CR 2006/30

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Tuesday 18 April 2006, at 10.15 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le mardi 18 avril 2006, à 10 h 15, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

M. Couvreur, greffier

The Government of Bosnia and Herzegovina is represented by:

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as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

Mr. Thomas M. Franck, Professor of Law Emeritus, New York University School of Law,

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

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

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Mr. Mauro Barelli, LL.M (University of Bristol),

Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

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

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Mme Brigitte Stern, professeur à l'Université de Paris I,

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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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Ms Ivana Mroz, LL.M. (Indianapolis),

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M. Vladimir Cvetković, deuxième secrétaire à l'ambassade de Serbie-et-Monténégro au Royaume des Pays-Bas,

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Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,

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M. Miloš Jastrebić, deuxième secrétaire au ministère des affaires étrangères de la Serbie-et-Monténégro,

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Mme Dina Dobrkovic, LL.B.,

comme assistants.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to begin the hearing of the second round of oral argument of the Parties. Each Party will dispose of eight sessions for this purpose and, as in the first round of oral argument, Bosnia and Herzegovina will speak first. The second round of oral argument of Bosnia and Herzegovina will be concluded on Monday 24 April 2006 and Serbia and Montenegro will begin its second round of oral argument on Tuesday 2 May 2006. And the second round of oral argument of Serbia and Montenegro and the oral proceedings in the case will end on Tuesday 9 May 2006.

I now give the floor to Mr. Softić, the Agent of Bosnia and Herzegovina, to begin the second round of oral argument.

Mr. SOFTIĆ: Thank you, Madam President.

1. Madam President, honourable Members of the Court, after the end of the first and at the very beginning of the second round I would like to express my honour for having another opportunity to address this honourable Court and to reiterate the significance of this case for Bosnia and Herzegovina, for its citizens and peoples, for the victims of genocide as well as for peace and security in the whole region. Moreover, I would like to repeat its importance for defining the content of international humanitarian law as well as the role of the International Court of Justice in its development and interpretation.

2. Let me address once more, why this case and why now? Simply stated, this case is more about the future rather than the past. Some have suggested that this case scrapes on old wounds, but this is about helping to heal what is still an open sore and susceptible again to the disease of ultra-nationalism. This case is about a fresh start for Bosnia and Herzegovina and for the region as a whole. Indeed, Bosnia and Herzegovina's future is intertwined with that of its neighbours, including Serbia and Montenegro, and we sincerely look forward to the fresh start in better relations and opportunities which we believe will be created by the resolution of this case by this Court.

3. Serbia and Montenegro committed genocide on the non-Serbs in Bosnia and Herzegovina and particularly on the Bosniak population of Bosnia and Herzegovina in the areas which,

according to the planners of the Greater Serbian project, should have gone to the composition of the future Serb State or the future union of Serbian States. Action bears responsibility. We are here to establish responsibility for breaching provisions of the Genocide Convention. Fulfilment of justice and implementation of the rule of law can do no harm, but on the contrary it can advance international peace and security.

4. Some people still suggest that Bosnia and Herzegovina should let bygones be bygones. Each of you comes from a State that has at some time suffered injustice and victimization. Would your country, though, set aside the violation of genocide and its responsibility to its citizens who are victimized? Could we allow our own history to be rewritten to justify old crimes and rationalize the potential for new ones against our citizens and country?

5. The Respondent has verbally offered the settlement of this case in the political realm. However, this offer has never been more than a statement of intention. Not on one occasion have representatives of the Respondent given any substance to what Serbia and Montenegro would have to offer. The Respondent has said at various times that the withdrawal of the counter-claims was a first step. Madam President, really, appearances are against the Respondent. We all know that the withdrawal of the counter-claims was closely connected to the Respondent's newly acquired position with respect to the jurisdiction of this Court. This new position would not have had a beginning of credibility if the counter-claims would have been entertained at the very same time. An acknowledgment of what has been done to the non-Serbs of Bosnia — other than "all sides did the same" — would have been one part of the minimum, the other part being some level of acknowledgment of responsibility. That could have been seen as a sign of true intentions to think seriously about a friendly settlement.

6. The approach now followed by the Respondent not only creates an image that this would be about avoidance rather than acceptance of responsibility. It would be about going back rather than moving forward. This is the picture which Serbia and Montenegro has left while conducting this case: it has engaged in rapid succession only exhibiting tactical objectives, has attempted to: deny any responsibility; deny this Court's jurisdiction; blame Bosnia and Herzegovina for genocide; marginalize the consequences and victims of its actions in pursuit of ethnic cleansing; recruit some Serb leaders within Bosnia and Herzegovina to try and subvert Bosnia and

Herzegovina's position before this Court. And most recently, the Respondent turned side and claimed differently. Bosnia and Herzegovina may appear before this Court but now, it claims, a criterion is not fulfilled by the Respondent: the Respondent was not a Member of the United Nations or a State party to the Statute of the International Court of Justice. All this is clearly directed to prevent reaching a decision in this case respectively to avoid that responsibility will be established. In that case the profit for the Respondent would be absolute.

7. We cannot see in these consecutive tactics sincerity toward a fresh start and better future, nor the acceptance of responsibility. Rather, we see another attempt to rewrite history. Rewritten history promoted by the Belgrade authorities has been used as a tool of war and genocide against Bosnia and Herzegovina in the past, and we have legitimate fears that a similar rewriting of history may be misused for the future. History traditionally has belonged to the victor. Bosnia and Herzegovina is only a survivor, and a weak one, since our State is, on a daily basis, still afflicted by the consequences of genocide. We ask that the Court not allow the Belgrade régime to presume the right of the victor, and that this Court provide the objective judgment of history.

8. Madam President, our people, i.e., Bosnia and Herzegovinian people, have lived in these areas for centuries sharing a common destiny. It is almost impossible to find similar territory where people and religions were so mixed as in Bosnia and Herzegovina. It used to be impossible to find a building that did not have members of all of our peoples living next to each other. Not to mention settlements and towns. Bosnia and Herzegovinian citizens shared the same Bosnian culture with strong influence of all larger world's cultures and religions whose basic characteristic was tolerance. All of this could only be undone, Bosnia and Herzegovinian society could only be broken by genocide. Making the territory of Bosnia and Herzegovina part of a new Yugoslavia, which turned out to be "one State for all Serbs" necessarily implied the need for separation of people. Since no one voluntarily leaves his home and — if that happens — returns as soon as the opportunity arises, i.e., as soon as the danger is over, then genocide was the only means to permanently separate people. Genocide was the required precondition for fulfilling the objectives.

9. Madam President, this case is not directed against the Serb people in whole and especially not against the Serb people in Bosnia and Herzegovina. Genocide was not committed by individually operating non-organized Serb people. The genocide was committed by a

well-organized entity, i.e., the then Federal Republic of Yugoslavia. We are asking to determine the responsibility of this State for committing genocide, i.e., for breaching the Genocide Convention. We are not asking to determine the responsibility of Serb people.

10. The death of Slobodan Milosevic, leader of the Serb people when genocide occurred, main creator and executor of the genocide campaign, which at first sight is not related to this procedure, additionally complicates the situation in the whole region. The lack of a judgment in his case blurs the judgment of history. It only increases the role for this Court to act as envisaged under the Genocide Convention. We do not deny but quite on the contrary we emphasize the role and importance of the International Criminal Tribunal for the former Yugoslavia as well as the need for all perpetrators to be punished for the criminal offences committed. Some of the perpetrators will face criminal sanctions while the others will evade justice in this or that way forever. However, this kind of responsibility does not exclude but on the contrary creates the exigency for establishing State responsibility. Those convicted by the ICTY were not doing it for their own sake to realize their own or family objectives but in the name of the State and for realization of State objectives.

11. Madam President, both States, the Applicant and the Respondent, have the same objective: joining the community of European peoples. The fact that the Respondent has committed genocide on the population of Bosnia and Herzegovina makes this objective hard to achieve until the Respondent hands in the main suspects for war crimes and until it faces its own past. Facing its own past means accepting responsibility for genocide. European future for the Respondent must not mean avoiding responsibility for genocide while at the same time enjoying the advantages produced by committing genocide. Facing the consequences of genocide means giving up the Greater Serbia ambitions.

12. Judgment on responsibility for genocide will help democratization of the Serbian society. The impression is that most of the citizens of Serbia and Montenegro have not dealt with its own past, yet. Political parties and movements that support war criminals and their aims still enjoy great support. The main indictees for war crimes are not being delivered because that would allegedly destabilize Serbia.

13. The truth is that many prominent intellectuals and human rights activists are longing for Serbia's confrontation with its own past. Judgment for genocide would accelerate democratization of the society and help abandon the ideology of conflicting with neighbours, and speed up the joining process of Serbia into the community of European States and peoples.

14. Judgment on responsibility for genocide would ease the reconstruction of Bosnia and Herzegovina and the reintegration of Bosnia and Herzegovinian society. Serbs in Bosnia and Herzegovina who are still exposed to strong propaganda, given the fact that political parties and movements that are co-responsible for genocide are still present at the political scene, would come to realize that in their name and with their assistance genocide was committed over their neighbours with whom they are far longer and more deeply connected. That would help the progressive forces among Serb people in Bosnia and Herzegovina who advocate the reintegration of Bosnia and Herzegovinian society and putting an end to continued injury inflicted by genocide.

15. Moreover, that would show not only to the Respondent but to all other potential offenders of the Convention on Genocide that genocide does not pay.

16. Madam President, here we are talking about mass violation of human rights in order to realize a political project. The perpetrators and the victim are here before the highest judicial instance of the United Nations awaiting justice.

17. Madam President, Bosnia and Herzegovina is not a victor. We also refuse to be only victims. We are trying to rebuild and start anew. It is up to the Court to record the judgment of history, but for the first time in the context of an objective ruling under the current treaty. New genocides will also be planned and executed, and we can only hope that they will never reach the scope of the holocaust. Let us not mislead ourselves, though: genocides continue to be committed as part of a political strategy of one form of homogeny or another executed under some red, blue, green, yellow, black or white banner. Unfortunately, this will not be the last genocide, but it will be the first upon which this Court can pass judgment and amplify the rule of law and reject those arguments that would, if taken to their rational conclusion, justify the destruction in whole or in part of a group of people only because they belong to a national or to an ethnically defined group, or because they adhere to a certain religion.

18. It is the obligation of all countries to work towards preventing and punishing the crime of genocide. This case is about the relation between the perpetrators and the victim. But of course it is also about relation of all countries and the international community as a whole towards genocide.

19. Therefore, not only the victims of the genocide but all signatories to the Convention on Genocide, the international community as a whole and the international legal system seek for establishing responsibility for genocide, correcting the consequences and discouraging future potential perpetrators. Thereby, we are expecting that this Court declare Serbia and Montenegro responsible for genocide in accordance with our claim which we will be submitting to the Court at the end of our pleadings.

20. Madam President, I am honoured to ask the Court to give the floor to our Deputy Agent, Phon van den Biesen. Thank you.

The PRESIDENT: Thank you. I give the floor to Mr. Phon van den Biesen.

