CR 2006/32

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Wednesday 19 April 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

in the case concerning the **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro)**

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le mercredi 19 avril 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

*en l'affaire relative à l'***Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Owada
		Simma
		Tomka
		Keith
		Sepúlveda
		Bennouna
		Skotnikov
	Judges *ad hoc*	Mahiou
		Kreća
	Registrar	Couvreur

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Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Owada
Simma
Tomka
Keith
Sepúlveda
Bennouna
Skotnikov, juges
MM. Mahiou,
Kreća, juges *ad hoc*

M. Couvreur, greffier

____

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Mr. Mauro Barelli, LL.M (University of Bristol),

Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

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comme assistants.

The PRESIDENT: Please be seated. Professor Franck you have the floor.

Mr. FRANCK: Thank you, Madam President, Members of the Court. I will be speaking this morning again about the subject of State responsibility for genocide in the context of Article IX of the Genocide Convention.

STATE RESPONSIBILITY FOR GENOCIDE

The law of State responsibility for genocide is precisely applicable to this case

1. The Applicant asks that this honourable Court determine that actions committed in Bosnia by the Respondent constitute genocide within the meaning of the Genocide Convention. Article IX of the Convention clearly authorizes the Court to make that very determination. The facts we have presented in evidence — facts about killings, torture, rape and deliberate displacement of very large numbers of non-Serbs within the territories identified for ethnic cleansing — make clear that the policy of Belgrade was one of deliberate destruction of the ethnic and religious groups that inhabited the coveted territories and stood in the way of their incorporation into a Greater Serbia. This is precisely the sort of thing that Article IX covers.

2. The policy of Belgrade, as early as 12 May 1992, was reported by the Secretary-General to the Security Council to the effect that Serb forces, with the active participation of the JNA — the Yugoslav army — were engaged in a campaign to create "ethnically pure regions" through "the seizure and intimidation of the non-Serb population"[1] of large parts of Bosnia.

3. A few days later, on 15 May 1992, the Security Council called for an end to the forcible expulsion of persons from these territories and condemned "any attempt to change the ethnic composition of the population" by force: a force it recognized, at that very time, was being exerted by "units of the Yugoslav People's Army . . ."[2].

4. Yet, by the end of the year, the Secretary-General reported that the JNA forces still had not been withdrawn . . .[3]. And the General Assembly cried out that "the Muslim population [is]

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[1]S/23900, para. 5, 12 May 1992.

[2]SC res. 752 (1992), 15 May 1992.

[3]A/47/147, 18 December 1992.

threatened with virtual extermination"[4] for which it blamed "the Republic of Serbia" and "the Yugoslav Army"[5]. These findings were reiterated in December of 1993[6]. This is not a matter of attribution. It is a finding of direct responsibility.

5. What is Belgrade saying in response? That it did not happen? That we are making it all up? That the Security Council and the General Assembly were hallucinating? Or that it was all so long ago that the embers have all but died and we should not be raking the coals?

6. When we quote Karadzic as promising that the Muslim people would be "annihilated"[7] shall we dismiss this as a mere figure of speech? Can we do so after the execution of thousands in cold blood at Srebrenica by Serb militias armed, paid, supported and guided by Belgrade? What are we to call Karadzic and Mladic and the Serb generals and colonels? Mad dogs? But who fed them? Who unchained them? And who, when their mayhem became obvious, kept on caring for them whenever they needed replenishment?

7. Co-President Mrs. Plavsic has answered that question: by October 1991, she admitted to the ICTY, the leadership

> "knew and intended that the separation of the ethnic communities would include the permanent removal of ethnic populations, either by agreement or by force and . . . that any forcible removal of non-Serbs from Serbian-claimed territories would involve a discriminatory campaign of persecution"[8].

But this was also obvious from the actions taken, and it could not have been less than obvious in Belgrade, as it was at United Nations Headquarters. It was a very public campaign.

8. And what a campaign of persecution it was. The Trial Chamber of the ICTY, in the *Brdanin* case confirmed this and found that there was agreement to use force and fear to expel non-Serbs from the areas to be ethnically cleansed of non-Serbs[9]. One may cavil at the precise numbers of civilians killed, or women raped, or persons tortured, but that in no way alters the fact that is central to this case and that has been confirmed, again and again, by the evidence we have

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[4]GA res. 820 (1993), 17 April 1993.

[5]*Ibid*.

[6]GA res. 44/88 (1993).

[7]ICTY, *Prosecutor* v. *Milosevic*, Decision on Motion for Acquittal, case No. IT-02-54-T, 16 June 2004, para. 241, exhibit 613, tab 8.

[8]ICTY, *Prosecutor* v. *Plavsic*, Factual Basis for a Plea of Guilty, case No. IT-00-39 & 40, 30 September 2002, para. 10.

[9]*Prosecutor* v. *Radoslav Brdanin*, Judgement, case No. IT-99-36-T, 1 September 2004, para. 65.

presented: that during the period 1992-1995 there occurred a deliberate effort, one that was largely successful, to destroy the non-Serb communities of substantially more than half of the country. Not one shred of evidence produced before this Court begins to rebut this simple fact. And, so, what are we to do with it? Forget about it? Are we to shrug and say, "Oh, well, that was another Yugoslavia, another government, another day."? Are we to applaud the "new" Yugoslavia, for having, after only eight years of defiance, applied under a brand new name to resume its full participation in the United Nations? And must that applause include an absolution for everything done in the past, including the commission of genocide? Is that the appropriate baptismal gift?

The applicable law is Article IX of the Genocide Convention

9. In the first round of the present oral proceedings, Professor Brownlie correctly identified one of the tasks of this litigation. It is to secure the "identification of the applicable law" which, he added, "is clearly the law of treaties, together with the principles of State responsibility for breaches of the obligations laid down in the treaty instruments" (CR 2006/16, p. 13, para. 13).

10. We fully subscribe to that. We also agree with him that the applicable law in this case is the Genocide Convention. Indeed, it is precisely the Respondent's violation of that instrument's obligations that is the matter which has brought us before this Court, and it has been brought exactly in accordance with the treaty's terms. What Applicant wants redressed is the Respondent's breaches of its treaty obligations, the Respondent's failure to take responsibility for those breaches, together with the Respondent's persistent unwillingness to end some of the continuing breaches.

11. Thus, there is a measure of agreement between the Parties as to the centrality of the Genocide Convention to these proceedings. However, there is no agreement whatsoever as to what those treaty-based obligations entail. There is no agreement about whether the events we deem genocidal actually occurred, and, if they did occur, whether they constitute genocide as defined in the Convention. There is no agreement as to whether the acts can be attributed to the Respondent. Each of these areas of disagreement will have been addressed by my colleagues during this second round of pleading. My object in this intervention is to address the first of the areas of disagreement. What do the treaty-based obligations actually entail at law?

12. Professor Brownlie has given us his version of the actual obligations entailed. In his view, the Convention requires States to prevent genocide and to punish those persons who commit genocide. And that is all. Yugoslavia, he says, has already begun to bring to trial several of its citizens who committed atrocities in what the Respondent calls the Balkan civil wars. But, he maintains, that is all the Convention requires.

13. Well, we asked in our written pleadings, what about Article IX of the Convention? Does it not quite explicitly impose on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide? And is this not an obligation enforceable at law in these very Chambers? To this, Professor Brownlie responds with a cloud of ambiguity. In his view, Article IX gives rise to that ambiguity. Where that Article appears to enunciate a principle of State responsibility for genocide, he sees ambiguity. Where that Article seems to establish the jurisdiction of this Court to resolve disputes between the parties regarding a State's responsibility, he sees more ambiguity.

14. It seems necessary to join my colleague and friend Professor Pellet in helping to clear up the ambiguity about Article IX of the Genocide Convention or, rather, show that there is no ambiguity at all.

15. On its face, the provision is almost undiplomatic in its utter clarity. The Article explicitly and clearly imposes on treaty parties State responsibility for any violation of the obligations assumed under the treaty, including — what could be more obvious? — State responsibility for genocide or aiding the commission of genocide. It equally establishes that it is the task of this Court to determine whether there has been a genocide for which a State is responsible or for the commission of which it has been the facilitator.

Article IX is entirely unambiguous about imposing State responsibility for genocide

16. In construing the law pertaining to State responsibility for genocide, Professor Brownlie counsels that "two interpretations are possible": either that Article IX establishes State responsibility and makes this Court responsible for implementing it, or, alternatively, that the Article merely establishes the Court's competence to "render a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals"

(CR 2006/16, p. 13, para. 14). Such a reading, were it adopted by the Court, would leave one of the most important provisions of the Convention, carefully drafted, in a cloud of ambiguity.

17. But there are not two plausible interpretations of Article IX. To support his claim, Professor Brownlie summons up, from the deepest recesses of the instrument's drafting history, an early version of the Convention that, indeed, did not include Article IX in its present crystalline form. That rudimentary draft envisaged a much more limited role for this Court. And it made no provision for State responsibility.

18. But the omissions of the early draft, surely, merely underscore the importance of the changes made by the Parties, when those omissions were remedied during later stages of the negotiations. We canvassed those changes extensively in our earlier written and oral pleadings. The changes were made carefully, after ample discussion, precisely to ensure that States, and not only individuals, would be held accountable — and accountable before this very Court — for acts of genocide. It was clear from the drafting discussions that this would be an obligation, and a remedy, which would complement and supplement the institution of criminal penalties that could be levied against individual miscreants.

19. In order to present as ambiguous the drafting changes made to Article IX, changes that were so clearly meant to institute State responsibility for genocide, Professor Brownlie immerses us in an account of the debates in which delegates laboriously explained that the changes they were making would not entail criminal penalties: that the responsibility being affixed to States was not to be regarded as criminal responsibility. While this is certainly true, it proves nothing. Indeed, when he quotes the French delegate, Charles Chaumont, Professor Brownlie rather dismantles the case for ambiguity. What Mr. Chaumont actually said, very sensibly, was that he was "in no way opposed to the principle of the international responsibility of States so long as it was a matter of civil, and not criminal, responsibility" (*id.*, p. 20, para. 46). Well, exactly. The changes of which Mr. Chaumont approved were to establish, beyond any doubt, State responsibility. No one, then or now, argues that this is criminal liability. Were it otherwise, this Court would have had to create an entirely different and unimaginable procedure, and the outcome, presumably, would involve the possibility of punitive penalties. We have never sought anything of the sort.

20. What we have here, from the Respondent, is simply a diversion: an obfuscation of the obvious meaning of Article IX, a meaning that is totally explicit on its face. The text makes "[d]isputes between the Contracting Parties . . . including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III" amenable to resolution by this Court, applying the Convention's clearly enunciated principles of State responsibility.

21. Members of this Court, Professor Brownlie even quotes at some length from your Judgment at the jurisdiction phase of this case, way back in 1996. But you will recall that, in your Judgment, you had already rejected precisely this same argument, the very one being made again now. And, you held then that Article IX establishes State responsibility for genocide. And you also held, very precisely, that the same Article IX designates you, this Court, to determine any dispute between the parties arising out of a purported violation of that responsibility.

22. I urge you, Members of the Court, to put this tired horse out to pasture. There is nothing in the least ambiguous about Article IX. It says what it means, it means what it says, and it was very deliberately drafted with precisely a situation — a dispute — such as this one in mind.

The acts constituting genocide are not defined in terms of numbers but of intent

23. Permit me, Madam President, to examine briefly another of the many aspects of the definition of genocide as to which we appear to be at odds with the Respondent. Ever since this case began, the Respondent has tried to draw us into a sort of numbers game, in which the issue between us becomes: who has the most precise demographics of genocide, rather than the genocide itself. We have done our best, as evidence has become available, as it has been received by United Nations Commissioners and Rapporteurs, as it has been reported by reputable news sources and recorded by cameras, sometimes ones held by the Respondent's own militiamen, we have done our best to present this evidence to the Court as objectively as possible. But it is not our principal object to fix the precise number of men shot at Srebrenica, or women raped or prisoners tortured at Prijedor, or in the many other camps whose existence and operation has been so richly documented in this Court and in the processes of the ICTY. Numbers matter, of course, but genocide, Madam President, does not have a numerical threshold.

24. To the extent that the demographics of genocide do matter, it is primarily because, to demonstrate genocide it is necessary to demonstrate intent. And intent, honourable Members of the Court, can be inferred from the magnitude of acts, from the dimension of the acts and the pattern of their commission. Let there be no ambiguity about it, and, please, let it not become a numbers game. In Bosnia, the acts committed were of such seriousness, and involved such large numbers of victims, and occurred in such a pattern of repetition all over the area designated for ethnic cleansing, that there can be no question about the intent of those who orchestrated those policies. In the *Plavsic* case, the ICTY accepted that the forcible expulsions "included mass killings" of non-Serbs in "numerous municipalities"[10] occurred. The numbers there cited by the Tribunal to support these conclusions were believed by the Yugoslav Criminal Tribunal to be accurate, but they were important, not alone because they were huge, but also because of what their dimension signified about motive. In the *Kristic* case the ICTY found that, at some point, at Srebrenica, "a decision was taken . . . to kill all the captured Bosnian Muslim men indiscriminately" and from this, the judges said, could be inferred the intent to destroy in whole or in part the group "as such"[11]. Can it really matter whether the actual number killed in that one event turns out to be 7,000 or 10,000?

25. There is something else that needs to be stressed here. The number killed is only relevant to a calculation of the size of what is only the tip of the iceberg. The demography of genocide is not constituted solely by counting the numbers killed, or tortured, or raped. As the ICTY said in the *Blagojevic* case, genocide can occur through "the intentional destruction of the *social* existence of the group"[12] which can be demonstrated, as we surely have done, by the "forcible transfer of the women, children and elderly" which, in that instance, manifested the intent to rid an entire area of its Bosnian Muslim population[13].

26. The Appellate Chamber of the ICTY in the *Krstic* case also decided that it was the evidence of "culpable acts systematically directed at the same group" — not specific numbers, but

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[10]ICTY, *Prosecutor* v. *Plavsic*, case No. IT-00-39 & 40, Judgement of 27 February 2003, paras. 41-42.

[11]ICTY, *Prosecutor* v. *Krstic,* case No. IT-98-33-T, Judgement, 2 August 2001, para. 549.

[12]ICTY, *Prosecutor* v. *Blagojevic,* case No. IT-02-60-T, Judgement of 17 January 2005, para. 664.

[13]*Id*., para. 675.

a pattern of acts systematically directed against the same group — that constitutes evidence from which genocidal intent can be inferred[14]. Were such culpable acts directed at the same group? It is beyond doubt. The *Krstic* Trial Chamber said it

> "has been established beyond all doubt that Bosnian Muslim men residing in the [Srebrenica] enclave were murdered, in mass executions or individually. It has also been established that serious bodily or mental harm was done to the few individuals who survived the mass executions."[15]

27. So, Madam President, the question is not: precisely how many were killed? How many were tortured, how many were raped? How many were displaced? We believe that we have drawn an accurate record of the dimensions of the disaster that was visited on Bosnia for daring to declare its independence. The *Krstic* Trial Chamber has found precisely this pattern of "widespread and systematic attack . . . launched against the Bosnian Muslim group". It confirmed

> "the humanitarian crisis in Potočari, the burning of homes in Srebrenica and Potočari, the terrorization of Bosnian Muslim civilians, the murder of thousands of Bosnian Muslim civilians in Potočari or in carefully orchestrated mass executions, and the forcible transfer of the women, children and elderly out of the territory controlled by Bosnian Serbs . . ."[16]

Thus there is essentially unrebutted evidence of the scale of acts inflicted on the non-Serb population, a scale that indisputably is of a dimension, and of a pattern, so as to constitute "destruction in whole or in part" of that group "as such". The numbers, surely, are large enough to make justice weep. What really matters, however, is the project. And, indeed, there was a project, for the pattern of these acts is far too clear to be random. That pattern speaks for itself: it speaks of the intent to destroy — one way or another — as much as necessary of the non-Serb communities of Bosnia in order to clear more than half the nation's territory and, therein, to eradicate any vestige of the multicultural, multi-religious, multi-ethnic fabric of civic life that had been typical of much of Bosnia. And it is that intent, rather than the precise counting of corpses, that provides the fundamental, irrefutable proof of genocide.

28. With your permission, Madam President, I will address the matter of intent, of *mens rea*, further in my pleadings next Thursday.

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[14] *Prosecutor* v. *Krstic,* case No. IT-98-33-A, Judgement, paras. 32-38.

[15] *Prosecutor* v. *Krstic*, case No. IT-98-33-T, para. 543.

[16] *Id.*, para. 537.

The PRESIDENT: Thank you, Professor Franck. I now call upon Professor Stern to address the Court.

