BHY

CR 2006/42 (translation)

CR 2006/42 (traduction)

Thursday 4 May 2006 at 3 p.m.

Jeudi 4 mai 2006 à 15 heures

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

Ms FAUVEAU-IVANOVIĆ: Thank you, Madam President.

III. Third strategic goal: elimination of the River Drina as a border

1. The third strategic goal proclaimed by the SerBiH Assembly was the establishment of the Drina river valley corridor and the elimination of the border between Republika Srpska and the Republic of Serbia. That goal was both a logical and a legitimate aim for the Bosnian Serbs.

2. The Bosnian Serbs and the SDS party, in power during the war, made no secret of their aspiration to be in the same State as Serbia. Initially, this aspiration was expressed as a desire to remain within Yugoslavia. At the outset, the Bosnian Serbs did not seek separation from anyone, they just wanted to remain within the State in which they had lived, and that was Yugoslavia. Once it became clear that it would not be possible to remain within Yugoslavia, the Bosnian Serbs expressed their legitimate and constitutional wish to separate from the other peoples of Bosnia and Herzegovina and join Serbia. The secession of peoples was provided for in the Yugoslav constitution and, as such, was not illegal or criminal.

3. There is no direct link between subsequent events in Bosnia and Herzegovina, and in particular in the Drina valley, and the implementation of the Bosnian Serbs' third strategic goal.

4. Eastern Bosnia, the Drina valley, had, like Bosanska Krajina in the western part of Bosnia and Herzegovina, been the scene of atrocious crimes during the Second World War. Fear arose and grew rapidly as political tension in the former Yugoslavia increased. All of the ethnic groups began to organize and arm themselves.

5. There was fear on all sides before the outbreak of the conflict. That fear, which the Applicant has tried to downplay, was real. In its report, the Netherlands Institute for War Documentation stated:

> "In the autumn of 1990, Muslims hardly dared to travel through Kravica in the same way that Serbs hardly dared to pass through Potocari between Bratunac and
11 Srebrenica. Barriers had been erected across the road in both places where members of the other ethnic group were checked."[1]

[1] http://www.srebrenica.nl, Netherlands Institute for War Documentation on Srebrenica, Part 1, The Yugoslavian Problem and the Role of the West 1991-1994, Chap. 10.

The situation was the same throughout Eastern Bosnia. The Netherlands Institute noted thus:

> "Despite acts of moderation on the part of the current community leaders in Bratunac and Srebrenica, polarization occurred between these ethnic groups. Social life was increasingly broken down in accordance with ethnic divisions. Anyone who tried to continue efforts towards mediation received threats. Rumours began to circulate amongst Muslims and Serbs that the other group was secretly arming itself."[2]

6. The Applicant has constantly denied that fear, it has tried to avoid it, but it existed. We are not attempting to explain or to justify it, we just note that fear existed. Fear alone cannot explain all of what occurred in Bosnia and Herzegovina, but it does show that the situation was significantly different from the tolerant State where the diverse communities lived with each other peaceably which the Applicant has chosen to portray.

7. The Applicant claims that a specific pattern was followed in the takeover of municipalities in Eastern Bosnia. According to the Applicant's allegations, that pattern comprised the expulsion of non-Serbs and the destruction of all indications of non-Serb life, identity and culture. In its claims, the Applicant holds that that pattern was adopted in order to accomplish the third strategic goal: the creation of a Drina river valley corridor and the elimination of the border that ran through it. However, the Applicant's allegations are unfounded.

***(a)* Events in the Drina valley in 1992**

8. The Applicant made reference to various municipalities in the Drina valley in which the Serbs took power long before 12 May 1992. The strategic goals were adopted on 12 May 1992 and were published in 1993. The strategic goals simply did not exist at the time that combat broke out in Eastern Bosnia.

9. The situation in Eastern Bosnia was considerably more complex than the Applicant has cared to admit. Numerous paramilitary formations were in the region. Thus, with respect to the situation in Zvornik, the protected witness for the Prosecution in the *Milosevic* case before the
12 Tribunal for the former Yugoslavia, witness B 1804, explained the organization of Muslim paramilitary forces in the Zvornik region. The witness stated that Muslim paramilitary units, the Green Berets and the Patriotic League, existed and operated in the Zvornik region before the war[3].

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[2] *Ibid*.

[3] ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Transcripts, p. 31856.

He also confirmed the presence in the region of the Kobras and Mosque Doves paramilitary units, the latter, led by Midhat Grahic, was well known for the devastation it left in its wake: dead people, burnt houses and looted premises[4].

10. Moreover, according to witness B 1804's statements, the reserve weapons of the police were transferred only to the Muslim forces and Muslim police[5]. The Territorial Defence blocked the bridge between Zvornik and Mali Zvornik to stop the Serbs from crossing the River Drina into Serbia, where Mali Zvornik is located[6].

11. Lastly, witness B 1804 stated that the fighting in Kula Grad, a town next to Zvornik, lasted several days and that the Muslims, from their positions in Kula Grad, fired on Zvornik and also on Mali Zvornik, which is in Serbia[7].

12. Two prosecution witnesses, one in the *Milosevic* case and the other in the *Krajisnik* case, confirmed that the outbreak of armed conflict in Zvornik was prompted by the murder of a Serb by Bosnian Muslims. Izet Mehinagic, whose statement was cited by the Applicant[8], testified in the *Krajisnik* case that on 5 April 1992, thus before the beginning of the armed conflict in Zvornik, the Muslims opened fire in the village of Sapna, in Zvornik municipality, killing an army officer, a certain Stanojevic, and wounding two other soldiers[9]. That version was confirmed by witness B 1804 in the *Milosevic* case, who confirmed that the conflict in Zvornik broke out with the murder in Sapna and the construction of barricades which followed[10].

13 13. This description of events in Zvornik differs from that provided by the Applicant. Zvornik was not a calm place where diverse communities coexisted peacefully. Zvornik was a place where fear and paramilitary formations prevailed, where criminal acts were committed: looting, assaults and finally killings. In any case, crimes were committed in Zvornik, by the

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[4] *Ibid*., pp. 31857-31858.

[5] *Ibid*., p. 31857.

[6] *Ibid*., p. 31859.

[7] *Ibid*., p. 31862.

[8] CR 2006/6, p. 16, para. 20.

[9] ICTY, *Prosecutor* v. *Momcilo Krajisnik,* case No. IT-00-39&40-T, Transcripts, p. 12692.

[10] ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Transcripts, p. 31859.

Muslims and by the Serbs, but there are no grounds for talking about genocidal intent on either side.

14. A similar environment prevailed in all of the towns of Eastern Bosnia. With respect to events in Foca, the CIA noted: "As elsewhere in the Drina valley, there had been trouble in Foca for weeks before April 1992."[11]

15. Events in Visegrad were also incorrectly portrayed by the Applicant, who said: "the Uzice Corps, a wholly Serb unit of the JNA, shelled the city of Visegrad and many of the Muslims, Bosnian Muslims, fled the town"[12]. The Applicant claims that this allegation comes from paragraph 42 of the Tribunal for the former Yugoslavia's Judgement in the *Visegrad* case. However, paragraph 42 does not contain any such statement. On the contrary, the Tribunal found:

> "many civilians fearing for their lives fled from their villages. In early April 1992, a Muslim citizen of Visegrad, Murat Sabanovic, took control of the local dam and threatened to release water. On about 13 April 1992, Sabanovic released some of the water, damaging properties downstream. The following day, the Uzice Corps of the Yugoslav National Army ("JNA") intervened, took over the dam and entered Visegrad."[13]

16. Moreover, according to the Judgement in *Vasiljevic* case:

> "the actual arrival of the Corps had . . . a calming effect. After securing the town, JNA officers and Muslim leaders jointly led a media campaign to encourage people to return to their homes . . . The JNA also set up negotiations between the two sides to try to defuse ethnic tension."[14]

17. Thus the role played by the JNA was different from the one which the Applicant seeks to attribute to it. That does not, of course, excuse the crimes committed in Visegrad after the withdrawal of the JNA units. Those crimes were indeed committed, but genocide was not.

14 18. The Applicant has sought once again to establish the facts, those that occurred in Visegrad in the present instance, on the basis of the judicial notice of adjudicated facts accorded by a decision in the *Krajisnik* case[15]. Judicial notice does not mean that the facts have been found, but merely that they are presumed. The Applicant itself, moreover, recognized that, when it explained

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[11] *Balkan Battlegrounds*, A Military History of the Yugoslav Conflict, 1990-1995, Vol. 2, Central Intelligence Agency, Washington, 2005, p. 299.

[12] CR 2006/6, p. 17, para. 23.

[13] ICTY, *Prosecutor* v. *Mitar Vasiljevic*, case No. IT-98-32-T, Judgement, 29 November 2002, para. 42.

[14] *Ibid.*, para. 43.

[15] CR 2006/6, pp. 18-19.

in its presentation of 28 February 2006 that: "by taking judicial notice of an adjudicated fact, a trial chamber establishes a well-founded presumption of the accuracy of that fact, which therefore does not have to be proven again at trial". The Applicant also admitted that "the adjudicated fact may, subject to that presumption, be challenged at that trial"[16]. We agree wholeheartedly with the Applicant's presentation of judicial notice of adjudicated facts, which demonstrates that such showings are presumptions which can be challenged and shown to be unfounded.

19. Furthermore, the Applicant stated that paramilitary formations remained in Visegrad after the departure of the JNA, indicating that the atrocities were carried out by the paramilitary unit known as the "White Eagles". We do not query the fact that that paramilitary unit committed crimes, what we dispute is that the Bosnian Serb forces and in particular the unit indicated, the White Eagles, were under the command of Vinko Pandurevic, an officer of the Republika Srpska army, as suggested by the Applicant in its oral argument of 2 March 2006[17].

20. The Applicant's claim that Vinko Pandurevic was at that time in command of the Bosnian Serb forces in the Visegrad region is supposedly based upon an indictment by the Prosecutor of the Tribunal for the former Yugoslavia. However, that indictment does not suggest that Vinko Pandurevic was the commander of Bosnian Serb forces in Visegrad in 1992 at all. The indictment concerning Vinko Pandurevic alleges that: "[d]uring the time period relevant to the events described in this Indictment, Vinko Pandurevic, was a Lieutenant Colonel in command of the Zvornik Brigade of the Drina Corps of the VRS [army of Republika Srpska]"[18]. The indictment to which the Applicant refers concerns the events at Srebrenica in July 1995 and covers the period
15 from 11 July to 1 November 1995 exclusively[19], during which time Vinko Pandurevic was indeed the commander of the Zvornik Brigade. The Applicant correctly noted that the White Eagles paramilitary unit was in Visegrad in 1992. The commander of that unit is known. The unit was

[16]CR 2006/3, p. 51, para. 66.

[17]CR 2006/6, p. 18, para. 26.

[18]ICTY, *Prosecutor* v. *Vinko Pandurevic*, case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005, para. 13.

[19]*Ibid*., para. 26.

under the command of Milan Lukic, a Bosnian Serb from the village of Rujiste, located 15 km north of Visegrad[20].

21. The Applicant cited the example of Bijeljina, which the Serbs took over on 31 March 1992. Serbs formed the majority of Bijeljina's population, since 60 per cent of its inhabitants were Serbs. While Bosnia and Herzegovina had, at the time, proclaimed its independence without regard for the will of the Serb population and in breach of the constitution, it had not yet been recognized internationally and that independence was contested by the Bosnian Serbs, who, at that time, certainly did not regard the Drina river as an international frontier. True, international recognition is not a precondition for statehood, but in March 1992 Bosnia and Herzegovina did not correspond to the generally accepted definition of a State as a political community comprising a territory and a population subject to an organized authority[21].

22. True, the fact that the Drina river was not recognized by the Serbs as an international frontier cannot excuse the crimes committed in Bijeljina. But those crimes cannot be viewed as part of a plan aimed at eliminating the border along the River Drina. Moreover, the allegation that the Serbs took control of Bijeljina is not entirely accurate: they formed the majority of the population there and had the same claim to control over the town as the Muslims. Bijeljina, like all the other towns in Eastern Bosnia, belonged as much to the Bosnian Serbs as it did to the Bosnian Muslims.

23. In describing events in Bijeljina, the Applicant cited, once more, a decision pursuant to Article 98*bis* in the *Milosevic* case, claiming that: "[t]he Milosević trial chamber, in their dismissal
16 of the defence motion for acquittal of the charge of genocide, concluded that they had heard enough evidence for a trial chamber to find beyond reasonable doubt that a number of events had occurred"[22]. That statement was incorrect. First, the paragraph quoted of the decision did not claim that the evidence was sufficient to establish the facts beyond reasonable doubt. Second, according to the Tribunal's Rules, decisions on motions for acquittal pursuant to Rule 98*bis* cannot establish facts beyond all reasonable doubt, since these decisions are made before the defence has

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[20]ICTY, *Prosecutor* v. *Milan Lukic and Sredoje Lukic*, case No. IT-98-32/1-PT, Second Amended Indictment, 1 February 2006.