Mr. van den BIESEN:

ASSESSMENT OF SERBIA AND MONTENEGRO'S PLEADINGS

Introductory remarks

1. Madam President, Members of the Court, you have been taken through 60 hours of pleadings and through close to 20 hours of witness and expert statements. And we have just started with the second round which will amount to another 40 or 50 hours of pleadings. Is that — on top of the many thousands of pages of this file — enough to provide for a complete picture of four years of ethnically motivated armed violence in Bosnia and Herzegovina? Is it enough to provide for a complete picture of what was done to make this happen? The answer to these questions is probably: yes and no. "Yes", because it should be enough to provide a proper basis for the judgment Bosnia is seeking to obtain from this Court. "No", because in 30 hours of pleadings we are just not able to do justice, justice to each and every victim of this violence, let alone to each and every one of the beloved of each and every victim, who are trying to cope with the grief, the loss, the incalculable damage done to them. Damage done to them precisely because they happened to be Bosniak, or they happened to be Bosnian Croat. Obviously, we are not able to do justice to

those hundreds of thousands of victims in 30 hours of pleadings, and the upcoming 24 hours will not be of help for that purpose either.

2. In Bosnia these pleadings have been and, indeed, are broadcast live on television and they are simultaneously being translated. In Bosnia the question has been raised why it is that we did not bring the victims in person before this Court in order for them to testify about the cruelties, the atrocities, the ugliness, the unfairness, the ruthlessness, the meanness, the unscrupulousness, of which they and their killed beloved were the victims. Maybe, maybe that would have been a good idea. However, given the enormity of the numbers involved, that would have, inevitably, led to a process of selection. We have chosen not to go into such a process, simply because we do not think that the grief of one victim would deserve more attention, let alone more weight, than the grief of the next victim.

3. So, from this perspective, no, 50 hours of pleadings are not sufficient at all to do justice to each and every one of the victims. But we should not forget that the pleadings are only part of these proceedings and that all of our pleadings are entirely aimed at one goal only: to obtain a judgment from the Court which will, indeed, do justice, to the State of Bosnia and Herzegovina and to all of the — surviving — victims, including all of those who are watching these proceedings day after day. A judgment which clearly establishes State responsibility, the responsibility of Serbia and Montenegro for acts of genocide committed against the non-Serbs, the Bosniaks and the Bosnian Croats, of Bosnia and Herzegovina.

What the Respondent did not provide

4. If, from our perspective and from the perspective of the uncountable number of individual victims, the amount of time spent on these pleadings would be "yes" and "no" sufficient, certainly from the perspective of the Respondent the 30 hours that were available to them in their first round would have been more than sufficient.

5. Given the fact that Serbia and Montenegro have, within the framework of these proceedings, consistently taken the position that the Bosnian Serbs were the belligerents not the Respondent[1], that the Respondent is not responsible for the acts committed by Republika Srpska —

[1]CR 2006/19, p. 38, para. 246 (Mr. de Roux).

this is what Mr. Cvetković told the Court on 15 March: he said that his "distinguished colleagues [had] successfully demonstrated that . . . in any case, the actions of the Republika Srpska could not be attributed to Serbia and Montenegro"[2] — and given the fact that Serbia and Montenegro have taken the position that the Respondent, more specifically, is not responsible for the ethno-blitzkrieg in Bosnia and Herzegovina, for which the preparations began as early as 1991 and which, effectively, started on 31 March 1992 in Bijeljina, that the Respondent is not responsible for the siege of Sarajevo, which began on 2 May 1992, that it is not responsible for the ethnic cleansing and the connected takeover of 70 per cent, 70 per cent, of the territory of Bosnia and Herzegovina, that it did live up to its other obligations under the Genocide Convention to prevent and punish, given all of that, Madam President, two rounds of written pleadings and 30 hours of oral pleadings certainly would have been *more* than enough to demonstrate precisely that position.

6. One would expect Serbia and Montenegro to have submitted minutes of meetings of the FRY Government, minutes of meetings of the Government of Serbia, minutes of meetings of the Government of Montenegro, which then would, from at least 19 May 1992 onwards, reflect how appalled the Respondent's Governments were — at the time — by the atrocities committed by their Bosnian Serb brothers; minutes which would have reflected the numerous efforts that these Governments undertook to stop the Bosnian Serbs doing so.

7. One would expect Serbia and Montenegro to have submitted copies of the numerous cables, letters, courier messages, fax messages, that the Respondent would have sent to Pale and to Banja Luka, from 19 May 1992 onwards, to tell them, to beg them, to advise them, *to stop* committing "their" acts of genocide.

8. One would expect Serbia and Montenegro to have submitted copies of legislative measures aimed at effectively sealing the border between the Federal Republic of Yugoslavia and Bosnia and Herzegovina in order to prevent the transferral of any goods which would support the commission of these acts in Bosnia.

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[2]CR 2006/20, p. 34, para. 2 (Mr. Cvetković).

9. One would expect the FRY border authorities to have submitted copies of reports of incidents demonstrating how these authorities effectively prohibited the transfer of any goods which would support the commission of these crimes in Bosnia.

10. One would have expected copies of legislative regulations adopted in Belgrade declaring illegal and punishable under law any war-related trade between the Federal Republic of Yugoslavia and the Bosnian Serbs, be it trade against payment in kind or trade against any form of financial payment.

11. One would have expected copies of minutes of meetings of the authorities of the Serbian and Montenegrin Ministries of the Interior in which it would have been decided to stop the Special Forces of these Ministries from crossing the Bosnian border.

12. One would have expected copies of orders from the authorities of these Ministries to these Special Forces, instructing them to refrain from being involved in Bosnia and Herzegovina.

13. One would have expected copies of orders from the Chief of the General Staff of the JNA to all commanders to refrain from even the slightest involvement in providing any sort of assistance to the Bosnian Serbs, and also orders to refrain from any participation in armed activities across the Bosnian border.

14. One would have expected copies of the same, originating from the Chief of the General Staff of the VJ after the relabelling of the JNA in May 1992.

15. And one would have expected the presentation of court files, stretching back to 1992 showing the investigation, the prosecution of Yugoslav military and paramilitary personnel, accused of committing, if not acts of genocide, war crimes across the border in Bosnia and Herzegovina and/or accused of complicity in those acts.

16. Madam President, this list is certainly, quality-wise, not an exhaustive summing up of what — in the context of a case before this Court — may have been expected from the Respondent who has built its defence on the proposition, that it — apart from so-called humanitarian aid — did not have anything to do with crimes committed against the non-Serbs in Bosnia and Herzegovina, i.e., crimes committed by the Bosnian Serbs, let alone with genocide.

17. Moreover, one would have also expected that of those minutes, decisions, orders and other measures, repetitive series would have been available. When the Security Council clearly

took the position that action from the FRY was required to stop the killing in Bosnia, this — as one may expect — would have led to numerous documents of the sort just listed. It should also have been the case after May 1992 when the Security Council demanded "that all forms of interference from outside Bosnia-Herzegovina, including by units of the Yugoslav People's Army (JNA) as well as elements of the Croatian Army, cease immediately"[3]; and also after 30 May 1992, when the Security Council condemned the FRY for failing to take effective measures to implement the resolution and demanded that it would do that now[4]; shortly after 1993 when the Security Council demanded that the FRY "immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units" in Bosnia and Herzegovina[5]. And one may have expected the same shortly after this Court's Orders of 8 April 1993 and of 13 September 1993 (*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*, p. 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325).

18. Nothing, Madam President, nothing of this kind has been produced by the Respondent — nothing.

The Court adjourned from 10.50 to 11.35 a.m.

The PRESIDENT: Please be seated. Mr. van den Biesen, we are sorry about this technical interruption. Please now continue.

Mr. van den BIESEN: Madam President, I believe my last word was "nothing". I'm sorry about that but I will continue there.

19. One would have expected, Madam President, that the Respondent would have submitted the unredacted versions of the shorthand notes of the meetings of the Supreme Defence Council and its minutes, since the Agent of the Respondent made it so clear in the correspondence on this

[3] S/RES/752 (1992).

[4] S/RES/757 (1992).

[5] S/RES/819 (1993).

issue with the Court that they would have nothing to fear from the contents thereof. Well, it is exactly the SDC meetings — meetings of the leadership, the military and political leadership in Belgrade — which would have provided the forum to discuss the orders which needed to be given to the armed forces, orders of the sort listed just a minute ago. Also, these reports could have perfectly backed up the position taken by the Respondent with respect to the continued payment of officers in the military of the Bosnian Serbs; it could have clarified this issue; it most likely would have clarified the way the military dealt with the paramilitaries; it would have clarified the FRY position with respect to the best publicly known acts of genocide committed in Bosnia and Herzegovina: like the breadline massacre, the Markale massacre, Srebrenica and so on. From what we can read in the SDC minutes, there is no backup for the position of the Respondent. So it has got to be in the redacted parts of it. We will get back to several of these episodes later on during our pleadings. But, here again, nothing of this kind of material was provided by the Respondent to this Court.

20. It is not entirely fair to say "nothing", because the Respondent did submit one document which could have been explained as the Respondent's protesting at the killings in Bosnia and Herzegovina. Through his letter of 18 January of this year, the Agent of the Respondent sent a set of new documents to the Court, among them a letter of 12 May 1992. This letter, sent to the FRY military authorities by the Commander of JNA's 1st Military District, mentions many atrocities committed against the Muslim population in the Drina area. It also mentions the participation of various paramilitary groups, several of them coming from Belgrade. The letter ends as follows:

> "We consider that it is absolutely necessary to intercede, through the authorities of the Serb Republic of Bosnia, in order to prevent actions of this kind from being repeated, and not to permit large-scale inter-nationality conflicts to flare up. It is also necessary that the MUP forces of the Republic of Serbia should take measures within their competence to prevent the infiltration of armed groups into the territory of BiH."

The Respondent has, however, never submitted any evidence that this recommendation — because that is what it was — of General Stojanović ever materialized into effective steps or measures. Thus, the only thing this letter proves is that, indeed, at the beginning of May 1992:

> "the Muslim villages of Lonjin, Mihaljevci and Plana located on the left bank of the River Drina were set on fire. A part of the population of these villages was killed and a part of them were transported by buses in the direction of Tuzla, whereas yet another

> part of the population took refuge in the surrounding hills and is left without food or water."[6]

It almost sounds like what happened in Srebrenica, but this is only in May 1992. This letter also establishes the responsibility of Arkan's and other paramilitary groups from Serbia.

21. Apparently, and maybe understandably so, the Respondent itself did not think much of this document and did not consider it worth the while of explicitly presenting it during the oral pleadings.

22. Besides this one document of 12 May 1992, which contained only an isolated recommendation and not a general policy position, let alone clear and firm orders, the Respondent did not submit any evidence on paper to the Court which would provide for any support for their professed position, that — in short — Serbia and Montenegro opposed the Bosnian Serb position, especially its genocidal actions and had, in any event, nothing to do with the Bosnian Serb policy and the Bosnian Serb actions.

23. The explanation for this is simple: the Federal Republic of Yugoslavia, now Serbia and Montenegro, did not oppose what the Bosnian Serbs did and did not ever object to the Bosnian Serb actions. Also, the Respondent, clearly, never instructed its authorities, its military armed forces, or its other armed forces (be it paramilitary, secret police, police or any other) not to be involved. The Respondent never effectively stopped the provision of men, equipment, arms and ammunition to the Bosnian Serb military. On the contrary.

Fraud?

24. Obviously, we will elaborate on this during the upcoming pleadings. For now it suffices to say that the Respondent had a chance to make and to prove its case through its Counter-Memorial, through its Rejoinder and through its oral pleadings. Although we explicitly pointed out, on 27 February 2006, that the Respondent's defence should at the latest become visible in their first round of the present oral pleadings[7] and although the Respondent agreed with that — since on 16 March 2006 the Respondent's Co-Agent, while analysing the role of the Respondent,

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[6]Unpublic documents submitted by Serbia and Montenegro on 18 January 2006 (dated 5 January 2006), document No. 3.

