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THE HAGUE

Cour internationale de Justice

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YEAR 2014

Public sitting

held on Tuesday 4 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 mardi 4 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

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The PRESIDENT: Good morning. Please be seated. The sitting is now open. The Court meets this morning to hear the continuation of Croatia's first round of oral argument on its own claims. I invite Professor Philippe Sands to continue his presentation of the Genocide Convention. You have the floor, Sir.

Mr. SANDS:

THE GENOCIDE CONVENTION
(CONTINUED)

1. Mr. President, thank you, Members of the Court, thank you. Yesterday morning I introduced some background to the Convention. Today I am going to address the specific requirements that have to be established to prove that a genocide has been committed, within the meaning of the Convention. Before doing so, may I respond to your kind invitation, yesterday at close of play, with regard to the identity of the French delegate who spoke to the definition of the crime and the requisite number of victims. [Screen on] We have been asked to offer French versions of texts, and of course we will try to do that: what the delegate said, in French, on the afternoon of 13 October 1948, at the Palais de Chaillot in Paris, was that "le crime de génocide existe à partir du moment où un individu est atteint par des actes de génocides. Si le mobile du crime existe, il y a génocide même si un seul individu est atteint." Both versions are in your folder, at tab 6, and on the screen. My written text in fact, had the correct letters that constituted his name, but somehow the order of the letters got jumbled up — the "u" decided to take a little journey, a jump over the "m" and the "o"! I was of course, as you spotted, referring to Mr. Chaumont, and I am very grateful to you for that correction and for allowing us to set the letters straight. I also believe that the individual concerned proceeded to have a very distinguished career as an academic in France. [Screen off]

2. The Convention's text reflects the view of the drafters that States, as well as individuals, may perpetrate a genocide and may be internationally responsible for acts of genocide. By allowing for the responsibility of the State, the drafters recognized that this crime, where it occurred, would not necessarily be limited to the role and responsibility of any individual.

3. It is important too to recall that the crime emerged in conventional form before there was any conventional "crimes against humanity". That was the situation in 1951, when the Court gave its Advisory Opinion emphasizing the Convention's "special" and important purpose[1], noting rightly that it "was manifestly adopted for a purely humanitarian and civilizing purpose"[2], to endorse "the most elementary principles of morality"[3].

4. This context is not without significance in approaching the interpretation of the Convention. The tendency of some to claim — wrongly in our submission — that "genocide" should somehow be seen as "the crime of crimes" is taken to imply a restrictive approach to its interpretation: make sure, these views would say, it governs only the most occasional, exceptional and appalling of horrors, be careful, or you will devalue the currency, you will diminish the stigma. But there is a converse danger also: apply it too sparingly and you will make the Convention a complete irrelevance. The consequence of that approach was plain to see after the Judgment of this Court in the *Bosnia* case, which treated as a triumph the Judgment of the Court. "Serbia is innocent!", boasted a headline in the Belgrade tabloid *Kurir*, the day after this Court's Judgment[4]. In light of that approach, it seemed that to be condemned for "crimes against humanity" is seen as something of a vindication, getting off the hook.

5. The correct approach, we say, is to interpret and apply the Convention in accordance with the normal rules of treaty interpretation, as a free-standing treaty, not as an instrument that is said to stand at the apex of a legal order so that this Court should somehow treat it with kid gloves, as it sits up high on some unhappy pedestal, or to impose a restrictive interpretation. The reality is — and should be — as the ICTY Trial Chamber put it when it referred to genocide as one of the most "egregious manifestations" of crimes against humanity[5], and "a species of crimes against humanity"[6]. In this regard, my colleague Keir Starmer, who you will have noted has been

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[1] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[2] *Ibid.*

[3] *Ibid.*

[4] "Nedužni!", *Kurir*, 27 Feb. 2007: http://arhiva.kurir-info.rs/arhiva/2007/februar/27/V-08-27022007.shtml.

[5] *Prosecutor* v. *Tadić,* Trial Chamber Judgement, Case No. IT-94-1-T, Opinion and Judgement of 7 May 1997, paras. 622, 655.

[6] *Prosecutor* v. *Stakić*, Trial Chamber, Case No. IT-97-24-T, Decision on Rule 98 *Bis* Motion for Judgement of Acquittal, 31 Oct. 2002, para. 26.

honoured between the time the delegation list was transmitted to the Registrar and his appearance before the Court, although we do not think that the two events were connected, will have more to say, in due course, about the approach taken by the ICTY Prosecutor to the crime of genocide: the fact is that in this case you are acting as a court of first instance, in the sense that the judges of the ICTY have never been asked to expressed a view as to whether the facts in evidence before you, do or do not, constitute the crime of genocide. That is the situation in which you find yourself.

III. The elements of the crime of genocide

(a) *General definition, Article II*

6. So, let us turn to the elements of the crime of genocide. They are set out of course in Article II of the Convention, which for reference is at the very first tab of your judges' folder. Genocide comprises two distinct elements: the physical element, may be said the *actus reus*, and the mental element, the *mens rea*.

7. The *actus reus* is defined as: [screen on] killing members of the group (Article II *(a)*); causing serious bodily or mental harm to members of the group (Article II *(b)*); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Article II *(c)*); imposing measures intended to prevent births within the group (Article II *(d)*); and forcibly transferring children of the group to another group (Article II *(e)*). The *actus reus* is established if *any one* of these acts is carried out. The crime of genocide is made out if any one of these prohibited acts is accompanied by the necessary genocidal intent — that is, the "intent to destroy, in whole or *in part*, a national, ethnical, racial or religious group, as such". True to Rafael Lemkin's ideals, both the mental and physical elements of the crime are broadly worded. [Screen off]

(b) *The* actus reus

8. Start with the *actus reus*. It has been, we say, very clearly established in Croatia's Memorial and Reply that prohibited acts falling within the scope of, amongst others, Articles II *(a)*,

II *(b)* and II *(c)*, have been carried out by the Respondent or on its behalf or under its direction or control. The Parties are in agreement that Article II *(e)* does not apply in these proceedings[7].

9. We have noted that the Respondent has referred to *"actus reus"* in just three paragraphs of its Rejoinder[8]; that is a telling brevity. We have also noted that Serbia concedes that some of the acts invoked by the Applicant "could constitute the *actus reus* of genocide"[9]. Indeed, Serbia acknowledges that acts referred to by Croatia — as it puts it — "[t]heoretically . . . might correspond to the *actus reus* of genocide"[10]. We take these comments as a concession: there is nothing theoretical about what happened on the territory of Croatia from 1991, or the acts that lie so unhappily before you and on which you will hear more this week. The acts did or did not constitute the *actus reus* — in our submissions they very plainly did — and there is nothing theoretical about the characterization of the terrible acts of killing, raping, targeting, desecration amongst others, that occurred. Nor is there anything in the text of the Convention to indicate the need for a particular number of individual acts to have occurred[11]. The wording of Article II *(a)* and II *(b)*, for example, refers, on its face, to individual members of the group, not the group as a whole — this was really Mr. Chaumont's point. I have already referred you to the negotiating history, which makes clear, on his view and on the views of many, that even a single act of killing can give rise to the crime of genocide, provided of course that there is the requisite genocidal intent.

10. Over the course of tomorrow and Wednesday, Croatia will set out in considerable detail the factual basis of its claim, which establishes the *actus reus* of genocide. As you will hear, the evidence of a widespread campaign of destruction carried out by the Respondent — or on its behalf or with its support — comprising many acts against many individual members of the group is as clear as it is incontrovertible. It is surely not even arguable now, in light of all of the evidence and all of the factual findings of the ICTY, that the necessary *actus reus* has not been proven already.

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[7]Reply of Croatia (RC), para. 8.26.

[8]Rejoinder of Serbia (RS), paras. 256, 332 and 381.

[9]RS, para. 256.

[10]RS, para. 381.

[11]RS, para. 332.

(c) ***Mens rea: specific intent***

11. This is the real issue in this case: the question of the intent behind the acts. It is the major point of disagreement between the Parties. In the *Bosnia* case this Court referred to "genocidal intent" as specific intent, *dolus specialis*[12]. It is this specific intent that distinguishes genocide from other international crimes, including "crimes against humanity". There must be an intention on behalf of the perpetrator to destroy in whole *or in part* a protected group: and I emphasize these words, "in part", as the text makes clear there need not be an intent to destroy every member of the group, or even a majority of members of the group. One issue then is how to identify the "intent" of those who carried out the acts, whether by or on behalf of the State, or in circumstances in which the State turned a blind eye or otherwise failed to prevent the acts from occurring.

12. In our submission, the Court is required to find indicators of State policy to deduce what the intention of the State, or those acting on its behalf of, or under its direction or control, actually was[13]. As Judge Bennouna noted in the *Bosnia* Judgment (and as Croatia advanced in its Memorial and Reply and the Respondent accepted in its Counter-Memorial) States tend not to go around proclaiming an intention to destroy a part of a particular group[14]: individuals may do that, and the State with which they are associated may then, in differing ways, assist or adopt that objective, by action or inaction. Intent can be then inferred from a pattern of behaviour, and that is surely not now in dispute. On this point, we have noted that last July, July 2013, six years after the Court gave judgment in the *Bosnia* case, the ICTY Appeals Chamber reinstated genocide charges against Mr. Karadžić for genocidal acts committed in many towns and municipalities throughout Bosnia, other than Srebrenica[15]. In those proceedings the ICTY Prosecutor alleges that Mr. Karadžić and his co-conspirators in a joint criminal enterprise (including *inter alia* Messrs. Milošević, Arkan and Seselj, who are involved in these proceedings too) had the *mens rea* to commit genocide not only against Bosnian Muslims but also against Bosnian Croats, and that they had that *mens rea* from

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[12]Case concerning the *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. 121, para. 187; hereafter *Bosnia*.

[13]Schabas, W., *Genocide in International Law: The Crime of Crimes*, (Cambridge University Press, Second Edition, 2009), hereafter Schabas, p. 518.

[14]*Bosnia*, p. 362; Memorial of Croatia (MC), para. 7.34; RC, para. 8.7; Counter-Memorial of Serbia (CMS), para. 48.

[15]*Prosecutor* v. *Radovan Karadžić*, Case No. IT-9S-SI18-AR98bis.l, Judgement, 11 July 2013, para. 115.

October 1991; they had it to implement their plan, on the Prosecutor's account, to establish a Greater Serbia. It would be curious in the extreme to conclude that these three men had the requisite intent to destroy a part of a group on one side of the border, but they did not have it on the other side of the border; or that they had it against Bosnian Croats on that side of the border but not against Croatian Croats on this side of the border. This would be all the more peculiar if one considers that these three co-conspirators, as you heard yesterday, did not believe a border existed at all between the relevant parts of Bosnia, Serbia and Croatia; it was all just Greater Serbia in their view. Sir Keir Starmer will come back to this in due course.

13. What must be intended? Croatia's approach in these proceedings has been consistent: the requisite intent, which is to destroy a group *in whole or in part*, is not to be equated with the intent to *physically* destroy the entirety of the relevant group, but rather it is to stop it from functioning as a unit[16]. This is plain from the Convention's *travaux preparatoires*, for example the inclusion of forcible transfers as a form of the *actus reus* of genocide. Yet Serbia asserts — for example at paragraph 322 of its Rejoinder — that anything short of total physical destruction of the relevant group will not be genocidal. There is simply no authority for that proposition, which conflates the *actus reus* with *mens rea*[17]. It is not what the Convention says, and it is not what the drafters intended[18].

14. The Court has addressed this aspect in its Judgment in the *Bosnia* case. Addressing the forcible removal or deportation of members of the protected group, the Court concluded, at paragraph 190 of its Judgment[19], that: [screen on] "Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide . . .", and is "*not necessarily* equivalent to destruction of that group"[20].

15. The use of the words "as such" [next graphic] denotes that a policy aimed at driving people from their homes to make an area ethnically homogeneous does not directly, in and of itself,

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[16]See MC, para. 7.44; RC, para. 8.9.

[17]RS, para. 332; emphasis added.

[18]RC, para. 8.17.

[19]*Bosnia*, pp. 122-123, para. 190.

[20]*Ibid.*, p. 123; emphasis added.

equate with a genocidal intent. That is not the central point in this case because the Court's formulation, carefully chosen words, recognizes that evidence of forcible removal and deportation can be taken into account in identifying the existence of a genocidal intent. In other words, forcible removal and deportation accompanied by the acts listed in Article II, and coupled with an intent to destroy a part of the group, will be a genocidal act. Croatia's position is not that such acts alone and *per se* prove genocidal intent: it is those acts coupled with others, as we have explained in the written pleadings, that matter.

16. The Court's use of the words "*not necessarily*" [next graphic] makes clear that systematic deportation could contribute to acts of genocide. Serbia does not appear to disagree. In its Counter-Memorial it explains that "systematic expulsion from homes" can constitute genocide "provided such action is carried out with the necessary specific intent"[21]. [Screen off] There is no dispute between the Parties here.

17. There is no hard and fast distinction between the removal of a population or ethnic cleansing and genocide, as scholars recognize, beyond the element of intent. Professor Schabas says the two, ethnic cleansing and genocide, are divided by what he calls a "fuzzy rather than a bright line"[22]. And to make that point, he asserts that German policy only became genocidal after June 1941[23]. I am going to offer no comment on this suggestion, but it was plainly not one that was shared by Rafael Lemkin: read Chapter IX of his book, a chapter entitled "Genocide", and you will see that it is replete with references to actions taken well before June 1941, and he characterized them as genocidal in intent. Such early actions may also give rise to the inference that a genocidal intent exists. Vice-President Al-Khasawneh made that point in his opinion in the *Bosnia* case, at paragraph 41, noting that a "pattern of conduct known as ethnic cleansing may be relied on as evidence of the *mens rea* of genocide", and he cited the decision of the ICTY Appeals Chamber in the *Krstić* case[24].

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[21]CMS, para. 84 and RS, para. 333.

[22]Schabas, p. 233.

[23]*Ibid.*

[24]*Bosnia*, dissenting opinion of Vice-President Al-Khasawneh, p. 257, para. 41.

(d) *"In whole or in part"*

18. A key element of the *mens rea* requirement is the intention to destroy the protected group "in whole or" — and these are the crucial words for our purposes — "in part". We have paid very careful attention to the Judgment of the Court in the *Bosnia* case, especially in this respect. In that Judgment the Court identified three factors as being relevant in the determination of whether the "in part" requirement has been met. First, the Court said the intent must relate to at least a "substantial part of the particular group"[25]. Second, genocidal intent *can* be made out where there is an intent to "destroy the group within a geographically limited area"[26]. And third, it is appropriate to evaluate the prominence of the persons who are intended to be targeted in relation to the entire group[27]. Croatia notes that the Court emphasized that "substantiality" was, as the Court put it the "essential starting point"[28].

