



Legal process as a tool to  
re-write history:  
Law, Politics and History

Sir Geoffrey Nice QC  
Gresham Professor of Law



This lecture will soon be available on the Gresham College website,  
where it will join our online archive of almost 1,500 lectures.

[www.gresham.ac.uk](http://www.gresham.ac.uk)



# Geoffrey Nice, Gresham Professor of Law

## 13 February 2013 Barnard's Inn Hall

- **‘Legal process as a tool to rewrite history - Law, Politics and History’**
- Trials at the ICTY concerned political violence and criminality that resulted from disintegration of a federation from which seven new successor states were formed.
- Problems in the very small state of Kosovo may be seen as the beginning of the violent process of disintegration, now known loosely as the Balkan wars of the 1990s. The conflict in Kosovo of 1998-9 may be seen as the end of those wars. Kosovo now seeks global recognition as an independent state but faces opposition both as to its international legal entitlements and as to how its history in the conflict should be viewed.
- Conflicts in the small state of Bosnia may be seen as the heart of the 1990's Balkan wars. Bosnia's complex constitution and uncertain political equilibrium have left it with an insecure future.
- The struggle for the interpretation of historical events through the trial record might be as important in long run as the determination of guilt of innocence of the individuals tried.
- Kosovo and Bosnia both face a former foe – Serbia - which might like to leave a ‘historical record’ that suggests moral equivalence between Serbia and Kosovo and between Serbia and Bosnia. In any event,
- Serbia may have shown itself skilful in the use of the court system and of the court record to write or re-write narratives of the conflicts in Kosovo and Bosnia?
- If it has, how can Kosovo and Bosnia fight back and write their own – or at least better - narratives

**Eichmann in Jerusalem: A Report on the Banality of Evil**  
**Hannah Arendt**

‘[E]ven the noblest of ulterior purposes, “the making of a record of the Hitler regime which would withstand the test of history..... can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgement, and to mete out due punishment.’

# WILLIAM WALLACE











**D**arum ist die daz ungeschicklichste sache  
der werlt die man sich kan dencken das  
man sich der gubne dinsts also besprecht  
Nur durch die dinstung und nicht der dinst  
in der sache der sache den dinstung der dinst

North Koreans

Irish

Albanians

Belgians

Russians

Norwegians

Poles

Croatians

Spaniards

Turks

Croats

Serbs

Germans

Russians

Dutch

Canadians

English

Bosnians

Americans

Kosovo Albanians

Japanese

French

Italians







Nürnberg, 1. Oktober (SZ, Dana)

In der Dienstagsmittag-Verhandlung um 15.55 Uhr gab das Nürnberger Oberste Militärgericht das Urteil gegen die einzelnen Hauptangeklagten bekannt, das von der ganzen Welt mit ungeheurer Spannung erwartet wurde und den Schlußstein setzt unter eine Bilanz von Völkermord und Verbrechen furchtbarer Ausmaße. Loedrichter Lawrence verkündete folgendes Strafmaß:

### Zum Tode verurteilt:

Göring:	Tod durch Strang
Ribbentrop:	Tod durch Strang
Keitel:	Tod durch Strang
Kaltenbrunner:	Tod durch Strang
Rosenberg:	Tod durch Strang
Frank:	Tod durch Strang
Frick:	Tod durch Strang
Streicher:	Tod durch Strang
Sauckel:	Tod durch Strang
Jodl:	Tod durch Strang
Seyß-Inquart:	Tod durch Strang

Schacht: nicht schuldig nach allen Anklagepunkten, sofortige Entlassung nach Ende der Verhandlung angeordnet.

Papen: nicht schuldig nach allen Anklagepunkten, sofortige Entlassung nach Ende der Verhandlung angeordnet.

Fritzsche: nicht schuldig nach allen Anklagepunkten, sofortige Entlassung nach Ende der Verhandlung angeordnet.

### In Abwesenheit:

Bormann: zum Tode durch den Strang verurteilt.

### Lebenslänglich Gefängnis:

Heß:	lebenslängliches Gefängnis
Funk:	lebenslängliches Gefängnis
Raeder:	lebenslängliches Gefängnis

### Gefängnisstrafen:

Dönitz:	zehn Jahre Gefängnis
Neurath:	fünfzehn Jahre Gefängnis
Schirach:	zwanzig Jahre Gefängnis
Speer:	zwanzig Jahre Gefängnis

### Letzte Meldung:

Die sowjetische Delegation weicht von der Entscheidung des Gerichtes ab, Schacht, Papen und Fritzsche freisprechen, und fordert, daß die drei Angeklagten hängen verurteilt werden müssen.

Ebenso weicht die sowjetische Delegation von dem lebenslänglichen Gefängnisurteil gegen Heß ab, der zum Tode hätte verurteilt werden sollen.

