Federal Secretary of National Defence and Chief of Staff of the Supreme Command of the JNA, explained in this book published in Belgrade in 1993 that since the spring of 1991, the JNA had been utilised in order to protect and defend 'the Serb people outside of Serbia' and to assemble the JNA 'within the borders of the future Yugoslavia [Greater Serbia]' [Veljko Kadijevic, *My view of the Break-up, An Army without a State*, Belgrade, 1993, p. 121, Annex 271].

I can assure the Court that if the origin of that quotation is examined, there is no phrase "Greater Serbia". No doubt the square brackets indicate that that is an insertion, but it is most certainly not in the original. And then the quotation continues:

> "The same General Kadijević describes the goals of the JNA after the independence of Slovenia and Croatia as follows:
>
> > '(1) defend the Serb nation in Croatia and its national interest; (2) pull JNA garrison out of Croatia; (3) *gain full control of Bosnia and Herzegovina, with the ultimate aim of defending the Serb nation and its national rights when the issue arose*; (4) create and defend the new Yugoslav state of those Yugoslav nations that desire to be a part of it, meaning in this phase the Serb and Montenegrin nations. *The basic concept for deployment of the armed forces was thus adjusted to this modified task*' [*ibid*., p. 97, emphasis added, Annex 271]." (Reply, p. 765.)

4. Madam President, what is remarkable is the absence in these passages of evidence of a plan. In any event the purported RAM plan consists of suppositions based upon the insufficiently legible part of the transcript of a telephone conversation between Milosevic and Karadzic of 29 May 1991. Not a single ICTY indictment contains details about the existence of a plan entitled RAM. The controverted evidence of the RAM plan has been examined at some length in the Rejoinder, (pp. 590-598). Incidentally, the so-called RAM plan has not been referred in the oral argument.

5. I shall move now to the treatment of this question of the existence of a plan during the oral argument. The introductory speech by Mr. van den Biesen reveals nothing concrete about the

adoption of a plan to commit genocide (see CR 2006/2, pp. 18-52). The only passages which refer to a plan in his speech are as follows:

> "66. Earlier, two years before, in April 1993, Mladić presented the so-called 'Analysis of the Combat Readiness Report of the VRS in 1992' to the Republika Srpska Assembly. In this report the level of so-called support given to the VRS in 1992 is discussed in more detail. It is a peculiar document and we will come back to that later on. This is what Mladić stipulates in the introduction to his report on the year 1992: 'We have carried out individual and concerted battle operations according to a single design and plan.'"

And Mr. van den Biesen continues:

> "67. Indeed, Madam President, everything went according to a single plan. The pattern described earlier was, indeed, continued throughout 1992 and after 1992, for that matter. The 'plan' that Mladić refers to, was most certainly not a plan which the leaders of the self-proclaimed Republika Srpska at the time designed on the day that they proclaimed the 'independent Republic', and it was not a plan that the Republika Srpska leadership only began to draft on 20 May 1992, the day after the so-called 'withdrawal' of the JNA. This plan simply refers to something which formed the guideline for Belgrade's policies already for quite some time, which policies were from May and June 1992 onwards very much implemented by the Pale leadership. This guideline fits the Greater Serbia plan and the strategies to be employed in order to achieve the goal thereof. The ICTY has established this through, for example, the acknowledgment of Mrs. Plavsić, who said the following:
>
> > 'The SDS and the Bosnian Serb leadership were committed to a primary goal that all Serbs in the former Yugoslavia would remain in a common state. One method of achieving this goal was by separating the ethnic communities in BH. By October 1991, the Bosnian leadership, including Mrs. Plavsić, knew and intended that the separation of the ethnic communities would include the permanent removal of ethnic populations, either by agreement or by force and further knew that any forcible removal of non-Serb from Serbian-claimed territories would involve a discriminatory campaign of persecution.'"

6. With respect, these sources do not provide any real assistance to the Bosnian case. The Mladic plan obviously concerns military activities and is not quoted adequately in any case. The second paragraph quoted explains that there was not a plan but a pattern, or perhaps only a guideline.

7. Moreover, the statement relating to the Plavsic transaction based upon a plea bargain does not refer to a plan to commit genocide, the passage is not in the first person, of course, and the draftsman of the statement has made argumentative inferences.

8. I move on to examine the argument presented by Ms Karagiannakis on 28 February (CR 2006/4, pp. 10-21). In this lengthy presentation the emphasis is upon the subject of ethnic

cleansing but no plan is proved to have existed in relation to genocide. Most of the material is devoted to the steps taken by the Bosnian Serbs to organize institutions in the face of the turbulence resulting from the secessions and civil war. If a plan to commit genocide had existed counsel would no doubt have referred to it. Moreover, Ms Karagiannakis refers to the existence of at least 45 intercepts — 45 intercepts — of conversations between Milosevic and Karadzic in the period 29 May 1991 to 10 February 1992 (CR 2006/4, pp. 11-12, para. 8). It is strange indeed that no reference to a plan ever emerged from these intercepted conversations.

9. In other speeches on behalf of Bosnia and Herzegovina counsel examined the evidence alleged to show an intention to destroy a group but, in so doing, failed to identify a plan to commit genocide. I refer, in particular, to the speech of Professor Franck on 2 March (CR 2006/7, pp. 46-48).

10. When specific episodes are examined, the existence of a definitive plan, providing a political chart of some kind, is seen not to be a part of the picture. And perspectives suddenly change. This instability in the analysis of Bosnian counsel is to be seen in the presentation of Mr. van den Beisen on 28 February (CR 2006/4, p. 37). In relation to Srebrenica and ethnic cleansing in eastern Bosnia he observed:

> "Before I go into a more focused description of what actually happened in July 1995, I would like to provide some more context. If we want to give Srebrenica its proper place in the ethnic cleansing campaign that to a large extent destroyed the typical Bosnia and Herzegovina of before 1992, we need to look at a larger picture.
>
> 'Srebrenica' was not a goal in itself, it was merely the finale, the climax, the completion of what had been the plan all along, at least since the beginning of 1991. We are today discussing part of that earlier plan. This earlier plan did not focus on Srebrenica alone but related to all of eastern Bosnia.
>
> Yesterday and earlier today we have clarified how the Serbian project was prepared. How, beginning in 1991, the Serbian leadership in Belgrade organized the arming of Serbs in Croatia as well as in Bosnia and Herzegovina, and how parallel political structures were created to assume governmental authority when the hour would have come. We explained that this happened in all areas with substantial Serb populations, although this was expressly not limited to municipalities with Serb majorities."

11. The Court will appreciate that counsel for Bosnia and Herzegovina has avoided specifics about the plan. The events at Srebrenica are now part of an earlier plan. And the earlier plan is now a "project" and the "project" is evidenced by lawful Serbian activities, including the

distribution of arms and the creation of parallel structures. Can our opponents show the Court that the Croats and the Bosniaks did not distribute arms or create parallel political structures?

12. On the alleged plan or plans I would make two points in conclusion. First, the evidence presented which purports to relate to one or more plans is incoherent, it is vague and, in the final analysis, a fiction. Secondly, there is a major paradox in the approach of my opponents to the political issues of boundaries, which formed part of the agenda of the peace negotiations led by Owen and Vance. Thus, for example, Ms Karagiannakis regards references to such matters as evidence of ethnic cleansing but those issues were prominent in the agenda for a peace settlement.

### C. The question of paramilitaries

1. Secondly, I shall examine the question of paramilitaries. In the oral arguments our learned opponents have devoted much attention to the question of paramilitary units. In the first place Ms Karagiannakis provides a general account of what are described as "paramilitary units, volunteers and the units and the organs of the Ministries of the Interior" of the Respondent (see CR 2006/9, pp. 10-12). The argument is introduced by her as follows:

> "Madam President, Members of the Court, various irregular forces were involved in the targeting of non-Serbs in Bosnia. They included so-called volunteer units, units of the Ministry of the Interior of Serbia and other Serbian paramilitary units, and Bosnian Serb paramilitary units. This morning I am going to address the Court on the role of organs of the Respondent in controlling, directing and/or supporting these irregular military units. I will also address the Federal and Serbian Ministries of the Interior and the other means through which they participated in the ethnic cleansing in Bosnia."

2. Professor Condorelli covers the same ground later in the same session (CR 2006/9, pp. 49-56). Both counsel point out that the volunteer forces were constituted under legislation of the FRY. The subject of volunteers and paramilitary units is touched again by Professors Condorelli and Pellet on 6 March (see CR 2006/10, pp. 31-34, and *ibid.*, pp. 44-46 respectively).

3. The question of attribution is clear enough in principle. Like other States, both the FRY and Republika Srpska have made use of security police units and special forces, alongside units of the regular army. In addition, such units may be seconded to the armed forces of another State and, in the result form part of the command structure. In the alternative, such forces may take part in

joint operations with the forces of another State, whilst continuing to fall within the command structure of the sending State.

4. Each situation obviously must be analysed in the context and reference must be made to the pertinent command structures. Applying the principles of State responsibility is no doubt sometimes difficult, and it is not therefore surprising to note a certain difference of opinion in these matters between Professor Condorelli and Professor Pellet.

5. It is helpful to recall that the Bosnian Armed Forces included special purpose units known by the public as the Green Berets.

