CR 2006/40

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Wednesday 3 May 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le mercredi 3 mai 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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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),

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Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

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The PRESIDENT: Please be seated. Mr. Cvetković, you have the floor.

Mr. CVETKOVIĆ: Thank you, Madam President. Now, yesterday I began my pleading on the question of paramilitaries and I examined their status in the beginning of the conflict, that is in the spring of 1992. Today I will continue with the status of paramilitaries after spring 1992.

The status of paramilitaries after spring 1992

36. In April 1992 the Bosnian Serbs proclaimed their State and it was only this new-proclaimed State that can be responsible for the actions of the paramilitary groups operating on its territory. It seems, however, that although attempts were made to that extent, this State in its beginning did not have the capability to entirely seize control over various paramilitary groups. Therefore, paramilitaries stayed either out of any control or were under the control of local authorities and crisis staffs of the new State. In summer 1992, after the warring parties had completed the initial division of the territories, the new State was ready to take full control over the paramilitaries.

37. On 13 June 1992, the Presidency of the Serbian republic of Bosnia and Herzegovina adopted a decision on the prohibition of forming and activities of armed groups and individuals in the territory of the republic which are not under the unique command of the army or militia[1]. This decision prohibited the forming and activities of self-organized armed groups and individuals in the Republika Srpska territory and ordered that those groups and individuals be put under the unique command of the army or of the Ministry of the Interior of Republika Srpska.

38. However, the implementation of this Decision was not easily accomplished. A number of paramilitary groups remained out of control of the official organs of the Republika Srpska. On 28 July 1992, the Main Staff of the army of the Republika Srpska issued a report, which stated that there were still around 60 paramilitary groups, totalling between 4,000 and 5,000 men, which had to be placed under the exclusive command of the army, or else be disarmed and legal measures

[1]Rejoinder, Anns., Vol. 1, Ann. R10.

taken[2]. The report indicated that paramilitaries were unacceptable because they hid behind corrupt authorities, evaded combat, harmed the reputation of the official authorities and created an impression among the population that the ruling party was pro-Cetnik and that the paramilitaries were its exponents[3]. According to the report, the presence of the paramilitary groups was negatively affecting the Serbian people by diminishing trust in the Government and its capacity to deal with war profiteers, criminals and mass murderers and immensely discouraging the fighting élan of the Serbian republic of Bosnia and Herzegovina army members, often resulting in the abandonment of positions[4].

39. In accordance with the Main Staff report, the Commander of the 1st Krajina Corps, General Momir Talić, issued an order on 30 July 1992. The order read as follows:

> "1. Offer all paramilitary formations and their leaders, if they do honestly intend to serve the rightful struggle for survival of the Serbian people, an opportunity to join regular Serbian Republic of Bosnia and Herzegovina Army units and assign them in accordance with their military occupational specialties and military skills.
>
> 2. Do not include in units individuals and groups which have been involved in crimes and looting or have committed other criminal acts. Disarm and arrest them and bring criminal charges against them in SR BiH army courts, regardless of their citizenship.
>
> 3. In co-operation with the SR BiH MUP, disarm and arrest paramilitary formations, groups and individuals belonging to them who refuse to come under the unified command of the SR BiH Army and bring criminal charges against them corresponding to the criminal acts they have committed."[5]

General Talić added that citizens of the Federal Republic of Yugoslavia, who accepted the unified command of the Serbian republic of Bosnia and Herzegovina, were to be treated as volunteers and assigned to combat units. The existence of any paramilitary group was forbidden and, by 15 August 1992, all paramilitaries were to be disarmed[6].

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[2]Report on Paramilitary Formations in the Territory of the Serbian Republic of BiH of 28 July 1992, quoted in ICTY, *Prosecutor* v. *Krajišnik*, 1992 Bosnian Serb Command & Control (JNA-TO-VRS), Expert Report by Richard Butler, para. 7.4.

[3]*Ibid*., quoted in ICTY, *Prosecutor* v. *Brdjanin*, Military Developments in the Bosanska Krajina — 1992, A Background Study, Expert Report by Ewan Brown, para. 2.62.

[4]*Loc. cit.*

[5]1st Krajina Corps Order of 30 July 1992, quoted in ICTY, *Prosecutor* v. *Brdjanin*, Military Developments in the Bosanska Krajina — 1992, A Background Study, Expert Report by Ewan Brown, para. 2.63.

[6]*Ibid*., para. 2.64.

40. Despite the problems that the army encountered in gaining control over paramilitary forces during most of 1992, it seems that these efforts finally succeeded, since by the end of 1992 the Main Staff reported that "infantry units of the territorial defence and paramilitary formations, initially used according to the decision of crisis staffs and other similar authoritative bodies were incorporated into the VRS"[7].

41. All these efforts are, of course, misinterpreted by the Applicant as evidence that the Respondent had exercised control over paramilitary units[8]. In fact, these efforts of the Republika Srpska to put paramilitary forces under its control, and the decisions issued to that extent, prove that:

(a) there was no effective control over paramilitary groups during spring 1992; and

(b) the paramilitary groups were not formally part of the army or the police of the Republika Srpska until 13 June 1992.

42. In addition, and of more importance for the question of attribution, the decisions and orders of the Republika Srpska official bodies prove that:

(a) paramilitary formations were initially used according to the decisions of crisis staff and other similar authoritative bodies of the Republika Srpska, which means that, even when these formations did act under control of other organs, they acted under the control of crisis staff and other similar bodies of the Republika Srpska, and not under the control of the Respondent[9];

(b) these decisions also prove that the Republika Srpska authorities intended, and eventually succeeded, in putting the paramilitary groups under its control, irrespective of whether members of these groups were from Bosnia and Herzegovina or from the Federal Republic of Yugoslavia[10].

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[7]ICTY, *Prosecutor* v. *Krajišnik*, 1992 Bosnian Serb Command & Control (JNA-TO-VRS), Expert Report by Richard Butler, Exhibit P528, para. 7.5.

[8]See CR 2006/9, pp. 20-21, paras. 36-40 (Karagiannakis).

[9]*Ibid.*, para. 40.

[10]*Ibid*., para. 39.

Paramilitary involvement after 1992

43. Madam President, distinguished Members of the Court, having established the legal framework created in 1992 in the Republika Srpska, it is within this legal framework that we have to address the issue of the paramilitary involvement in the territory of Bosnia and Herzegovina after 1992. It is obvious that the official bodies of the Republika Srpska made very serious efforts to put all the paramilitary units under its control and command, and this approach is entirely consistent with the attitude expressed by General Mladić on as early as 13 May 1992. Remember that Mladić said: "All under arms are under my command, if they want to stay alive."

44. Thus, after 1992 the paramilitary involvement became very rare, and there were only a few occasions when paramilitary troops originating outside of Bosnia and Herzegovina were engaged in fighting in that territory. The Applicant mentioned only two occasions — the involvement of paramilitaries in the so-called "Pauk" group, in late 1994 and early 1995, and the involvement of paramilitaries in fighting around Sarajevo in the summer of 1995. In addition, there is evidence that in autumn 1995 some paramilitary troops were involved in Bosanska Krajina to protect Serbian territories from the joint attack of Bosnian Muslim and Croat forces. In any case, whenever paramilitaries were engaged in Bosnia and Herzegovina after 1992, they were under the command of the Republika Srpska authorities or other local authorities, as was the case during the "Pauk" operation.

45. This was best confirmed by the Applicant's expert, General Sir Richard Dannatt. The expert, responding to a question put by Ms Korner, stated the following:

> "They [paramilitaries] were subsequently brought under the main command of the army and indeed, under the regulations of the army they were obliged to come under the command of the army, and there is documentary evidence in the pack of General Mladic accepting command of all the paramilitaries and territorial organizations."[11]

A little later, there was this exchange between Ms Korner and the expert:

> "Ms KORNER: If the paramilitary formations came from Serbia and were then taken under the control of the VRS — under Mladic — if they came from there, if they were sent by the VJ, posted to the VRS, for example, under whose control or whose authority were they operating?

[11] CR 2006/23, p. 32 (Dannatt).

> General DANNATT: They were operating on the territory of the VRS, as I have indicated, Madam President, they would have been under the command of Mladic and part of the chain of command of the VRS."[12]

Although Ms Korner's assertion that the paramilitaries were sent to Bosnia and Herzegovina by the army of the Respondent was in clear contradiction with the claims of other counsel for the Applicant that the paramilitaries were sent by the Ministry of the Interior of the Republic of Serbia, the answer of General Dannatt is unambiguous on the question of under whose command the paramilitaries were in that territory. Moreover, never in his testimony did General Dannatt explicitly confirm that the paramilitaries were sent to Bosnia and Herzegovina by the official organs of the Respondent.

Operation "Pauk"

46. I will now discuss the Pauk operation. The operation "Pauk" was an operation created to support the forces of the Autonomous Province of Western Bosnia, governed by Fikret Abdić. We have already explained to the Court, on various occasions, who Mr. Abdić was, and we have informed the Court of the Muslim-Muslim armed conflict, waged between the forces of Mr. Abdić and the government forces of Bosnia and Herzegovina. Not to our surprise, the Applicant tried to completely conceal the existence of this conflict during their oral pleadings, since it simply did not fit the "pattern of Serbian genocidal conduct" which they allege before this Court. Accordingly, the Deputy Agent for the Applicant never once mentioned the Muslim-Muslim conflict in his section on "Pauk" in the first round[13].

47. Furthermore, Mr. van den Biesen went on to say: "Bihac was, for the purpose of realizing a Greater Serbia, an important strategic area that needed to be under the control of Serbs if the Greater Serbia project were to be successful."[14] It is difficult to see, Madam President, how the Serbs wanted to realize the project of "Greater Serbia" by helping one Muslim force fight the other.

48. Nevertheless, the existence of the Muslim-Muslim conflict is discussed in more detail by other speakers of Serbia and Montenegro and I will stay with the issue of paramilitaries. It is true that Arkan's men were involved in the operation. It seems also, from the "Pauk" diary, that the

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[12] *Ibid*, p. 33.

[13] CR 2006/8, pp. 52-54, paras. 50-59 (van den Biesen).

[14] *Ibid*, para. 51.

"Scorpions" were involved as well, although they were not referred to by that name. On the other hand, the "Pauk" diary does not support the assertions that units of the Serbian Ministry of the Interior were involved. The question before us, however, is not whether the mentioned units were involved or not, but under whose command and for what purpose.

49. I have already mentioned the purpose of their engagement and the purpose was to help the forces of Fikret Abdić to protect their province. This was confirmed by the expert for the Applicant, General Sir Richard Dannatt, who stated: "The operation was conducted in the Bihac area in the north of Bosnia with the intention of destroying the Sarajevo forces 5th Corps which would have removed the authority of Bosnia from Bihac and enabling Fikret Abdić's forces to take control in Bihac . . ."[15] Furthermore, the diary of the "Pauk" group clearly demonstrates that the operation itself was a typical military operation, with two forces engaged at the battlefield, and one force dominating the other in turn. This diary was in a large part kept and entries recorded by Muslims from the Abdić forces[16]. There was absolutely nothing genocidal and nothing criminal in the operation and this fact was, in a way, confirmed by the ICTY Prosecutor, since no person has so far been charged with any crime committed during this operation.

50. The second issue is the issue of command and control. According to all the available information, and according to the "Pauk" diary itself, the operation was conducted on behalf of Mr. Fikret Abdić. The military command of Serb forces participating in the operation was in the hands of General Mile Novaković, the Chief of Staff of the army of the Serbian republic of Krajina, that is the army of Croatian Serbs. There is absolutely no evidence that the operation was commanded or controlled from Belgrade. The fact that the government in Belgrade probably knew about the operation, and perhaps even sent a limited amount of supplies, is not enough to entail the responsibility of the Respondent. Of course, and once again, it should be stressed that there was absolutely nothing illegal or criminal in the operation itself, and even if some form of responsibility may be established, *quid non*, there was nothing illegal to be responsible for.

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[15]CR 2006/23, p. 31 (Dannatt).

[16]See for example pp. 91, 92, 98, 101, 102 etc.

