BHY

CR 2006/7 (translation)

CR 2006/7 (traduction)

Thursday 2 March 2006 at 3 p.m.

Jeudi 2 mars 2006 à 15 heures

10 The PRESIDENT: Please be seated.

Ms STERN: Madam President, Members of the Court, having this morning set out the facts regarding rape and sexual violence, I shall now begin the second part of my presentation and show the Court that rape and sexual violence are acts prohibited under Article II of the Genocide Convention.

II. RAPE AND SEXUAL VIOLENCE ARE ACTS PROHIBITED UNDER ARTICLE II OF THE GENOCIDE CONVENTION

39. Although acts of sexual violence are not expressly included in the acts constituting genocide listed in Article II of the Genocide Convention, they can nevertheless be brought within the scope of each of the listed categories. The specified categories of act have been drafted in sufficiently generic and broad terms to be capable of encompassing all the forms of genocide that the human imagination might be capable of devising. We know that for the *actus reus* of the crime of genocide to be established, it suffices that the acts committed fall within the scope of *just one* of the categories listed in the Genocide Convention. So we will see that rapes and acts of sexual violence, which all come within the category of acts prohibited by Article II *(b)* and *(c)* of the Genocide Convention, may also fall within one or other of the three further categories of act covered by Article II, depending on the circumstances in which they were committed. First of all it is undeniable that:

In the present case all the rapes and acts of sexual violence are acts of genocide under Article II *(b)* of the Genocide Convention, in that they are acts causing serious bodily or mental harm

40. On several occasions the United Nations General Assembly has made a point of stressing the *"extraordinary suffering"*[1] endured by the victims of rape and sexual violence. It is beyond dispute from the point of view of Article II *(b)* of the Convention that rapes and acts of sexual violence have the most significant repercussions, for it is difficult to see how it could be

[1]See *inter alia* United Nations documents, doc. A/RES/48/143, "Rape and abuse of women in the areas of armed conflict in the former Yugoslavia", 5 January 1994, Preamble, para. 14; doc. A/RES/50/192, "Rape and abuse of women in the areas of armed conflict in the former Yugoslavia", 23 February 1996, para. 8.

11 disputed — except of course by denying that the acts ever took place — that these are the very *quintessence* of serious bodily or mental harm.

41. *Serious bodily harm* means any form of bodily injury or any act that harms the physical state of the victim, any act that entails certain physical injuries. In the case of rapes or acts of sexual violence it needs to be stressed that one of the primary and immediate effects of the rape is first of all intense physical pain, sometimes bordering on real physical "agony". Of course, over and above the immediate physical pain felt by the victim, rape may in certain cases have physical after-effects, may be accompanied by major, even irremediable, gynaecological problems that may cause sterility. Again it goes without saying that acts of mutilation of the genital organs are capable of "causing great suffering or serious injury to body and health"[2], which, I think, calls for no further comment. It also goes without saying that the physical suffering caused by rapes and acts of physical violence is associated with incalculable mental and psychological suffering.

42. Although of course *serious mental harm* relates to non-physical attacks, it is apparent that it continues far beyond the perpetration of the rape or act of sexual violence. Reflecting the perpetrator's profound contempt for the victim — as a serious attack on the victim's dignity — rapes and acts of sexual violence are in effect acts intended to humiliate and dehumanize the victim, in that they affect the victim in the core of his or her being. As General Dallaire put it: "Massacres kill the body. Rape kills the soul."[3]

43. The psychological effects of rape and other forms of sexual attack have been specifically analysed in the report of the United Nations Commission of Experts in the following terms:

12

> "Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim's human dignity and *is what makes rape and sexual assault such an effective means of 'ethnic cleansing'*."[4]

---

[2] *Prosecutor* v. *Dusko Tadić alias "Dule"*, case No. IT-94-1-T, Trial Chamber, Judgement, 7 May 1997, para. 243.

[3] Examination-in chief of Brent Beardsley, Former Aid to the Force Commander, General Roméo Dallaire, United Nations Peace-keeping mission in Rwanda, *Bagasora, Kabiligi, Ntabakuze, Nsengiyumva* (ICTR-98-41-T), Trial transcript of 3 February 2004, cited by K. Askin "Gender Crimes Jurisprudence in the ICTR. Positive Developments", *Journal of International Criminal Justice,* Vol. 3, No. 4, 2005, p. 1008.

[4] United Nations, Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), doc. S/1994/674/Add. 2, Vol. V, 28 December 1994, "Rape and sexual attacks", p. 12, para. 25.

44. The mental suffering that follows rapes and acts of sexual violence has important traumatic consequences — generally expressed as "Rape Trauma Symptom" — which may continue throughout the life of the victim, whether as a state of permanent distress, insomnia, incessant nightmares, depression, phobias or even disorders leading victims to refuse any sexual relationship. Such distress is perhaps most extreme when the woman falls pregnant following the rape. Such a pregnancy in these circumstances creates a terrible dilemma for the victim: she is torn between a mother's instinctive desire to keep her child and the wish to seek an abortion or, if it is medically too late for an abortion, to abandon her child: this is a choice as dramatically painful as "Sophie's Choice"[5], which no woman in the world would ever wish to face. A study which Bosnia and Herzegovina cited in its Reply[6] by doctors from a gynaecological clinic in Zagreb which took in raped Bosnian women emphasized this profound traumatism when it described how these women lived through their pregnancies:

> "at the end of almost every session, the pregnant women in the present study group asked for help in ridding themselves of the 'unnatural body'. They called the fetus 'a thing'. They wished that they had a tumour instead of a baby, because a tumour could be removed easily."[7]

"A tumour rather than a baby": it is almost impossible for me to speak these words, and yet a woman managed to speak them not so long ago . . . There are many who rightly stress this unspeakable aspect of the mental suffering that originates from sexual violence: Amnesty
13 International has spoken of a "wound to the soul"[8], and a French historian has described rape, in a work entitled *L'histoire du viol*[9], as "mental murder".

45. These psychological consequences are particularly severe within Muslim society, where the reputation of women has a meaningful place in the reputation of the family. Over and above the humiliation and the suffering of the victim, it is the entire community that is disgraced. These

---

[5]William Styron, *Sophie's Choice,* Random House, 1994.

[6]Reply of Bosnia and Herzegovina, 23 April 1998, Chapter 7, para. 147.

[7]*Dragica Kozaric-Kovacic et al.*, "Rape, Torture and Traumatization of Bosnian and Croatian Women: Psychological Sequelae", *Amer. J. Orthopsychiat.*, Vol. 65, No. 3, July 1995, pp. 431-432 (Reply, Annex 78).

[8]"Amnesty International dénonce les viols qui se poursuivent en Bosnie", *Le Monde*, 23 January 1993, p. 3 (Reply, Annex 86).

[9]Georges Vigarello, *Histoire immédiate*, Paris, 1998.

issues have been illustrated by the ICTR in a way that cannot be bettered, in a case in which it is emphasized, and I quote:

> "*the harm* caused [a rape] need not bring about death but causes handicap such that the individual will be unable to be a socially useful unit or a socially existent unit of the group"[10].

46. Do I need to stress, Madam President, after what I have just stated, that it is indisputable that rapes and acts of sexual violence fall within the terms of the phrase "causing serious bodily or mental harm", the head of genocide set out in Article II *(b)* of the Convention. The initiative in expressly stating this obvious fact came from the International Criminal Tribunal for Rwanda; in the celebrated *Akayesu* case, the first in which a charge of genocide was upheld by an international tribunal, and a landmark in the development of the law, inasmuch as the court held that the concept of serious bodily or mental harm encompassed — without being limited thereto — "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution"[11]. As regards rapes and acts of sexual violence, the Tribunal emphasized that these acts:

14

> "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. *Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm*."[12]

47. The subsequent jurisprudence of international criminal tribunals has consistently followed this approach, expressly citing acts of sexual violence and rape in their indictments under the head of "serious bodily and mental harm"[13]. Recent confirmation can be found in the

---

[10]ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1. Trial Chamber II, Judgement, 21 May 1999, para. 107; emphasis added.

[11]ICTR, *Prosecutor* v. *Jean-Paul Akayesu,* ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 504; *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1, Trial Chamber II, Judgement, 21 May 1999, para. 110; *Prosecutor* v. *Georges Andersen Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 51; *Prosecutor* v. *Alfred Musema*, ICTR-96-13, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 156; *Prosecutor* v. *Ignace Bagilishema*, ICTR-95-1A-T, Trial Chamber I, Judgement, 7 June 2001, para. 59; *Prosecutor* v. *Laurent Semanza*, case No. ICTR-97-20-T, Trial Chamber III, Judgement and Sentence, 15 May 2003, paras. 320-321; *Prosecutor* v. *Juvénal Kajelijeli*, case No. ICTR-98-44A-T, Trial Chamber II, Judgement and Sentence, 1 December 2003, para. 815; *Prosecutor* v. *Sylvestre Gacumbitsi*, case No. ICTR-2001-64-T, Trial Chamber III, Judgement, 17 June 2004, para. 291.

[12]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-94-T, Trial Chamber I, Judgement, 2 September 1998, para. 731.

[13]ICTY, *Prosecutor* v. *Radovan Karadžić and Ratko Mladić*, cases No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 93. See ICTY, *Prosecutor* v. *Zejnil Delalić, Zdravko Mucić alias "Pavo", Hazim Delic, Esad Landzo alias "Zenga" ("Celebici"),* case No. IT-96-21-T, Trial Chamber II *quater*, Judgement, 16 November 1998, para. 486.

jurisprudence of the ICTY, more particularly in the *Krstić* case[14], in which the Tribunal held that "inhuman treatment, torture, rape, sexual abuse . . . are among the acts which may cause serious bodily or mental injury"[15].

48. In view of the preceding considerations it is difficult to see how it could be denied that the rape of a Bosnian Muslim woman amounts to "serious bodily and mental harm" inflicted on a member of the group of Bosnian Muslims, or that acts of sexual violence committed against non-Serb men amount to "serious bodily and mental harm" inflicted on a member of the group of Bosnian non-Serbs. It is an obvious fact. This serious bodily and mental harm is all the more grave because it is, so to speak, unending, as demonstrated by the touching testimony of a survivor of the Rwandan genocide, which can be read in a very moving book entitled *SurVivantes*, from which I will read a passage:

> "These victims are subjected to an unbearable paradox: they owe their survival to a rape. In most cases the killers had first massacred their families before their eyes, before abusing them and then sparing them. A paradox and a shocking piece of stagecraft: the killers let them live so that they would endure . . . *a hell worse than death* . . . So that [and the worst is I believe it] *so that survival would be worth nothing to them* . . . They held out during the genocide . . . They held out to survive that horror and now, having held out for ten years, *they are in a state of living death.* They are dying. That is precisely the power of genocide: *a horror at the time, but also a horror afterwards.* It is not the end of a genocide that completes the genocide, because inwardly there is never an end to a genocide. There is just an end to the killings, massacres, prosecutions [which is obviously essential] *but there is no end to the destruction.*"[16] *[Translation by the Registry.]*

15

In the present case all the rapes and acts of sexual violence are acts of genocide under Article II *(c)* of the Genocide Convention (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part)

49. Thus, although it is impossible to deny that acts of sexual violence fall within the provisions of Article II *(b)* of the Genocide Convention, it is also quite obvious that in the present case all the rapes and acts of sexual violence are acts of genocide under Article II *(c)* of the said

---

[14]ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33, Trial Chamber I, Judgement, 2 August, 2001, para. 513.

[15]*Ibid*., para. 513.

[16]Esther Majawayo and Souad Belhaddad, *SurVivantes. Rwanda Histoire d'un génocide*, éd. de l'aube, poche essai, 2004, p. 197; emphasis added.

Convention, which refers to the deliberate infliction on the group of "conditions of life calculated to bring about its physical destruction in whole or in part".

50. I would explain first that this phrase means "methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction"[17]. Thus what it is intended to cover are methods of destruction that act upon members of the group not immediately but gradually, and which are therefore inevitably far more insidious.

51. Rape may thus be regarded as a condition of life calculated to bring about the physical destruction of a group. As was expressly held by the ICTR:

> "[i]t is the view of the Trial Chamber that . . . the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part"[18].

52. The ICTY, too, in the amended indictment issued by the Prosecutor on 11 October 2002 against General Ratko Mladić, stated that the latter is accused of complicity in genocide for having, by his acts and omissions, participated in a joint criminal enterprise aimed at a form of partial

16 destruction of the Bosnian Muslims, which was effected, *inter alia*, by:

> "*the subjecting of Bosnian Muslims to conditions of life calculated to bring about their physical destruction*, namely through cruel and inhumane treatment, including torture, physical and psychological abuse, *sexual violence* . . ."[19].

It is thus clear that sexual violence is included among the conditions of life calculated to bring about the physical destruction of a group.

53. This point deserves more detailed explanation. First of all, we must keep in mind the fact already emphasized, that the consequences of rape and sexual violence go far beyond the damage caused to the physical and mental integrity of the victim, and have a more general scope.

---

[17]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-94-T, Trial Chamber I, Judgement, 2 September 1998, para. 505; *Prosecutor* v. *Alfred Musema*, ICTR-96-13, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 157; *Prosecutor* v. *Georges Andersen Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 52.