Mme STERN :

LES CRITERES DE DETERMINATION DU GROUPE OBJET DU GENOCIDE AU SENS DE L'ARTICLE II DE LA CONVENTION SUR LE GENOCIDE

1. Madame le président, Messieurs les juges, l'élément déterminant qui caractérise le crime de génocide réside, on le sait, en plus de la commission des actes matériels visés à l'article II de la convention sur le génocide, actes qui ont largement été décrits lors de ces plaidoiries, dans l'intention spéciale de «détruire, en tout ou en partie, *un groupe national, ethnique, racial ou religieux comme tel*». De ce point de vue, je ne peux qu'être d'accord avec Me de Roux, lorsqu'il dit que «[l]e génocide n'est pas un acte criminel dirigé contre un individu, le génocide n'est pas, non plus, dirigé contre un Etat, il est dirigé contre un groupe défini selon les critères national, ethnique, racial ou religieux»[17].

2. Dans ma plaidoirie sur les violences sexuelles lors du premier tour, j'avais indiqué que pour qu'il y ait génocide, il fallait que les violences sexuelles soient commises dans cette intention de détruire un groupe national, ethnique, racial ou religieux comme tel : cela m'avait amenée à examiner, comme vous vous en souvenez peut-être, le sens des expressions «détruire», «un groupe», «comme tel», «en tout ou en partie». L'objet de mon intervention de ce matin ne sera pas centré sur l'ensemble de ces expressions et je m'appesantirai essentiellement sur le terme de détermination du «groupe comme tel». Autrement dit, la Bosnie voudrait aujourd'hui précisément revenir sur la détermination et sur les moyens d'identification du groupe qui a été victime du génocide, génocide dont nous soutenons que la responsabilité incombe à la Serbie-et-Monténégro. Ce groupe n'aurait pas, selon le défendeur, été suffisamment défini en ce sens que la Bosnie[18] a alternativement pu l'identifier comme le groupe national des Musulmans de Bosnie-Herzégovine ou encore sous la dénomination générique du groupe des non-Serbes. Me de Roux va jusqu'à dire que le groupe visé est «assez flou»[19] tandis que le professeur Stojanović a déclaré : «[l]e

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[17] CR 2006/19, p. 51, par. 285 (de Roux).

[18] CR 2006/19, p. 51, par. 285 (de Roux); CR 2006/21, p. 43, par. 54 (Stojanović).

[19] CR 2006/19, p. 51, par. 285 (de Roux).

demandeur aurait dû spécifiquement déterminer le groupe qui aurait été la victime du génocide»[20]. Je ne pense pas me tromper en disant que nombreux sont ceux qui ici, dans ce grand hall de justice, n'ont aucun doute sur le groupe victime du génocide qui est tout sauf flou ! Mais, je m'efforcerai néanmoins d'en préciser les contours.

3. Quoi qu'il en soit, je ne reviendrai pas sur la première critique adressée par Me de Roux à la position de la Bosnie, lorsqu'il fait mine de croire que pour la Bosnie, il y aurait deux victimes du génocide : le ou les peuples de Bosnie, d'une part, et l'Etat bosniaque, d'autre part. Mon ami Alain Pellet a déjà fait justice à cet argument vraiment peu pertinent et a montré de façon convaincante que si nous ne nions pas que le génocide ne peut être perpétré qu'à l'égard d'un groupe, à notre connaissance les groupes n'ont pas accès à votre Cour et c'est bien sûr en ce sens que la Bosnie présente cette affaire dans laquelle elle accuse la Serbie-et-Monténégro de génocide à l'égard d'une partie de sa population. Autrement dit, la Bosnie-Herzégovine s'inscrit en faux, de façon véhémente, contre ce qu'a déclaré Me de Roux, lorsqu'il l'a accusée de prétendre tour à tour que le génocide avait été commis contre le peuple bosniaque et contre l'Etat bosniaque, «sans faire une distinction entre les deux» et, ajoute-t-il «sans d'ailleurs à cet égard [s']expliquer»[21]. J'espère que les explications que je viens de donner l'éclaireront sur ce point.

4. Je reviendrai par contre un peu plus longuement sur la seconde série de critiques concernant cette fois l'identification du ou des groupes visés, même, je dois dire, s'il ne m'a pas toujours été facile de bien saisir où se situait exactement cette critique.

L'identification des victimes, membres des groupes visés à l'article II de la convention sur le génocide

La victime du génocide doit être ciblée en raison de son appartenance à un des groupes visés à l'article II

5. Il est clair que le critère de l'appartenance des individus à un groupe déterminé est un élément essentiel de la définition du génocide, en ce qu'il exclut la qualification de génocide des actes matériels prohibés mais qui ont d'autres motifs que l'identification d'une personne à un groupe, comme par exemple l'identité personnelle de la victime, ses relations avec l'auteur ou

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[20] CR 2006/21, p. 43, par. 54 (Stojanović).

[21] CR 2006/20, p. 10, par. 297 (de Roux).

encore les activités politiques ou militaires de la victime. On sait que la convention sur le génocide a été élaborée pour protéger «le refus du droit à l'existence à des groupes humains entiers»[22] et qu'au-delà même des personnes qui sont individuellement les victimes immédiates du génocide, c'est le groupe auquel appartiennent ces individus qui constitue, au final, le destinataire ultime du crime. Le Tribunal pénal international pour l'ex-Yougoslavie a, à cet égard, très justement souligné dans l'affaire *Sikirica*, que :

> «[q]uand bien même ce sont les personnes qui sont les victimes de la plupart des crimes, *la victime ultime du génocide est le groupe*, dont la destruction exige nécessairement que des crimes soient commis contre ses membres, c'est-à-dire contre les personnes appartenant audit groupe»[23].

Cette même idée a été énoncée par le Tribunal pénal international pour le Rwanda dans l'affaire *Akayesu* sur laquelle j'aurai l'occasion de revenir.

6. Ce n'est ainsi pas, je le répète, l'identité personnelle propre des victimes mais l'appartenance de ces victimes à un groupe particulier qui constitue le critère déterminant dans le choix des victimes immédiates du crime de génocide. Lorsqu'est commis un génocide, ceux qui sont visés ne le sont pas parce qu'ils sont engagés dans des activités politiques ou militaires, mais ils sont visés uniquement parce qu'ils appartiennent à un groupe. Ce n'est pas pour ce qu'elle *fait* que la victime d'un génocide est visée, c'est pour ce qu'elle *est*, ou pour ce que les génocidaires considèrent qu'elle *est*. J'ajouterai cependant que si une victime est visée pour ce qu'elle est, cela peut constituer un génocide, même s'il se trouve que cette victime est par ailleurs engagée dans des activités politiques ou militaires. Je prendrai ici simplement l'exemple des Hutus modérés, visés parce qu'ils étaient assimilés aux Tutsis, et étaient donc considérés comme partie intégrante du groupe, même s'ils étaient aussi visés pour leur soutien politique aux Tutsis.

7. Cette distinction entre les victimes visées pour ce qu'elles *sont* et les victimes visées pour ce qu'elles *font* a été l'occasion d'une étrange contestation par la Serbie-et-Monténégro de son intention génocidaire, sur la base de l'aide qu'elle a apportée à certains Musulmans contre d'autres Musulmans. Le raisonnement est alors simpliste : puisqu'il nous est arrivé d'aider certains

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[22] Résolution 96 (I) de l'Assemblée générale, «Le crime de génocide», 11 décembre 1946, Nations Unies, doc. A/RES/96 (I), 11 décembre 1946, premier alinéa du préambule.

[23] TPIY, *Le procureur c. Dusko Sikirica, Damir Dosen, Dragan Kolundzija (Sikirica et consorts)*, affaire n° IT-95-8, Chambre de première instance III, jugement relatif aux requêtes aux fins d'acquittement présentées par la défense, 3 septembre 2001, par. 89; les italiques sont de nous.

Musulmans, nous disent nos contradicteurs serbes, à lutter contre leurs frères, il en résulte nécessairement que nous n'avions pas d'intention génocidaire, celle-ci ne pouvant se concilier qu'avec le fait de viser *tous* les Musulmans. Outre le fait que cela ne tient pas compte de la possibilité envisagée notamment dans l'affaire *Krstic* que l'intention génocidaire puisse viser un groupe dans un cadre géographique restreint[24], cette analyse — je crois — méconnaît la complexité des voies et des moyens par lesquels un génocide peut être commis. Mes contradicteurs se sont ainsi focalisés sur les événements de Bihac pour tenter de prouver qu'il n'y avait pas de génocide puisque, dans cette région, il est de notoriété publique que deux factions musulmanes se sont un temps affrontées. C'est ainsi que nos adversaires sont revenus à de nombreuses reprises sur les événements de Bihac dans plusieurs plaidoiries et ils ont conféré à ces événements un rôle majeur dans la contestation de l'existence de leur intention génocidaire. Si nous ne contestons pas les faits, nous contestons certainement les conclusions qui en sont tirées. Je rappellerai d'abord très rapidement l'analyse de la Serbie-et-Monténégro sur ces événements. Voici ce qu'ils nous disent :

> «Si une intention génocidaire avait existé chez les Serbes contre les Musulmans bosniaques en tant que groupe, en tant que groupe ethnique ou en tant que groupe religieux, il est évident que les Serbes n'auraient pas aidé les Musulmans de Fikret Abdic car la guerre entre les Serbes de Bosnie et les Musulmans n'était pas une guerre fondée sur des différences ethniques, nationales ou religieuses…»[25]

Cependant, l'explication de cette étrange collusion est donnée par nos adversaires eux-mêmes, sans qu'ils en soient sans doute parfaitement conscients, quelques séances plus tard, par la bouche du professeur Brownlie qui a expliqué que : «[t]he relations between Abdic and the Government of Serbia were evidently opportunist»[26]. Je n'aurais pas pu mieux dire. Mais avant de souligner ce que cela implique en ce qui concerne l'intention génocidaire, je tiens, par parenthèse, à attirer l'attention de la Cour sur ce que le conseil de la Serbie-et-Monténégro a ainsi reconnu, à savoir qu'il y avait des relations entre Abdic et le Gouvernement de Serbie, ce qui signifie que le Gouvernement de Serbie était intimement lié aux événements qui se sont déroulés en Bosnie durant toute la période du nettoyage ethnique. Outre cette reconnaissance de l'implication de la Serbie,

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[24] TPIY, *Le procureur c. Radislav Krstic*, affaire nº IT-98-33, Chambre de première instance I, jugement, 2 août 2001, par. 590; TPIY, *Le procureur c. Radislav Krstic*, affaire nº IT-98-33-A, Chambre d'appel, arrêt, 19 avril 2004, par. 37.

[25] CR 2006/18, p. 37, par. 92 (de Roux).

[26] CR 2006/21, p. 19, par. 14 (Brownlie).

qui devrait faciliter nos démonstrations sur l'imputation des actes de génocide à la Serbie-et-Monténegro, le conseil de cet Etat reconnaît également que les Serbes ont eu des relations opportunistes avec Abdic, c'est-à-dire qu'ils l'ont manipulé, qu'ils l'ont instrumentalisé. Comme cela a été également expliqué par Me de Roux,

> «les partisans de Fikret Abdic se sont alliés aux Serbes pour assurer leur survie et, effectivement, ils ont pu assurer cette survie grâce à cette collaboration avec les Serbes. Mais la collaboration des Serbes et des Musulmans dans cette région ainsi que l'aide que les Serbes ont donnée à cette population démontrent bien que la guerre n'avait pas pour objet de détruire un groupe national, ethnique, racial ou religieux…»[27]

Nous ne partageons nullement cette analyse : d'abord, nous pensons qu'il serait plus juste, compte tenu des rapports de force, de dire que ce sont les Serbes qui se sont alliés avec les Musulmans de Fikret Abdic, plutôt que l'inverse. Par ailleurs, et surtout j'insiste sur ce point, cette aide ne prouve pas que l'intention ultime n'était pas de détruire le groupe, puisqu'il y avait là une tentative d'introduire dans le groupe lui-même des ferments d'autodestruction. Les Serbes ont utilisé les Musulmans fidèles à Fikret Abdic pour lutter contre les autres Musulmans, ce qui avait un double avantage, d'une part, poursuivre l'objectif stratégique n° 1 dont on vous a déjà longuement parlé de réunion des territoires peuplés de Serbes et nettoyés de tous les non-Serbes à la Serbie-et-Monténégro, qui pourrait ainsi atteindre son objectif de Grande Serbie réunissant tous les Serbes dans un seul Etat et, d'autre part, participer de façon particulièrement perverse à la destruction du groupe des Musulmans de Bosnie en tant que tel en faisant faire une partie du travail de destruction par certains membres du groupe. Loin d'être donc un argument à l'appui de l'absence d'intention génocidaire, on voit donc que les événements de Bihac peuvent parfaitement s'inscrire dans l'intention génocidaire globale. Comme je l'ai déjà suggéré, ce n'est pas parce que certains Hutus modérés ont été victimes du génocide à côté des Tutsis qu'il n'y a pas eu de génocide au Rwanda. De la même façon, ce n'est pas parce que certains Musulmans ont été des instruments du génocide commis par les Serbes contre les Musulmans de Bosnie qu'il n'y a pas eu de génocide en Bosnie-Herzégovine. La perversion maximale consistant à utiliser certains membres du groupe en désaccord avec d'autres pour parvenir à la destruction du groupe en portant le germe de la destruction au cœur même du groupe visé me semble ici atteinte.

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[27] CR 2006/19, p. 13, par. 154 (de Roux).

Les groupes visés à l'article II sont les groupes national, ethnique, racial ou religieux

8. En dépit de certaines propositions tendant à définir le génocide comme la destruction délibérée d'êtres humains visés en raison de leur appartenance à une collectivité humaine quelconque comme telle[28], nous savons que les rédacteurs de la convention sur le génocide n'ont pas retenu une approche aussi large; ils n'ont envisagé la protection que de certains groupes humains spécifiques, énumérés à l'article II, aux termes duquel le *groupe victime du génocide* doit donc être soit un *groupe national*, soit un *groupe ethnique***,** soit un *groupe racial*, soit un *groupe religieux*. Et en ce sens, je ne peux encore qu'être d'accord avec Me de Roux, lorsqu'il déclare que «[l]a liste des groupes déterminés dans l'article II de la convention doit être considérée comme exhaustive»[29].

9. Après avoir brièvement rappelé les contours généraux du concept de groupe protégé par la convention, la Bosnie-Herzégovine s'attachera à l'examen des moyens et méthodes qui permettent de procéder à la détermination et à l'identification du groupe ciblé par les mesures génocidaires. Cet examen permettra à la Bosnie-Herzégovine de montrer que le groupe visé et considéré comme protégé au sens de la convention peut théoriquement être envisagé de deux façons. Il peut être envisagé alternativement sous la dénomination positive du groupe des Musulmans de Bosnie-Herzégovine principalement visé par le génocide et du groupe des Croates de Bosnie-Herzégovine également visé, même si ce fut à un moindre degré, par les actes de génocide, ou sous l'appellation négative du groupe des non-Serbes, ce qui évidemment inclut au moins les deux groupes précédemment mentionnés, et ce — je le montrerai — de façon parfaitement conforme à la convention. Personnellement, il me semble que compte tenu des données de notre affaire où le génocide est équivalant à un «nettoyage ethnique», la définition négative rend mieux compte des enjeux, même si je le souligne, les deux approches permettent plus ou moins d'arriver au même résultat. N'oublions pas que dans sa résolution 47/121 du 18 décembre 1992, l'Assemblée générale avait solennellement déclaré que «l'ignoble politique de nettoyage ethnique est une forme de génocide». Tout ce qui n'était pas serbe devait disparaître des territoires convoités, et, en ce sens, la définition négative rend mieux compte de l'intention génocidaire, ce

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[28] Voir notamment en ce sens, P. N. Drost, *The Crime of State. Genocide* (vol. II), Leyden, A. W. Sijthoff, 1959, p 122-123.

[29] CR 2006/19, p. 51, par. 287 (de Roux).

qui au regard de l'histoire de la région concernait essentiellement le groupe des Musulmans de Bosnie, accessoirement celui des Croates de Bosnie, deux groupes qui sont aussi parfaitement définis si on adopte une approche positive.

L'absence de définition des différents groupes visés à l'article II de la convention sur le génocide

10. Nous savons que si la convention énumère bien les groupes qui ont vocation à être protégés, elle ne définit cependant pas le sens des expressions employées, elle ne donne aucune précision supplémentaire s'agissant de la singularisation de chacun des épithètes «national», «ethnique», «racial», «religieux». Il ressort des travaux préparatoires de la convention que «cette énumération visait davantage à décrire un seul et même phénomène, correspondant en gros à ce qu'il était convenu d'appeler, avant la deuxième guerre mondiale, les «minorités nationales» qu'à renvoyer à différents groupes distincts de groupes humains»[30].

11. Les concepts de nation, de race et de religion, qui sont par essence imprécis, ne font pas, à ce jour, l'objet de définitions précises généralement et internationalement acceptées[31]; il va donc sans dire que ces notions suscitent des difficultés importantes d'interprétation dans la mesure où ces qualifications ne revêtent pas forcément un sens autonome, que certains qualificatifs peuvent parfois difficilement être envisagés isolément et qu'ils peuvent même se recouper ou se chevaucher[32]. Pour ne prendre qu'un exemple, on a ainsi pu souligner la difficulté d'opérer une distinction tranchée entre les notions de «groupe racial» et de «groupe ethnique». Si, pour certains, l'épithète «ethnique» se rapporte à toutes les caractéristiques biologiques, culturelles ou historiques

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[30] TPIY, *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre de première instance I, jugement, 2 août 2001, par. 556. Dans le même sens, voir W. A. Schabas, *Genocide in International Law,* Cambridge, University Press, 2000, p. 116.