Sarajevo (Treskavica)

51. The second involvement of paramilitary units from Serbia in the territory of Bosnia and Herzegovina happened on the battlefield around Sarajevo in the summer of 1995. In her pleading, Ms Karagiannakis referred to the following sentence from the ICTY indictment against Stanisic and Simatovic:

> "Before the VRS attack on Srebrenica, the Scorpions and the other special units attacked ABiH [army of Bosnia and Herzegovina] forces near Sarajevo in a co-ordinated move to draw units of the ABiH from Srebrenica and Žepa to Sarajevo by leaving open a land corridor between Srebrenica and Sarajevo. The ABiH responded by moving units to Sarajevo, thus making it easier for VRS forces to take control of Srebrenica."[17]

52. The truth was, however, rather different. At that time, the Bosnian Muslim forces launched an offensive against the Serb forces, and this is how the Netherlands Institute for War Documentation (NIOD) described the situation:

> "What UNPROFOR had been expecting for a long time, happened on 16 June: the battle of Sarajevo broke out again. That day the ABiH had started a major offensive from Sarajevo. The intention was to connect the city with the area of the Muslim-Croat Federation north and west of the city. From Central Bosnia the ABiH simultaneously attacked the VRS in the back. This outbreak attempt was in violation of the Security Council resolution 913 of 1994, that prohibited 'provocative action . . . in and around Safe Areas', but there was little UNPROFOR could do about it. Initially the offensive seemed to yield successes. The ABiH managed to block two supply routes of the VRS, which caused counter-attacks from the VRS."[18]

53. The Serb forces, consisting of the army and the police of the Republika Srpska, were outnumbered and the leadership of the Republika Srpska asked for assistance. Paramilitary forces responded to the call and two units were deployed — the "Scorpions" and the "Arkan's Tigers". These units participated in fighting under the command of the Republika Srpska police and, during their stay in Trnovo, a village near Sarajevo, the "Scorpions" executed six Muslim prisoners and recorded their crime on the video. There is no evidence that any other crime was committed by either the "Scorpions" or the "Arkan's" men, and there is no evidence that these units participated in the attack on Srebrenica. For the crime they have committed, the "Scorpions" are currently on trial before the Belgrade War Crimes Chamber. Contrary to the repetitive claims of the

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[17]ICTY, *Prosecutor* v. *Stanišić and Simatović*, Second Amended Indictment, 20 December 2005, para. 60; CR 2006/9, p. 16, para. 19 (Karagiannakis).

[18]NIOD Report — Srebrenica "A Safe Area", Part III, Chapter 1 — "The military and political situation in spring 1995", para. 16, available at http://www.srebrenica.nl/en/.

Applicant[19], the indictment against the members of the "Scorpions" includes the commander of that unit — a man called Slobodan Medic, also known as "Boca"[20].

54. The absence of any credible evidence that any of the units allegedly controlled by the Belgrade authorities had participated in the attack on Srebrenica was recently confirmed by the ICTY Trial Chamber which deals with the case of Jovica Stanisic and Franko Simatovic.

55. On 12 April 2006, the Trial Chamber issued a decision on defence motions regarding defects in the form of the second amended indictment. This decision deals exclusively with the charges relating to Srebrenica, which have been introduced by the ICTY prosecution in the second amended indictment. The new charges are contained in paragraphs 55 to 65 and paragraph 68 of the amended indictment. They include the sentence which Ms Karagiannakis quoted in her pleading in the first round[21].

56. From the Trial Chamber decision we can first learn that the ICTY prosecution apparently did not even intend to link the two accused with the attack on Srebrenica. In its response to the defence motion, the prosecution wrote that "it is not alleging that the accused were a party to the planning of the mass-murders in Srebrenica, only that the units of the Serbian DB participated in the murder of six Muslim prisoners after the capture of the Srebrenica enclave"[22].

57. More importantly, however, we can learn that the Trial Chamber was not satisfied by a mere explanation of the prosecution intentions. The Trial Chamber found "that the indictment is defective in that it is unclear from the indictment that the new charges related to the Srebrenica area pertain only to the murder of the six Bosnian Muslim prisoners"[23]. For that reason, the Trial Chamber ordered the prosecution to file "a revised Indictment which clarifies that the new charges pertain only to the murder of the six Muslim prisoners"[24].

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[19]CR 2006/30 p. 33, para. 11 (van den Biesen); CR 2006/11, p. 10, para. 1 (Condorelli).

[20]See "The Scorpions Indictment Raised", the official presentation of the War Crimes Prosecutor of the Republic of Serbia, available in English at www.tuzilastvorz.org.yu/html_eng/saopstenja/s_07_10_05.htm.

[21]*Ibid.,* para. 51.

[22]ICTY, *Prosecutor* v. *Stanisic and Simatovic*, Decision on Defence Motions Regarding Defects in the Form of the Second Amended Indictment, 12 April 2006, para. 14.

[23]*Ibid.*, para. 17.

[24]*Ibid.*, dispositive.

58. Madam President, distinguished Members of the Court, during this oral hearing the Second Amended Indictment against Stanisic and Simatovic was constantly used by the Applicant in their effort to link the Respondent with the attack on Srebrenica. The recent decision of the ICTY Trial Chamber in that case has not only proved that this is not true; it has also demonstrated, in the most obvious way, how the ICTY indictments can be unreliable as sources of evidence.

The relationship between the paramilitaries and the official organs of the Respondent

59. The Applicant further claims that the paramilitary forces were not what they pretended to be, but that they actually were units of the Serbian Ministry of the Interior. Thus, in her pleading, Ms Karagiannakis declared: "Indeed, forces such as Arkan's men, the Red Berets and the Scorpions were actually part of the Serbian MUP and others such as Šešelj's forces were supported by them and participated in joint operations with them in Bosnia."[25] I will proceed with examining the status of all of the four mentioned groups and I will start with the Red Berets.

"Red Berets"

60. According to the Applicant, the "Red Berets" were "a unit founded under the direction of the State Security Service of the Serbian MUP, i.e., the Serbian DB"[26]. Madam President, the notion of "Red Berets" is a myth created during the wars in former Yugoslavia, the myth that was started in Croatia and then spread to Bosnia and Herzegovina. This myth derives from several unquestionable facts, which were later amply misinterpreted:

(a) first, a large number of different units operating in Croatia and Bosnia and Herzegovina wore red berets, which became a kind of status symbol among the fighters,

(b) second, some members of the Serbian Ministry of the Interior, usually those originally from Croatia or Bosnia and Herzegovina, participated as volunteers in fighting or in training of Serb units from Bosnia and Herzegovina or Croatia,

(c) third, in 1996, the Serbian Ministry of the Interior formed a Special Operation Unit ("Jedinica za specijalne operacije — JSO"), to which a certain number of people who had participated in

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[25]CR 2006/9, p. 14, para. 15 (Karagiannakis).

[26]*Ibid.*, p. 14, para. 16.

fighting in Croatia or Bosnia and Herzegovina signed up. This unit also adopted a red beret as a distinctive headgear.

61. The man probably most responsible for the creation of the "red berets" myth is Mr. Dragan Vasiljković, better known as "Captain Dragan". This "Captain Dragan" was a Serb from Australia who appeared in the beginning of the Croatian conflict and formed a special unit of the Republika Srpska Krajina, called "Knindze". Mr. Vasiljković testified in the Milošević trial as a witness of the Prosecutor. When asked by the accused about his status during the conflict, Mr. Vasiljković explicitly said that he had never been a member of the State Security Service of Serbia[27], that he had never received any order at all from any person who had been a member of that Service, and that he had never received any salary during his service in Krajina[28].

62. This is how, in answer to a question put by the Prosecutor, Mr. Vasiljković explained the origin of a red beret:

> "Q: Mr. Vasiljković, after the battle of Glina, did your men -- or did you issue your men a distinctive garment that they wore from that point forward?
>
> A: Yes. All the participants in the battle for Glina had red berets. I obtained red berets for them. It was the only thing I had to give them."[29]

The battle of Glina happened in summer of 1991, but we can learn from the same witness that this practice continued in 1993, when the witness was hired by the Republic of Srpska Krajina to train their units. After the completion of the training, the graduates would be given red berets[30].

63. According to the Applicant, the Red Berets "participated in operations in Bosnia including operations targeting the non-Serbs of the Brčko municipality"[31]. The issue of "Red Berets" participation in Brčko was one of the issues discussed during the testimony of Mr. Vasiljković. From a rather long exchange between the witness and the Prosecutor, we can see that the "Red Berets" in Brčko were actually members of the Krajina special police[32]. Incidentally, the Second Amended Indictment of the ICTY Prosecutor against Stanisic and Simatovic, the two

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[27]ICTY, *Prosecutor* v. *Milošević*, testimony of Dragan Vasiljković, 19-21 February 2003, pp. 16575-16576.

[28]*Ibid.*, p. 16577.

[29]*Ibid.*, p. 16498.

[30]*Ibid.*, pp. 16674-16675.

[31]CR 2006/9, p. 15, para. 16 (Karagiannakis).

[32]ICTY, *Prosecutor* v. *Milošević*, testimony of Dragan Vasiljković, 19-21 February 2003, pp. 16535-16536.

men who were charged for the crimes allegedly committed by the "Red Berets", does not contain any charge relating to the municipality of Brčko.

64. Testifying in the Milosevic trial, Mr. Vasiljkovic gave a very important overview of the situation, from which we can actually see how the "Red Berets" myth was created:

> "A: Let me tell you how I think it was generally speaking in Yugoslavia. After the battle for Glina, the Knindza, who were then the special forces of the Krajina police, gained a significant reputation so that almost all those who fought there consider themselves to be special units or Knindza or Red Berets, so that my understanding of a special unit differs drastically from the special units that I saw on the ground.
>
> Q: Would it be fair to say that it was common for . . . many different units to take on the title or incorporate into the title of their unit 'special purposes unit'?
>
> A: Well, yes. I think that there were more special purpose units than regular units. I rarely came across someone who said, 'I was just a soldier.' Everyone over there was a so-called 'specialist' or a member of a special unit. It didn't mean much to me. It just meant that he was a fighter down there."[33]

65. The mention of various units called "Red Berets" can be found in numerous documents before the ICTY. The Trial Chamber in the *Brdjanin* case found that a "*Bosnian Serb* paramilitary group known as the Red Berets" participated in the attack on the Sanski Most municipality[34]. Interestingly, this same sentence was quoted by Ms Karagiannakis in her pleading on detention facilities[35].

66. We saw, therefore, how the first part of the myth was created. As to the second and the third parts, it would be useful first to establish when exactly the Special Operation Unit (the JSO) was formed. Mr. Zoran Lilić, the former President of the Federal Republic of Yugoslavia, another witness called by the ICTY Prosecutor, testified that this unit was officially formed in 1996[36]. This was confirmed before the ICTY by witness Obrad Stevanovic[37], who testified as a witness of the accused Milosevic.

67. It is not contested that some people who became members of this Special Operation Unit had previously participated in fighting in Bosnia and Herzegovina or in Croatia, some as

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[33] *Ibid.*, p. 16537.

[34] ICTY, *Prosecutor* v. *Brdjanin*, Judgement of 1 September 2004, para. 102, emphasis added.

[35] CR 2006/5, p. 31, para. 35.

[36] ICTY, *Prosecutor* v. *Milošević*, testimony of Zoran Lilic, 9 July 2003, p. 24013.

[37] ICTY, *Prosecutor* v. *Milošević*, testimony of Obrad Stevanovic, 26 May 2005, p. 39961.

paramilitaries and some as members of the armed forces of either Republika Srpska or of Republika Srpska Krajina. It is also quite possible that some of these men were previous members of the Serbian Ministry of the Interior who were engaged in either Croatia or Bosnia and Herzegovina as volunteers. On the other hand, the commander of the Muslim forces in Srebrenica, Naser Oric, was also a previous member of the Serbian Special Police and we see nothing strange in the fact that he joined the army of Bosnia and Herzegovina[38].

68. We agree, however, that some of the members of the Special Operation Unit were subsequently found to have been criminals. The best example is the former member of Arkan's unit, the man called "Legija", who currently faces charges in Belgrade for the assassination of the Prime Minister Djindjić and several other crimes. However, this by no means confirms that these people had been members of the Serbian Ministry of the Interior prior to the establishment of the Special Operation Unit. On the contrary, the fact that this unit was established in 1996 can only indicate that it had not existed before. The speech of Franko Simatovic from 1997, to which Ms Dauban referred[39], was described by the ICTY prosecution witness Vasiljkovic as, "so exaggerated that it couldn't possibly have been more pumped up"[40]. The witness further confirmed that the unit was given credit for things that were actually accomplished by individual members of the unit while they were members of different formations[41].

69. Ms Dauban made another effort to connect the "Red Berets", as a supposed unit of the Serbian State Security Service, with the crimes committed in Bosnia and Herzegovina. Referring again to Mr. Deronjic, and under the subtitle "The role of paramilitaries from the FRY in the takeovers of municipalities in 1992", she discussed a meeting in which Mr. Deronjic allegedly participated together with Franko Simatovic and Vinko Pandurevic[42]. Ms Dauban carefully avoided saying what the alleged meeting was about and instead she declared: "The meeting was held to discuss the activities which were to be carried out in the Drina Valley."[43]

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[38]See Central Intelligence Agency, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995*, Vol. II, p. 336, quotation in CR 2006/35, p. 30, para. 31 (Dauban).

[39]See CR 2006/34, p. 60, para. 37 (Dauban).

[40]ICTY, *Prosecutor* v. *Milošević*, testimony of Dragan Vasiljković, 19-21 February 2003, pp. 16701-16703.

[41]*Ibid.*, p. 16703; see also pp. 16558-16561, 16630-16632, 16691-16707.

[42]CR 2006/35, pp. 27-28, para. 25 (Dauban).