[18]ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1, Trial Chamber II, Judgement, 21 May 1999, para. 116; emphasis added.

[19]ICTY, *Prosecutor* v. *Ratko Mladić*, case No. IT-95-5/18-1, Amended Indictment, 11 October 2002, para. 34 *(c)*; emphasis added.

Over and above the individual, it is thus the latter's entire family that is targeted, and beyond the family, the group as a whole because the entire structure of the society is challenged.

By particularly targeting women, rape and sexual violence, given the disastrous effects on their victims, to which I referred this morning, destroy the symbolic pillar of the group, the foundation on which rests the entire structure of family and social life. In this regard, one can only endorse the words of Raphaël Lemkin, who considered that genocide was established in cases involving a *"co-ordinated plan aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves"*[20]. The destruction of essential foundations of the life of national groups.

54. By attacking the symbolic line of descent on which the group is based, i.e. the power of women to create life, rape and sexual violence undermine — in cases of refusal by female victims of rape to procreate or the physical impossibility for them to have children after being raped — the

17 aptitude and physical ability of the group to reproduce and renew itself, as was expertly explained by a French sociologist, Ms Véronique Nahoum-Grappe, in a passage I shall now read out:

> "attempting to hurt someone is also an intellectual exercise: touching a sensitive spot involves knowing the sacred core of the victim's culture. In most cases, however, what families and communities hold most dear are the outward indicators of the line of descent, pointing either towards the past . . . or towards the future (children, female sexuality . . .). These indicators are thus ideal targets for *crimes of desecration*. A crime of desecration can therefore be defined as an *attempt to interfere with blood ties at the point where the desecrator believes them to be manifested.*"[21]. *[Translation by the Registry.]*

Even though this desire to desecrate was doubtless not consciously present in the minds of the perpetrators of sexual violence, at least in those terms, it has to be considered that, by attacking the symbolic bedrock of the group, i.e. the woman as the vector of life, since she alone is able to give life, rape and sexual violence do in fact subject the group to conditions of life that eventually bring about its destruction.

---

[20]R. Lemkin, *Axis Rule in Occupied Europe*, Washington, Carnegie Endowment for International Peace, 1944, p. 79; emphasis added.

[21]V. Nahoum-Grappe, "*Purifier le lien de filiation. Les viols systématiques en ex-Yougoslavie, 1991-1995*" *[Purifying the line of descent. Systematic rape in the former Yugoslavia, 1991-1995]*, *Esprit*, December 1996, p. 152; emphasis added.

In the present case, certain acts of rape and sexual violence are acts of genocide under Article II *(a)* of the Genocide Convention (killing members of the group)

55. Rape and sexual violence may constitute killing within the meaning of the Genocide Convention, in several ways.

56. Situations where rape and sexual violence are followed by killing are common. Death may in the first place be the irremediable and direct consequence of the victim's resistance to her aggressor, who "avenges" her refusal by deliberately killing her; such a case was recorded by the United Nations Commission of Experts in its report, which states: "[c]aptors have killed women who resisted being raped, often in front of other prisoners"[22]. If such resistance to rape may occur directly in a relationship between victim and aggressor, it may also take other forms. Thus, a man's refusal to obey an order by Serbian soldiers to rape a girl also led to his death. This example

18 was reported in the *Stakić* case concerning rape and sexual violence in the Omarska camp, and was corroborated in identical terms by the ICTY in the *Brdanin* case[23], where the following account was given:

> "[o]ne incident of sexual abuse occurred in the 'White House' [Omarska camp compound] on 26 June 1992. The guards tried to force Mehmedalija Sarajlic to rape a girl. He begged: 'Don't make me do it. She could be my daughter. I am a man in advanced age.' The soldiers replied: 'Well, try to use the finger.' There was a scream and beatings, and then everything was silent. A minute or two later, a guard came into the room and asked for two strong men who went to fetch the body of Mehmedalija Sarajlic. His dead body was later seen near the 'White House'."[24]

57. Death may also result, through a direct cause-effect relationship, of course, from the very scale of the physical violence suffered by the victim, which will be all the more intense in cases of repeated gang rape of the type described above and may therefore result in the death of the victim. The brutality of the abuse inflicted, as for example in the case of mutilation of the genitals, may also lead directly to the death of the victim. I shall not go over this point again here, as an account has already been given to the Court.

58. Death may also, of course, be caused by the suicide of the victim after suffering rape and sexual violence. There are many reports of women who committed suicide because they could not

---

[22]United Nations, Commission of Experts, Final Report, S/1994/674, 28 December 1994, p. 55, para. 230.

[23]ICTY, *Prosecutor* v. *Radoslav Brdanin*, case No. IT-99-36-T, Trial Chamber II, Judgement, 1 September 2004, para. 516.

[24]ICTY, *Prosecutor* v. *Milomir Stakić*, case No. IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 236.

stand the thought of the sexual violence they had undergone and felt incapable of carrying the burden of the humiliation and shame attaching to rape. In this connection, one can only fully endorse the view expressed by the ICTY in the *Stakic* case, which I have already mentioned, namely that "[f]or a woman, rape is by far the ultimate offence, sometimes even worse than death because it brings shame on her"[25]. It should be borne in mind that this concept of shame is particularly prominent in the psychology of Muslims, for whom family honour is above all based on the unsullied reputation of women, on chastity. As is succinctly observed by the author Nawal El Saadawi in a work entitled *The Hidden Face of Eve. Women in the Arab World*, for the Muslim community:

19

> "A man's honour is safe as long as the female members of his family keep their hymen intact. It is more closely related to the behaviour of the woman in the family, than to his own behaviour . . . At the root of this . . . situation lies the fact that sexual experience in the life of a man is a source of pride and a symbol of virility; whereas sexual experience in the life of woman is a source of shame and a symbol of degradation."[26]

59. Rather than face the disgrace of a rape, a Muslim woman may sometimes prefer to take her own life. Thus, to give only one example among others, the most recent report by Mr. Tadeusz Mazowiecki on the human rights situation in the territory of the former Yugoslavia, in connection with the fall of Srebrenica, expressly referred to the suicide of a 14-year old girl who had been raped by Serbian soldiers[27].

60. All these elements clearly indicate that rape, if it does not itself constitute murder, may nevertheless be the underlying cause of the death of the rape victim, with which it is inextricably linked by a direct cause-effect relationship. But there is more, Madam President, Members of the Court.

---

[25]ICTY, *Prosecutor* v. *Milomir Stakić*, case No. IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 803.

[26]Nawal El Saadawi, *The Hidden Face of Eve. Women in the Arab World*, Boston, Beacon Press, 1982, p. 31.

[27]United Nations, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/9, 22 August 1995, para. 45, p. 10.

In the present case, some instances of rape and sexual violence are acts of genocide under Article II *(d)* of the Genocide Convention (measures intended to prevent births within the group)

61. According to the jurisprudence of the international criminal tribunals, measures intended to prevent births within the group include — as stated in the *Akayesu* case — "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages"[28].

62. As symbols of contempt for the women of a group and of "possession" of them, rape and sexual violence can undeniably — you will agree — be included among "measures intended to prevent births", which may result from a variety of factors.

20 63. First, it goes without saying that the forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces, and as already described at length, in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months. This outcome had already been described at an earlier period by Raphaël Lemkin, in the following terms, in his analysis of German policy towards the Jews: "[t]he birthrate of the undesired group is being further decreased as a result of the separation of males from females by deporting them"[29].

64. However, this situation may be perpetuated well beyond the period of separation. Nor need we dwell on the fact that rape and sexual violence are likely to give rise to a reduction in sexual relations over a very long period of time, owing to the fact that a Bosnian Muslim woman or girl who has been raped will either be rejected by her husband or will not find a husband, or again that a man who has been subjected to terrible sexual violence will no longer seek to approach a woman and start a family.

65. Secondly, the wounds and physical handicaps inflicted on a victim of rape and physical violence, and the fact that women frequently suffer gynaecological problems as a result of sexual violence, even to the extent of becoming infertile, obviously also prevent reproduction by the members of the group; and the same is true for certain types of sexual mutilation suffered by men.

---

[28]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 507; *Prosecutor* v. *Georges Andersen Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 53; *Musema*, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 158.

[29]R. Lemkin, *Axis Rule in Occupied Europe*, Washington, Carnegie Endowment for International Peace, 1944, p. 84, Reply, Ann. 84.

66. While the measures intended to prevent births within the group may be physical measures, they may also be of a mental nature. Thus, the psychological trauma produced in the victims of rape and sexual violence may lead to their no longer wising to have children, thereby affecting generation replacement. This particular aspect was highlighted by the ICTR in the *Akayesu* case:

> "rape can be a measure intended to prevent births when the person raped refuses
> **21** subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate"[30].

67. All these elements undeniably affect the normal reproductive cycle and, in the long run, impair generation replacement and may thus lead to the physical destruction of the group.

In the present case, certain acts of rape and sexual violence are acts of genocide under Article II *(e)* of the Genocide Convention in that they involved the forcible transfer of children of the group to another group

68. While rape and sexual violence may undeniably be characterized as "acts of destructive rape", these being the acts I have for the most part described up to now; they may also, in some cases, take on another dimension, commonly referred to as "procreative rape", the purpose of which is to induce a forced pregnancy with a view to modifying the ethnic composition of a population. Allow me at this point to refer to the remarks of the French sociologist cited above:

> "[t]he practice of ethnic cleansing is aimed at eliminating the other person not only in space, but also in time, past and future . . .. It seeks *not only his death, but* his 'eradication', thus making it impossible for him to appear again . . . *The rapist seeks to dislodge, eradicate and reconceive in his own image the alternative seed. The defilement of rape aims not at the death of the other person, which is too easy, but at* undoing his birth . . . *at recommencing his conception by replacing the other collective 'genome' by one's own . . . The term 'eradication' is pertinent: it is in fact the* roots *that are the object of the fundamental cleansing known as rape. They will not grow again because an alternative graft has been implanted in the matrix.*"[31] *[Translation by the Registry.]*

69. The Court will doubtless have noted that a reference to roots was also made yesterday by Laura Dauban, when she said that, after destroying a mosque, the Serbs went so far as to dig up and remove the very foundations. As regards forced pregnancies, it may be noted that, in patriarchal

---

[30] *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 508.

[31] Véronique Nahoum-Grappe, "*Purifier le lien de filiation. Les viols systématiques en ex-Yougoslavie, 1991-1995*" *[Purifying the line of descent. Systematic rape in the former Yugoslavia, 1991-1995]*, *Esprit*, December 1996, pp. 157-158, Reply, Ann. 87, emphasis added.

societies, it is the male line that is of decisive importance for establishing the descent of the child, and that only the father's ethnicity is therefore taken into account. This specific feature of patriarchal societies was recognized by the ICTR, which emphasized that:

22

> "[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group"[32].

I shall not enter here into an ethnological debate, being a jurist, not an ethnologist, and I shall not therefore express an opinion on whether or not the Muslim society of Bosnia is a patriarchal society. Allow me merely to say, Members of the Court, that, regardless of the elementary structures of a society, what matters most is the expressed intention of the person seeking through his seed to give a new line of descent to the unborn child, rather than the medical and scientific realities.

70. Be that as it may, as Bosnia and Herzegovina has shown in its Reply, numerous international reports have mentioned these forced pregnancies, which the Respondent, in its Rejoinder, nevertheless still questions[33]. Needless to say, for the same reasons, as I have already explained, it is difficult to give a precise estimate of the actual number of acts of rape and sexual violence, it is also extremely difficult to establish the number of forced pregnancies given the proven inadequacy of relevant testimony and the conspiracy of silence surrounding the birth of these children, who are covered with opprobrium from the time of their birth.

71. For example, Special Rapporteur Mazowiecki reported a substantial increase in abortions in 1992[34]. Here again, whatever the figures may be, they are certainly underestimated given the lack of direct testimony, the clandestine abortions performed outside hospitals and the clandestine confinements followed by abandonment of the child.

---

[32]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 507.

[33]Rejoinder of Serbia and Montenegro, 22 February 1999, para. 3.3.5.23.

[34]United Nation, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, Doc. E/CN.4/1993/50, 10 February 1993, Ann. II, p. 66, para. 9 and p. 67, paras. 14-16.

72. Forced pregnancies certainly occupy an important place in the genocidal policy of ethnic cleansing implemented by the Serbian forces. Allow me at this point to refer once again to the *Kunarac* case, where the ICTY recounts the following fact, which was confirmed on appeal[35]:

23

> "Kunarac also knew that Muslim women were specifically targeted, as he himself took several of them to his men and raped some of them himself . . . While raping FWS-183, the accused . . . told her that she should enjoy being 'fucked by a Serb'. *After he and another soldier had finished . . . Kunarac laughed at her and added that she would now carry a Serb baby and would not know who the father would be.*"[36]

This destructive intent carried into the actual group itself, and today confirmed by an ICTY judgment, had already been referred to by Bosnia in its Reply, which noted that the Commission of Experts had established that a Muslim woman had been raped almost daily for six months by three or four soldiers, who told her that "she would give birth to a chetnik boy who would kill Muslims when he grew up"[37].

73. Another reported fact, namely that, over and above forced pregnancies, for purely ethnic reasons, pregnant Muslim women were detained in the camps until they were no longer capable of being aborted, is further evidence of the desire to modify the composition of the Muslim national group in Bosnia and Herzegovina, by increasing the birth rate of purportedly non-Muslim children.

