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CR 2006/31 (translation)

CR 2006/31 (traduction)

Tuesday 18 April 2006 at 3 p.m.

Mardi 18 avril 2006 à 15 heures

10 Le PRESIDENT: Veuillez vous asseoir. Pour des raisons impérieuses qu'il vient juste de m'expliquer, le juge Abraham n'est pas en mesure de siéger cet après-midi. Monsieur Pellet, vous avez la parole.

M. PELLET : Je vous remercie infiniment, Madame le président. Madame le président, je crains que, compte tenu des incidents techniques survenus au cours de la matinée, la Cour ait à m'écouter plus longtemps que ce n'était prévu. Je voudrais également en appeler à votre compréhension, si nous devions aller au-delà de 18 heures, cela avec votre accord bien entendu.

Le PRESIDENT : Nous nous attendons certainement à une audience se prolongeant quelque peu cet après-midi.

M. PELLET : Je vous remercie beaucoup.

Madam President, Members of the Court,

GENERAL OVERVIEW OF BOSNIA'S LEGAL ARGUMENT

1. Having listened attentively to our opponents' oral presentation last month, we feel that it is necessary, now that we are starting on our second round of oral argument, to refocus the debate on the real issues of law posed by this tragic affair.

2. In terms of law, leaving aside for the moment issues of jurisdiction, to which we will return at length later on, matters are relatively simple and depend on the Court's replies to two questions:

1. Was genocide committed in Bosnia and Herzegovina?
2. Is that genocide attributable to the Federal Republic of Yugoslavia, today called Serbia and Montenegro?

3. The Respondent, exclusively concerned to escape the Court's jurisdiction under Article IX of the Genocide Convention of 1948, has endeavoured, not unskilfully, to change, and — if I may so put it — "sweeten" the terms of the debate. Professor Stojanovic clearly announced this clever ploy in his speech of 10 March:

11 "It is . . . obvious that ethnic homogenization [Ah, words so fair for acts so dire![1] . . .] was one of the consequences of all the wars in the territories of the former Yugoslavia, above all because of the country's extremely complex ethnic structure.

It is undeniable that homogenization was in part the result of migration of the population, which was admittedly forcible but made so by the context of the war, by the fighting, by poverty and by the insecurity inherent in any war. It is also true that the parties to the conflict went to great lengths to displace the population by force and used criminal methods; first, however, this policy was pursued by all parties to the conflict, and secondly, despite the fact that criminal methods were used and these acts can admittedly amount to war crimes and sometimes to crimes against humanity, in no case do they amount to genocide."[2]

4. This discourse, reiterated in subsequent speeches by counsel for Serbia and Montenegro, amounts to the following: yes, heinous crimes were committed in Bosnia and Herzegovina, BUT — and there are three big "buts":

(i) these were war crimes, crimes against humanity, but not genocide;

(ii) crimes were committed on all sides and not exclusively by the Serbs;

(iii) in any event, these appalling acts were committed in the course of a civil war, in which Serbia and Montenegro took no part.

5. Why is this approach such a clever one, Madam President? Because, by containing part of the truth, it enables the remaining part to remain hidden — the part involving the transition from "simple" (and of course I put that word between quotes), from "simple" war crimes or crimes against humanity, to genocide; and at the same time it jibes perfectly with a strategy calculated to prevent the Court from exercising its jurisdiction. Because it transforms an international dispute into an internal problem, leading to both protagonists in the tragedy which befell Bosnia and Herzegovina between 1992 and 1995 being sent away empty-handed. Because it absolves Serbia and Montenegro of all responsibility whilst not denying that of the Bosnian Serbs. Because, finally, it enables our opponents to demonstrate their compassion for the victims of the crimes committed in Bosnia and Herzegovina without compromising the legal position which they have adopted before this Court.

12 6. It is not my task in this speech — which is both a recapitulation and an introduction — to rebut point by point our opponents' argument: my colleagues will do so over the coming days.

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[1] See Molière, *Le Misanthrope*, Act 1, Scene 2 (Philinte).

[2] CR 2006/15 (Stojanovic), p. 42, paras. 203 and 203.

However, it does appear to us that many of the arguments put forward by counsel for the Respondent are based on a failure to understand — or on a systematic misrepresentation? — the argument made by Bosnia, both in its written pleadings and in its first round of oral pleadings — in so far as they saw fit to refer to the latter at all. Thus in general, as Maître van den Biesen has pointed out, Respondent's counsel, rather than answering our oral presentation, preferred to attack Bosnia's Reply, which they could and should have done in their Rejoinder — and which, incidentally, does not make our task any easier, since it obliges us to go back and repeat ourselves, and deprives us (and the Court too) of a genuine adversarial debate.

7. With your permission, Madam President, I therefore propose to show you — or rather remind you:

that the Bosnian position is not based on the (clearly mistaken) view of the law of State responsibility which Serbia and Montenegro ascribes to it;

that genocide was in fact committed in the territories of Bosnia and Herzegovina controlled by the Serbs; and

that this most serious violation of a peremptory norm of international law is attributable to the Respondent.

I. The applicable rules of the law of State responsibility

8. It seems to me helpful, Madam President, to begin by revisiting our argument in the overall context of the law of international State responsibility, an area to which our opponents returned a number of times. Despite our having, as we thought, expressed ourselves clearly, they ascribe to us in this respect a position which we do not in fact hold regarding the true nature of that responsibility, whose scope they misrepresent (A); and from whose rules they draw conclusions which appear to us to be totally erroneous (B).

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A. The nature and scope of the responsibility incurred by the Respondent

9. Professor Brownlie went to considerable lengths to show that State responsibility in international law is not a criminal one. His argument on this point occupies no less than six full

pages of his presentation of 13 March[3]. With all the respect that I owe to my sagacious opponent, I cannot help thinking of a certain Don Quixote, when he battled with what he took to be giants; and, like Sancho Panza, I have to say to him: "For Mercy's sake! Did I not indeed beseech Your Graciousness to have care, that these were naught else but windmills?"[4]

10. Yes, a windmill, this hypothesis of the State's criminal responsibility — a position never taken by Bosnia and Herzegovina, and from which my learned friend Thomas Franck and I were at great pains to dissociate ourselves in advance during our first round of oral argument[5], to which I am sorry that Professor Brownlie did not attend with greater care.

11. As we have already explained, we are in no sense seeking, Members of the Court, a criminal condemnation of Serbia and Montenegro. International law does not recognize the criminal responsibility of States, and it was to avoid all confusion that, in 2001, the International Law Commission in its wisdom ultimately abandoned any attempt to characterize as "crimes" serious violations of obligations deriving from peremptory norms of general international law, even though that term had been included in the Draft Articles on State Responsibility adopted by the Commission on first reading in 1996, and in particular in Article 19.

12. The fact nonetheless remains that:

— there are indeed degrees of gravity in the internationally wrongful acts which a State may commit[6]; and that,

— notwithstanding the terminology used in the Convention on the Prevention and Punishment of the "Crime" of Genocide, every violation of the Convention engages the responsibility of its

14 author, whether this be a private individual or a State — which does not mean that the consequences are the same in either case.

13. In the former case, this is a criminal responsibility, whose prosecution is a matter either for the States themselves (all have an obligation to punish "[p]ersons committing genocide or any

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[3]CR 2006/16, pp. 24-31, paras. 66-82; see also CR 2006/17, p. 43, para. 304 and p. 48, para. 324.

[4]Miguel Cervantès, *Don Quixote de la Mancha*, Chap. VIII.

[5]CR 2006/5, pp. 10-13, paras. 1-9 (Franck); CR 2006/8, pp. 11-17, paras. 4-18 (Pellet).

[6]See Arts. 40 and 41 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts appended to General Assembly resolution 56/83 of 12 December 2001.

of the other acts enumerated in article III" of the Convention[7]) or, where one exists, for an international penal tribunal[8], in this case the International Criminal Tribunal for the former Yugoslavia. In the latter case, the international responsibility of the State author of the genocide, or of other acts prohibited by the Convention, is a matter of general international law; it is one that can be tried in the present forum, Members of the Court, and carries the consequences attaching to any internationally wrongful act of the State; I will return to this in a moment. Moreover, it is self-evident that the one does not preclude the other: the responsibility of the individual does not absolve the State from its own responsibility and, conversely, an individual having perpetrated (or been complicit in) an act of genocide cannot invoke his official position in order to escape a criminal sanction[9].

14. Of course, there are certain obligations which are incumbent only upon the State: it is only for the State to prevent genocide and punish its perpetrators — obligations in regard to which Serbia and Montenegro is strangely silent, although it has failed in this regard in the clearest manner possible and, as to the second of them, continues so to fail. As evidence of this, I need only cite its obstinate refusal — a refusal which has lasted for ten years — to hand over General Mladić, despite insistent demands from the international community[10].

15. On the other hand, as regards the acts enumerated in Article III of the Convention, they are capable of engaging not only the responsibility of the individual perpetrators but also that of the States which planned, ordered and organized or tolerated them.

15 16. In rebuttal of our position, in his speech of 13 March last Professor Brownlie confined himself to recycling his presentation of 30 April 1996 during the preliminary objections phase: pages 15 to 23 of CR 2006/16 (paras. 20-58) reproduced *word for word* (subject to a few omissions and minimal variations) pages 8 to 21 of CR 1996/7, as can be seen from document No. 2 in this

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[7]Art. IV; see also Arts. V and VI.

[8]Art. VI.

[9]See Art. IV of the Convention.

[10]For recent examples, see the statement of the United Nations Secretary-General on his visit to the ICTY, of 12 April 2006, Press Release OK/MOW/1067[e], available on the Internet at: http://www.un.org/ icty/latest-f/index-f.htm (checked on 15 April 2006); the Press Release of the ICTY Prosecutor, 22 February 2006, http://www.un.org/icty/ briefing/2006/PB060222.htm (checked on 5 March 2006); the declaration by the Council of the European Union (General Affairs, External Relations), Press Release SN6343/06 Press 46, 27 February 2006. See also recent statements by President V. Kostunica in Press Conference of the Spokesman for the ICTY Prosecutor, 6 April 2006, http://www.un.org/icty/briefing/2006/PB060407.htm.

morning's judges' folder. It seems to me that it would not be helpful to try the Court's patience by repeating what Professor Thomas Franck said on 1 and 3 May 1996 in reply to this unchanged argument. That reply can be found at pages 49 and 50 of CR 1996/9 (paras. 8-9) and at pages 11 to 23 of CR 1996/11 (paras. 4-24); we have also included this in the judges' folder at tab 3. As to the position taken by the Court in its Judgment of 11 July 1996 following these exchanges, it can be summed up in a few words; they are quite unambiguous and represent a clear disavowal of the argument relied on by Serbia and Montenegro: "Article IX [of the Genocide Convention] . . . does not exclude any form of State responsibility" (*I.C.J. Reports 1996*, p. 616, para. 32). It is difficult to see, Members of the Court, why, in 2006, you should go back on what you decided ten years ago, given in particular, as I have said, that Respondent's counsel has provided us with no new element whatever in support of the argument made by him in 1996. Furthermore, on 1 March last, Professor Franck showed that, during the *travaux préparatoires*, this Article was precisely and expressly conceived in such a way as to include within the scope of the Convention the notion of responsibility *of the State* in the case of an act of genocide or complicity therein[11]. Our opponents ignore this and have not a word to say on this objective and, as I believe, irrefutable demonstration, and continue imperturbably to argue precisely as they did before this Court a decade ago.

17. There can be no doubt, Madam President, that, under the very terms of Article IX of the 1948 Convention, the Court has jurisdiction to adjudicate upon the responsibility of the Respondent
16 State "for genocide or for any of the other acts enumerated in article III" — which I note incidentally that Maître de Roux, more sensitive to the authority of *res judicata,* appears to accept notwithstanding the reiterated position of Professor Brownlie[12]. This has consequences which the Respondent refuses to draw, or on which it remains studiously silent, as to the manner in which a State's responsibility under the Convention is to be implemented.

B. The consequences of the Respondent's responsibility under the Convention

18. Madam President, not only does Serbia and Montenegro refuse to admit the obvious — moreover, a judicially established one — regarding the nature and extent of that responsibility, but it also behaves as if the Convention, which it interprets in an unreasonably narrow way, were a type

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[11]CR 2006/5, pp. 10-13, paras. 1-9.

[12]See CR 2006/18, p. 20, para. 38.

of "black box", impervious to the general rules of the law of State responsibility for internationally wrongful acts. One even has the feeling that it refuses to see the Convention as an international treaty imposing obligations on States, with all the attendant consequences.

19. Whether the Respondent likes it or not, the 1948 Convention is a treaty — and I am referring here to Article 12 of the ILC Articles of 2001 — which, like all treaties, places the States parties under international obligations whose violation entails their responsibility — not their criminal responsibility, but their *international* responsibility — to any other State party — moreover, without there being any need to enquire into the injury which the other party may have suffered, because — and no one denies this[13] — genocide is the very archetype of a particularly serious breach of an obligation deriving from a peremptory norm of general international law, a breach which entitles any State to invoke the responsibility of the State in breach[14].

20. Two points warrant attention:

— first, the Respondent, in conformity on this point with its basic (but misconceived) argument that the responsibility invoked by Bosnia and Herzegovina is criminal in nature, seeks to lock the Court into such an approach, in particular in respect of proof of the acts capable of

17 engaging Respondent's responsibility; I shall speak about this shortly when I turn to showing that genocide was indeed committed in Bosnia and Herzegovina;

— secondly, Serbia and Montenegro is trying to deprive you, Members of the Court, of any possibility of addressing the consequences of its responsibility once you have found that such has been incurred as a result of the breach of its obligations under the Convention.

21. At the beginning of his statement on 13 March, Mr. Brownlie admitted: "The applicable law is clearly the law of treaties, together with the principles of State responsibility for breaches of the obligations laid down in the treaty instrument."[15] We concur, as we also obviously agree that "the principles of State responsibility must be applied by reference to the pertinent cause of action:

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[13]See CR 2006/12, p. 10, para. 2 (Stojanović), p. 46, para. 1.5 (Mr. Varady), CR 2006/18, p. 13, para. 12 (de Roux).

