BHY

CR 2006/43 (traduction)

CR 2006/43 (translation)

Lundi 8 mai 2006 à 10 heures

Monday 8 May 2006 at 10 a.m.

10 Le PRESIDENT : Veuillez vous asseoir. Monsieur Obradović, vous avez la parole.

M. OBRADOVIĆ : Je vous remercie, Madame le président.

UN SCHEMA

Introduction

1. Madame le président, Messieurs de la Cour, dans le cadre de notre exposé final des faits et du droit, je souhaiterais ce matin attirer votre attention sur une demande particulière de l'Etat demandeur, qui est souvent revenue au cours de ces plaidoiries. C'est la demande selon laquelle l'intention génocide doit être déduite d'un certain schéma («pattern») obéissant à un comportement criminel.

2. Au début des plaidoiries du demandeur, M. Franck a invité la Cour à «tirer de certaines constantes — de certains ensembles de faits obéissant à un même schéma — les conclusions qu'imposent la logique ou l'expérience, quand bien même il n'en existe pas de preuves directes»[1]. Au second tour, le demandeur a en partie modifié sa position, affirmant avoir «des preuves confirmant directement l'intention génocide de hauts responsables serbes»[2]. Aucune preuve de ce genre, cependant, n'a été produite devant la Cour. Nous n'avons pas eu non plus d'éléments sérieux confirmant l'existence d'un plan génocide. Pourtant, le demandeur continue d'inviter la Cour à faire des déductions à partir d'un «schéma» de comportement criminel. Cette demande est devenue sa «stratégie de sortie» — à la fois un moyen et un but.

3. Il n'est pas courant en fait, dans la jurisprudence, que l'intention, en tant qu'élément du crime soit démontrée par des preuves directes; elle est plus généralement déduite «des faits, des circonstances concrètes ou d'une ligne de conduite délibérée»[3] *[traduction du Greffe]*. Mais l'existence de l'intention génocide n'est pas la seule chose qui puisse être déduite d'un ensemble de faits obéissant à un même schéma. Par exemple, l'existence d'une «attaque généralisée ou

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[1] CR 2006/3, p. 24, par. 15 (Franck).

[2] CR 2006/33, p. 36, par. 2 (Franck).

[3] TPIY, *Le procureur c. Radoslav Brdjanin*, affaire n° IT-99-36-T, Chambre de première instance, 1er septembre 2004, par. 704.

systématique lancée contre toute population civile»[4], en tant qu'élément du crime contre l'humanité, est également très souvent déduite des faits, des circonstances concrètes ou d'une ligne

11 de conduite délibérée. Le demandeur ne s'est pas donnée la peine de d'aider la Cour en expliquant la différence entre un schéma dont on peut déduire l'existence du crime de génocide et un schéma dont on ne peut raisonnablement déduire que l'existence de crimes contre l'humanité. Selon le demandeur, le seul schéma existant en l'espèce, est le «schéma génocide», et chacun des actes des Serbes pendant le conflit en Bosnie-Herzégovine, sans exception s'inscrit sans ce schéma.

4. Madame le président, ma tâche aujourd'hui consiste à prouver que le schéma de comportement criminel décrit par le demandeur en l'espèce ne permet pas de déduire raisonnablement l'existence du crime de génocide.

Schéma et crime de génocide

5. Un schéma de comportement criminel, susceptible de constituer l'*actus reus* du crime de génocide, n'est pas un élément nécessaire de ce crime. Ni la convention sur le génocide ni les textes fondamentaux des tribunaux pénaux internationaux ne mentionnent un «schéma». Ce terme apparaît pour la première fois dans les «Eléments des crimes», l'un des documents fondamentaux de la Cour pénale internationale, mais dans une acception entièrement différente de celle que le demandeur tente d'imposer en l'espèce. L'article 6 des Eléments des crimes de la CPI dresse la liste des éléments requis pour établir chaque acte génocide. Par exemple, l'alinéa *a)* de cet article définit comme suit les quatre *éléments cumulatifs* du génocide par meurtre :

> «1. L'auteur a tué une ou plusieurs personnes.
>
> 2 Cette personne ou ces personnes appartenaient à un groupe national, ethnique, racial ou religieux particulier.
>
> 3. *L'auteur avait l'intention de détruire*, en tout ou en partie, ce groupe national, ethnique, racial ou religieux, comme tel.
>
> 4. Le comportement s'est inscrit dans le cadre d'une série («pattern») manifeste de comportements analogues dirigés contre ce groupe, *ou* pouvait *en lui-même* produire une telle destruction.»[5]

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[4] Statut de Rome de la Cour pénale internationale, art. 7, par. 1.

[5] Cour pénale internationale, Eléments des crimes, Nations Unies, doc. PCNICC/2000/1/Add.2 (2000); les italiques sont de nous.

6. Ainsi, selon le point 4 de l'alinéa *a)* de l'article 6 des «Eléments des crimes» de la CPI, qui définit deux éléments alternatifs, il est clair qu'un génocide peut être commis par exemple dans un camp isolé, si l'intention de l'auteur (ou plutôt l'intention commune des auteurs qui ont des pouvoirs dans le camp) est de détruire un groupe, au moins partiellement, *et* si le comportement peut en *lui-même* avoir une incidence sur cette destruction. Dans le cas d'un camp isolé, cela

12 signifie que les détenus devraient représenter une partie raisonnablement importante du groupe concerné. Lorsque le comportement de l'auteur ne peut pas lui-même aboutir à la destruction d'une partie importante d'un groupe donné, il doit s'insérer dans un schéma manifeste d'activités criminelles semblables dirigées contre les membres du même groupe. En pareil cas, l'auteur partage l'intention génocide avec de nombreux autres individus auteurs d'actes semblables. Toutefois, dans les deux cas prévus par la disposition susmentionnée (point 4), *l'élément moral est indispensable : il faut que chaque auteur ait l'intention de commettre le crime de génocide* (telle que cette intention est décrite au point 3).

7. Mais le demandeur réclame en l'espèce autre chose, à savoir que l'intention génocide soit déduite d'un ensemble d'actes criminels *divers*. Ainsi que, M. Franck a déclaré :

> «Que des actes de meurtre, de torture, de viol, de déplacement forcé, bien que prouvés, séparément, permettent de dégager, lorsqu'ils sont pris de manière cumulative dans le contexte de poursuites pénales multiples à l'encontre d'individus, une sorte de système ou de «structure». C'est ce terrible schéma qui, en fin de compte, transforme de manière implacable une série de crimes ordinaires en un génocide général. C'est cette accumulation de crimes isolés — cette effrayante répétition d'actes mauvais — qui au bout du compte émerge, de façon tout à fait éclatante, comme une sorte de super crime de génocide.»[6]

8. Cette approche n'est pas compatible avec le droit pénal international en vigueur. Un schéma constitué d'une série de «crimes ordinaires» ne peut pas être simplement transformé en crime de génocide : celui-ci ne peut pas être la somme d'activités criminelles aléatoires, mais un crime spécifique, avec un élément moral spécifique. Si des «crimes ordinaires» n'ont pas été commis avec l'intention requise, comment pourraient-ils en s'additionnant constituer l'intention du crime «suprême» de génocide qui, nous dit-on devrait, être déduit des éléments existants de tous les crimes individuels ? Ce raisonnement ne serait pas seulement illogique, il serait impossible.

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[6] CR 2006/5, p. 19, par. 34 (Franck); voir également CR 2006/6, p. 46, par. 50 (Franck) et CR 2006/7, p. 31, par. 112 (Stern).

L'existence d'un schéma ne peut être utile à la Cour que pour discerner l'intention lorsqu'elle ne se déduit pas facilement des preuves directes. Comme nous l'avons déjà dit, chaque auteur du crime de génocide doit être animé du *dolus specialis* de perpétrer ce crime. Mais l'intention de tous les auteurs ou de certains d'entre eux ne peut pas être établie à partir de la simple «accumulation de crimes isolés»[7], qui ont déjà été qualifiés par le Tribunal pénal international de crimes autres que celui de génocide.

9. Il n'existe aucun jugement du TPIY contenant une telle conclusion. M. Franck le sait
13 bien, et c'est pour cela qu'il soutient que cette conclusion sort du champ de compétence des tribunaux internationaux[8]. Le défendeur n'est pas d'accord avec cette affirmation et je vais maintenant montrer que le TPIY a examiné très sérieusement la question de l'existence d'un schéma criminel, mais a conclu que ce schéma, dans les circonstances, ne pouvait pas prouver le crime de génocide.

10. Le premier exemple est tiré de l'affaire *Le procureur c. Radoslav Brdjanin*. Le jugement rendu par le TPIY dans cette affaire le 1er septembre 2004 se lit comme suit :

> «Si le caractère général et la grande ampleur des atrocités commises constituent la preuve d'une campagne de persécution, la Chambre de première instance est d'avis que, compte tenu des circonstances de l'espèce, *il n'est pas possible d'en conclure que la condition de l'intention spéciale requise pour établir le crime de génocide est satisfaite*.»[9]

11. Le TPIY est parvenu à la même conclusion dans son jugement sur l'affaire *Le procureur c. Milomir Stakic*, daté du 31 juillet 2003 :

> «La Chambre de première instance a passé ses constatations en revue … et il s'en dégage un ensemble d'atrocités dont les Musulmans de la municipalité de Prijedor ont été victimes en 1992, et qui ont été établies au-delà de tout doute raisonnable. Toutefois, pour pouvoir conclure que Milomir Stakic a pris part à ces actes en tant que coauteur d'un génocide, la Chambre de première instance doit être convaincue qu'il était animé de l'*intention requise*. Donc, la question capitale à laquelle la Chambre doit répondre est celle de savoir si l'accusé avait l'*intention spécifique voulue*, celle-ci étant l'élément constitutif essentiel de ce crime.»[10]

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[7] CR 2006/5, p. 19, par. 34 (Franck).

[8] *Ibid.*

[9] TPIY, *Le procureur c. Radoslav Brdjanin*, affaire n° IT-99-36-T, Chambre de première instance, jugement, 1er septembre 2004, par. 984; les italiques sont de nous.

[10] TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, Chambre de première instance, jugement, 31 juillet 2003, par. 546.

12. Il ressort clairement de ces deux affaires qu'il ne peut être suppléé à l'insuffisance des preuves produites par l'Etat demandeur par des déductions tirées d'un schéma de crimes qui ne sont pas le génocide.

13. Au second tour de plaidoiries, le demandeur, dans le cadre de sa stratégie de sortie, a exposé une nouvelle thèse, à savoir qu'il ne s'agit pas d'une affaire «concernant la culpabilité, ou le degré de culpabilité, d'auteurs individuels de tels actes», et qu'il doit y avoir d'importantes différences entre la preuve de la responsabilité individuelle et celle de la responsabilité d'un Etat[11]. Cela signifierait, selon le demandeur, que l'intention génocide d'un gouvernement ou de certains hauts responsables d'un Etat pourrait être déduite du comportement criminel de nombreux auteurs individuels même si ces auteurs n'avaient pas eux-mêmes d'intention génocide.

14 14. Madame le président, cette approche non plus n'est pas logique. Comment l'Etat peut-il être responsable du crime de génocide si aucun auteur individuel n'avait une intention génocide ? Ce critère de preuve requis pour les responsables du gouvernement ne devrait pas être moins exigeant que celui qui s'applique aux criminels «ordinaires».

15. L'exemple des deux accusés que je viens de citer nous est très utile ici. Ce n'étaient pas des criminels ordinaires. M. Brdjanin était le chef de la cellule de crise de la région autonome de la Krajina. Il s'agit d'une vaste zone de la Republika Srpska qui compte de nombreuses municipalités où des crimes notoires ont été commis. M. Stakic était le chef de la cellule de crise de la municipalité de Prijedor, où il y avait six camps de détention. Ces deux personnes n'ont pas été accusées d'avoir elle-même commis des crimes. Toutes deux ont été accusées, en raison du rôle majeur qu'elles ont joué dans le crime de génocide sur le territoire sur lequel elles exerçaient leurs pouvoirs. Dans les deux cas, le TPIY a conclu à l'existence d'un schéma de comportement criminel, mais pas d'un génocide. C'est la raison pour laquelle MM. Brdjanin et Stakic ont été acquittés du crime de génocide.

16. Madame le président, le seul schéma qui puisse avoir une importance pour l'établissement des faits de la cause serait un *schéma composé d'atrocités commises à une échelle*

[11] CR 2006/33, p. 38, par. 8 (Franck).

massive et ayant eu un effet destructeur pour les fondations mêmes d'un groupe donné. Le demandeur cependant n'a pas réussi à produire une quelconque preuve d'un tel schéma.

Schéma allégué de meurtres en masse

17. Il serait utile, à ce stade, de rappeler une fois de plus à la Cour le faux schéma que le demandeur a créé de toutes pièces dans ses écritures en exagérant le nombre des victimes des meurtres de masse, ce qui a complètement modifié l'image générale du conflit en Bosnie-Herzégovine. Ainsi, le demandeur a prétendu que deux mille cinq cents hommes avaient été tués pendant l'attaque de Zvornik, qui a duré deux jours[12]. Il a affirmé que mille personnes avaient été tuées dans un seul village (Hambarine)[13] et, de même, que cinquante à soixante personnes sont mortes chaque jour dans le camp de Trnopolje[14]. Ces allégations horribles devaient

15 rappeler à la Cour les camps de concentration nazis, ou le génocide notoire commis au Rwanda. Leur but était de créer l'impression d'un schéma de meurtres en masse susceptible de mettre en péril les fondements mêmes d'un groupe.

18. Au cours du premier tour de plaidoiries, nous avons cependant clairement démontré que le demandeur exagérait beaucoup le nombre des victimes de crimes de guerre dans la ville de Zvornik, de même qu'à Bijeljina, Brcko ou Kozarac, dans le village de Hambarine, dans les lieux de détention d'Omarska, de Keraterm, de Trnopolje et de Luka[15]. Le demandeur ne pouvait pas contester ou minimiser nos arguments, il n'en a nié aucun, et même l'agent adjoint de la Bosnie-Herzégovine les a admis[16] et a prudemment présenté des excuses pour les erreurs commises dans la présentation des faits[17]. Le défendeur s'en félicite.

19. Nous devons cependant souligner que les allégations inexactes du demandeur ont été nombreuses et qu'on les trouve tout au long des pièces de procédure. A titre d'exemple supplémentaire, je pourrais choisir une nouvelle municipalités — cette fois-ci ce pourrait être Bratunac — et rappeler à la Cour que le demandeur a prétendu dans sa réplique que six à

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[12] Réplique, chap. V, p. 100, par. 64.

