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THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Thursday 6 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 jeudi 6 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
		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
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: Please be seated. Good morning, the sitting is now open. This morning, the Court will hear the continuation of Croatia's first round of oral argument. Judge Yusuf, for reasons explained to me, is not able to sit this morning. Before calling on the first Counsellor to present the case, I will give the floor to Ms Blinne Ní Ghrálaigh, whom I understand has an answer to one of the questions. You have the floor Madam.

Ms NÍ GHRÁLAIGH: Mr. President, I am grateful for the opportunity to respond briefly to Judge Greenwood's question regarding the population of Eastern Slavonia in 1991. We can confirm that the figure relating to the population of the whole of Eastern Slavonia in 1991, contained in Croatia's pleadings, was 598,434 people, of whom 70.24 per cent were Croat, and 17.15 per cent were Serb[1]. We can further state that the population for the part of Eastern Slavonia which was to become part of the SAO SBWS was 184,921 people in 1991. This figure is not contained within Croatia's pleadings**.** ***T***he source for this is an academic article, the source for which we will set out in a footnote[2].

Mr. President, Members of the Court, while I am on my feet, I would like to take the opportunity to correct an inadvertent error that crept into yesterday's presentation. I mentioned that 510 mass graves had been discovered in Eastern Slavonia, containing almost 2,300 bodies. What I intended to say was that a total of 510 mass and individual graves had been discovered in Eastern Slavonia containing almost 2,300 bodies. We have now checked the most up-to-date figures on the website of the Directorate for Missing and Detained Persons**,** ***a***nd it is 71 mass graves, and 432 individual graves in Eastern Slavonia, giving a total of 503[3]. Thank you.

The PRESIDENT: Thank you very much. Now I call on Professor Davorin Lapaš. You have the floor, Professor.

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[1] ***MC, Annexes, Vol. 2, Part. 1, p. 3.***

[2] ***Nenad Pokos: "Demografske promjene na bivšim okupiranim područjima Republike Hrvatske izmedu 1991. i 2001. godine"; Demografski Kontekst I Sociokulturne Posljedice Hrvatskoga Domovinskog Rata Urednici: Dražen Živić, Ivana Žebec; Biblioteka Zbornici, knj. 35. - Str. - 284. Institut društvenih znanosti Ivo Pilar, Područni centar Vukovar, Zagreb - Vukovar, 2009.***

[3] ***https://www.branitelji.hr/pregled/masovne-i-pojedinacne-grobnice-identifikacija-zrtava.***

Mr. LAPAŠ:

KILLINGS WITH INTENT TO DESTROY

Introduction

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

2. You have heard from my colleagues yesterday a number of geographically specific presentations, focusing on the genocide committed by Serbia against Croats living in particular regions, towns and villages of Croatia. The presentations focused on particular groups of ethnic Croats, targeted for destruction by Serbia, in individual regions, towns and villages. Those presentations demonstrated how the genocide played out in a number of specific locations — in Eastern Slavonia, in Vukovar, in Saborsko and in Škabrnja. The Applicant's final two presentations on the facts — mine and that of Croatia's Agent, Professor Crnić-Grotić — take a different approach. They will take a step back, to deal more broadly with the *extent* of the genocidal crimes committed against the Croat population across *all those regions of Croatia* targeted by Serbia.

3. My presentation will focus on the killings of members of the Croat ethnic group of Croatia, with intent to destroy a part of that group, as prohibited by Article 2 *(a)* of the Genocide Convention. I will first provide the Court with an overview of the extent of the killings, focusing on some representative examples. I will then deal with the issue of graves and mass graves discovered in the regions of Croatia in which the killings were committed, which bear terrible witness to Serbia's genocidal intent. Thirdly, I will describe to the Court the ongoing situation regarding the hundreds of missing ethnic Croats, about whom Croatia to this day has no information.

4. Following my presentation, Professor Crnić-Grotić will then focus on examples of genocidal acts under Articles 2 *(b)* to *(d)* of the Convention.

5. The extent and pattern of these atrocities, and the JNA's role in both their commission and facilitation, are proof of Serbia's intent to destroy the Croat population of the regions slated for inclusion in a "Greater Serbia". The extent of the atrocities and the extended timeframe within

which they were committed also make clear that Serbia cannot *but* have been aware of their occurrence. And yet it failed to do anything to prevent them.

I. Killing members of the Croat ethnic group

6. Mr. President, Members of the Court, as my first point, I am going to take the Court through a chronology of Serbia's campaign in Croatia, beginning in August 1991. I deal particularly with the deliberate killings committed by the JNA and other Serb forces during Phases 2 and 3 of the three-pronged attack, described to you in earlier speeches. I will highlight the key dates on which different mass and individual killings occurred, in order to emphasize the chronology and the extent of the killings committed. I will also focus in on a number of specific examples of killings committed by Serbia, which are particularly illustrative[4].

7. This account — necessarily — does not and cannot mention every single killing committed. Too many atrocities were committed for me to be able to give an exhaustive account in the time available. There are also many incidents in which all victims were massacred, so that no eyewitness survived. And there are too many incidents about which the Respondent still refuses to divulge information, especially those that took place in prison camps within Serbia.

August 1991

8. I begin the account of the genocidal killings committed in Croatia starting from August 1991. [Plate on] You have heard from my colleagues yesterday about the historical events leading up to those killings. You will also have heard about the ethnic hatred whipped up by Serbia and the identification and vilification of the Croat population — men, women and children — as "Ustashas". You will recall the arming of local Serbs by Serbia and its role in the creation, arming and establishment of different paramilitary groups across Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika and Dalmatia. You will recall the significant increase in the numbers of JNA troops in July 1991, and the volunteers arriving from Serbia, to add to the numbers of rebel Serbs in Croatia. [Plate off]

[4]Where no footnote is indicated, the reference is to the chronology at Memorial of Croatia (MC), Vol. 5, App. 1, pp. 1-35.

9. Throughout August 1991, Croat villages in Eastern Slavonia and Banovina were attacked and destroyed by JNA soldiers and Croatian Serbs. Dalj and Erdut were attacked, and many Croat civilians massacred. On 26 August, the village of Kijevo, near Knin, was destroyed, following almost three months of siege, led by convicted war criminal Milan Martić. Ten civilians were killed[5].

September 1991

10. On 2 September, the JNA, together with Serb paramilitaries, occupied the Eastern Slavonian village of Berak. All Croat civilians remaining in the village were rounded up and detained. Forty-four men, women and children were taken away. Some of their bodies were found in mass graves in Berak and Šarviz.

11. On 3 and 4 September, Serb paramilitaries attacked the villages of Četekovac and Balinci in Western Slavonia. At least 20 Croat civilians, including many elderly people, were killed. The autopsy report from the Osijek General Hospital records as follows: [Plate on]

> "the killing of 20 villagers was a deliberate massacre of civilians. The victims were found in their doorways and yards, shot in the back or the side, half of them were elderly people (more than 59 years of age) and five of them were women — it is not likely that they were using firearms at the time of death."[6] [Plate off]

12. Between 6 and 14 September, approximately 176 Croat civilians were abducted and killed in a joint JNA and Serb paramilitary attack on Pakrac. Forty-nine of their bodies have been located and exhumed. Most of them had been shot at close range. They included a 10-year-old child and a number of women, including one victim, who had been raped and tortured before being murdered: her ears were cut off, and her skull shattered[7].

13. Less than a week later, on 22 September, Tovarnik was attacked. Forty-eight (48) Croat civilians were massacred. Ten of them were executed by a JNA firing squad[8]. Five other civilians were lined up and slaughtered with knives[9].

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[5]MC, Vol. 1, para. 5.214 and associated annexes; RC, Vol. 1, paras. 6.81-82.

[6]MC, Vol. 1, para. 5.46, referencing eds. S. Botica, A. Covic, M. Judas, G. Pifat-Mrzljak, V. Sakic, *Mass Killing and Genocide in Croatia 1991/2: A Book of Evidence*, Zagreb, 1992, p. 117.

[7]MC, Vol. 1, paras. 5.15-5.21, and associated annexes.

[8]MC, Vol. 2 (I), Ann. 79.

[9]MC, Vol. 2 (I), Ann. 75.

October

14. October was to prove to be a particularly bloody month. Over 80 civilians were massacred throughout the course of the month in the municipality of Hrvatska Kostajnica[10].

15. On 2 October, Serb paramilitary forces attacked the village of Novo Selo Glinsko. All but one of the 33 Croat civilians who had not fled the village were killed. The village was set ablaze. The bodies of 22 victims have never been found[11].

16. The same day, Serb paramilitaries and JNA reservists entered the village of Donji Čaglić, forced ten civilians from the basement of a house, and executed them by firing squad, before destroying their houses. Their bodies were buried in a trench, dug by a JNA vehicle[12].

17. On 4 and 5 October, 22 Croats were killed in a massacre in and around the police station in Dalj. The ICTY determined that the attack was carried out by Arkan and other Serb paramilitaries[13].

18. On 6 October, Serb paramilitaries massacred three Croat inhabitants of the farm town Orlovnjak, near Tenja, shooting them in the back of the head[14]. The 12th Proletarian Mechanised Brigade of the JNA provided them with cover.

19. As the examples of massacres and individual killings I have cited make clear, JNA soldiers were directly and actively involved in the killings of Croat civilians: they were involved in providing cover for the Serb paramilitaries; and they were also responsible for perpetrating the killings themselves. Further, as the facts demonstrate, and as the ICTY has determined, all military operations were conducted under the effective command of the JNA, the army of the emergent Serbian State[15]. Serbia's knowledge of and responsibility for those killings is therefore inescapable.

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[10]RC, Vol. 1, para. 6.32.

[11]MC, Vol. 1, paras. 5.81-5.83, and Vol. 2 (I), Anns. 252-255, 321; Specification of the Banished, Killed and Missing Persons from the Area of Municipality of Glina, Reference No. 511-10-02/02-9545/93 Ks from 24 June 1993; RC, Vol. 1, para. 6.22.

[12]MC, Vol. 1, paras. 5.48-5.49, Vol. 2 (II), Anns. 213 ***and*** 215; Reply, Vol. 1, para. 6.8.

[13]IT-03-69, *Prosecutor* v. *Stanišić and Simatović,* Trial Chamber Judgement, Part 1, 30 May 2013 (*"Stanisić"*), *para.* 432.