[14]See Art. 48 of the ILC Articles.

[15]CR 2006/16, p. 13, para. 13.

they cannot be applied in the abstract"[16]. Yet the obligations in question must be correctly understood: it is the breach of these which constitutes the pertinent "cause of action".

22. Since, contrary to the other Party's assertions, the responsibility of a State extends not only to possible breaches of the obligations to prevent and punish but also to breaches of its obligations in respect of "genocide or any of the other acts enumerated in article III", all such breaches are, barring a specific provision in the Convention, subject to the law of international responsibility of States. They must be judged in the light of the rules of that law and they entail the ordinary consequences which that law lays down and which, as generally accepted, are set out in the second part of the ILC Articles on State Responsibility for Internationally Wrongful Acts.

23. It is therefore of no significance that "the Convention makes no provision for remedies relating to the case of direct responsibility"[17]: there was no point in including any such provisions in the Convention; international law is well settled on this issue. And it is obviously incorrect that the only possible remedy would be a declaratory judgment[18]: this form of reparation might be appropriate for *certain* Convention violations attributable to the Respondent, but, since the various types of damage suffered by Bosnia and Herzegovina and its nationals are financially assessable[19], reparation in the form of compensation is required. In no way is this tantamount to "extend[ing] the jurisdiction available to the Court by virtue of Article IX of the Convention by invoking the general principles of international law relating to remedies"[20]. On the contrary: this is merely addressing the consequences of the obligations which the Convention imposes and which are clearly embodied in Article IX.

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24. I moreover note incidentally that, just as the Convention does not expressly address the consequences of a breach of its provisions by the States parties, equally it contains no provision governing the imposition of criminal liability on individuals: it enumerates the prohibited acts and provides a partial definition of them in Articles II and III; in subsequent Articles it establishes the jurisdictional rules applicable to the punishment of perpetrators of those acts, just as Article IX

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[16]CR 2006/17, p. 42, para. 298 (Brownlie); see also CR 2006/21, p. 21, paras. 3-4 (Brownlie).

[17]CR 2006/16, p. 24, para. 65 (Brownlie).

[18]CR 2006/17, p. 43, para. 304 (Brownlie).

[19]See Article 36, paragraph 2 of the ILC Articles of 2001.

[20]CR 2006/21, p. 22, para. 5 (Brownlie).

establishes the ICJ's jurisdiction over disputes "relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". But none of these provisions define the régime applicable either to the criminal liability of individuals — which is a matter for the domestic law of the competent States or for the statutes of international criminal courts — or to the international responsibility of States, the governing régime of which is that applicable to any internationally wrongful act.

25. By the same token, and contrary to what Professor Brownlie told you on 16 March[21], there is nothing to prevent the Court from upholding an applicant State's claim for reparation when a Respondent has failed to comply with provisional measures ordered (in this case, twice ordered) in the course of the proceedings.

26. I am willing to concede, Madam President, that the concept of "cause of action" may be difficult to grasp by a mind trained in the civil law but, all the same, I am, to be quite honest,

19 somewhat puzzled by Respondent counsel's use of the term in this context[22]. It seems to me that the issue can be stated very simply[23]:

— the Court has in a number of recent judgments held that it had jurisdiction over claims raised by a party in respect of the failure by the other party to comply with provisional measures indicated by the Court;

— the Court made clear on those occasions that such measures were legally binding on the parties;

— failure to comply with them is thus an internationally wrongful act, which, like *any* such act[24], entails the international responsibility of the party in default, with all attendant legal consequences; and

— in my statement on 7 March, I endeavoured to determine what those consequences could or should be in the present case[25].

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[21] *Ibid.*, pp. 22-24, paras. 1-9.

[22] See *ibid.*, p. 23, paras. 6 and 7.

[23] See CR 2006/11, pp. 42-49, para. 34 (Pellet).

[24] See Article 1 of the ILC Articles of 2001.

[25] See CR 2006/11, pp. 46-49, paras. 46-56.

27. In actual fact, Madam President, my opponent does not really dispute this analysis. Instead, he simply asserts that Bosnia and Herzegovina is not entitled to submit such a claim at this stage in the proceedings[26]. This makes no sense: obviously, in general it is only at the end of the proceedings that it becomes possible to determine whether, and to what extent, a State has fulfilled obligations under an order indicating provisional measures. Further, with the exception of Germany in the *LaGrand* case (*LaGrand (Germany* v. *United States)*, *Judgment, I.C.J. Reports 2001*, p. 474, para. 12) — but those were special circumstances — all States which have submitted similar claims to you have done so during oral argument and you have made no objection to this (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 453-454, paras. 320-322; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005, para. 25).

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28. Before turning to some general points concerning the real substantive issues of law raised in this case, I should like, Madam President, to set out, in the form of concise summary points, Bosnia and Herzegovina's position on the nature and scope of the obligations borne by parties to the Genocide Convention and the consequences of a violation of those obligations. These points are as follows:

(1) The Convention requires States not only to prevent and punish genocide, but also to refrain from committing it themselves, and from committing any of the other acts enumerated in Article III of the Convention.

(2) Any violation of these obligations gives rise to the responsibility of the State in breach.

(3) This responsibility is in no way penal in nature and coexists with the potential criminal liability of the individuals who committed the violation, such criminal liability lying within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia or, possibly, the domestic courts of Serbia and Montenegro.

(4) Unless otherwise provided in the Convention, the Respondent's responsibility for any violation of its provisions is subject to the general rules applying to the international responsibility of

[26]CR 2006/21, p. 23, para. 6 (Brownlie).

States for serious breaches of obligations deriving from peremptory norms of general international law.

(5) The Court thus has jurisdiction not only to hand down a declaratory judgment on the various breaches of the Convention which can be attributed to the Respondent, but also to decide the form and amount of the compensation owed by way of reparation for such damage caused to Bosnia and Herzegovina and its nationals as lends itself to reparation in this form.

(6) Finally, the Court also has jurisdiction to determine, in accordance with the rules applicable to the international responsibility of States, the consequences to be drawn from the failure by Serbia and Montenegro to comply with the two Orders indicating provisional measures adopted by the Court in 1993.

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II. Genocide was committed in Bosnia and Herzegovina

29. Madam President, there is no material disagreement between the Parties on either the legal definition of the various elements of genocide enumerated in Article II of the 1948 Convention when viewed separately, nor on the definition of the acts listed in Article III. On the other hand, it is apparent to me that the Parties remain deeply divided on a number of important points, particularly the following:

— the definition of genocide as an overall legal concept;

— proof of genocide; and

— the way in which the genocide alleged by Bosnia and Herzegovina combined with, or was an integral part of, the civil war on which Serbia and Montenegro places exclusive emphasis.

A. The definition of genocide

30. No matter what Maître de Roux said during his statement on 14 March[27], Bosnia and Herzegovina does not deny either that genocide is defined by Article II of the 1948 Convention[28] or that the elements of its physical component, the *actus reus*, are exhaustively enumerated in that Article, which nevertheless requires interpretation[29]. Bosnia and Herzegovina is not asking the

[27]CR 2006/18, pp. 20-23, paras. 40-50.

[28]CR 2006/5, pp. 14-15, paras. 14-21 (Franck); CR 2006/8, p. 20, para. 28 (Pellet); CR 2006/9, p. 58, para. 19 (Condorelli).

[29]CR 2006/5, p. 15, para. 19 (Franck).

Court to extend this definition. Nor does it deny that the "hallmark" of genocide, the characteristic which distinguishes it from a crime against humanity, lies in the intent of the perpetrator(s) "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[30]. However, the Parties remain divided on several important points which, apart from proof of genocidal intent, to which I shall return in a few moments, concern in particular:

— first, the definition of the "group" whose "destruction" is sought;

— second, the geographic framework in which this intent must manifest itself; and

22 — third, and perhaps most importantly, the way in which the various elements in the definition of genocide must fit together in order to justify the conclusion that genocide has taken place.

31. First, as to the definition of the group which is the target of genocidal intent, I must admit to a certain astonishment at a comment made by Mr. de Roux during his statement on 15 March. He finds fault with us for considering that "there are two victims of this genocide:

— the first is *the Bosnian people* or *the peoples of Bosnia and Herzegovina*; and

— the second is the *State of Bosnia and Herzegovina*"[31].

Our opponent cites paragraph 1.3.0.9 of Bosnia's Memorial, which does not deal with determining the group protected by the Convention, but with the definition of an internationally wrongful act under the law of responsibility.

32. I fear that Maître de Roux is seriously confused on the following point: under the international law of responsibility, it is indeed Bosnia and Herzegovina which is the victim of genocide or, in other words, the injured State. But the perpetrators of the genocide did not aim to destroy Bosnia and Herzegovina — a State is not a group within the meaning of the Convention; rather, it is the holder of the right under Article IX of the Convention to have recourse to the Court.

33. This clarification having been made, it nevertheless remains true that the Parties disagree as to the very definition of a group within the meaning of Article II of the Convention. Serbia and Montenegro protests the fact that we sometimes refer to "non-Serb groups" and sometimes to

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[30]Article II of the 1948 Convention. On this point, see CR 2006/5 p. 15, para. 215 (Franck); CR 2006/7, pp. 29-30, para. 90 (Stern); *ibid.*, pp. 46-48, paras. 7-11 and p. 56, para. 39 (Franck); CR 2006/8, p. 27, para. 47 (Pellet); and CR 2006/18, p. 19, para. 35; p. 23, para. 45; p. 50, para. 125 or p. 51, para. 132 (de Roux); CR 2006/19, p. 50, para. 281 (de Roux); CR 2006/20, pp. 18 *et seq.*, paras. 330 *et seq.*, p. 28, para. 31 (de Roux) ; or pp. 29-30, paras. 36-39 (Fauveau-Ivanović).

[31]CR 2006/20, p. 10, para. 296 ; emphasis original.

"Muslims" ("Bosniaks" in English)[32]. I shall confine myself at this stage to making two points here:

— first, a group may be defined in two different ways: either positively, as including all individuals sharing a national, ethnic, racial or religious trait, or negatively, as all individuals *not* having such a trait; the Convention provides no guidance in this respect, the case law is divided[33] and, as a practical matter, it is rare for genocide to affect only one group defined according to a single, specific criterion: genocide in Rwanda was committed against the Tutsis but it also affected "moderate Hutus" [34]; and, while the Jews were of course victims of the Shoah, it is clearly not absurd to see the Nazis' genocidal undertaking as directed more generally against non-Aryan peoples (as vague as that notion was) — Gypsies, for example, were also victims of it;

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— secondly, while Bosnia and Herzegovina did often refer in its pleadings, both written and oral, more specifically to "Muslims", that is quite simply because, as a matter of fact, they were the "preferred" — if that is the term — victims of the killing and other acts of maltreatment enumerated in Article II of the Convention.

34. The fact remains that the proclaimed objective of the FRY leadership, reiterated by Serb leaders in Bosnia and Herzegovina, was to create an "ethnically pure" territory, that is, one "cleansed" of its non-Serb populations, be they Muslims, "ethnic Croats" (the two dominant minorities in the Serb-controlled regions) or people of the other "nationalities" living in that territory.

35. This leads me to say a few words about the second point of disagreement between the parties as regards the definition of genocide. According to Serbia and Montenegro, we are not here faced with a case of genocide because the ethnic and religious groups subjected to heinous acts on the territory of Republika Srpska were treated properly elsewhere, including on the Respondent's territory. On 15 March last, Mr. Cvetković devoted an entire presentation to demonstrating this

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[32]See CR 2006/19, p. 51, para. 285 (de Roux); CR 2006/20, p. 10, para. 297 (de Roux); or CR 2006/21, p. 43, para. 54 (Stojanović).

[33]See CR 2006/20, pp. 11-13, paras. 304-308 (de Roux).

[34]See, notably: ICTR, Judgement of 2 September 1998, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, note 57, or Judgement of 4 September 1998, *Prosecutor v. Jean Kambanda*, case No. ICTR-97-23, para. 39.

point[35]. Bosnia and Herzegovina has very explicit reservations regarding the facts, and there is a great deal of evidence pointing in the opposite direction[36]. In law, however, this is in any event irrelevant: Article II of the Genocide Convention is not as categorical and absolute as Serbia and Montenegro claims it to be. The intention to destroy a group "as such" does not mean that the perpetrators of genocide must necessarily wish to destroy that group in its entirety and wherever it may be. Article II clarifies this point by stating that the "destruction" in question may target the group "in whole *or in part*"; and the words "in part' may mean — and do mean in this case — a well defined section of territory: in this instance, the area of Bosnia and Herzegovina which the Belgrade and Pale authorities intended to detach from that country in order to incorporate it in the FRY after "cleansing", "purging" it of all its non-Serb elements[37].

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36. I should add in this connection that I find it particularly scandalous that one of the counsel for Serbia and Montenegro should have felt able to invoke the humanitarian law of war in order to justify the forced displacement of the non-Serb populations, and that he had the audacity to state that "displacement of populations has always been a way of settling certain conflicts between opposing parties"[38]. This is to ignore the fact that, in this case before us today, those "transfers" were effected in a wholly discriminatory manner, against non-Serb populations alone, and were forcibly implemented through a policy of terror.

37. We all know, Madam President, that the Genocide Convention was adopted in the aftermath of the Second World War and that its drafters had in their minds the Shoah: the unimaginable horror, the genocide of genocides. However, even if there is always something deeply unpleasant about attempting to establish a hierarchy of horror, genocide cannot be limited to the Shoah — otherwise the 1948 Convention would be no more than just another rather futile memorial dedicated to the millions of victims of a tragedy which one would have us believe was unique: a dead letter, of no assistance to the victims of other attempts, on a smaller scale, to

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[35]CR 2006/20, pp. 33-58.

[36]See Reply, pp. 730-758, paras. 439-483; see also CR 2006/22, p. 52 (testimony of Mr. Riedlmayer).

