TO: The Judges of the International Court of Justice
The Peace Palace,
The Hague,
The Netherlands.

Amsterdam, 25 August 1993

YOUR EXCELLENCIES:

I hereby supplement and amend our March 20 Application and, with reference to paragraph 3 of Article 74 of the Rules of Court, Section C of our 27 July 1993 request for an indication of provisional measures by filing with the Court the attached Memorandum of Law on the "Imputability" of the Respondent for the conduct of Serb military, paramilitary, militia, and irregular armed units operating in the Republic of Bosnia and Herzegovina.

Please accept, Excellencies, the renewed assurance of my highest consideration.

Francis A. Boyle

Professor Francis A. Boyle
General Agent for the Republic of Bosnia and Herzegovina before the International Court of Justice

Attachment

IMPUTABILITY

SUMMARY OF ARGUMENT

Yugoslavia is responsible for the acts of genocide and the war crimes committed by the Bosnian Serb forces in Bosnia-Herzegovina. The liability of Yugoslavia is based on two separate legal principles. First, Yugoslavia is liable under the general law of state responsibility, as reflected in the Genocide Convention and in humanitarian law, for acts committed by the recipients of its aid, since it was aware that the aid was being used wrongfully. Second, Yugoslavia is liable because it adopted as its own the wrongful acts of the recipients of its aid.

I. A STATE CAN BE RESPONSIBLE, UNDER THE GENERAL LAW OF STATE RESPONSIBILITY, EVEN WHERE THE INTERNATIONALLY WRONGFUL ACTS ARE COMMITTED BY STATES OR PRIVATE PARTIES NOT ACTING AT ITS BEHEST.

The precise issue of imputability before the Court is one of first impression. This case raises the question of the responsibility of a state for military and financial support to a group of co-nationals in a neighboring state who are carrying out genocide and war crimes. This is a question different from attribution issues that have previously come before the Court. It is also different from the situations of attribution to which the International Law Commission's draft articles on state responsibility are addressed. Draft articles on State responsibility, in I.L.C. Report to General Assembly, U.N. General Assembly, 35th session, Supplement No. 10, p. 59, U.N. Doc. A/35/10 (1980), reprinted in I.L.C. Yearbook 1980, vol. 2, p. 30, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (pt. 2).

The I.L.C. draft articles are relevant to the present case, although they do not provide a direct solution. Certain of these articles are as follows. (1) A state is responsible, according to the I.L.C., for the acts of persons or groups who act "in fact" on behalf of that state, even if they are not in a formal sense officials or delegates of that state. I.L.C. Article 8. (2) A state, however, is not responsible for the acts of persons who do not act on its behalf. I.L.C. Article 11. (3) A state is responsible for the acts of another state over which it exercises powers with respect to that state in the field of activity in which the second state is acting. This is called indirect responsibility. I.L.C. Article 28. (4) A state is responsible for aid or assistance to another state if rendered for the commission of an internationally wrongful act. I.L.C. Article 27.

Another principle not directly relevant relates to moral approbation of illegal acts. The I.L.C. draft articles are silent on the responsibility of a state for acts carried out by another state or non-state grouping where no aid or assistance is provided, but where the state gives moral approbation. In this

situation a state is not, under customary law, responsible. Thus, in the Tehran case, this Court said that Iran could not be responsible on the rationale that it may have approved of the hostage-taking. Case Concerning United States diplomatic and Consular Staff in Tehran (U.S.A. v. Iran), 24 May 1980, 1980 I.C.J. p. 30, ¶59.

The present case falls outside all the above-mentioned situations. The present situation falls in between the two traditional categories of responsibility, namely, (1) responsibility of a state for its own acts; (2) responsibility of a state for acts of another state. However, the principles developed by the I.L.C., and by this Court, are relevant to devising a standard here. Clearly, where a state facilitates internationally wrongful conduct by a group that is not a state, responsibility must rest on that state.