[14]MC, Vol. 1, paras. 4.28-4.29, Vol. 2 (I), Ann. 163, Letter from the Ministry of Defence to the Republic of Croatia.

[15]IT-95-13/1-T, Trial Chamber Judgement, 27 Sept. 2007 ("*Mrkšić*"), para. 89.

20. If this were not already abundantly clear, from mid-October 1991, we have direct written evidence that the Serbian military leadership had been fully briefed that *genocide* was being committed by paramilitaries under its command. [Plate on] This is clear from the JNA military intelligence report, dated 13 October 1991, which you were first shown on Wednesday. [Next graphic] This document accurately records that in "the greater area of Vukovar, volunteer troops under the command of Arkan . . . are committing uncontrolled genocide and various acts of terrorism"[16].

21. The knowledge of the Serbian Assistant Minister of Defence is equally inescapable: the report notes that he had been personally informed[17].

22. Notwithstanding that report, "uncontrolled genocide" continued unabated and unchecked throughout the occupied areas of Croatia. [Plate off]

23. On 14 October, four men in Kostajnički Majur were shot dead, having been forced to dig their own graves. More were to be executed or disappeared over the following month[18].

24. The "minefield massacre" at Lovas, that you heard about yesterday, took place four days later, on 18 October. Again, the evidence makes clear that the most senior officials in the Serbian Ministry of Defence, including the Minister of Defence and the Minister of the Interior, as well as the JNA and Serbian Territorial Defence (TO) leadership, were made aware of the massacre ten days later[19].

25. On 20 October 1991, 41 civilians were detained by the Serb paramilitary unit "Milicija Krajine" at the fire station in Hrvatska Dubica. The following day they were taken to a nearby meadow in Krečane and executed by firing squad[20].

26. That same day, or the following, at least nine Croat civilians from Cerovljani were rounded up and killed[21]. On or around the same time, 29 civilians were killed also in Baćin[22]. In

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[16]RC, Vol. 1, para. 9.86, and Vol. 4, Ann. 63, memo of 13 Oct. 1991 from Colonel Milinko Dokovic.

[17]*Ibid.*

[18]MC, Vol. 1, para. 5.120, and Vol. 2 (II), Anns. 288 and 336: *Report of the Killed and Missing Persons in the Area of Hrvatska Kostajnica Municipality — Kostajnički Majur*.

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

[20]*Prosecutor* v. *Martić*, IT-95-11, Trial Chamber Judgement, 12 June 2007, ("*Martić"*), paras. 354-358 (referred to in the Reply, Vol. 1, para. 6.36). See also *Stanišić and Simatović,* para. 56.

[21]*Martić*, para. 359 (referred to in the Reply, Vol.1, para. 6.35). See also *Stanišić and Simatović*, para. 64.

relation to both incidents, the perpetrators were either Milicija Krajine, or units of the JNA or TO, or a combination of all three[23].

27. Twenty-nine (29) Croats were killed in Široka Kula over the course of October. Many of them were shot dead by the SAO Krajina forces on 13 October, after having been rounded up in the village. Their bodies were thrown into burning houses. A woman who managed to flee, and whose husband was killed, testified that one Serb ordered: "Kill them all, don't leave any of them alive!"[24]

November

28. The genocide continued apace throughout November. On 7 November 1991, eight unarmed Croat civilians were executed by JNA soldiers and Serb paramilitaries in Vukovići[25]. Over the course of the following fortnight, Croat civilians detained in the detention centre in Erdut were executed, including five civilians taken from the village of Klisa[26]. Their bodies were subsequently discovered in a mass grave in the village of Ćelije. Serb forces continued their rampage through the villages of Voćin and Hum[27].

29. On 19 November 1991 Serb forces entered Kostrići and massacred each and every one of the 15 Croats remaining in the village. The youngest was 3 years old. The oldest was 93 years old[28].

30. You have already heard yesterday of the hundreds of Croats massacred in Bogdanovci, Saborsko, Škabrnja and Vukovar, after their occupation.

December

31. The killings continued through December 1991. Eleven people sheltering in a house in Gornje Jame, set on fire on 11 December, have not been seen since[29].

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[22]*Martić*, para. 364-367 (cited in the Reply. Vol. 1, para. 6.37). See also *Stanišić and Simatović*, para. 64.

[23]*Martić*, paras. 364–365.

[24]MC, Vol. 1, paras. 5.165-5.171 and associated annexes.

[25]*Martić*, para. 371

[26]*Stanišić,* para. 455.

[27]MC, paras. 5.28-5.41.

[28]MC, Vol. 1, para. 5.116; Vol. 2 (II), Ann. 285; cf., also Ann. 335, *Report of the Killed and Missing Persons in the Municipality of Hrvatska Kostajnica-Kostrići*.

32. In mid-December 1991, a British Broadcasting Corporation camera crew were in the vicinity of Voćin, in Western Slavonia. This is what they recorded. [Show video] [Plate off]

33. Over 40 Croat civilians had been killed in Voćin, the majority of them elderly. They had been brutally tortured before being killed. Two autopsy reports by the Department of Forensic Medicine at the University of Zagreb record the savagery of the attack on the Croat inhabitants. The first, [plate on] of this 77-year-old man — now on your screens — records that he had been beaten with a chain and had been both shot and stabbed in both legs[30]. The second, of this 57-year-old woman [next graphic], records that she had been hacked to death, and her skull crushed[31]. [Plate off]

34. The following day, on 16 December, Serb paramilitaries returned to Joševica, where they had previously burned alive and shot civilians. On this occasion, they moved from house to house, shooting. Twenty-one (21) Croats were murdered, aged between 14 and 91[32].

35. A week later, on 21 December, nine civilians were murdered in Bruška by the Serb paramilitary group Milicija Krajine[33].

36. Mr. President, Members of the Court, these were attacks targeted repeatedly and relentlessly against the Croat population of the villages and towns of the regions targeted by Serbia, with the intent to destroy them.

37. The targets were those Croats who had not fled and were still in their towns and villages when the JNA and other Serb-controlled forces attacked. As you have heard, in many places, the only people left in the villages were the elderly and the infirm. It is for that reason that elderly people were so often the targets of Serbian atrocities: sometimes they were the only remaining members of the Croat population left to destroy. I will provide the Court with just a few examples. They include the elderly men and women of Voćin, whom you saw earlier on your screens, who were shot in the face and felled with axes, for no other reason than they were Croats and still in

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[29]MC, para. 5.91.

[30]Eds. S. Botica, A. Covic, M. Judas, G. Pifat-Mrzljak, V. Sakic, *Mass Killing and Genocide in Croatia 1991/2: A Book of Evidence*, Zagreb, 1992, p. 119.

[31]*Ibid.*, p. 220.

[32]MC, Vol. 1, paras. 5.84-5.88; Vol. 2 (II): Anns. 256-26***1***; RC, Vol. 1, para. 6.23; Vol. 2, Ann. 24.

[33]*Martić*, paras. 400-403.

Voćin. They also include a 71-year-old woman in Berak who was stripped naked in front of soldiers, before being dismembered and dumped in a well[34]. An 81-year-old woman in the same village was beaten to within an inch of her life, before being executed[35]. An elderly woman in Ilok was shot in the head, burnt and thrown in the canal[36]. Six (6) elderly villagers in Jasenice, were shot dead at point blank range[37]. Seven (7) elderly people, aged 80 to 85, were killed in Gornji Vaganac[38]. And two [plate on] elderly women in Četekovac, were shot in the back, as they tried — unsuccessfully — to hide at the bottom of their stairs from the Serb forces[39]. The list goes on and on.

38. Over the six months of its campaign, the JNA and other Serb forces, targeted for destruction ethnic Croats living in the areas to be included in a future "Greater Serbia", often after extreme acts of torture and ethnic abuse. Many were hacked to death. Others were hanged. Others were shot in the head. Many were beaten to death. Many more were killed in the numerous detention camps set up within the occupied parts of Croatia, in Serbia and other parts of the former Yugoslavia under Serbian control, or taken from camps to be killed. Professor Crnić-Grotić, will describe these camps to the Court in greater detail this morning [plate off].

II. Mass and individual graves

39. On the withdrawal of Serbia from the occupied areas of Croatia in 1995, mass and individual graves containing the remains of Croat victims of the genocide began to be uncovered. These graves have been painstakingly excavated and recorded by the Applicant's Directorate for Detained and Missing Persons. A detailed list of the excavations is appended to the statement of Croatia's expert-witness, Colonel Ivan Grujić, who testified to the Court yesterday.

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[34]MC, Vol. 1, para. 4.42; Vol. 2 (I), Anns. 30 and 33.

[35]MC, Vol. 2 (I), Ann. 28.

[36]MC, Vol. 1, para. 4.66; Vol. 2 (I), Ann. 55.

[37]MC, Vol. 1, para. 5.217; Vol. 2 (III), Ann. 555: Minutes on the investigation, County Court in Zadar, 22 Jan. 1997. For an account of the murder see MC, Vol. 4, Ann. 152; RC, Vol. 1, paras. 6.87-6.88.

[38]Eds. S. Botica, A. Covic, M. Judas, G. Pifat-Mrzljak, V. Sakic, *Mass Killing and Genocide in Croatia 1991/2: A Book of Evidence*, Zagreb, 1992. See also MC, Vol. 2 (III), Ann. 381.

[39]Eds. S. Botica, A. Covic, M. Judas, G. Pifat-Mrzljak, V. Sakic, *Mass Killing and Genocide in Croatia 1991/2: A Book of Evidence*, Zagreb, 1992.

40. He records that by July 2013, 142 mass graves [plate on] had been discovered in Croatia, containing the bodies of 3,656 victims. Three thousand, one hundred and twenty-one (3,121) of those have been identified. Twenty-seven (27) per cent of these 3,121 bodies were women, and 38.5 per cent of them were older than 60. Thirty-seven (37) minors were also identified. The black triangles on the map on your screens represent each mass grave discovered. The table appended to Colonel Grujić's statement sets out how many bodies were discovered in each.

