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CR 2006/19 (translation)

CR 2006/19 (traduction)

Wednesday 15 March 2006 at 10 a.m.

Mercredi 15 mars 2006 à 10 heures

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

Mr. de ROUX: Thank you, Madam President, Members of the Court, yesterday we started examining the forms that the crime of genocide may take, and I am going to continue my presentation on this point. I will then tackle the questions raised by Article III of the Convention, i.e., the examination of punishable acts, and I will finally conclude on the central issue of genocidal intent.

GENOCIDE (CONTINUED)

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

145. The conditions, inhumane as they certainly were, to which people were exposed in the enclaves, in particular the Srebrenica and Sarajevo enclaves, have been largely described and adjudicated upon in proceedings before the Tribunal for the former Yugoslavia. The Applicant's contention that between 20 and 30 people were dying of hunger every day in Srebrenica (Memorial, para. 2.2.2.6) is obviously without foundation. It has never been advanced in any case in which the Tribunal has addressed events in Srebrenica, and I would remind you that there have been six cases that have considered what took place in Srebrenica. In addition, if that were true — and forgive me, as yesterday, for this ghoulish arithmetic — it would mean that 9,000 persons would have died of hunger in Srebrenica in one year alone. I told you yesterday that the town of Srebrenica itself had 6,000 inhabitants.

146. As regards the safe areas actually proclaimed by the Security Council, and to which the Applicant refers in its Reply (Chap. 5, para. 174), admittedly these should not have been exposed to armed attack. At the same time, however, they should have been completely disarmed in order to be completely protected. We know very well — we spoke of it yesterday — that these areas were never disarmed during the conflict and were used as bases for, *inter alia*, the Bosnian army and the 28th Division of the army of Bosnia and Herzegovina, which had its headquarters in Srebrenica.

147. In the case concerning Colonel Blagojevic, who has been convicted, the Tribunal for the former Yugoslavia stated:

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> "It is not disputed that the Srebrenica enclave was never fully demilitarised and that elements of the ABiH [Army of Bosnia and Herzegovina] continued to conduct raids of neighbouring Bosnian Serb villages from within the enclave. The 8th Operational Group of the AbiH [Army of Bosnia and Herzegovina], later renamed the 28th Division of the AbiH [Army of Bosnia and Herzegovina], operated in the enclave."[1]

This was confirmed by — it might be said — a specialist, General Enver Hadzihasanovic, who was Chief of Staff of the army of Bosnia and Herzegovina when he gave evidence in the case concerning General Krstic[2]. Moreover, General Sefer Halilovic, another general in the army of Bosnia and Herzegovina, stated in his testimony in the same case that weapons were sent to Srebrenica by helicopter and that instructions were given to the military to disregard the obligation to disarm[3].

148. It is common knowledge that the same was true of the other "safe areas". It is also common knowledge that although, in attacking Srebrenica, Republika Srpska did not abide by the terms of the safe areas agreement and the Security Council resolutions, the same applies equally to Bosnia and Herzegovina. It is probably because Bosnia and Herzegovina had never demilitarized Srebrenica that the international community reacted as it did when the town was attacked in July 1995.

149. Furthermore, is it really conceivable that the safe areas should be treated as such when it was known very well that they were not disarmed, that they harboured large military units, not just territorial defence forces? For example, General Hadzihasanovic admitted in his testimony that the strength of the 28th Division, the famous Srebrenica 28th Division, was — and he was quite precise — 5,803[4].

150. The situation was the same in all of the towns proclaimed safe areas. In Sarajevo, the Bosnian army deployed 45,000 troops in the city. This was stated by General Karavelic, the deputy

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commander of the 1st Bosnian army corps covering the Sarajevo area, in his testimony before the Tribunal in the Sarajevo case[5]. All this was described by another "specialist" and witness of these

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[1]ICTY, *Prosecutor* v. *Vidoje Blagojevic*, case No. IT-02-60-T, Trial Chamber, Judgement, 17 January 2005, para. 115.

[2]Transcript of *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, 5 April 2001, p. 9509.

[3]*Id*., p. 9469.

[4]*Id*., p. 9514.

[5]Transcript of *Prosecutor* v. *Stanislav Galic*, case No. IT-98-29, 19 July 2002, p. 12026.

tragic events, General Sir Michael Rose, in his book *Fighting for Peace*: "My staff also suspected that the Bosnian army deliberately fired into the air on occasion to increase the tension in and around Sarajevo and to re-establish in the minds of the people around the world the images of war which has been proved so politically expedient in the past."[6]

151. In the same case several witnesses declared that certain troops in the army of Bosnia and Herzegovina were wearing civilian clothes[7], the army of Bosnia and Herzegovina was using civilian buildings for its bases and positioning its tanks and artillery in public places[8]. This is further confirmed in the same work by Sir Michael Rose, who confirms that military equipment of the army of Bosnia and Herzegovina was installed in the vicinity of civilians; he describes a scene that he witnessed:

> "The Serbs whom we could clearly see in their trenches in the pine-covered forest behind us had beaten off the Bosnian Army attack. By then they were using their own artillery and mortars to fire at Bosnian mortars one of which had been established in the grounds of Kosovo hospital a tactic already observed and protested about by my predecessor General Francis Briquemont. The Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour."[9]

152. According to Colonel David Fraser, an UNPROFOR representative in Bosnia and Herzegovina, who also testified in the Sarajevo case, this situation was a real nightmare for the military[10]. General Francis Briquemont, mentioned in Sir Michael Rose's book, who testified in this case, also stated that: "[when] two parties are waging war [in the city] and both are using artillery and mortar, I think that it is impossible . . . to avoid certain civilian neighbourhoods"[11]. In fact in Sarajevo, as more or less everywhere in Bosnia and Herzegovina, it was very difficult in this civil war to distinguish between civilians and military. We can only observe here that it is impossible to speak of wilful and intentional bombardment of civilian targets in this war, in which

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[6]General Sir Michael Rose, *Fighting for Peace*, The Harvill Press, London, 1998, p. 197.

[7]Transcripts of *Prosecutor* v. *Stanislav Galic*, case No. IT-98-29, 21 February 2002, p. 4208; 25 February 2002, p. 4317; 26 February 2002, p. 4448; 15 May 2002, p. 8494.

[8]Transcript of *Prosecutor* v. *Stanislav Galic*, 8 July 2002, p. 11331.

[9]General Sir Michael Rose, *Fighting for Peace*, The Harvill Press, London, 1998, p. 172.

[10]Transcript of *Prosecutor* v. *Stanislav Galic*, 5 July 2002, p. 11239; transcript of 15 July 2002, pp. 11629-11630.

[11]ICTY, *Prosecutor* v. *Stanislav Galic*, Judgement, 5 December 2003, separate opinion of Judge Nieto Navia, para. 9.

the military element and the civilian are indissolubly linked, where the civilian element conceals the military, and where the military element pervades the entire civilian domain.

153. The statements by General Sir Michael Rose, General Lewis Mackenzie, General Francis Briquement and Colonel David Fraser are statements by impartial individuals who all have direct knowledge of the events. In addition they have considerable personal military knowledge and experience, which gives their statements undeniable probative force.

154. The Applicant refers in its Memorial (para. 2.2.5.10) to events in the town of Bihac, of which we spoke at length yesterday. This town was the theatre of fighting between two Muslim party factions; the faction loyal to Alija Izetbegovic, fewer in number but far superior militarily, and the faction loyal to Fikret Abdic, which consisted of a great majority of inhabitants of the Bihac region but was much less well armed. As I told you, the differences between two factions of the same party revolved around the organization of the future Bosnian State, and the supporters of Fikret Abdic allied themselves with the Serbs to ensure their survival, and in fact they did survive, thanks to this collaboration with the Serbs. But Serb-Muslim collaboration in this region and the aid that the Serbs gave the population clearly show that the purpose of the war was not to destroy a national, ethnical, racial or religious group, but that its main purpose from the outset was political: to control both the nature of the Bosnian State that the international community had just recognized and the sharing out of territory in this new mini-Yugoslavia.

155. The transport of humanitarian aid for besieged areas falls within the same context. Although the Bosnian Serbs sometimes hindered such transport, it is noteworthy that humanitarian aid came to Bosnia and Herzegovina through the territory of Republika Srpska throughout the war — a glance at a map is sufficient. Yet 90 per cent of this aid was intended for the Muslim population. The people of Republika Srpska were treated no better; for a long time Banja Luka and its territory, i.e., Republika Srpska, was a true enclave, with no direct link with any other territory except enemy territories.

156. It was only when the town of Brcko was recaptured that a corridor to Serbia could be established, but throughout this period the town of Banja Luka was under a comprehensive blockade, and the people, whether Serbs, Croats or Muslims, were starving. The people were hungry and cold and were short of medical supplies; in light of this knowledge, it is perhaps

surprising that the leadership of Republika Srpska should be asked to give their enemy what they could not give their own citizens. Throughout the war the international community asked for and obtained free passage for humanitarian aid through Republika Srpska, such humanitarian aid being intended for its enemies.

157. The Applicant has also made an inventory of the towns from which Muslims were allegedly expelled. It is a fact — and we will return to it — that there is a certain number of towns from which that population was expelled. However, unfortunately, and I do say unfortunately, this occurred in all the towns.

158. In her presentation of 2 March 2006 Ms Laura Dauban described the situation in Bosanski Samac, citing judgments in the various Bosanski Samac cases. However, she omitted to say that all the persons convicted in these cases, both those found guilty and those who pleaded guilty, were convicted of crimes against humanity, persecution or torture[12]. But they were not convicted of genocide. Even more important, the Trial Chamber decided, precisely in the Bosanski Samac case, that it could not conclude that there had been ethnic cleansing or the forcible

15 displacement of people in Bosanski Samac in the period covered by the indictment[13]. The indictment covers exactly the period of the war in Bosnia and Herzegovina, and Article 28 of that document deals with the displacement of the population from 1992 to 1995[14].