[31] Nations Unies, ECOSOC, Commission des droits de l'homme, Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, version revisée et mise à jour de l'étude sur la question de la prévention et de la répression du crime de génocide établie par M. B. Whitaker, trente-huitième session, doc. E/CN.4/Sub.2/1985/6, 2 juillet 1985, p. 19, par. 30. Ce manque de clarté est souligné par une jurisprudence constante. Pour le TPIY, voir notamment *Le procureur c. Goran Jelisic*, affaire n° IT-95-10, Chambre de première instance I, jugement, 14 décembre 1999, par. 62; *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre de première instance I, jugement, 2 août 2001, par. 555; *Le procureur c. Radoslav Brdjanin*, affaire n° IT-99-36-T, Chambre de première instance II, jugement, 1er septembre 2004, par. 682. Pour le TPIR, voir notamment *Le procureur c. Georges Andersen Nderubumwe Rutaganda,* affaire n° ICTR-96-3-T, Chambre de première instance I, jugement, 6 décembre 1999, par. 56; *Le procureur c. Alfred Musema,* affaire n° ICTR-96-13, Chambre de première instance I, jugement et sentence, 27 janvier 2000, par. 161; *Le procureur c. Ignace Bagilishema*, affaire n° ICTR-95-1A-T, Chambre de première instance I, jugement, 7 juin 2001, par. 65; *Le procureur c. Juvénal Kajelijeli*, affaire n° ICTR-98-44A-T, Chambre de première instance II, jugement et sentence, 1er décembre 2003, par. 811.

[32] Voir W. A. Schabas, *Genocide in International Law*, Cambridge, University Press, 2000, p. 111.

d'un groupe tandis que le terme «racial» ne se rapporte qu'aux caractéristiques héréditaires physiques[33], eh bien, d'autres considèrent en revanche que les deux expressions doivent être considérées comme synonymes[34].

12. L'absence de définitions précises et internationalement acceptées des épithètes mentionnées explique la fluctuation et la variété des méthodes qui ont pu être mises en œuvre par la jurisprudence pour tenter de définir et d'identifier les groupes protégés par la convention.

Vers une définition des groupes visés : les différentes approches possibles

13. Je montrerai plus précisément que les insuffisances d'une approche fondée sur la détermination du groupe protégé selon des critères purement objectifs ont mis en relief la nécessaire prise en compte, en parallèle, d'une approche subjective de la notion, qui permet de rendre plus efficace, dans un sens conforme à l'objet et au but de la convention, la détermination du groupe visé et donc sa protection.

L'inadéquation de la détermination de l'appartenance au groupe selon la seule approche objective

14. Il semble qu'une des premières affaires dans la jurisprudence des deux tribunaux *ad hoc* qui ait procédé à une tentative de définition des quatre adjectifs qualifiant le groupe pouvant être visé par un génocide est l'affaire *Akayesu*. Confronté à la difficulté d'application pratique de ces concepts, le Tribunal pénal international pour le Rwanda a tenté d'apporter des éléments d'indications permettant d'éclairer, de manière objective, les différentes épithètes, et de déterminer par là même l'appartenance des victimes à un groupe national, ethnique, racial ou religieux.

15. Il a ainsi pu considérer, dans cette affaire *Akayesu*, que le «groupe national» qualifiait «un ensemble de personnes considérées comme partageant un lien juridique basé sur une citoyenneté commune, jointe à une réciprocité de droits et de devoirs»[35]. Pour définir un groupe national, on peut en effet se baser sur la définition de la nationalité que vous reconnaissez comme

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[33] Dans le sens de cette distinction, voir par exemple S. Glaser, *Droit international pénal conventionnel,* Bruxelles, Bruylant, t. I, 1970, p. 111-112.

[34] Voir M. N. Shaw, «Genocide and International Law», *in International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Y. Dinstein (dir. pub.), Dordrecht, Martinus Nijhoff Publishers, 1989, p. 807.

[35] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 512.

étant celle qui a été donnée par votre Cour dans l'affaire *Nottebohm* (*(Liechtenstein c. Guatemala), deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 4), dans laquelle elle a indiqué que la nationalité correspondait à «un lien juridique ayant à sa base un fait social de rattachement, une solidarité effective d'existence, d'intérêts, de sentiments, jointe à une réciprocité de droits et de devoirs» (*Nottebohm (Liechtenstein c. Guatemala), deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 23). En ce sens, cette définition englobe d'ailleurs également les minorités nationales[36]. Toujours selon la jurisprudence du Tribunal pénal international pour le Rwanda, le groupe «religieux», lui, peut être considéré comme un «groupe dont les membres partagent la même religion, confession ou pratique de culte»[37] ou les «mêmes croyances»[38]. Le terme «ethnique» qualifie pour sa part généralement un groupe dont les membres partagent une «langue et une culture communes»[39]. Enfin, la définition du groupe «racial» se trouve fondée sur «les traits physiques héréditaires, souvent identifiés à une région géographique, indépendamment des facteurs linguistiques, culturels, nationaux ou religieux»[40].

16. Il est cependant reconnu que ces qualificatifs s'avèrent parfois largement artificiels, comme l'a d'ailleurs constaté le défendeur lui-même[41], et que l'appartenance d'individus à un groupe national, ethnique, racial ou religieux, par une application stricte de ces critères objectifs et rigoureusement scientifiques, est parfois extrêmement difficile à établir en pratique. La doctrine et la jurisprudence sont ainsi unanimes à reconnaître que les concepts d'ethnie, de race ou de nation

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[36] Nations Unies, ECOSOC, Commission des droits de l'homme, Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, version revisée et mise à jour de l'étude sur la question de la prévention et de la répression du crime de génocide établie par M. B. Whitaker, trente-huitième session, doc. E/CN.4/Sub.2/1985/6, 2 juillet 1985, p. 18, par. 65. Voir également W. A. Schabas, *Genocide in International Law,* Cambridge, University Press, 2000, p. 115; M. N. Shaw, «Genocide and International Law», *in International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne,* Y. Dinstein (dir. pub.), Dordrecht, Martinus Nijhoff Publishers, 1989, p. 807.

[37] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 515.

[38] TPIR, *Le procureur c. Clément Kayishema et Obed Ruzindana*, affaire n° ICTR-95-1, Chambre de première instance II, jugement, 21 mai 1999, par. 98.

[39] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 513; *Le procureur c. Clément Kayishema et Obed Ruzindana*, affaire n° ICTR-95-1, Chambre de première instance II, jugement, 21 mai 1999, par. 98.

[40] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 514.

[41] CR 2006/20, p. 14, par. 313 (de Roux).

revêtent un certain degré de subjectivité selon le contexte dans lequel ils s'inscrivent et que, par essence, «l'appartenance à un groupe est une notion plus subjective qu'objective»[42].

La nécessaire prise en compte de critères subjectifs dans l'appréciation de l'appartenance des victimes à un groupe spécifique

17. L'affaire *Akayesu* illustre cette difficulté d'application pratique des seuls critères objectifs de qualification du groupe. Pour caractériser juridiquement le génocide des Tutsis, le TPIR se devait préalablement de déterminer l'appartenance des victimes tutsies du génocide à un groupe protégé par la convention. Par application du critère objectif, le groupe ethnique se définit, je venais de le dire, par le fait que ses membres partagent une langue et une culture communes. Or, la stricte application de ces critères, de même que l'application du critère de la religion, ne permettait pas en l'espèce de distinguer les Hutus et les Tutsis, ceux-ci partageant la même religion, la même langue, la même culture, et il n'était dès lors pas possible de parler de groupe ethnique sur la base des critères objectifs en ce qui concerne les Hutus et les Tutsis. C'est la raison pour laquelle le TPIR a été conduit à situer cette appartenance dans une appréciation plus subjective.

18. Il s'est à cet égard fondé sur le fait que

> «dans le contexte de l'époque … , [les Hutus et les Tutsis] étaient considérés, reprenant une distinction opérée par la colonisation elle-même comme formant deux groupes ethniques différents *aussi bien par les autorités que par les populations elles-mêmes* et leurs cartes d'identité mentionnaient leur appartenance ethnique»[43].

Pour pouvoir caractériser le groupe des Tutsis en tant que «groupe ethnique»[44] protégé au sens de la convention, le Tribunal a donc, on le voit, pris en considération à la fois une donnée objective, fondée sur la détermination institutionnelle du groupe ethnique (par la mention officielle de la dénomination «Tutsi» ou «Hutu» sur la carte d'identité) et une donnée subjective, fondée sur la perception par la collectivité elle-même de cette différenciation ethnique. Selon le TPIR :

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[42] TPIR, *Le procureur c. Georges Andersen Nderubumwe Rutaganda*, affaire n° ICTR-96-3-T, Chambre de première instance I, jugement, 6 décembre 1999, par. 56; *Le procureur c. Sylvestre Gacumbitsi*, affaire n° ICTR-01-64-T, Chambre de première instance III, jugement, 17 juin 2004, par. 254. Voir également W. A. Schabas, *Genocide in International Law,* Cambridge, University Press, 2000, p. 111.

[43] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 122, note n° 56; les italiques sont de nous.

[44] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 638; *Le procureur* c. *Juvénal Kajelijeli*, affaire n° ICTR-98-44A-T, Chambre de première instance II, jugement et sentence, 1er décembre 2003, par. 817.

> «[à] la lumière des faits portés à sa connaissance durant le procès, la Chambre considère que les Tutsis constituaient, au Rwanda, en 1994, un groupe dénommé «ethnique» dans les classifications officielles. Ainsi, les cartes d'identité rwandaises comportaient à l'époque la mention «ubwoko» en kinyarwanda ou «ethnie» en français, à laquelle correspondait, selon les cas, les mentions «Hutu» ou «Tutsi» par exemple. De plus, la Chambre a constaté que chacun des témoins rwandais qui s'est présenté devant elle a toujours spontanément et sans hésitation répondu aux questions du procureur s'enquérant de son identité ethnique.»[45]

19. Autrement dit, pour répondre à la difficulté d'appréciation du groupe ethnique dans le contexte rwandais, le TPIR a considéré qu'un «groupe ethnique» pouvait être défini à la fois selon le critère objectif, comme «un groupe dont les membres ont en commun une langue et une religion», et par application de la méthode dite subjective, comme — je cite encore une fois le Tribunal, car c'est particulièrement clair — «un groupe qui se distingue comme tel (auto-identification) ou un groupe reconnu comme tel par d'autres, y compris par les auteurs des crimes (identification par des tiers)»[46].

20. La jurisprudence a ainsi mis en évidence une approche dite subjective, permettant de déterminer le groupe ciblé en fonction du sentiment d'appartenance des victimes elles-mêmes du crime à ce groupe ou, plus encore, en fonction de la stigmatisation du groupe en tant qu'entité nationale, ethnique, raciale ou religieuse, par les auteurs du crime, c'est-à-dire «lorsque la victime est perçue par l'auteur du crime comme appartenant à un groupe dont la destruction est visée»[47]. Il va en effet sans dire que la dénomination du groupe visé implique parfois une certaine subjectivité, comme Sartre a pu le relever dans ses *Réflexions sur la question juive*, lorsqu'il écrivait : «[l]e juif est un homme que les autres hommes tiennent pour juif : voilà la vérité simple d'où il faut partir»[48].

21. Mais cette approche subjective n'est pas l'apanage du seul TPIR. Cette approche «subjective», fondée sur la perception soit par la victime, soit par l'auteur du génocide de la composition du groupe, a été mentionnée dans la jurisprudence du TPIY, pour la première fois, dans la décision rendue en application de l'article 61, dans l'affaire *Nikolić*, donc avant même que ne soit rendue la décision *Akayesu*. Le Tribunal a considéré, dans cette affaire, dans le cadre de

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[45] TPIR, *Le procureur c. Jean-Paul Akayesu*, affaire n° ICTR-96-4-T, Chambre de première instance I, jugement, 2 septembre 1998, par. 638.

[46] TPIR, *Le procureur c. Clément Kayishema et Obed Ruzindana*, affaire n° ICTR-95-1, Chambre de première instance II, jugement, 21 mai 1999, par. 98.

[47] TPIR, *Le procureur* c. *Juvénal Kajelijeli*, affaire n° ICTR-98-44A-T, Chambre de première instance II, jugement et sentence, 1er décembre 2003, par. 811.

[48] J.-P. Sartre, *Réflexions sur la question juive* (1954), Paris, Gallimard, coll. Folio Essais, 2005, p. 74-75.

l'appréciation de persécutions en tant que constitutives de crimes contre l'humanité, que : «la population civile faisant l'objet des mesures discriminatoires précédemment visées était identifiée, *par les auteurs des actes discriminatoires*, principalement par ses caractéristiques religieuses»[49].

22. Cette approche a été ensuite reprise dans l'affaire *Jelisić*, par la Chambre de première instance, dans les termes qui suivent — et je me permets de citer un assez long extrait de cette décision, car je crois qu'elle est particulièrement claire :

> «[s]i la détermination objective d'un groupe religieux est encore possible, tenter aujourd'hui de définir un groupe national, ethnique, racial ou religieux à partir de critères objectifs et scientifiquement non contestables serait un exercice périlleux et dont le résultat ne correspondrait pas nécessairement à la perception des personnes concernées par cette catégorisation. *Aussi est-il plus approprié d'apprécier la qualité du groupe national, ethnique ou racial du point de vue de la perception qu'en ont les personnes qui veulent distinguer ce groupe du reste de la collectivité. La Chambre choisit donc d'apprécier l'appartenance à un groupe national, ethnique ou racial à partir d'un* <u>*critère subjectif*</u> *: c'est la stigmatisation, par la collectivité, du groupe en tant qu'entité ethnique, raciale ou nationale distincte, qui permettra de déterminer si la population visée constitue, pour les auteurs présumés de l'acte, un groupe ethnique, racial ou national*.»[50]

23. Si, dans cette affaire, la Chambre de première instance n'a pris en considération que l'approche subjective, la Bosnie-Herzégovine tient à préciser que cette approche ne saurait en général être considérée comme exclusive mais que les deux approches doivent être envisagées de manière combinée, comme d'ailleurs la jurisprudence majoritaire le reconnaît. On peut en donner une illustration, de cette jurisprudence majoritaire, dans l'affaire *Blagojević*, qui préconise une approche fondée «on a case-by-case basis, consulting both objective and subjective criteria»[51].

Il convient maintenant encore de raffiner quelque peu l'analyse.

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[49] TPIY, *Le procureur c. Dragan Nikolic*, affaire n° IT-94-2-R61, examen de l'acte d'accusation dans le cadre de l'article 61 du Règlement de procédure et de preuve, décision de la Chambre de première instance I, 20 octobre 1995, par. 27.

[50] TPIY, *Le procureur c. Goran Jelisic*, affaire n° IT-95-10, Chambre de première instance I, jugement, 14 décembre 1999, par. 70; les italiques sont de nous; c'est nous qui soulignons.

[51] TPIY, *Le procureur* c. *Vidoje Blagojevic*, *Dragan Jokic*, affaire n° IT-02-60-T, Chambre de première instance I, jugement, 17 janvier 2005, par. 667; les italiques sont de nous; c'est nous qui soulignons. Cette approche mixte est d'application constante dans la jurisprudence du TPIR. Voir notamment *Le procureur c. Laurent Semanza*, affaire n° ICTR-97-20-T, Chambre de première instance III, jugement et sentence, 15 mai 2003, par. 317; *Le procureur* c. *Juvénal Kajelijeli*, affaire n° ICTR-98-44A-T, Chambre de première instance II, jugement et sentence, 1er décembre 2003, par. 811; *Le procureur c. Sylvestre Gacumbitsi*, affaire n° ICTR-01-64-T, Chambre de première instance III, jugement, 17 juin 2004, par. 254.

Les définitions objective et subjective peuvent être formulées de façon positive ou négative

24. Il y a ici un important point que j'aimerais préciser, car il me semble qu'aussi bien le TPIY que Me de Roux n'ont pas toujours bien procédé aux distinctions nécessaires. Ce point c'est qu'au-delà de l'approche objective ou subjective que je viens de vous présenter, l'analyse du groupe peut en outre s'opérer de deux façons distinctes, soit de façon positive, soit de façon négative, et ceci donc que l'on se fonde sur des critères objectifs ou des critères subjectifs ou même une combinaison des deux. Si je tiens à préciser ce point, c'est, comme je l'ai dit, parce que Me de Roux a semblé assimiler l'approche subjective avec l'approche négative, et peut-être même aussi, même si cela est moins clair, l'approche objective avec l'approche positive, confondant ainsi à mon sens une analyse procédurale et une analyse substantielle alors que ces assimilations ne reposent sur rien. Je reprendrai donc ce qu'il a dit dans l'une de ses plaidoiries :

> «La même Chambre du Tribunal pour l'ex-Yougoslavie qui a opté, je vous l'ai dit, pour une approche subjective et qui permet une définition du groupe par des critères négatifs indique cependant dans son jugement … en même temps «que les [t]travaux préparatoires de la convention montrent que l'on a voulu limiter le champ d'application de la convention à la protection de groupes «stables», définis de façon objective»…»[52]

Il me semble qu'il procède ainsi à certain nombre de confusions conceptuelles.

