Corrigé
Corrected

CR 2014/5

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Monday 3 March 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le lundi 3 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
	Judges *ad hoc*	Vukas
		Kreća
	Registrar	Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Vukas
Kreća, juges *ad hoc*

M. Couvreur, greffier

The Government of the Republic of Croatia is represented by:

Ms Vesna Crnić-Grotić, Professor of International Law, University of Rijeka,

as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Director General for EU Law, International Law and Consular Affairs, Ministry of Foreign and European Affairs, Zagreb,

Ms Jana Špero, Head of Sector, Ministry of Justice, Zagreb,

Mr. Davorin Lapaš, Professor of International Law, University of Zagreb,

as Co-Agents;

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Mr. Mirjan R. Damaška, Sterling Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School, New Haven,

Mr. Keir Starmer, Q.C., Barrister, Doughty Street Chambers, London,

Ms Maja Seršić, Professor of International Law, University of Zagreb,

Ms Kate Cook, Barrister, Matrix Chambers, London

Ms Anjolie Singh, Member of the Indian Bar, Delhi,

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London

as Counsel and Advocates;

Mr. Luka Mišetić, Attorney at Law, Law Offices of Luka Misetic, Chicago,

Ms Helen Law, Barrister, Matrix Chambers, London

Mr. Edward Craven, Barrister, Matrix Chambers, London,

as Counsel;

H.E. Mr. Orsat Miljenić, Minister of Justice of the Republic of Croatia,

H.E. Ms Vesela Mrđen Korać, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands, The Hague,

as Members of the Delegation;

Le Gouvernement de la République de Croatie est représenté par :

Mme Vesna Crnić-Grotić, professeur de droit international à l'Université de Rijeka,

comme agent ;

S. Exc. Mme Andreja Metelko-Zgombić, ambassadeur, directeur général de la division de droit communautaire et international et des affaires consulaires du ministère des affaires étrangères et des affaires européennes,

Mme Jana Špero, chef de secteur au ministère de la justice,

M. Davorin Lapaš, professeur de droit international à l'Université de Zagreb,

comme coagents ;

M. James Crawford, A.C., S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat, Matrix Chambers (Londres),

M. Philippe Sands, Q.C., professeur de droit, University College de Londres, avocat, Matrix Chambers (Londres),

M. Mirjan R. Damaška, professeur de droit émérite de l'Université de Yale (chaire Sterling), chargé d'enseignement à l'Université de Yale,

M. Keir Starmer, Q.C., avocat, Doughty Street Chambers (Londres),

Mme Maja Seršić, professeur de droit international à l'Université de Zagreb,

Mme Kate Cook, avocat, Matrix Chambers (Londres),

Mme Anjolie Singh, membre du barreau indien (Delhi),

Mme Blinne Ní Ghrálaigh, avocat, Matrix Chambers (Londres),

comme conseils et avocats ;

M. Luka Mišetić, avocat, Law Offices of Luka Misetic (Chicago),

Mme Helen Law, avocat, Matrix Chambers (Londres),

M. Edward Craven, avocat, Matrix Chambers (Londres),

comme conseils ;

S. Exc. M. Orsat Miljenić, ministre de la justice de la République de Croatie,

S. Exc. Mme Vesela Mrđen Korać, ambassadeur de la République de Croatie auprès du Royaume des Pays-Bas,

comme membres de la délégation ;

Mr. Remi Reichhold, Administrative Assistant, Matrix Chambers, London,

Ms Ruth Kennedy, LL.M., Administrative Assistant, University College London,

as Advisers;

Ms Sanda Šimić Petrinjak, Head of Department, Ministry of Justice,

Ms Sedina Dubravčić, Head of Department, Ministry of Justice,

Ms Klaudia Sabljak, Ministry of Justice,

Ms Zrinka Salaj, Ministry of Justice,

Mr. Tomislav Boršić, Ministry of Justice,

Mr. Albert Graho, Ministry of Justice,

Mr. Nikica Barić, Croatian Institute of History, Zagreb,

Ms Maja Kovač, Head of Service, Ministry of Justice,

Ms Katherine O'Byrne, Doughty Street Chambers,

Mr. Rowan Nicholson, Associate, Lauterpacht Centre for International Law, University of Cambridge,

as Assistants;

Ms Victoria Taylor, International Mapping, Maryland,

as Technical Assistant.

The Government of the Republic of Serbia is represented by:

Mr. Saša Obradović, First Counsellor of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands, former Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Mr. William Schabas, O.C., M.R.I.A., Professor of International Law, Middlesex University (London) and Professor of International Criminal Law and Human Rights, Leiden University,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Centre of Human Rights, Member of the Permanent Court of Arbitration,

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Professor of International Law, University of Glasgow,

M. Remi Reichhold, assistant administratif, Matrix Chambers (Londres),

Mme Ruth Kennedy, LL.M., assistante administrative, University College de Londres,

comme conseillers ;

Mme Sanda Šimić Petrinjak, chef de département au ministère de la justice,

Mme Sedina Dubravčić, chef de département au ministère de la justice,

Mme Klaudia Sabljak, ministère de la justice,

Mme Zrinka Salaj, ministère de la justice,

M. Tomislav Boršić, ministère de la justice,

M. Albert Graho, ministère de la justice,

M. Nikica Barić, Institut croate d'histoire (Zagreb),

Mme Maja Kovač, chef de département au ministère de la justice,

Mme Katherine O'Byrne, Doughty Street Chambers,

M. Rowan Nicholson, *Associate* au Lauterpacht Center for International Law de l'Université de Cambridge,

comme assistants ;

Mme Victoria Taylor, International Mapping (Maryland),

comme assistante technique.

Le Gouvernement de la République de Serbie est représenté par :

M. Saša Obradović, premier conseiller à l'ambassade de la République de Serbie au Royaume des Pays-Bas, ancien conseiller juridique au ministère des affaires étrangères,

comme agent ;

M. William Schabas, O.C., membre de la Royal Irish Academy, professeur de droit international à la Middlesex University (Londres) et professeur de droit pénal international et des droits de l'homme à l'Université de Leyde,

M. Andreas Zimmermann, LL.M. (Université de Harvard), professeur de droit international à l'Université de Potsdam, directeur du centre des droits de l'homme de l'Université de Potsdam, membre de la Cour permanente d'arbitrage,

M. Christian J. Tams, LL.M., Ph.D. (Université de Cambridge), professeur de droit international à l'Université de Glasgow,

Mr. Wayne Jordash, Q.C., Barrister, Doughty Street Chambers, London, Partner at Global Rights Compliance,

Mr. Novak Lukić, Attorney at Law, Belgrade, former President of the Association of the Defense Counsel practising before the ICTY,

Mr. Dušan Ignjatović, LL.M. (Notre Dame), Attorney at Law, Belgrade,

as Counsel and Advocates;

H.E. Mr. Petar Vico, Ambassador of the Republic of Serbia to the Kingdom of the Netherlands,

Mr. Veljko Odalović, Secretary-General of the Government of the Republic of Serbia, President of the Commission for Missing Persons,

as Members of the Delegation;

Ms Tatiana Bachvarova, LL.M. (London School of Economics and Political Science), LL.M. (St. Kliment Ohridski), Ph.D. candidate (Middlesex University), Judge, Sofia District Court, Bulgaria,

Mr. Svetislav Rabrenović, LL.M. (Michigan), Senior Adviser at the Office of the Prosecutor for War Crimes of the Republic of Serbia,

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Marko Brkić, First Secretary at the Ministry of Foreign Affairs,

Mr. Relja Radović, LL.M. (Novi Sad), ***LL.M. (Leiden (candidate))***,

Mr. Georg***ios*** Andriotis, LL.M. (Leiden),

as Advisers.

M. Wayne Jordash, Q.C., avocat, Doughty Street Chambers (Londres), associé du cabinet Global Rights Compliance,

M. Novak Lukić, avocat, Belgrade, ancien président de l'association des conseils de la défense exerçant devant le TPIY,

M. Dušan Ignjatović, LL.M. (Université Notre Dame), avocat, Belgrade,

comme conseils et avocats ;

S. Exc. M. Petar Vico, ambassadeur de la République de Serbie auprès du Royaume des Pays-Bas,

M. Veljko Odalović, secrétaire général du Gouvernement de la République de Serbie, président de la commission pour les personnes disparues,

comme membres de la délégation ;

Mme Tatiana Bachvarova, LL.M. (London School of Economics and Political Science), LL.M. (Université St. Kliment Ohridski), doctorante (Middlesex University) ; juge au tribunal de district de Sofia (Bulgarie),

M. Svetislav Rabrenović, LL.M. (Université du Michigan), conseiller principal au bureau du procureur pour les crimes de guerre de la République de Serbie,

M. Igor Olujić, avocat, Belgrade,

M. Marko Brkić, premier secrétaire au ministère des affaires étrangères,

M. Relja Radović, LL.M. (Université de Novi Sad), ***LL.M. (Université de Leyde (en cours))***,

M. Georg***ios*** Andriotis, LL.M. (Université de Leyde),

comme conseillers.

The PRESIDENT: Good morning. Please be seated.

The Court meets today to hear the oral arguments of the Parties on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. The Republic of Croatia chose Mr. Budislav Vukas and Serbia chose Mr. Milenko Kreća.

They were duly installed as judges *ad hoc* in the case on 26 May 2008 during the hearings on the preliminary objections raised by the Respondent.

*

I shall now recall the principal steps of the procedure so far followed in this case. On 2 July 1999, the Government of the Republic of Croatia filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (the "FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948. To found the jurisdiction of the Court, Croatia invoked Article IX of the Genocide Convention.

By an Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the Federal Republic of Yugoslavia. At the request of Croatia, these time-limits were successively extended to 14 September 2000 and 14 September 2001, and then again, at the request of the Applicant, to 14 March 2001 and 16 September 2002, respectively.

On 11 September 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the Federal Republic of Yugoslavia raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Consequently, by Order of 14 November 2002, the Court noted that, by virtue of

Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, and fixed 29 April 2003 as the time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the Federal Republic of Yugoslavia. Croatia filed such a statement within the time-limit thus fixed.

Public hearings were held on the preliminary objections from 26 to 30 May 2008. By its Judgment of 18 November 2008, the Court rejected the first and third preliminary objections raised by Serbia. It found that the second objection — that claims based on acts and omissions which took place before 27 April 1992, that is, the date on which the Federal Republic of Yugoslavia came into existence as a separate State, lay beyond its jurisdiction and were inadmissible — so this objection did not — according to the Court — in the circumstances of the case, possess an exclusively preliminary character and should therefore be considered in the merits phase. Subject to that conclusion, the Court found that it had jurisdiction to entertain Croatia's Application.

By an Order dated 20 January 2009, the Court fixed 22 March 2010 as the time-limit for the filing of the Counter-Memorial of Serbia. The Counter-Memorial, filed on 4 January 2010, contained counter-claims.

At a meeting held by the President of the Court with the representatives of the Parties on 3 February 2010, the Co-Agent of Croatia indicated that her Government did not intend to raise objections to the admissibility of Serbia's counter-claims as such, but wished to be able to respond to them in a Reply. The Co-Agent of Serbia stated that, in that case, his Government would wish to file a Rejoinder.

By an Order dated 4 February 2010, the Court directed the submission of a Reply by Croatia and a Rejoinder by Serbia, concerning the claims presented by the Parties, and fixed 20 December 2010 and 4 November 2011 as the respective time-limits for the filing of those pleadings. The Court also instructed the Registrar to inform third States entitled to appear before the Court of Serbia's counter-claims, which was done by letters dated 23 February 2010. The Reply and the Rejoinder were filed within the time-limits thus fixed.

On 16 January 2012, at a meeting held by the President of the Court with the Agents of the Parties, the Co-Agent of Croatia stated that her Government wished to express its views on Serbia's counter-claims in writing a second time, in an additional pleading.

By an Order dated 23 January 2012, the Court authorized Croatia to submit such an additional pleading, and fixed 30 August 2012 as the time-limit for its filing. Croatia filed that pleading within the time-limit thus fixed, and the case was ready for hearing.

*

At a meeting held by the President of the Court with the representatives of the Parties on 23 November 2012, it was decided that the Parties would negotiate with a view to communicate to the Court, by late March or early April 2013, their common views and points of agreement on the organization of the hearings in the case. By a letter dated 16 April 2013, Croatia informed the Court that the Parties had concluded an "Agreement on the method of examining witnesses and expert witnesses". That agreement, as amended subsequently with the permission of the Court, provided *inter alia*, that each Party would submit to the Court, not later than 1 October 2013, a list of witnesses and experts that it wished to call, together with their authentic written testimonies and statements, if such testimonies and statements had not been annexed to the written pleadings. Each Party would then communicate to the Court, not later than 15 November 2013, the name of any witness or expert called by the other Party that it did not wish to cross-examine. It was further agreed that written testimonies and statements would replace the examination-in-chief.

On 1 October 2013 the Parties communicated to the Court information concerning the persons whom they intended to call at the hearings, as well the written testimonies and statements which had not been previously appended to their pleadings. Croatia stated that it wished to call nine witnesses and three witness-experts in support of its claims. For its part, Serbia announced that it was planning to call seven witnesses and one witness-expert in support of its counter-claims.

By a letter dated 15 November 2013, Croatia informed the Court that it did not wish to cross-examine the witnesses and witness-expert announced by Serbia, on the understanding that they would not be called to testify before the Court, and that their evidence to the Court would be in the form of their written testimonies or statements. Croatia added that, if this understanding was not correct, or if the Court itself wished to put questions to Serbia's witnesses or witness-expert, it reserved the right to cross-examine them. By a letter of the same date Serbia informed the Court of

the names of the five witnesses and one witness-expert of Croatia that it did not seek to cross-examine, and indicated that it wished to cross-examine the other four witnesses and two witness-experts announced by Croatia.

At a meeting held by the President of the Court with the Agents of the Parties on 22 November 2013, the Parties agreed, *inter alia*, that there was no need to have witnesses and witness-experts come to the Court if they were not to be cross-examined, unless the Court itself wished to put questions to them.

By letters dated 16 December 2013, the Registrar informed the Parties, *inter alia*, that, at this stage of the proceedings, the Court did not wish to question the witnesses and witness-experts that the Parties were not intending to cross-examine. At the same time, he further informed them that the Court wished to receive certain additional documents concerning their witnesses and witness-experts, and that Serbia would have an opportunity to file written observations on a document requested of Croatia. By a letter dated 14 January 2014, Serbia provided the Court with the documents requested. By a letter dated 31 January 2014, Croatia communicated to the Court the requested document. By a letter dated 11 February 2014, Serbia indicated that it did not wish to present written observations on the document provided by Croatia.

By a letter dated 17 January 2014, Croatia asked the Court to take certain protective measures for two of its witnesses, consisting in particular of hearing their evidence in closed session and referring to them by pseudonyms.

By letters dated 7 February 2014, the Registrar informed the Parties that the Court had decided that the Parties should use pseudonyms when addressing the two witnesses for which Croatia had asked for protective measures, or when referring to them; and that these witnesses would be heard in a closed session of the Court, with only Registry staff and members of the official delegations of the Parties being permitted to attend that examination. The Parties were also informed that the Court had decided to impose the following measures to ensure the integrity of the testimonies/statements of the witnesses and witness-experts: (i) the witnesses and witness-experts would have to remain out of the court both before and after their testimony/statement; (ii) the Parties would have to ensure that the witnesses/witness-experts would not have access to the testimonies/statements of other witnesses/witness-experts before the end of the oral proceedings;

(iii) the Parties would have further to ensure that their witnesses and witness-experts would not be otherwise informed of the testimonies/statements of other witnesses/witness-experts and that they would have no contact which could compromise their independence or breach the terms of their solemn declaration; and (iv) the public could attend the witness examinations (except the closed session), but would be requested not to divulge the content of the testimonies/statements before the end of the oral proceedings; the same would apply to representatives of the media, who would have to subscribe to a code of conduct under the terms of which they would be allowed to take photographs and make sound recordings, on the express condition that they did not make public the content of the testimonies/statements before the end of the oral proceedings.

