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CR 2006/18 (translation)

CR 2006/18 (traduction)

Tuesday 14 March 2006 at 10 a.m.

Mardi 14 mars 2006 à 10 heures

1 The PRESIDENT: Please be seated. Maître de Roux, you have the floor.

Mr. de ROUX: Thank you.

GENOCIDE

Introduction

1. Madam President, Members of the Court, it is a great honour for me to appear before you as counsel for Serbia and Montenegro. But the honour of asking you to render justice is also a heavy responsibility, as you are required to adjudicate upon a tragedy caused by the disintegration of a European State: the State of Yugoslavia, whose frontiers were internationally recognized. You are to adjudicate upon the disintegration of a great European State, that of the southern Slavs, a State created by the Versailles Treaty precisely for the purpose of preserving the stability of the Balkans. However, the geopolitical collapse of Yugoslavia was not the result of an ethnic conflict, since what we have here is the same population speaking the same language, even if there is a long history of relations between the Croats of the Empire and the Bosnians of the Ottoman Porte, as they were called at the time. It is true that nationalism and nationalities have always been at work in the Balkans, whose history, as Professor Stojanovic pointed out, has frequently been marked by fury and chaos, but is it possible to speak of genocide in connection with this most recent conflict which followed the dark years of the 1940s? Can it seriously be claimed that Belgrade devised, planned and decided on the extermination of the Croats and the Bosnians? Can it at the same time be claimed that the Croats and the Bosnians had decided to exterminate the Serbs, on the grounds that there are no longer any Serbs living in Croatian Krajina or even in Zagreb, and that the Serb districts of Sarajevo were emptied of their inhabitants? This historical issue is also a legal issue, since genocide is the crime of crimes. But is it possible today to burden the history of the Balkans with this ghastly crime — which, fortunately, was not committed — at the very time when tensions in the region are to be defused, at the very time when your Court's mission is to contribute to peace and vengeance is to be excised from the memory of peoples?

2. I wish to emphasize that the respondent State, Serbia and Montenegro, categorically condemns acts of genocide, and is one with the entire international community in considering that the crime of genocide is the most serious of crimes against humanity.

21 3. In the present case, this Court, in its Judgment on Preliminary Objections of 11 July 1996, without dealing with the question of the interpretation of the Genocide Convention, held that its only jurisdiction to entertain the case is on the basis of Article IX of the Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, para. 41). We shall therefore analyse the facts alleged by the Applicant, in order to demonstrate that they do not in any way fall within the scope of this Convention.

4. In our analysis of the alleged acts of genocide, we shall put forward the following arguments:

first: genocide is an ambiguous term used with different meanings in both the legal and the political sphere: unfortunately, this term is trivialized in every conflict by declarations of a political nature;

second: in law, and under the terms of the Genocide Convention, *only* the acts enumerated in Article II of the Convention can constitute genocide;

third: since the commission of genocide can take one of the forms mentioned in Article III of the Convention, the Applicant should have stated expressly which form or forms it was referring to;

fourth: the Applicant should have specifically indicated *the group* alleged to have been subjected to genocide;

and last: since genocide can be perpetrated only by natural persons motivated by a specific intent to destroy a national, ethnical, racial or religious group in whole or in part, that specific intent must be established by the Applicant, and the natural persons alleged to have committed the crime must be identified.

5. We are faced with a series of heinous, revolting and cruel acts recounted by the Applicant throughout its written pleadings and reiterated in its oral pleadings. These acts, all these acts, are

certainly criminal and we can only agree with the finding made by this honourable Court on 13 September 1993, when it held that:

> "great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 348, para. 52).

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6. However, the fact that the population suffered through an extremely cruel war with substantial loss of human life is not sufficient to constitute genocide. The criminal acts which generated losses and suffering were no doubt committed on the territory of Bosnia and Herzegovina, as no one can deny. However, these acts, which unfortunately are inextricably bound up with the war, do not constitute genocide because, no matter how unconscionable and criminal they may be, they do not meet the material and moral requirements for them to be characterized as the international crime of genocide.

7. Madam President, Members of the Court, as you know, the crime of genocide was defined by reference to the destruction or attempted destruction of the Jewish people by the Nazi régime. Although this has already been mentioned by Professor Stojanovic, I should like to recall that six million Jews perished in the Second World War, that is to say an estimated 67 per cent of the Jewish population of Europe. It is sufficient to refer to the size of the Bosnian Muslim population to observe that, fortunately, such figures were never even remotely achieved. The events that took place in Bosnia and Herzegovina at the end of the twentieth century, 50 years after the Nazi madness, certainly have distant roots in the Second World War, but we shall demonstrate without difficulty that, despite the extreme horror of the war, no genocide was committed.

8. The Judgment rendered by the Nuremberg International Military Tribunal on 30 September and 1 October 1946 was the first judgment for the purpose of punishing acts perpetrated with the intention of destroying certain human groups. That judgment punished the crimes committed during the Second World War which I have just mentioned. The existence of the crime of genocide under international law was confirmed by the United Nations General Assembly. Resolution 260 (III) A of 9 December 1948 on the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (more commonly known as the "Genocide Convention")

established this crime in international law. The Convention entered into force on 12 January 1951 and has become one of the essential instruments for the protection of human rights throughout the world.

13 9. Your honourable Court has already held, in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, that the principles underlying the Convention "are recognized by civilized nations as binding on States, *even without any conventional obligation*". According to this Court, the Genocide Convention is intended to be a convention of universal scope; it has a "purely humanitarian and civilizing purpose", and the "contracting States" have neither "individual advantages or disadvantages", nor "any interests of their own", but a "common interest" *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951)*. The same reasoning was used in this case in the Court's 1996 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, paras. 22 and 31).

10. Today, the universal scope of the Genocide Convention is no longer in any doubt or subject to any discussion. Numerous legal instruments have explicitly recognized this general obligation on States.

11. At the time of the establishment of the International Criminal Tribunal for the former Yugoslavia, the Secretary-General wrote in his report of 3 May 1993, drawn up pursuant to paragraph 2 of Security Council resolution 808 (1993), that the Genocide Convention is part of international humanitarian law which has become part of international customary law[1]. And he went on to explain:

> "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951."[2]

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[1] Report of the Secretary-General of 3 May 1993, United Nations doc. S/25704, para. 35.

[2] *Id.*, para. 45.

12. Moreover, the international tribunals set up by the United Nations in recent years have all proclaimed genocide the crime of crimes[3]. The International Criminal Tribunal for Rwanda also

44 noted that the crime of genocide is considered an integral part of international customary law and, moreover, a norm of *jus cogens*[4].

I. The ambiguity of the concept of genocide

13. Thus, Madam President, Members of the Court, we are dealing with the crime of crimes. It is only natural that it should be the subject of particularly serious and painstaking consideration. In fact, the "*legal*" definition of genocide frequently differs from the "*political*" conception of the term, widely used in the language of journalists, for example, in relation to serious events, and also sometimes by the representatives of States in the work of international organizations or at meetings held in connection with crises or conflicts.

14. Because this term is ill-defined in common political usage, it describes all sorts of heinous acts and atrocities. It underscores the massive scale of a crime and sometimes serves propaganda purposes in order to rouse the international community and stir its conscience.

15. When the term genocide is used in this way, it obviously does not take account of the legal requirements by which we here are bound; it merely describes the iniquity of a particular form of conduct. The legal term, on the other hand, is an extremely precise concept, which is rigorously defined in the relevant instruments.

16. This distinction between the *political* and *legal* use of the term genocide is an important one, as the Applicant relies in fact on the use of the term genocide in various reports and in the resolutions of various United Nations bodies without differentiation. However, as regards these texts — as you well know — a distinction must first be made between Security Council resolutions, General Assembly resolutions and then the different reports cited by the Applicant, including those by the Commission of Experts and the United Nations Special Rapporteur for Human Rights. These resolutions and reports are, of course, a source of information. They are not

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[3]ICTY, *Prosecutor* v. *Stakic*, case No. IT-97-24-T ("*Stakic* case"), Trial Chamber II, Judgement, 31 July 2003, para. 502; ICTR, *Prosecutor* v. *Kambanda*, case No. ICTR-97-23-S ("*Kambanda* case"), Trial Chamber, Judgement, 4 September 1998, para. 16.

[4]ICTR, *Prosecutor* v. *Kayishema and Ruzindana*, case No. ICTR-95-1-T ("*Kayishema* case"), Trial Chamber, Judgement, 21 May 1999, para. 88: and similarly, *Prosecutor* v. *Rutaganda*, case No. ICTR-96-3-T ("*Rutaganda* case"), Judgement, 6 December 1999, para. 46.

a source of law. Moreover, the credibility of such information still has to be established in these
55 proceedings and, in any case, such resolutions and reports cannot validly determine the legal characterization of the acts described.

17. So then, among all the instruments which have been cited at length, the Security Council resolutions obviously have the highest value in legal terms. Indeed, States are bound by the resolutions of the Security Council. However, though binding on States, Security Council resolutions are still political resolutions adopted by the political organ of the United Nations.

18. Moreover, it is important to emphasize that Security Council resolutions with binding force are adopted in the context of the mandate for the maintenance of international peace and security conferred on the Security Council. In fact — and this is particularly true for the Balkans — the objectives of the mandate for the maintenance of international peace and security may coincide with the requirements of justice, but may also diverge therefrom. Consequently, the Security Council, having limited legislative authority as the political organ of the United Nations, is not empowered to undertake a legal characterization of the facts, but merely assesses their political importance and significance in the context of its mandate for the maintenance of international peace and security.

19. A legal characterization of the facts can only be undertaken by your Court in connection with disputes between States, or by another national or international judicial organ when the establishment of individual responsibility is involved. The Security Council may, of course, establish such international judicial bodies in order to deal with threats to international peace or security.

20. By resolution 808 (1993) of 22 February 1993, the Security Council decided to establish the International Criminal Tribunal for the former Yugoslavia, responsible precisely for the prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia[5]. In its resolution 827 (1993), the Security Council adopted the Statute for the Tribunal, Article 4 of which specifically identifies the crime of genocide as one of
66 the crimes falling within the jurisdiction of the Tribunal. And Article 4 of the Tribunal's Statute

[5]Security Council resolution 808 (1993), Art. 1.

reproduces word for word, without changing a single comma, Articles II and III of the Genocide Convention.