I. A STATE IS RESPONSIBLE FOR PROVIDING MATERIAL ASSISTANCE FOR THE COMMISSION OF UNLAWFUL ACTS.

The basic notion of state responsibility is that a state is responsible for internationally wrongful acts. International responsibility arises for an act or omission attributable to the state, where the conduct violates an international obligation of the state. I.L.C. Article 3.

Where a state gives material assistance to a non-state group that it knows to be carrying out acts that violate internationally protected rights, the state is responsible under Article 3. Its conduct in this situation is an "act." The act is the provision of material aid. If the state is aware that the group is carrying out, as a matter of policy, acts that are internationally wrongful, then state is providing assistance "for the commission" of internationally wrongful acts. Although the state is not committing the internationally wrongful acts itself, it is responsible for the aid that facilitates them.

The I.L.C. stated this principle where the recipient of the aid is another state. A donor state is responsible for giving aid to another state for the commission of an internationally wrongful act. I.L.C. Article 27. The articles did not explain what it might mean to give the aid "for the commission." However, the meaning of that phrase is relevant here, because the principle of liability is similar.

III. A STATE IS RESPONSIBLE FOR THE WRONGFUL ACTS OF AN AID RECIPIENT, WHERE THE STATE IS AWARE THAT THE RECIPIENT IS USING THE AID WRONGFULLY.

For liability to obtain, it is not required that the aid-giving state act with a purpose that the recipient should commit the internationally wrongful act. Views expressed within the

I.L.C. and the practice of states indicates that liability attaches where the state is aware of the wrongful use of its aid. Judge Ago, then I.L.C. rapporteur on state responsibility, cited as a situation that would entail responsibility the act of Germany in allowing the United States to use air bases in Germany to a launch military intervention in Lebanon in 1958. R. Ago, Seventh Report on State Responsibility, I.L.C. Yearbook 1978, vol. 2, pt. 1, p. 31, at p. 59, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 1). There, no evidence was available that Germany desired a U.S. intervention in Lebanon.

Referring to this kind of situation, namely that in which a state with base rights commits internationally wrongful acts from the bases, one I.L.C. member, Endre Ustor, said that responsibility arises "when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory." Summary Records of 1313th mtg., I.L.C. Yearbook 1975, vol. 1, p. 44, ¶13, U.N. Doc. A/CN.4/SER.A/1975.

The U.S.S.R. charged Germany and Turkey with responsibility when the United States launched balloons from their territory for overflights of the Soviet Union, without Soviet permission. Judge Ago noted that in this situation the responsibility of Germany and Turkey was "based on passive conduct or toleration on the part of their organs." Summary Records of the 1313th meeting, I.L.C. Yearbook 1975, vol. 1, p. 42, ¶4, U.N. Doc. A/CN.4/SER.A/1975. That characterization suggested that responsibility would lie even if Germany and Turkey did not wish for the United States to violate Soviet airspace.

The I.L.C., in a report on Article 27, said that "it is not sufficient for it to be possible for aid or assistance" provided without a purpose to promote the internationally wrongful act "to be used by the recipient State for unlawful purposes, or for the State providing aid or assistance to be aware of the eventual possibility of such use." I.L.C. Report to General Assembly, G.A.O.R. 33d session, Supplement No. 10, p. 255, U.N. Doc. A/33/10 (1978), reprinted in I.L.C. Yearbook 1978, vol. 2, p. 104, U.N. Doc. A/CH.4/SER.A/1978/Add.1 (pt. 2). Thus, it is not enough if there is only a possibility of wrongful use. However, if the aid-giving state is aware that the aid will be used wrongfully, then responsibility attached, as is implied by this statement of the I.L.C. See John Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility," British Year Book of International Law, 1986, p. 77, at pp. 107-125.

A similar standard applies where the aid recipient is a non-state grouping. It would defeat the purposes of the law of state responsibility to permit a state to violate internationally protected rights by giving material assistance to a non-state

grouping that it understands will commit unlawful acts. This Court indicated in both the Tehran case and in Nicaragua v. U.S.A. that a state can be responsible where the actual perpetrators of the internationally wrongful acts are parties other than states. In the Tehran case, it found Iran responsible on the grounds that Iran had made the acts of private hostage-takers its own (on which see more fully below), and in Nicaragua v. U.S.A. it found the U.S.A. responsible for acts of the "contras" on the grounds that it provided instruction in assassination to the "contras" (on which see more fully below).