Regarding the publication of the written testimonies of witnesses and written statements of witness-experts who will appear before the Court, and the publication of the verbatim records of the hearing of these witnesses/witness-experts, the Parties were advised that this would take place at the end of the oral proceedings (in their public versions with redacted passages concerning the protected witnesses). As to the written testimonies of witnesses and the written statements of witness-experts announced on 1 October 2013 but who will not be coming to the Court to be cross-examined, the Court intends to publish them on its website at the end of the oral proceedings, with a mention that the Parties did not wish to cross-examine these witnesses and witness-experts. A few of these written testimonies will be published in a redacted form or under pseudonyms.

Lastly, on the question of the broadcasting of the hearings, the Parties were notified, in the same letters, that the Court has decided that, while oral arguments would be broadcast on the Internet, the examinations of witnesses and witness-experts, protected or not, would not.

*

Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and annexes would not be made accessible to the public immediately on the opening of the oral proceedings. The Court considers that more information is required to decide exactly whether some of these documents should be redacted (and to what extent), or possibly withheld from publication, to protect personal information relating to a number of individual victims and witnesses. In any case, the annexes to the pleadings (which

contain written testimonies on disputed events in this case) will not be made public in any form until the end of oral proceedings. In addition, to ensure the protection of any information that should possibly be kept confidential, the Court has decided that a number of individuals will be referred to in public sessions by the annex number of their written testimony or, *casu quo*, by their pseudonym.

*

I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise a first and a second round of oral argument by the Parties.

The first round of oral argument will begin today. Croatia will have six sessions of 3 hours each, five sessions to present arguments on its own claims, the last one being on Friday 7 March 2014, and one session to respond to Serbia's counter-claims on Tuesday 18 March 2014, at 10 a.m. Serbia will begin its first round of oral argument and will have the same number of sessions as Croatia, that is, six. Its first round of oral argument will end on Friday 14 March 2014.

The second round of oral argument will begin on Thursday 20 March 2014, at 10 a.m. Croatia will have two sessions of 3 hours and one session of one and a half hours to present arguments on its own claims, the last one being on Friday 21 March 2014 at 3 p.m. Croatia will then have one session of one and a half hours to respond to Serbia's counter-claims on Tuesday 1 April 2014, at 10 a.m. Serbia will begin its second round of oral arguments on Thursday 27 March, at 3 p.m. It will have three sessions of 3 hours, the last one starting on Friday 28 March 2014, at 3 p.m.

*

In addition, I note that, during the first round of Croatia's oral argument, the Court will hear the witnesses and witness-experts called by Croatia which Serbia wished to cross-examine. These witnesses and witness-experts will be heard at two public hearings on 4 and 5 March from 3 p.m. to 6 p.m., as well as in one closed hearing. They will be cross-examined by Serbia and re-examined, if need be, by Croatia. Members of the Court may also ask them questions.

*

Croatia, which will be heard first, may, if so required, in this first sitting of oral argument, avail itself of a short extension of time, I would say up to twenty minutes, beyond 1 p.m., in view of the time taken up by my introductory words. I now give the floor to the Agent of Croatia, Professor Vesna Crnić-Grotić, to open. You have the floor, Madam.

Ms CRNIĆ GROTIĆ:

I. Introduction

1. Good morning. Mr. President, Members of the Court, I am honoured to appear before the Court on behalf of Croatia in the case against Serbia, all the more so on a case that raises such important issues under the Genocide Convention. Croatia is committed to the rule of law, and believes that a just decision by the Court will reinforce peace and stability in the region, contribute to the healing process for all involved, and support the purposes of the 1948 Convention.

2. Mr. President, Members of the Court, Croatia initiated these proceedings in 1999. At that time, Slobodan Milošević was still in power in Serbia, the man who was the mastermind behind the conflict and atrocity that tore apart the former Yugoslavia. You will be aware that Mr. Milošević was charged with genocide, crimes against humanity and war crimes before the ICTY. He died in 2006, avoiding conviction for any of those crimes.

3. When Mr. Milošević was removed as President of Yugoslavia in 2000 and a new government was established, Croatia immediately engaged in negotiations, with the aim of achieving a just solution with regard to the many issues left open after the war. Amongst those issues was that of the people still missing, a decade or more after the atrocities came to an end. Despite Croatia's efforts, many political leaders in Serbia have maintained an attitude of denial. It is to our great regret that this persists today. The current President of Serbia, Mr. Nikolić, has recently given interviews in which he has refused to recognize the events in Srebrenica as being a genocide, despite the clear verdict of this Court[1]. His statement is in your folders at tab 2. It is the

[1] http://www.Bdlive.Co.Za/World/Europe/2013/04/26/Serbian-President-Apologises-Only-For-Crime-In-Srebrenica (judges' folder, tab 2). See also: http://article.wn.com/view/2013/04/26/Serbian_president_apologises_only_for_crime_in_Srebrenica/.

kind of approach which means that this case has proceeded. Nor has Mr. Nikolić repudiated his connections with Vojislav Šešelj, indicted at the ICTY, and the paramilitary groups with which he has been associated. Such an unfortunate comportment explains why we are here today.

4. Croatia's only resort to justice appears to be this Court, which has an important role. This Court is the guardian of the 1948 Convention, and this Court is uniquely placed to address facts and state the legal principles in a manner that is authoritative and final. No other court or tribunal has that possibility, not a national court, not the ICTY. Serbia takes refuge in the fact that the ICTY prosecutor has not brought charges of genocide for facts that are before you in these proceedings. Does that mean that no genocide was committed, or that there was no failure to prevent genocide? Of course not. It means only that the ICTY prosecutor chose, in its exercise of prosecutorial discretion, to adopt the approach it did. You are the first international court to decide whether the terrible acts committed in and around Vukovar, and elsewhere on the territory of Croatia, were genocidal.

5. We do recognize that Serbia did, at one time, show a willingness to bring prosecutions against responsible persons on its territory. Some efforts were taken, some proceedings brought and convictions obtained. Yet the more recent developments are deeply unsettling. A Serbian War Crimes Chamber convicted 14 perpetrators of the massacre in Lovas, of which you will hear more this week, where a great many people were killed and exposed to the worst genocidal acts. Yet the Supreme Court quashed the judgment in January this year, and ordered a re-trial. Similarly, the judgment in the case concerning events in Vukovar was overturned by the Constitutional Court of Serbia last year. Mr. President, Members of the Court, undoubtedly courts in all States have a duty to protect the human rights of defendants in criminal cases, but these two cases cast a long shadow over Serbia's commitment to justice and the rule of law. We note too that no senior army officer has been indicted, as if the armed forces acted without orders from the top. Mr. President, Members of the Court, you will now on your screens see the results of what happened in Vukovar, a video taken in late November 1991, after the city succumbed to the attacks of the Yugoslav People's Army (JNA) and its allies[2]. Please show the video. [Video: footage of Vukovar]

[2]Source: http://www.youtube.com/watch?v=xfbRuaiGN5Q.

6. These images show what we are dealing with in this case, the result of an intention to destroy a part of a group. Over the course of the coming days, Croatia will show that its claims under the Genocide Convention are well-founded. Croatia still has no information on the whereabouts of the remains of more than 840 Croatian citizens, still missing as a direct result of the genocidal acts. In the past year, Serbia has helped to identify only one mass grave (in Sotin in Eastern Slavonia). A great part of our cultural property taken from churches, museums and galleries is still missing.

7. Mr. President, in 2008 this Court decided, subject to one point on which the jurisdictional issues were joined to the merits, that it had jurisdiction to hear this case. In its Judgment the Court decided that Serbia was legally bound by the Genocide Convention. The Court's solitary caveat was in relation to a preliminary objection *ratione temporis.* The key date appears to be 27 April 1992, which is the date on which Serbia now claims it came into existence as a State. Croatia will show that the Genocide Convention is applicable from the beginning of the conflict on the territory of Croatia, and that Serbia is to be held accountable for actions taken at all material times, not only actions of the Serbian authorities but also those of the former governing authority for which Serbia is internationally responsible. It is our case, and we will demonstrate, that Serbia took over *de facto* and *de iure* control of former federal organs, including the Yugoslav People's Army (JNA), from the time the former State effectively ceased to exist.

8. Mr. President, Croatia is well aware of the Judgment of the Court in the proceedings brought by Bosnia and Herzegovina against the same Respondent — Serbia. In that case, too, the Court had to hear about the extreme human suffering, killings and torture. In its Judgment in 2007 the Court decided that the only event amounting to the crime of genocide was the massacre in Srebrenica. Croatia will adopt the approach taken by the Court and show that genocide — and genocidal intent — is not a numbers game. The 1948 Convention aimed at preventing and outlawing actions of the kind that were taken on the territory of Croatia, beginning in the summer of 1990. It started with unrest and instability in the areas where the Serbs lived but grew gradually to the genocidal campaign incited, organized, controlled and facilitated by the Respondent.

9. Mr. President, in the next few days we will show you that the crimes that took place in the campaign against Croats amount to genocide within the meaning of Article II of the Convention,

and the true intention of its drafters. Let us be reminded that the intent to achieve the total destruction of the targeted group has never been seen as part of the definition of that crime. This Court rightly said that "genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area"[3]. Respectfully, Croatia will show how crimes took place in regions of Croatia that were designated by the Serbian leadership as falling within the compass of an ethnically homogenous "Greater Serbia".

II. Outline of the present hearing

10. Mr. President, allow me to outline for the Court the manner in which Croatia will proceed with its oral pleadings over the course of this week. We will follow the written pleadings without, however, repeating the arguments unnecessarily. We will rely on the material contained in our written pleadings but we will also make use of new relevant material that has come into the public domain since we submitted our Memorial and Reply. We will make use of updated information on deaths and missing persons, having regard to the mass graves that have been found over the past 15 years. These express the truth about what happened, events that remain open. Before turning to the outline of Croatia's oral pleadings, there is one administrative matter that I wish to address. In order to assist the Court, we have prepared judges' folders, which will be referred to by counsel as appropriate. The folder contains selected legal and factual authorities, and selected slides from those that will be presented during the speeches. The slides that depict written quotations are not reproduced in the folder as the relevant passages will appear in the compte rendu. The documents and slides in the folders are separated by dividers, and Croatia will provide the relevant parts of the folder prior to each session, so that it is regularly updated.

11. So, today my colleague Ms Andreja Metelko Zgombić will take the Court through the process of dissolution of the former Yugoslavia but, since the Court has heard the story on more than one occasion, Ms Metelko Zgombić will focus on the most important aspects of those matters for the purposes of this case. It allows an understanding of the legal and factual relations between the former republics and the federal structure of former Yugoslavia.

---

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), I.C.J. Reports 2007 (I)*, p. 126, para. 199, hereafter: *Bosnia* case.

12. She will be followed by Ms Helen Law, who will show how the rise of Serbian nationalism affected the relations between various nations in the former Yugoslavia and brought Slobodan Milošević to power, first in Serbia and then in Yugoslavia. She will set out how Serbian nationalism gave rise to the genocidal acts that followed, as the former Yugoslavia was torn apart. The idea of a Greater Serbia had been initiated in 1986, and in 1990 Mr. Milošević and his allies — men like Šešelj and Arkan of whom you will hear more — started to work on its realization by the harnessing of a genocidal intent. Hate speech was used to target Croats, and this opened the door to genocidal acts.

13. The first day of these proceedings will continue with Professor James Crawford, who will address the role of the JNA and paramilitary groups in the genocidal actions. He will show how the JNA turned from a force that protected Yugoslavia from foreign enemies into a supporter and collaborator of Mr. Milošević's genocidal intentions. This was reflected in the command structure and in the field. The JNA rounded up "volunteers" and paramilitary groups from Serbia, from Croatia and Bosnia, with the intention of destroying a part of the Croat population. The JNA kept the command over them and provided artillery, aviation and any other kind of support in destroying, seizing and occupying Croatian towns and villages.

14. We will end today with Professor Sands who will address the Genocide Convention, taking you through its origins and evolution. He will set out elements of the *actus reus* and specific intent that are to be applied by the Court. He will complete his presentation tomorrow morning.

15. Then Sir Keir Starmer will address issues of evidence and proof in these proceedings. He will explain the Applicant's position with respect to the Court's findings in the *Bosnia* case and the case law of the ICTY.

16. Finally, on the same day the Court will be presented with evidence of genocidal activities by the Respondent that took place in Croatia and its different regions. My colleague Ms Jana Špero will address these issues in overview, and Professor Sands will then provide the Court with an overview of how the Respondent's genocidal campaign unfolded across Croatia as a whole.

17. On the same day, in the afternoon, you will hear some first-hand accounts of the atrocities and the sufferings in Vukovar from the witness Mr. Franjo Kožul. In the same session you will also hear our expert witness, Ms Sonja Biserko, an individual of impeccable independence

and integrity. She will set out the political and historical framework for the genocide committed against the Croat population.

18. On Wednesday, Ms Blinne Ní Ghrálaigh will address the systematic pattern of attack adopted by the Serb forces, led by the JNA, and then as they pursued their genocidal campaign. She will focus in particular on the region of Eastern Slavonia. She will be followed by Sir Keir Starmer, who will describe how this pattern of attack was put into play against Vukovar, which is amongst the worst of the crimes committed by the JNA and its paramilitary allies. The events of November 1991 are well known, but they lie at the heart of this case, emblematic of genocidal intent and act.

19. By way of example, my colleague Professor Maja Seršić will illustrate some of the worst examples of genocidal acts in two places in Lika and Dalmatia. We will conclude the morning session of day three with Professor Davorin Lapaš, who will present evidence of massacres and mass killings committed with intent to destroy the Croat population.

20. On the same day in the afternoon you will hear a witness, Ms Marija Katić, who will tell you about killings and destruction in the village of Bogdanovci in Eastern Slavonia. The next witness will be Mr. Ivan Grujić, an expert witness who has been personally in charge of the excavations of mass graves and identifications of the dead from the beginning of the war in Croatia. He is the person well respected for his work by the International Committee of the Red Cross and he has testified before the ICTY on several occasions.

21. On Thursday morning, Mr. President, I will set out Croatia's position as to the fulfilment of the *actus reus* element of genocide in accordance with Article II of the Genocide Convention by giving you evidence about the ill-treatment of the Croat population, including rape and torture on attacked territories.

22. Professor James Crawford will then address the issues of attribution. Contrary to Serbia's assertion, all the acts of genocide are in fact attributable to the Respondent in accordance with international law. These acts were either committed directly by the JNA or under their command. It is the Applicant's argument that the JNA was a *de facto* and *de iure* organ of the Respondent and as such all responsibility is attributable to it.

23. The final presentation of the morning will be the first part of Sir Keir Starmer's argument about the legal basis for responsibility of the Federal Republic of Yugoslavia, or Serbia, for violations of the Genocide Convention.

24. Mr. President, Members of the Court, Friday, our final day of the first round, will be dedicated to the continued argument by Sir Keir Starmer about the legal basis for responsibility of FRY/Serbia for violations of the Genocide Convention.