74. Thus, in the indictment of Karadžić and Mladić, pursuant to Rule 61, the ICTY recognized this practice when it stated: "Some camps were specially devoted to rape, with the aim of *forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion* . . . It would seem that the aim of many rapes was *enforced impregnation.*"[38]

75. Forced pregnancies may thus also serve the purpose of a change in the ethnic composition of the target group, inasmuch as they lead to the expansion, by violent means, of one group (Serb) to the detriment of another (Bosnia and Herzegovina Muslims). It can therefore be

---

[35]ICTY, *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, cases Nos. IT-96-23 and IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, pp. 82-84, paras. 238-246.

[36]ICTY, *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, cases Nos. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgement, 22 February 2001, para. 583.

[37]Reply of Bosnia and Herzegovina, 23 April 1998, Chap. 7, para. 176.

[38]ICTY, *Prosecutor* v. *Radovan Karadžić and Ratko Mladić*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64; emphasis added.

said that these forced pregnancies result in the forced transfer of the unborn children of the group to another group.

24 76. While Serbia and Montenegro contends in this regard, in its Rejoinder[39], that a child born of a forced pregnancy could not in any circumstances be considered a Serb and accepted in the Serbian community, Bosnia and Herzegovina wishes for its part to affirm that the child in question could also not be considered a genuine Muslim within the Muslim community of Bosnia and Herzegovina. Therefore, even if the fate of these "children of shame" remains uncertain and it is likely, in some cases, that they were abandoned by their biological mothers, the fact remains, in both this and the contrary case, that they could certainly not be considered as belonging to the Muslims of Bosnia and Herzegovina, and would not be brought up in that group.

77. Finally, it is apparent that certain cases of rape against Muslim women in Bosnia and Herzegovina aimed at causing forced procreation may be contemplated as measures openly intended — even if that intention does not necessarily produce an effect — to ensure the transfer of unborn children from one group to another. Accordingly, these forced pregnancies clearly form part of the policy of genocidal ethnic cleansing of the Muslim group in Bosnia and Herzegovina. I would add that, even if the Court does not accept this analysis of what I have characterized as a "transfer of children from one group to another" — a transfer of unborn children from one group to another — the fact remains that what counts is the stated intention. That stated intention must always be clearly distinguished from the actual realization of the intent hidden behind this practice of forced pregnancy, which was clearly a genocidal intent, an intention to destroy the target group in whole or in part.

*

* *

78. As I said at the beginning of this address, although sexual violence is not mentioned in Article II, there is no denying that it can be prosecuted under each of the categories referred to in

---

[39]Rejoinder of Serbia and Montenegro, 22 February 1999, para. 3.3.5.23.

25 the Convention. This was, moreover, the finding made by the ICTY in the *Furundzija* case, where the Tribunal stated that, according to the context in which it took place, a rape could be prosecuted as genocide. Let me read out an important extract from that decision:

> "Rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. *Rape may also amount to* a grave breach of the Geneva Conventions, a violation of the laws or customs of war or *an act of genocide*, if the requisite elements are met, and may be prosecuted accordingly."[40]

79. While rape may be considered a crime against humanity, it may also — as we have just heard — be considered an act of genocide. Of course, in order to be considered an act of genocide, it must be accompanied by the intention to destroy a national, ethnical, racial or religious group in whole or in part. It is the existence of this intention which Bosnia and Herzegovina will now seek to demonstrate to the Court.

III. RAPE AND SEXUAL VIOLENCE WERE COMMITTED WITH GENOCIDAL INTENT

80. Madam President, Members of the Court, before demonstrating how rape and sexual violence committed in Bosnia and Herzegovina may be characterized as acts of genocide, I should like briefly to seek to get to the heart of this concept, with which we all claim familiarity. My colleague Tom Franck gave you this morning what I might call an insider's description of the concept of genocide, as interpreted by the two *ad hoc* tribunals. Following in his footsteps, I for my part shall pursue the quest for a definition from an outsider's perspective, so to speak, in order to differentiate it from concepts other than genocide.

The concept of genocide

81. Before being able to grasp any concept, it is frequently essential to compare it with related concepts, in order to pinpoint its specific features, to find its true essence. This is the method I shall follow by briefly comparing the concept of genocide with war crimes and crimes against humanity. First, the distinction between a war crime and an act of genocide is an important one, since those who deny the specific facts of what happened in Bosnia and Herzegovina

26 frequently say, "yes, it is true that rapes took place, but these are only war crimes that occur in all

---

[40] *Prosecutor* v. *Anto Furundzija*, case No. IT-95-17/1-T10, Trial Chamber II, Judgement, 10 December 1998, para. 172; emphasis added.

wars". The distinction between a crime against humanity and an act of genocide is also particularly revealing and necessary to our case, since, while the two concepts share certain characteristics — which is a very important point — the one, the concept of genocide, cannot however be reduced to the level of the other, that of a crime against humanity.

The distinction between a war crime and genocide: in our case, the rapes and sexual violence were not "mere" war crimes, but acts of genocide

82. As Article I of the Genocide Convention reminds us, genocide may be committed in time of peace or in time of war. The acts of sexual violence, which I have addressed at some length, were committed in time of war. And there may thus be a strong temptation to "downgrade" them — if I dare so put it — to war crimes. What I would, however, forcefully recall here before this Court is the fact that an armed conflict, the fact that there was a war going on between Serbia and Montenegro and Bosnia and Herzegovina — as Bosnia's Deputy Agent in particular has explained to you at length — did not mean that that no genocide was committed. The Respondent has indeed sought to take this point, arguing that this was a war, not genocide. Thus in its Rejoinder, for example, the Respondent states:

> "The various accounts . . . of military activities by JNA units [the Court will doubtless, have noted incidentally that the Respondent thus recognizes the involvement of the Yugoslav army in the events which took place in Bosnia and Herzegovina, confining itself to discussing whether those events should be characterized as 'war or genocide'] . . . relate to *episodes in a civil war* and nothing more. The numerous documents advanced by the Bosnian Government in this section of the Reply contain no evidence of genocidal intent . . . As the documents make clear, they are concerned exclusively with '*combat activities*'."[41]

83. A combat perhaps, Madam President, Members of the Court, but a combat whose ultimate purpose was the total or partial elimination of Bosnian Muslims from the territories claimed by Serbia and Montenegro, a combat which made intensive use, as one of its weapons, precisely of sexual violence. When, in the *Kunarac* case, the ICTY sought to ascertain the intent underlying all these acts of sexual violence, it specifically described it as "the intention to overcome the Muslims in any possible ways, including through criminal means"[42]. The "intention to overcome" is simply another way of saying the intention to destroy, in whole or in part. Thus, to

27

[41]Rejoinder of Serbia and Montenegro, para. 3.2.3.39.

[42]ICTY, *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac* and *Zoran Vukovic* cases IT-96-23 and IT-96-23/1, Trial Chamber II, Judgement, 22 February 2001, para. 582.

take but one example concerning one of the three accused, Kunarac, it was acknowledged that the rapes were clearly an integral part of the strategy of ethnic cleansing:

> "Dragoljub Kunarac also knew that Muslim women were specifically targeted, as he himself took several of them to his men and raped some of them himself. In the course of one of these rapes, he expressed, with verbal and physical aggression, his view that the rapes against the Muslim women were one of the many ways in which the Serbs *could assert their superiority and victory over the Muslims* . . ."[43]

One of the many ways of asserting superiority and victory over the Muslims, we know all too well what that means: victory could only be the disappearance of the Muslims as a group from the territories coveted by Serbia.

84. This need to draw a clear distinction between a war crime and genocide, between rape characterized — if I dare say so — as a "mere" war crime and rape characterized as an act of genocide, because of a different subjective intention, even if, objectively, it is the same individuals who are the victims, has been confirmed both by the ICTR and by the ICTY.

85. Right from the first case heard by the ICTR, the much-cited *Akayesu* case, the ICTR made it clear that, even if some of the Tutsis massacred belonged to the RPF (Rwandan Patriotic Forces), who were at war with the Hutu authorities, it was not because of the military conflict that they were killed, but because of their membership of the Tutsi ethnic group:

> "Clearly, the victims were not chosen as individuals but, indeed, because they belonged to the said group; and hence the victims were members of this group selected as such . . . Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially *because of their Tutsi origin and not because they were RPF fighters*."[44]

86. This fact of the separate existence, in relation to the conflict, of a policy of ethnic cleansing which could be characterized as genocide was recognized, in the clearest possible terms,

28 in the decision on review of the indictments against Karadzić and Mladić rendered on 11 July 1996 pursuant to Article 61 (on the very same day, so long ago, that the International Court of Justice rejected all of the preliminary objections raised by the State then calling itself the Federal Republic of Yugoslavia (Serbia and Montenegro):

---

[43] *Ibid.*, para. 583.

[44] *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, paras. 124-125.

> "Lastly, the Trial Chamber considers it important to mention an inherent aspect of the policy of 'ethnic cleansing' in Bosnia and Herzegovina, confirming the conclusions of the reports of the first Special Rapporteur of the United Nations Commission on Human Rights, Mr. Tadeusz Mazowiecki . . .: '*ethnic cleansing*' indeed seems to be not a *by-product of the war* initiated by the SDS and its military allies, *but rather its aim*'."[45]

87. In other judgments too, the ICTY has stated that, just because there was a war going on, that did not preclude the commission of other crimes such as crimes against humanity or acts of genocide. Thus, in the judgment of the trial chamber in *Kunarac and Others*, this clear distinction is made:

> "*It is irrelevant that the Serb aggression also pursued military goals and the objective of territorial gain*, because the criteria of 'armed conflict' and 'attack upon a civilian population' are not synonymous. If one is of the opinion that such an element does form part of the general requirements of crimes against humanity, the policy behind the Serb attack was to gain total supremacy over the Muslims in the area and finally a homogeneous region. To this end, that policy also encompassed expulsion through terror . . ."[46]

It goes without saying that rape constituted a particularly effective way of spreading terror, and was thus a favoured weapon in the policy of ethnic cleansing. It is equally clear that the fact that rapes and acts of sexual violence are very frequently committed in times of war, and can thus be characterized as war crimes, does not mean that in the case before us today those rapes and acts of sexual violence cannot be characterized, given the circumstances in which they were committed, as crimes against humanity or acts of genocide. We have now reached the second distinction which I wish to discuss with you.

29

The distinction between crimes against humanity and acts of genocide: in the present case, rape and sexual violence are not "merely" crimes against humanity, they are also acts of genocide

88. To clarify the elements of a crime against humanity, I would ask you to spend a moment with me on the *Nikolić* case. The indictment against Nikolić sets out the necessary elements in order for an act to be characterized as a crime against humanity:

> "First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organized and systematic. Although they need not be related to a

---

[45]ICTY, *Prosecutor* v. *Radovan Karadzić and Ratko Mladić*, cases Nos. IT-95-5-R61 and IT-95-18-R61, *Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, 11 July 1996, para. 64; emphasis added.

[46]ICTY, *Prosecutor* v. *Dagoljub Kunarac, Radomir Kovac and Zoran Vukovic*, cases Nos. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgement, 22 February 2001, para. 579.

> policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity."[47]

89. Thus it is clear from this passage that three elements are necessary in order for an act to be characterized as a crime against humanity:

it must be intentionally aimed at a civilian population identified as a group by the perpetrators of those acts;

it must be organized or systematic; and

it must be of a certain gravity.

90. However, as you know, genocide must also include these three elements: it must be intentionally aimed at a civilian population identified as a group by the perpetrators of the acts; it must be organized or systematic; it must be of a certain gravity. But that is not enough; in order for the acts to constitute genocide, there must also be a specific intention, "the specific intent to destroy a group without which, however atrocious the act . . . it cannot be characterized as genocide"[48]. This was what Stephan Glaser meant when he wrote that genocide could be seen as "an aggravated or special case of a crime against humanity"[49], as, in a sense, an extreme form of crime against humanity. It was by virtue of this specific intent, which distinguishes genocide from other crimes, that the ICTR held in the *Kambanda* case that genocide was the "crime of crimes"[50]. In other words, while there is no rigid boundary between crimes against humanity and genocide, rather a sort of *continuum*, genocide nonetheless — to cite the language of the ICTY in the *Stakic* case — constitutes "a unique crime where special emphasis is placed on the specific intent. The

30

---

[47]ICTY, *Prosecutor* v. *Dragan Nikolić*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, case No. 94-2-R61, 20 October 1995, para. 26.

[48]Observation of the Representative of the Federative Republic of Brasil during the preparatory proceedings on the Genocide Convention, in United Nations doc., Proceedings of the 6th Committee of the United Nations General Assembly, 21 September to 10 December, Official Documents of the General Assembly, p. 109.

[49]S. Glaser, *Droit international penal conventionnel*, Brussels, Bruylant, 1970, p. 109, cited by N. Ruhashyankiko, Special Rapporteur, in *Study on the Prevention and Punishment of the Crime of Genocide*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations doc. E/CN.4/Sub.2/416, 4 July 1978, para. 393.

