CR 2006/6

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Thursday 2 March 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le jeudi 2 mars 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Bosnia and Herzegovina is represented by:

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

Mr. Thomas M. Franck, Professor of Law Emeritus, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,

Ms Magda Karagiannakis, B.Ec, LL.B, LL.M., Barrister at Law, Melbourne, Australia,

Ms Joanna Korner, Q.C., Barrister at Law, London,

Ms Laura Dauban, LL.B (Hons),

as Counsel and Advocates;

Mr. Morten Torkildsen, BSc, MSc, Torkildsen Granskin og Rådgivning, Norway,

as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,

Mr. Wim Muller, LL.M, M.A.,

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

Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

Le Gouvernement de la Bosnie-Herzégovine est représenté par :

M. Sakib Softić,

comme agent;

M. Phon van den Biesen, avocat, Amsterdam,

comme agent adjoint;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international des Nations Unies,

M. Thomas M. Franck, professeur émérite à la faculté de droit de l'Université de New York,

Mme Brigitte Stern, professeur à l'Université de Paris I,

M. Luigi Condorelli, professeur à la faculté de droit de l'Université de Florence,

Mme Magda Karagiannakis, B.Ec., LL.B., LL.M., *Barrister at Law*, Melbourne (Australie),

Mme Joanna Korner, Q.C., *Barrister at Law*, Londres,

Mme Laura Dauban, LL.B. (Hons),

comme conseils et avocats;

M. Morten Torkildsen, BSc., MSc., Torkildsen Granskin og Rådgivning, Norvège,

comme conseil-expert et avocat;

S. Exc. M. Fuad Šabeta, ambassadeur de Bosnie-Herzégovine auprès du Royaume des Pays-Bas,

M. Wim Muller, LL.M., M.A.,

M. Mauro Barelli, LL.M. (Université de Bristol),

M. Ermin Sarajlija, LL.M.,

M. Amir Bajrić, LL.M.,

Mme Amra Mehmedić, LL.M.,

M. Antoine Ollivier, attaché temporaire d'enseignement et de recherche à l'Université de Paris X-Nanterre,

Ms Isabelle Moulier, Research Student in International Law, University of Paris I,

Mr. Paolo Palchetti, Associate Professor at the University of Macerata (Italy),

as Counsel.

The Government of Serbia and Montenegro is represented by:

Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest and Emory University, Atlanta,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of the All Souls College, Oxford,

Mr. Xavier de Roux, Masters in law, avocat à la cour, Paris,

Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris and member of the Council of the International Criminal Bar,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, and President of the International Law Association of Serbia and Montenegro,

Mr. Igor Olujić, Attorney at Law, Belgrade,

as Counsel and Advocates;

Ms Sanja Djajić, S.J.D., Associate Professor at the Novi Sad University School of Law,

Ms Ivana Mroz, LL.M. (Minneapolis),

Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,

Mme Isabelle Moulier, doctorante en droit international à l'Université de Paris I,

M. Paolo Palchetti, professeur associé à l'Université de Macerata (Italie),

comme conseils.

Le Gouvernement de la Serbie-et-Monténégro est représenté par :

M. Radoslav Stojanović, S.J.D., chef du conseil juridique du ministère des affaires étrangères de la Serbie-et-Monténégro, professeur à la faculté de droit de l'Université de Belgrade,

comme agent;

M. Saša Obradović, premier conseiller à l'ambassade de Serbie-et-Monténégro au Royaume des Pays-Bas,

M. Vladimir Cvetković, deuxième secrétaire à l'ambassade de Serbie-et-Monténégro au Royaume des Pays-Bas,

comme coagents;

M. Tibor Varady, S.J.D. (Harvard), professeur de droit à l'Université d'Europe centrale de Budapest et à l'Université Emory d'Atlanta,

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre de la Commission du droit international, membre du barreau d'Angleterre, *Distinguished Fellow* au All Souls College, Oxford,

M. Xavier de Roux, maîtrise de droit, avocat à la cour, Paris,

Mme Nataša Fauveau-Ivanović, avocat à la cour, Paris, et membre du conseil du barreau pénal international,

M. Andreas Zimmermann, LL.M. (Harvard), professeur de droit à l'Université de Kiel, directeur de l'Institut Walther-Schücking,

M. Vladimir Djerić, LL.M. (Michigan), avocat, cabinet Mikijelj, Janković & Bogdanović, Belgrade, et président de l'association de droit international de la Serbie-et-Monténégro,

M. Igor Olujić, avocat, Belgrade,

comme conseils et avocats;

Mme Sanja Djajić, S.J.D, professeur associé à la faculté de droit de l'Université de Novi Sad,

Mme Ivana Mroz, LL.M. (Minneapolis),

M. Svetislav Rabrenović, expert-associé au bureau du procureur pour les crimes de guerre de la République de Serbie,

Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,

Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,

Mr. Christian J. Tams, LL.M. (Cambridge),

Ms Dina Dobrkovic, LL.B.,

as Assistants.

M. Aleksandar Djurdjić, LL.M., premier secrétaire au ministère des affaires étrangères de la Serbie-et-Monténégro,

M. Miloš Jastrebić, deuxième secrétaire au ministère des affaires étrangères de la Serbie-et-Monténégro,

M. Christian J. Tams, LL.M. (Cambridge),

Mme Dina Dobrkovic, LL.B.,

comme assistants.

The PRESIDENT: Please be seated. I give the floor to Ms Dauban.

Ms DAUBAN:

THE TAKEOVER OF THE MUNICIPALITIES ON THE EASTERN SIDE OF BOSNIA

1. Madam President, Members of the Court, in the section of the pleadings on Srebrenica, we have already demonstrated to the Court how the Serbs, from both sides of the river Drina, were involved in a closely co-ordinated ethnic cleansing operation. We also explained how the Respondent and the Bosnian Serbs ignored the fact that the river Drina was actually, in parts, a border between two independent States: Bosnia and Herzegovina, and Serbia and Montenegro.

2. Moreover, we have demonstrated that the Srebrenica massacre formed the completion of the ethnic cleansing of all of the Drina Valley, i.e. all of eastern Bosnia and Herzegovina, and this was in accordance with the Greater Serbia concept and also in accordance with strategic goals Nos. 1 and 3, which have been dealt with by other members of the legal team of Bosnia and Herzegovina.

3. What we have not yet done is to explain in more detail how exactly the ethnic cleansing of the eastern side of Bosnia and Herzegovina was accomplished. This is what I will show to the Court during the course of my pleadings on this subject.

4. Bosnia and Herzegovina has already presented evidence to you, in its Reply of 23 April 1998[1], of the pattern of takeovers in the municipalities. We particularly focused on the municipalities of Zvornik and Opstina Prijedor. The evidence presented in our Reply on the takeovers and events in those municipalities was principally based on reports carried out by bodies of the United Nations. Since 1998, the work of the ICTY has confirmed a lot of those findings and the conclusions within them, while adding to the picture of events through numerous witness and expert testimonies and further documents which have since become public.

5. The sources I will be drawing upon to illustrate what happened in the eastern side of Bosnia and Herzegovina revolve primarily around the factual findings made by the ICTY. There are, at this point in time, only a limited number of finalized trial chamber and appeal chamber

[1]Chapter 5, Sections 6 and 7.

judgments to which I can refer the Court. However, there are also a number of other available and very reliable sources to which I will be referring the Court. These include the adjudicated facts from the cases, judgments on motions for acquittal and witness testimonies given in cases which have not yet been adjudicated on.

6. During the course of this session I will present to you the pattern of takeovers in the eastern part of Bosnia and Herzegovina, primarily, those municipalities which are located along or close to the river Drina. The map which is currently projected on to the screen behind me shows these territories.

[Photo: Show map of eastern Bosnia with municipalities highlighted]

I would like, at this point, to explain to the Court that this map is one which has been made by Bosnia and Herzegovina and is based on data from the official topographic maps of a company specializing in such map production.

7. In explaining how the municipalities of Bijeljina, Foca, Zvornik, Visegrad, Bosanski Samac, Bratunac, Vlasenica and Brcko came to be under Serb control, I will show the Court a pattern that was more or less repeated in each area. As I speak about each of these municipalities, a map will appear on the screen behind me and, for the reference of the Court, it shows where that municipality is located in Bosnia and Herzegovina and on what date it was taken over.

Bijeljina

[Map in]

8. The takeover of Bijeljina, which is a strategically important municipality close to the banks of the river Drina, was one of the first events of the Greater Serbian project. It took place on 31 March 1992[2]. The build-up to it was marked by an escalation of discrimination against the Bosniaks and Bosnian Croats, which eventually turned into outright violence. Alija Gusalic, who testified before the Milosević trial chamber, had served in the JNA and was from Bijeljina. He stated that letters were sent out by the Territorial Defence for reservists but they did not send them

[2]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, Judgment on Motion for Acquittal on 16 June 2004, para. 223.

to Muslims in the municipality[3]. He also gave evidence regarding the role of the paramilitaries from Serbia in the takeover, stating that these paramilitaries were primarily under the control of Zeljko Ranotović, who was infamously known as "Arkan" — and it is Arkan to whom I refer — and Vojislav Seselj, Head of the Serbian Radical Party in Belgrade[4]. Both of these men have been indicted by the ICTY for crimes against humanity and, Madam President, Members of the Court, both of these men are from Serbia and under Serb control. Mr. Gusalić testified that these paramilitary groups started to come to the region a few months before the violence began and held meetings and training sessions in preparation for what was to follow. He estimated that these men numbered about 100 from Seselj's group and 100 from Arkan's group[5].

9. The Milosević trial chamber, in their dismissal of the defence motion for acquittal of the charge of genocide, concluded that they had heard enough evidence for a trial chamber to find beyond reasonable doubt that a number of events had occurred[6]. I will list the most important of those events to the Court now, in order to give you a picture of the takeover and events in Bijeljina:

— the decision referred to the testimony of a protected witness who had been assigned to escort convoys transporting weapons, ammunition and other military equipment from Serbia to a number of municipalities including Bijeljina, Brcko and Zvornik;

— 48 non-Serbs were killed, including tens of people in the centre of the town and even behind the SDS headquarters: that is the Serbian Democratic Party, a Republika Srpska political organization;

— at that time — this is still according to the trial chamber — Bijeljina Television announced that Captain Dragan's guards, the Chetniks of Vojvoda and Mile Blagić, were some of the paramilitary groups involved in the violence;

— the local police used a list with names of prominent Muslims in the town who were to be arrested. These were usually businessmen and other prominent local figures. Those that were

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[3]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, Testimony of Alija Gusalić given on 31 March 2003, p. 18258.

[4]*Ibid.*, p. 18259.

[5]*Ibid.*, p. 18259.

[6]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, Judgment on Motion for Acquittal on 16 June 2004 — all the events listed are described in para. 225.

not arrested at checkpoints were rounded up by Arkan's men who went from house to house with a list of suspects: many of the people who were on those lists disappeared;

— for those that were not killed in Bijeljina, life became gradually unbearable: non-Serbs were dismissed from their jobs and, where possible, replaced with Serbs; property was seized from the Bosniaks and Bosnian Croat members of the municipality. This then escalated into arbitrary detentions and beatings; and finally, about 2,000 people, mainly Muslims, were detained at Batković camp, where at least 100 people died and many atrocities were committed.

10. On 4 April 1992, Biljana Plavsić, then a member of the Presidency of Bosnia and Herzegovina[7], came to Bijeljina to congratulate Arkan on its takeover. While it is widely documented that Arkan was involved in the operation to take over Bijeljina at the invitation of Biljana Plavsić, testimony given by protected witness B-129, a former secretary of Arkan's, before the Milosević trial chamber, shows upon whose *orders* Arkan was acting, and I would like to quote the relevant part of this examination:

> "Q. These early operations in Bijeljina, Zvornik and Brcko, who gave the order that they should go and work there?"

The reply of the witness

> "A. Arkan would always say that without orders from the DB, the state security, [SNFRY?] the Tigers were not deployed anywhere."[8]

11. The Milosević trial chamber concluded in its decisions on the defence motion for acquittal that "the Serb plan was to cleanse Bijeljina of its non-Serb population by first targeting people with economic, political and religious influence so the remainder of the population would be easier to control"[9]. When Bijelijna was taken over its street names were changed and all five mosques in the town were destroyed.

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[7]Mrs. Plavsić resigned four days later, on 8 April 1992. ICTY, *Prosecutor* v. *Biljana Plavsić,* case No. IT-00-39&40/1, Trial Chamber Sentencing Judgment, 27 February 2003, para. 14.

[8]ICTY, *Prosecutor* v. *Slobodan Milosević,* case No. IT-02-54-T, Testimony of B-129, 16 and 17 April 2003, pp.19425-19426.

[9]ICTY, *Prosecutor* v. *Slobodan Milosević,* case No. IT-02-54-T, Judgment on Motion for Acquittal on 16 June 2004, para. 225.

12. Madam President, Members of the Court, in 1991, the population of Bijelina was made up of 31.2 per cent Bosniaks, 59.2 per cent Serbs and 0.5 per cent of Bosnian Croats**.** After the war, the Bosniaks numbered 2.6 per cent, the Serbs 91.1 per cent and the Croats 0.7 per cent[10].

13. One photo-journalist, Ron Haviv, was given permission to follow Arkan's activities in the takeovers. He was present with Arkan and his men in Bijeljina, and I would like to show three of the horrifying events he captured on film. These images, Madam President, Members of the Court were shown to the world on the highly respected and infamous BBC documentary, "The Death of Yugoslavia".

[Video footage: clip 13 Death of Yugoslavia — Ron Haviv's photos]

Foca

[Map in]

14. I would now like to talk about the municipality of Foca. This is the most southerly district I will be presenting in this part of the pleading. It has become notorious for its detention centres primarily KP DOM, which Ms Karagiannakis included as part of her pleadings on camps yesterday morning. I would like to make a short summary of the events which took place in the actual takeover of the municipality to further highlight how the takeovers followed a pattern in the eastern side of Bosnia and Herzegovina.

