BHY

CR 2006/41 (translation)

CR 2006/41 (traduction)

Thursday 4 May 2006 at 10 a.m.

Jeudi 4 mai 2006 à 10 heures

10 The PRESIDENT: Please be seated. Madame Fauveau-Ivanović, you have the floor.

Ms FAUVEAU-IVANOVIĆ: Thank you, Madam President.

GENOCIDE

I. Genocide was not committed in Bosnia and Herzegovina: the criminal acts were not the consequence of the political objectives of the Bosnian Serbs

1. Madam President, Members of the Court, we have been able to observe during the oral pleadings that the positions of the Applicant and of Serbia and Montenegro do not differ substantially as regards the definition of the constituent elements of genocide enumerated in Article II of the Genocide Convention.

2. We agree that the material elements of the crime of genocide, its *actus reus*, are enumerated exhaustively in Article II of the Genocide Convention, and that the crime of genocide can only be constituted by the commission of one of the acts enumerated. We have also reached agreement on the fact that such acts constitute genocide only if they are committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religions group, as such.

3. However, we do not agree on the legal characterization of the facts in the present case, since the Applicant alleges that genocide was committed, while we consider that genocide was not committed. Indeed, Madam President, Members of the Court, genocide was not committed in Bosnia and Herzegovina. Neither Serbia and Montenegro nor the Bosnian Serbs had the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

4. The Applicant claims that we have adopted an approach to individual crimes which would be appropriate to criminal proceedings but which, according to the Applicant, is not appropriate to these proceedings before this Court, where State responsibility must be established. However, we did not isolate criminal acts, we placed them in context, the context of a civil war which the Applicant ultimately recognized, albeit partially.

5. Having placed those criminal acts in context, we evaluated them one by one in the overall
11 context of the war, which included military operations, the chaotic political situation, the State authorities' lack of control over the territory and — unfortunately — the criminal acts that were

committed. The Applicant admits that the same acts may constitute war crimes, crimes against humanity and genocide. The Applicant also admits that such acts constitute genocide only when they are committed with genocidal intent. And it is precisely this genocidal intent which has not been demonstrated in the present case, and which cannot be demonstrated, as it never existed.

6. As the Applicant accuses us of not wishing to look at the overall picture of the crimes committed, we shall present that picture using the same approach as that adopted by the Applicant. Once again, it will not be possible to establish genocide, since the acts committed, however criminal they may be, do not constitute genocide because there was no genocidal intent and genocide was not committed.

7. We agree with the Applicant that a plan is not a constituent element of genocide. Genocide may be committed outside the framework of any genocidal plan. However, as the Applicant itself states, the existence of a plan makes it easier to prove genocide. We support this argument also, but we cannot accept the existence of a plan in this case, simply because no such plan existed.

8. The Applicant seeks to infer genocidal intent from the policy objectives of the Bosnian Serbs, and attempts to demonstrate that the crimes committed were committed in pursuit of those objectives, which were formulated in the Assembly of the Serbian People of Bosnia and Herzegovina on 12 May 1992. We do not deny that the Bosnian Serbs had policy objectives. We do not deny that one of those objectives, the primary objective, was the separation of peoples through the creation of separate nation States. But that is not genocide. The political will of a people to separate from others never constituted genocide, it is not criminal, it is the expression of an internationally recognized right, the right of peoples to self-determination.

9. The Applicant made several references to the genuinely multicultural nature of Bosnia and Herzegovina. In its oral pleading on 18 April last, it stated: "Bosnia and Herzegovina was a truly ethnically mixed society with the highest percentage of mixed marriages."[1] But was Bosnia and Herzegovina a truly multicultural society, or was it rather a society in which different ethnic and

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[1]CR 2006/30, p. 32, para. 31.

religious groups lived side by side without, however, mixing? The Netherlands Institute for War Documentation noted in its report that:

> "In 1981, a mere 15.3 per cent of all marriages were mixed . . . In 1991, 16 per cent of the children in Bosnia were born out of a mixed marriage. These figures are frequently cited in the literature, but the annual averages between 1962 and 1989 sooner reveal a mixed marriage percentage of 11 to 12, a rate which remained almost constant throughout that period. It should also be noted when considering this figure that the mixed marriages took place mainly between members of small ethnic groups, such as Jews and Montenegrins, for whom the chances of marriage within their own group were slim. Such marriages were far less frequent among the three large ethnic entities, viz. Croats, Muslims and Serbs. In those three groups, mixed marriages took place mainly between Croats and Serbs (in that order), and far less often among Muslims — 95 per cent of Muslim women and 93 per cent of Muslim men entered into homogeneous marriages. . . It is often erroneously assumed that the percentage of such marriages was comparatively high in Bosnia. On the contrary, it is significant that precisely in Bosnia-Herzegovina where ethnic distribution was greater than in the rest of Yugoslavia, the percentage of mixed marriages between 1962 and 1989 was the lowest of all republics, with the exception of Macedonia."[2]

Madam President, Members of the Court, Bosnia and Herzegovina was a State comprising three peoples, the Muslims, the Croats and the Serbs, as well as national minorities — Jews, Roma, Montenegrins, Yugoslavs and others. However, these populations never formed a genuinely multicultural society, they preferred to live side by side in separate communities. The idea of separating the three main national communities never entailed the intention to destroy the other ethnic groups or some of them; quite the contrary, this idea in itself did not even entail a major population displacement.

10. The Applicant also sought to portray the programme of the Muslim party, the SDA party, and the armed forces of the SDA party, which constituted the Patriotic League, as a patriotic programme intended to cover all the nations of Bosnia and Herzegovina[3]. However, it can easily be shown that the programme of the Serb party of Bosnia and Herzegovina, the SDS party, was no different. The objectives of the SDS party, as formulated in July 1991, were the following:

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> "There can be no leading nations, no first and second class citizens no state-forming and non state forming elements. It is a goal of the party to improve interethnic relations, strike a balance to establish reciprocity strengthen the civil peace. It is a goal of the party to have a federative Yugoslavia with an equal and whole federal Bosnia and Herzegovina."[4]

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[2] http://www.srebrenica.nl, Netherlands Institute for War Documentation on Srebrenica, Part 1, The Yugoslavian Problem and the role of the West 1991-1994, chapter 3.

[3] CR 2006/30, pp. 43-44, paras. 38-40.

[4] ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Transcript, 1 February 2002, p. 1310.

11. The Applicant states that the Bosnian Muslims and their party had a patriotic programme. We say that the Bosnian Serbs and their party had a programme which guaranteed the equality of all nations in Bosnia and Herzegovina. The reality is that, despite everything, war did take place in Bosnia and Herzegovina.

12. We have never considered that civil war or legitimate policy objectives could serve as an excuse for the crimes that were committed, but we consider that these crimes must be placed in their context. The Applicant acknowledges that it can provide no direct proof of intent, and it seeks to infer such intent from an alleged plan, a line of conduct and the policy objectives of the Bosnian Serbs. We shall show that the plan alleged by the Applicant never existed, that no discernible line of conduct existed, and that the crimes were not committed in pursuit of the political objectives of the Bosnian Serbs.

(a) **Analysis of the "six strategic objectives"**

1. The alleged genocidal plan of the Bosnian Serbs is deduced by the Applicant from the six strategic objectives adopted at the session of the Assembly of the Serbian People of Bosnia and Herzegovina on 12 May 1992. The Applicant considers that these objectives were the consequence of the policy devised in Belgrade before the outbreak of the war. The Serbs of Bosnia and Herzegovina proclaimed their strategic objectives in May 1992 and — we acknowledge — these objectives were their policy objectives. However, in the first place, these objectives were the objectives of the Bosnian Serbs, the Serbs born in Bosnia and Herzegovina who possessed Bosnian nationality. Secondly, it is clear that these objectives were not devised in advance, and certainly not before the war. They were the outcome of the overall situation, both political and military, in Bosnia and Herzegovina in the spring of 1992. The strategic objectives of the Bosnian Serbs were the objectives they were forced to adopt in order to address the worrying turn of events in Bosnia

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and Herzegovina. A reading of these objectives leaves no room for doubt that they involved no genocidal intent, no criminal intent; they were merely the expression of the will of the Bosnian Serb people, born of their fear of the chaotic events sweeping the country.

2. The Applicant persistently seeks to deny that the Bosnian Serbs could have felt any fear. It denies that the Bosnian Serbs could have been relegated, in Bosnia and Herzegovina, from the

status of constituent people to minority status. It even attempted to discredit this hypothesis by declaring that all the peoples of Bosnia and Herzegovina were minorities, since none of them constituted the absolute majority[5]. It is true that, in demographic terms, all the peoples were minorities, but the Muslims, Croats and Serbs were the constituent peoples of the State of Bosnia and Herzegovina. Under the Constitution of Bosnia and Herzegovina, any important decision should have been taken with the agreement of the representatives of those three peoples, on the explicit understanding that lack of such agreement invalidated any decision. Madam President, Members of the Court, the decision concerning the independence of Bosnia and Herzegovina was taken without the participation of the Serb people, and this decision obviously violated the constitutional rights of the Bosnian Serb people. The Serb people feared being relegated to the status of a minority, and this fear was well founded.

3. In May 1992, the National Assembly of the Serbian People of Bosnia and Herzegovina adopted the following strategic objectives:

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

15 4. None of these goals refers to the destruction of the non-Serb peoples, none of these goals implies any such destruction, their exclusive purpose being to enable the Bosnian Serb people to create their own State.

5. In the Judgment delivered in the *Brdjanin* case, the Trial Chamber of the Tribunal for the former Yugoslavia found that: "In essence, these strategic goals constituted a plan to seize and control territory, establish a Bosnian Serb state, defend defined borders and separate the ethnic

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[5]CR 2006/30, p. 37, para. 21

[6]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-93-33-T, Judgement, 2 August 2001, para. 562, Exhibit P 562.

groups within BiH."[7] Such was the conclusion of the Trial Chamber in the *Brdjanin* case at the end of proceedings lasting three years. The conclusion of the Tribunal for the former Yugoslavia contains no indication that these goals were supposedly a genocidal plan. The Tribunal's conclusion is the only logical one since the plan was not genocidal. It was no more than a plan to establish the Serb State of Bosnia and Herzegovina, a plan for which there were deep historical reasons and which had been engendered by the extremely tense political situation in Bosnia and Herzegovina in spring 1992.

6. The first of the six strategic goals is the main one. It calls for the creation of State borders separating the territories under the control of the Serbian people from territories under the control of the two other main ethnic communities. It calls for the establishment of the State, it does not call for ethnic cleansing. The establishment of the national or ethnic State does not mean the cleansing of persons not part of the majority population group. All it means is that the majority group wishes to govern. The strategic plan of the Bosnian Serbs therefore calls neither for ethnic cleansing nor genocide.

7. However, the Applicant sees in the desire, the legitimate desire, of the Bosnian Serb people to have their own State, a desire to have an ethnically pure State, and even the desire to destroy the non-Serbs. Such an interpretation can only stem from an ignorance of history and of the ethnic reality of Bosnia and Herzegovina or from a distortion of that reality.

8. At the Sixteenth Session of the Assembly of the Serbian People in Bosnia and Herzegovina, held on 12 May 1992 at Banja Luka, the President of Republika Srpska, Radovan Karadzic, explained the meaning of the separation of the peoples and the establishment of the

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borders. He said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something."[8]

9. Bosnia and Herzegovina was a State made up of three constituent peoples: the Muslims, Serbs, and Croats. All these peoples had their own cultures and traditions, but all considered Bosnia and Herzegovina to be their country. All these peoples had the same constitutional rights in

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[7]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 76.

[8]Verbatim record of the Sixteenth Session of the Assembly of the Serbian People in Bosnia and Herzegovina on 12 May 1992 at Banja Luka, ICTY, *Brdjanin* case No. IT-99-36-T, exhibit P 50A, p. 52.

Bosnia and Herzegovina, but the situation changed when, at the end of 1991, the National Assembly of Bosnia and Herzegovina decided, against the will of the Serb people, to hold a referendum on independence.

10. Bosnia and Herzegovina was a State consisting of three peoples, each having the constitutional right to secession, since the federal constitution of socialist Yugoslavia, as adopted in 1974 and still in force in Bosnia and Herzegovina at the time, guaranteed the right of secession to the peoples and not to the republics. The first goal proclaimed by the Assembly of the Serbian People in Bosnia and Herzegovina was nothing other than the affirmation of the will of the Serbian people to make use of the right to secession, in accordance with the Yugoslav constitution then in force. The right to secession, guaranteed by the Yugoslav constitution, was an expression of the right to self-determination well established and recognized in international law. In no event can the first strategic goal be considered genocidal or criminal.

11. In interpreting the first strategic goal, the Applicant cites the English translation[9] of the address by Radovan Karadzic delivered at the session of the Assembly of Republika Srpska held on 18 and 19 July 1994. According to the translation presented, Radovan Karadzic said:

> "We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive enemies by the force of war from their homes, that is Croats and Muslims so that we no longer be together in a State."[10]

17 12. In fact, there is an error in the most important part of the translation, as Radovan Karadzic never said that the goal was "to drive enemies by the force of war from their homes". The transcript of Radovan Karadzic's address clearly shows that he never said anything of the kind. He did not say that the objective was to "to drive enemies by force from their homes" but to "free their homes of the enemy"[11]. The meaning of the words actually spoken by Radovan Karadzic is completely different from the translation presented by the Prosecutor of the

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[9]The translation is taken from ICTY, *Prosecutor* v. *Slobodan Milosevic,* case No. IT-02-54-T, exhibit P 537, The Assembly of Republika Srpska 1992-1995: Highlights and Excerpts by Robert J. Donia, p. 64.