[50]ICTR, *Prosecutor* v. *Jean Kambanda*, case No. IT-97-23-S, Trial Chamber I, Judgement and Sentence, 4 September 1998, para. 16; ICTR, *Prosecutor* v. *Omar Serushago*, case No. ICTR-98-39-5, Sentence, 5 February 1999, para. 15. See more recently the use of this expression in the partially dissenting opinion of Judge Wald appended to the Judgement in *Prosecutor* v. *Goran Jelisic*, IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para 2, and by the ICTY itself in *Prosecutor* v. *Milomir Stakić*, case No. IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 502.

crime is, in fact characterized and distinguished by a 'surplus' of intent"[51]: the intention "to destroy", in whole or in part, a national, ethnical, racial or religious group, as such". Thus over and above the facts, we have to show that, behind the acts described to you in the course of this week, there lay this specific intent.

The elements of genocidal intent: the sexual violence must be committed with intent to destroy a national, ethnical, racial or religious group as such

The sexual violence must be committed with intent to destroy

91. I would begin by making the point, as my colleague Tom Franck explained this morning, that the destruction of a group may be accomplished in different ways. The notion of "destruction" certainly is to be understood primarily in the sense of acts of physical and biological destruction. But let us not forget that the concept is wider. The notion of destruction is not confined to the murder of members of the group, but also includes other types of act committed with intent to destroy the viability of the group, and of course foremost among these are rape and sexual

31 violence[52]. It is in fact clear that rape and sexual violence can constitute a means of biological destruction of the group in the long term. We fully endorse what the ICTR said in this regard in the *Akayesu* case:

> "these rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. *Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.*"[53]

92. In the same way, what Bosnia and Herzegovina seeks of this Court is recognition that the acts of sexual violence were an integral part of the process of destruction of the group of Bosnian Muslims, known as ethnic cleansing. However, the sexual violence must also be carried out with the intent of destroying a group.

---

[51]ICTY, *Prosecutor* v. *Milomir Stakić*, case No. IT-97-24-T, Trial Chamber II, Judgement, 31 July 2003, para. 520.

[52]See ICTY, *Prosecutor* v. *Vidoje Blagojević, Dragan Jokić*, case No. IT-02-60-T, Judgement 17 January 2005, para. 666, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33, Trial Chamber I, Judgement, 2 August 2001, para. 580.

[53]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 731; *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1, Trial Chamber II, Judgement, 21 May 1999, para. 95; *Prosecutor* v. *Alfred Musema*, ICTR-96-13, Trial Chamber I, Judgement and Sentence, 27 January 2000, para. 933. (Emphasis added.)

The sexual violence must be carried out with the intent of destroying a group

93. We know that the Genocide Convention does not protect all groups, being confined to national, ethnical, racial or religious groups. These groups are not clearly defined. The approach generally adopted by the jurisprudence in order to determine whether victims belong to a particular group is based on a subjective criterion. As the Court emphasized in the *Jelisić* case[54]: "It is the stigmatization of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators." But I would also draw the Court's attention to a distinction made in this same case, where it was pointed out that the stigmatization of a group targeted by a policy of genocide could be made in two distinct ways, that is, on the basis either of positive or of negative criteria:

> "A 'positive approach' would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A 'negative approach' would consist of identifying individual as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. The Trial Chamber . . . deems that it is consonant with the object and purpose of the Convention to consider that its provisions also protect groups defined by exclusion where they have been stigmatized by the perpetrators of the act in this way."[55]

32

94. In the present case, there is no need for us to dwell at length on the fact that, even if all non-Serbs were targeted, the group most targeted by the various criminal acts has expressly been identified by the ICTY, many times over, as the "national group of Bosnian Muslims"[56].

The sexual violence must target the group *as such*

95. I shall not revisit this point at length, as we already addressed it this morning. I will simply add that it is therefore necessary that the group should have been targeted *as such*, that is to

---

[54]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 70; *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33, Trial Chamber I, Judgement, 2 August 2001, para. 557; ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1, Trial Chamber II, Judgement, 21 May 1999, para. 98.

[55]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 71.

[56]ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33, Trial Chamber I, Judgement, 2 August 2001, para. 560; ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, para. 591. See also, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 72.

say because of its specific characteristics as a distinct entity[57]. The ICTR also referred to this element in the *Akayesu* case, in the following terms:

> "The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element."[58]

Thus, if the aim of the perpetrators of genocide is to destroy the group in whole or in part by attacking a victim, it is not in fact the victim that is attacked, but the group itself; at the end of the day, it is the targeted group which constitutes the "ultimate" victim[59] of the genocide.

33 **The sexual violence must be aimed at destroying the group *in whole or in part***

96. It is accepted that the destruction sought need not necessarily concern the totality of the group, but may, as we well know, be aimed at the destruction of the group *in part*. The question then arises what is the proportion of the group which may be so defined. While no quantitative threshold is required, international criminal courts have consistently held, however, that it is necessary that the acts in question should at least have been aimed at a "substantial" part of the group[60], in such a way that the destruction envisaged affects the whole group in its entirety — in full. This criterion of "substantiality" covers different aspects. First, it may be thought that a part of the group is "substantial" inasmuch as it represents, in quantitative terms, a considerable proportion of the group in question. Secondly, a part of the group may be considered "substantial" because, this time in qualitative terms, it includes the most representative members of the targeted community. The fact that a specific part of the group is emblematic of the group as a whole, or that it is essential to its continuation or to its survival — as women are — means that this may be

---

[57]ICTY, *Prosecutor* v. *Milomir Stakić*, case No. IT-97-24-T, Judgement Trial Chamber II, 31 July 2003, para. 52l; *Prosecutor* v. *Goran Jelisić*, case, No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 79; *Prosecutor* v. *Slobodan Milošević*, case No. IT-02-54-T, Trial Chamber I, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 123.

[58]ICTR, *Prosecutor* v. *Jean-Paul Akayesu,* ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 522.

[59]ICTY, *Prosecutor* v. *Dusko Sikirica, Damir Dosen, Dragan Kolundzija (Sikirica et al.)*, case No. IT-95-8, Decision on Defence Motions for Judgement of Acquittal, 3 September 2001, para. 89.

[60]See ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 82 and ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 72. For the jurisprudence of the ICTR in this sense, see *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, case No. ICTR-95-1, Trial Chamber II, Judgement, 21 May 1999, para. 97; *Prosecutor* v. *Ignace Bagilishema*, case No. ICTR-95-1A-T, Trial Chamber I, Judgement, 7 June 2001, para. 64; *Prosecutor* v. *Laurent Semanza*, case No. ICTR-97-20-T, Judgement and Sentence, Trial Chamber III, 15 May 2003, para. 316.

regarded as a substantial part of the group. However, there is a further point, emphasized by the ICTY, when it stated that the eradication of a part of the group could also apply to the eradication of a group within a specific geographical area. Thus, the Tribunal carried out an analysis in geographical terms, concluding that a substantial part of the group can mean a part of the group situated within a defined geographical area:

> "[t]he Trial Chamber notes that it is accepted that genocide may be perpetrated in a limited geographic zone . . . The Trial Chamber adopted a similar position in its Review of the Indictment Pursuant to Article 61 filed in the Nikolić case. In this case, the Trial Chamber deemed that it was possible to base the charge of genocide on events which occurred only in the region of Vlasenica. In view of the object and goal of the Convention and the subject and subsequent interpretation thereof, the Trial Chamber thus finds that international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone."[61]

34

This approach, Madam President, Members of the Court, appears to me to be crucial in this case. It was moreover applied in spectacular fashion in the *Krstić* case, where it was decided that an act of genocide had been committed solely against the "Muslims of Srebrenica or the Muslims of eastern Bosnia"[62]. I have thus very briefly summarized the elements of genocidal intent. But how is that intent, so essential to the establishment of genocide, to be proved? I think it is time, Madam President, for me to stop. I will continue after the break.

The PRESIDENT: Yes, Professor Stern. We will rise for ten minutes.

The Court adjourned from 4.15 to 4.25 p.m.

The PRESIDENT: Please be seated.

Ms STERN: Madam President, Members of the Court. I ended my presentation in the first part of this afternoon's session with the question whether the necessary intent to establish genocide was present and, in particular, the question of how it was to be proved. This is what I shall now address.

---

[61]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 83.

[62]ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33, Trial Chamber I, Judgement, 2 August 2001, para. 560; *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, para. 23.

Proof of the genocidal intent underlying the acts of sexual violence: a bundle of indices

97. As the ICTR itself admitted in the *Akayesu* case, intent is "a mental factor which is difficult, even impossible, to determine"[63]. In practice, it can be readily understood that proof of genocidal intent is extremely difficult to establish. Few perpetrators of genocide, with the exception of Hitler, announce to the world their intention to destroy a specific group. While the criterion of intent cannot be purely and simply presumed[64], in the absence of which genocide would

35 lose its specific character, and evidence of intent must be provided, it is however accepted, in accordance with an established line of jurisprudence, that such evidence may become apparent from the combined effect of a certain number of elements — from the factual circumstances of the crime[65] — and that it may therefore be said that intent may be deduced from a bundle of concordant indices.

98. The indices enabling genocidal intent to be established beyond all possible dispute have been identified in numerous decisions or judgments, both of the ICTY and of the ICTR; we have cited many of them in our Rejoinder, but I will not re-cite them now. I will confine myself to quoting here a recent judgment of the ICTY, which summarizes in substance the combination of elements establishing the existence of a specific intent to commit the crime of genocide. Thus, in the *Jelisić* case, the ICTY held that proof of specific intent:

> "may, in the absence of direct explicit evidence, be inferred from *a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts*[66].

---

[63]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para. 523. See also ICTY, *Prosecutor* v. *Goran Jelisic*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 101.

[64]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998; para. 521; ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgement, 14 December 1999, para. 78.

[65]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, paras. 523-524; *Prosecutor* v. *Georges Andersen Nderubumwe Rutaganda,* case No. ICTR-96-3-T, Trial Chamber I, Judgement, 6 December 1999, para. 525; *Prosecutor* v. *Alfred Musema,* case No. ICTR-96-13, Trial Chamber I, Judgement and Sentence, 27 January 2000, paras. 166-167 . For the ICTY, see *Prosecutor* v. *Radovan Karadzić and Ratko Mladić*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Article 61 of the Rules of Procedure and Evidence, 11 July 1996, paras. 94-95; *Prosecutor* v. *Dusko Sikirica, Damir Dosen, Dragan Kolundzija (Sikirica et al)*, case No. IT-95-8, Decision on Defence Motions for Judgement of Acquittal, 3 September 2001, para. 61; *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33-A, Appeals Chamber, Judgement, 19 April 2004, para. 34.

[66]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10-A, Appeals Chamber, Judgement, 5 July 2001, para. 47. See also ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Trial Chamber I, Judgment, 14 December 1999, para. 73.

99. We therefore need to focus on the evidence in the cases of rape and sexual violence committed in Bosnia and Herzegovina which will enable us to show that they were indeed part of a general intent to destroy, in part, the group of Muslims of Bosnia and Herzegovina as such.

A genocidal intent did indeed underlie the rape and sexual violence

The genocidal intent in this case was not totally "unspoken"

100. As I just said, those who commit genocide seldom state their intention the way Hitler did. However, while we do not have at our disposal any — if you will — "official" text
36 announcing the genocide of the Bosnian Muslims, it should be noted that there is always within a group someone who speaks out, who dares call things by their true name — even unspeakable things. In the group of Serb leaders who conceived and organized this genocide, that is to say those who conceived the ethnic cleansing of Bosnia and Herzegovina, the one who spoke out was Karadžić; but he was only saying out loud what others were thinking. Thus it was Karadžić who, before the Bosnian Parliament, announced that all resistance to Serb domination would lead "the Muslim people to their annihilation"[67]. That is what it was, the ultimate aim of everything that happened in Bosnia. However, this was still merely the language of threat, not of prediction. The intention to destroy the group of Bosnian non-Serbs was expressed still more clearly, by Karadžić again, in the telephone conversation referred to by the Deputy Agent on the first day of the hearings, which left no room for doubt as to the intentions of the Serb leaders: "in just a couple of days, Sarajevo will be gone and there will be 500,000 dead, in one month Muslims will be annihilated"[68]. This intention to destroy the group of non-Serbs, and in particular the Muslims of Bosnia, did not remain confined to leading figures, but circulated among the Serbs. I would first observe that all of the leading individuals had the same intent, even if they did not all say so as clearly. I would remind you — and we have already cited it a number of times — of another telephone call where Milošević himself said, "don't stand in Karadžić's way"; in other words,

[67]Speech of Radovan Karadžić to the Parliament of Bosnia and Herzegovina, 14 October 1991, cited in ICTY, *Prosecutor* v. *Slobodan Milošević,* case No. IT-02-54-T, Trial Chamber I, Decision on Motion for a Judgement of Acquittal, 16 June 2004, para. 241.

[68]ICTY, *Prosecutor* v. *Slobodan Milošević,* case No. IT-02-54-T, Trial Chamber I, Decision on Motion for a Judgement of Acquittal, 16 June 2004, para. 241, Ex. 613, tab. 89 (intercepted communication with Momcilo Mandic, 13 October 1991).

himself endorsing the latter's quite explicit genocidal intent. But as I have just said, this destructive intent did not remain confined to the upper echelons: it spread through the Serbs, as is apparent from the following passage from the decision on review of the indictments of Karadžić and Mladić pursuant to Article 61:

> "The atmosphere of discrimination and hostility towards non-Serbs, imposed on the entire region by the Serb leaders, was well known at Kozarać. After Prijedor had been taken, but before the attack on Kozarać, the Serbs could often be heard on the police radio speaking of . . . the need to destroy these 'Balijas'."[69] (Balijas was a pejorative term for Muslims.)