### D. The modalities of the test of effective control

1. With the Court's permission I would like to return to the criteria of State responsibility and the issue of effective control, or as our opponents would put it, global control. The background is the use of paradigm cases in which the subject entity allegedly susceptible to control takes the form of a State, or a State in *statu nascendi*, or a guerrilla movement with a political leadership, like the *contras*. The adoption of this group of paradigm cases has almost certainly created a source of distortion in the application of the legal principles.

2. In the first place, it is necessary to recall the standard formulation of the legal criteria. The key statement in paragraph 115 of the *Nicaragua* Judgment is as follows: "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*I.C.J. Reports 1986*, p. 65.)

3. This aspect of the legal criteria is brought into prominence in the Commentary of the International Law Commission on Article 8 of the Articles on State Responsibility. The wording of the Commentary in paragraph 7 is of considerable significance:

> "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 directions 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."

4. This element in the legal position has not attracted the attention of our distinguished opponents. No doubt this element indicates the operational inadequacy of the concept of "global control".

### E. The Respondent's continuing presence as alleged by the applicant State

1. My next subject is the Respondent's continuing presence as alleged by the applicant State. On 3 March Mr. van den Biesen addressed the Court on a variety of topics assembled under the rubric "The Respondent's continued presence". This presentation was introduced as a "general overview of the facts which will be relevant" for the establishment of State responsibility (CR 2006/8, pp. 39-61). This division of facts and the relevant law has the result that the facts offered are question begging.

2. The outcome of this treatment is a replay of the standard themes of the pleadings of the applicant State.

3. Thus, in the first place, the arming and redeployment of Serbian forces after the political and military disintegration of the federal State, is regarded as unacceptable and sinister. The judicial finding relied upon by Mr. van den Biesen reads, in part, as follows:

> "As President of the Republic of Serbia, Slobodan Milosevic made arrangements to ensure that Bosnian Serb forces could retain personnel and arms by ordering, on 5 December 1991, that soldiers who were native of Bosnia and Herzegovina be transferred to Bosnia and that those in Bosnia who were native of other republics be moved out. [The judges continued]. On 25 December 1991, a JNA commander reported to Milosevic that these transfers were 90 per cent complete. According to the diary notes of Borisav Jovic (President of the SFRY Presidency), Milosevic anticipated that several Yugoslav republics would soon be recognized as independent States, and the Serbian President wanted to make sure [and he says I am still quoting the Judgment], that the JNA in Bosnia and Herzegovina could qualify as an indigenous Bosnian fighting force. Throughout 1991 and 1992, the Bosnian Serb leadership communicated with the SFRY leadership on strategic policy in the event that Bosnia and Herzegovina would become independent." (CR 2006/8, p. 41, para. 11.)

And that is the end of a quotation from *Prosecutor* v. *Brdjanin* on 1 September 2004.

4. These reactions of the Serbs are, in my submission, entirely to be expected in the prevailing circumstances. Unfortunately, the Trial Chamber was unwilling to accept that the JNA and VRS constituted two separate armies.

5. Counsel for the applicant State also relies on the evidence that Belgrade assisted the new Serbian Republic by paying the salaries of officers. Counsel for the applicant State finds all this very shocking. But again we have the problem of the attitude of exceptionalism against Serbs. In fact, former JNA officers, who were Muslims, played a leading role in the creation of the Bosnian Army, and that is not particularly surprising (CIA *History*, Vol. I, p. 132).

6. The evidence of military and economic assistance to the Bosnian Serb communities is not related to the criteria of State responsibility by counsel for the applicant State in his argument.

7. The sequence of the topics includes a section on military action. This includes the startling proposition that "there was only one army in Bosnia, being the Respondent's army" (CR 2006/8, p. 50, para. 37).

8. Then we come to an anomalous section of the speech, the segment is entitled "PAUK" (*ibid.*, pp. 52-54).

9. This strange interlude is introduced as follows:

> "51. Bihac is, for the purpose of realizing a Greater Serbia, an important strategic area that needed to be under the control of Serbs if the Greater Serbia project were to be successful. Only in this way would the Croatian Serbs and the Bosnian Serbs be able to merge together into a State with the Federal Republic of Yugoslavia: this was effectively the realization of Strategic Goal No. 1.
>
> 52. In November 1994 a special military command group was set up to conduct combat operations against the Bosnian army in the Bihac pocket the objective being to seize this territory. The name of this operation was 'Pauk', which literally means 'spider', and this fits the nature of the operation itself since it incorporated units from the Federal Republic of Yugoslavia, the Bosnian Serbs and the Serbs in Croatia.
>
> 53. The units involved in the entire operation included those from the Ministry of the Interior from the FRY, the army of the Bosnian Serbs and the army of the Serbs in Croatia. The most revealing document regarding this operation is the 'Pauk' Operation Diary, a diary which was captured by the Bosnian and Croatian Federation Forces when they retook Bihac as part of the so-called Operation Storm [which was itself a military operation]. This diary has been submitted in full in the Milošević case at the ICTY.
>
> 54. It [the diary] details, day by day, hour by hour, the actions carried out by the different units. And there are continuously clear references to Belgrade: particularly meetings taking place in Belgrade, ammunition requests sent to Belgrade, and senior military personnel visiting 'Pauk' from Belgrade." (CR 2006/8, pp. 52-53.)

10. It is not clear why the applicant State has introduced this material. The Bihac region for a very long period was the centre of the political domain of Fikret Abdic, the ruler of the Autonomous Province of Western Bosnia. Fikret Abdic was a prominent Muslim political leader,

opposed to President Izetbegovic. This entity is described in detail in the CIA *History* (Vol. 2, pp. 413-416, 513-517, 527-543).

11. The role of the Autonomous Province of Western Bosnia is difficult to describe and to outline the complex relations of Mr. Abdic with both Croats and Serbs would be unlikely to assist the Court very much in its present task.

12. The PAUK is an entity of obscure provenance, probably created by a Croatian Serb officer, and probably operating as a paramilitary unit apparently associated *simultaneously* with the FRY, Republika Srpska, Republika Srpska Krajina and the Autonomous Province of Western Bosnia. The evidence available includes excerpts, originally in the Serb language, from an operational diary. The excerpts from the diary, in the English translation, form part of the documents submitted by the applicant State on 16 January this year.

13. The excerpts available to the Court, in English, support the hypothesis that PAUK was working alongside the armed forces of Fikret Abdic. A proportion of the entries include Muslim names. In these circumstances, the contents of the diary certainly do not support the view that the agents of Belgrade — if that is who some of them were — had a genocidal *animus* against Muslims.

14. The relations between Abdic and the Government of Serbia were evidently opportunist. They are described in the CIA *History*, Volume 2, at pages 531 and 535. At the most, the episode is an example of special forces, of uncertain provenance, giving assistance to the Joint Command of Fikret Abdic and Republika Srpska Krajina.

15. In continuing the evidence of the alleged "continuing presence of the Respondent" in Bosnia, the next topic invoked by counsel for the Applicant is the Council of Co-ordinating Positions on State Policy (CR 2006/8, pp. 55-60). The role of this institution is described by my opponents as follows:

> "The Belgrade authorities, apparently, felt the need to create a mechanism to make sure that the positions of the three entities, the Federal Republic of Yugoslavia (Serbia and Montenegro), Republika Srpska and Republika Srpska Krajina would discuss their common position. This mechanism came to be the Council for Co-ordinating Positions on State Policy, which Council fell under the auspices of the President of the Federal Republic of Yugoslavia. Members of this Council were, next to the President of the FRY, the President of Serbia, the President of Montenegro, the leadership of Republika Srpska and of Republika Srpska Krajina, and also the

> Yugoslav Chief of Staff and the Bosnian Serb Commander of the army of Republika Srpska, Mladic.
>
> On 9 January 1993 a session of this Council took place. We know about this due to the testimony of Mr. Lilic before the ICTY. I referred to that earlier. On 9 January 1993 the Council met in a so-called 'enlarged Session', meaning that a larger representation of the political and military leadership of the three entities was present. The shorthand notes of this meeting have been made public through the Prosecutor of the ICTY in the course of the case against Mr. Krajišnik, one of the leaders of the Republika Srpska."

16. This natural and lawful arrangement for co-ordination between Serbian communities in a war situation is caricatured by our opponents. The main subject of discussion by this body was negotiations to improve conditions in the region. It is incidentally interesting to note the references by the leader of Republika Srpska to Serbia and Montenegro as a separate entity (see paragraph 79 of the minutes).

17. Then there is a certain practice of what must be called reverse interpretation by our learned opponents. In the discussion of the negotiations envisaged, the Foreign Minister of the FRY made the following statement:

> "We must clearly, comprehensively and generously guarantee them that the enclaves within the provinces [here, he clearly refers to enclaves such as Srebrenica, Gorazde], that is to say within the confederal unit, would be fully protected and that the refugees would have the right to return and be compensated for the destroyed property etc. It will not work out because the natural migration towards the mother country would follow. Nobody has ever paid the war reparation anywhere so I am sure that it will not happen here either. However, we have to make the comprehensive and generous gesture. Therefore, we must give a guarantee at the humanitarian aspect. We must guarantee that a non-existential creation called Bosnia would be held in such non-existential condition for many years. That should divert fears that the creation of Greater Serbia is ahead." (CR 2006/8, pp. 59-60, para. 82.)