[21] A. Pellet, P. Dailler, *Droit international public*, *LGDJ*, 7th ed., 2002, p. 408.

[22]CR 2006/6, p. 12, para. 9.

had the opportunity to submit evidence. Such decisions establish only the probability that evidence presented by the Prosecutor might be sufficient to prove the alleged facts. As the Applicant admitted in its oral argument of 28 February 2006, the test to apply to decisions pursuant to Rule 98*bis* is: "not whether the trier of fact *would* actually arrive at a conviction beyond all reasonable doubt on the prosecution evidence, but whether it could do so"[23].

24. The Applicant also quoted the statement of witness B 129, the former secretary of the Serb paramilitary Arkan, who testified before the Tribunal for the former Yugoslavia in the Milosevic case[24]. The Applicant cited only part of witness B 129's testimony, without quoting the part of her statement in which she says: "As far as Bijeljina is concerned, Arkan himself said he had gone at the invitation of Biljana Plavsic to assist the Serb people in Republika Srpska and that their assignment was to disarm the Muslims . . ."[25] Moreover, the Applicant neglected to mention that the statements of this witness concerning 1992 are no more than hearsay, since the witness had no contact with Arkan before February 1993. In her testimony before the Tribunal for the former Yugoslavia, the witness admitted that: "[w]henever I testified, the period from 1991 inclusive with February 1993 . . . I always stated that these were the — what the people said"[26].

17 25. We do not dispute that crimes were committed in Bijeljina. The atmosphere was tense, people were armed, public order had ceased to exist as the State was not functioning. Bosnian Muslim as well as Bosnian Serb paramilitary units were in Bijeljina and fighting broke out. The United Nations Commission of Experts noted with respect to events in Bijeljina in its report: "The battles engulfed the town for three days and nights . . . reportedly thousands of refugees fled from Bijeljina into Serbia."[27] While we are not entirely convinced of the credibility of the facts mentioned by the Commission of Experts in reference to the crimes committed, this statement regarding the general situation in Bijeljina could be correct and, at least, demonstrates that the events in Bijeljina were not as simple as the Applicant would like to portray them.

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[23]CR 2006/3, p. 48, para. 51.

[24]CR 2006/6, p. 13, para. 10.

[25]ICTY, *Prosecutor* v. *Slobodan Milosevic*, case No. IT-02-54-T, Transcripts, p. 19424.

[26]*Ibid.*, p. 19497

[27]Final Report of the United Nations Commission of Experts, 28 December 1994, Ann. III A, "Special Forces".

26. The Applicant claims that the takeover of Bijeljina involved discrimination against the Bosnian Muslims and Croats[28]. Nobody disputes the fact that there was a transfer of populations in Bijeljina. The current composition of the population of Bijeljina bears the marks of the departure of the Muslim population and the arrival of Serbian refugees from the territories controlled by the Government of Bosnia and Herzegovina. Bijeljina has a population of 105,000 at present, whereas it was 96,000 in 1991[29]. However, according to the evidence submitted by the Applicant, the proportion of Croats in Bijeljina has increased[30], indicating that the total number of Croats living in Bijeljina is now higher than in 1991. Of course, this does not mean that isolated incidents of discrimination against Croats did not take place, but the Applicant has not provided evidence of such discrimination, just as it has not provided evidence that the Croat population fell victim to criminal acts in Bijeljina.

27. In all of the municipalities of Eastern Bosnia, the demographic situation differs from that described by the Applicant. Thus, the former municipality of Zvornik is now divided into two, which was exactly what the Serbs sought before the war — a goal that could have been
18 accomplished peacefully. In 1997, the municipality of Zvornik, the part that remained inside Republika Srpska, had a population that was 96.81 per cent Serb and 3.19 per cent non-Serb. The Speaker of the Municipal Assembly, however, is a Bosnian Muslim, Mr. Vehid Kadric[31]. Note, by contrast, that the population of Sapna, the Muslim part of the former municipality of Zvornik, located in the Muslim-Croat Federation, was 100 per cent Muslim in 1997: no Serbs, no Croats, just Bosnian Muslims[32].

28. The situation is very similar in Foca, which is also now a municipality divided between Republika Srpska and the Muslim-Croat Federation. We do not deny that the Serbs represent the majority in the Serb part of Foca. More precisely, in 1997 the Serbs accounted for 96.21 per cent of the population and the non-Serbs for 3.79 per cent. However, in the part belonging to the

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[28]CR2006/6, p. 11, para. 8.

[29]http://en.wikipedia.org/wiki/Bijeljina.

[30]CR2006/6, p. 23, para. 39.

[31]http://www.opstina-zvornik.org

[32]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, case No. IT-00-39 and 40, Prosecution exhibit P 528, Ewa Tabeau — Ethnic Composition and Displaced Persons and Refugees in 37 Municipalities of Bosnia and Herzegovina — 1991 and 1997 by Ewa Tabeau and Marcin Zoltkowski, p. 20.

Muslim-Croat Federation, the population in 1997 was 100 per cent Muslim. Once again, no Serbs, no Croats, no members of any other ethnic group; this part of the town is entirely populated by Bosnian Muslims[33].

29. The Applicant claims that, after the war, the Muslims accounted for just 0.1 per cent of the population of Bratunac. We do not deny that immediately after the war only a few Bosnian Muslims lived in Bratunac. However, in 2002, Bosnian Muslims constituted 15.5 per cent of the population of Bratunac and the current Chairman of the Municipal Council is a Bosnian Muslim, Mr. Refik Begic[34].

30. As in Bratunac, the current Speaker of the Municipal Assembly of Visegrad is a Bosnian Muslim, Mr. Redzep Jelacic[35].

31. Moreover, the Croat population has not increased in Bijeljina alone, but across the whole of Eastern Bosnia. According to the evidence presented by the Applicant, along with Bijeljina,

19 more Croats now live in the municipalities of Bratunac[36], Visegrad[37], Foca[38] and Vlasenica[39] than before the war. The Croat population of Eastern Bosnia was never particularly large, but the fact is that it is now larger than in 1991. The number of Croats in Eastern Bosnia is certainly related to the fact that the Serbs and the Croats were not at war in that part of Bosnia and Herzegovina, but also to the fact that a part of the Croat population expelled by the Muslims from Central Bosnia during the war between the Muslims and the Croats took refuge with the Serbs of Eastern Bosnia.

(b) **Srebrenica**

32. Lastly, the Applicant seeks to show that the tragic events at Srebrenica in 1995 were the logical consequence of the third Strategic Goal, implemented not only in accordance with the Bosnian Serb plan, but also with an alleged Belgrade plan, under which the Serbs were to be guaranteed a territory extending 50 km on either side of the River Drina. Notwithstanding the

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[33]*Ibid.*, p. 19.

[34]http://www.bratunacopstina.com.

[35]http://www.opstinavisegrad.org.

[36]CR 2006/6, p. 23, para. 39.

[37]*Ibid*., p. 19, para. 28.

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

[39]*Ibid*., p. 24, para. 43.

causes of the events in Srebrenica, this episode is tragic, and without any doubt also criminal, but cannot in any way be linked with the third Strategic Goal and even less so with an alleged Belgrade plan.

33. Before embarking on an analysis of the picture of the events in Srebrenica presented by the Applicant in the oral pleadings of 19 April 2006, we are bound to say that the chronology of those events, as presented by the Applicant, and which was to be the ultimate proof of the plan[40], is simply incorrect. Though we are certain that this error, serious as it is, was not deliberate, we must correct it. The Applicant has presented a plan, a plan which never existed, since the last point in it, supposed to be the final point, i.e., the implementation of the Strategic Goals, but also of Radovan Karadzic's Directive 7 and Ratko Mladic's Directive 7.1 — the famous declaration by Colonel Ognjenovic, commander of the Bratunac Brigade, and according to the Applicant made on
20 4 July 1995 — could not have been made on that date since Colonel Ognjenovic was then no longer commander of that brigade. We do not deny that Colonel Ognjenovic's declaration exists. Yes, it exists, but it was made on 4 July 1994[41], long before Directives 7 and 7.1 — which supposedly represented the links in the plan presented by the Applicant — had been written, and could therefore in no way be the consequence or result of a plan allegedly elaborated in those Directives. In order to establish a plan, which it cannot establish, no plan ever having existed, the Applicant has presented an incorrect chronology of the events which preceded the taking of Srebrenica. We are convinced the error was inadvertent, but an error it is nonetheless, and the events presented by the Applicant simply do not correspond to the facts. Also, General Dannatt, the Applicant's expert in this case, who was also the Prosecutor's expert in the *Krstic* case, stated before the Tribunal for the former Yugoslavia that Directive 7 was never sent to the Drina Corps[42]. Consequently, the units in the Drina Corps could not possibly have had knowledge of it and acted on instructions supposedly included in it.

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[40]CR 2006/32, p. 41.

[41]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 103; *Prosecutor* v. *Vujadin Popovic et al.*, case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005, para. 23.

[42]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-T, CR 25 July 2000, pp. 5689-5690.

34. As regards the other elements which the Applicant endeavours to represent as a well-established plan, we must first analyse the evidence relating to the plan allegedly conceived by Belgrade. The only evidence of this plan presented to the Court by the Applicant[43], and the only evidence ever presented on the alleged plan to the Tribunal for the former Yugoslavia, is the statement by Miroslav Deronjic to the effect that he had heard in Belgrade that a territory 50 km wide was to have been guaranteed on the left bank of the River Drina, in other words in Bosnia and Herzegovina[44]. This statement by Miroslav Deronjic has never been corroborated by other evidence. We have previously analysed the credibility of Miroslav Deronjic. The various Chambers of the Tribunal for the former Yugoslavia, including the Appeals Chamber, rejected his statements, as he could no longer be considered a credible witness. The statement quoted by the

21 Applicant is particularly lacking in credibility since it is the statement by Miroslav Deronjic in his own case relating to the determination of sentence. The statement could not be duly examined, as no one in those proceedings was particularly interested in an alleged Belgrade plan. The only person interested was Miroslav Deronjic, who perhaps hoped that Belgrade's involvement might help the Prosecutor in other cases. Co-operation with the Prosecutor is regarded as an attenuating circumstance by the Tribunal and it is highly probable that, by accommodating himself to the Prosecutor's wishes, Miroslav Deronjic hoped to obtain a lighter sentence.

35. However, fully aware that the Tribunal for the former Yugoslavia had given limited credence to Miroslav Deronjic's statements, the Applicant cites this statement as sole evidence of an alleged Belgrade plan concerning the territories in Bosnia and Herzegovina. The Applicant even concludes that the third Strategic Goal was a consequence of this — alleged but not confirmed — Belgrade plan. No evidence has been presented indicating that the Strategic Goals had been established on the basis of a prior Belgrade plan. Also, while the third Strategic Goal was the elimination of the border on the River Drina, that Goal contained no reference to the alleged 50 km territory. On the other hand, while the elimination of the border on the River Drina was one of the Bosnian Serb claims, it was never supported by the Belgrade authorities.

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[43]CR 2006/4, p. 38, para. 8.

[44]ICTY, *Prosecutor* v. *Miroslav Deronjic*, case No. IT-02-61-S, Testimony of Miroslav Deronjic, transcripts of 27 January 2004.

36. In this plan, alleged but not confirmed, the Applicant sees evidence of Belgrade's Greater Serbia project, aimed at the creation of a new Yugoslavia, in which all Serbs would live in the same State[45]. While this is merely what the Applicant alleges, it is an allegation at odds with logic. Yugoslavia was a multi-ethnic State, whose nature did not inherently correspond to the allegations relating to a National Serb State. Furthermore, the capturing of the territory extending 50 km west of the River Drina would certainly not have enabled all Serbs to live in one State, since over a million Serbs living in Bosanska Krajina, which is in western Bosnia, and in Republika Srpska Krajina, which is in Croatia, would have remained outside that State. The Applicant seeks to devise an impossible construct to link Belgrade with the goals of the Serb people in Bosnia and

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Herzegovina, but that link does not exist and has never existed. So all the Applicant can do is make constructs which do not withstand serious, logical analysis.

37. Not content with making a construct linking the Belgrade plan — alleged but not confirmed — with the Strategic Goals of the Bosnian Serbs, the Applicant also endeavours to link the tragic events at Srebrenica in July 1995 with the Bosnian Serb Strategic Goals, as well as with the alleged Belgrade plan.

38. For example, citing the *Blagojevic* case heard by the Tribunal for the formal Yugoslavia, the Applicant alleges that "the plan for the final attack on Srebrenica must have been prepared quite some time before July 1995"[46]. This allegation is a distortion of the conclusions of the Trial Chamber in the *Blagojevic* case, for paragraph 106, the only paragraph among those referred to by the Applicant relating to military action in Srebrenica, does not mention the plan to attack Srebrenica but the plan to separate the enclaves of Srebrenica and Zepa[47].

39. Also, in its oral pleading of 19 April 2006, the Applicant claimed that paragraph 93 of the Judgment delivered in the *Krstic* case does not support the thesis that the plan for the mass murders at Srebrenica was not hatched until 12 July 1995[48].