[13] *Ibid.*, p. 85, par. 22.

[14] *Ibid.*, p. 210, par. 330.

[15] CR 2006/11, p. 22, par. 22-36.

[16] CR 2006/33, p. 45, par. 4 (Van den Biesen).

[17] CR 2006/30, p. 30, par. 2 (Van den Biesen).

sept cents hommes musulmans ont été conduits par les forces serbes à l'école primaire Vuk Karadzic le 10 mai 1992 : «La plupart d'entre eux furent tués par balles mais un jour jusqu'à cent cinquante personnes auraient été passées à tabac jusqu'à ce que mort s'ensuive.»[18]

20. La source de cette allégation incroyable est le rapport final de la commission d'experts des Nations Unies, fondé sur le «Rapport du 3 juin 1992 sur les destructions de guerre, les violations des droits de l'homme et les crimes contre l'humanité en Bosnie-Herzégovine» produit par une organisation non gouvernementale de Sarajevo dénommée «World Campaign Save the Humanity»[19]. Il est très difficile aujourd'hui de trouver des renseignements concernant cette ONG, ainsi que la source de l'information.

21. En revanche, le procureur du TPIY a accusé Slobodan Milosevic du meurtre «d'au moins quatorze non-Serbes» à Bratunac du 10 au 16 mai 1992[20]. Cette allégation fait partie de l'acte
16 d'accusation censé récapituler tous les crimes commis en Bosnie-Herzégovine par les forces serbes et qui, de l'avis du procureur, peuvent être prouvés au-delà de tout doute raisonnable. Aucun jugement ou acte d'accusation du TPIY ne constate ou n'allègue que cent cinquante personnes ont été battues à mort en une seule journée, à Bratunac ou ailleurs.

22. Le demandeur a vivement protesté parce que nous avions utilisé un raisonnement *a contrario*, et l'agent adjoint de la Bosnie-Herzégovine a déclaré : «le fait qu'une chambre de première instance ait conclu qu'un nombre «X» de personnes avaient été tuées dans un camp «Y» ne signifie pas que le nombre de personnes effectivement tuées dans ce camp ne sera jamais supérieur à «X»»[21].

23. Madame le président, nous en convenons. Nul ne conteste que le nombre de victimes à Bratunac puisse malheureusement être plus élevé. Toutefois, les conclusions factuelles que nous tirons de cet exemple sont les suivantes :

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[18] Réplique, chap. V, p. 107, par. 86.

[19] Rapport final de la commission d'experts des Nations Unies, annexe III.A, par. 381-383 (bibliothèque du Palais de la Paix).

[20] TPIY, *Le procureur c. Slobodan Milosevic*, affaire n° IT-02-54-T, acte d'accusation modifié (Bosnie-Herzégovine), 21 avril 2004, tableau B, par. 5.

[21] CR 2006/33, p. 58, par. 45 (Van den Biesen); voir également CR 2006/30, p. 26, par. 38 (Van den Biesen).

Premièrement, nous ne contestons pas le fait que de graves crimes ont été commis par les forces serbes lors de la prise de la ville de Bratunac, et une fois de plus, j'exprime les plus vifs remords pour ces crimes au nom des citoyens et du Gouvernement de Serbie-et-Monténégro.

Deuxièmement, c'est un fait que le procureur du TPIY a accusé M. Milosevic du meurtre d'au moins quatorze non-Serbes. Cette accusation n'a pas été confirmée par un jugement dans cette affaire.

Troisièmement, que cette accusation soit fondée ou non, il n'existe aucune preuve qu'une quinzième victime ait été tuée durant la prise de Bratunac. Et cela, c'est un fait.

Quatrièmement, il est évident que l'allégation du demandeur relative au nombre des victimes était inexacte et très exagérée.

Cinquièmement, cela signifie que la source de la preuve, citée correctement par le demandeur dans ce cas, n'est ni crédible ni fiable.

Sixièmement, rien ne prouve l'existence d'un schéma de génocide à Bratunac. Le demandeur n'a pas prouvé que les crimes commis dans cette ville l'ont été contre un nombre de victimes tel qu'il *pourrait* démontrer l'existence de l'intention de détruire un groupe particulier, en tout ou en partie, c'est-à-dire dans sa partie substantielle. On ne peut pas, à un schéma de destruction de cette nature substituer purement et simplement une série de crimes multiples mais isolés, qui ne constitue pas un génocide.

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Absence de preuve d'un schéma de crimes commis avec une intention génocide

24. C'est sans doute la valeur probatoire douteuse des sources qu'il a utilisées dans ses pièces écrites qui a finalement convaincu le demandeur d'éviter, quoique partiellement, «une bataille de chiffres» dans ses plaidoiries. Je dis «partiellement», parce que le conseil du demandeur, Mme Karagiannakis, n'a pas pu éviter citer des chiffres en relation avec les victimes serbes de la région de Srebrenica[22]. Le demandeur a accusé le défendeur de se livrer à un «jeu de chiffres», mais Mme Karagiannakis a fait exactement la même chose.

[22] CR 2006/32, p. 45, par. 14 (Karagiannakis).

25. Examinons cependant le type de schéma présenté en l'espèce par le demandeur. Nous avons vu un schéma de prise des municipalités de la partie orientale de la Bosnie en 1992. Mais il n'existe pas de preuve de la destruction physique d'*une partie substantielle* de tel ou tel groupe dans cette région.

26. On nous a ensuite présenté un schéma de différents crimes de guerre commis sur un territoire qui se trouvait sous le contrôle de l'armée de la Republika Srpska. Là encore, rien ne prouve qu'une partie substantielle d'un groupe ait été éliminée, et même les représentants de la Bosnie-Herzégovine, au cours de leurs plaidoiries, ont manifestement essayé d'éluder la question. Voyons comment Mme Karagiannakis a décrit ce schéma sans citer de chiffres. Elle a déclaré : «Un nombre *incalculable* de civils musulmans ont été tués au cours de ces attaques» (dans la municipalité de Prijedor)[23]. Décrivant la situation du camp d'Omarska et les crimes qui y avaient été commis, Mme Karagiannakis a souligné : «les détenus étaient sévèrement battus. Ils étaient torturés. Ils étaient tués»[24]. Il ne fait aucun doute que les prisonniers du camp d'Omarska ont été victimes de tortures mais, en l'espèce, pour des raisons juridiques, il faut nous demander combien d'entre eux ont été tués, et s'ils représentaient une partie substantielle d'un groupe. «*Beaucoup* [de détenus] étaient appelés à l'extérieur et n'étaient plus revus», a expliqué Mme Karagiannakis[25]. Cela ne ressemble-t-il pas au jeu du chiffre caché ?

27. Madame et Messieurs de la Cour, le nombre des victimes peut être un facteur très important dans la preuve de l'intention génocide. Selon la Commission du droit international, «le crime de génocide, par sa nature même, implique de détruire au moins une partie substantielle du
18 groupe visé»[26]. Comment un tribunal raisonnable pourrait-il déterminer ce qu'est une partie substantielle d'un groupe donné sans connaître au moins le nombre approximatif des victimes ? Dans le rapport de la sous-commission sur le génocide, le rapporteur spécial, M. Whitaker, avait déclaré que «l'expression «une partie» semblerait indiquer un nombre assez élevé par rapport à l'effectif total du groupe, ou encore une fraction importante de ce groupe, telle que ses

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[23] CR 2006/5, p. 34, par. 44 (Karagiannakis); les italiques sont de nous.

[24] *Ibid.*, p. 36, par. 52 (Karagiannakis).

[25] *Ibid.*, par. 53; les italiques sont de nous.

[26] Rapport de la Commission du droit international sur les travaux de sa 48e session, 6 mai-26 juillet 1996, p. 89; les italiques sont de nous.

dirigeants»[27]. Ce sont à la fois la proportion par rapport à l'ensemble du groupe et le nombre total de victimes qui sont pertinents. Cela a été confirmé dans le jugement du Tribunal pénal international pour le Rwanda par l'application du critère de pertinence dans l'affaire *Kayishema et Ruzindana*[28], ainsi que dans le jugement du TPIY sur le demande d'acquittement présentée en l'affaire *Sikirica et consorts*[29].

28. Un autre conseil du demandeur, Mme Stern, a tenté de démontrer que «l'intention de détruire le groupe peut se déduire *de la gravité et du caractère massif* des viols et des violences sexuelles commis à l'égard des membres du groupe des Musulmans de Bosnie»[30].

29. Il est bien évident que «le caractère massif» est on ne peut plus quantitatif. Voyons donc comment le demandeur a essayé de décrire ce caractère massif sans mentionner exactement les faits :

> «Plus précisément, les viols et les violences sexuelles ont principalement été dirigés contre les femmes, … et il est bien évident qu'elles ne peuvent qu'être considérées comme une composante importante et une «partie substantielle» du groupe des Musulmans de Bosnie tant parce que, quantitativement, elles constituent une forte quotité du groupe, les femmes sont la moitié du monde, portent la moitié du ciel.»[31]

30. Le défendeur peut admettre que les femmes représentaient effectivement une bonne part du groupe des Musulmans de Bosnie, mais il ne peut laisser dire que toutes les femmes musulmanes ont été victimes de viols et de violences sexuelles. Le demandeur n'a présenté aucune preuve solide du caractère massif de ces crimes. L'estimation douteuse que le rapporteur spécial de la Commission des droits de l'homme des Nations Unies avait formulée pendant la guerre dans son
19 rapport du 10 février 1993[32] a déjà été réfutée avec succès par notre conseil, Mme Fauveau-Ivanovic[33]. Nous pouvons donc conclure que le prétendu caractère massif des viols

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[27] M. Whitaker, Nations Unies, doc. E/CN.4/Sub.2/1985/6, p. 16, par. 29.

[28] TPIR, *Le procureur c. Kayishema & Ruzindana*, affaire n° ICTR-95-1-T, jugement, 21 mai 1999, par. 93; http://69.94.11.53/default.htm.

[29] TPIY, *Le procureur c. Sikirica et consorts*, affaire n° IT-95-8, jugement relatif sur le demande d'acquittement, 3 septembre 2001, par. 72; www.un.org/icty/sikirica/judgement/index.htm.

[30] CR 2006/7, traduction du sous-titre de la page 37 (Stern); les italiques sont de nous.

[31] *Ibid.*, p. 38, par. 103 (Stern).

[32] Nations Unies, rapport sur la situation des droits de l'homme dans le territoire de l'ex-Yougoslavie, soumis par M. Tadeusz Mazowiecki, rapporteur spécial de la Commission des droits de l'homme, doc. E/CN.4/1993/50, 10 février 1993, annexe II.

[33] CR 2006/20, p. 16-17, par. 12-20 (Fauveau-Ivanovic).

et des violences sexuelles n'a pas été prouvé et que, dès lors, l'intention de détruire le groupe des femmes bosniaques par des actes de viol et de violence sexuelle ne peut se déduire de ces allégations non prouvées.

31. Qui plus est, le demandeur a invoqué l'existence d'un réseau de lieux de détention quadrillant tout le territoire de la Republika Srpska, encore que le défendeur ne puisse accepter le chiffre de «cinq cent vingt camps et centres de détention contrôlés par les Serbes [qui] ont été organisés dans une cinquantaine de municipalités»[34]. Un tel fait doit être démontré par des recherches d'expert sérieuses qui se basent sur une enquête menée directement sur les lieux, des témoignages et des preuves matérielles. Il n'est pas acceptable d'affirmer que tel nombre de lieux de détention existait en Republika Srpska en se basant uniquement sur le témoignage d'un seul témoin[35]. D'après le graphique qui a été produit à la demande du Gouvernement de la Bosnie et qui a été présenté dans ce prétoire, *cinquante-huit* camps auraient existé dans la seule municipalité de Prijedor[36]. Cette affirmation incroyable ne figurait pas dans le jugement que le TPIY a rendu en l'affaire *Stakic*, dans lequel seuls *six* lieux de détention sont recensés et décrits pour Prijedor[37].

32. D'après les allégations formulées par le procureur du TPIY dans l'acte d'accusation *Milosevic*, la plupart de ces lieux de détention n'ont pas existé plus de trois mois. Seuls neuf centres de détention existaient en Republika Srpska après 1992, à savoir :

— le centre de détention de Batkovici, à Bijeljina[38], qui a existé pendant trois ans; aucune allégation du TPIY faisant état de meurtres commis là-bas;

— le centre de police de Cajnice[39], qui a existé pendant deux mois en 1993; aucune allégation du TPIY faisait état de meurtres liés à ce centre;

20 — la prison de Spreca à Doboj[40], qui a existé jusqu'en février 1993; aucune allégation de meurtres — là encore;

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[34] CR 2006/2, p. 43, par. 49 (Van den Biesen).

[35] CR 2006/5, p. 23, par. 6, note 35 (Karagiannakis).

[36] *Ibid.*, par. 7-8.

[37] TPIY, *Le procureur c. Milomir Stakic*, affaire n° 97-24-T, Chambre de première instance, jugement, 31 juillet 2003, «I. Factual Findings» [conclusions factuelles], part. E. 2, «Detention Facilities in the Prijedor Municipalities» [lieux de détention dans les municipalités de Prijedor] *[traduction du Greffe]*.

[38] *Ibid.*, annexe C-3.

[39] *Ibid.*, annexe C-11.

[40] *Ibid.*, annexe C-12.

— le camp de Bosanka à Doboj[41], qui a existé jusqu'en juin 1993; aucune allégation de meurtres;

— le camp de Seslija à Doboj[42], qui a existé en 1993; aucune allégation de meurtres;

— la prison de Foca[43], qui a existé pendant plus de deux ans et dans laquelle des massacres auraient été commis en 1992[44];

— le centre de Rasadnik, à Rogatica[45], qui a existé jusqu'en juin 1993; aucune allégation de meurtres;

— le vieil hôtel de Sanski Most[46], qui a existé pendant quatre jours en 1995, et

— le centre d'Uzamnica, dans l'ancienne caserne de Visegrad[47], qui a existé pendant plus de deux ans, sans aucune allégation de meurtres d'après l'acte d'accusation que le TPIY a établi dans l'affaire *Milosevic*.

33. Madame le président, la plupart des centres de détention que les Serbes contrôlaient en Bosnie-Herzégovine en 1992 n'ont pas existé suffisamment longtemps pour entraîner la destruction physique des prisonniers. Ils ont cependant existé suffisamment longtemps pour entraîner la destruction physique d'une partie substantielle du groupe visé par des exécutions, si tant est que les Serbes de Bosnie en aient eu l'intention.