[37]See in particular: Memorial, pp. 59-61, paras. 2.3.1.1-2.3.1.4; CR 2006/2, pp. 28-32, paras. 1-12 (van den Biesen); CR 2006/4, pp. 18-20, paras. 35-40, pp. 38-39, paras. 9-10 (van den Biesen); CR 2006/6, pp. 29-30, paras. 8-9 (Franck); CR 2006/10, pp. 50-53, paras. 33-38 (Pellet). Cf. CR 2006/20, pp. 15-18, paras. 318-329 (de Roux).

[38]CR 2006/18, p. 53, para. 140 (de Roux).

destroy certain human groups. To put it plainly, Madam President, we are arguing the case of *a* genocide, a monstrous event like any genocide; not *the* Shoah.

38. In this connection, the comparison which the Agent of Serbia and Montenegro[39] and Maître de Roux[40] felt obliged to draw between the extermination of 67 per cent of the European Jews by the Nazis and the — happily — much smaller percentage of the Bosnian Muslim population which perished in Bosnia and Herzegovina between 1992 and 1995 is to my mind not only highly questionable in moral terms, but also totally irrelevant in terms or law. Not only under Article II of the 1948 Convention is killing just one of the elements that serve to determine the existence of genocide. But also, in terms of the facts, the physical elimination — on what was

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undoubtedly a massive scale — of Muslims and of the members of other non-Serb ethnic or religious groups was only one of the means employed in order to induce the members of those groups to leave their ancestral lands and to achieve the intended aim of ethnic cleansing — that is to say, I repeat, the destruction, "in part", of a group within the meaning of the Convention, such part being limited to the members of the group living in the territory of Bosnia and Herzegovina of which the Serbs had gained control, but which represented as much as 70 per cent of the territory of that State.

39. Madam President, there is a third major difference between the parties in their approach to the definition of genocide under the 1948 Convention. Serbia and Montenegro is not concerned with genocide as an overall concept, but focuses attention on what I think should be characterized as "genocidal acts" — and I am referring more particularly to the statements made from this podium by Maîtres de Roux and Fauveau-Ivanović. Our opponents sought to analyse in succession each of the categories of acts enumerated in Article II of the Convention. I do not consider this approach to be wrong in itself, but it is not sufficient: such acts constitute genocide only if they form part of an overall plan, which cannot be identified through a purely analytical approach.

40. An isolated case of killing, torture or rape, whether motivated by racism or by the intention to destroy a human group within the meaning of Article II of the Convention, cannot be characterized as "genocide", at least in relation to issues of responsibility between States.

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[39]CR 2006/15, p. 39, para. 196.

[40]CR 2006/18, p. 12, para. 7.

Conversely, it may be that cumulative acts of this kind, which, taken separately, do not meet the definition of genocide because the perpetrators were not personally motivated by the intent to destroy, in whole or in part, a group as such, constitute genocide because they form part of an overall plan of which those individuals were only the more or less conscious executants.

41. This serves at the same time to explain why the ICTY, up to now, has handed down so few convictions for genocide or complicity in genocide, and why the acts which the Tribunal has had to deal with nevertheless constitute elements of an overall picture — a pattern — which establishes the existence of genocide. This leads me, Madam President, to consider briefly the difficult and complex question of the proof of genocide.

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B. Proof of genocide

42. Madam President, the Parties to these proceedings both accept that genocide is determined by the combination of a material element, the *actus reus*, the various possible manifestations of which are enumerated in subparagraphs *(a)* to *(e)* of Article II of the 1948 Convention, and a psychological element, the *mens rea*, entailing the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

43. Proving the existence of the first element, the *actus reus*, poses no particular problem, and I think that the pleadings *of both parties* (not just those presented on behalf of Bosnia and Herzegovina) have adequately established:

— that numerous Muslims and other non-Serbs were killed in Bosnia and Herzegovina;

— that bodily or mental harm, on a massive scale, was caused to the members of this group;

— that the group was deliberately subjected to conditions of life calculated to bring about its physical destruction in whole or in part; and

— that the group was the victim of measures intended to prevent births in its midst and was even subjected to the forcible transfer of children, given the rapes and other forms of sexual violence perpetrated against non-Serbs, and particularly Muslim women.

44. As regards the *mens rea*, Serbia and Montenegro claims by contrast that Bosnia and Herzegovina has failed to prove this, inasmuch as it has failed to show that all these acts, and each of them individually, were committed with genocidal intent. It is certainly true, for example, that

"to be a component of genocide, the act of killing must be accompanied by a pre-existing genocidal intent"[41]. However, contrary to what is claimed by our opponents, such pre-existing intent need not — for the purpose of establishing, in a dispute between States, that genocide was perpetrated — be present in the mind of each of the perpetrators: as I said before, they may be the executants of genocide (or accomplices thereto)[42] without however being personally motivated by genocidal intent.

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45. In this connection, our opponents' obsession with criminal law principles leads them astray. Maître de Roux is certainly right to affirm that the Parties to these proceedings are not the same as those who appear before the ICTY, and to note that "this difference in parties to the proceedings justifies . . . viewing the decisions of the Tribunal for the former Yugoslavia in a different light"[43]. But it is unfortunate that he failed to draw the necessary conclusions from this excellent observation, since he concentrated exclusively on demonstrating that our neighbour tribunal had generally failed to convict its accused of genocide[44].

46. All this is of course true, Madam President; but the reason for this is quite simple: the Tribunal is a criminal court which tries individuals — not States — on the basis of rules which, though international in character, are nonetheless rules of criminal law. It cannot convict persons brought before it unless, "beyond all reasonable doubt", the judges in the different trial chambers are persuaded that the individuals in question were personally motivated by genocidal intent. *You*, however, Members of the Court, are not criminal judges; the Parties that appear before you are not prisoners or prosecutors; and the evidence admissible is not the evidence that applies in criminal law. Had that been the case, there are hundreds of witnesses, thousands perhaps, whom we would have been obliged to call to testify. We did not do so — and for a very good reason, I believe: it would have served no purpose (except, no doubt, to irritate you . . .), but it would have made no contribution whatsoever to proving what we are required to prove. I would add, however, that this in no way amounts to saying that the decisions of the ICTY and the ongoing proceedings before

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[41] *Ibid*, p. 30, para. 72 (de Roux).

[42] Cf. ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33-A, Appeals Chamber, Judgement of 19 April 2004, paras. 135-144.

[43] CR 2006/18, 14 March 2006, p. 41, para. 102.

[44] See *ibid.*, pp. 33-43, paras. 81-107; see also p. 44, paras. 109-110 or p. 49, para. 123; and CR 2006/19, 15 March 2006, p. 14, para. 158, p. 39, para. 246 or p. 49, paras. 278-279.

that tribunal are not relevant; it only means that these are pieces of a puzzle which it is for us, for you, to put together in order to obtain an overall picture of what really happened.

28 47. What we have to prove is not that each of the individuals who committed the killings and the other acts constituting genocide was motivated by genocidal intent, but that the Respondent's organs of government, the State which was behind the genocide, which conceived and organized it (or which became guilty of complicity in it), were so motivated. This does not make our task — or yours, for that matter — any easier; but it has to be acknowledged, first of all, that it differs from that of the Prosecutor or the judges of the ICTY, a fact which our opponents persist in denying or blithely ignoring[45].

48. It is quite obvious that we cannot expect to find evidence of genocidal intent on the part of the respondent State in explicit declarations calling for the destruction, even the partial destruction, of the non-Serb populations or Muslims in that part of Bosnia and Herzegovina of which it had control: as I said during the first round of oral argument[46], even Hitler attempted to conceal the Shoah in "night and fog". It goes without saying that no late-twentieth century leader would have been reckless enough to call openly for genocide. It is for you, therefore, Members of the Court, to decipher the coded language used by the authorities of the FRY and their auxiliaries in Republika Srpska as an incitement to genocide; we have submitted a substantial body of evidence establishing such incitement[47]. I would add that we would doubtless have been better able to do so if, as the Agent of the Respondent informed us[48], the country that he represents had actually opened its State archives; unfortunately, it has done nothing of the sort. Or if it had been so good as to submit to the Court evidence it is keeping to itself.

49. It is no easy matter to prove the genocidal intent of the respondent State — a genocidal intent which, I hasten to point out, it harboured at the time of the facts at issue, between 1992 and

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[45]See for example CR 2006/18, 14 March 2006, p. 21, para. 41; p. 19, para. 36, p. 20, paras. 37-38, p. 21, paras. 41 and 43, p. 22, para. 46 (de Roux); CR 2006/19, 15 March 2006, p. 22, para. 181, p. 25, para. 193, p. 30, para. 216, p. 51, para. 287 (de Roux); CR 2006/20, 15 March 2006, p. 12, para. 306, p. 22, para. 346 (de Roux).

[46]CR 2006/8, 3 March 2006, pp. 23-24, paras. 39-41, p. 36, para. 67 (Pellet); see also: CR 2006/10, 6 March 2006, p. 50, para. 31 (Pellet).

[47]Memorial, pp. 59-61, paras. 2.3.1.1-2.3.1.4. Reply, pp. 819-823, paras. 157-169; CR 2006/10, 6 March 2006, pp. 49-55, paras. 30-41 (Pellet).

[48]CR 2006/12, 8 March 2006, p. 14, para. 19.

1995, but which it obviously no longer harbours today — but it is not impossible to do so. Such proof emerges from:

29 — the careless statements, usually coded, as I said, but frequently decipherable, made by the then leaders of the FRY and their surrogates in Bosnia and Herzegovina;

— the massive scale and simultaneous nature of the acts of genocide that occurred throughout the territory of Bosnia and Herzegovina under Serb control;

— the "selective destruction" of the most influential members of the group of non-Serbs or Muslims present on that territory[49]; and

— the systematic destruction of all the religious or cultural buildings of those groups, of which Mr. Riedlmayer, in his testimony on 17 March last[50], provided convincing evidence.

50. In this connection, I should like to provide a clarification which I consider to be important. Contrary to what our opponents appear to believe or wish to have us believe[51], Bosnia and Herzegovina is most assuredly not asking the Court to find that Serbia and Montenegro was responsible for a "cultural genocide" falling outside the terms of the 1948 Convention. The reason why the systematic destruction of the Croatian (and Catholic) and, above all, the Muslim cultural heritage is of particular relevance to this case has to do with the fact that it makes it extremely clear that those were in fact the groups that were targeted, as such, and that every trace of their existence and their centuries-old presence in the territories which the Respondent wished to annex or bring under its control was to be eradicated for ever.

51. And, Madam President, there is something else. On various occasions during the first round of oral argument, the representatives of the other Party allowed themselves a confession — or at least a semi-confession. Both Agent and counsel for Serbia and Montenegro laid stress on "the fear of the Serbs", a fear "accounted for by the recollection of crimes committed by the Ustashi during the Second World War"[52], crimes which can perhaps be regarded as constituting a

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[49]Cf. CR 2006/20, 15 March 2006, p. 16, para. 323 (de Roux).

[50]See CR 2006/22. See also Memorial, pp. 48-54, paras. 2.2.5.1-2.2.5.16 and p. 57, para. 2.2.6.7; Reply, pp. 168-186, paras. 248-286 and pp. 295-296, paras. 547-550; and CR 2006/5, 1 March 2006, pp. 44-59 (Dauban).

[51]See CR 2006/19, 15 March 2006 (de Roux), p. 21-22, paras. 178-179, or CR 2006/20, 15 March 2006, p. 15, para. 319 (de Roux).

[52]CR 2006/15, 10 March 2006, p. 43, para. 214 (Stojanović); see also CR 2006/21, 16 March 2006, p. 37, para. 23.

true genocide. That is indeed the view of Mr. Brownlie: "the genocide during the Second World War did take place"[53] — which led that eminent counsel to justify the assistance given by the FRY to the Bosnian Serbs, another remarkable confession: "The circumstances in which the assistance was given included the likelihood of acts of genocide directed against Bosnian Serbs"[54]. It is clear that by thus raising the spectre of anti-Serb genocide, the Belgrade authorities could only encourage Serbs to commit what might be termed "preventive genocide"[55].

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52. At the very least, Members of the Court, this constitutes a body of evidence leaving no doubt as to the deliberate, clear, undeniable intention to destroy the group or groups thus targeted; "in whole" in the area controlled by the Serbs; or "in part" whenever, fortunately, their existence was not threatened outside that area.

C. Genocide and civil war

53. Madam President, the Respondent blithely counters these facts with one single explanation, summed up in two words, which it uses as a "wild card": "civil war".

54. I shall be brief on this as Mr. van den Biesen discussed it this morning: it is clear that the war waged between the ethnic and religious groups in Bosnia and Herzegovina — between Muslims, Serbs and Croats and, on occasion, even within each of them, including in some cases between Muslim factions, as at Bihać, where for a time the Serbs formed an alliance with a group of Muslims of whom they made use in order to fight against the legitimate (and multi-ethnic) Sarajevo government.

55. But contrary to Serbia and Montenegro's assertion, the civil war does not explain everything. We are told that "the purpose of any armed conflict" is to bring about the departure of what are regarded as enemy populations[56]; but in this case, the exodus was triggered not by military operations, but by the spate of crimes and acts of violence perpetrated against the civilian populations. We are told that, in any war, the distinction between civilians and military personnel

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[53]CR 2006/17, 13 March 2006, p. 19, para. 202; see also CR 2006/19, 15 March 2006, p. 41-42, paras. 253-255 (de Roux).

[54]CR 2006/17, 13 March 2006, p. 17; see more generally pp. 17-20, paras. 192-204.

[55]See on this point, Reply, pp. 55-63, paras. 1-13; CR 2006/2, 27 February 2006, p. 28-30, paras. 1-8 (van den Biesen).

[56]CR 2006/15, p. 22, para. 157 (Stojanović).

becomes blurred[57]; perhaps, but in this case the Muslim and, more generally, the non-Serb civilian population was subjected to a policy of systematic terror intended to bring about its complete disappearance from the areas which were to be "cleansed" of all their non-Serb elements.

31 Sometimes we are told that this war was a war of territorial conquest[58], sometimes that it was a war of secession[59] — two notions which, incidentally, are scarcely compatible . . .; but it is not readily understandable why an armed conflict of this type would be accompanied by the wholesale murder of prisoners as was the case in Srebrenica, by the internment of civilians in camps in appalling conditions or by what was clearly an organized policy of sexual violence.