15. Before the takeover, Republika Srpska politician Maksimović stated that the Muslims were the greatest enemies of the Serbs. Furthermore, Karadzić said that either Bosnia would be divided along ethnic lines, or one of the ethnic groups would be wiped out from the area[11]. SDS leaders said that, if they were to reach power, the political and economic affairs of Foca would be run by the Serbs only[12]. The ICTY trial chamber in the Krnojelac case found that in the months preceding the outbreak of the conflict in Foca, both the Bosnian Serbs and the Bosnian Muslims

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[10]Figures based on 1991 census population of Bosnia and Herzegovina, State Institute for Statistics of the Republic of Bosnia and Herzegovina, Sarajevo, December 1993; Ewa Tabeau, Marcin Zoltkowski, Jakub Bijak, Arve Hetland (Demographic Unit, Office of the Prosecutor, ICTY), "Ethnic Composition, Internally Displaced Persons and Refugees From 47 Municipalities of Bosnia and Herzegovina, 1991 to 1997-98", submitted as an Expert Report in the case of Slobodan Milosević, 4 April 2003.

[11]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, Decision on Third and Fourth Prosecution motions for Judicial Notice on Adjudicated Facts given on 24 March 2005, No. 338.

[12]ICTY, *Prosecutor* v. *Milorad Krnojelac*, case No. IT-97-25, Judgment, 15 March 2002, para. 15.

began to arm themselves but the Serbs were more successful as they had access to the weapons of the JNA and Territorial Defence[13]. This finding was confirmed by the trial chamber — again ICTY — in the Kunarac judgment who found that the JNA military depot in Livade handed weapons over to the Bosnian Serb fighters[14].

16. On 8 April 1992 Serb military forces began the occupation of Foca town, which was completed between the 16 and 17 April 1992. Those Serb forces include local Bosnian Serb soldiers as well as soldiers from the Federal Republic of Yugoslavia and in particular a Serbian paramilitary formation known as the White Eagles[15] (led by Milan Lukic). Madam President, Members of the Court, this was an attack which directly involved Belgrade and this took place after Bosnia and Herzegovina was recognized as an international sovereign State.

17. Once the Serb forces had gained control over parts of Foca town, military police, accompanied by local and non-local soldiers, started to arrest Muslim and other non-Serb inhabitants. Men and women were separated and arrested. Beginning on around 14 April 1992, the KP Dom prison became the primary detention centre for Bosnian Muslims and other non-Serb men, as well as a few Serbs who tried to avoid military service.

18. In 1991, the population of Foca was made up of 51.3 per cent Bosniaks, 45.2 per cent Serbs and 0.2 per cent Croats. After the war, the Bosniaks were 3.7 per cent, the Serbs 92.6 per cent and the Croats 0.3 per cent[16].

Zvornik

[Map in]

19. The municipality of Zvornik is situated at the very east of Bosnia on the banks of the river Drina and it was scenes filmed from the takeover here which were shown to the world on "The Death of Yugoslavia". These scenes sent shock waves through the international community. The detailed facts and conclusions by various United Nations bodies up to 1998, who documented the situation in Zvornik, is evidence that Bosnia and Herzegovenia has submitted to the Court in its

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[13] *Ibid.*, para. 16.

[14] ICTY, *Prosecutor* v. *Dragoljub Kunarac,* case No. IT-96-23&IT-96-23/1-A, Judgment, 12 June 2002, para. 18.

[15] ICTY, *Prosecutor* v. *Momcilo Krajisnik,* case No. T-00-39-PT, Adjudicated facts, 28 February 2003, para. 360.

[16] *Op. cit.*, Note 10.

Reply[17]. As I have shown to a small extent and will continue to show to the Court this morning, Zvornik was not the first and would not be the last place to be ethnically cleansed in order to facilitate the strategic goal of eradicating the river Drina as a border.

20. The testimony of Izet Mehinagić, a high-ranking businessman from Bosnia who had frequent contact with the Bosnian Serb politicians during the relevant period, confirms the role of paramilitaries from Belgrade in the takeover of the municipalities. What he recounted before the Milosević trial chamber shows that Arkan, who was under the control and instruction of Belgrade, was taking the lead over the Serbian Democratic Party, the SDS, in actions in the takeover. I would just like to quote what he said in his testimony now: "Arkan stated that unless the Muslims laid down their weapons by 1700, the destiny of Zvornik would be the same as Bijeljina."[18]

21. Some of the paramilitary formations that were involved in the takeover of Zvornik are the same ones that were involved in the takeovers and crimes committed in other municipalities in eastern side of Bosnia, those paramilitary groups which I have been presenting: Arkan's tigers and Seselj's men[19]. The actual takeover of Zvornik took place on 9 April 1992. I would like to show the Court a small clip of an interview with Jose-Maria Mendiluce, an official of the United Nations High Commissioner for Refugees who was working in Bosnia and Herzegovina in 1992. He is clear in this interview as to the direction from which the shelling of Zvornik was being done.

[Video footage: Mendiluce 1]

22. The scenes that greeted Mr. Mendiluce as he passed through Zvornik on 9 April 1992 are truly sickening. I would like to show the Court a few of these images, again aired on the BBC documentary "The Death of Yugoslavia", as they provide a lucid picture of the form of the takeover of the municipality — the form which this takeover actually took.

[Video footage: Mendiluce 2]

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[17]Chapter 5, Section 6.

[18]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, case No. IT-00-39 and 40, Testimony of Izet Mehinagic given on 26 April 2005, p. 12609.

[19]ICTY, *Prosecutor* v. *Miroslav Deronjić*, case No IT-02-61-S, Sentencing Judgment, given on 30 March 2004, para. 68.

Visegrad

[Map in]

23. Visegrad, a municipality situated at the very east of Bosnia bordering Serbia and Montenegro, on the river Drina, was another strategically important area which needed to be under Serb control if the Drina River was to be eliminated as a border — strategic goal No. 3. Bosnian Muslims were made to disarm in early 1992 while the Serbs, with the support of the JNA, started to arm[20]. In Visegrad, the Serbian project against the Bosniaks and Bosnian Muslims began in early April 1992: on 14 April the Uzice Corps, a wholly Serb unit of the JNA, shelled the city of Visegrad and many of the Muslims, Bosnian Muslims, fled the town[21]. Despite assurances from the JNA that they would act as peacekeepers rather than aggressors, they announced to hundreds of Bosniaks and Bosnian Croats that they had gathered together in the football stadium that they had cleansed those areas where they considered there to be "reactionary forces" —this was on the left side of the Drina River. The civilians who lived on the right-hand side of the Drina were told they were not allowed to return home; many either fled or went into hiding as a result[22].

24. Just after the takeover, JNA Lt. Col. Jovanović made a statement about the cleansing of Visegrad and stated in his speech that the paramilitary group the "White Eagles" were under his command[23].

25. When the JNA "withdrew" from the municipality on 19 May 1992, which was the deadline set by the United Nations Security Council for a withdrawal of all forces of the Federal Republic of Yugoslavia from Bosnia, the paramilitary formations stayed behind in Visegrad[24]. The subject of what one of the paramilitary formations did in this municipality is the focus of one ICTY Appeals and Trial Chamber Judgment prosecuting one of this group's associates,

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[20]ICTY, *Prosecutor* v. *Mitar Vasiljević*, case No. IT-98-32, Judgment delivered on 29 November 2002, para. 41.

[21]*Ibid.*, para. 42.

[22]*Ibid.*, para. 44.

[23]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, testimony of B-1505 given on 2 September 2003, p. 25827.

[24]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, Decision on Third and Fourth Prosecution motions for Judicial Notice on Adjudicated Facts given on 24 March 2005, No. 630.

Mitar Vasiljević[25]. Two of the most horrific and notorious acts form the basis of the case against Vasiljević. On 7 June 1992, the White Eagles forcibly took seven Muslim men to the edge of the Drina River, lined them up and shot them in cold blood. Five of them were killed; and the two that did survive only did so by falling into the water and pretending to be dead[26]. Only one week later, the White Eagles carried out another atrocity, even more chilling. They directed a group of Muslim women, children and elderly men to a house, stripped them of their valuables and barricaded them into one room. They then set the house on fire. Those that managed to get out of the house had a light shone on them and were fired upon. Between 65 and 70 civilians died in this incident. The few survivors all sustained serious physical injuries[27].

26. Madam President, Members of the Court, it was Vinko Pandurević who led the Bosnian Serb forces in this area[28]. Vinko Pandurević was an officer in the VJ, the Yugoslav army, and was also an officer in the VRS, the Bosnian Serb army, but at all times remained under the administration of Belgrade: we have shown to the Court some of his personnel files in the documents submitted on 16 January 2006. One of those documents, namely No. 45 *(e)*, shows that Pandurević entered duty as a Lt. Colonel on the 10 November 1993 with the 30th Personnel Centre of the army of Yugoslavia. There is no mention of the Bosnian Serb army despite the fact that he was, at this time, Lt. Col in command of the Zvornik Brigade of the Drina Corps of the VRS. For Pandurević's actions during the conflict in relation particularly to Srebrenica he is charged by the ICTY with genocide.

27. The adjudicated facts from the Krajisnik trial chamber, at the ICTY, show some of the facts which have been adjudicated at one or more trials and have been confirmed on appeal or not appealed. Thus these facts have been repeatedly tested and upheld in the ICTY and are of the highest order of reliability. I would like to show to the Court some of the adjudicated facts submitted surrounding the takeover of Visegrad:

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[25]ICTY, *Prosecutor* v. *Mitar Vasiljević*, case No. IT-98-32, Judgment given on 29 November 2002; Appeals Chamber Judgment given on 25 February 2004.

[26]ICTY, *Prosecutor* v. *Mitar Vasiljević*, case No. IT-98-32, Judgment delivered on 29 November 2002, paras. 98 and 99.

[27]*Ibid.*, para. 117.

[28]ICTY, *Prosecutor* v. *Vinko Pandurević*, Consolidated Amended Indictment, 28 June 2005, IT-05-88-PT, para. 12.

— for the next few months, hundreds of non-Serbs, mostly Muslim, men, women and children and elderly people, were killed[29];

— Muslim homes were looted and often burnt down[30];

— the two mosques located in the town of Visegrad were destroyed[31];

— within a few weeks, the municipality of Visegrad was almost completely cleansed of its non-Serb citizens, and the municipality was eventually integrated into what is now the entity of Republika Srpska (RS)[32].

28. In 1991, the population of Visegrad was made up of 63.6 per cent Bosniaks, 31.8 per cent Serbs and 0.2 per cent Croats. After the war, the Bosniaks were 0.0 per cent, the Serbs 95.9 per cent and the Croats 0.6 per cent[33].

Bosanski Samac

29. Madam President, Members of the Court, on 17 April 1992, Bosanski Samac, a municipality lying on the river Sava which divides Bosnia and Croatia, was forcibly taken over by Serb military; these forces included Serbian paramilitaries and the JNA acting together[34]. It is unsurprising that the FRY was involved so directly in the takeover of this municipality, as it was of such tactical importance to the first strategic goal of the Bosnian Serbs.

30. Many of the facts surrounding this takeover have been discussed and ruled upon by the ICTY in a multi-defendant trial; it is the Simic case[35]. I would like to show the Court the main factual conclusions of that trial chamber now:

— "From the time of the takeover, the Serb forces participated in executing a plan to persecute the non-Serb civilians in the Municipality[36].

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[29]ICTY, *Prosecutor* v. *Momcilo Krajisnik*, Decision on Third and Fourth Prosecution motions for Judicial Notice on Adjudicated Facts given on 24 March 2005, No. 634.

[30]*Ibid.*, No. 645.

[31]*Ibid.*, No. 646.

[32]*Ibid.*, No. 650.

[33]*Op cit.*, Note 10.

[34]ICTY, *Prosecutor* v. *Blagoje Simić*, case No. IT-95-9-T, Judgment, 17 October 2003, paras. 442-456.

[35]ICTY, *Prosecutor* v. *Blagoje Simić*, case No. IT-95-9-T, Judgment, 17 October 2003.

[36]*Ibid.*, para. 984.

— Life was made increasingly difficult for the non-Serbs after the takeover: they had their property systematically looted and they were subject to arbitrary detention[37].

— Serbian paramilitaries, members of the local Bosnian Serb police and JNA soldiers participated in the arrests of Muslim civilians, and in the violence towards civilians when they are in detention[38].

— Non-Serbs from this municipality were detained in a JNA barracks in Brcko from April 1992 and then from 1 or 2 May 1992, in the JNA barracks in Bijelina. There was mistreatment in these barracks[39].

— Bosnian Muslim detainees were transferred across the border to Serbia and detained in Batajnica."[40]

31. On the night of 7 May 1992, there was a massacre in this municipality by members of the State Security of the Federal Republic of Yugoslavia of 16 men held in custody in Crkvina. The survivors of the massacre were made to clean up the bodies and blood and load the bodies onto a truck[41]. A meeting took place two days later in Belgrade at the Federal Secretary for People's Defence, where high-ranking Belgrade officials were informed of the massacre[42]. There was no condemnation of the actions of these men-agents of the State of the Federal Republic of Yugoslavia. What actually happened was that the torture, killings and sexual abuse was continued to be committed by the Special Forces of the Federal Republic of Yugoslavia throughout the month of May. In order to further provide information about this, I would like to cite the conclusions of the Todorovic trial chamber at the ICTY, which based itself also on the guilty plea put in by the accused[43]. They found that:

— "[there was a] forcible takeover by Serb forces of cities, towns and villages inhabited by non-Serb civilians; [there was] murder, sexual assaults and repeated beatings of non-Serb civilians detained in various detention camps in the region;

— [there was] unlawful detention and confinement of non-Serb civilians under inhumane conditions on political, racial or religious grounds;

— [there was] cruel and inhumane treatment of non-Serb civilians including beatings, torture, forced labour and confinement under inhumane conditions;

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[37] *Ibid.*, paras. 791, 842-843 and 846.

[38] *Ibid.*, paras. 654-659; 661-666.

[39] *Ibid.*, paras. 568; 700; 708; 714.

[40] *Ibid.*, paras. 442-456. 654-669;718; 770,984.

[41] *Ibid.*,para. 667.

[42] *Ibid.*, para. 363.

[43] ICTY, *Prosecutor* v. *Stevan Todorović*, case No. IT-95-9/1-S, Sentencing Judgment, 31 July 2001, para. 12.

— [there was] interrogation of non-Serb civilians who had been arrested and detained and they were forced to sign false and coerced statements;

— [there was] deportation, forced transfer and expulsion of non-Serb civilians from their homes and villages; and

— [there was] the issuance of orders and directives which violated the rights of non-Serb civilians to equal treatment under the law and which infringed their enjoyment of basic and fundamental rights".

32. Madam President, Members of the Court, in 1991, the population of Bosanski Samac was made up of 6.8 per cent Bosniaks, 41.4 per cent Serbs and 44.7 per cent Croats. After the war, the Bosniaks were 1.9 per cent, the Serbs 91.5 per cent and the Croats 1.3 per cent[44].