18. For my opponents this is all too clear, this language, and it is not acceptable that Serbs should make a generous gesture. So counsel for Bosnia and Herzegovina then proposes that the passage be given its opposite meaning. Mr. van den Biesen then says:

> "Here, again, it appears that the participants to this meeting, including this Foreign Minister of Serbia, are well aware of the fact that they are accountable for paying compensation 'for the destroyed property etc.', as he describes it. At the same time he, the then Foreign Minister of Serbia, is confident that they will not have to pay war reparation. He proposes to make a 'comprehensive and generous gesture', including several guarantees. As appears from his words, those gestures would only be made to 'divert fears that the creation of Greater Serbia is ahead'. Another preparation for another deceit." (CR 2006/8, pp. 59-60, para. 82.)

19. Madam President, in my submission, this segment from the argument provides another example of the habit of our opponents to construe every normal action of Serbia and Montenegro as evidence of culpability.

**F. The Genocide Convention and the question of remedies**

1. Madam President, with your permission, I shall return to the important business of how to apply the Convention. My friend Professor Pellet dealt with the consequences of State responsibility on 7 March (CR 2006/11, pp. 26-42). His theme is that of the specific remedies available and he reviews the remedies listed in the standard sources on State responsibility: compensation, restitution, satisfaction, cessation and assurances and guarantees of non-repetition.

2. This material is interesting and if I may say so, well presented. But is it at all relevant? In the first place, the applicable law is the Convention itself and not the principles of general international law. But counsel for the applicant State expressly adopts as the major premise of his arguments on remedies, the application of general international law (CR 2006/11, p. 29, para. 7).

3. With respect, this is not the appropriate legal approach. The causes of action or, if you wish, the bases of claim depend upon the applicable law, which consists of the provisions of the Convention. And it must follow that the remedial consequences must be kept compatible also with the causes of action.

4. In other words, Madam President, the principles of State responsibility relating to the content of responsibility, including reparation for injury, do not have the quality of a tent, a sort of turf, which can be placed over every treaty text. Everything must depend upon the nature of the primary duties. The nature of the responsibility for breaches of the Genocide Convention, and the availability of remedies, including reparation, were major issues of contention when the Convention was drafted.

5. It is also to be recalled that, even within the context of the Articles adopted by the International Law Commission, the Commission did not recognize the concept of penal damages — this in Articles 40 and 41 — and this is acknowledged by Professor Pellet (CR 2006/11, p. 33, para. 16).

Madam President, there is here a useful analogue with the jurisdiction to order provisional measures. As the Court indicated in the Order dated 8 April 1993, the Court cannot, on the basis of general considerations of international policy, extend its power to indicate provisional measures under Article 41 of the Statute (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports* 1993, pp. 18-19, paras. 33-35). In the present context, the applicant State cannot seek to extend the jurisdiction available to the Court by virtue of Article IX of the Convention simply by invoking the general principles of international law relating to remedies.

My last topic this morning is the issue of provisional measures.

**G. The issue of provisional measures**

1. The general question of the Court's indication of provisional measures in the Orders of 1993 has been examined by Professor Pellet on 7 March (CR 2006/11, pp. 42-48) and I shall avoid adding any further information but there are certain points to be made.

2. At the outset an important distinction must be drawn. The provisions of Article 41 of the Statute constitute primarily and, in my submission, exclusively, an aspect of the Court's — so to speak — public law competence. There is no indication in the Statute that breaches of procedural orders have delictual aspects as between the States parties to the proceedings. After all, the account in the standard work of Shabtai Rosenne does not suggest otherwise — I refer to his book in the long section in Volume III on this subject (see *The Law and Practice of the International Court, 1920-1996*, pp. 1419-1462).

3. It is important to bear in mind that, when the Court accedes to a request by a party to declare that the other party has violated an order of the Court for provisional measures, it does not follow that a readiness to act upon a request involves a recognition that there is a basis for a claim based upon State responsibility. This conclusion can be justified on various grounds. One ground would be the problems of evidence which would be involved. Another ground would be the onerous requirements of an enquiry on the issue whether new evidence had shown that the factual premises of the original order were mistaken. The position is complicated by the danger of an

imbalance in face of a request for a declaration only from one party. In the Judgment of 19 December 2005 in the case of *Democratic Republic of Congo* v. *Uganda*, the Court observed:

> "265. The Court further notes that the provisional measures indicated in the Order of 1 July 2000 were addressed to both Parties. The Court's finding in paragraph 264 is without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court."

4. In any case, the Court will presumably take account of the conduct of the party requesting such a declaration. The applicant State has not been consistent in this respect in these proceedings.

First: the submissions attached to the Memorial do not contain a request.

Second: during the preliminary objections the oral hearings containing the submissions were unaltered.

Third: the Conclusions and Submissions attached to the Reply, at pages 971 to 973, do not contain a request.

5. At the present stage of these proceedings the Court has not heard the final submissions of the Parties. However, counsel for the applicant State has, so to speak, informally asked the Court to treat the violation of an order as a basis of claim and has requested the award of a set of remedies for State responsibility (CR 2006/11, pp. 46-47, paras. 46-56).

6. Madam President, the Court will be aware that such a request raises a sensitive issue of competence and admissibility. Even if, for the sake of argument, such a claim were possible in law, the doctrine of *forum prorogatum* must operate and, in this case, must operate in reverse form. It is surely too late to introduce a new cause of action.

7. But, Madam President, there is a pre-preliminary issue, namely, whether there is such a cause of action available in general international law. No evidence has been given of such a phenomenon. If compensation is to be claimed, there would be a need for new pleadings and, in the result, no doubt, for a trial within a trial.

8. In any event, Madam President, Members of the Court, it is not true that Serbia and Montenegro had breached the Orders of the Court concerning interim measures. The measures ordered on 8 April 1993, and confirmed on 13 September the same year, read as follows:

> "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;
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> . . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> . . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution." (*I.C.J. Reports 1993*, p. 24, para. 52.)

9. In our submission, Serbia and Montenegro did not breach the Order, because in the first place, genocide has not been committed in Bosnia and Herzegovina; secondly, even if genocide has been committed, Serbia and Montenegro did not have influence over the persons who had committed it, as I have demonstrated on Monday; and third, Serbia and Montenegro not only obeyed the Order not to aggravate the existing dispute, but it tried to stop it, and encouraged Republika Srspka to sign the Vance-Owen plan. After the plan had not been signed by Republika Srspka, the Respondent introduced sanctions on Republika Srpska. And finally, Serbia and Montenegro also contributed, on the request from Republika Srpska, to the Dayton agreement, which ended the conflict.

Madam President, if I could thank the Court for their usual consideration and patience, I have finished this speech. I would ask you kindly to call on the Co-Agent of Serbia to follow me at the podium.

The PRESIDENT: Thank you, Professor Brownlie. I do now give the floor to Mr. Obradović.

Mr. OBRADOVIĆ: Thank you, Madam President.

**INTRODUCTION TO THE TESTIMONIES**

1. Madam President, distinguished Members of the Court, at this stage of the oral proceedings I would like to make a brief introduction to the following testimonies of the witnesses proposed by Serbia and Montenegro, in order to emphasize the importance of that part of the procedure.

2. In 1999, after the last written submission in this case, the representatives of the respondent State intended to invite several hundred witnesses. Most of them were the eyewitnesses of the atrocities committed against them, against members of their families or their neighbours in the Bosnian war. The counter-claim of Serbia and Montenegro has been supported with statements of those witnesses, taken in accordance with the rules of the criminal procedure of the former Yugoslavia[1]. On the other hand, the position of the Applicant toward the purpose and necessity of the testimonies before the International Court of Justice has been quite different from the said position of the Respondent.

3. After the fall of the Milosevic régime in the Republic of Serbia, the new representatives of the respondent State took the position that this dispute was a matter of the past. The people from the former Yugoslavia needed peace and reconciliation above all, and not the litigation by which attempts would be made to historically justify the previous conflict and continue it by the showing of legal arguments. A ceasefire was necessary in this procedure as well, and for that reason, the Respondent decided to withdraw the counter-claim. That was the act of our good will and our confidence in the joint European future of the people from the former Yugoslavia. Unfortunately, the Applicant did not follow that way, and today we are in the courtroom.

4. However, it does not mean that the affidavits submitted to the Court by the Respondent should be treated as unnecessary pages in this case, regardless of whether the counter-claim exists or not. Those are the records of serious testimonies which can surely complete the general picture of the conflict in Bosnia and Herzegovina, and fill the gaps in the black-and-white description

[1] Annexes to Part II of the Counter-Memorial, 23 July 1997.

given by the representatives of the applicant State, according to which one side in the war has been a victim, the other side has exclusively been a perpetrator, while the role of the third side, probably for political reasons, should not be explained.

5. The fact that the Respondent withdrew the counter-claim has not had an influence to its position on the significance of the testimonies as sources of evidence in this case. I have already demonstrated that the numerous international reports had shortcomings in the methodology of gathering information, since they did not employ adequate investigative methods and consequently their results cannot be considered as reliable. The statement of a witness who appears before the court should be treated as more reliable evidence than the statement of an anonymous witness, given to a non-governmental organization during wartime or attached to an application for asylum, and subsequently, included in the report sent to the Bassiouni Commission of Experts or to the Special Rapporteur of the United Nations Commission for Human Rights.