159. In its various written and oral pleadings the Applicant puts forward figures for persons killed, injured and raped in the course of the conflict. These are obviously terrible figures, but are they all imputable to the Serbs? In his presentation of 27 February 2006, Mr. Phon van den Biesen, the Applicant's Deputy Agent, stated that the most exact figure possible for the number of persons killed was 102,000. However, this includes civilian and military casualties, victims of the conflict between Serbs and Muslims, between Serbs and Croats, between Croats and Muslims and between the two rival Muslim factions in the Bihac region. This conflict, which caused so many

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[12]ICTY, *Prosecutor* v. *Blagoje Simic et al.*, case No. IT-95-9-T, Trial Chamber, Judgement, 17 October 2003; *Prosecutor* v. *Milan Simic*, case No. IT-95-9/2, Trial Chamber, Judgement, 17 October 2002; *Prosecutor* v. *Stevan Todorovic*, case No. IT-95-9/1, Trial Chamber, Judgement, 30 May 2002.

[13]ICTY, *Prosecutor* v. *Blagoje Simic*, case No. IT-95-9-T, Trial Chamber, Judgement, 17 October 2003, para. 33.

[14]Fifth Amended Indictment of *Blagoje Simic et al.*, case No. IT-95-9, 30 May 2002, para. 28.

casualties — 102,000, we are told, and I do not dispute the figure — includes Muslims, Croats and Serbs, because these were the warring parties.

160. In that same address, Mr. Phon van den Biesen puts the number of displaced persons at 816,000 and the number of refugees at 1,300,000, i.e., about 50 per cent of the population of Bosnia and Herzegovina, but those persons, like the refugees, are obviously not all Bosnian Muslims, they are not all non-Serbs; quite a considerable number of these displaced persons and refugees are Serbs. The Applicant does not challenge this. Reference is made to a speech by President Slobodan Milosevic in which he spoke of 500,000 refugees in Serbia — 500,000 refugees — and Mr. Phon van den Biesen confirms it: "For one time, Milosevic spoke the truth." Consequently, and in accordance with the documents cited by the Applicant[15], the Serb percentage among the refugees and displaced persons approximately matches the percentage of Serbs in the
16 population of Bosnia and Herzegovina. The Serbs, like the other peoples of Bosnia and Herzegovina, were victims of this war.

161. The Applicant alleges genocide in the region of Bosanska Krajina, a region where the Serbs were substantially in the majority before the war, although their numbers declined significantly during the Second World War because that region was already coveted at that time by Croatia, and a campaign to exterminate the Serbs had been conducted in 1941 and 1942. Today, much of this region belongs to the region of Una-Sana, which is part of the Croatian-Muslim Federation. This region comprises the municipalities — and this brings us back to names which you have already heard mentioned frequently — of Kljuc, Sanski Most, Bosanski Petrovac, Bihac, Bosanska Krupa. These are the municipalities which the Applicant cites regularly in order to allege genocide against the Bosnian Muslims. However, according to information from the UNHCR, the region of Una-Sana is today inhabited almost exclusively by Muslims. The UNHCR estimates that 94 per cent of the population of this region is Muslim, 3 per cent Croat and 2 per cent Serb.

162. It is difficult to see how an initially majority population group, which ends up as a population group of 2 per cent, could have been guilty of genocide. On the contrary, this is an

[15]Ewa Tabeau, Marcin Zoltkowski, Jakub Bijak, Arve Hetland (Demographic Unit, Office of the Prosecutor ICTY), "Ethnic Composition, Internally Displaced Persons and Refugees from 47 municipalities of Bosnia and Herzegovina 1991 to 1997-1998", submitted as an Expert Report in the case of Slobodan Milosevic, 4 April 2002.

illustration — and a tragic one at that — of what happened throughout this conflict when one of the parties to the conflict took control of a territory.

163. The number of other towns where the Serbs were in the majority and where there are no longer any Serb residents today is very high. I shall cite one example, that of Drvar, because of its flagrancy. Before the war, the Serbs accounted for 97 per cent of the population of that town, which is situated in south-western Bosnia, not very far from Croatia. Well, not a single Serb remains there today. And the situation is exactly the same in all the other towns overrun by the Muslims or the Croats, which had Serbian residents before the war. What this means is that the Muslims were expelled from the towns and villages overrun by the Croats, while the Croats were expelled from the towns and villages overrun by the Muslims. This clearly shows that each of the three belligerents implemented a policy of population displacement as an integral part of its military strategy. It was not a question of destroying a national, ethnic, racial or religious group, but simply of living in a secure territory, as a way of applying the painful lessons learned over a very long period of history.

17 164. In his address on 10 March 2006, Professor Stojanovic spoke of the national structure of Bosnia and Herzegovina before and after the war. Well, it has hardly changed. From a demographic standpoint, the Muslims' percentage share of the population of Bosnia and Herzegovina has even increased in relation to what it was before the war. The Serbian population in the Croatian-Muslim Federation controlled by the Muslims and the Croats has declined considerably, in the same proportion as the Muslim and Croat populations living in Republika Srpska. Republika Srpska is perhaps more homogeneous than the Federation, although on close analysis it is found that the great majority of people living in Croat-governed territories are Croats and that the territories under Muslim control are inhabited almost exclusively by Muslims. The population of the Federation, as it exists today, is not more mixed than the population of Republika Srpska. It is of course regrettable, but all the peoples of Bosnia and Herzegovina have taken the same coherent approach to acquiring their individual territories. This approach was based on the emergence of nationalistic movements, which had led to the disintegration of Yugoslavia. Once again, the disintegration of Bosnia and Herzegovina was a by-product of the disintegration of Yugoslavia, given its composition, since the same causes usually produce the same effects.

165. In his statement on 27 February 2006, the Agent of the Applicant stated that 4,300,000 Bosnians had lived in Bosnia and Herzegovina, and that today they number only 3,500,000. I do not wish to cast doubt on these figures, but they prove nothing. Of the 4,300,000 people living in Bosnia and Herzegovina before the war, 42.2 per cent were Bosnian Muslims and 32.2 per cent were Serbs. That was the official census count, since in Yugoslavia not only Yugoslav nationality but also the nationality of each of the constituent peoples was recorded on Yugoslav passports. The numbers were therefore not difficult to calculate. And now today, of the 3,500,000 Bosnians living in Bosnia, 45.5 per cent are Bosnian Muslims and 35.3 per cent are Serbs[16]. This means that the relative proportions have remained almost identical and that, apart from the direct victims of the

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conflict, there were refugees and then there was a high level of emigration among all the peoples of the region, for the purpose of going to live and work in countries more welcoming than that unfortunate territory. In a sense, as many Serbs as Muslims and Croats combined have disappeared in this conflict. As I said before, this territorial war was a war of separation, a ghastly and fratricidal war. This war — it is too late to bring this up today — could no doubt have been avoided, but it was not; this war should not have taken place, but it did. This war was a tragedy which saw horrible crimes committed, but this war was not genocidal. It was a war of secession.

166. Taking into the account the reality of civil war, it is really impossible, in the circumstances, to speak of the deliberate infliction on the Muslim people of conditions of life calculated to bring about their destruction in whole or in part. A legal analysis of what is meant by the deliberate infliction on a group of conditions of life calculated to bring about its destruction in whole or in part will confirm this.

(b) ***The legal concept of infliction of conditions of life calculated to bring about the physical destruction of a group in whole or in part***

167. The International Criminal Tribunal for Rwanda, in the *Akayesu* case, held that deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part should be construed as methods of destruction whereby the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their

[16]Ewa Tabeau, Marcin Zoltkowski, Jakub Bijak, Arve Hetland, (Demographic Unit, Office of the Prosecutor ICTY), "Ethnic Composition, Internally Displaced Persons and Refugees from 47 Municipalities of Bosnia and Herzegovina 1991 to 1997-1998", submitted as an Expert Report in the case of Slobodan Milosevic, 4 April 2002.

physical destruction[17]. It also held that the acts which may constitute such infliction include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below the minimum requirement[18].

168. According to the jurisprudence of the Tribunal for the former Yugoslavia, as established in the *Stakic* case — I would remind you that he was the mayor of the town of Prijedor — "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" includes methods of destruction apart from direct killings such as

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subjecting the group to a subsistence diet, systematic expulsion from homes, denial of the right to medical services, and the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion[19].

169. However, it should be noted that the mere expulsion of a group cannot be characterized as genocide[20]. This position was clearly and expressly adopted by the judges in the *Stakic* case. They noted that "it does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide."[21]

170. And in the *Eichmann* case, the Jerusalem court, which I cited yesterday, held that the use of terror to drive out the Jewish population and force it to emigrate did not constitute genocide, as the opportunity given to them to leave was evidence that there was no intent to perpetrate physical destruction.

171. The Applicant then tries to make out that the acts constituting genocide may be interpreted extensively. In support of this argument, in its oral pleading on 1 March 2006, it alleged that Dr. Bartos, the representative of Yugoslavia to the United Nations, had envisaged and proposed that the transfer of population groups should be included in the concept of genocide. Let us recall the dates. We are in November 1948, after the Second World War. Entire peoples have

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[17]ICTR, *Akayesu* case, Judgment, para. 505.

[18]*Id.*, para. 506.

[19]*Stakic* case, Judgement, para. 517.

[20]The German courts have held that the expulsion of Bosnian Muslims from the region in which they lived did not constitute genocide. See BGH *v.* 21.2.2001 – 3 StR244/00, NJW 2001, 2732 (2733).

[21]*Stakic* case, Judgement, para. 519.

been displaced. The question of Palestine and the creation of the State of Israel is raised. Syria, supported by the very same representative of Yugoslavia, Dr. Bartos, submits a proposal in the Sixth Committee for the addition of a subparagraph to Article II of the Genocide Convention, providing for the commission of genocide to include acts designed to force populations to abandon their homes in order to escape from the threat of subsequent ill-treatment. This takes us to the heart of the question we are discussing today and to the reference expressly made by the International Criminal Tribunal. Does genocide hinge on how we distinguish between the physical destruction

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and the mere dissolution of a group? That is the question. In fact, this proposal, put forward by Syria and Yugoslavia, was rejected by an overwhelming majority of votes, more precisely by 29 votes against, to five in favour, with eight abstentions[22]. This clearly shows that, once again in 1948, there was a reluctance to amend the definition of genocide and, in particular, to include population displacement in that definition, for reasons which can readily be understood. Thus, neither the text of the Convention nor the *travaux préparatoires* permit a broad interpretation of Article II of the Genocide Convention. Forcible population transfer was expressly excluded from the scope of the Convention.