[10]CR 2006/4, p. 19, para. 38.

[11]*"Da se ratosiljamo neprijatelja iz kuce*", Assembly of Republika Srpska, session of 18-19 July 1994, Expert Report by Robert Donia submitted in the case concerning *Prosecutor* v. *Milosević,* exhibit ERN 0215-2799 — 0215-2809, p. 71

Tribunal for the former Yugoslavia and reiterated by the Applicant. The goal was not to drive the enemy from their houses, but to liberate the State of the Bosnian Serbs from the enemy.

13. The address by Radovan Karadzic also needs to be analysed in its context. Radovan Karadzic was speaking in the context of the discussion on the plan proposed by the Contact Group. The Contact Group's plan envisaged the separation of the peoples. The Prosecutor's expert witness Robert Donia wrote in his report presented to the Tribunal for the former Yugoslavia in the *Milosevic* case that: "the delegates pass a five-point resolution that straddles the fence agreeing in principle to territorial separation from the other two groups and accepting the plan as the basis for further negotiations"[12]. It is thus absolutely clear that the plan of the Contact Group, the plan of the international community, envisaged an ethnically-based separation. The general context of this plan was acceptable to the Bosnian Serbs. On the other hand, they could not reach agreement between themselves on the territories which would have remained under their control and those which would have to be abandoned.

14. All the other goals proclaimed by the Assembly of the Serbian People in Bosnia and Herzegovina were merely the means envisaged for ensuring the viability of the State desired by the Bosnian Serbs. The address by Momcilo Krajisnik, President of the Assembly of the Serbian People in Bosnia and Herzegovina, delivered at its 16th session on 12 May 1992, clearly shows that the other goals were simply a means of implementing the first goal — the creation of the State of Bosnian Serbs. What he said was: "The first goal is the most important one and in relation to all other goals, all other goals are sub-items of the first one."[13]

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15. Hence, the second goal, the corridor between Semberija and Krajina, was necessary to the survival of the Serbs in Bosanska Krajina. Bosanska Krajina is the region in western Bosnia having a border with Croatia, but no common border with Serbia. The great majority of the population of Bosanska Krajina was of Serbian nationality. Without the corridor, these Serbs in Bosanska Krajina would have been cut off from Serbia as well as from eastern Bosnia. When the strategic goals were proclaimed, in spring 1992, the region of Bosanska Krajina was completely

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[12]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, exhibit P 537, The Assembly of Republika Srpska 1992-1995: Highlights and Excerpts by Robert J. Donia, p. 64.

[13]Verbatim record of the Sixteenth Session of the Assembly of the Serbian people in Bosnia-Herzegovina, on 12 May 1992, at Banja Luka, ICTY case concerning *Brdjanin* (IT-99-36-T), exhibit P 50A, p. 13.

isolated from the other territories populated by Serbs, the population was receiving no supplies, there was a dearth of basic items essential to survival; the corridor was the only chance of survival for hundreds of thousands of people who, moreover, were not all Serbs.

16. The third strategic goal, the elimination of the border between the two Serb States on the river Drina is understandable in the context of the constitutional right of secession conferred on the peoples by the Yugoslav Constitution. In fact, the intention of the Bosnian Serbs to join Serbia and create a Serb State is only logical. It is no more than the expression of the right of peoples to self-determination. However, this intention was peculiar to the Bosnian Serbs, and it was not shared by the rulers of Republika Srpska or by the State of Serbia and Montenegro. It was the expression of the will of a people, the expression of a legitimate will. This goal was devoid of any criminal intent. At the 16th session of the Assembly of the Serbian People in Bosnia-Herzegovina, held on 12 May 1992, Radovan Karadzic explained the third strategic goal:

> "We and our strategic interests and our living space are on both side of the Drina. We now see possibility for some Muslims municipalities to be set up along the Drina as enclaves in order for them to achieve their rights, but it must basically belong to Serbian Bosnia and Herzegovina."[14]

This statement clearly shows that the goal is territorial and expresses the will of the Bosnian Serbs to be linked to Republika Srpska and to its people. This will was the will of the Serbs of Bosnia, not of the Serbs of Serbia or of Serbia and Montenegro. The statement also shows that the purpose

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of this goal was not to drive out the Bosnian Muslims from their houses, since Radovan Karadzic envisaged the possibility that the Muslims would stay and would even have their own enclaves, self-governing territories. At the time, the Bosnian Serbs were offering the Bosnian Muslims the opportunity to exercise their right of self-determination. They could reasonably offer them nothing more.

17. The fourth strategic goal was to fix the borders of this projected Serb State along the Una and Neretva rivers. One of the maps put forward by the European Union in its attempts to resolve the conflict also set the border along the river Una, as Radovan Karadzic explained at the Session of the SerBiH Assembly of 12 May 1992. We can debate the justification for a border along the Una river, we can regard it as justified or unjustified, but the stated goal in itself certainly implied

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

no criminal intent. It could be regarded as wrongful in international law, since it breaches the principle of the intangibility of frontiers, but it can in no way be viewed as the intent to destroy a people. This goal involved no intent to cleanse ethnically and did not call for criminal acts towards a national, ethnic or religious group.

18. The fifth strategic goal concerned Sarajevo and the division of the city into two parts, one of which would have belonged to the Serbs and the other to the Muslims. This goal in itself demonstrates that the Serbs had no intention of eradicating the Muslim population. If their intent had been the destruction of Bosnia's Muslims, they would not have proposed the establishment of a Muslim sector of Sarajevo. In his speech to the Sixteenth Session of the SerBiH Assembly on 12 May 1992, Radovan Karadzic's asserted the Bosnian Serbs' aim of creating their own State without any intent to cause harm to the Muslims. Radovan Karadzic said:

> "We did not want in Sarajevo. We wanted the Serbian police to control the Serbian part of the town, to be responsible for the Serbian part of the town and Muslims for the Muslim part, and to divide the city without any fighting both in the whole of Bosnia and Herzegovina and in Sarajevo itself. All of that could be done in a peaceful manner. Sarajevo would not be the first or only border city."[15]

20 19. For certain understandable reasons, which could be termed historical, the Bosnian Serbs feared for their lives, their homes and their future. They were quite simply afraid of not surviving in Bosnia and Herzegovina. Owing to these fears, the Bosnian Serbs no longer wanted to live alongside the Croats and Muslims in the same State. They wanted their own State, a Serb State, in accordance with the Constitution in force, which recognized their right to a State. The fifth goal clearly demonstrates that the only intention of the Serbian people in Bosnia and Herzegovina was the creation of a separate State. The aspiration to establish a Serbian State of Bosnia and Herzegovina did not deny either the Muslims of their right to their own State or the right of members of the Muslim population to live in the Serb State, if they so wished.

20. Lastly, the sixth goal was a fairly common aspiration among States to gain access to the sea and thus avoid being landlocked. In the former Yugoslavia, Bosnia and Herzegovina had obtained access to sea, with the access running across Croatian territory, splitting the Republic of Croatia in two. The Serbian population of Bosnia viewed it as only normal to secure such access.

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[15]Minutes of the Sixteenth Session of the SerBiH Assembly of 12 May 1992 at Banja Luka, ICTY, *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Prosecution Exhibit P 50A, p. 10.

However, the Bosnian Serbs never made a serious attempt to achieve this goal. When the strategic goals were adopted, Radovan Karadzic explained that: "[i]t is very important but there are things that are more important than others or more feasible than others. We do not know how feasible that is . . ."[16]

21. The sole purpose of these goals was, consequently, the separation of the States and the creation of a Serb State. The goals of the Serb people did not deny the rights of other peoples. Momcilo Krajisnik, President of the SerBiH Assembly, alluded to creation of three separate States in his speech to the Sixteenth Session on 12 May 1992, affirming: "We [the Serbs] can part from them [the two remaining national communities] if Bosnia and Herzegovina is to be torn into three parts."[17]

22. The Serb goals proclaimed at the 12 May 1992 Session of the SerBiH Assembly were not
21 the cause of the war, but the consequence of the chaotic political situation obtaining in Bosnia and Herzegovina at the time of their adoption. They were not plotted in advance, they were not tied to the will of the leadership of the Krajina Serbs in Croatia, notably Milan Babic, nor were they tied to the will of the leadership of Serbia and Montenegro, notably Slobodan Milosevic. They were an expression of requirements arising out of the outbreak of war in Bosnia and Herzegovina and of the historically understandable fear of the Serbs who lived there.

(b) Criminal intent cannot be deduced from the acts and events related to the six strategic goals

23. The Applicant has cited a series of statements by Bosnian Serb leaders in order to establish genocidal intent. As none of the speeches at issue show genocidal intent or evidence that such intent could be deduced from them, the Applicant cites passages out of context, attributing to them a meaning they do not have.

24. Thus the Applicant referred to a speech by Radovan Karadzic to the Session of 15 October 1991 of the Assembly of Bosnia and Herzegovina[18]. The Applicant tried to

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[16]Minutes of the Sixteenth Session of the SerBiH Assembly of 12 May 1992 at Banja Luka, ICTY, *Prosecutor* v. *Brdjanin*, case No. IT-99-36-T, Prosecution Exhibit P 50A, p. 14.

[17]*Ibid*., p. 52.

[18]CR 2006/6, p. 31, para. 11.

demonstrate genocidal intent by quoting out of context a well chosen part of the declaration. The passage cited was:

> "This [by which he meant independence] is the road that you want Bosnia and Herzegovina to take, the same highway of hell and suffering that Slovenia and Croatia went through. Don't think that you won't take Bosnia and Herzegovina to hell and the Muslim people to possible extinction because the Muslim people will not be able to defend itself if it comes to war here."

In order to understand this speech, however, it must be put into its context. It was made at the height of the war in Croatia during a debate on the independence of Bosnia and Herzegovina. It was not a threat, but an entreaty, an appreciation of the situation in Bosnia and Herzegovina, where ethnic tensions were palpable and all three segments of the population well armed. When the cited

22 passage is put into context, the declaration can clearly be seen as an entreaty. In effect, before the passage quoted by the Applicant, Radovan Karadzic said: "I beg you once again, I do not threaten you, I beg you to understand seriously the interpretation of the political will of the Serbian people . . . Please understand seriously it is not good what you are doing." Moreover, the part quoted by the Applicant was followed by an explanation by Radovan Karadzic: "Please, these are important words, important situations have important words, how will you prevent that anyone kills everyone in Bosnia and Herzegovina." Alija Izetbegovic took the floor after Radovan Karadzic, but the latter spoke once again, providing an additional explanation to his declaration: "Muslim leaders spoke clearly until now that if it comes to the catastrophe it would be primarily the catastrophe of the Muslim people, it is also the catastrophe of the Croat and Serbian people."[19]

25. Moreover, a few days after the session of the Bosnian National Assembly at which this speech was delivered, Radovan Karadzic explained in an interview that the contentious phrase was only a citation of the words of Muhamed Filipovic, one of the Bosnian Muslim leaders, who had previously stated, in the same Assembly of Bosnia and Herzegovina, that: "if we do not reach an agreement but choose some other ways (division of the Bosnia and Herzegovina) that will be the beginning of the end of the Muslim people"[20]. Thus, the Applicant not only cited the words of

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[19]ICTY, *Prosecutor* v. *Radovan Karadzic and Ratko Mladic*, case No. IT-95-05 & 18-PT, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, p. 29.

[20]Daily newspaper *Politika*, 17 October 1991, p. 5.

Radovan Karadzic out of context, but also omitted to mention that those words merely paraphrased the words used by one of the Bosnian Muslim leaders.

26. The Applicant is unable to find any basis, in the statements made at the time of the adoption of the six strategic objectives by the Bosnian Serb leaders, for its contention that the strategic objectives entailed the ethnic cleansing of Bosnian Muslims and/or Bosnian Croats. For this reason, the Applicant unsuccessfully seeks confirmation of its unfounded argument from other sources. In particular, it refers to statements made more than a decade after the events. It also interprets the statements and the events in an illogical manner, seeking to endow them with a genocidal intent which it is impossible to establish because it never existed.

23 27. Thus, the Applicant seeks confirmation of its allegations in the *Biljana Plavsic* case, tried by the Tribunal for the former Yugoslavia[21], by misinterpreting the meaning of the evidence presented in that case. The Applicant refers to a document which it describes as a statement by Biljana Plavsic. However, the document cited by the Applicant is not a statement by Biljana Plavsic, but the factual basis for a guilty plea[22]. This is a document whose content was the subject of discussion and subsequent agreement between the Prosecutor and Biljana Plavsic. It is nothing more than an agreement acceptable to both parties, which serves their interests. Biljana Plavsic was indicted in criminal proceedings and reached an agreement which enabled her to receive a reduced sentence. This agreement can in no sense be considered a statement by Biljana Plavsic, and in no event can it be used as a factual finding by the Tribunal. Consequently, the facts alleged therein cannot be considered as established facts.

28. Moreover, in the *Stakic* case, the Trial Chamber assessed the value of possible testimony by Biljana Plavsic. Having found that Biljana Plavsic had pleaded guilty to the crime of persecution (a crime against humanity), the Tribunal held that it was unlikely that she could or would provide evidence from which the existence of genocidal intent could be inferred[23].

29. A similar assessment can be made of the meeting allegedly held in July 1991, in Belgrade, between Milan Babic, President of Republika Srpska Krajina, which was in Croatia, and

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[21]CR 2006/2, p. 48, para. 67 and CR 2006/32, p. 11, para. 7.