6. It is sure that experts' reports and testimonies can be sufficient evidence in some cases — for instance, in the case of a border dispute between two States. But this is not an ordinary litigation; this is a case in which the State is accused of "the crime of crimes" — genocide.

7. One could say that there are enough testimonies before the International Criminal Tribunal for the former Yugoslavia which deals with the individual criminal responsibility of the accused. The Court can always examine a statement given to the Tribunal and try to infer some factual conclusions from that. However, the direct testimony before the Court Chamber should have priority in relation to the reading of the record of the testimony previously given to another chamber, or another court.

8. For example, the representatives of the applicant State have frequently quoted a statement given to the ICTY Trial Chamber in the *Milosevic* case by another accused, Mr. Milan Babic, who in the meantime has made the plea agreement with the Prosecutor[2]. However, that statement, given in the *Milosevic* case, could not be simply taken as a source of evidence in another ICTY case, because it would harm the right of another accused to cross-examine the witness. For that reason, the Prosecutor invited again Mr. Babic to testify directly in the *Martic* case. Unfortunately, in the

[2]CR 2006/3, p. 36, para. 40; also, CR 2006/10, p. 56, para. 46.

evening before the cross-examination, Mr. Babic committed suicide[3]. This dramatic episode is sufficient to show the seriousness of this case, the responsibility of all of us, the State representatives, who try to demonstrate what they believe to be the truth, and the fatal challenges facing the witnesses who were directly involved in the tragic events in the former Yugoslavia.

9. Of course, the Applicant can use a vast amount of official documents drawn up during the war time, and they cannot be opposed as a reliable source of evidence. However, the documents very often can be the object of different interpretations by the Parties and it is clear that the testimony of the person directly involved in the events can contribute to the explanation of the meaning of the documents. I will try now to briefly demonstrate how the Applicant misinterpreted the transcript from the mentioned session of the Council for Harmonization of Positions on State Policy of the Federal Republic of Yugoslavia, held before the Geneva negotiations, on 9 January 1993[4].

10. Having read the 12 pages from the judges' folder prepared by the Applicant on 3 March 2006, we could agree with the Applicant only upon the cruel character of the Serbian leaders which have been directly shown by their own words. However, it is all the more strange when such persons as Mr. Karadzic and Mr. Milosevic discussed that Mr. Izetbegovic, former President of Bosnia and Herzegovina, be found guilty. It seems that they were convinced in blaming him, but from the submitted pages of the document we cannot realize what would be the reason for such an opinion.

11. However, the respondent State has some different observations to this document, compared with the Applicant's view. Firstly, it must be mentioned that the 12 pages have been cut out from the context of the whole session. From the submitted fragments, it cannot be seen that the purpose of that meeting was the intention of the Serbian and Montenegrin politicians to convince the Bosnian Serbs neither to demand nor to decide their union with the Federal Republic of Yugoslavia. From that point of view, it is not clear whether Mr. Milosevic, who died in the Detention Unit of the ICTY a couple of days ago, really meant that "integrity of the Serbian people" had been *de facto* reached, or he told it just in order to prevent Mr. Karadzic, one of the

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[3]ICTY, Press Release, 6 March 2006.

[4]CR 2006/8, pp. 55-60, paras. 65-83 (Mr. van den Biesen).

last ICTY fugitives, to provoke new political problems for the Federal Republic of Yugoslavia and the Serbian People on the whole.

12. Secondly, the integral version of this transcript cannot be fully understood without the knowledge of the historical background and the political context in which that meeting was held. It is obvious that the personal relations between Mr. Milosevic and Mr. Karadzic were very sour at that moment. The stenographic notes of their discussion show the seriousness of the dispute, but it is difficult to understand what the object of their dissonance was.

13. Thirdly, it cannot be inferred from this transcript that Mr. Karadzic was either under the authority of Mr. Cosic, President of the Federal Republic of Yugoslavia, or of Mr. Milosevic, President of the Republic of Serbia. It is clearly visible that both of them did not give orders to Mr. Karadzic, but tried to advise him. From their very confusing and even impolite conversation, it is not clear whether they had any success in their intentions.

14. However, the delegation of Bosnian Serb leaders participated in that session of the Yugoslav Federal body, not as members, but as guests invited by President Cosic, and that fact was emphasized in the press release of the session prepared by Mr. Svetozar Stojanovic[5].

15. Finally, the Applicant should explain to the Court why none of the Serb leaders at this meeting discussed the plan for the destruction of the Muslim community, in whole or in part, either in the Federal Republic of Yugoslavia or in the Republic of Srpska. The meeting was non-public, the stenographic notes were confidential, and none of them could suppose that one day their words would be repeated and interpreted before the Court. Of course, the remorseless Milosevic's question why the Bosnian Serbs had killed the Deputy Prime Minister of the Bosnian Government a day before the meeting and that Karadzic's tough response moved us to shock, but it is obvious that President Milosevic did not agree with such behaviour of Bosnian Serbs. No one from the Federal Republic of Yugoslavia incited Bosnian Serb leaders at that session to commit atrocities. "The territory is an essential issue", said the late Slobodan Milosevic. "Only the map matters."[6]

16. After this short analysis of the mentioned document, it seems that it is really regrettable that the Applicant has decided not to invite any witness who could explain the meaning of the

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[5]Judges' folder prepared by the Applicant on 3 March 2006, p. 167.

[6]*Ibid.*, p. 71.

words and the main intentions of the participants to that session, their relations and the political context in which that session was held. Without such an explanation, which would be given under the solemn declaration, the Respondent cannot accept the conclusions which the Applicant has tried to establish from some fragments of this document.

17. For all of these above-mentioned reasons, the Respondent has considered and still considers that testimony of the persons directly involved in the events is necessary in this case of historical importance.

18. During the meeting with President Shi held on 14 March 2005, the representatives of Serbia and Montenegro informed the Court about the intention to invite 30 witnesses in the oral proceedings, considering that number as a reasonable one.

19. As you know, Serbia and Montenegro in the meantime has decided to significantly reduce the list of witnesses in order to contribute to the economy and efficiency of the oral proceedings, especially in light of the fact that we are confident that the honourable Court has no jurisdiction in this case.

20. In addition, our Agent, Professor Stojanović, in his letter of 8 September 2005, proposed to the Court to invite five witnesses who have played very important roles during the conflict in Bosnia and Herzegovina, *as the witnesses of the Court*, because they did not want to be the witnesses of any Party in this difficult case, due to their different nations, high moral integrity and the strong intention for impartiality. Those were three generals of the United Nations Protection Force in Bosnia and Herzegovina, General Sir Michael Rose, General Lewis Mackenzie and General Satish Nambiar, who were directly involved in the events and who have very important views about the relations between the main actors of the conflict which should be deliberated by the Court. The fourth witness of the Court proposed by Serbia and Montenegro should be Mr. Jose Cutileiro, who was the Secretary-General of the European Community and was involved in the early peace negotiations in 1992.

21. The Respondent considers that the fifth person proposed by Serbia and Montenegro as the witness of the Court would be very important as well. That was Belgrade's Mufti, Mr. Hamdija Jusufspahic, head of the Islamic community in Serbia. He would testify about the position of the Muslim community in Serbia and Montenegro from 1992 to 1995, and we are sure

that he would confirm some conclusions established yesterday by our Co-Agent, Mr. Vladimir Cvetković.

22. However, the Court has so far not accepted the proposal of our Agent to invite the mentioned persons as witnesses of the Court. We hope that such a decision was rendered for the same reason which determined the Respondent to decide to reduce the list of its witnesses.

23. In the following days, Serbia and Montenegro will introduce to the Court eight witnesses. All of them have very important knowledge about the events relevant for the present case.

24. Mr. Zoran Lilic was the President of the Federal Republic of Yugoslavia and we cannot imagine a person who knows better the relation between Serbia and Montenegro and Republic of Srpska during the Bosnian conflict. His high credibility was confirmed by the ICTY Prosecutor who invited him as a witness in the Milosevic trial. Mr. Lilic will be our first witness.

25. The witnesses from the Republic of Srpska will be two prominent persons: Professor Dr. Vladimir Lukic, who was the Prime Minister in wartime, and Professor Dr. Vitomir Popovic, current Ombudsman of Bosnia and Herzegovina, who was the Deputy Prime Minister of the Republic of Srpska.

26. Sir Michael Rose will come to The Hague as well to testify in this case, notwithstanding that the Court has not decided to invite him as its witness. The impartiality of this distinguished United Nations officer is doubtless.

27. The expert Mr. Jean-Paul Sardon, Research Director at the National Institute for Demographic Studies from Paris will present to the Court his evaluation of the previous estimations of the war casualties in Bosnia and Herzegovina.

28. Professor Dr. Dragoljub Micunovic, one of the Serbian opposition leaders and former President of the Parliament of the Federal Republic of Yugoslavia, and Mr. Dusan Mihajlovic, former Minister of the Interior of the Republic of Serbia, who was a member of the Government during the Milosevic rule, as well as a member of the democratic Government after the fall of the Milosevic régime, are the persons who have significant knowledge about the Yugoslav conflict.