56. "Military necessity" or the inevitable "foul-ups" which occur in all armed conflict really offer no satisfactory explanation in themselves for these systematic, planned and premeditated crimes[60]. In reality, genocide was the method used by the Serbs in this war of conquest (or of secession, the name is unimportant), who were controlled, directed, organized and financed from Belgrade. A civil war? Yes, partly so, even though the massive involvement of the FRY does not allow one to say that it was so exclusively, but a "genocidal" war in both methods and aim: the eradication of the non-Serb populations from the territories controlled by the Serbs.

57. Our opponents put forward another argument. While not acknowledging that the Serb strategy was essentially genocidal, they accept that abominable crimes were committed by the Serbs but, they say, this was also true of the other parties to this "fratricidal conflict"[61]. Three observations will suffice on this point, Madam President:

(1) Bosnia and Herzegovina does not deny and has never denied, that inexcusable crimes have been committed by Bosnian Muslims or Croats; it is dismayed by this and, unlike the

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[57]Cf. CR 2006/15, p. 23, para.. 158 (Stojanović); CR 2006/18, p. 51, para. 132, or p. 52, para. 135 (de Roux).

[58]CR 2006/15, p. 13, para. 122, p. 25, para. 164, pp. 27-29, paras. 167-172, p. 31, para. 178, p. 33, para. 184, p. 36, para. 188, p. 39, para. 196, p. 43, para. 211 (Stojanović) ; CR 2006/18, p. 42, para. 105; CR 2006/19, p. 18, paras. 165 and 167, p. 38, para. 242, p. 43, para. 259, p. 47, para. 273 (de Roux); CR 2006/21, 16 March 2006, p. 41, para. 46, p. 42, para. 51 (Stojanović).

[59]CR 2006/12, p. 48, para. 1.16 (Varady); CR 2006/16, p. 32, para. 86; CR 2006/17, p. 17, paras. 192, 194 and 196, p. 20, paras. 204 and 206, p. 29, para. 254 (Brownlie); CR 2006/19, p. 40, para. 249, pp. 47-48, para. 273; CR 2006/20, p. 13, para. 310, p. 15, para. 316, p. 22, para. 347 (de Roux); CR 2006/21, p. 10, para. 14 (Brownlie); *ibid.* p. 39, para. 35 (Stojanović).

[60]CR 2006/14, p. 11, para. 3; CR 2006/15, p. 23, para 158 (Stojanović); *ibid.*, p. 22, para. 157; CR 2006/18, p. 12, para. 6, p. 52, paras. 134-136; CR 2006/19, pp. 12-13, para. 152, p. 21, para. 178, p. 50, para. 279 (de Roux); CR 2006/20, pp. 23-24, paras. 5-6 (Fauveau-Ivanović).

[61]CR 2006/19, p. 18, para. 155 (de Roux) ; see also, CR 2006/12, p. 46, para. 1.7, p. 48, para. 1.14 (Varady); CR 2006/18, p. 38, para. 92; CR 2006/19, pp. 16-17, paras. 163-164 (de Roux).

32 Respondent, has sought to punish the guilty and therefore co-operated with the ITCY to ensure that those responsible are brought to justice[62].

(2) But however odious these crimes were, they can in no way be equated with genocide. Moreover, unless it is regarded as having been exclusively tactical, the withdrawal of Serbia and Montenegro's counter-claims shows that it shares this position and never during the hearings did its representatives claim otherwise; and above all,

(3) Whatever the case, one genocide cannot excuse another which, moreover, our opponents have the grace to acknowledge[63].

58. Madam President, I have now finished the second part of my long presentation, in which I have tried to show the persisting discrepancies between the Parties on the legal issues related to the genocide against the non-Serb populations of Bosnia and Herzegovina, and particularly against the Muslims, between 1992 and 1995. Before coming to the question of the attributability of this serious violation of an obligation deriving from a norm of *jus cogens*, allow me to summarize the conclusions from what I have said, once again in the form of propositions:

(1) The genocidal acts enumerated in Article II of the 1948 Convention are not to be confused with genocide as a global internationally wrongful act which may engage the responsibility of a State party.

(2) Such genocide must be directed against a group which may be defined positively on the basis of the ethnic or religious characteristics of its members, or negatively, through the absence of either of these characteristics.

(3) Genocide may be "total" and, like the Shoah, aimed at the total destruction of a group, or partial and then, as in the case before us, it may seek the destruction of a human group in a particular territory.

33 (4) The "ethnic cleansing" perpetrated in the part of Bosnia and Herzegovina controlled by the Serbs thus constitutes genocide within the meaning of Article II of the Convention.

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[62]See Reply, pp. 900-903, paras. 23-25. See also, Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), United Nations, doc. S/2005/781, 14 December 2005, p. 11, para. 35. See also, *Prosecutor* v. *Hadzihasanović*, IT601-47, docs. DH 119, DH 155/2, DH 274, DH 275, concerning the proceedings before the courts of Bosnia and Herzegovina.

[63]CR 2006/15, p. 40, para. 199 (Stojanović) See also CR 2006/20, 15 March 2006 (Fauveau-Ivanović), p. 26, para. 19, p. 27, para. 25.

(5) The evidence that genocide has been committed may, under public international law, be adduced by any means and is not governed by the relevant criminal law rules in this field.

(6) The evidence used must make it possible to establish with certainty that the author of the genocide — the State which was the author of the genocide — was motivated by the intention to destroy in whole or in part a group defined in Article II of the Convention. Such certainty may result from a body of concordant evidence.

(7) Civil (or international) war cannot serve as a screen to excuse or exclude the genocide committed in Bosnia and Herzegovina. In the case before us, genocide constituted the purpose of the war waged by the Serbs and that war was the context of the genocide.

Madam President, I still have about half an hour to inflict on you; I do not know whether you prefer to suffer this now or after a break?

The PRESIDENT: I think we will take a short break now and be back within ten minutes.

Mr. PELLET: Thank you very much.

The Court adjourned from 4.30 to 4.40 p.m.

The PRESIDENT: Please be seated.

Mr. PELLET:

III. The genocide committed in Bosnia and Herzegovina is attributable to the Respondent

59. I now come, Madam President, with your permission, to the question of the attributability to the Respondent of the genocide which, as I have just recalled, was indeed committed in Bosnia and Herzegovina during the period from spring 1992 to the conclusion of the Dayton-Paris Agreements on 1 December 1995.

60 60. Curiously, Serbia and Montenegro proved, during the first round of oral pleadings, to be particularly unforthcoming on this nevertheless crucial aspect of the case. Mr. Brownlie did admittedly deal with the question on two occasions: at length in his two statements on 13 March[64]

[64]CR 2006/16, pp. 31-53, paras. 83-161 and CR 2006/17, *passim*.

and much more briefly on 16 March[65]. But in both cases my opponent confined himself, on the legal aspects, first to repeating several times that Republika Srpska was an independent State, without attempting to prove this or to draw from this questionable assertion any precise consequences as to responsibility and, secondly, to defend the celebrated "*Nicaragua* test", without seeking to answer the much more complete argument we had put forward.

61. For our part, during the first round of oral argument we showed that the Respondent was responsible for the genocide committed against the non-Serb populations in Bosnia and Herzegovina and, particularly, the Muslims. Professor Luigi Condorelli established that, during the relevant period — from 1992 to 1995 — Republika Srpska was completely in the hands of the FRY authorities and was to be considered as an organ of that entity, as such engaging its responsibility, pursuant to the rule set out in Article 4 of the ILC Articles on State Responsibility[66]. I, for my part, showed that, even if you do not accept this assimilation of Republika Srpska to an organ of the Respondent, the criterion of control, as set out in Article 8 of those Articles in any case led to the same result[67] and, in the alternative, that in any case it was impossible to avoid the conclusion that the FRY had made itself guilty of complicity "in genocide" — within the meaning of Article III *(e)* of the Genocide Convention — or of being an accomplice to "genocide" under the general principles of international law[68].

62. The Respondent remained almost totally silent during the first round of oral pleadings, both on the "organic" argument and on complicity. We must simply accept this, Madam President, but I must, once again, stress that this attitude, in which I am not sure whether we should see

35 contempt or negligence, is not likely to promote genuine debate between the two Parties, and that we would take it very badly if Serbia and Montenegro were now to reply to our first round of oral argument when we, for our part, would be unable to respond.

63. Subject to this preliminary remark, I shall confine myself to a few observations — which my colleagues will add to where appropriate during our further oral pleadings — on the legal

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[65]CR 2006/21, pp. 15-17.

[66]CR 2006/10, pp. 10-31, paras. 1-45 (Condorelli).

[67]CR 2006/10, pp. 38-48, paras. 3-23 (Pellet).

[68]CR 2006/10, pp. 58-62, paras. 51-63 (Pellet).

considerations, on which it is clear that the Parties are still at odds. These somewhat brief observations will relate to the following points in turn:

— the alleged independence of Republika Srpska;

— the control test and its relationship to the issue of attributability; and

— the issue, blithely ignored by counsel for the Respondent, of complicity.

A. The alleged independence of Republika Srpska

64. On numerous occasions during his oral pleadings devoted to the attribution of responsibility for the genocide committed in Bosnia and Herzegovina, Mr. Brownlie mentioned "the appearance of the Republika Srpska as an independent State"[69]. Without ever rebutting the very detailed argument to the contrary put forward both orally and in writing[70] by Bosnia, he confines himself to stating that neither that entity nor its army, the VRS, were under the control of the FRY authorities.

65. Allow me, Madam President, if you will, to point out that it is to say the least difficult to hold that an entity which is over 99 per cent dependent for its budget on the aid of a dominant and extremely comprehensive State, whose Central Bank cannot make any decision without the say-so of its counterpart in Yugoslavia[71], whose army is wholly "subsidised" by the FRY, its officers even receiving their pay and promotion directly from Belgrade[72], that such an entity can truly be

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regarded as a State, within the meaning given by international law to this term. Here, it is no more possible to speak of a sovereign State than it was in the case of Manchukuo, the former Bantustans of South Africa or the Turkish Republic of Northern Cyprus — which I fail to see how my opponent can distinguish from Republika Srpska on the ground, as he maintained, that: "It is the independence [but which independence?] of Republika Srpska and its territorial separation [but which separation?] which makes the comparisons with Northern Cyprus . . . inapposite."[73]

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[69]CR 2006/16, p. 31, para 85, p. 33, paras. 91-92, p. 39, paras. 115 and 117; CR 2006/17, p. 26, paras. 238 *(c)* and 242, pp. 44-45, paras. 309-310 or p. 46, para. 314; see also CR 2006/21, pp. 44-45, paras. 63-64 (Stojanović).

[70]Reply, pp. 674-685, paras. 346-358, pp. 788-816, paras. 80-145; CR 2006/9 (Torkildsen); CR 2006/10, pp. 18-24, paras. 19-32 (Condorelli).

[71]Reply, pp. 674-685, paras. 346-358; CR 2006/9, pp. 27-48, paras. 14-59 (Torkildsen).

[72]CR 2006/9, pp. 25-27, paras. 7-13 (Torkildsen).

[73]CR 2006/16, p. 39, para. 117.

66. In reality, Madam President, in all these cases, including Republika Srpska, these are puppet States, whose internationally wrongful acts engage the responsibility of the dominant State[74]. As Luigi Condorelli demonstrated in his oral pleading of 6 March[75], Republika Srpska was at the time no more than the intermediary of Belgrade's decisions and could be regarded as an organ of the FRY, as contemplated by Article 4 of the ILC Articles on State Responsibility for Internationally Wrongful Acts. And this was so notwithstanding the case — the only case — in which this *de facto* Serb province opposed the Belgrade Government (in connection with the Vance-Owen Plan) and the *trompe l'oeil* sanctions which ensued from it; as Professor Condorelli pointed out: happy the central government which only encounters opposition from its territorial components in just one isolated circumstance!

B. The control test and its relationship to the issue of attributability

67. Madam President, as we showed in the first round, the "organic theory" — which undoubtedly applies to the *de jure* organs of the FRY: its army, the JNA, then the VJ; its Ministry of the Interior (the MUP) and that of the Republic of Serbia and, in general, to all its governing organs — the organic theory, as I was saying, is just one of the routes whereby the Respondent's responsibility for the genocide committed in Bosnia and Herzegovina can be established. Another leads to the same result — and I hasten to add that although the two routes rely on slightly different reasoning, they are not mutually contradictory or incompatible: the interpreter — yourselves, Members of the Court — can in fact follow either of them; they both lead to the same conclusion, on the basis of the same facts. Essentially, these facts lend themselves to two distinct interpretations: we may rely on the organic argument, as Article 4 of the ILC Articles asks us to do, or we may apply the more flexible test of actual direction or control, as set out in Article 8.

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68. However, this very general rule is itself subject to divergent interpretations. Yet, our opponent does not hesitate: the only acceptable test of such control, indeed, "*the* criteria of State responsibility" he told us on 13 March[76] is that of "effective control", as applied by the Court in its

[74]Reply, pp. 812-816, paras. 137-145.

[75]CR 2006/10, pp. 18-24, paras. 19-32 (Condorelli).

[76]CR 2006/16, p. 33; emphasis added.

Judgment of 1986 in the *Nicaragua* case, from which he quotes very long passages supported by almost equally long extracts, from the commentary on Article 8 of the ILC Articles[77].

69. Well, Madam President, I wholeheartedly agree: control must be effective; Bosnia and Herzegovina has never said otherwise. What, however, seems to us more open to discussion is not the effectiveness of the control, it is its purpose. Should it, as in the *Military Activities* case, relate to each of the internationally wrongful acts committed by the entity "under control" — the *contras* in the case which gave rise to the 1986 Judgment, the Serbs in Bosnia and Herzegovina in the one before us now? Or should it be assessed from an "inter-subjective" standpoint and is it enough for the entity in question to be under the effective control of the State under whose authority it falls?