Bratunac

33. The municipality of Bratunac is located on the Drina River, directly on the border with Serbia and Montenegro. According to the "Variant A and B" document, issued by the Serbian Democratic Party, Bratunac was a Variant B municipality — thus it had a Serb minority. The President of the Crisis Staff and Commander of the Territorial Defence, Miroslav Deronjić, was indicted by the ICTY and pleaded guilty to crimes against humanity. His sentencing judgment summarizes and gives his detailed account of the events which took place in Bratunac[45].

34. As you have already heard, the role of Miroslav Deronjić was a crucial one in the takeover of the municipality of Bratunac. This municipality was a strategically important one which needed to be under Serb control in order to enable the link to a contiguous Serb State[46]. I would like now to quote the findings of the Deronjić trial chamber in their sentencing judgment:

> "As part of the process of ensuring that the Municipality of Bratunac would become ethnic Serb territory, 'volunteers' from the SFRY, with the co-operation of the SFRY authorities, crossed the Drina River on 14 or 15 April 1992 . . . Their purpose for entering Bosnia and Herzegovina was to assist the Bosnian Serbs in taking over power and forcibly removing Muslims from the area."[47]

35. The Court has heard how Deronjić took the lead in implementing the instructions which mandated the mobilization of all Serbian police forces, as well as JNA reserve forces and the Territorial Defence. This was not where their participation ended. According, again to the

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[44] *Op cit.*, Note 10.

[45] ICTY, *Prosecutor* v. *Deronjić*, case No IT-02-61-S, Sentencing Judgment given on 30 March 2004.

[46] ICTY, *Prosecutor* v. *Deronjić*, case No IT-02-61-S, Sentencing Judgment given on 30 March 2004, para. 49.

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

sentencing judgment of Deronjić, based on the factual basis of his plea agreement and his testimony, which was given twice, the takeover was carried out by Captain Reljić of the JNA, the Territorial Defence, and paramilitaries plus the Bosnian Serb police force. I would like to quote the trial chamber now: "The arrival of the JNA unit under the command of Captain Reljić and the arrival of 'volunteers' from Serbia was agreed upon by the top leadership of the Republika Srpska and the SFRY."[48]

36. Deronjić testified that their commander met with and issued an ultimatum to the leaders of the Srebrenica and Bratunac Muslim communities to surrender weapons and legal authority to the Bosnian Serbs. Otherwise they were to suffer from destruction at the hands of thousands of Serb soldiers who were amassed across the Drina River in Serbia[49]. Deronjić, in the factual basis for his guilty plea, concluded that paramilitary units were sent to these regions from Serbia and they engaged in the use of force against the Muslim population[50]. Based on what Deronjić had disclosed in his testimony, the trial chamber found that:

> "The final or ultimate objective of such conduct was to expel the non-Serb population from those municipalities. Due to the fact that the Accused had the opportunity to monitor these events in Eastern Bosnia and Podrinje, which were municipalities close to and with a similar population makeup as Bratunac, he was able to conclude that the operative part — that is the actual implementation of the use of force — was directed from Belgrade."[51]

37. Madam President, Members of the Court, the JNA did not only arm the local Serbs; they actively took part in the actual takeover. Between 21 and 25 April 1992, two JNA formations arrived in the municipality, one was under the command of Captain Relić. Relić declared a military government in Bratunac[52]. Another JNA formation from the Novi Sad Corps from Serbia arrived with armoured personnel carriers (APCs), military trucks and police cars. Captain Relić had decided that the Muslim villages in the municipality and in particular the Muslim village of Glogova should be disarmed and the JNA troops participated in this process. As I have said before, the arrival of the JNA unit under the command of Captain Reljić and the arrival of the "volunteers"

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[48]ICTY, *Prosecutor* v. *Miroslav Deronjić*, Sentencing Judgment, case No IT-02-61-S given on 30 March 2004, para. 81.

[49]*Ibid.*, para. 70.

[50]ICTY, *Prosecutor* v. *Miroslav Deronjić*, Factual basis for guilty plea, 30 September 2003.

[51]ICTY, *Prosecutor* v. *Deronjić*, Sentencing Judgment, case No IT-02-61-S given on 30 March 2004, para. 68.

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

from Serbia was agreed upon by the top leadership of the Republika Srpska and the SFRY. These "volunteers" are more paramilitary formations including units of Arkan's Tigers, the White Eagles and Seselj's men[53].

38. After the Muslims acquiesced to the demands for disarmament, the Crisis Staff assumed political power in the municipality and the disarmament and ethnic cleansing of the Muslim population proceeded. This included the intimidation, looting and random killings of Bosnian Muslims by "volunteers" from Serbia. It also included the cleansing of the Muslim village of Glogova in a joint operation between the JNA, the Bratunac Territorial Defence, the Bratunac police, and with paramilitary "volunteers" from Serbia[54]. This was a truly horrifying event, and I would like to quote directly the Deronjić trial chamber judgment:

> "On 30 September 2003, Miroslav Deronjic pleaded guilty to the crime of Persecutions of non-Serb civilians in the village of Glogova, committed through the following underlying acts: ordering to attack the village of Glogova on 9 May 1992, burning it down, and forcibly displacing of Bosnian Muslim residents from the village. As a result, 64 Muslim civilians from the village were killed, Bosnian Muslim homes, private property, and the mosque were destroyed, and a substantial part of Glogova was razed to the ground."[55]

39. Madam President, Members of the Court, in 1991, the population of Bratunac was made up of 64.1 per cent Bosniaks, 34.1 per cent Serbs and 0.1 per cent Croats**.** After the war, the Bosniaks were 0.1 per cent, the Serbs 97.0 per cent and the Croats 0.4 per cent[56].

Vlasenica

40. The municipality of Vlasenica is located 5 km from the Drina River and the border with Serbia and Montenegro. The municipality was taken over by forces of the JNA, paramilitaries and armed Serb locals on the 21 April 1992[57]. Five months before this had taken place, a member of the SDS board in the municipality, Vajagic Zvonko, had mobilized an army of Bosnian Serb volunteers to fight. In an intercepted telephone conversation with Radovan Karadzić, he stated that

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[53] *Ibid.*, para. 74.

[54] *Ibid.*, para. 73.

[55] *Ibid.*, para. 44.

[56] *Op. cit.*, Note 10.

[57] ICTY, *Prosecutor* v. *Dragan Nikolić*, case No. IT-94-2-A, Judgment, 4 February 2005, para. 52.

these volunteers were under the command of the JNA, and Karadzić made some very telling remarks in response:

> "Those up there have helped the Army, the Party has helped the Army to form volunteer detachment, there is six hundred people . . . they are under the JNA command, they are trained, in JNA uniforms etc . . . Well, volunteer, but we are reinforcing war units, you know."[58]

41. On 21 April 1992 a JNA unit, with the assistance of members of the Serbian Volunteer Guard, took over the town[59].

42. Many Muslims and other non-Serbs fled from the Vlasenica area, and beginning in May 1992 and continuing until September 1992, those who had remained were either deported or arrested and placed into the notorious Susica camp[60]. This detention facility was documented in our Reply and has been discussed at length by Ms Karagiannakis.

43. Madam President, Members of the Court, in 1991, the population of Vlasenica was made up of 55.2 per cent Bosniaks, 42.3 per cent Serbs and 0.1 per cent Croats**.** After the war, the Bosniaks were 0.2 per cent, the Serbs 96.8 per cent and the Croats 0.4 per cent[61].

Brcko

44. Brcko municipality is located in the north-eastern part of Bosnia and Herzegovina, to the west of Bijeljina and on the south bank of the Sava River. In 1992 the SDS issued an ultimatum in the Parliament of the municipality of Brcko that the municipality should be partitioned into three separate cantons for the different groups[62]. Shortly after this ultimatum was issued, hostilities broke out on 30 April 1992, when the bridges on the Sava River were blown up by the JNA[63]. This resulted in many casualties because approximately 150 people were crossing that bridge at the time this action took place. Even before the hostilities had begun, the JNA had been building up its

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[58]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, Exibit P613, tab 136a, Intercept on 11.12.1991.

[59]ICTY, *Prosecutor* v. *Dragan Nikolić*, case No. IT-94-2, trial chamber Judgment given on 18 December 2003, para. 52.

[60]*Ibid.*, para. 54.

[61]*Op. cit.*, Note 10.

[62]ICTY, *Prosecutor* v. *Dusko Tadić*, case No. IT-94-1-T, Ex. 536, tab 1.

[63]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54-T, Judgment on Motion for Acquittal on 16 June 2004, para. 153.

personnel in the area and started operating checkpoints[64]. The JNA had also transported paramilitaries into the area from Serbia including Captain Dragan's Red Berets[65]. On 1 May 1992 the Serb forces commenced a week of shelling of Brcko town. All of the combined Serb forces participated in attacks on the area and JNA planes bombed the Bosnian Muslim and Bosnian Croat areas of the town on the 8 and 9 May 1992[66].

45. Goran Jelisić, who liked to call himself the "Serbian Adolf" claimed that he had gone to Brcko in order to kill Muslims[67]. In fact, when Mr. Jelisić appeared in his initial hearing before the ICTY, where he was charged with genocide, he even presented himself to the court as "Adolf"[68]! He pleaded guilty to crimes against humanity and his sentencing judgment contains many chilling admissions of the dreadful events that took place in the municipality[69]. For instance, five of the 13 murders to which Jelisić pleaded guilty were perpetrated in an always identical manner. I would like to quote from the trial chamber judgment:

> "Having undergone an interrogation at the Brcko police station, the victims were placed in the hands of the accused who took them out to an alley near the police station. The accused executed them, generally with two bullets to the back of the neck fired . . . A lorry then came to gather up the bodies."[70]

46. Many non-Serbs were rounded up and detained in a number of temporary collection centres until they could be taken to the newly created camp at Luka. This was one of the notorious places of detention run by the Serbs and was examined in the pleadings yesterday. Testimony given in the Milosević trial chamber indicates that the Serbs were selecting those to be killed from lists, which included many of the prominent members of the local community and this testimony is corroborated by the findings of Jelisić trial chamber judgment[71].

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[64]ICTY, *Prosecutor* v. *Dusko Tadić*, case No. IT-94-1-T, Ex. 536, tab 1.

[65]*Ibid.*

[66]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Judgment of the trial chamber given on 14 December 1999, para. 102.

[67]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Judgment of the trial chamber given on 14 December 1999, para. 102.

[68]*Ibid.*

[69]ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Judgment of the trial chamber given on 14 December 1999.

[70]*Ibid.*, para. 37.

[71]ICTY, *Prosecutor* v. *Slobodan Milosević*, case No. IT-02-54, Testimony of B-1405 given on 31 March 2003, and see ICTY, *Prosecutor* v. *Goran Jelisić*, case No. IT-95-10, Judgment of the trial chamber given on 14 December 1999, para. 92.

47. Madam President, Members of the Court, in 1991, the population of Brcko was made up of 44.1 per cent Bosniaks, 20.7 per cent Serbs and 25.4 per cent Croats**.** After the war, the Bosniaks were 31.4 per cent, the Serbs 54.1 per cent and the Croats 7.9 per cent.

Conclusions

48. Madam President, Members of the Court. I have, over the course of pleadings, shown to you what the pattern of ethnic cleansing was in the Drina municipalities of Bosnia and Herzegovina. I have shown you how two of the strategic goals of the Serb people were achieved and that this could not have been done without the involvement of Belgrade in the form of manpower, equipment and logistics. I have looked at the pattern of takeovers in eight strategically important municipalities.

[Map: eastern Bosnian municipalities with dates of takeovers]

49. There was a pattern to the ethnic cleansing of the municipalities, which I have discussed in my pleadings. First of all, the Serbs in the municipalities were armed by the JNA and the Territorial Defence; then, the combined Serb forces made of up of the JNA, paramilitaries from Belgrade and local Bosnian Serb forces, cleansed the towns and villages of Bosniaks and Bosnian Croats. The map, which is on the screen behind me, shows the municipalities and the dates upon which they were taken over.

50. From what I have shown you in this part of the pleadings, you may have in your minds now a clear picture of what ethnic cleansing is and how it happened in municipality after municipality, time and time again. These actions were co-ordinated. These actions were planned. These actions were brutal and targeted. These actions were part of a plan, a plan to eradicate and purify the strategically important municipalities of the Bosniaks and Bosnian Croats to make a State for the Serbs.

51. I would like now to conclude my pleadings and ask the Court to give the floor to Professor Franck.

The PRESIDENT: Thank you, Ms Dauban. I give the floor to Professor Franck.

Mr. FRANCK: Thank you, Madam President, may it please the Court:

THE LAW OF GENOCIDE AS DEVELOPED BY THE CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA

Decisions of the criminal tribunals

1. I, this morning, will be discussing the law of genocide, as it has been developed by the Criminal Tribunals for the former Yugoslavia and for Rwanda. Since this case began, so many years ago, the files of evidence of the events have burgeoned. In adducing that evidence, our task has been aided by the intrepid and inexorable work of the fact finding done by the International Criminal Tribunal for the former Yugoslavia, as you have just heard from my colleague, Ms Dauban.

2. That Tribunal has found many indicted persons guilty of various offences, and of course, has acquitted others. It has dealt with crimes committed in the entire period since 1991. It has heard cases implicating persons from Serbia, Bosnia and Croatia, persons of various religions and ethnic origins. Fact finding is the Tribunal's speciality, but its decisions have covered important concepts, from genocide to crimes against humanity, war crimes and joint criminal enterprises, and conspiracy to commit such crimes. Basically, however, it has been applying the prohibitions of the Genocide Convention and the applicable Geneva Conventions. It has applied this body of law to indict individuals accused of these crimes, and to acquit or indict them of acts they are accused of perpetrating individually, or in concert with other individuals.