IV. THE ABOVE STANDARD APPLIES UNDER THE GENOCIDE CONVENTION.

Responsibility in the case of awareness that the forces being aided are committing unlawful acts is also found in the article of the Genocide Convention that prohibits complicity in genocide. Genocide Convention, Article 3(e). Here too liability is based on providing aid in the face of awareness that it is being used unlawfully. Since the notion of complicity is borrowed from domestic law, that is where the content of complicity as found the Genocide Convention must be found. In domestic law, providing material means with knowledge of unlawful use constitutes complicity. Thus, the French Penal Code defines as an accomplice "those who procure arms, instruments, or any other means that were used for the act, knowing that they were to be so used." France, Penal Code 1810, Article 60(2). Similarly, the Polish penal code considers as an accomplice one who either "willing that another person should commit a prohibited act, or reconciling himself to it, provides him the means." Poland, Penal Code 1969, Article 18(2). The same rule is followed in the United States by case law jurisprudence. R. Perkins & R. Boyce, Criminal Law (3d ed. 1982), p. 747.

This rule is also followed in Yugoslav penal law, which defines "aiding" to include "the supply of tools of crime," and an accomplice as one "who intentionally aids." Yugoslavia, Penal Code 1951, Article 20. The penal code says that a person acts intentionally when he "was conscious of his deed and wanted its commission, or when he was conscious that a prohibited consequence might result from his act or omission and consented to its occurring." Yugoslavia, Penal Code 1951, Article 7. See similar provisions in Yugoslavia, Penal Code 1976, Article 13 (intent), Article 24 (complicity).

Thus, when the Genocide Convention employs the term "complicity," liability attaches for one who provides material means to those committing genocide and who is aware that the material means will be used to commit genocide. This standard is no different from that which the International Law Commission, as noted above, has said is required under customary international law for complicity by one state in the act of another state. Judge Ago has stated that "complicity," as defined by the I.L.C.,

"may, for example, also take the form of provision of weapons or other supplies to assist another State to commit genocide." R. Ago, Seventh Report on State Responsibility, I.L.C. Yearbook 1978, vol. 2, pt. 1, p. 31, at p. 58, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (pt. 1). This same standard applies, as indicated above, in the case of assistance by a state to a non-state grouping that is committing violations of the laws of warfare.

V. THE ABOVE STANDARD APPLIES UNDER HUMANITARIAN LAW.

Under the four 1949 Geneva conventions, as stated in common Article 1, a state party has an obligation to ensure respect for the conventions in all circumstances. This means that if a state is aware that a convention norm is being violated, it must take reasonable measures to endeavor to stop the violation. Security Council Resolution 681, U.N. Doc. S/RES/681 (1990). This obligation is unrelated to any connection between the state in question and the party committing the violation, but it clearly applies when the state is providing material aid to the party that is violating the Geneva conventions.

In Nicaragua v. U.S.A., this Court noted a state's responsibility under common Article 1 and said that it applies when the acts in violation of the laws of warfare are committed in a civil war, to which common Article 3 applies. The Court made this reference to common Article 1 in its discussion of encouragement by the United States to the "contras" to violate the laws of warfare. 1986 I.C.J. ¶220. The Court said that a duty to "ensure respect" applies even when the military conflict is a civil war, since the obligation to "ensure respect" derives not only from common Article 1 but as well from customary law. 1986 I.C.J. ¶220.

In Nicaragua v. U.S.A., the Court did not find as a fact that the U.S.A. was aware of violations being committed by the Nicaraguan "contras" when it gave them material assistance. In the present case, however, such an awareness is, as will be shown below, indicated by the facts and by statements of officials of both Yugoslavia and the Bosnian Serb forces. Thus, under the principles espoused by this Court in Nicaragua v. U.S.A., Yugoslavia is responsible for failing to "ensure respect" by the Bosnian Serb forces for the laws of warfare. A state that gives material aid, aware that the aid is used to violate the laws of warfare, fails to "ensure respect" for the laws of warfare.