Weiter hätten OKW, Generalstab und Reichskabinett nach der Meinung der sowjetischen Richter als verbrecherische Organisationen verurteilt werden sollen.

### „Im Namen der Gerechtigkeit“

(SZ) Eine Herausforderung an die ganze Welt und alles, was Menschensität trägt, — an alles auch, was in dieser Welt als Norm der Gerechtigkeit und des Rechtes Gültigkeit hatte, ist in Nürnberg mit einem Rechtspruch beantwortet worden, der nicht nur Schuldige aburteilt, sondern darüber hinaus für die ganze Welt zugleich auch altes Recht neu feststellt und verankert!

Der Begriff „Völkerrecht“ hat eine neue, tiefere Bedeutung bekommen! Gegen die in der Geschichte beispiellose Vergewaltigung aller der Prinzipien und Maßstäbe, die das Leben der Menschen und Völker bestimmen, haben die Männer, die in Nürnberg vor Gericht standen und geurteilt haben, vor den Augen der Welt statuiert, daß derjenige zum Verbrecher wird, der sich gegen die Gesetze der Menschenordnung vergreift. Mögen diese Gesetze geschildert oder ungeschrieben sein, — sie müssen „heller“ Gesetz sein und klarer, wenn



Funk: lebenslänglich



Dönitz: zehn Jahre



Neurath: Fünfzehn Jahre

lebenslänglich

zum Tode

zum Tode

zum Tode

zum Tode

Jodl: zum Tode

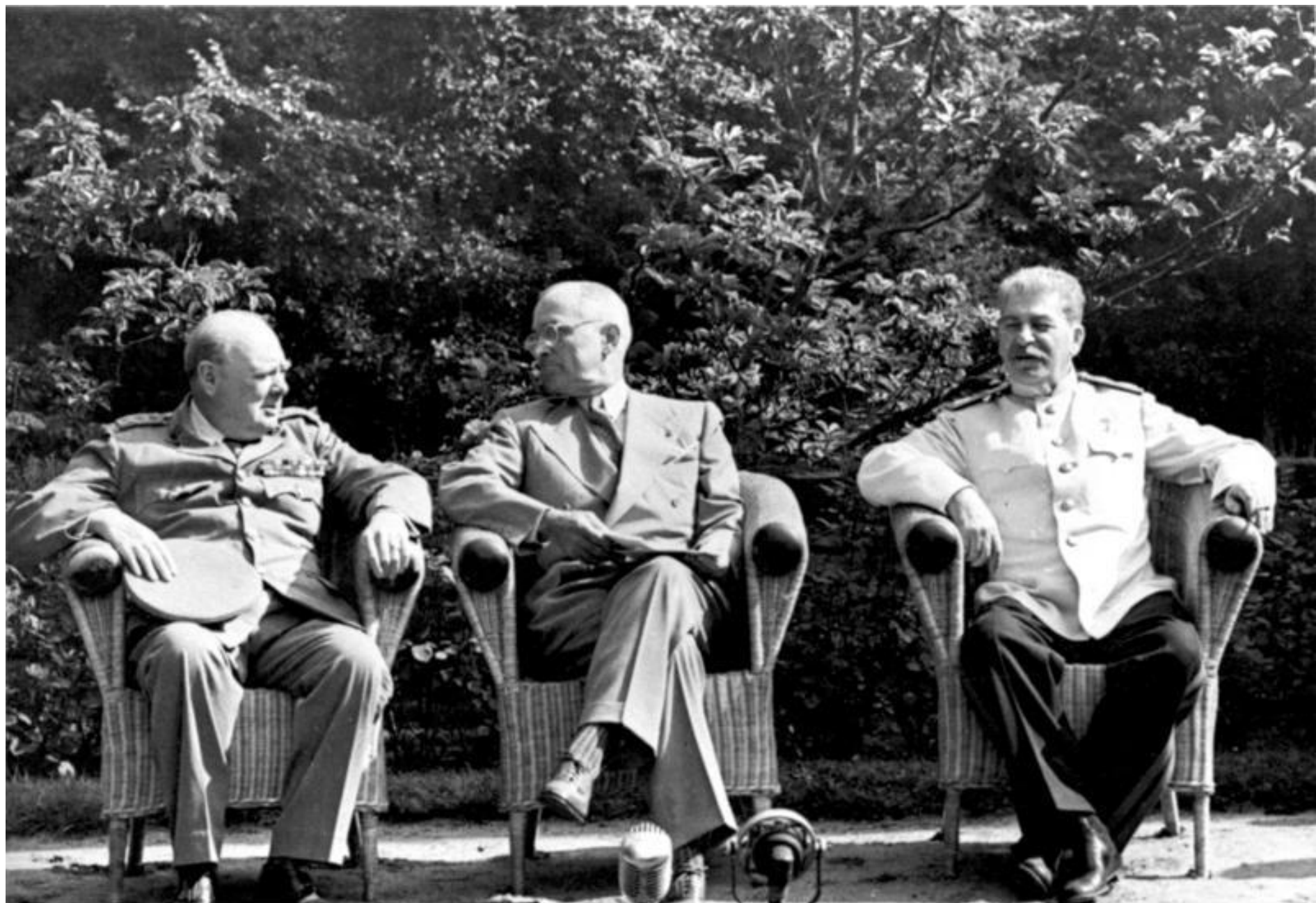
Papen: nicht schuldig

Seyß-Inquart: zum Tode

Speer: Zwanzig Jahre







Bundesarchiv, Bild 183-H27035  
Foto: o.Ang. | Juli 1945

**Oral Summary of Judgment, Kupreskic et al.  
14 January 2000**

‘the primary task of this Trial Chamber was not to construct a historical record of modern human horrors in Bosnia-Herzegovina. The principal duty of our Trial Chamber was simply to decide whether the six defendants standing trial were guilty of partaking in this persecutory violence or whether they were instead extraneous to it and hence, not guilty.’



# Judge Wald

“Initially the Tribunal was urged to make detailed findings about the social and political etiology of events leading up to the atrocities on trial. This, it was suggested, would provide an antidote to revisionist history by preserving adjudicated accounts of what actually happened in the foreplay to the Bosnian conflict. As a result, dozens of pages in ICTY judgments focus on the causes and precursors of the 1991 outbreak of hostilities. However, commentators, citizens, and officers of the implicated countries increasingly suggest that the adversarial trial process and the findings of judges may not produce the best approximations of history. Moreover, the “adjudication” by ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation.”

# Yugoslav Tribunal Statute

- Article 29
- Co-operation and judicial assistance
- 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
- 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) the identification and location of persons;
  - (b) the taking of testimony and the production of evidence;
  - (c) the service of documents;
  - (d) the arrest or detention of persons;
  - (e) the surrender or the transfer of the accused to the International Tribunal

# Yugoslav Tribunal Rules

- Rule 54
- General Rule
- (Adopted 11 Feb 1994, revised 30 Jan 1995, amended 6 Oct 1995)
- At the request of either party or proprio motu, a Judge or a Trial Chamber
- may issue such orders, summonses, subpoenas, warrants and transfer orders as may
- be necessary for the purposes of an investigation or for the preparation or conduct of