34. Bien qu'il ait invoqué l'existence d'un réseau constitué de nombreux lieux de détention en Republika Srpska, le demandeur n'a produit aucune preuve de crimes qui auraient été commis en ces lieux dans l'intention de détruire une partie substantielle du groupe visé. Jusqu'ici, le TPIY n'a déclaré personne coupable d'un génocide qui aurait été commis dans des camps ou dans des centres de détention de Republika Srpska.

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[41] TPIY, *Le procureur c. Milomir Stakic*, affaire n° 97-24-T, Chambre de première instance, jugement, 31 juillet 2003, «I. Factual Findings» [conclusions factuelles], part. E. 2, «Detention Facilities in the Prijedor Municipalities» [lieux de détention dans les municipalités de Prijedor].

[42] *Ibid.*

[43] *Ibid.*, annexe C-13.

[44] *Ibid.*, annexe B-8.

[45] *Ibid.*, annexe C-19.

[46] *Ibid.*, annexe C-20.

[47] *Ibid.*, annexe C-22.

Certains faits témoignent clairement de l'inexistence du schéma génocide

35. Madame le président, permettez-moi maintenant d'établir certains faits qui montrent clairement qu'il n'existait aucun schéma génocide en Bosnie-Herzégovine lors du conflit armé de 1992-1995.

21 36. *Premièrement*, pendant le conflit bosniaque, les patients non serbes ont été normalement et convenablement soignés dans tous les hôpitaux de Republika Srpska. Les annexes n^{os} 53 et 53A au contre-mémoire contiennent des informations sur des patients de nationalité non serbe qui ont été soignés entre 1992 et 1995 dans des centres médicaux des municipalités de Prijedor, Brcko, Sokolac, Doboj, Modrica, Bosanska Gradiska, Kasin Do, Bijeljina et Banja Luka, avec des listes indiquant le nom et l'âge des intéressés, le diagnostic établi et le service dans lequel ils ont été soignés[48]. Le demandeur n'a contesté ni ces documents, ni les faits dont ils font état. Selon ces informations, ce sont treize mille cinq cents Musulmans et Croates en tout qui ont été soignés en 1993 dans la clinique et dans le centre hospitalier de Banja Luka, en Republika Srpska[49]. Où était alors le schéma génocide ?

37. A ce stade, il me semble utile de rappeler à la Cour ce que Mme Ferida Hasanovic a écrit dans la lettre qu'elle a adressée le 8 février 1993 à son enfant Emina, qui était hospitalisé au centre médical de Zvornik. «Emina, mon enfant, ta mère est ici avec ton frère Faruk. Nous avons appris que tu étais dans un hôpital et que tu vas bien, ce qui nous réjouit. Tu nous manques énormément et nous espérons te revoir bientôt ainsi que ta parente Merima.»[50] Madame le président, il ne s'agit pas d'une déclaration de témoin douteuse qui a été signée par le juge d'instruction du tribunal de Zvornik[51]; c'est le message qu'une mère a rédigé de sa propre main sur le formulaire officiel de la Croix-Rouge, dix mois après la prise de la municipalité de Zvornik. Le défendeur sait gré au demandeur des efforts qu'il a faits pour découvrir la falsification de deux documents signés par M. Eric sous le titre de juge d'instruction du tribunal de Zvornik, puis soumis en tant qu'annexes à notre contre-mémoire. Nos déplorons cette erreur. Il n'en reste pas moins que, au deuxième tour

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[48] Contre-mémoire, annexes au chapitre I, vol. III et IV.

[49] *Ibid.*, p. 58, par. 1.3.3.13.

[50] *Ibid.*, annexes au chapitre I, vol. II, annexe n° 46, p. 437-439.

[51] CR 2006/30, p. 21-24, par. 24-33 (Van den Biesen, «Y a-t-il tromperie ?»).

de ces plaidoiries, le demandeur n'a contesté à aucun moment notre affirmation selon laquelle le prétendu massacre des enfants musulmans de l'hôpital de Zvornik n'a jamais eu lieu[52].

38. *Deuxièmement*, le demandeur n'a pas expliqué comment un prétendu schéma génocide pouvait se déduire du fait que les réfugiés de Srebrenica et de Zepa, qui avaient combattu dans la
22 28e division de l'armée bosniaque, se sont enfuis en République de Serbie après la chute de ces enclaves et qu'ils ont été bien traités sur le territoire du défendeur. Mon confrère Vladimir Cvetkovic a décrit la manière dont les intéressés avaient été traités[53], ce que M. Vladimir Milicevic a pleinement confirmé dans son témoignage[54]. Or, ce ne sont pas les seuls réfugiés musulmans qui aient gagné le territoire de la Serbie-et-Monténégro. Avec notre contre-mémoire, nous avons soumis des preuves démontrant que, en 1993, trente-quatre mille Musulmans ont trouvé refuge en Serbie-et-Monténégro, chiffre qui est passé à trente-six mille en 1994. M. Cvetkovic s'est reporté à ces documents dans son exposé du 15 mars 2006[55], et ces derniers n'ont jamais été contestés par le demandeur.

39. La même chose s'est produite dans le cas des réfugiés de Cazinska Krajina — «l'Etat de Fikret Abdic» —, après leur défaite dans la guerre intramusulmane. L'ouvrage de la CIA intitulé *Balkan Battlegrounds*: *A Military History of the Yugoslav Conflict, 1990-1995,* renferme les informations suivantes:

> «Le 21 août, juste quelques heures après qu'Abdic eut refusé la reddition inconditionnelle exigée par le Gouvernement de Bosnie, les troupes de l'armée de Bosnie envahirent Velika Kladusa. Le Gouvernement de Bosnie annonça que, pendant une période de trois jours, tous les anciens rebelles seraient amnistiés, mais des centaines de soldats d'Abdic abandonnèrent leurs armes pour rejoindre la colonne massive de dix mille réfugiés ou plus qui fuyait Velika Kladusa pour gagner les secteurs tenus par les Serbes en Croatie voisine.»[56]

Ces dix mille réfugiés, ou plus, qui ont trouvé refuge sur le territoire tenu par les Serbes étaient eux aussi des Musulmans. Où étaient alors les crimes reproduits selon le même schéma dans l'intention de détruire le groupe dit «non serbe» ?

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[52] CR 2006/12, p. 24-26, par. 12-18 (Obradovic).

[53] CR 2006/20, p. 49-51, par. 48-52 (Cvetkovic).

[54] CR 2006/28 (Milicevic).

[55] CR 2006/20, p. 46-47, par. 41 (Cvetkovic).

[56] CIA, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995* [Les champs de bataille des Balkans : histoire militaire du conflit yougoslave], vol. I, chap. 63, «The Western Theater» [Le théâtre occidental], p. 246 (bibliothèque du Palais de la Paix).

40. *Troisièmement*, je tiens à revenir sur un événement qui n'a pas été suffisamment développé dans les plaidoiries et arguments précédents. Il s'agit de la chute de Zepa, la zone de sécurité de l'ONU, qui a eu lieu dans les jours qui ont suivi la chute de Srebrenica, en 1995. Chacun sait aujourd'hui que plusieurs milliers de victimes de Srebrenica ont été tuées après la chute de cette enclave. Quiconque a-t-il jamais entendu parler de meurtres à Zepa ?

23 41. Les combats pour cette enclave ont presque duré jusqu'à la fin de juillet 1995. Voyons comment l'ouvrage de la CIA dépeint les jours qui ont suivi la chute de l'enclave de Zepa :

> «Le 26 juillet, l'évacuation des *milliers de civils* de Zepa commença véritablement, ceux-ci étant transportés vers la localité de Kladanj, qui était tenue par les Musulmans, dans des autocars serbes à bord desquels se trouvaient des soldats de la force de maintien de la paix des Nations Unies… Pas moins de *trois mille des Musulmans de Zepa* — sans armes pour la plupart — se cachaient dans les collines et dans les villages situés au nord de la ville mais, sans nourriture, armes ou ravitaillement, ils ne constituaient pas une menace alarmante. Le corps de la Drina de la VRS se contenta de maîtriser ce problème mineur avec une garnison d'unités de second rang et retira l'essentiel de ses troupes d'assaut pour les envoyer renforcer des secteurs plus importants; les habitants de la ville étaient livrés aux exigences de la forêt. Plusieurs centaines de ces hommes choisirent finalement de s'infiltrer en Serbie, tandis que les autres parvinrent à regagner le territoire tenu par le gouvernement ou furent découverts et capturés par les Serbes de Bosnie.»[57]

42. Or, aucune des décisions du TPIY ne fait état du moindre meurtre commis contre la population de Zepa, bien que l'enclave ait été prise par des forces serbes. Les milliers de Musulmans qui ont été déportés de Zepa n'ont visiblement pas été considérés comme des victimes du crime de génocide, alors que les milliers de Musulmans déportés de Srebrenica ont été considérés ainsi, d'après le paragraphe 31 de l'arrêt que le TPIY a rendu dans l'affaire *Krstic*[58].

43. Pourquoi les Serbes de Bosnie auraient-ils eu l'intention de détruire les Musulmans de Srebrenica, mais non ceux de Zepa ? Existe-t-il la moindre différence entre ces deux groupes ? Non, Madame et Messieurs de la Cour, tous étaient des Musulmans de l'est de la Bosnie, ce que personne ne conteste. Force est d'en conclure que les deux décisions[59] dans lesquelles le TPIY a conclu qu'un génocide avait été commis à Srebrenica montrent que ce massacre était un événement

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[57] CIA, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995* [Les champs de bataille des Balkans : histoire militaire du conflit yougoslave], chap. 86, «The Demise of Zepa — A Second Safe Area Falls» [la chute de Zepa — une deuxième zone de sécurité tombe], p. 359-360; les italiques sont de nous.

[58] TPIY, *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre d'appel, arrêt, 19 avril 2004, par. 31.

[59] TPIY, *Le procureur c. Radislav Krstic*, affaire n° IT-98-33, Chambre de première instance, jugement, 2 août 2001; Chambre d'appel, arrêt, 19 avril 2004; voir également *Le procureur c. Blagojevic et Jokic*, affaire n° IT-02-60, Chambre de première instance, jugement, 17 janvier 2005.

isolé qui s'était produit dans une zone géographique très limitée et qui n'avait aucun lien avec le contexte historique des événements intervenus dans la région plus vaste de l'est de la Bosnie. C'est seulement dans ces conditions que le Tribunal pouvait conclure qu'une partie substantielle du groupe musulman de Srebrenica (personnes tuées et survivants confondus) avait été victime d'un génocide — encore que le défendeur n'accepte pas une telle interprétation, qui tend selon nous à interpréter de manière trop large la définition du crime de génocide qui est énoncée dans la convention de 1948 sur le génocide.

24 44. Madame le président, j'espère que cette éminente Cour mesure toute la difficulté de la position morale dans laquelle les représentants de la Serbie-et-Monténégro se trouvent en l'espèce, et qui a été si souvent attaquée par les représentants de l'Etat demandeur. Il est toujours plus aisé d'être sur le banc de l'accusation pour dénoncer quelque chose de manifestement illicite et, naturellement, de tenter de conférer aux crimes commis la qualification juridique la plus grave. Nous ne cherchons d'ailleurs pas à nier que des crimes graves ont bel et bien été commis; nous voulons simplement nous borner à démontrer que ces crimes ne présentent pas les éléments constitutifs du crime qui nous occupe ici — le génocide.

Le génocide prétendument commis sur le territoire du défendeur

45. L'incapacité du demandeur à démontrer l'existence d'un schéma génocide devient encore plus évidente lorsqu'on examine la situation qui régnait en Serbie-et-Monténégro pendant le conflit en Bosnie-Herzégovine.

46. Au premier tour, mon confrère M. Cvetkovic a examiné les allégations du demandeur voulant qu'un génocide ait été perpétré sur le territoire de la Serbie-et-Monténégro. Bien que l'argument du génocide sur le territoire du défendeur fasse partie de ses pièces de procédure, le demandeur s'est complètement désintéressé de cette question lors de son premier tour de plaidoiries, et il n'a rien fait pour étayer les allégations formulées dans ses écritures. Au deuxième tour, l'agent adjoint du demandeur n'a abordé que brièvement cette question, en déclarant que nous avions représenté faussement le sort des Musulmans du Sandžac et en renvoyant à deux rapports d'organisations non gouvernementales pour conforter sa thèse[60]. Ce renvoi apparaît certes dans

[60] CR 2006/30, p. 27, par. 40 (Van den Biesen).

une note de bas de page et n'est assorti d'aucune autre explication, mais le défendeur répondra tout de même à ces nouvelles allégations.

47. Le premier rapport invoqué par le demandeur a trait à la région de Bukovica, au Monténégro. Cette région, dont Pljevlja est la ville la plus importante, est la région jouxtant le territoire de la Bosnie-Herzégovine qui, à l'époque de la guerre, était sous le contrôle des Serbes de Bosnie. Nul ne conteste que quelques incidents à motivation ethnique se soient produits dans la région de Bukovica, mais le demandeur n'a donné aucune preuve attestant que les autorités du défendeur avaient orchestré les incidents en question, ou même qu'elles les avaient reconnus par la suite. Au contraire, le rapport dont le demandeur s'est réclamé démontre clairement que tant les

25 autorités de la République du Monténégro que celles de la République fédérale de Yougoslavie tentaient alors de mettre un terme aux incidents et aux tensions ethniques dans la région, tentatives qui finirent par réussir. Les mesures prises par les autorités consistaient notamment à désarmer les unités paramilitaires qui étaient présentes dans la région et à traduire en justice les principaux criminels.

48. Le second rapport que M. van den Biesen a invoqué nous donne un très bon exemple de la manière dont le demandeur se sert des éléments de preuve. Ce rapport d'Amnesty International concerne deux crimes — généralement appelés les crimes de Sjeverin et de Strpce — qui ont effectivement eu lieu. Toutefois, il ressort très nettement du rapport que ces crimes n'ont pas été commis sur le territoire de la Serbie-et-Monténégro, mais qu'ils l'ont été sur le territoire de Bosnie-Herzégovine qui était aux mains des Serbes de Bosnie. En outre, ce rapport que le demandeur a invoqué comme preuve montre que les autorités de la Serbie-et-Monténégro ont pris des mesures pour enquêter sur ces crimes et pour en punir les auteurs; il montre que l'échec initial de ces mesures était dû au refus des dirigeants de la Republika Srpska de coopérer avec le défendeur, mais que les mesures en question se sont finalement traduites par des verdicts contre les auteurs des deux crimes. Vous trouverez un aperçu plus complet de ces mesures dans le rapport que l'OSCE a établi en 2003 sur les procès pour crimes de guerre qui ont eu lieu devant les juridictions de Serbie-et-Monténégro[61].