[22]ICTY, *Prosecutor* v. *Biljana Plavsic*, case No. IT-00-39 & 40-PT, Factual Basis for Plea of Guilt, 30 September 2002.

[23]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 550.

Radovan Karadzic and Slobodan Milosevic. The Applicant accepted as true the facts presented by Milan Babic. According to the latter's testimony before the Tribunal for the former Yugoslavia in the *Milosevic* case, Radovan Karadzic allegedly said at that meeting that he "would chase the Muslims into the river valley in order to link up all Serb territories in Bosnia and Herzegovina"[24].

24 This statement by Milan Babic was contested by Slobodan Milosevic under cross-examination[25]. Slobodan Milosevic not only denied the statement attributed to Milan Babic, he also gave a completely different version of what transpired at that meeting and of the content of the conversations that took place. According to Slobodan Milosevic, Radovan Karadzic, in the presence of Milan Babic, said that: "the Serbs and Muslims have excellent relationships, that your adventure was undermining the trust between the Serbs and Muslims, and that it was inflicting enormous damage to harmony achieved in Bosnia and Herzegovina"[26].

30. Consequently, with regard to the meeting held in Belgrade in July 1991 and referred to by the Applicant[27], we have the word of Slobodan Milosevic against the word of Milan Babic. While Slobodan Milosevic was at that time an indictee before the Tribunal for the former Yugoslavia, Milan Babic, at the time of his testimony in the *Milosevic* case, had the status of a suspect[28]. It is reasonable to assume that Milan Babic, as a prosecution witness, was prepared to make a statement which could be characterized as inaccurate at the least, in order to avoid being indicted.

31. It is true that the Trial Chamber of the Tribunal for the former Yugoslavia reported the part of Milan Babic's testimony cited by the Applicant in its Decision on Motion for Judgement of Acquittal[29]. However, this decision, handed down pursuant to Rule 98 *bis* of the Tribunal's Rules of Procedure and Evidence, does not establish the facts, but merely notes the likelihood that those facts occurred in the manner described by the Prosecutor. Decisions on motions for acquittal are

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[24]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Transcript, p. 13055.

[25]*Ibid.*, pp. 13809-13819.

[26]*Ibid.*, p. 13811.

[27]CR 2006/4, p. 11, para. 5; CR 2006/30, pp. 42-43.

[28]Mr. Babic testified in the *Milosevic* case from 19 November to 9 December 2002, and was indicted by the ICTY Prosecutor in November 2003. See ICTY, *Prosecutor* v. *Milan Babic*, case No. IT-03-72.

[29]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 253.

rendered after the close of the Prosecutor's case and are founded on the evidence submitted by the Prosecutor. However, at this stage of the proceedings, the defence case still has to be presented and the defence still has the possibility of demonstrating that the Prosecutor's allegations are unfounded. In the case of Milan Babic's testimony, because of the death of Slobodon Milosevic,
25 the Trial Chamber did not have the opportunity to evaluate the evidence presented during the trial. Consequently, it cannot be considered that the Tribunal accepted Milan Babic's testimony or that it would have accepted that testimony.

32. Moreover, Milan Babic gave evidence concerning a meeting allegedly held in July 1991. If that meeting was held in July 1991, it is clear that Slobodan Milosevic had no influence over the Bosnian Serbs or, more specifically, over the Serbs of Bosanska Krajina. The presentation of evidence by Milan Babic even calls in question Radovan Karadzic's influence over the Serbs of Bosanska Krajina. Indeed, in December 1991, several months after the Belgrade meeting, the Serbs of Bosanska Krajina were still seeking to join forces with the Serbs of Republika Srpska Krajina, whose president was Milan Babic[30].

33. However, some of the facts presented by Milan Babic can be accepted because they were confirmed by other evidence and were not contested by Slobodan Milosevic. For example, Milan Babic admitted that he had wanted to create a common State incorporating Republika Srpska Krajina, situated in Croatia, and Bosanska Krajina, situated in western Bosnia[31]. It is also apparently not in dispute that Radovan Karadzic and Slobodan Milosevic were not in favour of this plan for unification and creation of a Serb State. Milan Babic stated unambiguously that the plan to unify the two Krajinas was not carried out because of opposition from both Slobodan Milosevic and Radovan Karadzic[32]. Thus, it is clear that Slobodan Milosevic and Radovan Karadzic had no plan for the creation of a Serb State. It is also clear that, at the time, the plan aimed at enabling all Serbs to live in one State did not exist. Radovan Karadzic's opposition to such unification was made clear in a conversation he had with Slobodan Milosevic on 20 December 1991, in which he informed Slobodan Milosevic of the wish of the Bosanska Krajina Serbs to unite with the Serbs of

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[30]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Exhibit P 613/37, Conversation between Radovan Karadzic and Slobodan Milosevic on 20 December 1991.

[31]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No.IT-02-54-T, Transcript, p. 13055.

[32]*Ibid*., p. 13810.

Croatia in the following terms: "my people in Krajina those fools, wanted to make decision today on unification of Krajina and SAO Krajina"[33].

26 34. The Applicant also attempts to draw conclusions from intercepts of conversations between Radovan Karadzic and Slobodan Milosevic. According to the Applicant, Radovan Karadzic and Slobodan Milosevic spoke at least 45 times between 29 May 1991 and 10 February 1992[34]. The mere fact that Radovan Karadzic and Slobodan Milosevic were in contact is seen by the Applicant as proof of their joint plan. We do not deny that these conversations took place, but we cannot accept the Applicant's contention. These conversations were neither illegal nor criminal, they were logical and unexceptional. Slobodan Milosevic was the President of the Republic of Serbia and Radovan Karadzic was the President of the Serbian party in Bosnia and Herzegovina. Both of them were at the time living in a single State, that of Yugoslavia, which was internationally recognized.

35. It does not matter how many conversations Radovan Karadzic had with Slobodan Milosevic. Their subject-matter shows that neither of them harboured criminal intent. These conversations do not possess the meaning that the Applicant wishes to attribute to them and can in no respect be interpreted as "regular contacts during the preparatory phases of genocidal conflict"[35].

36. The Applicant refers specifically to the conversation between Radovan Karadzic and Slobodan Milosevic of 24 October 1991, in which Radovan Karadzic said: "We will establish Yugoslavia in all areas where we live . . . and we have to establish authority and control over our territories, so that he doesn't get his sovereign Bosnia."[36] True, those were Radovan Karadzic's words, but in the same conversation he also said: "We will recognize this government as the federal BiH Government but we will have to go on to organize our own authorities wherever the existing legal one is where this one is legal."[37]

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[33]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Exhibit P 613.37, Conversation between Radovan Karadzic and Slobodan Milosevic on 20 December 1991.

[34]CR 2006/4, p. 11, para. 8.

[35]CR 2006/4, p. 11, para. 8.

[36]*Ibid*., p. 12, para. 9.

[37]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Prosecution exhibit P 613/100, Conversation between Radovan Karadzic and Slobodan Milosevic on 24 October 1991.

37. What that conversation makes apparent is the process of politically organizing the Serb population in Bosnia and Herzegovina, but within the framework of Bosnia and Herzegovina, while recognizing its Government. Moreover, Radovan Karadzic spoke of establishing

27 Yugoslavia, and Yugoslavia was certainly not an ethnically pure State. It was, rather, by its nature, in its essence, a mix of peoples. There is nothing in that conversation that can be interpreted as a call to ethnic cleansing.

38. As the Applicant has made frequent reference to those conversations, we shall examine their content in order to show that they cannot, in any respect, be interpreted as a preparation for criminal acts. We shall demonstrate that the purpose of those discussions was to find a peaceful, political solution to the situation in Bosnia and Herzegovina, where instability was already apparent at the time.

39. The conversation intercepted from 29 May 1991 contained the following statement by Radovan Karadzic regarding the future organization of Bosnia and Herzegovina:

> "Izetbegovic talked about the division of Bosnia explicitly and openly, he had never been more explicit! I, we were shocked. We hadn't thought about that. Then we discussed what to do and how — they don't want to stay in Federal Yugoslavia and we don't want to leave Federal Yugoslavia . . . We did not want to leave and we still believe that it would be a pity if Bosnia were to fall apart."[38]

40. In that conversation, Radovan Karadzic also spoke of security, as disorder was already spreading in Bosnia and Herzegovina. In these circumstances, he mentioned the efforts he had made to avoid a deterioration of the situation. He said:

> "I sent Koljevic to Eastern Herzegovina to shut up those halfwits because we do not need any Chetniks to march up and down BiH . . . I sent Nikola Koljevic down there to organize them politically . . . he is also to organize a civil panel discussion for both Serbs and Muslims because the Muslims are afraid of the Serbs there."[39]

41. The conversation of 31 July 1991 demonstrates that Radovan Karadzic, the Bosnian Serb leader, was trying to work together with the leaders of the Bosnian Muslims and organize joint demonstrations[40].

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[38]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Prosecution exhibit P 613/1, Conversation between Radovan Karadzic and Slobodan Milosevic on 29 May 1991.

[39]*Ibid*.

[40]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Prosecution exhibit P 613/25, Conversation between Radovan Karadzic and Slobodan Milosevic on 31 July 1991.

42. The conversation of 13 September 1991 shows that the Bosnian Serbs were willing to do anything to avoid the war. In this conversation, Radovan Karadzic said: "We accepted both Muslim initiatives. Either the whole of the BiH in a Federal State of Yugoslavia or like this

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regional BiH in some Yugoslavia, in which we will have special relations with the federal State and Serbia."[41]

43. It is, moreover, not difficult to understand that, even on the eve of the war, the Bosnian Serbs persevered in their attempts to find a peaceful solution. At the 14th Session of the SerBiH Assembly on 27 March 1992, Radovan Karadzic declared:

> "War in BiH will not solve anything . . . we should strive to maintain peace. Peace is in our interests and benefits us politically. The Conference on BiH has yielded positive results. They think they have been defeated. They are wrong, they would obtain as much as we did, in addition to join the organs of BH."[42]

44. Clearly, the intercepted conversations do not support the Applicant's argument.

45. Having failed to show, with credible evidence, what cannot in any case be shown, the Applicant turned to the testimony of Miroslav Deronjic before the Tribunal for the former Yugoslavia. According to Miroslav Deronjic, Radovan Karadzic said to him at the beginning of 1991 that, if the Socialist Federal Republic of Yugoslavia ceased to exist, the Serbs would have no other option than the creation of a Greater Serbia[43].

46. Miroslav Deronjic's statements contain numerous discrepancies. When giving evidence in his own case, Miroslav Deronjic explained that he was incapable of citing the exact words used by Radovan Karadzic, but that the sentence indicated conveyed the meaning that Radovan Karadzic intended. He also declared that that was the first time that he had heard the expression "Greater

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Serbia", adding that he had never heard it before or seen in it any political programme[44]. However, Miroslav Deronjic subsequently testified in the *Krajisnik* case. While he repeated the major points of his previous testimony, he added that he had known the expression "Greater Serbia" as it

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[41]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Prosecution exhibit P 613/63, Conversation between Radovan Karadzic and Slobodan Milosevic on 13 September 1991.

[42]Minutes of the 14 Session of the SerBiH Assembly of 27 March 1992, p. 24, ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Prosecution exhibit P 2475.

[43]CR 2006/4, p. 15, para. 24.

[44]ICTY, *Prosecutor*. v. *Miroslav Deronjic*, case No. IT-02-61-S, Transcript, p. 113.

featured in certain political programmes and, more precisely, primarily in that of the Radical Party[45].

47. The Sentencing Judgement in the *Miroslav Deronjic* case includes parts of his testimony, but it should be noted that there was no trial of Miroslav Deronjic, as he pleaded guilty and came to a plea agreement with the Prosecutor. This agreement included *inter alia* an obligation to testify in a number of cases, which Miroslav Deronjic did. His various statements contain numerous discrepancies, as was remarked upon by Trial Chamber II in the Sentencing Judgement:

> "Immediately after the Sentencing Hearing, the Trial Chamber revisited Miroslav Deronjic's Testimony and compared it with the Indictment and the Factual Basis. As a result of this comparison, the Trial Chamber identified discrepancies that prompted the Trial Chamber to again examine all previous statements of the Accused. After reviewing in greater detail the Indictment, the Factual Basis, the Deronjic Testimony, all of his prior testimonies and statements, and in particular his witness statement of 25 November 2003, the Trial Chamber came to the conclusion that on a *prima facie* basis there were substantial material discrepancies."[46]

The Trial Chamber, moreover, even found discrepancies between the Factual Basis of the Plea Agreement and the Indictment[47].

48. The Trial Chamber in the *Deronjic* case was not the only one to notice the numerous discrepancies in Miroslav Deronjic's statements. The ICTY Appeals Chamber refused to grant any credence to Miroslav Deronjic's testimony in the *Krstic* case, finding that:

> "the Appeals Chamber is hesitant to base any decision on Mr. Deronjic's testimony without having corroborating evidence. The discrepancies in the evidence given by Mr. Deronjic and the ambiguities surrounding some of the statements he made, particularly with respect to his sighting of Krstic at Hotel Fontana, caution the Appeals Chamber against relying on his evidence alone."[48]

49. The contradictions in the statements and testimony of Miroslav Deronjic do not just concern the aforementioned meeting that he is said to have had with Radovan Karadzic. The Trial Chamber in the *Deronjic* case found a great many inconsistencies, the Appeals Chamber in the

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Krstic case rejected all of his testimony and Miroslav Deronjic himself admitted that his statements

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[45]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, case No. IT-00-39&40-T, Transcript, p. 1142.

[46]ICTY, *Prosecutor* v. *Miroslav Deronjic*, case No. IT-02-61-S, Sentencing Judgement, 30 March 2004, para. 35.