37

101. There are, however, any number of other factors that attest beyond all doubt to the genocidal intent of using rape and sexual violence that — I say now and repeat and can never say and repeat often enough — played such a central role in ethnic cleansing. There can be no doubt that an organized system of rape and sexual violence existed, following a set pattern — a pattern of rape. We will now rapidly outline the major features of this overall pattern.

The intent to destroy the group can be deduced from the severity and extensiveness of the rapes and sexual violence carried out against members of the Bosnian Muslim population

102. Need I catalogue once again the widespread and extensive nature of the rapes and sexual violence carried out throughout the territory of Bosnia and Herzegovina, as I highlighted at the beginning of our presentation this morning? The rapes and sexual violence perpetrated in Bosnia and Herzegovina were anything but sporadic, isolated incidents committed in the chaos resulting from an armed conflict. To demonstrate the degree of organization, we would refer you to the review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence concerning Karadžić and Mladić, which emphasized the predominant role of mass rape and sexual violence as an indication of intent to commit genocide.

> "certain methods used for implementing the project of ethnic cleansing appear to reveal an aggravated intent as, for example, the massive scale of the effect of the destruction. The number of the victims selected alone on account of their membership in a group leads one to the conclusion that intent to destroy the group, at least in part, was present. Furthermore, the specific nature of some of the means used to achieve the objective of ethnic cleansing tends to underscore that the perpetration of the acts is designed to reach the very foundations of the group or what is considered as such.

---

[69] ICTY, *Prosecutor* v. *Radovan Karadžić et Ratko Mladić*, cases Nos. IT-95-5-R61 and IT-95-18-R61, Review of Indictment Pursuant to Article 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 154; emphasis added.

> The systematic rape of women, to which materials submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child."[70]

However, this intent to destroy the group can also be deduced from the choice of victims of rape and sexual violence.

38

The intent to destroy the group can be deduced from the choice of the victims of rape and sexual violence

103. If the genocidal intent is in fact not always easy to infer, it is incontestably revealed, as far as the present case is concerned, by the choice of victims. Here again, the fact borne out by a great many international reports, corroborated by equally numerous rulings by the ICTY, that rape and sexual violence were systematically and *almost exclusively* — we are obliged to say "almost" in view of the odd isolated incidents of rape and sexual violence concerning Serbian women — perpetrated upon non-Serb groups[71], upon non-Serb men, children and women and, in particular, upon the Muslims of Bosnia and Herzegovina[72]. This fact undeniably indicates the discriminatory nature of these crimes. To be more precise, rape and sexual violence were primarily perpetrated upon women and, as I have already said a number of times, it is clear that women must be viewed as a sizeable proportion and "substantial" part of the Muslim population of Bosnia and Herzegovina, because, quantitatively, they make up a large percentage of the group: half the world, holding up half of the sky. Moreover, as I have already said, in qualitative terms, they form a symbolic, representative part of the group targeted. The genocidal intent is particularly apparent when the women raped and humiliated belonged to the intelligentsia, as was highlighted by the woman held at the Omarska camp in the short video footage you saw yesterday. Sexual violence towards women is an integral part of a policy of genocide, since it targets the group as a whole and, in this respect, we can only concur, once again, with the findings of the ICTR in relation to Tutsi women in the *Akayesu* case, which can just as easily be applied to the women of the Muslim population of Bosnia and Herzegovina; I quote:

---

[70]ICTY, *Prosecutor* v. *Radovan Karadžić and Ratko Mladić*, case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.

[71]ICTY, *Prosecutor* v. *Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac*, case No. IT-98-30/1-T, Judgement of Trial Chamber I, 2 November 2001 (*Kvocka et al.* "Omarska, Keraterm and Trnopolje camps"), para. 197.

[72]*Ibid*. para. 197.

> "This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. *Sexual violence was a step in the process of destruction of the Tutsi group — destruction of the spirit, of the will to live, and of life itself.*"[73]

39

I therefore assert before this Court that the sexual violence perpetrated upon the non-Serb women of Bosnia and, notably, upon Muslim women, was a step in the process of destruction of the group's spirit, of its will to live and of its life itself. However, there are still other elements in this bundle of indices which highlight the genocidal intent. I believe that, on our argument, the intent to destroy the group can also be deduced from the lack of preventive measures or punishment for acts of rape and sexual violence.

The intent to destroy the group can also be deduced from the lack of preventive measures or punishment for acts of rape and sexual violence

104. There is no need to repeat the fact, widely attested to by the numerous extracts from ICTY proceedings that I have read, that the leadership did not prevent these rapes, nor did they do anything to punish those committing them. May I simply remind you that the lack of preventive measures has been established by the ICTY, which highlighted the involvement and ready toleration of incidents of rape and sexual violence by the commander of one of the detention camps, Dragan Nikolić. According to the ICTY:

> "The Accused abused his personal position of power especially *vis-à-vis* the female detainees of Susica camp. He personally removed and returned women of all ages from the hangar, handing them over to men whom he knew would sexually abuse or rape them."[74]

105. Worse still, there were even orders to commit rape, orders to carry out sexual violence — as shown by the findings in the *Kunarać* Judgment, in which the ICTY indicated that "FWS-48 stated that some soldiers told her that they were ordered to rape their victims"[75] and again in the sentence handed down by the ICTY in the *Todorović* case, who was the head of the police in Bosanski Samac, which cites the following incidents:

---

[73]ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgement of Trial Chamber I, 2 September 1998, para. 732.

[74]ICTY, *Prosecutor* v. *Dragan Nikolić*, case No. IT-94-2-S, Sentencing Judgement of Trial Chamber II, 18 December 2003, para. 194.

[75]ICTY, *Prosecutor* v. *Dagoljub Kunarać, Radomir Kovać and Zoran Vuković*, case No. IT-96-23 & 23/1, Judgement of Trial Chamber II, 22 February 2001, para. 39.

> "Witness A described how he was taken to the police station in Bosanski Samac, where Stevan Todorovic began to beat him and kick him in the genital area. Witness A was then taken over to another man and ordered by Stevan Todorovic to 'bite into his penis'."[76]

40

106. Furthermore, it is, once again, unnecessary to emphasize the total impunity accorded to those who committed acts of rape and sexual violence. However, I would also like to remind you that the intention to destroy the group can also be deduced from the findings of the ICTY, and this is an extremely important point.

The intent to destroy the group can be deduced from the findings of the ICTY

107. Although the ICTY has rarely upheld charges of genocide, the genocidal intent becomes apparent from an overview of the events in Bosnia and Herzegovina, such as only the Court can possess.

108. Please allow me, in this respect, to return to the analysis of the *Kunarać* case with which I began my presentation. In that case, it seems to me clear that the ICTY referred explicitly to *the intent to cause serious harm to the group as such*. It is important at this point to quote an extract from the ICTY's conclusions: "The Trial Chamber is satisfied that the crimes committed by all three accused were part of the attack against the Muslim civilian population . . ."[77]

109. The ICTY did not, however, stop there and it continued its analysis as follows:

> "Likewise, judging by their individual conduct as charged and proved on the evidence before the Trial Chamber, they were aware that there was an attack on the Muslim civilian population going on, and they willingly took an active part in it. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic mistreated Muslim girls and women, and only Muslim girls and women, *because* they were Muslims. They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of and had the effect of perpetuating the attack against the Muslim civilian population."[78]

110. The intent to target the Muslim population of Bosnia as a group, a necessary precondition for the establishment of the existence of a crime against humanity, has therefore been proven. I would emphasize that the ICTY found that there was intent to cause harm to the civilian

41

population and, more particularly, to cause harm to a particular group among the civilian

---

[76]ICTY, *Prosecutor* v. *Stevan Todorović*, case No. IT-95-9/1-S, Sentencing Judgement of the Trial Chamber I, 31 July 2001, para. 38.

[77]ICTY, *Prosecutor* v. *Dagoljub Kunarać, Radomir Kovać and Zoran Vuković*, case No. IT-96-23 & 23/1, Judgement of Trial Chamber II, 22 February 2001, para. 592.

[78]*Ibid*, para. 592; ICTY emphasis.

population, thereby identifying the criteria of a discriminatory crime against humanity, a crime very close to that of genocide.

111. This Court consequently needs only to go one step further in the face of this accumulation of crimes against humanity attributable — as will be amply demonstrated in the days ahead by my colleagues Alain Pellet and Luigi Condorelli — to one and the same State. And this step consists in showing that, by that very accumulation, these discriminatory crimes against humanity constitute genocide.

112. The possibility of inferring genocidal intent from the repeated occurrence of acts which, in themselves, do not constitute genocide, was accepted in the 11 July 1996 review of the indictments concerning Karadžić and Mladić. According to the ICTY:

> "The intent which is peculiar to the crime of genocide need not be clearly expressed. As this trial chamber noted in the above mentioned *Nikolić* case, the intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or *the repetition of destructive and discriminatory acts*."[79]

This last point, Madam President, Members of the Court, is of vital importance. Although it is not my role to broach the arguments of our adversaries, I feel obliged to refute in advance what I can already hear them arguing in order to preclude this Court from recognizing that there has been genocide. They will seek in this particular instance to rely on the extensive case law of the ICTY, which has produced numerous convictions for crimes against humanity in respect of rape and sexual violence; but, in proceedings subsequent to the indictment stage[80], such acts of sexual violence have never been characterized as genocide, a charge that has yet to be upheld in the Tribunal's judgments. Such an argument is clearly misconceived and, applying the jurisprudence that I have just cited, this Court — and possibly only this Court — confronted by repeated acts of sexual violence following the same pattern, which, taken separately, have already been characterized as crimes against humanity, can, taken as a whole, readily be brought within the category of crimes of genocide. Let us not forget that the underlying substantive elements of a

42

crime against humanity are the same as those of the crime of genocide and that the difference — in

---

[79]ICTY, *Prosecutor* v. *Radovan Karadžić and Ratko Mladić*, case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

[80]ICTY, *Prosecutor* v. *Ratko Mladić*, case No. IT-95-5/18-I, Amended Indictment, 11 October 202, para. 34b; ICTY, *Prosecutor* v. *Slobodan Milošević*, case No. IT-02-54-T, Amended Indictment, 21 April 2004, para. 32c.

the case of a crime of a discriminatory nature — between the necessary intent for a crime against humanity and the intent to commit genocide is infinitesimal.

113. This notion — in itself perfectly straightforward, but sometimes ignored like so many straightforward matters — that an accumulation of crimes against humanity can result in genocide has already been voiced by the International Law Commission in its comments on "Breaches consisting of composite acts", in its 2001 "Draft Articles on Responsibility of States for Internationally Wrongful Acts".

> "While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful [meaning crimes against humanity or other crimes] . . ."[81]

114. It is thus only by keeping in mind the plan, and widespread, systematic policy, for genocidal ethnic cleansing carried out by Serbia and Montenegro that it is possible to conclude that — like the forced transfer of populations, like the murder of Bosnia's Muslims — these acts of rape and sexual violence constituted a key element in the implementation of this plan, the overall aim of which was definitively to expel the non-Serb inhabitants from the territory of a future Serb State in Bosnia and Herzegovina. Furthermore, these acts were committed, in light of the bundle of concordant indices that I have just outlined, with the intent to destroy, in whole or in part, the non-Serb population and, in particular, the group of Muslims of Bosnia and Herzegovina.

*

* *

115. Long considered as a form of physical release for soldiers and regarded as inevitable within the context of armed conflict, rape and sexual violence have for long been relegated to the status of "anonymous and invisible" acts. The direct criminalization of rape and sexual violence as crimes against humanity in the statutes of the international criminal tribunals constituted a significant advance in the manifestation of international repugnance and condemnation for these

[81] Comments by the ILC on Article 15 "Breach consisting of a composite act" in "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Comments", 2001, p. 149, para. 9.

abhorrent acts. But it is not enough. It is in your awareness of the need for all crimes to be identified and recognized in order for the current process of reconciliation to be completed that history expects more of you, Madam President, Members of the Court. It expects the law to take a further new, but necessary, step forward.

116. It expects, as Bosnia and Herzegovina has endeavoured to show you, that rape and sexual violence, over and above their characterization as the war crimes or crimes against humanity which they undoubtedly are, can also finally, depending upon the circumstances in which they were committed, be recognized by this Court as characterizable as acts of genocide. Such circumstances undoubtedly obtain in the present case.

117. Having come to the end of this presentation, Bosnia and Herzegovina hopes to have, first, demonstrated to the Court to a sufficient degree that rape and sexual violence can fall within the terms of all of the categories of substantive acts constituting acts of genocide.