29. Mr. Vladimir Milicevic was the Head of the Police Department who accepted 800 Muslim refugees after the fall of Srebrenica and Zepa in 1995. He will testify about their destiny and treatment in the territory of the Republic of Serbia.

30. All of these witnesses will be available for the Applicant's cross-examination for the time equal to the time of examination. We strongly believe that these witnesses will significantly contribute to the establishment of the factual findings and truth in the present case.

## THE APPLICANT'S NEW APPROACH TOWARDS PROCEEDINGS IN THE PRESENT CASE

31. Madam President, allow me now to turn to another topic which, in our opinion, has to be mentioned before the end of the first round of the oral pleadings of Serbia and Montenegro. It concerns the fairness of the Applicant's new approach towards proceedings in this case. This approach was first noticed in the Applicant's letters to the Court dated 28 December 2005 and 19 January 2006, in which the Deputy Agent of Bosnia and Herzegovina asked the Court to call upon Serbia and Montenegro to produce several hundred new documents with English translations.

32. In the letter of 31 January 2006, the Respondent informed the Court that the translation of the requested documents as well as the preparation for the consideration of their relevance in the present case would need a considerable amount of time. This new burden to the proceedings and especially to the Respondent, only a month before the opening of the oral hearings, would clearly put the Respondent in an unequal position. There was no reason which indicates that the Applicant was prevented to ask for the production of the new documents at an earlier stage of the proceedings. In its letter, the Applicant explained its negligence in this regard rather than the acceptable reason.

33. However, in spite of the fact that the Court has not upheld the said request of the Applicant, Professor Franck asked the Court to draw the negative inference from the behaviour of the Respondent, even in the absence of the formal order for the production of documents pursuant to Article 49 of the Statute of the International Court of Justice[7].

34. This Applicant's new approach towards the proceeding continued during the oral pleadings. Firstly, I would like to remind the Court that Serbia and Montenegro, after the submission of some confidential documents in accordance with Article 56 of the Rules of Court, submitted the list of the public documents that the Respondent would refer to during the oral

[7] CR 2006/3, p. 27, para. 21 (Professor Franck).

proceedings, as well as three folders of public documents which are part of the publication readily, but not easily available.

35. In relation to the numerous documents of the International Criminal Tribunal for the former Yugoslavia, the Respondent considered that judgments, decisions, indictments and basic documents that can be easily found on the website of the United Nations Tribunal, as well as in the Peace Palace Library, are easily available material. On the other hand, the ICTY transcripts from the oral hearings which contain the witness' statements, as well as some documents which have been used as exhibits in the ICTY trials, are not documents easily available, and for that reason, the Respondent decided to provide the Court and the Applicant with them, as an act of courtesy. Of course, all public documents that the Respondent will refer to in its oral pleadings cannot be fully presumed before the opening of the oral hearings, because the role of the respondent State is just to respond to the Applicant's arguments which cannot be known in advance. For that reason, our list of public documents should not be treated as a final, and some flexibility in that way is reasonable and understandable.

36. Thus, Serbia and Montenegro submitted its list of public documents on 31 January 2006, almost one month before the opening of the oral proceedings, while Bosnia and Herzegovina submitted its compact disc entitled . . .

The PRESIDENT: Mr. Obradović, I am going to interrupt you there. As you are aware the matter of which you are about to speak is not now within the proceedings of the Court and that has been settled between the Parties with the assistance of the Court and it would not be appropriate to continue pleading to that point.

Mr. OBRADOVIĆ: Thank you, Madam President, for that explanation. That assistance of the Court will be appreciated and that will make my today's speech significantly shorter. Anyway, Madam President, distinguished Members of the Court, I would like then to thank you for your kind attention and to respectfully suggest a short break before our Agent, Professor Radoslav Stojanović, concludes the first round of the oral arguments of Serbia and Montenegro. Thank you.

The PRESIDENT: Thank you Mr. Obradovic. The Court will now rise for a short break.

*The Court adjourned from 11.20 a.m. to 11.35 a.m.*

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

M. STOJANOVIĆ : Merci Madame.

**CONCLUSION**

1. Madame le président, Messieurs les juges, comme je l'ai déjà déclaré le premier jour, et maintenant je vais souligner que c'est un grand honneur et un privilège pour moi de plaider devant vous, mais je ne saisis pas cet honneur sans peine et affliction, car mon pays est accusé devant la plus haute cour universelle d'avoir commis le plus grave des crimes — le crime de génocide.

2. Mais mon pays n'est pas accusé seulement de génocide. Le demandeur nous accuse constamment de vouloir nous échapper à la responsabilité par les moyens procéduraux, en ajournant l'affaire et en la faisant traîner pendant treize années. Le demandeur nous a même accusé d'avoir essayé d'échapper à la responsabilité par le changement du nom de l'Etat. Vu le langage de l'accusation, j'hésite à la citer devant la Cour. Je rappelle ce que le demandeur a dit : «[t]his State cannot be allowed to rid itself of the stench of the blood it has spilled merely by putting on fresh new names» (CR 2006/5 (Franck), p. 16, par. 23).

3. Madame le président, le défendeur a en effet changé le nom au cours du déroulement de la présente affaire. Ce changement de nom a eu lieu en 2003 pour des raisons de politique interne — qui sont connues d'ailleurs — et il n'a aucun effet sur la présente affaire. Pourtant, ce qui a des effets sur cette affaire, c'est le fait qu'en 2000 le défendeur a été admis à l'Organisation des Nations Unies en tant qu'Etat nouveau. J'en parlerai un peu plus tard.

4. Treize ans se sont écoulés depuis l'introduction de la demande de l'Etat demandeur devant la Cour. Tellement d'événements ont eu lieu durant cette période. Nous avons vécu la chute du régime de Slobodan Milosevic et aujourd'hui la Serbie-et-Monténégro est reconnue par le monde entier comme faisant partie de la famille des Etats démocratiques. Nous nous sommes engagés vers l'intégration européenne et nous n'épargnons pas d'efforts en poursuivant ce but.

5. Madame le président, nous marchons sur cette voie à côté du demandeur. Les relations entre nos pays se sont améliorées de manière significative et la présente affaire fait partie de peu de questions qui sont encore pendantes. Pour cette raison, nous sommes d'accord avec le demandeur qu'il faut établir la vérité et qu'il faut aller en avant. Toutefois, nous ne pouvons pas souscrire à la version subjective des faits montrée par le demandeur et à sa perception de la vérité, telle qu'il nous l'a présentée dans ses observations écrites, mais également lors des audiences.

6. C'est justement la raison pour laquelle nous avons essayé d'initier un processus de réconciliation entre les deux Etats et d'y joindre la Croatie, en tant que troisième Etat intéressé. Lors de ma plaidoirie initiale, j'ai présenté les efforts que nous avons déployés à cet effet, ainsi que les réponses négatives que nous avons reçues du demandeur. Pourtant, nous maintenons cette proposition, comme je l'ai déjà mentionné le premier jour de nos plaidoiries.

7. Madame le président, beaucoup de changements se sont produits pendant les treize dernières années écoulées depuis l'introduction de la demande par la Bosnie-Herzégovine. Mais beaucoup de changements ont eu lieu pendant les trois dernières semaines écoulées depuis le début des audiences. Les acteurs principaux des conflits dans l'ex-Yougoslavie ne sont plus vivants. Alija Izetbegovic et Franjo Tudjman sont décédés, l'ancien leader des Serbes de Croatie, Milan Babic, s'est suicidé le 5 mars 2006 et Slobodan Milosevic est décédé le 11 mars dernier.

8. Les deux derniers sont décédés ici, à la Haye, dans leurs cellules de détention. Je n'ai pas l'intention de parler maintenant de leur responsabilité pénale, bien que ce sujet ait été largement débattu pendant les présentes procédures et qu'il sera certainement discuté lors du deuxième tour. Cependant, je veux souligner que ces deux hommes, à côté d'autres personnes de l'ex-Yougoslavie, dont la majorité avait été des hauts fonctionnaires de leurs Etats, se sont trouvés devant le TPIY pour répondre aux accusations pour des crimes qu'ils ont peut-être commis.

9. Nous avons soutenu devant la Cour, et ceci a été remarqué par notre estimé conseiller, M. Ian Brownlie, qui n'a fait que paraphraser les honorables juges Shi et Vereshchetin que ce n'est pas cette Cour, avec tout le respect que nous lui devons, mais le Tribunal pour l'ex-Yougoslavie qui est le juste cadre pour connaître des griefs formulés par le demandeur dans la présente affaire. En conséquence, nous demandons à la Cour de dire et juger dans la présente affaire que les dispositions de la convention sur le génocide s'appliquent seulement pour ce qui est du

manquement d'un Etat de prévenir et de punir les actes de génocide commis dans les limites de sa compétence territoriale.

10. Mais, Madame le président, avant de se prononcer à l'égard de ce que je viens de dire, la Cour doit décider si elle est compétente ou non. Nous n'essayons pas, comme l'affirme le demandeur de nous échapper à la responsabilité par le biais des détails techniques («escape responsibility on technicality», voir CR 2006/11 (Franck), p. 56, par. 38). Tout au contraire, et tel qu'exposé en détail par le professeur Tibor Varady, soit qu'elle soit demandeur, soit qu'elle soit défendeur, la Serbie-et-Monténégro a soutenu sa position d'une manière constante et unitaire dans toutes ses affaires devant cette Cour et nous avons demandé à la Cour de se prononcer sur la question de la compétence en se fondant sur les mêmes faits et sur la même analyse.