[47]*Ibid*., para. 28.

[48]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 94.

were not entirely truthful[49], as has already been shown by our Co-Agent, Mr. Vladimir Cvetkovic. Hence, any version of events given by Miroslav Deronjic must be thoroughly verified and assessed. In view of the contradictions and discrepancies tainting Miroslav Deronjic's statements, they cannot be regarded as truthful unless they are corroborated by other evidence.

50. The Applicant also refers to the document produced by the SDS party leadership on 19 December 1991 entitled "Variant A and B Instructions", supposedly issued to SDS municipal leaders[50]. This was a policy document, issued in response to the decision by the Croat and Muslim deputies regarding the organization of a referendum on Bosnia and Herzegovina's independence. The decision on holding a referendum was taken contrary to the wishes of the Serb deputies, thus against the will of the Serb people and in violation of the Constitution of Bosnia and Herzegovina, which required a consensus of the three constituent peoples for all important decisions.

51. The primary rationale of the "Variants A and B Instructions" was the defence of the Serb population, as is clearly indicated in its introduction. If the instructions can be interpreted as an expression of the Serb population's aspiration to have its own State or, more particularly, of its aspiration to remain within Yugoslavia, they cannot, in any way, be regarded as a call to attacks on the Muslims and Croats. The instructions did not call for ethnic cleansing. No genocidal or criminal intent can be inferred from them.

52. One month before the "Variant A and B Instructions" were issued, Momcilo Krajisnik, chairman of the SerBiH Assembly, declared to a Session of that Assembly on 11 November 1991: "In everything we do we should consider our complex social and political situation. All the

31 proposed solutions must be based on the Constitution and the laws, reflecting the interest of the Serbian people but not at the expense of other peoples in Bosnia and Herzegovina."[51] This statement explains precisely the aim of the "Variants A and B Instructions". The purpose of those instructions was the defence of the Serb population, but in full recognition of the rights of other peoples.

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[49]ICTY, *Prosecutor* v. *Miroslav Deronjic*, case No. IT-02-61-S, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, para. 15.

[50]CR 2006/4, p. 17, paras. 28-30.

[51]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Transcript, 1 February 2002, p. 1314-1315 and Prosecution Exhibit P 17.

53. The Variant B instructions, to be applied in municipalities where the Serbs were in a minority, recommended the division of such municipalities. That division would have ensured that the Serb population had its own organizations, but was in no way intended to prevent the other peoples from possessing their own administrative bodies. The instructions harboured no threats — their aim was not to threaten other groups, their aim was the defence of the Serb population's interests — but they did not deny the rights of other peoples.

54. Furthermore, no form of co-operation between the army and the municipal crisis staffs established by the Bosnian Serbs can be inferred from those instructions. While the instructions point to such co-operation, they were never addressed to the army and there is no evidence that they were ever received by any army units. By contrast, the speech by Ratko Mladic, commander of the Republika Srpska army, to the 16th Session of the SerBiH Assembly on 12 May 1992 clearly demonstrated that the army was not following instructions from the SDS and was not about to do so[52].

55. What the instructions do suggest, however, and what the Applicant preferred not to notice, is co-operation between the Serbs and the Muslim SDA and Croat HDZ parties. Both variants A and B contained instructions for SDS members to appoint a representative to coordinate relations with the municipal leaders of the SDA and HDZ[53].

56. Finally, in both the A and B variants, the instructions attempted to ensure the rights of other populations. The A variant included directions to those in charge of implementing the

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instructions to "take care to ensure that the national and other rights of members of all peoples are respected"[54].

57. The B variant contained the following instruction: "Within governmental bodies establish proportional representation of employees who are members of other nations and nationalities."[55]

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[52]Minutes of the Sixteenth Session of the SerBiH Assembly of 12 May 1992 at Banja Luka, ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Prosecution Exhibit P 50A, pp. 37-50.

[53]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, "Variant A and B Instructions", 19 December 1991, Prosecution Exhibit P 35, p. 6.

[54]*Ibid*., p. 5.

[55]*Ibid.*, p. 6.

58. The "Variant A and B Instructions" were written with a view to a possibility, an eventuality, to be used if necessary. If they were used, it was certainly not before the spring of 1992. However, in spring 1992, it was clear that Bosnia and Herzegovina was moving towards war, a war of all sides against each other. These instructions, which *inter alia* advocated the protection of other peoples' rights, cannot, in any respect, be regarded as an expression of genocidal intent.

59. The "Variant A and B Instructions" were examined by the International Tribunal for the former Yugoslavia, which found that it could not conclude whether they had been transmitted to the municipal boards. By consequence, the Tribunal could not conclude that the events that occurred in municipalities could be tied to the political leadership of Republika Srpska[56].

60. The "Variant A and B Instructions" constituted one of the policy documents of the Serb party of Bosnia and Herzegovina, the SDS. They were adopted in a specific situation, a few months before the war broke out. Their aim was to find a solution, one which might not have enabled Bosnia and Herzegovina to become an internationally recognized State, but one which might have protected the peoples of Bosnia and Herzegovina.

61. Madam President, Members of the Court, we do not deny that very serious crimes were committed. Nevertheless, those crimes were not the result of a genocidal campaign, as such a campaign never existed. Those crimes were not committed with genocidal intent, they were not planned nor were they co-ordinated. They were certainly not perpetrated in application of the Bosnian Serb's six strategic goals or the measures set out in the "Variant A and B Instructions".

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The six strategic aims and the "Variant A and B Instructions" were no more than the legitimate political proposals of the Serb population of Bosnia and Herzegovina.

62. Our final round of oral argument has only confirmed what has already been shown: the crimes were not the consequence of the political programme of the Bosnian Serbs. Our presentations have also confirmed that there was no genocide in Bosnia and Herzegovina. Irrespective of the approach adopted — bottom-up or top-down — the conclusion will always be the same: there was no genocide in Bosnia and Herzegovina.

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[56]ICTY, *Prosecutor* v. *Blagoje Simic*, case No. IT-95-09-T, Judgment, 17 October 2003, paras. 382 and 985.

63. We have demonstrated that the strategic goals of the Bosnian Serbs were not, of themselves, genocidal. We will now demonstrate that their implementation was neither genocidal or criminal and that the crimes committed cannot be attributed to the legitimate aspiration of the Bosnian Serbs to have their own territory. For the purposes of our exposé, we will address each strategic goal one after the other, except for goal number four (the frontiers on the Una and Neretva rivers) and number six (access to the sea). Goal number four (the frontiers on the Una and Neretva rivers) is contained within goal number one and principally concerns the Bosanska Krajina region. It is also partly included in goal number three concerning the Drina river valley, as the Neretva river is in this region. As for goal number six (access to the sea), it does not appear to warrant our attention since there was no attempt to achieve it.

Madam President, I do not know whether you would like to call for a break now or if I should continue and we could adjourn in ten minutes.

The PRESIDENT: Thank you, Maître. Why don't you continue first a while more and choose a convenient place?

Ms FAUVEAU-IVANOVIĆ: Alright. Thank you, Madam President.

II. Realization of the first two strategic goals: the situation in Bosanska Krajina

1. Bosanska Krajina has always been a specific region in Bosnia and Herzegovina. With a majority Serb population, it has a tragic history, its memory weighed down by the atrocities against the Serb population during the Second World War. The Trial Chamber of the Tribunal for the

34 former Yugoslavia described the situation in Bosanska Krajina in this particularly dark period of Serb history in the judgment delivered in the *Brdjanin* case:

> "Following the occupation of the Kingdom of Yugoslavia in 1941 by the German Nazi regime, the independent State of Croatia, which included BIH, was established. The State was governed by a group of extreme Croat nationalists, known as Ustasha. The Ustasha regime was particularly brutal in the Bosnian Krajina, where tens of thousands of Serbs, Jews and Roma were systematically killed in extermination camps because of their religion and ethnicity. A significant number of members of the Bosnian Muslim community collaborated with the Ustasa and the Germans during the war."[57]

[57] ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement of 1 September 2004, para. 53.

2. We will not go back over that period, certainly the darkest in its history, but were duty bound to mention it, providing as it does the best explanation of the conduct of the Serbs in this region, conduct inspired by a single emotion — fear.

3. Fear occupies a particular place in the conflict which took place in Bosnia and Herzegovina, despite the Applicant's constant denial. The fear explains the conflict, it explains the situation, it explains the events. We have already referred to this fear in our reference to the document "Instructions, variants A and B". The description of the events which took place in the past, as presented by the Tribunal in the *Brdjanin* case, provides a further explanation of this fear.

4. As a large region with a majority Serb population, Bosanska Krajina was the ideal starting-point for the creation of the Serb State of Bosnia and Herzegovina — the realization of the first strategic goal. Situated in western Bosnia and Herzegovina, completely separated from the other Serb-populated territories and enclosed between Croatia and the territories populated by the Croats and Bosnian Muslims in Bosnia and Herzegovina, Bosanska Krajina needed the corridor which would link it with eastern Bosnia in order to survive. Hence, the events at Bosanska Krajina cannot be separated from the second strategic goal, the corridor between Krajina in western Bosnia and Semberija in eastern Bosnia.

35 ***(a)*** **Situation and events in Bosanska Krajina**

5. The Applicant refers to the municipality of Sanski Most, one of the few municipalities in Bosanska Krajina where the Serbs were not in a majority, alleging that the attacks were planned in advance by the army and the municipal crisis staff[58]. We do not dispute that there was fighting at Sanski Most, as for that matter in most of the municipalities with a mixed population, but we do strongly contest that the military activities were planned in advance and that the army was involved in those plans.

6. The Applicant has presented no evidence for its allegations and cannot do so, as no such evidence exists. The fighting at Bosanska Krajina was not planned in advance, it was the consequence of the activities of the Green Berets and of the Patriotic League, the two Bosnian

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

Muslim military organizations active in the municipalities of Sanski Most, Prijedor and Kljuc, as well as in the other municipalities in Bosanska Krajina and Bosnia and Herzegovina.

7. As regards the military activities of the Bosnian Muslims, the Trial Chamber found in the *Brdjanin* case that: "Muslims were also preparing for a war and correspondingly arming themselves. In June 1991, SDA leaders formed the 'Council for National Defence of the Muslim Nation' with the Patriotic League as its paramilitary arm."[59] It is thus incorrect to speak of Serb attacks, and more appropriate to speak of armed combat between the Serbs and the Bosnian Muslims.

8. We do not dispute that, both during and after the fighting, crimes took place, but these crimes did not form part of a plan or programme; they were, alas, a consequence of the civil war, were indeed part of the civil war, the civil war which the Applicant has at last recognized, albeit only partially. It is common knowledge that the war context particularly favours crimes. No one wishes to excuse or justify crimes committed in war, but the overall situation must be carefully analysed. This analysis is even more necessary when the direct evidence of criminal intent does

36 not exist and when that intent has to be deduced from the context in which the crimes were committed.

9. The Applicant refers to the killings in the region of Bosanska Krajina and particularly at Sanski Most[60]. The Tribunal for the former Yugoslavia considered these events in the *Brdjanin* case. *Inter alia*, the Trial Chamber concluded, with respect to the villages of Hrustovo and Vrhpolje situated in the municipality of Sanski Most and cited by the Applicant, that "armed Bosnian Muslim forces, as well as the Patriotic League, were present"[61].

10. The existence of armed Muslim formations has not been verified in the Sanski Most municipality alone. It has been verified in all the municipalities in which the crimes took place. Hence, there was armed conflict in Kljuc municipality. The Trial Chamber ruled, in the *Brdjanin* case, with respect to the village of Pudin Han situated in Kljuc municipality, that: "On 27 May 1992, the resistance fighters attacked a Bosnian Serb military column in the area of

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[59]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement of 1 September 2004, para. 89.

[60]CR 2006/5, pp. 31 and 32.

[61]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 102.

Pudin Han."[62] The Trial Chamber also concluded that, the same day, 27 May 1992, Dusan Stojakovic, a Bosnian Serb, deputy commander of the Kljuc police station, was killed by Muslim soldiers.[63]

11. It has also been established that there was armed combat in the village of Vecici, situated in Kotor Varos municipality where the population was mixed. Also in the *Brdjanin* case, the Trial Chamber found that: "In the village of Vecici, the Bosnian Serb forces faced considerable Bosnian Muslim armed resistance and fighting continued for months."[64]

12. The Prosecutor's military analyst in the *Brdjanin* case, Mr. Ewan Brown, also confirmed the existence of Bosnian Muslim military organization in the Muslim villages in the territory of Bosanska Krajina. In his report, he stated:

> "In a number of Bosanska Krajina municipalities it was also evident that inhabitants of the non-Serb villages had attempted to organise themselves and had established some form of local crisis staff of territorial/local defence. Some of this activity may well have been in direct response to the mobilization of the Bosnian and Herzegovina territorial defence, announced earlier in May by Alija Izetbegovic."[65]

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13. The conclusions of the Tribunal for the former Yugoslavia confirm that there was indeed armed combat in these villages. Although this fact does not excuse or justify the crimes committed, it situates them in their true context. All these crimes may be characterized as war crimes, as violations of the laws and customs of war, and some crimes may be characterized as crimes against humanity, but none of these crimes, individually or taken together with others, can be characterized as genocide.

14. All the crimes to which the Applicant refers were connected with the armed conflict and their purpose was the destruction of the enemy's armed forces. Unfortunately, it was not always possible to maintain control and civilians were killed. War creates disorder, and crimes — very serious crimes — were committed on the fringes of the armed conflict by persons who could be characterized as criminals, seeing in the general disorder an opportunity to satisfy their basest impulses. Nothing can excuse these crimes, but they do not constitute genocide. They were not

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[62] *Ibid.*, para. 108.