An obligation to "ensure respect" is present even where, as the Court said in Nicaragua v. U.S.A., the conflict is internal. The conflict in Bosnia-Herzegovina, however, bears an international character. Such is the conclusion of the Security Council's Commission of Experts, who said that after analyzing the situation it had decided to apply "the law applicable in

international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia." Interim Report, op. cit., ¶45. Thus, the applicability of common Article 1 is even more clear here than it was in Nicaragua v. U.S.A.

VI. YUGOSLAVIA HAS PROVIDED MATERIAL ASSISTANCE TO THE BOSNIAN SERB FORCES.

Under the principles of liability described above, Yugoslavia is responsible for the genocide and law of war violations committed by the Bosnian Serb forces in Bosnia-Herzegovina. Yugoslavia, by its own admission, has provided substantial military aid to the Bosnian Serb forces, and, as will be shown in the next section, in so doing it has been aware that the Bosnian Serb forces were committing atrocities against non-Serb populations.

Yugoslavia freely acknowledges its material aid to the Bosnian Serb forces. In a communiqué, the government of Serbia stated that it "firmly believ[ed] that a just battle for freedom and the equality of the Serbian people is being conducted in the Serb Republic," and thus that "the Republic of Serbia has been unreservedly and generously helping the Serb Republic." Communiqué Issued After the Session of the Government of the Republic of Serbia. Emphasis added.

Serbian President Slobodan Milosevic was quoted by Tanjug press agency as stating on 11 May 1993: "In the past two years, the Republic of Serbia, by assisting Serbs outside Serbia, has forced its economy to make massive efforts and its citizens to make substantial sacrifices. . . . Most of the assistance was sent to people and fighters in Bosnia-Herzegovina." British Broadcasting Corp., Summary of World Broadcasts, 13 May 1993, Part 2 Eastern Europe, C.1 Special Supplement, p. EE/1687/C1.

When the Yugoslav army withdrew from Bosnia-Herzegovina in 1992, it left intact many Serb-staffed units to become part of the Bosnian Serb forces. "Remnants of JNA (Yugoslav People's Army) Said to Become 'Serb Army,'" Belgrade TANJUG Domestic Service, 1223 GMT, 7 May 1992, translated into English in Foreign Broadcast Information Service, 8 May 1992, pp. 18-19. "Disposition of JNA Presents Problems," Belgrade Borba, 6 May 1992, p. 9, translated into English in Foreign Broadcast Information Service, 14 May 1992, pp. 26-27.

Yugoslav President Dobrica Cosic, addressing the Yugoslav federal assembly, said that the Yugoslav army left with the Bosnian Serb forces substantial quantities of military equipment, including three hundred tanks, 231 artillery pieces, and a large quantity of infantry weapons and ammunition. "President Addresses Federal Assembly," Belgrade Radio Belgrade Network, 0935 GMT 14

July 1992, translated into English in Foreign Broadcast Information Service, 15 July 1992, pp. 33-37.

Bosnian Serb military leaders have acknowledged the receipt of armaments from Yugoslavia. Vojislav Seselj, a leader of the Chetniks (Bosnian Serb military force), answered in the affirmative when asked by a reporter whether some of his weapons came from the Yugoslav army. "Chetnik Leader Discusses New Serbian Borders," Der Spiegel (Hamburg), 5 August 1991, pp. 124-126, translated into English in Foreign Broadcast Information Service, 5 August 1991, pp. 51-53.

Yugoslavia has gone well beyond the moral approbation this Court found on Iran's part regarding the actions of the persons who took hostages at U.S. diplomatic facilities in Tehran. Both Yugoslavia and Iran expressed approval of the actions of the private groupings. But whereas Iran did not materially assist the hostage-takers, Yugoslavia has, as indicated, provided material assistance, and on a large scale.