[43]*Loc. cit.*

70. We have seen how reliable a witness Mr. Deronjic was, but even if we are to believe him this time, his testimony alleges that the meeting was held in June or July 1992, and that it solely concerned the establishment of training camps for the members of the Bosnian Serb armed forces, in which instructors from Serbia would take part[44].

71. Madam President, the so-called "takeover" of municipalities in the Drina Valley, according to Ms Dauban's own account, had been completed in early May 1992[45] and the alleged meeting that took place in June or July the same year could not possibly discuss this "takeover". Even if Mr. Deronjic told the truth this time, which is not very likely, the truth would only be that the Serbian Ministry of the Interior, in agreement with the authorities of Republika Srpska, agreed to help the training of the Bosnian Serb armed forces after the fighting in the Drina Valley had already ended. There is absolutely nothing criminal in the whole operation and this training, even if it happened, had no connection with the previous "takeover" of municipalities in the Drina Valley. Nevertheless, the way in which the Applicant tried to connect this statement of Mr. Deronjic with that "takeover" shows that the record of the Applicant's intentional misrepresentation of the evidence is never-ending.

Arkan's Serbian volunteer guard

72. According to the Applicant, "Arkan's unit was in fact a unit of the State Security Service of the Serbian Ministry of the Interior or the DB"[46]. The main source for this allegation is a protected witness who testified in the Milošević trial, Ms B-129. By reading the transcripts of her testimony given on 16 and 17 April 2003, we can find that the testimony was almost completely circumstantial and based on what she had heard from other people. In fact, she testified to a great extent about the events that had happened before she even became Arkan's secretary or even "shared an office with the Serbian Volunteer Guard".

73. However, even that testimony was wrongly presented to this Court. The Applicant alleged that Arkan's unit was a unit of the State Security of the Serbian Police, while in fact the

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[44]ICTY, *Prosecutor* v. *Miroslav Deronjic*, statement of Miroslav Deronjic, Exhibit No. P600*a*, p. 38-41.

[45]See CR 2006/6, pp. 10-26 (Dauban).

[46]CR 2006/9, p. 17, para. 25 (Karagiannakis).

testimony of B-129 confirmed the opposite. Thus, in a response to a direct question of the accused, the witness said the following:

> "Q: You said that there were close ties with the DB. Did anyone — was anyone from the SDG [Serbian Volunteer Guard] a member of the DB?
>
> A: Do you mean during the war operations?
>
> Q: What I mean is throughout, throughout all the things and time you know about. Or let me be more specific. Did any of them have an ID card affiliating him to the DB?
>
> A: No."[47]

74. As to the issue of payment, referring to B-129, counsel for the Applicant declared, in general terms:

> "Arkan and his men were paid by the Serbian DB usually in cash which was either delivered to the headquarters or collected. It was sometimes as much as three to four million Deutschmarks at a time and this was newly printed money which had just come out of the mint."[48]

This statement is rather dubious since it implies that, in addition to having control over Arkan, the State Security of Serbia also had control over the German Bundesbank, being able to print millions of Deutschmarks as it felt necessary.

75. However, even if we accept this statement as true, by reading B-129's testimony carefully, we can see that her statement relies exclusively to what she referred to as the "Banja Luka Operation", the one action of the Arkan's unit that the Applicant did not mention at all, and in which Arkan's unit was engaged to defend the Serbian-held territory from the joint Muslim-Croat attack. For the other two operations in which Arkan's men participated, the witness gave an entirely different account, or simply did not know the answer. This is what she stated with respect to "Operation Pauk", answering questions put by the accused:

> "Q: All right. Now, do you know that it was precisely the leadership of the Autonomous Province of Western Bosnia that they were hired out to help as instructors, to help the army of the Autonomous Province of Western Bosnia? Do you know that?
>
> A: Yes.

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[47]ICTY, *Prosecutor* v. *Milošević*, testimony of B-129, 16 and 17 April 2003, p. 19568.

[48]CR 2006/9, 6 March 2006, p. 18, para. 27 (Karagiannakis), referring to testimony of B-129, p. 19454.

> Q: Well, do you, therefore, also know that the money which was sent for those purposes, you say through the SDG, was the money that the authorities of the Autonomous Province of Western Bosnia paid out for the jobs that they were supposed to do; that is to say, the training for the instructors and so on?
>
> A: Yes. They received money from Fikret Abdić during the Velika Kladusa event. But it didn't stop there with training. The members of the guard were at the front. They fought for Fikret Abdić."[49]

And in response to a similar question of the Prosecutor regarding the involvement of Arkan's unit on the Treskavica Mountain, the Prosecutor asked:

> "Q: How were the Tigers at Treskavica paid?
>
> A: Regarding their payments, I don't know anything because all that happened on the ground."[50]

76. Madam President, conclusions about the relationship between the State Security of the Republic of Serbia and Arkan and his men are not that easy to be drawn. What is obvious is that Arkan's volunteer guard was not a part of the official structures of the Respondent as the Applicant alleges. It is very probable, on the other hand, that Arkan had some contacts with a couple of people who held high positions in the State Security of the Republic of Serbia. These contacts were, however, far from the relationship of subordination and the Applicant has not offered any reliable evidence that Arkan and his unit were under the command or control of the Respondent when engaged in fighting in Bosnia and Herzegovina or elsewhere. On the contrary, the evidence suggests that whenever they were engaged on the territory of Bosnia and Herzegovina, they were under the command of local Serbian forces, or even under the command of Fikret Abdić.

Scorpions

77. The third unit which the Applicant claimed had been a unit of the Ministry of the Interior of the Republic of Serbia are the "Scorpions". As I said in the beginning, this unit was not well known during the conflict, but became notorious because of the horrific video showing the execution of six Muslim prisoners near the village of Trnovo.

78. In her pleading, Ms Karagiannakis discussed two documents which mention the "Scorpions" as a unit of the Serbian Ministry of the Interior[51]. Both documents are intercepts of

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[49]ICTY, *Prosecutor* v. *Milošević*, testimony of B-129, 16 and 17 April 2003, p. 19562.

[50]*Ibid.*, p. 19479.

[51]See CR 2006/9, p. 16, paras. 20-22 (Karagiannakis).

cables sent by the detached command post in Trnovo of the Republika Srpska police. The first document was signed by the Deputy Commander of the Special Police Brigade, Ljubiša Borovčanin, and the second by the Staff Commander of that detached command post, Savo Cvjetinović. Both these men were officials of the police forces of Republika Srpska. And both documents were addressed exclusively to various units within the Ministry of the Interior of Republika Srpska. No unit or organ of the Respondent is mentioned as a recipient of these documents.

79. Having been intercepts, the two documents are of a debatable authenticity. If they were authentic then they should exist, or should have existed, in their original form. The Respondent did not have access to the originals of those documents and from the form in which they were presented it is difficult to assess how authentic they really are. Nevertheless, even if we accept their authenticity, these documents do not prove anything more than that some police officials of Republika Srpska attributed the "Scorpions" to the Ministry of the Interior of the Republic of Serbia.

80. On the other hand, there is evidence that proves the contrary — that the "Scorpions" were not a unit of the Serbian police. In her effort to create an impression of a long-term Belgrade-directed genocidal history of the "Scorpions", Ms Karagiannakis stated that the history of this unit began in Vukovar, probably referring to the events in Vukovar in 1991. To prove this, the counsel for the Applicant referred to a witness in the Milošević trial — C-017[52]. Witness C-017 testified in that trial as a witness of the Prosecutor. According to his testimony, witness was from Western Herzegovina[53], a region around Mostar in Bosnia and Herzegovina, and he later became a member of the unit called "White Wolves". According to the witness, the "White Wolves" were a unit of the army of Republika Srpska under the direct control of General Mladić[54]. If we read the part of his testimony to which counsel for the Applicant referred, we can see that his testimony was misrepresented. However, this part of his testimony is much more revealing than that.

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[52]*Ibid.*, p. 15, para. 18.

[53]ICTY, *Prosecutor* v. *Milošević*, testimony of C-017, 11 June 2003, p. 22150.

[54]*Ibid.*, p. 22135.

81. The witness was involved in the fighting in Treskavica and he was later despatched to Jahorina, under the orders of General Mladic. While staying in Jahorina, the witness saw the "Scorpions" arrive, of which he gave the following account:

> "A: . . . [w]hen we arrived at Jahorina . . . we first saw vehicles with license plates of the Republic of Srpska Krajina. And after that, people in black uniforms with markings of Arkan's Tigers and others with Skorpije markings and people from the MUP of Srpska Krajina. Some of them were in black uniforms and others in the standard police uniforms.[55]
>
> . . .
>
> Q: Did you see any soldiers with scorpion patches as well?
>
> A: Yes, I did.
>
> Q: Who were they?
>
> A: At that point in time, I had no idea, because that was the first time for me to see people with such insignia, and it was the first time I had heard of the name Scorpions. But later on, staying in Vukovar, I learnt that it was a unit from that area whose commander was a certain Boco."[56]

A little later, the Prosecutor put to the witness one of the two documents which Ms Karagiannakis discussed in her pleading. This is how the testimony continued:

> "Q: And reference in this document is made to the Scorpions unit of the Serbian MUP . . . Were you aware that the Scorpions were a police unit related to the Serbian MUP, or is that not known to you?
>
> A: No, that was not known to me."[57]

82. This exchange between the ICTY Prosecutor and the witness C-017, who actively participated in the fighting on the Treskavica Mountain around Sarajevo, is significant for many reasons:

(a) first, and I would say the least important, it shows that the witness did not say that the history of the "Scorpions" began in Vukovar in 1991 (as alleged by the Applicant), but only that he learned afterward, while staying in Vukovar, that the "Scorpions" were from that area;

(b) second, the testimony shows that the "Scorpions" were, in fact, from the Vukovar area, irrespective of when they were actually formed. Vukovar is, of course, in Croatia;

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[55] *Ibid.*, pp. 22076-22077.

[56] *Loc. cit.*

[57] *Loc. cit.*

(c) third, the testimony demonstrates that the "Scorpions" drove vehicles bearing license plates of Republika Srpska Krajina, again in Croatia;

(d) fourth, and the most important, it shows that a man who was heavily engaged in the fighting alongside the "Scorpions" did not have any idea that the "Scorpions" were, in fact, a unit of the Serbian police. It would be rather reasonable to expect that a man, who obviously had a lot of knowledge about different units operating in Bosnia and Herzegovina, would know whether a certain unit fighting next to him belonged to the Serbian police or not.

83. That the "Scorpions" arrived from Republika Srpska Krajina was confirmed also by one of the highest officials of the Republika Srpska police at that time. In his interview to a Sarajevo newspaper *Slobodna Bosna*, published last year after the video showing the execution of six Bosnian Muslims had first appeared, Mr. Tomislav Kovač, former Deputy Minister of the Interior of Republika Srpska at that time, stated that the "Scorpions" had arrived as a part of the Ministry of the Interior of Republika Srpska Krajina[58].

84. It seems, thus, that the evidence regarding the status of the "Scorpions" is, at least, controversial and, in light of the other evidence, the two documents referred to by the Applicant cannot be taken as a sufficient proof that the "Scorpions" were a unit of the Serbian Ministry of the Interior, especially since the authenticity of the documents is disputable. Whatever is the case, all the evidence, including the two documents — if they are authentic — clearly shows that, once deployed in Bosnia and Herzegovina, the "Scorpions" entered the command structure of Republika Srpska and were completely under the control of the Republika Srpska police forces.

Šešelj's forces

85. Finally, Madam President, we come to the forces led by Vojislav Seselj. It is uncontested that the paramilitary volunteer units of his political party participated in fighting in Bosnia and Herzegovina, mostly in 1992, but contrary to what the Applicant claimed, they were not under the control of the Serbian Ministry of the Interior. The main evidence on connections between the Serbian police and Šešelj's forces are various statements of Šešelj himself, given in

[58]Summary of the interview available in English on: http://www.b92.net/english/news/index.php?version=print&dd=10&mm=06&yyyy=2005&nav_category=&nav_id=32192&order=priority&style=headlines.

mid-1990s[59]. First of all, these statements mainly relate to the war in Croatia in 1991 and I have already explained that the evidence concerning 1991 cannot be used in this case simply by way of analogy. Secondly, this is what Vojislav Šešelj said more recently, when testifying in the Milošević trial in 2005:

> "Q: Mr. Šešelj, in the course of that answer to Laura Silber on The Death of Yugoslavia tape, you said that you were getting weapons from Milošević's police, from the then Minister of Internal Affairs, Radmilo Bogdanovic, and then from his successor. True or false?
>
> A: This entire interview, which lasted about one hour, is one I published in one of my books. And you could have found that too. So I'm not challenging the fact that I gave this interview, however, for reasons of political propaganda, I threw Mr. Milošević and Radmilo Bogdanovic into the entire story, wanting to annoy them and to cause on their part an improper political reaction."[60]

86. The whole testimony of Vojislav Šešelj, which lasted for several weeks during the months of August and September 2005, is full of denial of his previous statements in which he had implicated Slobodan Milošević and the State security service of the Serbian police in arming and support of his units. Of course, it is quite possible that Mr. Šešelj lied during his testimony before the ICTY. But then again, it is possible that he lied when he gave those previous interviews. We do not intend to claim that the truth is one way or the other; we just want to demonstrate that such serious issues as State responsibility cannot be determined from statements of a former politician, indicted by the ICTY, who often changed those statements according to what he thought opportune.