25. Je répète, en effet, que l'analyse positive ou négative peut s'appliquer que l'on adopte des critères subjectifs ou objectifs. Et je vais illustrer cette affirmation. Ainsi, une analyse positive des critères objectifs consistera par exemple à déterminer un groupe religieux parce qu'il a une certaine religion, tandis qu'une analyse négative des critères objectifs conduira à la définition d'un groupe religieux n'ayant pas la religion de ceux qui poursuivent une politique génocidaire, groupe qui selon le contexte historique dans lequel le problème se pose pourra concerner un, deux ou plusieurs groupes religieux différents, différents mais unis dans leur commune qualité — ou en l'espèce défaut — aux yeux des génocidaires, de ne pas avoir la même religion qu'eux. Il en va de même de la détermination du groupe selon des critères subjectifs. Ainsi, la stigmatisation du groupe visé par les actes génocidaires peut s'opérer de deux façons distinctes, soit selon des critères positifs, soit selon des critères négatifs**,** qui ont été identifiés par le TPIY dans l'affaire *Jelisic*, comme je le rappellerai un peu plus tard. On peut ainsi subjectivement — je reprends un

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[52] CR 2006/20, p. 12, par. 307 (de Roux).

exemple — définir un groupe ethnique de façon positive parce qu'*on considère qu'il a certaines caractéristiques physiques*, ou au contraire de façon négative parce qu'on déplore l'absence de certaines caractéristiques physiques propres au groupe des génocidaires. Disons pour conclure que tout concept peut se définir de façon positive ou négative : je suis moi/je ne suis pas l'autre. C'est cette dialectique de l'autre précisément exclu, soit parce qu'il est l'autre, soit parce qu'il n'est pas comme le génocidaire, qui est au cœur de l'intention génocidaire.

26. Alors face à ces outils fort divers, approche objective positive, approche objective négative, approche subjective positive, approche subjective négative, ou encore combinaison de ces différentes analyses, comment définir les groupes visés à l'article II de la convention sur le génocide ? Me de Roux a souligné quant à lui que l'approche négative — sans plus de précisions d'ailleurs — «ne fait pas l'unanimité dans l'état actuel du droit international»[53]. Je lui en donne bien volontiers acte, mais il en va de même des autres approches, dans leurs différentes combinaisons. Il y a ainsi, me semble-t-il, pour votre Cour, saisie pour la première fois d'une affaire de génocide, une occasion unique de clarifier les choses, de poser un précédent auquel il sera possible de se référer en ce qui concerne la façon de définir les groupes visés à l'article II de la convention sur le génocide. Certes, tout n'est pas controversé. D'un côté, il semble ne pas y avoir de grandes divergences quant à la nécessité de combiner l'approche objective et subjective pour tenter de définir le groupe en tenant compte de la complexité des choses. Mais d'un autre côté, il y a des positions assez divergentes quant à l'admissibilité d'une approche négative du groupe : ainsi serait à proscrire pour certains, dont nos contradicteurs serbes, la référence au groupe des non-Serbes comme pouvant être un groupe visé à l'article II, tandis que d'autres y voient au contraire l'essence même d'un groupe visé parce qu'il doit être éradiqué parce qu'il est différent du groupe des génocidaires.

27. Il me reste donc à tenter une analyse de l'approche négative, afin de déterminer si elle est conforme à l'objet et au but de la convention sur le génocide.

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[53] CR 2006/20, p. 12, par. 306 (de Roux).

La conformité de l'approche négative avec l'objet et le but de la convention sur le génocide

L'approche négative est tantôt retenue, tantôt rejetée par la jurisprudence

28. Qu'il nous soit permis, pour commencer, Madame le président, Messieurs les juges, de rappeler l'analyse des groupes effectuées par la commission d'experts qui a été formulée dans les termes qui suivent :

> «[s]'*il y a diversité ou pluralité de groupes victimes et si chaque groupe est protégé comme tel*, peut-être est-il conforme à l'esprit et au but de la convention de considérer *tous les groupes victimes comme constituant une entité plus large*. C'est le cas par exemple, s'il apparaît que le groupe A veut détruire en tout ou en partie les groupes B, C, et D, c'est-à-dire *quiconque n'appartient pas au groupe national, ethnique, racial ou religieux A*. En quelque sorte, le groupe A a défini un *groupe non A pluraliste sur la base de critères nationaux, ethniques, raciaux ou religieux, et il semble pertinent d'analyser le sort du groupe non A de la même manière, comme si le groupe non A avait été homogène*.»[54]

29. Me de Roux estime que cette analyse est «un peu compliquée en droit»[55]. Je ne vois quant à moins rien qui soit plus simple, c'est une constatation élémentaire de théorie des ensembles : toute collectivité peut être divisée en A et non A, de même qu'une porte doit être ouverte ou fermée. Et je ne vois pas en quoi une définition négative conduirait à des groupes moins stables, puisque le groupe défini négativement sera toujours le groupe qui ne possède pas certaines caractéristiques nationales, ethniques, raciales ou religieuses, elles-mêmes présumées stables.

30. Cette analyse juridique trouve des échos d'ailleurs dans les analyses politiques des Serbes. C'est ainsi que le SDS a été le premier parti proposant de diviser la population entre Serbes et non-Serbes. Je rappellerai que lors de l'organisation d'un référendum par le SDS tenu les 9 et 10 novembre 1991 sur la question suivante : «Do you agree with the decision of the Assembly of the Serbian People in Bosnia-Herzegovina of October 24, 1991, that the Serbian people shall remain in the joint state of Yugoslavia together with Serbia, Montenegro, SAO Krajina, SAO Slovenia, Baranja and Western Srem, and others who declare themselves in favor of staying ?»[56] Eh bien, dans ce référendum les non-Serbes ont reçu un billet de couleur jaune, pour

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[54] Nations Unie, doc. S/1994/674, rapport final de la commission d'experts établie conformément à la résolution 780 (1992) du Conseil de sécurité, p. 26-27, par. 96; les italiques sont de nous.

[55] CR 2006/20, p. 12, par. 306 (de Roux).

[56] Assemblée des Serbes de Bosnie, première session, 24 octobre 1991, English ERN 0301-5405, BCS ERN SA01-2082.

que l'on puisse distinguer leurs votes de ceux des Serbes : il me semble qu'il y a là à n'en pas douter une définition négative d'un groupe dont la seule caractéristique est dans ce qu'il n'est pas, c'est-à-dire dont la seule caractéristique est la non-serbianité.

31. En ce qui concerne la jurisprudence des tribunaux *ad hoc*, elle est à cet égard quelque peu confuse. Alors nous ne sommes évidemment pas sans savoir, Madame le président, Messieurs les juges, qu'une définition du groupe envisagée, de manière négative, c'est-à-dire par exclusion ne fait pas l'unanimité et que le TPIY, dans l'affaire *Stakic*, l'a rejetée, en des termes très généraux, en première instance d'abord — et je cite :

> «[l]'article 4 du Statut protège les groupes nationaux, ethniques, raciaux ou religieux. Lorsque plusieurs groupes sont pris pour cibles, *on ne saurait les regrouper sous une appellation générale telle que, par exemple, les «non-Serbes»*. A ce propos, la Chambre de première instance ne souscrit pas à l'«approche négative».»[57]

Cette conclusion a ensuite été confortée et longuement explicitée en appel — mais j'y reviendrai — et reprise en termes similaires mais sans plus d'explications dans l'affaire *Bradnin*[58].

32. Cette jurisprudence n'est cependant pas la seule et l'on sait qu'il y a également plusieurs affaires, où c'est au contraire l'approche négative qui a été retenue. C'est ainsi que le TPIY a adopté l'approche négative dans l'affaire *Jelisic*, certes en première instance mais cela n'a pas été remis en cause en appel. Et le Tribunal, je crois, s'est exprimé en termes très clairs :

> «[u]ne telle *stigmatisation* du groupe peut s'effectuer selon *des critères positifs ou négatifs. Une «approche positive» consistera pour les auteurs du crime à distinguer le groupe en raison de ce qu'ils estiment être les caractéristiques nationales, ethniques, raciales ou religieuses propres à ce groupe. Une «approche négative» consistera à identifier des individus comme ne faisant pas partie du groupe auquel les auteurs du crime considèrent appartenir et qui présente selon eux des caractéristiques nationales, ethniques, raciales ou religieuses propres, l'ensemble des individus ainsi rejetés constituant, par exclusion, un groupe distinct*.»[59]

33. Si l'on fait une application pratique de cette approche à notre affaire, on peut ainsi considérer que les Musulmans de Bosnie-Herzégovine, en tant que groupe national, ethnique ou religieux, — visé, à titre principal, je l'ai déjà dit, par le génocide —, et les Croates de

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[57] TPIY dans l'affaire *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, Chambre de première instance II, jugement, 31 juillet 2003, par. 512; les italiques sont de nous.

[58] TPIY, *Le procureur c. Radoslv Brdjanin*, affaire n° IT-99-36-T, Chambre de première instance II, jugement, 1er septembre 2004, par. 685-686.

[59] TPIY, *Le procureur c. Goran Jelisic*, affaire n° IT-95-10, Chambre de première instance I, jugement, 14 décembre 1999, par. 71; les italiques sont de nous; c'est nous qui soulignons.

Bosnie-Herzégovine, en tant que groupe religieux ou groupe ethnique — accessoirement visé par les actes de génocide — peuvent être envisagés, soit de façon positive, comme deux groupes individualisés en prenant en compte leurs caractéristiques propres que j'ai indiquées, soit de façon négative comme constituant une entité plus large, désignée, pour les besoins de la cause, sous l'appellation plus générique et négative du «groupe des non-Serbes», en tant que formant la collectivité humaine distincte visée et ciblée par les auteurs du génocide. C'est en effet bien parce que les Musulmans de Bosnie-Herzégovine et les Croates de Bosnie-Herzégovine ne présentaient pas, dans l'esprit des génocidaires, au-delà des caractéristiques nationales, ethniques ou religieuses propres à chaque groupe, des Musulmans ou des Croates, les mêmes caractéristiques nationales, ethniques ou religieuses que les Serbes qu'ils ont collectivement été stigmatisés par les auteurs du génocide en tant que groupe distinct du leur. Aucun obstacle juridique, Madame et Messieurs de la Cour, ne s'oppose à mon sens à ce que l'on souscrive à une telle approche d'autant plus que les deux groupes victimes, envisagés collectivement pour les besoins de la cause en tant que non-Serbes, constituent, pris isolément, aussi deux groupes protégés au sens de la convention sur le génocide.

Le rejet de l'approche négative dans l'affaire *Stakic* n'emporte pas la conviction

34. Si la Cour prend position sur cette question, il m'apparaît, comme je vous l'ai déjà dit, que l'approche négative est particulièrement opportune dans une affaire de nettoyage ethnique génocidaire. La Cour, bien sûr, dans ses analyses juridiques n'est pas liée par les décisions des Tribunaux *ad hoc* mais de toute évidence les analyses développées par ces Tribunaux sont des points de repère qui peuvent être stimulants dans nos réflexions. Aussi voudrais-je reprendre devant vous le raisonnement suivi par le Tribunal pénal international pour l'ex-Yougoslavie dans l'affaire *Stakic*[60] mais je ne reprendrai pour le critiquer. Je vais donc montrer que le rejet de l'approche négative dans l'affaire *Stakic* n'emporte pas la conviction. Comme je l'ai déjà dit, c'est donc dans cette affaire que le Tribunal pénal international pour l'ex-Yougoslavie a rejeté l'approche négative Et il est probable que cette affaire nous sera opposée par le défendeur, qui semble contester la référence fréquente faite par la Bosnie, dans ses écritures comme dans ses

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[60] TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-A, Chambre d'appel, arrêt, 22 mars 2006.

plaidoiries, au groupe des non-Serbes, encore une fois définis négativement par opposition au groupe des Serbes. Si dans la décision donc, le Tribunal n'a pas adhéré à la détermination du groupe selon une approche subjective, mise en œuvre par l'entremise d'un critère négatif, nous allons voir que le raisonnement suivi par la Chambre d'appel présente plusieurs incohérences et incertitudes et n'emporte pas, au final, la conviction.

35. Qu'il nous soit permis d'abord de rappeler brièvement l'analyse juridique à laquelle s'est livrée la Chambre d'appel. Je rappelle que la Chambre d'appel n'a en fait pas souscrit à l'argumentation de l'accusation, qui faisait valoir que la Chambre de première instance avait commis une erreur de droit en s'abstenant justement de définir le groupe ciblé par le génocide comme étant celui des non-Serbes dans la région de la municipalité de Prijedor et en demandant donc cette Chambre de première instance à l'accusation de prouver, de manière séparée, que le génocide avait été commis d'une part contre les Musulmans de Bosnie-Herzégovine, d'autre part contre les Croates de Bosnie-Herzégovine. Eh bien, les arguments juridiques avancés pour réfuter la définition négative du groupe ne m'apparaissent absolument pas décisifs d'un point de vue juridique. Qu'il me soit permis à cet égard de nous attarder quelque peu, Madame le président, Messieurs les juges, pour vous montrer successivement qu'une définition négative du groupe est conforme au texte, est conforme à l'objet et au but comme d'ailleurs il est conforme aux travaux préparatoires de la convention sur le génocide.

La détermination du groupe par exclusion n'est pas contraire au texte de la convention sur le génocide, qui se réfère au «groupe comme tel»

36. Pour refuser de souscrire à la définition du groupe par exclusion, la Chambre d'appel insiste beaucoup sur cette expression de «groupe comme tel» considérant que cette locution «has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity»[61]. Et sur ce point, elle considère que

> «when a person targets individuals because they lack a particular national, ethnical, racial or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics»[62].

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[61] TPIY, *Le procureur c. Milomir Stakic*, affaire nº IT-97-24-A, Chambre d'appel, arrêt, 22 mars 2006, par. 20.

[62] *Ibid.*

37. Cette argumentation ne suscite guère l'adhésion dans la mesure où il me semble qu'elle procède d'une confusion, d'une interprétation erronée de l'expression «comme tel». Cette expression en effet ne renvoie pas *à l'identité particulière du groupe* mais renvoie simplement *à l'intention spécifique constitutive du génocide.*

38. En effet, l'expression «comme tel» signifie que «l'acte de destruction doit être dirigé contre le groupe, comme tel, c'est-à-dire *qua* groupe»[63]. Et, c'est le groupe ciblé, comme je l'ai déjà dit au début de ma plaidoirie, qui est la victime ultime et finale du génocide. Dans la mesure alors où la locution «comme tel» ne tend qu'à faire valoir que la victime du génocide n'est pas l'individu mais le groupe, la Bosnie ne voit pas en quoi une définition négative du groupe s'avérerait en contradiction avec cette exigence[64] : c'est parce que les Musulmans de Bosnie et les Croates de Bosnie ne présentaient pas les mêmes caractéristiques nationales, ethniques, raciales et religieuses que celles du groupe des Serbes qu'ils ont été visés par les auteurs des actes génocidaires en tant que formant un groupe distinct de non-Serbes, groupe visé comme tel et je ne vois pas donc en quoi il y aurait la moindre difficulté d'appliquer une définition négative dans cette optique.

La détermination du groupe par exclusion n'est pas contraire à l'objet et au but de la convention

39. Dans un second temps, la Chambre d'appel a fait valoir que la nécessité de définir le groupe de manière positive ressortait de l'étymologie du terme de génocide composé, comme on le sait, de la racine grecque, *genos*, et de la racine latine *caedere* (tuer) et des travaux de Raphaël Lemkin. Pour la Chambre d'appel, ces éléments tendent à montrer que les groupes envisagés ne peuvent être que des groupes possédant une identité propre («a particular positive identity»[65]) et non «the destruction of various people lacking a distinct entity»[66]. Si la Bosnie sait bien que les rédacteurs avaient en vue des groupes homogènes, elle fait cependant valoir, avec le juge Shahabuddeen, qui était en désaccord avec la Chambre d'appel sur ce point, que «that need

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[63] TPIR, *Le procureur c. Clément Kayishema et Obed Ruzindana*, affaire n° ICTR-95-1, Chambre de première instance II, jugement, 21 mai 1999, par. 99.

[64] Voir dans le même sens, l'opinion partiellement dissidente du juge Shahabuddeen, attachée à l'arrêt rendu par la Chambre d'appel dans l'affaire *Stakic* (*Le procureur c. Milomir Stakic*, affaire n° IT-97-24-A, Chambre d'appel, arrêt, 22 mars 2006), par. 10.