11. En s'appuyant sur cette analyse, nous avons démontré qu'avant le 1er novembre 2000, la Serbie-et-Monténégro n'avait pas accès à cette Cour, car elle n'était pas membre de l'Organisation des Nations Unies, et car aucune autre base à un tel accès n'existait. Ce fait a été clairement établi par cette Cour en 2004 — et donc, ni dans cette affaire, la Cour ne peut avoir la compétence, car elle ne l'avait pas au moment pertinent.

12. Nous avons démontré également que l'Etat défendeur n'est pas resté lié et n'est jamais devenu lié par l'article IX de la convention sur le génocide, qui est la seule base de compétence invoquée. Le défendeur ne répondait pas aux conditions d'adhésion à la convention sur le génocide avant de devenir Membre de l'Organisation des Nations Unies.

13. La seule supposition plausible qui aurait pu raccorder la Yougoslavie à l'article IX de la convention sur le génocide au moment où l'arrêt de 1996 sur les exceptions préliminaires avait été rendu est la supposition que la Yougoslavie en est *restée* liée en tant que successeur de la personnalité de l'ex-Yougoslavie. Vu qu'il s'est avéré que le défendeur n'a pas succédé à l'ex-Yougoslavie et n'a donc pas repris son statut dans les traités, cette supposition est dénuée de tout fondement. En réalité, l'Etat défendeur n'est pas resté lié par l'article IX de la convention sur le génocide.

14. Nous avons démontré ensuite que le défendeur n'est jamais *devenu lié* par l'article IX de la convention sur le génocide. Le défendeur n'a jamais déposé une notification de succession à la convention sur le génocide. La déclaration du 27 avril 1992 n'a pas et n'aurait pas pu avoir pour

effet la succession. De même, la succession automatique n'est pas intervenue. Même si la succession automatique avait eu lieu, celle-ci n'aurait pas pu inclure l'article IX, vu son caractère de clause relative au règlement juridictionnel des différends.

15. De plus, nous avons démontré que le défendeur ne remplissait même pas les conditions d'adhésion à la convention sur le génocide avant de devenir Membre des Nations Unies. En tant qu'Etat non-membre des Nations Unies il aurait pu adhérer à la convention seulement sur le fondement d'une invitation en application de l'article XI. Une telle invitation ne lui a jamais été adressée — et personne n'a soutenu le contraire. Après l'entrée dans les Nations Unies, la Yougoslavie a adhéré à la convention, avec une réserve à l'article IX.

16. Il faut souligner que le statut du défendeur par rapport aux traités est démontré de manière factuelle par les enregistrements du dépositaire. Ces enregistrements montrent et confirment de manière non équivoque que l'Etat défendeur est devenu partie à la convention sur le génocide seulement au moment où il y a adhéré en 2001, et ceci en déposant la réserve à l'article IX.

17. Vu que la Cour n'avait pas de compétence pour juger le défendeur au moment pertinent et que celui-ci n'est jamais resté ou devenu lié par l'article IX de la convention sur le génocide, nous prions la Cour d'examiner la question de compétence, et de se déclarer incompétente dans la présente affaire.

18. En dehors, de l'incompétence de la Cour, nous avons également démontré que la plupart des preuves présentées par le demandeur, aussi bien dans ses observations écrites que dans ses plaidoiries orales, sont contestables. Le plus frappant encore est que le demandeur perpétue une partie de ces preuves douteuses tout au long des observations écrites et continue à les répéter encore une fois devant la Cour. Comme notre coagent, M. Sasa Obradovic, l'a expliqué, le seul but probable de l'insistance continue sur de telles preuves est celui d'induire la Cour dans l'erreur et de la choquer. Et pire encore, le demandeur prie la Cour de tirer des inférences de ce type de preuves malgré le fait que ces preuves ne répondent pas aux critères exigés pour la crédibilité des preuves dans les affaires devant cette Cour.

19. Mais, Madame le président, nous avons démontré aussi qu'il n'y a pas eu de génocide en Bosnie-Herzégovine. Et aussi nous avons montré qu'il n'a jamais existé en Serbie-et-Monténégro ni dans le peuple serbe un plan de génocide.

20. Dans ma plaidoirie de la semaine dernière, j'ai réfuté les allégations du demandeur soutenant que le conflit de 1992-1995 a été la conséquence du plan de la création de la «Grande Serbie», un plan qui, d'après le demandeur, date depuis le XIX[e] siècle et a ses origines dans le plan de Garasanin, intitulé «Nacertanije». Pour soutenir mes arguments j'ai rappelé, ici, devant la Cour, des événements les plus importants de l'histoire de la Serbie et de l'ex-Yougoslavie.

21. Ce plan n'a été qu'un projet panslave envisageant l'unification de tous les Slaves du sud. De plus, ce projet n'a à nul point envisagé l'extermination d'aucune des nations vivant dans le territoire de l'ex-Yougoslavie. Tout au contraire, il était fondé sur l'union des nations différentes dans un seul Etat. Ce projet a été, par ailleurs, réalisé après la première guerre mondiale par la création du Royaume des Serbes, Croates et Slovènes, et par la création de cet Etat ce plan est entré dans l'histoire.

22. Tandis qu'entre les deux guerres mondiales les dirigeants ou l'élite intellectuelle de Serbie n'avaient plus l'idée de la «Grande Serbie», l'idée de l'«hégémonie serbe» fut lancée par le parti communiste yougoslave, sous l'influence du Komintern, dont l'un des objectifs était de démembrer la Yougoslavie, telle que créée par Versailles.

23. Lors de la deuxième guerre mondiale, ironiquement, les pouvoirs de l'Axe ont mis en œuvre les idées du Komintern et ont divisé la Yougoslavie dans un faisceau de petits Etats ayant des statuts différents. Le plus grand d'entre eux fut l'Etat indépendant de Croatie, un Etat qui, à part la Croatie, comprenait des parties de la Serbie d'aujourd'hui, ainsi que la totalité de la Bosnie-Herzégovine. Des atrocités monstrueuses contre le peuple serbe ont été commises sur le territoire de cet Etat et elles se sont ancrées dans la mémoire du peuple. Malheureusement, un rôle significatif dans la perpétration de ces atrocités fut joué par les Musulmans de Bosnie-Herzégovine.

24. Après la seconde guerre mondiale, dont Tito et ses partisans sont issus comme vainqueurs, les auteurs de ces atrocités n'ont pas été déferrés à la justice pour leurs crimes. Le parti communiste a promu «l'unité et la fraternité» entre les nations, une politique qui n'a pas manqué d'effets positifs.

25. Pourtant, la politique d'«unité et fraternité» a été accompagnée par la décentralisation exagérée de l'Etat, dans lequel les unités fédérales jouissaient de la souveraineté au détriment de l'Etat fédéral. Le pouvoir de l'Etat fédéral n'était, par la suite, qu'une coquille creuse. Dans ce contexte, la Yougoslavie n'était plus une fédération, mais au mieux une confédération, sinon une association d'Etats indépendants.

26. Bien qu'à l'exception de la Slovénie toutes les unités fédérales fussent multinationales, chacune d'entre elles, à l'exception de la Bosnie-Herzégovine, était toujours dominée par une nation distincte. En conséquence, le processus de consolidation de la souveraineté des unités fédérales a conduit progressivement à la consolidation de la souveraineté des élites nationales, quoique encore bien cachées par le voile du parti communiste.

27. Ce système a quand même fonctionné jusqu'à la mort de Tito et au début de la crise économique des années quatre-vingt. La crise économique a aggravé encore plus la rupture entre les unités fédérales et entre leurs élites nationales respectives.

28. Au moment de la chute du communisme dans toute l'Europe de l'Est, ces élites devaient trouver une nouvelle doctrine leur permettant de garder le pouvoir. La nouvelle doctrine fut le nationalisme. Le nationalisme a été encouragé par des motifs divers et les motifs ne furent pas difficiles à trouver dans l'histoire bouleversée des Balkans. Quant aux Serbes, la plus simple voie fut de leur rappeler des atrocités commises par les Oustachas pendant la deuxième guerre mondiale.

29. Pourtant, le nationalisme serbe ne fut qu'une réaction. Comme je l'ai déjà montré, le peuple serbe avait atteint ses buts lors du congrès de Versailles et il n'avait aucune raison de demander une revision. Par contre, les autres, et en particulier les Croates, n'avaient pas mis en œuvre leurs projets et ils ont saisi la chute du communisme en Europe de l'Est comme le moment opportun pour créer leurs Etats indépendants.

30. A ce moment-là, le fameux «mémorandum» de l'Académie serbe des sciences et des arts fut publié en réaction à la situation dans la Yougoslavie et en réponse aux autres nationalismes. Ce document n'était qu'une lamentation sur le sort du peuple serbe et n'était ni un projet de création de la «Grande Serbie», ni un appel à l'extermination des autres.