21. What is interesting is the fact that the Security Council appears to have been reluctant to include the crime of genocide within the jurisdiction of the Tribunal, but that it did so eventually. Indeed, a re-examination of resolutions 808 and 827 (1993) reveals no mention whatsoever of this crime. The resolutions in question merely refer to the Geneva Conventions, which are central to humanitarian law but not relevant to genocide, as they quite simply do not deal with that subject.

22. On the other hand, and contrary to the resolutions setting up the Tribunal for the former Yugoslavia, genocide is specifically mentioned in resolution 955 (1994) by which the Security Council established the International Criminal Tribunal for Rwanda. In that resolution, the Security Council decided to establish an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law[6].

23. It is interesting to note the different language used by the Security Council when adopting the resolutions establishing the two international tribunals. This difference clearly demonstrates the reluctance of the Members of the Security Council to characterize the acts committed on the territory of the former Yugoslavia as genocide.

24. Finally — and this is not without significance — even if the Security Council is not qualified to undertake a legal characterization of the facts and, hence, to establish the existence of genocide, *no* resolution of the Security Council refers to genocide in the context of the conflict in the former Yugoslavia. This is all the more important as the Security Council has adopted a large number of resolutions on this conflict. On the other hand, the Security Council uses the term genocide in its resolutions relating to the Rwandan conflict, particularly resolutions 925, 935 and 955 (1994)[7]. The Security Council has always been reluctant to use the term genocide in relation to the situation in the former Yugoslavia, unlike in the Rwandan conflict, simply because the purpose of the civil war in Bosnia and Herzegovina was clearly not the destruction of an ethnical, national,

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[6]Security Council resolution 955 (1994), Art. 1.

[7]Resolution 925 (1994) of 8 June 1994, resolution 935 (1994) of 1 July 1994 and resolution 955 (1994) of 8 November 1994.

77 racial or religious group, and because the intention to commit genocide did not emerge as one of the war aims in Bosnia and Herzegovina, whereas it was the key to the Rwandan conflict.

25. Turning now to the United Nations General Assembly, we find that it uses the term genocide in certain resolutions, particularly resolutions 47/121 and 47/147 (1992), but a re-examination of these resolutions reveals, interestingly, that the Assembly draws no conclusions. The United Nations General Assembly merely calls for consideration to be given to the extent to which the acts committed in Bosnia and Herzegovina and in Croatia constitute genocide, in accordance with the Convention. It is obvious that, if the General Assembly had been convinced of the existence of genocide, it would have worded its resolution differently; it would not have contented itself with merely raising the issue.

26. All the other subsequent resolutions adopted by the United Nations General Assembly, which could be considered to contain a reference to genocide (resolutions 48/88 (1993), 48/143 (1993) and 48/153 (1993) of 20 December 1993 and 49/205 (1994) of 23 December 1994) refer only to those first two resolutions. And while some of these resolutions[8] speak of the prevention of the crime of genocide, none claims or maintains that genocide was committed in Bosnia and Herzegovina. It cannot therefore be argued that the facts constituting the alleged crime have been established, in relation to the situation in Bosnia and Herzegovina, by any General Assembly resolution.

27. What is more, the General Assembly does not have that power, and as the honourable Professor Pellet has said: "The Assembly is a political forum rather than a dispute settlement body."[9]

28. We are convinced, therefore, that your Court cannot accept the Applicant's assertion that the United Nations General Assembly authoritatively determined the existence of facts and the legal classification of those facts (Memorial, para. 3.3.2.5), thereby depriving your Court of its role.

29. There is no doubt that numerous crimes were committed during the Bosnian tragedy, as they were throughout the territory of the former Yugoslavia. The Applicant, in its various written

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[8]General Assembly resolution A/RES/48/88, 20 December 1993, preamble.

[9]*Droit pénal international*, Nguyen Quoc Dinh, Patrick Dallier and Alain Pellet, 5th ed., Paris, LGDJ 1994, p. 802, para. 528.

88 pleadings, speaks of large-scale crimes, and on this point we can only agree, since the crimes were, quite obviously, committed on a large scale. It is, moreover, in this context that one must review the resolutions of the United Nations General Assembly. Their purpose was to alert world opinion and to put an end to the unlawful acts, irrespective of their precise legal characterization. Moreover, this is not the first time that the General Assembly has made political use of the term genocide. You will recall that it did so to describe the situation in Palestine in its resolution 37/123 of 16 December 1982, where it declared in much more explicit terms and without any ambiguity that it:

> "1. *Condemns* in the strongest terms the large-scale massacre of Palestinian civilians in the Sabra and Shatila refugee camps;
>
> 2. *Resolves* that the massacre was an act of genocide."

30. However, no one has ever tried, on the basis of this resolution, to bring to justice on charges of genocide the authors of the crimes committed at Sabra and Shatila, although their identities are known, no doubt because the conception of genocide expounded by the United Nations General Assembly stood outside the legal framework of the Genocide Convention and went beyond the elements prescribed for the definition of an offence.

31. Concerning the reports of various committees, and without going into the veracity of the facts alleged in those reports, as cited by the Applicant, to which my colleague Saša Obradović has already referred, we can only say that those reports were written to raise public awareness and, in the case of the Commission of Experts, to record testimony and safeguard the evidence of criminal acts that had been committed.

32. The Commission of Experts established on 6 October 1992 by Security Council resolution 780 (1992) was set up initially to provide the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law. Following the establishment of the Tribunal for the former Yugoslavia, *all* the information collected by the Commission was transferred to the Prosecutor of the Tribunal. In its final report, the Commission does in fact acknowledge the existence of grave breaches of the

99 Geneva Conventions and of international humanitarian law in general[10]. International humanitarian law certainly encompasses breaches of the Geneva Conventions, of the laws and customs of war, commonly known as war crimes, and crimes against humanity. Breaches of international humanitarian law may also include genocide, but there is no indication that the Commission of Experts intended such inclusion. Nothing in the report provides a basis for the conclusion that the Commission of Experts found evidence of genocide in the events in Bosnia and Herzegovina; the report proves nothing. On the other hand, in referring the matter to the Prosecutor of the International Criminal Tribunal, it simultaneously instructed that Prosecutor to review and investigate allegations of the commission of genocide in Bosnia and Herzegovina in the course of those events.

33. This brings us finally to what your Court will find most enlightening, namely the search for truth by the International Criminal Tribunal for the former Yugoslavia. At the conclusion of its numerous proceedings, that Tribunal, a judicial institution, seldom accepted the factual findings of the various committees, including the Commission of Experts, cited by the Applicant. In most instances, the judges on the Tribunal, in their judgments and sentences, established a factual situation completely different from that described in the findings and reports of the committees.

34. The Genocide Convention is therefore the only international instrument which provides a legal definition of the crime of genocide, the only definition of interest to us in these proceedings.

35. Let us review that definition, which is simple and concise: Article II of the Convention states that genocide is a crime committed *with intent* to destroy, in whole or in part, a national, ethnical, racial or religious group. In the absence of such intent to destroy a group, no act, however reprehensible it may be, constitutes genocide.

36. It is true that genocide is an international crime, defined by international law, but the legal concept of genocide belongs to criminal law. And like any norm creating a criminal offence, it precisely determines the elements of that criminal act, which are the following:

20 1. *the material element* comprising the different material acts potentially constituting the *actus reus* of genocide; and

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[10]Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), S/1994/674, paras. 311 and 322.

2. *the moral element*, that is to say the element of intent or *mens rea*.

37. It should be borne in mind that, although this is an international crime under international law, it is governed primarily by a rule of criminal law, which, like any rule of criminal law and in accordance with the principles of criminal law, must be interpreted rigorously and restrictively.

38. Of course, today's proceedings are intended to determine the responsibility of a State, but for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State or that the genocide was committed in a territory where the State should have exercised its authority in order to prevent genocide or to punish the perpetrator or perpetrators, and failed to do so.

II. The material element of the crime of genocide

39. The material acts which constitute the crime of genocide are listed in Article II:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

40. The Applicant alleges that Serbia and Montenegro committed genocide, by way of the acts indicated in the Article, as well as by other acts which, according to the Applicant, can also be included within the definition of genocide.

210 41. Contrary to what the Applicant claims (Reply, Chap. 2, para. 40 and Chap. 6, para. 6), it seems clear that the list in Article II of the Convention is exhaustive. The rules of criminal procedure in all countries demand a strict interpretation of the relevant texts, according to the old maxim *nullum crimen sine lege, nulla poena sine lege* (no crime can be committed and no

punishment can be imposed without an existing law). The fact that international criminal law is to be interpreted strictly is borne out by Article 22.2 of the recent Statute of the International Criminal Court, which stipulates that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

42. And the jurisprudence of the International Criminal Tribunal for the former Yugoslavia also indicates that genocide can only be constituted by the acts mentioned by Article II of the Convention, which are the same as those — as I said earlier — included in Article 4.2 of the ICTY Statute, as it was copied directly from the Convention. Thus, in its judgment in *Brdjanin* case, Trial Chamber II ruled that genocide is characterized by one or several of the acts *(actus reus)* enumerated in Article 4.2 of the Tribunal's Statute[11].

43. To engage the responsibility of a State, however, the conduct of an individual himself capable of engaging the State must be shown to be criminal, as criminal law can only ascribe a crime to a physical person.

44. In either case, only the acts listed in Article II of the Convention can constitute the *actus reus* of the crime of genocide.

45. In its Reply (Chap. 2, para. 44), the Applicant endeavoured to convince the Court that there has been a development in the notion of genocide since the Convention was adopted and that it should now be construed in a broader sense. And the Application refers to the Judgment of your Court of 19 December 1978 (Reply, Chap. 2, para. 45), in an area far removed from criminal law, since the case concerned was the *Aegean Sea Continental Shelf* case *(Greece* v. *Turkey)*. The Applicant sought on this basis to indicate that your Court had extended the way in which a treaty may be applied: the meaning of an expression in a treaty is assumed to follow "the evolution of the law and to correspond to the meaning attached to the expression by the law in force at any given time". However, the Applicant quotes only part of the sentence, which has, moreover, been completely taken out of the context of the Judgment, to an extent where, I feel, it can be misleading and deform the real meaning of the Judgment. In the Judgment concerned, the Court stressed the

[11]ICTY, *Prosecutor* v. *Radislav Brdjanin*, case No. IT-99-39-T, Judgement, 1 September 2004, para. 681.

difference between various international instruments, clearing establishing that, while certain instruments are open to interpretation according to the law in force at any given time, others must be strictly construed according to the meaning implied by the language of the signatories at the time when they were adopted (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, para. 77).