19. The text of the Convention has no "substantiality" requirement and, as I have explained, the negotiating history does not indicate that these words were used. Indeed, the history indicates that acts intended to be taken against a very small group may be sufficient to trigger the Convention. From where then did the Court find the word? We have sought to unpack that conclusion. The answer to the question is of course found at paragraph 198 of this Court's Judgment in that case, which says:

[Screen on]

> "That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. Krstić, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17)." [29] [Screen off]

20. In essence, the Court invokes two sources: *(a)* judicial rulings, namely the "consistent rulings" of the ICTY (and specifically the Appeals Chamber decision in the case of *Krystić*) and, before the ICTR, the cases of *Kayishema*, *Byilishema*, and *Semanza*; and secondly the views of the

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[25] *Bosnia*, p. 126, para. 198.

[26] *Ibid*., p. 126, para. 199.

[27] *Ibid*., p. 127, para. 200.

[28] *Ibid*., see also p. 127, para. 201.

[29] *Bosnia*, p. 126, para. 198.

International Law Commission, as reflected in paragraph 8 of the Commentary to Article 17 of the ILC's draft Code of Crimes against the Peace and Security of Mankind.

21. We have gone back to look closely at each of these sources, to ascertain exactly how the Court came to identify a "substantiality" requirement, and also to understand what it means. Taking these sources in something of a chronological order, it seems that many roads lead back to the views expressed in July 1985 by Mr. Benjamin Whitaker, Special Rapporteur to the United Nations Sub-Commission on Prevention of Discrimination and Minorities. His report is very instructive. He recognized in that report that genocide need not involve the destruction of a whole group and that it could occur with "an attack affecting half of a small group" as well as "a massacre which affects only one tenth of a larger group". He set out competing views on this issue. On one view, as he told us[30]: [Screen on]

> "'In part' would seem to describe a reasonably significant number, relative to the total of a group as a whole, or else a significant section of a group such as its leadership."

And he then set out another view: [Next graphic]

> "On the other hand, it has been urged that, given the *mens rea* of such intent, the Convention should be interpreted as applying to cases of 'individual genocide', where a single person was a victim of any of such acts, though strictly even such a minimalist interpretation requires evidence of more than one victim, since the plural is used consistently throughout Article II *(a)* to *(e)*."[31]

And then he set out his own view, which is this: [Next graphic]

> "In order that the gravity of the concept of genocide should not be devalued or diluted by the inflation of cases as a result of too broad an interpretation, the present Special Rapporteur suggests that considerations of both of proportionate scale and of total numbers are relevant."[32]

22. His report did not refer to the negotiating history, or to any requirement of "substantiality", at least not in express terms. His qualifier, his chosen formulation, was "a reasonably significant number", one that takes account of considerations of "proportionate scale and total numbers". On Mr. Whitaker's approach, a genocide could occur where the intention is to

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[30]Report of the United Nations Sub-Commission on Prevention of Discrimination and Minorities, E/CN.4/Sub.2/1985/6, 2 July 1985, para. 29.

[31]*Ibid.*

[32]*Ibid.*

destroy just a small number of individuals who form part of a small group, whether by reason of locality or total numbers. [Screen off]

23. The word "substantial" seems to have crept into an international text for the first time a decade later, in 1996. It did so in the ILC's Commentary to Article 17 of the draft Code of Crimes against the Peace and Security of Mankind, which reproduces Article II of the Convention. [Screen on] The commentary, which is not troubled by any footnotes in this part, indicates that:

> "It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less *the crime by its very nature requires the intention to destroy at least a substantial part of a particular group*."[33]

The ILC's Commentary, prepared by Mr. Tian, offered no authority whatsoever for the choice of the word "substantial", and expressed no view as to elements of proportionality or total numbers. On its face it was not inconsistent with Mr. Whitaker's approach, to the effect that a genocide could occur where the intention was to destroy a part of a group living in a geographically defined area, whether a region, or a town, or a village, or something even smaller. [Screen off]

24. One of the first decisions of the ICTR to address this matter was the Trial Chamber in the *Kayishema* case, in May 1999. It looked at the report of Mr. Whittaker and the ILC Commentary for guidance, and concluded that the words "'*in part' requires the intention to destroy a* considerable *number of individuals who are part of the group*"[34].

25. This approach was then "adopted" by the ICTR in the *Bagilishema* case in 2001 (the Court got the name slightly wrong in the Judgment, we noted). And in that case the Trial Chamber referred to the *Kayishema* decision and stated:

> "As for the meaning of the terms 'in whole or in part', the Chamber . . . *considers that the intention to destroy must target at least a substantial part of the group*."[35]

So in this way, the word "substantial" somehow became a part of the ICTR case law; it was the inadvertent consequence of an ILC Commentary drafted without explanation or footnote or authority in the relevant part. That is the wonderful world of international law in which we live.

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[33] *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17; emphasis added.

[34] *Prosecutor* v. *Kayishema and Ruzindana*, Trial Chamber Judgement, Case No. ICTR-95-1-A (Judgement of 1 June 2001), para. 97.

[35] *Prosecutor* v. *Bagilishema*, Trial Chamber Judgement, Case ICTR-95-1A-T (Judgement of 7 June 2001), para. 64.

But the key point is this. The conclusion is entirely consistent with the intent to target a relatively small group, or a sub-group within a larger group.

26. What happened next? In 2003, in the *Semanza* case, the ICTR Trial Chamber cited only Baglishema in support of its findings:

> "Although there is no numeric threshold of victims necessary to establish genocide, the Prosecutor must prove beyond a reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part. *The intention to destroy must be, at least, to destroy a substantial part of the group.*"[36]

27. At around this time, matters migrated to the ICTY. In 2001 the Trial Chamber in the *Krstić* case surveyed the relevant academic literature after the Convention was adopted. The Chamber noted that the Genocide Convention itself provided "no indication of what constitutes intent to destroy 'in part'", and that the preparatory work in the view of that Chamber "offers few indications either" — in fact, we beg to disagree, as we have shown, the preparatory work does offer indications in favour of a relatively low threshold[37]. The Trial Chamber noted, however, that in the draft Convention submitted by the United Nations Secretary-General he observed that "the systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime", and the Secretary-General referenced two early commentaries on the Genocide Convention: that of Nehemiah Robinson who expressed the view that the intent to destroy could pertain to only a region or even a local community if the number of persons targeted within that region or local community was substantial, and another commentary by Pieter Drost remarked that any systematic destruction of even a fraction of a protected group would constitute genocide.

28. The Trial Chamber looked at those commentaries and noted that: "A somewhat stricter interpretation has prevailed in more recent times"[38]. But it concluded that the killing of all members of a group within a small geographical area "would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area", even if the numbers killed were even smaller. The test according to the Trial Chamber was whether it was

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[36] *Prosecutor* v. *Semanza*, Trial Chamber Judgement, Case ICTR-97-20-T, (Judgement of 15 May 2003) para. 316.

[37] *Prosecutor* v. *Krstić*, Trial Chamber Judgement, Case No. IT-93-33-T, (Judgement of 2 August 2001), hereafter *Krstić,* Trial Chamber, para. 585.

[38] *Ibid.*, para. 586.

intended "to annihilate the group as a distinct entity in the geographic area at issue". This was consonant with the object and purpose of the Convention.

29. For its part, the Appeals Chamber in *Krstić* concluded that the intent requirement of genocide under Article 4 of the Statute will be satisfied "where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group"[39]. To reach that conclusion the Appeals Chamber invoked with approval all the authorities and reports I have mentioned, including that prepared by Mr. Whittaker and the judgment in the Kayishema case, neither of whom used the term "substantial". The Appeals Chamber then cited with approval the article by Nehemiah Robinson, and in particular the page where he dealt with intent and numbers. [Screen on] It is therefore appropriate to remind this Court what Mr. Robinson wrote back in 1960:

> "the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, provided the number is substantial"[40]. [Screen off]

A similar view was adopted by Pieter Drost, as I have mentioned, who confirmed that the Convention in his view applies to instances where a "fraction" of a larger group is intended to be targeted exclusively because of their membership to the group. As Drost put it: [Screen on]

> "acts *perpetrated with the intended purpose* to destroy various members of the same group are to be classified as genocidal crimes although the victims amount to only a small part of the entire group present within the national, regional or local community"[41]. [Screen off]

30. The Appeals Chamber in *Krstić* proceeded on the basis that the "numeric size of the targeted part of the group is the necessary and important starting point"[42]. It noted — and this in our view is equally significant — that "[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him"[43]. Those are crucial words, because they indicate that this factor must inform the analysis of whether the targeted group is, in terms of proportionality and numbers, reasonably significant, considerable or substantial, having regards to

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[39]*Prosecutor* v. *Krstić*, Appeals Chamber Judgement, Case No. IT-98-33-T, (Judgement of 19 April 2004), hereafter *Krstić*, Appeals Chamber, para. 12.

[40]Nehemia Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs, World Jewish Congress, 1960), p. 63.

[41]Pieter Drost, *The Crime of State, Book II, Genocide* (Sythoff, Leiden, 1959) p. 85.

[42]*Krstić*, Appeals Chamber, para. 12.

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

the opportunity actually presented. The issue of opportunity is one that Sir Keir Starmer will develop in his submissions.

31. Mr. President, Members of the Court, with this short journey we can see that genocide, as conceived by the drafters of the Convention, by those who have commented on it, and by those who have been called upon to interpret it as a part of their judicial function, does not require an intent to destroy an entire group, wherever it may be located. The intention is connected to the location of an area, to the group that is there located, and to the opportunity. The location can be a state, or a region, or a town, or a village, or a hamlet, or even something smaller. The point is that an act of genocide can be limited to an intention formed in relation to a particular distinct and geographically limited area.

32. This is the approach that captures the ideals, and the ideas, and the intentions of men and women like Rafael Lemkin and the states that drafted the Convention. Numbers are important in a certain sense, but to seek to characterize an act as genocidal or not is not an exercise that can occur *in abstracto*. The numbers have to be taken in their context. The number actually targeted, the number available to be targeted, these are the matters that inform the evidence of intent to commit genocide.

33. The *Krstić* case concerned killings in Srebrenica. The ICTY Trial Chamber focused on the fact that "the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica *as a community*"[44]. It did not rule that it was necessary to show a "substantial" number of killings; it was sufficient that the evidence showed an intent to eliminate Bosnian Muslims as a community in a geographically restricted area. The killing of men, which they characterized as a "selective destruction of the group", would have "a lasting impact upon the entire group"[45] in that area. In our respectful submission, the approach of the Trial Chamber was correct.

34. There has been ample support for this approach in the literature, and strong criticism of alternative approaches. It has been said that the "substantiality" requirement, if applied the wrong way, would undermine the Convention, by failing to provide adequate protection for groups, subgroups, and even microgroups. One commentator, writing back in 2002, bemoaned efforts at

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[44] *Krstić,* Trial Chamber, para. 594; emphasis added.

[45] *Ibid.* 595.

the ICTY to establish a principle that that the crime only exists when very large numbers of people have been killed. "[N]either the plain language nor the purpose of the statute", that commentator wrote, "supports any such quantitative requirement in the intent element"[46]. Such an approach would be

> "unworkable and incompatible with the core values established by the Genocide Convention~~. The number of victims attributable to a defendant can and should constitute one evidentiary factor — probably a very important factor — when a court infers intent. However, such a number remains merely one factor among many~~."[47]

35. Mr. President, this Court is the guardian of the Convention. The words "in part" are to be interpreted in accordance with their ordinary meaning, having regard to the object and purpose of the Convention. The negotiating history shows that if the drafters intended a qualifier to be read into the Convention, it was only in the sense that the word would inform the context in which the intent was formed — what is the group targeted, what is the number in *that* group, and what is the opportunity? In our submission, the intent to destroy a part of a group means a group within a region, or a subregion, or a community, provided the number within that group is reasonably significant, or considerable, or substantial.

36. This approach is supported by the plain meaning of Article II and the negotiating history. It meets the object and purpose of the Convention. For the purposes of this case, what it means is that this Court must begin by identifying the group that is targeted, in each particular locality. The matter is going to be addressed in some detail in the speeches to come. Establishing a different approach, or a higher threshold, consigns the Convention to irrelevance. More importantly, it will defeat its object and purpose, which is to offer genuine protection to individuals who form a part of an ethnic, national or religious community or group. We live in a globalizing, peripatetic world, one in which small groups of such a kind spring up in a multitude of locations around our planet, and this makes the Convention in this regard more important than it has ever been before.

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[46]Alonzo-Maizlish, D., "In Whole or In Part: Group Rights, the Intent Element of Genocide and the 'Qualitative Criterion'", *New York University Law Review*, Vol. 77 (Nov. 2002) 1369, p. 1385.

[47]*Ibid.* p. 1397.

IV. The obligation to prevent and punish

37. I turn now to obligations to prevent and punish. The central obligation imposed on States by the Convention is principally set out in Article I of the Convention, and referred to in Articles IV, V, VI, VII and VIII. Article I of the Convention provides that [Screen on]

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent *and to punish*." (Emphasis added.) [Screen off]

38. During the negotiations on the final text of the Convention, a Belgian representative argued that not to include this more onerous obligation would render the Convention meaningless, and constitute mere repetition of resolution 96 (I). The Belgian representative explained that "since the fundamental purpose of a convention was to create an obligation, it was preferable that the undertaking to prevent and suppress the crime of genocide which appeared at the end of the preamble, should constitute the text of article I of the convention"[48].

39. This provision underscores the collective responsibility of the State both before and after the fact. The Convention is of a dual character and it principally features two obligations: the State is required to take all steps within its power to prevent genocide and, in addition, to act, where genocide has occurred, by punishing perpetrators in accordance with the terms of the Convention[49].

(a) *Obligation to prevent*

40. Beginning with the obligation to prevent, the Court in *Bosnia* rightly described this as a crime of due diligence, one of conduct rather than of result[50]. The question that falls to be answered is this: did the respondent State, did Serbia employ all means reasonably available to it to prevent genocide, whether committed by its own organs or by others which it controlled or which it was in a position to influence?

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[48]UN doc. A/C.6/SR.67 (Kaeckenbeeck, Belgium).

[49]See *Bosnia*, p. 219, para. 425.

[50]*Bosnia*, p. 221, para. 430.

41. In *Bosnia*, the Court ruled that there were "[v]arious parameters [that] operate when assessing whether a State has duly discharged the obligation concerned"[51]. These parameters are considered in some detail in our Reply. Today I will simply emphasize a number of key factors[52].

42. The first is the "capacity of the State to influence effectively the actions of persons likely to commit, or already committing, genocide"[53]. The question to be answered in this case is whether Serbia not only failed to prevent its own forces from acting genocidally, but whether, while acting in co-operation with many other groups in operation, it had the capacity to "influence effectively" those groups that were already active on the territory of Croatia. We have no doubt that the military capabilities of the JNA far outweighed those of the paramilitary groups[54]. As the ICTY ruled in *Mrkšić*, the JNA had the "military might to enforce" its effective command and control over "volunteer or paramilitary units fighting in the Serb cause"[55]. That is a finding of fact.