172. One is thus forced to conclude that what the Applicant calls "ethnic cleansing" (Memorial, para. 2.2.5.3; Reply, Chap, 6, paras. 30-49), and what it presents as a form of genocide, is in reality population transfer, as discussed at length in the *travaux préparatoires* of the Genocide Convention.

173. Moreover, looking at the term "ethnic cleansing", it is obviously not a legal term; it is simply a highly emotive media coinage. And this ill-defined media coinage groups together, in a single image, several legal categories, including deportation and population transfers, none of which constitutes the *actus reus* of genocide, since they are not included in Article II of the Genocide Convention.

174. It should be noted that, at the time of the establishment of the Tribunal for the former Yugoslavia, the term "ethnic cleansing" was used for the first time with a legal connotation, and

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[22]United Nations, *Official Records of the General Assembly, Third Session, Sixth Committee*, Summary Records, 21 September-10 December 1948, pp. 176 and 186.

that it was then assimilated, not to genocide, but to a crime against humanity. In his report on the Statute of the Tribunal, the United Nations Secretary-General stated:

> "Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution."

21 175. Finally, the Tribunal has itself, more particularly in its *Stakic* judgment, established a distinction between ethnic cleansing and genocide, holding that ethnic cleansing does not constitute a distinct crime[23].

176. Thus, as the judges on the Tribunal noted, a distinction must be drawn between the *dissolution* of a group and its destruction. Only physical or biological destruction constitutes genocide. In the *Stakic* case, the judges noted that the idea of physical destruction is inherent in the term genocide, which is derived from the Greek root *genos*, meaning "race" or "tribe", and from the Latin infinitive *caedere*, meaning "to kill".

177. In that same case, the judges also pointed out that cultural genocide, as distinct from physical and biological genocide, was specifically excluded from the Genocide Convention. Further, in the *Blagojevic* case, Trial Chamber I held:

> "The Appeals Chamber has recently confirmed that by using the term destroy the Genocide Convention and customary international law in general prohibit only the physical or biological destruction of a human group. In the *travaux préparatoires* of the Convention a distinction was made between physical or biological genocide on the one hand and cultural genocide on the other."[24]

178. Trial Chamber I in the same case refers to the opinion of the International Law Commission on the meaning of the word "destruction" in relation to the crime of genocide. The International Law Commission defines such destruction as:

> "the material destruction of a group either by physical or by biological means, not the destruction of the national linguistic, religious, cultural, or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word destruction which must be taken only in its material sense, its physical or biological sense."[25]

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[23]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, paras. 981 and 982.

[24]*Blagojevic* case, Trial Chamber I, Judgement, 17 January 2005, para. 657.

[25]*Id.*

The destruction of the cultural and historic heritage, to which the Applicant devoted much of its written pleadings (Memorial, Section 2.2.5; Reply, Chap. 5, paras. 248-286), was only the consequence of the war. Of course, the war context does not detract from the criminal nature of some of these acts, but in no event can these acts legally be said to constitute genocide.

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179. In conclusion, the concept of genocide, as it was defined when the Genocide Convention was adopted in 1949, has not changed in legal terms. The different texts adopted or proposed subsequently, including in particular the International Law Commission draft in 1996 and the Statute of the International Criminal Court in 2002, reproduced word for word the language of the Genocide Convention.

180. Taking into account the civil war raging in Bosnia and Herzegovina at the time of the alleged events, a war which, by its very nature, generated inhuman conditions of life for the entire population in the territory of that State, including the Serbian population, it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction.

181. Before entering into an analysis of the elements which distinguish the crime of genocide from other offences that might be constituted by the acts enumerated above, we should now look at the various offences characterized as genocide in the Applicant's allegations. For the purposes of this part of my argument, genocide is to be understood in the broadest sense of the term, encompassing all forms of participation in the commission, *stricto sensu*, of a criminal offence.

III. Forms of participation in the crime of genocide

182. We will examine Article III of the Convention, which stipulates that the following acts are punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide; and

(e) complicity in genocide.

We can conclude that Article III of the Convention was intended to cover any form of "complicity" in genocide, going beyond the legal sense of the word, provided the intent was shared.

23 183. Once again, the Applicant does not indicate how the genocide was committed or who committed it, but merely alleges that Serbia and Montenegro — which, moreover, was not even one of the three belligerents — is responsible for the genocide in all of the forms set out in Article III that I have just cited, with the exception of attempt, since the Applicant has clearly stated in its oral pleadings that it does not allege an attempt, but the full, completed offence.

184. The perpetration of genocide itself, under Article III *(a)* of the Convention, does not warrant any particular comment; it involves the commission of the offence as previously defined. We would, nevertheless, quote the judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in which the Chamber defined the perpetrators of the principal crime of genocide in the following terms:

> "The Trial Chamber has previously identified the perpetrators or co-perpetrators of genocide as those who devise the genocidal plan at the highest level and take the major steps to put it into effect. The perpetrator or co-perpetrator is the one who fulfils 'a key co-ordinating role' and whose 'participation is of an extremely significant nature and at the leadership level'. This Trial Chamber regards genocide under Article 4 (3) *(a)* as usually limited to 'perpetrators' or 'co-perpetrators'."[26]

I believe that this quote goes to the heart of the matter, the core definition of perpetrators. It makes things very clear.

185. But now let us consider, in much greater detail, the three other forms of implication in genocide, as intent plays a very specific role.

186. We will analyse:

(i) conspiracy to commit genocide;

(ii) direct and public incitement to commit genocide;

(iii) complicity in genocide.

(i) Conspiracy to commit genocide

187. Conspiracy to commit genocide is the most appropriate charge for participation by the State.

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[26]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 532.

24 188. According to the *travaux préparatoires*, conspiracy to commit genocide was included in the Convention so as to make an agreement to commit genocide punishable *even* if no prior preparations had been made[27]. This had been found necessary in order to meet the requirements of genocide prevention emphasized by the United Nations Secretariat in the following terms:

> "Prevention could require making punishable certain acts which, in themselves, do not constitute genocide, for example, certain material acts preparing genocide, an agreement or accord to commit genocide, or all forms of propaganda tending by their systematic and hateful character to promote genocide."[28]

189. The notion of "conspiracy" was based on the Anglo-Saxon common law definition of the crime of conspiracy. In its report, the *Ad Hoc* Committee on Genocide explained that conspiracy was a crime under Anglo-American law[29]. This reflects the comments made during the Committee's debate on the notion of conspiracy. France's representative, for example, pointed out that it was a concept for which there was no equivalent in French law. The United States representative, speaking as Chairman of the Committee, explained that, under common law, conspiracy is a crime involving the agreement of two or more individuals to commit a criminal act. The representative of Venezuela pointed out that the word *conspiración* in Spanish means a plot against the Government, whereas the English term "conspiracy" in Spanish means an association with a view to committing an offence. The Polish representative noted that, under common law, the term "complicity" covers only the two notions of "aiding and abetting" *("complicité et provocation")*, so that the notion of "conspiracy" does not correspond to "complicity". He further observed that the Secretariat's draft provided under separate heads — as we shall see in a moment — for complicity on the one hand, and conspiracy or any other form of agreement. When the matter was debated in the Sixth Committee, a decision had to be taken. The United States representative, Mr. Maktos, indicated that the word "conspiracy" had a very precise meaning in

25 common law; it meant when two or more persons agree to commit an illicit act[30], and Mr. Raafat, Egypt's representative, announced that the notion of agreement had been included in Egyptian law;

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[27]United Nations, *Official Documents of the General Assembly, Sixth Committee,* Summary Records, 21 September-10 December 1948.

[28]Note from the United Nations Secretariat (1948), p. 8.

[29]Report of the *Ad Hoc* Committee on Genocide (1948), p. 8.

[30]United Nations, *Official Records of the General Assembly, Third Session*, 84th Meeting (1948), p. 212.

it meant the coming together of several persons to commit a crime, regardless of whether the offence was committed.

190. The lengthy account that I have imposed on you demonstrates quite simply that, at the time, there were differences among the representatives of the various legal systems as to the meaning of the offence of conspiracy to commit genocide.

191. The notion of conspiracy to commit genocide has since been written into the Statutes of the *ad hoc* International Tribunals, which reproduce precisely, in Article 4.3 for the ICTY and Article 2.3 for the ICTR, the terms of the Genocide Convention.

192. Conspiracy to commit genocide has much in common with a broader notion applicable to other crimes subject to the jurisdiction of international courts, namely a joint criminal enterprise.

193. As with conspiracy to commit genocide, there is no set definition for a joint criminal enterprise: the meaning tends to vary, prompting considerable debate as to its place in a criminal justice system.

194. In the present case, the Applicant has provided no evidence which could suggest that a conspiracy — and I mean a conspiracy — to commit genocide involving Serbia and Montenegro ever existed. Moreover, it has shown no agreement between individuals, State institutions or agents or States with a view to the commission of genocide.

195. It has done no more than cite or recount a multitude of facts, some of which have never been confirmed, while others, as we have seen, have proved to be untrue. Those facts have, moreover, not been characterized as genocide upon examination by the International Criminal Tribunal for the former Yugoslavia.

196. The Tribunal for the former Yugoslavia has not once been able to establish the existence of a State conspiracy to commit genocide. On the contrary, in the case of *Brdjanin*, who, I would remind you, was President of the Prijedor region, the Tribunal found that the Bosnian Serbs' plan was to bring together as much territory as possible where the Serbs formed the majority of the population in order to create a Serb State within Bosnia. And the Trial Chamber held that it was not possible to conclude that an intent to destroy the Muslims and Bosnian Croats existed in

26 western Bosnia[31], especially as the Bosnian Muslims' plan had clearly been an exact mirror image of that of the Serbs: bringing together as much territory as possible where Muslims formed the majority of the population.

197. When the case of *Krstic* came before the Appeals Chamber of the ICTY, it quashed his conviction for participation in a joint criminal enterprise with a view to committing genocide[32], due, again, to a lack of evidence regarding the other people involved, the members of the conspiracy.