3. The ICTY, then, has assembled pieces of a puzzle. Occasionally, it has found that a defendant has actually committed crimes of such scope that the intent to destroy in whole, or in part, a community, could be attributed to his crimes and he has been then convicted of genocide, because that factor was present. More often, when defendants were charged with both genocide and crimes against humanity, the Yugoslav Tribunal has convicted them of the latter, for which a demonstration of broader destructive intent was not a necessary component. In the Brdanin case, the trial chamber explained why: it said that it was satisfied that there was a strategic plan "to link Serb-populated areas in Bosnia and Herzegovina together, to gain control over these areas and create a separate Bosnian Serb State, from which most non-Serbs would be permanently removed,

and that force and fear were used to implement it [that is, the plan] . . .". But, said the Tribunal, the evidence in this one case, alone, did not allow the conclusion that "there was an intention to do so by destroying the Bosnian Muslim and Bosnian Croat groups in the region". It then added this very important explanation of why it had chosen to convict of crimes other than genocide. "The trial chamber stresses," it said, "that it is only on the basis of the evidence in this concrete case, temporally and geographically limited, that it reaches the conclusion that genocidal intent is not the only reasonable inference that may be drawn from the Strategic Plan."[72]

4. Our case, Members of the Court, is not temporally or geographically limited. You have, and will continue to be presented with, a very large canvass and with many parts of that puzzle. Individual pieces may simply — one shudders at the word "simply" — demonstrate murder, extermination, rape, terrorization of people to make them flee. But, put together, you will see clearly that genocidal intent is, indeed, the only reasonable inference that may be drawn from the strategic plan. And the author of that plan is the Respondent.

5. On Tuesday, I discussed the various sources of evidence on which Bosnia and Herzegovina rely in presenting to you our claim to have been the victims of a terrible genocide, one deliberately committed by the Respondent. I discussed our reliance on judicial notice and inferences, visual evidence, expert testimony, the reports and determinations of various United Nations organs and agencies, and the decisions of fact and of law made by the International Tribunal for Rwanda and, most importantly, the ICTY. In my present pleadings, I will try to demonstrate the salience of the findings in matters of law and of fact made by the Yugoslav Tribunal, but primarily in matters of law, and of course, also the findings of law made by the Rwanda Tribunal.

6. My co-counsel, Magda Karagiannakis, also on Tuesday, showed why these findings of tribunals, constituted under the binding authority of the Security Council and adhering to the highest international standards of justice and probity, are entitled to the most serious consideration by, and can be very helpful to, the deliberations of this Court. In this part of my pleadings, I intend to take you through that jurisprudence of the two *ad hoc* Criminal Tribunals in so far as these have

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[72] *Prosecutor* v. *Radoslav Brdanin*, IT-99-36-T, 1 September 2004, para. 981.

directly construed the law of genocide. My colleagues have already begun, and I will continue to present you with the essential fact finding which has been done in the ICTY, facts many of which arise out of cases in which crimes against humanity were proven but which are, nevertheless, very relevant to the factual issues in contention in this case. For the present, however, let us focus on the Tribunals' development of the law of genocide.

7. The jurisprudence of the Yugoslav and Rwandan Tribunals is particularly helpful in elucidating the terms of the Genocide Convention. As I indicated in my pleadings yesterday, the Convention is a salient landmark on humanity's long and agonizing ascent to civilization. It defines genocide as enumerated acts: killing, causing serious bodily or mental harm, or deliberately inflicting conditions calculated to bring about a group's destruction. It classifies these acts as genocide only when there is the requisite intent, when these acts are "committed to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[73]. When this case began these many years ago, these were words on a page. In the ensuing decade, they have become the subject of extensive legal practice. The jurisprudence of the two Tribunals, when it has been focused on genocide, has addressed four specific aspects of genocide's definition in ways that are immediately relevant to the present case. Each bears on the essential matter of guilty intent:

(1) what evidence may be used to determine "intent to destroy"?

(2) what does "destroy" mean?

(3) what does "in whole or in part" mean? and

(4) what does "as such" mean?

The "intent to destroy"

8. Let us turn first then to "intent to destroy". The Plavsić case, determined by the Yugoslav Tribunal in 2003, is especially instructive as it is based not on contested evidence but, rather, on the voluntary admissions made by a person in a position to know, who had served in the highest echelons of the Serb Bosnian authority. This is what Mrs. Plavsić told the Tribunal in her statement of agreed facts[74]. She said to the judges that

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[73]Genocide Convention, Art. II.

[74]*Prosecutor* v. *Plavsić*, Factual Basis for a Plea of Guilty, case No. IT-00-39 and 40, 30 September 2002.

> "the Bosnian Serb leadership knew that the Serb forces fighting on the side of the Bosnian Serbs were far more powerful militarily than those of the non-Serbs. The Bosnian Serb forces, collaborating with the JNA . . . 'to implement the objective of ethnic separation by force' committed . . . persecutory acts [which] included: killings during attacks on towns and villages; cruel and inhumane treatment during and after the attacks; forced transfer and deportation; unlawful detention and killing, forced labour and use of human shields; cruel and inhumane treatment and inhumane conditions in detention facilities; destruction of cultural and sacred objects; and plunder and wanton destructions."

These, Madam President, are not conjectures, these are not simply our pleadings, these are not even simply opinions of the judges of the ICTY. These are the admissions of one of the most senior participants in the conflict, a person well positioned to know what happened, and one of the few perpetrators to have shown remorse. Moreover, the acts Mrs. Plavsić described, she said, were committed by forces of the Bosnian Serb Republic whose Co-President was "collaborating with the JNA and the MUP of Serbia", the Ministry of the Interior of Serbia — the forces, Madam President, of Belgrade. And the acts, she admitted — the killings and inhumane treatment — were committed precisely to bring about ethnic cleansing.

9. So, we know from Mrs. Plavsić's agreed facts that these events occurred, that they were deliberately organized to clear large swathes of Bosnia and Herzegovina to make room for an ethnically-cleansed Republika Srpska, and that this collaborative campaign of murder and mayhem was facilitated by the decisive intervention of forces from neighbouring Serbia. But was it genocide? As we know, in order for these acts to add up to genocide, they must have been committed with intent to destroy, in whole or in part, a group. First, therefore, we must look for the elusive element of intent.

10. The ICTY, however, has been in no doubt that the requisite genocidal intent may readily be inferred, first of all, from statements made by the key leaders such as the one I have just quoted[75]. Another example, Radovan Karadzić, the future President of Republika Srpska from 1992 until 1995, in an intercepted telephone communication of 12 October 1991, said: "They [the Muslims] will disappear, those people will disappear from the face of the Earth . . . They do not understand that there would be bloodshed and that the Muslim people would be exterminated."[76]

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[75]See ICTY, *Prosecutor* v. *Milosević*, Decision on Motion for Judgment of Acquittal, case No. IT-02-54-T, 16 June 2004, paras. 238-245.

[76]http://www.domovina.net/tribunal/page_006.pbp. Intercepted communication with Goiko Djogo, dated 12 October 1991; ICTY, *Prosecutor* v. *Milosević*, Decision on Motion for Judgment of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 241.

11. Three days later, on 15 October, 1991, Radovan Karadzić publicly addressed his genocidal intent to the legislature of Bosnia and Herzegovina and to the world when he said:

> "This [by which he meant independence] is the road that you want Bosnia and Herzegovina to take, the same highway hell and suffering that Slovenia and Croatia went through. Don't think that you won't take Bosnia and Herzegovina to hell and Muslim people to extinction because the Muslim people will not be able to defend itself if it comes to war here."[77]

12. My colleagues, Professors Condorelli and Pellet, will later demonstrate that this genocidal intent was inspired by, and shared with Belgrade, which actively participated and supported these aspirations. For the present, it is merely my task to demonstrate that there has been ample opportunity for the ICTY to hear, evaluate and verify evidence which demonstrates that the killings, the rapes, the torture, the destruction of schools and cultural properties — acts committed with careful targeting against the non-Serb population of Bosnia — were not, as Respondent would have us believe, merely the unfortunate happenstance of war, or of random criminality but, rather, that they were endemic, were part of an intended policy that involved terror and, when thought makes it necessary, extermination.

13. The judges at the Yugoslav Tribunal have verified the dimension of these crimes. In 1992, alone, in one area of Bosnia that the Serbs had decided to "clear", the Tribunal, again in the Plavsić case, confirmed "mass killings" of at least 50,000 persons, 850 villages that "were completely devastated" and 408 detention facilities in which "people were detained by force and exposed to serious physical and mental abuse"[78].

14. Such gross, patterned and systematic brutality must lend itself to conclusions about motive, and both the Yugoslav and Rwanda Tribunals have reached that conclusion. In the Yugoslav Tribunal's 2 August 2001 decision in the Krstić case, the judges held that they could infer by irrefutable logical inference the requisite *mens rea* to commit genocide — on the part of the defendants. They concluded that the genocidal intent was itself manifest in the very acts committed. What acts? A systematic pattern of targeted murders, for example. Thus, they said, "[a]ll of the executions [that is at Srebrenica] systematically targeted Bosnian Muslim men of

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[77]ICTY, *Prosecutor* v. *Milosević, id.*, para. 241.

[78]Plavsić, *id.*, paras. 41 and 45.

military age, regardless of whether they were civilians or soldiers"[79] — that is still from the Krstić case. From this they — the judges — inferred that the intent was to destroy all or part of that community, that "a decision was taken at some point to kill all the captured Bosnian Muslim men indiscriminately . . .". The Tribunal inferred "the strength of [that] desire" from the fact that "Bosnian Serb forces systematically stopped the buses transporting the women, children and elderly . . . and checked that no men were hiding on board . . ." and that, then, "[t]he men . . . were lined up and shot in rounds"[80]. "In such cases" the Tribunal said, "the intent to destroy, in whole or in part, as such, must be discernible in the criminal act itself" because, the Tribunal had concluded, "the objective of the criminal enterprise" is "discernible in the act itself"[81].

15. In *Prosecutor* v. *Blagojević*[82], the ICTY trial chamber, applying earlier precedents in its jurisprudence[83], held that, while "the specific intent requires that the perpetrator seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such", this intent need not be evidenced through a master plan; "[t]he existence of a plan or policy is not a legal requirement of the crime"[84].

16. We have demonstrated, nevertheless, that there was a plan. But, as the Yugoslav Tribunal has said so clearly, a plan can — and should — also be *inferred* from the methodical and patterned way the very same kind of criminal actions were replicated, over and over, in widely scattered parts of Bosnia. From that pattern it can certainly be inferred, in the words of the International Criminal Tribunal for Rwanda's Akayesu judgment, that the "perpetration of the act charged therefore extends beyond its actual commission . . . [to advance] the realization of an ulterior motive, which is to destroy, in whole or in part, the group of which the individual is just one element"[85]. This is the law of evidence to which I alluded on Tuesday. It makes the point that, when a person of one group, over and over again, kills and mutilates persons of another group, it

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[79]ICTY, *Prosecutor* v. *Radislav Krstić*, case No. IT-98-33-T, Judgment, 2 August 2001, para. 549.

[80]*Id.*, para. 547.

[81]*Id.*, para. 549.

[82]17 January 2005.

[83]See, also, *Jelisić*, Appeal Judgment, paras. 46-48.

[84]*Blagojević*, para. 656.

[85]ICTR, *Prosecutor* v. *Akayesu*, case No. ICTR 96-4-T, Judgment 2 September 1998, para. 522.

must be inferred, absent convincing evidence to the contrary, that he has a lethal objective directed not only against random individuals but also against the whole group to which all the victims belong. In some national jurisdictions, we have the concept of "hate crimes". In international law, we have the concept of genocide. Both require a showing of *animus* but, in both national and international law, *animus* can be derived from a showing of a pattern of victim selection.

17. So far we have spoken mainly of murder, but murder is not the only act from which requisite intent may be deduced by inference. Another act that permits the inference of genocidal intent is "ethnic cleansing" — which was sometimes brought about by terrorizing a population into flight through selective murder, but also by such other acts as systematic rapes, beatings, and the creation of impossible conditions of life. These acts, committed to induce flight in order to clear out the non-Serb populations, call for an inference of the intent to destroy all, or part, of a population. In Blagojević, the ICTY inferred, from the forcible transfer of that city's Muslim population, "a manifestation of the specific intent", a manifestation of the specific intent to destroy the Muslim community of Srebrenica[86]. No evidence of a master plan or blueprint could speak more clearly than the actions by which a policy of ethnic cleansing was pursued in Bosnia, actions from which it is impossible not to infer deliberate genocidal intent. The Blagojević trial chamber said it "has no doubt that all these acts constituted a single operation" and that the perpetrators "clearly intended through these acts to physically destroy this group"[87].

18. So much for victim selection, but what about scale, what about patterns of victimization? Whether the act is murder, torture, ethnic cleansing or rape, its scale is also key to inferring intentionality. In the Krstić case, the Appeals Chamber of the ICTY said that "given the scope of the killings the trial chamber could legitimately draw the inference that [the extermination of the men of military age at Srebrenica] was motivated by genocidal intent"[88] — could infer that from the scope of the activity From the scope — the enormity — of the acts can be inferred the

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

[87] *Id.*, para. 677.

[88] ICTY, *Prosecutor* v. *Krstić*, para. 27, case No. IT-98-33-A, Appeal Judgment, 19 April 2004.

genocidal intent of the actors. In Akayesu, the Rwanda Tribunal held that the "scale of the atrocities committed . . . can enable the Chamber to infer the genocidal intent of a particular act"[89].

19. In the present case, the Respondents deny this. In their 1999 Rejoinder, they argue that "the pattern of acts, mass scale, gravity, the number of victims are not facts sufficient to draw the conclusion of the existence of genocidal intent"[90]. By this the Respondents apparently did not mean to challenge the established facts: that killings, murder, rapes and pillaging occurred on a massive scale and followed a common pattern. Rather, they seek to deny that mass scale and common pattern of killings, rapes and torture can *ever* form the basis of a judicial inference: that those who committed these acts acted out of genocidal intent. The ICTY and the ICTR have clearly rejected this argument and held that, in Bosnia, as in Rwanda, the pattern of proven acts, their massive scale and extreme gravity, the number of victims, all this does, indeed, make inevitable the inference of the intent to destroy a *people*, not just *persons*. We urge this Court to endorse this sound inferential reasoning.

20. Of course, the Criminal Tribunals have only been asked to look at the acts of solitary indicted individuals. You, however, are being asked to see all the acts committed by many; and from that panoramic optic will emerge Bosnia's wider patterns which, it will be clear, cannot be dismissed as isolated atrocities, committed against random persons by a few wanton individuals but, rather, as a concerted policy of genocide. That inference is compelled, not only by the number of wrongful acts but, also, by the repetitive patterns of their commission, which, when seen as such, can only be construed as genocide. We have introduced, and will introduce, more evidence of very great numbers of acts which, taken in isolation, are evidence of horrendous cruelty but which, taken in unison, as they must be, create an irrefutable presumption that they were planned and intended. Taken together, this pattern of planned and intended acts converts the repetitive acts of murder, rape, torture, and ethnic cleansing into what those acts obviously were meant to accomplish — the destruction of a significant part of Bosnia's Muslim population.