70. At the hearing on 3 March, I took the liberty, Members of the Court, to invite you to "forget *Nicaragua*"[78]. This is what my eminent opponent humorously calls the "amnesia argument"[79]. But a witty remark, to which I willingly pay tribute, cannot take the place of argument, or suffice to discredit the argument which engendered it . . . And again I invite you, Members of the Court, to reflect on the validity of applying this criterion in the present case. As regards the effectiveness of the control, there is no problem of course: for the genocide committed in Bosnia and Herzegovina to engage the responsibility of the Respondent, the different organs or individuals, the direct authors of the acts of genocide, must clearly have been in a situation of close

38 dependency with respect to the FRY. Bosnia and Herzegovina showed, in the first round of its oral pleadings, that there can be no doubt about this, either as regards Republika Srpska itself, its army, the VRS and the volunteers who joined it and, in general, the organs falling within its apparatus of State, or as regards the Serb paramilitary groups, created, trained and organized by the Ministry of the Interior of the Republic of Serbia and involved in the most sinister operations linked to the genocide — including in Srebrenica. We saw terrible visual evidence of this during the hearing of 28 February 2006, in the film we were shown of the execution of six young Muslims by members of the "Scorpions", one of these paramilitary groups. We will revert to this global control

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[77] *Ibid.*, pp. 33-35, paras. 94-98. See also CR 2006/17, p. 24, para. 226 or CR 2006/21, p. 16, para. 2.

[78] CR 2006/8, p. 34, paras. 63 *et seq.* (Pellet); and see also CR 2006/10, pp. 39-40, para. 8 and pp. 46-47, paras. 20-23 (Pellet).

[79] CR 2006/16, p. 39, para. 114.

exercised by Belgrade over all these entities in the coming days and will again establish the effectiveness of that control.

71. Thus, from the legal perspective, that is not the major issue. It is, rather, whether, for the responsibility of the Respondent to be engaged in the present case, Bosnia and Herzegovina is obliged to establish that, over and above an effective general control over the persons and entities that perpetrated genocidal acts in Bosnia and Herzegovina, the Belgrade authorities had effective control over each of those acts, as required by the Court in its 1986 Judgment with respect to a context and circumstances which differed greatly from the present case[80]. Mr. Brownlie sees no reason for you not to follow that precedent. I do.

72. Needless to say that I am in no sense asking you, Members of the Court, to apply to Yugoslavia a "low standard of proof in cases of genocide"[81]; nor, moreover, to invent a principle of "strict liability"[82], which does not appear justified by any legal argument in the present case. All that I am asking you to do is to find that genocide, as I have just shown, is a global offence, the existence of which is established by a series of genocidal acts (those set out in Article II of the 1948 Convention) — not *one* act, Madam President, but *several* acts; a combination of co-ordinated acts with but a single purpose: the destruction, in whole or in part, of a group of humans having one or more of the characteristics indicated in that Article.

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73. If this analysis is correct — and I sincerely believe it is — the question of the applicability of the "*Nicaragua* test" and the choice between that and the "*Tadić* test", again cited by counsel for Serbia and Montenegro at the hearing of 13 March[83], are not valid issues. Members of the Court, all that you have and need to assure yourselves of is that the Belgrade authorities had effective general control over the perpetrators of genocidal acts and wielded this control with the intent, in an area of the Republic of Bosnia and Herzegovina, to destroy the non-Serb populations, and in particular the Muslims, with a view to making the territories concerned "ethnically pure".

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[80]See CR 2006/9, p. 32, para. 57 and pp. 34-37, paras. 65-70 (Pellet); see also CR 2006/16, p. 39, para. 116 (Brownlie).

[81]*Ibid*., para. 111.

[82]CR 2006/17, p. 44, para. 307 (Brownlie).

[83]*Ibid*. pp. 36-38, paras. 100-110.

C. Complicity revisited

74. Madam President, during the first round of oral argument, Serbia and Montenegro said little regarding the issue of its complicity in this genocide. Mr. de Roux touched on it when, on 15 March, he analysed the ancillary crimes to genocide listed in paragraphs *(b)* to *(e)* of Article III of the 1948 Convention[84]. The analysis he gave was extremely brief, but then this brevity doubtless shielded it from criticism; in any event, I could see no major difference from what I had myself said on the subject before the Court on 3 March last[85].

75. I noted, in particular, that our opponent seemed to accept, albeit in a rather oblique manner[86], the distinction that I had made between, on the one hand, complicity *in* genocide, within the meaning of Article III of the Convention and, on the other, *aiding and abetting* genocide pursuant to the general rules of international law on responsibility. In either case, the accomplice aids and abets the principal perpetrator of the wrongful act — in the present case, the perpetrator of the genocide. And that, Members of the Court, if you were to reject the proposition — self-apparent to us — that the FRY was the perpetrator, could only have been Republika Srpska — irrespective of whether it was or was not a subject of international law. It is clear that the prohibition of genocide and of complicity in genocide applies to all, regardless of the legal nature of the persons or entities responsible — on whatever basis (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 31).

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76. The distinction between the two types of complicity on which the two Parties seem to agree, at least from a legal standpoint, lies in the fact that, in the first instance — complicity *in* genocide under Article 3 *(e)* — the accomplice must himself be motivated by genocidal intent, whereas, in what we might term "common law complicity", in *aiding and abetting* genocide, the

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[84]CR 2006/19, pp. 29-32, paras. 213-222.

[85]CR 2006/8, pp. 26-28, paras. 45-50 (Pellet). See also CR 2006/10, pp. 58-59, paras. 51-54 and pp. 59-60, para. 58 (Pellet).

[86]CR 2006/19, p. 31, paras. 219-220.

responsibility of the accomplice is incurred by the mere fact that he knowingly aided and abetted the perpetrator of the act but without necessarily sharing the latter's genocidal intent.

77. This second form of complicity is not legally based upon the precise wording of Article 3 *(e)* of the Convention, but upon the general principles of international law on State responsibility (of which there is an equivalent in terms of individual criminal responsibility in Article 7 of the ICTY Statute, which formed the basis of the conviction of General Krstić for aiding and abetting genocide)[87]. And while, as Mr. Brownlie so firmly asserts[88], it is true that in the *Nicaragua* case the Court did not conclude that the United States had sufficient control over the *contras* in order for the internationally wrongful acts committed by the latter to be attributed to the Respondent, it, nevertheless, was of the opinion that the responsibility of the United States was engaged by the multifaceted aid that it had granted the counter-revolutionary forces: the Court "takes the view that the *contras* remain responsible for their own acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, *included*

41 *conduct related to the acts of the* contras" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 65, para. 116; emphasis added).

78. In the present case, it appears difficult to deny that the FRY was, at the relevant time, motivated by a genocidal intent. Indeed, the Respondent's Agent has, on a number of occasions, characterized the régime in power then as "criminalized" and its leaders as "criminals"[89] — without, of course, openly admitting that amongst the crimes concerned was the genocide for which Serbia and Montenegro is responsible. But, in any case, the criminal intent of the leadership of that period was not denied and this, I believe, should, Members of the Court, be sufficient for you, as far as the notion of complicity is concerned, to opt for "Article 3 *(e)* complicity" rather than "*Nicaragua* complicity" — the complicity corresponding to aiding and abetting the commission of

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[87]ICTY, Appeals Chamber, Judgement, 19 April 2004, *Prosecutor* v. *Radislav Kristić*, case No. IT-98-33-A, paras. 135-144; compare, ICTY, Trial Chamber I, Judgement, 17 January 2005, *Prosecutor* v. *Vidolje Blagojević and Dragan Jokić*, case No. IT-02-60, para. 797.

[88]CR 2006/16, pp. 33-35, paras. 94-95, p. 39, para. 116; CR 2006/17, p. 24, para. 226; CR 2006/21, p. 16, paras. 1-3.

[89]See CR 2006/12, p. 12, para. 11 (Stojanović); see also p. 13, para. 15 or pp. 15-16, para. 23, or CR 2006/21, p. 40, para. 40 (Stojanović).

a wrongful act without the accomplice necessarily sharing the criminal intent of the perpetrator of the act. Unfortunately, the leadership in Belgrade shared only too readily the genocidal intent of its counterpart in Pale.

79. As for the bare fact of assistance, we dealt with it at length last month[90] and will return to it again in this second round of oral argument. I would just like to emphasize that, far from denying the provision of massive aid to the Bosnian Serbs during the period of genocide[91], the Respondent has attempted to justify its attitude, notably by the fear (or likelihood as Mr. Brownlie put it[92]) of a genocide being committed against the Serbs. I have just said what can be made of this unlikely attempt at justification. In any case, the fact is that Serbia and Montenegro provided massive aid to Republika Srpska and, as Bosnia and Herzegovina has shown in great detail, without this aid, this entity could not have existed and certainly could not have put into effect its genocidal policy known as "ethnic cleansing".

42 80. Mr. Brownlie sees nothing wrong in this: "the assistance provided by the FRY to the Republika Srpska and its armed forces was perfectly compatible with the principles of general international law and the provisions of the United Nations Charter"[93]. This is somewhat disturbing, Madam President. Thus, massive aid contributing decisively to a genocidal policy carried out openly with a view to the "serbianization" of the territories claimed as being a part of Greater Serbia is apparently compatible with the principles of international law and with the United Nations Charter? That was not the opinion of the organs of the United Nations, which condemned such aid repeatedly[94]. It did not appear to be the opinion of Serbia and Montenegro's Agent before this Court, who, as I have just noted, is less indulgent than his counsel towards the actions of the former Government of his country. And it is certainly not the opinion of Serbia and Montenegro's Council

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[90]Reply, pp. 468-498, paras. 11-58, pp. 588-589, para. 212; CR 2006/4, pp. 12-21, paras. 10-44 (van den Biesen); CR 2006/8, pp. 39-50, paras. 1-36 (van den Biesen); CR 2006/9, pp. 25-44, paras 7-47 (Torkildsen); CR 2006/10, pp. 18-27, paras. 19-37 (Condorelli), *ibid*., p. 45, para. 16 (Pellet).

[91]See, for example, CR 2006/16, p. 39, para. 116 (Brownlie) or CR 2006/17, pp. 16 and on, paras. 1991 and on (Brownlie).

[92]CR 2006/17, p. 17.

[93]*Ibid*., p. 23, para. 222.

[94]See United Nations, doc. A/RES/46/242, 25 April 1992; United Nations, doc. A/RES/47/121, 18 December 1992; United Nations, doc. S/RES/819 (1993), 16 April 1993; United Nations, doc. S/RES/820 (1993), 17 April 1993; United Nations, doc. S/RES/838 (1993), 10 June 1993; United Nations, doc. A/RES/48/88, 20 December 1993.

of Ministers which, in a declaration it adopted on 15 June 2005, in commemoration of the 10th anniversary of Srebrenica, expressly attributed to the "undemocratic regime of terror and death" of Milosevic (that is the Government of the FRY at the time) this "massive crime"[95].

81. In so doing, the Government of Serbia and Montenegro has, in truth, gone a lot further than mere recognition of past aid and complicity. It has admitted its full responsibility as the perpetrator of the atrocities committed at Srebrenica. In view of such a declaration — a commendably dignified admission, although it would have been more convincing had it contained the word "genocide" — we, on this side of the floor, have great difficulty in understanding how certain members of Serbia and Montenegro's legal team can continue to assert blandly that the Respondent was in no way involved in the genocidal policy implemented in Bosnia and Herzegovina[96], or that the victims of massacres were just combatants engaging in attacks against the Serb forces[97].

43 82. The fact is, in any case, Madam President, that the Respondent was present in a wide variety of ways in that part of Bosnia and Herzegovina controlled by the Serbs and subjected to "ethnic cleansing"; it made an active contribution to that end; and it recognizes its responsibility for one of the most terrible episodes of this tragedy — Srebrenica. We believe that this goes far beyond mere aiding and abetting or complicity in genocide or just conspiracy within the meaning of Article III *(b)* of the 1948 Convention. We are convinced that Serbia and Montenegro's involvement in genocide was such that it should be regarded as the real perpetrator, either because Republika Srpska was under the control of the FRY in accordance with Article 8 of the 2001 ILC Articles or because it should be regarded as one of the FRY's organs in line with Article 4 of the same text.

83. As I have done for the other sections of my presentation today, before I finish I would like, Madam President, to resume the main points of Bosnia and Herzegovina's reasoning

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[95]Available at http://www.info.gov.yu/saveznavlada/detaljis.php?strid=699; copy in judges' folder of 6 March 2006.

[96]CR 2006/17, pp. 10-15, paras. 162-183 (Brownlie).

[97]CR 2006/16, pp. 10-12, paras. 3-12 (Brownlie); CR 2006/18, p. 38, para. 94 (de Roux); CR 2006/19, pp.10-11, paras. 146-147 (de Roux).

concerning the attribution to the Respondent of the genocide carried out on the former's territory between 1992 and 1995.

(1) If Republika Srpska was a State, it was a puppet State, with no legal existence at international level and its internationally wrongful acts engage entirely the responsibility of the "dominant" State, in this case the FRY, of which this so-called State was no more than an organ.

(2) Or else the FRY exercised undivided and effective control over this entity and its responsibility as organ of the genocide is thus engaged.

(3) In view of the global nature of the genocide committed against the non-Serb populations of Republika Srpska, and in particular the Muslims, there is no need to require that this control be demonstrated for every — unfortunately countless — genocidal act which, together, constituted the genocide for which the Respondent is responsible.

(4) It is only in the alternative that Bosnia and Herzegovina requests you, Members of the Court, to find that the Respondent should, at the very least, be regarded as an accomplice to genocide within the meaning of Article III *(e)* of the Convention and, in the further alternative, as having
44 aided and abetted genocide on account of the multifaceted and decisive aid to the commission of genocide provided by it.

84. Madam President, we felt that it would be helpful, on this first day of the second round of oral argument, to provide an outline of our position, so that the Court might have an overview of it. It was, one might say, a transition between the two phases of our argument. But this is of course just an "overture" — long as it may have been — and much as I hope that it has proved clear and coherent, the main "themes" of our reasoning need to be addressed in greater detail and developed both in terms of the facts and of the law. My colleagues will now use their time to cover these areas more closely while following roughly the same outline as I have just used; we will conclude by conducting a lengthy and necessary analysis of the issue of the Court's jurisdiction.