[63] *Ibid.*

[64] ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 111.

[65] *Ibid.*, Military Developments in the Bosanska Krajina 1992, Ewan Brown, Military Analyst, 27 November 2002, p. 133.

committed with the intention of destroying in whole or in part a national, ethnic, racial or religious group as such. Even if they are evaluated in their totality, all of them together, these crimes do not constitute genocide, as each of them was committed in a particular situation, without any plan, any design and, most importantly, without any genocidal intent.

Would now be a good time? Thank you.

Le PRESIDENT : Oui, certainement. L'audience est levée.

L'audience est suspendue de 11 h 25 à 11 h 40.

Le PRESIDENT : Veuillez vous asseoir. Maître Fauveau-Ivanović, vous avez la parole.

Ms FAUVEAU-IVANOVIĆ: Thank you, Madam President.

15. Most of the crimes alleged by the Applicant to have been committed at Bosanska Krajina were addressed in the *Brdjanin* case[66] before the Tribunal for the former Yugoslavia. Of course, this esteemed Court is not bound by the findings of the Tribunal for the former Yugoslavia. However, it may be noted that the Trial Chamber concluded the *Brdjanin* case, after three years of proceedings, with an acquittal on genocide.

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16. The facts presented by the Applicant which allegedly took place at Bosanska Krajina were investigated by the Tribunal for the former Yugoslavia. However, either the Tribunal was not able to verify these facts, or they were presented differently during the *Brdjanin* proceedings, but the Tribunal's conclusions differ appreciably from the Applicant's presentation.

17. Hence, according to the expert called by the Applicant, Mr. András Riedlmayer, 30 members of the Muslim community were burned in August 1992 in the mosque in the village of Hanifici, in Kotor Varos municipality[67]. First, such a statement lay completely outside the expertise for which Mr. Riedlmayer was called and for which he is qualified. Secondly, according to Mr. Riedlmayer's statement[68], his knowledge of these events cannot be described as other than hearsay. Mr. Riedlmayer has no direct knowledge of this event. Lastly, that statement differs

[66]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, paras. 416-422.

[67]CR 2006/22, p. 28, para. 49.

[68]*Ibid.*, p. 41.

significantly from the finding of the Trial Chamber in the *Brdjanin* case, which assessed the events in the village of Hanifici and concluded that eight persons were killed[69], and that these persons were neither killed nor burned in the mosque. A crime was patently committed, but the nature and scale of the crime are not as presented by Mr. Riedlmayer in these proceedings.

18. During its oral pleadings of 1 March 2006, the Applicant referred to Mr. Riedlmayer's report to the Tribunal for the former Yugoslavia. In that report, Mr. Riedlmayer described the murders in the village of Carakovo, in Prijedor municipality, which were said to have taken place in front of the mosque and included the horrific murder of the local imam[70]. The value of this report as evidence is more than merely limited, since the event described lay completely outside the scope of the expert opinion Mr. Riedlmayer was asked to give and for which he is qualified.

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Furthermore, it never proved possible to establish the reality of this event before the Tribunal for the former Yugoslavia, which investigated the events at Carakovo in two cases, the *Brdjanin* case[71] and the *Stakic* case[72]. In neither case did the Tribunal find evidence pointing to the murders in front of the mosque or the murder of the local imam in the village of Carakovo. If these events had occurred, the Tribunal would certainly have confirmed them. The simple fact is that the Tribunal was unable to do so because they never happened.

19. The situation at Prijedor was similar to the situation at Sanski Most, Kljuc and Kotor Varos. The Tribunal for the former Yugoslavia considered the events at Prijedor in a number of cases. However, the Applicant prefers to refer to different reports prepared by different commissions rather than to the Tribunal's conclusions. And the Applicant's approach is understandable, since the facts ascertained by the Tribunal do not bear out the facts alleged by the Applicant.

20. In the first round of our oral pleadings, we showed that the number of persons killed had been exaggerated, the exaggerations being principally based on the different reports. We are not going to go over them again, yet must mention some of the most telling examples. Hence, in its

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[69]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 430, footnotes 1104 and 1105.

[70]CR 2006/5, p. 52, para. 22.

[71]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 410.

[72]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, paras. 266-268.

Reply (Chap. 2, para. 22), the Applicant cited the report by Tadeusz Mazovietcki[73], according to which a thousand people were killed in the village of Hambarine. In the *Brdjanin* case, the Trial Chamber established, on the basis of the testimonies and forensic expertise, that three persons were killed in the village of Hambarine[74].

21. Concerning this event, we should add that the fighting at Hambarine was started by the Bosnian Muslims, who opened fire on the Serbs. A witness in the *Stakic* case described this incident. He stated that well-armed Bosnian Muslims, at their checkpoint, had called on the Serbs to give up their weapons and opened fire with a machine gun when the Serbs refused to do so[75].

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22. Trial Chamber II in the *Stakic* case accepted the testimony of this witness and found that: "Based on this evidence, the Trial Chamber concludes in favour of the Accused and finds that the Muslim personnel at the checkpoint was the first to open fire on this manifestation of the conflict."[76]

23. The same assessment can be made of the events at Kozarac. The Applicant, without mentioning the existence of the armed conflict, reported an exaggerated number of killings in its Memorial (para. 2.2.2.11). In support of its claims, the Applicant cited the United Nations report which did, in fact, allege that 5,000 persons were killed at Kozarac[77]. The events at Kozarac were examined in several cases before the Tribunal for the former Yugoslavia, and as the investigations progressed, the number of persons killed grew smaller. The judgment rendered in the most recent case in which these events were investigated, which is the *Brdjanin* case, refers to 80 Muslim victims at Kozarac[78]. The total number of victims at Kozarac, including Croats and Bosnian Muslims, did not exceed 140, according to the Tribunal's findings[79].

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[73]Sixth report submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, United Nations, doc. A/47/6661, doc. S/24809, 17 November 1992, p. 8, para. 17 *(c)*.

[74]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 401.

[75]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Testimony of witness DH, Transcript, pp. 13504-13507.

[76]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 130.

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

[78]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 403.

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

24. In the *Stakic* case, the Tribunal for the former Yugoslavia held that the population of Kozarac attempted to establish control in the town and that, with the aid of Sead Cirkin, a former officer in the Yugoslav National Army, it organized armed patrols[80]. The Trial Chamber also found that Muslim paramilitary units had been active in the Kozarac area[81].

25. In the *Brdjanin* case, Trial Chamber I found that a total of 1,669 people were killed in Bosanska Krajina in 1992, the year when the worst crimes were committed[82]. In the same case, the Tribunal also found that, prior to the war, 233,128 Bosnian Muslims and 103,314 Croats lived in
41 the relevant municipalities[83]. Thus, out of the total Muslim and Croat population of Bosanska Krajina, which amounted to 296,482 persons, 1,669 were killed and it has not been established that all the victims were Croats and Bosnian Muslims. It might be cruel to count the victims, since every victim is a victim too many, and all these people should not have been killed, but the facts established do not show genocidal intent, which in any event never existed.

26. The Applicant criticized our references to the judgements of the Tribunal for the former Yugoslavia with regard to the number of killings[84]. This is a strange argument, to say the least, since the Respondent itself refers to the indictments by the Tribunal's Prosecutor, and to various decisions, whose probative value is certainly not as great as that of the judgments. Moreover, the Applicant's contention that killings which were not confirmed in the judgments could nevertheless have been committed is not entirely accurate. Thus, the Tribunal rarely tries the direct perpetrators of the crimes committed, but more usually tries the political leaders or military commanders responsible for the totality of the crimes committed in the region under their responsibility, who are consequently charged with crimes also committed by third parties. This is particularly true in the *Brdjanin* case. Radoslav Brdjanin was the political leader of Bosanska Krajina, who occupied a key position throughout the war, both at regional level and in Republika Srpska[85]. Radoslav Brdjanin was charged with all the crimes committed in 1992 in the region of Bosanska Krajina, one

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[80]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 140.

[81]*Ibid.*, para. 142.

[82]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 465.

[83]*Ibid.*, para. 967.

[84]CR 2006/30, pp. 26-27.

[85]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 286.

of the most important regions under Bosnian Serb control. In addition and in conclusion, the Applicant has not presented credible evidence to show that crimes were committed other than those found to have been committed by the Tribunal. And irrespective of the nature of the proceedings, the burden of proof still rests on the Applicant.

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27. The best known camps in Republika Srpska were established by the Bosnian Serbs in the region of Bosanska Krajina, and more particularly in the municipality of Prijedor. Conditions in those camps were bad, but all of them were investigated in several cases before the Tribunal for the former Yugoslavia, which never found that genocide had been committed.

28. Although the Applicant has acknowledged at these hearings that the Tribunal's Prosecutor investigated the camps, it prefers once again to base its allegations on the various reports, all of which were considered by the Tribunal for the former Yugoslavia. However, in none of the cases relating to the camps did the Tribunal find that genocide had taken place. The Applicant attempts to circumvent this fact by alleging that those cases were limited in scope, both territorially and temporally[86]. As far as the camps in Bosanska Krajina are concerned, the cases tried by the Tribunal were certainly limited in time, since most of the camps were closed at the end of the summer of 1992. As regards limitation to a geographical region, this is only partially true, since the *Brdjanin* case, though not concerned with all of Bosnia and Herzegovina, nevertheless encompassed 16 municipalities within its scope. However, genocide was not found to have been committed.

29. Finally, when the Applicant refers to the findings of the Tribunal in regard to the camps, it prefers to cite the decision on judicial notice of adjudicated facts in the *Krajisnik* case[87]. Before entering into an analysis of that decision, it should be noted that it relates to facts previously established in other cases tried before the Tribunal, where no proof of genocide was found[88]. We would add that the camps to which the Applicant refers had also been investigated in certain cases

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[86]CR 2006/5, p. 22, para. 3.

[87]*Ibid.*, p. 33, para. 41.

[88]ICTY, *Prosecutor* v. *Dusko Tadic*, case No. IT-94-1; *Prosecutor* v. *Miroslav Kvocka et al.*, case No. IT-98-30/1.

which were not cited in the decision rendered in the *Krajisnik* case. Even so, once again, genocide was not shown to have occurred[89].

43 30. According to the decision in the *Krajisnik* case to which the Applicant refers: "the Prijedor Chief of Police Simo Drljaca issued the official order to establish the camps. Simo Drljaca was a chief of the Prijedor municipality Public Security Station and a member of the Prijedor Crisis Staff."[90]

31. Simo Drljaca was the Chief of Police in Prijedor and bore much of the responsibility for establishing the camps as well as — probably — running them. His role was evaluated in the *Stakic* case, where the Trial Chamber found that:

> "Simo Drljaca, head of the Prijedor SJB, clearly played an important role in establishing and running the camps, and was portrayed by the evidence as being a difficult or even brutal person, but the Trial Chamber is not satisfied that Drljaca pulled the Crisis Staff into a genocidal campaign."[91]

32. In the *Stakic* case, Trial Chamber II assessed the evidence relating to the intent of the accused, Milomir Stakic, as well as evidence relating to the possible intent of other municipal officials in Prijedor, and came to the following conclusion:

> "The Trial Chamber has considered whether anyone else on a horizontal level in the Municipality of Prijedor had the *dolus specialis* for genocide by killing members of the Muslim group but concludes that there is no compelling evidence to this effect."[92]

33. The Trial Chamber also found that the persons higher up in the hierarchy of the Serb SDS party, which was in power in Republika Srpska, had no genocidal intent[93]. Admittedly, this finding was based on evidence presented in the *Stakic* case, but Milomir Stakic had been the Mayor of Prijedor and had contacts with Radoslav Brdjanin, President of the Bosanska Krajina Crisis Staff, as well as with Radovan Karadzic, President of Republika Srpska. There can be no doubt that the Prosecutor of the Tribunal presented all the evidence at his disposal in order to

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[89]ICTY, *Prosecutor* v. *Sikirica*, case No. IT-95-8; *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24; *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36.

[90]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, case No. IT-00-39 and 40-PT, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, rendered by Trial Chamber I on 24 March 2005; Ann., paras. 211-212.

[91]ICTY, *Prosecutor* v *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 555.

[92]*Ibid.*

[93]ICTY, *Prosecutor* v *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 551.

establish the genocidal intent of these persons. However, the Trial Chamber was unable to establish that the persons concerned were motivated by the specific intent necessary for the crime
44 of genocide. The judgment of Trial Chamber II in the *Stakic* case was upheld by the Appeals Chamber. The Tribunal's final judgment clearly establishes that genocide was not committed in the municipality of Prijedor. The Tribunal could not have found otherwise, as there was no genocidal intent and genocide was not committed.

34. The camps to which the Applicant refers were initially set up as holding centres for persons captured in combat or detained in police operations[94]. However, the original intention of the persons who established those camps is of little relevance, and we have no intention of denying that the conditions in the camps were bad. We do not deny that crimes were committed in those camps. But neither the poor conditions nor the crimes committed in the camps constitute genocide in the absence of genocidal intent. And such intent never existed.