198. As the Applicant fails to indicate which facts it bases itself upon in order to conclude that there was a conspiracy, it is virtually impossible in these circumstances to answer its allegations. Nor does the Applicant identify the individuals supposedly implicated in this conspiracy to commit genocide. And if we do not know who those implicated in the conspiracy were, we cannot of course analyse either their intent or their acts. In consequence, we can only conclude that the Applicant lacked the necessary evidence to raise a serious claim of conspiracy to commit genocide.

(ii) Direct and public incitement to commit genocide

199. The Applicant indiscriminately contends in its allegations that Serbia and Montenegro — for the dispute, this case, is not between Republika Srpska and the two other entities, it is between the Republic of Serbia and Montenegro and the Republic of Bosnia — and, the Applicant puts forward indiscriminate allegations, claiming that Serbia and Montenegro engaged in incitement to commit genocide. Of course, the Applicant does not identify the individuals capable of engaging Serbia and Montenegro's responsibility who conducted that incitement. Nor does it identify the individuals who were supposedly incited and then committed — or at least sought to commit — genocide.

200. Incitement to commit an international crime was first made punishable — and very **27** severely so — by the Nuremberg Tribunal. In its judgment on Julius Streicher, the Nuremberg

[31]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, para. 981.

[32]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, p. 87.

Tribunal, in view of the viciously anti-Semitic articles which the accused had published in the weekly *Der Stürmer*, concluded that:

> "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity."[33]

201. Common law systems tend to regard incitement as a specific form of criminal complicity, punishable as such. The common law defines incitement as the act of encouraging or persuading another person to commit a crime.

202. The legislation of certain civil law countries, including Spain, Argentina, Uruguay, Chile, Venezuela, Peru and Bolivia, also regards provocation, which is similar to incitement, as a specific form of participation in a crime; however, for the majority of civil law systems, incitement is generally viewed as a type of complicity. As I have said, civil law systems punish direct and public incitement as provocation, which is defined as an act aimed at directly provoking others to commit a crime through speeches, shouting, threats or any other means of communication, notably the broadcast media.

203. When the Genocide Convention was adopted, the delegates decided deliberately to include direct and public incitement to commit genocide as a specific crime, due notably to its importance in the preparation of genocide.

204. The notion of direct and public incitement to commit genocide is included in the articles on genocide in the Statutes of the International Tribunals for the former Yugoslavia and for Rwanda, as well as for the International Criminal Court.

205. In order to be punishable, incitement must be direct and public.

206. The public nature of the incitement can be analysed more closely in light of two factors: the place where the incitement was expressed and the issue of whether the audience was selected or restricted. The traditional jurisprudence on this point under civil law holds that statements are
28 "public" when they are uttered out loud in a place that is by its nature public. According to the International Law Commission, public incitement requires a call to commit an offence addressed in a public place to a number of individuals or a call to the general public by such means as the mass

[33] Nuremberg Trials, Vol. 22, p. 502.

media, for example, radio or television[34]. In this respect, it should be noted that, when the Convention was adopted, the delegates specifically agreed to rule out the possibility of criminalizing private incitement to commit genocide, thereby underscoring their commitment to set aside for punishment only truly public forms of incitement, that is to say, those widely publicized[35].

207. The "direct" element of incitement requires that the incitement assumes a direct form and specifically provokes others to engage in a criminal act. According to the Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission, a mere vague and indirect suggestion is insufficient to constitute direct incitement[36]. In civil law systems, provocation, the equivalent to incitement, is regarded as direct if it is aimed at causing a specific offence to be committed. When provocation is alleged in a civil law system, the prosecution must prove a clear causal link between the act characterized as provocation and a specific offence, in our case genocide.

208. In its jurisprudence, the Tribunal for Rwanda considers that the directness of incitement must be assessed in light of the culture and language concerned. According to the judgment in the *Akayesu* case, "a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience"[37].

209. Consequently, international jurisprudence has adopted the position that incitement needs to be assessed on a case-by-case basis, in light of the culture of the country concerned and the specific circumstances of the case, in order to determine whether it is direct or not. During this

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assessment, the question to be considered is whether those to whom the message was addressed directly and clearly understood its meaning.

210. However, irrespective of legal system and cultural background, according to the International Criminal Tribunal for Rwanda direct and public incitement should be defined as:

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[34]"Draft Code of Crimes against the Peace and Security of Mankind", Art. 2 (3) *(b)*: United Nations, *Official Records of the General Assembly, Fifty-First Session, Supplement No. 10*, Report of the International Law Commission to the General Assembly, doc. A/51/10 (1996), p. 26.

[35]*Yearbook of the United Nations*, 50th edition, 1945-1995, Martinus Nijhoff publishers, 1995; United Nations, *Official Records of the General Assembly, Sixth Committee*, Summary Records, 21 September-10 December 1948.

[36]United Nations, *Official Records of the General Assembly, Fifty-First Session, Supplement No. 10*, Report of the International Law Commission to the General Assembly, doc. A/51/10 (1996), p. 43.

[37]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Chamber I, Judgement, 2 September 1998, para. 557.

> "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication"[38].

211. The mental element of the crime of direct and public incitement to commit genocide therefore lies in the *intent* to induce or provoke others directly to commit an act of genocide. It thus requires proof that the accused intended, by his acts, to induce in the individual or individuals addressed a state of mind conducive to commission of this crime. That is to say, the person inciting genocide must him/herself necessarily be motivated by genocidal intent.

212. However, in its written pleadings, the Applicant has provided no analysis whatever of the situation and has failed to identify those supposedly responsible for incitement to commit genocide. It does not even identify the acts which allegedly constituted direct and public incitement to commit genocide. Nowhere does it prove genocidal intent.

(iii) Complicity

213. The "Nuremberg Principles"[39] already provided in Principle VII: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

214. Thus, participation by way of complicity in the most serious breaches of international humanitarian law was already considered a crime by the Nuremberg Tribunal.

215. Complicity is a form of participation in crime which is addressed by all criminal law systems — I am not going to spend much time on this point — including the Anglo-Saxon
30 (common law) system and the continental (civil law) system. An accomplice in an offence may be defined as one associated in the commission of the offence by another[40]; complicity obviously presupposes the existence of the principal offence.

216. The *travaux préparatoires* of the Genocide Convention show that the crime of complicity in genocide was contemplated only in those cases where genocide had in fact been

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[38] *Ibid*., para. 559.

[39] "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" adopted by the International Law Commission of the United Nations, 1950.

[40] *Osborn's Concise Law Dictionary* defines an accomplice as: "any person who, either as a principal or as an accessory, has been associated with another person in the commission of any offence", Sweet and Maxwell, 1993, p. 6.

committed. The principal offence must therefore be proved — and this is perfectly obvious under criminal law — before complicity can be charged. The Genocide Convention *did not criminalize complicity in an attempt to commit genocide, complicity in incitement to commit genocide or complicity in conspiracy to commit genocide*. It is therefore noteworthy that under Article III there can be complicity in genocide itself but there can be no complicity in the three other forms, which moreover are themselves types of complicity. It is impossible to be an accomplice in an attempt to commit genocide.

217. Complicity in genocide means all those acts of aiding or abetting which significantly contributed to the consummation of the crime of genocide or which had a substantial effect on the commission of that crime. Complicity therefore necessarily requires the existence of the principal offence. In other words, there can be complicity in genocide only where there has been genocide.

218. It is also true that the drafters of the Convention wished to require proof of genocidal intent on the part of the accomplice in order for there to be complicity *(complicité)*. This is a very important point: the accomplice's genocidal intent. The United Kingdom's representative on the Sixth Committee of the General Assembly, seeking to be explicit, proposed introducing the word "deliberate" to qualify "complicity", explaining that this was an important point because complicity required intent in certain systems but not in others. Several delegations (Luxembourg, Egypt, Soviet Union and Yugoslavia) then stated that they found this clarification useless because it was self-evident that complicity in genocide had to be intentional. The United Kingdom finally withdrew its amendment, nevertheless pointing out: "it was understood that, to be punishable, complicity in genocide must be deliberate".

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219. Thus, on this point concerning the intent of the accomplice, I think that, legally, it is perfectly clear. It is perfectly clear and, yet, in establishing complicity in the *Krstic* case, the Appeals Chamber of the Tribunal for the former Yugoslavia did not seek to find genocidal intent on the part of the accused. But, in so doing, the Tribunal was perfectly cognizant of the problem raised by the definition of complicity in Article III of the Convention, incorporated, as I mentioned, verbatim into Article 4, paragraph 3, of the Statute of the Tribunal. The Tribunal was fully aware of the difficulty because it did not base its finding of complicity on Article 4.3 *(c)* of the Statute,

but on Article 7.1 of the Statute of the Tribunal, which defines general and specific complicity[41]. There is therefore reason to believe that this choice was entirely deliberate on the part of the Tribunal. It simply circumvented the difficulty contained in the Convention, Article III of which was incorporated verbatim into its Statute.

220. The analysis of *mens rea* in the cases before the Tribunal for Rwanda is slightly different from that made by the Tribunal for the former Yugoslavia. Under the jurisprudence of the Tribunal for Rwanda,

> "an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[42].

Thus, under the jurisprudence of the Tribunal for Rwanda, an accomplice must be fully aware that he is lending his support to the commission of genocide and must do so deliberately. Here there is a slight difference in the jurisprudence of the two international tribunals.

221. Complicity may take the form of various acts. In the judgment handed down in the *Akayesu* case, the Tribunal for Rwanda specified acts which frequently constitute complicity or rather the *actus reus* of complicity:

> "Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes."[43]

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222. True, complicity may take the form of various acts, but the Applicant in its written pleadings has failed, once again, to identify a single act which could constitute complicity allegedly committed by persons whose acts could bind or be imputed to Serbia and Montenegro. Moreover, the Applicant has not identified the principal perpetrator of the crime in which Serbia and Montenegro allegedly lent its support as an accomplice.

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[41]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-93-33-A, Judgement, 19 April 2004, para. 138.

[42]ICTR, *Akayesu* case, Judgement, para. 545.

[43]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4, Judgement, 2 September 1998, para. 536.