46. And the Applicant forgets, once again, that the Genocide Convention is not merely an international treaty, but also an instrument of criminal law which defines the elements of the crime, is directly applicable to individuals and applicable in all States, so that a strict approach to interpretation clearly prevails.

47. Nevertheless, I think that this debate, like many others in this case, is highly theoretical and of little significance, because the notion of genocide has not evolved since the Convention was adopted. In this respect, it should be noted that the language of Article II has been literally copied in full into the basic documents of all of the international judicial organs with jurisdiction in respect of genocide, without the slightest comma being altered. At the time when the Tribunal for the former Yugoslavia was established, the Secretary-General expressly indicated in his report that Article 4.2 of the Tribunal's Statute was a reproduction of the relevant measures contained in the Genocide Convention[12] and the same was true of Article 2.2. of the Statute of the International Criminal Tribunal for Rwanda.

48. Since all the international instruments concerned with genocide, of which the latest, the Statute of the International Criminal Court, which came into force on 1 July 2002, use the terms of the Genocide Convention word for word, it would appear difficult to argue that there has been a change or evolution of any kind in the notion of genocide, which is now set in stone. In its written submissions, the Applicant continually tried to enlarge the legal definition of genocide, as if that set

23 out by Article II of the Convention was insufficient for it or hindered it in its approach to the matter. The broad interpretation invoked by the Applicant merely demonstrates its predicament relative to the established notion and cannot really be seriously entertained.

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[12]Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, doc. S/25704, para. 46.

49. The acts which represent the material element of the crime of genocide are first of all common law crimes. They can also constitute other international crimes, such as crimes against humanity and war crimes. They constitute genocide when they take place — and this is the essential difference — as part of a precise scheme, with particular intent. In order to distinguish between a murder under common law, a murder that is a war crime or crime against humanity, and a murder constituting genocide, certain well-defined legal requirements must be met.

50. The jurisprudence of the two International Tribunals, for the former Yugoslavia and for Rwanda, has explained in detail the grounds for prosecution under Article II of the Convention. Those acts have also been detailed in a recent document establishing "Elements of Crimes", adopted by the Assembly of States Parties to the Rome Statute on 9 September 2002, to be used by the International Criminal Court in order to interpret and apply the Articles of the Rome Statute[13].

51. Since the Applicant contends that the genocide in Bosnia was constituted by the perpetration of each of the acts set out in Article II of the Convention, we shall examine the meaning of each of the clauses of Article II of the Convention: (i) killing, (ii) causing serious bodily or mental harm, (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

52. Measures intended to prevent births within the group and forcibly transferring children of the group to another group will be examined together, as these two of the Applicant's charges are essentially based upon the allegations of rape, and I will let Ms Nataša Fauveau-Ivanovic deal with that sensitive issue.

24 53. Before analysing the legal components of each of the physical acts constituting genocide, I will briefly review the facts cited by the Applicant in its successive written and oral pleadings, which it regards as constituting genocide.

[13] "Elements of Crimes", doc. ICC=ASP/1/3, Introduction, para. 1.

(i) Killings

***(a)* Acts presented by the Applicant as acts of genocide by killing**

54. The Applicant alleges the killing of thousands of non-Serbs (Reply, Chap. 5, para. 10 and Memorial, para. 2.2.2) — considering non-Serbs as a group — throughout Bosnia and Herzegovina and indicates that killings of civilians took place in various towns throughout Bosnia and Herzegovina, notably in Bosanski Brod, Derventa, Bijeljina, Kupres, Foca, Zvornik, Visegrad, Bosanski Samac, Vlasenica, Brcko, Prijedor, Sarajevo, Mostar, Srebrenica, Zepa and Gorazde. These killings were alleged to be the result of a campaign aimed at the destruction of a national, ethnical, racial or religious group.

55. The Applicant does not provide detailed allegations for all of these towns and villages. Its presentation was limited to the Bosanska Krajina region of Western Bosnia and notably the towns of Prijedor and Kljuc, and subsequently to Brcko, a town in northern Bosnia, Sarajevo and western Bosnia (Bijeljina, Zvornik, Visegrad, Foca and Srebrenica).

56. We will therefore examine what occurred in these regions and municipalities mentioned by the Applicant; to which must be added the killings in the internment camps located in the aforementioned regions and towns.

57. As I have already indicated, we do not deny that a great many people were killed in the horrific civil war in Bosnia and Herzegovina, fuelled by centuries-old animosities, nor that killings of civilians took place. Certain of these killings indeed occurred inside the camps, which showed little respect for the laws and customs of war.

58. While the killing of civilians definitely represents a crime, in a civil war situation it is not always possible to differentiate between military personnel, sometimes fighting without uniforms, and civilians and this proved particularly difficult throughout this conflict.

59. Moreover, in its Reply (Chap. 5, para. 56), the Applicant admits that 90 per cent of the persons reported missing were men. Such a proportion clearly demonstrates that the majority of the victims were engaged in some way in combat or represented a military threat to the other side. While the killing of combatants can, in certain circumstances, constitute a war crime, the purpose of any war is, unfortunately, to neutralize the military force of the adversary through its elimination.

60. When discussing the military losses resulting from conflicts in general, and arbitrary killings in particular, there is a tendency towards inflating these losses, which is as true in Yugoslavia as elsewhere. Before undertaking an analysis of the number of victims alleged by the Applicant, I would like to emphasize just how difficult such a venture is. It is difficult because it can appear obnoxious to compute victims and suffering. Each victim deserves compassion and suffering should prompt remorse, but the elements themselves of the crime of genocide oblige us, against our will, to engage in this morbid arithmetic in order to rebut the Applicant's claims.

61. The Applicant claims, for example, that in the village of Hambarine, located in western Bosnia in the Bosanska Krajina region, 1,000 people were killed in May 1992 (Reply, Chap. 2, para. 22). The number of victims cited by the Applicant is based on a report by the Special Rapporteur of the United Nations Commission on Human Rights, Mr. Tadeusz Mazowiecki[14]. But for the tragic circumstances, such a statement could be described as far-fetched, given that the Tribunal for the former Yugoslavia in the *Brdjanin* case established the number of certain fatalities in Hambarine during these events in May 1992 at three[15]!

62. Similarly, with respect to the events in Kozarac, which is in the region of Prijedor, one of the most contested regions, the Applicant indicates that 5,000 people were killed (Memorial, para. 2.2.2.11). The Applicant's estimate is again based on a United Nations report[16]. The events in Kozarac, as one would expect, have been extensively investigated by the Tribunal for the former Yugoslavia and have given rise to a number of prosecutions and, therefore, several judgments.

26 63. In the *Tadic* case, the first on which the Tribunal ruled, the judges found that 800 people had been killed in Kozarac[17]. However, in the *Brdjanin* case, the latest with respect to the region concerned to have come before the Tribunal, the judges found, in their judgment, that the number of Bosnian Muslims killed in Kozarac was at least 80[18], while the total number of people killed

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[14]Sixth periodic report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, A/47/6661, S/24809, 17 Nov. 1992, p. 8, para. 17 *(c)*.

[15]ICTY, *Prosecutor* v. *Brdjanin*, Judgement, 1 September 2004, para. 401.

[16]Special Rapporteur's Report: Situation of Human Rights in the Territory of the Former Yugoslavia, United Nations doc. A/47:666, S/24809, 17 November 1992.

[17]ICTY, *Prosecutor* v. *Dusko Tadic*, case No. IT-94-1-T, sentencing Judgement, 7 May 1997, para. 565.

[18]ICTY, *Prosecutor* v. *Brdjanin*, Judgement, 1 September 2004, para. 403.

(Bosnian Muslims and Croats) in Kozarac and its surroundings did not exceed 140[19]. This is certainly a horribly high number, but it is, nevertheless, a long way short of the figure of 5,000 claimed by the Applicant.

64. The worrying thing is that this figure of 140 is not only significantly below the figure indicated in the report cited by the Applicant, but it is also very much lower than the one established by the very same Tribunal in its judgment on the first case seven years earlier. It would be logical for the number of victims to be higher in the later cases than in the earlier ones, as logically not all of the victims would have been recorded at the outset. In ICTY jurisprudence, however, we can see the opposite, as the number of victims diminishes over time. This clearly demonstrates that emotion and propaganda lead to a systematic overestimation of the number of victims and with time, as a result of professionally conducted investigations, the number of victims, high as it might be, proves to be significantly lower than the wartime estimates.

65. The Applicant alleges, based on a 1993 report by the Human Rights Committee[20], that around 15,000 people were killed, interned or obliged to perform forced labour in the region of Kljuc (Memorial, para. 2.2.2.3). As internment and forced labour do not constitute acts of genocide, the Applicant should have indicated the number of people killed. Since the Applicant did not indicate this number, we will, once again, refer to the judgment of the Tribunal for the former Yugoslavia in the *Brdjanin* case, which found that in the whole of the Bosanska Krajina region, in which the municipality of Kluc is located, and which also comprises the region of Prijedor, the number of people killed in 1992, during the worst crimes in the region, totalled 1,669[21]. More specifically, in the municipality of Kljuc, the judgment refers to the villages mentioned by the Applicant in its Memorial, that is Velgici, Krasulje, Pudin Han and Gornja Sanica, and concludes that 103 people were killed there, of which at least 98 were men[22].

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66. With respect to all of the municipalities mentioned by the Applicant in its written and oral presentations, the Tribunal for the former Yugoslavia, which has examined these acts, these

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[19] *Ibid*., para. 476.

[20] Human Rights Committee Report, 27 April 1993; p. 13 (CCPR/C/89).

[21] ICTY, *Prosecutor* v. *Brdjanin,* Judgement, 1 September 2004, para. 465.

[22] *Ibid*, para. 423-427 : according to the Judgement three people were killed in Pudin-Har (para. 423), 33, including two women, in Prhovo (para. 424 and 426) and 77 men in Velagici (para. 427).

serious, dramatic events, has never characterized them as genocide according to Article 4.2 of its own Statute.