VII. YUGOSLAVIA HAS PROVIDED OPERATIONAL ASSISTANCE TO BOSNIAN SERB FORCES IN COMBAT IN BOSNIA-HERZEGOVINA.

In addition to material aid, Yugoslavia has lent the aid of its military units in support of the military operations of the Bosnian Serb forces in Bosnia-Herzegovina. Yugoslav army units situated in Serbia, but just across the River Drina from Bosnia-Herzegovina, have provided direct operational assistance to the Bosnian Serb forces during combat. "Federal Army Supporting Bosnian Serbs," Belgrade Politika, 26 January 1993, p. 8, translated into English in Foreign Broadcast Information Service, 27 January 1993, pp. 46-47. Belgrade Television has filmed these operations, which have included flights by Yugoslav military airplanes and helicopters. Yugoslav units have entered Bosnia-Herzegovina during these operations. "Yugoslav Army Offensive Across Drina Detailed," Zagreb Globus, 12 March 1993, pp. 9-10, translated into English in Foreign Broadcast Information Service, 6 April 1993, pp. 41-43. The Yugoslav air force has flown missions both for reconnaissance and for combat in Bosnia-Herzegovina. "Sarajevo Suburbs under Attack; Poison Gas Suspected," Zagreb Radio Croatia Network, 1100 GMT, 23 June 1992, translated into English in Foreign Broadcast Information Service, 24 June 1992, p. 23.

VIII. YUGOSLAVIA HAS HELPED ORGANIZE THE BOSNIAN SERB MILITARY FORCES.

General Ratko Mladic, commander of the Bosnian Serb forces, is a career officer in the Yugoslav People's Army who was reportedly selected for his role in the Bosnian forces by Serbian President Milosevic. "Mladic Scorns Western Threats," Financial Times, 16 April 1993, p. 2. The Yugoslav army selected and

trained certain Serbian officers from its ranks and dispatched them for duty with the Bosnian Serb forces. "FRY Officers Reportedly heading for Bosnia," Sarajevo Radio Bosnia-Herzegovina Network, 1100 GMT, 29 January 1993, translated into English in Foreign Broadcast Information Service, 29 January 1993, p. 30. Thus, in addition to providing arms and equipment, Yugoslavia has participated in forming the officer corps of the Bosnian Serb forces.

IX. YUGOSLAVIA IS AWARE THAT THE BOSNIAN SERB FORCES USE ITS MATERIAL AND OPERATIONAL ASSISTANCE TO COMMIT GENOCIDE AND TO VIOLATE THE LAWS OF WARFARE.

Yugoslavia is aware of the aims of the Bosnian Serb forces and of the internationally wrongful means by which it achieves those aims. The practices of the Bosnian Serb forces have been extensively reported in the media and have been the subject of action by the action of the United Nations Security Council. The Security Council has instituted a procedure for the convening of tribunals to prosecute for breaches of humanitarian law in the Bosnia-Herzegovina conflict. By resolution, the Security Council established a commission of experts to analyze the facts and to prepare for such proceedings. U.N. Security Council Res. 780 (1992). In a subsequent resolution, the Security Council specifically asked the commission to investigate the practice of "ethnic cleansing." U.N. Security Council Res. 787.

In an interim report, the commission told the Security Council that the material collected to date "reveals that large-scale victimization has taken place." Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), 26 January 1993, ¶9. In its report the commission referred specifically to a report it had received of a mission by the Conference on Security and Cooperation in Europe to detention camps in Bosnia-Herzegovina, and a mission to Bosnia-Herzegovina by the Moscow Human Dimension Mechanism of the C.S.C.E. The commission also referred to findings of the European Community's Investigating Mission into the Treatment of Muslim Women in the former Yugoslavia. Interim Report, op. cit. ¶12. This latter report was also noted "with grave concern" by the U.N. Security Council in a 1993 resolution. In that resolution the Security Council decided to establish a war crimes tribunal for trial of breaches of international humanitarian law "in the territory of the former Yugoslavia since 1991." It repeated its criticism of "ethnic cleansing" and made a determination that this practice constituted "a threat to peace and security." U.N. Security Council Resolution 808, U.N. Doc. S/RES/808 (1993).