35. The Applicant seeks to establish the existence of genocidal intent in those camps by citing the facts on which Biljana Plavsic and the Tribunal Prosecutor reached agreement[95]. First of all, these facts cannot be considered to have been confirmed by Biljana Plavsic. It is true that she reached agreement with the Prosecutor on those facts, but she did not confirm them and they are not to be found in any statement by Biljana Plavsic. This was an agreement between the two parties in a specific case, a case in which both parties had their own interests and those interests made it necessary for them to accept these facts. Secondly, Biljana Plavsic admitted that unlawful detention had taken place and that the crime of persecution, a crime against humanity, had been committed. She never agreed, much less confirmed, that genocide had been committed. She never expressed any thought or idea from which genocidal intent could be inferred. Regarding her position in the presidency of Republika Srpska, Biljana Plavsic was certainly in a position to know whether genocidal intent existed, and to confirm such intent if it had existed. She did not do so. Therefore, no conclusion regarding any genocidal intent can be drawn from the *Biljana Plavsic* case.

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[94]ICTY*, Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 159.

[95]CR 2006/5, p. 24, para. 12.

36. The same assessment may be made of the decision rendered in the *Krajisnik* case, pursuant to Article 98*bis* of the Tribunal's Rules of Procedure and Evidence[96]. The Applicant
45 seeks to establish certain facts on the basis of the findings reached by the Trial Chamber in that decision. As we have already said, the decisions rendered pursuant to Article 98*bis* of the Tribunal's Rules of Procedure and Evidence do not establish facts beyond all reasonable doubt. Those decisions only establish the likelihood that the facts occurred, a likelihood which may prove to be incorrect.

37. The Applicant acknowledges that the findings of the Tribunal in Decisions Pursuant to Rule 98*bis* do not form part of final Judgements — although it attempted, nonetheless, to show their veracity — as they have already been challenged by the Defence and re-examined by the judges[97]. We have already indicated that those Decisions are pronounced at the end of the presentation of evidence by the Prosecutor. They are issued before the Defence has submitted its evidence and cannot be regarded as reliable findings by the judges. Such a conclusion is, moreover, supported by the fact that in certain cases, having found that genocide had taken place in the Decision Pursuant to Rule 98*bis*, the Tribunal has subsequently ruled at the conclusion of the case, following the presentation of evidence by the Defence, that genocide had not been committed. Trial Chamber I, for example, did not exclude genocide from its Decision Pursuant to Rule 98*bis* in the *Brdjanin* case[98]. That conclusion was even upheld by the Appeals Chamber[99]. However, in its final Judgement at the end of the case, Trial Chamber 1 found that genocide had not been committed in Bosanska Krajina[100]. The same thing happened in the *Stakic* case. Trial Chamber II did not exclude genocide from its Decision Pursuant to Rule 98*bis*[101]. However, in the final Judgement, the Tribunal found that genocide had not been committed[102]. The Appeals Chamber

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[96]ICTY, *Prosecutor* v. *Momćilo Krajisnik*, Decision on the Defence Motion for Acquittal under Rule 98*bis*, case No. IT-00-39-T, Transcript, 19 August 2005, pp. 17128-17130.

[97]CR 2006/5, p. 25, para. 14.

[98]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, Trial Chamber I, 28 November 2003.

[99]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Decision on Interlocutory Appeal, Appeals Chamber, 19 March 2004.

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

[101]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, Trial Chamber II, 31 October 2002.

[102]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003.

46 upheld the Judgement in the *Stakic* case and found in its final Judgement that genocide did not take place in Prijedor[103]. Consequently, the findings of the Tribunal in Decisions Pursuant to Rule 98*bis* can only be viewed as intermediate conclusions made exclusively on the basis of the evidence submitted by the Prosecutor. They do not contain findings of fact or of law which can be regarded as definitive.

38. It should also be noted that the Applicant makes no distinction between the camps that existed in Republika Srpska. There were differences, however. Conditions were certainly not good in any of those camps, but in certain camps they were not such as to amount to causing serious bodily or mental harm and could not be regarded as calculated to bring about the physical destruction of the group.

39. In the *Brdjanin* case, Trial Chamber II of the Tribunal for the former Yugoslavia held that the evidence submitted was in certain cases insufficient for it to find that the physical or mental harm caused was sufficiently severe to be characterized as serious. The Tribunal came to that conclusion as concerns the Bosanska Krajina region with respect to the following camps: Bosanska Kostajnica police station, Bosanski Novi municipality, Kotor Varoš elementary school, Ribnjak camp and Vijaka Mill in Prnjavor municipality, Sipovo SUP building, Sipovo municipality, Bosanski Petrovac police station in Bosanski Petrovac municipality and Krings factory, sports hall and Lusci Palanka police station in Sanski Most municipality[104].

40. The same analysis can be applied to the issue of whether conditions in the camps were calculated to bring about the physical destruction of the group. In the *Brdjanin* case, Trial Chamber II held that the evidence submitted was insufficient to show that conditions in certain camps could be construed as having been calculated to bring about the physical destruction of the

47 group. The Tribunal's finding concerned the following camps: Ribnjak camp in Prnjavor municipality, Bosanska Kostajnica police station, Bosanski Novi municipality, CSB building, Mali Logor and Vis Tujnice penitentiary, Banja Luka municipality, Grabovica elementary school and Sawmill camp, Kotor Varoš municipality, Kozila camp, Bosanska Petrovac municipality, Jasenica and Petar Kocic elementary schools, Bosanska Krupa municipality, SUP building and

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[103]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006.

[104]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, paras. 742-743.

Nikola Mackic school, Kljuc municipality, Prijedor barracks, SUP building and Miska Glava camp, Prijedor municipality, Hasan Kikic gymnasium and Krings factory, Sanski Most municipality, and SUB building, Teslic municipality.[105]

41. Moreover, certain events referred to by the Applicant with respect to the Manjaca military camp were disproven in trials by the Tribunal for the former Yugoslavia. For example, in its Reply (Chap. 5, para. 382), the Applicant alleged that:

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

That allegation, taken from the UN Commission of Experts' report, was dismissed by Trial Chamber II in the *Brdjanin* case, which found that "No evidence has been presented before the Trial Chamber that, as alleged in the Indictment, in Manjaca, detainees were subjected to acts of sexual degradation", prompting it to the following conclusion: "The Trial Chamber has been unable to find any indication of these events in the evidence."[106]

42. With regard to the Manjaca camp, evidence to the contrary was submitted to the Tribunal in the only case in which events in the camp have ever been tried. In the *Brdjanin* case, it transpired that Lord Paddy Ashdown, until recently the International Community's High Representative in Bosnia and Herzegovina, visited the Manjaca camp in 1992 as an envoy of the United Nations Secretary-General. On leaving the camp, Lord Ashdown described it as correctly run[107].

48 43. True, the camps mentioned are not all of those which existed in Bosnia and Herzegovina, but even if the conditions were so bad that they could cause serious bodily or mental harm to members of the group or correspond to conditions of life which could bring about the group's physical destruction in whole or in part, that does not automatically mean that genocide was committed. Genocidal intent must still be shown in order for those acts to constitute genocide. As the Tribunal for Rwanda correctly found on the basis of the *travaux préparatoires* for the Genocide

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[105] *Ibid*., paras. 907-908.

[106] *Ibid*., para. 755 and footnote No. 1837.

[107] ICTY, *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, case No. IT-99-36-T, Transcripts, 26 February 2002, pp. 2270-2271.

Convention: "absent intent to destroy a protected group, no act can amount to genocide, no matter how atrocious that act is"[108]. Genocidal intent has not been shown in any of the cases tried before the Tribunal concerning the events in Bosanska Krajina and it could not be, since it never existed.

44. Certainly, conditions in the camps, both in Prijedor and in the others in Bosanska Krajina, were extremely bad, but, without genocidal intent, such conditions can still not be regarded as acts amounting to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, which would have constituted genocide.

45. The words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[109] were proposed by the Belgian representative to the Sixth Committee of the United Nations General Assembly. In order to constitute genocide, the conditions must be calculated to bring about physical destruction, or in other words death. Although they do not consist of killings alone, they must bring about death.

46. The expression "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" was defined by the Rwanda Tribunal in the *Akayesu* case, in which it held that that expression "should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but

49 which, ultimately, seek their physical destruction"[110]. And, in the *Stakic* case, the Tribunal for the former Yugoslavia defined physical destruction: "The element of physical destruction is inherent in the word genocide itself, which is derived from the Greek *genos* meaning race or tribe and the Latin *caedere* meaning to kill."[111]

47. Moreover, basing itself upon the *travaux préparatoires*, the International Law Commission concluded:

> "As clearly shown by the preparatory work for the Convention, the destruction in question is 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

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[108]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 519.

[109]United Nations, doc. A/C.6/217 (Belgian proposal); doc. A/C.6/SR.82 (Soviet amendment).

[110]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 505.

[111]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 518.

'destruction', which must be taken only in its material sense, its physical or biological sense."[112]

48. With respect to the camps in Bosanska Krajina, they were not established to cause physical destruction. Most of those camps existed for only a matter of months and were shut down at the end of the summer of 1992. While we do not deny either the bad conditions in those camps or the crimes that were committed in them, we must note that, if they intended to destroy the Bosnian Muslims or a part of that population — those living in Bosanska Krajina — the Bosnian Serbs could have run the camps differently. The argument is extremely callous and not easy to express, but it is unfortunately highly realistic. It was used by Trial Chamber II of the Tribunal for the former Yugoslavia in the *Stakic* case, when it held that "[h]ad the aim been to kill *all* Muslims, the structures were in place for this to be accomplished"[113]. The Appeals Chamber found that the Trial Chamber had used that argument correctly in its assessment of the evidence. In the words of the Appeals Chamber's Judgement "the Trial Chamber cited this fact because it constitutes evidence that the Appellant did not seek to destroy the Bosnian Muslim group in whole *or in part* — the fact that more Bosnian Muslims could have been killed, but were not, indicates that the Appellant lacked *dolus specialis*"[114].

50 49. Although the above-mentioned trial judgment and the appeal judgment upholding it concern the intent of Milomir Stakic, the mayor of Prijedor, it should be noted that they are applicable to all the political and military leaders of the Bosnian Serbs, since all of them, in the territories under their control, had the possibility to destroy the peoples that the Applicant characterizes as non-Serbs. They did not do so, they never had the intention to do so. Their objective was to create a State in which the Serbian people would live in safety.

50. The Trial Chamber in the *Brdjanin* case used a similar argument. It looked at the number of Bosnian Muslims and Croats who had actually suffered serious bodily or mental harm caused to members of the group, and conditions of life calculated to bring about its physical destruction in whole or in part, acts which would constitute genocide if committed with genocidal intent. Trial Chamber I concluded:

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[112]Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May-26 July 1996, United Nations, doc. A/51/10, pp. 90-91.

[113]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 553.

[114]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006, para. 42.

> "The number of Bosnian Muslims and Bosnian Croats who were victims within the terms of Article 4 (2) *(a)*, *(b)* or *(c)* as such and of itself does not allow the Trial Chamber to legitimately draw the inference that the underlying acts were motivated by genocidal intent."[115]

Article 4 of the Tribunal's Statute is identical to Article 2 of the Genocide Convention.

51. The Trial Chamber also held in the *Brdjanin* case that not all the detainees in the camps were mistreated, and it concluded that:

> "although the evidence demonstrates that the beatings were widespread, they were not administered on all detainees, particularly when these were women and children. Nevertheless, of those detention facilities for which there is an estimated number of detainees, around 15,623 Bosnian Muslims and Bosnian Croats were detained in those camps and detention facilities where serious bodily and/or mental harm was inflicted on some of them."[116]

52. The Trial Chamber also held that the number of detainees could not be established with any certainty, since detainees were transferred between the different camps.[117]

53. Finally, the Trial Chamber concluded that the:

> "extremely high number of Bosnian Muslim and Bosnian Croat men, women and children forcibly displaced from the ARK in this case, particularly when compared to the number of Bosnian Muslims and Bosnian Croats subjected to the acts enumerated in Article 4 (2) *(a)*, *(b)* and *(c)*, does not support the conclusion that the intent to destroy the groups in part, as opposed to the intent to forcibly displace them, is the only reasonable inference that may be drawn from the evidence".[118]

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54. The great majority of detainees were able to leave the camps, the great majority of Bosnian Muslims were authorized by the Bosnian Serbs to leave the camps. It is true that they suffered during their detention in the camps and that most of them were unable to return to their homes. However, as Trial Chamber II correctly held in the *Stakic* case:

> "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 . . . This is because the dissolution of the group is not to be equated with physical destruction."[119]

55. Moreover, Trial Chamber I in the *Brdjanin* case also made the same finding.

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[115]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 974.

[116]*Ibid.,* footnote 2448.

[117]*Ibid.*

[118]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 976.

[119]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 519.

56. Lastly, having considered all the evidence presented in the *Brdjanin* case, the case which concerned the entire region of Bosanska Krajina comprising 16 municipalities and covering a large part of the territory of Republika Srpska, the Trial Chamber held that:

> "the scale of the acts enumerated in Article 4 (2) *(a)* to *(c)* does not allow the Trial Chamber to legitimately come to the conclusion in favour of the existence of genocidal intent, particularly when viewed in light of the number of Bosnian Muslims and Bosnian Croats forcibly displaced from the ARK. The difference between the two is too pronounced, particularly in light of the fact that during much of the period relevant to the Indictment, and certainly as from summer 1992, the Bosnian Serb forces controlled the territory of the ARK, as shown by the fact that they were capable of mustering the logistical resources to forcibly displace tens of thousands of Bosnian Muslims and Bosnian Croats, resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims and Bosnian Croats of the ARK."[120]

57. Contrary to the Applicant's claim that the Tribunal for the former Yugoslavia looked at the evidence in relation to one accused and one event, it emerges clearly from the text of the judgment rendered in the *Brdjanin* case that the Tribunal evaluated the evidence in its totality.