International case law on paramilitaries

87. Madam President, distinguished Members of the Court, at the end of this analysis concerning the relationship of the paramilitary units which operated in Bosnia and Herzegovina and the Respondent, I will briefly analyse the relevant international case law on paramilitaries.

88. The practice of international jurisdictions offers us only a few precedents with respect to the issue of State responsibility for paramilitary actions. One of them was adjudicated by this honourable Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. The relevant paragraphs of the Judgment of 27 June 1986 have already been discussed

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[59]Video materials submitted by Bosnia and Herzegovina on 16 January 2006, DVD No. 2, referred to in CR 2006/35, p. 27, para. 24 (Dauban).

[60]ICTY, *Prosecutor* v. *Milošević*, testimony of Vojislav Šešelj, 7 September 2005, p. 11917.

extensively in this case by both sides. If the facts of the two cases are compared they become self-explanatory and it is obvious that the Applicant has failed to offer evidence that would even get close to the test of effective control adopted in the *Nicaragua* case. Mr. Brownlie has already dealt with this in the first round and he will further elaborate on the issue today.

89. It is perhaps for this very reason that the Applicant asked the Court to "forget *Nicaragua*". We do not agree with this proposal. Nevertheless, we will show that the most recent international case law also does not support the legal conclusions proposed by the Applicant.

90. In the recent case of *Prosecutor* v. *Enver Hadžihasanović and Amir Kubura*, the ICTY issued the judgment on 15 March 2006. In this judgment, the question of Mujahidin paramilitaries, which was the core of the examination by the ICTY, is dealt with extensively, on almost 150 pages. Although this case is primarily about individual criminal responsibility, the ICTY analysed the relationship between the Mujahidin and the Bosnian army. For that reason, it might be useful to compare the facts analysed before the ICTY with the facts brought before you by the Applicant in this case.

91. To sum up very schematically, the conclusion of the ICTY in the *Hadzihasanovic and Kubura* case was that the Bosnian army did not have control over the Mujahidin paramilitaries before this unit was included *de jure* in the Bosnian army[61]. This *de jure* admission took place in August 1993, by effect of an order of the supreme command of the Bosnian army[62].

92. However, to come to the conclusion of the existence of the control, the ICTY did not satisfy itself with taking note of the mentioned order. It also verified whether this order was actually put into practice. The Tribunal indeed concluded to this effect, after noting that the Mujahidin unit was effectively accepted within the Bosnian army in an official ceremony, that it depended on the logistic support of the Bosnian army corps it had been subordinated to, that it was referred to as a unit of the respective corps and that it was used in combat operations[63]. Additionally, the Court considered that the fact that five members of the Mujahidin were decorated

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[61] ICTY, *Prosecutor* v. *Hadzihasanovic and Kubura*, Judgement, 15 March 2006, para. 805.

[62] *Ibid.*, paras. 837-840.

[63] *Ibid.*, paras. 815, 823, 839.

in 1994 by President Izetbegović also proved the effective enforcement of the order creating this unit[64].

93. The Tribunal's reasoning continues, following its own conclusions in the *Čelebići* case, where the Tribunal had found that, for engaging responsibility, the existence of a control *de jure* must be confirmed by an effective control[65]. For the purposes of examining the existence of such an effective control, the Tribunal verifies primarily the following criteria:

— first, the power to issue orders and to have them executed;

— second, the command of combat operations involving the forces concerned;

— third, the absence of any other authority over the forces concerned[66].

94. Thus, the Tribunal noted that after having been put under the command of the *Bosanska Krajina* operational group, the Mujahidin unit took part in several combat operations together with other units of the same group and under its command[67]. To the same effect, the Tribunal also noted that the members of the former paramilitary unit were subject to the same rules of military discipline as the other members of the army and that these rules were indeed applied to the Mujahidins[68].

95. So, it is only after the Tribunal satisfied itself that the Mujahidin unit was created *de jure* by an order of the Bosnian army, that this order was indeed put into practice and that the Bosnian army had effective control, that it engaged the responsibility of the defendant[69].

96. Madam President, applying the same reasoning to the case brought before you, one may consider the regulations of 1991, concerning the admission of volunteers in the JNA, similar to the order of August 1993, concerning the creation of the Mujahidin unit by the Bosnian army. However, following the pattern established by the ICTY, one can easily notice that it is not respected in the case of Serbian paramilitaries, especially during the relevant period, that is, as of April 1992.

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[64] *Ibid.*, para. 822.

[65] *Ibid.*, para. 845.

[66] *Ibid.*, para. 851.

[67] *Ibid.*, para. 848.

[68] *Ibid.*, para. 852.

[69] *Ibid.*, paras. 848, 852.

97. The Respondent contends that the 1991 regulations were not put into practice to the extent required by the reasoning presented above. Thus, no record of an official ceremony accepting the units of volunteers exists, let alone a ceremony for the decoration of any of their members. Paramilitary units were never referred to as JNA units. They stayed, as they are commonly known, and as they are indicated by the Applicant, *paramilitary* units.

98. During the relevant period the paramilitary units did not *depend* on the logistic support of the JNA, and they were not used in combat operations under the control of the JNA or any other organ of the Respondent. Further on, when verifying the existence of an effective control, the conclusion follows as to the absence of such control on the part of the Respondent. Thus, it has not been proved that during the relevant period any organ of the Respondent issued orders to the paramilitary units or that, if it did, they were executed. As shown, these units were in the beginning acting either independently or under the command of the proclaimed State of the Bosnian Serbs.

99. This fact brings about the other criterion mentioned by the ICTY, that is, the absence of any other authority over the forces concerned, which is not fulfilled as well. Equally, no case of application of rules of military discipline by the Respondent was indicated before this Court.

100. To conclude, although it is probable that immediately after the issuance of the regulations in 1991 a certain degree of control existed with respect to the units of volunteers, the development of circumstances in 1992 led to the loss of such control and the gradual increase in the independence of the paramilitary units. This situation had remained until the summer of 1992, when the paramilitary units were formally put under the control of either the army or of the police of the Republika Srpska, under which control they stayed until the end of the war in Bosnia and Herzegovina.

101. It follows, Madam President, that even if we "forget Nicaragua" and apply the legal reasoning of the ICTY, the conclusion remains the same — the Respondent was not in control over the paramilitary forces operating in Bosnia and Herzegovina.

Crimes attributed to paramilitary forces

102. Madam President, distinguished Members of the Court, it is often asserted that the crimes committed by paramilitary forces are the most terrible crimes committed in Bosnia and Herzegovina. We do not dispute that these units have committed crimes and, while we maintain our position that every crime in Bosnia and Herzegovina, and everywhere else in the former Yugoslavia, has to be investigated and adequately punished, we nevertheless have to take a brief look at the crimes that are attributed to paramilitary forces that were allegedly controlled by Belgrade.

103. Apart from Slobodan Milošević, who was indicted for all crimes in Bosnia and Herzegovina, and whose indictment is, for that reason, of no particular use for this analysis, there are four other people from Serbia and Montenegro who have been indicted before the ICTY for crimes connected with paramilitary activities.

104. Željko Ražnjatović Arkan was the first to have been indicted. He was initially indicted only in relation to crimes in Sanski Most[70]. Since the proceedings against him were terminated following his death, the indictment remained as it initially was. However, we can safely assume that the indictment would have been expanded with other crimes attributed to Arkan's unit. He was charged with crimes against humanity, grave breaches of the Geneva conventions and violations of the laws or customs of war.

105. The second is Vojislav Šešelj, who was initially indicted on 14 February 2003. His indictment was modified and amended on 15 July 2005. Although rather confusing in identifying which particular crimes are attributed to Šešelj's paramilitaries, the indictment charges Šešelj's forces with direct commission or participation in the commission of crimes in Zvornik, Bosanski Šamac, outskirts of Sarajevo, Bijeljina, Mostar and Nevesinje[71]. Vojislav Šešelj has been charged with crimes against humanity and violations of the laws or customs of war.

106. Lastly, on 1 May 2003, the ICTY Prosecutor issued an indictment against Jovica Stanišić and Franko Simatović, the former being the head and the latter being a high official of the State Security Service of the Serbian Ministry of the Interior in the first part of the 1990s.

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[70]ICTY, *Prosecutor* v. *Ražnjatović*, Initial Indictment, 30 September 1997.

[71]ICTY, *Prosecutor* v. *Šešelj*, Modified Amended Indictment, 15 July 2005, paras. 22-27.

They were charged on the basis of participation in the joint criminal enterprise and on the basis of command responsibility for all the crimes allegedly committed by members of the Serbian State Security Forces in Bosnia and Herzegovina (the so-called "Red Berets"), as well as for all the crimes committed by Arkan's unit and the "Scorpions". According to the second amended indictment, they were charged with crimes committed in Bijeljina, Bosanski Šamac, Doboj, Sanski Most, Srebrenica and Zvornik[72]. The charges for Srebrenica are now explained to relate only to the village of Trnovo[73]. Stanisic and Simatovic are charged with crimes against humanity and violations of the laws or customs of war.

107. As the Court will appreciate, none of these men who were charged in connection with paramilitary activities in Bosnia and Herzegovina has been charged with genocide. And, Madam President, these four men are not simple individual perpetrators charged with individual crimes. These are the four men charged with all the crimes that are alleged to have been committed by paramilitary units supposedly under the control of Belgrade. These are the men whom you would expect to have had the genocidal intent if such intent had existed. Still, they were not even charged with genocide. Of course, this Court is not bound by legal determinations of the ICTY, and especially not by legal qualifications of the ICTY Prosecutor, but it is indicative that the ICTY Prosecutor did not even try to charge any of these four men with genocide.

Conclusions

108. Madam President, distinguished Members of the Court, at the end of this rather long presentation on the paramilitaries, the following conclusions are submitted on behalf of Serbia and Montenegro:

(a) first Serbian paramilitary units were formed in 1991, during the war in Croatia. They were formed as volunteer units and the JNA tried to put them under control with various regulations adopted in 1991;

(b) these regulations had limited effect and most of the paramilitary units remained out of the control of the JNA. In any case, these regulations are relevant exclusively for the war in

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[72]ICTY, *Prosecutor* v. *Stanišić and Simatović*, Second Amended Indictment, 20 December 2005, paras. 41-67.

[73]*Ibid*., para. 55-57.

Croatia in 1991 and the Applicant has not offered any evidence that these regulations remained in force in 1992 in Bosnia and Herzegovina;

(c) in the beginning of the war in Bosnia and Herzegovina paramilitary units were not under the control of the Respondent, and they acted either independently or under the control of various local organs of the new self-proclaimed State of the Bosnian Serbs;

(d) in the summer of 1992, Republika Srpska adopted various decisions and took other measures to put the paramilitary units under its control;

(e) these measures were successfully put into practice by the end of 1992, and after that all paramilitary units operating in the territory of Bosnia and Herzegovina were either incorporated in or put under the command of the Republika Srpska authorities. This included paramilitary units and individuals from Serbia and Montenegro;

(f) after 1992, paramilitary units from Serbia and Montenegro were involved in the territory of Bosnia and Herzegovina on only few occasions;

(g) the Applicant has not proved that during their stay in that territory the paramilitaries were under the command or control of the Respondent. On the contrary, all the evidence points out that they were under the command of the local authorities;

(h) finally, the crimes committed by the paramilitary units, however grave they were, did not amount to genocide.

Madam President, this concludes my presentation. Thank you for your attention and I respectfully ask you to give the floor to Mr. Ian Brownlie.

The PRESIDENT: Thank you, Mr. Cvetković. I now call Mr. Brownlie.

Mr. BROWNLIE: Thank you, Madam President.

INTRODUCTION

1. Madam President, distinguished Members of the Court, in this second presentation, I shall pursue four tasks:

first: a rebuttal of the Bosnian delegation's attempts to denigrate the documentary and other evidence contradicting the thesis of attribution;

second: the reaffirmation of the evidence against attribution;

third: reaffirmation of the position of Serbia and Montenegro relating to the interpretation and implementation of the Genocide convention; and

finally, a further reconnaissance of relevant principles of State responsibility.

A. Rebuttal of the Bosnian attempts to denigrate the evidence contradicting the thesis of attribution

2. Madam President, in the first round, on behalf of Serbia and Montenegro, I presented a substantial quantity of reliable evidence, including significant third party sources, on the question of attribution. This evidence produced a strong concordance which contradicted the assertion that Republika Srpska and its armed forces were under the control of the Belgrade Government. The response of the applicant State has been unconvincing. It has also raised a number of questions. Why is the applicant State so reluctant to recognize the relevance and weight of significant third party sources, including the Netherlands Government report, the substantial CIA study and the book by Lord Owen? Ms Karagiannakis dismisses the Netherlands Government report as "not exhaustive" and states that "the writers did not have the benefit of all of the evidence of Belgrade involvement which we have presented to the Court" (CR 2006/32, p. 64, para. 79). But the Netherlands report runs to thousands of pages. Is it not strange that the Applicant did not consider that it might be relevant and helpful to the Court?