- the trial.
- Rule 54 bis
- Orders Directed to States for the Production of Documents
- (Adopted 17 Nov 1999)
- (A) A party requesting an order under Rule 54 that a State produce documents or
- information shall apply in writing to the relevant Judge or Trial Chamber and
- shall:
- (i) identify as far as possible the documents or information to which the
- application relates;
- (ii) indicate how they are relevant to any matter in issue before the Judge
- or Trial Chamber and necessary for a fair determination of that matter;
- and
- (iii) explain the steps that have been taken by the applicant to secure the
- State's assistance.
- (B) The Judge or Trial Chamber may reject an application under paragraph (A) in
- limine if satisfied that:
- (i) the documents or information are not relevant to any matter in issue in
- the proceedings before them or are not necessary for a fair
- determination of any such matter; or
- (ii) no reasonable steps have been taken by the applicant to obtain the
- documents or information from the State.
- (Amended 12 Apr 2001)

# Serbia's position

... I wish to emphasise that we have not provided new excuses but instead we have raised perfectly legitimate objections under Rule 54 bis (A). Of course Serbia and Montenegro has the right to do so under the Statute and Rules, **and in this the government is indeed an adverse party to litigation as any other government would be and has been in a similar procedure.** Of course this does not mean that the government is not assisting the International Tribunal as the Prosecution contends. The Prosecution may or may not agree with our objections, but it has no right to accuse of bad faith and non-cooperation a state that is fulfilling its obligations under the Statute, **and it exercises its rights under Rule 54 bis.** This is even more so when the state Serbia-Montenegro was actually following what was ordered by this Chamber

It should be remembered that it is this government that arrested and surrendered Mr. Milosevic in the first place. It should also be remembered that Mr. Djindjic, who was prime minister, took responsibility for this act, was assassinated in March, and at the same time from the investigation into his murder, it has transpired that there has been a further list of targeted officials, prominently including certain ministers responsible for cooperation with the International Tribunal. **To suggest in these circumstances that the government is actually withholding evidence is quite cynical, especially if one compares the armchair perspective of the Prosecution with the tangible challenges faced by the government.**



The commission's disputed cooperation with Slobodan Milosevic is a much bigger problem. Milosevic is posing very precise questions to witnesses which are based on very high-quality information on battlefield events, the engagement of personnel and units and the political background of steps taken by the warring sides. Milosevic never named the source of his information but the way his questions are posed indicate access to extensive information which only the Army of Serbia and Montenegro has in a number of military sites. Namely, apart from the documents in archives, Milosevic also cites sensitive information from the time when he was already in jail.

interested in the number of bullets. You do not get into the economy of bullet manufacture.