43. Second, the duty to take preventative measures arises at the moment the State becomes aware (or should have become aware) that there exists a serious risk of genocide being — or will be — committed[56]. In this case, when did the Respondent know, or should have known, that there was a serious risk that genocide would be committed — or was being committed — against Croats? The evidence advanced by Croatia reveals that at the very least, from 13 October 1991, the JNA leadership and the political leadership of Serbia were aware — in explicit terms — of genocidal activities; for example, the Tigers of Željko Ražnatović, known as Arkan, a paramilitary group. [Screen on] A JNA military intelligence report of 13 October 1991, set out at Annex 63 of the Reply, states that in "the greater area of Vukovar [which you saw much yesterday], volunteer troops under the command of Arkan . . . are committing uncontrolled genocide and various acts of terrorism". That is in black and white, in a military intelligence report of the JNA. It further notes that the Commander of the Serbian TO, who was also the Assistant Minister of Defence, has been

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[51] *Bosnia*, p. 221, para. 430.

[52] RC, para. 9.85.

[53] *Ibid.*

[54] MC, para. 8.63.

[55] *Prosecutor* v. *Mrkšić,* Trial Chamber Judgement, Case No. IT-95-13/1-T, (Judgement of 27 Sep. 2007), para. 89; set out in detail in RC, paras 9.74 and 9.87.

[56] *Bosnia*, para. 431.

informed[57]. As you will hear in due course, other military intelligence reports confirmed knowledge on the part of the JNA of genocidal activities taking place then and there. [Screen off] Furthermore, as Ms Law showed yesterday, the serious risk that paramilitary groups commanded by Šešelj, Arkan and others would commit acts of genocide was apparent at a much earlier stage even than that. The extremist rhetoric and hate speech used by these two individuals and others, both before and during the conflict, indicated that during that conflict in Croatia, ethnic Croats, consistently denigrated as Ustasha and denied the right to live in Greater Serbia, would be at serious risk of destruction from acts of genocide.

44. Third factor to be taken into account: the Court, this Court, in *Bosnia*, stressed the difference between complicity and the obligation to prevent. In order to establish complicity there has to be a positive act, whereas the obligation to prevent comprises the failure to implement a plan[58]. The obligation to prevent does not require full knowledge of the facts but instead merely requires proof that the State should have been aware of a serious danger that acts of genocide would be committed[59]. You have seen the document for yourselves; it cannot be said that Serbia was not aware.

45. In their separate opinions in that Judgment, Judges Keith and Bennouna voiced their disagreement with the Court's finding that Serbia was not complicit in the commission of genocide. Judge Bennouna explained that: [Screen on]

> "it is my view that all the conditions were met to justify a finding by the Court that the FRY was responsible for complicity with the Republika Srpska and its army in genocide at Srebrenica"[60]. [Screen off]

Both judges advocated that the requisite standard for guilt in complicity needed clarification from the Court. And we agree. Both argue that the test is whether the accused has knowledge of the perpetrators' intent and continues to assist the perpetrator. Judge Keith relied upon the view of Judge Shahabudeen, expressed in his dissent in the *Krstić* case, to the effect that "The necessary intent of the aider and abettor is the intent to provide the means by which the perpetrator may

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[57]See RC, para. 9.86.

[58]*Bosnia*, p. 222, para. 432.

[59]*Ibid.*

[60]*Bosnia*, declaration of Judge Bennouna, p. 360.

realize his own intent to commit genocide."[61] These sentiments were echoed by Judge Bennouna: [Screen on]

> "It is when aid and assistance are furnished in full knowledge of the recipient's genocidal intent that they constitute complicity, thus being distinguishable from a violation of the obligation of prevention, in respect of which all that is required is an awareness of the risk of genocide."[62] [Screen off]

(b) ***Obligation to punish***

46. I turn to the obligation to punish on which I can be brief because more will be said in due course. Article IV of the Convention requires the respondent State to punish the acts of persons within its jurisdiction who are responsible for genocide. This has not happened in Serbia, as we will show.

V. Conspiracy, incitement, attempt and complicity

47. I turn now to conspiracy and other related matters. Articles III *(b)*, *(c)*, *(d)* and *(e)* of the Convention provide for the punishment of four other categories of acts that do not amount to genocide of themselves. Croatia's primary argument is that acts constituting genocide occurred on the territory of Croatia, and that Serbia is responsible for those acts, and for failing to prevent genocide. The four further categories referred to in Article III are nevertheless a full part of Croatia's case.

(a) ***Complicity***

48. Article III *(e)* of the Convention sets out the offence of complicity. As is visible from our written pleadings, and as I have already explained, this provision is a central part of Croatia's case. The *actus reus* for complicity is broad and can be taken to include the provision of means to enable or facilitate the commission of the crime[63]. This was the subject of a lively debate within the Court in the *Bosnia* case, and a range of views were expressed. We have noted in particular the

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[61] *Bosnia*, declaration of Judge Keith, p. 354, para. 6.

[62] *Bosnia*, declaration of Judge Bennouna, p. 363: "In this case the *mens rea* is the intent on the part of the accomplice to assist the principal perpetrator where the accomplice has actual or constructive knowledge of the nature of the crime which the principal is preparing to commit." (*Ibid.*, p. 361.)

[63] *Bosnia*, p. 216, para. 419.

views expressed by Judges Bennouna and Keith[64]. There will be no doubt that paramilitary groups that carried out mass murder and destroyed entire Croatian communities, entire villages, entire populations, were unleashed by or on behalf of the Respondent. The JNA armed and equipped the paramilitaries, trained them, and integrated them into their operations[65]. The evidence is unequivocal.

49. Turning to the *mens rea* required to establish complicity, the *Bosnia* Judgment does not elucidate the quality of intent that is required. As I have explained, the facts specific to that case meant that the Court found it was unnecessary to decide whether specific intent was required[66]. As highlighted by Judge Keith in your *Bosnia* Judgment, at the ICTY, the Appeals Chamber in *Krstić* has held that in establishing complicity or secondary liability, for the *mens rea* requirement to be met, the principal perpetrator's genocidal intent must be established and the accomplice must have known of that genocidal intent[67]. And that standard has been given added authority by the recent judgment in the *Sainović* case[68]. Once more we would invite the Court to consider that requiring knowledge as opposed to sharing intent is the only way of distinguishing complicity from co-operation[69]. In this case it cannot be disputed that the Respondent knew of the genocidal intent of the paramilitaries. You have seen it for yourselves in black and white. The evidence is crystal clear.

50. Once again, the definitional elements of this offence are not disputed by the Respondent in the Rejoinder; Serbia explains that its "position concerning this is fairly relaxed — since genocide has not been committed the Respondent cannot be held responsible either for commission or for complicity"[70]. They are in real difficulty if genocide is found on that concession.

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[64]Para. 45 above.

[65]This is confirmed by the ICTY findings in the *Mrkšić* and *Martić* judgements and elaborated upon in the RC, paras. 4.113–4.129.

[66]*Bosnia*, paras. 422 and 423.

[67]*Krstić*, Appeals Chamber, paras. 138 *et seq.*

[68]*Prosecutor* v. *Sainović et al.*, Appeals Chamber Judgement, Case No. IT-05-87-A (Judgement of 23 Jan. 2014) para. 1649.

[69]For an example of this see *Prosecutor* v. *Ntakirutimana*, Appeals Chamber Judgement, Case Nos. ICTR-96-10 and ICTR-96-17-T (Judgement of 13 Dec. 2004) para. 500; declaration of Judge Bennouna in *Bosnia* (para. 45 above).

[70]RS, para. 344.

(b) ***Conspiracy***

51. I turn to conspiracy, which is an inchoate crime, only relevant in circumstances where the genocide has not in fact occurred. As we have demonstrated in the Memorial and the Reply, the *travaux* of the Convention and the judgment in *Musema* show that the common law understanding of conspiracy as an inchoate offence has prevailed[71]. However, if Croatia's claim is not successful, we invite the Court to consider the question of Serbia's responsibility on the basis that individual Serbian leaders, for whom the State bears international responsibility, were party to a conspiracy to commit genocide. That is elaborated in our written pleadings.

52. While the Court in *Bosnia* did not define conspiracy to commit genocide, conspiracy exists where two or more persons have agreed upon a common plan to commit genocide. The specific intent required is the same as that required for the crime of genocide itself[72].

(c) ***Direct and public incitement***

53. Direct and public incitement, provided for in Article III *(c)*, is also an inchoate offence and there is no requirement for the genocide to have actually occurred. The Parties agree on the definition of this offence — it requires "directly provoking the perpetrator(s) to commit genocide . . ." while also sharing the same specific intent as the principal perpetrator. Yesterday you heard from Ms Law, who drew your attention to the kind of incitements that were being publicly expressed well before the terrible events of 1991, in efforts to whip up a frenzy.

(d) ***Attempt***

54. And, finally, attempt. The Parties agree also as to the definitional aspects of the attempt to commit genocide in Article III *(d)* of the Convention. Again, this offence is only relevant if Croatia's claim that the Respondent is responsible for the crime of genocide were to fail.

VI. Conclusion: The role of the Court under the Convention

55. Mr. President, this concludes my presentation on general aspects of the Genocide Convention. We appreciate and recognize that it is not the first time that this Court or some of its

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[71]MC, para. 7.77; RC, para. 8.30.

[72]RC, paras. 8.29-8.31; *Prosecutor* v. *Akayesu*, Trial Chamber Judgement, Case No. ICTR-96-4-T, (Judgement of 2 Sept. 1998) para. 560; and MC, para. 7.76.

Members at least are confronted with issues relating to the interpretation of the Convention and its application. If the present case breaks new ground, as we say it does, it is on the facts, and these give rise to particular issues in relation to the application of the Convention in these proceedings. And so it is to these facts that we now turn, and I invite you to call to the Bar my friend and my colleague Sir Keir Starmer, who will address issues of evidence and proof.

The PRESIDENT: Thank you very much, Professor Sands. I now invite Sir Keir Starmer to take the floor. You have the floor, Sir.

Sir Keir STARMER:

EVIDENCE AND ISSUES OF PROOF

I. Introduction

1. Mr. President, Members of the Court, it is a real honour and privilege to appear before this Court for the first time.

2. In this speech I will address a number of questions of evidence and issues of proof arising from the pleadings. Following Professor Sands, it feels that we are descending from international principle to the nuts and bolts of proving the case.

3. I will deal very briefly with the burden and standard of proof. These are well established and the Parties are largely in agreement.

4. I will not deal at all with the skirmishes about the admissibility of certain documentary evidence. The Parties' rival arguments are set out in detail in the pleadings[73] and the Court will not benefit from my recital of them here.

5. However, I will spend some time dealing with two issues of real importance and contention between the Parties:

(a) the first is the significance of the ICTY findings which bear on the issues arising before this Court; and

[73]See Counter-Memorial (CMS), paras. 143-168; RC, paras. 2.34-2.58 and 2.64-2.68; Additional Pleading (APC), paras. 1.30-1.43.

(b) the second is the significance of the fact that the ICTY Prosecutor has not indicted a single accused for the crime of genocide in relation to relevant events in Croatia.

II. Burden and standard of proof

6. So, let me start with the burden of proof. The Court's approach here is clear[74]: the party seeking to establish any particular fact bears the burden of proving it. There is no contention between the Parties on that issue. I say no more.

7. This rule is nuanced in this particular case because the Respondent was in both *de jure* and *de facto* control of the territory where the Applicant says the genocidal campaign was planned or, alternatively, where steps were not taken to prevent it, and the Respondent was in effective control of the territory where the physical acts of genocide were carried out. In those circumstances, the Applicant submits that the Court is not only entitled to, but should, draw adverse inferences from the Respondent's failure to offer explanations and produce evidence in rebuttal of the Applicant's claims.

8. So far as the standard of proof is concerned, again the position is clear. The Court must be "fully convinced"[75] that the crime of genocide has been committed, and that the acts are attributable to the Respondent.

9. The same standard, of course, applies to the proof of special intent in establishing genocide. However — and I will develop this in later submissions — this Court has recognized that this standard can be met by proof of a pattern of conduct from which inferences can be drawn, so long as the inferences are sufficiently compelling. In the *Bosnia* case, the Court held that "for a pattern of conduct to be accepted as evidence of [genocidal intent], it would have to be such that it could only point to the existence of such intent"[76]. Mr. President and Members of the Court, no doubt in such cases, the required standard of proof is met by inferences drawn from a pattern of conduct. But the Applicant notes that the ICTY has not adopted such a strict rule. And the Applicant submits that the standard of proof required to prove genocidal intent will also be met

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[74] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Jurisdiction and Admissibility, *Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 209.

[76] *Ibid.*, p. 197, para. 373.

where there *may* be other possible explanations for a pattern of conduct, but nonetheless the Court is fully convinced, on the facts of the particular case, that the only proper inference is of genocidal intent.

10. When it comes to proving a failure to prevent, or to punish, acts of genocide, a different and lower standard of proof applies, namely "proof at a high level of certainty appropriate to the seriousness of the allegation"[77]. That variation recognizes the challenges of proving a negative, namely that the State has failed to take all available measures to prevent or punish genocide.

III. The significance of ICTY proceedings

11. So I move, Mr. President, Members of the Court, to the significance of the ICTY findings on the issues arising before this Court. This issue was considered in the *Bosnia* case[78], where the Court set out a number of important propositions, which the Applicant adopts and develops in its submissions in this case. I have set them out on screen for ease of reference:

[Screen on]

(a) first, a conviction by the ICTY of an individual for genocide cannot be a prerequisite to a finding by this Court of State responsibility for violation of the Genocide Convention;

(b) second, no evidential weight is to be accorded to a decision of the ICTY Prosecutor to include a charge in an indictment, and I will come back to that proposition in a moment when I consider what evidential weight should be afforded to a decision not to include a charge;

(c) thirdly, findings of fact by the ICTY are likely to be "highly persuasive" and the resulting verdicts and evaluations are also to be given "due weight"[79];

(d) and then, fourthly, agreed statements of fact following a guilty plea and resulting sentencing judgments, as in the ICTY cases of *Babić* and *Jokić*, are to be given a "certain weight"[80].

[Screen off]

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[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 130, para. 210.

[78] *Bosnia*, pp. 119-134, paras. 180-224.

[79] *Ibid.*, p. 134, para. 223.

[80] *Ibid.*, p. 134, para. 224.

12. These propositions are straightforward, they are important in this case, because as the Applicant will show in the course of its oral submissions, a number of ICTY judgements are rich in factual findings that are highly relevant to the present proceedings. The Applicant will refer in particular to the judgements in *Mrkšić*[81] and *Martić*[82]; and the sentencing remarks in *Babić*[83].

13. Adopting the approach of the Court in the *Bosnia* case, these findings, made after lengthy and painstaking assessment of the evidence, are highly persuasive in the determination of the issues before this Court in this case. In particular, as the Applicant will demonstrate, the findings of the ICTY, if accepted by this Court, not only make out the *actus reus* of genocide, but also establish clear patterns of conduct from which a genocidal intent can properly and compellingly be informed.

14. Against that background, the Applicant submits that it is highly significant that, although the Respondent seeks to distance itself from the relevant ICTY findings, it does not argue that they were wrongly arrived at, or that they should be set aside. In those circumstances, it is submitted by the Applicant, that it is open to this Court, and it is safe for this Court, to proceed on the platform of factual findings already established by the ICTY.

IV. Lack of ICTY indictment for genocide

15. I turn then to the lack of an ICTY indictment for genocide. I have already identified four propositions from the *Bosnia* case which the Applicant adopts. There is a fifth proposition which the Applicant needs to address.