(iv) The facts concerning participation by Serbs in one of the acts listed in Article III of the Genocide Convention

223. Having examined the various elements of the different forms of genocide, we shall analyse the facts alleged by the Applicant and shall arrive at the conclusion that under no circumstances do they constitute genocide.

224. The Applicant does not state what means Serbia and Montenegro employed to commit the alleged genocide. However, we have attempted to identify, with no guarantee of success given the difficulty of this task, the elements found in the Applicant's written pleadings which, according to the Applicant, could constitute the alleged genocide. We have to go into great detail and it is therefore these elements which we are going to examine.

225. Having failed to uncover a plan, to bring to light even a presumption of a genocidal plan by the Republic of Serbia and Montenegro, the Applicant relies on grand concepts. The Applicant's main concept is that the notion of Greater Serbia served as the ideological foundation for the genocide. Now, what is this notion of Greater Serbia which allegedly contained the seeds of the ideological basis for genocide, as *Mein Kampf* did for the acts tried in Nuremberg? The Applicant seeks to portray Bosnia and Herzegovina as a land of tolerance into which the Serbs injected nationalism and armed conflict. And finally, in order to link Serbia and Montenegro with the conflict which, as I have said a hundred times, was a civil war, the Applicant strives to assign the Yugoslav army a role which it never had.

33 226. Thus, to show that the Applicant's position is totally misconceived, we are going to disprove, one by one, the elements which we have been able to identify and which we have just mentioned.

(a) ***The Greater Serbia concept***

227. The Greater Serbia concept, the ideological pact. What is this? First of all, the concept of Greater Serbia has been wrongly described by the Applicant and, secondly, Serb leaders were never followers of this ideology. It was neither the motive nor the objective of the war in Bosnia and Herzegovina.

228. The Applicant considers that Serbia and Montenegro used the Greater Serbia concept to rally public opinion and to justify its alleged military campaign (Memorial, para. 2.3.3.1). In

support of this argument, the Applicant contends that the Greater Serbia ideology was born in the nineteenth century at a time when Serbia was still part of the Ottoman Empire under Turkish rule.

229. The Respondent is forced to reply briefly to wholly unfounded accusations. During the nineteenth century when, according to the Applicant, the concept of Greater Serbia was born, Serbia was not yet an independent State; it was in the midst of its struggle for independence, indeed against the Ottoman Empire, which ruled over Serbia and Montenegro as well as over Bosnia and Herzegovina, Macedonia and part of present-day Croatia. As to the other States which were to become States of Yugoslavia, Slovenia and Croatia were then part of the Austro-Hungarian Empire. When the various nationalities emerged in the nineteenth century, aiming to throw off the yoke of these two Powers, the Ottoman and Austro-Hungarian Empires, the southern Slavs, simultaneously in Serbia, Slovenia and Croatia, invented pan-Slavism, the union of the southern Slav peoples. Curiously, this ideology, for which Serbia is today reproached, was born not in Serbia so much as in Croatia first and then Slovenia. It was a form of emancipation from the Austro-Hungarian Empire at a time when Europe — indeed all of Europe — was being shaken by the emergence of various forms of nationalism.

34 230. The quotations cited by the Applicant and dating from this time, specifically the writings of Garasanin (Memorial, para. 2.3.1.2), are in no way the expression of a will to create a Greater Serbia in the sense of a Serb empire, as it were, but rather the will of a people, the Serb people, to free itself from Ottoman occupation. And the same concerns were to be found at the same time, as I said, in Croatia, where the greater pan-Slav movement together with the Illyrian movement — the main political movement — and its founder, Ljudevit Gaj, indeed aimed at uniting all the southern Slavs living in the Balkans in a single State[44]. That, moreover, was largely what led to the First World War and to the creation of Yugoslavia under the Treaty of Versailles.

231. And it was in reaction to this unifying movement that Austro-Hungarian propaganda in the early twentieth century invented the notion of "Greater Serbia", that is to say the idea of some form of Serb domination over the southern Slavs which would help the Croatian and Slovene provinces gain independence. At that time the Austro-Hungarian Empire was in effect in

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[44]Misha Glenny, *Balkans 1804-1899, Nationalism, War and the Great Powers*, Granta Books, London, 2000, p. 43.

competition with the small emerging country of Serbia, and, in particular, was competing — we are very familiar with this, our common history — for control over Bosnia and Herzegovina, which was slipping from the grasp of the Ottoman Empire.

232. Thus, in characterizing Serb aspirations in the Balkans as "Greater Serbia", the Austro-Hungarians were simply trying to draw a parallel with Russian expansionist policy, which they called at the time the "Greater Russia" expansionist policy. And that enabled them to transform the slightest Serb claim into expansionist aggression.

233. Yet, nowhere in its Memorial has Bosnia and Herzegovina seriously shown that this ancient doctrine — which moreover bore fruit, I would remind you, in the creation of Yugoslavia — was the foreign policy of the Yugoslav Federation, once it had been reduced to Serbia and Montenegro! For the events we are discussing today were the exact opposite of Greater Serbia. It was the end of the pan-Slav dream, the end of the dream of the southern Slavs, it was precisely the contrary.

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234. This period did not see Serb expansion, but, on the contrary, the shrinking of the Serb territorial sphere of influence, subject to challenge everywhere, including within the borders of the Republic of Serbia itself, that is to say in Kosovo, and within the borders of the Federation, because some Montenegrins also wished to secede. The camps full of refugees from Croatia, Bosnia and Herzegovina and Kosovo are unfortunately still flourishing today in Serbia, compounding the economic difficulties of a territory and a population which no longer has access to the same resources or the same markets and whose channels of communication have been drastically curtailed.

235. Serbia and Montenegro never declared war on Bosnia. Further, it has always maintained its borders with Bosnia and Herzegovina, notably along the Drina, unlike Croatia, which has eliminated the entire southern border of the country with Bosnia and Herzegovina, in a region predominantly populated by Croats.

Thank you, I shall request a break.

The PRESIDENT: Thank you, Maître de Roux. The Court will now rise for 15 minutes.

The Court adjourned from 11.30 to 11.45 a.m.

Mr. de ROUX: Thank you, Madam President.

(b) ***The tolerance of Bosnia and Herzegovina***

236. I would now like to turn to the Applicant's representation of Bosnia and Herzegovina, because its contention is that this country was a haven of tolerance and that Serbia brought first discord, then terror and horror. Such a claim is not just wrong, I would say first of all that it is not acceptable. It is really not acceptable to sing the praises of this land, beautiful possibly, but certainly not a land of tolerance. The Applicant bases his argument on the alleged tolerance of the Ottoman Empire towards Spanish Jews in the fifteenth century (Memorial, para. 2.1.0.2). In any event it cannot be said that the Ottoman Empire always showed the same tolerance towards the

36 Serbs whenever a show of independence entailed repression.

237. But to speak of tolerance among the various peoples of Bosnia and Herzegovina is hardly acceptable today if we look at what happened there, not in the fifteenth century but in the very recent past, and which unfortunately explains the tragedy of today to a large extent. Bosnia and Herzegovina was the scene of the worst atrocities committed against Jews, Serbs and gypsies during the last war. This territory was part of the new independent Croat State created by Nazi Germany, which became an effective satellite of its creator; the fascist régime of Ante Palevic is quite notorious — it suffices to re-read Malaparte to understand what happened in those lands of terror during those black years. And at the time the Bosnians were regarded as the flower of that Croat people and had powerful military forces which committed unlimited atrocities against the Serb resistance, particularly in the regions of Krajina and Eastern Bosnia.

238. The most notorious military unit, the Handjar Division, spread terror among the Serbs. And President Izetbegovic, or rather the man who became President of Bosnia and Herzegovina in 1990, who wanted an independent and sovereign Bosnia, was at that time a member of the Young Muslims, an organization set up in several countries and not then noted for its tolerance[45].

239. Finally, the Applicant's Memorial demonstrates its odd view of tolerance among the peoples of Bosnia and Herzegovina, because even today at this hearing it completely excludes the Serb element, accusing it *inter alia* of wanting to destroy the people, the territory and the culture of

[45]Wikipedia, *The free encyclopedia*, www.wikipedia.org/wiki/Alija.

Bosnia and Herzegovina (Memorial, para. 2.1.0.6). How could the Serbs of Bosnia want to destroy the people, the territory and the culture to which they belong? If a State of Bosnia and Herzegovina exists today, if a people, a territory and a culture of Bosnia and Herzegovina exist, they cannot do so without the Serb element. It is indispensable, like the Croat element and the Muslim element, in constituting Bosnia and Herzegovina, its people, its territory and its culture.

37 **(c)** ***The rise of nationalisms***

240. Let us return to the rise of nationalisms, to Yugoslavia and to its dissolution. The Applicant states that Marshal Tito suppressed Serb nationalism after the Second World War (Memorial, para. 2.3.1.3). Serb nationalism was seen everywhere as some kind of diabolical influence. Admittedly Marshal Tito's last Yugoslav Constitution was not very favourable to the Serbs, because, of all the Yugoslav Republics, only Serbia had autonomous provinces. Of course, after the Second World War Marshal Tito was especially tough in repressing the Serbs, who were not necessarily nationalists but were certainly opposed to the establishment of a communist régime in Yugoslavia. Their leaders were systematically eliminated or sent to camps and their overall leader, General Mihailovic, a hero of the war of liberation and companion of General de Gaulle, was executed. However, Marshal Tito had much more difficulty in suppressing Slovene, Muslim and above all Croat nationalist sentiment. This is not the place for a discussion of the numerous terrorist attacks by Croat nationalists on Yugoslav diplomats everywhere in the world throughout the life of Titoist Yugoslavia. However, such Croat armed opposition has always existed, and the events of 1990 clearly show that Tito never succeeded in suppressing Croat nationalism as expressed in 1971 during the notorious Croat spring, which was only one among many short-lived springs in Eastern Europe. Although these events are of limited relevance to our case we should remember that, as Tim Judah noted in his book[46], the events of 1990 show that what happened in 1971 was the dress rehearsal for what would happen in 1990. The Applicant passes over these events in complete silence. It overestimates Serb nationalism and attempts to belittle other nationalisms, which were in truth far more prevalent in communist Yugoslavia than Serb nationalism, and which indeed led to the break-up of Yugoslavia.