52 Once again we would emphasize that this particular case, the *Brdjanin* case, concerned the entire region of Bosanska Krajina. However, the Trial Chamber was unable to conclude that genocide was committed, quite simply because genocide was not committed. Consequently, the Trial Chamber found that:

> "Although the factors raised by the Prosecution have been examined on an individual basis, the Trial Chamber finds that, even if they were taken together, they do not allow the Trial Chamber to legitimately draw the inference that the underlying offences were committed with the specific intent required for the crime of genocide. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond reasonable doubt that genocide was committed in the relevant ARK municipalities." [121]

58. Even considering the type of conduct to constitute a pattern, the Trial Chamber was unable to draw an inference of genocidal intent. On the other hand, it found that:

> "The Trial Chamber has already provided an overview of the crimes that were committed in execution of the Strategic Plan in the ARK during the period relevant to the Indictment, and found a pattern of conduct of the Bosnian Serb forces throughout the ARK municipalities, the final objective of which was the permanent removal of most of the non-Serb population."[122]

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[120]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 978.

[121]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 989.

[122]*Ibid.*, para. 983.

Moreover, at the conclusion of the trial, the Trial Chamber characterized the crimes committed in the region of Bosanska Krajina as crimes against humanity — crimes of persecution, and held that:

> "While the general and widespread nature of the atrocities committed is evidence of a campaign of persecutions, the Trial Chamber holds that, in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied."[123]

59. It is true that this Court is not bound by findings of the Tribunal for the former Yugoslavia, but certain inferences may be drawn from the judgments of that Tribunal.

60. Another Trial Chamber reached the same conclusion in the case concerning the events at Prijedor. The events at Prijedor are undoubtedly central to the events in Bosanska Krajina, but the Trial Chamber held that it could not establish the specific intent required for genocide in relation to

53 either the accused or his subordinates[124]. Thus, the Trial Chamber held that: "the Trial Chamber has not found beyond a reasonable doubt that genocide was committed in Prijedor in 1992"[125].

61. Admittedly, the Trial Chamber evaluated only the evidence relating to 1992, since Milomir Stakic was charged only for the events that took place in 1992. However, when the Prosecutor indicted Milomir Stakic, he indicted him for that year only, since he was unable to find sufficient grounds to indict him for later years. The Tribunal for the former Yugoslavia tried several persons for events in the Prijedor region, and none of those persons was indicted for events that took place after 1992. This is eminently reasonable, since most of the camps in that region were closed at the end of 1992.

62. The year 1992 was certainly the worst year in Bosanska Krajina. The Applicant even acknowledged in its oral argument that 1992 was the worst year throughout Bosnia and Herzegovina[126]. However, the Tribunal never found that genocide was committed in the region of Bosanska Krajina. The Tribunal looked at the intention of the accused and of the persons linked to the accused in the political and military hierarchy of the Bosnian Serbs, but once again, it was unable to establish that genocide had been committed.

63. In the *Stakic* case, Trial Chamber II held that:

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[123] *Ibid.*, para. 984.

[124] ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 559.

[125] *Ibid.*, para. 561.

[126] CR 2006/2, p. 44, para. 56.

> "the common goal of the members of the SDS in the Municipality of Prijedor, including Dr. Stakic as President of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest."[127]

64. In fact, the Bosnian Serbs were afraid that men of military age would join the army of Bosnia and Herzegovina. As the Bosnian Serbs wanted to prevent Muslims from joining the army of Bosnia and Herzegovina, most of the crimes were committed against men of military age. The

54 fact that the war in Bosnia and Herzegovina was a civil war and that all the men in the former Yugoslavia received military training in the context of the territorial defence programme made it extremely difficult to distinguish between military personnel and civilians. In this connection, we wish to emphasize that we entirely agree with the Applicant's statement, in its pleadings on 2 March 2006, that one of the elements necessary for a finding of genocide is the commission of crimes against the civilian population identified as a separate group[128].

65. The Bosnian Serbs never harboured the intention to destroy the Bosnian Muslims, their intention was to protect themselves. The testimony heard by the Tribunal for the former Yugoslavia confirms that fear and protection of the Serbian population were the reasons for the detention of Muslim men of military age. We may cite the testimony of a Bosnian Muslim from Banja Luka, in the *Brdjanin* case, who stated that: "in Banja Luka, very few men of military age were permitted to leave in the direction of Travnik, for authorities feared that they would be mobilized into the ABiH"[129].

66. This was the reasoning adopted by the Tribunal, since the Trial Chamber in the *Brdjanin* case found that most of the victims of acts which could constitute genocide, and in particular most of the detainees, were men of military age. The Tribunal held that this fact militated against genocidal intent, and concluded:

> "There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived

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[127]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 553.

[128]CR 2006/7, p. 29, para. 90.

[129]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, testimony of witness Amir Dzonlic, Transcript, pp. 2397-2487.

> threat to the implementation of the Strategic Plan in the ARK and beyond. Security for the Bosnian Serbs seems to have been the paramount interest."[130]

67. The Tribunal therefore concluded that security for the Serbian population was the paramount interest for the Bosnian Serbs. This conclusion should be evaluated in the light of the fear to which we referred earlier. Fear was the main motive for all the acts of the Bosnian Serbs, fear was the reason for the adoption of the first strategic objective, separation of the other communities and the creation of the Serbian State. Fear caused crimes to be committed, but the motive behind those crimes was not the destruction of the Bosnian Muslims and Croats, who had

55 been allied in the heinous crimes perpetrated during the Second World War. Crimes were committed against Muslims and Croats, but none of those crimes was committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

68. Furthermore, in the *Stakic* case, both the Trial Chamber and the Appeals Chamber of the Tribunal for the former Yugoslavia, accepted the sincerity of the statement by Milomir Stakic, mayor of Prijedor, in 1992, during the war when the tragic events were taking place that: "those who stained their hands with blood will not be able to return. Those others, if they want . . . when the war ends, will able to return"[131]. Such a statement by a person occupying an important position in the Bosnian Serb and SDS party hierarchy clearly shows that the Bosnian Serbs had no intention of destroying the Bosnian Muslims, but intended to displace them, and to displace them temporarily. That intention to displace the Bosnian Muslim population was motivated much more by fear for Serb interests than by a real desire to expel the Muslim population.

69. The intention to displace the population may be deduced from the decisions adopted on 2 June 1992 by the municipalities in Bosanska Krajina, including Bihać, Bosanski Petrovac, Bosanska Krupa, Sanski Most, Prijedor, Bosanski Novi and Ključ, which agreed to the following policy:

> "All seven municipalities in our subregion agree that Muslims and Croats should move out of our municipalities until a level is reached where Serbian authority can be maintained and implemented on its own territory in each of these municipalities. In this respect, we request that the Crisis Staff of the Autonomous

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[130] *Ibid.*, Judgement, 1 September 2004, para. 979.

[131] ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 554; case No. IT-97-24-A, Judgement, 22 March 2006, para. 56.

> Region of Krajina provide a corridor for the resettlement of Muslims and Croats to Central Bosnia and Alija's independent state of BIH because they voted for it."[132]

70. This document not only shows the intention to displace the population, but to displace it temporarily until the organs able to guarantee protection and security were established. This

56 document, when taken together with the statement by Milomir Stakic quoted earlier (para. 51), clearly shows that the actions of the Bosnian Serbs were not directed against the Bosnian Muslims and/or Croats as such, but that their purpose was to protect the Serb population. Unfortunately, the authorities were at loss as to how to keep control of the situation — unsurprisingly so given the current context of the war in Bosnia and Herzegovina.

71. As to the displacement of the population, it should be noted that the Trial Chamber concluded in the *Stakic* case: "The intention to displace a population is not equivalent to the intention to destroy it."[133] Indeed, it may even be wondered whether the intention to displace the population is compatible with the intention to destroy. William Schabas considers that ethnic cleansing is aimed at displacing the population just as genocide is aimed at destroying it. In his opinion "it is logically inconceivable that the two agendas coexist"[134]. William Schabas's position is correct, since the population displaced is patently not a population destroyed. The population exists, circumstances may change, as indeed they did change in this case, and the population may return. People harbouring the intention to destroy would certainly not have allowed the bulk of the population to leave and to live sometimes only a few kilometres from their usual homes.

72. In the *Brdjanin* case, the Trial Chamber investigated the Strategic Goals adopted at the 16th Session of the Assembly of the Serbian People in Bosnia and Herzegovina together with their implementation and found that it could not deduce therefrom that genocide had been committed in Bosanska Krajina. The Trial Chamber found:

> "While the Trial Chamber is satisfied that the Strategic Plan was to link Serb-populated areas in BiH together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed, and that force and fear were used to implement it, it is not possible to conclude from the evidence actually brought forth in the instant case that there was an

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[132]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 967, footnote 229, Exhibit P 229.

[133]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 554.

[134]William Shabbas: "Genocide in International Law", *The Crime of Crimes* (Cambridge University Press), Cambridge, 2000, p. 200.

> intention to do so by destroying the Bosnian Muslim and Bosnian Croat groups of the ARK."[135]

57 73. Where the realization of the Strategic Goals in the Bosanska Krajina region is concerned, the Tribunal was thus able to conclude that the implementation of those goals engendered the forced transfer[136]. Certainly, no one can or indeed wishes to justify these acts, which are international crimes, but crimes against humanity, not genocide.

(b) ***Second Strategic Goal: establishment of the corridor between Krajina and Semberija***

74. The establishment of the corridor between Krajina and Semberija, which is in effect the corridor between Bosanska Krajina and eastern Bosnia, was indispensable to the survival of the population of Bosanska Krajina.

75. At the time when the Assembly of the Serbian People adopted the Strategic Goals, the Bosanska Krajina region was completely separated from the other Serb territories. This would not have been a matter of particular concern in normal times, but Bosanska Krajina was then enclosed within a hostile environment and was completely surrounded by Croat and Muslim forces.

76. At that time, the Croats represented a serious threat to the Bosnian Serbs and it was clear that supplies to the population in Bosanska Krajina would be impossible through Croatia. Mr. Ewan Brown, the Prosecutor's military expert, wrote in his report submitted in the *Brdjanin* case:

> "The threat posed by the Croats however was not only a perceived one but in some instances became very real . . . In March-April 1992 the Croats seized control of the Bosanski Brod and Derventa areas blocking the road that linked Banja Luka through the corridor to Belgrade."[137]

77. In spring 1992, Bosanska Krajina, under threat from the Croat military, therefore found itself in a difficult economic and social situation. That situation was acknowledged by the Trial Chamber in the *Brdjanin* case, which found that the economic situation posed problems for

58 Bosanska Krajina, and stated: "Undoubtedly, the worsening economic situation also accounted for the dismissal of several non-Serbs, as well as of Bosnian Serb employees"[138] and also that:

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

[136]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 997.

[137]*Ibid.*, Military Developments in the Bosanska Krajina 1992, Ewan Brown, Military Analyst, 27 November 2002, p. 13.

[138]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 84.

> "The Trial Chamber agrees that the armed conflict in Croatia in 1991 had a disastrous impact on the economy of Bosnia and Herzegovina, and particularly that of the Bosnian Krajina. There is evidence that several business concerns and enterprises, including public and socially owned ones, were not working at levels that would be sustained during normal times and that this resulted in unemployment."[139]

78. This difficult economic situation certainly influenced the whole population, which was beginning to realize the danger of a war. Just as the Bosnian Serbs feared the Muslims and Croats, they too feared the Serbs. The Trial Chamber in the *Brdjanin* case stated:

> "Already before the outbreak of the armed conflict in BiH, Bosnian Muslims and Bosnian Croats living in the Bosnian Krajina were feeling increasingly insecure and started leaving the region in convoys . . . The non-Serb population often sought to leave, and requested the convoys, which were then organised by the Bosnian Serb authorities."[140]

This conclusion by the Tribunal for the former Yugoslavia certainly corresponds to the reality. No-one can deny that the forced transfer of populations took place, but many people left their homes before the war, before the beginning of the armed conflict, simply out of fear.

79. We may consider fear to be justified or unjustified. We may consider that the reasons for that fear either did or did not exist. Yet the fact remains that people were afraid. Fear is a feeling, and by its very nature subjective. It may have been completely groundless, yet even so it still existed and among the Serbs of the Bosanska Krajina region, it triggered actions aimed at the creation of the Serb State, and among the Croats and Muslims a massive exodus of the population.

80. In the Bosanska Krajina case, the Tribunal for the former Yugoslavia ascertained that conditions in the camps were bad. Conditions were simply bad all over Bosanska Krajina. The most poignant evidence of this disastrous economic and social situation is certainly the deaths of 12 new-born infants in Banja Luka hospital in early June 1992, from lack of oxygen[141]. And this lack of oxygen was caused by the isolation of Bosanska Krajina, hemmed in by hostile forces which would not allow convoys to pass through. Unless the corridor was opened up, the population of Bosanska Krajina could not survive.

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81. The importance of the second strategic goal, whose purpose was to rally Bosanska Krajina and Eastern Bosnia is obvious. This goal was certainly not aimed at the destruction of the

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[139] *Ibid.*, para. 1038.

[140] Judgement rendered by the ICTY Trial Chamber in the case the *Prosecutor* v. *Radoslav Brdjanin*, 1 September 2004, para. 116.

[141] ICTY, *Prosecutor* v. *Radoslav Brdjanin* (IT-99-36-T), Exhibits DB 346 to DB 357.

Croats or Bosnian Muslims. It was necessary to enable the peoples of Bosanska Krajina, of all nationalities, to survive.

82. This disastrous economic and social situation was the only reason why the Bosnian Serb army had become involved in the operation to open up the corridor between Western Bosnia and Eastern Bosnia in summer 1992.