25. After that, Professor James Crawford will address the single jurisdictional issue that remains outstanding. On the basis of the facts, it will be evident that the Court has jurisdiction over the entire period of these unhappy events.

26. Finally, Professor Sands will bring together the main strands of Croatia's case, and bring our arguments to conclusion.

III. Conclusions

27. Mr. President, Members of the Court, Croatia will not address the issues raised by Serbia's counter-claim in this first round. In accordance with the schedule set by the Court, these will be addressed on the morning of 18 March.

28. Mr. President, that sets out the approach that will be taken by Croatia over the next week. We appreciate that the Court may wonder why it has taken so long to get to this stage, indeed why the Parties have not been able to resolve their differences. We have tried, time and again. Yet, time and again, new governments have come into power in Serbia who were unwilling to confront the truth about the events that began more than two decades ago. For this reason they are not mere historical events. They continue to resonate, and the Court continues to have an important role in addressing the facts and confirming once and for all that the requirements of the 1948 Convention have been met in relation to the Croatian application.

29. And now, Mr. President, I invite you to call Ms Metelko Zgombić to the Bar. Thank you.

The PRESIDENT: I thank Professor Crnić Grotić for her Agent's introductory statement. I will now call on Ambassador Metelko Zgombić, Co-Agent of Croatia, to continue the presentation of its case. You have the floor, Madam.

Ms METELKO ZGOMBIĆ:

HISTORICAL AND POLITICAL CONTEXT FOR THE GENOCIDE IN CROATIA: THE DISSOLUTION OF THE SFRY

I. Introduction

1. Mr. President, Members of the Court, it is my honour and privilege to appear before you once again on behalf of the Republic of Croatia. I will address the historical and political context of the dissolution of the SFRY and, by doing this, I will respond to the unfounded claim by the Respondent that it can have had no responsibility for conduct before its formal proclamation on 27 April 1992.

2. Serbia asserts that before 27 April 1992, the only State with the responsibility for any relevant acts or omissions in Croatia was the Socialist Federal Republic of Yugoslavia (the SFRY). This is a strategy of evasion, and it is not the one that the Court should accept. The reality is that during the critical period in 1991, the institutions of the SFRY had been appropriated by an emergent Serbian State and were no longer functioning as federal organs in accordance with the 1974 Constitution of the former Yugoslavia. Note that when Serbia — together with Montenegro — adopted a new Constitution on 27 April 1992 and named the State the Federal Republic of Yugoslavia, it did not ask for recognition by the international community and it did not consider itself to be a new State, different from the SFRY. The international community did not accept its claim of continuity; neither did Croatia. But the claim did implicitly, even expressly, involve an avowal by the Federal Republic of Yugoslavia of the conduct of the organs, previously organs of the SFRY, which it had taken over in the process of the dissolution of the Former Yugoslavia. In short, the Federal Republic of Yugoslavia continued to operate with the organs over which it assumed control in the process of dissolution of Yugoslavia. For convenience, I and my colleagues will simply refer to the Federal Republic of Yugoslavia by the current name, Serbia.

3. In this presentation, I am going to outline the process of the dissolution of the SFRY. To put these events in their context, some knowledge of the historic and political background is necessary and is provided in the pleadings, in particular in Chapter 2 of the Memorial and in

Chapter 3 of the Reply[4]. I will focus on the structure of the SFRY and on the developments which caused the constitutional crisis in the 1980s and early 1990s and which ultimately led to the SFRY's dissolution during the course of 1991. These events took place in the context of the re-emergence of extreme Serbian nationalism and the adoption by the Serbian leadership of a plan for a *de facto* "Greater Serbia".

4. I can do so briefly because the facts are relatively well known to the Court and it is familiar with them from the other cases. My colleagues will return to particular episodes of that process as required for the presentation of the case, and on Thursday Professor Crawford will deal with the legal implications for the attribution of conduct.

II. Serbia's repudiation of the SFRY Constitution

5. [Screen on] Mr. President, Members of the Court: let me briefly set the scene geographically. On the screen you can see the various geographical regions of Croatia. In these proceedings, particular reference will be made to Banovina, Kordun, Lika, Dalmatia, and for the purposes of these proceedings, Eastern and Western Slavonia. It is mainly in these regions that the acts that are the subject of this Application were committed — acts that, as you will hear during the course of this week, amounted to the genocide. [Next graphic]

6. You can now see on the screen a map of the whole territory of the former Yugoslavia. The SFRY was a federal State with eight constituent units. Its six republics were: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. It had also two autonomous provinces, Kosovo and Vojvodina, which were parts of the Federation and also parts of Serbia.

7. It is essential for this case to understand the fundamental principles on which the SFRY was established and on which it functioned. Without this understanding, it is impossible to fully appreciate the developments in the SFRY, including key events that led to the destruction of its federal institutions and its ultimate dissolution.

8. Established on the principle of the self-determination of peoples, the second Yugoslavia was from its inception envisaged as a federation of six constitutionally equal republics. This was in sharp contrast to the previous first Yugoslavia, which existed between the two World Wars and

[4]Memorial of Croatia (MC), Ch. 2, especially paras. 2.105–2.116; Reply of Croatia (RC), Ch. 3, especially paras. 3.81–3.117.

which was a Serbian-dominated unitary State, often referred to as "the dungeon of nations"[5]. The principles of federalism and equality of the constituent republics were implemented in the first post-war constitution of Yugoslavia in 1946 and were further developed and reinforced in the 1974 Constitution, which was in force until the dissolution of the SFRY. [Screen off]

9. Under the 1974 Constitution, the sovereignty of the six constituent republics and the two autonomous provinces were enhanced. The result was a federation with distinct confederal elements. This considerably strengthened the position of the republics in relation to the federal structure of the SFRY. All matters that were not explicitly granted to the federal government by the federal Constitution were reserved for the republics and the autonomous provinces.

10. The central organ of the federation was the collective rotating Presidency, composed of a member from each of the six republics and two autonomous provinces. Decisions were taken on the basis of a majority of the eight votes of the members of the Presidency, who were elected for terms of five years. As provided under Article 327, the Presidency of the SFRY was required to rotate the position of President and Vice-President from among its members for a term of one year[6].

11. Under Article 313 of the SFRY Constitution, the Presidency of the SFRY was "the supreme body in charge of the administration and command of the armed forces . . . in war and peace". Under Article 328, the President of the SFRY Presidency was in charge of the command of the armed forces and was also the Chairman of the Council for National Defence.

12. Mr. President, soon after the death of Tito in 1980, the Socialist Republic of Serbia began to question the basic principles governing the structure of the SFRY. With the re-emergence of extreme Serbian nationalism, inflamed by the infamous 1986 Memorandum of the Serbian Academy of Sciences and Arts — the so-called SANU Memorandum — and Milošević's coming to power in 1987, Serbia took a series of unilateral actions which disrupted the balance between the republics and cut deeply into the core structure of the federal State[7].

---

[5]R. J. Davies and B. Riley, *The Croats under Yugo-Slavian Rule: The Result of an Inquiry* (London, 1932), National and University Library in Zagreb, available at http://www.scribd.com/doc/97139484/Croats-Under-Yugo-Slavian-Rule.

[6]MC, para. 2.16.

[7]MC, para. 2.43.

13. A key development in the undermining of the constitutional system of the SFRY was the adoption on 28 March 1989 of an act amending the Serbian Constitution, followed by the Serbian Constitution in 1990. In contravention of the Constitution of the SFRY, the act abolished the autonomy of the two autonomous provinces. Power was centralized in the Republic of Serbia. Serbia retained, however, their representatives in federal organs. As a result of these changes in Kosovo and Vojvodina, along with the establishment of a pro-Serbian Government in Montenegro[8], Serbia came to control four out of the eight votes in the Presidency of the SFRY. This development can be seen as marking the beginning of the constitutional crisis in the SFRY. It became increasingly clear to the non-Serbian members of the SFRY Presidency that they could exercise no real power and authority in this federal organ and that half of the members of the Presidency had effectively been taken over by Serbia.

14. In March 1991, the SFRY Presidency rejected a Serbian proposal to declare a state of emergency. Responding to the failure to get the measure through the Presidency, Serbian President Slobodan Milošević made a televised speech noting that the refusal of the other republics to declare the state of emergency "had pushed Yugoslavia into the final stage of its agony". [Screen on] In the speech, made on 17 March 1991, several months before the conflict started, Milošević declared: "Under the existing conditions, the Republic [of Serbia] does not recognize the legitimacy of the Federal Presidency."[9] [Screen off]

15. On 15 May 1991, the Presidency, dominated by Serbia, with four votes against it, refused to recognize the constitutionally prescribed accession of the Croatian representative, Stjepan Mesić, to the office of President of the SFRY Presidency.

16. By that date, in mid-1991, the Yugoslav People's Army — or the JNA — no longer functioned as a federal organ. Command and control of the army had clearly vested in the Serbian leadership and those senior military figures who gave their allegiance to Serbia. Professor Crawford will show in more detail how the constitutional crisis extended to the JNA, but I will highlight a few key events.

---

[8]MC, para. 2.61.

[9]*Orlando Sentinel Tribune*, 17 March 1991, MC, Anns., Vol. 4, Ann. 34, para. 2.98.

17. The JNA had already disarmed the territorial defence forces in Croatia. The territorial defence forces were a component of the armed forces of the SFRY, but they were under the control of each of its constituent republics. The disarmament of the Croatian forces was planned and quickly undertaken in May 1990, before there had been a handover of authority following the election and before the new Government had been installed. The disarmament took place on the basis of a strictly confidential command signed unlawfully — and without the knowledge and agreement of the SFRY Presidency — by the Head of the General Staff of the JNA, General Blagoje Adžić. [Screen on] The arms taken, an estimated 80,000 to 200,000 guns, were stored in the warehouse of the JNA. Borisav Jović, the Serbian representative on the SFRY Presidency, wrote about the event on 17 May 1990: "Practically speaking, we have disarmed them. Formally the Head of the General Staff did this, but in fact, it was actually under our order. Extreme reaction by the Slovenes and Croats, but they have no recourse."[10] [Screen off]

18. In accordance with Article 5 of the Constitution of the SFRY, the boundaries between the republics could only be altered by mutual agreement between the republics concerned. But in January 1991 President Milošević made it clear that Serbia would not accept the separation of "the Serbian nation" into different States[11]. In March 1991, he said: "borders, as you know, are always dictated by the strong, they are never dictated by the weak"[12]. By early 1991, then, the Serbian leadership had begun to question the territorial borders between the constituent republics. In response to an explicit question asked by Serbia about the nature of the republican borders within the SFRY, the Badinter Commission concluded that the borders between Croatia and Serbia, between Serbia and Bosnia and Herzegovina, or with other States, could be changed only by free will and a common agreement. In the absence of such an agreement, the former administrative borders of the republics had become external borders and were protected by international law[13].

---

[10]B. Jović, *Poslednji dani SFRJ (Last Days of the SFRY)* (1996), 146, MC, Apps., Vol. 5, App. 4.

[11]BBC Summary of World Broadcasts, 17 Jan. 1991, MC, Anns., Vol. 4, Ann. 30.

[12]"Excerpts from shorthand notes from a meeting of the President of the Republic, Slobodan Milošević, and the deputy chairman of the National Assembly of the Republic of Serbia with presidents of municipal councils of the Republic of Serbia, held on 16 March 1991", prepared by M. M. Vreme (Belgrade), No. 25, 15 Apr. 1991, 62–66, quoted in RC, para. 3.38.

[13]Arbitration Commission, EC Conference on Yugoslavia (Badinter, Chairman), *Opinion No. 3*, 11 Jan. 1991.

19. Mr. President, Members of the Court, in January 1991, the SFRY Presidency had rejected a Serbian proposal to allow JNA intervention in Croatia. In March, as I mentioned, it had rejected another Serbian proposal to declare a state of emergency. Faced with these refusals, Serbia went ahead on its own initiative. In early April 1991, Milošević and Jović met Generals Kadijević and Adžić. The generals assured the Serb leadership that the JNA would secure areas held by rebel Serbs in Croatia *without* consulting the Presidency. On 5 July 1991, Milošević and Jović, who was at that time Serbia's representative in the SFRY Presidency, issued General Kadijević a series of demands, which he accepted. They demanded that the JNA concentrate its main forces along a line that would give it control over all the territory where Serbs lived[14]. They also demanded the complete elimination of Croats and Slovenes from the JNA. It is plain that by the middle of 1991, and despite the continuation of formal — and obviously futile — meetings, the SFRY Presidency had been effectively rendered impotent by Serbia. This set the stage for what followed.

20. In September and October 1991, the JNA and Serb paramilitary units began a general attack on all fronts in Croatia. On 7 October 1991, the historic building of the Croatian Government in the centre of Zagreb was attacked from the air. This deliberate attack occurred while the Croatian President, Franjo Tudman, the then President of the Presidency of the SFRY, Stjepan Mesić, and the SFRY Prime Minister, Ante Marković, were meeting inside the building. It was in this violent context that next day, on 8 October 1991, the Parliament of the Republic of Croatia declared the independence of Croatia.

21. Mr. President, Members of the Court, can there be any stronger proof of the collapse of the former common State and its organs and of Serbian control of the JNA, than the fact that the JNA attempted to kill the head of State and head of government of the SFRY, together with the President of Croatia?

---

[14]B. Jović, *Poslednji dani SFRJ (Last Days of the SFRY)* (1996), 349, cited in RC, para. 4.62.

22. The Badinter Commission concluded, in its Opinion No. 1 of 29 November 1991, that by that time the SFRY was already in a process of dissolution[15]. In truth, that process was by then advanced and, in fact, irretrievable.

III. Serbia's response to these facts

23. In its response to these facts, Serbia points to international and diplomatic activities undertaken by the SFRY between 1991 and early 1992[16]. These activities included the conclusion of bilateral and multilateral agreements, participation in diplomatic conferences and meetings. But this level of diplomatic activity cannot mask the reality: the fundamental breakdown and the inability of the SFRY organs, in particular the collective Presidency, to govern the SFRY during this period. Nor can it hide the fact that, at the time, the Serbian President had publicly disavowed the legitimacy of decisions taken at the federal level.

24. Serbia also argues that the finding of the ICTY in the *Martić* case — namely that Milošević participated in a joint criminal enterprise with, among others, Generals Kadijević and Adžić — does not mean that international responsibility for acts and omissions that took place in 1991 can be transferred to a State that only came into existence in April 1992. But the relevance of the joint criminal enterprise is that it indicates the extent to which the Federal Secretary for National Defence of the SFRY and the Head of General Staff of the JNA had by April 1991 committed themselves to the creation by force of a *de facto* "Greater Serbia". This plan came into existence no later than April 1991. An indispensable element of the creation by force of a "Greater Serbia" was a plan to rid large parts of Croatia of its Croat inhabitants, including by the destruction of a part of the Croatian population. That was, in plain words, a genocidal plan.

IV. The rebellion of Serbs supported by Belgrade

25. Mr. President, Members of the Court, I will now briefly address another important development: the rebellion of Croatian Serbs supported by Belgrade. From 1989 onwards, mass

---

[15]Arbitration Commission, EC Conference on Yugoslavia (Badinter, Chairman), *Opinion No. 1*, 29 Nov. 1991, 92 ILR 162.

[16]Rejoinder of Serbia (RS), paras. 435–436.

rallies of Serbs in Croatia were instigated, supported and encouraged by Belgrade. You will recall that at that time Croatia was still governed by the League of Communists.

26. Soon after the democratic transition in Croatia in 1990, an open Serb rebellion broke out, backed by Serbia and the JNA. In August 1990, weapons were seized en masse from police stations in areas with Serb majorities or significant Serb minorities. Roads and railway lines were blocked or cut off in the central area of Croatia, the Knin area. From that time, these areas were beyond the effective control of the Croatian authorities.