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[61] Voir le rapport de la mission de l'OSCE en Serbie-et-Monténégro intitulé *War Crimes Before Domestic Courts*, qui peut être consulté [en anglais] à l'adresse suivante : www.osce.org/documents/fry/2003/11/1156_en.pdf.

49. Cette absence du moindre élément constitutif du crime de génocide qui aurait été perpétré contre la population musulmane sur le territoire du défendeur démontre clairement que les autorités de la Serbie-et-Monténégro ne pouvaient pas avoir d'intention génocide à l'encontre de cette même population musulmane sur le territoire de la Bosnie-Herzégovine.

50. Mon éminent confrère M. Pellet a toutefois reconnu, fût-ce avec quelques réserves, que la population musulmane présente sur le territoire de la Serbie-et-Monténégro avait été traitée correctement, mais il poursuivit en expliquant que nous avions mal compris les termes de l'article II de la convention. D'après M. Pellet, l'intention de détruire le groupe comme tel ne signifie pas que les auteurs du génocide veulent détruire le groupe dans sa totalité, où que ses membres se trouvent, mais que l'intention génocide peut être limitée à une partie de ce groupe et au territoire dans lequel se trouve cette partie du groupe[62].

26 51. Malgré tout le respect que nous devons à nos éminents contradicteurs, c'est eux qui n'ont rien compris ici. La Serbie-et-Monténégro n'a jamais prétendu que l'intention génocide devait être dirigée contre le groupe dans sa totalité. La question posée était en revanche de savoir quelle partie du groupe serait le plus probablement prise pour cible de l'intention génocide, si cette dernière existait. Voici ce que la Chambre d'appel a déclaré dans son arrêt en l'affaire *Krstic* : «L'intention de détruire dont l'auteur du génocide est animé sera toujours limitée par les possibilités qui s'offrent à lui.»[63]

52. Madame le président, la présente affaire est engagée contre la Serbie-et-Monténégro, et l'intention génocide qui doit être établie ou, d'après le demandeur, déduite est l'intention génocide des représentants du Gouvernement de la Serbie-et-Monténégro. Aux termes du demandeur :

> «Le but ultime du président de la Serbie et de ses complices serbes de la RFSY, y compris les dirigeants serbes bosniaques, était de créer la Grande Serbie. Le projet d'un Etat homogène, ethniquement pur, formulé dans un contexte de populations mêlées envisageait nécessairement l'exclusion des ethnies non serbes.»[64]

53. Je crois que les Parties s'accordent sur le fait que, si le projet de «Grande Serbie» avait existé, il aurait indubitablement inclus la Serbie proprement dite, qui aurait constitué sa partie la

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[62] CR 2006/31, p. 23, par. 35 (Pellet).

[63] TPIY, *Le procureur c. Radislav Krstic*, Chambre d'appel, arrêt, 19 avril 2004, par. 13.

[64] CR 2006/4, p. 10, par. 2 (Karagiannakis).

plus importante. Je pense qu'elles devraient également s'accorder sur le fait de savoir si les autorités de la Serbie-et-Monténégro avaient le plein monopole du pouvoir sur leur territoire, ce qui signifie que la *possibilité de commettre un génocide s'offraient à elles, si elles avaient voulu en commettre un*. Et pourtant, Madame le président, nous n'avons absolument aucune preuve que le moindre crime grave ait été commis sur le territoire de la Serbie-et-Monténégro contre la population musulmane comme telle, entre 1992 et 1995, et, de toute façon, aucune preuve que le moindre crime ait été commis au vu et au su des autorités de la Serbie-et-Monténégro, ou avec leur consentement.

Conclusion

54. Au terme de cette plaidoirie, ma conclusion est la suivante :

a) de nombreux crimes ordinaires et isolés, même lorsqu'on y voit un schéma criminel, ne peuvent pas être simplement transformés en génocide, crime qui est constitué par des éléments bien précis;

27 *b)* aux fins juridiques qui nous occupent ici, un seul schéma compte — un schéma constitué par des crimes massifs qui puisse avoir un effet destructeur sur une partie substantielle, c'est-à-dire assez large, du groupe visé;

c) le demandeur n'est pas parvenu à démontrer l'existence d'un tel schéma en l'espèce.

REPONSE A LA QUESTION POSEE PAR LE JUGE SIMMA LE 5 MAI 2006

55. Madame le président, permettez-moi d'aborder à présent un autre point : la question posée par le juge Simma en rapport avec les sections caviardées du document du Conseil suprême de la défense de la République fédérale de Yougoslavie.

56. Je voudrais tout d'abord remercier M. le juge Simma pour sa question, qui reflète bien la profonde préoccupation qui est la sienne et celle de la Cour pour une bonne administration de la justice. Cette question est des plus concrètes et je ne voudrais pas perdre du temps à répéter les arguments procéduraux que nous avons à juste titre soulevés dans la correspondance que nous avons eue à ce propos avec la Cour, concernant la demande, fort tardive, faite par le demandeur en vue de la production d'un nombre énorme de documents (voir la lettre de l'agent de la

Serbie-et-Monténégro datée du 16 janvier, ainsi que ma lettre datée du 31 janvier 2006). Ces arguments sont à présent bien connus de la Cour. La question du juge Simma nous amène directement au contenu des parties caviardées des comptes rendus et procès-verbaux du commandement suprême de notre pays.

57. Madame le président, il est notoire que les documents émanant des organes militaires suprêmes sont, dans n'importe quel pays du monde, considérés comme strictement confidentiels, et qu'aucun Etat ne saurait être disposé à rendre facilement accessibles au public de tels documents. Le procureur du TPIY n'en ayant pas moins demandé au défendeur la production de ces documents, une solution a dû être trouvée en vue de cette production. C'est ainsi que, après une procédure juridique particulièrement longue et sensible qui s'est déroulée en 2003 en Serbie-et-Monténégro, le conseil national de coopération avec le TPIY mis en place en Serbie-et-Monténégro a pu communiquer au bureau du procureur du TPIY tous les documents du Conseil suprême de la défense présents dans les archives pour la période comprise entre 1992 et 1999. Au même moment, le conseil national de coopération, conformément à une décision confidentielle du Conseil des ministres de Serbie-et-Monténégro, demandait à la Chambre du TPIY chargée de l'affaire *Le procureur c. Slobodan Milosevic* d'ordonner, pour certaines parties de ces
28 documents, les mesures de protection prévues aux articles 54 *bis F)* et *I)* du Règlement de procédure et de preuve du TPIY.

58. La troisième Chambre de première instance du TPIY a reconnu l'intérêt de sécurité nationale de la Serbie-et-Monténégro à l'égard de ces documents et a ordonné un certain nombre de mesures de protection. Une telle procédure n'est pas rare devant le TPIY. Ainsi, les Etats-Unis, le Royaume-Uni et le Canada ont-ils tous invoqué des intérêts de sécurité nationale dans l'affaire *Le procureur c. Milutinovic et consorts* (décision relative à la requête de Dragoljub Ojdanic aux fins de délivrance d'ordonnances contraignantes en application de l'article 54 *bis* du Règlement, 17 novembre 2005, par. 33).

59. Madame le président, sauf tout le respect qu'ils portent à cette honorable juridiction, les représentants de la Serbie-et-Monténégro ne sont pas habilités à l'heure actuelle à débattre du contenu des sections caviardées des documents du Conseil suprême de la défense (CSD), et ce pour deux raisons majeures :

1) par une décision confidentielle du Conseil des ministres de Serbie-et-Monténégro, les sections caviardées ont été classées comme secret militaire par le Conseil suprême de la défense, en tant que leur divulgation porterait atteinte à des intérêts de sécurité nationale. Modifier cette décision exigerait un temps considérable ainsi que la mise en œuvre d'une procédure juridique complexe;
2) à l'heure actuelle, les sections caviardées des documents du CSD font l'objet de mesures de protection imposées par l'ordonnance du TPIY, ordonnance à laquelle nous sommes tenus de nous conformer. En effet, l'article 77, paragraphe A-2 du Règlement de procédure et de preuve du TPIY comporte une disposition aux termes de laquelle le fait de divulguer «des informations relatives à ces procédures en violant en connaissance de cause une ordonnance d'une chambre» constitue un acte d'outrage au Tribunal, susceptible de constituer un délit à part entière.

60. Madame et Messieurs de la Cour, aucune déduction négative ne saurait être tirée de la non-production alléguée des éléments de preuve requis par le demandeur (CR 2006/3, p. 26-27, par. 19-22 et CR 2006/33, p. 40, par. 13 (Franck)), et ce pour les raisons suivantes :

1) votre Cour n'a pas demandé à l'Etat défendeur de produire ces documents;
2) le demandeur n'a pas soumis sa requête de production de documents *en temps utiles*. Il a au contraire affirmé que l'affaire était en état et a demandé à plusieurs reprises à la Cour d'organiser sans délai des audiences. Aujourd'hui, cette requête soumise par le demandeur semble plutôt conçue pour excuser la rareté des éléments de preuve dont il dispose et comme une nouvelle tentative de transférer la charge de la preuve vers le défendeur.

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61. Lors de notre intervention consacrée aux rapports entre l'armée yougoslave et l'armée de la Republika Srpska, nous avons définitivement précisé un certain nombre de points qui, selon le demandeur, faisaient partie des passages non communiqués des documents du CSD.

62. Par ailleurs, les accusations du demandeur selon lesquelles les sections caviardées des documents du CSD permettraient en réalité de connaître la position du Gouvernement yougoslave vis-à-vis des massacres de Srebrenica et Markale (CR 2006/30, p. 20, par. 19 (Van den Biesen)) se trouvent réfutées par les éléments de preuve présentés devant la Cour par le demandeur lui-même. Le général sir Richard Dannatt a en effet témoigné dans la présente espèce en tant qu'expert proposé par le demandeur. Or le général Dannatt a également été expert du procureur du TPIY

dans l'affaire de *Srebrenica*. Il a déclaré que le témoignage qu'il fournissait devant votre Cour s'appuyait sur «un grand nombre de documents» (CR 2006/23, p. 15). L'examen de ce témoin a été mené par Mme Joanna Korner qui, en tant qu'ancien premier substitut du procureur du TPIY, est particulièrement susceptible d'avoir une bien meilleure connaissance que quiconque d'entre nous du contenu des sections caviardées des documents du CSD. Elle ne pouvait bien sûr directement interroger le témoin-expert sur les documents faisant l'objet de mesures de protection. Mais, lorsqu'il a été demandé au général Dannatt de donner son avis d'expert à partir de la connaissance qu'il pouvait avoir d'un grand nombre de documents, qu'a-t-il répondu ? A-t-il confirmé que l'armée de la Republika Srpska opérait sous le contrôle et les instructions spécifiques des autorités de Belgrade ? Ou encore a-t-il confirmé qu'il avait eu connaissance d'éléments prouvant que des ordres avaient été directement émis par Belgrade ? Non.

63. Madame le président, les archives du bureau du procureur du TPIY comportent plus d'un million de documents. Plusieurs des conseils du demandeur en la présente espèce sont d'anciens hauts fonctionnaires du bureau du procureur du TPIY. De toute évidence, le demandeur s'est appuyé sur leur expérience passée et, à partir de cette expérience, a retenu les vingt-trois documents les plus importants pour appuyer le témoignage de son expert militaire — vingt-trois sur un million. Mais cela n'a rien changé au résultat : il n'y a jamais eu d'ordres émanant de Belgrade, aucun contrôle exercé par Belgrade.

64. Nous rappelons par ailleurs que la Serbie-et-Monténégro a, à ce jour, soumis des milliers de documents confidentiels au bureau du procureur du TPIY. Les documents produits par la Serbie-et-Monténégro comportent les comptes rendus sténographiques du conseil de coordination

30 des positions en matière de politique générale. L'une des séances de ce conseil, tenue le 9 janvier 1993, a été analysée en détail par le demandeur (CR 2006/7, p. 55, par. 66 (Van den Biesen)). Les notes relatives à cette séance ont également été produites par la Serbie-et-Monténégro. Rien dans ce document n'a été noirci, bien que Radovan Karadzic et Ratko Mladic aient assisté à cette séance et aient pris part à la discussion. Et pourtant, rien dans ce document ne permet de conclure à un quelconque contrôle opéré par Belgrade ou à une quelconque intention génocide.

65. Madame le président, voilà qui conclut ma dernière plaidoirie en l'espèce. Cela aura été pour moi un grand honneur, en même temps qu'une lourde tâche. Je voudrais vous remercier pour votre aimable attention et vous demande de bien vouloir donner la parole à notre conseil et avocat, Mme Fauveau-Ivanovic. Merci.

Le PRESIDENT : Merci Monsieur Obradović. Je donne maintenant la parole à M[e] Fauveau-Ivanovic.

The PRESIDENT: Thank you, Mr. Obradović. I now give the floor to Maître Fauveau-Ivanović.

Ms FAUVEAU-IVANOVIĆ: Thank you, Madam President.

GENOCIDE

LEGAL ARGUMENTS

Madam President, Members of the Court, both parties now concur on the definition of the acts which can constitute genocide indicated in Article II of the Genocide Convention and we agree that this list is exhaustive. The two sides also now concur regarding the interpretation of Article III of the Genocide Convention, except with respect to complicity in genocide. Nevertheless, certain significant differences of opinion remain on the interpretation of the Genocide Convention and on the legal meaning of certain terms which it is very important to address in order to understand the crime of genocide. We will present our legal arguments this morning covering the notions which are still at issue between the parties. We will begin by analysing the notion of the protected group before addressing requisite intent for the crime of genocide, along with the standard of proof, and finally we will present our arguments on complicity.

I. Definition of the group

1. In its final submissions, the Applicant claims that:

31 "Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical

> or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population . . .”[65]

2. From a legal perspective, there are two major problems with that submission. First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted. The Applicant did not even impose geographical limits on its claim, affirming that the intent to destroy concerned the group in Bosnia and Herzegovina, but not limited to the territory of Bosnia and Herzegovina.

3. We will endeavour initially to analyse the definition of the group protected by the Genocide Convention in order to demonstrate that the community supposedly targeted, the non-Serb population, does not correspond to the definition of a national, ethnical, racial or religious group as provided for by the Genocide Convention. We will then examine more particularly how the targeted part of the group is determined.