[7]CR 2006/2, p. 21, para. 13.

confirmed that "the role of the respondent State is just to respond"[8] — it has hardly used these opportunities to do so, apart from repeating its mere denials. This is certainly not enough in response to the abundance of facts and materials submitted by our side. The Court may draw its inferences from this approach.

25. While the Respondent hardly submitted any real evidence in support of its position, it did, while criticizing the quality of the sources we have used, refer back to some of the materials which it submitted during the written pleadings. The Co-Agent referred to these materials as being "strong confirmatory evidence"[9]. He referred, *inter alia*, to a witness statement given "to the investigating judge of the Zvornik court, Mr. Vaso Eric, in accordance with the rules of the criminal procedure of the former Yugoslavia"[10].

26. Madam President, this brings me to a serious matter, a matter which we initially decided not to go into, since it relates to evidence submitted by the Respondent in relation to its counter-claims and those counter-claims no longer form part of these proceedings, including the evidence submitted in support of those. However, since the Co-Agent referred to precisely this Judge Erić we are forced to tackle this unpleasant issue. It is an issue about good faith, it is an issue about proper pleading, it is about truthfulness and quality of evidence submitted by the Respondent. In the case before the ICTY against the Bosnian Commander Naser Orić — Mr. de Roux referred to this case in his pleading[11] — the Prosecutor used many documents containing witness statements given to and signed by this same judge, Vaso Erić. Erić has retired and he appeared as a witness before the ICTY to testify about the veracity of these statements[12]. During his testimony, Erić confessed that he, despite the fact that his signature appeared on those statements, had not seen the witnesses involved, that he never talked to them, let alone that these witnesses had given a statement to him in his capacity as an investigative judge, let alone that this

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[8]CR 2006/21, p. 32, para. 35 (Mr. Obradović).

[9]CR 2006/12, p. 26, para. 19 (Mr. Obradović).

[10]*Ibidem*, para. 20.

[11]CR 2006/18, p. 38, para. 94.

[12]ICTY, *Prosecutor* v. *Naser Orić*, case No. IT-03-68, transcript pp. 4908-4977. Available at www.un.org/icty/transe68/050210IT.htm.

would have been done in accordance with the rules of criminal procedure of the former Yugoslavia. We have included the relevant materials in the judges' folder.

27. So what happened? Judge Erić explained what happened. He had, on various occasions, received a stack of statements which were delivered to him by a clerk named Pavle Jelisavčić[13]. This clerk came from Belgrade on behalf of a government-sponsored committee for gathering information on war crimes[14]; this committee is officially known as the Committee for the Collection of Data on Crimes Committed against Humanity and International Law, and the Respondent has confirmed in the Counter-Memorial that the witness statements submitted to the Court were deposited with this Committee[15]. Judge Erić stated that he, when confronted with the pile of statements, phoned the Bosnian Serb Ministry of Justice, who assured him, the judge, the President of the court in Zvornik, that there, indeed, existed some arrangement with Belgrade and that he, Erić, could trust this Pavle and that he could go ahead and sign that pile of statements in confirmation that these were given to him in his capacity of investigative judge[16].

28. Fraud would be the proper word for this: misrepresentation and fraud.

29. Many of the witness statements which the Respondent submitted as annexes to its Counter-Memorial and to its Rejoinder were given to precisely this investigative judge of the Zvornik court. We have not made an in-depth study of all of these statements, since they are connected to the counter-claims and since they are withdrawn. As we said before, we no longer consider these to be part of the proceedings[17].

30. However, given the fact that the Co-Agent of the Respondent explicitly referred to one of these statements, even labelling them as "strong confirmatory evidence", we deemed it useful to have a quick look at this issue and to inform the Court about our findings. After all, it is a document that the Respondent is submitting.

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[13] *Ibid.*, p. 4938.

[14] *Ibid.*, p. 4935.

[15] See letter dated 28 December 1994 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General, United Nations doc. A/50/56 and S/1994/1450, 29 December 1994. See also Counter-Memorial of 23 July 1997, p. 352, footnote.

[16] ICTY, *Prosecutor* v. *Orić*, transcript, p. 4937.

[17] CR 2006/2, p. 27, paras. 32-33.

31. We were able to identify at least two witness statements signed by Vaso Erić which appeared in the ICTY case against Naser Orić and which, much earlier, were submitted by the Respondent to this Court[18]. Also, we noted that many of the "Erić statements" were co-signed by another Zvornik court clerk, Gorica Trajković, of whom Erić — in his capacity as witness — testified that she "was a clerk who arrived with Pavle Jelisavcic . . . She came with him from Belgrade."[19] It means she came from the Respondent's judicial institutions. Erić confirmed that another clerk whose signature appeared, Ružica Jaić, was not employed by the Zvornik court either[20]. In the annexes to the Rejoinder, her name appears at least once as a court clerk in a statement supposedly given at the District Court in Belgrade[21]. And finally, Pavle Jelisavčić himself also appears as a court clerk on a number of statements, supposedly taken at the District Court in Belgrade[22].

32. We are not able to assess the validity of all of the witness statements, which were signed by these individuals and which were submitted to this Court. The need for doing so is in itself not very pressing, since these statements are not part of the file. However, all of this raises serious — and I mean serious — doubts about the quality and veracity of all of the materials submitted to this Court by the Respondent.

33. In any event, we leave it to the Court as to how to appreciate the fact that the Respondent submits this sort of fraudulent material under the heading "strong confirmatory evidence" to the Court. For our purposes it is enough to establish that these types of materials are, if anything, "strong confirmatory evidence" of the fact that the Respondent apparently is not able to properly, let alone effectively, disprove the accurateness of our positions.

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[18]Annex RC 313 to the Rejoinder of 22 February 1999, Vol. 6, p. RC 2863. See ICTY, *Prosecutor* v. *Orić*, transcript p. 4944. Annex RC 243 of the Rejoinder of 22 February 1999, Vol. 5, p. RC 2207. See ICTY, *Prosecutor* v. *Orić*, transcript pp. 4938, 4944, 4949.

[19]ICTY, *Prosecutor* v. *Orić*, transcript pp. 4948-4949.

[20]*Ibid.*

[21]See Annex RC54 to the Rejoinder of 22 February 1999, Vol. 2, p. RC 531.

[22]See e.g. Annexes RC 33 and RC 44 to the Rejoinder of 22 February 1999, Vol. 2, p. RC 279 and p. RC 293.

The evidence submitted by the Respondent

34. This brings me to another topic related to the evidence submitted by the Respondent, Madam President. I just noted that the Respondent had made no direct reference to one of the set of "unpublic documents" which it submitted 18 January 2006. This was not an exception, since the same applies to the six other "unpublic documents" which are part of that set of documents. Even though some of them may have been presumed to address some of the points that the Respondent has made during the first round, at no time did the Respondent refer explicitly to one of these documents in support of its arguments. Since we are not supposed to argue the case of our learned opponents, we cannot be expected to guess what the purpose of these documents may have been in order, then, to undo our own guessing. So, we would appreciate it to be put on record that these documents no longer form part of the file, since we will not have an opportunity to rebut any possible use the Respondent will make of these documents in their final round.

35. Madam President, the witnesses — I will get back to that later today — the witnesses called by the Respondent did not help Serbia and Montenegro either. They either showed themselves to be totally unreliable — Mr. Lukić and Popović are the examples of that — or mildly unreliable — Mr. Mihajlović, Mr. Milićević and Mr. Mićunović. In any event, all of these witnesses were clearly *pleading*, they were pleading on behalf of Serbia and Montenegro and they did not offer anything in addition to the various positions already taken by the Respondent.

Use of quotations

36. The Respondent has used surprisingly little evidence in support of its assertions. Apparently the CIA report *Balkan Battlegrounds* was deemed useful, since it is used by the Respondent no less than 19 times[23]. The same appears to be true for the Report of the Netherlands Institute for War Documentation on Srebrenica[24], to which reference was made five times, often

[23]CR 2006/15, p. 15, para. 133; p. 16, para. 135; p. 17, paras. 138-139; p. 19, para. 147; p. 20, para. 150; p. 20, para. 151; p. 21, paras. 153-156; p. 23, para. 159; p. 24, para. 162; pp. 29-30, paras. 173-176; p. 32, para. 181; pp. 34-35, paras. 185-186 (Prof. Stojanović). CR 2006/16, pp. 10-11, paras. 4-5 (Prof. Brownlie). CR 2006/17, p. 36, para. 277; p. 38, para. 285; p. 44, para. 309 (Prof. Brownlie). CR 2006/21, p. 18, para. 5; pp. 18-19, para. 10; p. 19, para. 14 (Prof. Brownlie).

[24]Netherlands Institute for War Documentation, *Srebrenica — a "safe" area. Reconstruction, background, consequences and analyses of the fall of a safe area* (Boom Publishers, Amsterdam 2002). Available at http://www.srebrenica.nl/en/a_index.htm

extensively[25]. However, the sections quoted from these reports, apparently selected by the Respondent in order to convince the Court, at no time reflect the general message of these reports. On the contrary, this general message usually helps Bosnia and Herzegovina much more than it does help Serbia and Montenegro. We will point this out in more detail during this week of pleadings.

37. It is rather surprising when we talk about quoting, Madam President, that counsel of the Respondent is several times extensively quoting himself, however without providing any reference to go with it. On Monday 13 March 2006, our learned opponent Brownlie reread a substantial part of his preliminary objections pleadings, which he had read to the Court ten years ago, on 29 April 1996, almost ten years ago to the day. Also, on many occasions, he reread most of Section 3.2.3 of the Rejoinder which was submitted by the Respondent seven years ago, on 22 February 1999[26]. We will get back to that later on.

A contrario reasoning

38. While the Respondent is not using a lot of evidence in support of its pleadings, it endeavours to undo Bosnia's position by sheer reasoning, by talk. In doing so, the Respondent has usually not been very convincing, to say the least. On many occasions they entirely rely on *a contrario* reasoning. For example, on the first day of their pleadings, counsel for the Respondent stated that "the Respondent considers that the ICTY indictments can be used as *argumentum a contrario* in a case when the Applicant's allegations are not contained in them"[27]. According to the Respondent's logic, if the ICTY Trial Chamber has convicted a certain individual for 28 killings in Trnopolje, it follows that no more than 28 killings could have taken place in Trnopolje[28]. And if the Prosecutor of the ICTY has alleged that Arkan's men killed 15 Bosnian Muslims and Bosnian Croats in Zvornik, no more than 15 Bosnian Muslims and Bosnian Croats in

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[25]CR 2006/16, p. 11, para. 7 (Prof. Brownlie). CR 2006/17, pp. 12-13, paras. 173-176; p. 29, para. 252; p. 34, para. 269; p. 37, para. 283 (Prof. Brownlie).

[26]See CR 1996/7, pp. 8-21 (Prof. Brownlie) and CR 2006/16, pp. 15-21. Also see CR 2006/16, pp. 31-33, paras. 84-92 (Prof. Brownlie), and Rejoinder, pp. 577-579, paras. 3.2.3.1-3.2.3.9. Also: paras. 150-153, pp. 50-51 and Rejoinder, paras. 3.2.3.14-3.2.3.18 (pp. 582-584). CR 2006/17, pp. 17-18, paras. 197-199 (Prof. Brownlie) repeat Rejoinder, pp. 587-588, para. 3.2.3.29-3.2.3.31. Paras. 205-215, pp. 20-22 repeat Rejoinder, pp. 588-590, paras. 3.2.3.33-3.2.3.40.