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

[46]CR 2006/4, p. 48, para. 44, footnote 73.

[47]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 106.

[48]CR 2006/32, p. 62, para. 72.

Madam President, Members of the Court, it has never been contended that the Appeals Chamber found that the plan was conceived on 12 July 1995, despite the fact that in its Judgment the Appeals Chamber reported the Prosecutor's thesis that the plan had been formed on 12 July 1995. To be perfectly clear on this point, we will once again cite paragraph 93 of the Judgement of the Appeals Chamber in the *Krstic* case, according to which: "The Prosecution argues that this evidence shows that a firm plan to kill the Muslim men of Srebrenica was formed as early as 12 July 1995."[49] The Prosecutor's argument here was confirmed by General Dannatt, who stated in his testimony before the Tribunal for the former Yugoslavia that he: "believe[d] that

23 the decision to kill the men was a decision taken in the Potocari environment"[50]. It has never been disputed that the Bosnian Serbs did not enter Potocari until 11 July 1995.

40. The Applicant persists in its attempt to establish the plan and cites paragraph 106 of the Judgement in the *Blagojevic* case, which reported the content of Directive 7 issued by Radovan Karadzic, President of Republika Srpska and Supreme Commander of the Bosnian Serb forces, on 8 March 1995. This Directive contained a statement — certainly an unfortunate one — that the military operations were to create: "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves"[51]. The "inhabitants of both enclaves" means the inhabitants of Srebrenica and Zepa. The Trial Chamber then explained that General Mladic issued Directive 7.1, based on Directive 7, on 31 March 1995[52]. The Judgement does not cite the text of Directive 7.1, but the text of that Directive is part of the file in the *Blagojevic* case, and it is not hard to see that the text of Directive 7.1 does not contain the regrettable reference to the conditions of life of the inhabitants of the enclaves, but specifies the task of the Drina Corps in terms clearly showing that it was to separate the enclaves of Srebrenica and Zepa from one another[53].

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[49]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 93.

[50]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-T, transcript of 25 July 2000, p. 5732.

[51]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 106.

[52]*Ibid.*

[53]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, exhibit P 402.

41. In its oral pleading of 2 March last, the Applicant cited the text of Directive 7 and asked: "What could be the more clear-cut intention of the genocidal intent to destroy on the part of the authorities in Pale."[54] In the *Krstic* case, the judges in the Appeals Chamber of the Tribunal for the former Yugoslavia examined this Directive and concluded: "Directives 7 and 7.1 are insufficiently clear that there was a genocidal intent on the part of the members of the Main Staff who issued them. Indeed the Trial Chamber did not even find that those who issued Directive 7 and 7.1 had genocidal intent."[55]

24 42. What seems so clear to the Applicant was obviously much less so to the judges at the Tribunal for the former Yugoslavia, who did not find that genocidal intent could be inferred from the text of Directives 7 and 7.1[56].

43. Moreover, even the Prosecutor of the Tribunal for the former Yugoslavia has accepted that the plan could only have been devised between 11 and 12 July 1995, as she states in the latest indictment drawn up, in respect of the events at Srebrenica, against the eight Bosnian Serbs: "On the evening hours of 11 July and morning of 12 July, at the same time the plan to forcibly transport the Muslim population from Potocari was developed, Ratko Mladic and members of his staff developed a plan to murder the hundreds of able bodied men."[57] We are not quoting this indictment with a view to establishing the facts alleged therein, since an indictment merely sets out the position of one of the parties; rather, we quote it because it shows that, after ten years of investigation, the Prosecutor of the Tribunal for the former Yugoslavia has been unable to find any indication of a criminal plan in existence before 11 July 1995.

44. Thus, neither Directive 7, issued by the Supreme Commander, Radovan Karadzic, nor Directive 7.1, issued by Ratko Mladic and amending the original text of Directive 7, can be considered a document from which genocidal intent can be inferred. These Directives, relating to the Srebrenica and Zepa enclaves, entrusted the Drina Corps forces with a totally different task: protecting the Serb population from the incessant attacks launched from the enclaves. The

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[54]CR 2006/6, p. 37, para. 26.

[55]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 90.

[56]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 90.

[57]ICTY, *Prosecutor* v. *Vujadin Popovic et al.*, case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005, para. 27.

Srebrenica enclave had never been demilitarized even though it was supposed to have been. The 28th Division of the army of Bosnia and Herzegovina maintained its headquarters in the city and Bosnian Muslims belonging to the 28th Division were continually attacking Serb-inhabited villages.

45. The Tribunal Prosecutor accepted as a fact that Srebrenica had never been demilitarized. In its opening statement in the *Blagojevic* case the prosecution said:

> "And then for two years we had Srebrenica and Zepa allegedly demilitarized but in fact not so demilitarized. The UN was able to take the heavy weapons of the Serbs . . . but the Bosnian Army stayed inside the enclaves and were able to run operations outside of the enclaves, attacking and terrorizing Serb villages and creating general chaos."[58]

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46. Accordingly, none of the crimes which took place in Srebrenica — and we do not deny that crimes did take place in Srebrenica — can be linked to a pre-existing plan or to the Directive. Those events are even less susceptible of being tied to the Strategic Goals adopted in May 1992. Furthermore, it should be recalled that, upon the adoption of the Strategic Goals on 12 May 1992, Radovan Karadzic told the Assembly of the Serbian People: "We and our strategic interests and our living space are on both sides of the Drina. We now see possibility for some Muslim 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."[59]

47. Moreover, the Applicant does not accurately depict the events leading up to the fighting in Srebrenica in July 1995. Thus, on 28 February, the Applicant stated: "The first days of July . . . were used by the Serb side to get their troops ready for the attack. All troops in the wider area were notified that the attack would begin on 6 July 1995."[60] The Applicant adduces no evidence in support of this allegation, which in any event is untrue. In fact, the order was not given to all units in the area but to some units of the Drina Corps, as the Trial Chamber of the Tribunal for the former Yugoslavia made clear in the *Blagojevic* case, when it found that: "the order included specific orders to Drina Corps subordinate units: the Bratunac Brigade, the Zvornik Brigade, the

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[58]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, transcript of 14 May 2003, p. 307.

[59]Transcript of the Sixteenth Session of the Assembly of the Serbian People in Bosnia and Herzegovina, 12 May 1992, Banja Luka, ICTY, *Brdjanin* case, case No. IT-99-36-T, Prosecution Exhibit P 50A, p. 14.

[60]CR 2006/4, p. 50, para. 53.

Milici Brigade and parts of the Skelani Brigade"[61]. The Tribunal also found in the *Blagojevic* case that "[t]he stated objective of the attack on the Srebrenica enclave was to reduce 'the enclave to its urban area'"[62] and then that "[a]s the operation progressed its military object changed from 'reducing the enclave to the urban area' to the taking-over of Srebrenica town and the enclave as a whole"[63].

26 48. What is more, in its opening statement in the *Blagojevic* case, the prosecution at the Tribunal for the former Yugoslavia addressed the legality of the military tasks assigned to the Drina Corps and stated: "Srebrenica and Zepa were illegally communicating and transferring weapons and assisting each other in the attacks on Serbs. And this is the legitimate aim of the VRS to stop this."[64] A very similar position was adopted in the *Krstic* case by the Tribunal's Trial Chamber, which concluded: "the plan for Krivaja 95 certainly did not include a VRS scheme to bus the Bosnian Muslim civilian population out of the enclave, nor to execute all the military aged Bosnian Muslim men, as ultimately happened following the take-over of Srebrenica"[65].

49. The military expert General Dannatt, called by the Applicant to appear before the Court, testified before the Tribunal for the former Yugoslavia in the *Krstic* case and stated that there were justifiable military motives for the military operation in Srebrenica. His words were as follows:

> "the extent to which, therefore, the attack on Srebrenica was a legitimate military act, according to general Geneva Convention norms, is my answer is yes, it is not unreasonable for the Serbs to have attacked the enclave of Srebrenica in which there were known to be Muslim military men"[66].

In his testimony before the Tribunal for the former Yugoslavia, Richard Buttler, the prosecution's other military expert in the *Krstic* case, gave his opinion that civilians in Srebrenica were not the target of the shelling[67].

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[61]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 120.

[62]*Ibid.*

[63]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan* Jokic, case No. IT-02-60-T, Judgement, 17 January 2005, para. 130.

[64]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan* Jokic, case No. IT-02-60-T, transcript of 14 May 2003, p. 308.

[65]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 120.

[66]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, transcript of 25 July 2000, p. 5695.

[67]*Ibid.*, p. 5318.

50. Accordingly, the Applicant's assertion that the city was shelled during the fighting in Srebrenica and that the civilian population was the target of that shelling[68] cannot be accepted as verified and generally accepted. The military attack was militarily justified and the shelling was most likely not directed against civilians but against military targets situated in the centre of the city, where, by the way, the 28th Division of the army of Bosnia and Herzegovina had its headquarters.

27 51. It is a known fact that the 28th Division of the army of Bosnia and Herzegovina was in the city of Srebrenica. The Division's headquarters, staffed by several thousand military personnel, was in the post office building in the city centre of Srebrenica. General Halilovic, a general in the army of Bosnia and Herzegovina, stated in his testimony before the Tribunal for the former Yugoslavia in the *Krstic* case that he had ordered his subordinates not to turn over usable weapons or ammunition to UNPROFOR. In accordance with his order, the only weapons surrendered to UNPROFOR were non-functional, while those in good condition and usable were retained by the Muslim forces[69]. Moreover, General Halilovic admitted that helicopters brought munitions to the Muslims in Srebrenica in violation of the flight ban, acknowledging that he personally despatched eight helicopters with munitions for the 28th Division[70]. Thus, it is apparent that the initial objective of the Srebrenica operation was a military one, the defeat of the army of Bosnia and Herzegovina stationed at Srebrenica.

52. General Dannatt confirmed in his testimony before the Tribunal for the former Yugoslavia in the *Krstic* case that:

> "If the objective was to defeat the Muslim army in Srebrenica so that Srebrenica as a military objective could be taken, then the use of artillery against military objectives in concert with infantry and armoured attacks is a perfectly legitimate and reasonable way to conduct an operation."[71]

53. What happened following the takeover of Srebrenica is not as clear-cut as the Applicant describes it. No one denies the tragedy of Srebrenica, nobody denies the crimes committed in the

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[68]CR 2006/4, p. 50, para. 53.

[69]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, transcript, p. 9466.

[70]*Ibid.*, transcript, pp. 9467-9468; Judgement, 2 August 2001, para. 24.

[71]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, transcript of 25 July 2000, p. 5612.

Srebrenica area after the Serbs entered the city. However, the position is much more complex than the Applicant will admit.

54. The Applicant is asking the Court to make a judicial finding that the fact that "7,000 to 8,000 persons were put to death at Srebrenica in just a few days in July 1995, and that many thousands more were deported, is now so well known that it can no longer be contested"[72]. The number put forward by the Applicant is certainly generally accepted, but it cannot be established by judicial finding. The reason why lies in a fact acknowledged by the Applicant: the cases before this Court and before the Tribunal are identical neither in nature nor as to the parties to them. The number of victims in Srebrenica was never disputed before the Tribunal for the former Yugoslavia; there was therefore no need for the Tribunal to enter into a thorough analysis of the tragedy, which did indeed occur.

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55. Moreover, the Tribunal is not done with evaluating the events at Srebrenica. The most important trial on the subject of these events has yet to begin and is planned to open at the end of this summer[73]. Furthermore, the Canadian General Lewis MacKenzie, former Commander of UNPROFOR forces in Bosnia and Herzegovina, recently called into question the figure of 8,000 persons killed. To be sure, this is merely an article, and we are not asking that it be considered anything else, but it was written by a high-ranking soldier very familiar with the situation in Bosnia and Herzegovina. In his article, "The Real Story Behind Srebrenica", General MacKenzie states:

> "Evidence given at The Hague war crimes tribunal casts serious doubt on the figure of 'up to' 8,000 Bosnian Muslims massacred. That figure includes 'up to' 5,000 who have been classified as missing. More than 2,000 bodies have been recovered in and around Srebrenica, and they include victims of the three years of intense fighting in the area. The math just doesn't support the scale of 8,000 killed. Naser Oric, the Bosnian Muslim military leader in Srebrenica, is currently on trial in The Hague for war crimes committed during his 'defence' of the town. Evidence to date suggests that he was responsible for killing as many Serb civilians outside Srebrenica as the Bosnian Serb army was for massacring Bosnian Muslims inside the town. 'Two wrongs never made a right, but those moments in history that shame us all because of our indifference should not be viewed in isolation without the context that created them.'"[74]

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[72]CR 2006/3, p. 23, para. 2.

[73]ICTY, *Prosecutor* v. *Vujadin Popovic et al.*, case No. IT-05-88-PT.

[74]General Lewis MacKenzie, "The Real Story Behind Srebrenica", *The Globe and Mail*, 14 July 2005, posted on the website www.transnational.org/features/2005/MacKenzie_Srebrenica.html

56. As we have said, we do not deny the crimes which were committed in Srebrenica, but we ask that they be put in context. They must be placed in the context of the horrifying civil war which lasted nearly four years in Bosnia and Herzegovina.