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[46]Tim Judah, *The Serbs, History, Myth and the Destruction of Yugoslavia*, Yale *Nota Bene* Book, 2nd edition, 2000, p. 146.

241. As regards recent events, the Applicant seeks to demonstrate Serb nationalism and the wish to create a Greater Serbia on the basis of a document that was much cited during these black
38 years, the Memorandum of the Serbian Academy of Arts and Sciences (Memorial, para. 2.3.1.3). This document is notorious for the way it was manipulated throughout the civil war. It is not a political document or a document of the Government of Serbia and Montenegro. It is a joint document from the Serbian Academy of Sciences which was no more than a reaction to the rise of nationalism, mainly in Slovenia and Croatia, because that is where the events began — do not forget that the events began with the Slovenian revolt, then the Croat demand for independence. Moreover, this document is no more than a discussion paper regarding Serbia's own territory.

242. In a very general way the Applicant targets Slobodan Milosevic's speeches. It is difficult to argue about these speeches today because the former President died before the end of his trial and no one knows what the outcome would have been. Let us simply say that in 1991 Slobodan Milosevic, the head of the communist régime, endeavoured to hold onto Yugoslavia within its frontiers and within its political régime and failed. The Constitution of Yugoslavia was extremely complicated. If I may put it that way, Marshal Tito had tied things up very nicely. The Constitution certainly authorized self-determination and secession by *the peoples* — the founding peoples. However, the constituent republics were not granted this right. And it was this constitutional ambiguity that led the Serbs of Bosnia to oppose the secession of the entire republic because that right of secession belonged to the people, and it was clear that they were about to get involved in a war of secession. Hence the Serbs protested against the secession of the entire republic, which was not the secession of a people — just as they protested against the Croat secession, because constitutionally and legally the two founding peoples of Croatia were the Serbs and the Croats. As we will see again shortly: no one asked the Serb people for their opinion.

243. But above all the Applicant forgets that at this time nationalistic speeches were not a Serb speciality. Well before the 1990s — in what was doubtless a long-standing tradition — the Croats began to demand a pure Croat race. Thus during his election campaign in 1989 President Tudjman stated publicly — and this is still widely remembered — that he thanked God that his wife was neither Jew nor Serb!

244. The notorious Islamic Declaration written by President Izetbegovic, also in 1971 — what a spring that was! — expressed his desire to create an Islamic State uniting all Muslim lands.

39 He called for the creation of a vast Muslim community: "the implementation of Islam in all fields of individuals' personal lives, in family and in society, by renewal of the Islamic religious thought and creating a uniform Muslim community from Morocco to Indonesia." And he adds:

> "There can be no peace or coexistence between the 'Islamic faith' and non-Islamic societies and political institutions. Having the right to govern its world itself, Islam clearly excludes the right and possibility of activity of any strange ideology on its own turf. Therefore, there is no question of any laicistic principles, and the State should be an expression and should support the moral concepts of the religion."

Of course, one can understand these remarks, but one can also understand the anxiety of Catholics and Orthodox Christians accustomed to living in a secular State.

245. In this context the speeches of Slobodan Milosevic cited by the Applicant, which were intended for the Serbs of Serbia, may seem quite moderate. In any event they contain no genocidal intent.

246. Other speeches cited by the Applicant were not delivered by the leaders of Serbia and Montenegro but by Serbs of Bosnia, who were belligerents, and they cannot readily be imputed to Serbia and Montenegro because they emanate from individuals who certainly did not belong to the same party as that in power in Belgrade. These speeches by Bosnian Serbs were made in a situation of conflict that was political first before becoming military. Admittedly they often go much too far! Unfortunately, they reflect the situation existing in Bosnia and Herzegovina at the time. As regards the speeches of Brdjanin cited by the Applicant, for which he was convicted, and which were held to be incitements to persecution, it should be made clear that Brdjanin was not convicted of genocide but of the crime of incitement to persecution, which is not the same thing. I simply wish to stress that Brdjanin had nothing to do with Serbia and Montenegro; he was a Bosnian Serb, born in Bosnia, whose parents had been killed by Croat forces during the Second World War. So Brdjanin is a pure national of Bosnia and Herzegovina, immersed in the unhappy history of that country.

40 **(d)** ***The beginnings of the armed conflict***

247. Acts of war, characterized as genocide by the Applicant, Bosnia and Herzegovina, were committed in the territory of Bosnia and Herzegovina as part of a conflict involving from 1992 three clearly defined entities: a Croat entity, a Muslim entity and a Serb entity. These corresponded to what were constitutionally and legally called in Yugoslavia the three founding peoples of the State. May I remind you that under the Constitution each of these three founding peoples had, as a people, a constitutional right of self-determination. Later the conflict would become more complex and intense because of the split in Izetbegovic's party over Bihac, which we have already discussed.

248. Thus the referendum of 29 February 1992 on Bosnia and Herzegovina was not about the choice of the founding peoples as such, but about a State seeking to efface the distinction between its constituent peoples, and that is why the proclamation of the independence of Bosnia and Herzegovina as such was preceded by the proclamation of Republika Srpska, i.e. the Serb Republic of Bosnia, which, anticipating the independence of Bosnia and Herzegovina from the Yugoslav Federation, was detaching itself from Bosnia. We can discuss the reasons for this action by the Bosnian Serbs, as we can discuss the reasons that led the Croats and Muslims to the decision to hold a referendum on independence against the expressed wish of the Serbs, who, may I remind you, accounted for a third of the population. This referendum organized by the central Government of Bosnia and Herzegovina was obviously contrary to the Constitution of the State, because for such a referendum it was not enough for the majority of the population to vote; what was necessary was for the three constituent peoples to show their agreement. And I would remind you that we were in the same situation when the independence of Croatia was proclaimed. But no agreement could be reached on this point. The proclamation of Republika Srpska was simply a response to the decision by the central Government of Bosnia and Herzegovina to seek independence — a last-ditch attempt by the Serb people to prevent the referendum and at the same time to prevent war in Bosnia.

249. Out of this situation there arose a civil war, the purpose of which was separation, the secession of territories, just as the territory of Yugoslavia had just been split apart under

41 international pressure. Madam President, Members of the Court, the paradox here is that, while the

international community accepted all of the Yugoslav nationalisms and the disappearance of this great European State, it pressed at the same time for it to be reconstituted in miniature. How could Serbs, Croats and Muslims be separated from Yugoslavia — from the Federal Republic — and how could these three peoples who had just decided to separate from the great pan-Slav State be suddenly pressured into freely living together in a State that was much smaller but had exactly the same characteristics as Yugoslavia? I see this not as a legal question, but as a historical question that we should bear in mind; the problem of nationalities and the issue of minorities arose in comparable terms in both cases.

250. The administrative boundaries of Yugoslavia, created arbitrarily under Marshal Tito's régime in 1945, did not respect the national entities that constituted Yugoslavia in 1918.

251. The disappearance of the first Yugoslavia in 1941 through the formation of a Croat-Bosnian State on the initiative of the German National Socialist Government and the extermination of Serbs in that territory between 1941 and 1945 had obviously made the question of nationalities an extremely complex and sensitive one, which the democratic centralism of the communist party in power from then on had dealt with in its own way for 45 years. However, nationalist movements were never extinguished in Yugoslavia, particularly the Croat movement.

252. The desire for independence, first of Slovenia then of Croatia, and the proclamation of that independence on 25 June 1991, were the starting-point of the Yugoslav conflict in the name of the nationalism of the peoples that made up the Federal Republic.

253. The goal of the Croat war of independence was a unified Croat territory no longer including a substantial Serb minority, or in other words no longer including a second constituent people. The conflict in Croatia had existed since the summer of 1990, and it grew worse in 1991. The new Croat Constitution abolished all the special rights enjoyed by Serbs as a constituent people of the Republic of Croatia, thus reducing them to a minority that no longer had any guaranteed rights. I can assure you that the Serbs of Croatia had no need of the Serbs of Serbia to remind themselves of the tragedy experienced by them in the independent State of Croatia during

42 the Second World War. What shocked them most was that in 1991 Croatia again adopted the same symbols and the same currency as those which had seen hundreds of thousands of Serbs in Croatia and Bosnia sent to concentration camps or exterminated. May I remind you that in 1990 and 1991

(fortunately that time has passed) swastikas were freely on sale on Republic Square, the central square in Zagreb, and there was no shortage of buyers. The transition now was from words to deeds; employees of Serb origin in workshops, factories and businesses were being dismissed en masse, whilst the streets were being renamed.

254. It might be feared that the same would happen in Bosnia and Herzegovina if the Serbs were reduced to being a simple minority.

255. Consequently the Serbs, possibly indeed wrongly, might well have felt threatened if they were to become a simple minority in the new republic, the more so because brutal ethnic cleansings were a long tradition in the Balkans, reaching a peak during the Second World War, leaving a bad taste in the mouths of Serbs in Croatia and Bosnia because they had been systematically hunted down and massacred by the régime of Ante Pavelic, whom Franjo Tudjman nonetheless described as: "the historical expression of the Croat people".

256. So it is not without good reason that in 1991 the parties to this new civil war characterized their enemies as they had done during the Second World War. Each readopted a former propaganda appellation once thought to be outworn: Ustashi for the Croat-Muslims, Chetniks for the Serbs. Only the "partisans" disappeared with the collapse of the communist régime; they had been the only multi-ethnic constituent of the conflict in the Second World War!

257. Thus the dismemberment of Yugoslavia, accepted if not encouraged by the international community, was bound to lead to a bloody separation of the peoples forming the nations whose emergence was being encouraged. If the independence of peoples leads to the creation of nations, the latter still needs a cohesive territory to harbour them, and their minorities have to be tolerated and, indeed, protected.

43 258. When a territory is weighed down by the history of the antagonism of its peoples and that antagonism is rooted in part in religious intolerance, it is apparent that the violence of the war may be extreme, because that is the price of controlling the territory.

259. It is clear that Croat nationalism and Bosnian nationalism were opposed by a Bosnian Serb nationalism that led to the creation of a separate entity and the conquest by that entity of the greatest possible area of territory.