(a) The notion of the protected group

4. We agree with the Applicant that genocide is not a crime perpetrated upon individuals or States, but upon groups determined by their race, nationality, ethnicity or religion. The list of groups protected contained in Article II of the Genocide Convention is exhaustive and groups defined on the basis of other criteria, such as political or economic factors, do not come within the terms of the Convention and are afforded no protection by it.

5. We also concur with the Applicant that the victims of genocide are not targeted for what they do but for what they are.[66] It is not the individuals' acts which matter, but their identities,

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although their acts are of significance in determining whether genocide has occurred, as genocide cannot be found if the individuals were indeed targeted because of their acts. When some individuals within a protected group, engaged in certain activities, fall victim to criminal acts,

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[65]CR 2006/37, p. 59, para. 1.

[66]CR 2006/32, p. 20, para. 6-7.

while other individuals within the same group, but not engaged in the same activities, do not, it appears clear that the individuals have not been targeted for who they are, that is the members of a group, but for what they do, their military or political activities for example. That was exactly what happened in Bosnia and Herzegovina. That does not mean that no crimes were committed, but it does mean that genocide was not committed.

6. In this context, the Applicant's denial of the significance of the aid and support provided by the Bosnian Serbs to the Muslims of the Bihac pocket is unsustainable[67]. The aid provided to the Muslims who supported Fikret Abdic demonstrates that the Serbs had no intention of destroying the Muslim population. Fikret Abdic, a Bosnian Muslim, had a similar vision of Bosnia and Herzegovina to the Serbs; he implemented policies which suited the Bosnian Serbs and the Bosnian Serbs supported him, irrespective of the fact that he was a member of the Bosnian Muslim population. The Applicant disputed our contention that the Muslims of Bihac pocket allied themselves with the Serbs and claimed that, on the contrary, the Serbs allied themselves with those Muslims[68]. This distinction is, however, of little importance: irrespective of who allied themselves with whom, the fact remains that the Muslims supporting Fikret Abdic and the Bosnian Serbs were allies and fought together against the armed forces of Bosnia and Herzegovina.

7. The Applicant even claims that the Serbs used the Bihac Muslims as an instrument of destruction[69]. Of course, the Applicant did not provide any evidence to support that claim and nor could it have done. Such evidence could not exist, as the claim is not based on the facts. Finally, aware that its allegations did not correspond to reality, the Applicant endeavoured to extricate itself

33 from its complicated and groundless analysis by claiming that genocide can be geographically limited[70], doubtless with a view to excluding the Bihac region from the genocidal intent that it contends existed.

8. Regarding the protected group, the Applicant admits that the group has to be a national, ethnical, racial or religious group[71]. However, it did not specify which group was targeted on the

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[67] *Ibid*., pp. 20-22, para. 7.

[68] *Ibid*., p. 22, para. 7.

[69] *Ibid*.

[70] *Ibid*., p. 21, para. 7.

[71] *Ibid.*, p. 23, para. 8.

basis of those criteria, claiming in its final submissions that genocide was committed upon the national, ethnical or religious group of the non-Serbs, including in particular the Muslim population.

9. The non-Serbs do not possess the characteristics required for them to be characterized as a national, religious or ethnical group, as they comprise individuals of diverse nations, ethnic groups and religions.

(b) **Criteria determining the group**

10. In it oral arguments, the Applicant claimed that the group can be defined either on the basis of positive criteria as the group of Bosnian Muslims and the group of Bosnian Croats or using negative criteria as the group of non-Serbs[72]. And the Applicant itself admitted that the positive and negative approaches do not produce the same results, as the group of non-Serbs, according to the Applicant's claim, includes at least the Bosnian Muslims and the Bosnian Croats[73], implying, of necessity, that the group comprises other individuals as well.

11. Thus the Applicant has shown by its own arguments that the non-Serb population does not constitute a stable and well-defined group, as it includes the Bosnian Muslims, the Bosnian Croats, but also all the other individuals of diverse ethnicities, nationalities and religions living in Bosnia and Herzegovina, whom the Applicant has not once mentioned. We could cite, by way of example, the Jews, the Roma and the Yugoslavs. We have heard no allegations concerning them in the Applicant's oral arguments nor seen any in its written pleadings. Although we cannot know whether these communities are included in the group that the Applicant defines as the non-Serbs, it

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claims, without providing any evidence that "[e]verything that was non-Serb had to disappear from the territories coveted . . ."[74]. It is well known that a large Jewish community lived in Bosnia and Herzegovina. The Applicant has never claimed that any criminal acts were perpetrated against this community. And it could not do so: the Serbs were not at war with the Jews and no crimes were committed against the Jews. There was no Serb intent to destroy a group. The Serbs had no intention to destroy any of the groups living in Bosnia and Herzegovina, but they were at war with

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

[73] *Ibid*.

[74] *Ibid.*, p. 23, para. 9.

certain political groups which were organised on an ethnic basis. Crimes were committed during that war, but the crimes did not constitute genocide.

12. The Applicant also claims that the Bosnian Croats were targeted by acts of genocide as well, but to a lesser degree[75]. What a curious notion! Genocide is not characterized by a numerical threshold of criminal acts, it is characterized by and consists of the existence of genocidal intent. If the requisite intent exists, the criminal act constitutes genocide; if it does not, the criminal act, irrespective of its atrocity or scale, does not constitute genocide. It is impossible to understand what the "lesser degree" of genocide claimed by the Applicant means.

13. Moreover, in most of its presentations, the Applicant has not referred to the Bosnian Croats. The Croats were not mentioned once in the oral arguments concerning sexual violence[76], Srebrenica[77] or Sarajevo[78].

14. Thus it would appear that the group targeted has not been defined in an appropriate way, so as to enable it to be determined, in accordance with the Genocide Convention, on the basis of national, ethnical or religious criteria.

15. We share the Applicant's view that the concepts of nation, race and religion are imprecise and that no generally and internationally accepted definition exists. Nevertheless, international jurisprudence has fixed the common principles applicable to all four categories of

35 groups which must be met for a group to be characterized as a protected group within the terms of the Genocide Convention. Thus the Trial Chamber of the Rwanda Tribunal held in the *Akayesu* case that: "[t]herefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner"[79].

16. The established common criterion is therefore undisputable membership of the group, independent of the individual's own will.

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[75] *Ibid*.

[76] CR2006/6, CR 2006/7 and CR 2006/33.

[77] CR 2006/32, pp. 40-69.

[78] CR 2006/4.

[79] ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 511.

17. We do not dispute that diverse approaches to defining groups are possible in theory and, as the Applicant stated, these approaches can include subjective and objective criteria and positive and negative criteria or a mixture of them all.

18. However, it is also accepted that the group must be identified within the context in which it exists, relative to the case concerned and on a on a case-by-case basis[80].

19. We do not therefore deny that the merits of all the approaches — subjective, objective, positive and negative — can be assessed from a theoretical standpoint. However, the result obtained must be a group clearly defined by its national, ethnical, racial or religious characteristics, which appears impossible using negative criteria and has certainly not been achieved in the present case. The non-Serb group within the context of Bosnian society is composed of a number of national, ethnical and religious groups and the Applicant itself admits that there are at least two such groups. Consequently, the non-Serb population cannot be considered to be a group possessing distinctive national, ethnical or religious characteristics.

(i) The objective approach and the subjective approach

20. Before entering into an analysis of the negative approach, we should like to express agreement with the Applicant concerning the subjective approach. Indeed, as the Applicant has

36 already said, international jurisprudence has given consideration to the subjective approach[81]. However, we should like to make it clear that international courts have generally adopted a combined approach, concluding that the subjective approach is not sufficient in itself to identify the group. Thus, in addition to the cases cited by the Applicant in which a combined subjective and objective approach was adopted, it may be recalled that the Tribunal for the former Yugoslavia held in the *Brdjanin* case that:

> "In accordance with the jurisprudence of the Tribunal, the relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group."[82]

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[80]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2004, para. 557 and ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 684.

[81]CR 2006/32, pp. 27-29, paras. 17-23.

[82]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 683.

However, in the same case, Trial Chamber II held that the determination of the group has to be made on the basis of different criteria and, in particular, by combining objective and subjective criteria.

> "The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention"[83].

21. Moreover, the Tribunal for Rwanda held in the *Rutaganda* case that: "a subjective definition alone is not enough to determine victim groups as for provided for in the Genocide Convention"[84]. The Tribunal for Rwanda also held, in the *Musema* case, that: "subjective definition alone is not enough"[85]. And in the *Semanza* case, Trial Chamber I of the Tribunal for Rwanda concluded that: "the determination of whether a group can be defined as a target group ought to be assessed . . . by reference to the objective particulars of a given social or historical context, and by the subjective perception of the perpetrators"[86].

22. Although the Tribunal for Rwanda accepted a combination of the objective and
37 subjective approaches in most of its cases, in some cases it also adopted the objective approach alone. Thus, in the *Bagilishema* case, Trial Chamber I held that each of the concepts of national, ethnical, racial and religious groups must be assessed in the light of a particular political, social, historical and cultural context, and it concluded that membership of the group must be an objective feature of the society in question[87].

23. Consequently, international jurisprudence authorizes the subjective approach in combination with the objective approach, but it also sometimes adopts the objective approach alone.

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[83] *Ibid.*, para. 684.

[84] ICTR, *Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda*, case No. ICTR-96-3-T, Judgement, 6 December 1999, paras. 56–57.

[85] ICTR, *Prosecutor* v. *Alfred Musema*, case No. ICTR-96-13-T, Judgement, 27 January 2000, para. 162.

[86] ICTR, *Prosecutor* v. *Laurent Semanza*, case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 317.

[87] ICTR, *Prosecutor* v. *Ignace Bagilishema*, case No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 65.

(ii) The positive approach and the negative approach

24. The approach may be subjective or objective, but it still does not permit the group to be defined in a negative manner. In the *Stakic* case, the Appeals Chamber of the Tribunal for the former Yugoslavia concluded:

> "whether or not a group is subjectively defined is not relevant to whether a group is defined in a positive or a negative way . . . Consequently when a target group is defined in a negative manner (for example non-Serbs), whether the composition of the group is identified on the basis of objective criteria, or a combination of objective and subjective criteria, is immaterial as the group would not be protected under the Genocide Convention."[88]

25. Admittedly, the first judgment that made a finding of genocide, which was delivered in 1999 by the Tribunal for the former Yugoslavia in the *Jelisic* case[89], accepted the negative approach, but this was a purely theoretical consideration since the Prosecutor, in the relevant indictment in the case, determined the target group by means of positive criteria. In the *Jelisic* case, the Prosecutor alleged that the target group was the group of Bosnian Muslims[90]. In addition, although the first decision of the Tribunal for the former Yugoslavia recognized the negative approach in theory, recent decisions of the Tribunal, including those of the Appeals Chamber, have completely rejected it.

26. Thus, in the *Stakic* case, the Trial Chamber of the Tribunal for the former Yugoslavia held:

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> "Article 4 of the Statute protects national, ethnical, racial or religious groups. In cases where more than one group is targeted, it is not appropriate to define the group in general terms, as, for example, 'non-Serbs'. In this respect, the Trial Chamber does not agree with the 'negative approach' taken by the Trial Chamber in *Jelisić*:
>
> > A 'negative approach' would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.
>
> Conversely, a targeted group may be distinguishable on more than one basis and the elements of genocide must be considered in relation to each group separately, *e.g.* Bosnian Muslims and Bosnian Croats."[91]

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[88] ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006, para. 26.

[89] ICTY, *Prosecutor* v. *Goran Jelisic*, case No. IT-95-10-T, Judgement, 14 December 1999.

[90] *Ibid.*, Amended Indictment, 19 October 1998.

[91] ICTY *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 512.

27. The approach adopted by the Trial Chamber in the *Stakic* case was subsequently accepted by Trial Chamber II in the *Brdjanin* case, which stated:

> "In addition, the Trial Chamber agrees with the Stakic Trial Chamber that, '[i]n cases where more than one group is targeted, it is not appropriate to define the group in general terms, as for example, "non-Serbs"'. It follows that the Trial Chamber disagrees with the possibility of identifying the relevant group by exclusion, *i.e.*: on the basis of 'negative criteria'."[92]

28. Moreover, Trial Chamber II of the Tribunal for the former Yugoslavia held in the *Brdjanin* case, like Trial Chamber II in the *Stakic* case: "Moreover, where more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately."[93]

29. The findings of the Trial Chamber in the *Stakic* case were upheld by the Appeals Chamber of the Tribunal for the former Yugoslavia, which held that:

> "Article 4 of the Tribunal's Statute defines genocide as one of several acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*'. The term 'as such' has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet 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."[94]

30. The Appeals Chamber found support for its position in Raphaël Lemkin's definitions of

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the crime of genocide as the physical destruction of a nation or an ethnic group. According to Raphaël Lemkin, the crime of genocide is intended to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups[95].

31. Consequently, the Appeals Chamber of the Tribunal for the former Yugoslavia concluded that: "genocide was originally conceived of as the destruction of a race, tribe, nation, or other group with a particular positive identity — not as the destruction of various people lacking a distinct identity"[96].

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[92]ICTY *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 685.

[93]*Ibid.*, para. 686.

[94]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006, para. 20.

[95]Raphal Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation — Analysis of Government — Proposals for redress*, Washington D.C., Carnegie Endowment for International Peace, 1944, p. 79.

[96]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006, para. 21.

32. Moreover, the Appeals Chamber of the Tribunal for the former Yugoslavia founded its reasoning on the *travaux préparatoires*[97] of the Genocide Convention, which show that the crime of genocide was conceived of to signify crimes directed against groups that may be characterized as stable, constituted in a permanent fashion, and membership of which is determined by birth. All other groups, which are unstable, and which individuals may join through voluntary commitment, such as political and economic groups, were expressly excluded from the framework of the Genocide Convention, and are not considered to be protected by the Convention.