[27]CR 2006/12, p. 31, para. 40 (Mr. Obradović).

[28]*Ibid.*, p. 27, para. 22.

Zvornik will have been killed[29]. And, if the ICTY did not convict an individual of genocide, it would be for sure, so says the Respondent, that genocide did not happen[30].

39. Madam President, litigators, in general, are aware of the shortcomings of *a contrario* reasoning: if something is not black, the conclusion "then, it must be white" is only justified if it is a given that there only is a choice between these two colours. In all other cases the answer "then, it would be white" may only be correct by coincidence. This also seems to be the case with many of the conclusions drawn by the Respondent: if they are correct at all, this is purely a matter of coincidence. Certainly, this approach is not sufficient in a court case, let alone in a court case with the stakes as high as those in this one.

40. In this perspective rock-bottom was touched with this way of reasoning when the Respondent informed the Court about its assumed logic connected to the perpetration of genocide. Mr. Cvetković, who argued that the Respondent was not guilty of genocide, explained — using the holocaust and the Rwandan genocide as evidence for that — that a true genocide always begins "next door". And he said since many Muslims were living in Belgrade, untouched, and since many Muslims lived in the Sandžak region, untouched, he argued, it is just not possible that Serbia and Montenegro could have committed acts constituting genocide against Muslims living abroad[31]. Quite apart from the fact that, here, he ignored the fate of the Kosovo Muslims in 1998-1999 and quite apart from the fact that he misrepresented the fate of the Sandžak Muslims, who did not remain untouched — as was confirmed by the Humanitarian Law Centre in Belgrade and by Amnesty International: they suffered from attacks, abductions, torture and ethnic cleansing[32] —, there is no logic to this way of reasoning but it does have the appearance of perverting the issues at stake. This sort of reasoning, Madam President, at no time can be seen as a serious rebuttal of our, indeed, very serious allegations.

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[29]CR 2006/12, pp. 23-24, para. 10 (Mr. Obradović).

[30]CR 2006/18, pp. 27-28, p. 90 (Mr. de Roux).

[31]CR 2006/20, pp. 55-56, paras. 66-71 (Mr. Cvetković).

[32]See: *Bukovica* (Humanitarian Law Centre, Belgrade), available at www.hlc.org.yu/storage/docs/2b36abd4b25a6fd8d77214c2a37c2742.pdf; Amnesty International, "Still seeking justice in the Sandzak", EUR 70/005/2003, 1 February 2003, available at www.web.amnesty.org/library/Index/ENGEUR700052003?open&of=ENG-YUG.

41. During the upcoming sessions we will try our best to effectively contradict all that has been stated by the Respondent in the first round of pleadings. In doing so, we will — if possible — try and limit reliance on sources which have not been relied on already. At the same time, whenever the Respondent's position is best contradicted by referring to sources which were not mentioned earlier, we will most certainly do so.

SDC shorthand reports and SDC minutes

42. Now I come back, Madam President, to the issue of the Supreme Defence Council reports. We will at times have to refer to the reports of the Supreme Defence Council. We will especially refer to the shorthand notes of these meetings. We know that the Respondent in this case has switched its initial tactic from launching a counter-offensive into a hide-and-seek approach aimed at preventing the Court from delivering a judgment on the substance of the case. We also know that the Respondent is hiding documents which are most relevant to this case by, first, seeing to it that the ICTY would not disclose them in their entirety to the public and, secondly, by not providing these documents to this Court. We have provided the Court, through our letter of 28 December 2005, with sections of an in-depth media report, which revealed that the Respondent's reason for objecting to the ICTY's making the contents of these documents public was inspired by the interests of Serbia and Montenegro in the present case. We know that Mr. Djerić pleaded before the ICTY on behalf of the Respondent and that he must have referred to this case as the reason — or at least one of the reasons — why the Respondent had overriding objections against making them public. Now that the Respondent has not seen fit to submit the documents to this Court, we challenge Mr. Djerić to either deny or to confirm his role and the substance of his pleadings before the ICTY. His response, which we may reasonably expect in the Respondent's second round, will be public and therefore, eventually, verifiable.

43. Obviously, at this stage we are only able to refer to the unredacted sections of these minutes. At this point, we really find ourselves in a fight in which one of the Parties, Bosnia and Herzegovina, has its hands tied behind its back, while the other Party, Serbia and Montenegro, has complete freedom of movement.

44. In other words, Bosnia and Herzegovina is not able to appreciate the unredacted sections in the wider context of the entire document, let alone in the wider context of the entire sequence the nature of the SDC meetings. The Respondent does not have this handicap. On the contrary: the Respondent has been in charge of the redacting process. The Respondent, obviously, does possess all of the SDC documents and the Respondent has explicitly been arguing before the ICTY that the SDC minutes were not to be made public, since that would hurt the Respondent's case before the International Court of Justice. Whatever conclusions need to be inferred from this, it is clear that Serbia and Montenegro should not be allowed to respond to the positions that we take based on our reading of the partially unreadable, for partially redacted, SDC materials. That is, Serbia and Montenegro, should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely unredacted versions of *all* of the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.

Concluding remark

45. Madam President, Members of the Court, these oral pleadings come at the end of rather prolonged proceedings. They are meant, as these proceedings usually do, to exclusively focus on the merits of the case. However we are not closing our eyes to the fact that a debate on jurisdiction has become inevitable and we will, obviously, provide the Court with our views with respect to that very question. We will take it seriously, we will spend a considerable amount of time on elaborating Bosnia's position and on showing the Court that, whatever way one chooses to look at it, this issue is not to be decisive for the fate of our case. We have planned to be pleading the jurisdictional questions on Friday and on next Monday. The upcoming sessions we will further devote to the substance of Bosnia's case.

46. Madam President, this concludes my first pleading in this session. I will now continue to summarize our factual case to the Court, against the background of the Respondent's first round of pleading.

BOSNIA AND HERZEGOVINA'S FACTUAL CASE

1. Obviously, Madam President, during our written and oral pleadings we are presenting to the Court the facts and the law as experienced, analysed, assessed and perceived by Bosnia and Herzegovina. At the same time the Bosnian legal team was instructed to at all times go about this job in the best possible balanced manner, which is another confirmation of Bosnia's sincere wish to indeed get the record straight with respect to the horror that came across Bosnia. This horror lasted not only during the years 1992 to 1995, but the results of that have been present ever since and they continue to be felt to this very day. Since the campaign of genocide led to a total disruption of the very make-up of Bosnia and Herzegovina. this disruption is part of the damage done which damage continues to be actively experienced each and every day.

2. We have gone to some lengths to try to present the facts in a pure, objective manner and we have at all times avoided lawyering with the facts let alone with the law. If we were not 100 per cent successful at all times in achieving this goal, we do apologize for hurting anyone's feelings if we did.

3. Also, we have tried, at all times, to submit the context of materials and documents from which we only planned to use parts, sections or specific quotes. The first reason for this really is that we feel we owe it to justice to fight a legal battle in the open. The second reason for this obviously was to provide the Respondent and the Court with a truly, a truly readily available manner to verify the context of the materials we used.

4. We regret that this has not always been appreciated but we are even more troubled by the cynicism shown by the Respondent with respect to video materials which we sent to the Court for the very mentioned purposes. Mr. Obradović informed the Court on 8 March that, among other things, he found it "easy to conclude that most of these materials are the author's creations, that they are often based on prejudices and above all a lot of video materials were made in order to evoke public emotions". This is not exactly a very specific way of rebutting the substance of these

videos. Moreover, Mr. Obradović has apparently missed our point in submitting the entire videos to the Court and to the Respondent.

5. Leaving all of this aside and focusing on the heart of the matter, it is relevant to note for the record that the Respondent has not denied that all of the clippings which we showed here in open court that all of these represent a true picture of precisely what was shown by us.

6. One exception was made by the Respondent and a very ugly exception indeed. This is what Mr. Obradović told the Court with respect to the footage showing the beastly killing of six Bosniak boys by the Scorpions — Scorpions, one of the paramilitary groups, acting under the Respondent's responsibility. He said "it is clear that the Applicant addressed those scenes to the Court for emotional reasons". When I reread this sentence to you today — "it is clear that the Applicant addressed those scenes to the Court for emotional reasons" — I am still, after having already reread it many times over, troubled to grasp the enormity of this sentence. How does this fit into Professor Stojanović's stipulation that "en aucun moment, nous ne voulons nier les souffrances des victimes que nous ne pouvons et nous ne voulons pas oublier"? Is this not precisely what the Respondent is doing? Denying which is undeniable and which should not be denied? This denying is exactly one of the reasons why we are here, why we are here before this Court asking for a judgment which would effectively put an end to this.

7. Now, as a response to Mr. Obradović's observation, we do not have pictures, let alone video footage of all the other 7,000 to 8,000 Srebrenica killings. But we all know that all of the other mass killings would have produced even more horrendous pictures, such as the killings on 13 July 1995 at Bratunac at Jadar River and Nova Kasaba at Sandici Meadow. Or the killings on 13 July at Kravica warehouse, where 1,000 Bosniak men were executed; 16 July 1995 in Branjevo where 1,200 Bosniak men were executed. Or the mass killings at Potočari, Cerska Valley, Orahovac, Pekovci School, Tisca and the Piliča Cultural Centre.

8. We are not here to create special emotional effects, Madam President. We showed these killings because they connected — those images connected — an image of the true nature of what we had explained thus far only in words, and only on paper. Just to try and show the true reality. We also showed them to illustrate the ultimate, deliberate, nature of these killings. We showed it because of the comments made by the killers which, more than anything else, demonstrated that the

boys were killed because they were Bosniaks. We showed it because the footage demonstrates that it, apparently, was not part of the plan to arrest, to detain and possibly to prosecute the boys, assuming that they committed a crime, for which assumption no evidence whatever is available.

9. Madam President, there are thousands of pictures available of exhumations from mass graves all over Bosnia; and those who carried out the exhumations — the specialists — they make a difference between so-called primary graves and secondary graves. The secondary ones being graves where body remains from the primary graves are reburied. Why? They are reburied in attempts to hide the existence of mass graves. They are reburied in attempts to hide the traces of genocide. And, in the course of this process, usually the use of heavy machines led to the remains of one body crudely being divided into pieces. Thus the remains of one person is often found in two or three different secondary graves. Many of the available pictures of these remains show victims with their hands tied behind their backs. Their remains and pictures show the shot traces, more often than not they are in the back of the skull or in the back of the body. We are not showing those because you have seen enough to envisage what we mean when, in this case, we talk about mass killings.

10. Mr. Obradović concluded his unfortunate discourse on this video footage by flatly stating that the Scorpion criminals "according to the documentation available to our delegation were not members of the Serbian police or any other body of Serbia and Montenegro"[33]. A denial which is only supported by the mere statement that the documentation available to the Respondent's representatives does not contain conclusive information as to the availability of relevant documentation and it obviously is not to be considered as an effective denial; especially not when, as in this particular case, the evidence in support of the denied position is overwhelmingly clear and the Respondent knows this full well, since the Respondent's own prosecutor's office has all the relevant files.

11. The Respondent did not deny that several of the Scorpion military who stand trial in Belgrade have pleaded guilty. It should be noted again that these soldiers were only prosecuted after a worldwide uproar emerged after the showing of this video footage. The existence of this

[33]CR 2006/12, p. 42, para. 80 (Mr. Obradović).

footage had been widely known in Belgrade already for many years, but apparently during all those years the authorities did not see the need to prosecute; and they also, to this very day, did not see the need to include the commander of the Scorpions in these proceedings. One may only guess the reasons why.