41. The Respondent suggests that the term "mass grave" and the grisly findings themselves are of "little worth" to a determination of whether genocide occurred. For the Respondent they are "nothing more than evidence of irregular burials". The Respondent argues that these are not "genuinely mass graves", disputing Croatia's use of the term. It suggests that "relatively small clusters of deceased persons" would be a more appropriate description for the pits into which it piled the bodies of the Croats it had killed, many of them dug by the terrified victims themselves[40]. "Relatively small clusters of deceased persons" is how the Respondent would prefer that Croatia refer to the mass graves discovered at the Vukovar New Cemetery, containing the corpses of 938 victims [next graphic]; or the 200-person grave, discovered at Ovčara [next graphic]; or the grave at Lovas, containing 68 corpses, many of which still displayed the white ribbon, marking them as Croats out for death [next graphic]; or the 56-person grave uncovered in Baćin; or the 27 bodies discovered in a pit in Škabrnja; or the 25 bodies discovered in a grave in Golubnjača; or the 24-person grave found near Dalj; or the 22-person grave found in Vojarna and Tordinici [next graphic]. The list goes on and on. These are not "clusters of deceased persons". They are the *mass graves* of the members of the Croat population, targeted for Serbia's genocidal destruction.

42. There is no universally accepted definition of a "mass grave" in international law. The Applicant adopts the definition of mass grave used by the United Nations Special Rapporteur of the Commission on Human Rights, appointed "to investigate first-hand the human rights situation in the territory of the former Yugoslavia"[41]. It defines a mass grave as a grave containing three or more bodies. While the Respondent queries this definition, it fails to state how many more Croats

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[40]RS, para. 349.

[41]Commission on Human Rights resolution 1992/S-1/1 of 14 August 1992, *Situation of Human Rights in the Territory of the Former Yugoslavia*, E/CN.4/1993/50, 10 Feb. 1993; Ann. I, para. 5.

it considers Serbian forces would have had to slaughter and bury for the mass graves to be "genuine" in its view.

43. [Next graphic] The map now on your screens represents each grave of one or two persons, killed in the genocide. The smaller dots identify between one and ten exhumed bodies in a given locale. The largest represent over 101 individual bodies in a given locality. By December 2013, over 1,100 such graves have been identified across the formerly occupied territory of Croatia.

44. Croatia's efforts to uncover the graves of the genocide victims has been hampered by Serbia's practice of removing and reburying victims during its occupation of the region — often in Serbia, in a vain attempt to cover up its atrocities. To date, 103 bodies have been repatriated from Serbia. [Plate off]

III. Missing persons

45. Whilst many of the victims of the genocide have now been accounted for, and their remains located, hundreds of Croats still remain missing. Twenty-three years later, Croatian families continue to mourn more than 850 missing people. The victims are still denied a proper burial and a dignified final resting place; and their families are still denied the opportunity to lay them to rest[42].

46. Mr. President, Members of the Court, thank you for your attention. Mr. President, I would ask you now to call on Professor Crnić-Grotić.

The PRESIDENT: Thank you very much, Professor Lapaš and I give the floor now to Professor Crnić-Grotić. You have the floor, Madam.

Ms CRNIĆ-GROTIĆ:

[42]Witness-expert statement of Ivan Grujić.

RAPES, TORTURE, IMPRISONMENT AND DEPORTATIONS WITH INTENT TO DESTROY

I. Introduction

1. Mr. President, Members of the Court, following on from the presentation by Professor Lapaš, in this presentation I will show the Court how forces under the command and control of the Respondent used extreme sexual violence, torture, mass imprisonments and deportations in its systematic effort to destroy the Croat ethnic group in the attacked regions of Croatia. As with the previous presentation, the evidence I shall present to the Court demonstrates, irrefutably, that the *actus reus* of genocide, as defined by Articles 2 *(b)-(d)* of the Convention, was committed on countless occasions against innumerable Croat victims during the Respondent's genocidal campaign in Croatia.

II. Rape and preventing births

2. Croat women and girls were frequently the victims of ethnically targeted violence, including rape and gang rape, by members of the JNA, TO, Serbian police and paramilitaries. Let us be reminded that in 2008 the United Nations Security Council adopted Resolution 1820, which noted that [Plate on]: "rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide" (emphasis added)[43].

3. Raped women often feel ashamed and they do not even report such attacks. That was the case also in Croatia — the number of reported incidents hides much bigger figures of unreported cases. Those attacks have left an enduring legacy of fear, trauma and shame undiminished by the passage of time. [Plate off]

4. Multiple and gang rapes of Croat women were commonplace. In Siverić several women were gang-raped by Serb soldiers, some of whom had previously threatened they would "kill the seed of Croatia"[44]. In Lovas, a young woman was raped repeatedly over the course of a number of days by a TO soldier, having been threatened that she and her parents would "disappear overnight" if she did not acquiesce[45]. In Vukovar a woman was repeatedly raped by six JNA soldiers who

[43]Women and peace and security, UN SC S/RES/1820 (2008).

[44]Memorial of Croatia (MC), Vol. 2 (III), Anns. 438-441.

[45]MC, Vol. 2 (I), Ann. 108.

said, “Come on Ustasha girl, now you will see how Serbs are doing it.” The rapists inserted a beer bottle into the woman’s rectum, before repeatedly raping her again. The young woman’s six-year-old sister was also seriously sexually assaulted, after having been forced to watch her sister’s rape[46].

5. Sexual attacks often took place in victims’ homes, with their relatives being forced to watch, adding an additional dimension of violation and degradation to the women’s ordeals. In Sotin, a young mother was raped at gunpoint in her home by two JNA soldiers, while her mother-in-law and two-year-old child were in the house. The following day, one of the rapists, a JNA captain, returned to rape the young woman and attempted to rape her mother-in-law in Negoslavci, where they had been forcibly transferred by Serbian forces[47]. In Doljani a woman was raped at gunpoint in her own kitchen by three paramilitaries[48]. In Bapska a Serb fighter raped a woman in her home before proceeding to beat and rape her 81-year-old mother, tearing the elderly woman’s navel with his hands during the attack[49]. In Čakovci a Croat woman had her hands tied with wire before being stripped and raped in her home by a Serb paramilitary half her age[50]. In Dalj a young victim was gang-raped in front of her parents and siblings. As a consequence she became pregnant and subsequently gave birth to a child. Two of the rapists were eventually convicted by the Croatian court in 2013[51].

6. Rapes were frequently accompanied by gratuitous physical violence, mutilation and ethnic abuse. In Gornji Popovac Croat women were violently raped on several occasions by Serb paramilitaries[52], while in Tovarnik a soldier raped two 15-year-old girls before shooting them dead along with their grandmother in plain sight of other soldiers[53].

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[46]MC, Vol. 2 (I), Ann. 117. Two former Serb paramilitaries were convicted in 2007 by the Croatian Supreme Court for sexually assaulting a six-year-old girl and the repeated gang rape of her sister, which the young child was made to watch.

[47]MC, Vol. 2 (I), Ann. 94.

[48]MC, Vol. 2 (II), Ann. 226.

[49]MC, Vol. 2 (I), Ann. 72.

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

[51]County Court in Osijek, verdict of 4 September 2013, http://www.jutarnji.hr/konacno-presuda-za-ratni-zlocin-u-dalju-osudeni-za-silovanje-hrvatice-pred-njenom-obitelji/1124083/.

[52]MC, Vol. 2 (III), Ann. 356.

[53]MC, Vol. 2 (I), Ann. 79.

7. In different villages and towns across Eastern Slavonia, women were forced to act as "comfort women" to members of the Serb forces[54]. This systematic and ethnically targeted sexual enslavement was perpetrated against scores of Croat women across the region, especially in Lovas where women were rounded up nightly and brought to TO headquarters, where they would be raped[55]. In Vukovar, handcuffed women were taken, nightly, from their place of detention to a nearby café, where they would be raped by multiple men in uniform and in civilian attire, having been given perfume and lipstick to make themselves "look pretty"[56].

8. There were also incidents of serious sexual violence against men. In Tovarnik, for example, three Croat men were castrated with a knife, one after the other, before being shot in the head. The castration was witnessed by a JNA captain who failed to intervene in any way[57]. Sexual violence in Serb detention facilities was also commonplace, as I shall address shortly.

9. Mr. President, the Applicant's pleadings are full of accounts by numerous witnesses who were either direct victims or observers of many cases of violent sexual assaults and rapes, including gang rapes, against Croat civilians in towns, villages and hamlets that fell under occupation of the JNA and the Serb paramilitary forces, such as [plate on] Berše[58], Brđani[59], Doljani[60], Joševica[61], Korenica[62], Kostajnički Majur[63], Kovačevac[64], Ljubotić[65] and Lisičić[66], Novo Selo Glinsko[67],

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[54]MC, p. 189.

[55]MC, Vol. 2 (I) Ann. 108.

[56]MC, Vol. 2 (I), Ann. 116.

[57]MC, Vol. 2 (I), Ann. 81.

[58]MC, Vol. 2 (III), Ann. 457.

[59]MC, Vol. 2 (II), Ann. 220.

[60]MC, Vol. 2 (II), Anns. 226 and 224.

[61]MC, Vol. 2 (II), Ann. 263.

[62]MC, Vol. 2 (III), Ann. 372.

[63]MC, Vol. 2 (II), Ann. 336: Report of the Killed and Missing Persons in the Area of Hrvatska Kostajnica Municipality — Kostajnički Majur.

[64]MC, Vol. 2 (I), Ann. 368.

[65]MC, Vol. 2 (III), Ann. 459.

[66]MC, Vol. 2 (III), Ann. 500.

[67]MC, Vol. 2 (II), Ann. 255.

Parčić[68], Puljane[69], Šarengrad[70], Sekulinci[71], Smilčić[72], Sotin[73], Tenja[74], and Vukovar[75] and many others. [Plate off]

III. Torture

10. Across occupied parts of Croatia, Croat civilians were systematically subjected to brutal and often sadistic violence. Humiliation, mutilation and degradation came in many savage and cruelly inventive forms. Croatia's Memorial and Reply provide a detailed — although far from exhaustive — account of such acts of torture committed by the Respondent's forces throughout the territories earmarked for "Greater Serbia".

11. Beatings — including with bats, wire, boots, chains, sticks and other objects — were commonplace, inflicted on women and men, the elderly and the young alike. In almost every single witness testimony we hear the same story — "they were beating us everywhere with everything". Earlier this week you heard and saw a witness who was one of the victims of these brutal beatings. In his statement he talked about the so-called "gauntlet" — two rows of people standing in line "escorting" people going from the buses to places of detention with blows and hits, trying to inflict as much pain as possible to captured Croatians. Many times these beatings resulted in deaths because they were so brutal. Croats were often made to attack each other to amuse their captors and humiliate their victims. In Lovas, for example, two men were handcuffed to steel posts and forced to hit, spit at and beat each other after being tortured[76]. In Ilok, Croats were taken to the police station where they were savagely beaten and forced to attack each other with sticks[77].