33. Finally, the Appeals Chamber of the Tribunal for the former Yugoslavia, on the basis of the Genocide Convention and the *travaux préparatoires*, definitively abandoned the negative approach to determination of the group, accepted as one of the theoretically acceptable criteria in the *Jelisic* case, which was moreover the one and only case cited by the Applicant in support of its argument that the negative approach was permitted. The Appeals Chamber gave ample reasons for its finding, holding that:

> "The drafting history of the Genocide Convention, whose second article is repeated verbatim in Article 4 (2) of the Tribunal's Statute, shows that the Genocide Convention was meant to incorporate this understanding of the term genocide — an understanding incompatible with the negative definition of target groups . . . members of the Sixth Committee declined to include destruction of political groups within the definition of genocide, accepting the position of countries that wanted the Convention to protect only 'definite groups distinguished from other groups by certain well established', immutable criteria. Given that negatively defined groups lack specific characteristics, defining groups by reference to a negative would run counter to the intent of the Genocide Convention's drafters."[98]

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34. The Appeals Chamber also took into consideration developments in international law and international criminal law, but it held that the original concept of a protected group, as defined in the Genocide Convention, has not changed. In fact, the Economic and Social Council of the United Nations observed in its study on the prevention and punishment of the crime of genocide that: "genocide should generally be regarded as a crime committed against a group of individuals permanently possessing certain common features"[99]. And the Economic and Social Council

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[97]United Nations, *Official Records of the General Assembly*, Third session, Sixth Committee, Summary Records, 21 September-10 December 1948.

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

[99]Study of the Question of the Prevention and Punishment of the Crime of Genocide, UNECOSOC, Commission on Human Rights, United Nations, doc. E/CH.4/Sub.2/416, 4 July 1978, para. 56.

concluded that the Genocide Convention protects, for example, a group comprised of persons of a common national origin or any religious community united by a single spiritual ideal[100].

35. The group alleged to have been targeted in the *Brdjanin* and *Stakic* cases was the non-Serb group, allegedly consisting, among others, of Bosnian Muslims and Croats. The group alleged to have been targeted in these cases of the Tribunal for the former Yugoslavia was the same as the group said to have been targeted in the instant case. The Chambers of the Tribunal for the former Yugoslavia, including the Appeals Chamber, held that non-Serbs do not constitute a group protected under the terms of the Genocide Convention, and that it would be appropriate to consider the groups said to have been targeted as two different and separate national, ethnic and religious groups: the group of Bosnian Muslims and the group of Bosnian Croats. The final conclusion of the Appeals Chamber for the former Yugoslavia calls for no commentary, it is crystal clear. The Appeals Chamber concluded: "As previously explained, unlike positively defined groups, negatively defined groups have no unique distinguishing characteristics that could be destroyed."[101]

36. Moreover, in the present case, the so-called group of non-Serbs is not defined at all, as the Applicant itself claimed that the group included at least the Bosnian Muslims and the Bosnian Croats[102]. This form of words even suggests that the group includes other nations, ethnic groups and religions not specified by the Applicant. As the Applicant does not include in the alleged group of non-Serbs all persons who obviously cannot be considered as Serbs, and who should therefore logically belong to the community of non-Serbs, no criterion exists whereby the non-Serb population could be properly determined as a group within the meaning of the Genocide Convention.

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Madam President, would this be an appropriate time for the break?

(c) Determination of the "in part" group

37. In its final submissions, the Applicant stated that Serbia and Montenegro intended to destroy the non-Serb group in part within, but not limited to, the territory of Bosnia and

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[100] *Ibid.*, para. 78.

[101] ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-A, Judgement, 22 March 2006, para. 23.

[102] CR 2006/32, p. 23, para. 9.

Herzegovina[103]. To be honest with the Applicant, we do acknowledge that in its oral pleadings it said that genocide was allegedly perpetrated in a particular territory[104], which it characterized as the area of Bosnia and Herzegovina which the Belgrade and Pale authorities intended to detach from Bosnia and Herzegovina in order to incorporate it into Yugoslavia[105]. Apart from the fact that no such areas exist, the Belgrade authorities never having wished to detach part of Bosnia and Herzegovina's territory from it, that allegation does not define the territories where the genocide was supposedly committed.

38. The Applicant's oral pleadings do not provide any clarification of its submissions and what the term "in part" means remains completely unknown. We do not know whether the Applicant sought to allege that the intention to destroy the non-Serb group in part was aimed at the

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non-Serbs in Bosnia and Herzegovina as part of a whole consisting of all non-Serbs everywhere in the world or whether, by the expression "in part", the Applicant meant part of the non-Serb population living in Bosnia and Herzegovina.

39. However, before determining the meaning of the in part group, it must be said that it is extremely difficult, not to say impossible, to speak of the destruction of part of the group when the group itself is not defined.

40. It is well established that the part of the group concerned must be a substantial part of the group. Hence, the Trial Chamber of the Tribunal for Rwanda found in the *Kayishema* case that: "'in part' requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition."[106] This definition was accepted and refined by the Trial Chambers of the Tribunal for Rwanda in the *Bagilishema* and *Semanza* cases, which found that the intention to destroy must at least be directed at a substantial part of the group[107].

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[103]CR 2006/37, p. 59.

[104]CR 2006/31, p. 32, para. 58.3.

[105]*Ibid.*, p. 24, para. 35.

[106]ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 97.

[107]ICTR, *Prosecutor* v. *Ignace Bagilishema*, case No. ICTR-95-1A-T, Judgement, 7 June 2001, para. 54 and *Prosecutor* v. *Laurent Semanza*, case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 316.

41. Scholarly writers also require the part concerned by the intention to destroy to be substantial. For example, Raphaël Lemkin explained that: "the destruction in part must be of a substantial nature so as to affect the entirety"[108]. Nehemiah Robinson reiterated this view, stating that the perpetrator of the genocide must have the intention to destroy a substantial number of the individuals constituting the target group. Justifying his position, Nehemiah Robinson stressed that the act must be directed at the destruction of the group, for such was the aim of the Genocide Convention[109]. Whereas Benjamin Whitaker wrote: "'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership."[110]

43 42. The case law of the Tribunal for the former Yugoslavia has also established criteria for determining the part of the group which may be considered substantial under the Genocide Convention. The Appeals Chamber of the Tribunal for the former Yugoslavia thus held:

> "The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4."[111]

43. Since in the present case the group as such is not defined, it is not possible to assess who forms a substantial part of it. Furthermore, the Applicant does not offer much help as regards determining which part of the group is targeted. Consequently, both the group as such and the part of the group supposedly targeted remained completely undefined.

44. Also, in the *Brdjanin* case, the Trial Chamber of the Tribunal for the former Yugoslavia considered that: "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it"[112]. This

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[108]Executive Sessions of the Senate Foreign Relations Committee, Historical Series, 1976, p. 370, quoted by William A. Schabas, *Genocide in International Law*, 2000, p. 238.

[109]Nehemia Robinson, *The Genocide Convention: A Commentary*, 1960, p. 63.

[110]Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, United Nations, doc. E/CN.4/Sub.2/1985/6, para. 29.

[111]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 12.

[112]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 700.

conclusion is not specific to the *Brdjanin* case, since the Trial Chamber in the *Krstic* case reached the same conclusion, finding that the perpetrator of the genocide must consider part of the group which he wishes to destroy as a distinct entity, which must be eliminated as such[113]. In the present case, it is impossible to define the distinct part of the group supposedly targeted.

45. The case law of the Tribunal for the former Yugoslavia has accepted that genocide aimed at destroying the group in part can be perpetrated within a geographically limited territory[114]. However, the Appeals Chamber noted that: "The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will
44 not indicate whether the targeted group is substantial, it can — in combination with other factors — inform the analysis."[115]

46. It therefore clearly appears that genocidal intent may be inferred from the opportunity available to the perpetrator for carrying out his or her intentions. In the *Krstic* case, the Appeals Chamber found:

> "the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control."[116]

47. Furthermore, although the International Law Commission accepted that genocide may be committed without being directed against the totality of the group throughout the world, it would seem that its position is not favourable to the possibility of committing genocide in a very limited territory. For example, the International Law Commission wrote in the commentary on the Draft Code of Crimes against the Peace and Security of Mankind that:

> "the intention must be to destroy a group in whole or in part. It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[117]

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[113]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 590.

[114]ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 703.

[115]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 13.

[116]*Ibid.*, para. 17.

[117]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, International Law Commission, *Yearbook 1996*, Vol. II, Part Two, p. 46.

48. This conclusion explains that geographically limited genocide must be considered in the context of the opportunity actually available to the perpetrator for commission of the crime. Thus geographically limited genocide would be acceptable solely if the perpetrator had control over a limited territory and did not have the possibility to extend his or her misdeeds beyond that territory.

49. In this connection, it must also be emphasized that this interpretation is certainly the only possible interpretation when the genocide is limited to a restricted territory, as the notion of geographically limited genocide is not unanimously accepted. Accordingly, the Trial Chamber held in the *Stakic* case:

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> "In construing the phrase 'destruction of a group in part', the Trial Chamber with some hesitancy follows the jurisprudence of the Yugoslavia and Rwanda Tribunals which permits a characterisation of genocide even when the specific intent extends only to a limited geographical area, such as a municipality. The Trial Chamber is aware that this approach might distort the definition of genocide if it is not applied with caution."[118]

Scholarly writers have also expressed reservations about genocide perpetrated in a geographically limited area. Professor William Schabas has written:

> "Although the concept of genocide on a limited geographic scale seems perfectly compatible with the object and purpose of the convention, it does raise questions relating to the plan or policy issue. Localized genocide may tend to suggest the absence of a plan or policy on a national level, and while it may result in convictions of low-level officials within the municipality or region, it may also create a presumption that the crime was not in fact organized on a larger scale."[119]

50. The reasoning of the Appeals Chamber of the Tribunal for the former Yugoslavia in the *Krstic* case might therefore be acceptable, with the conclusion that the local Serb authorities intended to destroy the Muslims in Srebrenica, but subject to the qualification that the intention was theirs, and solely theirs, as only their intention could be deduced from acts limited to a geographically restricted territory, which was the only territory over which those forces had control. However, as Professor William Schabas said, this argument directly militates against the existence of genocidal intent at the national level and, therefore, at the level of a State.

51. The Applicant has not determined the protected group, since it described it by reference to negative criteria and with no geographical limit, which would mean that all non-Serbs were the

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[118]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 523.

[119]W. Schabas, "Was genocide committed in Bosnia and Herzegovina? First Judgements of the International Criminal Tribunal for the Former Yugoslavia", (November 2001) *Fordham International Law Journal*, p. 23, paras. 42-43.

group concerned. Furthermore, even confining ourselves to Bosnia and Herzegovina, the non-Serb population still remains too complex and lacking in any distinctive characteristic which would permit it to be defined as a group within the terms of the Genocide Convention.

52. As the group has not been defined in accordance with the criteria laid down by the Genocide Convention, it is impossible to determine its substantial part, which is needed if we are to deduce the genocidal intent aimed at the destruction of the group in part. Also, the Applicant has provided no criterion which might assist us in determining the part of the group targeted.

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II. Genocidal intent and the standard of proof in establishing State responsibility

1. The Genocide Convention places upon States the obligation to prevent and punish the crime of genocide. It also prohibits the commission of the crime of genocide. The obligations to prevent and punish genocide are State obligations and breaches of them are to be assessed according to the general principles applicable to State responsibility. My colleague, Professor Brownlie, has presented our main arguments with respect to State responsibility. Today we will submit alternative arguments concerning only State responsibility for breaches of Articles II and III of the Genocide Convention.

(a) State responsibility and genocidal intent

2. We have reached agreement with the Applicant on the nature of State responsibility, which must be assessed in accordance with the principles of the international responsibility of States, as it does not correspond to criminal responsibility. We also concur with the Applicant that the law applicable in the present case is the Genocide Convention[120]. The Genocide Convention is an international treaty and as such places upon State Parties obligations which, if breached, engage the State's international responsibility. However, the Genocide Convention is also a document containing legal rules defining a crime — in international crime, which can only be established by applying the principles and rules of criminal law.

3. Whereas the Genocide Convention is a treaty and breaches of it may engage State responsibility, the crime of genocide must first be found pursuant to the rules of international

[120]CR 2006/32, p. 12, para. 10.

criminal law, according to which genocide must by committed by an individual. The State becomes responsible only if genocide is committed by an individual capable of engaging the State's responsibility. In its commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission stated:

> "The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An 'act of State' must involve some actions or omission by a human being or group: 'States can act only by and through their agents and representatives.'"[121]

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4. Moreover, the text of Article IV of the Genocide Convention implies that genocide can only be committed by individuals, since it states that: "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Thus the Genocide Convention expressly stipulates that individuals shall be answerable for genocide, including those persons capable of engaging State responsibility. The Convention does not suggest in any way that States themselves can commit genocide.

5. In accordance with the general rule of the international responsibility of States, the only conduct that can be attributed to the State is that of its organs or of persons acting under the control of those organs[122]. In its presentation of 20 April 2006, the Applicant stated that: "in the full meaning of the term, genocide is an international crime which not only engages the criminal responsibility of the individuals committing it but also that of the State to which the acts committed by individuals, acting *de jure* or *de facto* on its behalf, may be ascribed"[123]. And the Applicant further stated: "it is for violation of the prohibition of genocide that the Respondent is internationally responsible, since the acts constituting that genocide were committed by its agents or organs"[124].

6. Consequently, the condition *sine qua non* for establishing State responsibility would appear to be the prior establishment of the individual responsibility of a perpetrator engaging the

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[121]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 71.

[122]*Ibid*., p. 80.

[123]CR 2006/33, p. 31, para. 44.

[124]CR 2006/34, p. 22, para. 27.

State's responsibility. State responsibility would be subject to the rules of general responsibility applying to the international responsibility of States, but initially, before that, the crime of genocide would have to be established according to the rules of criminal law and the individual perpetrator identified.

7. According to the Genocide Convention, specific intent to destroy in whole or in part a national, ethnical, racial or religious group must be found, and no crime can be characterized as genocide without such specific intent. In its Draft Articles on Responsibility of States for
48 Internationally Wrongful Acts, the International Law Commission noted that: "[g]enocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in Article II"[125].

8. In its presentation of 18 April last, the Applicant stated that "[t]he genocidal acts enumerated in Article II of the 1948 Convention must not be confused with genocide as a global internationally wrongful act which may engage the responsibility of a State party"[126]. We would like to stress that the Genocide Convention does not provide for two concepts of genocide: one in which individuals are answerable in criminal proceedings according to the rules of criminal law and another in which State responsibility can be incurred according to the customary rules of the international responsibility of States. For the crime of genocide, an international crime, there is only one definition, which is laid down by the Genocide Convention, and its commission can in certain cases engage State responsibility.

9. Thus a State cannot be responsible for breaches of Articles II and III of the Genocide Convention unless the requisite intent can be established on the part of its organs and agents, who will ultimately always be individuals. In its Draft Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission stated:

> "Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents . . . For example, Article II of the Genocide Convention states that: 'In the present Convention, genocide means any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group . . .' Whether responsibility is objective or

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[125]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 147.

[126]CR 2006/31, p. 32, para. 58.1.