57. Many people were killed in the Srebrenica operation, but a great number were killed in combat. General Dannatt testified before the Tribunal for the former Yugoslavia that:

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> "what we in fact saw happening on the ground in that period in July indicated that combat operations were ongoing for really quite some time, and particularly the combat operations against the Muslim column particularly made up of 28th Division breaking out of Srebrenica. That posed a major threat to the security of the Drina Corps, and I would have thought that operations against that column was undoubtedly combat operations."[75]

In addition, General Enver Hadzihasanovic, a general in the army of Bosnia and Herzegovina, admitted in his testimony before the Tribunal for the former Yugoslavia that: "the head of the column finally managed to break through to Bosnian Muslim-held territory on 16 July 1995. ABiH forces attacking from the direction of Tuzla assisted by piercing a line of about one-and-a-half kilometres for the emerging column."[76] These statements, one by a senior officer from Bosnia and Herzegovina and the other by an impartial source, confirm that fighting broke out in the area after the Serbs entered Srebrenica.

58. As for the events in Srebrenica in July 1995, it was never denied before the Tribunal for the former Yugoslavia that the men killed were of military age. However, no one knows and no one has ever sought to determine the number of soldiers in the column which left Srebrenica. No one knows and no one has ever sought to determine how many men were killed in combat. These questions have to be answered before the act can be given legal characterization. The killing of men in combat in wartime is not a criminal act; unfortunately, it is the legitimate aim of the military operation. The killing of prisoners of war is a violation of the Geneva Conventions, it is a violation of the laws and customs of war as well, it is a war crime, a very serious international crime, but the issue is: can this crime, clearly a heinous one, be called genocide without cheapening the notion of genocide? And it is perhaps also worth recalling the view expressed by

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[75]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, transcript of 25 July 2000, pp. 5604-5605.

[76]*Ibid.*, Judgement, 2 August 2001, transcript, pp. 9529-9530, para. 65.

the Applicant in its oral argument on 2 March 2006 to the effect that genocide is a crime aimed at the civilian population[77].

59. As we have already said, the events at Srebrenica were tragic, but they were unplanned.

30 Srebrenica was declared a safe area and was supposed to be demilitarized. Bosnian Muslim forces were present in Srebrenica throughout the whole war; they were organized in the 28th Division of the army of Bosnia and Herzegovina and carried out attacks against the Serb population.

60. Thus, the military operation conceived in Directive 7.1 and ordered by the commander of the Drina Corps on 2 July 1995 was legitimate. Fighting between Bosnian Serbs and members of the 28th Division of the army of Bosnia and Herzegovina broke out after the Serbs entered the city and it caused many deaths. Crimes — horrible, heinous crimes — were committed, but in a context different from that described by the Applicant.

61. We must observe that the Applicant describes certain events without offering the slightest evidence in support of its assertions. Thus it cites various statements by Dutch military personnel without giving the sources[78]. Such evidence cannot be accepted. The Applicant also said, in its statement on 28 February 2006: "we know from the quotes that I have given earlier to you that, indeed, the order was: kill them all"[79]. Once again, the Applicant has not quoted anything containing such an order. Obviously, the Applicant is unable to offer any evidence to support this allegation because no such evidence exists, no such order was ever given, it was never formulated, it did not exist. The only order in existence as to the fate of the Muslim men of Srebrenica is the order given by Lieutenant Colonel Vinko Pandurevic, Commander of the Zvornik Brigade, a unit of the Drina Corps of the Republika Srpska Army, who ordered that the column be allowed to pass so that it could reach territory controlled by the Government of Bosnia and Herzegovina. The Trial Chamber of the Tribunal for the former Yugoslavia stated in the *Krstic* case:

> "On 16 July 1995, Lieutenant Colonel Vinko Pandurevic, the Commander of the Zvornik Brigade, reported that, in view of the enormous pressure on his Brigade,

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

[78]CR 2006/4, pp. 52 and 55.

[79]*Ibid.*, p. 58, para. 73.

he had taken a unilateral decision to open up a corridor to allow about 5,000 unarmed members of the Bosnian Muslim column to pass through."[80]

62. Similar reasoning may be applied to the video showing the killing of six men in Trnovo.

31 The Applicant quotes an article from the *New York Times* and describes this incident as being part of the crimes committed in Srebrenica and as the means by which Belgrade's alleged plan to ensure its control over a territory stretching 50 km west of the Drina was to be implemented[81].

63. Regrettably, the crime shown on the video did take place and two of the six victims were from Srebrenica. However, there is no evidence that the actions in Trnovo were part of the Srebrenica operation and the crimes committed in the Srebrenica area. Trnovo is a village situated no less than 150 km east of the Drina river. The village lies in the Sarajevo region and along the Sarajevo front, where the major Muslim offensive took place in June and July 1995.

64. Two of the six people killed were from Srebrenica, but it is unknown where the other four came from[82]. Furthermore, it is a known fact that the front of the column of men from Srebrenica, members of the 28th Division of the army of Bosnia and Herzegovina, succeeded in reaching territory controlled by the Government of Bosnia and Herzegovina, specifically Tuzla, where the 2nd Corps of the army of Bosnia and Herzegovina had its headquarters. The men who made it to Tuzla were immediately integrated into other units of the army of Bosnia and Herzegovina and were sent to other fronts in Bosnia and Herzegovina, one of those fronts indeed being that of Sarajevo. General Halilovic, a general in the army of Bosnia and Herzegovina, confirmed before the Tribunal for the former Yugoslavia that: "military operations in the Sarajevo area were given a higher priority at the critical time"[83].

65. Accordingly, there is a possibility which cannot be excluded that the six men whose murder is shown on the video were captured on the Sarajevo front and then executed. This does not excuse the execution of these men; that is a crime, a horrible crime, but a crime unrelated to the events in Srebrenica and definitely unrelated to the Strategic Goals of the Serb people in Bosnia and Herzegovina.

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[80]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 65.

[81]CR 2006/3, p. 28, para. 23.

[82]ICTY, *Prosecutor* v. *Vujadin Popovic et al.*, case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005, para. 33.16.

[83]ICTY, *Prosecutor* v. *Radislav Krstic*, transcript, pp. 9453 and 9492.

66. Lastly, the Applicant itself has admitted that the Trial Chamber of the Tribunal for the former Yugoslavia recently — on 12 April 2006, to be precise — confirmed the charges against
32 Jovica Stanisic and Franko Simatovic in respect of the murders at Trnovo but also ordered the prosecution to clarify the connection with Srebrenica because this was not clear from the indictment[84]. Moreover, Jovica Stanisic and Franko Simatovic, charged with the murders at Trnovo, are not accused of genocide.

67. The Applicant constantly seeks to identify a connection between the crimes committed in Srebrenica in 1995 and the Strategic Goals of the Serb people of Bosnia and Herzegovina announced in 1992. No such connection can be found because none existed. No plan provided for the takeover of Srebrenica let alone for the crimes committed. The tragedy of Srebrenica, which was indeed a tragedy, even without account being taken of its magnitude, cannot be seen as the result of a preconceived plan. The most which the prosecution at the Tribunal for the former Yugoslavia was able to find was a plan which, if it existed at all, was formulated on 11 July 1995 at the earliest.

68. The Applicant nevertheless puts forward certain facts occurring between 1991 and 1995 which, in its view, could serve as the connection between the Strategic Goals and the events of July 1995. The Applicant's allegations are nothing but its own interpretation of the facts. A different interpretation can be given to those facts because the situation was different from that described by the Applicant.

69. Thus the Applicant stated in its argument on 28 February 2006:

> "the ICTY has, by now, dealt with various cases related to Srebrenica. In the case against Blagojević, the Commander of the Bosnian Serb Bratunac Brigade, the trial chamber has, meticulously and thoroughly, first established all relevant facts, before it began to consider and to appreciate the exact role of the accused. The facts established by the trial chamber in its judgment of 17 January 2005, include the 1993 period, which I am describing to the Court just now."[85]

The Trial Chamber's findings referred to by the Applicant concern events said to have taken place in March 1993[86].

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[84]ICTY, *Prosecutor* v. *Jovica Stanisic and Franko Simatovic*, case No. IT-03-69-PT, Decision on Defence Motions Regarding Defects in the Form of the Second Amended Indictment, 12 April 2006.

[85]CR 2006/4, p. 43, para. 25.

[86]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic,* case No. IT-02-60-T, Judgement, 17 January 2005, para. 98.

70. The Tribunal must, of course, establish the facts before assessing the responsibility of the accused, but the facts which are relevant in criminal cases are those which reveal the role of the defendants in the events forming the factual basis of the charges against them. Vidoje Blagojevic,

33 the accused in the case cited by the Applicant, was indicted solely in respect of events taking place in Srebrenica between July and November 1995. The events alleged to have occurred in 1993 clearly lay beyond the scope of the indictment against Vidoje Blagojevic and, as they were not part of the charges, the Trial Chamber assuredly neither heard nor weighed evidence concerning them.

71. If the Applicant had wished to describe events in Srebrenica in 1993, it should have cited the *Naser Oric* case before the Tribunal for the former Yugoslavia, dealing with events having taken place in Srebrenica in 1992 and 1993[87]. The Applicant finally did so, but in a peculiar fashion, denying any and all responsibility on the part of Bosnian Muslims[88]. Naser Oric was however the Commander of the armed forces of Bosnia and Herzegovina in the Srebrenica area. The Tribunal has yet to hand down its judgment in this case, but the trial has concluded and the record in the case paints a very different picture from the one offered by the Applicant.

72. The Applicant also refers repeatedly to the "Skelani" military action which took place in January 1993. Thus, it asserted in its oral argument: "This is January 1993, this is the Respondent's army involved in the implementation of the 50 km plan, also known as strategic goal No. 3."[89] The description of the Yugoslav army's involvement in these events is incorrect. What happened on the border between Bosnia and Herzegovina and Serbia cannot be explained without the context in which the conflict occurred.

73. We do not deny that the Respondent's army was involved in military operations in the border area between Bosnia and Herzegovina and the Republic of Serbia. In the course of those operations, the Respondent's army operated in territory of Bosnia and Herzegovina but the action at Skelani in January 1993 was prompted by attacks by the army of Bosnia and Herzegovina in the Republic of Serbia's territory, in the territory of a foreign, sovereign and independent State.

74. These events were described as follows by the CIA:

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[87]ICTY, *Prosecutor* v. *Naser Oric* (IT-03-68-T).

[88]CR 2006/32, pp. 43–49.

[89]CR 2006/4, p. 41, para. 18.

34 "Oric's troops thrust along the Drina river to where it touches Serbia to the northeast and almost captured the Serbian border village of Skelani, some 25 km to the southeast of Srebrenica. For good measure, Oric's men fired mortar rounds into Serbia itself."[90]

The Netherlands Institute wrote in its report that, on 16 January 1993: "Bosnian government offensive to cut Serb corridor between Serbia and Pale escalates tension when Bosnians fire across border into town of Bajina Basta."[91] Bajina Basta is a city on the Serbian side of the Drina river, on territory of the Republic of Serbia, territory of the Respondent. The action taken by the Yugoslav army at the time was in response to the attack by the army of Bosnia and Herzegovina on Yugoslav territory. Such actions are recognized under international law: the Charter of the United Nations recognizes every State's right of self-defence in the event of attack, that is to say the use of armed force against its sovereignty, territorial integrity or independence[92].

75. We are not here to discuss the crimes committed by Bosnian Muslims during the war. Those crimes cannot excuse the crimes committed by Bosnian Serbs, but the crimes of Bosnian Serbs cannot be considered in isolation and out of the general context of a bloody war. It is worth quoting the Netherlands Institute on the subject of the situation in the Srebrenica area in 1992 on the eve of the armed conflict:

> "the Serbs remained on the defensive in this region. Overall, Muslim fighters from Srebrenica attacked 79 Serbian places in the districts of Srebrenica and Bratunac. They followed a certain pattern. Initially, Serbs were driven out of ethnically mixed towns. Then Serbian hamlets surrounded by Muslim towns were attacked and finally the remaining Serbian settlements were overrun. The residents were murdered, their homes were plundered and burnt down or blown up. There was a preference to launch these attacks on Serbian public holidays (those of Saint Joris, Saint Vitus and the Blessed Peter, and Christmas Day), probably because least resistance was expected. Yet it simultaneously contributed to the development of profound Serbian grievances. Many of these attacks were bloody in nature. For example, the victims had their throats slit, they were assaulted with pitchforks or they were set on fire . . ."[93]

76. Today, ten years after the war in Srebrenica, which has remained on territory of Republika Srpska, the President of the municipality is a Bosnian Muslim, Mr. Abdurahman Malkic,

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[90] *Balkan Battlegrounds, A Military History of the Yugoslav Conflict, 1990-1995*, Vol. 1, Central Intelligence Agency, Washington, 2005, p. 184.

[91] 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 10.