That economy must ensure that production of all means of war that we have goes smoothly.

Pavle BULATOVIĆ:

And it does not refer to that kind of companies only. The Federal Government passed a decree on companies, which have special significance for our defence. We make contracts with them and plan production, i.e. services which should meet all our needs.

Slobodan MILOŠEVIĆ:

Do you remember how ŠPER /as written/ did it in Germany, and he was by far the most efficient minister of economy. They captured half the world. Wartime organisation of the Ministry of Economy in relation to the needs of let us say the Army, does not involve market relations or currency values any more. It must be as follows. ŠAINOVIĆ, who is Minister of Economy, must have a plan. And then he says – officer in charge of the ammunition production is obliged to provide this and that amount of brass, this and that amount of some raw material, this and that amount of lead, this and that amount of copper, etc. That is a daily, weekly, monthly amount needed for unhindered operation of the factory. Then he knows what he gets from *Bor* and what is the dynamics of supply. He knows what he gets from *Kablavi*, what he gets from steelworks, etc. He makes an overview of what he is supposed to receive in kind. That is where counting of prices stops because there is no economy.

-20-

War is not economy, but, at the same time, it is the largest economy because everything must be rationalised.

Therefore, here it is not the question of whether we respond to those needs, but if we do not respond to the needs adequately, it is the same as if we have not responded at all. If you simulate that you have resolved something, then we would

Radoje KONTIĆ:

We formed the group for current issues. It has to finish this job. Of course, there must be an active involvement of the General Staff in this matter.

24.

Momčilo PERIŠIĆ:

The issue of supply for the population must be included in it too...

Slobodan MILOŠEVIĆ:

It should be made in such way so that we can see how the country would function in the state of war!

Zoran LJILIĆ:

It is clear. I think that 30 days are enough to do that.

Slobodan MILOŠEVIĆ:

All salaries and pensions are to be cancelled; the basic necessities are to be determined per a household member; rationalised supply of employees – everything must be included. Furthermore, the food, necessary clothes, medicines must be included too! There are no more shopping, selling, trade; black marketers are to be arrested and executed by firing squad!

You say here, “first 15 days of terrorist...” and you act with 130,000 /sic/. You don’t act with 130,000 people, you have additional 100,000 police forces that will act in terrorist and other situations, special police units – they will all act together with the Army.

Momčilo PERIŠIĆ:

Fine, I thought that I was not in charge of proposing all that?

Slobodan MIL.OŠEVIĆ:

Yes, I understand. But all this must be interrelated.

For example, the most beautiful town in Kosovo, the one in which the Šiptar /derogatory for Albanians/ separatists invested the most, i.e. the Đakovica group, is Đakovica. There is no prettier, richer or more organised town in Kosovo than Đakovica is. It is situated in the most beautiful place, and there is a former barracks a bit uphill, currently abandoned.

25.

An armoured motorised unit should be relocated there so that they know that their treasure will under attack tomorrow if something that must not and need not starts happening. They need to know that the army exists and that it is there.

Momčilo PE:RIŠIĆ:

But Mr. President, we have a barracks there.

Slobodan MIL.OŠEVIĆ:

You have nothing there!

Momčilo PE:RIŠIĆ:

I have a battalion there.

Slobodan MIL.OŠEVIĆ:

No you don't, you don't, you have an empty barracks!

Momčilo PE:RIŠIĆ:







[Redacted text block]

[Redacted text block]

10.

Current issues

Under this item, President of FR Yugoslavia Zoran LJILIĆ advised the members of the Supreme Defence Council of the need to relieve Major General Djuro DŽEPINA, head of the 4<sup>th</sup> Administration of the General Staff of the Army of Yugoslavia, of his duties, pursuant to the Law on the Army of Yugoslavia, and record him as undergoing treatment on sick leave.

Federal Defence Minister Pavle BULATOVIĆ informed the Supreme Defence Council of the discussions of the Yugoslav delegation led by Deputy Federal Prime Minister Mr Nikola ŠAINOVIĆ in the Ukraine and at meetings with the representatives of the Defence Ministry of the Russian Federation. More detailed written reports shall be submitted in due course.

\* \* \*

No stenographic record was kept of this session.