67. Let us now turn to events in Srebrenica, which probably constituted the most dreadful crime committed during this war. In the case of General Krstic, who was sentenced to 35 years' imprisonment, and to which we will return later, the Tribunal estimated that 7,000-8,000 men[23] of combat age were executed. Other judgments are pending with a view to shedding light on what actually happened in this enclave under the protection of international forces. In this respect, we note again in our own morbid arithmetic divergences in the number of victims in the various cases related to Srebrenica before the Tribunal. Thus, the widely accepted figure of 7,000-8,000 people does not correspond to the number of victims indicated in the indictment of General Mladic, who has yet to be arrested, in which the total number of victims of executions in Srebrenica — and this is only the indictment — amounts to 5,390 people exactly[24]. The figure of 8,000 has recently been challenged by the Canadian General Lewis MacKenzie, the first commander of the UNPROFOR in Bosnia and Herzegovina. General MacKenzie is of the opinion that the evidence presented to the
28 Tribunal in The Hague casts serious doubt upon the figure of 8,000 Muslims killed. In his article "The Real Story Behind Srebrenica", this number includes 5,000 people reported as missing and the victims of three years of intense combat in the region. General MacKenzie logically concludes that "[t]he math just doesn't support the scale of 8,000 killed"[25]. Once again, we are not denying the reality of the appalling crime committed at Srebrenica, but in the present case we must keep to the facts as they are. And these facts do not constitute genocide.

68. Finally, to provide an idea of the approximate nature of the Applicant's allegations, we can note that its Memorial devotes much space to the story of Borislav Herak, a Bosnian Serb who is supposed to have murdered a Bosnian Muslim man. This story, which accounts for so much space, is entirely false, because Borislav Herak simply did not kill anybody and his supposed

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[23]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, para. 2.

[24]ICTY, *Prosecutor* v. *Ratko Mladic*, case No. IT-95-5/18, Amended Indictment, 8 November 2002, Annex B (Murders 1995).

[25]General Lewis MacKenzie, "The Real Story Behind Srebrenica", *The Globe and Mail*, 14 July 2005, reproduced by www.transnational.org/features/2005/MacKenzie_Srebrenica.html.

victim is still very much alive[26]. The truth of Herak's story was reported by Agence France Presse on 28 February 1997; the story was also carried by *The New York Times* on 1 March 1997, the *Washington Post* on 15 March 1997 and *The Guardian* on 26 March 1997. The story of Borislav Herak provides no evidence of the torture which the Serbs are supposed to have used. The whole story proved to be false and a complete invention.

69. But the Herak case, on which I will concentrate for a moment, is interesting because it sheds light on the role of propaganda in this conflict. Everybody knows that in modern warfare, propaganda — disinformation — is a weapon as effective as a number of divisions; and Bosnia and Herzegovina made frequent use of it in order to portray itself to international public opinion as an innocent victim. Bosnia and Herzegovina very rapidly understood that the major stake in the conflict was to appear as weak and innocent and confronted by strength, that it had to attribute the "good" and the "bad" roles right at the start of the action, as it were. To this end, Bosnia and Herzegovina engaged the services of a reputed American public relations agency, Rudder & Finn Global Public Affairs, whose mission was to convince international public opinion that the
29 Muslims of Bosnia and Herzegovina were in fact the victims of a genocide. However, people in the public relations industry are talkative and, when they make such a good job of an assignment, they find it difficult not to inform others about it.

70. In an interview in October 1993, Mr. James Harff, the director of this agency, confirmed that Rudder & Finn Global Public Affairs was working for the Republic of Croatia, for Bosnia and Herzegovina and for Kosovo. In the interview, Mr. Harff stated:

> "by a single move we were able to present a simple story of good guys and bad guys, which would hereafter play itself. We won by targeting Jewish audience. Almost immediately there was a clear change of language in the press, with the use of words with high emotional content, such as 'ethnic cleansing', 'concentration camps', etc., which evoked images of Nazi Germany and the gas chambers of Auschwitz. The emotional charge was so powerful that nobody could go against it."

And Mr. Harff continued:

> "Our work is not to verify information. We are not equipped for that. Our work is to accelerate the circulation of information favorable to us, to aim at judiciously

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[26]AFP, wire story of 28 February 1997; "Jailed Serbs, Victims Found Alive, Embarrassing Bosnia", by Chris Hedges, *The New York Times*, 1 March 1997; "Serb Convicted of Murders Demanding Retrail After 2 Victims Found Alive", by Jonathan Randall, *Washington Post*, 15 March 1997; "War Crimes Put Justice in the Dock" by Karen Coleman, *The Guardian*, 26 March 1997.

> chosen targets. We did not confirm the existence of death camps in Bosnia, we just made it known that 'Newsday' affirmed it . . . We are professionals. We had a job to do and we did it. We are not paid to be moral."[27]

71. The propaganda that Bosnia and Herzegovina engaged in bore fruit. It must be said that, in this, the Sarajevo authorities and President Izetbegovic proved particularly skilful, to the extent that their own war aims were quickly forgotten. It is obvious that the Application made to this Court is, to a large extent, part of this strategy. The number of victims and the description of events in the Herak case are evidence of this.

Madam President, I would like to ask for a break, if you would be so kind, before continuing with my discussion of the legal definition of killing as a constituent act of genocide.

The PRESIDENT: Yes, Maître de Roux, we will take an early break now of 15 minutes.

The Court adjourned from 11.10 to 11.25 a.m.

30 The PRESIDENT: Please be seated. Maître de Roux.

Mr. de ROUX: Madam President, Members of the Court, I shall now return to the legal definition of "killing", material element of genocide.

(b) ***The legal definition of killing, material element of genocide***

72. "Killing" as referred to in Article II *(a)* of the Genocide Convention calls for no special comment. It falls within a legal category known to the law of all civilized countries. However, to be a component of genocide, the act of killing must be accompanied by a pre-existing genocidal intent. An examination of the preparatory work for the Genocide Convention clearly shows that the crime of genocide, over and above its constituent physical acts, necessarily includes premeditation.

73. Killing *per se*, a crime generally covered by national law, including the criminal law of the former Yugoslavia, can, under international criminal law, also be a war crime, a crime against humanity or an act of genocide, according to the manner in which it is characterized.

74. However, the specific requirements of genocide are not met in the present case.

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[27]Yohanan Ramati, "Stopping the War in Yugoslavia", published in *Midstream — A Monthly Jewish Review*, April 1994 ; htpp://www.balkanpeace.org./cib/bac/bac09.shtml.

75. In its written pleadings the Applicant refers very frequently to the systematic nature of the killings. Admittedly killings were carried out in the territory of Bosnia and Herzegovina during the armed conflict involving the three ethnic, national and religious communities living in that State. In this context it is doubtless possible to speak, as the Applicant does, of large-scale killings in Bosnia and Herzegovina. However, that does not amount in law to genocide.

76. Of course, the systematic nature of the killings may constitute a crime against humanity. Thus Article 3 of [the Statute of] the International Criminal Tribunal for Rwanda requires that, for a murder to be characterizable as a crime against humanity, it must be committed as part of a

31 widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The Secretary-General further stated in his report on the creation of the Tribunal for the former Yugoslavia that "crimes against humanity" means "extremely serious inhuman acts such as intentional homicide, torture or rape committed as part of a widespread or systematic attack against a civilian population . . ."[28]. Under Article 7 of the Statute of the International Criminal Court, "crime against humanity" means "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Thus it is their widespread and systematic character that can make killings a crime against humanity. On the other hand, that widespread and systematic character is not enough *per se* to constitute the crime of genocide, the specific aim of which is to eradicate an ethnical, national, racial or religious group.

77. To support its thesis of systematic killings, the Applicant cites various documents from the Tribunal for the former Yugoslavia (indictments, judges' orders confirming indictments, decisions pursuant to Rule 61 of the Tribunal's Rules of Procedure and Evidence, decisions on motions for acquittal pursuant to Rule 98*bis* of the Tribunal Rules, Trial Chamber judgments and Appeals Chamber decisions), as if all this — as if all these procedural or judicial decisions, of form or of substance — could constitute proof. And that brings us, as I was saying to you just now, to the question of the hierarchy of United Nations decisions. From a strict legal viewpoint there is certainly work to be done on these citations in order to determine what can constitute evidence and

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[28]Report of the Secretary-General of 3 May 1993, United Nations, doc. S/25704, para. 48.

what cannot. And that is why I am going to look a little more closely with you at the procedures and judgments of the International Criminal Tribunal.

78. The Applicant's extensive references to indictments and to judicial decisions confirming indictments cannot be taken as evidence of a crime or even of any offence at all. In no legal system
32 does an indictment prove the commission of the offence charged, since it is simply an accusation, which has to be proved. It is merely a claim by one party to the proceedings, which may be upheld at the trial but may also be dismissed: that is the role of the court. That is why I will not spend much time on analysing the indictments cited, some of which, and particularly those alleging genocide, have been rejected in almost all cases by decisions of the Tribunal.

79. Lastly I should like to return to a point of procedure that is peculiar to the International Criminal Tribunal for the former Yugoslavia: the decision of the court confirming the indictment. Under the Tribunal's Rules of Procedure and Evidence — a unique feature, applying to that Tribunal only — the indictment must be confirmed by the Tribunal in order to have legal effect. This is important, because it involves in particular the issuing of the arrest warrant; Rule 47.H of the Tribunal's Rules provides:

"Upon confirmation of any or all counts in the indictment,

(i) the Judge may issue an arrest warrant . . ., and

(ii) the suspect shall have the status of an accused."

In other words — and this is the case in almost all legal systems, whether common law or civil law — here we have an accused who is the subject of an indictment. Thus confirmation merely confers legal validity on the indictment, which nevertheless stays what it is, i.e., a document that has to be proved in law or disproved. Similarly, decisions pursuant to Rule 61 of the Tribunal's Rules of Procedure and Evidence do not represent proof of the alleged offences. Those decisions are based exclusively on evidence submitted by the Prosecutor and allow an international arrest warrant to be issued. This again is a procedural act which cannot prejudge guilt.

80. Thus the Applicant is trying to confer probative value on decisions pursuant to Rule 98*bis* of the Tribunal's Rules of Procedure and Evidence on *motions* for acquittal submitted
33 by the defence. It is a feature of proceedings before this Tribunal that these motions are submitted by the defence immediately after the Prosecutor's case has been presented, but *before* the defence

has begun to present its own evidence. The wording of Rule 98*bis* of the Rules of Procedure confirms that this is a request to the Tribunal for a decision that may put an end to the prosecution, but if the Tribunal refuses this in no way prejudices the final decision, which can still be an acquittal. Rule 98 of the Tribunal's Rules provides:

> "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties [we are in oral, not in written proceedings], enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."

What is actually involved at this stage? It is simply a matter of eliminating indictments, which generally contain a very long list of charges; at this stage in the proceedings it is a matter of eliminating charges unsupported by evidence, which have simply been put forward in the indictment but are without foundation. If, on the contrary, there is evidence capable of leading to a conviction, the proceedings — i.e., the judicial debate — continue by examining the relevance of this evidence. But, as we have seen, proceedings under Rule 98*bis* of the Tribunal's Rules, which are oral, in no way prejudge the decision in the case!