Madam President, may I request you to adjourn us for the tea break?

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[89]ICTR, *Prosecutor* v. *Akayesu*, case No. ICTR 96-4-T, Judgment 2 September 1998, para. 523.

[90]*Id.*, para. 3.3.3.1.

The PRESIDENT: The Court will rise for ten minutes.

The Court adjourned from 11.25 to 11.35 a.m.

The PRESIDENT: Please be seated.

Mr. FRANCK: Madam President, Members of the Court. We have been discussing the question of intent as analysed by the ICTY and the ICTR. Permit me now to turn to the term "to destroy"

"To destroy"

21. A population's destruction can be accomplished in various ways. Genocide occurs, of course, when a population is killed. But that is not the only way to destroy a people. Here, again, the words of the Genocide Convention have been interpreted in the jurisprudence of the two Tribunals that have been charged with giving them effect in the context of contemporary events.

22. The Convention defines genocide as an act "to destroy" a populace. Killing is a means to achieve such destruction. But is that threshold established by the Convention passed only when the destruction is carried out by killing? The Tribunals have answered that question with a firm "no". In Prosecutor *v.* Blagojević, the trial chamber found that, although purely "cultural genocide" as such is not within the definition of genocide adopted by the Convention, the intent "to destroy the group as a separate and distinct entity" can also be manifest in other ways short of murder, including "the forcible transfer of a population"[91] which is likely to lead, the court continued, "to the physical or biological destruction of the group" qua group[92], as — and I quote the court again —

> "when the transfer is conducted in such a way that the group can no longer reconstitute itself — particularly when it involves the separation of its members. Here, again, ethnic cleansing, carried out in this manner and for this purpose, equals genocide."

[91] *Id.*, para. 665.

[92] *Id.*, para. 666.

In such cases, the trial chamber found "the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was"[93].

23. "Ethnic cleansing" is the ironic and terrible name by which this forcible transfer has become known, and it is one of the several ways a genocide has been held, as a matter of law, to have been committed. It is one of the ways in which the existence of a group as a group can be made impossible. At her sentencing hearing, Republika Srpska Co-President Mrs. Biljana Plavsić said she had "come to the belief and accept the fact that many thousands of innocent people were victims of an organized, systematic effort to remove Muslims and Croats from the territory claimed by Serbs"[94]. For this, she accepted responsibility "fully and unconditionally"[95]. She also expressed remorse — which we have yet to hear from the Respondent. One can but pray that this Court will change the hearts and minds of those not yet able to seek reconciliation with their victims and with their own humanity.

24. In the context of Bosnia in the first half of the 1990s, ethnic cleansing was more than a violation of humanitarian law: it was genocide. Clearly, the concept of destruction of a group is not one inherently limited to the killing of its members, but also includes any other acts intended to destroy the group's viability as a distinct entity by undermining the group's ability to survive as such. The ICTY has adopted a notion of genocide that "includes the intentional destruction of the *social* existence of the group . . ."[96]. That is the Blagojević case. In the specifics of the case before it, the trial chamber found that the perpetrator had "the intent . . . ultimately to bring about the destruction of the Bosnian Muslims of Srebrenica"[97] not only by the murder of its men but also by the "forcible transfer of the women, children and elderly" which "is a manifestation of the specific intent to rid the Srebrenica enclave of its Bosnian Muslim population"[98]. It held that the perpetrators must be assumed to have known that "the combination of the killings of the men with

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[93]*Ibid.*

[94]*Plavsić, id.*, para. 72.

[95]*Id.*, para. 71.

[96]ICTY, *Prosecutor* v. *Blagojević*, case No. IT-02-60-T, Judgment of 17 January, 2005, para. 664.

[97]*Id.*, para. 674.

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

the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population" and that they "clearly intended through these acts to physically destroy this group"[99].

25. The Blagojević ICTY trial chamber also inferred genocidal intent from the evidence that, with the majority of Srebrenica's Muslim men killed or missing, their spouses would be unable to remarry in the social circumstances of their community and start new families[100]. The killing of so high a percentage of the men, therefore, had severe procreative implications. The ICTY judges concluded that the perpetrators were aware of these consequences when they embarked on their genocidal spree[101].

26. Although this intent is the only possible inference from the acts committed, it scarcely needs to be inferred when it is directly demonstrable by the words of the perpetrators. The ICTY has accepted as proven that, in

> "March, 1995, political and military leaders in the Republika Srpska issued orders specifically calling for, *inter alia*, the creation of 'an unbearable situation of total insecurity, with no hope of further survival or life' for the [Muslim] inhabitants of Srebrenica."[102]

What could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?

27. These cases are cited, here, because it would appear to be relevant to the definition of the law pertaining to genocide as enunciated by the *ad hoc* Criminal Tribunals for the former Yugoslavia and for Rwanda. In the Yugoslav Tribunal, the judges have clearly indicated that it is appropriate to draw inferences from demonstrated facts. The evidence of targeted killings, but also the evidence of patterns of other acts intended to force a population to abandon its homes, mosques, schools, and intended to destroy its social and cultural cohesion, to scatter it, battered and beaten, into alien lands, also establishes an intent to destroy that population as a population and to transform them into the rootless, the demoralized and the internally and externally displaced.

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[99] *Id.*, para. 677.

[100] *Id.*, para. 93 and Notes 195, 196.

[101] *Id.*, para. 595.

[102] *Prosecutor* v. *Dragan Obrenović*, IT-02-60/2-S, Judgment of 10 December 2003, para. 27. The quote is based on Radovan Karadzić's instructions in "Operation Directive 07" issued by the Supreme Command of the Armed Forces of the Republika Srpska, on 8 March 1995, and quoted as proven by the ICTY in several cases, including *Obrenović*, but also *Prosecutor* v. *Momir Nikolić*, IT-02-60/1-S, 2 December 2003, para. 29.

28. In the cited cases, the judges of the Yugoslav Tribunal have attributed these acts to the Bosnian Serb forces and authorities who were standing accused before them, or were actually before them. But, surely, not to them alone, for the authorities in Belgrade, we have shown and will show, were also, themselves, perpetrators and willing partners in, and facilitators of, this genocide. That will be demonstrated to you by the pleadings, beginning tomorrow, which pertain to attribution. For the present, I wish merely to emphasize the unanimity with which the jurisprudence on genocide has determined that acts of extreme violence and intimidation, acts intended to destroy the coherence of a community and to achieve its displacement and dispersal, *that such acts also amount to genocide*, just as surely as does killing.

29. In this respect it is worth recalling the Blagojević judgment in somewhat greater length:

> "The trial chamber finds in this respect that the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct way of destroying a group, other acts or series of acts can also lead to the destruction of the group. A group is comprised of individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The trial chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself — particularly when it involves the separation of its members. In such cases the trial chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was."[103]

The judges added that they were not making an argument for a concept of cultural genocide, but, rather, clarifying the meaning of genocidal destruction itself.

30. The two *ad hoc* Criminal Tribunals have also made it clear that genocidal intent need not be an intent to effect the universal destruction of an entire race, ethnicity or religious group: an object usually beyond the means of even the most heinous perpetrators. The intent may be limited to attacking the key socio-cultural elements that hold the group together. Such a more limited enterprise can still be genocidal. As the 1992 report of the United Nations Commission of Experts, established under Security Council resolution 780 to examine evidence of genocide, has noted: destruction of the *leadership* of the targeted group may be an important part of the overall scheme.

> "If the group suffers extermination of its leadership and in the wake of that loss, a large number of its members are killed or subjected to other heinous acts, for example deportation, the cluster of violations ought to be considered in its entirety in

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[103] *Id.*, para. 666.

> order to interpret the provisions of the Convention in a spirit consistent with its purpose."[104]

The concept of a "cluster of violations" is one that has been adopted by the ICTY, for example in the Krstić case[105], and it surely merits the serious consideration of this tribunal.

31. Similarly, the intent to destroy a group in whole or in part need not be universal in the geographic sense. As the Krstić tribunal has pointed out, "the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterized as genocide"[106]. "Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part they wish to destroy as a distinct entity which must be eliminated as such."[107] The Jelisi judgment of the ICTY, too, has held that genocide could target a limited geographic zone[108]. In the Rwanda Tribunal, the judges of the trial chamber in the Ruzindana case[109] concurred with the International Law Commission, which had stated that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe". We have demonstrated, and will further demonstrate, that the genocide committed in Bosnia was a concerted effort, through various means, to eliminate, as such, the Bosnian Muslim community in those parts of Bosnia and Herzegovina which has been designated for exclusive Serb control.

32. The same intent to destroy a group may become evident in a pattern of rapes.

33. In our pleadings later today, my colleague Professor Stern, who will follow me, will have occasion to demonstrate the existence of such a prevalent pattern of rape. She will prove that this has been shown, in the case of Bosnia, to be a matter of fact. In law, she will further show, this pattern, like the patterns of killings and forcible population displacement, has been construed by the Criminal Tribunals as being means intended to effect the destruction of the group.

34. We also demonstrate clearly discernible patterns in the destruction of Muslim places of worship and learning. Individually, the burning of a mosque or a library is an act of pillage. In

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[104]United Nations doc. S/1994/674, para. 94.

[105]*Id.*, para. 587.

[106]*Id.*, para. 589.

[107]*Id.*, para. 590.

[108]ICTY, *Prosecutor* v. *Jelisi*, para. 83.

[109]ICTR, *Prosecutor* v. *Kayishema and Ruzindana*, TC, para. 95.

law, however, the concerted destruction of all, or almost all, of the mosques in the territory of a population may be evidence of the intent to commit genocide. In the Plavsić decision, the Tribunal speaks of 850 villages that became "no longer inhabitable" as a result of their "looting, ransacking and destruction" by Serb forces, and "the destruction of over 100 mosques . . . and seven Catholic churches"[110]. When these prevalent acts are taken together, and when they are set next to other patterns of killings, torture, rape and displacement, they permit, indeed, they compel the drawing of an inference that these acts constitute evidence of intent to destroy the history, the culture and the intellectual life that holds the group together. In the Krstić case, the Tribunal agreed that mere acts against the culture of a group cannot form the basis of a charge of genocide by itself. But, the trial chamber said:

> "Where there is physical and biological destruction [of a group] there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group."

In that instance, the Tribunal took "into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group"[111].

35. Genocide, in Article II of the Convention, is also defined as the causing of serious bodily and mental harm to members of the group.

36. Here, again, the Tribunals have helped develop the jurisprudence. Both the ICTR[112] and the ICTY[113] have created an impressive body of precedent which has construed "bodily or mental harm" to include "acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death and deportations", as well as other acts of cruelty that cause "a traumatic experience from which one will not quickly — if ever — recover"[114]. That is the Blagojević case. In the decision of the Yugoslav Tribunal on review of the indictment against Karadzić and Mladić, it was stated by the Tribunal that cruel treatment, torture, rape and deportations could constitute the serious bodily or mental harm done to members of a

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[110] *Plavsić, id.*, paras. 43, 44.

[111] *Id.*, para. 580.

[112] See *Rutaganda* trial Judgment, para.51; *Musema* trial Judgment, para. 156; *Bagilishema* trial Judgment, para. 59; *Gacumbitsi* trial Judgment, para. 291; *Kajelijeli* trial Judgment, para. 815.

[113] *Krstić* trial Judgment, paras. 513 and 516; *Blagojevic* trial Judgment, paras. 644-647.

[114] *Blagojević, id.*, paras. 646 and 647.

group so as to sustain a count of genocide[115]. The matter is summarized in the Yugoslav Tribunal's 2004 judgment in the Brdanin case:

> "'Causing serious bodily or mental harm' [as a means to commit genocide as defined by the Genocide Convention] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group."[116]

The evidence of incredible torments inflicted on these prisoners by Serb militias and prison camp guards obviously meets any reasonable definitional standard to qualify as "bodily or mental harm". From the breadth and scope of the infliction of this harm it is impossible not to deduce the intent to inflict harm. From the sharp focus of the torment on an ethnic and religious group it is impossible not to infer the intent that transforms torment into genocide.

37. According to the ICTR, serious bodily or mental harm includes measures aimed at a slow death, such as starvation, systematic expulsion, excessive work, and deprivation of proper housing, clothing, medical services and hygiene[117].

38. These acts, in other words, are the bloodstained building blocks of genocide, whenever they are intentionally deployed to "destroy" a community's ability to exist. Co-President Biljana Plavsić has voluntarily testified in confirmation of the evidence given by other witnesses, as well as confirming the Prosecutor's evidence of "the scale and planning of the offence, the number of victims, the length of time over which the crimes were committed, the violence associated with the crimes and the repeated and systematic nature of the crimes"[118]. In her admissions to the ICTY, she said:

> "Although I was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, I refused to accept them or even investigate . . . In this obsession of ours to never again become victims, we had allowed ourselves to become victimizers."[119]

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[115]ICTY, *Prosecutor* v. *Radovan Karadzić and Ratko Mladić*, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, cases Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para. 93.

[116]ICTY, *Prosecutor* v. *Radoslav Brdanin*, case No. IT-99-36-T, 1 September 2004, trial chamber II, para. 690.

[117]ICTR, *Prosecutor* v. *Jean Paul Akayesu*, case No. ICTR 96-4-T, Judgment, 2 September 1998, paras. 505-506.

[118]*Plavsić, id.*, para. 56.

[119]*Plavsić, id.*, para. 51.

39. That the Serbs throughout much of European history have suffered and been victimized is beyond question. But, as she herself has admitted explanation cannot justify. You, the judges of the World Court, have before you ample evidence of patterned and endemic practice of torture and abuse. From these you can surely conclude, as have the Rwanda and Yugoslav Tribunals, that the intent to destroy a group is the only possible logical inference that can be drawn from the systematic prevalence of these practices. What must be inferred from these heinous acts, inescapably and inexcusably, is genocide.