12. In any event, the Prosecutor at the ICTY found the evidence important enough to amend the indictments against these two men, Jovica Stanišić and Franki Simatović, whose cases we have discussed earlier. They were both high authorities within the Ministry of the Interior in Belgrade. Although very recently the Trial Chamber ruled that it would not accept the part of the amendment of this indictment with respect to the attacks on Srebrenica as such for reasons of proper criminal proceedings; the Trial Chamber did confirm the amendment with respect to the Scorpions killing of the six boys — which murders we witnessed on video in this Great Hall of Justice[34]. The indictment states:

> "62. The Bosnian Serb forces then distributed the Bosnian Muslim prisoners to different Serb and Serbian units for the purpose of murdering them. One bus full of prisoners was taken to the base of the Scorpions at Treskavica, from which about 15 male prisoners were taken from the bus for execution by members of the Scorpions. Members of the Scorpions took six of the prisoners by truck to a secluded rural area several kilometres from their base. Under the command of Slobodan Medic — (Boča) — the Scorpions murdered the prisoners by shooting them. Slobodan Medic — also known as (Boča) — had these murders videotaped."[35]

13. Why am I telling the Court all of this? This issue represents this sense of denial of what really is at stake in this case; and, even more importantly, a sense of denial of what really happened to the Bosniaks and the Bosnian Croats of Bosnia and Herzegovina. A denial which, as my colleague Alain Pellet mentioned in our first round, formed, less than a year ago, the centre of a mass meeting of students — law students — gathering in the faculty of law in Belgrade[36]. The students at this meeting shouted "Karadzic, Karadzic" and the participants "insisted that no crime at all took place in Srebrenica and that the victims were soldiers of the 'Muslim army sacrificed by Alija Izetbegovic . . .'". Actually the position taken in this Court by Mr. de Roux when he

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[34]Hague clears ex-Serbian security officials of Srebrenica charges, FoNet News Agency (Belgrade), BBC Monitoring Newsfile, 14 April 2006. See also "Ex-Geheimpolizeichefs von Srebrenica-Anklagepunkt befreit" [Former chief of Secret Police freed of Srebrenica charges], *der Standard* (Austria), 14 April 2006, available at http://derstandard.at/?url=/?id=2415414.

[35]ICTY, *Prosecutor* v. *Jovica Stanisić and Franko Simatović*, case No. IT-03-69, paras. 59 and 62.

[36]CR 2006/11, p. 40, para. 28 (Prof. Pellet).

discussed Srebrenica is as a matter of principle not any different from that of those students gathering in Belgrade[37]. Obviously we will get back to discussing Srebrenica later on this week. But the approach discussed here is exemplary for the Respondent's approach. This approach is in many ways peculiar, it's an unusual mix of, on the one hand blunt and sweeping denials with, on the other hand, an almost absolute absence of specifically denying specific facts.

14. It is an approach which includes storytelling, storytelling rather than providing or rebutting facts. It includes several mantras like "it was a civil war", or "all sides were bad", or "all sides were victims", or "the Bosnian Serbs did it, not us"; mantras which, as mantras do, aim to get the message across by sheer repetition, not by arguing.

We will try and address these mantras and we will try and show the Court that the true facts are reflected in our pleadings, and not in the pleadings of the Respondent.

History

15. When we provided the Court with some historic background to the events central to our case, we did not envisage engaging in a course in history writing. We did, indeed, trace back the Greater Serbia notion to Garasanin and his *Nacertanije* (Plan) of 1844[38]. We were not about to study the precise context of his writing and we were not interested in the fact that the publication, as Professor Stojanović explains[39], was only read in a small circle (which is in itself not surprising in the second half of the nineteenth century). It was only read apparently in a small circle until a somewhat wider publication 100 years ago. Our point has been that the Greater Serbia rhetoric was key to the events in the second half of the 1980s and in the 1990s, which led to the ethnic cleansing of, in the first instance, 70 per cent of the territory of Bosnia and Herzegovina. An ethnic cleansing campaign which, as we are arguing in our case, squarely meets the criteria of the Genocide Convention.

16. Seen from this perspective, our perspective, the extensive narrative presented by Professor Stojanović covering the first six hours of the Respondent's pleadings on the merits did not meet the point that we are making. Besides that, this narrative was scarcely referenced and

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[37]CR 2006/18, p. 27, para. 67 (Mr. de Roux).

[38]Application instituting proceedings, 20 March 1993, para. 24.

[39]CR 2006/14, p. 12, para. 5 (Prof. Stojanović).

clearly hardly supported by verifiable sources. The lack of those combined with several important mistakes have led us to the conclusion that we should not spend much time in rebutting this.

17. We have never stated that Milošević or the other Serbian leaders have based their propaganda on a correct version of the history of Serbia and its heroes. We have only listened to what they said and we have made an analysis similar to the one made by Richard Holbrooke in his book[40], by Warren Zimmermann in his book[41], by Norman Cigar[42], by Tim Judah[43], by Adam LeBor[44], and Ed Vulliamy[45], among many others. And precisely this same analysis was made by the ICTY in its very first substantial judgment, in the *Tadić* case[46]. These writers all agree that the end of the communist era in the former Yugoslavia not only created the conditions for its dissolution, but also moved the Serbian leadership in Belgrade to try and save their political, territorial and economic authority by playing the ethnic/nationalist card in the most extreme way.

18. And so it happened that the Serbian Prince Lazar was revived 600 years after he lost his great battle against "the Ottomans", which battle was fought in Kosovo. And so the notion of "revenge" on "the Turks" was revived. So the notion of Serbian victimhood was recultivated. And, thus, the impression was raised that the Serbs were about to, again, become victims of genocide. We did provide this analysis in our written pleadings and, again, in our oral pleadings[47]. This analysis as such, including the detailed references to the relevant sources, has not been rebutted by the other side.

19. Rather the contrary has been the case. Several times Mr. de Roux gave as the Respondent's position that the Respondent found it *understandable* that the Serbs in Bosnia and

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[40]Richard Holbrooke, *To end a war* (Random House, New York 1998), pp. 22-24.

[41]Warren Zimmerman, *Origins of a catastrophe* (Random House 1996), pp. 10-13, 120.

[42]Norman Cigar, *Genocide in Bosnia: the policy of "ethnic cleansing"* (Texas A&M University Press 1995), pp. 22-37.

[43]Tim Judah, *The Serbs: history, myth & the destruction of Yugoslavia* (Yale University Press, New Haven and London 1997), notably pp. 158-160 and 308-310.

[44]Adam LeBor, *Milosevic: a biography* (Bloomsbury 2002), pp. 75-87.

[45]Ed Vulliamy, *Seasons in hell: understanding Bosnia's war* (St. Martin's Press 1994), pp. 42-55.

[46]ICTY, *Prosecutor* v. *Duško Tadić*, case No. IT-94-1, Trial Chamber Opinion and Judgement, 7 May 1997, paras. 72, 83, 88, 89, 94.

[47]CR 2006/2, pp. 29-30, paras. 3-8 (Mr. van den Biesen).

Herzegovina felt threatened and he referred to their experience in recent history. For example, about the hate speech of the likes of Radoslav Brđanin, Mr. de Roux said:

> "Ces discours des Serbes de Bosnie étaient prononcés dans une situation de conflit qui fut d'abord politique avant d'être militaire. Oh certes, ils sont souvent très excessifs ! Mais ils reflètent malheureusement la situation qui existait à l'époque en Bosnie-Herzégovine . . . Et je voudrais simplement rappeler que Brdjanin n'avait rien à voir avec la Serbie-et-Monténégro, il était un Serbe de Bosnie, né en Bosnie, dont les parents d'ailleurs avaient été tués lors de la deuxième guerre mondiale, justement par les forces croates. Brdjanin est donc bien un pur ressortissant de Bosnie-Herzégovine, plongé dans la malheureuse histoire de ce pays."[48]

And he continued: "

> "Dès lors, les Serbes, peut-être à tort d'ailleurs, pouvaient se sentir en danger s'ils devaient constituer une simple minorité dans la nouvelle république, d'autant que les épurations ethniques brutales dans les Balkans étaient une longue tradition ayant culminé durant la deuxième guerre mondiale, laissant aux Serbes de Croatie et de Bosnie un goût amer . . ."[49]

And the Agent spoke in the same way when he said:

> "Cette attitude des Serbes (l'attitude qui consistait à s'opposer à la séparation de la Bosnie-Herzégovine), accompagnée de la peur, les poussait à accepter les armes de toute provenance . . . Il faut mentionner le fait qu'en Bosnie-Herzégovine, après la deuxième guerre mondiale, la plupart des maisons avaient des armes de trophée de la deuxième guerre mondiale. Cette tendance a été sans doute motivée par l'expérience de la deuxième guerre mondiale dans laquelle les Serbes non armés étaient une proie facile des O[ustacha]."[50]

And, even more telling, he says:

> "Il était clair que la pression internationale était très forte et que la Yougoslavie devrait retirer l'armée nationale yougoslave de Bosnie-Herzégovine. Le risque que ce retrait représentait pour les Serbes de Bosnie était évident."[51]

20. It is, Madam President, disturbing to see in these very proceedings, conducted by lawyers who informed the Court about their personal positions in the relevant period of time and who claim to have all along opposed Milosevic's policies, that this propaganda, which led to the extensive use of genocidal armed force, seems to be repeated, or at least justified. This becomes even more clear when we hear Mr. de Roux speak about the understandable repugnance of the Bosnian Serbs against becoming a minority in Bosnia and Herzegovina. To give just two examples:

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[48]CR 2006/19, pp. 38-39, para. 246 (Mr. de Roux).

[49]*Ibidem*, p. 42, para. 255.

[50]CR 2006/15, p. 18, paras. 143-144 (Prof. Stojanović).

[51]*Ibidem*, p. 19, para. 148.

— On 10 March, the Agent of the Respondent stated:

> "Après la reconnaissance de la Bosnie-Herzégovine, le peuple serbe vivant dans ce pays a été réduit au statut d'une minorité nationale dans son propre pays dans lequel il existait et vivait depuis des siècles en tant que l'un des trois peuples constitutifs . . . Il est difficile d'imaginer la situation dans laquelle un peuple devient une minorité nationale dans son propre Etat. Et pourtant c'est le destin du peuple serbe en Bosnie-Herzégovine. Raisonnablement, l'on ne peut nier que dans ce cas-là ce peuple ait eu le sentiment d'une grande déception et d'un échec historique. Cet échec aurait pu être accepté, mais son acceptation aurait signifié la disparition du peuple serbe en Bosnie-Herzégovine . . . Le changement du statut des Serbes, du peuple constitutif, en une minorité nationale signifiait pour eux la perte de leur identité collective."[52]

— And Mr. de Roux said on 15 March: "L'on pouvait craindre qu'il en soit de même en Bosnie-Herzégovine [qu'en Croatie] si les Serbes étaient réduits à être une simple minorité."