3. Madam President, in our opinion the answer lies in the reluctance of our learned opponents to deal with the *specifics* of individual documents, and an indifference to matters of actual context.

The rebuttals offered by the applicant State: response

4. It is now appropriate to examine the proposed rebuttals of our evidence produced on behalf of Bosnia and Herzegovina — and, first, the report of the Secretary-General dated 30 May 1992.

(a) ***Report of the Secretary-General dated 30 May 1992***

5. This document appears in the transcript (CR 2006/16, p. 41). Mr. Ollivier suggests that the report is not definitive (CR 2006/34, paras. 5-7). However, the key paragraph is, I submit, reasonably clear and circumstantial, and I shall quote it:

> "Given the doubts that now exist about the ability of the authorities in Belgrade to influence General Mladic, who has left JNA, efforts have been made by UNPROFOR to appeal to him directly as well as through the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'. As a result of these efforts General Mladic agreed on 30 May 1992 to stop the bombardment of Sarajevo. While it is my hope that the shelling of the city will not be resumed, it is also clear that the emergence of General Mladic and the forces under his command as independent actors apparently beyond the control of JNA greatly complicates the issues raised in paragraph 4 of Security Council resolution 752 (1992). President Izetbegovic has recently indicated to senior UNPROFOR officers at Sarajevo his willingness to deal with General Mladic but not with the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'. "

6. In my submission, this represents a careful contemporary appreciation of key questions of fact relating both to the political and military status quo.

(b) ***Statements made by Lord Owen on relations of Republika Srpska and Belgrade***

7. Second, there are the statements made by Lord Owen on relations of Republika Srpska and Belgrade. The quite extensive evidence on this question was set out in the first round (CR 2006/16, pp. 44-48). This is detailed and relies upon three different sources. In face of this material Mr. Ollivier, in the fashion of his delegation, picks out a few short phrases (CR 2006/34, paras. 8-11).

(c) ***The work of the International Conference on the former Yugoslavia and the recognition of the separate political identity of the Bosnian Serbs***

8. Third, there is the work of the International Conference on the former Yugoslavia and the recognition of the separate political identity of the Bosnian Serbs. In my first round speech I reviewed the extensive evidence to the effect that the practice of the International Conference on the former Yugoslavia and the Chairman of the Steering Committee recognized the negotiating status of the Bosnian Serb party (CR 2006/16, paras. 123-132). This material is of considerable significance. If the Bosnian Serbs were a fiction, why should they be given a role on the same level as the other negotiating parties?

9. Mr. Ollivier ignores the awkward realities, namely the equal negotiating status of the Bosnian Serbs, and concentrates on what transpired at Dayton, when in any event the Bosnian Serbs remained a party to the negotiations (CR 2006/34, paras. 12-17).

(d) ***The decisions of the ICTY relating to genocide***

10. I come now to the decisions of the ICTY relating to genocide, significant and detailed decisions in which there is no reference to any involvement of the FRY Government, or any command structure relating to leaders in Belgrade (CR 2006/17, paras. 163-169). Ms Karagiannakis responds with the observation: "However, these ICTY Chambers were not seized with the question of Belgrade involvement and thus were not presented with relevant evidence of this. Therefore, the lack of findings in this regard is not surprising." (CR 2006/32, p. 64, para. 78.)

11. Madam President, first of all I must point out that this evidence was proposed by me as evidence of the non-involvement of the Belgrade Government in the decision-making in Republika Srpska and not with particular reference to Srebrenica as counsel appears to think. Secondly, given the legal significance of the issue of the command structure, and the constant assertions of Belgrade control by the Bosnian delegation, the absence of the element should be surprising at least to Ms Karagiannakis.

(e) ***The final rupture between Belgrade and the Bosnian Serbs on 4 August 1994***

12. In my first round speech, on behalf of Serbia and Montenegro, I presented substantial evidence of the rupture of relations between Republika Srpska and Belgrade in the period 1993 to 1994 (CR 2006/16, paras. 122-144; and CR 2006/16, paras. 170-172). The evidence presented involves, in particular, the considered views of Lord Owen, who was a major player in the negotiations.

13. There is no point in repeating the evidence which Mr. Ollivier sweeps to one side (CR 2006/34, paras. 18-22). This cursory dismissal of major quantities of concordant evidence is typical of the style of our opponents. The credibility of Lord Owen? Ignore it. His direct involvement in events? Ignore it. The public evidence of the rejection of the Vance-Owen Plan in Pale? Ignore it.

14. Now, of course, Mr. Ollivier points out that Belgrade was giving assistance to Pale to some extent. But, Madam President, this is to miss the point, which is the independence of Republika Srpska in the political sphere. It is, of course, necessary to recall the history. The Bosnian Serbs were eventually brought to the negotiating table as the result of a bombing campaign.

(f) ***The report of the Netherlands Institute for War Documentation on Srebrenica***

15. This report was commissioned by the Netherlands Government. This important report was relied upon by Serbia and Montenegro in the first round and I now reaffirm that reliance (see CR 2006/17, paras. 173-176). Counsel for Bosnia and Herzegovina has the nerve to state that this report is "by its own admission, not exhaustive", but does not explain what this means. On any normal assessment, it is a major third party source. One further point. Ms Karagiannakis refers to the report "as a source which does not implicate Belgrade". In fact the report expressly exculpates the FRY Government. In the Epilogue to the report the conclusion is that: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is improbable." (Epilogue, point 10.)

(g) ***The Milosevic conversation with Lord Owen on 16 April 1993***

16. The independent role of the Belgrade Government in relation to Republika Srpska is confirmed by the episode of the telephone call involving President Milosevic and Lord Owen on 16 April 1993. The relevant documents were set forth in my first round speech on attribution (CR 2006/17, paras. 177-183). The telephone call is authenticated by several sources, including the transcript of the Milosevic trial. Milosevic is seeking to warn the UNPROFOR Commander of the feud which existed between the two armies as a consequence of actions in the past against Serb villages. Milosevic was trying to frustrate the operations of Mladic and Karadzic as the documents make clear.

17. Ms Karagiannakis (CR 2006/32, paras. 82-83) states that I quoted this evidence in order to rebut the testimony of General Clark in the *Milosevic* case. That is not so. The evidence was introduced as a major element in my first speech on attribution as a part of the confirmatory

evidence of the non-involvement of the Belgrade Government in relation to Republika Srpska. My reference to General Clark appears later in the same speech (CR 2006/17, paras. 292-296).

18. Ms Karagiannakis alleges, without any basis, that Milosevic knew about Srebrenica before it happened. What Milosevic knew was that which was a matter of public knowledge in the region, namely, that raiding from the enclave had created a legacy of hatred. There is confirmation of the raids to be found in the following sources:

(a) The CIA study, *Balkan Battlegrounds* (Vol. I, p. 184).

(b) The Netherlands Government report (pp. 1277-1278).

(c) The judgment of the Trial Chamber in the *Krstic* case (Judgement, para. 24).

(d) The evidence of General Dannatt (CR 2006/23, p. 42: answer to my question).

19. Madam President, on this matter of the Lord Owen-Milosevic conversation, counsel for Bosnia and Herzegovina is astonishingly evasive. She does not deny that it took place. Lord Owen clearly did not believe at any stage that Belgrade had advance knowledge of the murders in 1995. And, finally, why are counsel for Bosnia and Herzegovina so reluctant to accept the opinion of independent contemporary observers?

B. In addition to this material the respondent State has produced documentary evidence rebutting allegations of the involvement of the Belgrade Government specifically in the events in Srebrenica.

(a) *Report of the Secretary-General dated 15 November 1999*

20. In the first round the report of the Secretary-General dated 15 November 1999 was submitted (CR 2006/17, para. 268). As I pointed out, this substantial report, entitled "The Fall of Srebrenica", contains no indications that the FRY Government had been involved in the events.

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

21. In my first round speech on attribution I pointed out that the former President of the FRY, Zoran Lilic, giving evidence in the *Milosevic* case, had denied that Milosevic had any role in the events in Srebrenica. The relevant passage I include in the transcript for the sake of convenience:

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

A. Yes. I tried to link that up to the constitution of the centres. And one of the fears was, in which I issued an order for this to be stopped, that President Milosevic himself-actually, I was in a situation in which I could directly at the beginning of August have intensive meetings to discuss other issues and problems within the Federal Republic of Yugoslavia. I know that he was personally very upset and angry, and I think that he was very sincere in his behaviour and conduct, and he even said at one point that that leadership from Pale, that they were mad, if they had actually done that. And I'm quite sure that as far as he is concerned, he could not have issued an order of that kind. I do believe that Srebrenica, unfortunately, is the result of the individuals who allowed themselves to perpetrate an act of that kind, and it is my deep conviction that it cannot be placed in the context of any participation on the part of the Yugoslav army at all, and that is why I said that Mr. Milosevic, which was exceptionally angry, his reaction was very strong, and he considered that this kind of behaviour and conduct would worsen our positions with respect to preparations for the Dayton Conference. I think he even said that at one of the meetings. Of course, nobody would take on this great burden on the side of the Bosnian Serbs, that is." (Transcript, 17 June 2003, pp. 22616-22617.) (See further CR 2006/17, paras. 271-272.)

22. In this context Ms Karagiannakis has advised the Court not to consider this evidence "as objective and conclusive evidence on the issue of Srebrenica" (CR 2006/32, para. 81). If Mr. Lilic's evidence is not to be taken into account, then one should rule out a great deal of the evidence produced by the applicant State, much of which is second-hand.

(c) ***The evidence of Colonel Robert Franken, Deputy Commander of the Dutch battalion in Srebrenica*** **(CR 2006/17, paras. 274-276)**

23. His answers to the two questions from Mr. Milosevic appear in the transcript as follows.

"Mr. Milosevic: [Interpretation]

Q. But anyway, Mr. Franken, do you know that in the last part of the main report of the Dutch government 2001 in point 10 it says literally, 'There are no indications that the action was launched in co-operation with Belgrade either in respect of political or military co-ordination.' Are you *[illegible]* of that?

A. [From Franken] I've read that. Yes, I've read that. That's correct.

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

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

24. Unfortunately, Madam President, we shall depart from these hearings without knowing what counsel for Bosnia has to say about Colonel Franken's evidence.

Madam President, if it were it convenient for you I can stop there. Thank you.

The PRESIDENT: Yes. Thank you, Mr. Brownlie. The Court will now briefly rise.

The Court adjourned from 11.20 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Professor Brownlie.

Mr. BROWNLIE: Thank you, Madam President. I was reviewing the evidence rebutting allegations of the involvement of the Belgrade Government in the events in Srebrenica and I had just reached the item:

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

25. This contains the following passage as a conclusion to the section entitled "The Possibility of Yugoslav Involvement":

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

26. In response to my quotation of *this* paragraph, Ms Karagiannakis quotes an earlier introductory paragraph, one of a sequence of three paragraphs (see CR 2006/32, para. 80). Madam President, the paragraph I quoted in the first round is clearly the *concluding* assessment.

(e) ***The intercept evidence presented in the Krstic trial***

27. We introduced some important material which was presented in the *Krstic* case (CR 2006/17, paras. 278-279). This intercept evidence has not been attacked by Bosnia and Herzegovina and it is important because it relates to the period *immediately after* Srebrenica and

provides clear indications that Republika Srpska forces did not act in co-operation with the Belgrade authorities. It appears in my argument in CR 2006/17, paragraphs 278 to 279.

C. The legal significance of the events in Srebrenica

28. In the first round of these oral hearings I gave an account of the background to the Srebrenica murders of 1995 (CR 2006/16, paras. 1-12). In addition, and also in connection with Srebrenica, I responded to the material discussed by Mr. van den Biesen under the heading "Srebrenica or ethnic cleansing of Eastern Bosnia": my discussion can be found at CR 2006/16, paragraphs 282 to 287.

29. These aspects of my two speeches relating to Srebrenica and the Drina Valley have been the subject of riposte by Ms Karagiannakis (CR 2006/32, paras. 1-42) and Ms Dauban (CR 2006/35, paras. 28-29). In relation to these two speeches I must make a preliminary point. Both speakers state that my intention was to *justify* the events in Srebrenica. That was manifestly *not* my intention, and my choice of words makes that clear.

30. Madam President, my purpose in indicating the evidential sources available on the issue of Srebrenica was twofold. In the first place I thought it necessary to establish, in front of the Court, the serious limitations of the presentation of facts in the mode adopted by our distinguished opponents. In the oral hearing Bosnia and Herzegovina has, until the second round, avoided any detailed discussion of Srebrenica and the historical sequence of events. At least we now have Ms Karagiannakis discussing the number of Serb soldiers and civilians killed and referring to "Muslim armed units". What an enormous change in the presentation of the facts by our opponents!