Members of the Court, I thank you for your patient attention and kindly ask you, Madam President, to recall the Deputy Agent of Bosnia and Herzegovina, who will sum up what we have learnt from hearing the witnesses, experts and witness-experts. Thank you very much.

Le PRESIDENT : Merci, Monsieur Pellet. Je donne la parole à M. van den Biesen.

M. van den BIESEN :

APPRECIATION DES DEPOSITIONS DES TEMOINS, EXPERTS ET TEMOINS-EXPERTS

Introduction

1. Madame le président, Messieurs de la Cour, je ne pense pas exagérer en disant que l'audition des témoins, experts et témoins-experts a constitué pour nous tous une expérience judiciaire exceptionnelle. Si en général les avocats — et je ne m'exclus pas du nombre — qui ne plaident pas au pénal n'aiment guère les auditions d'experts ou de témoins et, en fait, n'en ont pas vraiment l'habitude, il est apparu clairement que les pénalistes ne sont pas non plus particulièrement à leur place dans une procédure «civile».

2. Sans doute est-ce aussi pour cela que, selon nous, les deux Parties n'ont pas retiré grand-chose de ces auditions, même s'il semble juste de dire que la Bosnie-Herzégovine a
45 finalement remporté un certain avantage sur le défendeur. La qualité des deux experts appelés à la barre par la Bosnie en est sans conteste l'unique raison. De manière générale, on peut penser que la Cour et les Parties auraient probablement tiré un plus grand bénéfice du concours des experts s'il avait été demandé à ceux-ci de présenter leur point de vue par écrit bien avant leur audition. Cela nous aurait vraisemblablement permis à tous d'avoir avec eux des échanges plus satisfaisants.

3. Je consacrerai cette partie de nos plaidoiries à un bref examen de l'intervention de chacun des témoins, experts et témoins-experts mais, évidemment, nous aurons encore à revenir sur leur déposition.

4. Madame le président, il est incontestable que les témoins appelés à la barre par le défendeur — pour notre part, nous n'avons pas présenté de témoins — n'ont fait que répéter, à maintes reprises, les arguments que le défendeur avait avancés au cours de ses trente heures de plaidoiries du premier tour. Cela n'a toutefois pas été le cas de l'expert appelé à la barre par le défendeur, ni de ceux présentés par la Bosnie-Herzégovine. S'agissant des seconds, le conseil du défendeur a posé à M. Riedlmayer la question de savoir si son exposé n'était pas, en réalité, «plus la déposition d'un avocat que d'un témoin impartial extérieur»[98]. Quoi qu'on puisse penser de

[98] CR 2006/22, p. 54 (Fauveau-Ivanović).

M. Riedlmayer, on ne peut certainement pas lui reprocher de plaider. Ses connaissances étendues ont paru confirmer la thèse présentée par la Bosnie-Herzégovine tout au long de cette affaire. Mais il n'est pas parvenu à ces conclusions parce que la Bosnie-Herzégovine lui avait demandé de le faire ou parce qu'il voulait lui faire plaisir. Ce qu'il a dit, il l'a dit parce que, à sa connaissance, c'était la vérité. Si l'on compare cette remarque du conseil du défendeur et celle que M. Brownlie avait faite au sujet de M. Morten Torkildsen, la seconde était plus aimable et sans doute aussi beaucoup plus juste : M. Brownlie a qualifié M. Torkildsen de «témoin-expert présenté comme conseil», ce qui revenait en réalité à reconnaître l'indépendance et la qualité de l'exposé de M. Torkildsen[99]. Madame le président, permettez-moi à présent de passer en revue les différents exposés, et je commencerai par celui de M. Riedlmayer.

46 **M. Andras Riedlmayer**

5. En définitive, M. Riedlmayer a établi clairement deux points par l'exposé de trois heures qu'il a fait le vendredi 17 mars 2006. Il a démontré :

1. qu'il est incontestablement le grand spécialiste de la question de la destruction des biens culturels en Bosnie-Herzégovine (et au Kosovo également, d'ailleurs).
2. que la destruction par la Partie serbe de mosquées et d'autres lieux de culte musulmans, ainsi que d'églises catholiques et d'autres lieux de culte catholiques, ne s'était pas produite dans le cadre de combats armés, mais s'inscrivait en réalité dans une politique mûrement planifiée, réfléchie et menée à grande échelle, politique visant à détruire l'esprit et l'âme de la population non serbe de Bosnie-Herzégovine.

Oui, nous nous félicitons d'avoir à nos côtés un expert de si haut niveau, notamment parce qu'il a su, par sa sincérité, démontrer sans l'ombre d'un doute qu'il avait observé sans idées préconçues les événements qui s'étaient déroulés en Bosnie-Herzégovine.

6. M. Riedlmayer a fourni une description détaillée des différents épisodes de la destruction du patrimoine culturel non serbe, destruction commencée en 1991 par la JNA, qui s'est intensifiée en avril 1992 par des actes de la Partie serbe, et s'est poursuivie tout au long du nettoyage ethnique

[99] CR 2006/17, p. 27, par. 245 (Brownlie).

pour s'étendre également à la destruction des mosquées de Srebrenica après le massacre de juillet 1995.

7. M. Riedlmayer a également confirmé que l'Institut oriental de Sarajevo avait été détruit par des obus incendiaires le 17 mai 1992, et indiqué pour quelle raison il l'avait été. Cet incendie constituait, sans nul doute, une attaque délibérée contre l'identité musulmane et contre les Musulmans en tant que partie constitutive de la société et de l'histoire de la Bosnie. En outre, M. Riedlmayer a établi non seulement que l'attaque menée contre la Bibliothèque nationale de Sarajevo avait bien été menée par les Serbes, mais aussi qu'elle visait manifestement à détruire ce bâtiment, symbole de la composition multiethnique et multiculturelle de la société bosniaque; l'épisode le plus révélateur de l'incendie de la Bibliothèque étant que des tireurs isolés avaient fait feu depuis les collines environnantes pour empêcher que l'on sorte les trésors du bâtiment pour les sauver et que l'on éteigne l'incendie.

8. La façon dont M. Riedlmayer a répondu à toutes les questions qui lui ont été posées au cours de son contre-interrogatoire a, de toute évidence, empêché le défendeur d'en tirer avantage. La sincérité avec laquelle il a répondu à la question concernant la lettre qu'il avait envoyée au président Clinton, lui demandant — au président Clinton — de mettre fin à l'embargo sur les armes que les Etats-Unis avaient imposé à la Bosnie-Herzégovine, a démontré, une fois encore, qu'il était un homme de qualité. A cet égard, nous souhaiterions ajouter que M. Riedlmayer a envoyé cette lettre après que le Sénat américain, le 26 juillet 1995, eut voté à une majorité écrasante la levée de l'embargo, en s'appuyant sur l'article 51 de la Charte des Nations Unies, comme M. Riedlmayer le faisait dans sa lettre. La Chambre des représentants avait auparavant voté dans le même sens, à une majorité similaire[100]. Cette mesure était clairement soutenue par les deux partis[101]. Autrement dit, le fait de défendre cette position n'était pas politiquement orienté : il est clair qu'à l'époque, M. Riedlmayer était un citoyen du monde extrêmement inquiet, et cette position était aussi celle de millions d'autres citoyens du monde.

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[100] 104e congrès des Etats-Unis d'Amérique (première session), *Bosnia and Herzegovina Self-Defence Act of 1995*, H. R. 1172 et S. 21, adopté par le Sénat le 26 juillet 1995 (*legislative day* 10 juillet 1995). Voir : http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_bills&docid=f:s21es.txt.pdf.

[101] Voir le procès-verbal du vote par appel nominal : www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00331

9. En comparaissant en tant qu'expert au nom de la Bosnie-Herzégovine, M. Riedlmayer a clairement étayé l'argument de la Bosnie concernant l'intention génocidaire qui a présidé aux actes commis, argument qui occupe une place centrale dans notre thèse. M. Riedlmayer a également renforcé la position de la Bosnie concernant l'«atteinte grave à l'intégrité … mentale de membres du groupe», prévue à l'alinéa *b)* de l'article II de la convention sur le génocide, dans la mesure où la destruction de ce précieux et vivant patrimoine culturel a véritablement atteint, affecté et sérieusement meurtri les cœurs et les esprits, tant des Croates de Bosnie que des Bosniaques.

Le général Richard Dannatt

10. Au cours de son intervention de près de trois heures devant la Cour, le lundi 20 mars 2006, le général Dannatt a fait la démonstration éclatante des raisons pour lesquelles il est sur le point de devenir commandant en chef de l'état-major des forces armées du Royaume-Uni, c'est-à-dire l'officier le plus gradé du pays. Ses vues hautement stratégiques sur les questions militaires et, plus particulièrement, sur les relations qui existent entre les dirigeants politiques, d'une part, et les exécutants militaires, d'autre part, ont donné à la Cour une idée claire de la façon dont se prépare le recours à la force armée, et dont ce recours à la force est guidé et dirigé par les autorités politiques.

11. Le général Dannatt a répondu à des questions à première vue d'ordre général sur le «pourquoi», le «qui» et le «comment» exactement comme on peut s'y attendre de la part d'un
48 commandant en chef de l'armée de terre appelé à conseiller les plus hautes autorités politiques de son pays, ce qu'il fait actuellement. Répondre à ce genre de questions à ce niveau du processus de décision est, par définition, quelque chose qui requiert à la fois une vision d'ensemble et une connaissance détaillée de la manière dont les choses se passent dans la réalité.

12. Il apparaît clairement que l'analyse du général Dannatt n'est pas fondée sur un point de vue personnel, mais sur des années d'expérience du terrain, des années d'étude et d'enseignement, et des années passées à concevoir et à mettre en œuvre la stratégie militaire d'un grand Etat, l'un des membres permanents du Conseil de sécurité de l'Organisation des Nations Unies.

13. Sur la base de cette expérience, qu'il a démontrée à la Cour dans son exposé sur les différents niveaux de prise de décisions[102], et de sa connaissance du fonctionnement des armées, des moyens qui leur permettent d'agir, ainsi que des règles fondamentales qui régissent le fonctionnement de toute armée, il a établi clairement que la notion de Grande Serbie, qui s'est propagée à Belgrade à la fin des années quatre-vingt et au début des années quatre-vingt-dix, avait été traduite en plans plus concrets et constitué le ressort principal des événements qui se sont déroulés dans les Balkans : tout d'abord — en 1991 — en Croatie puis, à partir du début de l'année 1992, en Bosnie-Herzégovine.

14. Le général Dannatt a précisé à la Cour que la JNA avait effectivement distribué des quantités énormes d'armes en Bosnie[103] et indiqué que, compte tenu de la nature de la structure de commandement de la JNA, cette distribution n'avait pas été décidée à un niveau subalterne[104]. Il a expliqué le caractère inhabituel de ce qui s'est passé lorsque la JNA s'est retirée, indiquant que s'il avait lui-même retiré une armée en abandonnant ses armes, il aurait été tenu pour «personnellement responsable de la mauvaise utilisation de l'équipement et de [sa] négligence en la matière»[105]. Le général Dannatt a expliqué qu'il n'était pas illogique en soi que des Bosno-Serbes demeurent en Bosnie après l'indépendance de ce pays et postulent à un emploi dans l'armée locale. Sa réponse a suscité quelques sourires de la part des conseils du défendeur, mais il n'y avait en réalité pas de quoi : le général Dannatt n'a pas dit qu'il était normal de rester sur place et de postuler à un emploi au sein d'une armée sécessionniste, c'est-à-dire d'une armée qui s'opposerait au gouvernement légitime de l'Etat. Au contraire, et ce point est très important, il a dit qu'il était «inhabituel» de faire partie de deux armées à la fois : la VRS et l'armée yougoslave[106].

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15. En outre, à propos de ce caractère «inhabituel» pour un officier d'être employé par deux armées en même temps, le général Dannatt a analysé le cas de deux des officiers qui se sont trouvés dans cette situation «inhabituelle», les généraux Krstić et Pandurević, les considérant tout simplement comme des exemples d'officiers ayant une double «casquette», mais dont le véritable

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[102] CR 2006/23, p. 13.

[103] *Ibid.*, p. 27.

[104] *Ibid.*, p. 11-12.

[105] *Ibid.*, p. 39.

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

supérieur était en réalité l'armée yougoslave, à travers le 30e centre du personnel[107]. Nous souhaitons rappeler à la Cour que ces deux personnes ne sont que des exemples, des exemples d'un phénomène fort répandu : selon M. Lilić — à l'époque président de la RFY —, qui a témoigné devant le TPIY en l'affaire *Milošević*, environ mille huit cents officiers de la VRS étaient en fait des officiers de l'armée yougoslave[108].

16. S'agissant de la question des «opérations conjointes», le général Dannatt a très clairement établi que les opérations du type de celles que nous avons présentées à la Cour, auxquelles participaient des unités de l'armée et des unités paramilitaires des trois entités serbes, ne sont possibles que sur la base d'un processus de décision élaboré d'un commun accord[109].

17. La Bosnie-Herzégovine considère que le général Dannatt, sur la base de sa propre expérience, de ses connaissances et de sa clairvoyance, a confirmé les raisons pour lesquelles, dans les années quatre-vingt-dix, le Conseil de sécurité de l'Organisation des Nations Unies avait, dans de nombreuses résolutions successives, désigné Belgrade comme le principal responsable de ce qui se passait en Bosnie. Le général Dannatt a confirmé — de son propre point de vue — que la présente Cour avait à bon droit, dans ses deux ordonnances de 1993, demandé au défendeur : en substance, de s'abstenir de tout soutien aux forces qui commettraient un génocide en Bosnie-Herzégovine; il a également confirmé que la Bosnie-Herzégovine a raison de soutenir que c'est Belgrade, c'est-à-dire le défendeur, qui est le premier et le principal responsable des problèmes en cause en la présente affaire. Nous reviendrons sur la déposition du général Dannatt par la suite et j'en viens maintenant à M. Lukić.