16. The majority of this Court held that decisions of the ICTY Prosecutor *not* to include a charge of genocide in an indictment "may . . . be significant"[84]. The implication, it seems, is that the decision of a prosecutor *not* to include a charge of genocide in an ICTY indictment may assist in disproving the existence of the responsibility of a State for acts of genocide.

17. Mr. President, Members of the Court, the Applicant takes issue with this approach. As a general proposition, a prosecutorial decision not to prosecute should be given little or no probative

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[81]Case No. IT-95-13/1-T, Judgement, 27 Sep. 2007.

[82]Case No. IT-95-11-T, Judgement, 12 June 2007.

[83]Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004.

[84]*Bosnia*, p. 132, para. 217.

value in respect of the establishment of facts — including intentions — or legal conclusion, on matters of State responsibility. And on the facts of this particular case, the Applicant says no evidential weight should be placed on the decision of the ICTY Prosecutor not to charge any identified suspect with the offence of genocide.

18. The Applicant's detailed arguments in support of that proposition are set out in the Reply[85]. Here I will distil those arguments into three substantive submissions. Before I do so, I make the observation that the approach of the ICTY Prosecutor is not markedly different to the approach of domestic prosecutors in many countries around the world, particularly where the principles applied are strikingly similar, which is the case, for example, in my own jurisdiction, where I have some recent experience.

19. Accordingly there is a powerful argument for attaching no more significance to the exercise of a prosecutor's discretion to the decisions of the ICTY Prosecutor than would be attached to domestic prosecutorial decisions in other comparable jurisdictions.

20. I return then to my three substantive submissions, which are as follows:

(a) first, the discretion of any prosecutor, including the ICTY Prosecutor, to bring a particular charge is very wide. It may be influenced by very many factors — some case-specific; some not — that militate strongly against attaching any evidential significance to the exercise of this discretion;

(b) secondly, the decision of an ICTY Prosecutor not to include a charge is not a reviewable decision. Reasons do not have to be given and, even if given, cannot be tested. Since a decision to *include* a particular charge *can* be tested in the ensuing criminal proceedings, and indeed the charge can be dismissed and excluded from the indictment if unsupported by the evidence[86], it is, to say the least, problematic — and some might say illogical — to accord *greater* weight to an unreviewable decision not to bring a particular charge than to a reviewable decision to bring a particular charge;

(c) thirdly, there is a fundamental distinction between individual criminal responsibility for particular acts, and the State responsibility for the accumulation of acts by multiple actors.

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[85]Reply (RC), paras. 2.25-2.31.

[86]See ICTY Statute, Art. 19 (1); ICTY Rules of Procedure and Evidence, Rule 47.

21. I develop each of these submissions.

(a) ***Prosecutorial discretion***

22. First, the submission about prosecutorial discretion. And I start at the beginning of the process. The ICTY Prosecutor has a wide discretion both in commencing and conducting an investigation, and in relation to the charges to be included in the indictment. Under Article 16 (1) of the ICTY Statute, responsibility is vested in the ICTY Prosecutor for the investigation and prosecution of crimes. Under Article 18 (1) of the ICTY Statute, the ICTY Prosecutor may initiate investigations *ex officio* or on the basis of information from any source. It is for the prosecutor to access the available evidence and decide whether there is a sufficient basis to proceed[87].

23. Thus, from the very outset, the ICTY Prosecutor is constrained by the available evidence at that stage. That will influence any investigation and, in turn, influence any prosecution decision about the charge. As every prosecutor will appreciate, it is very rare indeed to have all the relevant information available at the beginning of an investigation and, in very many instances, had different information been available at the outset, the investigation would have taken a different course. That is an age-old problem in investigating a prosecuting crime.

24. Since the jurisdiction of the ICTY is over individuals, it is also inevitable that any investigation started by the ICTY Prosecutor must focus on the activities of one or more identified individuals. Mr. President, Members of the Court, such an investigation is not a general fact-finding exercise at the end of which individual culpability is assessed. It is a very different exercise, it is from the outset an investigation into an individual or individuals, intended to ascertain whether there is sufficient evidence to charge *them* with any offence. In that sense, the investigation will follow a relatively narrow course.

25. I move on, then, to the next stage of the exercise: the prosecutorial decision. Then of course, the first thing to note, is that the decision whether to indict an individual and, if so, with what charges, is inevitably bound up with the initial decision to investigate. If the investigation has followed a particular line of enquiry, there will be no decision for a prosecutor to make on what *might* have been the evidence if some other line of enquiry had been adopted. The decision of the

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[87]ICTY Statute, Art. 16.

ICTY Prosecutor is whether, on the evidence resulting from a particular investigation into one or more individual suspects, there is sufficient evidence to provide reasonable grounds for believing that the identified suspect committed a crime for which he can be properly charged.

26. That decision may well be affected by the breadth and extent of the investigation. If the investigation, for operational or other reasons, did not produce specific evidence against the identified suspect, it may well be that the individual cannot properly be charged. Mr. President, Members of the Court, that does not mean that a crime has not been committed. Whether a charge could have been brought against another suspect had he or she been investigated, or even against the identified suspect had the investigation taken a different course, is, quite simply, an unanswerable question.

27. And the discretion of a prosecutor also operates at other levels. So, for example, it is plain that neither the ICTY Statute nor the ICTY Rules on Procedure and Evidence impose an obligation on the Prosecutor either to investigate or to prosecute. Nor is there an obligation to pursue the most serious charges available on the totality of the evidence in any given case[88]. The Prosecutor is free to characterize the conduct of an accused under any appropriate heading. In international law, unlike in domestic law, the vast majority of crimes are very serious but not all can be pursued. The ICTY, in the *Mucić* case, emphasized the breadth of prosecutorial discretion as to investigations and indictments and the "finite human and financial resources" available which means that the Prosecutor "cannot realistically be expected to prosecute every offender"[89]. This principle applies equally in respect of the choice of charge.

28. In 2001, former ICTY Prosecutor Carla del Ponte explained to the United Nations Security Council that decisions to prosecute are necessarily selective. And I put the quote on your screen, just so the significance can be appreciated:

[Plate on]

> "From the many thousands of significant targets, we have selected under 200 . . . and we do not expect to prosecute even all of those . . . [T]he figures represent, as I have said, only a fraction of the potential number of crimes or suspects, all of which involve mass murders, multiple killings, or other crimes at the very

[88]RC, para. 2.27 (2).

[89]Case No. IT-96-21, Appeals Chamber Judgement, 20 Feb. 2001, p. 602.

> highest end of the scale of national or international crimes. In fact we turn most cases away."[90]

[Plate off]

29. How different to the position that this Court finds itself in. The reality is that a very wide range of factors may influence the discretion to prosecute which cannot have any material significance for the determination of issues before this Court. These include cost, length, manageability, availability of witnesses and sometimes availability of the accused[91]. It is not uncommon for a prosecutor to decide not to bring charges against an individual, not because a conclusion has been reached on the basis of the evidence but, much more pragmatically, on the basis that a key witness is unable or unwilling to provide the necessary evidence, either at all, or on conditions acceptable to the court. No sensible inference about the commission of a crime can be drawn from that set of circumstances.

30. Moreover, the ICTY Prosecutor is increasingly under pressure of time, with the ICTY Completion Strategy having been in place for nearly 10 years[92]. A number of persons suspected of crimes in Croatia, including Slobodan Milošević and Slavko Dokmanović, have passed away before they could be brought to justice. The Prosecutor may opt to pursue certain charges over others following a plea bargain, or because conviction is considered to be more likely on a less serious charge and adequate penalties are still available[93]. Certain charges may not be pursued because there is no single person in respect of whom the elements of *actus reus* and *mens rea* can be proved.

31. Conversely, the factual scope of the case may render proceedings far too long and complex if charges are brought.

32. Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR, and well known to this Court, has rightly argued[94] that drawing inferences from the absence of ICTY charges is — in

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[90]ICTY Press Release GR/P.I.S./642–e, Address by Carla Del Ponte, ICTY Prosecutor, to the United Nations Security Council (27 Nov. 2001).

[91]RC, para. 2.27 (3).

[92]RC, para. 2.31.

[93]Reply, para. 2.27 (3).

[94]R. Goldstone and R. Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", (2008) 21 *Leiden Journal of International Law* 95.

his words — "troublesome" because, and I put the quote on your screen, this is the Chief Prosecutor: [Plate on]

> "the Prosecutor's decision not to charge genocide in an indictment may have nothing at all to do with the absence of evidence that genocide was committed"[95]. [Plate off]

May I just leave that up there for one moment. If he is right about that — the decision not to charge may have nothing to do with the absence of evidence — one does ask how any inference can be drawn from a Prosecutor's decision not to bring a charge? And there is the additional fact that reasons are not given for not charging. Mr. President, Members of the Court, that quote in a sense is a complete rebuttal of any argument that weight can be given to a decision not to prosecute a given individual for genocide.

33. There may be a lack of evidence of *mens rea* in respect of a particular individual, evidence could have been obtained from a State intelligence source and therefore be undisclosable, or there may have been, much more simply, a plea bargain or some unrelated weakness in the prosecution case. None of these factors can or should carry evidential weight as to whether a violation of the Genocide Convention has in fact occurred[96].

34. There is also an important timing issue. There are real risks in giving weight to the Prosecutor's decision not to charge genocide, when the position may change. As Professor Sands has already indicated this morning, since this Court's decisions in the *Bosnia* case, the ICTY has found in the *Tolimir* case that genocide was committed not only in Srebrenica but also at Žepa[97]. And as you heard moreover, in July last year, the Appeals Chamber of the ICTY reinstated genocide charges against Karadžić[98].

(b) ***The status of the decision to charge***

35. I now turn to the second broad submission about the status of the decision to charge. Unlike the position in some domestic jurisdictions, the ICTY Prosecutor is under no obligation to

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[95]R. Goldstone and R. Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", (2008) 21 *Leiden Journal of International Law* 95, at 106.

[96]RC, para. 2.30.

[97]*Prosecutor* v. *Zdravko Tolimir*, Case No. IT-05-88/2-T, Trial Judgement, 12 Dec. 2012, para. 1173.

[98]*Prosecutor* v. *Radovan Karadžić*, Case No. IT-9S-SI18-AR98bis.l, Judgement, 11 July 2013, para. 115.

give reasons for decisions whether or not to charge particular persons or particular crimes. And as a matter of fact, the ICTY Prosecutor has not done so in any case relevant to the issues before this Court.

36. There is therefore simply no way of telling whether the Prosecutor reached a considered evaluation that particular events did not amount to the crime of genocide or whether charges were not brought for some other wholly unrelated reason[99]. Even if the Prosecutor *had* reached such a considered position — which will never be known — the evidential significance of such a decision should be minimal, since the Prosecutor's decisions are not judicial but executive in status, and involve no definitive finding of fact[100].

37. And that brings me to a linked issue and that is that there are no means of reviewing or challenging prosecutorial decisions not to charge, unlike the position in some other jurisdictions. Under Article 19 of the ICTY Statute[101] and Rule 47 of the Rules of Evidence and Procedure, the judicial arm of the ICTY will review each indictment, including the charges that *have* been included, and has the power to dismiss any count not supported by the evidence. But the judicial arm has no way of reviewing the charges that have *not* been included, or the reasons for non-inclusion. It would therefore be illogical to afford greater evidential weight to an unreviewable decision without reasons *not* to include a charge, than the reviewable decision to *include* a charge.

38. The Applicant stands back and submits that a principled approach would result in no weight being given to either decision. The decision to include a charge and the decision not to include a charge can be regarded merely as different — negative and positive — outcomes of the same decision-making process; that is, the decision *whether* to include a particular charge. Neither outcome involves a definitive finding of fact; therefore, no evidential inferences should be drawn

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[99]RC, para. 2.27 (6).

[100]RC, para. 2.27 (5).

[101]Article 19 (1) of the ICTY Statute provides:

"1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

See further the detailed procedure for review of indictments set out in ICTY Rules of Procedure and Evidence, Rule 47.

either way[102]. As recognized in the *Bosnia* case, and as I mentioned earlier, it would be wrong to infer from the inclusion of a charge in an indictment that the act is likely to have been committed. In the Applicant's submission, it would be equally wrong to infer from the non-inclusion of a charge that the act has *not* been committed. As every prosecutor knows, a decision to include a charge or not can be a very finely balanced exercise indeed. There are numerous examples of good and rational prosecutors taking different views on the same evidence. Far better, it is submitted, for this Court to reach its own conclusion, on the basis of the evidence before it and the legal principles to be applied. As Professor Sands has said, in this respect the Court is effectively acting as a first instance court.

(c) ***Distinguishing individual criminal responsibility and State responsibility***

39. I then turn to my third submission on this issue. As the Applicant makes clear in the Reply, a decision to prosecute an individual may well be made for reasons wholly unconnected to the question of State responsibility for violation of the Genocide Convention[103]. More fundamentally than that, the ICTY and this Court are asked to address entirely different legal questions; their answers should not be determinative of each other[104]. The ICTY is concerned with individual responsibility for particular crimes, not State responsibility for an accumulation of crimes[105]. The ICTY's scope of inquiry is limited to the operations of one accused in relation to each charge. That represents a small segment or puzzle-piece in the much larger picture that this Court is asked to consider — namely the cumulative impact on a protected group of a series of crimes, systematically perpetrated on a large section of the population, over a wide geographical area, by a large number of perpetrators, some or all of whom cannot be identified and brought to justice before the ICTY for their parts in events[106].

40. This Court is able to — and must — take a global view of all the evidence, including findings already made by the ICTY. It also has before it, and is able to rule on, additional evidence

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[102]RC, para. 2.27 (5).

[103]RC, para. 2.27 (4).

[104]RC, para. 2.29.

[105]RC, para. 2.27 (7).

[106]RC, para. 2.27 (7).

that was not the subject of charges before the ICTY[107]. For example, the total destruction of the city of Vukovar and its civilian population was not charged in the *Mrkšić* indictment; nor were the killings and torture at Velepromet. The Applicant will refer in the course of submissions to first-hand witness evidence not available to or considered by the ICTY in this regard. Also before this Court are findings of genocidal forcible displacement by the Croatian national courts in cases such as *Koprivna* and *Velimir*[108], along with convictions by the Belgrade District Court War Crimes Chamber of Serbian perpetrators of atrocities in Croatia[109]. This Court is in a far better position than the ICTY Prosecutor, and indeed the ICTY itself, to assess whether the totality of the crimes committed amounted to genocide. Of course, this Court is *the* guardian of the Convention.

41. Furthermore, the Applicant in this case does not face the challenge encountered by the ICTY Prosecutor in proving that both action and intent emanate from the same, single perpetrator. A paradigm example of the evidential complexities this can prevent is the case of Veselin Šljivančanin.

The PRESIDENT: Šljivančanin.