260. Bosnia, multi-ethnic and multicultural, so desired by the international community, resisted neither the pressures of history nor the programmes of the communist parties in power, that of the Muslim nationalist party (SDA) being no exception. The programmes of these three parties, so mutually antagonistic that they obviously could not cohabit in a democratic union such as we know in our countries, should be re-read. Each had armed militias available, all the easier because since Tito the defence of Yugoslavia was based on an armed and autonomous territorial military organization, formed into crisis cells and directed against the invader since 1948. This territorial armament at the level of each municipality, whichever people it belonged to, obviously gave to each the resources for a terrible war, because there could be fighting from village to village, virtually from neighbour to neighbour.

261. So it was a true civil war that erupted in a Bosnia which, while recognized by the international community, comprised three peoples who no longer wished to share a common destiny. How could what had just failed elsewhere be successful here, how could peoples that had just been separated be brought together? In 1991 17 per cent of the population of Bosnia and Herzegovina was Croat, 43.5 per cent Muslim and 31.5 per cent Serb.

262. Yugoslavia, now limited to Serbia and Montenegro, not only took no part in this war but was to distance itself quite quickly from Republika Srpska, to the point of imposing sanctions on it after 1994 because it refused the Anglo-American peace plan. Bear in mind that a delegation at the highest level from Belgrade, led by President Milosevic himself, came to Pale to the Parliament of the Serbs of Bosnia to attempt to persuade it to ratify the Anglo-American accord organizing the division of Bosnia and Herzegovina. Bear in mind that the Serb Parliament of
44 Republika Srpska, which has been described to you as being the puppet of Belgrade, refused this peaceful and sensible solution, probably wrongly but certainly with disdain, and that immediately afterwards the Belgrade Government imposed a blockade, *inter alia* along the River Drina, in order to isolate Republika Srpska still further and to induce it to accept an international solution.

263. Thus it is clear that the Serbs of Bosnia sought closer union with what they regarded as their motherland, and which perhaps they still regard as their motherland; but to contend that the Belgrade Government waged war on Bosnia using the Serb minority is simply the reverse of the truth.

(e) ***The role of the JNA***

264. In order to give this falsehood the ring of truth, much has been made of the federal army of socialist Yugoslavia, to which the Applicant refers in its Memorial (para. 2.3.3.2), but the role of the Yugoslav federal army was in the final analysis only a consequence of the secession of Slovenia and Croatia. After the fighting, moreover, the federal army found it necessary to withdraw from Slovenia, leaving behind its Slovenian officers and troops. It was then forced to withdraw from Croatia after the fighting there, leaving behind its Croatian officers and troops, so that in fact it was, in a way, Serbianized; but it is absurd to assert, as the Applicant does, that the purpose of this forced reorganization was to take control of Bosnia and Herzegovina. The increase in the number of troops in Bosnia and Herzegovina was initially no more than the consequence of the withdrawal from Slovenia and Croatia. Look at a map, there was no other route by which to withdraw, Croatia was at war and, at the time, Bosnia was still a part of the Federal Republic of Yugoslavia. At the time, the federal army was the regular and legitimate army of Bosnia and Herzegovina in the same way as it was the regular and legitimate army of Serbia. The Yugoslav National Army, having withdrawn from Slovenia and Croatia, stationed itself in Bosnia and Herzegovina in late 1991 and early 1992. It withdrew on 19 May 1992, following Bosnia's accession to independence on 6 April 1992.

265. However, the operation did not run smoothly and, here again, I shall cite an eyewitness, General MacKenzie, who was on the spot in Sarajevo when the federal army withdrew. That army was the target of choice for the Muslim forces, which had already organized themselves into

45 territorial defence forces, as was in fact the case for the entire territory. In his book, *Peacekeepers*, General MacKenzie reports: "On or about April 12, they [Muslim Territorial Defence] had been ordered to block the JNA's barracks, occupy its weapons depots and communications centres and attack JNA soldiers and their families with the objective of driving them from Bosnia"[47]. General MacKenzie continues with the following description of even more violent events which took place on 3 May 1992:

> "The heaviest shooting was about fifty metres away. I could see TDF [Territorial Defence Forces] soldiers sticking their rifles through the windows of civilian cars that were part of the convoy and shooting the occupants . . . we saw blood

[47]General Lewis MacKenzie, *Peacekeepers*, published in Vancouver/Toronto, Douglas & McIntyre, 1993, p. 156.

> splattered over the windscreens of some of the cars. When we reached a crowd of some twenty TDF [Territorial Defence Forces] soldiers, we realized that they had driven a car across the road to split the convoy in half. The JNA soldiers were sitting helplessly in the back of their trucks, the TDF were demanding that they throw out their weapons and military equipment. To make the point one of the TDF soldiers who had two grenades hanging from his teeth, was threatening to throw a third into the back of the truck full of JNA soldiers if they didn't hurry up and surrender their weapons. Weapons and kit were flying out the back of the truck and landing all around the TDF soldiers."[48]

This is what happened in Sarajevo during the evacuation of the federal army.

266. After losing first its Slovenian officers and troops, then its Croatian officers and troops, and finally its Bosnian officers and troops, the federal army obviously became much more homogeneous, much more Serbian. Thus, Tihomir Blaskic, a Bosnian Croat officer, joined the Croatian army in Bosnia as a colonel and rose to the rank of general; Sefer Halilovic, a Serbian Muslim, joined the Muslim army of Alija Izetbegovic as a general. And unlike General Ratko Mladic, who is admittedly a Serb, but comes from Bosnia and Herzegovina, Sefer Halilovic is not from Bosnia and Herzegovina. He also comes from Serbia.

267. With regard to the arming of the Serbs, to which the Applicant refers in its Memorial (Sec. 2.3.4), this operation took place under the same circumstances as the arming of the entire population of Bosnia and Herzegovina, including Croats and Bosnians. Moreover, General Sefer Halilovic, the Chief of Staff of the army of Bosnia and Herzegovina, who has written

46 a very insightful book called *Cunning Strategy*, explains how the Muslims were armed, how they went to Croatia for training and how they organized themselves into the Patriotic League, which later became the army of Bosnia and Herzegovina. All these events, which were in fact *preparations for war* — the Patriotic League was created well before the start of the war — took place in 1991, at a time, therefore, when Bosnia and Herzegovina was still a Yugoslav federal State. However, the Applicant's Memorial stresses the arming of the Serbs and seeks to conceal the fact that the arming of the population was a widespread phenomenon in Bosnia and Herzegovina in the 1990s.

268. The federal army withdrew from Bosnia when that territory proclaimed its independence. The Respondent will not deny that a part of the army stationed in Bosnia remained in Bosnia as an organ of Republika Srpska. However, contrary to the Applicant's allegations

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[48]General Lewis MacKenzie, *Peacekeepers*, published in Vancouver/Toronto, Douglas & McIntyre, 1993, p. 168.

(Memorial, para. 2.3.6.1), the federal army did not become the army of Republika Srpska. It is important to point out that, in the Yugoslavia that had just been dissolved, while it is true that people possessed federal Yugoslav nationality, every individual also and compulsorily had the nationality of one of the component republics of federal Yugoslavia. Military personnel who became members of the army of Republika Srpska possessed Bosnian nationality, and they quite simply remained in the Republic to which they belonged, because they were not Serb citizens but belonged to one of the founding peoples of Bosnia.

269. The Applicant's entire assessment of the organization and functioning of the army of Republika Srpska (Memorial, paras. 2.3.6.6 to 2.3.6.7) is flawed, since it fails to mention the most important fact about that army. Thus, while General Mladic, a native of Bosnia, was indeed appointed Commander-in-Chief of that army, he was appointed Commander-in-Chief not by the Belgrade Government but by the Supreme Commander of the army of Republika Srpska, who was Radovan Karadzic. That is not really quite the same thing, and one clearly sees how the federal army's links with its officers of Bosnian Serb origin, who remained behind in Republika Srpska, were cut, in the same way as its links with officers of Croatian or Slovenian or Bosnian origin were cut. Clearly, therefore, it cannot be claimed, just because elements of the federal army became the army of Republika Srpska on account of their origins, that the army of Republika Srpska was under the orders of Belgrade; it was under the orders of General Mladic and President Radovan Karadzic.

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270. These acts can in no way constitute complicity in genocide, since, for that to be the case, genocide would have to be committed, and at the time when these splits in the army occurred, no act of war had yet been committed on the territory of Bosnia, with the exception of those I have cited, which took place in Sarajevo.

(f) ***The strategic plan***

271. The Applicant makes frequent reference to the strategic objectives of the Serbs in Bosnia or the Bosnian Serbs in order to demonstrate the existence of a genocidal plan alleged to link the Bosnian Serbs with Serbia and Montenegro.

272. The Assembly of the Serbian People of Bosnia did indeed, on 12 May 1992, adopt strategic objectives which were not concealed, were not the subject of a covert plan, since they were simply published in the *Official Journal* of Republika Srpska. The Applicant has made a number of references to the strategic objectives of the Serbian people of Bosnia. I shall therefore repeat them:

1. Establish State borders separating the Serbian people from the other two ethnic communities.
2. Set up corridor between Semberija and Krajina.
3. Establish a corridor in the Drina Valley, that is eliminate the Drina as a border separating Serbian States.
4. Establish a border on the Una and Neretva Rivers.
5. Divide the city of Sarajevo into Serbian and Bosnian Muslim parts and establish effective State authorities in both parts.
6. Ensure access to the sea for the Republika Srpska.

273. It should be noted first of all that these strategic objectives do not include the elimination of the Bosnian Muslim population. There is an intent to separate, but no intent to destroy, since reference is made to dividing the town of Sarajevo between the Serbs and the Bosnian Muslims, and establishing State authorities in both parts. Hence, what we clearly have here is what I have been telling you since the beginning of my presentation, what we clearly have

48 here is a strategy of secession of territories and secession of peoples, rather than a strategy of extermination. One cannot, therefore, use war aims clearly expressed in this way to prove a genocidal intent — moreover a genocidal intent on the part of Serbia and Montenegro, which was obviously not party to the war aims of Republika Srpska. It is true that these principles were at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. One could say that this political programme was in breach of international law, but in no sense did these objectives constitute a call to genocide, they were not genocidal.