Here, Madam President, the Respondent is, again, just repeating the earlier propaganda. *Who* was threatening the Serbs? *Who* was in a *position* to threaten the Serbs? Well, in any event not the Bosniaks, who — as Mr. Karadzic had pointed out so explicitly in the Assembly of 15 October 1991 — would be "annihilated". Why? Karadzic explains: since they would have no way to defend themselves[53]. Simply, the facts do not support the Respondent's pure speculation about the feelings of the Bosnian Serbs, which speculation is only presented to the Court as a matter of justification. In effect, this is what this reasoning leads to. The reasoning goes: the Bosnian Serbs feared a status of minority and this explains their being provided by Belgrade with an entire army in order to cleanse 70 per cent of Bosnia's territory and turn it into a purified Serb land, which then could be merged with the rest of Serbia. What sort of reasoning is this?

21. The relevant facts are as follows: first, in Bosnia and Herzegovina all "nations" were minorities, not one of them formed the absolute majority. As we mentioned before, the 1991 census showed the make up of Bosnia's population:

— a little over 43 per cent Bosnian Muslims,

— 31 per cent Bosnian Serbs,

— 17 per cent Bosnian Croats, and

— almost 8 per cent Others[54].

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[52]CR 2006/15, p. 12, paras. 120-122 (Prof. Stojanović).

[53]CR 2006/2, p. 34, para. 18 (Mr. van den Biesen).

[54]CR 2006/2, p. 31, par. 9 (Mr. van den Biesen).

Besides that, and more importantly so, as Professor Stojanović acknowledged[55], Bosnia and Herzegovina was a truly ethnically mixed society with the highest percentage of mixed marriages. In other words, ethnicity was not, given the make up of Bosnia, a divisive issue. The notion of the Serbs becoming a minority really was something that was introduced into the Bosnian public debate from outside of Bosnia and Herzegovina.

22. In this context the Respondent stated that the Serbs would have lost its status of constituent nation in Bosnia due to Bosnia's becoming an independent State[56]. This is just not true. The successive constitutions of the Republic of Bosnia and Herzegovina since the Second World War recognized three "constituent nations": Muslims, Croats and Serbs.

23. The Serbs' recognition as a "constituent nation" remained intact until March 1994 when it was superseded by the Constitution of the Federation of Bosnia and Herzegovina. During that time, the Presidency of Bosnia and Herzegovina continued to have two Bosnian Serb members. After the SDS members Nikola Koljević and Biljana Plavšić resigned on 7 April 1992, the two Serbs who were next on the list of votes received in the election, Mirko Pejanović and Nenad Kecmanović, were appointed in their place. These were, of course, members of other political parties, but the Respondent seems to count as "Serbs" only those who were leaders of the SDS.

24. The Serbs' status as a "constituent nation" was not included in the Constitution of the Federation of Bosnia and Herzegovina that was prepared by United States government attorneys as part of the Washington Agreements of March 1994, but it was restored in Annex 4 of the Dayton Peace Agreement signed in December 1995[57]. The Constitution, however, of Republika Srpska continued to recognize only Serbs as a constituent nation, and also the Constitution of the Federation recognized only Croats and Bosniaks. In 1998, it was Alija Izetbegović — who is, by the Respondent, based on his earlier writing, positioned here as a proponent of an Islamic State but whose record in public office only provides for the contrary and prove him to be a wholeheartedly defender of a multi-ethnic, democratic Bosnian State — who appealed to the Constitutional Court

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[55]CR 2006/14, p. 39, para. 90 (Prof. Stojanović).

[56]CR 2006/15, p. 12, para. 122 (Prof. Stojanović).

[57]Annex 4 to General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Agreement"), 21 November 1995, United Nations docs. A/50/790 and S/1995/999, 30 November 1995, preamble, p. 59.

of Bosnia to compel the application of the "three constituent nations" formula in all Constitutions of the country. And in July, the court decided in favour of that request[58], and since then all Constitutions have been revised to include language reflecting the equal rights of all constituent nations in Bosnia and Herzegovina.

25. At the time, there was no reason whatsoever for the Serbs to fear the non-Serbs of Bosnia and Herzegovina and, it should be added, the Respondent has failed to produce any evidence to the contrary. The justification implied in the Respondent's pleadings is, therefore, totally misplaced.

26. We should remember that it was Milošević who said:

> "As far as the Serbian people are concerned, they want to live in one State, hence divisions into several States, which will separate Serbian people and force them to live in different sovereign States is, from our point of view, unacceptable. That is, let me specify, out of the question."[59]

We should remember that it was Karadžić who threatened the Muslims of Bosnia and Herzegovina with annihilation. History shows — it is the centre of this case — that these threats were deadly serious. And, indeed, they were taken seriously by the non-Serbs. It was exactly against the background of these threats that Izetbegović, who did not especially want Bosnia and Herzegovina to become an independent State, stated in the fall of 1991 that Bosnia would not have a choice but to become independent if Slovenia and Croatia would leave the SFRY. In that case, the Bosniaks would, indeed, become a minority in the new Yugoslavia as envisaged by Milošević and his party men: in a Yugoslavia consisting of Serbia and Montenegro and Bosnia and Herzegovina, according to the 1991 census, the total population would have been almost 12.5 million people. According to that same census, only 17.3 per cent of this population would have been Muslim[60]. Now the real world provided for evidence what that would imply: since Serbia, i.e., Milošević, had already — through illegal proceedings in the Serbian parliament — taken away the relative autonomy of Vojvodina and of Kosovo and Milošević had already clearly threatened the Muslims in Kosovo. That is what the real world told the Muslims in Bosnia. The Vukovar massacre,

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[58]Constitutional Court of Bosnia and Herzegovina, case U 05-98, Partial Decision III of 1 July 2000. Available in English at www.ccbh.ba/?lang=en&page=decisions/byyear/2000.

[59]CR 2006/23, p. 21 (testimony of General Sir Richard Dannatt).

[60]For BH: Census figures of 1991.For Serbia: the *Statistical Yearbook of Serbia, 2005*, available at http://webrzs.statserb.sr.gov.yu/axd/en/god.htm; for Montenegro: Statistical Office of Montenegro at http://www.monstat.cg.yu/EngMeniGodisnjiPodaci.htm.

conducted in a combined operation of the JNA and paramilitaries from Belgrade, also had already taken place, which again clearly showed that the threats were to be taken seriously. Moreover, the arming of the Bosnian Serbs by both the JNA and the Serbian Ministry of the Interior in Belgrade did not go unnoticed and formed another reason to take these threats seriously.

27. So, the facts do not provide for any serious reason for the Serbs to feel threatened. And, again, to suggest this as part of a defence in the current case is totally misplaced.

Civil war

28. One of the mantras of the Respondent clearly comes down to "it was a civil war" and certainly, Madam President, as years went by, civil war features came to be visible. Apparently, in the Respondent's view, this civil war is to serve as an explanation and as a justification of the armed violence of the period 1992-1995. It clearly is not only meant to serve as justification but also as a denial of the existence of genocidal intent. The "civil war" label is also meant to — apparently as a matter of automaticity — exclude that the Federal Republic of Yugoslavia could possibly have anything to do with it, let alone that any violations could be attributed to it. Finally, the "civil war" denomination is used to argue that it is not possible to make a difference between military and civilians. All of these approaches will not be able to help the Respondent since the "civil war" label does not take away the substance or the focus of our case.

29. Even if the Respondent were correct in using "civil war" as the overall label, the label has no relevance for our case. Indeed, in a civil war situation it is perfectly possible that the parties become engaged in violating the Genocide Convention, regardless of the civil war label. Indeed, in a civil war situation it is perfectly possible that only one of the warring parties violates the Genocide Convention, again, regardless of the civil war label.

30. Our position is that, regardless of the label one chooses, it has been the Serb side, with the Respondent in a dominant position, which has consistently acted in violation of the Genocide Convention while implementing its Greater Serbia policy. This policy was not just a political ideal or an idealistic dream. Would it have been just that, then no true democrat could have had any objections to the dreaming of that dream, or to a political campaign aimed at winning votes to support that dream. But we are not talking about a dream in our case. The Greater Serbia policy

happened to be a road map leading towards "the New Yugoslavia" given the inevitable and, indeed, anticipated secession of Slovenia and Croatia. A road map which, from the very beginning onwards, implied the explicitly foreseen use of armed force. A road map which soon revealed, beginning in Croatia — in Vukovar —, that it implied ethnic cleansing of non-Serbs who would stand in the way of achieving the Greater Serbia goal. A road map which in Bosnia and Herzegovina translated into the Six Strategic Goals, which mentioned the separation of ethnically defined "nations" as its number one objective[61].

31. The non-Serb sections of the Bosnian population never had this type of policy or this type of picture of what the future of Bosnia and Herzegovina would look like. The Government of Bosnia and Herzegovina has never had a policy calling for the separation of the mixed population, let alone that it ever implemented such a policy with clearly genocidal means.

32. So, the civil war approach is in any event not relevant to our case. At the same time using "civil war" in the way the Respondent does is certainly not supported by the facts. For this would imply a readiness on all sides involved to take up arms against the other side. As far as the "sides" are concerned, the Respondent prefers to define the "sides" in ethnic terms, which is in itself telling, but — as we will see later — just flat wrong.

33. The Respondent points at the emergence of "nationalistic" political parties in Bosnia and Herzegovina and seems to imply that this in itself was leading up to a civil war[62]. What is the basis for that assertion? Of course, the Respondent does not provide the basis for that, simply because it is non-existent. In any event, the Respondent here ignores the fact that Bosnia and Herzegovina, at the time, was a new developing democracy. The firm reign of the Communist Party had only recently lost its grip and it is not unusual at all in new democracies that new political parties are created based on religious designations. It is, on the other hand, totally unusual that this would lead to civil war, let alone that it would be usual that this would lead to genocide.

34. It is noteworthy, however, that Karadžić had from the very beginning onwards a close relationship with Slobodan Milošević. As we have pointed out, this partnership included Milan

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[61]CR 2006/4, pp. 18-19, paras. 36-37 (Ms Karagiannakis).

[62]CR 2006/14, p. 15, para. 14; pp. 39-40, paras. 91-92 (Prof. Stojanović); CR 2006/15, p. 18, para. 143; pp. 42-43, para. 207 (Prof. Stojanović).

Babić, the leader of the Serbian Democratic Party in Croatia (SDS), the political party which organized the Serbs in Croatian Krajina.

35. We have referred the Court to a meeting in Belgrade between Milošević, Karadžić and Babić[63]. In the ICTY case against Milošević, this meeting was revealed through the testimony of Mr. Babić himself. In the judgment of the Trial Chamber in the *Milošević* case with respect to the Motion for Acquittal, we are able to read the findings of the judges:

> "In July 1991, Mr. Babić, Radovan Karadžić, and the Accused [Milošević] had a conversation during which Radovan Karadžić stated that he would chase the Muslims into the river valleys in order to link up all Serb territories in Bosnia and Herzegovina. The Accused warned Mr. Babić not to 'stand in Radovan's way'."[64]

Mr. Brownlie has given the Court his opinion on this part of the judgment and he calls it "a very prejudicial summary of a long series of exchanges from the transcript of the testimony of Mr. Babić"[65]. And he blames my colleague, Professor Franck, for using this judgment. To prove to the court that he, Mr. Brownlie, is right, he has produced in the judges' folder a couple of pages from the Babić transcript and he has suggested that the Court should itself find out why he is correct — why he is correct in his opinion that the judges of the Tribunal were "prejudicial". Madam President, this is a peculiar way of litigating and it becomes even more peculiar if one looks at the documents produced by the Respondent. This is what the witness said:

> "Karadzic said the following: that he held Alija Izetbegovic in his pocket, that he could settle accounts with him at any time, but the time was not ripe for it so that the Serbs should not be blamed for things, that it would be better to wait for Izetbegovic to first make the wrong political move and that is when accounts would be settled, and the Muslims would be expelled or crammed into the river valleys and that he [Karadzic] would link up all Serb territories in Bosnia-Herzegovina, but he said that he wasn't sure whether he would take Zenica from them."