81. So now we come to judgments — jurisprudence. Of course your Court is not bound by that jurisprudence, but it is of interest, in that, in the course of its numerous investigations, proceedings and judgments, the International Criminal Tribunal dealt both with the period and localities in question; as regards judgments, the Applicant frequently cites the first judgment in the *Tadic* case[29], the first case tried before the Tribunal for the former Yugoslavia. The Applicant's reference to this case is understandable, because when the Parties were filing their written pleadings the *Tadic* case was one of the rare cases to have been tried by the Tribunal. However, no proof of genocide was established. This case, rather than supporting the thesis of genocide, contradicts it, and does not help the Applicant's case at all. In the *Tadic* case the Prosecutor did not even accuse Dusko Tadic of genocide. He did not even allege that genocide had been committed in

34 the town, in a region that repeatedly figures in these proceedings: Prijedor, a locality at the interface, as it were, of Bosnian and Serb areas of influence, and for which there was such bitter fighting. So the Prosecutor in the *Tadic* case does not even allege that genocide was committed in

[29]ICTY, *Prosecutor* v. *Dusko Tadic*, case No. IT-94-1, 15 July 1999 ("the *Tadic* case").

Prijedor. Dusko Tadic was accused of crimes against humanity and was convicted of those crimes. Thus that case provides no evidence of genocide, contrary to what the Applicant claims.

82. Again, of course, your Court is not bound by that decision but will certainly take account of the fact that the Tribunal's Prosecutor, after an in-depth investigation, did not even accuse Dusko Tadic of genocide. Yet, in accordance with his accusatorial role, the prosecutor includes all possible charges in the indictment and, as you will see in the jurisprudence, he generally alleges genocide in all cases in which there is even the slightest suspicion of it. The jurisprudence of the Tribunal allows cumulative charges. While this may be a matter for debate among criminal lawyers, it is nonetheless so; the Tribunal's Appeals Chamber has decided: "Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."[30] Much has been written on this particular matter: cumulative indictments, conflicting characterization; but it has been settled by the Tribunal's Appeals Chamber: it is not possible to determine with certainty which of the charges brought against an accused will be proven. So all possible charges are always included. I stress, all possible charges. Thus the Prosecutor very frequently charges genocide cumulatively with the offence closest thereto: a crime against humanity. And yet he did not do so in the *Tadic* case. Moreover, in three of the "Prijedor" cases in which the Prosecutor brought charges of genocide — genocide charges in the notorious municipality of Prijedor — the *Sikirica*, *Brdjanin* and *Stakic* cases, all three accused were acquitted of genocide. They were convicted of crimes against humanity, which is certainly a dreadful crime, but it is not genocide.

35 83. If I may, we will briefly examine those three cases from that area, because they were decided by the Tribunal after the Applicant's written pleadings were filed. We are going to rely on these three judgments in order to establish that genocide was not committed in Bosnia and Herzegovina and to show that the Applicant has been unable to prove that it was.

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[30]ICTY, *Prosecutor* v. *Mucic et al.*, case No. IT-96-21-A, Appeals Chamber Judgement, 20 February 2001, para. 400.

(c) *Can the acts committed in Bosnia and Herzegovina be characterised as "killing",* actus reus *of genocide?*

84. Let us begin with the *Sikirica* case, which concerns the Keraterm prison camp. We shall then take a look at the *Stakic* case, because Mr. Stakic was the elected mayor of Prijedor. Finally, Brdjanin was President of the Crisis Staff of Bosanska Krajina, that is to say of the entire region. We therefore have a camp guard, the mayor of a town, a regional President. We have here something very important: we have not only the military aspect, we have the political aspect. In other words, we will examine a genocidal plan obviously conceived at the political level, since the Mayor of Prijedor and the President of the Crisis Staff belonged to the same political party, the SDS. Yet the Tribunal held that certain acts constituted crimes against humanity but that none could be characterized as genocide[31].

85. And in the *Stakic* case, the case of the mayor, the Tribunal judges concluded that the objective of the SDS, the Serbian Democratic Party, in the municipality of Prijedor was to establish a Serbian municipality and that the evidence was insufficient to conclude that the goal was the destruction of the Muslims; rather, the goal was simply to eliminate any threats from Muslims because the security of the Serbs and the protection of their rights appeared to be their paramount interest[32]. The Tribunal concluded that, on the basis of the evidence presented in the case, it was not convinced that genocide had taken place in Prijedor[33].

86. In the judgment handed down in the Keraterm camp case on the defence motion by the
36 defendant Sikirica to acquit of charges of genocide[34], the Trial Chamber concluded that the evidence had not shown that the group as such had been the target of the criminal acts. According to this judgment, the criminal acts were directed against individual members of a group[35]. The Chamber found that, in so far as the mistreatment was proved, the relevant crime was a crime against humanity, persecution, and not genocide. Accordingly, even if the evidence showed that

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[31]ICTY, *Prosecutor* v. *Dusko Sikirica et al.*, case No. IT-95-8 (the "Keraterm case"), Indictment, 30 August 1999; *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24, Indictment, 10 April 2002; *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36, Indictment, 9 December 2003.

[32]ICTY, *Prosecutor* v. *Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, paras. 553 and 561.

[33]*Id*., para. 561.

[34]ICTY, *Prosecutor* v. *Dusko Sikirica* (Keraterm), case No. IT-95-8-T, Judgement on defence motions to acquit, 3 September 2001.

[35]*Id*., para. 90.

part of the Muslim or Croat population in Bosnia and Herzegovina had been targeted, the target had not been the group as such, but individual members of the group. Consequently, the Chamber concluded that, in respect of the Keraterm camp, no requisite element of the crime of genocide had been proved.

87. Therefore, contrary to what the Applicant has contended, we can say that the jurisprudence of the Tribunal for the former Yugoslavia, at least in respect of the extensive Prijedor region, completely contradicts the Applicant's argument.

88. The Tribunal was unable to establish that genocide occurred in the region of Bosanska Krajina (Western Bosnia), comprising 16 municipalities. And, in the *Brdjanin* case, the case of the President of the Crisis Staff, the politician responsible for that region, the Trial Chamber held that genocide had not been proved[36].

89. It is clear from the judgments cited that the Bosnian Serbs and Bosnian Muslims in the Prijedor area, and elsewhere in Bosanska Krajina, did indeed savagely fight each other for control of territory. It is also clear from the Tribunal judgments that the objective pursued by the Serbs of Bosnia was indeed to seize control over areas, to grab territory. It may moreover be added that the other two parties to the conflict, the Croats and the Bosnian Muslims, had exactly the same war objective. We saw this, for example, in Mostar, between the Croats and the Bosniaks, we also saw it during Operation "Storm", carried out by the Croats against the Serbs in Krajina, which also led to the complete disappearance of the Serb population from conquered Krajina. Thus, what the Tribunal tells us is that no intent to destroy a national, ethnical, racial or religious group could be established, no intent existed. But, under the Genocide Convention, the crime of genocide cannot

37 be committed unless there is intent to destroy a group, not to seize territories by force.

90. Exactly the same can be said in respect of other regions of Bosnia and Herzegovina. The Applicant alleges that genocide took place in Sarajevo, Bosanski Samac, Brcko, Bratunac, Zvornik, Gorazde, Foca, Mostar, Bihac, Visegrad and Srebrenica. The Tribunal for the former Yugoslavia has been called upon to rule on many of these events. It has ruled on the events which took place in Sarajevo, Brcko, Bratunac, Foca, Visegrad, Bosanski Samac, and Srebrenica and has never come

[36]ICTY, *Prosecutor* v. *Radislav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 982.

to the conclusion that the acts committed in Sarajevo, Brcko, Bosanski Samac, Foca, Visegrad or Bratunac constituted genocide. There has been no conviction for genocide in these cases.

91. As for the references to the town of Mostar in the Applicant's Memorial (Memorial, para. 2.2.5.3), I would call them rather ridiculous if the events were not so tragic. Mostar lies in the border region of Bosnia and Croatia. Twenty per cent of Mostar's pre-war population was Serb; a few Serbs remain today, making up perhaps 1 per cent of the population. From the beginning of the war, Mostar was fought over by the Croats and Muslims, while all the Serbs were driven out and are no longer to be found there.

92. The references to Bihac (Reply, Chap. 5, para. 34), are also highly tendentious. In the town of Bihac, two Muslim forces *born of the same party* — this has to be stressed because it is important — were present: the forces of Fikret Abdic, which were fighting against the government forces of Alija Izetbegovic, who had deployed his fifth corps of the army of Bosnia and Herzegovina to weaken Fikret Abdic's defence forces and therefore the defence of the Bihac region. The two Muslim factions, which engaged in ferocious fighting in the town, were obviously not acting in pursuit of a genocidal goal. They disagreed on the form which the Bosnian State should take; they did not share a conception of the State to be created. Throughout the war the Serbs of Bosnia, as well as the Serbs of Croatia, helped the side of Fikret Abdic, whose positions seemed to the Serbs to be more moderate than those of President Izetbegovic, notably in respect of the secularity of the future State. If the Serbs had harboured genocidal intent towards the Bosnian

38 Muslims as a group, as an ethnic group or as a religious group, it is clear that they would not have helped the Muslims of Fikret Abdic because the war between the Bosnian Serbs and the Muslims was not a war based on ethnic, national or religious differences. The war in Bosnia and Herzegovina was a war triggered by political differences concerning the very conception of the State of Bosnia and Herzegovina and of the balance of power among the various minorities making up that State; I shall return to this question later on.

93. Let us now turn to Srebrenica — this is the only real issue. The Criminal Tribunal for the former Yugoslavia did in fact decide that General Krstic, commander of the Drina Corps of the army was guilty of complicity in genocide. This decision merits special analysis because the conclusion that there was complicity in genocide is, at the very least, odd in the light of the facts

accepted by the Tribunal. We have already said this, but the Srebrenica case is so tragic that we undoubtedly need to repeat it: this was probably one of the worst episodes in the civil war in Bosnia and Herzegovina.

94. Before the civil war broke out, Srebrenica was a municipality — in Serbia, there are towns and villages, and municipalities encompassing their surrounding territory — of 37,000 inhabitants, well-endowed with natural resources, notably its mines. Serbs made up roughly one quarter of the population of the municipality. The town itself counted 6,000 inhabitants, of which 1,700 were Serbs, who were quickly expelled, at the very beginning of the war, by the Bosnian Muslim forces. Their commander, Naser Oric, indicted by the Tribunal for the former Yugoslavia in 2003, quickly turned it into a fortified town from which military raids were launched against Serb villages. These raids, made with the objective of ridding the entire municipality around Srebrenica of its Serb population, produced several hundred victims among Serb farmers.