SECRETARY  
Major General

Dr Slavoljub ŠUŠIĆ  
/signed/

PRESIDENT

Zoran LJILIĆ  
/signed/

/coat of arms/

**FEDERAL REPUBLIC OF YUGOSLAVIA**SP /strictly confidential/ no. 9-229 July 1995

BELGRADE

D E F E N C E

S T A T E S E C R E T

**M I N U T E S**

of the **THIRTY-NINTH** session of the Supreme Defence Council  
held on 29 July 1995

The session was chaired by the President of the Federal Republic of Yugoslavia Zoran LJLIĆ, and attended, in addition to the members of the Supreme Defence Council, President of Serbia Slobodan MILOŠEVIĆ, and President of Montenegro Momir BULATOVIĆ, also by Federal Prime Minister Dr Radoje KONTIĆ, Federal Defence Minister Pavle BULATOVIĆ, Chief of the General Staff of the Army of Yugoslavia Colonel General Momčilo PERIŠIĆ, and Major General Dr Slavoljub ŠUŠIĆ, secretary of the Supreme Defence Council.

**Agenda:**

1. Assessment of the current military and political situation in the region and proposal of measures for strengthening the security and defence of the Federal Republic of Yugoslavia.
2. Current issues.

\* \* \*

The Supreme Defence Council did not declare any view regarding the Minutes of the previous, 38<sup>th</sup> session, since the session had been convened urgently and the background materials had not been provided in advance.

Item 1

The conclusions from the assessment of the current military and political situation in the region and proposed measures for strengthening the security and defence of the Federal Republic of Yugoslavia were presented by Chief of the General Staff of the Army of Yugoslavia Colonel General Momčilo PERIŠIĆ. According to the assessment of General PERIŠIĆ, with the development of the situation in the broader international arena and on the frontline, the crisis in the territory of the previous Yugoslavia had entered a critical stage characterised by an increasingly prominent orientation towards the war option.

ICJ Judgment  
26 February 2007

Sarajevo  
6 October 2012  
Phon van den Biesen



## *Jurisdiction*

“The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*), pp. 617-621, paras. 35-41).

[...]

It has **no power to rule on alleged breaches of other obligations under international law, not amounting to genocide**, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.” (Para 147)

*Relationship RS/FRY paras. 235-241*

**“The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.” (Para 241)**

[firmly confirmed by the ICTY Trial Chamber in its Judgement (a.o.) in the Perisic-case, 6 September 2011, appeal is pending]

## *Specific Intent*

“In addition to those mental elements, **Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, . . . [the protected] group, as such”**. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. **It is often referred to as a special or specific intent or *dolus specialis*** ; in the present Judgment it will usually be referred to as the “specific intent (*dolus specialis*)”. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.” (Para 187)

## *Specific Intent*

“The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. **Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.**” (Para 189)

## *Specific Intent and “Ethnic Cleansing”*

“[...] In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, **and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own.** That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.” (Para 190)

*Killings, paras. 245-277*

“(…) **The Court thus finds that it has been established by conclusive evidence** that **massive killings** of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims. (Para 276)

The Court is however not convinced, on the basis of the evidence **before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*)** on the part of the perpetrators to destroy, in whole or in part, the group as such. [...] The killings outlined above **may amount to war crimes and crimes against humanity**, but the Court has no jurisdiction to determine whether this is so. [...]” (Para 277)

*Causing serious bodily and mental harm, paras. 298-318*

“Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, **the Court considers that it has been established by fully conclusive evidence** that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although **they too may amount to war crimes and crimes against humanity**, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.” (Para 319)

*Deliberately inflicting conditions of life....etc. paras. 323-328*

**“The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence.** It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph (c), of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. [...]” (Para 328)



### *Deportation and expulsion*

**“The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina.** With regard to the Respondent’s argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification could be accepted in the face of proof of specific intent (*dolus specialis*). However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).” (Para 334)

*Destruction of historical, cultural property/objects, paras. 335-344*

**“In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question.**

The Court takes note of the submission of the Applicant that the destruction of such heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention [...].”

(Para 344)

*Camps, paras. 345-354*

“On the basis of the elements presented to it, **the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps.** However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (*dolus specialis*).” (Para 354)

## *Srebrenica*

“The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that **these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.**”  
(Para 297)

## *Srebrenica*

“[...] It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). **It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above).** Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.” (Para 386)

## *Srebrenica*

**“In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. [...] The functions of the VRS officers including general Mladic, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska.” (Para 388)**

## *Srebrenica – Complicity*

“(…) The Court sees no reason to make any distinction of substance between “**complicity** in genocide”, within the meaning of Article III, paragraph (*e*), of the Convention, and the “**aid or assistance**” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 (…).” (Para 420)

## *Srebrenica – Complicity*

“Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): **the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator.** But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless **at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.** If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.” (Para 421)



## *Srebrenica – Complicity*

“The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. **There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.(...)**” (Para 422)

## *Srebrenica – Complicity*

“(…) However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because **it is not established beyond any doubt** in the argument between the Parties **whether the authorities of the FRY supplied — and continued to supply — the VRS leaders** who decided upon and carried out those acts of genocide with their aid and assistance, **at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.**” (Para 422)