118. Bosnia and Herzegovina further hopes, secondly, to have shown the Court that, far from being isolated or opportunistic acts, the rapes and sexual violence perpetrated on a massive and systematic basis throughout the territory of Bosnia and Herzegovina were an integral part of the policy of widespread, systematic, genocidal ethnic cleansing — a policy which could only have been implemented at the highest levels of State — and that they served the ultimate aim of destroying, in whole or in part, the group of the Muslims of Bosnia and Herzegovina residing in the territory coveted by Serbian forces, with a view to the establishment of a Greater Serb State. It is for this reason that Bosnia and Herzegovina contends that ethnic cleansing, as conducted on its territory, notably by way of a policy of widespread rape and sexual violence, is indistinguishable from genocide: the ethnic cleansing carried out in Bosnia and Herzegovina, notably by means of rape and sexual violence, was genocide.

119. Bosnia and Herzegovina accordingly respectfully invites the Court to characterize the acts of rape and sexual violence perpetrated in Bosnia and Herzegovina upon the non-Serb
44 population and, more particularly, upon the Muslims of Bosnia and Herzegovina, as what they in fact were: acts of genocide, for which primary responsibility lies with the State, Serbia and Montenegro — a responsibility which must, of course, coexist with the establishment of individual criminal responsibility, but cannot simply be subsumed within the latter. We consider that only

recognition of the responsibility of Serbia and Montenegro in the present case would, over and above its symbolic value, be legally capable of fulfilling the Court's role as "the instance capable of repairing the tears in the social fabric"[82], to quote the elegant and apt words of a French thinker.

Thank you, Madam President, Members of the Court, and I ask you to give the floor to my colleague, Tom Franck.

Le PRESIDENT : Je vous remercie, Madame Stern. Vous avez la parole, Monsieur Franck.

M. FRANCK : Je vous remercie, Madame le président, Messieurs de la Cour.

LA QUALIFICATION DES FAITS FACE AU DROIT DU GENOCIDE

1. Vous serez soulagés, tout comme moi, d'en être à notre dernier exposé de ce tour qui porte sur les faits et sur le droit relatif au génocide proprement dit. Jusqu'ici, nous avons en quelque sorte suivi deux pistes parallèles dans notre démonstration. La première piste est consacrée aux faits. Nous vous avons donné des preuves de ce qui s'était produit pendant les années sombres d'une guerre imposée à la Bosnie par un gouvernement qui, à Belgrade, voulait absolument dépecer le pays et établir les frontières d'une Grande Serbie dont la population non serbe aura «d'une manière ou d'une autre», pour reprendre les termes de Mme Plavšić, été «éliminée», pour reprendre ceux de M. Karadžić *[traduction du Greffe]*.

2. Ces faits que nous vous avons présentés ne relèvent pas de la rumeur publique ni de la conjecture. S'ils ont été invoqués dans ce prétoire, c'est essentiellement et seulement après être déjà passés par un processus sérieux de vérification. J'entends par là que ces faits sont constatés dans des résolutions de l'Assemblée générale ou du Conseil de sécurité de l'Organisation des Nations Unies — ce qui donne à penser que les faits ont été signalés par des Etats informés par leur
45 représentants dans les zones où le conflit est en cours —, et que ces résolutions ont été adoptées (généralement à une majorité écrasante — parfois à l'unanimité) après avoir été examinées de très près par les ministères des affaires étrangères des Etats membres. Il peut également s'agir de faits dont il est rendu compte à certains organes de l'Organisation par des experts qui les ont établis après enquête approfondie, souvent menée sur les lieux, et après avoir interrogé des victimes et des

[82]P. Bouretz, speech at the inaugural session of the 1991-1992 Legal philosophy seminar held at the Institut des Hautes Etudes sur la Justice, 4 November 1991.

témoins. Puis il y a les faits qui ont été passés au crible par le Tribunal pénal international pour l'ex-Yougoslavie. Ce sont des faits qui ont résisté à la rigoureuse épreuve d'un système contradictoire «musclé» et qui ont satisfait au critère de la preuve au-delà de tout doute raisonnable. A l'occasion, nous avons présenté des dépositions faites devant le Tribunal pénal, certaines à différents stades d'une procédure encore pendante. Nous nous sommes efforcés de vous signaler ces dépositions-là dont la fiabilité n'est peut-être pas totale.

3. Voilà donc nos «témoins» en ce qui concerne les faits. Et ils sont si éminents, ces «témoins», si crédibles et si unanimes que nous n'avons guère besoin d'ajouter quoi que ce soit en citant personnellement des témoins oculaires ou des victimes à la barre.

4. La seconde de nos deux pistes, à ce stade de nos plaidoiries, a consisté à présenter le droit du génocide : ce qu'ont écrit les auteurs de la convention, quelle intention ils avaient et ce que la justice en a manifestement fait par la suite en interprétant le texte — je pense ici à la Cour internationale de Justice, au Tribunal pénal international pour l'ex-Yougoslavie et au Tribunal pénal international pour le Rwanda. Ces juridictions ont reçu spécialement compétence pour appliquer et pour interpréter la convention sur le génocide, bien trop souvent face à de nouvelles atteintes précises et inqualifiables à la mission civilisatrice de cette dernière.

5. Donc, nous avons suivi ces deux pistes : les faits et le droit. Les faits et le droit se rapportant à quoi ? Ce que nous avons simplement tenté de montrer clairement, dans cette première partie de nos plaidoiries, en passant les faits et le droit en revue, c'est qu'un génocide a été commis en Bosnie. Dans la partie suivante de notre démonstration, nous nous efforcerons de montrer tout aussi clairement que ce génocide est imputable au défendeur.

6. Mais, avant tout, nous devons nous assurer que les faits que nous avons présentés sont bien considérés comme étant de ceux qui, très précisément, imposent de conclure qu'un génocide — au sens du droit applicable — a bel et bien eu lieu en Bosnie. Pour ce faire, permettez-moi de vous rappeler brièvement les faits déjà exposés et de le faire tout particulièrement dans le contexte des dispositions du droit applicable qui qualifient cette sorte d'actes de génocide. Nous espérons pouvoir ainsi rapprocher nos deux pistes, démontrant par là de manière
46 rigoureusement limpide que le droit du génocide, tel qu'il est défini, a été honteusement bafoué par les actes terribles dont nous savons qu'ils ont été perpétrés.

L'intention : les actes ont été commis dans l'intention de détruire une communauté

7. Madame et Messieurs de la Cour, j'ouvre tout d'abord une brève parenthèse sur l'intention de détruire une communauté. Vous en avez déjà longuement entendu parler — plus que de besoin, pensez-vous peut-être — mais permettez-nous d'y revenir une dernière fois, nous sommes condamnés à nous répéter par les dénégations que le défendeur n'a cessé de nous opposer durant ces treize années de procédure. Nous avons montré que les meurtres, les tortures, les viols, les destructions de biens religieux et culturels et les actes de nettoyage ethnique ne constituaient pas des événements isolés dans ce que d'aucuns ont pu qualifier ironiquement d'énième guerre des Balkans. Au contraire : tous ces actes s'inscrivaient dans le cadre d'une stratégie plus ambitieuse, proclamée publiquement par les autorités serbes, une politique tendant à réunir «tous les Serbes dans un seul Etat». Il ne s'agissait pas d'une simple aspiration, mais de la bannière d'une campagne militaire soigneusement préparée et caractérisée par une férocité jamais vue en Europe depuis la fin de la seconde guerre mondiale. Pour réunir «tous les Serbes dans un seul Etat», il fallait au préalable chasser tous les non-Serbes, tout simplement et par n'importe quel moyen, du territoire destiné à constituer la Grande Serbie[83]. Il s'ensuit que, lorsque ce nettoyage ethnique a pris la forme qu'on lui connaît — meurtre généralisé, viols, tortures et destruction de communautés entières —, c'était là une conséquence délibérée de moyens sciemment choisis pour réaliser un objectif minutieusement planifié et voulu. Les massacres et les déplacements massifs qui ont commencé en 1991 n'étaient pas des moyens accessoires tendant vers un but : c'était le but même qu'envisageait M. Karadžić lorsque, le 14 octobre, il proféra publiquement ses menaces sur le coût d'une éventuelle indépendance de la Bosnie : ce coût était l'anéantissement[84].

8. Ce qui suivit la reconnaissance de l'indépendance de la Bosnie, ce fut la mise en œuvre méthodique d'une stratégie faisant appel à l'occupation des villes non serbes et à la destruction des communautés qui y vivaient ou, sinon, la «Vukovarisation»[85] des localités non serbes qui ne se laisseraient pas soumettre — une guerre éclair, un «blitzkrieg», destiné à les transformer essentiellement en cimetières habités. Ce système fut reproduit de multiple fois jusqu'à atteindre

[83] Voir CR 2006/2 (Van den Biesen), «Vue d'ensemble du génocide» (première partie), et les sources citées.

[84] *Ibid.*

[85] Le sens de cette notion est expliqué très clairement dans la décision rendue par le TPIY en l'affaire *Babić*, affaire n° IT-03-72-S, Chambre de première instance, jugement du 29 juillet 2004, par. 10-27.

son paroxysme avec le siège, le nettoyage ethnique et les tueries de Srebrenica, et jusqu'à ce qu'enfin, l'épuration des zones convoitées pour constituer la Grande Serbie fut achevée.

9. Dans les secteurs que les forces serbes purent occuper, cette politique consista notamment à «décapiter» délibérément les élites de la communauté non serbe : c'est-à-dire à les arrêter, à les placer dans des camps de concentration et, bien souvent, à les exécuter[86]. Mais ce ne furent pas les élites non serbes qui, à elle seules, subirent le gros de ce carnage. Environ cent mille personnes furent tuées, souvent exécutées. Cent à deux cent mille subirent des tortures, des viols et des brutalités dans des camps d'internement. Plus de deux millions de personnes furent chassées de chez elles et déplacées à l'intérieur du territoire : la moitié de la population totale de la Bosnie[87]. Il s'agissait de la mise à exécution délibérée d'un plan impitoyable. Il s'agissait de tueries, de tortures, de viols et de destructions délibérées visant à détruire en tout ou en partie les communautés qui faisaient obstacle à la construction démographique de la Grande Serbie.

10. Mme Biljana Plavšić, dans les faits qu'elle a admis devant le TPIY, a reconnu cette intention de manière très claire. Elle a déclaré que le but des Serbes était

> «de faire en sorte que l'objectif de la séparation ethnique par la force soit réalisé si aucune solution négociée n'était trouvée. Ces préparatifs consistaient notamment à armer de vastes pans de la population serbe de Bosnie en collaboration avec, entre autres, la JNA [l'armée de Belgrade], le ministère de l'intérieur (MUP) de Serbie et des paramilitaires serbes…» *[Traduction du Greffe.]*

L'«objectif de la séparation ethnique» devait être réalisé — et je cite — «par la force»[88]. Ce sont là encore les propos de Mme Plavšić. Nous avons vu par quoi ce recours délibéré à la force s'était soldé : un génocide, la «route d'enfer» dont M. Karadžić avait parlé dans ses menaces publiques d'octobre 1991[89]. Permettez-moi d'insister sur le mot terrible qu'il avait utilisé. Il n'avait pas parlé de «défaite», mais d'«anéantissement». Quand le but du recours à la force n'est pas simplement la victoire, mais l'anéantissement du vaincu, alors l'intention motivant ce recours à la force n'est pas simplement de l'emporter, l'intention est de détruire. Cette sorte d'appel aux armes, c'est l'ordre de commettre un génocide.

---

[86] *Ibid.*

[87] *Ibid.*

[88] TPIY, *Le procureur c. Plavšić*, affaire n° IT-00-39 et 40-PT, par. 11.

[89] Repris et cité dans l'exposé intitulé «Vue d'ensemble du génocide» (deuxième partie), CR 2006/2 (Van den Biesen).

48 11. Dans l'affaire *Brdjanin*, le TPIY a été appelé à examiner cette politique d'anéantissement planifié, et il a constaté qu'elle était dramatiquement réelle[90]. Dans son exposé de lundi, mon confrère M. Phon van den Biesen vous a minutieusement présenté certaines des preuves qui confortent la conclusion du TPIY quand ce dernier dit que la campagne militaire serbe a délibérément adopté des tactiques visant à détruire les communautés non serbes de Bosnie qui faisaient obstacle à la constitution d'une Grande Serbie exclusivement serbe. Force est d'en conclure que cette débauche de tueries, de viols et de destructions n'était pas une conséquence fortuite de la stratégie militaire et politique serbe mais constituait au contraire une fin en soi, c'était le but même de cette stratégie.

Le meurtre de membres du groupe ou l'atteinte grave à leur intégrité physique ou mentale doivent être qualifiés d'actes de génocide

12. La convention sur le génocide indique clairement que tout meurtre perpétré en vue de détruire une communauté en tout ou en partie *constitue un génocide*.

13. Ces quatre derniers jours, vous nous avez entendu donner longuement les preuves du massacre délibéré des communautés non serbes de Bosnie. Ce massacre, comme nous venons juste de tenter de le démontrer, a été commis dans l'intention de détruire les communautés en question, intention qui a été proclamée par les dirigeants serbes et reconnue par les juges du TPIY. Nous ne doutons pas que vous la reconnaîtrez vous aussi.