[65] TPIY, *Le Procureur c. Milomir Stakic*, affaire n° IT-97-24-A, Chambre d'appel, arrêt, 22 mars 2006, par. 21.

[66] *Ibid.*

not prevent a more general approach from being taken to the matter; even the genocidal campaigns of the Second World War were not understood exclusively through the lens of the «positive» approach»[67].

La détermination du groupe par exclusion n'est pas non plus contraire aux travaux préparatoires de la convention, travaux préparatoires qui insisteraient selon nos contradicteurs sur le caractère stable et homogène du groupe visé

40. La Chambre d'appel a ensuite fait valoir que la détermination du groupe par exclusion était en contradiction avec les travaux préparatoires car, selon elle, ces travaux préparatoires indiquaient que l'on ne voulait exclure que des groupes présentant *un caractère permanent et stable*, et excluant au contraire les groupes n'ayant pas ce caractère permanent et stable, comme les groupes politiques, économiques ou sociaux. Là encore, l'argument, je crois, n'est pas décisif, d'une part parce qu'il n'est pas certain que le caractère stable du groupe soit fondamental pour sa définition, mais d'autre part, parce que même s'il l'est, un groupe défini négativement peut dans un contexte donné être tout aussi stable qu'un groupe défini positivement.

41. Je voudrais d'abord dire qu'il n'est pas certain, qu'à la lecture des travaux préparatoires, que la convention n'ait eu en vue que les groupes homogènes, stables et permanents. Bien sûr, on se réfère souvent au caractère de permanence de stabilité pour justifier l'exclusion des groupes politiques mais on sait qu'il y a bien d'autres raisons pour lesquelles ces groupes ont été exclus. C'est ainsi que certains auteurs ont pu faire valoir que

> «the debates leave little doubt that the decision to exclude political groups was mainly an attempt to rally a minority of member States, in order to facilitate rapid ratification of the Convention, and not a principled decision based on some philosophical distinction between stable and more ephemeral groups»[68].

42. Quand bien même, Madame et Messieurs de la Cour, l'on souscrirait à ce critère de permanence et de stabilité, force est cependant de constater, que, à l'exception du groupe racial si on considère qu'il est fondé sur des caractéristiques génétiques qu'on ne peut pas modifier, les trois autres groupes ne peuvent que se prévaloir d'une permanence et d'une stabilité toutes relatives, si l'on veut bien prendre en compte le fait que :

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[67] Voir l'opinion dissidente partielle du juge Shahabuddeen, attachée à l'arrêt rendu par la Chambre d'appel dans l'affaire *Stakic* (TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-A, Chambre d'appel, arrêt, 22 mars 2006), par. 12.

[68] W. A Schabas, *Genocide in International Law,* Cambridge, University Press, 2000, p. 133.

> «[n]ational groups are modified dramatically as borders changes and as individual and collective conceptions of identity evolve. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has occurred. Religious groups may come into existence and disappear within a single lifetime»[69].

43. Si l'on veut bien de surcroît bien prendre en considération que la déclaration universelle des droits de l'homme, adoptée au lendemain de la convention sur le génocide, reconnaît le droit fondamental de chaque individu à «changer de nationalité»[70] et qu'elle conçoit le droit à la liberté de religion, comme impliquant «la liberté de changer de religion»[71], il s'avère malaisé de conclure que la nationalité et la religion étaient, même à l'époque, considérées comme présentant un caractère absolument permanent et stable.

44. La Bosnie-Herzégovine tient en tout état de cause à faire valoir qu'au-delà de leur caractéristiques nationales, ethniques ou religieuses intrinsèques, le groupe des Croates et des Musulmans de Bosnie s'auto-identifiait comme constituant une entité plus large et qu'ils se sentaient principalement visés et ciblés, parce qu'ils ne présentaient pas, comme je l'ai dit, les caractéristiques nationales, ethniques ou religieuses des Serbes, et il ne fait aucun doute, Madame le président, que c'était cela exactement la perception des auteurs du génocide. La Bosnie ne voit pas à quoi cette entité plus large — le groupe des non-Serbes — constituée des deux groupes susmentionnés, ne présenterait pas un caractère permanent et stable, dans le contexte des faits, des persécutions et des actes de génocide qu'ils ont subis.

45. A la lumière de tout ce que je viens d'exposer, la Bosnie-Herzégovine espère avoir démontré à la Cour qu'une définition négative du groupe ne contredit en rien la lettre, l'objet et le but et les travaux préparatoires de la convention. Elle pense avoir démontré qu'aucun obstacle juridique — je le répète — ne s'oppose à ce qu'une telle approche puisse être retenue. Cette approche n'élargit pas la notion de groupe protégé par la convention, elle optimise simplement

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[69] W. A Schabas, *Genocide in International Law,* Cambridge, University Press, 2000, p. 133.

[70] Article 15 de la déclaration universelle des droits de l'homme du 10 décembre 1948.

[71] Article 18 de la déclaration universelle des droits de l'homme du 10 décembre 1948.

l'application de la convention dans un sens qui me paraît particulièrement conforme à l'objet et au but du traité.

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46. Au terme de cette plaidoirie et des précisions ainsi apportées aux différentes méthodes permettant de déterminer le groupe protégé, la Bosnie-Herzégovine demande à la Cour de reconnaître, pour les besoins pratiques de la cause, que le groupe qui a été visé par le génocide commis par la Serbie-et-Monténégro, peut être envisagé sous l'appellation générique du «groupe des non-Serbes» en ce qu'elle permet de regrouper le groupe des Croates de Bosnie-Herzégovine en tant que «groupe ethnico-religieux» protégé par la convention sur le génocide ainsi que le groupe qui a été visé principalement en l'espèce, le «groupe national — très exactement — des Musulmans de Bosnie-Herzégovine»[72], comme le groupe a été défini par de nombreux jugements du TPIY.

47. Qu'il nous soit donc en dernier lieu permis, Madame le président, de revenir sur l'allégation du défendeur qui, dans un dernier élan, nous dit : «Mais ce «groupe des Musulmans de Bosnie-Herzégovine», vous ne définissez pas clairement les critères sur lesquels il est défini»[73]. Eh bien, pour répondre, je lirai simplement un extrait du jugement rendu dans l'affaire *Krstić*, qui, me semble-t-il, est suffisamment explicite :

> «A l'origine, les Musulmans de Bosnie-Herzégovine ont été considérés comme un groupe religieux et ils ont été reconnus comme «nation» par la Constitution yougoslave de 1963. En outre, les preuves présentées au procès indiquent très clairement que les plus hautes autorités politiques serbes de Bosnie et les forces serbes de Bosnie opérant à Srebrenica en juillet 1995 considéraient les Musulmans de Bosnie comme un groupe national spécifique[74]…

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[72] TPIY, *Le procureur c. Goran Jelisic*, affaire n° IT-95-10, Chambre de première instance I, jugement, 14 décembre 1999, par. 72; *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre de première instance I, jugement, 2 août 2001, par. 560; *Le procureur c. Radislav Krstic*, affaire n° IT-98-33-A, Chambre d'appel, arrêt, 19 avril 2004, par. 591; *Le procureur c. Vidoje Blagojevic, Dragan Jokic*, affaire n° IT-02-60-T, jugement, 17 janvier 2005, par. 667.

[73] CR 2006/20, p. 14, par. 315 (de Roux).

[74] TPIY, *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre de première instance I, jugement, 2 août 2001, par. 559.

La Chambre conclut que le groupe protégé, au sens de l'article 4 du Statut, est en l'espèce les Musulmans de Bosnie-Herzégovine.»

Si la Cour ne souscrivait pas à l'approche du groupe défini par exclusion en tant que groupe des non-Serbes alors même qu'aucun obstacle théorique, nous l'avons vu, ne s'oppose à un telle acception, la Bosnie-Herzégovine demanderait alors à la Cour de reconnaître que les deux groupes indiqués ont été tous les deux visés — donc d'une part le groupe des Croates de Bosnie-Herzégovine et, d'autres part, et principalement, le groupe national des Musulmans de Bosnie-Herzégovine.

Je remercie la Cour de son attention.

The PRESIDENT: Thank you, Professor Stern. The Court will now rise for 15 minutes.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. Ms Karagiannakis, the Court will hear you.

Ms KARAGIANNAKIS:

Introduction

1. Madam President, Members of the Court, Bosnia has demonstrated to this Court that the massacre of thousands of men and the forced transfer of tens of thousands of women and children from the Srebrenica enclave was genocide and that this can be attributed to the Respondent. The Respondent denies both that Srebrenica was genocide and that these events can be attributed to it. The purpose of this pleading is to rebut these arguments and the underlying factual allegations upon which they are based.

Genocide in Srebrenica was committed as part of a policy to cleanse eastern Bosnia which originated in Belgrade

2. The genocide that was committed in Srebrenica was the culmination of a Serb policy to cleanse eastern Bosnia. This was part of an overall policy to create an ethnically purified, geographically contiguous Greater Serbia. Mr. van den Biesen, in his pleadings on eastern Bosnia and Srebrenica set out the critical facts that demonstrate this long-standing policy which

subsequently crystallized into a plan to eradicate the Muslims of Srebrenica. These facts have not been denied by the Respondent. They are:

(a) The decision which was made by the political and State leadership of the FRY that an area of 50 km from the Drina would be Serb. This decision was conveyed to the Bosnian Serb municipal leaders in May 1991[75].

(b) On 12 May 1992, the Strategic Goals of the Serbian people were declared. They included Strategic Goal 1 to "establish State borders separating the Serbian people from the other two ethnic communities" and Strategic Goal 3 to "establish a corridor in the Drina River Valley, that is, eliminate the Drina as a border separating Serb States"[76].

(c) On 8 March 1995, the Supreme Commander of the RS Armed Forces, Karadzic, issued Directive 7 which mandated the creation of "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants" of Srebrenica and Zepa. This task was assigned to the Drina Corps[77];

(d) On 31 March 1995, as a result of this directive, General Ratko Mladic issued a Directive for Further Operations No. 7/1, which specified the Drina Corps' tasks[78].

(e) On 4 July 1995, Colonel Ognjenovic, the then commander of the Bratunac Brigade, sent a report to his units where he stated that the final goal of the Bosnian Serb army was an entirely Serbian Podrinje which meant the expulsion of the Muslims from the Srebrenica enclave. He stated that the enemy's life had to be made unbearable and their temporary stay in the enclave impossible so that they would leave en masse as soon as possible, realizing that they cannot survive there[79].

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[75]CR 2006/4, pp. 38-39, paras. 9-10 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Miroslav Deronjić*, case No. IT-02-61, Sentencing Judgement 30 March 2004, para. 54.

[76]CR 2006/4, pp. 38-39, para. 10 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 96; Exhibit P746a, ICTY *Prosecutor* v. *Krstic*, Judgement, case No. IT-98-33-T, 2 August 2001, para. 562.

[77]CR 2006/4, p. 49, para. 48 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 106.

[78]CR 2006/4 p. 49, para. 48 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 106.

[79]CR 2006/4, p. 49, para. 49 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 103.

(f) The takeover operation of Srebrenica was conducted under the plan code named "Krivaja 95" which was issued on 2 July 1995. The stated objective of this plan was "to separate and reduce in size the Srebrenica and Zepa enclaves, to improve the tactical position of the forces in depth of the area, and to create conditions for the elimination of the enclaves"[80].

3. Finally, the Respondent has not rejected the description of the actual mass forced transfers or the mass killings. The manner in which they were perpetrated clearly shows that they were well planned and organized. This is supported by findings of the ICTY. More specifically, the *Krstic* Trial Chamber found that "following the takeover of Srebrenica, in July 1995, Bosnian Serb forces devised and implemented a plan to transport all of the Bosnian Muslim women, children and elderly out of the enclave"[81]. The *Blagojevic* Trial Chamber found that:

> "There is ample evidence before the Trial Chamber of a wide-scale and organised killing operation carried out by VRS and the MUP forces from 12 until 19 July 1995. Thousands of Bosnian Muslim men from the Srebrenica enclave were executed and buried in different locations in the Srebrenica, Bratunac and Zvornik municipalities."[82]

4. A central theme which underlies the Respondent's arguments is apparently one of a prolonged civil war in the Srebrenica area between the army of Republika Srpska and the 28th Division of the Bosnian army[83]. The main argument posited by Mr. Brownlie was that Srebrenica was "in local terms the taking of revenge" and that there was no long-term planning involved in those events and certainly no long-term planning by Belgrade[84]. Mr. de Roux argued that the massacre was not committed with the intent to destroy Muslims but with the motivation to destroy an enemy military force[85]. Although these arguments are different, they are based on the same basic factual allegations. First, that the Bosniak forces in Srebrenica launched raids on Serb villages and attacked the Serb populations in the region, causing deaths and casualties. Second,

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[80]CR 2006/4, p.53, para. 62 (Mr. van den Biesen); ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, paras. 120, 137, 674.

[81]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001 para. 52.

[82]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 291.

[83]CR 2006/16, para. 3 (Mr. Brownlie).

[84]*Ibid.*, para. 9.

[85]CR/2006/19, paras. 96-102 (Mr. de Roux).

that the Srebrenica enclave was not demilitarized after the declaration of the United Nations Safe Area and Bosniak raids continued.

Events prior to the declaration of the Srebrenica Safe Area in April 1993

5. With respect to the events prior to the declaration of the Srebrenica Safe Area in April 1993, Mr. de Roux argued that at the beginning of the war, Bosniak forces under the command of Naser Oric expelled the Serbs of Srebrenica, turned Srebrenica into a fortified town and launched raids on surrounding Serb villages with the objective of riding the entire municipality around Srebrenica of its Serb population. He said that these raids "produced several hundred victims among Serb farmers"[86]. Mr. Brownlie also asserted that the Bosnian Army raided Serbian villages in the Srebrenica-Bratunac region and caused substantial civilian casualties[87].

6. As we will see the best available and objective sources on the nature of these raids do not support the factual allegations forwarded by the Respondent. However, prior to considering the substance of the allegations, it is important to examine the two main sources of evidence used by the Respondent in support of these arguments, *Balkan Battlegrounds* and the Dutch Srebrenica report.

7. Mr. Brownlie presented material from *Balkan Battlegrounds*[88] to imply that the offensive of Serb forces in the Drina Valley during 1993, was only a response to local raids by Bosniak forces from Srebrenica during 1992, under the command of Naser Oric and they were not conducted to control and ethnically cleanse eastern Bosnia by Serbs. However, when one reads *Balkan Battlegrounds*, it is apparent that this text supports the proposition that the activities of the Serb armed forces in the Drina Valley were indeed aimed at creating an ethnically clean Serbian territory.

8. *Balkan Battlegrounds* describes the Bosnian Serb Strategic Goals in 1992. They included the aim to ensure that the "Drina is not a border"[89]; the report states that "the Bosnian Serbs

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[86]CR 2006/18, para. 94 (Mr. de Roux).

[87]CR 2006/16, para. 4 (Mr. Brownlie).

[88]*Ibid.*, para. 5.

[89]*Balkan Battlegrounds A Military History of the Yugoslav Conflict 1990-1995*, CIA (2002) ("*Balkan Battlegrounds*") Vol. 1, p. 140.

wanted to create an independent, territorially contiguous republic that would eventually join the Federal Republic"[90]. Further, it states that "a war aim also appears to have been that the population of the new state, Republika Srpska, must be almost purely Serb"[91]. According to this source "the systematic way that the Bosnian Serbs, particularly the SDS organizations, carried out their ethnic cleansing operations makes it almost certain that they had high level direction"[92].

9. In relation to Srebrenica, *Balkan Battlegrounds* clearly states that it was the Serbs who first took over Srebrenica town in April 1992 using the same pattern that had been employed in the eastern Bosnian municipalities of Bijelina, Zvornik and Foca. The Muslim inhabitants were forced to abandon their town as Serb artillery fire rained down on their homes. According to this source, Naser Oric was "able to form and lead a small resistance band that employed classic tactics against Serb occupiers" and he succeeded in defeating the Serb occupiers. As a result "the Serbian population decided to flee the town and its environs" [93]. After this rare victory, "Srebrenica was like a magnet to the Muslim population of the Drina Valley as refugees flooded in from ethnically cleansed areas such as Zvornik and Bratunac, soon to be followed by armed Serbs converging on the Serbrenica lowlands"[94]. From this time and during 1992, Bosniak forces engaged in a stalwart resistance to the Bosnian Serb efforts to control this strategic valley bordering Serbia[95].

10. It is as a result of this resistance that the Serb forces launched an offensive in the Drina Valley to finally achieve their long-standing goals.

11. This analysis is supported by Operational Directive 4. In November 1992, General Ratko Mladić issued this directive for further operations which set out the tasks of the Drina Corps in the Podrinje region, that is, the Drina Valley region. The directive states that:

> "forces in the wider Podrinje region shall exhaust the enemy, inflict the heaviest possible losses on him and force him to leave the Birac, Zepa and Goražde areas together with the Muslim population. First offer the able-bodied and armed men to surrender, if they refuse, destroy them."[96]

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[90]*Ibid.,* p. 140.