27. This rebellion resulted in the self-proclaimed Serb entities on the territory of Croatia in 1990 and 1991, the so-called Serb Autonomous Provinces or "SAOs". The establishment of these entities is discussed at more length in Croatia's pleadings[17].

28. The first to be proclaimed was the so-called "SAO Krajina". The Serb community in Knin adopted a resolution establishing this entity one day before the proclamation of a new constitution for the Republic of Croatia, on 21 December 1990[18]. The Serbs in the area ceased their relations with the Croatian Government and the police there separated themselves from the policing system of Croatia[19]. On 19 December 1991, the rebel Serbs proclaimed the so-called "Republic of Serbian Krajina", the "RSK". The "RSK" was soon joined by the two other self-proclaimed SAOs on the territory of Croatia. These were the "SAO Western Slavonia" and the "SAO Eastern Slavonia, Baranja and Western Syrmium"[20]. By the end of 1991, almost one third of Croatia's territory was occupied, with the genocidal campaign under way.

29. Mr. President, Members of the Court, just to complete the story. After more than four years of occupation, destruction of Croats, failed negotiations, facing constant destruction of its towns and infrastructure, the intransigence of the rebel Serbs and the inefficiency of the United Nations, Croatia regained control over most of its occupied territory in 1995. The last area to be reintegrated into Croatia was that of Eastern Slavonia, including the area around Vukovar —

[17]RC, paras. 3.57–3.80.

[18]MC, para. 2.94.

[19]MC, paras. 2.93–2.95.

[20]RC, para. 3.76.

where some of the worst atrocities of the genocide were committed. The area was peacefully reintegrated by January 1998.

V. Conclusion

30. Mr. President, Members of the Court, you do not need to dwell on any of these facts at great length. The evidence is plain and overwhelming that, by early 1991, the SFRY had, in reality, ceased to exist and function as an effective federal State. Within a few months, by the middle of 1991, as the conflict in Croatia began, it was also plain that Serbia, under the leadership of Milošević, had rendered the Presidency effectively impotent and had taken control of the JNA. Serbia — including the JNA — was pursuing an expansionist and aggressive policy of acquiring the part of Croatia that it envisaged as forming part of a "Greater Serbia". This policy included support for the self-proclaimed Serb entities that were established on Croatian territory in 1991. This was the context for the genocidal campaign that ensued.

31. With your permission, Mr. President, Ms Law will begin the process of analysing that genocidal campaign by setting out in more detail the influence of the extremist Serbian nationalism in the period before conflict.

32. Thank you, Mr. President, Members of the Court, for your attention.

The PRESIDENT: Thank you very much, Madam Co-Agent, and I now give the floor to Ms Helen Law. You have the floor.

Ms LAW:

HISTORICAL AND POLITICAL CONTEXT FOR THE GENOCIDE IN CROATIA: THE ROLE OF EXTREMIST SERBIAN NATIONALISM

1. Mr. President, Members of the Court, it is an honour for me to appear before you in these proceedings on behalf of the Republic of Croatia. I anticipate my presentation taking approximately 30 minutes. With your permission I will continue without a break, but of course please do indicate if, at any stage, you would like me to break.

2. My presentation is the second of the three presentations this morning addressing the background to the genocide committed by Serbia against ethnic Croats. It focuses on the rise of

extremist Serb nationalism in the years leading up to the genocide. Professor Crawford will then describe the parallel Serbianization of the Yugoslav People's Army (JNA) that contributed to the acts of genocide.

3. This morning I will address three matters:

I. The rise of extremist Serbian nationalism from the late 1980s and the virulent campaign of hate speech against Croats conducted in the Serbian media;

II. The support shown by President Milošević for extremist nationalist aims;

III. The connection between extremist Serbian nationalist ideology and the genocidal acts committed in Croatia.

I. The rise of extreme Serbian nationalism

4. I begin then with the rise of extremist Serbian nationalism in the period before the conflict in Croatia. This builds on the accounts of the rise of extremist Serbian nationalism following the death of President Tito in 1980 set out in our pleadings[21].

5. The political importance of Serbian nationalism in this period does not appear to be in dispute between the Parties. Serbia admits that, prior to 2000, "Serbian nationalism was the leading political idea"; it does not dispute that, "hate speech was abundant in the Serbian media at the end of the 1980s and during the 1990s"[22]. The Respondent goes so far as to concede the role played by historical revisionism during this period and admits that, "Serbian nationalists misused the recollections of these past events . . ."[23].

6. The Respondent's assertions that Serbian nationalism went "hand in hand" with Croatian nationalism have been refuted comprehensively in Croatia's pleadings[24]. The role and effect of Serbian nationalist propaganda was confirmed by the expert report of Professor de la Brosse, a Senior Lecturer at the University of Reims, which was submitted to the ICTY Trial Chamber

[21]See Chapter 2 of the Memorial and Chapter 3 of the Reply.

[22]Counter-Memorial of Serbia (CMS), paras. 423 and 434.

[23]CMS, para. 420.

[24]RC, Vol. 1, paras. 3.17-3.25 and 3.41-3.53.

during the proceedings against Slobodan Milošević[25]. In 2004 the Trial Chamber adopted the conclusions of the report, noting that, and as you shall see on screens [Plate on]:

> "Professor de la Brosse determined that a comparison between Serbian, Croatian, and Bosnian nationalist propaganda yielded the conclusion that Serbian propaganda surpassed the other two both in the scale and content of the media messages put out."[26] [Plate off]

7. The publication in 1986 of a Memorandum drawn up by the Serbian Academy of Sciences and Arts — which you have heard referred to as the "SANU Memorandum" — precipitated a period in which extreme nationalist propaganda dominated Serbian culture[27]. The Memorandum was in effect a manifesto, setting forth a Serb nationalist reinterpretation of the recent history of the SFRY. It carried weight because of the authority of its authors, and reflected basic precepts of the Serb nationalist movement. It was premised on the view that the Socialist Republic of Serbia and the Serbs in the other republics of the SFRY were in a uniquely unfavourable position within the SFRY.

8. The Memorandum adopted the position that: "[The Serbian nation] . . . is now the only nation in Yugoslavia without its own state."[28] The Memorandum proposed a review of the SFRY Constitution under which the autonomous provinces would become an integral part of Serbia and the Federal State would be strengthened. This option, referred to in the SFRY as the "Unitarian option", was unlikely to be acceptable to other republics in the SFRY, fearing the domination of Serbian interests in a Unitarian State. The Memorandum also claimed that a covert programme for the Croatization of ethnic Serbs was underway in Croatia.

9. In her expert report submitted to the ICTY during the trial of Slobodan Milošević[29], Professor Audrey Budding, an associate at the Harvard Academy for International and Area Studies, who wrote her doctoral dissertation on Serb Intellectuals and the National Question,

---

[25]RC, Vol. 4, Ann. 106, (Professor R. de la Brosse, "Political Propaganda and the Plan to Create a 'State for all Serbs' — Consequences of Using Media for Ultra- Nationalist Ends", Report Compiled at the Request of the OTP of the ICTY, 4 February 2003) (Professor R. de la Brosse Report).

[26]*Prosecutor* v. *Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 237.

[27]MC, Vol. 1, para. 2.43 *et seq.*

[28]MC, Vol. 4, Ann. 14, p. 75, para. 7.

[29]Expert Report of Professor Audrey Budding entitled "Serbian Nationalism in the Twentieth Century" submitted to the ICTY during the trial of Slobodan Milošević referred to in *Prosecutor* v. *Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 235; the Budding Report.

1961-1991, described the Memorandum as "the best known document of the contemporary Serbian national movement"[30], and explained how it set off "a political firestorm"[31]. As she noted, the second half of the Memorandum asserted that the very survival of Serbs in Croatia was threatened by assimilation: "Serbs in Croatia were never as endangered in the past as they are today"[32]. She concluded that the Memorandum was inflammatory because of the contrast between its complaints about the position of Serbia and Serbs within Yugoslavia and its "vague and elliptical references to a possible post Yugoslav future"[33].

10. The Respondent claims that Croatia exaggerates the importance of the SANU Memorandum[34]. We disagree, and so does the ICTY, having regard to the reliance placed on the reports of Professor Budding and Professor de la Brosse. Professor de la Brosse found that it was the deliberate leaks of the SANU Memorandum that sparked things off and "raised the issue of Serbian nationalism publicly"[35]. Other independent commentators have described the Memorandum as a "political bombshell," one that "convulsed" the country[36].

11. Following the publication of the SANU Memorandum, articles began to appear in the Serbian media that demonized the Croats[37], referring to their alleged genocidal tendencies.

12. As noted in the written pleadings, during the Second World War terrible crimes were committed against the Serbs and others by the Ustasha puppet régime of the so-called Independent State of Croatia (NDH). From the early 1980s, leading Serbian newspapers ran inflammatory articles about the Ustasha concentration camp in Jasenovac[38].

13. A number of Serbian historians and journalists gave vent to the theory that the Croatian people were collectively to blame for the large number of Serbs who were killed between

---

[30]The Budding Report at Pt. 4, p. 53.

[31]*Ibid.*, p. 54.

[32]*Ibid.*, Pt. 4, p. 54.

[33]*Ibid.*, pp. 57-58.

[34]CMS, para. 428.

[35]RC, Ann. 106, Professor R. de la Brosse Report, para. 34.

[36]RC, Vol. 1, para. 3.11.

[37]MC, Vol. 5, App. 3 (Hate Speech: The Stimulation Of Serbian Discontent And Eventual Incitement To Commit Genocide), see especially paras. 17-22.

[38]MC, para. 2.53 and RC, para. 3.13.

1941-1945. This promoted a view that Croats were, by their very nature, genocidal in character and that they adhered to a continuing genocidal intent against the Serbs[39].

14. As Professor de la Brosse's Report notes, and you see on the screen [Plate on]:

> "[the] incessant reminders of the [NDH] and atrocities committed by the Ustasha were an alibi for the political objectives of the [Serbian] regime and were at the root of the development and strengthening of inter-ethnic hatred . . . The parallel between the past and the present comparing Franjo Tuđman's regime to that of Ante Pavelić, was made to raise anti-Croatian hatred to fever pitch."[40] [Plate off]

The Report sets out several examples in this regard.

15. In 1986 a mobile exhibition entitled *The Dead Open the Eyes to the Living*, was displayed at JNA barracks throughout Yugoslavia[41]. The Exhibition, which was open to the public, ran from 1986 to 1991. From the map showing the exhibition sites it is easy to see that these were the areas were genocidal acts were later perpetrated by the Respondent[42]. This had a clear goal. It connected the crimes of World War II to the allegedly "separatist" tendencies in the Socialist Republic of Croatia. This coincided with articles that appeared in weekly journals with a large JNA readership (e.g., Front, People's Army), fomenting the demonization of the Croats.

16. These and other actions played a key role in preparing the ground for the acts of genocide against Croats that were to follow[43].

17. In April 1991 a Member of the Serbian Parliament — Milan Paroški — made a well-publicized and widely reported speech in the village of Jagodnjak in Baranja (north-eastern Croatia). Referring to Croats and Hungarians, he declared that this was Serbian land and then said (as you can see on your screens) [Plate on]: "Whoever tells you that this is his land is a usurper, and you have the right to kill him like a dog!"[44] [Plate off] Baranja was occupied by Serb forces in August 1991 and remained under Serb control until 1998. It was the scene of many horrific atrocities.

---

[39]MC, Vol. 5, App. 3 (Hate Speech).

[40]RC, Ann. 106, Professor de la Brosse Report, para. 54.

[41]RC, Vol. 1, para. 3.14.

[42]RC, Vol. 4, Ann. 113, Exhibition sites of "*The Dead Open the Eyes to the Living*".

[43]MC, Vol. 5, App. 3, in particular paras. 35-37.

[44]See MC, Vol. 5, App. 2, Video clip 3.

II. The support shown by President Milošević for extremist nationalist aims

18. I turn to my second point, namely the role played by Slobodan Milošević in whipping up anti-Croat hatred. The ICTY found in *Martić* that Milošević and others including Babić, Adzić, Karadzic, Mladić and Vojislav Šešelj were party to a joint criminal enterprise (the "JCE"). Its common purpose was the establishment of an ethnically pure Serb territory[45]. The finding withstood the 2008 appeal[46]. I will now examine Milošević's role in supporting and encouraging extremist Serb nationalist aims in the period leading up to the genocide.

19. According to Budding, from 1990 the Serbian leadership actively supported Serb nationalists in Croatia, in order to secure their allegiance to Belgrade and against the newly elected Croatian government[47]. By August 1990, Serbs in the area around Knin, in Croatia, severed relations with Zagreb and were engaged in an outright rebellion by cutting off the Knin area from the rest of Croatia, in a move that came to be known as the "Log Revolution".

20. At this time, President Milošević used hate speech against the Croats to rally support for his nationalist aims. As noted in the 1994 Report of the UN Commission of Experts, in addressing Serbia's parliament in March 1991, he said (and again, you see on the screens) that [Plate on]:

> "Serbia and the Serbian people are faced with one of the greatest evils of their history: the challenge of disunity and internal conflict . . . All who love Serbia dare not ignore this fact, especially at a time when we are confronted by the vampiroid, fascistoid faces of the Ustashas, Albanian secessionists and all other forces in the anti-Serbian coalition which threaten the people's rights and freedoms."[48]

21. He also made use of the media to legitimize the goal of a Greater Serbia, including through violent means. As Professor de la Brosse noted in his authoritative report (and you see on the screen) [Next plate]:

> "The political and military goal of a State for all the Serbs, which presupposed annexing Bosnian and Croatian territory in which Serbs lived, was supported by the Serbian media that served as tools to legitimise the use of force and violence. In July 1991, Slobodan Milošević would again choose Serbian television to deliver a speech in which he announced that war had become inevitable."[49] [Plate off]

---

[45]*Martić*, Trial Chamber Judgement, IT-95-11-T, 12 June 2007, paras. 445-446.

[46]*Martić*, Appeals Chamber Judgement, IT-95-11-A, 8 Oct. 2008.

[47]Budding Report, p. 67.

[48]See the Final report of the United Nations Commission of Experts — established pursuant to — Security Council Resolution 780 (1992), 28 Dec. 1994, at http://www.ess.uwe.ac.uk/comexpert/anx/IV.htm, citing Misha Glenny, The Fall of Yugoslavia: The Third Balkan War 47 (1992).

[49]RC, Vol. 4, Ann. 106, Professor R. de la Brosse Report, pp. 59 – 60, para. 60.

22. The rise of Serb nationalism also found expression in the formation of extremist political parties and paramilitary organizations. The Serbian leadership and the JNA worked in close concert with extremist politicians, such as Vojislav Šešelj and Arkan, and the paramilitary organizations they established as well as many others.

23. The link between President Milošević and extremist Serbian nationalist views has been confirmed by the ICTY. In its 2004 *Milošević* decision, the ICTY Trial Chamber adopted the testimony of United States Ambassador Galbraith, to the effect that Slobodan Milošević "was the architect of a policy of creating Greater Serbia and that little happened without his knowledge and involvement"[50]. This applied equally to the situation in Croatia.

24. One of the most prominent extreme nationalist politicians during this period was Vojislav Šešelj, who established the Serbian Radical Party (SRS) in Serbia in 1991[51]. He is currently on trial for war crimes before the ICTY. As outlined in the Memorial, Šešelj began his rise in the Serbian political arena in 1990. In June 1991, he was elected to the Serbian Assembly. He and his paramilitary organization, "Šešelj's Men" were responsible for countless genocidal atrocities across Croatia, including in Vukovar.