That Yugoslavia understood that Resolution 808 was directed at violations committed by the Bosnian Serb forces in Bosnia-Herzegovina is indicated by the reaction to the resolution of Momcilo Grubac, Human Rights Minister of Yugoslavia. Mr Grubac

criticized Resolution 808, stating, "There is an international hysteria about the events in Bosnia-Herzegovina. The international public is not properly informed about what is going on there. There are many prejudices and prejudged stands regarding the guilt of one party and the innocence of the other parties involved in the conflict." "Federal Republic of Yugoslavia: F.R.Y. Human Rights Minister on Pitfalls of U.N. Resolution on War Crimes Tribunal," Yugoslav Telegraph Service (English), 2343 GMT, 23 February 1993, British Broadcasting Corporation, Summary of World Broadcasts, 25 February 1993 (Nexis).

The Security Council's Commission of Experts concluded that "ethnic cleansing" had been carried out "by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property." It characterized these acts as "crimes against humanity" and as well as "war crimes. Finally, it said that "such acts could also fall within the meaning of the Genocide Convention." Interim Report, op. cit. ¶56.

The cited reports, along with many compiled by non-governmental organizations, also cited by the commission, Interim Report, op. cit. ¶14, placed blame on the Bosnian Serb forces for atrocities in Bosnia-Herzegovina. The large number of such reports compiled by respected international organizations leave no room for doubt that Yugoslavia is aware of atrocities being committed by the recipients of its material aid and operational assistance.

Yugoslav officials have indicated that they are aware of that Yugoslav aid is facilitating unlawful actions by the Bosnian Serb forces. In the above-quoted statement of 11 May 1993, Serbian President Milosevic said, "Serbia has lent a great, great deal of assistance to the Serbs in Bosnia. Owing to that assistance they have achieved most of what they wanted." This statement indicates awareness that the Bosnian Serb forces were using Yugoslav aid to drive other nationalities from territory over which the Bosnian Serb forces sought to exert hegemony.

Yugoslavia is aware that the Bosnian Serb forces seek to take the bulk of the territory of Bosnia-Herzegovina, and to drive out Bosnian Moslems resident there. Bosnian Serb leader Radovan Karadzic has claimed two thirds of Bosnia-Herzegovina's territory for an anticipated Bosnian Serb state. "Serbian Leader Lays Claims to Bosnian Territory," Vienna Kurier, 27 February 1992, p. 3, translated into English in Foreign Broadcast Information Service, 27 February 1992, p. 34.

Regarding Yugoslavia's aims with respect to Bosnia-Herzegovina, General Zivota Panic, Chief of the General Staff of Yugoslavia, complained that Western countries were trying to take away Serbia's "Lebensraum" in Bosnia. "Serbs Will Fight to Bitter End, General Says," Reuters (dateline Bonn), 24 April 1993.

Finally, Yugoslavia is aware of the centrality of its assistance to the effort of the Bosnian Serb forces. The quoted statement of President Milosevic that those forces had achieved their goals "owing to" Yugoslavia indicates Yugoslavia's awareness that its material aid facilitated the commission of atrocities by the Bosnian Serb forces.

X. YUGOSLAVIA'S AID TO THE BOSNIAN SERB FORCES DIFFERS IN MATERIAL RESPECTS FROM THE U.S.A. AID TO THE NICARAGUAN CONTRAS THAT WAS AT ISSUE IN NICARAGUA V. U.S.A.

Under principles of liability followed by this Court in Nicaragua v. U.S.A., Yugoslavia is responsible for the atrocities committed by the Bosnian Serb forces. In Nicaragua v. U.S.A., this Court said that even if the United States supplied the "contras," and even if it exercised some direction over their target selection and military planning, nonetheless it was not responsible for acts the "contras" might commit in violation of the laws of warfare. Nicaragua v. U.S.A., ¶115. There was no evidence there of awareness by the U.S.A. that the "contras" would commit such acts. Such awareness was found only with respect to the assassination of Nicaraguan government officials, because of a manual written by the U.S.A. that suggested such assassination. For the writing of the manual, the Court held the United States responsible. 1986 I.C.J. ¶292(9).