[91]*Ibid.,* p. 140.

[92]*Ibid.,* pp. 140-141.

[93]*Ibid.*, p. 317.

[94]*Ibid.*, p. 317.

[95]*Ibid.*, p. 150.

[96]ICTY, *Prosecutor* v. *Blagojevic,* Judgement, case No. IT-02-60-T, 17 January 2005, para. 97, Exhibit P400.

12. Accordingly, Serb military operations in the Drina Valley from November 1992 were not simply a defensive reaction to Bosniak raids but were aimed at forcing the Bosniak forces to leave together with the Muslim population. Again this directive was another step in the long-standing policy to cleanse the Drina River Valley of its Muslim population.

13. During his pleadings, Mr. Brownlie also quoted *Balkan Battlegrounds* for the proposition that "according to one estimate, more than 3,000 Serb soldiers and civilians had been killed or wounded by Bosnian soldiers from the Srebrenica area since the war began"[97]. The number quoted in *Balkan Battlegrounds* is derived from a book. The footnote associated to this figure in the book states: "the figure of 2,000 dead was given by officials in the new Serb-run municipality government in Srebrenica who were interviewed in September 1996 but asked not to be named"[98].

14. This figure of 3,000 dead and wounded Serb soldiers and civilians has been presented to this Court as one which is derived from an independent and reliable source. However, when one looks at the underlying source for the number quoted, it actually comes from unnamed Bosnian Serb officials. For these reasons, these figures can hardly be considered as objective and reliable evidence.

15. The second main source relied upon by the Respondent in relation to the arguments regarding Bosniak raids and resulting casualties is, as I said, the Dutch report[99]. Two of the quotes from this cited by the Respondent refer to Muslim sallies, meaning assaults from defensive positions, on Serb villages in the second half of 1992 until early 1993. These quotes contain allegations that Serb hamlets were attacked, residents were murdered, and settlements were burnt[100]. When these quotes are placed in the context of the Dutch report it is clear that these raids were part of a Muslim resistance to a campaign of Serb ethnic cleansing that had begun in 1992 in the Drina region and a desperate need for food arising from the dire situation in the Srebrenica

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[97]CR 2006/16, para. 6 (Mr. Brownlie).

[98]David Rohde, *Endgame. The betrayal and fall of Srebrenica: Europe's worst massacre since World War II* (1997), p. 16, fn. 8, p. 395.

[99]http://www.srebrenica.nl/en/

[100]CR 2006/16, para. 7 (Mr. Brownlie) and CR 2006/17, para. 283 (Mr. Brownlie).

enclave[101]. Further, as we will see in a moment, the alleged crimes committed against the Serb population are not substantiated by the findings of the ICTY.

16. Apart from the Dutch report that was quoted by the Respondent, he also quoted the assertion that it "is estimated that between 1,000 and 1,200 Serbs died in these attacks, while about 3,000 of them were wounded"[102]. The footnote associated with this quote is a document which was produced by Yugoslav State Commission for War Crimes and Genocide[103]. It was submitted to the General Assembly on 24 May 1993 by the Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations with a request that it be distributed.

17. Madam President, this quote was presented to the Court as a finding of the Government of the Netherlands when in fact its ultimate source is the Respondent itself. In these circumstances these figures cannot be relied upon as objective and independent evidence.

18. The Respondent has levelled serious allegations of a campaign of ethnic cleansing and atrocities at Bosniak forces and Naser Oric in particular. The Respondent seeks to rely on third-party sources for the facts that it asserts. However, when one examines the quotes provided one sees that they have not been provided to you in their full context. The Court also may have noticed the discrepancies between the alleged numbers of dead and injured Serb civilians resulting from the raids[104]. They are confusing and contradictory. Where the ultimate basis for these sources can be ascertained, they can be traced to the Yugoslav or unnamed Bosnian Serb officials. Yet again, this is very far from objective and conclusive evidence on this very serious issue. Apart from these questionable sources, the Respondent has not provided any detailed and objectively substantiated figures for its allegations in this regard.

19. Notwithstanding this, the question still remains as to what extent, if any, these factual assertions regarding the nature of the Bosniak raids are accurate. We will seek to answer these questions using the best available independent sources on the topic.

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[101]Dutch report. See Part II: Dutchbat in the enclave; Chap. 2: The history preceding the conflict in Eastern Bosnia up until the establishment of the Safe Area; Part 3: The beginning of the war April 1992 and Part 4: The Muslims fight back.

[102]CR 2006/17, para. 283 (Mr. Brownlie).

[103]Dutch report, p. 910, fn. 5 citing UN A/48/177 and S/25835.

[104]CR 2006/16, para. 6 (Mr. Brownlie); CR 2006/17, para. 283 (Mr. Brownlie); CR 2006/18, para. 94 (Mr. de Roux).

20. The primary United Nations sources of evidence for the activities of Naser Oric around Srebrenica prior to the declaration of the United Nations Safe Area in April 1993, are the decisions of the ICTY Trial Chamber hearing his trial. In respect of the topic of village raids, the *Oric* indictment alleges that during May 1992 to February 1993, Muslim armed units engaged in various military operations against the VRS in the municipalities of Bratunac, Srebrenica and Skelani of eastern Bosnia and during those operations these units burnt and plundered Serb villages[105]. There are no factual allegations against Mr. Oric of a widespread or systematic campaign waged against the Serb civilian population. There are no factual allegations against Mr. Oric that Serb civilians were deliberately killed or forcibly transferred from these villages during the raids. There are no factual allegations against Mr. Oric stating that he or his forces were acting pursuant to a policy of ethnic cleansing.

21. After the end of the prosecution case in the *Oric* trial, the defence made a motion for judgment of acquittal pursuant to Rule 98*bis* of the Tribunal Rules. The Trial Chamber issued an oral decision acquitting Naser Oric of charges of plunder arising from the operations. The Trial Chamber unanimously found:

> "Under normal circumstances, the taking away of livestock or cattle would undoubtedly amount to plunder but in the extraordinary circumstances of this case, this appropriation of plunder together with food had become indispensable for the survival of the population of Srebrenica. The evidence brought forward by the Prosecutor itself shows that not only was Srebrenica under siege, but that in the course of this protracted siege, the town was completely encircled and isolated and that the population which kept increasing in geometric proportions because of the influx of refugees, was starving. In addition, there is always abundant evidence that in spite of the repeated calls for help and for supplies by the Srebrenica authorities, they never arrived precisely because the town was surrounded and isolated and, therefore, could never arrive in Srebrenica . . . It is finally pertinent to point out that there is no evidence to show that the plunder of cattle was disproportionate given the circumstances . . . As regards the alleged plunder of furniture and television sets, the Trial Chamber has come to the conclusion that the evidence is so puny that although there is evidence that a bed, a sofa, and a television set may have been taken away, this does not rise to the level of seriousness . . . which is related to the jurisdictional requirement of Article 1 of the Statute of the Tribunal."[106]

22. Madam President, Members of the Court, this allegation of plunder was part of the factual matrix that the Respondent has characterized as atrocities. This finding reflects the fact that

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[105]ICTY, *Prosecutor* v. *Oric*, case No. IT-03-68, Second Amended Indictment, 1 October 2005, Count 3-6, para. 27.

[106]ICTY, *Prosecutor* v. *Oric*, case No. IT-03-68, Wednesday 8 June 2005, Transcript, p. 9031.

the activities of the Bosniak forces in respect of Serb villages were largely motivated by the legitimate necessity to feed the starving and besieged Muslims of Srebrenica.

23. The *Oric* Trial Chamber also issued another decision which is pertinent to the issue of Bosniak raids and the context within which they occurred. In the *Oric* decision on the first and second defence filings pursuant to scheduling order, the Trial Chamber found that there was no need for Oric's defence to adduce evidence on a number of facts because they were "sufficiently addressed during the Prosecution case in a manner and to an extent in which in the Trial Chamber's opinion does not require any further evidence". These facts included:

"— The large number of attacks by Bosnian Serb forces on Bosnian Muslim villages within the geographical scope of the Indictment, including the wanton destruction and plunder of Bosnian Muslim villages and hamlets and the laying of mines by Bosnian Serb forces in and around destroyed Bosnian Muslim villages and hamlets;

— The killing and inhumane treatment of Bosnian Muslims, whether civilians or non-civilians, by Bosnian Serbs or Bosnian Serb forces;

— The policy of 'ethnic cleansing' by Bosnian Serb political or military authorities before, during and after the crimes charged in the Indictment, in and around Srebrenica;

— The positive treatment of Serbs — whether civilians or non-civilians, hostages or wounded, in Bosnian Muslim hospitals — by Bosnian Muslims, unless relating to persons identified in Counts 1 and 2 of the Indictment;

— The situation of Srebrenica during the period relevant to the Indictment, namely the positioning of Bosnian Serb forces in and around Srebrenica, and the isolation of Srebrenica from the rest of Bosnia and Herzegovina while being under constant siege and suffering from air and artillery bombardment;

— The influx of refugees in Srebrenica and the critical condition under which the population of Srebrenica had to live during the period relevant to the Indictment, to include food and medical shortages, hygiene issues, security concerns, sporadic electricity and telecommunications shortages;

— The genocide committed against Bosnian Muslims in Srebrenica in 1995;

— The military superiority of the Bosnian Serbs at the time relevant to the Indictment, namely that the Bosnian Serbs were better equipped militarily than the Bosnian Muslims and that, in addition, the Bosnian Serbs benefited from the support of the former JNA and from Serbia;

— The Bosnian Muslim military capacity in Srebrenica was largely dependent on weapons that could be captured from the Bosnian Serb forces; and

> — The urgent necessity for the Bosnian Muslims to attack villages and hamlets named in the Indictment in order to try and secure food, medicine and weapons, for the purpose of the survival of the Muslim population in Srebrenica . . . "[107]

24. Madam President, these are the objective and credible facts that the Court can rely upon for its consideration of the Bosniak raids prior to the declaration of the Srebrenica Safe Area in April 1993. They tell a different story than that presented to you by the Respondent. The Muslims were huddled together in Srebrenica desperately trying to survive and this survival included resistance and raids for food, medicine and weapons to defend themselves. They were not victimizers, they were not the perpetrators of a policy of ethnic cleansing, but were the victims of it. Accordingly, there is no proper factual basis upon which the Respondent can rest its so-called "revenge" argument.

Demilitarization of the Srebrenica Safe Area after April 1993

25. As previously noted the Respondent has argued that after the declaration of the United Nations Safe Area in April 1993, the 28th Division of the Bosniak army was based there and was launching raids from the enclave. The Respondent therefore argues that the subsequent massacre was motivated by revenge for these ongoing raids or a desire to eliminate an enemy military force[108].

26. Mr. Stoijanovic cited *Balkan Battlegrounds* as a basis for the proposition that the 28th Division was present in the Srebrenica Safe Area[109]. This source also states that by early 1995:

> "The Bosnian Serbs were equally determined to take the enclave to achieve their fundamental war aim of an ethnically pure state in eastern Bosnia and they needed to do this soon to free up desperately needed troops for military actions elsewhere."[110]

27. Pages 321 to 322 of this same source states that the 28th Division's available manpower total was essentially irrelevant as there were far too few weapons to arm them. Only one third to one half of these men carried weapons of any kind. Neither the weapons nor their ammunition

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[107]ICTY, *Prosecutor* v. *Oric*, case No. IT-03-68, Decision on the First and Second Defence Filings pursuant to Scheduling Order, 4 July 2005.

[108]CR 2006/16, para. 4 (Mr. Brownlie) and CR 2006/19, para. 98 (Mr. de Roux); CR 2006/19, paras. 146-149 (Mr. de Roux).

[109]CR 2006/15, para. 186 (Mr. Stojanovic).

[110]*Balkan Battlegrounds*, p. 319.

came close to being adequate in numbers or in types for a serious defence of the town. The Bosniak army did not trust the United Nations to guarantee the enclave's safety and was critical of peacekeepers' weak responses to Serb violations including the shelling of the Safe Area and the blockading of entire enclaves[111].

28. Again the most reliable evidentiary sources on the issue of demilitarization of the enclave are those emanating from the United Nations. The *Blagojevic* Trial Chamber described the situation in Srebrenica immediately prior to the declaration of the Safe Area. It found:

> "By March 1993, Bosnian Serb forces were advancing rapidly, causing more civilians to flee. During this offensive, the Zepa enclave was separated from the Srebrenica enclave. Bosnian Muslims from neighbouring villages sought refuge in an area of approximately 150 sq km around Srebrenica town. At one point the population in this area reached 50,000 to 60,000 people. As the Bosnian Serbs advanced, they destroyed Srebrenica's water supply and the town's electricity supply; the population increased, while the supplies of food and water ran low and public hygiene and living conditions deteriorated rapidly."[112]

29. In response to this humanitarian emergency and the fears that the Bosnian Serbs would take over the enclave, on 16 April 1993 the United Nations Security Council adopted resolution 819. It demanded that "all parties and others treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act". It also demanded "the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica". It further demanded that "the Federal Republic of Yugoslavia immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina". The resolution did not place any specific restrictions on the activities of the army of the Republic of Bosnia and Herzegovina[113].

30. On 18 April 1993, a demilitarization agreement was signed by General Mladic and General Halilovic. This agreement had been brokered by UNPROFOR. The Bosniak forces handed over some of their arms to the peacekeepers. On 21 April, UNPROFOR released a press statement declaring the demilitarization of Srebrenica a success. On 25 April 1993, a Security

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[111]*Ibid.,* p. 321.

[112]ICTY, *Prosecutor* v. *Blagojević,* case No. IT-02-60-T, Judgement, 17 January 2005, para. 98.

[113]S/RES/819 (1993) 16 April 1993: The report of the Secretary-General pursuant to General Assembly resolution 53/35 dated 15 November 1999 and entitled "The Fall of Srebrenica" (A54/549) ("Report of the Secretary-General"), para. 55; see paras. 52-58.

Council mission arrived in Srebrenica. In their subsequent report, the mission members noted that whereas resolution 819 (1993) had demanded that certain steps be taken by the Bosnian Serbs, the demilitarization agreement of 18 April 1993 had required the Bosniaks to disarm. They supported UNPROFOR's role in brokering the demilitarization agreement because the alternative would have been a massacre of 25,000 people. The mission members then condemned the Serbs for perpetrating a slow-motion process of genocide[114].

31. A further demilitarization agreement was finalized on 8 May 1993. Under the terms of the new agreement there would be further disarmament of Bosniak forces within the enclave and the Serb heavy weapons and units surrounding the enclaves would be withdrawn. On 6 May 1993 the Security Council passed resolution 824 (1993) which called for the "the immediate cessation of armed attacks or any hostile acts against the safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they ceased to constitute a menace to their security and that of their inhabitants". As in resolution 819 (1993), all of the Security Council's demands in resolution 824 (1993) were directed at the Bosnian Serbs[115].

32. The Secretariat of the United Nations explained to UNPROFOR that the Security Council had laid great emphasis in resolution 824 (1993) upon the withdrawal of the Bosnian Serbs from their positions threatening the Safe Areas. The Secretariat stated that the implied sequence in the second demilitarization agreement — Bosnian Government forces disarming first, followed by a Serb withdrawal later — would be unacceptable to the Security Council[116]. That is, the international community was of the view that the Serbs should withdraw from the areas surrounding the enclave and only then should the Bosniak forces be fully disarmed.

The PRESIDENT: Could you please speak just a little slower? I hear that the interpreters are doing their best but are lagging behind. Thank you.

Ms KARAGIANNAKIS: I apologize.

33. In resolution 836 the Security Council decided:

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[114]Report of the Secretary-General, paras. 59-64.

[115]Report of the Secretary-General, paras. 65-69.

[116]*Ibid.*, para. 69.

> "to extend . . . the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units *other than those of the Government of the Republic of Bosnia and Herzegovina* . . ."[117] (emphasis added).

This means that the presence of the Bosnian government forces in the Safe Area was explicitly permitted by the Security Council.

34. This is what the United Nations Secretary-General concluded in his report on the fall of Srebrenica, regarding the demilitarization of the Safe Area.

> "Criticisms have also been levelled at the Bosniacs in Srebrenica, among them that they did not fully demilitarize . . . it is right to note that the Bosnian Government had entered into demilitarization agreements with the Bosnian Serbs. They did this with the encouragement of the United Nations. While it is also true that the Bosniac fighters in Srebrenica did not fully demilitarize, they did demilitarize enough for UNPROFOR to issue a press release, on 21 April 1993, saying that the process had been a success. Specific instructions from the United Nations Headquarters in New York stated that UNPROFOR should not be too zealous in searching for Bosniac weapons and, later, that the Serbs should withdraw their heavy weapons before the Bosniacs gave up their weapons. The Serbs never did withdraw their heavy weapons.
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> . . . .
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> Srebrenica, military experts consulted in connection with this report were largely in agreement that the Bosniacs could not have defended Srebrenica for long in the face of a concerted attack by armour and artillery. The defenders were an undisciplined, untrained, poorly armed, and totally isolated force, lying prone in the crowded valley of Srebrenica. They were ill-equipped even to train themselves in the use of the few heavier weapons that had been smuggled to them by their authorities. After over three years of siege, the population was demoralized, afraid and often hungry. The only leader of stature was absent when the attack occurred. Surrounding them, controlling all the high ground, handsomely equipped with heavy weapons and logistical train of the Yugoslav army, were the Bosnian Serbs. There was no contest."[118]

35. Madam President, according to these findings of the Secretary-General, the so-called failure to demilitarize on the part of the major Bosnian government forces could not and cannot be used as a pretext to justify the attack on Srebrenica.