31. Il n'y a point de continuité entre le plan de Garasanin du XIX[e] siècle et le «mémorandum»; le seul point de continuité est, en effet, celui qu'aucun d'entre eux ne représentait un projet de la «Grande Serbie» et n'appelait à la destruction des autres nations.

32. Au vu de tout ce qui précède, je prie la Cour de rejeter les griefs du demandeur qui se fonde sur une analyse quasi historique de la continuité du projet de la «Grande Serbie» depuis le XIX[e] siècle jusqu'au mémorandum de l'Académie serbe des sciences et des arts. En plus, ce débat historique lancé par le demandeur manque de pertinence devant cette Cour mais, au nom de la vérité historique et scientifique, le défendeur a considéré nécessaire d'y répondre dans ses plaidoiries.

33. Il en ressort, Madame le président, Messieurs les juges de la Cour, que le conflit de l'ex-Yougoslavie n'est pas simple à expliquer et que, en tout cas, il ne peut pas être expliqué par l'analyse manquant toute impartialité offerte par le demandeur. Il ne correspond pas à la vérité que le conflit ait éclaté comme conséquence du nationalisme serbe. Au nom de la vérité mentionnée ci-dessus, dans ma plaidoirie de la semaine dernière j'en ai parlé largement et par la suite je vais parcourir ce sujet brièvement.

34. Les causes du conflit sont complexes et elles peuvent s'expliquer par la combinaison de plusieurs éléments. Dans le cas de la Slovénie, les raisons de la sécession furent principalement de nature économique, tandis que les prétentions pour l'indépendance de la Croatie se fondaient premièrement sur l'aspiration de créer un Etat national indépendant.

35. En tout cas, les républiques qui tendaient à la sécession de la Yougoslavie se préparèrent pendant plusieurs années. Les préparations incluaient des activités politiques et diplomatiques et aussi la procuration des armes et l'établissement des forces armées capables de s'opposer à la l'armée nationale de la Yougoslavie. En d'autres mots, la sécession allait être poursuivie soit par des moyens pacifiques soit par la force.

36. Les préparations se sont déroulées dans les limites des frontières nationales et, naturellement, les Serbes n'ont pas fait exception. Les objectifs des Serbes étaient pourtant contraires à ceux des autres nations. Les Serbes voulaient maintenir la Yougoslavie et dans ce but ils ont commencé à se procurer des armes.

37. Les préparations pour le conflit étaient dirigées et organisées par les leaders politiques des groupes nationaux. Ces leaders ont utilisé les nouvelles circonstances pour consolider leur pouvoir. Sous cet aspect non plus, les dirigeants politiques serbes, y inclus ceux de Belgrade, ne furent pas une exception. Nous avons démontré que ces activités n'étaient pas différentes par rapport à celles des autres groupes nationaux. En effet, Madame le président, la procuration d'armes est tout simplement procuration d'armes, peu importe la nation intéressée.

38. Malheureusement, les préparations ont réussi et ils ont amené la Yougoslavie dans une situation d'où il était difficile de trouver une issue. Pour y arriver, l'appui et l'action diplomatique ferme de la part de la communauté internationale étaient nécessaires. Plus encore, il était nécessaire que les leaders locaux aient du bon sens et la capacité du compromis. Malheureusement, les deux manquaient.

39. La communauté internationale était elle-même partagée et elle n'a pas réussi à prévenir le conflit par une action politique ferme. Pour cette raison, la communauté internationale porte elle-même une partie de la responsabilité pour l'évolution des événements. La responsabilité primordiale appartient, néanmoins, aux leaders des groupes nationaux, qui n'étaient pas prêts pour les compromis.

40. De ce point de vue, Slobodan Milosevic porte une responsabilité politique importante pour le conflit et la Serbie-et-Monténégro n'a pas l'intention de le nier. En fin de compte, ce fut la Serbie-et-Monténégro qui l'a fait arrêter et qui l'a envoyé à La Haye, où mis à part sa responsabilité politique, sa responsabilité pénale devait être établie, si celle-ci existait.

41. Cependant, les autres leaders portent une responsabilité similaire pour le conflit, et il s'agit particulièrement des leaders croates et musulmans — Franjo Tudjman et Alija Izetbegovic. Il est regrettable que même pas aujourd'hui les dirigeants de Croatie et de Bosnie-Herzégovine ne sont pas prêts à accepter une telle responsabilité.

42. Il est également regrettable que le demandeur dans la présente affaire tente de justifier toute action des Musulmans bosniaques, bien que parfois il admette, mais pas sans difficulté, l'injustice de certains de leurs actes. D'autre part, il traite chaque action des Serbes pas seulement de criminelle, mais de génocidaire. Au début des plaidoiries du demandeur, son agent adjoint a admis que la guerre en Bosnie-Herzégovine avait été déclenchée par un Musulman bosniaque qui

avait provoqué une fusillade lors d'une fête de mariage serbe (CR 2006/4 (van den Biesen), p. 23, par. 6). M. van den Biesen a admis que cet acte avait été inapproprié, mais en même temps il n'a pas omis de le justifier en affirmant que le tireur avait été «choqué par les images de Vukovar et par le discours de haine des leaders politiques de Belgrade» *(loc. cit.)*.

43. Je suis persuadé que le but et l'objectif de cette haute Cour est celui d'établir la vérité sur le conflit en Bosnie-Herzégovine, mais la vérité ne peut être établie par l'illustration préjugée, en noir et blanc, des événements, où toute action de l'autre Partie est présentée comme constitutive de génocide et agressive, lorsque toute action du demandeur est présentée comme pacifique et défensive. C'est cette approche manquant cruellement d'impartialité qui rend impossible la réconciliation longuement attendue.

44. Il est alors incontestable que le conflit en Bosnie-Herzégovine a été déclenché par un Musulman bosniaque qui a tiré des coups de feu lors d'une fête de mariage serbe. Pourtant, le fait que ce fut un Musulman qui a tiré le premier coup de feu ne m'amènera pas à tirer les inférences d'une conspiration datant depuis des siècles que les Musulmans auraient contre les Serbes, ou d'une association criminelle qui aurait pour but la destruction des Serbes en Bosnie-Herzégovine.

45. Non, Madame le président, je ne crois pas que le peuple musulman de Bosnie-Herzégovine ait eu l'intention de détruire le peuple serbe. Mais je ne crois pas non plus que le peuple serbe ait eu l'intention de détruire le peuple musulman.

46. J'ai démontré que la guerre en Bosnie-Herzégovine a été une guerre pour le territoire. Dans le contexte de la dissolution évidente de l'une des anciennes républiques yougoslaves, les trois parties au conflit, les Serbes, les Musulmans et les Croates, poursuivaient chacune le même objectif qui était d'obtenir le plus de territoire. Il est possible que les plans relatifs à ces territoires eurent été différents, vu que les Musulmans aspiraient à une Bosnie-Herzégovine indépendante qu'ils auraient pu dominer, tandis que les Serbes et les Croates avaient des objectifs différents — l'unification des territoires qu'ils considéraient comme les leurs avec leurs Etats mères (la Serbie et la Croatie). Malgré cela, l'essence restait la même — contrôler autant de territoires que possible.

47. Il est tout à fait réel que l'occupation des territoires et l'installation des autorités dans ces territoires ont été accompagnées par l'exode des membres des autres nations. Une partie de la

population s'est échappée au conflit, une partie de la population fuyait la guerre. Certains ont quitté volontairement leurs maisons après l'ascension au pouvoir de leurs adversaires politiques. Malheureusement, une partie de la population a été forcée de quitter le territoire, ce qui est, sans doute, un acte criminel.

48. Cependant, cet acte criminel a été commis par toutes les parties au conflit et, en comparant les pourcentages des Musulmans ou des Croates qui ont été forcés de quitter Prijedor, Banja Luka ou Zvornik, aux pourcentages des Serbes qui ont été forcés de quitter Tuzla, Zenica ou Mostar (contrôlés par des Musulmans ou des Croates), les résultats sont presque équivalents et ces résultats ne peuvent être altérés par un film montrant une poignée de Serbes célébrant les Pâques orthodoxes à Tuzla (que l'on a vu ici, à la Cour, lors de la présentation du 28 février 2006 de M. van den Biesen).

49. Les crimes de déportation, d'expulsion ou de transfert forcé que je viens de décrire sont, en effet, à condamner et ont été poursuivis pénalement, mais ils ne sont pas le génocide. Ce crime est souvent dénommé «nettoyage ethnique», et même l'agent adjoint du demandeur ne le considère comme constituant du génocide. Dans son interview à *Der Spiegel* du 7 mars 2006, M. van den Biesen a déclaré : «All the individual cases that the ICTY deals with are only part of the ethnic cleansing campaign and genocide. We are putting everything into one case. *We are first asking the Court to declare that this was genocide and not ethnic cleansing*.» (Disponible en anglais, sur Spiegel Online, à http ://www.spiegel.de/international/0,1518,404731,00.html.)