14. Cette reconnaissance peut se baser sur les proclamations des autorités serbes. Toutefois, elle peut également se fonder sur l'ampleur même et sur le caractère systématique des meurtres et des tortures. Dans l'affaire *Plavšić*, le Tribunal a reconnu que, dans un des secteurs de la Bosnie que les Serbes avaient décidé de «nettoyer», au moins cinquante mille personnes ont été massacrées, que huit cent cinquante villages ont été — et je cite le Tribunal — «complètement dévastés» *[traduction du Greffe]* et qu'il a été créé quatre cent huit lieux de détention, dans lesquels étaient infligés de «graves sévices physiques et psychologiques»[91] *[traduction du Greffe]*.

49 Nous vous avons déjà rappelé les conclusions détaillées qui ont été formulées en l'affaire *Krstić*,

---

[90] TPIY, *Le procureur c. Brdjanin,* affaire n° IT-99-36-T, 1er septembre 2004, par. 104-114.

[91] TPIY, *Le procureur c. Plavšić*, affaire n° IT-00-39 et 40-PT, exposé des faits du plaidoyer de culpabilité, 30 septembre 2002, par. 41 et 45.

dans laquelle le TPIY, concluant qu'un génocide avait été commis, a décrit l'élimination systématique des hommes et des jeunes garçons de Bosnie[92].

15. Dans cette affaire, la Chambre du TPIY a rendu une conclusion que la Cour ne devrait pas manquer de faire sienne. Elle a déclaré que «l'intention de détruire, en tout ou en partie, un groupe comme tel doit transparaître dans l'acte criminel lui-même» car «le but … transparaî[t] dans l'acte criminel lui-même»[93]. Pardonnez-moi de me répéter, mais cette conclusion juridique me semble revêtir une grande importance. En d'autres termes, si une partie entreprend de tuer la moitié des membres d'une communauté, l'intention des tueurs est on ne peut plus évidente. Le fait de tuer tant de monde, de manière si méthodique, trahit l'intention génocide des tueurs. Notre thèse est que, de par l'ampleur de la tuerie, ces meurtres trahissent de manière flagrante l'intention criminelle de ceux qui les ont perpétrés. La Chambre d'appel du TPIY l'a exprimé ainsi : elle a dit que «l'ampleur des meurtres» autorisait le Tribunal à conclure à l'«intention génocidaire» de leurs auteurs[94].

16. Il est également clair que, lorsque la moitié du groupe visé par les meurtres est le groupe des hommes en âge de procréer, il est normal — et peut-être même obligatoire — d'en déduire que les auteurs des meurtres avaient l'intention délibérée de détruire la capacité du groupe touché à se perpétuer sur le plan biologique. C'est ce qui a permis au TPIY de déduire, dans l'affaire *Blagojević*, que l'intention des tueurs allait au-delà du simple meurtre pour viser délibérément la destruction du groupe en tant que tel. Aux termes des juges,

> «les forces serbes de Bosnie non seulement savaient que le meurtre des hommes conjugué au déplacement forcé des femmes, des enfants et des personnes âgées entraînerait inéluctablement la disparition physique de la population musulmane de Srebrenica, en Bosnie, mais elles visaient aussi manifestement, par ces actes, à éliminer physiquement ce groupe»[95] *[traduction du Greffe]*.

17. Voilà pour les meurtres (qui sont en fait des exécutions), tels qu'ils ont été constatés à Srebrenica. Mais les auteurs du génocide ne se sont nullement contentés de tuer. Ils avaient d'autres cordes à leur arc, leur spécialité étant d'infliger une mort lente par des milliers d'entailles.

---

[92] TPIY, *Le procureur c. Radislav Krstić*, affaire n° IT-98-33-T, jugement, 2 août 2001, par. 549.

[93] *Ibid.*, par. 549.

[94] TPIY, *Le procureur c. Radislav Krstić*, affaire n° IT-98-33-A, arrêt de la Chambre d'appel, 19 avril 2004, par. 27.

[95] TPIY, *Le procureur c. Blagojević*, affaire n° IT-02-60-T, jugement, 17 janvier 2005, par. 677.

A cet égard, le siège de Sarajevo qui a duré trois ans constitue l'archétype. Il nous fournit une base factuelle amplement suffisante pour conclure que, lorsque les exécutions n'étaient pas possibles parce que les Serbes ne contrôlaient pas le lieu où vivaient encore les victimes désignées, une terrible guerre d'usure s'engageait. Il s'agissait d'une politique délibérée consistant à infliger des sévices physiques inqualifiables aux civils de Bosnie qui refusaient de se rendre. Le nombre

50 épouvantable de bombardements aveugles, jour après jour, nuit après nuit, démontre amplement l'existence d'une intention préméditée de détruire les communautés musulmane et croate par — je cite l'alinéa *c)* de l'article II de la convention sur le génocide — une «[s]oumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle».

18. Mardi, mon confrère M. Phon van den Biesen vous a décrit le siège de Sarajevo dans toute sa brutalité. Sarajevo était une ville charmante et paisible qui s'était attiré l'admiration générale en accueillant avec succès les jeux olympiques d'hiver et, surtout, en faisant régner un climat sociopolitique de compromis au sein d'une population remarquablement plurielle. Nous avons porté à votre attention tous les cas où des civils musulmans ont été délibérément pris pour cible — par exemple, lors du bombardement des personnes faisant la queue pour acheter du pain devant le point de distribution de la rue Vasa Miškin, et lors des bombardements de l'hôpital civil, de la célèbre bibliothèque de Vijecnica et du marché de Markale, celui-ci ayant coûté la vie à plus de soixante civils et fait bien plus de blessés encore —, des faits qui sont également constatés dans le rapport du rapporteur spécial de la Commission des droits de l'homme des Nations Unies, Tadeusz Mazowiecki, qui est allé en juger par lui-même et a dénoncé «ce qui para[issait] être une tentative délibérée pour terroriser la population». Il a indiqué que des tireurs isolés s'en prenaient à des civils innocents et que l'hôpital civil «a[vait] été délibérément bombardé à plusieurs reprises»[96].

19. Tout cela s'inscrivait dans le cadre d'une stratégie délibérée, que résume bien l'ordre sans nuances émanant du général serbe Mladić : «Visez les Musulmans.»[97] *[Traduction du Greffe.]* Dans la ville, pour servir cet objectif génocide, environ dix mille personnes furent tuées et

---

[96] Voir les références données en bas de page dans la plaidoirie du 28 février 2006 de M. van den Biesen, intitulée «Le siège de Sarajevo», CR 2006/4.

[97] *Ibid*.

plus de vingt mille civils furent blessés[98]. Dans l'affaire *Galić*, la Chambre du TPIY a conclu que le défendeur, le général Galić, en sa qualité de commandant des forces serbes, avait illicitement semé la terreur dans la population civile par des actes délibérés de violence, dont des violations des lois et coutumes de la guerre et des crimes contre l'humanité[99]. Mais Galić n'était que l'instrument d'une politique. Cette politique avait été définie par ceux qui, en novembre 1992, l'avaient promu

51 au rang de général. De qui s'agit-il ? Des dirigeants de Belgrade, naturellement. Et leur politique générale, dont le siège de Sarajevo n'est qu'une illustration parmi tant d'autres, était de commettre un génocide.

20. L'existence avérée de camps d'emprisonnement mis en place par les Serbes pour les communautés non serbes témoigne, elle aussi, de cette politique. Dans ces camps, comme l'a démontré ma collègue Magda Karagiannakis dans sa plaidoirie, les Musulmans étaient systématiquement détenus dans des conditions inhumaines, roués de coups, torturés, violés et tués. Si l'on considère cela comme des actes gratuits commis par certains chefs et gardes de camps, il s'agit de crimes atroces, mais si l'on considère que ces actes s'inscrivent dans le cadre d'un plan d'ensemble visant à détruire en totalité ou en partie les communautés qu'il fallait, d'une manière ou d'une autre, éliminer d'une Grande Serbie désormais pure, il s'agit d'un génocide.

21. S'il y a des faits qui sont établis et dont la Cour doit dresser le constat, ce sont bien les conditions qui régnaient dans ces camps de l'horreur. Elles ont été constatées dans des résolutions du Conseil de sécurité, largement relatées dans la presse mondiale et les médias yougoslaves eux-mêmes en ont fait état[100]. Dans trente-sept municipalités à peine dont le TPIY a examiné la situation, il y avait quatre cent huit centres de détention où des Musulmans et d'autres personnes non serbes étaient détenus et systématiquement soumis aux sévices physiques et psychologiques les plus atroces[101].

22. Le TPIY a constaté qu'il y avait des éléments étayant l'accusation selon laquelle

---

[98] *Ibid.*

[99] *Ibid.*

[100] CR 2006/5 (Karagiannakis), «Les camps».

[101] TPIY, *Le procureur c. Biljana, Plavsić*, affaires n[os] IT-00-39 et 40/1, jugement portant condamnation, 27 février 2003, par. 45.

> «les prisonniers étaient en règle générale, détenus dans des locaux surpeuplés, dans de mauvaises conditions d'hygiène, avec très peu d'eau ou de vivres à leur disposition [et que] beaucoup ont été tués ou furent victimes de violences physiques ou psychologiques extrêmement graves, notamment des passages à tabac, des tortures ou des viols»[102].

La même Chambre de première instance a également jugé qu'il existait des éléments prouvant que ces détentions illicites s'inscrivaient dans le cadre du plan des dirigeants serbes visant à créer «un territoire dominé par les Serbes coûte que coûte»[103]. Dans un autre jugement du TPIY, celui rendu en l'affaire *Nikolić*, si abondamment citée, le Tribunal a dit qu'il régnait «un climat de terreur dans le camp»[104]. D'un camp à l'autre, le TPIY a pu constater qu'il était justifié de dire que les prisonniers étaient détenus dans des conditions atroces et, en particulier, étaient régulièrement victimes de passages à tabac, de viols et de meurtres[105].

52 23. Ma collègue Mme Karagiannakis a passé en revue devant vous, en étudiant un camp après l'autre, ces faits épouvantables dont l'existence est avérée, et je ne vais pas y revenir. Ce qu'il faut garder en mémoire, c'est qu'il s'agissait non pas d'une simple succession de brutalités commises aveuglément, mais de violences systématiques, délibérées et organisées, de la soumission de communautés entières à des «conditions d'existence devant entraîner [leur] destruction physique totale ou partielle». Ces atrocités délibérées doivent être considérées non pas isolément mais dans le cadre d'un système appliqué à l'ensemble du territoire de la Bosnie sous contrôle serbe, se caractérisant par des traitements cruels, un système qui doit lui-même être considéré comme s'inscrivant dans le cadre d'un plan général consistant à tuer, torturer, violer et détruire systématiquement. Il s'agissait d'un système manifestement conçu pour détruire toutes les communautés qui, pour les Serbes, faisaient obstacle à la constitution d'une Grande Serbie sans Musulmans ni Croates. Il n'y a qu'un mot pour qualifier ce plan : le génocide. Les noms des lieux où des crimes innommables comme ceux-ci ont été commis au nom de la purification ethnique — Susica, KP Dom, Prijedor, Omarska, Trnoplje, Manjaca, Bosanski Šamac, Luka — porteront à jamais le sceau de l'infamie. Ces noms appellent la reconnaissance et le repentir. Car lorsque des

---

[102] TPIY, *Le procureur c. Momcilo Krajisnik*, affaire n° IT-00-39-T, jugement relatif à la demande d'acquittement formulée par la défense au titre de l'article 98bis du Règlement, 19 août 2005, p. 17 118 des CR.

[103] *Ibid.*, p. 17 131 des CR.

[104] TPIY, *Le procureur c. Dragan Nikolić*, affaire n° IT-94-2-S, jugement portant condamnation, 18 décembre 2003, par. 67.

[105] CR 2006/5 (Karagiannakis), «Les camps».

crimes aussi abominables ne sont pas reconnus, ils vont souvent suppurer avant d'éclater en cris de vengeance.

24. Parmi les modalités d'application de cette politique de génocide, nous avons souligné le rôle central et terrible du viol. Ma collègue, Mme Brigitte Stern, vient de passer en revue devant vous aujourd'hui dans sa plaidoirie les éléments prouvant ce qui a été accompli, par qui et dans quelle intention. Je n'essaierai pas de minimiser ces événements horribles en tentant de les résumer pour en faire état une nouvelle fois.

25. Voici en revanche ce qu'il y a lieu de réaffirmer : ce que vous a relaté Mme Stern, ce n'est pas un récit à caractère pornographique d'actes isolés commis par des individus dépravés. Non : on peut trouver des histoires comme celles-là dans la presse à sensation de la plupart des pays. Ce dont Mme Stern a fait état devant vous, c'est de viols systématiques s'inscrivant *dans le cadre d'une politique délibérée*. Il s'agit d'une tout autre question puisque, comme l'a fait observer le TPIY, ce recours massif aux violences sexuelles mérite une attention particulière parmi les méthodes du nettoyage ethnique, en raison de leur caractère systématique et de la gravité des souffrances infligées aux populations civiles[106]. Mme Stern a qualifié cela de véritable politique de violences sexuelles, politique qui était partie intégrante, peut-être même partie essentielle, du nettoyage ethnique de nature génocide qui visait la population non serbe et en particulier musulmane de Bosnie.