Mr. STARMER: Šljivančanin. Thank you. As with Professor Crawford, I have been practising, but not quite enough! I have got it to come several times in the next passage, so I go with some trepidation. The Trial Chamber found that Mr. Šljivančanin, who headed the evacuation of Vukovar hospital, had failed to protect from mistreatment 194 prisoners killed at Ovčara, but that he lacked the *mens rea* for murder[110]. However, the Appeals Chamber found on circumstantial evidence that on the night in question Mr. Mrkšić, the colonel in charge, must have told Mr. Šljivančanin that JNA protection had been withdrawn from the prisoners[111]. The Appeals Chamber therefore found that Mr. Šljivančanin possessed the *mens rea* for aiding and abetting murder. Mr. Šljivančanin applied for a review, submitting new testimony from a witness who

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[107]RC, para. 2.27 (8).

[108]RC, paras. 2.71-2.74.

[109]RC, para. 5.8.

[110]*Mrkšić and others*, Case No. IT-95-13/1-T, Judgement, 27 Sep. 2007, paras. 655-674.

[111]*Mrkšić and others*, Case No. IT-95-13/1-A, Judgement, 5 May 2009, para. 62.

heard the relevant conversation that Mr. Mrkšić did not inform him of the withdrawal. The Appeals Chamber then overturned its finding on *mens rea* for murder[112].

42. In this way — this is really the point — the fragile evidence of one murmured conversation became the battleground for the determination of whether one individual had committed certain offences. This example is illustrative of the limited evidential scope available to international criminal tribunals. It is much simpler for this Court to find, based on all of the evidence now before it, that the mass destruction of prisoners because they were part of a group was carried out at Ovčara by Serb paramilitaries under JNA control, in violation of the Geneva Convention. This is particularly so because State responsibility bites even where actions and intent emanate from different sources. Serbia is liable for the conduct of its organs, whether or not it is possible to prove that an individual commander necessarily shared the genocidal intent of those who framed the campaign[113].

43. Former Prosecutor Goldstone has emphasized the key point, that the ICTY and the ICJ are asked to answer entirely different legal questions[114]. The ICTY is asked *whether genocide was committed* by the individual before the tribunal. The ***ICJ*** is asked *whether genocide occurred* by acts attributable to a State[115]. Even where criminal responsibility is not substantiated beyond reasonable doubt for whatever reason in respect of a particular individual, it remains entirely open to this Court to make a finding of State responsibility for a pattern of conduct amounting to genocide under the Genocide Convention.

44. For all those reasons, Mr. President and Members of the Court, the Applicant submits that no evidential weight should be placed on the decision of the ICTY Prosecutor not to charge an identified suspect with the offence of genocide in relation to events currently before this Court.

45. Mr. President, Members of the Court, thank you for listening to these submissions. With your permission I will now pass over to my colleague Ms Špero, who will give an overview of the factual speeches, unless now would be a convenient point to take a break.

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[112]*Mrkšić and others*, Case No. IT-95-13/R.1, Review Judgement, 8 Dec. 2010, paras. 31-32.

[113]RC, para. 2.27 (4).

[114]Goldstone, p. 105.

[115]RC, para. 2.28.

The PRESIDENT: Thank you very much, Sir Keir. I think this is an appropriate moment to take a 15 minutes break. The hearing is suspended for 15 minutes.

The Court adjourned from 11.30 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I invite Ms Jana Špero to continue the presentation of Croatia's case. You have the floor, Madam.

Ms ŠPERO:

INTRODUCTION TO THE APPLICANT'S CASE ON THE FACTS

1. Mr. President, Members of the Court, it is a privilege to appear before you on behalf of Croatia to introduce the factual presentation of the case.

Introduction

2. My task and that of my colleagues in the next six presentations is to set out Croatia's factual case. We will describe to the Court atrocities committed by Serbia over the course of 1991 and 1992. Those atrocities included killings and infliction of serious bodily and mental harm against a group of ethnic Croats living in the regions slated for inclusion in a "Greater Serbia" — atrocities which constitute the physical element of the crime of genocide. They were committed with the intent to destroy a part of the Croat population in those regions. These facts also go to the mental element of the crime of genocide. The facts will further demonstrate that the JNA, under the command and control of Belgrade, was directly involved in the genocide. They demonstrate that the JNA perpetrated, and also, ordered, facilitated, aided and abetted the commission of genocide by the TOs and other Serb forces, including paramilitaries. Facts also demonstrate that Serbia knew that genocide was occurring and yet failed to prevent it. Indeed, it continued to provide financial and military support to the rebel Serb authorities and the Serb paramilitary groups and volunteers engaged in what it knew was "uncontrolled genocide" in Croatia[116].

[116]Reply (RC), Vol. 4 Ann. 63: memo of 13 Oct. 1991 from Colonel Milinko Dokovic: "the greater area of Vukovar, volunteer troops under the command of Arkan . . . are committing uncontrolled genocide and various acts of terrorism".

3. My presentation today will do four things by way of introduction to Croatia's case on the facts.

4. First, I will provide an overview of the genocidal campaign waged by Serbia in Croatia.

5. Second, it will take the Court through some of the key factual findings of the ICTY, relating to those events. These are directly relevant to the Court's assessment of the facts of this case. They establish beyond any doubt the *actus reus* of genocide.

6. Third, it will demonstrate how the facts before the Court prove not just the *actus reus*, but also the *mens rea* and *dolus specialis* of genocide, namely the intention to destroy the Croat population in the areas of Croatia targeted to be part of "Greater Serbia".

7. Fourth, it will set out a roadmap for the following factual presentations.

Overview of the conflict

8. Mr. President, Members of the Court, I turn to my first point, which is to provide the Court with an overview of the genocide in Croatia. A more detailed chronology is provided in Volume 5 of the Appendices annexed to Croatia's Memorial[117].

9. [Screen on] The Court heard yesterday about Serbia's plans for the creation of a Croat-free "Greater Serbia", which envisioned inclusion of over half of the territory of Croatia. That territory was to include the regions now depicted on your maps, namely: [Next graphic] Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika and Dalmatia. The territory corresponds to that of the three so-called "Serbian Autonomous Oblasts" or SAOs, which were those self-proclaimed Serb autonomous areas, unlawfully declared on the territory of the Republic of Croatia in 1990 and 1991, [Next graphic] namely the SAO Krajina, the SAO Western Slavonia and the SAO Eastern Slavonia, Baranja and Western Srijem. This is the main territory in which the genocide in Croatia was carried out.

10. As you heard yesterday, Serbia first identified which regions of Croatia to include in "Greater Serbia". It then set about demonizing the Croat population of those regions as dangerous "Ustashas", intent on Serb destruction and incapable of living in harmony with Serbs. Having stoked fears and ethnic hatred, it then armed local Serbs; it assisted in the creation and arming of

[117]Memorial (MC), Vol. 5, App. 1, p. 1.

ultra-nationalist, anti-Croat paramilitary groups; and it tasked the JNA, an army under Serbian direction and control, with carrying out its plan to eliminate the Croat population living in those regions. With that intent, the JNA, under the control of Serbia, as well as Serb TOs and paramilitaries and other Serb forces under JNA command, pursued a genocidal campaign — throughout those regions.

11. The newly formed and ill-equipped Croatian forces, described to you yesterday by Professor Crawford — they were no match for the JNA and other Serb forces. The defence of targeted villages was often limited to groups of local, Croat men, calling themselves "defenders", often armed only with hunting rifles. Croat civilians, often elderly people, unable or unwilling to flee, were subjected to extreme brutality, as they were tortured, raped and killed by JNA soldiers, TOs and paramilitaries. Entire Croat communities were intentionally destroyed.

12. By the end of 1991 the JNA, together with the TOs and Serb paramilitary forces, had occupied almost one third of Croatian territory. On 19 December 1991, the "Republic of Serbian Krajina" was declared on the territory of the SAO Krajina and it soon expanded to encompass the other two SAOs.

13. During the course of the genocidal campaign, the JNA and subordinate Serb forces killed over 12,500 Croats, 865 are still missing to this day. They caused serious mental and physical harm to tens of thousands of Croats. They raped more Croat women than can be known. They destroyed over 100,000 homes and over 1,400 Catholic buildings and places of worship. They rounded up over 7,700 Croats for detention, ill-treatment, rape and torture, sending them to detention camps in occupied parts of Croatia, Serbia, and other parts of the former Yugoslavia, and they forcibly deported over 550 000 others.

14. These are the atrocities, committed with the intent to destroy the Croat population in the targeted regions, on which the Applicant's case is based. [Screen off]

The factual findings of the ICTY establish the Applicant's factual case

15. Mr. President, Members of the Court, as you heard yesterday, when Croatia submitted its application to this Court on 2 July 1999, initiating proceedings in this case, Slobodan Milošević was still the President of the Federal Republic of Yugoslavia. No prosecutions had taken place and

the Federal Republic of Yugoslavia was still refusing to co-operate with the ICTY. It provided safe harbour to those indicted by the Tribunal.

16. In the intervening 15 years, many of the individual atrocities pleaded by Croatia in this case have been adjudicated by the ICTY. As determined by this Court in the *Bosnia* case, those findings of fact by the Tribunal, made after lengthy and painstaking assessment of the evidence before it, are "highly persuasive"[118]. They are central to the assessment by this Court of the facts before it. Of particular significance are the findings in *Martić, Stanišić and Simatović, Mrksić et al,* and *Babić*[119]. In those cases, the ICTY found, beyond any reasonable doubt, that atrocities were perpetrated by members of the JNA, together with other Serb forces, as part of a systematic attack against the ethnic Croat population of Croatia.

Milan Martić

17. In the case of Milan Martić, third President of the so-called "RSK", who was convicted for his role in the killing, torture, imprisonment and persecution of ethnic Croats, the ICTY determined that there had been *"a widespread and systematic attack"*[120] against the Croat population, by the JNA, TO, Serbian police and Serbian paramilitaries, acting in concert. That attack involved [Plate on]

> "the commission of widespread and grave crimes"[121], with "the goal of creating an ethnically Serb state"[122].

18. The Trial Chamber found that [next graphic]

> "numerous attacks were carried out on Croat majority villages by the JNA acting in cooperation with the TO and the Milicija Krajine"[123].

and that

> "[T]hese attacks followed a generally similar pattern, which involved the killing and removal of the Croat population."

19. The ICTY further determined that [next graphic]

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[118] *Bosnia*, paras. 220-223.

[119] Verdicts are outstanding in two further cases, namely *Hadzić* and *Šešelj*.

[120] *Martić*, ICTY Trial Chamber, para. 352.

[121] *Martić*, ICTY Trial Chamber, para. 443,

[122] *Martić*, ICTY Trial Chamber, para. 342.

[123] *Martić*, ICTY Trial Chamber, para. 344.

> "widespread crimes of violence and intimidation and crimes against private and public property were perpetrated against the Croat population, including in detention facilities run by MUP forces of the SAO Krajina and the JNA . . ."[124] [Plate off]

20. Hundreds of Croat civilians were imprisoned and subjected to "*severe mistreatment*"[125].

Jovica Stanišić **and** ***Franko Simatović***

21. In the case of *Stanišić,* the ICTY Trial Chamber found as a matter of fact that "*Serb forces committed a large number of murders against Croats*"[126].

22. It further determined that "*members and units of the JNA* "[127], Serb authorities and other Serb forces perpetrated

> "attacks on villages and towns with substantial or completely Croat populations [. . .] killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment of Croat persons; and the looting and destruction of property"[128].

23. It found that [screen on]

> "[i]n SAO Krajina and SAO SBWS most victims were Croats"[129],

and that

> "[t]he evidence shows that the persons targeted were primarily members of the civilian population"[130]. [Plate off]

Mile Mrksić, Miroslav Radić **and** ***Veselin Šljivančanin***

24. In the case of *Mrksić et al.*, the ICTY Trial Chamber made important findings of the fact regarding the command and control exercised by the JNA over the TOs and Serb paramilitaries.

25. It held that the [plate on]

> "de facto reality . . . generally, in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations"[131].

26. It determined, on the facts before it, [next graphic] that the JNA

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[124]*Martić*, ICTY Trial Chamber, para. 443.

[125]*Martić*, ICTY Trial Chamber, para. 349.

[126]*Stanišić,* ICTY Trial Chamber, para. 970.

[127]*Stanišić et al.*, ICTY Trial Chamber, para. 997.

[128]*Stanišić et al.*, ICTY Trial Chamber, para. 997.

[129]*Stanišić et al.*, ICTY Trial Chamber, para. 971.

[130]*Stanišić et al.*, ICTY Trial Chamber, para. 971.

[131]*Mrksić,* ICTY Trial Chamber, para. 89.

> "not only had de jure authority . . . but also had the manpower, armament and organisation to exercise effective de facto control over all TO and volunteer or paramilitary units"[132].

27. These critical findings of fact bear directly on the responsibility of Serbia. [Plate off]

Milan Babić

28. In addition to the these findings of fact by the ICTY, the basis of the guilty plea of Milan Babić, the president of the so-called SAO Krajina and subsequently the President of the self-declared "RSK", was that he, together with Serbian forces, including the JNA and the TO units from Serbia, in concert with Serbian authorities, established within Croatia a régime that [plate on]

> "included the extermination or murder of hundreds of Croat and other non-Serb civilians"[133],

and that they did so

> "in order to transform that territory into a Serb-dominated state"[134]. [Plate off]

29. The ICTY in its sentencing judgment described the régime as also involving the detention of hundreds of Croat civilians in inhumane living conditions and the forcible deportation of thousands of Croat civilians.

30. Contrary to Serbia's repeated protestations in its Rejoinder, the ICTY's factual findings are of significant assistance to Croatia, as explained by Sir Keir Starmer this morning. They leave no room for any shred of doubt that acts constituting the physical element of the crime of genocide, including killings and the infliction of serious bodily and mental harm, were committed by Serb forces against the Croat population.

31. Mr. President, Members of the Court, so clear are the ICTY factual findings, that Serbia has found itself compelled to accept in its Rejoinder that atrocities *were* committed against the Croat population. Having originally sought in its Counter-Memorial to avoid any acknowledgment of those atrocities, the Respondent was forced by the weight of the ICTY findings, corroborating the evidence before this Court, to change tack in its Rejoinder. It thus now acknowledges — somewhat reluctantly, it must be said — that it would be "unrealistic to deny" that atrocities

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[132] *Mrksić*, ICTY Trial Chamber, para. 89.

[133] *Babić*, Sentencing Judgement, para. 15.

[134] *Babić*, Sentencing Judgement, paras. 8 and 16.

occurred[135]. The Respondent clarifies — half-heartedly — at various stages of its Rejoinder that "it is not [its] contention that . . . atrocities were not perpetrated during the conflict in 1991"[136]. It accepts that the fact that those atrocities "involved acts directed against civilians is not really in dispute either"[137] and that "[e]thnic hatred no doubt figured in much of the behaviour of those responsible for the crimes that were committed"[138].

32. Indeed, the Respondent goes so far as to seek to persuade the Court that it had never in fact sought to suggest that atrocities had not been committed. It thus explains [plate on] :

> "A careful reading of the Counter-Memorial indicates that the Respondent is not denying that killings took place, that they were methodical, directed at civilians and driven by ethnicity."[139]

33. This is an important acknowledgment, that bears underscoring: there is no longer any factual dispute between the Parties as to whether atrocities occurred. Serbia continues to dispute various specific incidents pleaded by the Applicant and to take issue with the nature and weight of the evidence relating to others. However, it does not dispute that the factual basis of Croatia's case is made out.