95. In 1993, the United Nations first prevented the town from being conquered by Serb forces; I would remind you of the action of General Morillon, who went, practically alone, into the town to promise the inhabitants that they would be protected. The United Nations adopted resolution 824 (1993) on 6 May 1993, then resolution 836 (1993) of 4 June 1993, authorizing
39 UNPROFOR, in response to violations of the safe areas, "to take the necessary measures, including the use of force"[37]. A Dutch army battalion (Dutchbat) was stationed there; it was there in July 1995 when General Radislav Krstic, commanding the Drina Corps of the army of Republika Srpska, took possession of the enclave. Women, children and old men were allowed to flee through a corridor to territory held by Bosnian Muslims, while men of fighting age and those who had been in the military forces were executed.

96. In the *Blagojevic* case, the Tribunal for the former Yugoslavia stated:

> "As the situation in Srebrenica escalated towards crisis on the evening of 10 July, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABIH [Army of Bosnia and Herzegovina] and attempt a

[37]Security Council resolution 836 (1993), para. 9.

> breakthrough towards Bosnian Muslim held territory to the north of the Srebrenica enclave."[38]

The Tribunal thus found that military-age men, together with members of the 28th Division of the Army of Bosnia and Herzegovina, which was holding Srebrenica, received the order to leave the enclave and attempt to break through the Serb lines, leaving the civilian population behind. This was therefore a military retreat in the face of the advance by the Republika Srpska forces. The great majority of men killed or missing were in this group. The logical question to be asked is whether these victims can all be considered ordinary civilians.

97. Madam President, Members of the Court, I find arguing over the legal characterisation of this tragic event to be particularly disagreeable. It is difficult because Srebrenica is a tragedy and the argument as to legal characterisation might seem cynical in the extreme. Nevertheless, we are in proceedings before the Court, before the highest Court, in proceedings in which one State, Serbia and Montenegro, has been accused of genocide. It falls to me to convince you that that State, that the State of Serbia and Montenegro, harboured no genocidal intent whatsoever in the Srebrenica affair.

40 98. This enclave in eastern Bosnia and Herzegovina, whose Serb population, as I have already told you, had been driven out by Muslim forces at the beginning of the conflict, was obviously a strategic objective of Republika Srpska. The United Nations was well aware of this situation and was supposed to protect the area through the deployment of international forces, notably the Dutch battalion. The protected enclave was however never demilitarized; in addition to the territorial defence forces of Bosnia and Herzegovina, the 28th Division of the Army of Bosnia and Herzegovina, that is to say a military force of more than 5,000 men, was based there. The military position of the enclave, under attack from Republika Srpska troops, became so untenable for Bosnia and Herzegovina that UNHCR proposed, well before the tragedy which occurred in July 1995, the evacuation of Srebrenica's civilian population. The Tribunal's judgment in the *Blagojevic* case notes: "While large-scale evacuation of the endangered population had been proposed as an alternative way to save the lives of the people trapped in Srebrenica by the

[38]ICTY, *Prosecutor* v. *Vidoje Blagojevic*, case No. IT-02-60-T, Trial Chamber, Judgement, 17 January 2005, para. 218.

UNHCR, this course of action was rejected."[39] The government in Sarajevo at that time argued before the Security Council that such an evacuation would be tantamount to accepting ethnic cleansing. Thus, these were the circumstances in which the order was given to the Muslim military forces, that is to say practically all the men who could bear arms, to leave the enclave and attempt a breakthrough and these are the circumstances in which prisoners were executed en masse by Bosnian Serbs, while the civilian population, driven out of the city, children, women, old people, reached the Tuzla region in the presence of the Dutch battalion from the United Nations, which was on the spot.

99. The Tribunal found General Krstic and Colonel Blagojevic guilty of complicity in genocide. The Trial Chamber's conviction of Colonel Blagojevic has not yet become final. As for the Judgment concerning General Krstic, the Tribunal found him guilty of complicity in genocide, without however making clear whether he was the principal perpetrator of the crime and, particularly, without establishing genocidal intent on the part of General Krstic personally. The issue before the Tribunal was whether the execution of military-age men resulted from genocidal

411 intent or simply from the strictly military intent to weaken or destroy the potential of the army of Bosnia and Herzegovina. In other words, were the Bosnian Muslims massacred because they were Muslim or because they represented a military potential at a time when the belligerents were within reach of carving up the territory of Bosnia and Herzegovina?

100. Admittedly, the massacre itself, whatever its cause and scope, is indubitably a tragedy, and the lawyer's concern to assign it its precise characterization may appear inappropriate, but it is one thing to eliminate prisoners of war in violation of the laws of war and another to exterminate a people for no other reason than the nation, ethnic group, race or religion to which it belongs.

101. A number of commissions of enquiry, including a French parliamentary commission and a Dutch commission, have looked into this tragedy; those of the Dutch military in positions of authority gave evidence, as did their counterparts in the French force, since the international corps was then under the command of General Janvier. The whole truth has never been brought to light. Military operations were undoubtedly conducted by the Bosnian Muslims from the enclave against

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[39] *Blagojevic* case, Judgement, 21 January 2005, para. 101.

neighbouring Serb villages; the Dutch battalion was possibly held hostage by the Bosnian Muslim as part of the plan for territorial division then under discussion. This area, where tension was extreme, was the theatre of atrocities in the extreme.

102. Can it be said in all legal honesty that this crime constitutes, beyond all reasonable doubt, genocide rather than the war crime consisting of the criminal elimination of the enemy military force? I am well aware that this Court is not a court of appeal for the Tribunal for the former Yugoslavia and it therefore would not seem necessary to enter into a discussion of the decisions handed down by the Tribunal against the presumed perpetrators of the acts. The Court will nevertheless note that the parties are not the same and this difference in parties to the proceedings justifies our viewing the decisions of the Tribunal for the former Yugoslavia in a different light.

103. My honourable colleague Ian Brownlie said in clear terms that these acts, committed during an internal civil war in Bosnia and Herzegovina, cannot be ascribed to the Government of Serbia and Montenegro, which was not a party to the conflict, just as it was not a party to General Krstic's trial or to any other trial before the Tribunal. In respect of this matter, it must be noted that the judgment in the *Blagojevic* case acknowledges that the war in Bosnia and
42 Herzegovina, at least in regard to the Srebrenica episode, was an internal civil war. This conclusion follows ineluctably from paragraph 599 of that judgment, dealing with the application of the Geneva Conventions and concluding: "this Trial Chamber does not find any reason why this general principle should not be applicable also *to non-international conflicts*"[40]. The Tribunal thus upheld the application of the Geneva Conventions to a conflict which it categorized as a non-international one. If the conflict in Bosnia and Herzegovina, and specifically in Srebrenica, had been international, the Chamber would not have been confronted with the issue of the applicability of the Geneva Conventions and the history of the dissolution of Yugoslavia and later of Bosnia and Herzegovina cannot be so regarded.

104. The judgment rendered on 19 April 2004 by the Appeals Chamber of the Tribunal for the former Yugoslavia in General Krstic's case established that women, children and old people

[40] *Blagojevic* case, Judgement, 17 January 2005, para. 599.

from Srebrenica were evacuated from the enclave through a corridor enabling them to reach territory controlled by the Government of Bosnia and Herzegovina. The Tribunal's Appeals Chamber nevertheless found that this population transfer involved genocidal intent. In so finding, the Tribunal did not seek to determine the main reason for the tragic evacuation from the enclave of Srebrenica.

105. In 1995, the Dutch battalion, stationed in this region and part of the United Nations peacekeeping forces, actively took part in the evacuation of Srebrenica's civilian population to territories controlled by Bosnian Muslims. It actively participated in this with a view not, it would seem, to genocide but rather to protecting the civilian population. If UNHCR's proposal had been accepted a few months earlier, many lives would have been saved. But UNHCR's proposal was not accepted and its rejection was nothing other than the direct consequence of the struggle among the warring parties for the conquest of territory.

106. True, a plan to carve up Bosnia and Herzegovina had just fallen through, but the attempt to obtain territories with homogeneous populations in the newly created States continued. And remember — at this point, which I find extremely important — the failure of that international plan was against the wishes of Serbia and Montenegro, which did its utmost to achieve the plan's

43 adoption. And from the time that the plan failed there was a complete break between Republika Srpska and the Republic of Serbia and Montenegro, which was to take a number of retaliatory steps against Republika Srpska. In particular, the Serb populations of Sarajevo and Tuzla served as bargaining chips, as it were; these were ultimately used, as moreover was the Serb population of Republika Krijina, in Croatia, which was driven from its land. Paradoxically, it was Serbia and Montenegro which accepted the greatest number of refugees, among whom were a high number of Bosnian Muslims, notably from eastern Bosnia and in particular from Zepa, another Muslim enclave captured by the Bosnian Serbs after the Srebrenica operation. In the indictment in the *Tolimir et al*. case, a case dealing with precisely Srebrenica and Zepa, the Prosecutor of the Tribunal for the former Yugoslavia alleges: "The Muslim men fled to Serbia because they feared they would be harmed or killed if they surrendered to the VRS."[41] It logically follows that these

[41]ICTY, *Prosecutor* v. *Zdravko Tolimir et al.*, case No. IT-04-80, Indictment, para. 33.

Bosnian Muslims were not afraid to go to Serbia and Montenegro, because that is where they found refuge.

107. It is therefore patently illogical for Serbia and Montenegro to have harboured genocidal intent in this episode, in which it did not participate and as a result of which it later took in a significant number of refugees and survivors. In truth, a complete and impartial investigation into the events at Srebrenica remains to be undertaken. Especially since recent history is rife with cases of extermination en masse of prisoners of war which have never been characterized as genocide. The best known of these tragedies is certainly that of Katyn, where the Red Army executed all the Polish officers it had at its mercy. That case has been the object of much debate, but never of any prosecution.

(ii) Serious bodily or mental harm

(a) *The acts alleged to have constituted serious harm within the meaning of the Genocide Convention*

108. In order to demonstrate genocide involving inhuman acts, the Applicant generally cites

44 rape, torture and the detention camps, which it describes as concentration camps. For my part, I shall concentrate on the detention camps and torture, while rape will be dealt with by my colleague, Ms Nataša Fauveau-Ivanović.