25. As set out in the pleadings, Šešelj advocated an extremist plan to achieve a Greater Serbia, a plan which was aired on Serbian state-controlled television. When asked where the Serbian borders should lie, Šešelj stated: "The western border is the Karlobag-Ogulin-Karlovac-Virovitica line . . . There can be no changes unless a new war takes place . . . You can see that Croats don't have much territory left."[52]. You can now see on your screens a video. [Play video] A related photograph is in your judges' folder at tab 4. And Šešelj's vision has been set out in the Memorial[53].

26. Serbia has accepted that Šešelj became President Milošević's ally by November 1991[54]. Mr. Milošević relied on Šešelj's extremist rhetoric at a much earlier stage, well before the conflict

---

[50]*Prosecutor* v. *Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, case No. IT-02-54-T, 16 June 2004, para. 249.

[51]MC, para. 3.51.

[52]See MC, Vol. 5, App. 2, Video clip 4.

[53]See MC, para. 2.76 and related notes including Vol. 5, App. 2, Video clip 7.

[54]CMS, para. 445.

began. Although Milošević and Šešelj later fell out, Milošević ensured that Šešelj was in a position to promote his extremist nationalist aims. This was clear from the uncritical, prime time coverage Šešelj received on the Milošević controlled, State-run television as confirmed by Professor de la Brosse in his expert report. As you see on the screens [Plate on]:

> "Systematic media coverage was given to Vojislav Šešelj's positions, such as the declaration he made in September 1991 before the Serbian parliament which was broadcast by Belgrade Television:
>
> 'Karlobag-Ogulin-Karlovac-Virovitica must be our option and the army must withdraw its troops to this line. If they cannot be withdrawn from Zagreb without a fight they should pull out under fire and constantly shell Zagreb. The army still has unused resources. If its troops are in danger it has the right to use napalm bombs and everything else it has in its arsenals . . . They wanted war, now they have it!'"[55]
> [Plate off]

27. Šešelj was one of those responsible for the validation of the Chetnik movement. The Chetnik movement was based on an extreme form of nationalism which centred on the idea of a "Greater Serbia". In the implementation of their nationalist aims, the Chetniks collaborated with the Italians and the Germans during the Second World War, and committed atrocities against Muslim and Croat populations in parts of Bosnia and Herzegovina and Croatia[56]. Before breaking away to establish the SRS, Šešelj had co-founded the extremist nationalist Serbian Renewal Party (SPO) in 1989 with Vuk Draskovic, a writer and later a politician, who sought to resurrect the reputation of the Chetniks[57]. He was a vocal proponent of the need to establish a Serbian Krajina region in Croatia[58]. As pointed out by Professor Budding in her report, the SPO was the most prominent party in putting forward specific border claims for a Greater Serbia in the 1990 Serbian elections[59].

28. The evidence shows — and it is not seriously disputed — that President Milošević (1) made use of Šešelj's rhetoric and extremist ideology in the build-up to the war in Croatia, in particular by ensuring his access to the State controlled media; and (2) that the Serbian leadership

---

[55]RC, Ann.106, Professor R. de la Brosse Report, p. 60, para. 60.

[56]MC, paras. 2.09, 2.54 *et seq.*

[57]MC, para. 2.55.

[58]B. Mamula, *Slučaj Jugoslavija* [Yugoslavia Case], 2000, pp. 292-293.

[59]Budding Report, Part 5, p. 66. The SPO said that Serbia should claim all territories which belonged to Serbia on 1 December 1918 and also all territories in Croatia and Bosnia which Serbs were in a majority before the Ustasha genocide.

was then also prepared to give his paramilitary organization a key role in the conflict, during which they were involved in the commission of crimes, in Croatia's case, genocidal crimes.

29. Another prominent extremist Serb nationalist who played an important part in the conflict was Željko Ražnjatović, known as Arkan. As explained in the pleadings, Arkan's paramilitary organization the "Serbian Volunteer Guard" — which was later referred to as the "Tigers" — was established on 11 October 1990 and had its headquarters in Erdut in Eastern Slavonia in Croatia. This followed a decision of the Federal Secretariat for National Defence to form special units for the protection of the Serbian leadership and Serbia itself. These units reported directly to the Headquarters of the JNA and Arkan was appointed by the then Secretary of the Federal Secretariat for National Defence, Lieutenant Colonel-General Marko Negovanović[60].

30. As shown in the pleadings, Arkan used hate speech against the Croats whom he consistently referred to as Ustashas[61]. He and his paramilitary group, Arkan's Tigers, were also responsible for some of the worst atrocities of the genocide.

31. Arkan and his paramilitary organization were deployed in Eastern Slavonia, where they committed acts of genocide in and around Vukovar in the summer and autumn of 1991[62]. There is overwhelming evidence of Arkan's ties with the Governments of Serbia and the FRY, with the self-declared Serbian Republics, and with the JNA[63].

32. Serbia acknowledges in the Rejoinder that Arkan had "political connections with the leadership of Serbia"[64]. Serbia conceded this, although it claims that "the nature and the extent of these connections are not easy to determine". In fact, there is clear evidence of the nature and extent of these connections as set out in the pleadings and in the findings of the ICTY to which my colleagues will refer.

33. Šešelj and President Milošević were committed to what came to be known as the "amputation of Croatia"[65]. According to this idea, up to one third of the territory of the Republic of

---

[60]MC, Vol. 5, App. 5a, p.119.

[61]MC, Vol. 5, App. 3, pp. 64-65, paras. 43-45.

[62]MC, Vol. 5, App. 2, Video Clip 8.

[63]RC, para. 4.107.

[64]RS, para. 547.

[65]See MC, Vol. 5, App. 4.3, p. 99 where Borisav Jović reports Serbian President Milošević as having referred to the "amputation" of Croatia in a conversation with him on 28 June 1990.

Croatia would be cut away from the boundaries and included within an extended Serbian State. The core of the "amputation" consisted of those parts of Croatia in which Serbs claimed they were in the majority, or a significant minority, but the "amputation" was also to include larger Croat-majority towns, such as Dubrovnik, Split, Zadar, Šibenik and Osijek, in which there were relatively few Serbs. The "amputation" was coupled with an intention to destroy a part of the Croat population. The original core of 11 districts with a Serbian ethnic majority gradually grew due to the further addition of smaller Serb enclaves, but also of areas where the Serbs had never been even a significant minority. A map published on 1 March 1991 in the Serbian weekly paper *Nin* provided the clearest possible indication of the Serbian intent to extend its territorial limits into the Republic of Croatia[66].

34. In March 1991, Milošević confirmed the Serbian government's support for the nationalist Serbs in Croatia — which you will see on your screens: [Screen on]

> "I have asked the Serbian government to carry out all preparations for the formation of additional forces whose volume and strength would guarantee the protection of the interests of Serbia and the Serbian people . . . The citizens of Serbia can be sure that the Republic of Serbia is capable of ensuring the protection of its own interests and those of all its citizens and the entire Serbian people. The Republic of Serbia, the citizens of Serbia and the Serbian people will resist any act of dismantling our homeland."[67] [Screen off]

35. Serbia now accepts that the leadership of the Republic of Serbia, headed by Slobodan Milošević supported the establishment of Serb territorial autonomy in Croatia[68]. It did so publicly and covertly, and provided considerable political and financial support.

III. Connection between extremist Serbian nationalism and the genocide

36. Serbia argues that there is a "missing connection" between Croatia's evidence as to the rise of Serbian nationalism and the establishment of genocidal intent[69]. There is no missing connection: the connection between extremist Serbian nationalist ideology and the Serbian leadership's openly expressed plan to create a Greater Serbia, involving the destruction of a part of the Croat population, is well documented in the evidence before the Court. So is the connection

---

[66]See MC, Vol. 1, Plate 8.

[67]MC, Anns., Vol. 4, Ann. 35, BBC Summary of World Broadcasts, 18 March 1991.

[68]RS, para. 537.

[69]RS, paras. 19-20.

between that ideology and the conduct of the campaign itself, in particular through the participation of extremist paramilitary organizations. This is clear from the following points:

(a) Extremist Serbian paramilitary organizations played a direct role in the genocide.

(b) Paramilitaries began to be integrated into the JNA from around September 1991, following a refusal on the part of conscripts and reservists from Croatia, Slovenia and other republics to join the JNA.

(c) To meet the significant shortfall in numbers required for the campaign, the JNA enlisted tens of thousands of volunteers. The army command and senior officials from the Serbian Ministry of the Interior MUP) also worked closely with leaders of paramilitary forces who, while not formally integrated into the JNA, worked in concert with it and operated under JNA command.

(d) Prominent extremist Serbian nationalist politicians, including Šešelj and Arkan, formed paramilitary groups which actively participated alongside the JNA in the acts of genocide perpetrated in Croatia.

(e) The Serbian leadership, led by Slobodan Milošević, encouraged support for the views of extremist nationalists by promoting their access to the media and supporting their aim to create a Greater Serbia.

(f) From the late 1980s onwards, extremist commentators and politicians openly engaged in hate speech against Croats, who were systematically demonized as “ustasha” or fascists, said to be collectively responsible for the crimes of the puppet NDH régime during World War II. The view that Serbs were under imminent threat from Croats was widely promoted.

(g) The idea that a single, ethnically pure State for all Serbs, a Greater Serbia, had to be created by force therefore took place in this toxic environment. The clear implication was that the Croat population in such territory would have to be destroyed.

(h) In this way, the emergence in the 1980s of a plan for a single State for all Serbs, a *de facto* Greater Serbia, was not merely a territorial reconfiguration of the SFRY to be achieved by conventional armed conflict. It became inextricably linked with extremist views about Croats, and the intention to destroy a part of the Croat population. These views promoted the idea that it was impossible for Croats and Serbs to live together peacefully as the Croats posed a threat to Serbs by their very presence in the territory to which Serbia now laid claim.

(i) This was the context for the establishment of a Greater Serbia, based on the forcible acquisition of approximately one third of the territory of Croatia[70]. That plan underpinned a genocidal campaign.

37. In this way, expressions of extremist Serbian nationalist ideology played a key role both before and during the genocidal conflict in Croatia. The demonization of the Croats was the first stage of a programme that led to their intended destruction. During the conflict, proponents of this extremist ideology participated in political and military actions during the genocidal campaign in Croatia both within the ranks of the JNA and alongside it, as Professor Crawford will later explain.

Mr. President, Members of the Court, I thank you for your kind attention.

The PRESIDENT: Thank you, Ms Law, for your presentation and Professor Crawford will address the Court after the break. This sitting is adjourned for 15 minutes.

The Court adjourned from 11.50 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. The hearing is resumed and I invite Professor Crawford to address the Court. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President.

SERBIAN CONTROL OF THE JNA AND JNA CONTROL OF SERB FORCES IN CROATIA

I. Introduction

1. Mr. President, Members of the Court, it is again an honour to appear before you on behalf of Croatia.

2. Serbia has sought to distance itself from the conduct of the JNA. And it is obvious why Serbia would try. The evidence for the JNA's role in what we say were acts of genocide — which role has been the subject of numerous findings of the ICTY — is overwhelming and in many cases beyond dispute. From early to mid-1991, the JNA purported to adopt a neutral "buffer zone" policy, but in fact it intervened to ensure that rebel Serbs could seize control of Croatian territory.

[70]RC, para. 3.37.

From August 1991, it was involved in some of the worst atrocities, directly and through collusion with Serb paramilitaries. Among other examples, after the fall of Vukovar in Eastern Slavonia, high-ranking JNA officers aided and abetted the large-scale murder and torture of prisoners. Faced with these facts, Serbia falls back on the formalistic argument that, until 27 April 1992, the JNA was a *de iure* organ of the SFRY and not an entity for which Serbia had responsibility. That claim partly involves issues of law which I will address on Thursday; it also raises an issue of jurisdiction, which I will address on Friday. But above all it involves questions of fact, and as to the facts the evidence is clear. By July 1991, before the conflict began, the SFRY had ceased to function as a State. Instead the JNA was following the political direction of the Serbian leadership and was engaged in an aggressive campaign to seize some one third of Croatia's territory.

3. In this presentation I will address three aspects of the developing role of the JNA. First, the process of what we have termed "Serbianization", which brought the JNA firmly under the control of the Serbian leadership. Second, the phoney policy of neutrality. Third, the JNA's role in arming and then controlling and directing Serb forces in Croatia. This narrative about the JNA not only provides crucial background to the facts of what occurred, it underlies their legal consequences, including the attribution to Serbia of the acts of the JNA. I will finish this presentation with a word about the mismatch between Serbian and Croatian forces.

II. The JNA falls under Serbian control

4. Mr. President, Members of the Court, Croatia has presented a substantial body of evidence on the critical role of the JNA in the atrocities committed in Croatia. This includes JNA orders and regulations; witness testimony; press articles from the official JNA newspaper *Narodna Armija* and elsewhere, and videotapes. It also includes extracts from memoirs by members of the Serbian political and military leadership, in particular Borisav Jović, at the time a Serbian representative in the SFRY Presidency, and General Kadijević, the SFRY Defence Minister. Croatia will also refer the Court to a number of rulings of the ICTY that support our case on the role played by the JNA in the crimes committed during the war. These rulings lend further support to the conclusion that the JNA was pursuing Serbian aims and objectives from at least July 1991 and that they established its relationship with other Serb forces.

5. I begin with some background on the JNA. It was an important constitutional, political and social entity in the SFRY. Its role was to protect, as a whole, the interests of the six republics and the two autonomous provinces in the SFRY. Under the 1974 Constitution of the SFRY, the control of defence was decentralized to a significant degree. The military structure comprised two elements. The first was the JNA itself. [Screen on] You can see on the screen how at this time the organizational structure of the JNA provided for a number of armies and independent corps whose territorial locations generally corresponded to the internal borders of the republics. As the ICTY explained in *Mrkšić*, — I'm sorry, I've been practising that, not very well it seems — the law of the SFRY "allowed for the possibility in time of war, or in the event of an immediate threat of war or other emergencies, for the armed forces to be reinforced by volunteers"[71]. These volunteers, thousands of them from Serbia, joined the JNA of their own volition rather than because they were subject to military service.

6. The second element of the military structure was the Territorial Defence forces, often referred to by the abbreviation TO, for *Teritorijalna obrana*. These were established in each of the republics. Whereas the JNA itself acted under the control of the SFRY Presidency, in peacetime the republics themselves controlled the Territorial Defence forces[72]. As the Trial Chamber explained in *Mrkšić*, they were "organised on a territorial basis, at the level of local communities, municipalities, autonomous provinces and republics, the highest command level being the republican level"[73].

7. The process of Serbianization began as early as the mid-1980s, when the JNA increasingly allied itself with Serbian conservatives who opposed political reform and favoured greater centralization[74]. An important shift occurred in 1988, when the JNA was restructured. In effect, it was recentralized. [Next graphic] You can now see on the screen a map of military regions in the SFRY. The restructuring of the JNA removed the significant powers of the Territorial Defence forces of the republics and made them subordinate to the military regions[75]. Ultimately this more

---

[71] *Prosecutor* v. *Mrkšić et al*, IT-95-13, Trial Chamber Judgment, 27 Sept. 2007, 31, para. 83.

[72] See MC, paras. 3.08–3.12 and more generally on the history of the JNA, Ch. 3.

[73] *Mrkšić*, 31, para. 83.

[74] MC, paras. 3.13–3.16.