50. Madame le président, j'ai démontré que notre thèse selon laquelle la guerre en Bosnie-Herzégovine a été en réalité une guerre pour des territoires est le mieux confirmée par la solution finalement trouvée au conflit. L'accord de Dayton qui a mis fin à la guerre prévoit les limites territoriales des parties au conflit, après des concessions faites par toutes les parties. Après la signature de l'accord, la paix fut rétablie en Bosnie-Herzégovine et, malgré la fragilité des relations internes dans cet Etat, la paix a été maintenue avec succès jusqu'à présent. Si le conflit avait pour but de détruire l'une des nations de Bosnie-Herzégovine, l'accord de paix n'aurait jamais été signé et, à plus forte raison, il n'aurait jamais été appliqué.

51. Le fait que la guerre en Bosnie-Herzégovine fut une guerre pour des territoires a été démontré avec plus de détails par notre estimé conseiller, M. Xavier de Roux. A côté de

Mme Fauveau-Ivanovic, M. de Roux a analysé la multitude des allégations du demandeur relatives au prétendu génocide en Bosnie-Herzégovine.

52. Nous avons démontré que le génocide est une notion ambivalente utilisée dans le monde juridique et dans le monde politique avec des significations différentes et que dans chaque conflit les déclarations de nature politique banalisent ce terme.

53. Nous avons aussi démontré qu'en droit, le génocide, aux termes de la convention sur le génocide, ne peut être constitué que par l'un des actes énumérés dans l'article II de la convention et que, puisque la commission du génocide peut revêtir l'une des formes mentionnées dans l'article III de la convention sur le génocide, le demandeur aurait dû spécifier les formes auxquelles il se réfère ainsi que les actes qui auraient constitué l'une ou l'autre de ces formes.

54. Le demandeur aurait dû spécifiquement déterminer le groupe qui aurait été la victime du génocide. Puisque le génocide ne peut être perpétré que par des personnes physiques animées par l'intention spéciale de détruire un groupe national, ethnique, racial ou religieux en totalité ou partiellement, cette intention spéciale doit être établie par le requérant, comme doivent être identifiées les personnes physiques qui auraient commis le crime.

55. Enfin, nous avons montré que le demandeur n'a pas démontré que les actes pouvant constituer le génocide avaient été commis ou que ces actes étaient dirigés contre un groupe ethnique, racial, national ou religieux bien défini. Le demandeur n'a aucunement démontré que ces actes avaient pour objectif la destruction entière ou partielle du groupe national, ethnique, racial ou religieux bien défini ou que l'auteur de ces actes avait agi dans l'intention de détruire entièrement ou partiellement le groupe susvisé bien défini.

56. Dans notre analyse, Madame le président, nous nous sommes appuyés sur la jurisprudence du Tribunal pour l'ex-Yougoslavie et sur ce point, bien que nous soyons à la fin de nos plaidoiries dans le premier tour, je vous dois une explication pour ce qui est du fait que nous nous sommes en effet écartés de nos opinions antérieures concernant le Tribunal pour l'ex-Yougoslavie telles qu'exprimées dans notre duplique, rappelées par le professeur Franck devant la Cour (voir CR 2006/5 (Franck), p. 21, par. 39).

57. Cependant, nous ne considérons pas que tous les matériaux du Tribunal pour l'ex-Yougoslavie revêtent la même pertinence et aient la même valeur probante. Nous nous

appuyons premièrement sur les arrêts et jugements du Tribunal, vu qu'uniquement les jugements peuvent être considérés comme établissant de manière crédible les faits concernant les crimes perpétrés.

58. Ces jugements, Madame le président, montrent que le Tribunal a établi, à l'exception de Srebrenica, que le génocide n'a été commis en aucun des cas invoqués par le demandeur. Le seul cas où le Tribunal a établi l'existence d'un génocide territorialement limité est l'affaire de Srebrenica.

59. Dans son analyse du jugement rendu par le Tribunal dans l'affaire *Krstic*, M[e] de Roux a mis en évidence les graves carences de ce jugement. Je veux souligner quand même que le Tribunal a trouvé le général Krstic coupable de complicité au génocide, en omettant à la fois d'indiquer qui étaient les auteurs principaux et ne pouvant donc pas établir leur intention, si nécessaire pour la commission du génocide.

60. Mais aussi douteuses qu'elles soient, les conclusions dans l'affaire *Krstic* ne regardent pas la Serbie-et-Monténégro. M. Ian Brownlie a réussi à démontrer que les événements de Srebrenica avaient eu un caractère local et que les autorités du défendeur n'avaient pas été impliquées dans le massacre.

61. Permettez-moi, Madame le président, d'ajouter ici une note personnelle. Vous avez remarqué peut-être pendant ces plaidoiries que je ne me suis pas particulièrement préoccupé de Slobodan Milosevic. Depuis 1989, quand à côté des autres, j'ai posé des bases du premier parti d'opposition en Serbie, jusqu'à sa chute en 2000, j'ai été l'opposant farouche de M. Milosevic. Mais malgré mon opinion intime sur sa personne, je ne partage pas l'avis qu'il ait participé aux événements de Srebrenica ou qu'il les ait même connus d'avance.

62. Mais, mes opinions personnelles ont moins d'importance. Ce qui est vraiment important ce sont les preuves présentées devant vous par M. Brownlie, preuves confirmant que ni Slobodan Milosevic ni tout autre représentant de la Serbie-et-Monténégro n'ont aucun rapport avec cet événement criminel.

63. Cependant, M. Brownlie a démontré beaucoup plus que le fait que les autorités du défendeur n'ont pas été impliquées dans les événements de Srebrenica. Il a offert des preuves significatives du fait que la Republika Srpska avait été une entité indépendante tout au long du

conflit et qu'elle n'était pas, une simple «subordonnée» du défendeur, comme le demandeur voudrait la présenter.

64. L'indépendance de la Republika Srpska, bien qu'elle n'ait pas été acceptée formellement, a été reconnue depuis le 30 mai 1992 par les rapports pertinents du Secrétaire général des Nations Unies, par les documents et la pratique de la Conférence internationale pour l'ex-Yougoslavie et par le coprésident du comité permanent, par la reconnaissance par les Etats intéressés du statut de partie aux négociations des Serbes de Bosnie, par l'avis de lord Owen sur les relations entre Belgrade et Pale, ainsi que par la nature particulière de la conscience politique des Serbes de Bosnie.

65. Le demandeur n'a pas réussi à prouver que le gouvernement du défendeur avait le contrôle effectif sur la Republika Srpska au moment relevant. Le demandeur n'a non plus réussi à démontrer que l'armée de la Republika Srpska se trouvait sous le contrôle du défendeur, vu que tout au long du conflit l'armée mentionnée était subordonnée exclusivement aux autorités de la Republika Srpska.

66. En particulier, l'Etat demandeur n'a pas réussi à prouver que la Yougoslavie exerçait le contrôle effectif sur les opérations militaires et paramilitaires durant lesquelles ont été commises les prétendues infractions. De plus, le demandeur n'a pas abouti à prouver l'existence d'un ordre ou d'une instruction provenant de la Yougoslavie et qui auraient constitué la planification ou la perpétration des actes indiqués par l'Etat demandeur comme des violations de la convention sur le génocide.

67. Enfin, notre coagent, M. Vladimir Cvetkovic, a démontré que le demandeur n'a pas réussi à prouver que, sur le territoire du défendeur, le génocide ou toute autre infraction au droit international pénal ait été commise contre la population musulmane de Bosnie-Herzégovine ou contre la population musulmane de Serbie-et-Monténégro.

68. Nous avons démontré en plus que le demandeur n'a pas réussi à prouver qu'un ancien représentant ou un représentant actuel du défendeur serait coupable de génocide ou de tout autre crime commis à l'égard de la population musulmane sur le territoire de la Serbie-et-Monténégro. Cette absence de tout élément du crime de génocide contre la population musulmane sur le territoire de la Serbie-et-Monténégro, où une minorité significative musulmane vit, est la preuve

indéniable que les autorités de la Serbie-et-Monténégro n'auraient pas pu commettre le génocide contre cette même population musulmane sur le territoire de la Bosnie Herzégovine.

69. Madame le président, Messieurs les juges, c'est le moment de mettre fin au premier tour de plaidoiries orales. Nous y avons de vous présenter une image objective du conflit en Bosnie-Herzégovine, une image fondée sur les faits et sur une analyse juridique solide et non pas seulement sur des images choquantes que nous avons pu voir dans les médias encore une fois à la fin de la semaine dernière, après la mort de Slobodan Milosevic.

70. Nous avons toute la confiance dans cette Cour et nous sommes persuadés que son arrêt sera fondé sur une analyse approfondie de tous les faits et sur le droit applicable. Et une telle analyse ne peut conclure que dans un seul sens. La Serbie-et-Monténégro n'est pas responsable pour les actes qui ont eu lieu en Bosnie-Herzégovine et en tout état de cause, le génocide n'y a pas eu lieu. Mais, avant tout, la Cour devra se prononcer sur la question de la compétence.

Merci, Madame le président. Et je fais mon petit résumé, il est mieux de dire peut-être un résumé modeste par comparaison avec les plaidoiries de notre «team» qui ont été exposées pendant ces dernières semaines. Merci, Madame le président.

The PRESIDENT: Thank you, Professor Stojanović. This brings to an end the first round of oral argument as such. The Court will meet tomorrow at 10 a.m. to begin the hearing of the witnesses, experts and witness-experts called by the Parties. The Court now rises.

*The Court rose at 12.40 p.m.*