"In whole or in part"

40. With your permission I would now like to say some words on the phrase "in whole or in part" found in the Genocide Convention — destroy "in whole or in part". The evolving jurisprudence on genocide has also cast light on the meaning of the phrase "in whole or in part". Article II of the Convention defines genocide as acts intended to destroy a group in whole or in part. The Genocide Convention, developed in the aftermath of the European holocaust, was not intended to deal with the trivial. To qualify as genocide the acts must have been undertaken with the intent to destroy a substantial number of individuals in the targeted group. The International Law Commission, in its drafting of a comprehensive code of crimes prohibited by international law, has reported that "the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group"[120]. In the Krstić case, the Appeals Chamber of the ICTY said: "The intent requirement of genocide . . . is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group."[121] The Appeals Chamber then went on to explain that the "protected group" in that case was "the Muslim population of Srebrenica"[122] and not, of course, every Muslim in Bosnia and Herzegovina , or in the former Yugoslavia, or in Europe. The murder of the men and boys, the Tribunal

[120]Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, p. 89.

[121]ICTY, *Prosecutor* v. *Krstić*, para. 12, case No. IT-98-33-A, Appeal Judgment, 19 April 2004.

[122]*Id*., para. 19.

concluded, must be seen as the killers' way of ensuring that the group as a whole — by which the judges meant the Muslims of the Srebrenica region — could not perpetuate itself[123].

41. The Krstić Appeals Chamber of the ICTY[124], on 19 April 2004, concluded that the threshold determining when the killings in a targeted population become genocidal involves considerations of its proportion of that population, but, also, of the victims' prominence and leadership role within the group. We have presented you, Members of the Court, with the findings of fact by the ICTY that show the deliberate policy of eradicating the religious cultural and intellectual leaders of the victimized groups.

42. We will present evidence of the deliberate targeting of the Muslim population in such a way as to kill as many as necessary and destroy as much as was necessary to prevent the perpetuation of a Muslim community in those areas the Serbs wished to establish as their "ethnically cleansed" State. The creation of a geographically contiguous purely Serb Republika Srpska made it necessary, in the minds of the perpetrators, to kill — not all Muslims, not even all Muslims of Srebrenica — but all, or as many as possible, of the Muslim men and boys. And so, also, in the Drina Valley. That policy of targeted killing and destruction, the ICTY has determined, constitutes the intended obliteration of the Muslim community in that area "in whole or in part" so as to meet the grim requirements of the Genocide Convention. As the ICTY said in the Krstić case, those who massacred the Bosnian men "knew . . . that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim community at Srebrenica"[125].

43. "In whole or in part", then, is a standard which, we have demonstrated, and will continue to demonstrate, is all too readily met by overwhelming evidence of the targeted destruction — by killings, rapes, torture, forcible removal, and by the patterned destruction of Muslim homes, mosques, schools and libraries — in those designated areas the perpetrators sought to clear of the large and historic Muslim communities that stood in the way of their plan to join those areas to Greater Serbia.

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[123] *Id*., para. 17.

[124] *Id*., paras. 8-14.

[125] *Id.*, para. 595.

44. The Convention makes clear that "in whole or in part" does not need to be satisfied by evidence of an intent to kill every Muslim in Bosnia and Herzegovina . The "part" the perpetrators sought to destroy was the part that stood in the way of their dream of a Serb State, a State of all the Serbs, a State of Serb hegemony and contiguity. As the Krstić tribunal has made clear, the intent to destroy the Bosnian Muslim community was pursued by a combination of means. And, the Tribunal concluded, to the extent these means, in combination, were successful in eradicating the Bosnia and Herzegovina Muslim community in parts of the country coveted by the perpetrators, the definition of genocide had been met. As the Yugoslav Tribunal stated in the Brdanin case, "the jurisprudence of the Tribunal supports the approach that permits the characterization of genocide even when the specific intent to destroy a group, in part, extends only to a limited geographical area"[126]. That area was not so limited and, in fact, entailed more than 60 per cent of the former territory of Bosnia and Herzegovina. This Court will surely wish to take into account that definition of the Convention's requisites.

"As such"

45. And now we come to the last phrase "as such": to destroy in whole or part a group as such". In the Musema case, the ICTR defined the meaning of the phrase "as such" as used in the Genocide Convention's definition of the crime: the destroying of a group "as such".

> "For any of the acts charged to constitute genocide, the acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone."[127]

46. In other words, as the Rwanda Tribunal said in the 1999 Rutaganda case, the acts must have been committed "against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group"[128]. There can be no doubt that the systematic murder, expulsion, torture, rape and despoliation committed in Bosnia

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[126] *Brdanin, id.*, para. 703.

[127] ICTR, *Prosecutor* v. *Musema*, trial chamber I, ICTR, 96-13-A, 27 January 2000, para. 165.

[128] ICTR, *Prosecutor* v. *Rutaganda*, case No. ICTR-96-3-T, Judgment, 6 December 1999.

and Herzegovina was not the result of animus against individual victims but, rather, the victimization of persons, institutions and places precisely because of their identification with a group: the Bosnian Muslim community or a specific part thereof, or the Croat community.

47. As for the term "group" it has been held, by the Rwanda Tribunal in Akayesu[129], to signify persons whose membership is automatic, by birth, and whose membership is essentially unchallengeable by its members. The State of Bosnia and Herzegovina, in this case, clearly qualifies as the representative of the victim groups consisting of persons who are its citizens. The sovereign State of Bosnia and Herzegovina has the right, under the Genocide Convention, as construed by the *ad hoc* Criminal Tribunals for Yugoslavia and Rwanda, to bring this action on behalf of those of its citizens who were killed or otherwise egregiously victimized by actions of another State, killed because — and solely because — they were members of an ethnical or religious group within Bosnia who were perceived by that other State as obstructing its plan to expand its dominion into parts of what was internationally recognized to be part — indeed, the larger part — of Bosnian territory. The intent was to destroy these obstructionist groups by targeting their members.

48. The crimes committed against those citizens because of their group identity have been clearly distinguished by the Rwanda Tribunal's jurisprudence from other kinds of brutality. For example, a dispute between persons, or communities, regarding title to land or resources may be the occasion of atrocities and even of large-scale slaughters. However, a clear distinction now exists, Members of the Court, in law, between an attack on a community in order to deprive it of a resource and one directed at vitiating its right to exist. The events in Bosnia and Herzegovina during the 1990s clearly come within the latter category.

49. The ICTY has adopted the same interpretation of the Convention as did the Rwanda Tribunal, for example in distinguishing acts which fall under its jurisdiction as constituting crimes against humanity from its jurisdiction over acts that constitute genocide. In the Jelesić case, the ICTY stated that genocide differs from persecution, a crime against humanity, in that, in the latter, the perpetrator chooses the victims because of the group to which they belong but does not

[129] *Id.*, para. 511.

necessarily seek to destroy that community. There can be no doubt that, in the instance of the Bosnian Muslims and Bosnian Croats, they were selected for wholesale killing, rape and torture not only because of their membership and role in the group, but because the perpetrators sought to destroy the group. The acts were directed at them because the intended victim was not the individual person, but the group *as such.*

50. In the course of our pleading, we are seeking to make clear that the crimes committed against the Muslims and other non-Serbs of Bosnia were motivated by that intent to destroy the group. They were killed, raped, tortured and made to flee their burning homes because the aim was to destroy their communities *as such.* True, many of the offences for which individuals have been convicted in the ICTY were prosecuted as discrete crimes against humanity. But, this was because, in the limited mandate of that Tribunal, each defendant could only be convicted of the individual acts he or she had committed. In this Court, with its far broader jurisdictional horizon, we ask that the pieces of the puzzle be pieced together to show that they were not random acts, but parts of a common criminal enterprise which, seen *in toto*, can readily be identified as genocide.

Madam President, this concludes my pleadings for this morning. I now respectfully request that you call on my colleague, Professor Brigitte Stern.

The PRESIDENT: Thank you, Professor Franck. I now call upon Professor Stern.

Mme STERN : Madame le président, Messieurs les juges.

1. L'affaire qui est aujourd'hui devant vous est un moment fort, j'oserai même dire un moment fondateur, dans cette lutte contre ce mal absolu qu'est le génocide de ses semblables, semblables mais considérés comme si différents que leur humanité même est niée. Dans cette affaire, un Etat, pour la première fois dans l'histoire de l'humanité, un Etat poursuit un autre Etat, devant la plus haute juridiction internationale, pour génocide commis contre un groupe faisant partie de sa population. Dans cette affaire un Etat, la Bosnie-Herzégovine, qu'avec mes collègues je représente, demande à votre Cour, de reconnaître un autre Etat, un de ses voisins, la Serbie-et-Monténégro, responsable d'un génocide, et de lui faire assumer les conséquences de ses actes.

2. S'il l'on en croit Elie Wiesel, votre prétoire devrait aujourd'hui être placé au centre du monde. Dans l'allocution qu'il a prononcée lors de la remise de son prix Nobel en 1986, celui-ci en effet a déclaré, et je le cite : «Wherever men or women are persecuted because of their race, religion or political views, that place must at that moment — become the centre of the universe.»[130]

3. Dans ce lieu central où nous nous trouvons, pour demander à cette Cour de reconnaître la responsabilité de la Serbie-et-Monténégro pour des actes de génocide commis en Bosnie-Herzégovine, il me faut préalablement vous emmener sur un chemin difficile et douloureux, un chemin parcouru essentiellement par des milliers de femmes bosniaques, mais également par des hommes bosniaques, mais également par des enfants bosniaques, il y a de cela un peu plus de dix ans.

4. Dans la décision relative à l'examen de l'acte d'accusation de Karadzić et Mladić, rendue le 11 juillet 1996 dans le cadre de l'article 61, le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a déclaré : «de l'avis de la Chambre, *les violences sexuelles méritent une attention particulière parmi les méthodes de nettoyage ethnique*, en raison de leur systématicité et de la gravité des souffrances infligées à la population civile»[131].

5. C'est précisément sur ces violences sexuelles, dont le viol constitue sans conteste la forme la plus grave[132], que je vais concentrer mon attention. Et, ce qu'il m'incombe de vous montrer dans les heures qui viennent est que l'on est face, non pas à des violences sexuelles et aux viols qui accompagnent hélas tous les conflits, mais que l'on est face à une véritable politique de violences sexuelles, qui était partie intégrante, peut-être même essentielle, du nettoyage ethnique génocidaire qui visait les non-Serbes et en particulier les Musulmans de Bosnie-Herzégovine.

6. Pour cela, je vais commencer par égrener une litanie d'horreurs, je m'en excuse d'avance. Les faits sont brutaux. Les faits sont violents. Mais ce sont les faits et vous devez les connaître. Mes premiers développements seront donc consacrés à un rappel des faits, certains qui ont déjà été

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[130] Allocution d'E. Wiesel, reproduite dans le *New York Times*, 11 décembre 1986.

[131] TPIY, *Le procureur c. Radovan Karadzić et Ratko Mladić*, affaires n^{os} IT-95-5-R61 et IT-95-18-R61, examen de l'acte d'accusation dans le cadre de l'article 61 du Règlement de procédure et de preuve, 11 juillet 1996, par. 64; les italiques sont de nous.

[132] TPIY, *Le procureur c. Anto Furundzija*, affaire n^{o} IT-95-17/1-T10, Chambre de première instance II, jugement, 10 décembre 1998, par. 175.

mentionnés dans notre réplique, mais aussi et surtout, tous les faits qui ont été nouvellement avérés et constatés depuis par les instances internationales, en particulier dans les jugements du Tribunal pénal pour l'ex-Yougoslavie (TPIY) (I).

7. Je démontrerai ensuite que ces faits sont des actes constitutifs du génocide qui s'est produit. Certes, ni les violences sexuelles en général, ni le viol ni la grossesse forcée ne sont mentionnés en tant que tels dans l'article II de la convention sur le génocide, que je ne citerai pas une fois de plus, car il est désormais inscrit dans toutes vos mémoires. Bien que les violences sexuelles ne soient pas énoncées *expressis verbis* dans le vocabulaire de l'article II, je ne pense pas avoir beaucoup de difficultés à vous convaincre, dans un second volet de mes développements, qu'en raison du contexte dans lequel ces actes ont été commis, les violences sexuelles et les viols peuvent entrer dans les cinq catégories juridiques d'actes constitutifs de génocide énumérés à l'article II de la convention sur le génocide (II).

8. Mais, nous le savons bien, il ne suffit pas que soient commis les terribles actes mentionnés à l'article II, pour qu'il y ait génocide. Il faut bien sûr, un élément supplémentaire, qui fait toute l'horreur, qui fait toute la spécificité du génocide, qui lui confère son «caractère exceptionnel»[133]. Il est en effet nécessaire que ces différents actes aient été effectués, vous le savez, dans «l'intention de détruire en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel». On n'insistera jamais assez sur l'importance de l'intention génocidaire dans la qualification des actes de génocide. Mes derniers développements auront donc trait à l'intention génocidaire qui se retrouve, comme nous le verrons, derrière les actes de violence sexuelle commis en Bosnie-Herzégovine (III).

The PRESIDENT: Ms Stern, could I ask you to assist the interpreters by speaking a little more slowly?

Ms STERN: Yes, Madam President, I will try.

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[133] TPIY, *Le procureur c. Milomir Stakić*, affaire n° IT-97-24-T, Chambre de première instance II, jugement, 31 juillet 2003, par. 520.

I. LES FAITS (LA BASE FACTUELLE PERMETTANT DE DETERMINER QU'UN GENOCIDE A ETE COMMIS)

9. La première constatation qu'il convient de faire est que les faits, les actes de violence sexuelle, sont extrêmement nombreux et qu'il n'est pas possible d'en effectuer devant vous un sinistre inventaire qui serait exhaustif. Les viols et les violences sexuelles ont été commis à un niveau inégalé jusque-là, comme l'avait déjà constaté Cherif Bassiouni, président de la commission d'experts, dont le rapport a notamment servi de base à la création du TPIY, lorsqu'il a déclaré que «[l]e conflit dans l'ex-Yougoslavie aura vu des violences sexuelles d'une nouvelle ampleur»[134].

10. Je ne vais donc que vous présenter les grandes lignes de force qui apparaissent aux yeux de quiconque se penche sur les innombrables violences sexuelles qui se sont produites en Bosnie, que j'illustrerai par quelques exemples, pour que le tableau que je vous présente sorte de la sphère intellectuelle pour s'incarner dans la douleur de celles et de ceux qui les ont vécues. Je ne reviendrai donc pas en détail sur les plus de trente pages de la réplique de la Bosnie-Herzégovine en date du 23 avril 1998, trente pages consacrées à la description de nombreuses violences sexuelles relatives à cette instance devant la Cour, ne rappelant qu'ici ou là tel ou tel incident et je m'efforcerai plutôt d'attirer l'attention de la Cour sur des faits soit nouvellement connus, soit nouvellement confirmés.