## *Srebrenica – Complicity*

“A point which is clearly decisive in this connection is **that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken**; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.” (Para 423)

UNITED NATIONS



INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991



02X-103

NATIONS UNIES

12/30

TRIBUNAL INTERNATIONAL CHARGE DE POURSUIVRE LES PERSONNES PRESUMES RESPONSABLES DE VIOLATIONS GRAVES DU DROIT INTERNATIONAL HUMANITAIRE COMMISES SUR LE TERRITOIRE DE L'EX-YOUGOSLAVIE DEPUIS 1991

To: Patrick Lopez Terres, Chief of Investigations	FROM: Eamonn Smyth, Head of Mission, Skopje and Pristina
FAX NO.: 8586	FAX NO.: 8942
TEL NO.:	TEL NO.:
ATTN.: As directed by Patrick Lopez Terres	REF.: RP/79/03
DATE: 30 October 2003	PAGES:
DRAFTED ES BY: [Signature]	AUTHORISED ES BY: [Signature]

SUBJECT: ISSUES FROM THE CHIEF PROSECUTOR'S VISIT MEETING WITH THE DIRECTOR, DOJ, UNMIK

Patrick,

Following the visit on 23 October 2003, I met Mr. Paul Coffey, Director, Department of Justice, UNMIK yesterday evening (29 October). Please find enclosed:

a. The Albanian issue.

Please find enclosed the relevant material received from DOJ relating to this issue. Photographs of the location will be provided later. Marked Annex 'A'

b. War Crimes cases - Pre-trial - UNMIK

Please find the current list. Marked Annex 'B'

c. Information regarding UNMIK War Crimes arrests

Please find the 'Request' for the Conduct of an Investigation. Marked Annex 'C'

Regards

Eamonn

ICTY Investigations	
Date	03 NOV 2003
Name	P. LOPEZ-TERRES
Signature	[Signature]

**NOTICE OF CONFIDENTIALITY**

This facsimile transmission contains United Nations proprietary information that is strictly confidential and/or legally privileged, and is intended solely for the use of officials of the United Nations and/or the named recipient hereof. Any unauthorized disclosure, copying, distribution or other use of the information herein is strictly prohibited. If you have spontaneously received this facsimile transmission, please notify the United Nations immediately.

Churchillplein 1, 2517 JW The Hague, P.O. Box 13888, 2501 EW The Hague, Netherlands

(c:\work\my\deltrans\files\reports\0003\tp\_79\_03.doc)

CONFIDENTIAL.

THIS INFORMATION IS NOT FOR CIRCULATION.

THIS INFORMATION IS SUBJECT TO JOURNALISTIC CONFIDENTIALITY

#### SUMMARY

Beginning in mid-1999 (and possibly earlier), between 100 and 300 people were abducted and taken by truck and van to detention facilities in or near the northern Albanian towns of Kukes and Tropoje. Most of these people were Serbian men from Kosovo taken captive between June and October 1999. Beginning in August 1999, some of these captives (24-100) were transferred from northern Albania to secondary detention facilities (private homes and rough industrial compounds) in central Albania, mainly near the town of Burrel (or Burreli), about 110 kilometers southwest of Kukes. Captives were also moved to detention facilities near Peshkopi, about 50 kilometers east of Burrel.

The captives taken to central Albania were again moved, in small groups, to a private house south of Burrel that was set up as a makeshift clinic. There, medical equipment and personnel were used to extract body organs from the captives, who then died. Their remains were buried nearby. The organs were transported to Rinas airport near Tirana (approximately 75 kilometers southwest of Burrel) and flown abroad. Other captives taken to the house/clinic near Burrel included a smaller number of females from Kosovo, Albania and eastern Europe. The last delivery of captives to the house/clinic was reported in spring or early summer of 2000.

In addition to captives taken to Albania alive, an unknown number of bodies of Serbian civilians killed in Kosovo were transported to Albania and buried in remote locations.

This summary is based on interviews with at least eight sources, all ethnic Albanians from Kosovo or Montenegro who served in the Kosovo Liberation Army. Four sources directly participated in the transport of at least 90 ethnic Serbs and others to detention facilities in northern and central Albania. Of these, three sources delivered captives to the house/clinic south of Burrel, two sources claim to have participated in the disposal of human remains near the house and one source claims to have participated in the delivery of body parts and/or organs to Rinas airport near Tirana. None of the sources witnessed the medical operations.

According to all sources, the transports and surgical procedures were carried out with the knowledge and/or active involvement of mid-level and senior KLA officers as well as doctors from Kosovo and abroad. The operation was supported by men with links to Albanian secret police operatives of the former government of Salih Berisha.