53 26. Le rapporteur spécial de l'Organisation des Nations Unies, M. Mazowiecki, a indiqué que les enquêtes qu'il avait menées portaient à conclure que les viols étaient commis «sur une grande échelle»[107]. En l'affaire *Brdjanin*, le TPIY a confirmé que les viols commis visaient délibérément des victimes choisies uniquement parce qu'elles étaient musulmanes[108]. Lorsque l'on associe les faits attestant du recours méthodique, d'un camp à l'autre et d'une ville à l'autre, au viol institutionnalisé, au fait également établi que les femmes victimes étaient violées en raison de leur

---

[106] TPIY, *Le procureur c. Rodovan Karadžić et Ratko Mladić*, affaires n[os] IT-95-5-R61 et IT-95-18-R61, examen des actes d'accusation dans le cadre de l'article 61 du Règlement de procédure et de preuve, 11 juillet 1996, par. 64; document examiné dans la plaidoirie de Brigitte Stern, «Les viols, les faits et le droit», 2 mars 2006.

[107] Nations Unies, doc. A/48/92, annexe II, «Rapport de l'équipe d'experts chargés d'enquêter sur les allégations de viols dans l'ex-Yougoslavie sur la mission qu'elle a effectuée dans ce pays du 12 au 23 janvier 1993», p. 72, par. 30 et p. 79, par. 66.

[108] TPIY, *Le procureur c. Radoslav Brdjanin*, affaire n[o] IT-99-36-T, jugement, 1[er] septembre 2004, par. 518.

religion et de leur origine ethnique et que l'intention des violeurs était de détruire, par un moyen ou par un autre, la communauté à laquelle les victimes appartenaient, il ne s'agit assurément plus de simple dépravation, mais de génocide. Le viol, comme Mme Stern l'a de toute évidence démontré, n'était pas le seul objectif des violeurs. Il s'agissait plutôt d'un moyen permettant de détruire, en totalité ou en partie, la communauté au sein de laquelle les victimes avaient été choisies. Le viol était le moyen mais l'intention était de détruire.

27. Toutefois, ce n'étaient pas seulement les corps que détruisait ce déchaînement de folie génocide, c'était aussi l'esprit : un esprit profondément ancré dans les institutions intellectuelles et religieuses musulmanes, dont beaucoup sont d'un âge vénérable et d'une incomparable beauté. Ce sont non seulement les mosquées, mais aussi les églises catholiques qui ont été systématiquement détruites, car les Serbes ont voulu couper les racines des deux religions dans les secteurs qu'ils avaient décidé de purifier des éléments non serbes et d'intégrer à la Grande Serbie.

28. Ma collègue Laura Dauban a montré que ces destructions ont été délibérées afin que les Musulmans ne reviennent jamais. Elle a cité Jan Boeles, représentant des Pays-Bas au sein d'une mission de surveillance de la Communauté européenne qui disait qu'il s'agissait du meurtre de l'identité culturelle d'un peuple[109]. La Chambre de jugement en l'affaire *Brdjanin*, a-t-elle souligné, avait conclu «que les dévastations étaient ciblées, contrôlées et délibérées»[110]. La plupart de ces destructions n'avaient rien à voir avec les combats entre les groupes; au contraire, elles se rattachaient manifestement au plan de génocide. Elles ont eu lieu après la défaite des communautés non serbes plutôt que pendant les combats : Aladza, cette magnifique mosquée de marbre remontant à 1555, avec ses superbes fresques et son architecture monumentale, qui était protégée

54 par l'UNESCO, fut non pas détruite à coups de roquette, mais dynamitée et rasée[111]. Le TPIY a constaté, en l'affaire *Kunarac*, que cet événement s'était produit «bien après la fin des combats, alors que les Serbes contrôlaient entièrement la ville»[112].

---

[109] CR 2006/5 (Dauban), «Les biens culturels».

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

29. Le pillage de l'héritage culturel a été accompli avec la même férocité lorsqu'il visait les instituts supérieurs d'apprentissage et d'étude. Lors de sa plaidoirie, Mme Dauban a déjà attiré votre attention sur la destruction de l'Institut d'études orientales de Sarajevo en mai 1992. Si la collection inestimable de milliers de livres d'histoire, de philosophie et de poésie arabe, turque, perse et bosniaque ainsi qu'environ deux cent mille autres manuscrits ont été détruits, ce n'est pas parce que les Serbes qui assiégeaient la ville ont mis à profit sans discernement une puissance de feu supérieure, mais parce que ces œuvres ont été soigneusement prises pour cible. Vous avez vu des images de cet acte de vandalisme et l'un de nos experts que nous allons faire déposer, M. Riedlmayer, vous en dira davantage sur le sujet.

30. Le problème se résume donc à ceci : à l'arrière-plan de tous nos moyens de fait et de droit se pose la même question : pourquoi ces femmes ont-elles été les victimes d'un comportement systématique qui s'écarte autant des règles universelles de la décence ? Pourquoi une région civilisée du monde est-elle tombée dans une telle barbarie ? Les femmes ont été violées, les hommes et les jeunes garçons tués, les mosquées et les églises catholiques dynamitées, les grandes institutions islamiques — musées, écoles et bibliothèques — ont été prises pour cibles, tout cela dans le même but : détruire, en totalité ou en partie, les groupes, communautés, et confessions qui faisaient obstacle. Les Serbes ont nettoyé le pays comme les cupides «barons du bois» rasaient généralement les grandes forêts, en défrichant, en incendiant, en tranchant dans le vif, sans jamais se soucier du passé, ni du présent, ni de l'avenir.

31. L'Assemblée générale des Nations Unies, exprimant ce que le monde consterné savait, a fait état de «souffrances extraordinaires» causées à la population victime de ce déchaînement de viols et d'autres crimes[113]. Pourtant, ce n'est qu'une partie de ce qu'ont vécu ces victimes. Et que dire des innombrables autres victimes : les femmes, les hommes et les garçons de Srebrenica ainsi que les victimes des deux sexes et de tout âge mises au supplice et tuées dans ces camps barbares ? Elles ont toutes subi, elles aussi, des souffrances excessives et, dans bien des cas, mortelles. Il incombe à la Cour de donner la qualification juridique qui convient à leurs «souffrances

[113] Nations Unies, doc. A/RES/48/143, préambule, 5 janvier 1994.

55 extraordinaires». Cette qualification juridique, Madame et Messieurs de la Cour, gardiens de la conscience de l'humanité, cette qualification juridique ne peut être que le *génocide*.

32. Nous ne pouvons pas faire marche arrière. Nous ne pouvons pas ressouder ce qui a été irrémédiablement brisé, qu'il s'agisse de la vie ou de l'âme des victimes, ou de leurs relations avec des voisins qui en sont venus à les tuer, à les torturer et à les violer. La seule chose que nous puissions faire, c'est refuser de contribuer à fausser les événements qui se sont réellement produits, refuser de tolérer que ce compte rendu soit faussé, car connaître ces événements, c'est poser les premiers jalons d'une frontière solide entre civilisation et barbarie. Mais ce compte rendu, pour qu'il soit exact, ne saurait énumérer simplement une masse de faits et d'actes commis au hasard. Si nous voulons avoir un tableau de la réalité qui ne soit pas faussé, si nous voulons savoir ce qu'un monde civilisé ne peut pas tolérer et ne tolérera pas, il faut dresser la liste complète de ces faits et actes. Et c'est seulement ici, en cette enceinte, que cette liste complète peut être établie. Et lorsque vous, les juges, procéderez à l'établissement de cette liste, il apparaîtra très vite que sur cette terre dévastée, dans cette Bosnie victime de ces massacres, ces tortures, ces viols et ces destructions planifiés, s'est précisément produit le type de calamité que la convention sur le génocide visait à prévenir et à réprimer.

Ce système de l'horreur permet de conclure à l'existence d'un génocide délibéré et planifié

33. Examinons un instant ce système de l'horreur qui permet de conclure à l'existence d'un génocide délibéré et planifié. Autrement dit, arrêtons-nous un instant pour examiner encore une fois la question des conclusions à en tirer. La réaction que suscite l'examen de tous ces faits est un mélange d'horreur et d'ennui.

34. D'abord, une réaction d'horreur, en raison de la nature des faits. Des hommes et de jeunes garçons — des civils — à qui on ordonne de s'agenouiller, souvent sur la berge d'une rivière, avant de leur tirer par derrière dans la tête, ou à qui on dit de sauter d'un pont dans une rivière pour leur tirer dessus pendant leur chute. Des centaines de camps, peuplés de civils, de centaines de milliers de civils qui sont forcés de vivre avec la faim, la crasse, qui sont roués de coups, violés, puis, souvent, assassinés. La gorge tranchée, la poitrine écrasée, le crâne ouvert à coups de tuyaux de fer. La même chose, partout, dès que les Serbes prenaient le contrôle, quand ils

commençaient à exécuter leur plan de serbisation en se débarrassant — par un moyen ou par un autre — de tous les autres.

35. Ensuite, malgré nous, ces atrocités suscitent aussi chez nous l'ennui car elles furent toujours les mêmes, toujours les mêmes, partout. Le mal s'était banalisé : il y avait le
56 bombardement des civils, des mosquées, des marchés, des bibliothèques et des musées. Puis, l'occupation. La séparation des hommes et des garçons d'un côté et des femmes et des filles de l'autre, et le départ vers les centaines de camps. Ensuite venaient les démolisseurs, qui rasaient les mosquées, pour paver les décombres afin de s'assurer qu'il n'en reste aucune trace. Les bibliothèques, l'Institut étaient incendiés. Ces images ne vous rappellent-elles pas — comme je crains bien qu'elles me rappellent — les synagogues incendiées de Berlin et de Francfort après la nuit de cristal ? Un nouveau parc de stationnement vient ensuite remplacer l'espace vide de sa mosquée détruite. De nouveaux noms : «la cité des Serbes», au lieu de Foča, le nom historique. Vient aussi le meurtre des notables susceptibles de soutenir leur groupe : le clergé, les intellectuels, les médecins, les journalistes. Puis c'est l'assassinat collectif des hommes en âge de procréer. Et c'est le viol des femmes qui doit les empêcher, socialement, psychologiquement et physiquement, d'avoir des enfants.

36. Horrible et ennuyeuse, donc, cette répétition d'actes d'une cruauté suprême et d'une banalité paralysante. A quoi rime-t-elle ? Que prouve-t-elle en *droit* ?

37. La réponse n'est que trop évidente. Cela prouve qu'il y avait un *système*. Cela prouve que ce sont exactement les mêmes événements qui ont été répétés indéfiniment : ici, là, partout, les soldats serbes arrivaient, conquéraient ou, pire, quand la conquête n'était pas possible, ils faisaient le siège. Un esprit normal conclut nécessairement que cette répétition inlassable, dans le même ordre, selon les mêmes modalités, des meurtres, des actes de torture et des situations de nature à rendre la vie impossible, l'esprit normal conclut que tout cela ne pouvait pas relever d'un sadisme simple et aveugle. Il ne s'agissait pas d'un étonnant concours de circonstances atroces et diaboliques.

38. Non : Madame le président, Messieurs de la Cour, nous vous avons infligé l'exposé de tous ces faits et événements monstrueux, effroyables — et nous sommes conscients du malaise que vous éprouvez — car vous conclurez inévitablement, vous aussi, à l'existence d'un *système*. Et s'il

y avait là un système, c'est qu'il y avait un plan. Et l'exécution de ce plan était nécessairement intentionnelle.

39. L'intention. Nous voici donc dans le vif du sujet. Nous avons passé en revue devant vous la jurisprudence des Tribunaux pour l'ex-Yougoslavie et le Rwanda, lesquels, bien qu'ils examinent leurs affaires au cas par cas, une instance après l'autre, n'en sont pas moins parvenus à en tirer une seule et même conclusion dont la logique est implacable. Cette conclusion est que les meurtres, les actes de torture, les déplacements forcés, les viols, la terreur suscitée pour inciter à fuir, que tous ces méfaits ont été délibérément perpétrés dans l'intention de détruire, en totalité ou en partie, des groupes qui étaient dynamiques sur les plans ethnique et religieux, des groupes qui se définissaient par leur confession, leur race ou leur origine ethnique.

57 40. Oui, ce qui est fait est fait. Mais si vous vous refusez à retenir la qualification de génocide, renonçant ainsi à défendre une frontière précieuse qui sépare la civilisation qui est fragile des crises apparemment chroniques de la barbarie, qu'est-ce qui fera échec à la prochaine crise et à la suivante ? Nous sommes tout à fait conscients de la difficulté de la situation dans laquelle nous vous avons placés, vous les juges. Car votre décision en l'occurrence et ses modalités vont avoir des répercussions extraordinaires : sur l'humanité tout entière, sur le droit, ainsi que sur les espoirs et la foi que les peuples du monde entier ont placés en la Cour.

41. Nous espérons que vous avez trouvé notre démarche utile qui a consisté à vous exposer le droit et les faits d'une manière pratique et méthodique; nous vous remercions de votre infinie courtoisie et attention.

Madame le président, Messieurs de la Cour, ainsi s'achèvent nos plaidoiries d'aujourd'hui. C'est avec gratitude que nous vous rendons les minutes supplémentaires que nous vous avons dérobées le premier jour et nous vous remercions.

Le PRESIDENT : Monsieur Franck, je vous remercie. L'audience est à présent levée; elle reprendra demain à 10 heures.

La séance est levée à 17 h 55.

_____