11. Mais il me faut au préalable revenir, même s'il n'y aura pas lieu de s'y attarder longuement, sur les allégations inadmissibles présentées par la Serbie-et-Monténégro dans sa duplique, qui s'évertue, une nouvelle fois, à réfuter la réalité des violences sexuelles, qu'elle ne daigne envisager que sous la dénomination, combien lourde de sens, combien insultante de «prétendus viols»[135].

12. Au-delà même de la contestation par le défendeur de certaines sources d'information présentées dans notre réplique, qui résulte d'une lecture et d'une interprétation soit sollicitée soit tronquée des propos effectivement cités et sur lesquelles il n'y a pas lieu de revenir, la Serbie-et-Monténégro n'a, pour contester la réalité des viols et violences sexuelles, trouvé d'autre issue que de se lancer dans une véhémente critique de l'impartialité du procureur du TPIY dans

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[134] Cherif Bassiouni, «Sexual Violence», («Violences sexuelles, une arme de guerre invisible dans l'ex-Yougoslavie»), document spécial n° 1, Institut international des droits de l'homme, faculté de droit de l'Université DePaul, 1996, p. 2, (réplique, annexe 71).

[135] Duplique de la Serbie-et-Monténégro, 22 février 1999, par. 3.3.5 : «Les prétendus viols».

l'élaboration des actes d'accusation qu'il émet. Elle a ainsi fait valoir que celui-ci pratiquerait une «politique de deux poids deux mesures»[136] dans l'appréciation des faits indiquant que lorsque des Serbes sont en cause, les incriminations sont plus graves lorsqu'il s'agit de Bosniaques. Si la Bosnie ne compte pas s'engager sur le terrain de cette discussion avec le défendeur, qui est sans intérêt dans la présente affaire, elle doit cependant examiner plus avant la conséquence qui en est tirée, c'est-à-dire la remise en cause par notre adversaire de la véracité des faits établis dans les actes d'accusation, qu'elle juge, et ce sont les mots qu'elle a écrits, «peu crédibles»[137].

13. La Bosnie-Herzégovine tient à préciser qu'elle n'a jamais prétendu que les actes d'accusation revêtaient la valeur du jugement définitif.

14. Mais, qu'à cela ne tienne : les allégations de la Serbie-et-Monténégro sont à présent aussi malvenues qu'inutiles. Personne ici n'ignore que les actes d'accusation que la Bosnie-Herzégovine mentionnait dans sa réplique ont depuis lors été étayés et corroborés par des jugements définitifs et que les faits qu'ils incriminaient sont donc solidement établis. Ainsi, pour s'en tenir à la seule jurisprudence du TPIY, la réplique se référait à dix actes d'accusation, deux décisions d'examen d'actes d'accusation dans le cadre de l'article 61 et un seul jugement, celui rendu dans l'affaire *Tadić*. Or, il y a aujourd'hui, nous le savons tous, de nombreux jugements qui ont été rendus, dont vous pourrez trouver les références dans les notes de ma plaidoirie.

15. Cela étant précisé, je commencerai ce terrible récit en prenant justement comme exemple les faits établis par le TPIY dans l'affaire *Kunarac, Kovac et Vukovic*[138], que l'on a appelé «*the rape-camp case*», l'affaire du camp des viols : je précise que même si cette affaire n'est pas *stricto sensu* centrée sur un camp de détention, elle a cependant été nommée ainsi car toute la ville de Foca et ses alentours sont devenus, dans des maisons, dans des écoles, dans des gymnases, un gigantesque espace de viols et de violences sexuelles.

16. Si je prends cet exemple, c'est qu'il s'agit d'un exemple particulièrement significatif, même s'il est loin d'être isolé, de la façon dont a été effectué le nettoyage ethnique et surtout de la

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[136] Duplique de la Serbie-et-Monténégro, 22 février 1999, par. 3.3.5.6.

[137] Duplique de la Serbie-et-Monténégro, 22 février 1999, par. 3.3.5.36.

[138] *Le procureur c. Dagoljub Kunarac, Radomir Kovac et Zoran Vukovic*, affaires n^{os} IT-96-23 et IT-96-23/1, Chambre de première instance II, jugement, 22 février 2001.

façon dont les viols ont été utilisés dans le cadre de ce nettoyage ethnique. D'après le TPIY, nombre de femmes

> «ont été violées à de nombreuses reprises. Des soldats ou des policiers serbes venaient dans ces centres de détention, sélectionnaient une ou plusieurs femmes, et les emmenaient pour les violer. De nombreuses femmes et jeunes filles, y compris 16 des témoins à charge, ont été violées de cette façon.»[139]

17. Les exemples précis de viols et de violences sexuelles ne manquent pas dans ce jugement. Je n'en ferai pas le triste inventaire et ne retiendrai que quelques occurrences particulièrement représentatives et révoltantes :

> «FWS-62 a décrit comment, une nuit, la femme qui dormait près d'elle avait été violée devant tous les autres détenus, alors que son fils de dix ans était à ses côtés[140].
>
> FWS-95 a estimé que pendant sa détention tant au lycée de Foca qu'au Partizan, c'est-à-dire à peu près quarante jours, elle avait été violée environ cent cinquante fois[141].
>
> FWS-95 a déclaré que, la nuit précédant la libération des femmes du Partizan, elle avait été emmenée dans un stade avec FWS-90 et violée, par de nombreux soldats, généralement par deux à la fois[142].
>
> FWS-75 … et A.B., alors âgée de douze ans, ont été conduites … à un appartement…. FWS-75 et A.B. y sont restées une vingtaine de jours durant lesquels elles ont été constamment violées par les deux occupants… A la mi-novembre, les deux femmes ont été emmenées dans une maison… Elles y sont restées une vingtaine de jours pendant lesquels elles ont été violées à maintes reprises par un groupe de soldats qui les ont emmenées dans un autre appartement et ont continué de les violer pendant environ deux semaines… A.B. a été vendue pour 200 deutsche mark et personne ne l'a jamais revue.»[143]

18. Cette affaire n'est qu'un exemple d'une stratégie maintes fois renouvelée. Si l'on voulait caractériser d'une seule phrase — mais combien lourde de sens — les violences sexuelles qui ont eu lieu en Bosnie-Herzégovine, je vous dirai simplement que les violences sexuelles se sont produites à très grande échelle, dans toutes les sphères et composantes de la société musulmane de Bosnie, de façon répétée, partout en Bosnie, et surtout avec une violence et une perversité inouïes.

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[139] *Le procureur c. Dagoljub Kunarac et consorts, ibid.*, par. 574.

[140] TPIY, *Le procureur c. Dagoljub Kunarac, Radomir Kovac et Zoran Vukovic*, affaires n^{os} IT-96-23 et IT-96-23/1, Chambre de première instance II, jugement, 22 février 2001, par. 31.

[141] *Ibid.*, par. 37.

[142] *Ibid*., par. 39.

[143] *Ibid.*, par. 42.

Les violences sexuelles se sont produites à très grande échelle

19. Mais les chiffres, vous le savez, dans leur sécheresse et leur abstraction, ne reflètent pas toute la douleur qu'ils recouvrent, même s'ils sont un point de repère permettant de la mesurer.

Les données chiffrées sur les violences sexuelles

20. Je ne vais pas m'engager dans une bataille de chiffres. Je mentionnerai simplement le rapporteur spécial de la Commission des droits de l'homme, qui, sous la direction de M. Tadeusz Mazowiecki, a déclaré qu'il y avait eu «probablement douze mille cas de viols environ»[144]. Mais pour les besoins de cette affaire, une telle conclusion est inutile.

La sous-estimation des violences sexuelles

21. Les chiffres ne rendent pas la réalité et, en outre, les chiffres avancés, aussi impressionnants soient-ils, sont très vraisemblablement en deçà de la réalité. Il est en effet de notoriété publique, et d'ailleurs Tadeusz Mazowiecki l'avait rappelé dans son rapport, que «les viols sont parmi les crimes les plus sous-estimés»[145]. Les femmes violées se retranchent le plus souvent derrière un mur de silence, et plus encore peut-être dans la société musulmane que dans les autres. L'opprobre, la honte, voire la crainte des représailles, qui accompagnent le viol, leur font souvent préférer l'angoisse du silence à la libération que peut donner la dénonciation de ce qui leur est arrivé. Amnesty International a bien mis ce phénomène en évidence, dans un rapport sur les violences sexuelles en Bosnie-Herzégovine, où il est écrit : «[c]ertaines femmes, semble-t-il, pensent qu'elles doivent effacer cette épreuve de leur mémoire; d'autres se sentent dégradées et honteuses ou craignent d'être l'objet d'un ostracisme social si elles font savoir ce qui leur est arrivé»[146]. La femme violée non mariée craint de ne plus pouvoir trouver de mari, la femme violée mariée craint de soutenir le regard de son mari et de ses enfants, les deux craignent d'être rejetées par leur communauté. Cela suffit, me semble-t-il, à expliquer que la Bosnie ne cherche pas à

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[144] Nations Unies, s*ituation des droits de l'homme dans le territoire de l'ex-Yougoslavie*, rapport 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, p. 70-71, par. 30.

[145] Réplique de la Bosnie-Herzégovine, 23 avril 1998, chap. 7, par. 25.

[146] Rapport d'Amnesty International, Bosnie-Herzégovine : viols et sévices sexuels pratiqués par les forces armées, index AI : EUR 63/01/93, janvier 1993, p. 1-2, (Réplique, annexe 77).

impressionner la Cour avec de grands nombres, ceux-ci, quels qu'ils soient, risquant en tout état de cause d'être bien en deçà de la réalité.

La controverse sur la preuve des violences sexuelles

22. Une réalité — cette réalité des viols et des violences sexuelles — que le défendeur s'était évertué à nier dans son contre-mémoire, en soulevant une controverse sur la preuve des violences sexuelles, plus précisément, le défendeur a soutenu que la Bosnie-Herzégovine n'ayant pas apporté la preuve des séquelles des violences sexuelles, celles-ci n'étaient pas prouvées. La Serbie-et-Monténégro demandait en particulier que soient rapportées les preuves des conséquences immédiates et à plus long terme des viols et des violences sexuelles. Parmi les conséquences immédiates, la Serbie-et-Monténégro demandait à la Bosnie d'apporter la preuve de «blessures au vagin et du rectum à la suite de l'insertion de force d'objets et de maladies sexuellement transmissibles»[147]; parmi les séquelles tardives, la Serbie-et-Monténégro demandait encore à la Bosnie-Herzégovine d'apporter les preuves suivantes :

> «chez les hommes, il doit y avoir des cicatrices sur le pénis …, une atrophie des testicules, des modifications sur les tubes séminifères et la prostate, en particulier une stérilité; chez les femmes : des cicatrices sur les organes génitaux externes, le vagin ou l'utérus, …; chez les deux sexes : des fissures de l'anus …, des lésions des muqueuses et des tissus vasculaires, etc.»[148].

La Bosnie-Herzégovine voudrait faire partager à la Cour son indignation devant une telle défense. Comment oser nier la réalité des viols et violences sexuelles, face aux innombrables témoignages des victimes : pourquoi auraient-elles parlé de viol, si ce n'était pas vrai, alors que l'on sait la honte qui s'attache à un tel événement subi par une victime ? Comment oser ensuite demander des traces physiques alors que bien évidemment elles ne sont pas nécessaires pour prouver le viol, un viol peut s'inscrire dans la chair et l'esprit de la victime sans qu'aucune trace apparente ne subsiste. Un viol est un viol, quelles que soient les traces physiques qui subsistent. La Bosnie-Herzégovine ne s'engagera donc pas dans cette voie dont l'inanité semble finalement avoir été reconnue par la Serbie-et-Monténégro elle-même, dans la mesure où elle a passé sous silence cette prétention, aussi fallacieuse dans les faits qu'erronée en droit, dans sa duplique, même si elle ne s'est pas

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[147] Voir contre-mémoire de la Serbie-et-Monténégro, par. 1.3.4.3.

[148] *Ibid.*.

explicitement rétractée. Pour clore ce débat artificiel, lancé par le défendeur, je citerai simplement l'affaire *Bradnin*, où le TPIY a déclaré sans l'ombre d'une ambiguïté que *:*

> ««l'atteinte grave à l'intégrité physique et mentale» sanctionnée par l'alinéa b) s'entend, en particulier, d'actes de torture, de traitements inhumains ou dégradants, de violences sexuelles, y compris les viols…. Il n'est pas nécessaire que des dommages soient permanents ou irrémédiables.»[149]

Ce faux débat étant écarté, je vais maintenant montrer que les violences sexuelles se sont produites à l'égard de toutes les composantes de la société musulmane de Bosnie.

Les violences sexuelles se sont produites à l'égard de toutes les composantes de la société musulmane de Bosnie

Les viols et violences sexuelles ont principalement été commis contre des femmes musulmanes de Bosnie

23. Ils ont été commis de façon tout à fait généralisée, à l'égard de femmes de tous âges : à l'égard de jeunes adolescentes de treize ans, de quatorze ans, de dix-sept ans, qui découvraient ainsi brutalement la vie sexuelle, à l'égard de jeunes épouses et de jeunes mères dont la vie de femme était inexorablement brisée, mais aussi à l'égard de vieilles femmes de plus de quatre-vingts ans, «qui ont du affronter la mort accablées par ce dernier outrage indécent»[150] et même — j'ose à peine prononcer ces mots — de fillettes de quatre à sept ans.

Je démontrerai tout à l'heure que les violences sexuelles à l'égard des femmes ont suivi un schéma qui leur donne leur dimension génocidaire. Les femmes ont été victimes de violences sexuelles aussi bien à l'extérieur des camps, et notamment au moment de la prise de villes et villages par les forces serbes, que lors de leur internement dans les camps, où les viols ont encore été plus fréquents[151]. S'il est indéniable que les femmes ont été les victimes principales des violences sexuelles, y compris des femmes très jeunes, des jeunes filles, des petites filles même, comme je viens de le dire, les hommes n'ont pas été épargnés.

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[149] TPIY, *Le procureur c. Radoslvan Bradnin*, affaire n° IT-99-36-T, Chambre de première instance II, jugement 1er septembre 2004, par. 690. Voir aussi TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, Chambre de première instance II, jugement, 31 juillet 2003, par. 516.

[150] Réplique de la Bosnie-Herzégovine, 23 avril 1998, chap. 7, par. 45.

[151] Réplique de la Bosnie-Herzégovine, 23 avril 1998, chap. 7, par. 60-80.