50 **M. Vladimir Lukić**

18. M. Vladimir Lukić, le premier *témoin* appelé à la barre par la Serbie-et-Monténégro, a fait partie des dirigeants de la Republika Srpska durant la majeure partie de la période pertinente en l'espèce. Au cours de sa déposition, il n'a pas vraiment fait mystère de ses antécédents en qualité de premier ministre de la Republika Srpska entre janvier 1993 et août 1994 : il s'est longuement

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[107] CR 2006/23, p. 27-28.

[108] TPIY, *Le procureur c. Slobodan Milošević*, affaire n° IT-02-54, compte rendu d'audience du 17 juin 2003, p. 22591. Voir www.un.org/icty/transe54/030617IT.htm.

[109] CR 2006/23, p. 29-34.

exprimé en tant que tel, abordant de nombreuses questions dans des termes plutôt généraux. Il n'a jamais été très concret et ne s'est à aucun moment efforcé d'appuyer ses dires sur des éléments de preuve supplémentaires. De plus, il n'a absolument rien ajouté à la propagande que la Bosnie-Herzégovine n'a que trop entendu, se contentant de la reprendre. Il n'a pas non plus ajouté le moindre élément de fond à ce que le défendeur avait déjà dit à la Cour. En réalité, il a plaidé pour le défendeur, bien que de manière assez répétitive. Ce faisant, il a également donné le sentiment de mélanger des observations personnelles avec des choses qu'il avait entendu dire à l'époque, des rumeurs ou des informations floues dont il avait pu avoir vent. *A aucun moment*, le rôle précis qu'il a personnellement joué dans le processus de décision n'a été éclairci. Sans doute n'y a-t-il là rien de surprenant, dans la mesure où le défendeur a indiqué à plusieurs reprises que, si quelqu'un devait être tenu pour responsable des actes reprochés par la Bosnie en la présente affaire, ce devrait être la Republika Srpska. A l'évidence, les responsables serbes de Bosnie venus témoigner en ces lieux ne pouvaient pas y voir une invitation à faire preuve d'une grande franchise au sujet du rôle qu'ils ont joué personnellement à l'époque.

19. Les allégations de M. Lukić concernant un massacre de civils serbes à Pofalići et l'expulsion de six mille civils serbes[110], événements auxquels il prétend avoir assisté personnellement, semblent n'être rien de plus qu'une rumeur infondée. En tout cas, le demandeur, dont le gouvernement siège à deux pas de là, à Sarajevo, ne reconnaît aucun des événements auxquels M. Lukić fait allusion.

20. Le récit de ce que M. Lukić a appelé la «libération de Trnovo»[111] est révélateur. A cet égard, nous aimerions rappeler à la Cour que le recensement de 1991 montrait que la municipalité de Trnovo avait une population mixte, avec une large majorité de Musulmans (69,2 %). Cette municipalité a été prise par le défendeur et a subi un nettoyage ethnique. Le témoin, lui, considère qu'elle a été «libérée»[112]. Après Dayton, la municipalité a été divisée en deux parties, l'une relevant de la Fédération et l'autre de la Republika Srpska. Une partie de la population musulmane

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[110] CR 2006/24, p. 18-19.

[111] *Ibid.*, p. 16.

[112] Voir TPIY, *Le procureur c. Slobodan Milosevic*, affaire n° IT-02-54, «*Ethnic composition, internally displaced persons and refugees from 47 municipalities of Bosnia and Herzegovina, 1991 to 1997-98*», rapport d'experts présenté par Ewa Tabeau, c.s., annexe A1, 4 avril 2003, p. 69-84.

51 y est retournée; non plus dans une municipalité ethniquement mixte, mais dans une partie de cette municipalité dite ethniquement «pure», dont le témoin considère qu'elle a été «libérée».

21. M. Lukić a en outre fait montre d'un manque total de crédibilité en tentant de faire croire à la Cour qu'il n'était pas au courant de l'existence des six objectifs stratégiques. Ceux-ci s'inscrivaient dans la politique officielle de la Republika Srpska, ils y ont été publiés au Journal officiel, ils étaient au cœur du plan que les Serbes de Bosnie s'employaient à mettre en œuvre : il semble totalement inconcevable que le premier ministre de l'époque n'en ait pas eu connaissance.

22. Qu'il n'ait pas le souvenir d'avoir créé une commission pour le droit international, cela est hautement invraisemblable eu égard à la mission assignée à cette commission, laquelle a été énoncée dans une décision officielle portant la signature de M. Lukić et publiée au Journal officiel de la Republika Srpska. Je ne citerai qu'une partie des tâches confiées à la commission — la liste intégrale figure dans le dossier des juges. Sa mission était la suivante :

> «— préparation du procès relatif au génocide commis contre des membres du peuple serbe;
>
> — participation au travail des organes compétents chargés de préparer une réponse dans le cadre du procès pour le génocide prétendument commis par la République fédérale de Yougoslavie;
>
> — coopération avec les experts juridiques de la République fédérale de Yougoslavie dans le cadre de l'instance introduite devant la Cour internationale de Justice de La Haye et d'éventuelles procédures ultérieures;
>
> — coopération avec des institutions juridiques respectables et d'éminents experts du monde entier.»[113]

Lorsque ces objectifs de la commission ont été présentés à M. Lukić au cours de sa déposition, il a formellement déclaré : «C'est faux, c'est entièrement faux.»[114] Puis il a prétendu ne pas être au courant de l'instance introduite par la Bosnie, de la présente instance devant la Cour internationale de Justice, affirmant ne pas en avoir entendu parler «pendant la guerre [et] pas davantage … à Dayton»[115]. Et il a ajouté : «Si nous en avions eu connaissance, je peux vous assurer [je peux vous assurer] que nous nous serions comportés de manière très différente à Dayton.»[116]

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[113] Journal officiel de la Republika Srpska, n° 6, 20 mai 1993, p. 265, art. 2.

[114] CR 2006/24, p. 29.

[115] *Ibid*.

[116] *Ibid.*, p. 30.

23. Soit M. Lukić ment purement et simplement, soit, ce qui est sans doute plus vraisemblable, son récit démontre qu'il n'avait pas voix au chapitre à Dayton. En effet, à Dayton,
52 c'est M. Milošević qui était aux commandes, et M. Lukić, en tant que membre de la délégation, ne faisait que de la figuration. Quoi qu'il en soit, il est certain que la demande de la Bosnie, qui avait donné lieu à deux séries d'audiences publiques et à deux ordonnances de votre Cour, n'est pas passée inaperçue dans la région à l'époque. En outre, chacun sait que M. Milošević a inscrit cette demande en tête de l'ordre du jour de toutes les négociations de paix — y compris celles de Dayton —, exigeant son retrait inconditionnel et immédiat; comme je l'ai dit, il l'a fait aussi à Dayton.

M. Vitomir Popović

24. M. Vitomir Popović, le deuxième témoin du défendeur s'est placé nettement dans la même catégorie que M. Lukić : celle des témoins sans aucune crédibilité.

25. Bien que M. Popović ait exercé plusieurs fonctions en Republika Srpska, y compris celle de vice-premier ministre, il n'a jamais, pas plus que M. Lukić, traité concrètement le moindre sujet dans sa déposition.

26. Il a adopté la position bien connue de la Republika Srpska et du défendeur au sujet des divergences d'opinion sur le plan Vance-Owen qui, comme nous le savons, a finalement été rejeté par la Republika Srpska. Il y a des raisons de mettre en doute aussi bien les explications du défendeur que celles de la Republika Srpska — et de M. Popović — au sujet de ces prétendues divergences d'opinion, mais l'essentiel, pour nous, est de savoir si le rôle du défendeur a — comme celui-ci l'affirme — ou n'a pas changé après le mois de mai 1993. Sur ce point, M. Popović a mauvaise mémoire, à moins qu'il ne soit tout simplement mal informé. Il a déclaré que l'aide humanitaire était «réduite au strict minimum», mais on a compris ensuite qu'il n'avait pris en compte ni l'aide financière, ni le financement du corps des officiers de l'armée serbe de Bosnie dans son explication. Ce financement relevait selon lui — qui était à l'époque vice-premier ministre — d'un ministère qu'il ne «dirigeai[t] pas», ajoutant qu'il n'avait jamais vu aucune information en ce sens[117]. La chose est tout à fait incroyable, étant donné que nous avons montré

[117] CR 2006/25, p. 16.

que 90 % du budget de la Republika Srpska était financé par Belgrade, ce que le vice-premier ministre devait savoir. Cela vaut aussi pour le paiement de la solde de mille huit cents officiers des forces armées serbes de Bosnie — ce n'est pas quelque chose qui passe inaperçu de quelqu'un qui occupe un tel poste. Cela vaut également pour l'accord de mai 1994 entre les banques nationales

53 des trois entités serbes, accord qui a placé les principales institutions financières de la Republika Srpska sous le contrôle de la banque nationale yougoslave.

27. Comme M. Lukić, et de manière tout aussi incroyable, M. Popović a lui aussi affirmé ne pas avoir eu connaissance des six objectifs stratégiques qui constituaient la clef de voûte de la politique adoptée publiquement par la Republika Srpska.

28. M. Popović, lui, s'est souvenu de la commission du droit international, ce qui pourrait s'expliquer par le fait qu'il en était le président. En revanche, il semble avoir plus de difficulté à se rappeler le mandat précis de cette commission qui — comme nous le savons maintenant — consistait principalement à aider le défendeur à mettre sur pied sa défense devant la Cour en la présente instance. M. Popović pensait que cette commission — qu'il présidait — était chargée de la mise en œuvre des dispositions de la convention européenne des droits de l'homme, mais il n'a pas précisé ce que cela pouvait recouvrir. Dans ce contexte, il lui a semblé se souvenir de problèmes de logement que rencontraient les officiers de la JNA qui quittaient le territoire de la Republika Srpska[118]. Puis, comme on insistait, M. Popović a ajouté aux attributions de la commission — qui semblaient lui être revenues à l'esprit — les «crimes commis contre la population serbe sur le territoire de l'ancienne Bosnie-Herzégovine»[119]. Nous tenons à attirer l'attention de la Cour sur cette déclaration singulière, non pas tellement parce qu'elle est manifestement fausse, mais parce que le témoin parle en l'occurrence de l'*«ancienne»* Bosnie-Herzégovine. Si cette déclaration traduit son état d'esprit de l'époque, elle est révélatrice; si elle traduit son état d'esprit actuel, elle est inquiétante, puisqu'il exerce aujourd'hui la fonction de médiateur pour la Bosnie-Herzégovine.

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[118] CR 2006/25, p. 16.

[119] CR 2005/26, p. 18.

Sir Michael Rose

29. Contrairement au général Dannatt, le général Rose a comparu en tant que témoin devant la Cour. Il a donné un tour singulier à sa déposition en déclarant, d'entrée de jeu : «Je me considère comme un témoin de la Cour, et rien d'autre.»[120] Ce faisant, le témoin s'est expressément distancié de la décision prise par la Cour et communiquée par le greffier aux Parties par lettre en date du 15 novembre 2005 (124553), selon laquelle la Cour avait décidé, à ce stade, de ne pas user du pouvoir que lui confère le paragraphe 2 de l'article 62 du Règlement de faire

54 déposer des «témoins de la Cour». Madame le président, vous vous en souviendrez, la Cour avait pris cette décision après que la Bosnie-Herzégovine se fut opposée à la proposition du défendeur tendant à ce que la Cour fasse immédiatement usage de ce pouvoir, en convoquant comme témoins — en vertu de cette proposition — notamment le général Rose. Puisque le général Rose tenait à être considéré *exclusivement* comme un «témoin de la Cour», le défendeur aurait même dû d'emblée enlever son nom de la liste.

30. Au cours de sa déposition, le général Rose a répété que, selon lui, la période allant de 1992 à 1995 en Bosnie-Herzégovine était une période de guerre civile. Nous avons déjà indiqué aujourd'hui que cette définition n'est pas en soi pertinente par rapport à ce qui est en jeu dans la présente espèce. Ce qui est plus important, c'est qu'il a confirmé l'absence d'équilibre des responsabilités en l'espèce. Il a déclaré que «[b]ien entendu, les forces militaires qui étaient sous le commandement du général Mladić ont été de très loin les principaux auteurs de crimes de guerre et d'atrocités pendant la guerre civile»[121]. Il a également confirmé que l'armée du Gouvernement bosniaque comprenait des membres de tous les groupes ethniques, que ce n'était pas une armée exclusivement musulmane et qu'«[i]l [était] donc plus juste de parler de forces du Gouvernement bosniaque»[122]. Il a aussi confirmé ce qu'il avait dit dans sa déposition devant le TPIY : «[l]es Serbes ne peuvent en aucun cas être décrits comme des artisans de la paix. C'étaient eux les agresseurs.»[123] Enfin, il a confirmé la thèse qu'il avait déjà avancée dans son livre, à savoir que

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[120] CR 2006/26, p. 10.

[121] *Ibid.*, p. 11.

[122] *Ibid.*, p. 24.

[123] *Ibid.*, p. 29. Voir aussi TPIY, *Le procureur c. Stanislav Galić*, affaire n° IT-98-29, compte rendu de l'audience du 20 juin 2000, p. 10267, voir : www.un.org/icty/transf29/020620FE.htm.

— pendant cette guerre civile — une seule partie était coupable de génocide : «c'est le régime de Pale qui commettait un génocide»[124], a-t-il déclaré. Le défendeur devra clarifier sa position au cours du deuxième tour de plaidoiries, après avoir maintes fois répété qu'il n'y avait pas eu de génocide.