> subjective in this sense depends on the circumstances including the content of the primary obligation in question."[127]

The primary obligation at issue is clearly that provided for by the Genocide Convention, according to which specific intent must be found.

10. The Applicant recognizes that any act must be accompanied by genocidal intent in order to constitute genocide, but is of the opinion that genocidal intent does not have to exist in all of the

49 direct perpetrators, who could commit the acts without being motivated by such intent. We do not believe it necessary to engage in a debate as to whether the direct perpetrator of the acts constituting genocide needs to have genocidal intent[128], since the intent of that person would only be relevant if the perpetrator falls within the category of persons capable of engaging the responsibility of the State. However, we would stress that the direct intent of the person capable of engaging the responsibility of the State, irrespective of whether he/she is the direct perpetrator, or the person who devised, planned and prepared genocidal acts, must be found beyond all reasonable doubt. Moreover, if the person capable of engaging State responsibility is not the direct perpetrator of the crime, the link between that person and the individuals who directly committed the crime would have to be established in order to find that the criminal acts were carried out in execution of the genocidal intent of the person capable of engaging State responsibility. And *only* if all those conditions were met, could the responsibility of the State be incurred. In the present case, the Applicant has shown nothing of the sort.

11. We are bound also to take note of the comment of the International Law Commission, which observed in its Draft Code of Crimes against the Peace and Security of Mankind:

> "The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intention of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group . . . A soldier who is ordered to go from house to house and kill only persons who are members of a particular group . . . cannot be unaware of the destructive effect of his criminal conduct on the group itself."[129]

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[127]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, pp. 69-70.

[128]CR 2006/31, pp. 26-27, para. 44.

[129]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, International Law Commission, *Yearbook 1996*, Vol. II, Part Two, p. 45.

The International Law Commission's analysis is highly logical. The direct perpetrators could hardly claim not to be aware of the intent underlying the orders they received in the event of genocide, as, although it is rarely expressed explicitly, genocidal intent, when it exists, is obvious and it is difficult to claim that it was unknown.

12. The Applicant claims that it must be assumed that the State intended to achieve the result attained and that the State must consequently be fully accountable for that outcome[130]. We have demonstrated that genocide did not take place, but beyond that, we cannot accept the argument that the State can be assumed responsible where no intent has been established on the part of the individual alleged to have committed genocide and capable of engaging the State's responsibility.

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***(b)* Deducing genocidal intent from circumstantial evidence**

13. As the Applicant has provided no direct evidence of the intent of the persons capable of engaging the responsibility of the State in the present case, it has endeavoured to deduce intent from circumstantial evidence and notably that of a plan, project or pattern of conduct, that is to say from the number and nature of the crimes. However, genocidal intent cannot be deduced from the circumstantial evidence presented by the Applicant. That is only logical, as no such intent ever existed and the criminal acts perpetrated in Bosnia and Herzegovina did not constitute genocide.

(i) The lack of a plan

14. The existence of a plan is not a legal ingredient of genocide, but the existence of such a plan can help to establish the specific intent required for the crime of genocide[131]. According to the Applicant, the main evidence of such a plan was the strategic goals of the Bosnian Serbs approved on 12 May 1992 at a session of the Assembly of the Serbian People in Bosnia and Herzegovina. However, those strategic goals harboured no genocidal intent, as we demonstrated in our presentation of Thursday last. Moreover, the Tribunal for the former Yugoslavia has assessed those strategic goals in a number of cases[132]. We will not repeat the findings of the Tribunal as we

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[130]CR 2006/33, p. 40, para. 12.

[131]ICTY, *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, para. 225.

[132]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 41; *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 981; *Prosecutor* v. *Stanislav Galic*, case No. IT-98-29-T, Judgement, 5 December 2003, paras. 725-729; *Prosecutor* v. *Radislav Krstic*, case No. IT-98-33-T, Judgement, 2 August 2001, para. 562.

presented them last week, but we would stress once again that the Tribunal has not been able to deduce genocidal intent from the strategic goals of the Bosnian Serbs. True, this Court is not bound by the findings of the Tribunal, but a number of conclusions can be drawn from them.

51 15. The Applicant would no doubt say that the Tribunal for the former Yugoslavia did not have the full picture, which is in effect what it claimed: "The ICTY with jurisdiction over individual crimes, but not State responsibility, had no reason to discern that pattern or to name the perpetrator, the mastermind of the pattern, because that mastermind was not an individual but a State"[133]. We cannot share in this analysis of the work of the Tribunal for the former Yugoslavia, because the Tribunal considers the political context and weighs the evidence, which does not relate exclusively to the individual responsibility of the accused. This is particularly so in those cases where the defendants are charged with complicity and the intent of the principal perpetrator must be proved if the crime is to be properly characterized.

16. The Tribunal has rarely tried the direct perpetrators of the alleged crimes; most individuals tried by the Tribunal have been senior political and military figures whose responsibility could not be established in the absence of a clear view of the overall context of the war in Bosnia and Herzegovina. Thus in the *Stakic* case the Tribunal stated: "The Trial Chamber has considered whether anyone else on a horizontal level in the Municipality of Prijedor had the *dolus specialis* for genocide by killing members of the Muslim group but concludes that there is no compelling evidence to this effect."[134]

And the Tribunal also found:

> "Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakic to enable it to draw the inference that those perpetrators had the specific genocidal intent."[135]

It is thus clear that the Trial Chamber in the *Stakic* case did not confine itself to establishing the personal intent of the accused; it also assessed the intent which may have been harboured by others in the political hierarchy of Republika Srpska. After weighing all of the evidence concerning not

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[133]CR 2006/33, p. 39, para. 10.

[134]ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 555.

[135]*Ibid.*, para. 547.

only the accused but also any other individual whom the accused may have aided or assisted, the Trial Chamber concluded: "In order for Dr. Stakic to be held responsible for complicity in
52 genocide, it must be proved that genocide in fact occurred. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond a reasonable doubt that genocide was committed in Prijedor."[136]

17. Just as in the *Stakic* case, the Trial Chamber in the *Brdjanin* case considered all the evidence adduced, which in the latter case concerned an entire region of 16 municipalities, and found:

> "Although the factors raised by the Prosecution have been examined on an individual basis, the Trial Chamber finds that, even if they were taken together, they do not allow the Trial Chamber to legitimately draw the inference that the underlying offences were committed with the specific intent required for the crime of genocide. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond reasonable doubt that genocide was committed in the relevant ARK municipalities."[137]

18. Although the Applicant in principle rejects the findings of the Tribunal for the former Yugoslavia, it nevertheless argues that General Krstic's and Colonel Blagojevic's convictions by the Tribunal can engage Serbia and Montenegro's responsibility. Without wishing to go into the issue of the imputability to Serbia and Montenegro of acts committed by officers in the Republika Srpska army, which was discussed by our counsel and advocate Professor Brownlie, I must observe that a legal analysis of the findings concerning the responsibility of General Krstic and Colonel Blagojevic, as determined by the Tribunal, does not support the Applicant's argument.

19. First, as found by the Tribunal for the former Yugoslavia, neither General Krstic nor Colonel Blagojevic had genocidal intent. They were convicted on the basis not of the Genocide Convention but of the Statute of the Tribunal, specifically Article 7 of the Statute, for aiding and abetting, a form of joint action in the commission of the crime which is not recognized by the Genocide Convention. Secondly, while the Tribunal did assess whether individuals other than the accused had genocidal intent, in neither of these cases did it find any such intent on the part of an individual whose actions could engage Serbia and Montenegro's responsibility. In the *Blagojevic*
53 case, the Trial Chamber cautiously concluded that the Bosnian Serb forces, an amorphous entity

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[136] ICTY, *Prosecutor* v. *Milomir Stakic*, case No. IT-97-24-T, Judgement, 31 July 2003, para. 561.

[137] ICTY, *Prosecutor* v. *Radoslav Brdjanin*, case No. IT-99-36-T, Judgement, 1 September 2004, para. 989.

and one which in any case did not belong to the State of Serbia and Montenegro, intended to destroy the Muslim population of Srebrenica[138]. As for the *Krstic* case, both the Trial Chamber and the Appeals Chamber carried out a detailed analysis in respect of the person who might have had genocidal intent; that led them to draw a great number of contradictory conclusions.

20. Thus, in the *Krstic* case, the Appeals Chamber upheld the Trial Chamber's conclusion that certain members of the headquarters staff of the Republika Srpska army had genocidal intent, finding: "The Trial Chamber — as the best assessor of the evidence presented at trial — was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica."[139] However, the Appeals Chamber held that:

> "the ambit of the genocidal enterprise in this case was limited to the area of Srebrenica. While the authority of the VRS Main Staff extended throughout Bosnia, the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region. From the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control."[140]

These two conclusions are not only contradictory, they are mutually exclusive. According to the first conclusion, members of the headquarters staff of the Republika Srpska army had genocidal intent, while, according to the second, the genocidal intent was harboured by those Bosnian Serb forces whose control was limited to the Muslims of Srebrenica. As the Appeals Chamber itself admits, the headquarters staff of the Republika Srpska army controlled all the territory of Bosnia and Herzegovina which was under Bosnian Serb control; accordingly, members of the headquarters staff of the Republika Srpska army are obviously ruled out as members of the group of individuals who might have had the intent to destroy the Bosnian Muslims on the territory limited to Srebrenica.

54 21. Further, the Applicant is wrong in its assertion that the individuals convicted of complicity in genocide in the *Krstic* and *Blagojevic* cases acted as part of a criminal enterprise to

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[138]ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case no. IT-02-60-T, Judgement, 17 January 2005, para. 677.

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

[140]*Ibid.*, para. 17.

destroy, in whole or in part, the group to which the victims belonged. This contention is a distortion of the judgments handed down by the Tribunal for the former Yugoslavia in the *Krstic* and *Blagojevic* cases. In fact, the Tribunal has never found that there was a criminal enterprise aimed at the total or partial destruction of a group. In the *Krstic* case, the Appeals Chamber overturned General Krstic's conviction by the Trial Chamber for participation in a criminal enterprise to commit genocide[141] and held that the aim of the criminal enterprise was the forcible transfer of civilians[142], a crime against humanity. In the *Blagojevic* case the Trial Chamber did not find that Colonel Blagojevic had participated in a criminal enterprise, not even an enterprise aimed at forcible transfer, while there was no consideration at all in the *Blagojevic* case of the criminal enterprise to commit genocide alleged by the Applicant[143].

22. To be sure, a State's responsibility is not limited to acts of genocide committed by individuals capable of engaging the State's responsibility who have been convicted of that offence. However, where the perpetrators, the individuals, have not been convicted, the Court must, before assessing the responsibility of the State, establish the personal responsibility of the individuals capable of engaging the State's responsibility. While the trial and conviction of the perpetrators of the genocide is not required, it is on the other hand necessary to identify them and establish their responsibility, because the State is answerable only for those acts of genocide committed with the specific intent required by the Genocide Convention by persons capable of engaging its responsibility, whose specific intent must first be established.

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(ii) Genocidal intent cannot be deduced from the pattern of criminal conduct or the number of crimes

23. With regard to the pattern and number of crimes, the Applicant claims that the number of crimes, as well as their systematic and discriminatory nature, demonstrates a pattern of conduct from which genocidal intent can be deduced. We cannot accept that claim. First, the crimes were committed in a war setting. The war would not, of course, excuse genocide if it had occurred, but it raises the question of the intent of those who committed these crimes, as it undoubtedly offers an

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[141] ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-33-A, Judgement, 19 April 2004, paras. 143 and 237.

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

[143] ICTY, *Prosecutor* v. *Vidoje Blagojevic and Dragan Jokic*, case No. IT-02-60-T, Judgement, 17 January 2005, paras. 714 and 705.

alternative explanation for the crimes perpetrated. Second, and more importantly, the pattern of conduct and the crimes committed do not demonstrate their genocidal nature. The adding together of a series of crimes, irrespective of their gravity, cannot ever amount to genocide unless there is genocidal intent, and that did not exist and so could not be proved.

24. The crimes alleged by the Applicant could be common-law offences, violations of the laws and customs of war or crimes against humanity. There are certain similarities between genocide and crimes against humanity. The Applicant has stated a number of times that the crimes were committed on a large scale, in a systematic manner and with discriminatory intent. That is of no help whatsoever in terms of establishing genocidal intent, as crimes against humanity, and especially persecution and extermination, also have these characteristics.

25. In Article 18 of its Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission defined crimes against humanity as acts: "committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group"[144].

26. Hence, according to international law crimes against humanity have to be committed on a large scale or in a systematic manner. Moreover, they have to be directed by a Government, an organization or a group, thereby demonstrating their organized and coordinated nature.

56 Furthermore, the International Law Commission explained that the expression "in a systematic manner" meant crimes committed repeatedly or continually, pursuant to a preconceived plan or policy, while "on a large scale" implies a multiplicity of victims. Consequently, the expression "in a systematic manner" excludes crimes committed at random or in an indiscriminate manner, while "on a large scale" rules out isolated acts, which do not therefore constitute crimes against humanity[145].

27. For the *ad hoc* tribunals, crimes against humanity do not have to be directed by a State or organization. Nevertheless, the International Criminal Court clearly stated in its Elements of Crime:

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[144]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, International Law Commission, *Yearbook 1996*, Vol. II, Part Two, p. 47.

[145]*Ibid*.

> "It is understood that 'policy to commit such an attack' requires that the State or organization actively promote or encourage such an attack against a civilian population. A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."[146]

28. However, all international courts require that crimes against humanity must be committed in a systematic manner or on a large scale. In the *Kayishema* case, the Trial Chamber defined the meaning of those terms in international criminal law, holding that: "[a] widespread attack is one that is directed against a multiplicity of victims. A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of those conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons."[147]

29. Consequently, in order to be characterized as crimes against humanity, the criminal acts concerned must be carried out in a systematic manner and on a large scale. And those are precisely the characteristics from which the Applicant seeks to infer genocidal intent. But genocidal intent cannot be deduced from those characteristics — the systematic manner and large scale of the crimes — as those same characteristics are constituent elements of crimes against humanity, which
57 are, in any case, extremely serious international crimes. Within that context, it is worth emphasizing that the International Criminal Court said with respect to crimes against humanity in its Elements of Crimes that: "crimes against humanity as defined in Article 7 are among the most serious crimes of concern to the international community as a whole"[148].