#### SITE LOCATION



CONFIDENTIAL.

THIS INFORMATION IS NOT FOR CIRCULATION.

THIS INFORMATION IS SUBJECT TO JOURNALISTIC CONFIDENTIALITY

#### SUMMARY

Beginning in mid-1999 (and possibly earlier), between 100 and 300 people were abducted and taken by truck and van to detention facilities in or near the northern Albanian towns of [REDACTED]. Most of these people were Serbian men from Kosovo taken captive between June and October 1999. Beginning in August 1999, some of these captives (24-100) were transferred from northern Albania to secondary detention facilities (private homes and rough industrial compounds) in central Albania, mainly near the town of Burrel (or Burreli), about 110 kilometers southwest of Kukes. Captives were also moved to detention facilities near [REDACTED], about [REDACTED] kilometers [REDACTED] of Burrel.

The captives taken to central Albania were again moved, in small groups, to a private house south of Burrel that was set up as a makeshift clinic. There, medical equipment and personnel were used to extract body organs from the captives, who then died. Their remains were buried nearby. The organs were transported to Rinas airport near Tirana (approximately 75 kilometers southwest of Burrel) and flown abroad. Other captives taken to the house/clinic near Burrel included a smaller number of females from Kosovo, Albania and eastern Europe. The last delivery of captives to the house/clinic was reported in [REDACTED] 2000.

In addition to captives taken to Albania alive, an unknown number of bodies of Serbian civilians killed in Kosovo were transported to Albania and buried in remote locations.

This summary is based on interviews with [REDACTED] sources, all ethnic Albanians [REDACTED] who served in the Kosovo Liberation Army. [REDACTED] the transport of at least 90 ethnic Serbs and others to detention facilities in northern and central Albania. [REDACTED] delivered captives to the house/clinic south of Burrel. [REDACTED] the disposal of human remains near the house and [REDACTED] the delivery of body parts and/or organs to Rinas airport near Tirana. None of the sources witnessed the medical operations.

[REDACTED] the transports and surgical procedures were carried out with the knowledge and/or active involvement of mid-level and senior KLA officers as well as doctors from Kosovo and abroad. The operation was supported by men with links to Albanian secret police operatives of the former government of Saliu Berisha.

#### SITE LOCATION

specific roles in the operation. This was due in part to fears that the information could be traced back to them. However, four sources who say they directly participated in transports gave these accounts.

Source #2

*This man recalls participating in three shipments of captives and human remains from Kosovo to northern Albania and two deliveries of captives to a house/clinic in central Albania.*

My first delivery from Kosovo was around July 20, the second was around July 23 and the last one was in early August. On the morning of July 20 (plus or minus one day) I was in a town near my village, east of Peja. I came to see my superior PA. He said he was asked by RZ to get a driver for some job. I knew that this group (or "gang") was dangerous for they were well known for killing Serbs in Pasino Selo. At that time our town had no Serbs. I was told I would have to drive a truck from Peja to Prizren. PA told me to do the job, keep my mouth shut and forget about the task so I could live to reach old age. I was given a dusty dirty SAAB. The freezer unit (in the container) didn't work. I drove from Peja to Prizren, 80km. I drove for an hour and a half. PA was the only one with me on the truck. After arriving in Prizren he told me to turn toward Suva Reka. I drove 15 minutes. We passed by Ljutoglav and then pulled over 1km after Ljutoglav. Ljutoglav is between Suva Reka and Prizren. I turned right. There was one big three floor house on the right side and there I turned right and drove between 100 to 200m. There were thirty prisoners there, including one woman, waiting for us and 10 KLA soldiers. The prisoners obviously had a long walk. They were dusty and dirty and some of them had bruises. The atmosphere was normal there and at the beginning I thought they would be exchanged for our men. There was one KLA soldier interrogating a few Serbs. One of them said he was Dragan Jacimovic from Silovo. He was about 40. Silovo is near Gnjilane. Other Serbs were from Retimlje; Ocerusa and Gnjilane. The people were forced onto truck. I drove back to Prizren. PA got off in Prizren and two KLA who had joined me in the cabin stayed all the way. They were not in uniforms. We had a discreet escort in Golf 2 with four KLA in it. One of the KLA men in the cabin was very unpleasant. I asked him about the destination. He told me to shut up and drive.

As we were leaving Prizren I had to pull over because one of the vehicles had a problem with a tire.

Near the main road there arrived a (separate) group of fifteen captured Serbs. A jeep was slowly driving ahead of them with KLA inside. Four or five KLA were walking along with the Serbs. They stopped to smoke a cigarette. Among the men I recognized Vlastimir Stevanovic from Prizren. He worked as a waiter at the Army club in Prizren. He was

CKX-103

F6130

specific roles in the operation. This was due in part to fears that the information could be traced back to them. [REDACTED]

[REDACTED]  
[REDACTED] three shipments of captives and human remains from Kosovo to northern Albania and two deliveries of captives to a house/clinic in central Albania.