31. And thus my first purpose was to indicate the different realities hiding behind the overconfident and monolithic assertions and repetitions of counsel for Bosnia and Herzegovina.

32. And then, and more importantly, my second purpose was to further my argument on attribution by showing the historical background to the events in Srebrenica and establishing that the causes were local. The existence of the feud between the two armies was a matter of public knowledge. It was what our opponents would describe as a "notorious fact".

33. The reliable evidence of Lord Owen confirms the long-standing feud between the two armies: and if I can quote the evidence as it was in my first round speech:

> "178. Lord Owen describes the episode in his statement, in written form and dated September 2003, to the ICTY. With reference to the conditions in the Muslim-held enclave at Srebrenica, Lord Owen states:
>
> > 'General Philippe Morillon's brave attempt to do something has been well chronicled. What that personal initiative demonstrated for the future, however, was that there was no way that we would get the Bosnian Serbs to lift their blockade unless there was true demilitarization and such demilitarization was politically unacceptable within the Security Council, largely because of the opposition of the Bosnian Government in Sarajevo and the Muslim commander in Srebrenica'.
>
> 179. Lord Owen then quotes in his statement to the ICTY the relevant passage from his book, *Balkan Odyssey*. The passage reads as follows:
>
> > 'On 16 April I spoke on the telephone to President Milosevic about my anxiety that, despite repeated assurances from Dr. Karadzic that he had no intention of taking Srebrenica, the Bosnian Serb army was now proceeding to do just that. [This is in 1993.] The pocket was greatly reduced in size. I had rarely heard Milosevic so exasperated, but also so worried: he feared that if the Bosnian Serb troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between the two armies. The Bosnian Serbs held the young Muslim commander in Srebrenica, Naser Oric, responsible for a massacre near Bratunac in December 1992 in which many Serb civilians had been killed. Milosevic believed it would be a great mistake for the Bosnian Serbs to take Srebrenica and promised to tell Karadzic so. He did not think we would be able to get Canadian troops into Srebrenica for some time but thought we might be able to negotiate UN monitors. I agreed to meet Milosevic in Belgrade for lunch on Wednesday, 21 April.' (*Balkan Odyssey*, 1995, p. 143; Lord Owen's Statement, pp. 35-36.)
>
> 180. This exchange with Milosevic was confirmed by Lord Owen during the evidence in the ICTY on 3 November 2003 (Transcript, pp. 28411-28412, 28415-28416)." (CR 2006/17, paras. 178-180.)

34. Madam President, our opponents seek to challenge the strong and concordant evidence of the raids on Serb villages, but the reasoning adopted does not help their cause. Thus, with the assistance of *Balkan Battlegrounds*, it is asserted that it was the *Serbs* who moved first in the sequence of events: I refer to the speeches of Ms Karagiannakis (CR 2006/32, paras. 9-10) and Ms Dauban (CR 2006/35, paras. 30-31). Madam President, such amendments simply confirm the *local* character of the sequence of events: they make no *real* difference.

35. My main contention is that, on the evidence, when the Bosnian army was defeated in the field, the results were *in local terms* the taking of revenge. No long-term planning was involved

and certainly no planning in Belgrade. The evidence, which our opponents prefer to set aside, is that Belgrade did not approve of the situation in the enclave and its possible dangers. As Lord Owen pointed out, the demilitarization of the enclave was opposed by the Bosnian Government and the Muslim commander in Srebrenica.

36. In the speeches of counsel for Bosnia and Herzegovina relating to Srebrenica and the question of the raids on Serb villages outside the enclave, certain spectacular examples of double standards in matters of evidence are to be found. First of all, both Ms Karagiannakis and Ms Dauban display a surprising reluctance to allow any significance to independent third party sources, such as Lord Owen or the Dutch Government report.

37. A similar example can be found in the pleadings of Ms Dauban (CR 2006/35, para. 35). Counsel rejects the evidence of Sir Michael Rose, concerning raids by Naser Oric because "he did not have first-hand experience of such events". In the first place such raids continued long after 1993. I referred Ms Dauban to the speeches of Professor Franck, where no insistence is to be found upon first-hand experience as a standard of evidence. Professor Frank emphasized the making of inferences from patterns of events. Well, Madam President, one of the patterns of events was the making of raids by Naser Oric and the inability of United Nations commanders to stop those raids. The raids were a matter of public knowledge and a part of the professional knowledge of United Nations commanders.

38. On the same page of the transcript Ms Dauban quotes from the report of the Military Analysis Team of the Prosecutor in the *Milosevic* case (CR 2006/35, para. 36). This was compiled by two experts. Did *they* have first-hand experience or professional experience comparable to that of Sir Michael Rose? Counsel did not find it necessary to explain these inconsistencies.

Conclusions on the evidence of attribution in these proceedings

39. Madam President, at this stage I can summarize the state of the evidence on the question of attribution.

First proposition. The evidence of attribution given prominence by the applicant State is both insubstantial and unreliable.

Second proposition. The categories of material invoked by my opponents do not produce even a prima facie case of attribution.

Third proposition. The attempts of the applicant State to denigrate the concordance of evidence on the absence of attribution produced on behalf of the respondent State have conspicuously failed.

D. State responsibility under the Genocide Convention

40. Madam President, I shall move on to certain other questions on which the Parties are still divided. The first of these topics is the interpretation and application of the Convention itself, and the second is the application of the principles of State responsibility. However, before I develop my argument, I would like to deal with a number of baseless complaints presented by both Professor Pellet and Professor Condorelli (see, for example, CR 2006/31, para. 62 (Pellet); and, CR 2006/35, para. 3 (Condorelli)).

Complaints of the applicant State

41. The burden of these complaints was that in my first round speech I *ignored* the arguments of my opponents on State responsibility. Madam President, this is simply not true. Much of my long first speech was devoted to the question of attribution on the basis of the "organic thesis" of the applicant State. In other words, the working assumption was the Applicant's argument that Republika Srpska was an organ of the FRY, or was under its effective control.

42. The first alternative thesis, that is, the application of the control test, as argued by Professor Pellet, was examined in considerable detail (see CR 2006/16, paras. 111-119). The basis of the status of Republika Srpska was then examined at considerable length.

43. The further alternative arguments, stressed by Professor Pellet and Professor Condorelli, was that of complicity of the FRY. The viability of this argument depends on the preferred view on the question whether the Convention creates the direct responsibility of the State for acts of genocide, including the ancillary acts.

The relevance of the *travaux préparatoires*

44. The counsel for Bosnia and Herzegovina do not show any real interest in the drafting history of the Convention. Professor Pellet leaves the subject aside. Professor Franck purports to deal with the matter but does so in purely rhetorical terms (CR 2006/32, para. 13). He complains that Mr. Brownlie only sees ambiguity. But this, with respect, is a superficial response. The ambiguity is real and is revealed by the drafting history, and by the doctrine. Article IX of the Convention forms part of the problem and does not provide the solution as my friend Professor Franck claims. It is generally accepted, outside Bosnia and Herzegovina, that the text of a treaty is to be interpreted by reference to the text as a whole (see, for example, Lord McNair, *The Law of Treaties*, 1961, p. 381). Professor Franck has an evident resistance to the specifics and regards reference to the drafting history as somewhat unfair (CR 2006/32, para. 17). This is strange for various reasons, including the fact that his colleague, Professor Stern, found it appropriate to refer to the drafting history.

45. Incidentally, Madam President, given that there are 11 judges on the Court who were not Members in 1996, and given that the drafting history was an important part of my argument, I re-presented the argument instead of making a formal cross reference to the transcript of 1996.

The applicable law and the question of criminal responsibility

46. I move now to the question of the applicable law and criminal responsibility. In my argument in the first round I argued at length and with reference to both contemporaneous doctrine and subsequent doctrine that the Convention does not provide a vehicle for the imposition of the criminal responsibility of the State (CR 2006/16, paras. 20-81). In response Professor Pellet has confirmed that he agrees with this view (CR 2006/31, paras. 9-11). And he points out that international law does not recognize the criminal responsibility of States (*ibid.*, para. 11).

47. But, Madam President, this confirmation does not solve the problem, as Professor Pellet appears to believe. The Convention has the purpose of preventing and punishing the *crime* of genocide. Genocide is not recognized in general international law as an example of the internationally wrongful act of a State as described in the ILC Articles. Consequently, when counsel for Bosnia and Herzegovina argues that the Convention creates a direct responsibility of the State for the *crime* of genocide, this leads to a conundrum. Professor Pellet recognizes that

there is no such responsibility of the State and, at the same time, claims that such responsibility was created by the Genocide Convention. Not only that but, on behalf of Bosnia, it is claimed that the Articles of the International Law Commission apply to such a crime. With respect, the provisions can have no such application.

48. Professor Pellet cannot demonstrate how the direct responsibility of the State for the crime of genocide can be transformed into an ordinary breach of an international obligation of the State in accordance with the provisions of the Articles adopted by the International Law Commission. This transformation takes place in paragraph 13 of his speech on 18 April but is not explained adequately.

The relevance of causes of action to the application of the Convention in the sphere of remedies

49. The approach to the application of the Convention adopted by our opponents meets serious difficulties in the sphere of remedies. The position has been explained in my first round speeches as follows: on 13 March (CR 2006/17, paras. 298-304); and 16 March (CR 2006/21, Section F, p. 21, paras. 1-5).

50. These passages appear to have escaped the attention of my friend and colleague Professor Pellet. With the permission of the Court I would like to recall the main points. The premise of the discussion is the assumption by Professor Pellet that the principles of general international law on State responsibility and remedies can be applied automatically in order to provide a treaty text with, so to speak, a legal entourage. This process of supplementation is not limited to questions of interpretation but involves the superscription of matters of legal substance.

The principles relied upon by Bosnia-Herzegovina are secondary rules of responsibility

51. The presentations made on behalf of Bosnia and Herzegovina must be seen in a general perspective. The emphasis placed upon the principles of State responsibility is misleading because, legally speaking, the tail is wagging the dog. The principles of State responsibility constitute secondary rules in relation to the treaty provisions of the Genocide Convention, which are primary rules. This distinction was adopted and applied as fundamental to the work of the International Law Commission.

52. The Commentary by the Special Rapporteur contains the following assessment of the distinction:

> "Thus whatever its intellectual origins may have been, the central organizing idea of the 1996 Draft Articles, the distinction between primary and secondary rules of responsibility, was indispensable. Without such a distinction, there was the constant danger of trying to do too much, in effect, of telling States what kinds of obligations they can have. However difficult it may be to draw in particular cases, the distinction allowed the framework law of State responsibility to be set out without going into the content of these obligations. That would be an impossible task in practice even if it were possible in principle (which for the reason given it is not). The distinction between the two was made very clearly by the International Court in the *Gabčíkovo-Nagymaros Project* case, in the context of the relationship between the law of treaties and the law of responsibility. The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework — those rules, denominated 'secondary', which indicate the consequences of a breach of an applicable primary obligation." (James Crawford, The International Law Commission's Articles on State Responsibility, Cambridge, 2002, Introduction, pp. 15-16.)

53. The legal consequence is that the principles advanced by Bosnia and Herzegovina are the *secondary* principles and the provisions of the Genocide Convention are the primary principles. Counsel for Bosnia and Herzegovina seek to use the secondary principles to invent, under a flag of convenience, namely State responsibility, principles which Bosnia argues, form a part of the Genocide Convention itself.

Some conclusions on the application of the Genocide Convention

54. It is now appropriate to summarize the extraordinary legal constructions offered to the Court by Bosnia and Herzegovina. The approach of counsel for Bosnia and Herzegovina to the interpretation of the provisions of the Genocide Convention involves setting aside normal standards of treaty interpretation and legality. Article IX is interpreted in isolation. The drafting history is ignored. The evidence of contemporary and subsequent doctrine is ignored. Secondary rules are given priority over primary rules.

55. It is in any event the case that remedies are ancillary to the substantive provisions of an agreement between States. Thus, for example, the question whether restitution is an available remedy will depend upon the treaty provisions and will not, in the first place, depend upon the mechanical application of the secondary rules of State responsibility. This will be the case more

particularly when the drafting history reveals, as it does here, that the nature of the remedies has been a major subject of contention among the Parties.

E. The principles of State responsibility: some specific issues

Introduction

56. In the light of the three previous presentations, and as I draw toward the close of my argument, it is necessary to return to the leading question of State responsibility and the provisions of the Genocide Convention. The arguments of Bosnia and Herzegovina have been set forth at length, and with some repetition, as follows in the second round (CR 2006/31, paras. 61-81 (Pellet); CR 2006/35, paras. 1-29 (Condorelli)).

57. The position of the applicant State can be summarized without much difficulty.

(1) On the assumption that Republika Srpska was an organ of the FRY at the material time, then the FRY was responsible for breaches of the Convention within the provisions of Article 4 of the ILC Articles.

(2) In the alternative, if the Court does not accept that the Republika Srpska is an organ of the FRY, then the FRY was responsible for the direction or control of the relevant conduct within the provisions of Article 8 of the ILC Articles.