[92] A. Pellet, P. Dailler, *Droit international public*, *LGDJ*, 7th ed. 2002, pp. 941-944.

[93] http://www.srebrenica.nl, Netherlands Institute for War Documentation on Srebrenica, Part 1, The Yugoslavian Problem and the role of the West 1991–1994, Chap. 10.

35 while the Vice-President of the municipal assembly, Mr. Sadik Ahmetovic, is also a Bosnian Muslim[94].

77. The Tribunal for the former Yugoslavia has held that genocide was committed in Srebrenica. Yet the judgments rendered in the cases concerning Srebrenica require careful legal analysis. They contain certain contradictions which can cast doubt on the correctness of the legal conclusions. Furthermore, the Chambers adopted a broad interpretation of genocide which is not followed by the Tribunal's other Chambers and which is definitely not in accordance with the Genocide Convention.

78. The Tribunal found no direct evidence proving genocidal intent. We are not referring to General Krstic's intent, because the Tribunal clearly found that he lacked genocidal intent[95]. This concerns the intent which somebody else, somebody who was not tried in that case, might have had. And the Trial Chamber inferred this intent from the facts, among which the fact, deemed particularly significant, that the identity papers of the Bosnian Muslim men, who had first been set apart, were destroyed. Thus, the Trial Chamber considered that: "the removal of their identification could only be an ominous signal of atrocities to come"[96].

79. Nonetheless, while the Trial Chamber found, on the basis of the testimony, that "[l]ater, after all of the Bosnian Muslim civilians had gone from Potocari, the piles of personal effects, including identity cards, that had been taken from the Bosnian Muslim men and boys were set on fire"[97], it also found, but on the basis of the forensic evidence, that "[i]dentity documents and belongings, found in most of the exhumed graves, suggest that the victims were linked with Srebrenica. Among the items found were license cards and other papers with references to Srebrenica."[98] The coexistence of these two paragraphs in the same judgment is disturbing because nobody knows how destroyed, burnt-up papers ultimately ended up together with their owners in mass graves.

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[94]http://www.srebrenica-opstina.org.

[95]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, paras. 133-134.

[96]*Ibid.*, para. 160.

[97]*Ibid.*, para. 160.

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

36 80. This however is not the only unsettling element in the *Krstic* case. The Trial Chamber found: "There is no evidence that the Drina Corps devised or instigated any of the atrocities that followed the take-over of Srebrenica in July 1995. The evidence strongly suggests that the criminal activity was being directed by the VRS Main Staff under the direction of General Mladic."[99] But the Appeals Chamber found:

> "the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the takeover of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control."[100]

In its judgment the Trial Chamber concluded that members of the main staff had genocidal intent. The Appeals Chamber, without overturning the trial court judgment, considered that the forces whose control was limited to the Srebrenica area had genocidal intent. Hence, it definitely could not have been the members of the headquarters staff of the army of Republika Srpska who had this intent, because they controlled all of the territory of Republika Srpska. In addition, the Appeals Chamber found that General Krstic, a member of the forces whose control was limited to the Srebrenica area, did not have such intent. The existence of genocidal intent somewhere was held to have been proved, but it was never made clear whose intent it was.

81. Moreover, the Trial Court concluded from the testimony that the Bosnian Muslims of Srebrenica lived in a patriarchal society[101]. The Appeals Chamber upheld this finding and reiterated that the physical disappearance of the Muslim population of Srebrenica was linked with the patriarchal nature of Bosnian Muslim society[102]. It is difficult to see how the Trial Chamber could have come to such a conclusion without help from an expert capable of describing the

37 characteristics of a patriarchal society and evaluating the characteristics of Muslim society in Bosnia and Herzegovina. Yet what is most important in respect of the characterization of Muslim society in Bosnia and Herzegovina is that opinion on the matter is not undivided.

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[99]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 290.

[100]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 17.

[101]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, paras. 91 and 595.

[102]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 28.

82. In his statement before this Court the expert András Riedlmayer, a specialist in Balkan history who has devoted his last ten years of work to the cultural history of Bosnia and Herzegovina[103], confirmed that he had written in an article that Bosnian society was a modern, industrialized, European society[104]. It is not for us to pass judgment on the character of Bosnian Muslim society, but it is assuredly impossible for a society to be both modern and patriarchal at the same time.

83. The comments referred to above reveal factual contradictions on which the Tribunal based its legal conclusions. It will never be known whether the Tribunal might have characterized the events at Srebrenica as genocide without these contradictions. Nevertheless, the factual findings are not the only ones calling for special analysis. The legal conclusions evidence a very broad interpretation of genocide, an interpretation which clearly exceeds the bounds of the Genocide Convention.

Madam President, would this be a suitable time for a break?

The PRESIDENT: We could take the break now, or you could go to the end of this section. Which do you prefer?

Ms FAUVEAU-IVANOVIĆ: I would prefer to take a break now, if that would suit you.

The PRESIDENT: Yes, certainly. The Court will now rise.

The Court adjourned from 4.25 to 4.40 p.m.

38 The PRESIDENT: Please be seated. Maître Fauveau-Ivanović.

Ms FAUVEAU-IVANOVIC: Thank you, Madam President.

84. The Appeals Chamber of the Tribunal for the former Yugoslavia found General Krstic guilty of aiding and abetting genocide. Aiding and abetting genocide does not correspond to complicity in genocide as provided for in Article III of the Genocide Convention. And General Krstic was effectively convicted on the basis of Article 7.1 of the Tribunal's Statute, in

[103]CR 2006/22, pp. 12-13.

[104]*Ibid.*, pp. 51-52.

accordance with the general rules of criminal law applicable to aiding and abetting, which do not require the evidence of specific intent necessary for the crime of genocide. The Appeals Chamber held as follows:

> "The Trial Chamber acknowledged, moreover, that the evidence could not establish that 'Radislav Krstic himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population' and that he 'appeared as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995'. The Trial Chamber found that 'left to his own devices, it seems doubtful that Krstic would have been associated with such a plan at all'. The Trial Chamber also found that Radislav Krstic made efforts to ensure the safety of the Bosnian Muslim civilians transported out of Potocari."[105]

Nevertheless, this man, who had never envisaged that the removal of the population would become the systematic execution of part of the civilian population and who made efforts to ensure the safety of the Bosnian Muslim civilians, was sentenced to 35 years for aiding and abetting genocide. But was it really genocide? How can we speak of genocide when, in the middle of a war, officers of the Bosnian Serb army made efforts to ensure the safety of Muslim civilians?

85. The Appeals Chamber recognized that the literature suggests that accessories to genocide should show specific intent to destroy, in whole or in part, the protected group as such, since it found that: "Article 4 (2)'s requirement that a perpetrator of genocide possess the requisite 'intent to destroy' a protected group applies to all of the prohibited acts enumerated in Article 4(3),

39 including complicity in genocide."[106] And Trial Chamber I had noted that "[t]he same analysis applies to the relationship between Article II of the Genocide Convention, which contains the requirement of specific intent, and the Convention's Article III, which lists the proscribed acts, including that of complicity"[107].

86. The *travaux préparatoires* for the Genocide Convention clearly show that the Convention's authors believed that accessories to genocide should possess genocidal intent[108].

87. General Krstic's *mens rea* was not found, but that does not mean that genocide was not committed. Although General Krstic's intent does not fall within the scope of the Convention,

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[105]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 132.

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

[107]*Ibid*., para. 142, footnote 245.

[108]United Nations doc. A/C.6/236 & Corr.1; doc. A/C.6/SR.87.

someone else's intent might have. However, the Tribunal for the former Yugoslavia was unable to establish such intent. The issue of the specific intent required for genocide was left unanswered.

88. Moreover, in all the trials linked to the events at Srebrenica, the Tribunal has extended the meaning of the term destruction of a protected group.

89. In the *Krstic* case, Trial Chamber I found that: "the physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through the purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community"[109]. And subsequently: "Several recent declarations and decisions, however, have interpreted the intent to destroy clause in Article 4 so as to encompass evidence relating to acts that involved cultural and other non-physical forms of group destruction."[110]

90. The Trial Chamber in the *Blagojevic* case went even further, adopting the partial dissenting opinion of Judge Shahabuddeen in the *Krstic* case, according to which:

> "It is the group which is protected. A group is constituted by characteristics — often intangible — binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological."[111]

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91. Such an analysis runs counter to the intentions of the authors of the Genocide Convention. In the Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission explained the meaning of the words "physical destruction" in the following terms:

> "As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide, 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 'destruction', which must only be taken in its material sense."[112]

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[109]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 574.

[110]*Ibid*., para. 577.

[111]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 659; *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, partial dissenting opinion of Judge Shahabuddeen, para. 48.

[112]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, p. 46.

92. In its reliance on the opinion of Judge Shahabuddeen, the Trial Chamber in the *Blagojevic* case ruled that "'mere displacement' does not amount to genocide. However, he further found that displacement can constitute genocide when the consequence is dissolution of the group."[113] A completely different approach was adopted by the Trial Chamber in the *Stakic* case — distinguishing between the destruction and the dissolution of a group — which held: "It does not suffice to deport a group or part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group."[114] The Trial Chamber's Judgement in the *Stakic* case and the acquittal of Milomir Stakic of genocide were upheld by the Appeals Chamber[115].

93. Finally, it becomes obvious that the findings of the Trial Chamber in the *Blagojevic* case fall outside the scope of the Genocide Convention, since the Chamber held:

> "While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself — particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasizes that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical and biological destruction."[116]

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94. This conclusion corresponds precisely to the definition of a crime against humanity, but it does not correspond to the intentions of the authors of the Genocide Convention and does not come within the terms of the Convention. Genocide, often regarded as the crime of crimes, must be assessed carefully. Deportations, forced transfers and the destruction of cultural monuments do not constitute genocide.

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[113]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 660.

[114]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2005, para. 519.

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

[116]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, para. 666.

IV. Fifth Strategic Goal: the situation at Sarajevo

1. I now come to the fifth Strategic Goal, which was the division of Sarajevo. The text of this goal was: "Divide the city of Sarajevo into Serbian and Bosnian Muslim parts and establish effective State authorities in both parts." This Goal assigned part of the city to the Bosnian Muslims. If the intention was to destroy the Muslim people, the Bosnian Muslims would not have needed their part of the city.

2. The division of the city, and moreover according to ethnic criteria, would appear to be contrary to human rights, signifying as it does the displacement of a population; and the Applicant interprets it as ethnic cleansing. However, the idea of dividing Sarajevo did not imply either population displacement or ethnic cleansing. It did not imply human rights violations. It was no more than a proposal by the Bosnian Serbs, it was an expression of the desire of the Serbian people for its own State, a legitimate desire of one of the constituent peoples of Bosnia and Herzegovina.

3. Also, Sarajevo was not the multi-ethnic, multicultural and multi-religious city portrayed by the Applicant[117]. When Bosnia and Herzegovina proclaimed its independence in March 1992, the city was not particularly friendly to minorities. The exodus of persons belonging to the national

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minorities became a mass movement at the very start of the conflict in Sarajevo. The bulk of the Jewish minority left Sarajevo at the beginning of April 1992. General MacKenzie noted in his journal on 11 April 1992: "I drove to the airport to confirm rumours of a mass exodus of the Jewish community from Sarajevo. The reports were correct."[118] The Jewish people thus opted to leave Sarajevo and depart *en masse* for Belgrade, for Serbia and Montenegro[119].

4. In its oral pleading of 28 February 2006, the Applicant showed the composition of the city of Sarajevo as consisting of ten municipalities. Detailed examination of the demographic composition of those municipalities shows that the population of Sarajevo was not truly mixed, each of the municipalities, with three exceptions, having a clear Serb or Muslim majority[120]. In its report, the CIA writes: "Although the city census showed a Muslim or Yugoslav majority, almost

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[117]CR 2006/4, p. 22, para. 2.

[118]Lewis MacKenzie, *Peacekeeper: The Road to Sarajevo*, Douglas and McIntyre, Vancouver/Toronto, 1993, p. 145.

[119]*Ibid.*

[120]CR 2006/4, pp. 22-23.

120,000 Serbs were concentrated in five municipal districts of Sarajevo's city centre and most of these did not share the Sarajevo government's perception of a multiethnic capital."[121]

5. The Netherlands Institute noted in its report that, even before the war, the peoples were living in separate communities albeit in a small area. The report continues:

> "decades before the outbreak of the war, some observers felt that even in Sarajevo there existed a parallel reality, 'a deep and obvious separation between the ethnic groups, a separation characterized by both mistrust and apprehension'. 'Most of the peace and quiet rests on hypocrisy and on not wanting to attract the regime's attention . . .' As a Croat resident of Bosnia said later: 'Yes, we lived in peace and harmony. We lived in peace and harmony because every hundred yards there was a policeman who made sure that we were really nice to one another.'"[122]

6. In fact, Sarajevo was not a multi-ethnic capital, the three communities living in the same city, but side by side without mixing. The proposed Serb division of the city was not intended to

43 change life in Sarajevo but to guarantee each of the constituent peoples its own State. The proposal did not even signify the displacement of the population, but was no more than a proposed administrative division. That division in itself did not mean that the Serbs could not live in the part governed by Bosnian Muslims or that the Bosnian Muslims could not live in the Serb part of the city. It simply meant that the city would have two parts, one of which would have been governed by the Muslims and the other by the Serbs.