12. Attacks were typically designed to ensure the maximum possible infliction of pain and fear. In Bapska a Croat man was held in a basement along with 15 other people. He was

[68]MC, Vol. 2 (III), Ann. 450.

[69]MC, Vol. 2 (III), Ann. 454.

[70]MC, Vol. 2 (I), Ann. 51.

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

[72]MC, Vol. 2 (III), Anns. 493 and 494.

[73]MC, Vol. 2 (I), Ann. 31.

[74]MC, Vol. 2 (I), Ann. 11.

[75]MC, Vol. 2 (1), Anns. 127 and 151; Sunčica (Marija Slisković, ed. (2012)), pp. 100-103.

[76]MC, Vol. 2 (I), Ann. 96.

[77]*Ibid.*, Anns. 68 and 69.

handcuffed, brutally beaten and left hanging by his hands. In a typical example of sadistic savagery, Serb guards then used pliers to pull out his teeth before forcing a cup full of salt into his mouth[78]. Another detainee in the basement in Lovas also had his teeth knocked out and salt forced into his bloodied mouth during a severe beating[79].

13. In Đulovac detainees were beaten with wires, batons, sticks and hoses. Members of the Milicija Krajine put bombs — which they dubbed "kinder eggs" — into the mouths of Croat civilians. Croats were terrorized with mock executions[80].

14. Real executions were often preceded by sadistic torture, beatings and mutilation. In Kusonje, a group of Croat soldiers who surrendered were captured, bound with wire and shot in the head. But, before they were murdered they were tortured and some were castrated with wire tied around their testicles, while others were forced at gunpoint to sing Serbian songs[81]. An eyewitness described how one man was beaten so violently that his eye fell out. A Serb military then cut off the man's detached eye, nose and ear before hacking at his shoulders and back with a knife[82].

15. Autopsy reports and eyewitness accounts of Croats forced to bury their fellow dead routinely record signs of torture prior to death[83].

16. The intolerable effect of the Respondent's treatment of the Croat population is clear. In Cicvare, a Croat man was bound to a post with wire, wrapped in a Croatian flag, and battered with a cane. Eight days later he was found hanged in his home, having committed suicide shortly after the attack[84]. In Bapska, a Croat man hanged himself after being severely beaten and abused by members of the JNA[85]. In Vukovar, a Croat man committed suicide shortly after witnessing the deaths of four women who were killed when a JNA soldier threw a bomb into a basement where they were hiding[86]. And in Kusonje, a Croat man who had been beaten, stabbed and mutilated in

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

[79] *Ibid.*, Ann. 96.

[80] MC, Vol. 2 (II), Ann. 219.

[81] MC, Vol. 2 (II), Ann. 183, para. 5.27.

[82] *Ibid.*, Ann. 184.

[83] Croatian Medical Journal, War Suppl. 1 1992.

[84] MC, Vol. 2 (II), Anns. 433 and 543.

[85] *Ibid.*, Anns. 69 and 70.

[86] Reply of Croatia (RC), Ann. 23.

the street, begged to be killed rather than endure further torture[87]. Death was preferable to the torture meted out by the JNA and other Serb forces.

IV. Prison camps

17. During the course of the Respondent's campaign in Croatia, the JNA and forces under its command detained over 7,700 Croatian citizens in scores of prison facilities and makeshift prison camps in occupied areas of Croatia, in Serbia and in other parts of the former Yugoslavia[88]. [Plate on] The map on your screens shows the Serb-run detention facilities located throughout these areas. [Plate off]

18. Detention facilities varied in size and arrangement. However, incarceration was always a prelude to severe beatings, sexual abuse, degradation and execution. [Plate on] As the ICTY noted in *Martić*, "[a]ppalling acts of inhumane treatment, including torture, were committed in detention facilities" against Croat detainees[89]. [Plate off]

19. In Lovas, men and women were tortured and beaten with crowbars, knives and electrodes in a makeshift jail created in the basement of a private house. When one of the prisoners succumbed to beatings and died, they left his body inside for three days[90]. Elsewhere in Eastern Slavonia 104 Croat citizens, mostly women and elderly people, were detained in a basement of a house in Berak, guarded by members of the TO and the Šešelj´s White Eagles paramilitary group. Almost 30 of the younger men were transferred to Begejci detention camp on 6 October 1991, where they were subjected to forced labour and torture, being forced to dig their own graves. Many prisoners simply disappeared overnight not to be seen alive ever again[91].

20. Survivors of the camps have borne witness to the savagery that they endured during their imprisonment. One woman survived the horrors of the basement camp, only to be found hanged shortly after her release[92]. The 30 prisoners detained in the Tovarnik prison were made to

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[87]MC, Vol. 2 (II), Ann. 184.

[88]Statistical information provided by the Office for Detained and Missing Persons of the Croatian Government (see Appendix 6 to the Memorial, para. 1).

[89]*Prosecutor* v. *Milan Martić*, (IT-95-11-T), Trial Chamber Judgement, 12 June 2007, para. 491.

[90]MC, Vol. 2 (I), Ann. 81.

[91]*Ibid.*, Ann. 34.

[92]*Ibid.*, Ann. 33.

undertake forced labour and were subjected to daily, sustained beatings[93]. A disabled man had to watch, handcuffed, as his elderly parents were beaten repeatedly, before being executed. He was then forced to remain with their corpses all night[94].

21. Detainees were often mutilated, electrocuted and beaten unconscious. Electric power drills were used to drill holes into the feet and knees of detainees[95]. A Croat man detained at camps in Bijela and Miokovićevo describes the severe mistreatment meted out by his captors. This included the extraction of his teeth, beatings with electrical wire, and the laceration of his body and hands[96]. Prisoners were not given any food for several days and were forced to stand with their hands tied to their necks[97].

22. In Velepromet, in Vukovar, Serb fighters amputated prisoners' hands; one detainee had a cross carved into his back before he was murdered; others were mutilated and decapitated[98]. To compound the abasement, guards poured urine and excrement over the captives[99]. In the prison at Drniš Croat detainees were also electrocuted, forced to lick soldiers' boots, had their teeth knocked out, and were tortured with sticks, cables and wires[100]. In Korenica prison camp, Croat civilians were electrocuted, beaten with cables and hoses, sodomized with batons, forced to rape one another and had Serbian icons carved into their bodies[101]. Croat detainees in Sekulinci were tied to a tree and beaten all over their bodies[102].

23. Detainees were often subjected to appalling sexual abuse. Rapes often took place in Serb-run police stations, detention camps and other improvised detention facilities[103]. The rape of female detainees was endemic at the Velepromet prison camp, for example. One woman was

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[93] *Ibid.*, Ann. 52.

[94] *Ibid.*, Ann. 52.

[95] *Ibid.*, Ann. 96.

[96] MC, Vol. 2 (I), Ann. 220.

[97] *Ibid.*

[98] Sunčica (Marija Slisković, ed., 2012), p. 72.

[99] MC, Vol. 2 (I), Ann. 150.

[100] MC, Vol. 2 (II), Anns. 383 and 458.

[101] MC, Vol. 2 (II), Anns. 372, 383 and 384.

[102] MC, Vol. 2 (I), Ann. 186.

[103] RC, Ann. 98; MC, Vol. 2 (I), Ann. 116.

gang-raped by four soldiers the day after she arrived at the camp[104]. Another was gang-raped by a group of 15 men who subsequently boasted that they "took turns" on her[105]. Yet another woman was removed from the camp and taken to a nearby house, where she was gang-raped by many Serb armed men[106]. Another woman was told she would have to undergo an examination to see if she was pregnant, in order to prevent her from giving birth to an "Ustasha". A paramilitary and a soldier in a JNA uniform then raped her[107].

24. Women were not excluded from brutal physical violence in camps and en route to them. Twenty-six (26) Croat women from Vukovar were taken to Begejci prison camp in Serbia. Many of them were beaten and raped during the journey to the camp[108]. In Sremska Mitrovica prison camp, in Serbia again, Serb prison guards allowed convicts to gang-rape a female detainee, repeatedly[109]. The woman became pregnant as a result of one of these rapes; she was then raped throughout her pregnancy until she eventually suffered a miscarriage[110]. In Berak detention facilities, women had their heads forcibly held to cages containing starved rats, which would bite chunks from their faces[111].

25. In the Begejci detention camp, male prisoners were forced into homosexual intercourse[112]. In Bapska and Lovas male detainees were deliberately beaten on their genitals by their Serb captors[113]. In Tenja, a Croat man had his testicles tied and beaten during a police interrogation[114]. In Knin, male Croat prisoners were sexually abused through forced mutual oral sex, forced oral sex with prison guards, and forced mutual masturbation, as established by the ICTY[115].

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[104]MC, Vol. 2 (I), Ann. 151.

[105]*Ibid.*

[106]Sunčica (Marija Slisković, ed., 2012), pp. 69-75.

[107]*Ibid.*, pp. 91-94.

[108]MC, Vol. 2 (I), Ann. 31.

[109]*Ibid.*, Ann. 144.

[110]Sunčica (Marija Slisković, ed., 2012), pp. 108-110.

[111]MC, Vol. 2 (I), Anns. 30 and 34.

[112]Mass Killing and genocide in Croatia, pp. 107-108; (MC, para. 4.101).

[113]MC, Vol. 2 (1), Anns. 74 (Bapska) and 96 (Lovas).

[114]*Ibid.*, Ann. 14.

[115]*Martić*, Trial Chamber Judgement, para. 288, footnote 899.

26. Croat detainees were invariably subjected to virulent ethnic abuse. In Beli Manastir Croat prisoners were denounced as "Ustasha" by their Serb captors. One detainee described how Serbs waving machine guns approached the guards and demanded, "let the Ustasha go so we can kill them"[116]. In Begejci guards offered local Serbs the chance to beat Croat prisoners, describing the captives as "the worst Ustashe"[117]. In Knin the ICTY found that Croat detainees imprisoned at the JNA barracks were "severely beaten", "displayed as Ustashas" and forced to "take an oath to King Petar and the Serbian fatherland"[118]. The ICTY noted that violence and maltreatment in the prison was accompanied by trenchant ethnic abuse[119].