Des violences sexuelles ont en effet également été commises contre des hommes musulmans de Bosnie

24. Les violences sexuelles contre les hommes ont été perpétrées essentiellement dans les camps de détention. De nombreux témoignages relatent des violences sexuelles en tous genres exercées à l'encontre d'hommes[152], parfois un père et son fils, parfois deux frères. Comme cela avait été souligné dans la réplique, contre les hommes, «les agressions sexuelles revêtaient principalement deux formes : l'une était les actes sexuels forcés avec d'autres hommes, l'autre les atteintes à leur virilité»[153]. Bien sûr, un schéma d'ensemble, comme celui qui existe sans contestation possible pour ce qui est des violences sexuelles à l'égard des femmes, un tel schéma d'ensemble est moins aisément discernable en ce qui concerne les violences sexuelles commises à l'égard des hommes, ne serait-ce que parce qu'elles sont, comme je viens de l'indiquer moins nombreuses. Mais cela disqualifie-t-il pour autant leur prise en considération dans une affaire où est dénoncé un génocide ? Je ne le pense pas. Je ne le pense pas car en effet, des actes de violence sexuelle entre des hommes non-Serbes, et en particulier Musulmans de Bosnie, qui pourraient ne pas être qualifiés d'actes de génocide, s'ils étaient considérés isolément, deviennent de tels actes s'ils sont analysés dans le schéma global du génocide, dans lequel ils s'inscrivent aisément, surtout dans un contexte culturel musulman.

Les violences sexuelles se sont également produites de façon répétée

25. Il est évident que les viols et les violences sexuelles ne se sont pas limités à des actes sporadiques entre les auteurs et leurs victimes. De nombreux viols ont en effet été perpétrés par plusieurs agresseurs en même temps sur une même victime. Ainsi que le TPIY l'a par exemple corroboré dans l'affaire dont j'ai déjà parlé dite du «camp des viols», des viols collectifs ont été commis, je cite le Tribunal :

> «[l]es appelants ont été pour l'essentiel condamnés pour avoir violé des femmes détenues dans des locaux qui servaient de quartiers généraux militaires, des centres de détention et dans des appartements où logeaient les soldats… De manière générale, ces femmes ont été violées par plus d'un agresseur et avec une régularité quasi inimaginable.»[154]

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[152] TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, jugement, Chambre de première instance II, 31 juillet 2003, par. 241.

[153] Réplique de la Bosnie-Herzégovine, 23 avril 1998, chap. 7, par. 54.

[154] *Le procureur c. Dragoljub Kunarac, Radomir Kovac et Zoran Vukovic*, affaires n^{os} IT-96-23 et IT-96-23/1-A, Chambre d'appel, arrêt, 12 juin 2002, par. 132; les italiques sont de nous.

26. Si la commission des viols et violences sexuelles a connu son paroxysme en 1992, la politique des viols en tant que moyen de terreur, ne s'en est pas moins poursuivie bien après, comme en attestent les rapports périodiques du rapporteur spécial désigné par la Commission des droits de l'homme des Nations Unies, rapports rendus en 1993, 1994, 1995 et encore 1996, qui font, sans relâche, état de la persistance de la commission de tels actes[155]. En 1996, l'Assemblée générale des Nations Unies se déclarait ainsi toujours «indignée que la pratique systématique du viol soit employée comme arme de guerre et comme instrument de la politique de nettoyage ethnique contre les femmes et les enfants dans la République de Bosnie-Herzégovine»[156]. Madame le président, Messieurs les juges, c'est l'Assemblée générale qui le souligne : en Bosnie, la pratique systématique du viol a été utilisée comme instrument de la politique de nettoyage ethnique, c'est-à-dire comme instrument du génocide.

Les violences sexuelles se sont produites partout en Bosnie

27. Ce nettoyage ethnique dont les violences sexuelles étaient un élément central se sont produites partout en Bosnie, sur tout le territoire. Les violences sexuelles ont tout d'abord accompagné la prise d'assaut des villes et des villages.

Les violences sexuelles ont accompagné la prise d'assaut des villes et des villages

28. Ils ont alors pris la forme d'une véritable stratégie visant à intimider et terroriser les populations pour les contraindre à fuir et à quitter leurs territoires. Les occurrences précitées tirées de l'affaire *Kunarac* mettent en œuvre les violences commises dans la municipalité de Foca. Je pourrais redire cela pour bien d'autres villes mais cela vous a déjà été exposé longuement depuis le début de la semaine et je n'y reviendrai pas. Je rappellerai cependant simplement quelques noms qui évoqueront pour vous ce qui a déjà été dit.

Les violences sexuelles se sont surtout déchaînées dans les camps

29. Les violences sexuelles en effet se sont surtout déchaînées *dans les camps de détention* dans lesquels la population non serbe, en particulier musulmane, qui n'avait pas encore fui, a été

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[155] Voir réplique de la Bosnie-Herzégovine, 23 avril 1998, chap. 7, par. 88-92.

[156] Nations Unies, doc. A/RES/50/192, «Viols et sévices dont les femmes sont victimes dans les zones de conflit armé dans l'ex-Yougoslavie», 23 février 1996, par. 2.

transférée. Ces camps ont été installés dans plusieurs régions comme cela vous a été exposé par collègue Magda Karagiannakis.

30. Des viols et violences sexuelles ont ainsi été régulièrement commis dans le centre de détention de Luka, dans la municipalité de Brcko[157].

31. Ils ont également été commis dans la région de Prijedor, avec les tristement célèbres camps de détention d'Omarska, de Keraterm, de Trnopolje. Ils ont également été commis dans la région de Bosanski Samac, ils ont également été commis dans la municipalité de Vlasenica où a été installé le sinistre camp de Susica dont le commandant Dragan Nikolic a reconnnu dans son plaidoyer de culpabilité avoir lui-même violé des femmes. Je pourrais encore continuer cette litanie mais je m'arrêterais là.

32. Au-delà du fait que l'on voudrait pouvoir se persuader que cette liste soit exhaustive, il ce que je voudrais surtout, Madame le président, Messieurs les juges, montrer à votre Cour, c'est que toutes les décisions — toutes les décisions — qui ont trait aux événements qui se sont produits dans ces camps ont expressément tenu à souligner que les viols et les violences sexuelles avaient été commis par leurs auteurs avec une intention discriminatoire à l'égard des femmes *parce qu'elles étaient musulmanes*[158].

Les violences sexuelles se sont produites avec une violence et une perversité inouïes

33. Madame le président, Messieurs les juges, je ne peux cacher à cette Cour, avant de clôturer la présentation des faits, que les violences sexuelles se sont produites avec une violence et une perversité inouïes. Si l'exposé brut des faits s'avère parfois seul à même de permettre de mesurer toute la cruauté et la perversité avec laquelle les viols et violences sexuelles ont été perpétrés en Bosnie et qu'il permet par là même de saisir l'intensité des souffrances physiques et des humiliations, la Bosnie-Herzégovine, n'entend pas, dans le temps qui lui est imparti, procéder à un inventaire exhaustif, qui ne pourrait être que sordide.

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[157] *Le procureur c. Slobodan Milosević*, affaire n° IT-02-54-T, Chambre de première instance I, décision relative à la requête aux fins d'acquittement, 16 juin 2004, par. 159; *Le procureur c. Rando Cesic*, affaire n° IT-95-10/1-5, Chambre de première instance I, jugement portant condamnation, 11 mars 2004, par. 13.

[158] *Le procureur c. Radoslvan Bradnin*, affaire n° IT-99-36-T, Chambre de première instance II, jugement, 1er septembre 2004, par. 518; *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, Chambre de première instance II, jugement, 31 juillet 2003, par. 806; *Le procureur c. Momcilo Krajisnik*, Chambre de première instance I, *Decision on third and fourth prosecution motions for judicial notice of adjudicated facts*, 24 mars 2005, par. 607-608 (dans ses conclusions générales à propos de l'affaire *Kunarac*).

34. C'est ainsi à dessein que je ne m'étendrais pas longuement sur les détails des mutilations sexuelles que certaines victimes ont subies, sur le fait, qu'en certaines occasions, des frères ou des parents ont été contraints de se livrer à des relations sexuelles entre eux, en public[159]; sur les viols de femmes commis devant leurs enfants en bas âge[160]; sur les viols collectifs[161]; sur le fait que les objets les plus divers ont été utilisés à des fins de pénétration sexuelle, pour ne citer que l'usage «d'une matraque de police [qui] a été enfoncée dans l'anus d'un détenu»[162], ce qui a justement été considéré par le TPIY comme un «acte de torture»[163]. Il va en effet sans dire que les vocables de viol et de violences sexuelles, que j'utilise dans ma plaidoirie, s'avèrent parfois notoirement insuffisants pour décrire la brutalité et la perversité d'actes qui correspondent à de véritables actes de «torture» sexuelle.

35. L'exemple qui suit, issu de l'affaire *Stakic*, relative à des viols et violences sexuelles commis dans le camp d'Omarska, permettra de donner à la Cour un aperçu des conditions, particulièrement dégradantes et humiliantes pour les victimes, dans lesquelles certains viols et violences sexuelles ont été commis. Je cite un passage de cette affaire :

> «le témoin G [je précise que le témoin G est une femme] a été conduit dans un bureau du poste de police où se trouvaient cinq hommes portant des uniformes différents. «Lugar» lui a ordonné de se déshabiller. Elle l'a fait très lentement en posant ses vêtements sur la table. Ce jour là, elle avait ses règles. Un des hommes l'a donc insultée; il lui a ordonné de se coucher sur la table et d'écarter les jambes. «Lugar», qui se tenait à côté de la table, lui a ordonné de s'allonger de manière à ce qu'elle ait un couteau sous la gorge. Deux hommes l'ont alors battue à maintes reprises, l'un armé d'une ceinture, l'autre d'une batte, tout en l'insultant. Après le premier coup, le couteau a glissé. Elle a pleuré; les hommes ont poussé à fond le volume de la musique. L'un d'eux a annoncé qu'il fallait la rafraîchir et il a uriné sur elle.»[164]

36. S'il fallait convaincre davantage encore la Cour, il ne serait besoin que de reprendre ici le cas tristement célèbre des sévices sexuels infligés à Fikret Harambasic, qui ont entraîné sa mort, et

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[159] TPIY, *Le procureur c. Rando Cesic*, affaire n° IT-95-10/1-5, Chambre de première instance I, jugement portant condamnation, 11 mars 2004, par. 13.

[160] TPIY, *Le procureur c. Dagoljub Kunarac, Radomir Kovac et Zoran Vukovic*, affaires n°s IT-96-23 et IT-96-23/1, Chambre de première instance II, jugement, 22 février 2001, par. 30.

[161] TPIY, *Le procureur c. Slobodan Milosevic*, affaire n° IT-02-54-T, Chambre de première instance I, Décision relative à la requête aux fins d'obtenir un jugement d'acquittement, 16 juin 2004, par. 200.

[162] TPIY, *Le procureur c. Blagaje Simic, Miroslav Tadic, Simo Zaric*, affaire n° IT-95-9-T, Chambre de première instance II, jugement, 17 octobre 2003, par. 728.

[163] *Ibid.*, par. 772.

[164] TPIY, *Le procureur c. Milomir Stakic*, affaire n° IT-97-24-T, Chambre de première instance II, jugement, 31 juillet 2003, par. 236.

qui ont été relaté dans l'affaire *Tadić*. Le récit du TPIY souligne la barbarie des faits lorsqu'il montre que «G» et «H» ont été contraints de commettre des violences sexuelles sur Fikret Harambasic [165]. *Ce récit souligne la barbarie des fait*s, surtout si l'on ne perd pas de vue que derrière l'abstraction des dénominations, «H» et «G», se trouve des êtres de chair et de sang. Je lis le récit que l'on trouve dans la décision *Tadić* :

> «[l]e témoin «H» a reçu l'ordre de lécher ses fesses nues et «G» a été obligé de sucer son pénis et de mordre ses testicules. Pendant ce temps, plusieurs hommes en uniforme qui se tenaient autour de la fosse ont assisté à ce qui se passait et criaient de mordre plus fort. Les trois hommes ont ensuite reçu l'ordre de s'extraire de la fosse et le témoin H a été menacé, le couteau sur la gorge, que ses deux yeux seraient énucléés s'il ne fermait pas de force la bouche de Fikret Harambasic pour l'empêcher de crier; G a ensuite dû s'allonger entre les jambes nues de Fikret Harambasic et, tandis que ce dernier se débattait, il a dû frapper et mordre ses organes génitaux. G a ensuite arraché d'un coup de dents l'un des testicules de Fikret Harambasic et l'a recraché, après quoi on lui a dit qu'il était libre de partir. Le témoin H a reçu l'ordre de traîner Fikret Harambasic jusqu'à une table proche, où il s'est tenu à ses côtés avant de recevoir l'instruction de retourner dans la pièce d'où il venait, ce qu'il a fait. On n'a ni revu, ni entendu parler de Fikret Harambasic depuis.» [166]

37. Nous arrêtons là cet inventaire sordide, l'énoncé même de l'aperçu qui vient d'en être présenté s'avérant amplement suffisant pour permettre à la Cour d'entrevoir les souffrances physiques, les souffrances psychiques, les humiliations que ces actes odieux ont pu engendrer chez les victimes.

38. Au regard de toutes les considérations qui précèdent, la Bosnie-Herzégovine tient à insister sur le fait que les caractéristiques générales des viols et violences sexuelles commis sur tout son territoire que je viens de présenter à la Cour, démontrent, Madame le président, Messieurs les juges, à suffisance, que les viols et les violences sexuelles commises à l'égard de la population non serbe, et en particulier musulmane, de Bosnie-Herzégovine, ne sauraient décidément et décemment pas être considérés — si l'on ose cette expression — de «dommages collatéraux» qui seraient inhérents à toute guerre, à tout conflit armé. Les faits de viols et de violences sexuelles sont désormais avérés. Ils n'ont plus à être prouvés : ils sont de notoriété publique, même s'ils sont avant tout une blessure intime.

J'en ai ainsi terminé, Madame le président, avec l'exposé des faits.

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[165] TPIY, *Le procureur c. Dusko Tadic alias «Dule»*, affaire n° IT-94-1-T, Chambre de première instance, jugement, 7 mai 1997, par. 198.

[166] *Ibid.*, par. 206.

The PRESIDENT: Thank you Professor Stern. The Court will now rise and resume at 3 o'clock this afternoon.

The Court rose at 1.05 p.m.

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