My first delivery from Kosovo was around [REDACTED] On the morning of [REDACTED] (plus or minus one day) I was in a town near my village, [REDACTED] I came to see [REDACTED] I knew that this group (or "gang") was dangerous for they were well known for killing Serbs. [REDACTED] At that time our town had no Serbs. I was told I would have to drive a truck from [REDACTED] to [REDACTED] told me to do the job, keep my mouth shut and forget about the task so I could live to reach old age. I was given a dusty dirty [REDACTED]

[REDACTED]  
[REDACTED] There were [REDACTED] prisoners there, [REDACTED] waiting for us and [REDACTED] KLA soldiers. The prisoners obviously had a long walk. They were dusty and dirty and some of them had bruises. The atmosphere was normal there and at the beginning I thought they would be exchanged for our men. [REDACTED]



C-12X-103

P 11/30

color was pale yellow). The source said that he believed human remains were buried behind the house and in a nearby graveyard.

Source #4

This man was involved in burying Serb civilians killed in the Djakovica area. He also was involved in at least three transports of captives from Kosovo to northern Albania.

After the war ended there was revenge. Then they started to move (living) people away, to Biceaj and other places (in Albania). There were also truckloads of medical gear and supplies from Pristina, Djakovica, Prizren, (the KGB there), taken to Albania. They took a group of people, alive, from Prizren across the border at Vrmica along the main road... A second group was taken over Pastrik mountain to Tropoja. That was not the main road. It was wide enough for one vehicle.

I was ordered by men in Dzavid Elshani's unit (the source says Elshani commanded the KLA's 128th special unit that wore black uniforms) to assist in the transports. They told us to go to Kukës, then Biceaj. There were four of us ordered to do this, but there were others. In the first group there were 15 or 20 people, all men. They were healthy and strong aged late 20s to late 40s. They were ordinary civilians, Serbs. Villagers. The first group was from Zociste, Orahovac, Musutiste (a village near Suva Reka), Ljubizda. Return. The truck we used was an ordinary truck, like a refrigerator lorry. It didn't have air conditioning or anything else. I thought they would be killed but we were under strict orders not to hurt the captives not to beat the captives and to give them food and water. This was after the revenge killings, in late July or early August.

There were two cars in front of us to make sure no one would try to stop us. But no one stopped us. I was sitting next to the driver. We made it to the border fast, in 40 minutes. But the road on the Albanian side was bad and it took two hours to get to Biceaj. We drove to a house on the outskirts of the village. A second group of (Albanian men) was there and took the captives into a house. There was one man there who people called a doctor. He was an Albanian from Kosovo. The people at the house were again talking about how the captives were not to be mistreated.

The second transport happened four or five days later. There were 20 or 25 men, mainly from Orahovac and Djakovica.

We picked them up near the auto school (auto skola) in Prizren. It was daytime. As you drive on the left side, toward Albania, the driving school is on the left side and the men were picked up there. The truck was already there when I arrived. The men were the same age, healthy. I didn't recognize any of them. It was dark in the truck. We headed toward the border, this time going the small road through Nasec over Pastrik mountain. Near the border we handed off the men to another group who drove them into Albania, to Tropoja.

After that they stopped using me, but I know from others that the transports continued, at

C/2X-103

P11/30

color was pale yellow). The source said that he believed human remains were buried

This man was involved in burying Serb civilians killed in the [redacted] area. He also was involved in [redacted] transports of captives from Kosovo to northern Albania.

After the war ended there was revenge. Then they started to move (living) people away, to [redacted] and other places (in Albania). There were also truckloads of medical gear and supplies from [redacted] taken to Albania. They took a group of people, alive, from [redacted] across the border at [redacted] along the main road... A second group was taken over [redacted] to [redacted]. That was not the main road. It was wide enough for one vehicle

[redacted]  
[redacted] In the first group there were [redacted] people, all men. They were healthy and strong aged late 20s to late 40s. They were ordinary civilians, Serbs, Villagers. The first group was from [redacted]. The truck we used was an ordinary truck, [redacted] It didn't have [redacted] or anything else. I thought they would be killed but we were under strict orders not to hurt the captives not to beat the captives and to give them food and water. This was after the revenge killings, [redacted]

[redacted] But no one stopped us. [redacted] We made it to the border fast, in [redacted] But the road on the Albanian side was bad and it took two hours to get to [redacted] We drove to a house on the outskirts of the village. A second group of (Albanian men) was there and took the captives into a house. There was one man there who people called a doctor. [redacted] The people at the house were again talking about how the captives were not to be mistreated.

[redacted]  
[redacted]  
[redacted] the transports continued, at