27. Several hundred Croats were imprisoned and tortured in Serb detention facilities in Knin. The ICTY made various findings about these facilities in *Martić*. Detainees at the old hospital were severely mistreated and abused in a variety of ways. These included being forced to drink urine, having their heads forced into toilets, sleep deprivation, sexual abuse and being "beaten every day for long periods, often by several guards at a time using rifle butts, truncheons, and wooden staves"[120], as one of the witness statements records. Detainees were also verbally abused by guards, who said that "the Croatian nation has to be destroyed" and "all Croats have to be killed"[121]. The ICTY found that the detainees were subjected to mistreatment and torture[122].

28. One victim describes, in graphic terms, how prisoners were repeatedly tortured with electricity by their Serb guards, and you can see his testimony on the screen. [Plate on]

> "On one night in July, they started to take us out 'for electricity' . . . 5-6 Chetniks were in the corridor, they were laughing and enjoying the watching. One Chetnik would take a cable, he would connect one end with electricity, and we had to put the other end into our large intestine. Before that we had taken our clothes off, and we had to stand on a wet blanket. We received electricity shock, bodies were shaking, the cable would fall out, and the Chetnik would yell: 'Again!'. It would last for how long he wanted. Sometimes they would take you out only once, and sometimes a few times. We were screaming like animals, and shaking, and we were all in shock after that . . . Once they connected a knife and a rifle with electricity, and

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[116]MC, Vol. 2 (I), Ann. 26.

[117]MC, Vol. 2 (I), Ann. 31.

[118]*Prosecutor* v. *Jovica Stanišić and Franko Simatović*, (IT-03-69-T), Trial Chamber Judgement, 30 May 2013, para. 390; see also *Martić*, Trial Chamber, paras. 282-283.

[119]*Martić*, Trial Chamber, para. 288.

[120]*Ibid.*

[121]*Ibid.*, para. 416.

[122]*Ibid.*, para. 414.

> ordered us to take it in our hands. Then they released electricity and we shook, and shook, and they were laughing and saying: 'More, more!' . . . They would take out two or even three men and tie their genitals with a wire, and they would pull it saying: 'Look how it's getting up'."[123]

[Plate off]

29. A similar detention facility operated at the Knin barracks of the JNA 9th Corps[124]. The ICTY found that scores of detainees were deprived of medical treatment and sufficient food, held without sanitary facilities and "severely beaten for at least 20 days"[125]. Mr. President, Serbia cannot escape these clear findings of fact, which establish, unequivocally, that Croat detainees were subjected to widespread and systematic mistreatment at numerous Serb-run detention facilities *because* they were Croats.

V. Deportations and conditions of life calculated to bring about the physical destruction of the group

30. Now I will address deportations and conditions of life calculated to bring about the physical destruction of the group. Across the occupied regions, the Respondent deliberately sought to impose conditions of life to bring about the destruction of the Croat ethnic group in these areas. In addition to physical violence and imprisonment, Serbian-controlled forces systematically sought to strip Croats of basic human dignity through forced labour, arbitrary restrictions on movement, expropriation and destruction of property and other forms of harassment, discrimination and intimidation. They were substantially successful in that endeavour. By way of illustration, in *Stanišić and Simatović*, the ICTY found that as a result of the Respondent's actions between 80,000 and 100,000 civilians had fled the SAO Krajina within one year from April 1991[126]. Expert evidence suggested that 98 per cent of the people who fled particular regions of the SAO Krajina were Croats[127].

31. The Trial Chamber explained that those people fled [plate on]

> "as a result of the situation prevailing in this region . . . which was created by a combination of: the attacks on villages and towns with substantial or completely

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[123] MC, Vol. 2 (I), Ann. 248.

[124] *Martić*, Trial Chamber, para. 409.

[125] *Stanišić and Simatović*, Trial Chamber, para. 384.

[126] *Ibid.*, para. 403

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

> Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment (including coercive measures) of Croat persons and the looting and destruction of property"[128].

Lest there be any doubt about the authorities responsible for creating that intolerable state of affairs, the Trial Chamber explained that [next graphic]:

> "These actions were committed by the local Serb authorities and the members and units of the JNA (including JNA reservists), the SAO Krajina TO, the SAO Krajina Police (including Milan Martić), and Serb paramilitary units, as well as local Serbs . . ."[129] [Plate off]

32. The ICTY went on to explain that the Respondent's actions "caused duress and fear of violence" which left civilians with no choice but to leave the SAO Krajina[130] and the SAO Eastern Slavonia[131]. The ICTY found that in addition to the widespread mistreatment and numerous persecutory murders, many tens of thousands of Croat civilians were forcibly deported from towns and villages in these regions including Saborsko, Škabrnja, Knin[132], Erdut[133], Dalj[134] and Vukovar[135].

VI. Conclusion

33. The impact of the killings, violence, severe mistreatment, detention and abuse outlined in these last two presentations are undeniable. The vast numbers of dead and missing Croats; the cold-blooded execution of terrified civilians; the graphic accounts of unspeakable sexual violence, torture, beatings and mutilation; the thousands of bodies discarded like detritus in mass graves; the enduring trauma evident in the testimony of the witnesses before the Court, all speak for themselves.

34. Mr. President, Members of the Court, Croatia has presented the Court with extensive and irrefutable evidence proving that killings, beatings, rape, torture and imprisonment of Croats were endemic throughout the Respondent's campaign. The purpose of this exercise was not, as the

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[128] *Ibid.*, para. 404.

[129] *Stanišić and Simatović*, Trial Chamber, para. 404.

[130] *Ibid.*, para. 998.

[131] *Ibid.*, para. 1050.

[132] *Ibid.*, paras. 1004-1009.

[133] *Ibid.*, paras. 1019-1024.

[134] *Ibid.*, paras. 1033-1038.

[135] *Ibid.*, paras. 1041-1046.

Respondent has sometimes suggested, to drown the Court in irrelevant detail. Nor is it an attempt to bombard the Court with evidence of the most grisly crimes, in a misguided belief that sadistic and gratuitous violence against innocent Croat civilians is *per se* genocide. Instead, it is simply to establish that acts falling within Articles 2 *(a)* to *(d)* of the Convention were systematically committed during the Respondent's campaign in Croatia, and to cast further light upon the intention of the perpetrators.

35. Those destructive acts were indiscriminate, save in one critical respect: they were consistently and deliberately directed against innocent members of the Croat population. They served no military purpose. Their barbarity and calculated sadism, frequently laced with toxic anti-Croat abuse, were at odds with a desire merely to "cleanse" Croatian territory of its non-Serb population. The commission of these acts can only be explained by a belief, fostered by virulent hate speech, that Croats were subhuman, undeserving of even the most basic human rights to life, dignity and peaceful co-existence. Viewed together, and in isolation, these actions were consistent with one — and only one — intention: to destroy the Croat ethnic group in the targeted regions of Croatia.

36. Mr. President, Members of the Court, I thank you for your attention. This presentation concludes Croatia's factual presentations. I will now make way for Professor James Crawford, who will address the issue of attribution, probably after the break. Thank you.

The PRESIDENT: Thank you very much, Professor. I think Professor Crawford can still start and we will make a pause during his presentation. So, I give you the floor, Professor Crawford.

Mr. CRAWFORD:

ATTRIBUTION

I. Introduction

1. Thank you, Mr. President. Mr. President, Members of the Court, it is Croatia's submission that acts by the JNA and by Serb forces under its direction or control are attributable to

Serbia for the whole period when the JNA was a *de facto* Serbian State organ[136]. I am going to explain how this legal conclusion follows straightforwardly from the facts in evidence before you. Those facts include the process that transformed the JNA from a federal organ of the SFRY, whose constitutional role was to protect the six constituent republics and two autonomous provinces as a whole, into an instrument of Serbian State policy, ignoring the Constitution. You have also heard that in October 1991 the JNA attacked a building in Zagreb while the Head of State and head of government of the SFRY, along with the President of Croatia, were meeting inside. This makes a nonsense of Serbia's assertion that the JNA remained a State organ of the SFRY for which it had no responsibility. By then, the SFRY had long since ceased to function as a State. You have now heard detailed submissions on the facts of the campaign against the Croat population. Let me recapitulate some of the points that Croatia says those facts demonstrate.

2. First, they demonstrate that senior Serbian officials were told that genocide was occurring and yet failed to prevent it. Here attribution poses no difficulty. But bear in mind that, regardless of other issues, Serbia's failure to prevent and its failure to punish acts of genocide amount in themselves to breaches of the Genocide Convention[137]. The same applies in so far as Serbia subsequently acknowledged and adopted conduct in breach of the Convention, as discussed in the pleadings[138].

3. Secondly, the facts demonstrate that the JNA was directly involved in acts of genocide. They also demonstrate that the JNA ordered, facilitated, aided, abetted and otherwise supported the commission of genocide by other Serb forces, of which they had actual knowledge. This includes acts by the forces of the self-proclaimed Serb entities in Croatia and by paramilitaries. In so far as this conduct by the JNA itself amounts to acts of genocide or to *complicity* in acts of genocide, all that Croatia is required to establish is that the conduct by the JNA is attributable to Serbia. I will deal with that in this presentation. I will also submit that the conduct attributable to Serbia includes conduct by the JNA before 27 April 1992, when the FRY — now Serbia — was formally proclaimed.

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[136]MC, paras. 8.32–8.55; RC, paras. 9.58–9.81.

[137]MC, paras. 8.56–8.70; RC, paras. 9.82–9.94.

[138]Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II (2), Art. 11. See further MC, paras. 8.53–8.55.

4. Thirdly, the relevance of conduct by other Serb forces goes beyond demonstrating complicity by the JNA. Conduct by other Serb forces breached the Convention *directly*. So the last point I will make in this presentation is that conduct by other Serb forces over which Serbia, through the JNA, exercised direction or control, including the forces of the self-proclaimed Serb entities and the paramilitaries, is attributable to Serbia.

II. The JNA was a *de facto* State organ of Serbia

5. Mr. President, Members of the Court, I begin with the attribution to Serbia of conduct by the JNA[139]. Serbia's international responsibility for the JNA's conduct arises in part from the principle of international law, recognized in Article 4 (1) of the Articles on State Responsibility, that "[t]he conduct of any State organ shall be considered an act of that State"[140].