30. Furthermore, the crime against humanity of persecution is traditionally regarded as an offence close to that of genocide, since both crimes require discriminatory intent. However, whereas in genocide the victim of the crime is the group, the victims of persecution are individuals, but individuals targeted on particular grounds, *inter alia*, their membership of a group which has been targeted. Discriminatory intent is therefore necessary for persecution as well. And as the International Law Commission so rightly observed in its Draft Code of Crimes against the Peace and Security of Mankind, the crime of persecution applies "to acts of persecution which lacked the

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[146]International Criminal Court, Elements of Crimes, ICC-ASP 1/3, p. 116.

[147]ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 123.

[148]International Criminal Court, Elements of Crimes, ICC-ASP 1/3, p. 116.

specific intent required for the crime of genocide"[149]. Thus, Madam President, Members of the Court, genocidal intent cannot be deduced from acts capable of constituting genocide accompanied by discriminatory intent, as those same acts with the same intent constitute crimes against humanity.

31. The Draft Code of Crimes against the Peace and Security of Mankind, moreover, enumerates in Article 18 a number of acts which constitute crimes against humanity, among them, in subparagraph *(e)* "persecution on political, racial, religious or ethnic grounds", which is also a crime in the Statutes of the *Ad Hoc* Tribunals and in the Statute of the International Criminal Court. However the Draft Code prepared by the International Law Commission contains, along with persecution, another crime against humanity for which discriminatory intent must be shown. Subparagraph *(f)* of Article 18 of the Draft Code defines that crime against humanity as "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population".

58 32. The crime set out in Article 18 *(f)* of the International Law Commission's Draft Code goes beyond mere discrimination against individuals and concerns a part of the population, bringing it even closer to the notion of genocide, which targets a group. Beyond the fact that it targets part of the population and must be committed with discriminatory intent, the crime must also be carried out in a systematic manner or on a large scale, and be organized by a Government, organization or group. The criminal act can only be characterized as a crime against humanity if all of those criteria are met and it will remain a crime against humanity as its perpetrators lack the specific intent required for the crime of genocide, which is the destruction in whole or in part of a national, ethnical, racial and religious group.

33. Persecution is generally accepted as being the crime which has the most in common with genocide, but certain other crimes against humanity can easily be mistaken for genocide. Those crimes can, in effect, only be distinguished from genocide by the lack of genocidal intent, whereas the material acts constituting them are identical to those capable of constituting genocide.

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[149]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, International Law Commission, *Yearbook 1996*, Vol. II, Part Two, p. 49.

34. Thus the International Law Commission described the crime against humanity of extermination in the Draft Code of Crimes against the Peace and Security of Mankind as: "a crime which is by its very nature directed against a group of individuals . . . involves an element of mass destruction . . . is closely related to the crime of genocide"[150].

35. In the *Vasiljevic* case, Trial Chamber I of the Tribunal for the former Yugoslavia accepted the opinion of the International Law Commission and held that:

> "[e]xtermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also covers situations where some members of a group are killed while others are spared. Extermination refers to killing on a vast scale. It is directed towards members of a collection of individuals; the method used to carry out the killing is irrelevant; knowledge of the vast murderous enterprise is required."[151]

Moreover, Trial Chamber I did not just explain the constituent elements of the crime of extermination, but also highlighted the difference between genocide and extermination, holding:

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> "This Trial Chamber concludes from the material which it has reviewed that criminal responsibility for "extermination" only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect. Responsibility for one or for a limited number of such killings is insufficient. The Trial Chamber also concludes that the act of extermination must be collective in nature rather than directed towards singled out individuals. However, contrary to genocide the offender need not have intended to destroy the group or part of the group to which the victims belong."[152]

36. And the Rwanda Tribunal's Trial Chamber 2 defined the constituent elements of the crime of extermination in the *Kayishema* trial thus:

> "The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[153]

37. Consequently, the criminal acts, pattern of conduct and plan would have been the same for extermination as for genocide, the only factor distinguishing the one from the other being

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[150] *Ibid*., p. 48.

[151] ICTY, *Prosecutor* v. *Mitar Vasiljevic*, case No. IT-98-32-T, Judgement, 29 November 2002, para. 224.

[152] *Ibid*. para. 227.

[153] ICTR, *Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 144.

genocidal intent, which has to be shown as such. It cannot be deduced from the material act alone, or from the plan or project, all of which, without genocidal intent, are evidence only to crimes against humanity.

38. Genocidal intent is clearly the only element distinguishing the crime of genocide from other offences constituting crimes against humanity. In the Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission stated:

> "The definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law. The prohibited acts enumerated in subparagraphs *(a)* to *(e)* are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence . . . The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. As indicated in the opening clause of Article 17, an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is 'committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'."[154]

60 39. Consequently, the specific intent required for genocide, irrespective of individual or State international responsibility, can never be inferred simply from the fact that acts constituting the *actus reus* of the crime of genocide have been committed. Specific intent is the constituent element of genocide which must be shown and the burden of proof is upon the Applicant, who has not been able to demonstrate it quite simply because genocidal intent never existed.

III. Complicity in genocide

1. I now come to the last part of my statement, which deals with the question of complicity in genocide. The Applicant asserted in its oral argument on 18 April 2006 that our respective interpretations of the acts listed in Article III of the Genocide Convention were not significantly different. While we can agree with the Applicant as to most of the forms of commission of the crime of genocide set out in Article III of the Genocide Convention, it would however appear that we do not interpret complicity in genocide in the way described by the Applicant in its oral statements[155].

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[154]Draft Code of Crimes against the Peace and Security of Mankind with commentaries, International Law Commission, *Yearbook 1996*, Vol. II, Part Two, p. 44.

[155]CR 2006/31, p. 39, para. 75.

2. We obviously acknowledge that the Tribunal for the former Yugoslavia has convicted two Bosnian Serbs of aiding and abetting genocide *(la complicité du genocide)* under Article 7.1 of the Tribunal's Statute, which refers specifically to aiding and abetting in conjunction with Article 4 of the Tribunal's Statute, which incorporates the text of Articles II and III of the Genocide Convention. We acknowledge too that the Tribunal for the former Yugoslavia has held that persons furnishing aid and assistance can be convicted of aiding and abetting genocide without having genocidal intent. However, we do not believe that this conclusion is legally correct; moreover, it is definitely not founded on the Genocide Convention, which requires genocidal intent for all forms of commission, including complicity in genocide. The category of aiding and abetting genocide *(l'aide et l'assistance à la commission du genocide)* was established exclusively on the
61 basis of the Tribunal's Statute, specifically Article 7.1 thereof, which applies to the individual responsibility of those tried by the Tribunal. This category is alien to the Genocide Convention.

3. The Appeals Chamber of the Tribunal for the former Yugoslavia moreover acknowledged in the *Krstic* case: "Krstić's responsibility is accurately characterized as aiding and abetting genocide under Article 7 (1) of the Statute, not as complicity in genocide under Article 4 (3) *(e)*"[156]. Article 4.3 *(e)* of the Tribunal's Statute is identical with Article III *(e)* of the Genocide Convention, which defines complicity in genocide. The Tribunal has thus established a difference between complicity in genocide *(la complicité dans le genocide)*, determined by the Genocide Convention, and aiding and abetting genocide *(la complicité du genocide)*, which, as interpreted by the Tribunal, has been provided for by the Tribunal's Statute, notably Article 7.1.

4. The distinction is an important one because complicity in genocide requires the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. On the other hand, aiding and abetting genocide does not require such intent, but only the knowledge that the principal perpetrator of the crime has genocidal intent. Thus, a person, a natural person, may be convicted of aiding and abetting genocide, for having participated in the crime of genocide, without having had genocidal intent, which, under the Genocide Convention, is an element of genocide and is required for complicity in genocide.

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[156]ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-36-A, Judgement, 19 April 2004, para. 138.

5. The Appeals Chamber of the Tribunal for the former Yugoslavia has recognized that complicity in genocide, as contemplated in the Genocide Convention, requires the intent to destroy a protected group, as it found in the *Krstic* case that: "Article 4 of the Statute is most naturally read to suggest that Article 4 (2)'s requirement that a perpetrator of genocide possess the requisite 'intent to destroy' a protected group applies to all of the prohibited acts enumerated in Article 4 (3), including complicity in genocide."[157] The Appeals Chamber added: "the same analysis applies to the relationship between Article II of the Genocide Convention, which contains the requirement of specific intent, and the Convention's Article III, which lists the proscribed acts, including that of complicity"[158].

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6. A distinction between complicity in genocide and aiding and abetting genocide has been drawn by the Tribunal for the former Yugoslavia, but the Genocide Convention recognizes only complicity in genocide, as set out in Article III*(e)* of the Genocide Convention. Aiding and abetting genocide, as recognized by the Tribunal for the former Yugoslavia, cannot be extended to State responsibility because the Genocide Convention does not recognize it.

7. The *travaux préparatoires* of the Genocide Convention clearly show that genocide and all the forms in which it may be committed that are set out in Article III of the Genocide Convention require *dolus specialis*, which as an element of the crime of genocide must be specifically proved. The Appeals Chamber of the Tribunal for the former Yugoslavia noted moreover in the *Krstic* case: "There is also evidence that the drafters of the Genocide Convention intended the charge of complicity in genocide to require a showing of genocidal intent."[159] In fact, the United Kingdom's representative on the Sixth Committee of the General Assembly proposed to include the word "deliberate" in the text of the Convention before the term "complicity", explaining that it was important to specify that complicity had to be deliberate, because in some legal systems complicity was punishable without any need for the requisite intent to have been proved. However, in the view of representatives of a number of States this clarification was superfluous because there had never been any doubt as to complicity being intentional in nature. The United Kingdom ultimately

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

[158] ICTY, *Prosecutor* v. *Radoslav Krstic*, case No. IT-98-36-A, Judgement, 19 April 2004, para. 142, footnote 245.

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

withdrew its proposal, as it had been clarified that complicity in genocide had to be deliberate, intentional, in order to punishable[160].

8. Thus, there can be no remaining uncertainty as to the fact that aiding and abetting genocide is nothing but a construct of the Tribunal for the former Yugoslavia by means of which it

63 was able to convict General Krstic even though it had concluded that he lacked genocidal intent. This Court is not the Appeals Chamber of the Tribunal for the former Yugoslavia and we do not intend to examine the lawfulness of the Tribunal's findings, but under no circumstances can that construct be applied in these proceedings, which are founded uniquely and exclusively on the Genocide Convention, which, for its part, requires specific genocidal intent as an element of all forms in which the crime of genocide can be committed, as set out in Article III of the Genocide Convention, including complicity.

9. The Applicant has tried in its oral argument to draw the same distinction between complicity in genocide *(la complicité dans le genocide)* , founded on the Genocide Convention, and aiding and abetting genocide *(la complicité du genocide)*, supposedly founded on general rules of international responsibility of States, asserting that: "This second form of complicity is not legally based upon the precise wording of Article III *(e)* of the Convention, but upon the general principles of international law on State responsibility."[161]

10. The Applicant does not say so explicitly but it would appear that this form of aiding and abetting is based on the rule of customary international law put forward in Article 16 of the draft articles on Responsibility of States for internationally wrongful acts, which reads:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
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> *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and
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> *(b)* The act would be internationally wrongful if committed by that State."[162]

11. We can indeed understand why the Applicant has avoided citing this Article. The draft articles provide that the aid or assistance must be furnished to a State. That would not be true in

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[160]United Nations, doc. A/C.6/236 and corr. 1; doc. A/C.6/SR.87.

[161]CR 2006/31, p. 40, para. 77.

[162]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 155.

this case because the Applicant itself alleges that the principal perpetrator in this case was Republika Srpska, which is not a subject of international law[163]. Further, the International Law Commission requires that the State furnishing the aid and assistance must know that the aid and

64 assistance are meant to facilitate an internationally wrongful act and must intend to facilitate the commission of the wrongful act. In its commentary to the draft articles on Responsibility of States for internationally wrongful acts, the International Law Commission says:

> "the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State."

Accordingly, the general principles of State responsibility do not relieve the Applicant of its obligation to prove a particular intent on the part of the State and this intent has never been proved in the present case. It could not be proved because it never existed.

12. Moreover and most importantly, the draft articles on Responsibility of States for internationally wrongful acts provide in Article 55 that the articles, which in effect codify the general principles of State responsibility, do not apply where a special rule governs the question of responsibility. Draft Article 55 provides:

> "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[164]

Article 55 of the draft articles on Responsibility of States applies to all aspects of State responsibility, including the content of that responsibility. Consequently, if a special international rule requires specific intent in order for there to be a violation of the international obligation, the international responsibility of the State can only be incurred where the rule is violated with the requisite specific intent. The International Law Commission has observed in its commentary to the draft articles:

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[163]CR 2006/31, p. 40, para. 75.

[164]Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 356.

> "Article 55 provides that the Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal
65 consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*."[165]

The Genocide Convention is the primary rule in this case, it contains the applicable law and it contains a special rule concerning complicity in genocide. Thus, whether or not there has been a violation of obligations laid down in the Genocide Convention must be determined in accordance with the provisions of the Convention, including the issue of complicity.

13. Genocidal intent must therefore be proved in order for a State to be held responsible for violations of Articles II and III of the Genocide Convention. And, as a State cannot directly commit a wrongful act but does so through its organs, which in all cases are ultimately natural persons, the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, on the part of an individual capable of causing the State's responsibility to be incurred must be proved if the State is to be held answerable for violations of Article II and III of the Genocide Convention.

Conclusions

1. Madam President, Members of the Court, genocide is often called the crime of crimes and it is the supreme crime, the negation of humanity itself, but it is not the only serious international crime. Crimes against humanity are very grave, systematic, large-scale international crimes. Genocidal intent is the only element on the basis of which the crime of genocide can be distinguished from other crimes against humanity.

2. Genocidal intent is an element of the crime of genocide which must be proved in order for an individual to be held responsible for the crime of genocide. Such intent must also be proved if a State is to be held answerable for violations of the Genocide Convention. The Applicant has failed to demonstrate genocidal intent on the part of persons capable of causing the State's responsibility to be incurred. The Applicant has been unable to prove such intent because it never existed.

3. Neither Serbia and Montenegro nor the Bosnian Serbs intended to destroy in whole or in
66 part a national, ethnical, racial or religious group. Genocide cannot be committed without such intent and it was not committed in Bosnia and Herzegovina. The facts show the truth about what

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[165] *Ibid.*

happened in Bosnia and Herzegovina: a bloody, fratricidal civil war. Crimes were committed but genocide was not.

Madam President, that ends my statement.

The PRESIDENT: Thank you, Maître Fauveau-Ivanović.

The Court now rises, and the session will resume at 3 o'clock this afternoon.

The Court rose at 12.55 p.m.