34. More important still, as you heard from Professor Philippe Sands this morning, is the Respondent's concession at paragraph 381 [Next graphic] of its Rejoinder that:

"theoretically, of course, such acts might correspond to the *actus reus* of genocide"[140].

35. Given the "careful" and considered nature of the Respondent's admissions, this concession is critical: there is now no dispute between the Parties that atrocities occurred, and there is no dispute that those atrocities fall within the categories of acts constituting the *actus reus* of genocide. The difference between the Parties relates only to the characterization of the crime to which these acts gave rise. [Plate off]

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[135]RS, Vol. 1, para. 354.

[136]RS, Vol. 1, para. 384.

[137]RS, Vol. 1, para. 360.

[138]RS, Vol. 1, para 375.

[139]RS, Vol. 1, para 392.

[140]RS, Vol. 1, para. 381.

What the facts establish

36. Mr. President, Members of the Court, that leads me to the third point of my presentation. The Respondent rebukes Croatia, at various stages of its pleadings, for engaging in what it terms "rather lengthy recitals of alleged atrocities"[141]. The Respondent would prefer that the brutality of its acts of violence against the Croat population were not laid bare before this Court. However, such recital is far from gratuitous, as the Respondent seeks to insinuate.

37. First and importantly, as I stated at the beginning of my presentation, the facts do not just establish the — now undisputed — *actus reus* of genocide. They also evidence the *mens rea* or *dolus specialis* of genocide, that is Serbia's intention to eliminate and destroy a part of the Croat population, in the targeted areas of Croatia. The factual evidence, which the Respondent seeks to criticize Croatia for "rehearsing" unnecessarily, demonstrates that atrocities committed were not isolated, random incidents. Rather, they were part of a systematic pattern of horror visited upon village after village across the occupied areas of Croatia in order to establish Serbia's plan for a Croat-free "Greater Serbia" on the territories seized. That systematic campaign divulges and is only consistent with an intention to destroy a part of the Croat ethnic group.

38. Further, while the — necessarily — limited incidents adjudicated by the ICTY establish the Applicant's factual case, they do not tell the whole story. Unlike the ICTY, this Court is not concerned with individual criminal responsibility for particular crimes committed by particular human beings. The Court in these proceedings is concerned with the responsibility of the Respondent for the totality of the assault against the Croat population in the targeted areas, and for failing to prevent and punish the same. A detailed account of that conflict is necessary to demonstrate that, contrary to the Respondent's assertions, the armed onslaught orchestrated by Serbia did not involve ***only*** the commission of war crimes, as determined by the ICTY in its assessment of individual criminal responsibility. It also exhibited, from the very early stages, the characteristics of a genocidal military campaign aimed at the destruction in whole or in part of an ethnically, religiously defined group of people. That group of people were the Croats living in villages and towns targeted for attack by Serbia.

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[141]RS, Vol. 1, para. 375.

39. Second, the factual evidence shows that the attacks upon and seizures of Croat villages were led and directed by the JNA, to which all other Serb forces were subordinated, and which was itself subordinated to the Respondent. It establishes that the JNA committed atrocities itself. It also directed the TOs and Serb paramilitary groups to commit similar atrocities; and it facilitated their commission, by failing to prevent or curtail them, in all but a few limited and isolated incidents. There can be little dispute on these matters, having regard to the ICTY's findings of fact. The factual evidence pleaded by Croatia establishes not only the Respondent's responsibilities for the atrocities committed, but also the clear genocidal intent behind them.

40. Thirdly and importantly, it is critical for Croatia to set out the detail of its factual case in order to make clear that this case is not concerned with abstract legal concepts, but with real events, real people, real acts of destruction. Serbia's genocidal acts were directed against, and intended to destroy, the Croat population of the villages, towns and regions concerned. The effects of those atrocities continue to be felt profoundly in Croatia. Croatian families continue to mourn 12,500 dead. Croatian families continue to search for the remains of over 800 individuals — fathers, sons, mothers, daughters, friends — still missing and unaccounted for. Serbia still refuses to help locate them. Thousands of my compatriots continue to live with the trauma of torture and rape. The brutal events of the campaign waged by Serbia are etched onto the landscape of Croatia and into the lives and family histories of every Croatian citizen.

41. These atrocities, with which the Respondent accuses Croatia of "smother[ing] the Court", are the atrocities with which Serbia sought to smother and destroy the Croat population of the targeted areas. They constitute the factual basis of the genocide, for which Croatia seeks justice before this Court.

Road map of the factual presentations

42. Mr. President, Members of the Court, I turn now to the final part of my presentation, that is the road map of the six factual presentations to follow.

43. In the first presentation, Professor Philippe Sands will describe the genocide committed against the Croat population living in the regions that were to form part of "Greater Serbia". His presentation will demonstrate the clear ethnic animus that drove the attacks against the Croat

population and the destructive consequences of Serbia's campaign. He will illustrate Serbia's role in directing the JNA's participation in and command of the atrocities committed, its extensive support and co-ordination of genocidal paramilitary groups, its wilful failure to prevent genocide and its failure adequately to punish it.

44. The second, third and fourth presentations are more geographically specific. [Screen on] The second presentation focuses on the genocide committed against the Croat population of Eastern Slavonia, that is the area now highlighted on the map. [Next graphic] Ms Blinne Ní Ghrálaigh will use a case study of Eastern Slavonia to describe the ruthless pattern of attacks on Croat majority villages by the JNA, and other Serb forces, as they pursued their genocidal campaign against the Croat population. It is Croatia's case that the widespread, co-ordinated pattern of attack, stands as clear evidence of Serbia's genocidal intent. In the third presentation, Sir Keir Starmer will describe to the Court how the pattern of attack was put into action against the Croat inhabitants of Vukovar [next graphic], now tragically infamous for the carnage visited on its population in November 1991. As a final case study, Professor Maja Sersić will describe the genocide committed against the inhabitants of the lesser-known villages of Škabrnja, [next graphic] in northern Dalmatia, and Saborsko, in Lika.

45. On Wednesday and Thursday, Professor Davorin Lapas and Professor Vesna Crnić-Grotić will conclude Croatia's case on the facts. Their presentations adopt a thematic, rather than geographic, approach to the atrocities committed. They will show to the Court that the atrocities, including the killings, rapes and serious bodily and mental harm, inflicted on the Croat population by Serbia, were not one-off aberrations, committed by unaccountable individuals or rogue elements within the Serb forces. Rather, they formed part and parcel of a systematic programme to destroy a part of the Croat population. [Screen off]

46. The presentations will draw on the extensive materials before the Court, as set out in Croatia's pleadings[142] available. The materials take the form of victim and witness statements, of reports by independent observers and commentators and by international and humanitarian agencies, of political, military and intelligence documents, of medical and forensic data, of

[142]See in particular Memorial (MC), Vol. 1, Chaps. 4 and 5 and Reply (RC), Vol. 1, Chaps. 5 and 6, and associated annexes.

exhumation and missing persons' records, of contemporaneous news reports and other evidence. They include the judgments and factual findings of the ICTY. They demonstrate beyond any doubt, that atrocities constituting the crime of genocide were perpetrated against the Croat population of Croatia by the JNA, by the TO, by Serb police and security services, and by Serb paramilitary groups subordinated to it, acting under the direction, and with the active support and co-ordination, of Serbia.

47. Mr. President, Members of the Court, the presentations make for a grim listening. This will not be a pleasant few days of hearings. However, those are the atrocities committed by Serbia against Croats — just because they were Croats. Those are facts of this case. And so describe them we must.

Conclusion

49. In conclusion, it remains for me to emphasize one final point, both for the Court and for the victims and survivors of the atrocities with which the Applicant's claim is concerned.

50. The scale of atrocities does not allow for an exhaustive presentation. Croatia will be able to present to the Court only a number of representative examples. This necessary selectivity cannot undermine or in any way deny the facts or call into question the suffering of the victims. In so far as Croatia focuses on incidents, particular incidents or localities, that focus should not be interpreted as undermining the significance or the gravity of the crimes committed elsewhere.

51. Mr. President, Members of the Court, thank you for your attention. I now leave the floor to my colleague, Professor Philippe Sands.

The PRESIDENT: Thank you very much, Ms Špero. I give the floor to Professor Sands. You have the floor, Sir.

Mr. SANDS:

GENOCIDAL ACTIVITIES IN THE OCCUPIED REGIONS OF CROATIA: EASTERN SLAVONIA, WESTERN SLAVONIA, BANOVINA, DALMATIA, KORDUN AND LIKA

I. Introduction

1. Mr. President, driven by the vision of an enlarged and ethnically pure Serbian State, the Respondent committed a large number of genocidal acts across communities of the occupied regions of Eastern and Western Slavonia, Banovina, Dalmatia, Kordun and Lika, these were very large regions by any standard.

2. My task in this presentation is to set those acts in context by providing the Court with an overview of how the campaign unfolded, and I am going to highlight patterns and themes that cast light on the ethnically destructive intention that led to those activities. These demonstrate different aspects of Serbian responsibility under the Convention.

3. The presentation will be in three parts, I will begin by demonstrating the clear racial animus that underlay all of these acts.

4. In the second part I am going to show the Court how the Respondent's actions deliberately targeted Croat groups with the intention of destroying them across these areas and, in the third part, I am going to take the Court to examples that demonstrate the different ways in which Serbia's responsibility is engaged.

5. I should say that the examples I give are illustrative and they are unhappy and I apologize in advance for having to take you to material which is, both in terms of word and images, extremely unhappy material.

II. The Respondent's campaign in Croatia

6. I begin with history. And I hope you will forgive me for that. You heard on Monday, Mr. President, the circumstances in which a frenzy was whipped up of hatred, a call for action against Croats in certain parts of the former Yugoslavia, on the basis of a false historical narrative, that once again cast Serbs as victims of some horror. And you heard more yesterday if you read

your newspapers, as the Agent of Serbia used exactly the same argument that somehow being in the Court today and yesterday was once again an indicator of victimhood.

7. Let us begin in the spring of 1991. [Next graphic] On 1 May 1991 the Serbian flag was hoisted in the small town of Borovo Selo in Eastern Slavonia. A group of policemen tried to take it down and that caused them to be attacked. The following day Serb paramilitaries murdered 12 Croatian policemen in the village, and wounded many others. This was a very significant moment in Eastern Slavonia, a catalyst for the arrival of the JNA, ostensibly to establish a "buffer" zone between Serb and Croat communities. The reality was very different: it was to establish a military presence and in particular to block any attempt to investigate or arrest the perpetrators of the killings[143]. The JNA's deployment set the stage for an escalation on which you will hear more.

8. [Next graphic] Elsewhere in Croatia, on 13 August 1991, Serbs in Western Slavonia proclaimed the "Serbian Autonomous Region of Western Slavonia"[144], the third of the self-declared Serb autonomous zones, joining the "SAO SBWS" (declared in February 1991) and the "SAO Krajina" (declared in December 1990).

9. From August 1991 the campaign against ethnic Croats accelerated rapidly, with the JNA firmly at the helm. On 19 August 1991, Milan Martić, who occupied various senior leadership positions in the SAO Krajina, declared that land controlled by the police and TO of the SAO Krajina "will forever remain Serbian"[145]. According to the ICTY, from that moment August 1991, "the JNA became an active participant in Croatia on the side of the SAO Krajina"[146]. And from that point on, as the ICTY has found "the SAO Krajina TO was subordinate to the JNA" and there was "operational cooperation between the JNA and the armed forces of the SAO Krajina"[147].

10. Having primed and armed the Croatian Serb minority population in the weeks and months that came before, the JNA — whose ranks were swelled by Serb volunteers — led attacks against Croat groups in towns and villages throughout the targeted regions. Participants in the

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[143]MC, Vol. 1 para. 4.16.

[144]MC, Vol. 1, para. 5.07.

[145]*Prosecutor* v. *Milan Martić*, (IT-95-11-T), Trial Chamber Judgement, 12 June 2007, para. 333.

[146]*Martić*, Trial Chamber Judgement, para. 330.

[147]*Martić*, Trial Chamber Judgement, para. 142.

campaign included TO units from Serbia, the SAO Krajina and the SAO SBWS; the security and police forces of the Republic of Serbia and the Serb autonomous areas; the Milicija Krajine; and numerous Serb paramilitary groups[148] of which you will hear more. In just a few frenzied months, the JNA and Serb forces under its command attacked, for the purposes of destruction, Croat groups in town after town and village after village throughout the regions that you can see on your screens. The intention was plain and simple, to destroy the Croat communities in their entirety, and this was largely achieved: human populations were wiped out, and homes, schools, businesses, churches and hospitals razed to the ground. [Next graphic]

11. In *Martić*, the ICTY described the pattern of death and destruction in the SAO Krajina, you have the quote on the screens, you have a description of the events from June 1991 to December 1991, raids carried out against predominantly Croat villages in the SAO Krajina. It identifies the perpetrator and a long list of villages by name and then it says:

> "Villagers were left with no choice but to flee. During or immediately after the attacks, villagers who stayed behind were killed and beaten. Private and public property, including churches and schools, were destroyed and looted."[149]

Those are findings of fact. [Screen off]

12. Substantial? It is very difficult to see how you could possibly conclude that this was not substantial. The chronology and sequence of attacks is set out in our pleadings[150]. And you are going to hear more particular case studies shortly.

III. The ethnic purpose of the Respondent's campaign

13. You heard from Ms Law on Monday about the context, which we know from the writings of people in this field of genocide studies as it has come to be known, genocide always begins with the demonization of a particular group, that is the early warning. Let us start then with demonization.

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[148]MC, Vol. 1, Chap. 3, Sec. 2.

[149]*Martić*, Trial Chamber Judgement, para. 349.

[150]MC, Vol. 1, Chaps. 4 and 5; RC, Vol. 1, Chaps. 5 and 6.

(a) ***Demonization, denunciation and ethnic tagging***

14. The ethnically destructive intent behind the Respondent's campaign is plain from the demonization of Croat groups in communities and towns and regions across the area — ethnic abuse on defenceless civilians, and the use of ethnic markers in relation large numbers of individuals were indicators of the aim of dehumanization.

15. A graphic manifestation of this was the deliberate mutilation of Croat civilians with the use of Serb symbols. In the village of Ilok in Eastern Slavonia, for example, two masked men arrived at the house of a Croat family and shouted: "Open up, you Ustasha mother". They broke down the door, handcuffed one of the residents and then used a knife to slice a cross with four "Cs" into his forehead — the acronym for the Serb nationalist motto "Only unity saves the Serb"[151]. Similarly in Korenica in Lika, a Serb fighter cut an identical emblem into the chest of an imprisoned priest[152]. Two examples out of many. Coincidence? Surely not! The nature of these acts, and their scale, indicates that they were not random. The details are set out in the pleadings. They reflected an underlying ethnic intent to destroy the groups.