[75] MC, paras. 3.17–3.31; RC, para. 4.23.

centralized structure would facilitate the takeover of the JNA by the Serbian leadership. The process is well evidenced and is detailed rather thoroughly in our Reply[76]. I will take you only to a few points. In light of the evidence, it is profoundly counter-factual to suggest — as the Respondent now does — that the JNA could have continued to function as an organ of the SFRY until April 1992. [Screen off]

8. You will recall that Slobodan Milošević, the President of Serbia, had announced publicly in March 1991 that Serbia no longer recognized the legitimacy of the SFRY Presidency[77]. The constitutional crisis that undermined the role of the collective SFRY Presidency and led to the dissolution of the SFRY extended to the JNA. Over the period of the crisis, it progressively ceased to function as an organ protecting the interests of all of the republics and autonomous provinces. By early 1991, the SFRY had lost control. Instead the JNA took its orders from and pursued the political objectives of the Serbian leadership. [Screen on] Let me quote from the 2003 report of Reynaud Theunens, submitted to the ICTY in the *Milošević* case. Mr. Theunens is a military expert with experience as a Balkan analyst in the Belgian Ministry of Defence. He participated in United Nations peacekeeping operations in the former SFRY from 1994–1999[78]. He said:

> "From late summer 1991 onwards, . . . orders and instructions from what remained of the SFRY Presidency, the Supreme Command and the Supreme Command Staff indicated that at least *de facto* the JNA moved towards ceasing to be the 'SFRY Army' and instead gradually developed into a mainly Serb force, serving Serbian goals . . . "[79] [Screen off]

9. There are two points here. First, the JNA did indeed become a mainly Serb force. By June 1991, the officer corps of the JNA was already about two thirds Serbian. The commanders of every armoured and mechanized JNA brigade located in Croatia and in the adjoining areas were Serbs or Montenegrins. This reflected the lack of confidence placed in non-Serb commanding officers to fulfil what by that time had become the objectives of the JNA — namely the objectives of the Serbian leadership[80].

---

[76]MC, Ch. 3; RC, Ch. 4, especially paras. 4.16–4.38.

[77]*Orlando Sentinel Tribune*, 17 March 1991, MC, Anns., Vol. 4, Ann. 34, quoted in MC, para. 2.98.

[78]See *Prosecutor* v. *Milošević*, IT-02-54, Decision on Motion to Acquit, 16 June 2004, para. 270.

[79]Expert Report of R. Theunens, 16 Dec. 2003, Part I: Structure, command & control and discipline of the SFRY Armed Forces, 6–7, para. 8, submitted by the Prosecution in *Milošević* and cited in RC, para. 4.52.

[80]MC, paras. 3.32–3.42. See also Anns., Vol. 3, plates 9.1, 9.2 and 9.3.

10. That alignment of objectives between the JNA and the Serbian leadership is my second point. Under the Constitution, the use of the armed forces required the agreement of five out of the eight members of the Presidency. But SFRY constitutional requirements were bypassed, and manifestly bypassed, to the extent that private meetings took place between the Serbian leadership and General Kadijević. Jović gives us a number of accounts of these meetings. According to one, on 5 July 1991, Jović and Milošević demanded and obtained a significant promise from Kadijević. Kadijević promised that the JNA would "defend" the Serb population of Croatia. This was in July. But you will hear over the course of this week, the word "defend" is a ~~***gross***~~ distortion of what the Serbian leadership actually intended and what the JNA actually did ***— a gross distortion***. Jović noted that Kadijević had promised that the JNA would execute the orders "of a group of members of the Presidency, although they do not constitute a qualified majority", this in the event that the Presidency was "not able to perform its functions and to make the decision on defending the country's integrity"[81]. From that time until the end of 1991 and the end of Kadijević's command over the JNA, Serbia demanded and consistently received support from the JNA. Serbia argues that the fact that this promise was sought demonstrates the independence of the JNA (it does not appear to dispute that the promise was sought and obtained)[82]. What the promise illustrates rather, is the contempt and disregard of the JNA command for the Constitution and the SFRY Presidency. It also illustrates the close alignment of the JNA, by this stage, with the position of the Serbian leadership.

11. From mid May 1991 to 7 July 1991, the Serb Presidency did not hold any meetings. This was a time of crisis in the country ***of which*** it was the primary constitutional organ. But the JNA was deployed along the borders of the territory to which Serbs laid claim, including large parts of Croatia. This was consistent with what Jović and Milošević had requested from Kadijević on 5 July 1991. By then, the transformation of the JNA had been achieved[83]. [Screen on] General Kadijević himself described what was happening at a meeting he had with Milošević and Jović on 30 July 1991 he said:

---

[81]B. Jović, *Poslednji dani SFRJ* (*Last Days of the SFRY*) (1996), 162, cited in RC, para. 4.70.

[82]RS, para. 459.

[83]MC, para. 3.39.

> "The JNA should be transformed into a military force of those who want [] to remain in Yugoslavia, comprising at least: Serbia, the Serb nation, plus Montenegro."[84]

12. Note the reference in this candid statement not only to Serbia but also to "the Serb nation". [Next graphic] And here are Kadijević's views on the nature of the JNA, again candidly expressed and again as recorded by Jović, on 24 September 1991, when he said:

> "Serbia and Montenegro should declare that the military is theirs and assume command, financing, the war, and everything else. All the generals on the General Staff, except one, are Serbs, and they all support this approach and think the same way."[85] [Screen off]

13. Why did the Serbian leadership not declare, at this time, that the JNA was a Serbian army? The fact that it did not do so *de iure* does not detract from the fact that it was a Serbian army *de facto*. Its rationale for not doing so was purely tactical and presentational. One of the paramilitary leaders, Šešelj, of whom you have heard, explained: "[w]e must fight for a Serbia that covers all Serbian territories" and "[w]e shall call such a Serbia Yugoslavia as long as that is in our interest"[86]. I will say more about the legal consequences of the *de facto* status of the JNA in my presentation on Thursday, but Šešelj, not for the first or last time, really says it all: "[w]e shall call such a Serbia Yugoslavia as long as that is in our interest".

14. The *Balkan Battlegrounds* report, on which Serbia's pleadings rely heavily, confirms that by midsummer 1991 Milošević and Jović were the JNA's *de facto* political overseers in rump Yugoslavia[87]. Perhaps unsurprisingly given its reliance on the report, Serbia seems to accept the conclusion that "[t]he Army became increasingly Serbianized after the eruption of the Slovenian Ten-Day War as conscripts began deserting and the other republics refused to send their biannual intakes of conscripts to the JNA"[88]. At the same time, Serbia refuses to confront the fact that JNA had ceased to enjoy any legitimacy as a federal army. It was seen by many Serbs and non-Serbs as following the directives of the extreme nationalist government led by Milošević[89] — and that perception was accurate.

---

[84]Jović, *Last Days of the SFRY*, MC, Apps., Vol. 5, App. 4.3, quoted in MC, para. 3.34.

[85]Jović, *Last Days of the SFRY*, MC, Apps., Vol. 5, App. 4.3, quoted in MC, para. 3.40.

[86]MC, Apps., Vol. 5, App. 2, video clip 13, quoted in MC, para. 3.40.

[87]*Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990–1995* (Central Intelligence Agency, Office of Russian and European Analysis, May 2002), 96, cited in RC, para. 4.71.

[88]*Balkan Battlegrounds*, 93, cited in RC, para. 4.38.

[89]RS, para. 445.

III. The phoney policy of neutrality

15. Mr. President, Members of the Court, this brings me to the next aspect of the developing role of the JNA. Serbia seeks to present it as playing first a neutral role and then, from September 1991, a defensive role — initially, at least, in defence of the SFRY. That is a whitewash.

16. Serbia's Rejoinder uses revealing language when it characterizes the JNA's role in the early stages of the conflict. Serbia continues to claim that the JNA "acted as a federal organ of the then SFRY", and that it was "trying to subdue insurgent forces that were attempting to bring about the secession of Croatia from the SFRY"[90]. In intervening to prevent Croatia's independence, however, the JNA was not acting as a federal organ. Its actions can be contrasted with its rapid retreat from Slovenia, which was also trying to separate. The opposition to Croatia's independence came from Serbia, supported by the governments in Montenegro and the two autonomous provinces, which had been brought under control ***of*** Serbia. In acknowledging that the JNA was determined to preserve the existence of a notional SFRY, including by force, Serbia effectively concedes that the JNA stepped outside its constitutional role as a federal organ.

17. In its Rejoinder, Serbia concedes that "the role of the JNA in Croatia gradually changed from a peacekeeping force to one of the warring parties"[91]. This is a significant concession (even if it is wrong to describe the JNA's role as ever having been that of a "peacekeeping force"). Serbia adds that the JNA became a warring party "only as a reaction to hostile and criminal actions undertaken by the newly created Croatian armed forces who started a war for secession against the SFRY — the country the JNA was tasked to protect"[92]. Serbia again misses the point. It does not seek to defend the JNA's actions on legal or constitutional grounds. Instead it cites a political objective — patently a political objective of Serbia rather than of the republics collectively. The JNA adopted a line drawn by Serbia on what could be permitted to the other republics, without regard to the functioning of the Constitution or the democratically-expressed will of three republics, including Croatia. The point here is that, by this stage, the JNA was operating under the effective control of the Serbian leadership and was pursuing Serbian objectives.

---

[90] RS, para. 176.

[91] RS, para. 454.

[92] *Ibid.*

18. The *Balkan Battlegrounds* report acknowledges this. In summer 1991, the JNA was "acting in the name of Yugoslavia but irresistibly biased towards Serbia"[93]. The report also notes that "after the war in Slovenia began, the JNA dispatched large numbers of troops to the border with Eastern Slavonia and elsewhere in Croatia to intimidate Zagreb into backing away from secession"[94]. Coming from a report on which Serbia relies, these are strong statements. They confirm that the JNA was acting in accordance with Serbian objectives, Serbian characterizations. These objectives were far from being "neutral" or defensive.

19. Serbia makes a number of assertions about the extent to which the Serbian leadership controlled or commanded General Kadijević. It calls them "uneasy political allies"[95]. But whether uneasy or not, they *were* political allies. The relevant point is the role played by the JNA in the conflict under General Kadijević. He describes that role in his memoir. The objective, he said, was to totally block Croatia from the air and the sea and to secure and hold the planned border of the territory claimed by Serbs[96]. This aligns, not with the objectives and interests of the republics, but rather with those of Serbia and its allies in the self-proclaimed Serb entities in Croatia, and those objectives were not defensive; they were avowedly aggressive. In *Martić*, the Trial Chamber of the ICTY concluded that Kadijević was a party to a joint criminal enterprise whose common purpose "was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population"[97]. And that is the fact: the displacement can be characterized one way or another but the fact is indisputable and has been found by tribunals looking at the issue with care. Indeed Serbia does not dispute this; it simply says that this conclusion must be "taken with reserve" and does not prove that the JNA was a *de facto* organ of Serbia or acting under its direction or control[98]. I will consider that legal proposition in my later presentation. But as a factual matter, given that the JNA's senior command was actively engaged in a joint criminal enterprise with the President of Serbia, to take action against the population of

[93]RC, para. 4.26.

[94]*Balkan Battlegrounds*, 92, cited in RC, para. 4.57.

[95]RS, para. 462.

[96]V. Kadijević, *My View of the Collapse* (1993), p. 135.

[97]*Prosecutor* v. *Martić*, IT-95-11, Trial Chamber Judgment, 12 June 2007, para. 445.

[98]RS, para. 464.

one of the constituent republics of the SFRY, only one conclusion is possible: that it was already functioning as a Serbian army.

IV. The JNA arms, controls and directs Serb forces in Croatia

20. Mr. President, Members of the Court, I turn to the next issue: the JNA's role in arming, controlling and directing Serb forces. The proclamation of the Serb entities in Croatia in 1990 and 1991 set the stage for the destruction of part of the Croatian population. Serbs were spurred into action by the emergence of radical Serb institutions and by powerful anti-Croat rhetoric, as we have shown. In addition to the JNA itself, a variety of groups were involved in the destructive onslaught against the Croat population. Serbia asserts that it did not supervise or direct these groups. But that is not correct: they were under the control of the JNA. Without the active, extensive and sustained assistance of the JNA and Serbia, they could not have conducted a campaign to destroy a part of the Croat population.

21. I will introduce the variety of groups that participated in the Serb onslaught, then I will deal with the JNA's role in arming these groups, and then with its direction and control. The groups fell into several categories.

22. First, of course, there was the JNA itself[99].

23. Secondly, there were the ***T***erritorial ***D***efence forces from the constituent republics, in particular Serbia[100].

24. Thirdly, there were the groups that we have termed "paramilitaries"[101]. Overall, 32 volunteer paramilitary units operated in Croatia: 16 organized in the Republic of Serbia, and 16 operating from the Serb entities in Croatia. They were organized not only by the Serbian Government but also by political parties and local police or community leaders. Their members were drawn from the JNA, from the ***T***erritorial ***D***efence forces and from local militia and police. There are some reports that criminals were released from prison solely for the purpose of forming units[102]. We have listed these groups in our pleadings and annexes[103].

---

[99]RC, paras. 4.73–4.77.

[100]RC, paras. 4.78–4.84.

[101]RC, paras 4.11–117.

[102]Final Report of the United Nations Commission of Experts established pursuant to SC res 780 (1992), United Nations doc. S/1994/674/Add. 2 (Vol. I), 28 Dec. 1994, Ann. IIIA, Special Forces, cited in MC, para. 3.48.

[103]MC, paras. 3.47–3.53 and Anns., Vol. 3, plate 6.7.

25. Fourthly, there were the forces established by the self-proclaimed autonomous Serb entities in Croatia: the "SAO Krajina", the "SAO Eastern Slavonia" and the "SAO Western Slavonia"[104]. These included forces described as "police" and as "***T***erritorial ***D***efence" forces. These so-called ***T***erritorial ***D***efence units of the self-proclaimed Serb entities are distinct from the ***T***erritorial ***D***efence units of the constituent republics, which were part of the formal military structure of the SFRY. Also established by the "SAO Krajina" were special police units known as the Milicija Krajine. Serbia states in its pleadings that the Milicija Krajine were within the framework of the Ministry of Internal Affairs but were under the authority of the Ministry of Defence[105]. The "SAO Eastern Slavonia" also established its own special police units: the Srpska Nacionalna Bezbednost (Serbian National Security)[106]. Along with the Milicija Krajine, this was later incorporated into the Ministry of Internal Affairs of the "RSK"[107].

26. Like the more heterogeneous paramilitaries, the forces of the Serb entities were *ad hoc* formations which would have been unable to perpetrate atrocities without JNA support. One vital aspect of that support was the role of the JNA in arming both the forces of the Serb entities and the paramilitaries[108]. In May 1990, the JNA had disarmed the Croatian Territorial Defence[109]. These weapons were inherited by the so-called "police" and Territorial Defence units of the "SAO Krajina"[110]. More widely, in early 1991, the JNA began arming local Serbs and paramilitaries. Villages with a Serb majority became outposts of the JNA and bases for these newly established paramilitary groups[111].

27. There is considerable eyewitness testimony and official JNA orders to evidence that this was endorsed at the highest Serbian political and military levels. For example, a letter from Colonel Dušan Smiljanić to General Ratko Mladić, both senior JNA officers, describes how from April 1991 the JNA engaged in "the illegal arming of the Serbian people from our . . .

[104]RC, paras. 4.85–4.99.

[105]CMS, para. 494; RC, para. 3.75.

[106]*Prosecutor* v. *Hadžić*, IT-04-75-PT, Second Amended Indictment, 22 March 2012, p. 4.