7. The fifth Strategic Goal, the division of Sarajevo, does not confirm the intention to destroy the Bosnian Muslims. On the contrary, it clearly shows that no such intention ever existed. After the end of the war, Sarajevo was divided and that division was confirmed by the Dayton Agreement. Now certain municipalities in Sarajevo are divided between Republika Srpska and the Croat-Muslim Federation. The two parts are ethnically homogenous, with Serbs living in the Serb part of the city and Muslims living in the part of the city belonging to the Federation. However, the Serb part is home to a larger percentage of national minorities than the Muslim part[123].

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[121] *Balkan Battlegrounds, A Military History of the Yugoslav Conflict, 1990-1995*, Vol. 1, Central Intelligence Agency, Washington, 2005, p. 346.

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

[123] ICTY, *Prosecutor* v. *Momcilo Krajisnik*, cases Nos. IT-00-39 and 40, exhibit P 528, Ewa Tabeau — Ethnic Composition and Displaced Persons and Refugees in 37 Municipalities of Bosnia and Herzegovina — 1991 and 1997 by Ewa Tabeau and Marcin Zoltkowski, p. 20.

8. As in other regions of Bosnia and Herzegovina, the situation in Sarajevo was completely different from that presented by the Applicant. The Applicant's allegations concerning the beginning of the conflict in Sarajevo voiced in its oral pleading of 28 February 2006 are not correct, and, moreover, the Applicant provided no evidence for those allegations[124]. On the other hand, the tensions between the Bosnian Muslims and the Serbs were palpable even before the beginning of the conflict. The CIA wrote in its report:

> "In Sarajevo as elsewhere in Bosnia one of the first tangible indications that widespread communal violence was looming came immediately after the results of the republic wide independence referendum were announced on 3 March. Roadblocks, barricades, and checkpoints sprang up all over Bosnia that day but the division of Sarajevo city along ethnic lines was the largest and most pronounced confrontation in the republic. And with four killed in clashes between roving rival ethnic lines was also the bloodiest."[125]

44 9. The Bosnian Muslims in Sarajevo had been well armed and well organized since the start of the conflict and were so long before it. In its report, the CIA noted: "Armed non-Serbs in Sarajevo initially numbered perhaps 10,000"[126] and also: "Not only did the Muslim-dominated academy occupy a commanding post atop Vraca Hill overlooking the Serb majority Grbavica neighbourhood, it was also stockpiled with guns and ammunition."[127]

10. The CIA was not alone in noticing that both parties were preparing for war and that both parties had warlike intentions. General MacKenzie, who was present in Sarajevo at the time, recorded in his journal on 10 April 1992 the events which had taken place a few days before, more specifically on 7 April 1992: "Bosnia was now a country. But conditions were bordering on anarchy and the thugs were coming out from woodwork. A good deal of shooting and looting was being carried out by criminal elements devoid of any political motives."[128] On 10 April 1992, General MacKenzie wrote in his journal: "The fighting had spread from the downtown area and was now going on around our headquarters in the PTT building. JNA were on a hill one kilometre south of us; the Presidency forces held the high ground directly north of us."[129]

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[124]CR 2006/4, pp. 23-24, paras. 6-9.

[125]*Op. cit.*, p. 345.

[126]*Op. cit.*, p. 347.

[127]*Ibid.*, p. 346.

[128]*Op. cit.*, p. 141.

[129]*Ibid.*, p. 144.

11. Furthermore, General MacKenzie's notes show that the Bosnian Muslims were not armed in Sarajevo alone, but throughout Bosnia and Herzegovina. On 20 and 21 April, he noted in his journal:

> "The actions of the Bosnian Territorial Defence Forces throughout the new nation were beginning to have serious repercussions in Sarajevo. On or . . . 12 April they had been ordered to blockade the JNA barracks, occupy its weapons depots and communications centres and attack JNA soldiers and their families . . ."[130]

45 12. On 3 May 1992, General MacKenzie noted the withdrawal of the JNA from Bosnia and Herzegovina: "All of the JNA weapons had been confiscated by the Territorial Defence Forces and six to seven JNA officers had been killed in cold blood during the incident."[131]

13. All these descriptions show that in Bosnia and Herzegovina there were not the criminals on one side and the innocent on the other; there was not one side which was well armed, prepared and ready for war and another comprising innocent, unarmed, defenceless civilians. No, in Bosnia and Herzegovina, there were populations which, for one reason or another, could not reach an agreement on the organization of the State they shared. These peoples could not even find an agreement on their peaceful separation. The Bosnian Serbs and Muslims, as well as the Croats, chose to stick to their positions even if that meant war, and war — a bloody civil war — took place. That fact is no longer at issue, as the Applicant recognized it in its second round of oral argument.

14. However, the Applicant still refuses to accept that there was no genocidal intent in Bosnia and Herzegovina and that all sides in this war had the same goal: protecting the interests of their ethnic group. It continues to claim that the war was caused by an alleged Serb intent to destroy the Muslim population. Thus the Applicant continues to claim that the Serbs were well armed, well equipped and well prepared, whereas the Bosnian Muslims were unarmed, bereft of military equipment and unprepared for war.

15. However, General MacKenzie noted in his diary for 14 May 1992:

> "The Territorial Defence Forces launched a major assault at exactly 0500 hours into the area just west of the Rainbow Hotel. The preparatory fire for the attack started around 0300. Gradually the intensity of the shelling and the tank fire increased

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[130] *Ibid.*, 1993, p. 156.

[131] *Ibid.*, p. 170.

> until it was impossible to sleep. The entire hotel was vibrating as two tanks took turns firing from positions under our windows on the East side of the building."[132]

The Territorial Defence Forces were the Bosnian Muslim armed forces, subsequently to become the Bosnia and Herzegovina army. On 14 May 1992, that is at the very beginning of the war, these forces carried out an attack on the Bosnian Serbs, a major assault. The Bosnian Muslims were not

46 unarmed, they were armed just like the Serbs and the Croats. If they had not been, they would certainly not have launched a major assault, they would not have gone to war. On the contrary, had they been unarmed, they would have searched for a peaceful solution, they would have sought to prolong negotiations. But the Bosnian Muslims sought to avoid negotiations, they sought to avoid a political solution, they tried to provoke incidents and armed activity and they succeeded.

16. The fact that a civil war took place does not mean that crimes were not committed. Crimes were committed and very serious offences at that: war crimes and crimes against humanity. The war does not excuse such crimes, but it does put them into the context of a civil war in which all sides concerned were fighting for territory in order to attain their political goals, which for the Bosnian Muslims consisted of an independent Bosnia and Herzegovina, while for the Serbs it was to remain in Yugoslavia or, if this was not possible, to create their own State. No side possessed genocidal intent, no crime was committed with a view to destroying the other group.

17. The siege of Sarajevo lasted for years, throughout the duration of the war. The siege of Sarajevo was regarded as a military necessity by the Bosnian Serbs, as the city was never demilitarized, even though it was designated a safe area. We demonstrated in our first-round arguments that tens of thousands of soldiers belonging to the Bosnia and Herzegovina army were stationed in Sarajevo throughout the war[133].

18. We cannot deny that crimes were committed during that siege, and nor would we want to. The crimes committed during that siege could certainly be characterized as war crimes and certain even as crimes against humanity. Nevertheless, it is not possible to accept the Applicant's claim that those crimes systematically targeted the civilian population, much less that there was "a strategy of aiming at civilians"[134]. We cited in our first-round presentations, statements by

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[132] *Ibid*., p. 185.

[133] CR 2006/19, p. 11, para. 150.

[134] CR 2006/4, p. 29, para. 23.

members of UNPROFOR stationed in Sarajevo during the war which confirmed the presence of a large number of troops in Sarajevo. We also quoted statements indicating that the Bosnian Muslims installed military equipment near to civilian buildings with a view to drawing Serb fire[135].

47 That was the reality of Sarajevo, the cruel and brutal reality of a civil war in which crimes were committed, but genocide was not. The Serb people of Bosnia and Herzegovina and the State of Serbia and Montenegro never had any intention to destroy the Bosnian Muslims and/or Croats. The Bosnian Serbs did not want to live with the Bosnian Muslims, but they did want to live next to them, with each people having its own State and government.

19. The Applicant has attempted to demonstrate the genocidal intent of the Serbs by supposed attacks on Bosnia and Herzegovina's cultural and historical heritage. That allegation does not correspond to the reality. The cultural and historical heritage of Bosnia and Herzegovina belongs to the Serbs as well. The Bosnian Serbs are one of the three peoples to have lived in Bosnia and Herzegovina for centuries. Without its Serb component, the history and culture of Bosnia and Herzegovina cannot exist. However, the Applicant appears to forget that. Consequently, the Applicant portrays the assault on the culture of Bosnia and Herzegovina, the attack on the National Library, as an act of genocide. Such a claim is incomprehensible, as it is not clear whether the Applicant alleges an attack on the culture of Bosnia and Herzegovina or an attack on the culture of Bosnia's Muslims. However, the witness-expert, Mr. András Riedlmayer, confirmed that the National Library was "the repository of the entire country's written heritage as such"[136]. As such, that library belonged to the Serbs as well. Mr. Riedlmayer also confirmed that the library contained Serb and Croat works, which were also destroyed[137]. Finally, Mr. Riedlmayer admitted that the destruction of the library was more of a political act, concluding: "First of all the National Library clearly was not the single property of any one of Bosnia's national groups. It was the common heritage of all the Bosnian peoples."[138]

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[135]CR 2006/19, pp. 12-13, paras. 151-153.

[136]CR 2006/19, pp. 12-13, paras. 151-153.

[137]*Ibid.*, p. 49.

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

20. As a political act, representing the destruction of Serb culture as much as Muslim and Croat culture, the destruction of the National Library can in no way be regarded as an act of genocide. Moreover, it has never been established who destroyed the Sarajevo National Library.

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21. The Tribunal for the former Yugoslavia tried General Galic, commander of the Sarajevo Corps of the Republika Srpska Army, for the events that took place in Sarajevo between September 1992 and August 1994. General Galic was found guilty of crimes against humanity and violations of the laws and customs of war[139]. No allegations of genocide were ever made against General Galic. The judgment concerning General Galic was, moreover not unanimous. One of the judges ruled that the responsibility of the Bosnian Serbs for a number of incidents had not been established beyond all reasonable doubt, notably for the shelling of Markale market[140]. The Judgement in the *Talic* case is currently being appealed.

22. The Applicant would have us believe that the Tribunal for the former Yugoslavia's Prosecutor and judges were not aware of the overall picture of events and did not seek to apprehend it. While it is true that the task of the Tribunal is to establish individual responsibility, that does not mean that the Tribunal does not take account of the context in which crimes were committed. In a number of cases, the judges were obliged to consider the context and the overall picture. For example, in the *Momcilo Krajisnik* case the indictment concerns the whole of Bosnia and Herzegovina. In the period covered by the indictment, Momcilo Krajisnik was President of the Assembly of Serbian People in Bosnia and Herzegovina. In order to accuse Momcilo Krajisnik, the Prosecutor would have needed to have a view of the overall situation and she certainly did. Nevertheless, Momcilo Krajisnik has never been accused of genocide for the events in Sarajevo.

CONCLUSION

1. Madam President, Members of the Court, in response to the Applicant's claim that we have considered acts constituting genocide in isolation, we have attempted to present an overall picture of the events in Bosnia and Herzegovina during this cruel and bloody civil war. However, genocide cannot be established, as it was not committed.

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[139] ICTY, *Prosecutor* v. *Stanislav Galic*, case No. IT-98-29-T, Judgement, 5 December 2003.

[140] *Ibid.*, partially dissenting opinion of Judge Nieto Navia, para. 71.

49 2. We agree with the Applicant on the definition of the acts enumerated in Article II of the Genocide Convention. We also agree that the list of those acts is exhaustive, but that each of them individually, or in conjunction with the others, may constitute genocide only if it is committed with genocidal intent, that is, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

3. Although we have reached agreement on the constituent elements of genocide, we do not agree on the nature of the crimes committed in Bosnia and Herzegovina. We do not agree that the crimes committed in Bosnia and Herzegovina constitute genocide; they constitute common law crimes, war crimes or crimes against humanity. Such crimes become genocide only if committed with genocidal intent. War crimes and crimes against humanity are very serious crimes. These international crimes, of an extremely serious nature, were unfortunately committed in Bosnia and Herzegovina, and the perpetrators must answer for their criminal acts, but genocide was not committed. Genocide was not committed in Bosnia and Herzegovina, and consequently Serbia and Montenegro cannot be held responsible for violations of the Genocide Convention.