109. The Applicant considers that genocide is revealed in particular by the existence of the camps, which it describes as concentration camps (Memorial, Sect. 2.2.1 and Reply, Chap. 5, Sect. 5). However, a number of detention camps run by the Serbs in Bosnia were the subject of investigation and trial in the Tribunal for the former Yugoslavia. *In no instance* was an act characterized as genocide, although genocide was alleged by the Prosecutor in certain cases.

110. The acts committed in the camps referred to most frequently by the Applicant, namely Omarska, Keraterm, Trnopolje, Manjaca, the other camps in the region of Bosanska Krajina, and the Luka camp at Brcko, the Susica camp and the camps at Foca, all featured in proceedings before the Tribunal for the former Yugoslavia. No conviction for genocide was handed down on account of any criminal acts committed in those camps.

111. Moreover, the Applicant, in its assessment of the camps, makes no effort to identify those camps where criminal acts capable of constituting genocide were committed. It considers

that the conditions in all the camps, without distinction, were such as to prove the existence of genocide.

112. Naturally, we shall not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, the conditions were not of the kind described by the Applicant in all the camps. Thus, in its Reply (Chap. 5, para. 382) the Applicant alleges with respect to the Manjaca camp:

> "The camp held a limited number of women. During their stay in Manjaca they were raped repeatedly. One young girl was raped in front of her mother and died soon afterwards. Muslim inmates were also coerced to rape female prisoners. A 14 year-old boy was, for example, forced to have sex with a 60 year-old woman."

This allegation by the Applicant, reproduced from the report by the United Nations Commission of Experts, is entirely false. The Manjaca camp, a military camp and a camp with a military tradition, situated in Bosanska Krajina, never held women or children.

113. Moreover, on the subject of the Manjaca camp, Mr. Paddy Ashdown, the High Representative of the international community in Bosnia and Herzegovina, who in 1992 was the

45 Special Envoy of the United Nations Secretary-General, had the opportunity to visit Manjaca and stated on leaving the camp, which is so often cited by the Applicant for its allegedly genocidal conditions, that the camp was being run correctly[42]. This statement was, moreover, confirmed by the testimony of a former detainee in the Manjaca camp, a Muslim detainee, who testified before the Tribunal for the former Yugoslavia in the *Brdjanin* trial[43]. It also emerges from the *Brdjanin* trial, at which the Manjaca camp and the conditions there were assessed, that a delegation from Merhamet, that is to say the Muslim humanitarian organization, was able to visit the camp in 1992 and found that "material conditions were poor, especially concerning hygiene. But there were no signs of maltreatment or execution of prisoners."[44] This is the Merhamet report, which one would expect to be objective at the very least.

114. Although we do not have enough time to expose all the falsehoods contained in the Applicant's written pleadings, we are obliged to denounce the allegation that, in 1995, *540 persons*,

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[42]Transcripts in the *Brdjanin and Talic* case, No. IT-99-36-T, 25 February 2002, p. 2226, 26 February 2002, pp. 2270-2271; and 5 June 2002, pp. 6714 and 6715.

[43]Transcript in the *Brdjanin and Talic* case, No. IT-99-36-T, 5 June 2002, pp. 6714 and 6715.

[44]Transcript in the *Brdjanin and Talic* case, No. IT-99-36-T, 5 June 2002, p. 6713.

previously detained at Manjaca, were exhumed from mass graves in western Bosnia (Reply, Chap. 5, para. 384). The Applicant would have us believe that, in citing this allegation, it is reporting the conclusions of the Working Group on missing persons in the territory of the former Yugoslavia, contained in United Nations document E/CN.4/1996/36. This document does indeed report the fact that 540 bodies were exhumed of persons presumed to have been previously detained at Manjaca. Contrary to the Applicant's allegation, the report says noting definite about the identity of those persons, their nationality, or the cause or date of their death. The Tribunal for the former Yugoslavia, in its enquiries concerning this camp, never envisaged that such a high number of prisoners could have been killed there, and established in the *Brdjanin* case that the number of persons killed during that entire period was ten[45].

115. The prosecutor of the Tribunal for the former Yugoslavia tried to prove that genocide had been carried out in the Keraterm camp. However, the judges on the Tribunal found that, in the Prijedor region where the Keraterm camp was situated, the total number of victims falling within the terms of Article 4.2 *(a)*, *(b)*, and *(c)* of the Tribunal's Statute amounted to approximately 1,000 to 1,400 Muslims of the 49,351 Muslims in the municipality of Prijedor, that is to say between 2 per cent and 2.5 per cent, and they concluded that this percentage would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group in Prijedor[46]. What is more, the judges found that the number of Bosnian Muslims or Bosnian Croats detained elsewhere than in the Keraterm camp, and who were victims within the meaning of Article 4.2 of the Tribunal's Statute, was negligible, and they concluded that "it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred"[47].

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116. Moreover, the alleged number of detainees in these camps is highly exaggerated. According to the list of camps cited by the Applicant in its Memorial (para. 2.2.0.1), more than 300,000 persons are said to have been detained in camps by the Bosnian Serbs. This is an unlikely figure. The fact that this figure is inaccurate is clear from the Applicant's inconsistencies when it refers to the number of detainees. In her oral argument on 1 March 2006, Ms Karagiannakis told

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[45] *Brdjanin* case, No. IT-99-36-T, Judgement, 1 September 2004, para. 440.

[46] ICTY, *Prosecutor* v. *Dusko Sikirica (Keraterm)* case, No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001, para. 72.

[47] *Id.*, para. 75.

you that the number of detainees had amounted to between 100,000 and 200,000. Of course, although 100,000 is a frightening figure, it is still three times less then 300,000. Moreover, the mere fact that different figures appear in different written and oral pleadings by the Applicant proves that it has not even sought to establish the true number of detainees, so that in actual fact the figures cited in such a casual manner are highly approximate.

117. There are also considerable discrepancies in the Applicant's written pleadings as regards the number of detainees in a single camp. For example, the number of detainees in the Omarska camp during the same period (this camp was open from June to August 1992) — and it must not be forgotten that these are camps which usually had a rather short lifespan — is variously estimated, in the Applicant's written pleadings, at between 3,000 and 11,000 (Memorial, para. 2.2.1.4).

47 118. The Applicant alleges that 50 to 60 people were killed every day in the Trnopolje camp (Reply, Chap. 5, para. 330). Bearing in mind that this camp was open for four months, a simple calculation would show that the number of persons killed there would be 6,000, a number which, obviously, is in no way proven by the evidence and which, in any case, is extremely unlikely given the number of prisoners.

119. According to the Applicant, between 1,200 and 2,000 persons were killed at the Omarska camp in Prijedor, in the Bosanska Krajina region (Memorial, para. 2.2.1.4). As the Applicant is playing with figures, it has to be said that this number of between 1,200 and 2,000 persons is inconsistent with the allegation nevertheless made in the same paragraph, that ten to 20 people were killed every day. If that were true, the total number of persons killed in the Omarska camp, which was open for three months, would be between 900 and 1,800. Finally, in its Reply (Chap. 5, para. 369), the Applicant estimates the number of persons killed in the Omarska camp at between 1,000 and 5,000. A reference to the judgment by the Tribunal for the former Yugoslavia reveals very different estimates of the number of victims in the whole of the region concerned, rather than in a single camp. In the trial of *Brdjanin*, the official in charge of the Bosanska Krajina region, the Tribunal's judgment estimates that a total of 1,669 persons[48] were

[48]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, Judgement, 1 September 2004, para. 465.

killed in the entire region, including the camps. So, while the number of the victims of this conflict is certainly very shocking, it cannot be allowed to be inflated out of all proportion by the propaganda of the belligerents.

120. Turning to the other camps, the Applicant claims that between 2,000 and 3,000 persons were killed in the Luka camp in particular, in the region of Brcko (Memorial, para. 2.2.1.17). In its Reply, the Applicant inflates the number of alleged victims and puts forward the number of three to five thousand persons (Reply, Ch. 5, para. 398). Although these figures are inaccurate, the Applicant did not invent them. The Commission of Experts did in fact mention a figure of 2,000

48 persons killed, as attested by a witness, and concluded that the final figure could be between 3,000 and 5,000[49]. The number of 3,000 killed was also put forward in one of the reports by the Special Rapporteur, Mr. Tadeusz Mazowiecki[50]. However, the judgment rendered on 14 December 1999 in the *Jelisic* case puts the number of deaths proved beyond reasonable doubt at 66, while the Prosecutor, for his part, put forward a figure in his indictment, of just over 100 victims[51]. Once again, the discrepancy in the figures demonstrates the unreliability of the different reports when it comes to the establishment of the facts, because those reports were drawn up in the heat of the moment, without the benefit of hindsight, and in the crossfire of propaganda from the different belligerents. This discrepancy also demonstrates that the real number of victims was not the number claimed by the Applicant. Indeed, if the Applicant had taken the trouble to examine one by one the judgments of the Tribunal for the former Yugoslavia, he could have confirmed this ghoulish arithmetic, as we — to our distress — have done, because the figures are there.

121. Finally, as regards the Luka camp, the Tribunal in the *Jelisic* case, the only case concerning the Brcko region that was brought before it, held that the Prosecutor had not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Brcko or elsewhere, within which the murders committed by

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[49]Final Report of the United Nations Commission of Experts, S/1994/674/Add. 2, Vol. I, 28 December 1994, Ann. III.A, Special Forces, p. 142, para. 396.

[50]Situation of human rights in the territory of the former Yugoslavia, Report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Hugh Rights, E/CN.4/1993/50, 10 February 1993, Ann. II, p. 93, para. 749.

[51]ICTY, *Prosecutor* v. *Goran Jelisic*, Judgement, 14 December 1999, paras. 90-91.

the accused would allegedly fit[52]. Consequently, although in that case the Prosecutor attempted to prove genocide, particularly in the Luka camp, his findings were not endorsed by the Tribunal. I am not, of course, suggesting that you should follow the findings of the Tribunal for the former Yugoslavia — you are not bound by its findings, you are not bound by its judgments — but who has done a better job of throwing light on this ghastly war than the investigators of the Tribunal, numerous, precise and meticulous as they are? I believe that the facts established by the Tribunal should serve as a factual basis for the legal characterization of the facts. And the facts established

49 by the Tribunal concerning the Brcko camp differ substantially from those submitted by the Applicant, and are not evidence of genocide.