6. Article 4 (2) goes on to state that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State"[141]. After 27 April 1992, the JNA was renamed the Army of Yugoslavia (VJ) and became a *de iure* organ of Serbia under its internal law[142]. Before that, it was notionally an organ of the SFRY. But Article 4 (2) is not exhaustive: the word "includes" was carefully and deliberately selected by the ILC, as explained by Mr. Simma in his then capacity as Chairman of the Drafting Committee[143] of the ILC in 1998, and as confirmed in the commentary[144]. To similar effect, in your *Bosnia* Judgment, you held that it is permissible to go behind the characterization of organs in internal law if they act "under such strict control by the State that they must be treated as its organs for the purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act"[145]. You

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[139]MC, paras. 8.47–8.48; RC, paras. 9.67–9.70.

[140]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 4 (1):

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

[141]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art 4 (2).

[142]FRY Constitution, Sec. VIII, especially Art. 135.

[143]*YILC*, 1998, Vol. I, p. 289, para. 77.

[144]*YILC*, 2001, Vol. II (2), p. 42, para. 11.

[145]*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. 204, para. 391.

endorsed the test from *Nicaragua* of when to attribute responsibility to a State by acts by entities that are not its organs under its internal law[146]. The test, as you put it in *Bosnia*, is that

> "persons, groups of persons or entities may, for the purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument"[147].

The Court must look beyond legal formalities and — I quote again from *Bosnia* — "grasp the reality of the relationship between the person taking action and the State to which he is so closely attached as to appear to be nothing more than its agent"[148]. In the last resort, international law looks to the facts. That is what gives it its real life.

7. You warned in *Bosnia* that the purpose of the principle, which you described as a "well-established rule"[149], is to prevent States from evading their international responsibility by acting through "persons or entities whose supposed independence would be purely fictitious"[150]. That is precisely Serbia's approach here.

8. The JNA was a *de facto* State organ of the emergent Serbian State, in accordance with the test you articulated in *Bosnia*, during a substantial period before 27 April 1992. It was completely dependent on the emergent Serbian State. It was Serbia's instrument and agent. It was under Serbia's strict control. Your factual findings in *Bosnia* concerned the "Republika Srpska", of course located in Bosnia-Herzegovina, and are not directly relevant to the question you now have to decide. But Croatia has referred you to relevant judgments and factual findings of the ICTY that do concern that question directly. We have presented further supporting evidence amounting to compelling proof of these propositions. I will not repeat that evidence. But you will recall, for example, the conclusion of the *Balkan Battlegrounds* report that by midsummer 1991, Milošević and Jović were the JNA's *de facto* political overseers in rump Yugoslavia[151]. Or take the finding by the ICTY that the JNA operated under the direction and control of Milošević and other members

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[146] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64.

[147] *Bosnia*, p. 205, para. 392.

[148] *Bosnia*, p. 205, para. 392.

[149] *Bosnia*, p. 202, para. 385.

[150] *Bosnia*, p. 205, para. 392.

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

of the Serbian leadership. It found them to be a party to a joint criminal enterprise, one whose "common purpose . . . was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population"[152].

9. I will add one point to these facts. On Tuesday, Judge Greenwood asked about my comment that the Presidency held no meetings during a period of constitutional crisis. Thank you for the opportunity to correct that. What I should have said was that the federal Presidency of the SFRY held no meetings between 15 May and 12 July 1991, except for one extraordinary occasion. What happened was this. In accordance with the rotation prescribed by the SFRY Constitution, the Croatian representative, Stjepan Mesić, should have become President on 15 May. But Serbia — along with Montenegro and the two autonomous provinces — no longer autonomous — blocked his election. Mesić was not elected until an extraordinary midnight meeting of the Presidency held on the evening of 30 June and the morning of 1 July, and attended by representatives of the European Community[153]. The first meeting of the SFRY with Mesić presiding was not held until 12 July.

10. On what basis was the JNA acting at this time? In a diary entry for 5 April 1991, while he was still notionally President of the SFRY, Jović recounts a remarkable meeting that he and Milošević had with Generals Kadijević and Adžić. ***~~[Screen on]~~*** He writes:

> "we have 'crossed the Rubicon'. We are no longer seeking any decisions from anyone, we are taking any necessary actions to protect the Serb nation, we will inform the Presidency of any events, and anyone who does not like it can go home. It is stupid to meet with a State leadership against whom they have declared war. The military will not attack anyone, but it will defend both itself and the Serb nation in Krajina."[154]

11. Mr. President, Members of the Court, they had indeed crossed the Rubicon. The die had been cast. ***~~[Screen off]~~*** The JNA would "defend" — "defend" is a word which requires some elaboration — the so-called "Serb nation in Krajina", where an unconstitutional entity had been proclaimed in furtherance of a "Greater Serbia". From at least this point it is fanciful to speak of the JNA as anything other than a Serbian army. By the time Mesić became SFRY President on

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[152] *Prosecutor* v. *Martić*, IT-95-11, Trial Chamber Judgement, 12 June 2007 *(Martić)*, para. 445.

[153] MC, paras. 2.105–2.106.

[154] B. Jović, *Poslednji dani SFRJ (Last Days of the SFRY)* (1996), 317; MC, Vol. 5, App. 4.3.

1 July, it was too late. General Kadijević himself writes in his memoir that when Mesić issued orders "the headquarters of the Superior Command simply ignored them and treated them as if they did not exist"[155]. Our pleadings describe the denouement of the SFRY Presidency[156]. By November, as Mesić himself put it, it was "senseless" to speak of the federal Presidency; it no longer functioned[157]. Revealingly, Kadijević's memoir is subtitled *An Army without a State*. He recalls: "[s]ince the further development of the events caused the state of Yugoslavia to disappear more and more, the military administration pleaded for the fast creation of a new Yugoslavia"[158], which he also refers to as "a new Yugoslav state"[159]. He — the commander of the JNA — saw the JNA as being responsible to this emergent State. ~~***[Screen on]***~~ His words:

> "the Serb and Montenegrin people considered the JNA as their army, in the same way that they considered the Yugoslav state their country. In accordance with this, the JNA's responsibility was to secure for th[is] new Yugoslavia and the entire Serb population its own army."[160]

Perfectly clear.

12. That sums it up accurately. The JNA was, and was considered to be, and was considered by others to be, a *de facto* organ of the emergent Serbian State. Conduct by the JNA during the whole period to which this claim relates amounts to conduct by that emergent Serbian State. ~~***[Screen off]***~~

13. You have heard evidence that some Serb and Serbian paramilitary groups were formally integrated into the JNA as so-called "volunteers" pursuant to an order of September 1991[161]. The legislative framework provided that they were "on an equal footing with military personnel or

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[155]V. Kadijević, *My View of the Collapse: An Army without a State* (Belgrade, 1993), 37; MC, Vol. 5, App. 4.1.

[156]MC, Chap. 2, especially paras. 2.105–2.112.

[157]MC, paras. 2.110–2.111, citing S. Mesić, "Kako je srušena Jugoslavija" ("How Yugoslavia was brought down"), *Mislav Press* (Zagreb, 1994), 312–314; MC, Vol. 5, App. 4.2.

[158]V. Kadijević, *My View of the Collapse: An Army without a State* (Belgrade, 1993), 90; MC, Vol. 5, App. 4.1.

[159]*Ibid.*, 131; MC, Vol. 5, App. 4.1.

[160]*Ibid.*, 163–164; MC, Vol. 5, App. 4.1.

[161]See MC, para. 8.48, and Croatia's presentation on Serbian control of the JNA and JNA control of Serb forces in Croatia, citing Expert Report of R. Theunens, 16 Dec. 2003, submitted by the Prosecution in *Prosecutor* v. *Milošević*, IT-02-54, Part I: Structure, command & control and discipline of the SFRY Armed Forces, 6 (para. 7); Part II: The SFRY Armed Forces and the conflict in Croatia, pp. 34–46.

military conscripts"[162]. To the extent that volunteer paramilitary groups operated as part of the JNA, their conduct is attributable to Serbia on the same basis as any other conduct by the JNA.

14. Serbia asserts in its Rejoinder that Croatia "has failed to offer even a hint of proof that any of the crimes committed by the JNA members had been committed on the instructions of the leadership of Serbia at that time"[163]. But under Article 4 (***1***), Croatia need not adduce evidence of instructions given to the JNA to commit specific crimes. If an entity can be equated with a State organ, the State is responsible for *all* conduct of that entity as though it were any other conduct of the State[164]. In other words, attribution does need not to be established separately for each act. Indeed, under Article 7, it does not matter if the organ, person or entity "exceeds its authority or contravenes instructions"[165]. And there is no evidence here — not even a hint — that the Serbian leadership gave instructions to the JNA or to forces under its control *not* to commit the relevant acts. Such evidence, if it existed, would be in Serbia's possession.

15. Two other points should be made. First, this is not the only basis for attribution. Article 8 of the Articles on State Responsibility provides that conduct is considered an act of a State "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"[166]. I will return to this in considering the attribution of conduct by paramilitaries, but it would also apply to the JNA if the JNA is for some reason considered not to be a State organ of Serbia. Secondly, conduct may be attributable to a State even if it occurs outside of the national jurisdiction. As you said in *Namibia*, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts

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

[163]Rejoinder of Serbia (RS), para. 4.70.

[164]*Bosnia*, para. 397.

[165]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 7:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

[166]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art 8:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

affecting other States"[167]. In other words, it is irrelevant that conduct by the JNA occurred on Croatian rather than on Serbian territory.

III. Serbia was *in statu nascendi* before 27 April 1992

16. Mr. President, Members of the Court, this leaves only one question: can Serbia evade responsibility for conduct by the JNA before 27 April 1992, on the ground that the FRY was only formally proclaimed on that date[168]? Recall that for convenience, I am referring to the FRY as Serbia, Serbia being the acknowledged continuator State[169]. The answer to this question is no. The proclamation merely formalized an existing, consolidated factual situation: no other State claimed Serbian territory or contested Serbian independence — as opposed to contesting its entitlement to represent the former SFRY. It does not preclude Serbia's responsibility for conduct before 27 April 1992. This follows from two propositions.