And then the Prosecutor asked Babić what the reaction of Milošević was to this remark. And Babić then said: "He said that I shouldn't be stubborn and stand in the way of Radovan, stand in Radovan's way."[66] Apparently Milošević did not respond by objecting to Karadžić's threat to expel "the Muslims" or to cram them into the river valleys. Apparently Milošević did not object to

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[63]CR 2006/3, p. 36 (Prof. Franck).

[64]ICTY, *Prosecutor* v. *Slobodan Milošević*, case No. IT-02-54, Trial Chamber Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 253.

[65]CR 2006/17, p. 40, para. 291 (Prof. Brownlie).

[66]Page 4 in judges' folder of 13 March 2006.

his planning to link up all Serb territories in Bosnia. All of this did actually happen — all of what Karadžić had promised that would happen did actually happen — and it became known to us as "ethnic cleansing". Of course Milošević did not object to this, because this was his own policy, a policy which during this meeting in July 1991 was central to questions not of principle but only of implementation.

36. So, the emergence of political parties does not support the "civil war" approach professed by the Respondent. At the same time the close relationship between the three Serb parties certainly was crucial, certainly was relevant for the joint operation aimed at realizing Greater Serbia.

37. We have demonstrated that Milošević sent his Deputy Minister of the Interior, Mihalj Kertes, from Belgrade to Bosnia to see to it that arms were distributed to the Serbs[67]. We have demonstrated how the JNA did the same and used the Bosnian Serb party, SDS, to this end[68]. The Respondent did not deny this, although these facts undermine its "civil war" approach, but the Respondent did respond. It just shifted to another mantra: it shifted to the mantra "all sides did the same" and pointed out that "the Muslim side" had their Patriotic League[69].

38. Well, the formation of the Patriotic League indeed took place, but only in response to the arming of the Bosnian Serbs, which began, as we have seen, at the latest in April 1991. The Patriotic League had — as did the SDA — a programme aiming at the preservation of Bosnia and Herzegovina. It stated, among other things:

> "Bosnia and Herzegovina is homeland of the Muslims, Serbs and Croats and all citizens living therein, and is not severable because of its ethnical mix, and for the centuries they have been living together and thus the division would be paid by thousands of lives. Thus we call all Muslims, all Serbs and all Croats and all citizens of Bosnia and Herzegovina to defend their homeland Bosnia and Herzegovina."[70]

So, the programme was, indeed, patriotic — that is what it was — and it sought to include all of Bosnia's "nations".

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[67]CR 2006/2, p. 32, para. 13 (Mr. van den Biesen).

[68]CR 2006/4, pp. 12-14, paras. 10-17 (Ms Karagiannakis).

[69]CR 2006/15, pp. 21-23, paras. 153-163 (Prof. Stojanović). CR 2006/19, pp. 45-46, para. 267 (Mr. de Roux).

[70]Vahid Karavelic, *Agresija na Bosnu i Hercegovinu, Sjeveroistocna Bosna 1991-1992* [The Aggression on Bosnia and Herzegovina, North-East Bosnia 1991-1992] (Institut za istrazivanje zlocina protiv covjecnosti i medjunarodnog prava, Sarajevo 2004), pp. 195-196.

39. The Patriotic League was not very successful military-wise, which showed that it is just not true that "all sides" were the same here. The Bosniaks did not have the JNA to back them up or to provide them with arms. The Bosniaks did not have the MUP in Belgrade in charge of arms distribution to them. This was confirmed by the ICTY Trial Chamber in the *Brđanin* trial judgment:

> "However, the Bosnian Muslims' efforts to procure and distribute weapons were nowhere near as successful as those of the Bosnian Serbs, both in terms of the number and the quality of the obtained weapons. This was due in part to the fact that Bosnian Muslims mainly procured their weapons on an individual basis. Some obtained their weapons by buying them from Bosnian Serbs returning from the front line in Croatia. On a number of occasions, Bosnian Muslims purchasing weapons in this way were identified and later arrested [for it]. Equally, the Bosnian Croat population's endeavours to arm themselves fell far short of the arming efforts conducted by the Bosnian Serbs."[71]

Pistols and old rifles and only occasionally modern weapons formed the armament of the Patriotic League. It all appeared totally useless against the abundant and up-to-date equipment of the JNA.

40. Another reason for the lack of arms of the Patriotic League was the fact that non-Serbs were disarmed — they were disarmed — ahead of time in all the municipalities where Serbs formed a majority. And this has also been confirmed as a fact by the ICTY in various judgments:

> "Before the actual outbreak of the conflict . . . The Serb population had been receiving arms and equipment from the JNA throughout 1991, whereas in areas where Muslims and Croats predominated, local TO units were downsized and disarmed by the JNA."[72]

And:

> "Then in the second half of 1991 military units were formed [by the JNA] in Serb-populated villages in Bosnia and Herzegovina and supplied with weapons and with uniforms . . . Those TO units in predominantly Muslim and Croat areas of Bosnia and Herzegovina were at the same time largely disbanded by the JNA. General Kadijević in his book describes how 'naturally we used the territorial defence (the TO) of Serb regions in Croatia and Bosnia and Herzegovina in tandem with the JNA' to paralyse territorial defence where it might provide a basis for creating the armies of secessionist republics."
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> "The TO of Bosnia and Herzegovina had in any event been to a degree neutralised by the action taken by the JNA to disarm it. Traditionally all TO weapons were stored locally, within each municipality, but in late 1991 and early 1992 the JNA removed all local stocks of weapons from TO control, at least in Muslim-populated

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[71]ICTY, *Prosecutor* v. *Radoslav Brđanin*, case No. IT-99-36, Trial Chamber Judgement of 1 September 2004, para. 89.

[72]ICTY, *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić, Hazim Delić and Ezad Landžo (Čelebići)*, case No. IT-96-21, Trial Chamber Judgement of 16 November 1998, para. 109.

> areas. This left those local TO units virtually disarmed whereas units which were drawn from Serb-populated areas, and only those, were substantially re-equipped."[73]

These facts have been established by the Trial Chamber of the ICTY. All of this shows, beyond any reasonable doubt, that the "all sides did the same" mantra does not have a basis in the factual situation on the ground.

41. We have demonstrated that the Bosnian Serbs created parallel structures in Bosnia and Herzegovina: the "Autonomous Regions", the parallel Serb Municipal Assemblies and the local "crisis staffs". The JNA, at all times, participated in those crisis staffs[74]. The Respondent has not denied that.

42. The so-called "other sides" did not create those parallel structures and most certainly the JNA did not participate in any sort of "crisis staff" of the Bosniaks, which crisis staffs did not even exist in the first place. So, no even-handedness here. We have demonstrated that the JNA actually began using armed violence, in close harmony with paramilitaries from Belgrade, in Bijeljina and that this event marked the beginning of the ethnic cleansing campaign in Bosnia. The other side has only weakly denied this by saying that the numbers we provided for the victims in Bijeljina are too high, but that killings did happen[75]. At one other point, the Respondent noted that it would examine what happened in a number of regions and municipalities including Bijeljina, but it never returned to that subject[76].

43. Madam President, this Court recalled in its Judgment on Preliminary Objections of 11 July 1996 that Bosnia and Herzegovina became an independent State on 6 March 1992 (*I.C.J. Reports 1996 (II)*, p. 612, para. 23). The Respondent agrees with that[77]. So, clearly, in Bijeljina the JNA, which only took orders from Belgrade, was acting as an aggressor. As we just noted, the other side only weakly denied this. Also, the other side did not deny that the JNA *did refuse* to take orders from the newly formed Bosnian Government[78].

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[73]ICTY, *Prosecutor* v. *Duško Tadić*, case No. IT-94-1, Trial Chamber Opinion and Judgement, 7 May 1997, paras. 106, 107.

[74]*Ibidem*, pp. 17-18, para. 32.

[75]CR 2006/12, p. 43, para. 83 (Mr. Obradović).

[76]CR 2006/18, p. 16, para. 56 (Mr. de Roux).

[77]CR 2006/16, p. 32, para. 86 (Prof. Brownlie).

[78]CR 2006/4, p. 25, para. 11 (Mr. van den Biesen).

44. It is important to note that from the day of Bosnia's independence, 6 March 1992, onwards the Bosnian Government was the Government of an independent State. We know that the Serb side refused to recognize that at the time. But it is telling, and disturbing, that the Respondent in these proceedings, until this very day, continues to do so.

45. The Dayton Peace Agreement, to which the Respondent is also a party, established the new Constitution for Bosnia and Herzegovina. Article 1, paragraph 1, of this Constitution reads under the heading "Continuation" as follows:

> "The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state with its internal structure modified as provided herein and with its present internationally recognized borders."[79]

In other words, here it is acknowledged that, under international law, Bosnia and Herzegovina, indeed was an independent State as of the day on which the Republic of Bosnia and Herzegovina was constituted, i.e., 6 March 1992. Article 5 of the General Framework Agreement — and again, the Respondent is a party to this provision as well — reads:

> "The Parties welcome and endorse the arrangements that have been made concerning the Constitution of Bosnia and Herzegovina, as set forth in Annex 4. The Parties shall fully respect and promote fulfilment of the commitments made therein."[80]

It is exceptional, to say the least, and it is in any event not correct, that the Respondent today entirely ignores these legal realities to which it has committed itself as a party to the Dayton Peace Agreement.

46. The Respondent ignores all that and prefers to present its civil-war mantra. It talks about a three-sided civil war. Professor Stojanović talked about "une guerre civile menée entre les citoyens de la Bosnie-Herzégovine appartenant aux ethnies différentes afin de prendre les territoires et établir les frontières de leurs entités"[81]. Professor Brownlie stated that a "three-sided civil war emerged within Bosnia . . . The three sides were the Muslims, the Croats and the Serbs of Bosnia."[82] Mr. de Roux speaks about "une guerre civile qui éclate dans cette Bosnie, reconnue

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[79]Annex 4 to General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), 21 November 1995, United Nations doc. A/50/790 and S/1995/999, 30 November 1995, p. 60.

[80]*General Framework Agreement for Peace in Bosnia and Herzegovina* (Dayton Agreement), 21 November 1995, United Nations doc. A/50/790 and S/1995/999, 30 November 1995, p. 3.

[81]CR 2006/15, p. 29, para. 171 (Prof. Stojanović).

[82]CR 2006/16, p. 32, para. 86 (Prof. Brownlie).

certes par la communauté internationale, mais qui contient trois peuples ne souhaitant plus partager un destin commun"[83]. Ms Faveau-Ivanović also described the conflict as a civil war[84], while Professor Varady stated that "[t]he actual conflict we are facing was an ethnic conflict, the dividing lines between the warring parties were ethnic dividing lines"[85].

47. Further the Respondent specifies the parties and talks about three wars: "a war of 'Muslims against Serbs', a war of 'Muslims against Croats' and a war of 'Muslims against Muslims'"[86]. This, however, is a straightforward denial of the existence of an independent Bosnia and Herzegovina and also a straightforward denial of the existence of its Government. At the same time, it shows that the Respondent's mindset is, also *today*, preoccupied — if not obsessed — by an approach defined in ethnic terms only.