[107]*Prosecutor* v. *Hadžić*, IT-04-75-PT, Second Amended Indictment, 22 March 2012, p. 4.

[108]RC, paras. 4.118–4.129.

[109]RC, para. 3.55.

[110]MC, para. 3.47.

[111]MC, para. 3.45.

warehouses"[112]. Between April and July 1991, the letter says, "around 15,000" infantry weapons and anti-aircraft guns were distributed to Serbs in the area, and in August 1991, the JNA established a special operation team responsible for the "arming of the Serbian people". The letter adds: "from August to October 1991, we distributed, or to say pulled out from the Ustashas' warehouses around 20,000 pieces of various weapons" and ***they*** included "howitzers, bombs and rocket launchers"[113]. Two JNA officers describe how the JNA distributed weapons to rebel Serbs across Lika in the summer of 1991[114]. [Screen on] One of the officers explained that senior JNA commanders had authorized the mass arming of Serbs throughout the region:

> "During July and August 1991, mostly at night, they transported weapons from Sv[eti] Rok and Skradnik, and which was distributed among the Serbs in Lika . . . Usually after a visit of Lieutenant Colonel Smiljanić and General Borić, the Serbs would be armed on a massive scale."[115] [Screen off]

28. Similarly, the ICTY found that in Kordun "helicopters were used by the JNA to carry weapons and ammunition, which were distributed to local Serbs"[116]. In relation to Western Slavonia, a former Serb fighter testified before a Croatian military court that in November 1991 the JNA supplied paramilitaries with arms from a local Territorial Defence warehouse[117]. A document entitled "Request for Ammunition and Other Equipment" of 18 September 1991 shows that the JNA supplied arms and military equipment to the so-called "Ministry of Defence of the Rep[ublic] of the Serbian Krajina"[118], a wholly unconstitutional entity. Other witnesses described how the JNA similarly armed Serb forces in numerous locations across Croatia[119]. This was not the defence of the 1974 Constitution.

29. Serbia presents the self-proclaimed Serb entities as operating independently of the Serb leadership[120]. But that is inconsistent with the facts[121] and with the findings of the ICTY. The

---

[112]Letter from Dušan Smiljanić to General Mladić dated 15 Oct. 1994, MC, Anns., Vol. 2 (III), Ann. 411.

[113]Letter from Dušan Smiljanić to General Mladić dated 15 Oct. 1994, MC, Anns., Vol. 2 (III), Ann. 411.

[114]See the witness statement of former JNA Major Mustafa Čandić and former JNA officer Suad Šalo, MC, Anns., Vol. 2 (III), Anns. 339 and 340.

[115]MC, Anns., Vol. 2 (III), Ann. 340.

[116]*Martić*, para. 201.

[117]MC, Anns., Vol. 2 (II), Ann. 169.

[118]Request for Ammunition and Other Equipment, delivered to the "Ministry of Defence of the Republic of the Srpska Krajina" on 18 Sept. 1991, MC, Anns., Vol. 2 (II), Ann. 234.

[119]MC, Anns., Vol. 2 (II), Anns. 193, 206, 247, 293 and 495; testimony of Dzuro Matovina, in *Prosecutor* v. *Milošević*, IT-02-54, 8 Oct. 2002, transcript, 11105.

[120]CMS, paras. 610–613.

[121]RC, paras. 4.39–4.44.

Milošević indictment alleged that Milošević and other participants in the joint criminal enterprise — which included high-ranking officials of the self-proclaimed Serb entities in Croatia — "directed, commanded, controlled or otherwise provided substantial assistance or support to the JNA, the Serb-run TO staff, and volunteer forces"[122]. In *Martić*, the ICTY held that the existence of that joint criminal enterprise had been established[123]. It also found that the "SAO Krajina" Territorial Defence was subordinate to the JNA "beginning after the summer of 1991"[124], that the Serbian authorities financed and equipped its Ministry of Internal Affairs and that its units were subordinated to the JNA for specific assignments[125]. When subordinated, those units would be under the command of the JNA unit commander[126].

30. In fact, JNA control extended much further than this. Mr. Theunens — to whom I have referred — testified about this control in his expert report. [Screen on] He comments as follows on the legislative framework adopted by Serbia and by organs of the collapsing SFRY under Serb control in order to accommodate "volunteers":

> "In order to regularise the de facto situation that existed on the ground, in particular with regard to the presence of volunteer groups and paramilitary formations, legislation was amended. In August and September 1991, Serbia and the SFRY adopted Decrees and Instructions for the registration and acceptation of volunteers in the TO of the Republic of Serbia and the JNA. In December 1991, the SFRY Presidency adopted an Order for the engagement of volunteers into the SFRY Armed Forces. Contrary to the situation during the Kosovo conflict eight years later, volunteers were allowed to join and remain in their own groups during their participation in operations."[127]

31. The order of September 1991 integrating volunteers into the JNA confirms that Serbia had effective control of the paramilitary groups[128]. It is notable that the 1982 law on volunteers, annexed to Mr. Theunens' report, provides that "in view of the rights and responsibilities,

---

[122] *Milošević*, Indictment, para. 68.

[123] *Martić*, para. 445.

[124] *Martić*, para. 142.

[125] *Martić*, paras. 140–142.

[126] *Martić*, para. 142.

[127] Expert Report of R. Theunens, 16 Dec. 2003, submitted by the Prosecution in *Milošević*, Part I: Structure, command & control and discipline of the SFRY Armed Forces, 6 (para. 7). The legislative framework is discussed in more detail in Part II: The SFRY Armed Forces and the conflict in Croatia, 34–46.

[128] RC, para. 4.108.

volunteers are on an equal footing with military personnel or military conscripts"[129]. [Next graphic]

32. Mr. Theunens goes on to give the following summary of the unified command structure for operations by the JNA along with other Serb forces in Croatia:

> "Documentary evidence indicates that (local) Serb(ian) TO units and staffs operated under single, unified command and control with the JNA. The JNA established Operational (OG) and Tactical Groups (TG) to restore and/or maintain unified and single command and control during the operations, involving the JNA, local Serb TO, Serbian TO and volunteers/paramilitaries."[130]

33. Let me repeat that list. The JNA itself. The local Serb TO — that is, the forces of the self-proclaimed Serb entities in Croatia. The Serbian TO. And fourth: the volunteers or paramilitaries. All those forces were under a single, unified command. [Screen off]

34. The ICTY explored this unified command structure in *Mrkšić*. It observed that "in situations when JNA and TO forces were engaged in joint combat operations, these units were subordinated to the officer in charge of carrying out the operation"[131]. This command structure was reflected in the JNA's own Brigade Rules, which stated that the integration of command was achieved "through joint efforts by the brigade command and commands of the brigade's subordinate and other units and staff of the TO operating in coordination [with] the brigade" — that is, the JNA brigade. [Screen on] Rule 108 made it clear that this integration of command was to be achieved, "on the basis of unity of command and subordination"[132]. As the ICTY noted:

> "The principle of unity or singleness of command . . . required that in a zone of operations, in combat action, one commander was responsible for commanding all military units in that area, including TO and volunteer units, and that all subjects in the area, i.e. all units and their individual members, were subordinated to the one commander . . .
>
> [I]t is clear that that, in practice, at least at the time relevant to the Indictment, the officers in command of all joint combat operations were JNA officers."[133]

35. The ICTY gave an example of how this principle of "singleness of command" was implemented. A circular issued on 12 October 1991 by General Blagoje Adžić, the Chief of Staff

---

[129]Expert Report of R. Theunens, 16 Dec. 2003, submitted by the Prosecution in *Milošević*, Part II: The SFRY Armed Forces and the conflict in Croatia, 34–35.

[130]Expert Report of R. Theunens, 16 Dec. 2003, submitted by the Prosecution in *Milošević*, Part I: Structure, command & control and discipline of the SFRY Armed Forces, 7 (para. 9), cited in Reply, para. 4.77.

[131]*Mrkšić*, para. 84.

[132]*Mrkšić*, para. 84

[133]*Mrkšić*, paras. 84–85.

of the Federal Secretariat for National Defence, affirmed that "at all levels all armed units, whether JNA, TO or volunteers, must act under the single command of the JNA". [Next graphic] Three days later, on 15 October, the command of the First Military District of the JNA — and I quote again from the ICTY — "issued an order to all units subordinated to it . . . to establish 'full control' within their respective zones of responsibility. Pursuant to this order, paramilitary units which refused to submit themselves under the command of the JNA were to be removed from the territory."[134] [Screen off]

36. The Trial Chamber held that the evidence established "complete command and full control of the JNA of all military operations" involving Serb paramilitaries and volunteers. I repeat those words: "full control". Moreover, said the Trial Chamber, "in the final analysis the JNA under the command of Mile Mrksić not only had *de jure* authority as identified above, but also had the manpower, armament and organisation to exercise effective *de facto* control over all TO and volunteer or paramilitary units" in the relevant areas[135].

37. The inclusion of the paramilitaries in this structure is confirmed by some of the paramilitary leaders themselves. The Serb Volunteer Guards, for example, told the press: "[w]e are currently under the command of the Territorial Defence of the Serb Slavonia, Baranja and Western Sirmium Region, and they are under the command of the JNA"[136]. [Screen on] Dragoslav Bokan was the leader of the White Eagles paramilitary unit, which you will hear was responsible for some of the worst atrocities committed against the Croat population. He explained that an agreement existed that implied that

> "nobody should wear special signs and that all units should be under the direct control of the Territorial Defence. Only [Vuk Drašković's] guard did not accept it. They demanded that their headquarters be in Belgrade, which was not accepted. Anyway, we no longer had direct control over our men from the moment they were put under the control of the Territorial Defence."[137] [Screen off]

38. Finally, let me highlight the close ties of the Serbian leadership and the JNA with another paramilitary leader, nicknamed "Arkan". The Security Service of the Headquarters of the

---

[134]*Mrkšić*, paras. 85–86.

[135]*Mrkšić*, para. 89.

[136]"Time of the warriors" ("Vrijeme ratnika"), *Pobjeda*, 13 Jan. 1992, MC, Anns., Vol. 4, Ann. 22.

[137]Dejan Anastasijević, "Plucking the eagle's feather" ("Cerupanje orlova"), *Vreme*, 22 Nov. 1993, MC, Anns., Vol. 4, Ann. 23.

Territorial Defence of the Republic of Serbia stated that Arkan was "paid especial attention to by a larger number of ministers and other officials in the Government of Serbia and enjoy[ed] a specially privileged treatment"[138]. The Security Service of the 12th Corps of the JNA stated in January 1992 that Arkan was openly "supported by the Ministry of the Interior, the TO and the Ministry of People's Defence of the Republic of Serbia, but it is claimed that this is so on direct orders of the highest leadership of the Republic of Serbia"[139]. The same JNA document also reports that Arkan was "taking part in meetings of the Command of the 1st Military District together with the Corps Commanders". Croatia's Memorial includes a photo of Arkan attending a funeral in the company of Milošević[140].

39. [Screen on] The expert report of Mr. Theunens in the *Milošević* case, which analyses the command structure of the JNA in detail, cites a letter to Arkan from the mayor of Pentrinja, in Croatia, which is described as a "Serbian municipality". This confirms that the JNA was responsible for arming and feeding Arkan's unit and that it was under JNA control:

> "We agree with the proposition that members of . . . ARKAN's unit participate in fighting on the JNA and Territorial Defence positions in the municipality of Petrinja. The unit will be commanded by a senior officer and the unit will be part of and under the command of the commander of the 2nd motorised battalion of the 622nd motorised brigade, Bogdan ERCEGOVAC. Arming and food supplied are the responsibility of the 2nd motorised battalion."[141]

40. That is of course of the JNA. [Screen off]

41. I will deal with the legal consequences of the control and direction exercised by the JNA on Thursday. But those are the facts. A peacekeeping force does not arm one of the warring parties. Yet the JNA armed, controlled and directed all the other Serb forces responsible for the acts that Croatia says amount to genocide — both the forces of the self-proclaimed autonomous Serb entities and the paramilitaries. The evidence is clear, precise and direct; just as you required it in *Nicaragua*. The evidence I have cited also provides further proof that the JNA was acting as a *Serbian* army pursuing the political objectives of Serbia and its Serb allies in Croatia.

---

[138]Security Organ of the Republic's Headquarters of the TO of the Socialist Republic of Serbia, Strictly Confidential No. 254-1/9, 13 Oct. 1991, Notification, ICTY doc. No. 0340-4870-0340-4871.

[139]Security Organ of the Command of the 12th Corps, 1 Jan. 1992, Information, ICTY doc. No. 0340-4884-0340-4887, cited in RC, para. 4.107.

[140]MC, Vol. 1, plate 13.

[141]Expert Report of R. Theunens, 16 Dec. 2003, Part II: The SFRY Armed Forces and the conflict in Croatia, p. 62, para. 6, submitted by the Prosecution in *Milošević*.

V. The mismatch with Croatian forces

42. Mr. President, Members of the Court, I will finish by mentioning the mismatch in strength between the JNA and other Serbian and Serb forces on one side and the Croatian defence forces on the other. Serbia's pleadings make various allegations about Croatia's preparations for the conflict. They allege that the Croatian Government started to prepare for an armed conflict in mid 1990[142]; in other words, they were the aggressors. But by 1990, rebel Serbs had already begun their unlawful seizure of parts of Croatian territory, with the support of the JNA. It was the preparations by Croatia that were defensive.

43. I mentioned that in May 1990, the JNA completely disarmed the Croatian Territorial Defence. Serbia's pleadings largely ignore this fact, and yet it preceded the defence activities of Croatia[143]. It was this disarmament that rendered necessary the enlargement and arming of the Croatian police. Additional personnel were also required to meet the shortfall in numbers caused by the rebellion of Serbian police officers in the areas of Croatia where the Serb community had purported to proclaim its autonomy. Croatia began these defence activities very much at a disadvantage. The disarmament left the Croatian Ministry of Internal Affairs as the only internal institution in Croatia with weapons. It had only a single armed unit, a special operations or antiterrorist force about the size of a company and a total of 15,000 rifles or pistols[144]. It was thus the Ministry of Internal Affairs that played the key role in the first phase of the development of the Croatian forces: it enlarged the regular police and organized Special Police and Reserve Police units[145]. It also began to organize some company-sized volunteer units during this phase[146].

44. There were two subsequent phases. On 18 April 1991, Croatia formed the National Guard Corps, otherwise known as the "ZNG". From June to September 1991, the ZNG brigades were the only Croatian units fully equipped with small arms, though they lacked heavy weapons[147]. The Ministry of Internal Affairs also began transferring police reserve units to the ZNG to provide it with territorially organized reserve brigades and independent battalions[148]. The final significant

---

[142] RS, para. 448.

[143] RC, para. 3.55.

[144] *Balkan Battlegrounds*, Ann. 2, pp. 35–37.

[145] *Ibid.*, pp. 35–37.

[146] *Ibid.*, pp. 37–38.

[147] *Balkan Battlegrounds*, Ann. 3, p. 45.

[148] *Ibid.*, p. 45.

player to emerge was the Croatian Army itself. This came in the third phase, after the State Supreme Council decided on 22 September 1991 to establish a Main Staff of the Croatian Army**,** which absorbed the ZNG command[149]. It is notable that despite the addition of armoured and artillery units at this time and the incorporation of arms captured from the JNA, the ZNG was still, as the *Balkan Battlegrounds* report described it, "an infantry-rich, firepower-poor force in comparison to the JNA, which fielded upwards of 1,000 tanks compared to the 250 or so available to the ZNG in the 1991 fighting"[150].