16. There is much worse. In a macabre practice that evokes another period and another place, across the occupied communities and regions — not isolated incidents, numerous, set out in the pleadings — Croat civilians were forced to wear white ribbons, and ordered to adorn their homes with white rags. These were measures of ethnic designation. Thus earmarked, they were ready targets for destruction. In Bapska, Croats were forced to hang white ribbons on their doors by Serbs who shouted, "Ustasha! We will kill you all"[153] — in the witness statements. The Croat populations in Arapovac[154], Lovas[155], Šarengrad[156], Sotin[157], Tovarnik[158] and Vukovar[159], amongst other places, were forced to wear white bands by Serb forces. The scale was substantial, by any

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[151]MC, Vol. 2 (I), Annex 57.

[152]MC, Vol. 2 (III), Ann. 383.

[153]MC, Vol. 2 (I), Ann. 66.

[154]MC, Vol. 2 (III), Ann. 348.

[155]MC, Vol. 2 (I), Ann. 96; Ann. 97; Ann. 98; Ann. 101; Ann. 102; Ann. 104; Ann. 105; Ann. 107; Ann. 108.

[156]MC, Vol. 2 (I), Ann. 53.

[157]MC, Vol. 2 (I), Ann. 93; RC, Vol. 2, Ann. 3.

[158]MC, Vol. 2 (I), Ann. 76; Ann. 83; Ann. 84; Ann. 86.

[159]MC, Vol. 2 (I), Ann. 128.

reasonable standard. [Screen on] You will see now a photograph on your screen. It shows the use of a morbid decoration in a mass grave, found tied to the skeletal remains of murdered civilians in those mass graves. And I do apologize for having to show this to you in open court to you in this way but, Mr. President, Members of the Court, it is cruelly ironic that, many years after the bodies of victims ceased to be recognizably Croat, ragged ethnic markers remained bound to their bones, an enduring monument to a campaign of calculated racial destruction against people for the simple reason that they were Croat. [Screen on]

(b) ***Anti-Croat abuse and the ubiquitous "Ustasha" label***

17. Let us turn to the ubiquitous "Ustasha" label. Attacks on Croat civilians were frequently accompanied by virulent ethnic abuse and racial threats. And I am going to tone down some of them in this open court room. Reflecting the clear influence of racist propaganda that came directly from Belgrade — you heard the source on Monday — and the hate speech that dominated the Serbian media from the late 1980s, the derogatory "Ustasha" label was simply used to describe anyone who was Croat. [Screen on] Witnesses recount how Croats were explicitly denounced as "Ustashas" while being attacked, killed or threatened with violence in numerous towns. You can see them on your screens, each one indicates where witness statements have been prepared where this has been done. Again, I ask you to ask yourselves, is this substantial across such a territory? Is it pure coincidence across such a territory? Obviously not.

18. The witness statements are substantial in describing this intent. In Poljanak, an armed soldier told Croat civilians that he wore a glove "so that I won't get my hand bloody when I slit the throats of Ustashas"[160]. In Voćin, heavily armed Serb paramilitaries shouted at Croats: "Ustashas, we will slaughter you all, we will cut your arms and legs off."[161] Other such paramilitaries cried: "Give us Ustashas to slaughter them, because we are ear-nose-throat specialists."[162] A wounded Serb fighter in the village asked to be left alone to reflect, "I can die now" he was reported as saying, "since I have killed four Ustashas yesterday"[163]. So pervasive was the anti-Croat sentiment

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[160]*Martić*, Trial Chamber Judgement, para. 216

[161]MC, Vol. 2 (II), Ann. 189.

[162]MC, Vol. 2 (II), Ann. 204.

[163]MC, Vol. 2 (I), Ann. 194.

in that village that one Serb doctor there refused to prescribe medicine for sick Croat children, because he had "no medicine for little Ustashas"[164].

19. Contrast, a Serb doctor in Lovas, who did treat Croat victims of Serb violence, was beaten up by the Serbs, who were angry that he was "curing Ustashas" while they were busy "fighting against and murdering Ustashas"[165]. And, again, each of these references is footnoted and you can find all of the material and all of the witness statements, and you are going to hear from witnesses in the course of the next few days, in relation to this kind of material. A Croat woman in Berak who sought medicine for her epileptic husband was grabbed by a TO soldier, who loaded his gun and shouted: "[An expletive towards] your Ustasha mother, you should die instead of going to the doctor, I will cut you into pieces and send you to your children to cook"[166].

20. That same woman described how a JNA captain shouted "[Expletives towards] your Ustasha mother" after finding a Croatian flag in her house. She was then savagely beaten, losing many teeth in the attack. Two Serb fighters later approached that same woman and used more expletives against her "Ustasha mother": "I killed your son today and buried him in the garden", she was told. "You don't have to feed him anymore."[167] Other Serbs in the village demanded that Croats provide the addresses and photographs of all their "Ustasha children". "Where are the young Ustasha?" they were asked[168]. Obviously they had been hidden.

21. A woman in Tovarnik recounts how a JNA reservist asked her about her nationality. Upon learning her to be a Croat, the soldier started shouting at her, "Milošević told them . . . they were going to the front line and that their task was to kill and destroy everything Croatian"[169]. Another witness describes how a Serb paramilitary attacked Croat civilians with a knife saying: "you Ustashas, I will suck your blood with this. I will slaughter you with this knife."[170]

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[164]MC, Vol. 2 (II), Ann. 195.

[165]MC, Vol. 2 (I), Ann. 103.

[166]MC, Vol. 2 (I), Ann. 30.

[167]*Ibid.*

[168]MC, Vol. 2 (I), Ann. 34.

[169]MC, Vol. 2 (I), Ann. 76.

[170]MC, Vol. 2 (I), Ann. 80.

22. You are going to hear later in the week about the multitude of acts of sexual violence committed against Croat women and Croat men. Many of those sexual crimes, as you will hear and as you will know from the pleadings, were accompanied by terrible ethnic abuse. In Berak, for example, three Croat women, including a 44-year-old mother of six boys, were subjected to a public gang rape. The two younger women were gang raped repeatedly over the months that followed, the 44-year-old having been singled out for such punishment because she had "delivered 6 Ustashas". The older woman was taken away and never seen again[171]. Another woman in Berak was blindfolded and gang raped by seven JNA reservists, who forced her to swallow sperm and urine while shouting, "swallow you Ustasha [Expletive]" and "[Expletive] your Ustasha mother"[172]. The rapists shouted — and this is known to be significant in genocidal studies and in genocidal activities — "we will exterminate their seed" before stripping the woman naked and raping her for more than two hours. In Bapska, another town, a Croat man had his genitals beaten 30 times — on his witness statement — by Serb military policemen who said as they carried out the act: "You won't make any more little Croats."[173] That is genocidal sentiment.

23. Such language, Mr. President, is redolent of a genocidal intent. We leave it to you to conclude its substantiality across all of these villages and towns. It is very difficult, we say, to see how you could not possibly do so. [Screen off]

(c) ***Military orders to attack and destroy the Croat population***

24. I turn to military orders to attach and destroy the Croat population. The ethnically destructive objective of the Respondent's campaign is reflected in many official decisions and orders, including, for example, the "Decision on the Return of Expelled Serbs to Ethnically Clean Serbian Villages", promulgated by the Municipal Assembly of Pakrac in June 1993[174]. A witness from Glina testified that the President of the local Serbian Democratic Party, Dr. Dušan Jović,

[171]MC, Vol. 2 (I), Ann. 30.

[172]MC, Vol. 2 (I), Ann. 35.

[173]MC, Vol. 2 (I), Ann. 74.

[174]MC, Vol. 2 (II), Ann. 239: Decision on the Return of Expelled Serbs to Ethnically Cleanse Serbian Villages.

ordered Serb units to "kill and slay every living creature of Croat origin". On this account, Dr. Jović "used to say that Croats should be exterminated while they were in the womb"[175].

25. Military orders, of which you have many in your materials, prove that membership of the Croat ethnic group was *the* determining factor in deciding whether civilians lived or died. A former JNA officer described how a senior JNA commander "commended" to him a JNA colonel and "encouraged him . . . to exterminate the Ustashas"[176] in a similar way. Likewise, an order from the leadership of the Glina TO of 4 October 1991 instructed TO units "to spare" two Serbs — two Serbs — when "mopping up terrain in Glina"[177].

26. The desire to eliminate any and all Croats pervaded the paramilitary ranks. In Ervenik two paramilitaries murdered a Croat family of four. One of the two killers then provided an account of what he had done:

[Screen on]

> "[we] agreed to set on fire and kill the people of Croatian nationality in the village of Ervenik who remained there . . . both Slobodan and I firmly decided to go to the mentioned Croats and to kill them"[178].

There is no other way but to characterize that as an act intending to destroy a part of a group.

27. Putting that plan into deadly action, one of the paramilitaries then denounced the father of the family as an "Ustashe" and shot him dead at the entrance to the family's home. He then asked the mother: "Will the Ustashe come back?" — using more expletives — before cutting her throat with a knife and shooting dead her two children[179]. [Screen off] All of this was well documented.

28. There was a continuum, Mr. President, from extreme nationalism to killings and other genocidal acts. This happened in numerous Croat towns and villages. The villages of [screen on] Četekovac, Čojlug and Balinci, where Serb forces murdered at least 20 Croat civilians in 1991, are a typical example[180]. A Serb fighter describes attending meetings in Podravska Slatina with

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[175]RC, Vol. 2, Ann. 6.

[176]MC, Vol. 2 (I), Ann. 245.

[177]*Martić*, Trial Chamber Judgement, para. 324, footnote 1002 referring to a TO order dated 4 October 1991.

[178]MC, Vol. 2 (III), Ann. 467.

[179]MC, Vol. 2 (III), Ann. 466.

[180]MC, Vol. 1, paras. 5.42-5.46; RC, Vol. 1, paras. 6.8-6.12.

"extreme Serbs". At those rallies they listened to speeches by the leaders of a political party, the Serbian Democratic Party, "with the aim of causing national intolerance, a break and national hatred between the Croatian and Serbian people"[181]. [Screen off]

29. A Serb fighter went on to describe how weapons were distributed to rebel Serbs from JNA warehouses. In September 1991 the fighters were commanded to attack Balinci. One group was ordered to "clean the right row of houses from the road in Balinci", while another was ordered to "clean the left row". A third group was ordered to ensure that no one escaped from the village. Croat civilians were then singled out and shot, stabbed and beaten to death. Afterwards Serb soldiers boasted that they "shot at anything that moved in Balinci"[182], presumably because it was Croat. In a blunt reflection of the purpose of the operation, a former TO fighter described how "[t]he order to commit genocide against the civilian population" was issued by the local TO commander, Boro Lukić[183]. They knew exactly what they were doing and they knew how to characterize it.

30. This is unequivocal evidence.

IV. Destruction of Croat towns and villages

31. Let me turn to the destruction of Croat towns and villages. The ethnically destructive consequences are indisputable. Across the maps that you have seen, entire villages, towns and small regions, *entire* communities were wiped out. Four brief examples prove the point.

32. [Screen on] In 1991 the village of Novo Selo Glinsko in Banovina had 239 inhabitants, all of whom were ethnic Croats[184]. On 26 September 1991 the JNA and Serb paramilitaries attacked the village. By the end of the month 206 civilians had fled for their lives, leaving just 33 inhabitants[185]. On 2 October 1991 the TO and local paramilitaries entered the village and killed 32 of the 33 remaining residents, they rounded up the men and women and executed them in

[181]MC, Vol. 2 (II), Ann. 202.

[182]MC, Vol. 2 (II), Ann. 202.

[183]MC, Vol. 2 (II), Ann. 198.

[184]MC, Vol. 1, paras. 5.81-5.83; RC, Vol. 1, para. 6.22.

[185]MC, Vol. 2 (I), Ann. 252.

groups, and they then set the village ablaze[186]. One Croat resident managed to escape the carnage. Within the space of a single week a Croat population of 239 was reduced to nothing.

33. [Next graphic] The village of Kostrići in Banovina — much smaller — 15 inhabitants at the beginning of 1991, all of them Croats[187]. On 19 November 1991, a group of Serb paramilitaries entered the village and murdered every single inhabitant, entirely destroying the Croat population. The dead included two young boys aged 3 and 5[188]. That is not substantial, that is total destruction of the group. The Respondent criticizes the Applicant's reliance on the village as an example of genocide, they say that the witness statements "are not based on direct knowledge" of the killings[189]. Well, obviously when you kill every single person in a village there are not going to be people left behind to offer the kind of witness statements they would like to see. The evidence is established by the exhumations of the victims[190].

34. [Next graphic] Next example, the village of Joševica in Glina. It had 133 inhabitants at the start of 1991, 126 of them were ethnic Croats and there were just two were Serbs[191]. On 16 December 1991 Serb paramilitaries entered the village and shot dead every single Croat civilian they could find — this of course reminds one of the words of the Appeals Chamber in the *Krstić* case: "The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him."[192] They identified a target of every single person they could find and sought to kill every single person they found. Some escaped, they hid or they happened to be working elsewhere when the attack took place. When they returned, they found that 21 of their Croat relatives and neighbours had been murdered[193]. Most of those who survived fled the village; the minority who remained were beaten, raped and abused, and four more Croats were murdered in the months that followed. By 1993 not a single Croat was left in the village. Soon you are going to

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[186]MC, Vol. 2 (I), Ann. 252; Ann. 254; Ann. 255.

[187]MC, Vol. 1, paras. 5.115-5.116.

[188]MC, Vol. 2 (I), Ann. 285; MC, Vol. 2 (II), Ann. 335: Report of killed and missing persons in the area of the Hrvatska Kostajnica Municipality-Kostrići.

[189]CMS, Vol. 1, para. 806.

[190]RC, Vol. 3, Ann. 43, pp. 522 and 525.

[191]MC, Vol. 1, paras. 5.84-5.88; RC, Vol. 1, para. 6.23.

[192] *Ibid.* para. 13.

[193]MC, Vol. 2 (II), Ann. 256; Ann. 257; Ann. 260; Ann. 261; RC, Vol. 2, Ann. 24.

hear from a witness from that village and you will be able to ask her yourselves any questions you wish in relation to the experience that she went through. You will see the deep psychological scars that are left from such an experience[194].

35. [Next graphic] Next, the village of Baćin in Banovina. 414 inhabitants in 1991, of whom about 400 were Croats and there were just six Serbs[195]. In 1991 in October the village was attacked and taken over by Serb forces. The ICTY found that, "[f]ollowing the take-over of Baćin, all the inhabitants left, with the exception of around thirty mostly elderly civilians". The Trial Chamber went on to note the evidence that [next plate]

> "in October 1991 all of the people who remained in the village were taken to Krečane near Baćin, where they were killed along with a number of others who were brought from Cerovljani and Hrvatska Dubica"[196]. [Screen off]

All of the people who remained, that is not substantial, it is total, it is complete. The Trial Chamber found that 28 civilians from the village were killed by one or more of the JNA, TO or *Milicija Krajine*[197]. Substantial? I leave it to you to discuss whether or not you think that is substantial or not.