122. With regard to the Foca camp, to which the Applicant refers frequently (Reply, chap. 5, paras. 412-419), alleging particularly grisly conditions, this camp was the focus of several cases, particularly the *Kunarac*[53] and *Krnojelac*[54] cases, before the Tribunal for the former Yugoslavia. But here again, in these cases the Prosecutor did not claim that genocide had been committed in that camp. The Prosecutor did not bring an indictment for genocide in the Foca camp. It is obvious that, *a fortiori*, no conviction for genocide was handed down in connection with the events that took place in the Foca region.

123. The Applicant also refers to the campaign of terror and torture allegedly carried out in northern Bosnia and Herzegovina, and cites the indictment issued by the Prosecutor of the Tribunal for the former Yugoslavia in the *Bosanski Samac* case (Reply, chap. 5, para. 145). Once again, we are forced to note that this case[55] makes no reference to genocide, nor was genocide alleged by the Prosecutor. Similarly, we can cite the criminal acts to which the Applicant refers and which were allegedly committed by Dragan Nikolic (Reply, chap. 5, para. 85) in the Susica camp[56], or by Dragan Gagovic (Reply, chap. 7, para. 9) in the Foca camp[57], since no charge of genocide was either upheld or alleged against those persons. It is, moreover, significant that no charge of

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[52] *Id.*, para. 98.

[53] ICTY, *Prosecutor* v. *Dragoljub Kunarac* case, No. IT-96-23 and 23/1.

[54] ICTY, *Prosecutor* v. *Milorad Krnojelac* case, No. IT-97-25.

[55] ICTY, *Prosecutor* v. *Blagoje Simic et al* case, No. IT-95-9.

[56] ICTY, *Prosecutor* v. *Dragan Nikolic* case, No. IT-94-2.

[57] ICTY, *Prosecutor* v. *Dragan Gagovic* case, No. IT-96-23.

genocide was ever alleged on the basis of acts perpetrated in the Foca, Susica or Bosanski Samac camps.

124. Moreover, in order to prove its allegations, the Applicant cites the testimony of former detainees (Reply, chap. 5, paras. 84, 104, 108, 113 and 155), the same detainees who testified before the Criminal Tribunal for the former Yugoslavia. The same detainees whose testimony did not serve to satisfy that Tribunal that genocide had taken place. The Tribunal heard their testimony in numerous proceedings. It recorded it, but it did not draw from it the same conclusions as the Applicant.

50 **(b) The legal definition of serious bodily or mental harm and its application in the present case**

125. Serious bodily or mental harm to a person is covered in many national criminal codes. When directed against a member of a group it may constitute a crime against humanity, and when it is directed against a national, ethnical, racial or religious group and inflicted with intent to destroy that group in whole or in part it may constitute genocide.

126. Serious bodily or mental harm has come before the courts, *inter alia*, in the celebrated *Eichmann* case, in which the Jerusalem District Court stated in its judgment of 12 December 1961 that serious bodily or mental harm to members of a group could be caused by enslavement, deportation, persecution, detention in ghettos and camps in conditions designed to degrade them and deprive them of human rights, to eliminate them and cause suffering, and by torture[58]. However, these acts constitute genocide only if committed with intent to exterminate a group, and the Jerusalem court decided that all the acts previously mentioned had been committed with the precise intention of exterminating the Jewish people. The court also decided that these acts constitute crime against humanity when intent to exterminate a group is not established.

127. The Tribunal for Rwanda has taken the view, *inter alia* in the *Akayesu* case, that serious bodily or mental harm, without limiting itself thereto, means acts of torture, be they bodily or mental, inhumane or degrading treatment or persecution[59].

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[58]"Attorney-General of the Government of Israel v. Adolph Eichmann", Israel, District Court of Jerusalem, 12 December 1961, cited in *International Law Reports*, Vol. 36, 1968, p. 340.

[59]ICTR, *Prosecutor* v. *Akayesu*, case No. IT-95-1-T, Trial Chamber, Judgement, para. 504.

128. The Tribunal for the former Yugoslavia was even more specific, deciding in the *Stakic* case that causing serious bodily or mental harm meant, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury[60].

51 129. Both the *ad hoc* Tribunals considered that the harm inflicted need not be permanent and irremediable, but must be serious and long-lasting.

130. However, as the Jerusalem court pointed out when trying the *Eichmann* case, all these acts, without the special intent required for genocide, constitute crimes against humanity. Only acts committed with the particular intent to destroy a national, ethnical, religious or racial group in whole or in part will constitute the crime of genocide.

131. It should be noted that the intent must be specifically directed towards the destruction of the group; a mere discriminatory intent is not enough. Rapes, torture and other inhumane acts committed with discriminatory intent would constitute crimes against humanity, persecution. The Trial Chamber of the Tribunal, Judge Antonio Cassese presiding, decided in the *Kupreskic* case that persecution as a crime against humanity was the same kind of criminal act as genocide.

> "Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging…. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."[61]

This shows once more the difference of degree and the importance of genocidal intent, a genocidal plan.

132. In the present case no one denies that great suffering was inflicted on the civilian population of Bosnia and Herzegovina. No one denies, and above all we do not deny, that the acts committed often amounted to serious bodily or mental harm to members of that population. However, your Court cannot confine itself to recording the sufferings of the population, the acts of torture, the rapes; it must establish that all these sufferings were inflicted with intent to destroy a national, ethnical, racial or religious group. At this point in our proceedings this has not been

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[60] *Stakic* case, Judgement, 31 July 2003, para. 516.

[61] *Prosecutor* v. *Zoran Kupreskic et al.,* case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 636.

demonstrated. What has been demonstrated is the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war. But without this genocidal intent there is no crime of genocide.

52 **(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part**

***(a)* Facts alleged by the Applicant to constitute conditions of life calculated to bring about the physical destruction of the group in whole or in part**

133. The Applicant maintains in its Reply (Chap. 5, para. 168) that all the atrocities suffered by the Muslim population during that war can be put in the category of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and it refers in particular to laying siege to towns, bombarding the civilian population, deprivation of food, deportation and expulsion.

134. However, most of these events took place in a context which is unfortunately a context of war and which affected the entire population, whatever its origin. We cannot but agree with the Applicant when it states in its Reply (Chap. 5, para. 168) that it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate.

135. The civilian population suffers in any war. But proclaiming these sufferings is not enough. The state of war itself must be examined.

***(b)* The context: the state of war**

136. The alleged genocide was committed in the context of an armed conflict, in a war, and in a civil war into the bargain. Of course, genocide can be committed both in a state of war and in a context of peace. However, when we find ourselves in a context of war, and of fratricidal war, the realities of that state of war, and in particular the risks run by the civilian population, must be taken into account. In this context, displacement of a population is sometimes necessary, and the Geneva Convention even makes such displacements obligatory. Thus Article 17 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War[62] provides:

[62] Adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949, entry into force 21 October 1950.

> "The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."

53 This is what UNHCR had proposed for the Srebrenica region.

137. Without dwelling on the fact that this Article imposes a duty on all parties to the conflict, and therefore on the Applicant also, we can see the logic of this provision, which impliedly recognizes that the civilian population is inevitably in danger in an armed conflict. Article 49.2 of the Convention provides that:

> "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

138. In its Advisory Opinion in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, given on 9 July 2004, this Court observed that "the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* para. 135).

139. Finally, the Geneva Convention demonstrates that it is sometimes difficult in wartime to make a distinction between the evacuation of the population, which is obligatory, and forced transfer, which is forbidden, because Article 49.3 lays down the conditions that most be respected both in the event of transfer and in the event of evacuation. That Article provides:

> "The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."

140. It should also be recalled that displacement of populations has always been a way of settling certain conflicts between opposing parties and that there have been many population displacements in history following an armed conflict. Thus displacement of populations, far from being a crime, is often the peaceful solution adopted to settle a conflict or dispute between States, as well as a way of preventing fresh conflicts. After the Great War, and indeed in the Balkan

54 region, there were a number of international conventions which contained clauses relating to the

exchange of populations. To mention only those concerning the Balkans, there is the convention for the exchange of Greek and Turkish populations concluded in Lausanne on 30 January 1923 and the Convention between Greece and Bulgaria respecting Reciprocal Emigration, signed on the basis of the Peace Treaty concluded between the Principal Allied and Associated Powers and Bulgaria.

141. The Permanent Court of International Justice, predecessor of this Court, had to rule on these two conventions. Thus the Permanent Court confirmed that the Convention between Greece and Turkey was lawful, although it stressed that this practice ran counter to the generally recognised rights of individuals. The Convention between Greece and Turkey provided for a compulsory exchange, i.e., a forced transfer. After four years of war the international community took the view that it was better to displace the populations than to maintain what could become the source of a subsequent conflict.

142. The Greco-Bulgarian Convention on Emigration was signed for the same purpose; nevertheless, although signed on the basis of Article 56, paragraph 2, of the Peace Treaty concluded between the Allied Powers and Bulgaria, it forms part of the provisions relating to the protection of minorities. In its Advisory Opinion on this Convention, given on 31 July 1930, which clearly refers to the dissolution of ethnic and religious communities, the Permanent Court of International Justice ruled:

> "The general purpose of the instrument is thus, by as wide a measure of reciprocal emigration as possible, to eliminate or reduce in the Balkans the centres of irredentist agitation which were shown by the history of the preceding periods to have been so often the cause of lamentable incidents or serious conflicts, and to render more effective than in the past the process of pacification in the countries of Eastern Europe." (*The Greco-Bulgarian communities, Advisory Opinion, 1930, P.C.I.J. Series B, No. 17*, p. 17.)

143. This Advisory Opinion by the Permanent Court of International Justice affects our region, and the dispute on which you are to rule affects our region. Today, a century later, the Advisory Opinion by the Permanent Court of International Justice has unfortunately lost none of its topicality, and its use in the overall settlement of the Yugoslav conflict would probably have saved many lives.

144. Displacements of persons accompany all conflicts. Article XIII of the Potsdam Protocol stemming from the Potsdam Conference held after the Second World War, from 17 July to 2 August 1945, provided for the transfer of the German population from Poland and
55 Czechoslovakia. Other German population transfers from the countries of Eastern Europe took place after the Second World War. These transfers were carried out against the will of the German people, but no-one has ever had the idea of describing these transfers as genocide. Equally those who carried out the transfer of the German population, those who assisted it and those who approved it certainly did not have the intention of destroying the German people, although this transfer meant that in certain cases German people disappeared from certain regions.

This, Madam President, Members of the Court, is what I wanted to convince you of this morning, and I thank you for your attention.

The PRESIDENT: Thank you, Maître de Roux. The Court now rises, and the hearings will resume at 10 o'clock tomorrow.

The Court rose at 1 p.m.