17. The first proposition is the widely accepted principle that a State can be responsible for conduct by persons acting on its behalf before the date of its formal proclamation. Specific dates are not decisive. States are not like companies, registered in a companies' office somewhere in New York. The justification for this is well-expressed by Ian Brownlie when he comments, "the distinction between *statu nascendi* and statehood cannot be very readily upheld" and thus "once statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition as a State, when some degree of effective government existed"[170]. That comes from the 5th edition of Brownlie, which was the edition in force at the relevant time (in "force" I think is perhaps the wrong word) but the latest edition is to the same effect[171].

18. The principle is recognized in Article 10 (2) of the Articles for State Responsibility ***~~[Screen on]~~***:

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[167] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118.

[168] MC, paras. 8.37– 8.45; RC, paras. 9.80–9.81.

[169] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, paras. 23–34.

[170] I. Brownlie, *Principles of Public International Law*, 5th ed. (Clarendon Press, 1988), pp. 77–78.

[171] See, e.g., 8th ed. (OUP, 2012), pp. 135–136.

> "(2) The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."[172]

19. At the preliminary objections stage, Serbia argued that Article 10 (2) covers only "the situations of secession or decolonization, in which an 'insurrectional or other movement' succeeds in establishing a new State", and that Serbia was not trying to secede[173]. As I pointed out then[174], whereas paragraph (1) of Article 10 does apply only to "an insurrectional movement", Article 10 (2) — with which we are concerned here — expressly applies to "a movement, insurrectional *or other*" (emphasis added). The ILC's commentary confirms that the word "other" broadens Article 10 (2) to "reflect . . . the existence of a greater variety of movements whose actions may result in the formation of a new State"[175].

20. Serbia falls back in its Rejoinder on a number of equally disingenuous arguments[176]. First, it argues that Article 10 (2) did not exist as a customary rule at the time of the relevant conduct, in 1991–1922[177], since "any pre-1992 practice confirming the existence of the alleged rule of customary law contained in [Article 10 (2)] is lacking"[178]. Serbia's counsel seem not to have read the ILC commentary. The ILC cites decisions of mixed claims commissions such the *French Company of Venezuelan Railroads* in 1902[179], the *Bolivar Railway Company* claim in 1903[180] and the *Pinson* case in 1928[181]. It also cites a proposal to codify the rule at the 1930 Hague

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[172]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10 (2).

[173]CR 2008/8, p. 55, para. 3 (Djerić).

[174]CR 2008/11, pp. 13–15, paras. 19–24 (Crawford). See also, RC, paras. 7.52–7.57.

[175]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10, para. 10.

[176]RS, para. 160.

[177]RS, paras. 161–166.

[178]RS, para. 162.

[179](1902) X RIAA 285, 354, cited in Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10, para. 12.

[180](1903) IX RIAA 445, 453, cited in Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10, para. 12.

[181](1928) V RIAA 327, 353, cited in Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10, para. 12.

Codification Conference[182]. The rule has been recognized in the literature since at least the early twentieth century[183]. Serbia's Rejoinder does not identify a single commentator who can provide support for the assertion that it is a new rule.

21. Secondly, Serbia says "there was no 'movement' aiming at the establishment of the FRY"[184]. But even leaving aside whether that is an overly specific formulation of the aim that the movement is required to have, Croatia has already met the point. The ICTY found in *Martić* that from at least August 1991, the Serbian leadership had a common political objective to unite Serb areas in Croatia and Bosnia-Herzegovina with Serbia in order to establish a unified Serb State[185]. That was a movement. The ICTY observed, for example ~~***[next slide]***~~:

> "Milošević . . . publicly supported the preservation of Yugoslavia as a federation of which, inter alia, the SAO Krajina would form a part. However, Slobodan Milošević covertly intended the creation of a Serb state. Milan Babić testified that Slobodan Milošević intended the creation of such a Serb state through the establishment of paramilitary forces and the provocation of incidents in order to allow for JNA intervention, initially with the aim to separate the warring parties but subsequently in order to secure territories envisaged to be part of a future Serb state."[186] ~~***[Screen off]***~~

22. In addition, I have already cited General Kadijević's belief, recorded in his memoir, that the JNA should be the army of "a new Yugoslav state"[187].

23. Thirdly, Serbia turns to the ILC's comment that Article 10 (2) does not "encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor state"[188]. But that formula was simply intended to exclude

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[182]League of Nations, Conference for the Codification of International Law, Vol. III, Bases of Discussion for the Conference drawn up by the Preparatory Committee, doc. C.75M.69.1929.V), 108, 116, 118, reproduced in *YILC* 1956, Vol. II, 223, 224, cited in Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001, Vol. II (2), Art. 10, para. 13.

[183]E.g. H. Silvanie, "Responsibility of States for Acts of Insurgent Governments" (1939) 33 *AJ* 78, 1; J. G. de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico, under the Convention of September 8, 1923* (Nijhoff, 1938), pp. 108–109; J. H. Ralston, *International Arbitral Law and Procedure* (Ginn & Co; 1910), pp. 232–233; T. C. Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States* (Stevens; 1951), pp. 326–327. See further, J. Crawford, *The Creation of States in International Law*, 2nd ed. (Clarendon Press; 2006), pp. 658–664.

[184]RS, paras. 167–173.

[185]*Martić*, paras. 329–336.

[186]*Martić*, para. 329.

[187]V. Kadijević, *My View of the Collapse: An Army without a State* (Belgrade, 1993), pp. 90, 131, 163–164; MC, Vol. 5, App. 4.1.

[188]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 10, para. 10.

instances of constitutional advocacy, within the predecessor State, for change[189]. The reference to "revolution" — a reference in a comment about what Article 10 (2) *excludes* — from that reference Serbia manufactures a requirement that the movement must constitute a "revolutionary force". It even puts the phrase "revolutionary force" in quotation marks, although without any citation. Similarly, it quotes a reference by the ILC to movements in a "continuing struggle with the constituted structure"[190]. But, again, this is totally out of context: the ILC here is distinguishing such movements generally from the circumstances covered by Article 10[191] — including the circumstances covered here by Article 10 (2).

24. Fourthly, Serbia adds that since the putatively Serb areas of Croatia and Bosnia-Herzegovina did not in the end become part of Serbia, the movement did not "succeed" in establishing a new State[192]. Again this is profoundly counter-factual. The Court must take account of realities, not fictions. The Court lives in the real world. Serbia was in truth a new State, arising out of a transformation of the organs of the SFRY, including the JNA, into organs of Serbia and instruments of Serbian policy. The fact that Serbia did not achieve the full extent of its territorial ambitions cannot relieve it of responsibility for what it actually did.

25. Fifthly, Serbia notes that Article 10 (2) is a rule of attribution that cannot extend the temporal scope of treaty obligations[193]. Croatia agrees that they are separate questions: I will deal separately with the issue of jurisdiction *ratione temporis* tomorrow. But the argument by Serbia is irrelevant to questions of attribution.

26. Serbia's final argument is that Article 10 (2) does not apply "in cases where the predecessor State can be held responsible", since it was designed to "close a 'responsibility gap'"[194]. The assertion that no such gap would exist strains credibility. The SFRY was no longer functioning as a distinct entity from the Serbian leadership, which had taken control of its State organs. As explained in the Reply, it is by no means clear that the SFRY *could* have been held

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[189]RC, para. 7.60.

[190]RS, para. 175.

[191]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 10, para. 2.

[192]RS, paras. 178–179.

[193]RS, paras. 180–184.

[194]RS, paras. 187–188.

responsible for the conduct of its constituent republics during the period of its dissolution[195]. ~~*[Screen on]*~~ But in any the case, the point is dealt with by Article 10 (3), which says:

> "(3) This Article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9."[196]

27. In others words, the possibility that the predecessor State might *also* be notionally responsible for the conduct on some basis does not mean that a State *in statu nascendi* can escape responsibility. It is possible for two States to be responsible for the same conduct on different grounds. The ILC commentary confirms this — I would say, self-evident — point[197]. ~~*[Screen off]*~~ Mr. President, this would be a convenient moment for a break.

The PRESIDENT: Thank you very much, Professor Crawford. So, the sitting is suspended for 15 minutes.

The Court adjourned from 11.35 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. I give the floor to Professor Crawford and I ask him to take his time so that the interpreters into French can properly translate, as they have a heavy workload during these hearings as all pleadings are, in principle, in English. You have the floor.

Mr. CRAWFORD: It is not a principle but an accident and I apologize.

28. I am dealing with the question of whether conduct can be attributed to Serbia, even if it occurred before the Serbian State was formally proclaimed. The second aspect of that proposition is a factual one. One action amongst the variety that may result in the formation of a new State within the meaning of Article 10 of the ILC Articles is a situation where an entity takes command of the institutions of a pre-existing State that is in the process of dissolution. That is what the Serbian leaders did — and they did it actually under the rubric of continuity. Part of the irony is that they now claim discontinuity, whereas at the time they claimed continuity. As you have heard, by mid-1991 the only organized and functioning authorities were those of the six constituent

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[195]RC, paras. 7.66–7.69.

[196]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 10 (3).

[197]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 10, para. 15.

republics. By then those republics, including Croatia, had assumed responsibility for their acts, those acts of their own organs and agents and other functionaries under their direction or control[198]. The *de iure* federal organs of the SFRY itself, including the JNA, became *de facto* organs of the emergent Serbian State. That State was under the domination and control of President Milošević and the other members of the Serbian leadership. The dissolution of the SFRY and the emergence of the republics as entities with their own international legal personalities — eventually recognized as new States — occurred simultaneously, but not, as I have said, at any precise moment of time. One cannot expect State dissolution to be so well organized. Rosenne notes that the underlying connection between the former movement and the newly established State are the men and women who remain the same and the strongly marked element of continuity in policy[199]. In the case of Serbia, the continuity of policy and practice was seamless. The continuity of personnel was also seamless: the same Serbian political and military leaders controlled the JNA before and after 27 April 1992[200].

29. Serbia was, in other words, *in statu nascendi* long before 27 April 1992. It follows that conduct by the JNA is attributable to Serbia for the whole period when the JNA was a *de facto* organ of the emergent Serbian State, both before and after that date.

IV. Conduct by other Serb forces in Croatia

30. Mr. President, Members of the Court: I turn to the attribution of conduct by Serb forces other than those formally integrated into the JNA[201]. ~~***[Screen on]***~~ The acts by these groups that we have characterized as acts of genocide fall under Article 8 of the Articles on State Responsibility. This provides:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the

[198]Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, 25 June 1991, MC, Vol. 4, Ann. 9; Declaration on the Establishment of the Sovereign and Independent Republic of Croatia, 25 June 1991, MC, Vol. 4, Ann. 8; Decision and Conclusions of the Croatian Parliament, 8 Oct. 1991, MC, Vol. 4, Ann. 10.