36. [Screen on] The execution of Croat civilians went hand in hand with the physical annihilation of Croat villages. The ICTY has found that countless Croat towns and villages were destroyed — you can find all of the details in the pleadings. In the *Mrkšić* case the ICTY emphasized the ethnically-targeted nature of the destruction in Eastern Slavonia: [Next graphic]

> "Many towns around Vukovar were destroyed . . . As one witness described, the difference between Serb and Croat villages was obvious. In the former, the houses were generally untouched whereas in the latter, everything was torched and devastated."[198] [Screen off]

37. Town after town Serb forces sought out, identified and then executed Croat civilians who hid from the carnage just because they were Croats. I could go on and on with these examples, I will not do so, the material is in your pleadings.

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[194]MC, Vol. 2 (II), Ann. 259.

[195]MC, Vol. 1, paras. 5.112-5.114; RC, Vol. 1, para. 6.37.

[196]*Martić*, Trial Chamber Judgement, para. 189.

[197]*Martić*, Trial Chamber Judgement, paras. 364-365.

[198]*Mrkšić*, Trial Chamber Judgement, para. 55.

38. ***There was*** targeting ***too*** of Croat monuments and sacred sites, you heard from Ms Špero about that, in numerous villages. Across the occupied region more than 200 churches and chapels were completely destroyed, and hundreds more were seriously and permanently damaged. At least 100 Catholic cemeteries were damaged or destroyed[199]. Mr. President, why would you destroy a place of religious worship? Why would you destroy many places of religious worship, if you did not intend to destroy the group? They do not pose a threat in military or other terms.

39. None of these churches were legitimate military targets, no church ever is. [Plate on] Scores of other churches and sacred sites were bombed, mined and seriously damaged across the rest of Croatia. The scale of the destruction is very clear as you can see from this and other images taken from the pleadings.

40. The JNA's destruction and desecration of the church of St. Mary Magdalene in Tompojevci is typical of the treatment of churches across the occupied regions, as one person said: [Next graphic]

> "The church was shelled. Its interior was completely devastated. Holy pictures lay around as well as everything else. The army made a public toilet out of the church."[200] [Screen off]

41. After the destruction of the Croat population, the names of "cleansed" villages were replaced with new Serb names, erasing the nomenclature of the wholly destroyed ethnic groups[201]. Even the Croat dead did not escape Serbia's endeavour to destroy all physical manifestations of Croat identity. Numerous witnesses describe how dead Croats were mutilated and dismembered. *A parish priest* from Zadar described how Serb fighters dug up and then desecrated Croat graves in an effort to eradicate all traces of the Croat group: [Screen on]

> "When it [comes] to ethnic cleansing, they behaved towards us as if we were lice or bugs. Even the traces of dead Croats had to be removed. So they exhumed the skeletons and the skull . . . Lots of family vaults were demolished and tombstones were carted away. They ground down the tombstones and then used the material to erect monuments to their fighters in the villages."[202] [Screen off]

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[199] *Ibid.*

[200] *Ibid*, p. 174.

[201] See for example the plan to rename Bapska "Aranoco", described by Tomsilav Rukavina in his testimony to the ICTY in *Prosecutor* v. *Hadžić*, 6 Dec. 2012, T. 2132.

[202] MC, Vol. 2 (II), Ann. 398.

42. A quarter of a century on, the legacy of that campaign persists and is indelibly imprinted across these parts of Croatia. If you were to travel there today, you would still see the consequences almost a quarter of a century later.

V. Serbia's responsibility under the Genocide Convention

(a) *Genocidal activities of the JNA*

43. I turn to Serbia's responsibility under the Genocide Convention, starting with the responsibility of the JNA. The JNA was the primary protagonist in this genocidal campaign***:*** ***o***f shelling and aerial bombardment that had no legitimate military purpose whatsoever. It was purely about the destruction of groups. The pleadings reveal ***a*** cumulative substantial body of evidence, which shows a substantial disruption of parts of ethnic Croat groups in villages and towns across these occupied parts. The JNA was at the heart of these operations.

(b) *Genocidal crimes by Serb forces operating under the JNA's command*

44. What about Serb forces operating under the JNA's command? In addition to the activities of the JNA, the evidence which we have put forward shows beyond any reasonable doubt that the Respondent's leadership in Belgrade had direct control over Serb forces fighting alongside the JNA. The Former President of the RSK, Milan Babić, testified to the ICTY said that President Milošević was the "Commander in Chief" with ultimate control of the JNA and other entities. Babić described two lines of command: [Screen on]

> "One ***line*** went through the Presidency of Yugoslavia, the JNA, and the Territorial Defence units . . . The other . . . went through the State Security Service[s] of Serbia . . . For the most part, [he said] they engaged in joint operations. *I know from August 1991 onwards, it was the JNA that played a command role in these operations.*"[203] (Emphasis added.)

45. [Screen off] The relationship of control and support was noted by the Trial Chamber in the *Martić* case, which found that from August 1991 until early 1992 Croat villages "were attacked by forces of the TO and the police forces of the SAO Krajina and . . . the JNA acting in

[203] Testimony of Milan Babić, 20 Nov. 2002, T. 13129-13130.

cooperation". The Tribunal also observed that, "these attacks followed a generally similar pattern, which involved the killing and the removal of the Croat population . . ."[204].

46. The SFRY Federal Secretary for the Defence, Veljko Kadijević, stated that one of the "principal ideas" behind the deployment of the JNA in Croatia was to facilitate "full co-ordination with Serb insurgents in the Serbian Krajina"[205]. Pursuant to that objective, in Banovina and Kordun JNA General Špiro Niković issued an official order *expressly subordinating* all TO forces in the region to JNA command.

47. One of the first attacks in Dalmatia provides a specific example of the JNA's command over local Serb forces. On 26 August 1991, the JNA attacked the Croat village of Kijevo in conjunction with the Milicija Krajine and the local TO. The ICTY found as fact that the decision to attack was "taken by Milan Martić in co-ordination with the JNA"[206]. The Tribunal also found that, [screen on] there was co-ordination between the JNA and the MUP". And, expressly held that, "the JNA was in command of the participating forces", which included the local TO and the SAO Krajina Police[207]. This finding directly contradicts the Respondent's assertion that Serb forces in the RSK only ever "fought in cooperation, and not under the command of the JNA"[208]. That is plain wrong, as a matter of finding of fact. [Screen off]

48. The JNA's command over paramilitaries is also reflected in the testimony of the President of the Serbian Democratic Party in Kordun, who told the ICTY that Captain Vasiljković, the leader of the extreme Serb paramilitary force "Captain Dragan's Group" — on which you will hear more, also known as the Knindže or the "Knin Ninjas" — "participated in co-ordination with a tank unit" in the attack on Glina.

(c) ***The Respondent's support and co-operation***

49. I will say something briefly on the Respondent's support and co-operation. The ICTY has found as fact that the Krajina leadership "cooperated with the JNA in organizing operations on

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[204]*Martić*, Trial Chamber Judgement, para. 443.

[205]*Martić*, Trial Chamber Judgement, para. 330.

[206]*Martić*, Trial Chamber Judgement, para. 166.

[207]*Martić*, Trial Chamber Judgement, para 167; *Stanišić and Simatović*, Trial Chamber Judgement, para. 361.

[208]RS, Vol. 1, para. 503.

the ground"[209]. During the armed campaign hostilities, "the SAO Krajina leadership requested and obtained military assistance from Serbia". That assistance even included the establishment of a military training camp for the Milicija Krajine. The co-operation between the JNA and the armed forces of the SAO Krajina "was extensive"[210], the ICTY ruled.

50. Such extensive military assistance occurred within a broader framework of extensive support and political co-ordination with Serbia and the Serbian governmental authorities. The ICTY found: [screen on]

> "The SAO Krajina, and later the RSK, government which included Milan Babić and Milan Martić, sought and received significant financial, logistical and military support from Serbia, including from the MUP and SDB of Serbia [that is a finding of fact] . . . [they also found as fact] *that the police of the SAO Krajina were mainly financed with funds and material from the MUP and the SDB of Serbia*."[211] (Emphasis added.) [Screen off]

(d) ***Serbia's failure to prevent genocide***

51. Let me move briefly to Serbia's failure to prevent genocide. The JNA's command and support of TO forces and Serb paramilitaries went hand in hand with a persistent and wilful failure to prevent countless acts of genocide. The evidence consistently establishes that Serb paramilitaries operated with the full knowledge, direction and active control, save in a very few limited and isolated exceptions.

52. The attacks and killings in the village of Vukovići are a typical example. On 8 October 1991 the JNA attacked the village and burned down a great number of houses[212]. A month later, on 7 November 1991, eight unarmed Croat civilians were shot dead in the village. In *Martić* the ICTY found as fact that the victims were murdered because of their Croat ethnicity[213], with the intent to destroy them as such. They were destroyed by a "mixture of JNA soldiers,

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[209]*Martić*, Trial Chamber Judgement, para. 344.

[210]*Martić*, Trial Chamber Judgement, para. 446.

[211]*Martić*, Trial Chamber Judgement, para.446.

[212]*Stanišić and Simatović,* Trial Chamber Judgement, para. 225.

[213]*Martić*, Trial Chamber Judgement para. 373.

including members of a JNA special unit from Niš, as well as local armed men present in Vukovići"[214]. The ICTY findings are absolutely devastating to the Respondent's case.

53. In support of its defence, Serbia does point to isolated instances where individual JNA officers intervened to save Croat civilians from imminent execution or torture. And Croatia pays tribute to each and every one of these instances of honourable, decent behaviour. Unfortunately, the examples were rare. More to the point, these examples underscore the extent of the JNA's knowledge concerning the intentions of the paramilitaries, and [their] behaviour, and the ability to halt the killings and executions.

54. The evidence of the JNA consciously permitting genocidal killings to take place is irrefutable. In Lipovača, Serb paramilitaries murdered 12 Croat civilians in October and December 1991. The ICTY's findings in *Martić* prove the JNA was fully aware of the paramilitaries' intention to torture and kill Croat civilians, yet they did nothing to intervene. In your folders and on your screen, you can see the conclusions of the judgement and the failure to prevent: [Screen on]

The PRESIDENT: Professor Sands, we have reached 1 o'clock, but I will give you five more minutes as the Court has taken a bit longer break, having discussed certain issues. So, you have five more minutes.

Mr. SANDS: I am very grateful Mr. President.

The PRESIDENT: So, you have five more minutes.

Mr. SANDS: I am very grateful, Mr. President, and I promise to finish well within those five minutes.

55. The JNA foresaw the departure of the paramilitaries and knew what would happen next. The acts of the paramilitaries that followed were plainly attributable to the Serbian leadership who had participated in what was found to be a joint criminal enterprise.

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[214] *Martić*, Trial Chamber Judgement para. 371. The ICTY reached the same finding in *Stanišić and Simatović*, Trial Chamber Judgement, para. 85.

56. I have already mentioned this morning how, in some cases, the knowledge of genocidal activity was observed and recorded. Once again, I draw your attention to the JNA intelligence report of 13 October 1991, which you can see on your screens now. The JNA knew about the uncontrolled genocide that was being committed. That is, 13 October 1991, in relation to the kinds of acts that I have just been describing to you. With this document, the characterization of the acts, knowledge of them, there is irrefutable evidence of responsibility for a failure to prevent genocide in and around Vukovar. [Screen off]

57. Another example is the evidence of the former Serbian Chief of Security in the Federal Secretariat for National Defence. He testified before the Belgrade War Crimes Court in 1999 and at Slobodan Milošević's prosecution at the ICTY. On 28 October 1991, he was informed that paramilitaries had forced Croat civilians to walk through a minefield in Lovas and that 70 civilians had been executed in the village. At a meeting at the Serbian Ministry of Defence that day, 28 October 1991, he told senior officials what paramilitaries were doing to civilians: [Screen on] "I added that *what they were doing in the villages of Lovas and Tovarnik was worse than what Germans did during World War II*" (emphasis added).

58. The officials present at that meeting on 28 October 1991, included a JNA General, the Serbian Minister of Defence, the Commander of the Serbian TO, the Deputy Minister of the National Defence of Serbia, the Minister of Defence and a General from the Serbian Ministry of Defence. Despite explicitly drawing these issues to the Respondent's senior military and political leadership, the Chief of Security explained that his information and warning, "were turned a blind eye on"[215]. He was mocked as "a Swabian from Kragujevac" — a German from Serbia.

59. Faced with this evidence, it is difficult to see how the Respondent can dispute that by October 1991 its senior leadership did not know that Serb paramilitaries fighting alongside the JNA were committing acts of genocide. [Screen off]

VI. Conclusion

60. Let me close with six brief points.

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[215]RC, Vol. 2, Ann. 26.

61. *One*, widespread and systematic attacks on groups of Croat villages were not driven by military or political necessity, or by mere hostility. The intention was to destroy these groups in part.

62. *Second*, Croat civilians were systematically singled out.

63. *Third*, that process resulted in the destruction of Croat groups in many towns and villages across the area I have described.

64. *Fourth*, the programme of systematic destruction was orchestrated by the Respondent's military and political organs, aided by Serb paramilitary groups.

65. *Fifth*, the scale and barbarity of the killings, torture and desecration, together with the use of explicit and toxic ethnic abuse, negates any possibility that the Respondent's campaign was intended merely to displace the Croat population. The evidence before you points unambiguously to one conclusion: a specific intention to destroy parts of the Croat population, parts of groups.

66. *Sixth*, whatever adjective or qualifier this Court decides to take, it is impossible not to characterize the facts revealed by the evidence as involving parts of those group that were either "reasonably significant" or "considerable" or "substantial".

Thank you for giving me five minutes more, Mr. President. That concludes our presentation for this morning.

The PRESIDENT: Thank you, Professor Sands. Before adjourning this sitting, I am going to give the floor to two Members of the Court who have some questions to ask. To that end, I shall now give the floor to Judge Sir Christopher Greenwood. You have the floor, Sir.

Judge GREENWOOD: Thank you, Mr. President. I have two questions for Croatia. The first is just a request for clarification.

> "1. Yesterday, counsel for Croatia told the Court that 'from mid-May 1991 to 7 July 1991, the Serb Presidency did not hold any meetings' (CR 2014/5, p. 46, para. 11 (Crawford)). Was the intention to refer to the Presidency of the SFRY?
>
> 2. What official position, if any, did Vojislav Šešelj hold at the times that he is alleged to have made the statements which were quoted yesterday?"

The PRESIDENT: Thank you, Judge Greenwood. The other Member of the Court with a question is Judge Bhandari. I give him the floor. Judge Bhandari, please.

Judge BHANDARI: Thank you, Mr. President.

"I would like to hear the Parties' submissions regarding what probative value the Court should give the following types of evidence:

(i) Statements of individuals that were annexed to the pleadings where the deponent was not called as a witness at these proceedings;

(ii) Statements of individuals who were named as a witness to these proceedings but not cross-examined by the opposing Party and therefore never appeared before the Court;

(iii) Statements of individuals who were both named as a witness to these proceedings and cross-examined by the opposing Party before this Court."

Thank you.

The PRESIDENT: Thank you, Judge Bhandari. The text of these questions will be sent to the Parties as soon as possible. The Parties are invited to reply orally to the questions during the first round of oral argument and, of course, they will be free subsequently to provide their comments on the reply of the other Party.

The Court will meet again this afternoon from 3 p.m. to hear Croatia's witness and witness-expert. Thank you, the Court is adjourned.

The Court rose at 1.10 p.m.

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