(3) In the further alternative, the Respondent is liable for complicity in genocide in accordance with Article III *(e)* of the Genocide Convention.

58. In the oral argument my learned opponents have regarded complicity as the winning argument and complain that I do not share their enthusiasm. But it must be clear from my general position concerning the application of the Convention that the complicity argument has no legal validity. Article III of the Convention is concerned with the conduct of individuals.

59. In any event, the reliance of Bosnia and Herzegovina upon the principles of State responsibility is, as I have suggested, wholly misconceived and this because the primary rules in this case are set by express treaty provisions. Madam President, the secondary rules of State responsibility cannot be employed as a replacement for the express primary rules of treaty provisions. Articles 4 and 8 of the ILC provisions simply do not form part of the Genocide Convention.

60. In this context, reference to Article III *(e)* of the Convention only serves to emphasize the muddled analysis. With your permission, I shall explain why.

61. The question of complicity is dealt with in Article 16 of the ILC Articles, and I will quote, first the heading:

> "Aid or assistance in the commission of an internationally wrongful act"

and, the provision

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> *(a)* that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> *(b)* the act would be internationally wrongful if committed by that State."

62. Now what is significant is the fact that most treaties do not have provisions dealing with aid or assistance and reliance is instead placed upon the general principles of State responsibility. The Genocide Convention, however, does have express provisions on ancillary forms of genocide. The reason for this is precisely the role which the Convention has in formulating the definition of the new crime for the purpose of spelling out the obligation to legislate and to prevent and punish genocide in the municipal courts of States parties to the Convention.

63. Madam President, it is thus an error to seek to invoke complicity by reference to Article III, while relying in other respects *ab extra* upon the Articles on State Responsibility governing other topics. The explanation is that Article III envisages the responsibility of individuals, and does not relate to complicity in the context of State responsibility.

64. And it is necessary to emphasize, once more, that the Articles on State Responsibility are not related to the crimes of a State but to attribution of the internationally wrongful act of a State.

65. The interest of Bosnia and Herzegovina is closely related to the issue of assistance given by the FRY to the Republika Srpska. This assistance was lawful and the applicant State has not been able to prove otherwise. Moreover, in this connection, the control test is to be applied in the appropriate form. If I could remind the Court, the formulation in the Commentary of the International Law Commission is as follows:

> "It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will

> depend on its own facts, in particular those concerning the relationship between the instructions given or the directions or control exercised and the specific conduct complained of [complained of]. In the text of article 8, the three terms 'instructions', 'direction', and 'control' are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act."

66. That is the end of the quotation from the official Commentary of the ILC, and it appears as paragraph 7 of the Commentary to Article 8 of the ILC work, which Article has been repeatedly invoked by my distinguished opponents.

67. I shall now turn to the specific issues examined by my colleagues yesterday and this morning. The first topic dealt with was the role of the JNA in Bosnia and Herzegovina at the beginning of 1992. Mr. Olujic has carefully explained to the Court the nature of the political and military arrangements in Bosnia and Herzegovina in the period of the disintegration of the former SFRY. His analysis ends with the establishment of the army of Republika Srpska and the changes in the relationship with the Federal Republic of Yugoslavia which was established on 27 April 1992.

68. Mr. Olujic was followed by the Co-Agent, Mr. Obradovic, who presented the Court with an analysis of the relationship between the Yugoslav army and the army of Republika Srpska. Mr. Obradovic demonstrated that the VRS was not under the effective control of any organ of Serbia and Montenegro.

69. And finally, Mr. Cvetkovic, also Co-Agent of Serbia and Montenegro, examined the questions posed by the activities of the paramilitary units. Mr. Cvetkovic and his colleagues have provided the necessary correctives to the factual distortions and confusions contained in the presentations of Bosnia and Herzegovina.

70. In approaching the subject-matter of State responsibility in this case, the Court will no doubt bear in mind that the exigencies of legal principle insisted upon by Professor Pellet and Professor Condorelli are deeply flawed and question begging. The secondary rules of State responsibility cannot be given priority over the primary rules of the Convention itself and the interpretation and application *of the Convention as such.*

71. In this context it is to be emphasized that the *Nicaragua* case depended upon the causes of action — causes of action with one exception based on the bilateral treaty — but the causes of action based upon customary or general international law. In that context there were no primary

rules set by treaty provisions. But even then the Court applied the criterion of effective control differently in the case of the causes of action *not* related to the humanitarian law of war. The test of effective control was applied more stringently in the latter case. And, Madam President, it is clear that in the present proceedings the analogue with the humanitarian law of war is genocide.

72. And overall the application of the principles of State responsibility is subject to the prior determination of the Court on the interpretation of the Genocide Convention.

73. Madam President, there is one final point concerning the Convention. If the Convention is applied on the basis that the provisions defining acts of genocide can refer to the direct responsibility of the State for the crime of genocide, then there are no *clearly* specified judicial standards. No such standards are available. Article 8 of the ILC provisions is as follows:

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

74. But these provisions were not *intended* to apply to issues of criminal responsibility. In the first round Professor Pellet accepted that there were serious difficulties in using such formulations. And he admits that relating the specifics of the *mens rea* of genocide to the modalities of attribution and control leads to serious problems (CR 2006/10, paras. 20-22). And obviously, the ICTY material *does not* relate to the responsibility of States.

F. Further evidence of non-attribution

75. Madam President, I shall now move to the other topics on my agenda. It is obvious that the question of attribution continues to divide the Parties and it is necessary to remind the Court of other evidence supporting the position that the FRY authorities were not involved in decision making in Republika Srpska. The relevant items are presented in chronological order.

First item: the conversation between Milosevic and Karadzic in January 1992, concerning the Babic's refusal to accept the Vance Peace Plan

76. The transcript of this conversation is in the judges' folder. The episode has been examined carefully in my previous speech in this round. The relevance of this material for present

purposes is that it demonstrates clearly that Milosevic was not able to control either Babic or Karadzic.

Second item: debate in the National Assembly of Republika Srpska, on 5 and 6 May 1993

77. This is the significant debate in which Milosevic and other invited speakers failed to persuade the National Assembly of Republika Srpska to accept the Vance-Owen Peace Plan. The Plan was rejected by 51 votes to none, with 21 abstentions. It was decided that the question of the Peace Plan would be settled by a referendum on 15 and 16 May 1993. The episode is a dramatic demonstration of the independence of Republika Srpska.

78. The transcript is included in the judges' folder.

Third item: debate in the National Assembly of Republika Srpska held on 22 and 23 October 1995

79. This document is also in the judges' folder. It contains a series of reports to the National Assembly of the contacts between a delegation representing Republika Srpska and the Republic of Serbia. The delegation had the status of a State and parliamentary delegation. The main item on the agenda was the Dayton Peace Plan — this is in 1995. From the content of the document it is clear that the negotiations were at arm's length and involved two States.

Fourth item: the evidence of General Dannatt on 20 March 2006

80. General Dannatt's evidence is in the transcript CR 2006/23. The material relating to imputability is at pages 40-46. The evidence given at page 40 indicates that General Dannatt accepted that the army of Republika Srpska was an entirely separate entity. The Court will also wish to recall the answer General Dannatt gave in response to the President's question at CR 2006/23, page 44. This answer was carefully qualified but General Dannatt did accept that "day-to-day operational control" was exercised by General Mladic and the Main Staff of the VRS.

Fifth item: the evidence of General Rose on 24 March 2006

81. General Rose's evidence appears in the transcript, CR 2006/26. By way of preface I would remind the Court that General Rose was a witness of fact, he had not been shown any

documents, and he had not had a contractual relationship with the Office of the ICTY Prosecutor. He thus gave his evidence in complete independence.

82. In his personal statement, General Rose had this to say:

> "As a result of the work undertaken by the United Nations, I was often required to travel to Pale, where Republika Srpska had its military and political headquarters, and I was able to gain some impression as to how closely the political and military operations of Republika Srpska were being either directly controlled or influenced by Belgrade. And my impression was that it was not, on the military side, a formal military command arrangement. They were not, in technical terms, under command, but a great deal of influence was brought to bear and a great deal of consultation, material support was provided and on one or two notable occasions, actual military support was deployed in support of Republika Srpska from the former Republic of Yugoslavia. So there was a link, but it was not formal. And of course on the political side, again there were many occasions where one was able to achieve changes in the political position of Mr. Karadžić by bringing pressure to bear through the United Nations or, indeed, sometimes through Russia, on Milošević's administration and government, and that would then be translated, but never clearly done; it was always a long process and often did not produce results. So, again, one's impression was that it was not a formal arrangement." (CR 2006/26, pp. 11-12.)

83. There was a question and answer on the same subject, as follows:

> "Mr. Brownlie: Thank you. Now if I can proceed with some more precise questions. What is your opinion on the relation between the army of Republika Srpska and the Yugoslav army in general?
>
> General Rose: As I said in my opening remarks, there was clear evidence of liaison and, on two notable occasions, direct military support provided, but otherwise my impression was that materiel support was being given in terms of fuel, ammunition, reinforcements of soldiers being recruited 'voluntarily' to fight for the army of Republika Srpska in Serbia, but there was no formal military command arrangement: they were not under tactical command, they were not under full command, in a way that one would get in a coalition of forces." (*Ibid*., p. 13.)

84. In addition there was a question on the same subject from Judge Owada:

> "Judge Owada: The question is the following: if I understood you correctly, and of course this was a verbal exchange, so I may not have grasped what you said correctly, but my understanding was that you said to the effect that no formal military command relationship existed between the army of Republika Srpska and the army of Yugoslavia. Now, my question is whether that statement of yours was based on your impression or your inference on the basis of some circumstantial factors that you observed, or based on some concrete evidence?
>
> General Rose: I fully understand that, Madam President. It was an inference drawn from the impressions that I had gained during that time. There was no concrete evidence one way or the other, but having lived in the military for the whole of my career, I have an understanding of formal military command relationships and my view was that they did not exist between those two organizations. (*Ibid*., p. 33.)

The PRESIDENT: Mr. Brownlie, could I interrupt you? I am anxious that you may be falling on the wrong side of the line of non-repetition, because of the manner in which you are presenting it. You are fully entitled to remind us of what is to be particularly looked at in the CRs and to summarize for us the points you get from those, but I see we do have quite a few pages more of reading out again what had been said previously in the case.

Mr. BROWNLIE: Madam President, I think I can help you quite easily by leaving some of the quotations from the witnesses in the transcript. So perhaps, if you agree, we can proceed in that way. Thank you.

Sixth item: the evidence of Mr. Lukic on 23 March 2006

85. I would just remind you that the witness was from 20 January 1993 until 18 August 1994 the Prime Minister of the Republic of Srpska. In my submission his evidence calls for careful reading, and what I consider to be the key passage will be in the transcript.

> "Ever since its inception in 1992 Republika Srpska, then under the name of the Serbian Republic of Bosnia and Herzegovina, featured all elements of statehood except for international recognition. Throughout its entire territory it had its bodies of government, its national assembly, its government, its local and/or municipal bodies of government, its judiciary, its health and educational systems. Also Republika Srpska had its own banking and financial systems reflected in the existence of a national bank, its own currency, budget, payment operation service. Republika Srpska also had its army and police with a complete system of command and logistical support to those structures. The statehood of Republika Srpska was not disputable during the conducting of numerous international negotiations. Republika Srpska was recognized also through the Washington Croat and Muslim Agreements and received final recognition under the Dayton Paris Peace Accords." (CR 2006/24, p. 12.)

Seventh item: the evidence of Mr. Popovic on 23 March 2006

86. This is the transcript of CR 2006/25, and I would be happy to leave the key passage in the transcript.

> "From 20 January 1993 to 18 August 1994, I was Deputy Prime Minister of Republika Srpska in charge of internal affairs. My chief task was to co-ordinate the work of several ministries, including the Ministries of Justice, Education, Science and Culture, and Religion. Being a professor of international law, I was also intensively involved in the harmonization of the legislation of Republika Srpska with the European Union. During my time in office and later, the Government of Republika Srpska was completely independent in decision making and the implementation of its decisions. And it maintained partnership relations with other governments and institutions. It is my opinion that we controlled the overall situation in that period to the greatest extent possible, even the circumstances of war, and that we created the

> necessary conditions for the preservation of our territory, people and army. The Government maintained partnership relations with the Governments of Serbia and Montenegro, the Republic of Serb Krajina, Herceg-Bosna and the Autonomous Republic of Western Bosnia." (CR 2006/25, pp. 10-11.)

87. Mr. Popovic also gives a clear account of the response of his Government to the Vance-Owen Peace Plan.

Eight item: the evidence of Mr. Mihajlovic on 27 March 2006

88. The evidence appears in CR 2006/27, and there I quote two questions and answers from the transcript, and they will be part of the transcript of today's hearing.