36. The United Nations Secretary-General also reached the following conclusion regarding the raids from the Safe Areas.

> "A third accusation levelled at the Bosniac defenders of Srebrenica is that they provoked the Serb offensive by attacking out of that safe area. Even though this accusation is often repeated by international sources, there is no credible evidence to

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[117] S/RES/836 (1993), 4 June 1993.

[118] Report of the Secretary-General, paras. 475-476.

> support it. Dutchbat personnel on the ground at the time assessed that the few 'raids' the Bosniacs mounted out of Srebrenica were of little or no military significance. These raids were often organized in order to gather food, as the Serbs had refused access for humanitarian convoys into the enclave. Even Serb sources approached in the context of this report acknowledged that the Bosniac forces in Srebrenica posed no significant military threat to them . . . The Serbs repeatedly exaggerated the extent of the raids out of Srebrenica as a pretext for the prosecution of a central war aim: to create a geographically contiguous and ethnically pure territory along the Drina, while freeing their troops to fight in other parts of the country. The extent to which this pretext was accepted at face value by international actors and observers reflected the prism of 'moral equivalency' through which the conflict in Bosnia was viewed by too many for too long."[119]

37. Yet again we see that the allegations made by the Respondent lack substance. These raids of the defenders of Srebrenica were often organized to gather food because the Serbs were strangling Srebrenica and blocking humanitarian aid. These raids were exaggerated by the Serbs in order to provide a pretext for creating an ethnically pure territory along the Drina River.

38. Indeed it is this "moral equivalency", referred to by the Secretary-General, which underlies the Respondent's approach to this whole case. These unsubstantiated allegations and exaggerations were used at the time as a pretext for genocide and they are being recycled and repeated to this Court during these proceedings. Even if these allegations were true, could they ever justify or excuse committing genocide as a response?

39. These United Nations findings are entirely consistent with the factual findings made by the ICTY. The defence in the *Krstic* case advanced the same basic arguments that are being made by the Respondent in this case. These arguments were rejected by the ICTY.

40. In the *Krstic* case the defence argued that revenge or the alleged failure of the Bosniak forces to demilitarize may have been a motivation for the massacre in Srebrenica[120]. The Trial Chamber considered the alleged crimes against the Serb population by Bosniak forces, their alleged failure to fully demilitarize and the allegations of subsequent raids from the Srebrenica enclave. The Trial Chamber found that the Krivaja operation, that is, the attack plan on Srebrenica

> "was not confined to mere retaliation. Its objective, although perhaps restricted initially to blocking communications between the two enclaves and reducing the Srebrenica enclave to its urban core, was quickly extended. Realising that no resistance was being offered by the Bosnian Muslim forces or the international community, President Karadzic broadened the operation's objective by issuing, on 9 July, the order to seize the town. By 11 July, the town of Srebrenica was captured,

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[119]Report of the Secretary-General, para. 479.

[120]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, 29 June 2001, Trial transcript, pp. 10155-10157.

> driving 20,000 to 25,000 Muslim refugees to flee towards Potocari. Operation Krivaja 1995 then became an instrument of the policy designed to drive out the Bosnian Muslim population."[121]

41. The defence in the *Krstic* case also argued that the Srebrenica massacre was motivated by a desire to eliminate an enemy military force and was therefore not committed with the requisite genocidal intent. This argument was considered and rejected on appeal. The argument was rejected because the Serb forces killed civilians and military personnel alike, able-bodied and disabled people alike, they did not differentiate and therefore the perpetrators were not seeking just to eliminate an enemy military threat, they were seeking to destroy the Bosnian Muslims of Srebrenica[122].

42. In sum, these United Nations sources speak with one voice in rejecting the exaggerations and pretexts invoked to justify the attack on Srebrenica. The Serb forces that subsequently massacred the men and boys and terrorized and expelled the women and children were not doing so to rid themselves of the opposing side's military forces or out of revenge. Rather, the events in Srebrenica were the culmination of a long-standing Serb ethnic cleansing policy for eastern Bosnia that was finally executed in a cold-blooded, organized and planned manner.

Terrorization and forced transfer of Bosnian Muslim women, children and elderly people

43. Madam President, Members of the Court, the Respondent has also made a number of factual assertions and arguments in support of its basic proposition that the events in Srebrenica did not constitute genocide. It has characterized the mass expulsion of women, children and elderly persons as an "evacuation", it has questioned the numbers of people who were killed and has also questioned whether the victims of the mass executions included civilians.

44. In his narrative on the events in Srebrenica, Mr. de Roux addressed the fate of the civilians. He stated that the Appeals judgment in the *Krstic* case found that they were "allowed to flee" and "evacuated" through a corridor to territory held by Bosnian Muslims"[123]. This is not what the judgment says and not an accurate description of what happened. The *Krstic* Appeals Chamber

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[121] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, 29 June 2001, para. 568.

[122] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, paras. 26-27.

[123] CR 2006/18, paras. 95 and 104 (Mr. de Roux).

confirmed that the fate of the tens of thousands of women, children and old people after the fall of Srebrenica constituted a "forcible transfer"[124].

45. The fate of these people was graphically described by the *Krstic* Trial Chamber. After the takeover of Srebrenica, thousands of Bosnian Muslim residents fled to Potocari seeking protection in the United Nations compound. By the evening of 11 July 1995, approximately 20,000 to 25,000 Bosnian Muslim refugees were gathered there. Several thousands had squeezed inside the United Nations compound itself, while the rest were spread throughout the neighbouring factories and fields. The vast majority of these people were women, children, elderly or disabled people[125].

46. The conditions were awful. There was little food or water. The population was panicked and terrified. As they sat there they heard sniper fire and shelling. On 12 July the conditions got even worse as the day progressed and they were subjected to an active campaign of terror. The refugees saw Serb soldiers setting houses and haystacks on fire. They were told by Serb soldiers that they would be slaughtered; that this was Serb country. Killings occurred. The terror of the people escalated as night fell. Screams, gunshots and other terrifying noises were heard throughout the night. Soldiers were picking people out of the crowd and taking them away. In one case reported in the *Krstic* Trial judgment a witness recounted how three brothers — one merely a child and the others in their teens — were taken out in the night. When the boys' mother went looking for them, she found them with their throats slit[126]. Some people became so desperate that they committed suicide by hanging themselves[127].

47. On 12 and 13 July 1995, the women, children and elderly were transported out of Potocari by the Drina Corps to Bosnian Muslim held territory. Most of them did not even know where they were headed. Importantly, they had no choice in the matter. They had to go. These people were hit and abused by Serb soldiers as they boarded the buses. After getting off the buses they were forced to walk for several kilometres through "no-man's-land" to Bosnian territory. The

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[124]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, paras. 31 and 33; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 532.

[125]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 37.

[126]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 41-44.

[127]*Ibid.*, paras. 45-46.

removal of the Bosnian Muslim civilian population from Potocari was completed on the evening of 13 July 1995. By 14 July, United Nations soldiers visiting Srebrenica did not find a single Bosnian Muslim alive in the town[128].

48. Mr. de Roux also seemed to imply that because the United Nations peacekeepers participated in the mass forced transfer, this somehow meant that genocidal intent could not be inferred from this expulsion[129].

49. Dutch Bat soldiers tried to escort the buses carrying the Bosnian Muslim civilians out of Potocari. They were only allowed to accompany the first convoy of refugees on 12 July 1995. After that they were stopped and their vehicles were stolen at gunpoint. According to the Deputy Commander of Dutch Bat, they were being stopped by the Bosnian Serb soldiers "because they didn't want anybody to be around; that's obvious . . . they didn't want us to witness whatever would happen"[130]. The fact that the United Nations tried to protect these people does not legitimize the cleansing and forced transfer of these women, children and old people or the genocidal intent that can be inferred from it.

50. Finally Mr. de Roux argued that if the UNHCR proposal to evacuate the enclave had been "accepted a few months earlier, many lives would have been saved. But UNHCR's proposal was not accepted and its rejection was nothing other than the direct consequence of a struggle among the warring parties for the conquest of territory."[131]

51. Indeed, on 2 April 1993, the United Nations High Commissioner for Refugees wrote to the Secretary-General saying that the people of Srebrenica were convinced that the Bosnian Serbs would pursue their military objective to gain control of the enclave. She noted that the evacuation of non-combatants from Srebrenica was one option, and that these people were desperate to escape to safety because they saw no other prospect than death if they remained where they were. She stressed, however, that the Bosnian government authorities were opposed to the continued

[128] *Ibid.*, paras. 48-52.

[129] CR 2006/18, paras. 98, 104-105 (Mr. de Roux).

[130] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 50.

[131] CR 2006/18, paras. 98, 104-105 (Mr. de Roux).

evacuation of people, which they saw as designed to empty the town of its women and children in order to facilitate a subsequent Serbian offensive[132].

52. Madam President, the argument forwarded by Mr. de Roux is extraordinary. It amounts to blaming the Bosnians for the mass forcible transfers of their own people in Srebrenica during July 1995 because they did not want to accept their so-called "evacuation" in 1993. According to this perverse logic it is the defenceless victim who is to blame for not agreeing to quietly leave her home before she is ethnically cleansed from it.

53. In any event, and as the Secretary-General's report points out, it was the Security Council that finally rejected the "evacuation" proposal in 1993 and instead condemned "the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of Bosnia and Herzegovina as part of its overall abhorrent campaign of 'ethnic cleansing'"[133].

54. Madam President, Members of the Court, the *Krstic* Trial Chamber found that this expulsion constituted forcible transfer and that this transfer, while not an act of genocide, was evidence of the intent to destroy the Muslims of Srebrenica as part of the group of the Muslims of Bosnia and Herzegovina[134]. The Appeals Chamber of the ICTY confirmed this and set out the reasons why genocidal intent — why genocidal intent — to destroy the Muslims of Srebrenica could indeed be inferred from the mass expulsion, coupled with the killings. It confirmed that:

> "Forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself."[135]

Numbers of people killed

55. The Respondent has also challenged the number of people killed after the fall of Srebrenica. Mr. de Roux recognized that the ICTY had found that 7,000 to 8,000 men and boys

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[132]Secretary-General's Report, para. 59.

[133]United Nations Security Council resolution 819 (1993) of 16 April 1993; Secretary-General's Report, para. 57.

[134]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 595; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, paras. 31 and 33.

[135]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, para. 31.

had been killed after the fall of Srebrenica, but nevertheless proceeded to question this finding on the basis of an ICTY indictment and an article[136].

56. It must be said at the outset that this is a deeply distasteful argument that constitutes the denial of the existence of thousands of victims of Srebrenica.

57. In any event, the argument posited by Mr. de Roux lacks merit. The press article to which he referred was written by a Mr. McKenzie, who was not there at the time and is not an expert demographer. It is about one internet page long and is not sourced. It provides nothing more than the editorial-like opinion of one person. The indictment quoted by Mr. de Roux, the Mladic indictment, does not contain the figure of 5,390 people killed as stated by him[137]. Counsel has obviously added up the figures cited in Annex B of the indictment. The annex sets out conservative and approximate figures for some of the execution sites, but not all of them. The execution sites referred to in this indictment, the Mladic indictment, have been the subject of factual findings in the *Krstic* and *Blagojevic* cases which have heard and seen the relevant evidence and come to the accurate figure. Accordingly, the macabre and crude arithmetic of Mr. de Roux simply cannot be used to argue that less than 7,000 to 8,000 people were killed after the fall of Srebrenica.

58. In any event, the Respondent's resort to sources in this case is contradictory. Mr. Obradovic had previously argued that indictments and press articles could not be used as sources of evidence in this Court[138]. Despite this Mr. de Roux used precisely these sources to question a finding of the *Krstic* Trial Chamber which was subsequently confirmed by the ICTY Appeals Chamber[139].

59. The figure found by the *Krstic* Trial Chamber and confirmed on appeal is an entirely reliable and credible one. The figure is based on a detailed demographic report by Professor Brunborg who conservatively estimated that a minimum of 7,475 persons from Srebrenica were listed as missing on the basis of ICRC lists. The figure was corroborated by

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[136]CR 2006/18, para. 67 (Mr. de Roux).

[137]CR 2006/18, para. 67 (Mr. de Roux).

[138]CR 2006/12, p. 31, para. 39, p. 37, para. 67 (Mr. Obradovic).

[139]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, para. 2.

forensic evidence from exhumations of mass graves that had been uncovered up until the time of the trial. Significantly it was corroborated by statements of the main perpetrators themselves, the Bosnian Serb army[140]. Lastly, the murders were corroborated by the evidence of survivors. This figure has most recently been confirmed by the *Blagojevic* Trial Chamber which found that over 7,000 Muslim men from Srebrenica were massacred[141]. In addition to these sources the Republika Srpska has adopted a report by its own Srebrenica commission which has also found that some 8,000 Bosniaks were liquidated after the fall of Srebrenica[142].

Civilians were targeted for killing

60. In part of his argument about why Srebrenica was not genocide Mr. de Roux also questioned whether the males who were slaughtered after the fall of the enclave were truly civilians. He argued that it was the military-age men, together with members of the 28th Division of the army of Bosnia and Herzegovina, who received the order to leave the enclave and attempt to break through Serb lines[143]. He quoted from a part of a paragraph of the *Blagojevic* judgment in support of his argument.

61. However, if one looks at all of the paragraphs dealing with the escape of the column from the judgment one sees that it tells a different story. A story of desperation. According to the Trial Chamber, the column was formed through word of mouth because the community feared that if their men were to be caught by Serbs they would be killed. Escaping was their only chance of survival. They did not leave pursuant to an order, but a decision of the military and civilian leaders. The column was made up of 10,000 to 15,000 Bosnian Muslims. This consisted of predominantly men and boys between the ages of 16 and 65, including a few women, children and old people[144].

62. The *Blagojevic* Trial Chamber went on to conclude:

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[140]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 80-84.

[141]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 671.

[142]26th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations XIII. The Srebrenica Commission http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=33537.

[143]CR 2006/18, para. 96 (Mr. de Roux).

[144]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, paras. 218-220.

> "The attack was clearly directed against the Bosnian Muslim civilian population in the Srebrenica enclave. The Trial Chamber has heard evidence that the 28th Division of the ABiH was located in the Srebrenica enclave and that members of that division were among the men that formed the column. However, the Trial Chamber finds that the estimated number of members of the ABiH present in the enclave and among the column, ranging from about 1,000 soldiers to 4,000 soldiers do not amount to such numbers that the civilian character of the population would be affected, as the vast majority of the people present in the enclave itself and in the column were civilians."[145]

63. The fears of the Bosniak population were confirmed and those that were captured from this column were killed: civilian or military, young or old, able-bodied or handicapped, all captured people were to be killed[146]. There was to be no mercy.

64. We have previously described the efficient and cold-blooded nature of the killing operation, which in turn demonstrated military planning and implementation. This was an industrial killing operation. Men were transported to detention facilities or schools where they were held under guard. Many were blindfolded and had their hands tied behind their backs. They were taken to the killing fields. One group after another was mowed down. At the same time bulldozers were used to bury the bodies. The main killing operation was completed in less than a week. By some miracle a handful of survivors, usually hiding under bodies, lived and were able to bear witness.

65. One of the survivors described what happened at the Orahovac execution site on the 14 July 1995, to the *Blagojevic* Trial Chamber:

> "We got off the lorry, and we were told to line up as quickly as possible. When we did so, I was together with my cousin Hariz, and we held hands. And he said they would kill us. And I said they wouldn't. He didn't even finish speaking when the bursts of fire started . . . The burst of fire killed my cousin. He was shouting, screaming. I fell on the ground. He fell on top of me. That's when screaming and groaning of injured men started . . . Afterwards, they continued to bring more shifts, more groups. They continued to execute those injured people who were screaming."[147]

66. Finally, the Appeals Chamber in the *Krstic* trial also concluded that captured men were killed regardless of their age or status: "They stripped all the male prisoners, military and civilian,

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[145]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 552.

[146]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 75 and 85, fn. 155.

[147]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 327.

elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity."[148]

Planning

67. Mr. Brownlie denied that there was any plan, arguing: "the existence of a definitive plan, providing a political chart of some kind, is seen not to be a part of the picture"[149]. If we have appreciated this argument correctly, the Respondent's position is that if you don't have a piece of paper setting out the plan in terms, and containing a political chart, then you cannot infer that genocide was committed. This approach must be rejected both legally and factually.