31. Le général Rose a affirmé, à partir de ce qu'il avait personnellement pu observer, «qu'il y avait un soutien matériel sous forme de carburant, de munitions, de renforts en soldats «volontaires» pour combattre dans les rangs de l'armée de la Republika Srpska en Serbie»[125]. Il a aussi confirmé les déplacements réguliers de Mladić à Belgrade et expliqué que, par l'intermédiaire de Belgrade, il pouvait obtenir des choses qu'il ne pouvait obtenir en s'adressant à Pale[126]. Il a affirmé qu'il n'existait pas de dispositif *officiel* de commandement militaire et que, du côté des Serbes de Bosnie, «il n'y avait pas … de commandement général, ce qui aurait été le cas dans une
55 coalition de forces»[127]. Lorsque le juge Owada lui a demandé sur quoi reposaient ces observations, il a répondu :

> «C'était une *conclusion* déduite des *impressions* que j'avais eues pendant cette période. Il n'y avait aucune preuve concrète les confirmant ou les infirmant mais, ayant passé toute ma carrière dans l'armée, je sais ce que sont des relations officielles de commandement militaire et, à mon avis, il n'y en avait pas entre ces deux organisations.» (Les italiques sont de nous.)

32. Madame le président, le général Rose a illustré par là la grande différence entre son témoignage et la déposition faite par le général Dannatt en tant qu'expert. La déposition du général Rose repose entièrement — comme il l'a indiqué — sur ses impressions et sa propre expérience de militaire. Le général Dannatt a une bien meilleure connaissance théorique des armées en général, il a une expérience considérable et il a assumé des responsabilités beaucoup plus larges que le général Rose au long de sa carrière. En plus — et cela a son importance —, alors que le général Rose a déclaré qu'il «n'y avait aucune preuve concrète … confirmant ou … infirmant [ses impressions]»[128], le général Dannatt, avant de venir déposer en tant qu'expert, avait étudié

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[124] CR 2006/26, p. 34.

[125] *Ibid.*, p. 13.

[126] *Ibid.*, p. 13 et 28.

[127] *Ibid.*, p. 13.

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

longuement de nombreux rapports militaires et documents connexes du TPIY qui étaient accessibles au public.

33. A la fin de sa déposition, le général Rose s'est écarté de son rôle de témoin et il a donné son point de vue personnel sur la présente instance. Ce point de vue est bien connu de la Bosnie-Herzégovine. Que ce point de vue soit erroné et ne réponde pas à l'objet même de la présente instance ni d'ailleurs à la finalité même des décisions qu'il est demandé à la Cour de rendre, tout cela a été traité par M. Franck durant le premier tour de plaidoiries[129]. Le point de vue du général Rose n'ébranlera pas la conviction et l'engagement ferme de la Bosnie-Herzégovine en l'espèce.

M. Jean-Paul Sardon

34. Le défendeur avait soumis à la Cour un résumé très succinct de l'exposé qu'allait faire M. Sardon. L'exposé lui-même a été tout sauf succinct. A une vitesse extrême, M. Sardon a lu un exposé très long et extrêmement technique, ce qui ne nous a pas permis de mener un véritable
56 contre-interrogatoire. Comme nous examinerons plus tard dans la semaine le sujet traité par M. Sardon, je me limiterai maintenant à quelques remarques concernant sa déposition.

35. M. Sardon s'est manifestement contenté de faire de longues observations sur les rapports établis par les experts du TPIY. Il a souligné qu'il n'avait jamais effectué aucune recherche lui-même[130] et reconnu qu'il n'avait jamais soumis ses thèses aux auteurs des rapports du TPIY. Il n'a pas non plus proposé d'approche et de méthode différentes de celles des enquêteurs du TPIY et encore moins fourni de nouvelles conclusions étayées par des recherches approfondies.

36. De ce point de vue, le demandeur estime que l'exposé de M. Sardon ne peut pas être considéré comme une véritable contribution au débat engagé dans la présente instance.

M. Dušan Mihajlović

37. M. Mihajlović, appelé en tant que témoin, s'est placé dans la double position d'observateur extérieur et de participant de l'intérieur. Observateur extérieur, parce qu'il n'exerçait aucune fonction officielle dans le Gouvernement de la Serbie au cours de la période qui nous

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[129] CR 2006/11 (Franck).

[130] CR 2006/26, p. 36.

intéresse; participant de l'intérieur puisque son parti était une composante du Gouvernement de la République de Serbie de 1993 à 1997.

38. Le participant Mihajlović ne peut être considéré comme un témoin crédible, puisque son parti figurait parmi les autorités coupables précisément des actes de génocide dont nous tenons le défendeur pour responsable. Et l'observateur extérieur n'est pas davantage crédible puisque, en cette qualité, il ne pouvait avoir connaissance de ce qui se passait à l'intérieur.

39. Il a parfaitement illustré son statut d'observateur extérieur en affirmant que le Gouvernement de la République de Serbie ne discutait pas des événements de Bosnie-Herzégovine[131]. Cette déclaration n'est absolument *pas* crédible : à l'époque, la République fédérale de Yougoslavie, dont la Serbie était l'entité dominante, faisait l'objet de sanctions de l'ONU et de toutes sortes d'autres pressions extérieures. La Cour a ordonné à la RFY, dans deux ordonnances consécutives, de — en substance — veiller à ce que les personnes ou entités relevant de son contrôle ne commettent pas de génocide en Bosnie[132]. On ne peut donc absolument pas dire
57 que les autorités de la République de Serbie ne discutaient pas de la situation en Bosnie-Herzégovine à l'époque[133]; si cette affirmation devait être tenue pour vraie — ce qu'elle n'est assurément pas —, le témoin n'a en aucune manière expliqué comment il «savait» que l'aide humanitaire apportée aux Serbes de Bosnie en Bosnie-Herzégovine n'était qu'occasionnelle.

40. De manière générale, son statut d'observateur extérieur a été confirmé par le fait qu'il n'avait jamais été au courant des opérations militaires conjointes menées par la RFY en coopération avec les forces armées de la Republika Srpska et de la Republika Srpska de Kraïna[134]. Et aussi par le fait qu'il n'avait eu aucune information sur l'argent versé et les fournitures livrées par la République fédérale de Yougoslavie à la Republika Srpska[135].

41. En fait, M. Mihajlović a fait une seule observation intéressante : «Le 5 octobre, nous avons fait tomber M. Milošević, mais nous n'avons pas changé le système : nous avons hérité du

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[131] CR 2006/27, p. 13.

[132] *C.I.J. Recueil 1993*, mesures conservatoires, ordonnance du 8 avril 1993, p. 3, par. 52 A) 2.

[133] CR 2006/27, p. 12.

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

[135] *Ibid.*

legs criminel de l'ère Milošević et Legija faisait partie de cet héritage dont nous ne sommes pas parvenus à nous débarrasser rapidement.»[136]

42. Dans cette observation, premièrement, M. Mihajlović qualifie l'*ère* Milošević de criminelle — ce qu'a d'ailleurs fait aussi l'agent de la Serbie-et-Monténégro dans ses plaidoiries[137]. Tout au long de sa déposition, M. Mihajlović n'a rien dit qui permette de considérer que ce qualificatif ne peut pas s'appliquer à la période pertinente pour nous (de la fin des années 80 jusqu'à 1995). La Bosnie-Herzégovine approuve donc sans réserve M. Mihajlović sur ce point.

Deuxièmement, M. Mihajlović confirme que «Legija faisait partie de cet héritage [criminel]». Sur ce point aussi, la Bosnie-Herzégovine approuve sans réserve le témoin. Nous avons démontré que Legija était le second d'Arkan, qu'il était membre du ministère serbe de l'Intérieur et qu'il était impliqué dans les actes de violence armée perpétrés à diverses reprises en Bosnie-Herzégovine[138].

43. Le comportement de M. Mihajlović est typique de la ligne de conduite des représentants de la Serbie-et-Monténégro en la présente espèce, qui est d'ailleurs aussi celle du conseil des ministres de la Serbie-et-Monténégro : tous qualifient l'ère Milošević de régime criminel[139], mais
58 lorsqu'on les interroge sur cette criminalité ou lorsque — comme en l'espèce — il s'agit d'en tirer les conséquences juridiques, ils adoptent sans peine l'attitude consistant à soutenir qu'il n'y a pas eu le moindre crime. En cela, M. Mihajlović ne s'est pas comporté comme un véritable témoin, mais comme un avocat du défendeur.

M. Vladimir Milićević

44. M. Milićević, qui a aussi déposé en tant que témoin, a dirigé un camp à Mitrovo Polje, en Serbie, du mois d'août 1995 au mois de février 1996. Il a qualifié ce camp de «centre d'accueil» et décrit les personnes qu'il hébergeait comme «peu instruit[e]s», dans un «état … psychologique … très mauvais» et n'ayant «pas mangé depuis longtemps»[140]. Ces

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[136] CR 2006/27, p. 23.

[137] CR 2006/12, p. 12, par. 11; p. 13, par. 15; p. 15, par. 23; CR 2006/21, p. 40, par. 40.

[138] CR 2006/8, p. 53, par. 56 (Van den Biesen).

[139] CR 2006/11, p. 10-11, par. 2-4 (Condorelli).

[140] CR 2006/28, p. 11.

personnes étaient en fait des réfugiés qui avaient fui l'enfer de Srebrenica et de Žepa en juillet 1995.

45. M. Milićević a tout d'abord déclaré que les hommes étaient âgés de 18 à 55 ans[141], mais il a admis ensuite qu'il y avait aussi dans le nombre des jeunes de moins de 18 ans. Selon son témoignage, ces jeunes gens avaient été estafettes dans la brigade à laquelle — toujours selon le témoin — ils avaient été affectés[142].

46. M. Milićević a d'abord indiqué avoir eu une parfaite connaissance de la situation des personnes hébergées dans son centre mais, lorsqu'on lui a demandé de faire le rapprochement entre les réfugiés et les horreurs de Srebrenica et Žepa, il s'est contenté de dire : «Eh bien, d'après ce qu'elles nous ont indiqué, elles étaient passées de manière illégale sur le territoire de la Yougoslavie et avaient fui celui de la Bosnie-Herzégovine, en proie à la guerre.»[143] Lorsque nous avons insisté sur le rapprochement entre ce qui s'était passé à Srebrenica et à Žepa et ses réfugiés, il a ajouté : «Non, il n'entrait pas dans mes attributions de faire un tel rapprochement.»[144] Madame le président, Messieurs de la Cour, nous parlons du mois d'août 1995, alors que la prise de Srebrenica monopolise l'attention des médias. Les nouvelles des massacres se répandent. M. Milićević, selon ses dires, accueille des personnes épuisées et affamées, en mauvais état psychologique et physique. Ces personnes lui disent d'où elles viennent : de l'autre côté de la
59 rivière. M. Milićević prétend savoir exactement à quelle brigade militaire appartenaient ces hommes, mais il nie avoir eu la moindre idée des événements qui avaient provoqué leur fuite et les avaient obligés — «de manière illégale», c'est tout ce qu'il sait — à traverser la rivière à la nage.

47. Je ne sais pas ce que le défendeur a essayé de prouver en appelant ce témoin à la barre, mais ses déclarations sont simplement trop peu fiables pour corroborer quoi que ce soit d'utile.

M. Dragoljub Mićunović

48. M. Mićunović a participé, avec l'agent actuel du défendeur, à la création du parti démocratique. Comme son collègue, il a insisté sur le pacifisme de l'opposition démocratique et à

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[141] CR 2006/28, p. 10.

[142] *Ibid.*, p. 16.

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

[144] *Ibid.*

maintes reprises souligné son opposition, et celle de son parti, au régime de Milošević. Cela étant, il n'a jamais précisé contre quoi exactement s'élevait cette opposition démocratique durant les années qui nous intéressent en l'espèce.

49. M. Mićunović décrit toutes sortes de conférences politiques et émet toutes sortes d'opinions sur MM. Tudjman, Izetbegović et Milošević, les présentant tous comme des dirigeants incapables[145]; comme le défendeur, il attribue les responsabilités de manière égale aux deux camps[146], et il ne fait que répéter — à sa manière — ce qu'a dit le défendeur. A aucun moment, le témoin ne semble avoir une connaissance concrète des faits pertinents en l'espèce, pertinents pour notre affaire. Interrogé sur les opérations militaires et les activités des 30e et 40e centres du personnel à Belgrade, il a déclaré n'en avoir pas eu connaissance. Dans ces conditions, il est même surprenant que ce témoin ait confirmé, sans réserve, qu'il était simplement normal de supposer que la République fédérale de Yougoslavie continuait d'approvisionner en armes les Serbes de Bosnie[147].

50. A son retour à Belgrade, M. Mićunović a rendu compte de sa déposition devant la Cour à plusieurs médias, en indiquant que les accusations de la Bosnie étaient principalement des instruments de propagande[148]. Du moins, Madame le président, cela montre-t-il que ce témoin — ce qui est en soi tout à fait concevable — s'identifie complètement avec la position du défendeur. Il ne montre pas la moindre compassion pour les victimes, ne fait preuve d'aucun sentiment de responsabilité, ne met même pas en cause la responsabilité des anciens dirigeants de la RFY que ses collègues qualifient de groupe de criminels.

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Remarques finales

Madame le président, j'en ai terminé avec mon analyse de l'audition des experts, témoins et témoins-experts. Nous nous reporterons à leurs dépositions à chaque fois que cela pourra se révéler utile dans la suite de nos plaidoiries.

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[145] CR 2006/29, p. 12.

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

[147] *Ibid.*, p. 20.

[148] Chances of genocide case, '50-50'", B92, 10 avril 2006. Voir : www.b92.net/ english/news/ index.php?nav_id=34401&style=headlines&dd=10&mm=4&yyyy=2006.

Madame le président, ainsi s'achève notre plaidoirie d'aujourd'hui.

Le PRESIDENT : Merci, Monsieur van den Biesen. Je voudrais juste confirmer à l'agent, M. Softić, que si M. Franck souhaitait commencer sa plaidoirie malgré l'heure tardive, la Cour serait disposée à dépasser quelque peu l'horaire prévu. La décision vous appartient.

M. van den BIESEN : Nous en avons parlé, Madame le président, et nous vous remercions de nous le proposer à nouveau, mais nous pensons que nous en avons déjà peut-être fait un peu trop et préférons que M. Franck commence sa plaidoirie demain.

Le PRESIDENT : L'audience est levée et reprendra demain à 10 heures.

L'audience est levée à 17 h 55.