83. The Applicant claims that, in realizing this second strategic goal, the Bosnian Serbs forcibly took over the municipality of Bosanski Šamac[142]. The Bosnian Serbs did establish power in the municipality of Bosanski Šamac and certain crimes were committed there in the period following their seizure of power. Yet, the crimes committed in Bosanski Šamac municipality must be placed in the very specific context of the geographical situation of the town of Bosanski Šamac, which is situated not only in the corridor linking the territories populated by the Serbs in Western and Eastern Bosnia, but also on the border between Croatia and Bosnia and Herzegovina.

84. Owing to the war in Croatia between the Croats and the Croatian Serbs, the Croatian Croats aided the military organization of the Bosnian Croats[143] and, before the beginning of the war in Bosnia and Herzegovina, organized numerous attacks on the Serb population, but also on the Yugoslav national army, which was then the legitimate army in Bosnia and Herzegovina.

85. The Tribunal for the former Yugoslavia held, in the case relating to Bosanski Samac, that the first incidents, which took place more than six months prior to the outbreak of the fighting in Bosnia and Herzegovina, were directed against the Serbs and the Yugoslav national army, at the time when Bosnia and Herzegovina was still part of Yugoslavia. The Tribunal held that: "In autumn 1991 and March 1992 Croatian paramilitary attacked JNA barracks and garrisons in areas around Bosanski Samac"[144] and also that: "On 27 January 1992 a Serb orthodox church was mined."[145]

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[142]CR 2006/5, paras. 68-69.

[143]ICTY, *Prosecutor* v. *Blagoje Simic et al. (Bosanski Samac),* case No. IT-95-9-T, Judgement, 17 October 2003, para. 253.

[144]*Ibid.*, para. 184.

[145]*Ibid.*, para. 185.

86. In addition, Trial Chamber II found that the Muslims and Croats had begun to arm themselves[146] and to organize armed units in the autumn of 1991, that is before the Serbs had adopted the "Variant A and B instructions", which in this context can be seen to be what they really were: the outcome of fear and a reaction to a threat.

87. The Tribunal found beyond all reasonable doubt that armed units and Bosnian Muslim patrols had been operating in Bosanski Samac as far back as September 1991. These units and patrols were present in the municipality of Bosanski Samac throughout the period up to April 1992[147]. In addition to Muslim military units, the Trial Chamber also found that there were Croat checkpoints[148]. Finally, the Chamber concluded that: "Croatian and Muslim paramilitary groups were also active in the region. Croatian armed forces, often wearing ZNG [that is Croatian Army] uniforms, were present in the Croatian populated villages in Bosanski Samac Municipality."[149]

88. It should be noted that the municipality of Bosanski Samac had 32,960 inhabitants in 1991, 44.7 per cent of whom were Croats and 6.8 per cent Bosnian Muslims[150], which means that the Croatian and Bosnian Muslim population together accounted for slightly more than 50 per cent of the municipality's total population, or roughly 17,000 persons.

89. There can be no doubt that, during the war period, but even before the war, part of the
61 population of Bosanski Samac left the town. In the trial concerning the events at Bosanski Samac, which lasted more than two years, the Trial Chamber accepted the statements of witnesses who testified that: "a substantial number of residents of Bosanski Samac were evacuating themselves and their families in the period prior to the takeover". The findings of the Trial Chamber clearly demonstrate that members of all the ethnic groups left Bosanski Samac in the year prior to the conflict[151]. Moreover, it should be noted that Trial Chamber II, at the conclusion of the trial, found two persons guilty of a crime against humanity — deportation. They were found guilty by reason

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[146] *Ibid.*, para. 251.

[147] *Ibid.*, paras. 245-246.

[148] *Ibid.*, para. 244.

[149] *Ibid.*, para. 249.

[150] *Ibid.*, para. 175.

[151] *Ibid.*, para. 193.

of the deportation of 16 persons, Croats and Muslims[152]. Sixteen deported persons out of a population of 17,000.

90. The Trial Chamber evaluated evidence during years of trial proceedings, and found that 16 persons had been deported. It cannot be denied that other crimes were committed in Bosanski Samac. However, the crimes committed in Bosanski Samac were certainly not all genocidal in nature. The crimes committed in Bosanski Samac were committed by local residents, on an individual basis, they were unplanned and they were certainly unconnected with implementation of strategic objective No. 2 which, moreover, was not even considered by the Tribunal for the former Yugoslavia in the *Bosanski Samac* case.

91. On the other hand, the Trial Chamber in the same case paid particularly careful attention to the document entitled "Variant A and B instructions". The Tribunal did not accept that the document had had an impact on the events at Bosanski Samac, and concluded:

> "The Trial Chamber is satisfied that the Assembly of the Serbian People of the Municipality of Bosanski Samac and Pelagicevo was established according to recommendations of the leadership of Republika Srpska, but does not accept that it was formed in accordance with the so-called 'Variant A and B' instructions issued by the SDS Executive Board on 19 December 1991."[153]

And the Trial Chamber held finally that:

> "[it] is not satisfied that it is possible, upon the evidence, to extend the common plan to the political leadership of Republika Srpska, and to demonstrate that the Instructions for the Organization and Activity of the Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances, published on 19 December 1991 by the SDS Main Board . . . were formally delivered from the SDS Executive Board on the national level to the municipal authorities in Bosanski Samac . . . The Trial Chamber is not satisfied beyond reasonable doubt that the existence of a common plan to persecute non-Serbs in Bosanski Samac Municipality can be vertically extended to the political leadership of Republika Srpska."[154]

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92. The establishment of the corridor was a military operation, a necessary military operation, since the western part of Republika Srpska, meaning the Serb population in western Bosnia as well as Croatia, could not survive without that corridor. This military operation was conducted by the army of Republika Srpska. No officer in the army of Republika Srpska was ever charged with crimes committed in the context of that military operation, either by the Prosecutor of

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[152] *Ibid.*, paras. 1051-1052.

[153] *Ibid.*, para. 382.

[154] *Ibid.*, para. 985.

the Tribunal for the former Yugoslavia, or by the Prosecutor in Bosnia and Herzegovina before the War Crimes Court.

93. The same assessment applies to the municipality of Brcko, situated at a strategic point on the corridor linking western and eastern Bosnia.

94. The Applicant mainly cites crimes committed in the Luka camp[155]. First of all, without regard to the fact that the events at Brcko, and particularly those that occurred in the Luka camp, were investigated by the Tribunal for the former Yugoslavia[156], the Applicant fails to refer to the judgment rendered in the *Brcko* case. It prefers to cite the decision given in the *Milosevic* case pursuant to Article 98*bis* of the Tribunal's Rules of Procedure and Evidence, a decision which does not establish the facts, but only the likelihood that the facts occurred. The decisions rendered pursuant to Article 98*bis* of the Tribunal's Rules merely establish that an incident could have occurred, but they do not establish that it did occur. The facts referred to in those decisions are not established facts, but probable facts.

95. The conclusions reached by the Trial Chamber in the *Brcko* case differ substantially from the claim made by the Applicant in its Memorial (para. 2.2.1.17) that between 2,000 and 3,000 people were killed in the Luka camp in Brcko. In its Reply (Chap. 5, para. 398), the
63 Applicant put forward an even higher number, between 3,000 and 5,000 persons killed. The figures cited by the Applicant come from various reports, including the final report of the Commission of Experts[157] and the report submitted by Mr. Tadeusz Mazowiecki, the Special Rapporteur of the United Nations Commission on Human Rights[158].

96. The facts established in the judgment delivered by the Tribunal for the former Yugoslavia in the *Brcko* case were completely different. Trial Chamber I concluded that 66 bodies had been found in mass graves in the region of Brcko. All the persons killed had been shot and

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[155]CR 2006/5, pp. 41-43.

[156]ICTY, *Prosecutor* v. *Goran Jelisic*, case No. IT-95-10.

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

[158]Situation of Human Rights in the Territory of the former Yugoslavia, report submitted by Me. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, United Nations, doc. E/CN.4/1993/50, 10 February 1993, Ann. II, p. 93, para. 749.

they were all males of fighting age[159]. This fact is important, as a doubt persists as to where and how these persons were killed. Some of them at least could have been killed in the fighting. In any event, the Trial Chamber found that: "It appears from these exhibits that about sixty persons were killed in Brcko during May 1992 (of a total Muslim population of about 22,000 people)."[160]

97. Sixty-six persons killed is still a large number. Too large, because none of these persons should have been killed. However, the fact is that the Tribunal for the former Yugoslavia established this figure for the number of victims, which is 30 times less than the number of 2,000 alleged by the Applicant in its Memorial. It is also 80 times less than the number of 5,000 alleged by the Applicant in its Reply. The disturbing fact is not that the Applicant alleged these figures; it had grounds for doing so, as the figures cited by the Applicant were to be found in the reports of the various committees, United Nations committees. The question to be asked, a legitimate one, is how these committees arrived at these figures. The Tribunal for the former Yugoslavia based the facts on the forensic evidence and on witness testimony, and underscored the exaggerations contained in the reports, which were moreover analysed by our Co-Agent,
64 Sasa Obradovic, in his oral presentation of 8 March 2006[161]. The fact that the different reports contained such exaggerations should be carefully considered whenever the facts alleged are based on the reports concerned, even if the latter emanate from United Nations committees. Indeed, the Tribunal for the former Yugoslavia was never able to confirm the information contained in the reports.

98. The Trial Chamber in the *Brcko* case not only established the number of persons killed in that municipality. It also established that the military personnel of the army of Republika Srpska had come to the Luka camp on 19 May 1992, had established order and had improved the régime in the camp. Goran Jelisic, a mentally disturbed person, who was indicted by the Tribunal for the former Yugoslavia and subsequently convicted for crimes committed in the Luka camp, was not seen again in the camp after the arrival of the army[162]. The Trial Chamber found that it could not

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[159]ICTY, *Prosecutor* v. *Goran Jelisic (Brcko)*, case No. IT-95-10, Judgement, 14 December 1999, para. 90.

[160]*Ibid.*, para. 91; footnote 128.

[161]CR 2006/12, p. 36, para. 63.

[162]ICTY, *Prosecutor* v. *Goran Jelisic (Brcko)*, case No. IT-95-10, Judgement, 14 December 1999, para. 96.

conclude that Goran Jelisic had killed under orders, but considered it possible that he had acted beyond the scope of the powers entrusted to him[163]. The Tribunal also found that it could not be established that there was a plan to destroy the Muslim population in Brcko or elsewhere, and that the murders committed in Brcko did not, therefore, fit within such a plan[164].

99. Brcko and Bosanski Samac are located in the corridor. If crimes were committed in those two municipalities, the evidence does not show that they were orchestrated. In both towns, crimes were committed by local residents, and in the case of Brcko, by a person belonging to neither the political leadership nor the military structure of Republika Srpska. Neither in Brcko nor in Bosanski Samac were crimes committed in execution of strategic objective No. 2. In the case of Brcko, the army of Republika Srpska, which had been brought in to establish the corridor and thus to implement strategic objective No. 2, did in fact establish order and put a stop to criminal activity.

65 100. Moreover, the evidence presented by the Applicant itself does not support the claim of genocide. Thus, the Applicant stated:

> "Members of the SDA, which was the main Muslim political party, were targeted. For example, people were called out by their surnames and beaten, because their names were recognized as belonging to those who had been organizers of the SDA. In another example, one witness saw men from Seselj's or Arkan's group kill a Serb who had tried to help a Muslim flee the former Yugoslavia; later that night, the soldiers killed the Muslim, who was an active member of the SDA."[165]

Thus the Applicant implicitly acknowledged that the Bosnian Muslims were individual victims who were not targeted by reason of their belonging to the group of Bosnian Muslims, but by reason of their belonging to the SDA party. The members of the SDA, apart from being Muslims, were political opponents of the Bosnian Serbs. They were also their military adversaries on the field of battle. Cruel as this may appear, the fact that the leaders of the Muslim SDA party were targeted also seems logical in the context of the civil war raging in Bosnia and Herzegovina at the time. The acts committed against the leaders of the SDA party, criminal though they might be, cannot in any sense constitute genocide. They may constitute war crimes and crimes against humanity, but they do not constitute genocide.

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[163] *Ibid*., paras. 95 and 97.

[164] *Ibid.*, para. 98.

[165] CR 2006/5, p. 42, para. 75.

101. All the above-mentioned allegations clearly demonstrate that the Bosnian Muslims were not targeted as a group, but as individuals — the individual members of the SDA party, who were Muslims, because the SDA party was the party of the Muslims of Bosnia and Herzegovina. No doubt exists as to the fact that the SDA party was the political opponent of the SDS party. The fact that the crimes were committed against political opponents clearly shows that they were committed for political reasons. These crimes were not committed because of the victims' membership of a national, ethnical, racial or religious group, but because of political opposition, which in some cases also entailed military opposition. The lack of a national, ethnical or religious element is shown, finally, by the murder of the Serb who tried to help the political enemies of the Serbs in power[166].

66 102. No one is denying that all these crimes are serious crimes, international crimes, but they were not directed against the Bosnian Muslims as a group. They were directed against individuals who were political opponents of the Bosnian Serbs and who, as opponents, were seen as a threat. Consequently, these crimes, politically motivated and directed against individuals, may constitute crimes against humanity, crimes of persecution in particular, but they do not in any sense constitute genocide.

Madam President, would this be an appropriate time for the break?

The PRESIDENT: Thank you, Maître Fauveau-Ivanović. The Court now rises and the hearings will resume at 3 o'clock this afternoon.

The Court rose at 12.50 p.m.

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[166] *Ibid.*