4. The Applicant stated explicitly on several occasions that genocidal intent can be inferred from the plan, the policy, the line of conduct[141]. We accept that it is difficult to prove intent, but when the issue is the crime of genocide, such intent can in no case be presumed. As has been clearly established by the jurisprudence of the *ad hoc* Tribunals: "The Trial Chamber notes that it is generally accepted in the jurisprudence of the Tribunal and of the ICTR that, in the absence of direct evidence, the specific intent for genocide can be inferred from 'the facts, the concrete circumstances, or a "pattern of purposeful action"'."[142] However, if an inference is to be drawn from the circumstantial evidence and/or a line of conduct, it must be the only reasonable inference available from the evidence presented[143].

50 5. We showed in the first round of our oral argument, adopting an analytical approach and assessing individual crimes on an *ex-post-facto* basis, that genocide was not committed. We have now once again demonstrated, on the basis of a global, consolidated approach, that genocide was

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[141]CR 2006/7, p. 56.

[142]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 704.

[143]*Ibid.*, para. 353.

not committed. Irrespective of the approach adopted, genocide will never be found because it was not committed in Bosnia and Herzegovina.

6. We have never denied that some acts capable of constituting one of the acts enumerated in Article II of the Genocide Convention were committed in Bosnia and Herzegovina, but we have said — and we now repeat — that these acts were not committed with genocidal intent. We have shown that there was never any plan, any policy aimed at destroying the Bosnian Muslims. We shall now show that the facts, the circumstances, the line of conduct do not permit an inference of genocidal intent to be drawn, since such intent never existed. Genocide was not committed.

7. We reached agreement with the Applicant that 102,000 people were killed in Bosnia and Herzegovina during the war, and this number is also accepted by the Tribunal for the former Yugoslavia[144]. However, it should be recalled that the Applicant previously alleged, most notably in its Memorial (para. 2.1.0.8), that 250,000 people were killed. This number was alleged in 1994, when the war was still going on and the killings were continuing. The Applicant put forward this number as one that is generally accepted; and this number of 250,000 persons killed *was* generally accepted. Even Mr. Jean-Paul Sardon, the witness-expert in demography, admitted that he had written without any supporting evidence an article published in a professional journal, in which he affirmed that the war in Bosnia had produced 200,000 to 300,000 victims[145].

8. The number of 250,000 persons killed was widely and commonly accepted; it was accepted by the demographic experts, it was accepted by the various committees which based their reports on this figure, it was accepted by international agencies, including United Nations agencies,

51 the General Assembly and the Security Council, which adopted resolutions on the basis of this figure and which condemned the Bosnian Serb forces, again on the basis of this same figure.

9. Madam President, Members of the Court, this number was incorrect. It did not correspond to the facts, it did not correspond to the reality, it did not correspond to the truth. Now, we ask the question: how can all these documents, these reports, decisions and resolutions, all based on erroneous facts, how can they constitute credible evidence in these proceedings? They cannot, because their starting point, the facts on which the entire argument was based, were false.

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[144]CR 2006/33, p. 48, para. 12.

[145]CR 2006/26, pp. 53-54.

Fortunately, the number of victims is much lower than the number alleged in all of these documents.

10. One hundred and two thousand persons killed; it is an extremely disagreeable task to seek to prove that 102,000 people were killed, and not 250,000 people. Those 102,000 people killed were not numbers, they were men, women and children. They were human beings, and none of them should have been killed. Unfortunately, they were killed and unfortunately we are here involved in proceedings in which Serbia and Montenegro is accused of genocide, a genocide that was not committed. Consequently, we are obliged to analyse these figures; it is not a game, as the Applicant calls it, it is a necessity caused by these proceedings. A necessity accepted even by the Applicant, who stated:

> "To the extent that the demographics of genocide do matter, it is primarily because, to demonstrate genocide, it is necessary to demonstrate intent. And intent, honourable Members of the Court, can be inferred from the magnitude of acts, from the dimension of the acts and the pattern of their commission."[146]

11. Genocide does not require a specific number of victims, there is no numerical threshold for genocide. However, the numbers are very important when it is necessary to draw an inference of genocidal intent. And the number initially alleged by the Applicant, a very large number of persons killed, have proved to be erroneous. Admittedly, it was a widely accepted number, but it was wrong. In the end, the Applicant accepts the number of 102,000 persons killed, but this number tells us nothing about the identity of the victims. Were they all Bosnian Muslims? No, they certainly were not; some of them were Croats, some were Serbs, and there were undoubtedly

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persons of other nationalities among the victims. We do not know the nationality of these people who were killed, but do we know if they were civilians or military combatants? Do we know whether these people were victims in a war between the Muslims and the Serbs, or were they the victims of the war between the Croats and the Muslims, or again of the conflict between Muslims, between the forces loyal to Fikret Abdic and those loyal to Alija Izetbegovic? We do not know. We have no answers to all these questions. The Applicant should have provided these answers, but failed to do so.

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[146] CR 2006/32, p. 16, para. 24.

12. The situation regarding the number of killings is not exceptional. The same assessment can be made of the camps which were to be found in Bosnia and Herzegovina. The Applicant now alleges that between 100,000 and 200,000 people were detained in 520 camps run by the Bosnian Serbs during the war[147]. But is 520 the correct number of camps? In its Memorial, the Applicant claimed that there were 170 camps, but a look at the list of those camps shows that the number of detainees would have been 300,000 persons (Memorial, para. 2.2.0.1).

13. Thus, once again, the evidence presented by the Applicant has to be analysed carefully. The first question that arises is whether 520 camps really existed on the territory of Republika Srpska. In the *Brdjanin* case, Trial Chamber II found that some detention camps were in reality places of interrogation rather than of confinement. The Tribunal also found that the regular transfer of detainees between different camps might cause some distortion in their numbers[148].

14. The Tribunal also found in the *Brdjanin* case that 15,623 Bosnian Muslims and Bosnian Croats were detained in the different camps in the region of Bosanska Krajina, but it also found that serious bodily and/or mental harm was inflicted on only some, not all of them. Finally,

53 the Tribunal concluded, on the basis of the evidence presented, that women and children were better treated than men[149].

15. Fifteen thousand six hundred and twenty three detained persons is a large number. This number does not cover the whole of Bosnia and Herzegovina, but the region of Bosanska Krajina, the region in which the worst camps were located, including Keraterm, Omarska and the camps to which the Applicant frequently referred as Manjaca and Trnopolje. Most of the camps were in fact situated in that region. We know that 15,623 people were detained in the camps of Bosanska Krajina, but we do not know who the detainees were. What was the number of civilians in those camps? What was the number of military combatants? We do not know. But we know that the majority of the detainees were men of military age, since this is the conclusion reached by the Trial Chamber of the Tribunal for the former Yugoslavia in the *Brdjanin* case[150].

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[147]CR 2006/5, p. 23, para. 6.

[148]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 974, footnote 2448.

[149]*Ibid.*

[150]*Ibid.*, paras. 974, 979.

16. The fact that men of military age comprised the majority of the detainees is not without significance. Trial Chamber II in the *Brdjanin* case held that precisely this fact: "could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence"[151].

17. Consequently, it is extremely important to ascertain the identity of the detainees, but the Applicant did not deem it necessary to provide proof of the identity of the detainees, it merely alleged that people were held in detention. Yes, people were held in detention, we do not deny that fact, we do not deny that the camps were terrible places in which the conditions were extremely poor, we do not deny that crimes were committed in those camps. However, these crimes, serious as they may be, do not constitute genocide. They were not committed with intent to destroy, in whole or in part, the Bosnian Muslim population and/or the Croat population. They were committed because of fear, because of the total disorder that prevailed at the time in Bosnia and Herzegovina, where the State was unable to establish order and authority.

54 18. We also agree with the Applicant that sexual violence, including rape, can constitute genocide. We agree that rape can constitute serious bodily or mental harm, that rape can be intended to subject a group to conditions of life calculated to bring about the physical destruction of the group. We also agree that rape can constitute action aimed at preventing births and that it can lead to the transfer of children from one group to the other. In the present case however, the only one which concerns us, in Bosnia and Herzegovina the rapes were not genocidal acts.

19. We do not dispute that rape was committed in Bosnia and Herzegovina. We do not dispute that, in certain cases, the rapes constituted inhumane acts and thus crimes against humanity. Yet in no case did rape in Bosnia and Herzegovina constitute genocide.

20. The Applicant alleges that 12,000 rapes were recorded in the Tadeusz Mawoziecki report[152]. No further evidence has been submitted. We have already explained how that report arrived at the figure of 12,000 rapes[153]. We have also confirmed that this number of rapes allegedly

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[151] *Ibid.*, para 979.

[152] CR 2006/6, p. 52, para. 21.

[153] CR 2006/20, p. 25.

committed includes all rapes allegedly committed in Bosnia and Herzegovina during the war, regardless of the nationality of the victim and of the perpetrator of the crime[154].

21. The Applicant has cited judgments delivered by the Tribunal for the former Yugoslavia which included rape and sexual violence[155]. We do not dispute that. We acknowledge that the rapes were committed, but they do not constitute genocide and none of those judgments found that genocide had been committed. We do not, as claimed by the Applicant[156], consider rape as collateral damage, we consider rape to be a serious crime, regardless of the circumstances in which it has been committed. Yet the victims of the rapes are not necessarily victims of genocide.

55 Serious crimes were committed, including crimes against humanity, but genocide, the only crime that concerns us here, was not committed.

22. The Applicant has also not provided any evidence in support of its completely unfounded allegations that the rapes were used as procreative rapes or to prevent births. The Applicant merely cited a decision delivered in 1996 by the Tribunal for the former Yugoslavia pursuant to Article 61 of the Rules of Procedure and Evidence in the *Ratko Mladic and Radovan Karadzic* case[157]. The decision cited concerned the confirmation of the indictment against Radovan Karadzic and Ratko Mladic, a confirmation which contains no allegations that genocide had been committed by measures aimed at preventing births or by transferring children from one group to the other[158].

23. The principal evidence for these unfounded allegations presented by the Applicant is the patriarchal nature of Bosnian Muslim society, an allegation completely at odds with the statement by Mr. Riedlmayer, the expert called upon by the Applicant and a specialist in the history of the Balkans, who has described Bosnia and Herzegovina as a modern, industrialized European society[159].

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[154] *Ibid.*, pp. 25-26.

[155] CR 2006/33, pp. 17-18.

[156] *Ibid.*, p. 19.

[157] CR 2006/33, p. 24.

[158] ICTY, *Prosecutor* v. *Ratko Mladic and Radovan Karadzic*, cases Nos. IT-95-5 and 18, Indictment.

[159] CR 2006/22, pp. 51-52.

24. As the Applicant was unable to deduce any intention from the facts capable of constituting genocide, it turned to acts which, while certainly illegal, criminal and perhaps constituting war crimes, are nevertheless excluded from the Genocide Convention.

25. We dispute that these acts can prove a genocidal intent which cannot be proved otherwise, but we agree that these acts may contribute to evidence of that intention. Yet in the present case, the cultural destruction and displacement of the population was supposedly the principal if not only evidence of the intention.

26. The Applicant has devoted lengthy oral pleadings to cultural destruction. It even called on an expert who essentially repeated the facts presented by the Applicant in its oral pleadings[160].

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However, in his testimony, this expert implicitly acknowledged that the cultural destruction in Bosnia and Herzegovina could be linked to the military actions. Replying to the question whether the cultural destruction was significant in Iraq, the expert replied: "Yes, although I believe that the circumstances were fundamentally different from that in Bosnia." Later, explaining the differences between the situation in Bosnia and Herzegovina and in Iraq, the expert declared: "Actually I believe that in Iraq the destruction to which I refer, which is of cultural institutions, had actually no connection to military actions."[161] This comment is an admission that the cultural destruction in Bosnia and Herzegovina was linked to the military actions. And as the Applicant admitted in its oral pleading of 1 March 2006:

> "Under the Hague Regulations and customary international law, institutions dedicated to religion are protected. This protection is restated in both Additional Protocols I and II to the Geneva Conventions. This protection can be lost if the buildings are used for military purposes."[162]

27. It is not our intention to justify the cultural destruction which, in many cases, represented a violation of the Geneva Conventions, but we are bound to note that the American public relations agency, Ruder and Finn Global Public Affairs, was working and indeed still is for Bosnia and Herzegovina precisely on the question of the cultural heritage[163]. This agency worked for Bosnia

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[160]CR 2006/22 (expert witness) and CR 2006/5, pp. 45-59.

[161]CR 2006/22, p. 53.

[162]CR 2006/5, p. 45, para. 4.

[163]http://www.ruderfinn.com.

and Herzegovina during the war, its sole task, on the admission of its director, Mr. James Harff, being to convince public opinion that the Bosnian Muslims were the victims of genocide[164].

28. The Applicant also refers to the displacement of the population, which it terms ethnic cleansing. The Applicant has stated that it was scandalous to invoke the displacement of the populations as a solution to the conflicts. However, that was not our own statement, it was the finding of the Permanent Court of International Justice in its Advisory Opinion concerning the Greco-Bulgarian Communities in the following terms:

> "The general purpose of the instrument is thus, by as wide a measure of reciprocal emigration as possible, to eliminate or reduce in the Balkans the centres of irredentist agitation which were shown by the history of the preceding periods to have been so often the cause of lamentable incidents or serious conflicts, and to render more effective than in the past the process of pacification in the countries of Eastern Europe." *(Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 19.)