89. The first exchange was as follows.

> "Mr. Brownlie: Thank you very much Mr. Mihajlovic, could I ask you just to remind the Court which periods you formed part of the Government; those periods when you held government office?
>
> Mr. Mihajlović *[interpretation from Serbian]*: I was the Vice-President of the Republican Government twice: the first time from the end of 1989 until the end of 1990 and the second time from the year 2001 until 2003. Otherwise the political party that I was President of, New Democracy, formed part of the Government from 1993 to 1997, but I personally held no office in that Government in that period." (CR 2006/27, p. 14.)

90. And the second question and answer now follows:

> "Mr. Brownlie: I do have one or two questions. First of all, Mr. Mihajlović, can you confirm to the Court that decision making in Republika Srpska, both political and military, was independent of decision making in Belgrade?
>
> Mr. Mihajlović *[interpretation from Serbian]*: It was general knowledge that the Serbs in Bosnia and Herzegovina had their authentic political parties, State organs and army and all their decisions were autonomous, as I have already said, and independent of Belgrade, in fact, often contrary to decisions taken in Belgrade and often in opposition to the positions of both Milošević and of Dobrica Ćosić, the latter being an even greater authority among the Serbian people there. I believe that that story is associated with these volunteers who took part in the conflict in Bosnia and Herzegovina and who came from Serbia. In that connection I can say the following: that it is general knowledge that Serbs and Muslims lived together side by side in the former Socialist Federal Republic of Yugoslavia and that they both were constituent peoples in Bosnia and Herzegovina in their joint republic. And, when the civil war broke out, after the secession of Bosnia and Herzegovina from Yugoslavia, contrary to the will and without any say on the part of the Serbs there, who wanted Bosnia and Herzegovina to remain part of Yugoslavia, there was no preventing the Serbs in Serbia, hailing from Bosnia and Herzegovina, from coming to the assistance of their brethren in Bosnia and Herzegovina." (*Ibid*., pp. 25-26.)

This concludes my presentation of the further evidence supporting the position that the FRY authorities were not involved in decision making in the Republika Srpska.

G. The declaration of the Council of Ministers dated 15 June 2005

91. On that date the Council of Ministers of Serbia and Montenegro issued a statement as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the great majority of citizens of Serbia and Montenegro put up the strongest resistance.
>
> Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.
>
> Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

92. Professor Condorelli has argued at great length that this statement constitutes a legally binding recognition of the responsibility of Serbia and Montenegro as a State entity, for the crime of genocide (CR 2006/11, paras. 1-17).

93. In the first place, the wording of the statement refers unambiguously to the responsibility of individuals. There is no reference to the commission of genocide in any case. The indictments subsequently implemented related to individuals and to proceedings in the courts of Serbia. The precedent derived from the *Nicaragua* case is unimpressive. In that case the declarations concerned involved the specific context of procedure and law. The context of the statement in question was primarily political. In so far as it was legal, the context concerned the imminent use of the courts of Serbia and Montenegro to do justice.

94. In addition, the context involved contemporary reactions to the Scorpions video and the murders in Srebrenica. That is why the reference in the document is to "war crimes".

95. There is one final point to be made by way of emphasis. Professor Condorelli alleges that the statement recognizes that it was the Government of the Yugoslav State which was responsible for organizing and executing the crime. Madam President, it does no such thing.

96. Incidentally, and this has already been pointed out this morning, Mr. van den Biesen has asserted that the commander of the group of scorpions has not been indicted (CR 2006/30, para. 11). My instructions are that that assertion has no basis in fact.

H. The alleged plan or plans to commit genocide

97. The applicant State has at no stage succeeded in proving the existence of a plan. In the first round the position of Bosnia and Herzegovina was analysed on behalf of the Respondent. The conclusion reached was that the evidence presented which purports to relate to one or more plans is incoherent, vague and, in the final analysis, a fiction (CR 2006/21, paras. 1-12).

98. In the second round speeches the opening presentation of Mr. Van den Biesen gives no description of a plan — and this in a very lengthy presentation (CR 2006/30, paras. 1-66). All that can be seen are some references to a "Greater Serbia" policy — for example at paragraph 30.

99. Later on, Mr. van den Biesen makes an effort to bring back the "RAM" plan (CR 2006/34, pp. 36-37, paras. 23-26), but he does not offer any new evidence on the existence of this purported plan. The former Prime Minister of the SFRY, to whom Mr. van den Biesen referred, did not confirm the existence of the plan. What Mr. Markovic did, as a witness of the ICTY Prosecutor, was merely to recognize the voices of Mr. Milosevic and Mr. Karadzic on the tape that was played to him.

100. In the second round speech of Ms Karagiannakis there can be found what is a virtual abandonment of the hypothesis of a plan. Ms Karagiannakis first of all quotes from my speech in the first round. She states that:

> "67. Mr. Brownlie denied that there was any plan, arguing: 'the existence of a definitive plan, providing a political chart of some kind, is seen not to be a part of the picture'. If we have appreciated this argument correctly, the Respondent's position is that if you don't have a piece of paper setting out the plan in terms, and containing a political chart, then you cannot infer that genocide was committed. This approach must be rejected both legally and factually." (CR 2006/32, p. 61, para. 67.)

101. In my submission this distorts the Respondent's position somewhat. If the term "plan" is used it is reasonable to expect that it would be expressed in some form, either in writing or, for example, in the form of an intercepted telephone conversation. Counsel for Bosnia then continues:

> "68. First, the existence of a written plan is not a legal ingredient of the crime of genocide. Secondly, and notwithstanding this, in the case of Srebrenica a policy and a plan did exist. The Court is entitled to find and ought to find that there was a long-standing policy to ethnically cleanse eastern Bosnia and Srebrenica, in particular. The killings and expulsions were committed in furtherance of that policy and pursuant to a plan to kill the men and boys and expel the remainder of the Muslim population. The Court should make this finding on the basis of the uncontested facts that were presented at the commencement of these pleadings and the relevant factual findings surrounding the crimes themselves as set out in the United Nations sources and in particular the findings of the ICTY." (CR 2006/32, para. 68.)

102. This convoluted reasoning has several implications.

First: there is still no evidence of a plan to commit genocide, as alleged by the applicant State, existing since 1991.

And secondly: according to counsel for Bosnia, the Court has a *duty* to find the existence of a policy: this reasoning necessarily involves the abandonment of the hypothesis of a plan.

103. In conclusion, counsel for Serbia and Montenegro finds it surprising that the important allegation of the making of a plan to commit genocide should be the subject of such a superficial forensic effort.

I. Provisional measures of protection

104. In the first round I responded to Professor Pellet's submissions on this topic as fully as possible (CR 2006/21, paras. 1-9). Professor Pellet responded on 18 April (CR 2006/31, paras. 25-27). From these presentations it is clear that in this connection the Parties are divided both on the facts and on the law. In other words, the issues have been joined.

105. Incidentally, Professor Pellet states that he does not understand the concept of "cause of action", but this is rather evasive. It is also recognized in international law as the basis of claim. And the fact remains that in its jurisprudence the Court has not yet examined the precise issue raised on behalf of the respondent State.

J. The duty to prevent and punish

106. The position of the respondent State on this aspect of the case has been explained fully in the first round. In the second round, Professor Condorelli has presented the arguments of the applicant State at some length (CR 2006/34, paras. 7-26). The positions of the two Parties are not only divided on this group of issues, but are completely at a tangent.

107. In the first place, the relevance of the subject is contingent upon the determination of breaches of the Convention on the part of individuals.

108. In the second place, the relevance of the subject is contingent upon the determination by the Court of certain other questions concerning the interpretation and application of the Convention.

109. In the third place, the relevance of the subject is contingent upon the determination of the status of Republika Srpska and the presentation of Professor Condorelli makes this absolutely clear (see CR 2006/34, para. 11).

110. Finally, Professor Condorelli provides his views on various issues of State responsibility which are already at issue in the case.

CONCLUDING OBSERVATIONS

111. Madam President, I have now reached my concluding observations. These inevitably reflect the extraordinary aspects of these proceedings.

112. The first extraordinary feature is the weakness of the Applicant's evidence on the issue of attribution. This weakness is manifested in many ways. On the key question of command and control, the military expert called by the applicant State did not confirm that the command structure of the army of Republika Srpska ended in Belgrade or that orders were issued directly from Belgrade. But there are *other* weaknesses.

113. There was the use of General Dannatt to present 23 documents, some of which had originally been submitted with the bundle of 76 documents on 16 January. Madam President, it is reasonable to assume that these two sets of documents, presented at a relatively late stage, constituted the very best of the documentary collection of the applicant State. But no conclusive evidence of the effective control of Republika Srpska by the FRY was presented.

114. And the issue of effective control, though the subject of much argument, is not helpful to the applicant State. In the first place, there is a great deal of concordant evidence from independent sources which confirms the independence of Republika Srpska in the relevant period. And, in the second place, there is the decision in the *Nicaragua* case. This has not been adequately explained to the Court by our opponents. And, as I pointed out already, the key point is that the Court applied the criterion of effective control differently in the case of the causes of action *not* related to the humanitarian law of war, such as the breaches of the principle of non-intervention. The test of effective control was applied more stringently in the case of breaches of the laws of war; and it must be clear that such stringency would apply, and would apply *a fortiori*, in a case of alleged genocide.

115. I shall now revert to the idiosyncratic practices of our opponents in matters of evidence. The presentation of documents is unusual, to say the least, and in my first speech this round I provided some examples. The applicant State clearly has a strong aversion to the context of most documents, including the specific context of the statement quoted. Our opponents suffer from a forensic condition, the context aversion syndrome.

116. Madam President, this aversion to context extends unfortunately to the historical background of recent events and, in consequence, significant elements of causation are excised from the picture. As a result, important evidence has not been submitted to the Court. This is true of Srebrenica. For the applicant State this is the paradigm case of genocide. And if that is so, why have our opponents been so reluctant to give the Court the historical background?

117. This aversion to context, in this case historical context, is illustrated by the refusal to recognize the evidence of the raids by Naser Oric on Serb villages and the accumulated hatred which was caused. The many observers of these facts include General Morillon, the Commander of the French-United Nations units in Bosnia and Herzegovina. In his evidence at the Milosevic trial, he confirmed "the terrible massacres committed by the forces of Naser Oric in all the surrounding villages" (Milosevic trial, transcript, pp. 32031-32032).

118. And, Madam President, the point about the raids and the local feuds between the two armed forces is *very* relevant to the issue of attribution. The processes of cause and effect were local in every sense. External decision making could have had no role.

119. I move now to another example of the significance of the historical background and local knowledge thereof. In my earlier presentation I referred to the letter from the people of Kupres to the Ministry of Defence in Belgrade requesting military protection and dated 22 January 1992.

120. This letter refers expressly to the dangers of genocide aimed at Serbian communities and refers expressly to the events in the region during the Second World War. This document was not taken seriously by our opponents although it was printed in their Reply (see CR 2006/34, para. 14 (Dauban)). In fact only ten weeks after that letter was sent Croat Muslim armed units, wearing Ustasha insignia, committed crimes against Serb civilians in the area (Counter-Memorial, pp. 447-454, 973-975 (Kupres)). Madam President, the Second World War background makes a

parenthesis necessary. The Kupres region includes the commune of Livno. In the territory of Livno there were pits into which the bodies of Serbs had been thrown during the Second World War. Atrocities against Serb civilians increased after 27 April 1992. In particular, the Serb Memorial to the victims of Ustasha who were killed during the Second World War was blown up. At least 150 Serb civilians were killed and their bodies thrown into pits (Counter-Memorial, pp. 457-459, 994-995 (Livno)). And thus, Madam President, the historical background involved real dangers and constituted evidence of significant causal links within the region concerned. Such dangers and concerns were indigenous. The letter of 22 January 1992 unfortunately concerned imminent dangers.

121. And, finally, there is the insistence by our opponents in caricaturing the content of the Genocide Convention. This policy of distortion arises from two sources. First, the refusal to take the drafting history seriously and, secondly, the unfortunate confusion relating to the distinction between primary and secondary rules — this in the situation where the primary rules are in a treaty instrument. This confusion certainly illustrates the dangers of referring to Don Quixote.

122. As I conclude my second speech, I would like to acknowledge once again the significant assistance received from colleagues in the delegation of Serbia and Montenegro. If I may thank the Court for your customary patience and consideration. Thank you.

The PRESIDENT: Thank you, Mr. Brownlie. I understand that that will be the end for this morning of the submissions of Serbia and Montenegro. Judge Tomka has a question which he wishes to put to the Respondents. And I call upon Judge Tomka.

Judge TOMKA: Thank you, Madam President. The question is as follows: has the Federal Republic of Yugoslavia (Serbia and Montenegro) deposited with depositaries of multilateral conventions an instrument of its accession to any other multilateral convention, in addition to the 1948 Genocide Convention, to which the Socialist Federal Republic of Yugoslavia was a party as of 27 April 1992? In the affirmative, could Serbia and Montenegro provide a list — or, at least, examples — of such conventions? Thank you, Madam President.

The PRESIDENT: Thank you. The reply to that question may be given either orally or in writing by Friday 12 May. The Court now rises.

The Court rose at 12.55 p.m.