The facts in the present case differ from those in Nicaragua v. U.S.A. in three critical respects. First, Yugoslavia and the Bosnian Serb forces make no secret of their close collaboration and of the fact that they share a common aim in Bosnia-Herzegovina. Yugoslavia readily acknowledges both that it provides material assistance and that the purpose of the assistance is to promote the stated aim of the Bosnian Serb forces. That aim is to take territory from the Bosnian Muslims in order to establish a Bosnian Serb state that would comprise two-thirds of the territory of Bosnia-Herzegovina. "Serbian Leader Lays Claims to Bosnian Territory," Vienna Kurier, 27 February 1992, p. 3, translated into English in Foreign Broadcast Information Service, 27 February 1992, p. 34. The aim is carried out through driving out civilian populations through terror created by the commission of atrocities.

In Nicaragua v. U.S.A., the United States alternatively denied the fact of the material assistance and denied that it gave the assistance with the aim (overthrow of the Nicaraguan government) espoused by the "contras." Here there is no denial

either of the material assistance or of an espousal of the aims of the aid recipients.

Second, Yugoslavia, at the time of providing material aid, was aware that the Bosnian Serb forces were carrying out a policy of expulsion that involved both the killing of members of certain groups, and other atrocities, as a means to secure their departure. The fact of such violations was widely disseminated by the international media and was further known to Yugoslavia through its contacts with the Bosnian Serb forces. This factual element was lacking in the Nicaragua v. U.S.A., where the violations being committed by the "contras" were not so widely known. This is a critical difference, because it brings Yugoslavia into responsibility under the criteria outlined above. Yugoslavia, at the time it provided material assistance, knew that the Bosnian Serb forces were perpetrating internationally wrongful acts and provided assistance nonetheless.

Third, whereas the "contras" were a rebel group within a well defined state, the Bosnian Serb forces seek not to become the government of Bosnia-Herzegovina but to establish their own state in a sector of Bosnia-Herzegovina's territory. The Bosnian Serb forces call themselves a state. Even though this state was not formally constituted or recognized, the Bosnian Serb forces, representing an aspirant "state," are farther from being a mere private grouping than were the "contras." Thus, the aid provided by Yugoslavia is more tantamount to aid to a state than was the situation in Nicaragua v. U.S.A.

What is required for liability is the provision of aid with awareness that it will be used wrongfully. In Nicaragua v. U.S.A., this Court at one point mentioned "control" as a possible criterion for liability. However, as Judge Ago pointed out in his separate opinion in Nicaragua v. U.S.A., it is not necessary, for responsibility, to establish "control." The Court in its opinion in Nicaragua v. U.S.A. had referred to "control" only because Nicaragua had asserted that the United States of America controlled the "contras." Nicaragua v. U.S.A., ¶277. Judge Ago aptly cautioned in his separate opinion against requiring "control" as an element of responsibility. Nicaragua v. U.S.A. (Judge Ago, separate opinion), ¶18, note 1.

The Court, to be sure, in its opinion in Nicaragua v. U.S.A., had not required "control" as a prerequisite for liability. Had there been compelling evidence of U.S.A. awareness of the atrocities committed by the "contras," the Court would have had to address that fact.

So long as the criteria indicated above are present, namely, that aid is given with awareness of its wrongful use, responsibility arises. Yugoslavia was aware that genocide was being committed, and that the laws of warfare as defined by the

Geneva conventions were being violated by the Bosnian Serb forces, yet it continued its aid. In the circumstances, it had open to it a ready means for stopping the violations, namely, it could have terminated material aid. Despite having this means open to it, Yugoslavia did not take advantage of it. Instead it continued its assistance to the Bosnian Serb forces, in order, in the quoted words of President Milosevic, to help the Bosnia Serb forces carry out their aims.