274. These strategic aims were analysed in several cases before the Tribunal for the former Yugoslavia, particularly in the *Brdjanin*, *Galic* and *Stakic* cases, but in none of those cases was this strategic plan — which was discussed at great length — ever characterized as genocidal, and in

none of those cases were the persons who were involved in devising these strategic objectives, as in the case of *Brdjanin*, or in implementing them, as in the case of *Stakic* and *Galic*, convicted of genocide.

275. In respect of Srebrenica, the Applicant cites objective 1, that is to say the establishment of borders separating the Serbian people from the other ethnic communities in Bosnia and Herzegovina, and objective 3, elimination of the border between Bosnia and Herzegovina and Serbia on the river Drina, in order to establish a genocidal intent which resulted in the Srebrenica tragedy in 1995. The Appeals Chamber of the Tribunal for the former Yugoslavia examined the events at Srebrenica on several occasions, and accepted the Prosecutor's argument — and since this is the only finding of genocide, this point is therefore important, because the Prosecutor identifies the starting date of the genocidal intent in this case — "a firm plan to kill the Muslim men of Srebrenica was formed as early 12 July 1995"[49]. Thus, the judges of the Tribunal for the former Yugoslavia, in the only case where — in the circumstances I have described to you — they used the concept of complicity in genocide, identified 12 July 1995 as the starting date for genocidal intent, so that the strategic plan of the Bosnian Serbs has nothing at all to do with the genocidal intent established by the Tribunal.

49 276. The Applicant would also have us believe that a directive from the Supreme Command of the armed forces of Republika Srpska, dated 8 March 1995, sets out the genocidal plan. At the hearing on 28 February 2006, the Applicant cited part of this directive: "Planned and well-thought-out combat operations and they need to create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves." The Applicant goes on: "As a result of this directive, General Ratko Mladic on 31 March 1995 issued a Directive for Further Operations . . . No. 7/1, which further directive specified the Drina Corps' tasks." At the sitting of 2 March 2006, Professor Franck asked: "What could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?"

277. Well, the judges of the Appeals Chamber of the Tribunal for the former Yugoslavia did not and do not share the opinion you heard expressed by Professor Franck. In the *Krstic* case, the

[49] *Krstic* case, Appeals Chamber, Judgement, 19 April 2004, para. 93.

Appeals Chamber held: "Directives 7 and 7.1 are insufficiently clear to establish that there was a genocidal intent on the part of the members of the Main Staff who issued them. Indeed, the Trial Chamber did not even find that those who issued Directive 7 and 7.1 had genocidal intent."[50] This clearly means that, after examining these directives cited by the prosecution, the Appeals Chamber of the Tribunal for the former Yugoslavia held that they contained no indication of genocidal intent.

278. And it was with full knowledge of the facts that the Tribunal dismissed charges of genocide in virtually all its cases, and upheld only complicity on the part of General Krstic and General Blagojevic in the Srebrenica cases, relying — as I said before — on a concept of complicity which is not the one contained in the Convention, but which is set out in Article 7 of the Tribunal's Statute.

279. In no other case did the Tribunal make a finding of genocide. For example, in the *Brdjanin* case in particular, which was related to the events in Bosanska Krajina, and in which the Tribunal examined the expressed and actual policy of the Serbian party, the objectives of that policy, and in particular the strategic objectives which have been portrayed to you as a genocidal plan, the Tribunal held that it could not, on the basis of that plan, establish that there had been genocide. The Tribunal failed to establish genocide precisely because, in case after case, tragedy after tragedy, it had an overall picture of the war. An overall picture which demonstrates the full scale of the tragedy of the peoples of Bosnia and Herzegovina, a tragedy known as war, a tragedy with many criminal features, but not one involving genocide.

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280. The best example of the Tribunal's position on the policy aspect, the aspect of genocidal intent as a policy, is its judgment in the case of Ms Biljana Plavsic. Ms Biljana Plavsic is probably the most senior political figure from Republika Srpska to have been tried by the Tribunal. She was a member of the Presidency of the Republic, she had produced a large number of written materials used in evidence against her, and she was convicted of crimes against humanity. But the Tribunal did not find that Biljana Plavsic — accused of crimes committed throughout the territory of Bosnia and Herzegovina under Bosnian Serb control — had committed the crime of genocide.

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[50] *Krstic* case, Appeals Chamber, Judgement, 19 April 2004, para. 90.

Bear in mind the most authoritative definition given by the Secretary-General of the United Nations concerning the crime of genocide: when it is political in nature, it must be charged to the most senior perpetrator, the most senior decision maker. Ms Biljana Plavsic is one of the most senior decision makers to have been convicted by the Tribunal for the overall policy conducted by Republika Srpska. She was not convicted of genocide.

281. Thus the Applicant's argument that the multitude of crimes tried and examined individually together constitute genocide is misconceived. It is not the number of crimes, it is not the grisly nature of the crime, that constitutes genocide. Only the intent to destroy a national, ethnical, racial or religious group, in whole or in part, can raise a crime to the level of genocide. And it is therefore this moral element, this element of intent, which must be the yardstick.

282. Having determined the material element of the crime of genocide and the forms that involvement in its commission may take, we must address the particularity which sets genocide apart from any other crime. That particularity is the requirement of a specific intent, the requirement that the crime of genocide be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

283. Let us therefore examine the concept of genocidal intent and the possibility of attributing such intent to individuals alleged to have committed genocide in Bosnia and Herzegovina *and to have engaged the responsibility of Serbia and Montenegro*.

284. First of all, the tangible elements of such specific intent are clearly the following:

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— *identification of the* national, ethnical, racial or religious *group* which is the subject of the genocidal plan (i);

— *the total or partial destruction* of the group targeted (ii); and

— lastly, *the degree of* genocidal *intent*, in its moral and psychological *form* (iii).

(i) Determination of the national, ethnical, racial or religious group

285. Genocide is not a criminal act targeting an individual, nor is genocide directed against a State, it is directed against a group defined on the basis of national, ethnical, racial or religious criteria. Genocide constitutes the negation of the specific right to exist of a human group identified on the basis of specific criteria. Consequently, the group must be precisely defined and have its

own specific existence. As the ICTR held in its judgment in the *Akayesu* case, the victim of the crime of genocide is the group itself[51]. For this reason, it is for the Applicant clearly to define the group subjected to genocide. But in the instant case, it has to be said that the group always remained somewhat ill-defined.

286. Some writers have criticized the Genocide Convention for not defining with sufficient clarity what is meant by a "group" under the Convention. The Whitaker report stated that the lack of clarity in the definition of the group had the effect of reducing the effectiveness of the Convention[52].

287. In order to define as precisely as possible the concept of "protected groups" under the Genocide Convention, it should first be said that the list of protected groups, that is to say national, ethnical, racial or religious groups, is an exhaustive one. The text of the Convention should be interpreted in accordance with the principles of criminal law. A strict interpretation is required. The list of groups identified in Article II of the Convention must be considered to be exhaustive.

288. It would appear from a reading of the *travaux préparatoires* of the Convention[53] that the crime of genocide was perceived as capable of targeting only "stable" groups, constituted in a

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permanent fashion, and membership of which is determined by birth, excluding more "mobile" groups, which one joins, for example, through individual voluntary commitment, such as political or economic groups.

289. The *travaux préparatoires* of the Convention show that political groups are explicitly excluded from the framework of the Convention. Not retained at the draft stage when submitted to the General Assembly by the Secretary-General because of their "lack of permanence", political groups were included under protected groups in the *ad hoc* committee's draft document by a narrow majority in 1948[54]. The reference to political groups was, however, again rejected in the final draft prepared by the Sixth Committee of the General Assembly[55].

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[51]ICTR, *Akayesu* case, Judgement, 2 September 1998, para. 521.

[52]United Nations, Whitaker Report on Genocide, 1985, para. 30.

[53]United Nations, *Official Records of the General Assembly, Sixth Committee*, Summary Records, 21 September-10 December 1948.

[54]United Nations, doc. E/794, 24 May 1948, pp. 13-14.

[55]United Nations, doc. A/C6/SR 69, p. 5.

290. This view of the matter is confirmed by the statutes of the international courts responsible for trying the crime of genocide, all of which have adopted word for word the definition in the Convention, without extending its scope to political or other groups. The jurisprudence of the Tribunal for the former Yugoslavia adds weight to this interpretation, since, in the *Jelisic* case, Trial Chamber I held that "Article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups"[56].

291. The concepts of nation, ethnicity, race and religion have been the subject of a great deal of research. As the law stands at present, no precise definitions are generally and universally accepted. Each of these concepts much be assessed in the light of a given political, social and cultural context.

292. In the *Akayesu* case, Trial Chamber I found:

> "Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[57]

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293. The common criterion applicable to all groups is quite clearly that of automatic membership, excluding any volition. Trial Chamber I of the ICTR, in that same case, defined the constituent elements of each of the protected groups by reference to the criteria to be met by each of them if they were to be protected by the Genocide Convention.

294. Thus international jurisprudence has defined the different groups mentioned in the Convention as follows:

— a *national group*, defined on the basis of this Court's Judgment in the *Nottebohm* case *(Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955)*, was defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties;

— an *ethnical group* is defined as a group whose members share a common language or culture;

— the definition of a *racial group* is based on hereditary physical traits, often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors; and

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[56]ICTY, *Prosecutor* v. *Jelesic*, case No. IT-95-10-T, Judgement, 14 December 1999, para. 69.

[57]*Akayesu* case, Judgement, para. 511.

— a *religious group* is one whose members share the same religion, denomination or mode of worship[58].

295. In the context of the present case, it is therefore necessary to determine the national, ethnical, racial or religious group protected by the Genocide Convention which Serbia and Montenegro allegedly sought to destroy.

With your permission, Madam President, we shall take up this latter point in this afternoon's sitting.

54 The PRESIDENT: Yes, certainly, Maître de Roux. Thank you.

The Court will now rise and we shall resume at 3 o'clock this afternoon.

The Court rose at 1 p.m.

[58] *Akayesu* case, Judgement, paras. 512-515.