68. First, the existence of a written plan is not a legal ingredient of the crime of genocide. Secondly, and notwithstanding this, in the case of Srebrenica a policy and a plan did exist. The Court is entitled to find and ought to find that there was a long-standing policy to ethnically cleanse eastern Bosnia and Srebrenica, in particular. The killings and expulsions were committed in furtherance of that policy and pursuant to a plan to kill the men and boys and expel the remainder of the Muslim population. The Court should make this finding on the basis of the uncontested facts that were presented at the commencement of these pleadings and the relevant factual findings surrounding the crimes themselves as set out in the United Nations sources and in particular the findings of the ICTY.

69. The *Krstic* Appeals Chamber found that intent may be inferred from factual circumstances of the crimes themselves and may be inferred even where the individuals to whom the intent is attributable are not precisely defined[150].

70. The ICTY Appeals Chamber found that the factual circumstances surrounding Srebrenica as found by the Trial Chamber permitted the inference that the killing of Bosnian Muslim men was done with genocidal intent. It held:

> "The scale of the killing, combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific intent. The

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[148] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, para. 37.

[149] CR 2006/21, paras. 10 and 11 (Mr. Brownlie).

[150] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004, para. 34.

> Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims."[151]

71. In addition to the killing of the men and boys and the expulsion of the women and of the civilian population, the Court can also consider the destruction of Muslim religious and cultural property in Srebrenica as a fact from which it may infer genocidal intent. The *Krstic* Trial Chamber considered that the deliberate destruction of mosques was evidence of the intent to destroy the group[152]. This Court has heard the expert testimony of Mr. Riedlmayer who testified that after Srebrenica was overrun by Serb forces in July 1995

> "all traces of Muslim heritage in Srebrenica were also destroyed. The town's five mosques, all of which were still standing at the time Srebrenica fell, were all destroyed along with the religious archives recording the history and properties of the town's Muslim community."[153]

72. Mr. de Roux also made arguments regarding the planning behind the events in Srebrenica. He argued that "the judges of the Tribunal . . . identified 12 July 1995 as the starting date for genocidal intent" and he used this assertion to argue that the strategic objectives of the Serbian people which he characterized as a plan "has nothing at all to do with the genocidal intent established by the Tribunal"[154].

73. However, the paragraph quoted by the Respondent from the *Krstic* Appeals Chamber judgment does not make that finding[155]. None of the ICTY judgments dealing with Srebrenica identify precisely when the genocidal plan was first formulated. The *Krstic* Trial Chamber was "unable to determine the precise date on which the decision to kill all the military aged men was taken" but was "confident that the mass executions and other killings committed from 13 July onwards were part of this plan"[156]. The *Blagojevic* judgment went further in its factual findings and stated:

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[151] *Ibid.*, para. 35.

[152] ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 580.

[153] CR 2006/22, para. 59 (Mr. Riedlmayer).

[154] CR 2006/19, para. 275 (Mr. de Roux).

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

[156] ICTY *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 573.

> "The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95' operation [dated 2 July 1995], the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there . . .".[157]

74. Significantly, both the *Krstic* and *Blagojevic* Trial Chambers referred to the strategic objectives as part of the relevant factual background to the events in Srebrenica during 1995[158]. In this regard the *Krstic* Trial Chamber found:

> "The Bosnian Serbs' war objective was clearly spelt out, notably in a decision issued on 12 May 1992 by Momcilo Krajisnik, then President of the National Assembly of the Bosnian Serb People. The decision indicates that one of the strategic objectives of the Serbian people of Bosnia-Herzegovina was to reunite all Serbian people in a single State, in particular by erasing the border along the Drina which separated Serbia from Eastern Bosnia . . ."[159]

75. Mr. de Roux also said that that Directives 7 and 7.1 contained no indication of genocidal intent[160]. In this regard we invite the Court to consider the plain meaning of the text from Karadzic in Directive 7, that is, "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Zepa". Barring a directive quoting the terms of the Genocide Convention itself, it is difficult to imagine a clearer statement of genocidal intent.

76. This is especially the case when one considers that the Serb forces to which this directive was addressed, subsequently organized, planned and committed the mass murder of men and boys in Srebrenica. That Karadzic intended this genocide is supported by a statement that he made when he addressed the 54th Assembly of Republika Srpska held on 15 and 16 October 1995. He declared: "I . . . found General Krstic and advised him to go into the city and proclaim the fall of Srebrenica, and after that we will chase the Turks through the woods. I approved that radical mission, and I feel no remorse for it."[161]

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[157]ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, para. 674.

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

[159]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, para. 562.

[160]CR 2006/17, para. 276 (Mr. de Roux).

[161]"The Assembly of Republika Srpska, 1992-95: Highlights and Excerpts" by Dr. Robert J. Donia submitted 29 July 2003; Exhibit No. 537, ICTY, *Prosecutor* v. *Milosevic*, case No. IT-02- 54-T, p. 83; ICTY, *Prosecutor* v. *Milosevic*, Decision on Motion for Judgement of Acquittal, case No. IT-02- 54-T, 16 June 2004, para. 245.

FRY participation in Srebrenica

77. The final aspect of the Respondent's argument that remains to be addressed is that of Belgrade involvement in Srebrenica. Mr. Brownlie asserted that the Government of the FRY did not "formulate or adhere to a plan" for genocide[162] or that it was involved in planning or implementing the murders in Srebrenica[163].

78. The Respondent refers to a lack of evidence of Belgrade involvement in various sources to support its view. The first three sources that are referred to are the *Krstic* Trial and Appeal judgments and the *Blagojevic* judgment[164]. However, these ICTY Chambers were not seised with the question of Belgrade involvement and thus were not presented with relevant evidence of this. Therefore, the lack of findings in this regard is not surprising.

79. The Dutch Srebrenica report is also cited by Mr. Brownlie as a source which does not implicate Belgrade. However the report, by its own admission, is not exhaustive[165]. Further, a perusal of the sources used for the report indicates that the writers did not have the benefit of all of the evidence of Belgrade involvement which we have presented to the Court.

80. *Balkan Battlegrounds* is also quoted for the proposition that Belgrade's military or security forces were not implicated in the Srebrenica atrocities[166]. However, the quote provided by the Respondent states that the Yugoslav army or Serbian State Security (MUP) forces may have contributed to the Srebrenica battle. Indeed in the preceding passages from this section of *Balkan Battlegrounds* one sees the following quote:

> "There are some reports from UN officials and Bosnian survivors that suggest Yugoslav Army (VJ) troops (likely from the elite formations such as the 63rd Airborne or 72nd Special Operations Brigades) as well as possibly elements of the Serbian State Security Department (RDB) Special Operations Unit ("Red Berets") may have been engaged in the battle in Srebrenica. Bosnian Army forces have cited a jeep they captured with Yugoslav Army license plates — N2660 — as evidence that VJ forces had been directly involved in the fighting, although this could indicate only that VJ equipment was being used on the other side of the Drina. VJ and RDB assistance in some form is also consistent with President Milosevic's close co-ordination and planning with General Mladic of Bosnian and Krajina Serb political

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[162]CR 2006/16, paras. 260 and 262-263 (Mr. Brownlie).

[163]CR 2006/17, para. 267 (Mr. Brownlie).

[164]*Ibid*., paras. 166-169 and 279 (Mr. Brownlie).

[165]*Ibid.*, paras. 173 and 269 (Mr. Brownlie).

[166]*Ibid*., paras. 276-277 (Mr. Brownlie).

goals and military strategy during 1995. Elements of the same units had helped the Bosnian Serbs at other times and other places in Bosnia."[167]

81. Mr. Brownlie has cited the testimony of Zoran Lilic in the ICTY Milosevic trial for the proposition that Milosevic did not have a role in Srebrenica[168]. Zoran Lilic was the President of the FRY when Srebrenica took place. He formerly headed the SDC of which Mr. Milosevic was a key member. He is a person who is clearly associated with the Respondent and with Mr. Milosevic. Mr. Lilic was due to testify before you but he did not, for unknown reasons. Certainly, in these circumstances the Court should not consider the favourable testimony that Mr. Lilic provided for his former colleague in the ICTY on the issue of Srebrenica, as objective and conclusive evidence on this issue.

Madam President, I see that we are approaching the . . .

The PRESIDENT: Yes. Ms Karagiannakis, for compelling reasons the Court cannot sit beyond ten past one, so I hope you will be able to conclude with that small overrun.

Ms KARAGIANNAKIS. I will do my best.

The PRESIDENT: I would suggest that for any long citations you might find it useful just to refer the Court to where they will find those.

Ms KARAGIANNAKIS: I am obliged.

82. Mr. Brownlie also quoted Lord Owen on Milosevic's attitude to Srebrenica during 1993[169]. He did so in order to rebut the testimony of General Clark in the *Milosevic* case. General Clark had asked Mr. Milosevic why, if he had this influence over the Bosnian Serbs, he had allowed Mladic to kill all those people at Srebrenica. Milosevic replied: "Well, General Clark, I told him not to do it but he didn't listen to me." This testimony clearly establishes that Milosevic knew about Srebrenica before it happened[170]. Lord Owen testified in the *Milosevic* case that

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[167]*Balkan Battlegrounds*, pp. 322-353.

[168]CR 2006/17, paras. 271-272 (Brownlie).

[169]CR 2006/17, paras. 177-183 and 292-296 (Mr. Brownlie).

[170]ICTY, *Prosecutor* v. *Milosevic*, Decision on Motion for Judgement of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 280.

Mr. Milosevic intervened and was of considerable help in stopping General Mladic going in and taking Srebrenica in 1993[171].

83. There are two points that can be made about this. First, there is no reason why Lord Owen's version of events in 1993 would affect the knowledge of Mr. Milosevic in 1995 about the Srebrenica massacre before it happened. Secondly, according to Lord Owen, Mr. Milosevic clearly had considerable influence over General Mladic in 1993 and managed to stop him from taking Srebrenica. The only question is why didn't he exert the same influence to stop Mladic in 1995.

84. What the Respondent has not denied or even addressed is the evidence that the political and military leadership of the FRY decided that the area which was 50 km from the Drina should be Serb. It has not denied that Mihal Kertes armed the Bosnian Serbs pursuant to that aim. It has not addressed the fact that the JNA and Serbian paramilitaries engaged in ethnic cleansing of Muslims in Eastern Bosnia during 1992.

85. The Respondent is silent about Serbian buses that were used to forcibly transfer the women, children and elderly from the enclave. It has been silent about the use of Dutch APCs seized in Srebrenica which were subsequently used by the Yugoslav army in Kosovo[172].

86. As the Secretary-General stated, the Bosnian Serb forces that surrounded the enclave "were handsomely equipped with the heavy weapons and logistical train of the Yugoslav army"[173].

87. VJ officers posted to the VRS played a critical leadership role in the Srebrenica genocide. The first of these officers is General Mladic, the military leader of the gruesome operation[174]. He was an officer of the VJ and was only retired in 2002[175]. Even after Mladic was charged with genocide and up until this day, he enjoys freedom in Serbia.

88. A number of other officers, who played key leadership roles or who otherwise participated in Srebrenica, were officers of the VJ who were posted to the VRS. This is evidenced by documents submitted to the Court by Bosnia and Herzegovina that demonstrate that they were

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[171]CR 2006/17, para. 181 (Mr. Brownlie).

[172]CR 2006/ 4, p. 50, para. 52; and p. 52, para. 58 (Mr. van den Biesen).

[173]Report of the Secretary-General, para. 476.

[174]ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, e.g., paras. 407, 619, 631.

[175]CR 2006/9, p. 26, para. 13 (Mr. Torkildsen).

promoted in the Yugoslav army and/or were on active duty in the 30th Personnel Centre of the General Staff of the Yugoslav army. These officers included:

— General Krstic, the Chief of Staff and subsequent Commander of the Drina Corps from 13 July 1995, who was found guilty of aiding and abetting the Srebrenica genocide[176];

— General Zivanovic, the commander of the Drina Corps up until 13 July 1995. He issued orders organizing transport for the forcible transfer of civilians from Potocari and to capture the men from the fleeing column[177];

— Lieutenant Colonel Pandurevic, who was the Commander of the Zvornik Brigade and was instrumental in the murders of thousands of men and boys. He has been charged with genocide[178];

— Lieutenant Colonel Blagojevic, who has been convicted of complicity to commit genocide in Srebrenica[179];

— Lieutenant Colonel Obrenovic, who pleaded guilty and was convicted of persecution as a crime against humanity[180];

— Captain Momir Nikolic, who pleaded guilty and was convicted of persecution as a crime against humanity in relation to Srebrenica[181];

— Major Dragan Jokic, who was convicted of extermination as a crime against humanity for his participation[182];

— Lieutenant Colonel Krsmanovic, who organized the transportation for the forcible transfer[183];

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[176]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 42; also see Nos. 44*a*-44*j*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 19 April 2004.

[177]Documents submitted by Bosnia and Herzegovina on 16 January 2006, No. 51*b*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 126, 128, 137, 169.

[178]Documents submitted by Bosnia and Herzegovina, Nos. 42, 46*c*; also see Nos. 45*a*-45*e*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 392, 393, 411, 423; *Prosecutor* v. *Popovic et al.*, case No. IT-05-88, Consolidated Amended Indictment, 11 November 2005.

[179]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 42; ICTY, *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, p. 304.

[180]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 48*b*; *Prosecutor* v. *Obrenovic,* case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003.,

[181]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 46*b*; *Prosecutor* v. *Nikolic*, case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003.

[182]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 42; *Prosecutor* v. *Blagojevic*, case No. IT-02-60, Judgement, 17 January 2005, p. 305.

[183]Document submitted by Bosnia and Herzegovina on 16 January 2006, No. 69*a*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 138, 177 and 344.

— Lieutenant Colonel Sobot, who was also involved in this organization of transportation[184];

— Colonel Cerovic, who was engaged in communications for the Drina Corps Command regarding the handling of Muslim prisoners[185].

89. Instead of being the subject of criminal investigations or prosecutions or dismissals or demotions, or even having their pay stopped, some of these officers including Krstic, Pandurevic and Obrenovic, were promoted in the VJ after they had played leadership roles in the notorious events in Srebrenica[186].

90. None of us can forget the video-taped, cold-blooded executions committed by the Scorpions, a unit of the Serbian MUP, after the fall of Srebrenica[187]. They were not there to engage in legitimate policing activities. They were there to kill. They were there to kill Muslims. They shot those teenage boys because they were Muslims.

Conclusion

91. In conclusion a final quote from the Secretary-General's report encapsulates the place of the Srebrenica enclave within the overall Serb policy regarding the Safe Area and Bosnia in general:

> "the key issue — politically, strategically and morally — underlying the security of the 'safe areas' was the essential nature of 'ethnic cleansing'. As part of the larger ambition for a 'Greater Serbia', the Bosnian Serbs set out to occupy the territory of the enclaves; they wanted the territory for themselves. The civilian inhabitants of the enclaves were not the incidental victims of the attackers; their death or removal was the very purpose of the attacks upon them. The tactic of employing savage terror, primarily mass killings, rapes and brutalization of civilians, to expel populations was used to the greatest extent in Bosnia and Herzegovina, where it acquired the now infamous euphemism of 'ethnic cleansing'. The Bosnian Muslim civilian population thus became the principal victim of brutally aggressive military and paramilitary Serb operations to depopulate coveted territories in order to allow them to be repopulated by Serbs."[188]

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[184]Document submitted by Bosnia and Herzegovina, No. 48*c*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 138, 177 and 344.

[185]Document submitted by Bosnia and Herzegovina, No. 48*c*; ICTY, *Prosecutor* v. *Krstic*, case No. IT-98-33, Judgement, 2 August 2001, paras. 199 and 412, also see paras. 104, 247, 248, 275.

[186]CR 2006/8, p. 46, para. 29 (Mr. van den Biesen); document submitted by Bosnia and Herzegovina on 16 January 2006, No. 48*b*.

[187]CR 2006/9, pp. 15-16, paras. 17-23 (Ms Karagiannakis).

[188]Secretary-General's Report, para. 495.

92. What happened in Srebrenica was not an isolated incident motivated by visceral desires or the wish to eliminate an enemy force. It was part of a larger policy of achieving Greater Serbia, a policy which was conceived and instigated from Belgrade and was expressed in a decision of the FRY leadership to ensure that 50 km from the Drina River would be Serb. It was executed by the Bosnian Serbs and the FRY Serbs, from the beginning of the war through ethnic cleansing in eastern Bosnia. It culminated in the plan to kill the men and boys of Srebrenica and expel their mothers, sisters, wives and children. This plan was executed by Bosnian Serb forces and organs of the FRY. It resulted in the destruction of Bosnian Muslims of Srebrenica through death and removal.

93. Madam President, distinguished Members of the Court, this was genocide. The victims of this triumph of evil look to this International Court of Justice to give it its proper name. Thank you, that completes my pleading.

The PRESIDENT: Thank you, Ms Karagiannakis. The Court now rises and the hearings will resume at 10 o'clock tomorrow.

The Court rose at 1.10 p.m.

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