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29. The displacement of populations has occurred in many regions with a mixed population and has always been in a sense discriminatory. The displacement referred to by the Permanent Court of International Justice concerned the displacement of the Greek population of Bulgaria and the displacement of the Bulgarian population of Greece. Like all displacements of populations, that one was discriminatory, yet it was accepted, and accepted precisely to prevent "lamentable incidents".

30. In Bosnia and Herzegovina, the populations were displaced, certain people leaving Bosnia and Herzegovina before the war for economic reasons, but also from fear, the fear which the Applicant refuses to acknowledge. However, the Trial Chamber of the Tribunal for the former Yugoslavia found in the *Stakic* case that the population exodus started in 1991[165] precisely owing to a growing feeling of insecurity and fear[166]. Also in the *Brdjanin* case, the Tribunal reached a similar conclusion, namely that: "Already before the outbreak of the armed conflict in Bosnia and Herzegovina, Bosnian Muslims and Bosnian Croats living in the Bosnian Krajina were feeling increasingly insecure and started leaving the region in convoys."[167]

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[164]CR 2006/18, p. 29, para. 70.

[165]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 692.

[166]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 52.

[167]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 116.

31. Although the population had begun to leave Bosnia and Herzegovina before the war, we do not dispute that people were expelled and forcibly transferred. However, sometimes during the war, people were also asking to leave. In its oral argument, the Applicant contended, on the basis of a purely humanitarian decision, that the Serb policy was to displace its own population[168]. In reality, the minority peoples, regardless of their nationality, were seeking to leave territories under the control of another ethnic group. The Serbs were doing this, the Croats were doing it and the

58 Muslims too. In the *Brdjanin* case, the Trial Chamber reported the testimony of a witness of the Prosecutor, Mr. Besim Islamovic, a Muslim from Sanski Most, who stated:

> "In the municipality of Sanski Most Bosnian Muslim representatives met with Bosnian Serb municipal authorities and representatives of the SDS on several occasions between June and August 1992 during which they requested that the Bosnian Serb municipal authorities organise convoys so that Bosnian Muslims could safely leave the area."[169]

The convoys requested by the Muslims were organized and escorted to the territories under Muslim control by the Bosnian Serb police[170], which guaranteed the security of the convoys.

32. The Applicant also appears not to accept the fact that a particularly bloody war had broken out between Muslims and Croats in 1993, a war which lasted almost two years. That war not only caused a large number of victims — of persons killed — it also triggered a huge exodus of the Muslim population from territories under Bosnian Croat control and also an exodus of Croats from territories under Muslim control.

33. Furthermore, while the conflict between the Croats and Bosnian Muslims broke out in full force in 1993, it began earlier. The Trial Chamber of the Tribunal for the former Yugoslavia found in the *Neletilic and Martinovic* case that the incidents started in 1992[171]. The trial Chamber in the *Blaskic* case was even more specific, finding that the tensions between the Muslims and

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[168]CR 2006/33, p. 53.

[169]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 560.

[170]*Ibid*.

[171]ICTY, *Prosecutor* v. *Mladen Naletilic and Vinko Martinovic*, case No. IT-98-34-T, Judgement, 31 March 2003, para. 24.

Croats started in May 1992[172] and that those tensions subsequently erupted into a large-scale conflict[173].

34. The Bosnian Muslims and the Croats were undoubtedly at war, but over and above this fact, the Bosnian Croats' objective was similar to that of the Bosnian Serbs. The main objective of the Bosnian Croats, as proclaimed at a meeting on 12 November 1991, was the following: "The Croatian people in Bosnia and Herzegovina must finally embrace a determined and active policy which will realize our eternal dream — a common Croatian State."[174] The objective of the Croatian people of Bosnia and Herzegovina was similar to the first objective of the Serbian people of Bosnia and Herzegovina, only the Bosnian Croats proclaimed their objective six months before the Bosnian Serbs proclaimed their objectives.

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35. The conflict between the Bosnian Muslims and the Bosnian Croats did indeed take place and resulted in a large number of victims; people were killed, they were detained in camps, women were raped, mosques were destroyed, people were expelled and forcibly transferred[175]. Ignoring the war between the Bosnian Muslims and the Bosnian Croats, the Applicant ignores the crimes committed during that war and considers it unnecessary to separate the victims of that war from the victims of the war that took place between the Serbs and the Muslims. All victims are victims, but the Bosnian Serbs are not and cannot be held responsible for victims of a conflict in which they played no part.

36. The Applicant entered into a very complicated analysis of figures and percentages in order to demonstrate genocidal intent[176]. In that analysis, it recognized that a substantial number of Serb refugees arrived in Bosnia and Herzegovina from the Krajina region in Croatia[177]. A large number of Croatian Serbs did indeed come to Bosnia and Herzegovina. However, even if we count

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[172]ICTY, *Prosecutor* v. *Tihomir Blaskic*, case No. IT-95-14-T, Judgement, 3 March 2000, para. 343.

[173]ICTY, *Prosecutor* v. *Mladen Naletilic and Vinko Martinovic*, case No. IT-98-34-T, Judgement, 31 March 2003, para. 25.

[174]ICTY, *Prosecutor* v. *Tihomir Blaskic*, case No. IT-95-14-T, Judgement, 3 March 2000, para. 341.

[175]ICTY, *Prosecutor* v. *Tihomir Blaskic*, case No. IT-95-14-T; *Prosecutor* v. *Dario Kordic and Mario Cerkez*, case No. IT-95-14/2; *Prosecutor* v. *Zoran Kupreskic et al.*, case No. IT-95-16; *Prosecutor* v. *Zlatko Aleksovski*, case No. IT-95-14/1; *Prosecutor* v. *Anto Furundzija*, case No. IT-95-17/1; *Prosecutor* v. *Miroslav Bralo*, case No. IT-95-17; *Prosecutor* v. *Jadranko Prlic et al.*, case No. IT-04-74; *Prosecutor* v. *Ivica Rajic*, case No. IT-95-12; *Prosecutor* v. *Enver Hadzihasanovic and Amir Kubura*, case No. IT-01-47.

[176]CR 2006/33, pp. 48-50.

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

this large number of Serbian refugees who came to Bosnia and Herzegovina during the war, the proportion of Serbian inhabitants and Muslim inhabitants remained the same. Before the war, 42.2 per cent of the population of Bosnia and Herzegovina were Bosnian Muslims and 32.5 per cent were Serbs. After the war, 45.5 per cent of the population of Bosnia and Herzegovina are Bosnian Muslims and 35.3 per cent are Serbs. This is a fact, and the Applicant certainly cannot change this fact. It is a fact which certainly does not permit of an inference of genocidal intent.

60 37. The Applicant frequently refers to ethnic cleansing, which is not a legal term. The term "ethnic cleansing" was coined by journalists and public opinion. It is true that the United Nations General Assembly has used this term in some of its resolutions, but the General Assembly is a political organ of the United Nations, and its resolutions certainly do not contain legal findings or legal definitions. Moreover, as we said before, these resolutions were based on erroneous facts.

38. Genocide is a crime aimed at destroying, in whole or in part, a national, ethnical, racial or religious group, as such. Forcible transfer was expressly excluded from the Genocide Convention. Serbia and Montenegro is aware that certain Chambers of the Tribunal for the former Yugoslavia, in the *Srebrenica* case, based their judgments on forcible population transfer. However, these legal findings which, in any case, are not binding on this Court, are not in conformity with the Genocide Convention. Instead of referring to those judgments, we shall refer to the *travaux préparatoires* of the Sixth Committee, which expressly excluded forcible transfer from the framework of the Genocide Convention; Syria proposed that the Genocide Convention should include "imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment"[178], but that proposal was expressly rejected. Moreover, the Tribunal's Chambers are not unanimous in their legal characterization of population displacement. While in the *Krstic* case, the Tribunal inferred intent from the fact that population displacement had taken place, it also found in the *Stakic* case that: "it does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group."[179]

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

[179]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 1 September 2003, para. 519.

39. Moreover, in his report, which is also a commentary on the Statute of the Tribunal for the former Yugoslavia, the United Nations Secretary-General equated ethnic cleansing with crimes against humanity. He wrote:

> "Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution."[180]

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40. The fact is that a population that has been deported, transferred and displaced is not a population that has been destroyed. A further fact is that the Muslim population was frequently transferred a few kilometres away from its habitual place of residence. The fact is that there was no intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

41. All of the ethnic groups in Bosnia and Herzegovina endeavoured to establish homogenous communities, and they succeeded. The Applicant has shown the ethnic composition of certain municipalities in which the Bosnian Muslims formed the majority before the war, and in which they found themselves in a minority after the war. We do not deny these facts. However, this was the common policy of all the communities and all the parties in this war, and it was certainly not aimed at the destruction of a national, ethnical, racial or religious group.

42. The available information concerning the composition of the population of Bosnia and Herzegovina shows that all the parties succeeded in establishing ethnically homogeneous communities. It also shows that genocide was not committed. We cannot look at all the municipalities, but we shall refer to some representative municipalities. Thus, we can cite the example of the municipality of Sanski Most, one of the municipalities in which the Applicant claims that genocide was committed. This municipality is currently on the territory of the Croat-Muslim Federation, and Amnesty International reported that:

> "Sanski Most's pre-war population was approximately 60,000, with 46 per cent Bosniacs and approximately 42 per cent Bosnian Serbs. In Sanski Most, the local authorities have openly invited refugees and displaced people whose pre-war home was not Sanski Most to settle there, regardless of the fact that the area changed hands several times during the war and much of housing has been destroyed. As of

[180] Report of the Secretary-General, doc. S/25704, 3 May 1993.

December 1997, the population was estimated to be approximately 45,000, almost all of whom are Bosniacs."[181]

62 43. The municipality of Sanski Most is not exceptional. The situation in the municipality of Kljuc is identical. There, the Serbs formed the majority before the war. According to the information obtained in the 1991 population census, the municipality had 37,233 inhabitants, 47.58 per cent of whom were Muslims, while 49.52 per cent were Serbs. In 2003, the municipality had 16, 020 inhabitants, 97 per cent of whom were Bosnian Muslims[182].

44. The UNHCR, in a report concerning the region of Sana-Una, which belongs to the Croat-Muslim Federation and is composed of the municipalities of Bihac, Bosanska Krupa, Bosanski Petrovac, Buzim, Kljuc and Sanski Most, wrote that the present-day population is estimated at 273,251 inhabitants, the overwhelming majority of whom, 94 per cent, are Muslims. Serbs account for 2 per cent of the population and Croats 3.5 per cent[183]. Before the war, the Serbs were in the majority in Kljuc, they accounted for more than 40 per cent of the population in Sanski Most and more than 70 per cent in Bosanski Petrovac; today, in this region, they have been reduced to 2 per cent. This is the reality of Bosnia and Herzegovina, a country in which three main constituent peoples have lived together for centuries. They lived together under the authority of the Ottoman Empire, under the Austro-Hungarian Monarchy, under the former Yugoslavia, but they have always lived beside each other, never with each other. They have never agreed to mix, they have never agreed to create the nation of Bosnia and Herzegovina, they have remained Bosnian Muslims, Serbs and Croats, and each of them has wanted its own State.

45. The Bosnian Muslims, like the Croats, the Serbs and the people of any other nationality that have lived in Bosnia and Herzegovina, were victims of the crimes committed during the war. They were displaced, but they were not destroyed. None of these peoples attempted to destroy any of the others, and none of these peoples harboured genocidal intent. Madam President, Members of the Court, there was no plan, no policy aimed at destroying a national, ethnical, racial or religious group. The facts presented in the course of these proceedings do not support an inference of

[181] http://web.amnesty.org.

[182] http://en.wikipedia.org/wiki/Kljuc.

[183] http://www.unhcr.ba.

genocidal intent, and they cannot do so because no such intent ever existed. Genocide was not committed in Bosnia and Herzegovina.

63 Madam President, I apologize. I have finished somewhat ahead of schedule.

Le PRESIDENT : Je vous remercie, Madame Fauveau-Ivanović. En pareilles occasions, vous n'avez pas à présenter d'excuses.

M. le juge Simma va à présent poser une question et je donne maintenant la parole à M. le juge Simma pour qu'il pose sa question.

Le juge SIMMA : Ma question est la suivante :

Les plaidoiries de la Serbie-et-Monténégro approchant de leur conclusion, je voudrais saisir l'occasion pour poser la question de savoir si la Serbie-et-Monténégro a quelque chose à ajouter au sujet des documents caviardés du Conseil suprême serbe de la défense ?

Je vous remercie.

Le PRESIDENT : Le texte de la question du juge Simma sera communiqué pour information à la Bosnie-Herzégovine et à la Serbie-et-Monténégro.

La Cour va se retirer à présent et les audiences reprendront le lundi 8 mai, à 10 heures.

L'audience est levée à 17 h 45

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