XI. YUGOSLAVIA, BY ESPOUSING THE AIMS OF THE BOSNIAN SERB FORCES, HAS ADOPTED THEIR ACTS AS ITS OWN.

As a second and additional basis of responsibility, Yugoslavia has adopted the acts of the Bosnian Serb forces. In the Tehran case, this Court held Iran responsible for the acts of private groups of young persons who occupied various diplomatic premises of the United States of America in Iran. As the Court analyzed the facts in that case, the initial occupations of diplomatic premises were carried out without the direction or encouragement of Iran, and thus the initial occupations were not acts of Iran as a state. However, several weeks after the initial actions, the government of Iran by decree said that the premises would remain occupied until the United States of America turned over to Iran for trial the former Shah, and that the majority of hostages "will be under arrest until the American Government acts according to the wish of the nation." 1980 I.C.J., p. 34, ¶73.

The Court said that this expression of policy turned the private acts into acts of Iran. "The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible." 1980 I.C.J., p. 35, ¶74. The Court arrived at this conclusion even though it did not find any material assistance by the government to the hostage-takers. The government of Iran, to be sure, omitted to act positively to free the hostages, but it did not assist the acts of the hostage-takers in a material fashion.

In the present case, the quoted statements by governmental authorities of Serbia and Yugoslavia indicate that Yugoslavia shares the aims of the Bosnian Serb forces. Given its provision of aid and its awareness of the atrocities committed by the Bosnian Serb forces, Yugoslavia has adopted their acts as its own, just as Iran did of the acts of the hostage-takers.

XII. YUGOSLAVIA IS RESPONSIBLE FOR THE ATROCITIES COMMITTED BY THE BOSNIAN SERB FORCES IN THEIR CAMPAIGN TO REMOVE MEMBERS OF OTHER GROUPS FROM BOSNIA-HERZEGOVINA.

Under general principles of state responsibility, and under the Genocide Convention and humanitarian law, Yugoslavia is liable for those atrocities committed by the Bosnian Serb forces

while Yugoslavia (1) was providing material aid, (2) was aware of the ongoing atrocities, (3) was aware that the aid would facilitate the commission of these atrocities. Yugoslavia's liability rests on its provision of aid for the commission of internationally wrongful acts, under principles of state responsibility. Its liability also rests on its failure to "ensure respect" by the Bosnian Serb forces for the laws of warfare. Its liability further rests on its complicity with the Bosnian Serb forces, as that concept is found in the Genocide Convention. In addition, Yugoslavia is responsible on the grounds that it adopted the actions of the Bosnian Serb forces as its own.

Increasingly during the twentieth century, the law has come to recognize that a state that provides aid to a wrongdoer, whether the wrongdoer be a state or a private party, can be just as serious a threat to the international legal order as the state or private party that directly carries out wrongful acts. This tendency was crystallized by the International Law Commission, in its Draft Articles on State Responsibility. If an international order based on the rule of law is to obtain, liability for aiding a wrongdoer must be a firm principle.

In domestic law, the historical development of liability was that liability first emerged for direct acts causing harm. Only later did the notions of accessorial liability come into the law. Similarly in international law, first there came an acceptance of the principle of direct liability, and only later did accessorial liability come to be recognized. In both domestic law and international law, this progression is a natural development. The increasingly sophisticated nature of the law as it develops comes to encompass more sophisticated types of wrongful behavior.

In the contemporary world, the provision of aid by states to other states or private groupings is a widespread phenomenon. In the many armed conflicts of the late twentieth century, outside states have been prominent as providers of material assistance. If an international legal order consonant with respect for the rights of others is to exist, this Court must find liability in these situations.

The principles enunciated by this Court in the Tehran and Nicaragua v. U.S.A. cases require a finding of liability in the present case. The Court has developed a jurisprudence on this topic that complements the postulates stated by the International Law Commission, applying those postulates to complex factual circumstances. The demands of the international legal order call for a finding of liability on the part of Yugoslavia for its facilitation of atrocities by the Bosnian Serb forces.