45. More generally, the *Balkan Battlegrounds* report observes that the Croatian forces lacked the firepower to push "the more professional and heavily armed JNA" out of Croatia and "[i]n contrast with the JNA, Croatia had little in the way of a military logistic structure and little time to develop one"[151]. This mismatch, augmented by the Serb paramilitary forces that the JNA armed and exercised control over, was a significant one.

46. I should add that the victims of the Serb forces were themselves not always totally defenceless. But here the mismatch was even more extreme. The primary defence of towns and villages was often conducted by local men, calling themselves "defenders" but sometimes defending their villages with little more than hunting rifles. As you will hear — for example, from Sir Keir Starmer with respect to Vukovar — the disproportion is a compelling indication that Serbia's intention was not limited to military objectives but involved the devastation of the civilian population. The intention was to destroy that population, in part, because it was Croat. By the time Vukovar fell, the JNA had an advantage of at least 16:1 in manpower and of more than 100:1 in artillery and tanks.

VI. Conclusions

47. Mr. President, Members of the Court, let me sum up. During 1991 the JNA abandoned any "neutral" role under the Constitution of the SFRY and progressively transformed itself into an army pursuing Serbian objectives. This culminated in General Kadijević's agreement on 5 July 1991, before the conflict started, that the JNA would act in Serbia's interests, and

[149] *Balkan Battlegrounds*, Ann. 11, p. 111.

[150] *Ibid.*

[151] *Balkan Battlegrounds*, Ch. 13, p. 109.

irrespective of the Constitution. By then, Serbia had clearly assumed control over the JNA, which became its *de facto* military force. You will hear more this week about the consequences of the relationship between the Serbian leadership and the JNA, including the JNA's direct participation in activities. This included the sustained support for the rebel Serbs in Croatia provided by Serbia through the JNA and other State organs. It enabled acts which we say were acts of genocide both by the JNA and by forces under its direction or control.

48. The issue of attribution of conduct to Serbia, to which I will return, should be seen in the context of that relationship between the Serbian leadership and the JNA.

49. Mr. President, Members of the Court, thank you for your attention. Mr. President, I would ask you now to call upon Professor Sands, who will address the legal framework for the crucial issue of characterization that faces you, Croatia's claim under the Genocide Convention.

The PRESIDENT: Thank you, Professor Crawford, and I give the floor to Professor Sands.

Mr. SANDS:

THE GENOCIDE CONVENTION (TO BE CONTINUED)

I. Introduction

1. Mr. President, Members of the Court, it is an honour for me to appear once again before you in these proceedings on behalf of the Republic of Croatia. You've heard some of the context that leads into the terrible events, the details of which we are going to describe to you in the course of this week. My presentation, which will be short this afternoon, will address the law applicable, at least begin to address the law applicable, to the present case, which is of course the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948.

2. The Convention is, of course, of great significance, the first modern human rights treaty, adopted in that remarkable period immediately after the end of the Second World War. The concept of "genocide" came into being, as a legal term, only in the summer of 1945. It did so before any other human rights treaties existed, and it did so alongside the parallel concept of

"crimes against humanity". Since the Convention was adopted it has of course been subject to judicial interpretation, including by this Court, by the ICTY and by the ICTR.

3. I will begin by addressing the emergence of the Convention and the role of this Court in giving effect to its obligations. I will then set out, in some detail, the elements of the crime, focusing both on the physical and mental elements (the *actus reus* and the *mens rea* requirement), and in particular the meaning of the words "in whole or in part", a central element of this case. I will then address the obligations to prevent and to punish, and the other categories of acts specified in the Convention that do not in themselves amount to genocide.

II. The evolution of the Genocide Convention

(a) *The Second World War, Rafael Lemkin and the Nuremburg trials*

4. Mr. President, Members of the Court, you need no reminder about the harrowing events that led to the drafting of the Genocide Convention. Its adoption stems from the terrible events in the years after 1933. The end of the war, in the spring of 1945, was followed by the preparation of the Statute of the International Military Tribunal at Nuremberg. It was adopted in August 1945, and the indictment of German defendants on the 8 October 1945[152]. Article 6 of the Nuremberg Statute includes "crimes against peace", "war crimes" and newly "crimes against humanity" (I should mention that this last mentioned was introduced into the Statute on the suggestion of Professor Hersch Lauterpacht in a conversation with Robert Jackson, which took place in the afternoon of 29 July 1945, at Lauterpacht's home, in the garden at No. 6 Cranmer Road, in Cambridge; it was a part of Professor Lauterpacht's desire to make individuals — and their protection — the "central unit" of international law)[153]. The Statute made no reference to "genocide", or the destruction of groups as such; that was much to the dismay of Rafael Lemkin, who nevertheless managed to get the word "genocide" and its definition inserted into the indictment which was adopted in October 1945 and became a central charge in the proceedings.

5. Lemkin, like Lauterpacht, studied law at the University of Lviv, now in the Ukraine, although he arrived two years after Lauterpacht had left for Vienna. Unlike Lauterpacht, who was

---

[152] *Trial of the Major Criminals before the International Military Tribunal*, Nuremburg, 14 Nov. 1945-1 Oct. 1946, Nuremburg 1947, Vol. I, pp. 43-44.

[153] Principle VI, Charter of the International Military Tribunal, 1945.

focused on the protection and rights of individuals as such, Lemkin's concern was with the protection of groups. His original work, in 1933, addressed this as "barbarity" and "vandalism", but a decade later he decided to create a new word. And in 1943 he published a proposal for the then Polish Government-in-exile in London, using the Polish word *ludobójstwo*, a literal translation of a German word, which was *Völkermord* (murder of the peoples), a word used by the poet August Graf von Platen (in 1831), then by Friedrich Nietzsche in his work "The Birth of Tragedy" (in 1872).

6. By the end of 1943 Professor Lemkin had abandoned the use of the word for one that was more easily pronounceable and created a new one, "genocide". This combined the Greek word "genos" — meaning race or tribe — with the Latin word "cide", which means to kill. [Screen on] The term was first used in Chapter IX of his book *Axis Rule in Occupied Europe*, which was published in November 1944, published by the Carnegie Foundation and you can now see a copy of that on your screen. The word offered a reaction against what Lemkin described as a "scheme" intended to effect a permanent change to the biology of certain occupied areas, by killing off the intelligentsia, destroying culture, transferring wealth, depopulating territories by starvation, killing or other means of displacement. On Lemkin's approach, genocide described a process, it identified a number of steps, from the identification and separation of members of a group to their removal from a territory and in some cases their killing. On Lemkin's approach, each step was to be treated as a genocidal act. And the commission of "genocide" did not require the killing of an entire group, or indeed even a significant part of it. Preparatory acts, in his view, were genocidal. [Screen off]

7. Integrated into the indictment, but not the Statute at Nuremburg, the word "genocide" was first used in an international courtroom on 20 November 1945. It was spoken by Monsieur Pierre Mournier, the assistant prosecutor for the French Republic[154]. Later that day, Captain Kuchin, Chief Prosecutor for the USSR, became the second person to use the term[155] in an international courtroom. David Maxwell-Fyfe became the first member of the British prosecution

---

[154]French prosecutor Champetier de Ribes: *Trials of the Major War Criminals (France* v. *Goering*), opening statements, 20 Nov. 1945.

[155]Chief Prosecutor for the Soviet Union Captain Kuchin; *Trials of the Major War Criminals (France* v. *Goering*), opening statements, 20 Nov. 1945.

team to use the term, although he had to wait several months until his cross-examination of Konstantin von Neurath, on 25 June 1946. "We are charging you and your fellow-defendants with, among many other things, genocide", Sir David said, "which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin: 'a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves'"[156]. Of the four prosecution teams at Nuremburg, only the United States declined to call for a conviction on genocide in its closing arguments, which may well explain why the word was not mentioned in the judgment[157]. Rafael Lemkin was utterly dismayed by that failure[158], but he did not give up.

(b) ***The negotiating history: 1946-1948***

8. Two months after the judgment, on 11 December 1946, the United Nations General Assembly unanimously adopted resolution 96 (I), entitled "The Crime of Genocide". This affirmed that [Screen on]

> "genocide is a crime under international law which the civilized world condemns and for the commission of which principals and accomplices — whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable"[159].

The General Assembly also called on Member States "to enact the necessary legislation for the prevention of this crime" and requested the Economic and Social Council ("ECOSOC") to undertake "the necessary studies, with a view to drawing up a draft convention on the crime of genocide"[160]. [Screen off]

9. Two draft texts of the Convention were prepared by the Secretariat and an *ad hoc* committee established by the Economic and Social Council before a third draft was subsequently drawn up and adopted by the General Assembly in Paris in 1948. The first draft, which was

---

[156]British prosecutor Sir David Maxwell-Fyfe: *Trials of the Major War Criminals (France* v. *Goering)*, 17 IMT 61, 25 June 194); Lemkin, R., *Axis Rule in Occupied Europe*, p. 79.

[157]Proceedings of the International Military Tribunal, Judgment of the Tribunal, 1 Oct. 1946.

[158]King, H. T. Jr., Remarks at Case Western Reserve University School of Law Frederick K. Cox International Law Center Symposium, "To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Negotiation of the Genocide Convention", 27 Sep. 2007, reprinted in 40 *Case Western Reserve Journal of International Law* pp. 13–14.

[159]Resolution on the Crime of Genocide, General Assembly resolution 96 (I), 11 Dec. 1946.

[160]*Ibid*.

circulated in May 1947, was prepared by the Secretary-General in consultation with three experts, including Rafael Lemkin, and it was published with their comments[161]. The two other experts were Professor Henri Donnedieu de Vabres, who had been a French judge at the International Military Tribunal at Nuremberg, and Vespasian Pella, a Romanian diplomat. As with all other major international conventions, the negotiating history reveals a number of substantive and definitional issues that had to be resolved before the final text could be adopted for signature.

10. A summary preliminary report of the a*d hoc* Committee provided that "in this Convention, the word 'genocide' means a criminal act aimed at the physical destruction, in whole or in part, of a group of human beings"[162]. The prevailing view at the General Assembly was that cultural genocide should be dealt with elsewhere, but not all aspects of cultural genocide fell out of the Convention. Article II *(e)*, for example, lists "Forcibly transferring children of the group to another group" as a genocidal act[163]. The Secretariat produced a draft under the direction of Rafael Lemkin which provided that the "forcible transfer of children to another human group" is a form of cultural genocide[164]. So while the term "cultural genocide" does not feature in the final text of the Convention, one of its core elements at least is listed in the Convention as amongst the methods by which the crime of genocide is perpetrated. In this way, Lemkin's broad vision and understanding of the legal concept of genocide has endured and is reflected in the Convention as adopted.

11. A second area of divergence among the negotiating parties concerned the issue of scale for the crime of genocide to occur, and the extent of the requisite intent, which I will focus on in more detail tomorrow. During the negotiations there were a number of explicit references to the concept of "partial destruction". [Screen on] The negotiating Committee stated in a preliminary draft of the principles that "[t]he convention should include as instances of genocide such crimes as group massacres or *individual executions* on the grounds of race, nationality (or religion) . . ."[165]. I

---

[161]The Secretary-General, Report and the Draft Convention of the General Secretariat, UN doc. A/AC.10/41, 26 June 1947.

[162]UN doc. E/AC.25/SR.10.

[163]Article II *(e)* of the Genocide Convention.

[164]UN doc. E/447, p. 6.

[165]UN doc. E/AC.25/7, Principle VII.

emphasize these words: "individual executions". This drew on Lemkin's approach and the historical experience through which he and the drafters of the Convention and that entire generation in Europe and elsewhere lived: they understood from first-hand experience that the identification of genocidal acts was not a numbers game alone; it was not to be limited to the killings of huge numbers of individuals, or indeed the destruction of groups in their entirety. The meaning of partial destruction was an issue that permeated the negotiating process. The French delegate, Mr. Chamount, suggested that one individual death could, in and of itself, constitute an act of genocide. At the Sixth Session of the negotiations, he proposed that [next graphic] "the crime of genocide existed as soon as an individual became the victim of acts of genocide. If a motive for the crime existed, genocide existed even if only a single individual were the victim."[166] Others delegates argued that such an extreme example should not be made explicit in the Convention, but could be covered by the alternative wording of "in whole, or in part", which was proposed by Norway. Mr. Rafaat of Egypt expressed the view that [next graphic] "the aim of the French amendment would be met if the Committee adopted the Norwegian proposal [A/C.6/228] to insert the words 'in whole or in part' after the words 'with the intent to destroy'"[167].

12. It is this Norwegian formulation in this context relating to "in whole or in part" that made its way into the final draft, and is part of the Convention today that you will have to interpret and apply. The negotiating history makes it absolutely clear that the final wording adopted by the delegates envisaged that the crime of genocide encompasses the destruction of even a small group of individuals, a subgroup of a larger group, which itself forms a part of the whole group. The words "in part" say what they say: if the drafters had intended to indicate a large group, or a very large group, or a complete group, they could have said so; they could, for example, have used the formulation "in significant part" or "in substantial part". They chose not to do so. [Screen off] Tomorrow I will continue in more detail on the question of numbers in relation to a separate but related issue, the intention to commit genocide, which is the *mens rea* of the crime.

13. There was at least one other important area of disagreement amongst the delegates, and that concerned the role of this Court under the Convention. The original draft of the Convention

---

[166]UN doc. A/C.6/SR.73 (Chamount, France).

[167]*Ibid.* (Rabaat, Egypt).

sent to the General Assembly would have limited this Court's jurisdiction simply to matters of interpretation or application of the Convention. The a*d hoc* Committee draft, which was silent on the question of State responsibility, provided that [screen on] "[d]isputes between any of the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice"[168].

14. This more limited formulation was not the text that was adopted. [Screen off] Instead, following the incorporation of a text proposed by the United Kingdom and Belgium, the Court was given jurisdiction to rule on the question of the responsibility of a State for genocide[169]. The United Kingdom delegate explained that "[t]he delegations of Belgium and the United Kingdom had always maintained that the convention would be incomplete if no mention were made of the responsibility of States . . ."[170]. The United Kingdom's delegation explained that "the responsibility envisaged by the joint . . . amendment was the international responsibility of States following a violation of the Convention. That was [and I use his words] civil responsibility, not criminal responsibility."[171]

15. The intention of the drafters that this Court be charged with that duty of overseeing the conduct of State parties, according to that standard, and to hold them accountable if established, is evident from the final wording of Article IX of the Convention, which explicitly refers to the responsibility of States. Those words place a significant responsibility on this Court, recognizing that States, as well as individuals, may perpetrate genocide, and may be internationally responsible for acts of genocide or for failing to prevent acts of genocide from taking place. The conditions in which that will occur are matters to which I will return tomorrow morning.

16. Mr. President, with your permission, this is probably a good place to break. I thank you for your attention. Tomorrow we will get to the nitty-gritty of the issues that you face.

---

[168]UN doc. E/AC.25/SR.20, p. 6.

[169]UN doc. A/C.6/SR.105 (18 in favour, 2 against, with 15 abstentions).

[170]UN doc. A/C.6/SR.103 (United Kingdom, Fitzmaurice).

[171]*Ibid.*

The PRESIDENT: Thank you, Professor Sands, for completing your pleading of today. May I kindly just ask you to check the name of the French delegate — whether it was Mr. Chamount, or rather Charles Chaumont, a later well-known professor.

Mr. SANDS: I will certainly do that, Mr. President.

The PRESIDENT: This sitting is adjourned. We will meet tomorrow morning at ten o'clock.

The Court rose at 1:10 p.m

_____