48. The truth of the matter is that the Bosnian Government and the Bosnian army have during the entire 1992-1995 period endeavoured to protect the threatened, if not killed, wounded, raped or chased from their homes and families, population of Bosnia and kept endeavouring to move the Serb side from illegally obtained control over a large part of Bosnia's legitimate territory. This is not exactly in line with Mr. de Roux' unfounded assertion "une guerre civile qui éclate dans cette Bosnie, reconnue certes par la communauté internationale, mais qui contient trois peuples ne souhaitant plus partager un destin commun". The facts show that this not wishing to share a common fate was only true for the Serb side.

49. Given the fact that the JNA was a well trained armed force combined with the fact that the BH army was virtually non-existent, the Serb side who was — as General Rose confirmed[87] — the aggressor, succeeded to overtake one municipality after the other in a well-organized and well-planned manner.

50. We need to remember that Karadžić defined in his Directive of December 1991 entitled "Instructions for the organization and activity of organs of the Serbian people in Bosnia and

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[83]CR 2006/19, p. 43, para. 261 (Mr. de Roux).

[84]CR 2006/20, p. 23, para. 2 (Ms Faveau-Ivanović).

[85]CR 2006/12, p. 48, para. 1.13 (Prof. Varady).

[86]CR 2006/15, pp. 29-36, paras. 173-188 (Prof. Stojanović).

[87]CR 2006/26, pp. 29-30 (testimony of Sir Michael Rose).

Herzegovina in extraordinary circumstances"[88], that he did define municipalities with substantial Serb inhabitants in "Variant A" and "Variant B" municipalities, being municipalities with a Serb majority and municipalities with a Serb minority, respectively. The document mapped out precisely how these should be taken over by the Bosnian Serbs. We also must remember that this directive provided for the activation of the parallel structures and the crisis staff, which were created in anticipation of precisely this moment. We also need to remember that the JNA was represented in each and every crisis staff. So, the JNA did participate in the planning, it did participate in the implementation of the planning. They were all in it together, and it has been like that ever since. None of this has effectively been denied by the Respondent.

51. For the Serb side nothing really changed on 19 May 1992, the day on which, as the Respondent claims, the withdrawal of the JNA would have been completed. Also, nothing changed with respect to the participation of paramilitaries from Belgrade, which operated under the responsibility of either the JNA or the Serbian Ministry of the Interior.

52. We provided the pattern of this overtaking of one municipality after the other, and we did so several times during the written and oral pleadings[89]. The pattern as such has not been contested by the Respondent. The only response has been "all sides did the same", which — if true — does in any event not amount to an effective denial, but which also is not true, while the Respondent has not even tried to prove its assertions. Besides this mantra "all sides did the same", the Respondent in this context also engaged in a numbers game. And we will get back to that later this week.

53. "Overtaking" of one municipality after another actually is not the proper word for it, because the aim was not to bring the population under a new régime. Not at all, this was not an average war of territorial conquest. The true aim turned out to include a genocidal intent and became visible as soon as the combined Serb forces controlled the municipalities.

54. The aim became visible when in Prijedor the non-Serb elite — Bosnian Croats and Bosniaks alike — were arrested and transported to camps where they were beaten continuously, not seldom beaten to death. They were transported to camps where the women were raped, camps

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[88]CR 2006/2, p. 33, para. 15 (Mr. van den Biesen).

[89]*Ibidem*, pp. 42-44, paras. 45-55. CR 2006/6, pp. 10-26 (Ms Dauban). Reply of 23 July 1998, pp. 68-76, paras. 19-39 and Chap. 5.

where people through lack of food turned into living skeletons in three or four months time. The aim became visible when in Prijedor one non-Serb home after the other was set to flames, while Serb houses were carefully protected.

55. The aim became visible in Bijeljina, when Arkan's paramilitaries from Belgrade took over the town, arrested the prominent Bosniak citizens, who subsequently disappeared, and proceeded to seize the property of Bosniak civilians. This escalated into arbitrary beatings, killings and detentions. Up to 2,000 people were detained in the Batković camp, where many atrocities were committed, and as many as 100 people died[90]. The aim became visible in Zvornik, when paramilitaries from Serbia, supported by JNA artillery fire from the Serbian side of the River Drina and supported by JNA ground troops in Bosnia and Herzegovina, took over the town. Civilians were killed, their blood soaked the street so much that United Nations High Commissioner for Refugees jeep skidded on the blood on the streets. There were lorries full of corpses of women, children and old people[91].

56. The aim became clear when paramilitaries from Serbia forcibly took seven unarmed Muslim men from Visegrad to the edge of the Drina River, lined them up along the banks and proceeded to shoot them in cold blood[92]. The aim became clear in the Mahala area of Visegrad town where a group of over 70 Muslim women, children and elderly men were taken to a house, stripped of their valuables and barricaded in a room. The house was then set on fire and those that tried to leave the house were fired upon[93]. The aim became clear in Korićanske Stijene when a group of over 200 male prisoners from Trnopolje Camp were taken; they were taken to a cliff and they were told that they were going to be exchanged — the dead for the dead and the living for the living. They were ordered to kneel down where they cried and begged for their lives before the shooting started. If the corpses did not fall into the abyss they were pushed, and the soldiers threw grenades into the gorge to make sure there were no survivors[94]. The aim became clear in Glogova

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[90]CR 2006/6, pp. 12-14, paras. 7-9 (Ms Dauban).

[91]CR 2006/6, pp. 15-16, paras. 15-16 (Ms Dauban).

[92]CR 2006/6, p. 18, para. 25 (Ms Dauban).

[93]CR 2006/6, p. 18, para. 25 (Ms Dauban).

[94]ICTY, *Prosecutor* v. *Radoslav Brđanin*, case No. IT-99-36, Trial Chamber Judgement, 1 September 2004, paras. 459-460.

when a group of unarmed Muslim residents were grouped together and shot. Other residents were ordered to dump their corpses into the river and were then lined up by the river and shot: a total of 64 civilians were killed[95]. The aim became clear in Sarajevo when at least 16 civilians were killed by a mortar as they queued for bread in the centre of the city in May 1992.

57. All of this was the aim, all of this was not accidental: it was the intent. This was precisely the intent which the drafters of the Genocide Convention had in mind when they concluded Article II of the Convention.

58. To call this, Madam President, "a territorial war" as the representatives of the Respondent continue to do, goes beyond any sort of "newspeak". Using "territorial war" to describe a clearly intended, clearly genocidal campaign of killing, causing bodily and mental wounding, raping, forcibly transferring, ethnic cleansing of an ethnically and religiously defined group, goes beyond reasonable and dignified pleading and clearly enters the domain of undertakings aimed at misleading this Court.

59. In this case we are not discussing a territorial war, we are not discussing a civil war, we are not discussing even-handedness. We are discussing a clearly organized campaign of destruction, a campaign aimed at the non-Serbs of Bosnia, destruction through the use of overwhelming armed force; a campaign which meets the criteria of the Genocide Convention.

60. If anyone would still be in doubt about the true aim of the Serb side, about their true intent, then there is still the issue of the destruction of, what is generally referred to as, the cultural heritage of the Bosnian Croats and the Bosniaks. Mr. Riedlmayer has provided the Court with a compelling and lucid picture of the unimaginable size of this clearly well-planned destruction and of its widespread character[96]. Moreover, he has effectively demonstrated that this destruction occurred entirely unrelated to any kind of warfare. The aim of this destruction was totally clear, it was explicitly intended to erase the soul and the spirit of the non-Serbs — i.e., of the Bosnian Croats and of the Bosniaks — from the land which by then was indeed cleansed and purified.

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[95]ICTY, *Prosecutor* v. *Miroslav Deronjić*, case No. IT-02-61, Trial Chamber Judgement, 30 March 2004, paras. 93-97.

[96]CR 2006/22 (testimony of Mr. Riedlmayer).

61. Purified into Serb, pure Serb, territory, which territory, then, was to be kept eternally. This trying to defend and keep this territory, indeed, provided for the characteristics of a territorial war. A war about territory, where all traces of ethnically defined Bosnian Croat and Bosniak groups were deliberately, entirely and in a clearly organized and pre-planned manner erased through acts listed in Article II of the Genocide Convention. A territorial war fought by the Serb side with the clear intention to make sure that the Bosnian Croats and the Bosniaks would not ever be able to re-begin living in the places which had been their homes and their places of birth for centuries.

Financial unity

62. The final point I want to address, Madam President, before I conclude is the financial unity as was discussed by our colleague Morten Torkildsen in the first round. He has demonstrated to the Court how the Republika Srpska project was exactly financed. He showed and he explained how the backbone of the Bosnian Serb military forces, the officers, remained employed, remained paid and promoted by the Yugoslav army. Until November 1993, this was apparently done in a continuation of the situation which existed before the so-called withdrawal of the JNA on 19 May 1992. From November 1993 onwards this was organized through the 30th Personnel Centre of the Yugoslav army. Likewise Belgrade paid for the officers of the Krajina Serb army through the 40th Personnel Centre[97]. The Respondent only superficially responded to this, but did not effectively deny it.

63. Mr. Torkildsen also showed and demonstrated, based on available evidence, how more than 90 per cent of the Republika Srpska budget was covered through payments by and so-called credits from the Belgrade monetary authorities and institutions[98]. The Respondent did not deny this.

64. Further, we have shown and demonstrated to the Court how the so-called National Bank of Republika Srpska — and likewise the National Bank of Republika Srpska Krajina — functioned in subordination to the National Bank of Yugoslavia (NBY), how it was to submit its yearly

[97]CR 2006/9, pp. 25-27, paras. 7-13 (Mr. Torkildsen).

[98]CR 2006/9, pp. 30-31, para. 20 (Mr. Torkildsen).

balance to the National Bank of Yugoslavia in order for the same to integrate it in its own "consolidated" balance, and how the governors of both the Republika Srpska and Republika Srpska Krajina banks were under an obligation to attend the meetings of the National Bank of Yugoslavia authorities. All of this was agreed in a document made up by all three parties, to which document we referred explicitly[99]. The Respondent, again, did not deny. However, Mr. Brownlie suggested that all of this would be perfectly normal[100].

65. Certainly, all of this cannot be considered perfectly "normal", especially not given the particular circumstances of an ethnic cleansing campaign going on in Bosnia and Herzegovina and given the continued denials of Belgrade being involved. We will get back to the issue of financial unity between the three Serb entities (FRY, Republika Srpska, Republika Srpska Krajina) later on during our pleadings.

Concluding remarks

66. Madam President, Members of the Court, during the rest of this week's pleading we will elaborate on the facts while further rebutting positions assumed by the Respondent. We will try and focus your attention on the facts that matter and we will not use mantras aimed at blurring the true picture. We will follow exactly the same approach with respect to the legal questions relevant to put the facts in their proper perspective. Thank you very much, Madam President.

The PRESIDENT: Thank you very much, Mr. van den Biesen. Just to clarify where we are after the unexpected events of this morning, is the Court to understand that your pleadings for the day are concluded, Mr. van den Biesen?

Mr. van den BIESEN: Well, you may see me back in the afternoon, but first Professor Pellet will take the floor and after him I have another topic to cover and, if time allows for that, then Professor Brigitte Stern will be speaking.

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[99]CR 2006/9, pp. 44-48, paras. 48-59 (Mr. Torkildsen).

[100]CR 2006/17, pp. 27-28, paras. 245-247 (Prof. Brownlie).

The PRESIDENT: I see. Thank you very much indeed. The Court will resume at 3 o'clock this afternoon.

The Court rose at 1.20 p.m.

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