[199]S. Rosenne, *The Law and Practice of the International Court 1920–2005*, Vol. II (Jurisdiction), 4th ed. (Brill, 2006), 919.

[200]MC, Vol. 5, App. 8.

[201]MC, paras. 8.49–8.52; RC, paras. 9.71–9.79.

instructions of, or under the direction or control of, that State in carrying out the conduct."[202]

31. The words "instructions", "direction" and "control" in Article 8 are disjunctive. The commentary confirms that "it is sufficient to establish any one of them"[203]. You observed in *Bosnia* that this is "a completely separate issue" from whether an entity constitutes a *de facto* state organ[204]. The responsibility of a State is, you said, "incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations"[205]. Here the Court must consider separately the specific circumstances of each alleged act of genocide. ~~***[Screen off]***~~

32. Croatia has shown the existence of instructions, direction or control with respect to a variety of conduct. It has presented witness testimony, independent reports and other evidence that the JNA armed paramilitary groups and other Serb forces, gave them further logistical and direct military support, participated in joint planning with them, and jointly carried out operations side by side with these forces. Take — to repeat just a few examples from the factual evidence — the training of paramilitaries at JNA bases in Pančevo and Knin[206]; the JNA's co-operation in a massacre at Orlovnjak, a village farm near Tenja, including by blockading roads[207]; and its co-operation in Bogdanovci, where paramilitary attacks took place with JNA weapons[208]. This is direct side-by-side collaboration and co-operation under a single control. You have heard that the pattern of attacks followed by the JNA was to provide cover to Serb paramilitaries who conducted what were termed "mopping-up" operations to destroy the remaining Croat population of villages[209].

33. In my earlier presentation, I dealt in some detail with the direction and control exercised by the JNA over other forces in Croatia. I quoted from a number of decisions of the ICTY that

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[202]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 8.

[203]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 8, para. 7.

[204]*Bosnia*, p. 207, para. 397.

[205]*Bosnia*, p. 207, para. 397.

[206]MC, para. 5.129.

[207]MC, para. 4.29.

[208]MC, paras. 4.48, 4.53.

[209]See also MC, para. 3.57; RC, para. 5.10.

support those factual conclusions. You will recall that in both *Martić* and in *Mrkšić*, the Trial Chamber found that the doctrine of "unified command and subordination" meant in practice that the JNA had effective command and control of all joint military operations with the Serb forces in Croatia. ~~***[Screen on]***~~ The Chamber's conclusion in *Mrkšić* provides a clear statement of the conclusions to be drawn from this evidence. The Chamber held that a range of military orders

> "serve to confirm that what had been established as the *de facto* reality, not only in the zone of operations of OG South, but, generally, in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations. This, in the Chamber's finding, reflects the reality of what had been established. It was a reality, which the JNA had the military might to enforce, even though it may well have been reluctant to be too heavy handed in doing so, against TO and volunteer or paramilitary units fighting in the Serb cause."[210]

34. The phrase used here by the ICTY is "the *complete* command and full control by the JNA of all military operations". I have already established that the JNA was a *de facto* State organ of Serbia. That brings conduct by participants in those operations squarely within the boundaries of Article 8. Such conduct is attributable to Serbia on the basis of complete command and full control. That extends to the JNA itself; to Territorial Defence forces, particularly those of Serbia; to the forces of the self-proclaimed Serb entities in Croatia; and to paramilitary and volunteer groups. This was confirmed by Reynaud Theunens in his analysis of the principle of "unified and single command and control" in the *Milošević* case[211]. ~~***[Screen off]***~~

35. I mentioned earlier that there were about 32 different "volunteer" groups operating in different parts of Croatia[212]. They included special forces, militias made up of former Territorial Defence forces, paramilitary units under the command of a local leader, and police augmented by armed civilians[213]. Serbia alleges that Croatia has failed to distinguish between these groups and has consequently failed to prove that they were under the direction or control of the Serbian leadership and the JNA[214]. On the contrary, Croatia has, in so far as possible, sought to identify the

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[210] *Prosecutor* v. *Mrkšić et al*, IT-95-13, Trial Chamber Judgement, 27 Sept. 2007, para. 89.

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

[212] MC, paras. 3.47–3.49.

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

[214] Counter-Memorial of Serbia (CMS), paras. 572–573, 607–608.

relevant groups in its submissions on the facts, including this week. Examples of the evidence pertinent to particular groups are set out in the Reply[215].

36. True, it is not always possible to distinguish precisely the acts of each specific group involved. But for the purpose of attribution, at this stage it is also not necessary. The JNA exercised effective command and control of joint military operations of all the forces fighting on the side of the JNA. This is the "principle of unity or singleness of command" found to be proven in *Mrkšić*[216]. Naturally you will make your own factual findings — and we presented further free-standing evidence to support them. But the decisions by an international tribunal charged with determining the facts to a criminal standard of proof in an adversarial hearing, are entitled to very great weight. They are consistent indeed with an allegation made by Serbia itself in prosecutions in its own domestic courts for war crimes in Lovas in Eastern Slavonia where it was said that the "parties to the conflict were the JNA forces with *other armed groups under their command and control*"[217].

37. I should stress that by drawing this general conclusion that the JNA exercised effective control over joint military operations, Croatia is not invoking the test of "overall control" applied by the ICTY Appeals Chamber in *Tadić*, for a completely different purpose. That test was satisfied, as a matter of applicable law in *Tadić* if a State had "*a role in organising, co-ordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operations support"[218]. You rejected that test in *Bosnia*[219], with respect, correctly. But the evidence in this case shows that Serbia's involvement went much further than mere overall control established by organizing and financing. In *Bosnia*, you went on to reaffirm the customary rule reflected in Article 8: "where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed", the State is

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[215]RC, para. 9.78.

[216]*Mrkšić*, paras. 84–85.

[217]*Vujović et al.*, KV 4/2006; *Sireta et al*, KV 9/2008; *Pašić*, KV 4/2007; and the decision of the Supreme Court of Serbia in the same case, K z I r z 2/08, cited in RC, para. 9.79.

[218]*Tadić*, Appeal against Conviction (1999) 124 *ILR 61*, 100; emphasis in the original.

[219]*Bosnia*, p. 130, para. 210.

responsible[220]. That is the case here in respect of each of the acts that Croatia alleges were committed by paramilitaries or other forces not integrated into the JNA. A *de facto* Serbian State organ — the JNA — either gave instructions or directions pursuant to which those forces acted, or else exercised *effective* control over the military actions during which the forces committed the acts. Control, in detail, not some umbrella control. This is the only inference to be drawn from the "principle of unity or singleness of command" and from each of the specific incidents about which you have heard this week, this was a campaign in which the JNA exercised command and control over operations that we say amounted to a campaign to destroy a part of the Croat population. That is enough for attribution.

38. Finally, I will take this opportunity to answer Judge Greenwood's question about what official position, if any, Šešelj held when he made the statements we quoted about the creation of a "Greater Serbia". Šešelj was a prominent Serb nationalist politician, the founder of the Serbian Radical Party, and from June 1991 a member of the National Assembly of Serbia. But the basis on which we submit that conduct by Šešelj and his forces is attributable to Serbia is not that he was a public official; a member of parliament is, in general, not a public official for this purpose. A member of parliament represents his constituency and not the State. But Šešelj and his forces operated under the direction and control of the JNA, in the way I have described[221]. And his comments about the creation of a "Greater Serbia" are also relevant in so far as they indicate the common intent of the members of the joint criminal enterprise, a conspiracy held by judicial authority to have existed, and to have involved Šešelj, Milošević and others. Milošević used Šešelj, a close confidante, to say publicly what he and the JNA intended more covertly[222], and you can draw a reasonable inference from that.

V. Conclusion

39. Mr. President, Members of the Court, my conclusions can be put simply. The JNA, which was itself directly responsible for acts of genocide and was complicit in others, was a *de facto* State organ of Serbia. This fact is relevant even in respect of the period before

[220] *Ibid.*

[221] RC, paras. 4.104–4.106 and sources cited therein.

[222] RC, para. 3.37.

27 April 1992, when Serbia was a State *in statu nascendi* and its authorities had taken control of the federal organs of the no-longer-functional SFRY, including the JNA. To the extent that forces *cannot* be characterized as part of the JNA — whether they are forces of the self-proclaimed entities or of non-enlisted paramilitaries — decisions and factual findings by the ICTY and evidence presented by Croatia show that they were nonetheless under the JNA's direction and effective control. On these grounds, the conduct by the JNA and those other forces is clearly attributable to Serbia. But even if such conduct were not so attributable, Serbia would still be responsible in so far as it failed to prevent or punish acts of genocide or in so far as it subsequently acknowledged and adopted that conduct.

40. Mr. President, Members of the Court. That concludes these submissions on attribution. Tomorrow I will address the separate, but related, question of your jurisdiction in respect of events prior to 27 April 1992. Mr. President, I now ask you to call upon Sir Keir Starmer.

The PRESIDENT: Thank you very much, Mr. Crawford. I give the floor to Sir Keir Starmer.

Sir Keir STARMER:

LEGAL BASIS FOR RESPONSIBILITY OF THE RESPONDENT FOR VIOLATIONS OF THE GENOCIDE CONVENTION (TO BE CONTINUED)

I. Introduction

1. Mr. President, Members of the Court, my task in this speech is to set out the Applicant's case establishing Serbia's responsibility under international law for violations of the Genocide Convention, which are the subject of the present proceedings.

2. The Applicant puts its case on three alternative bases. The primary basis of responsibility put forward by the Applicant is that the acts of the JNA (the *de facto* Serbian Army) and/or the Serb and Serbian forces (including militia, special forces, Territorial Defence ("TO") and all volunteer and paramilitary formations), constituted direct involvement in acts of genocide under Article III *(a)* of the Genocide Convention and are attributable to Serbia, which has responsibility under international law. So that is the primary basis of the Applicant's case.

3. The Applicant further submits that, if this Court is not satisfied on the primary case, Serbia is also responsible for having failed to prevent genocide under Article I of the Genocide Convention. Serbia should have taken all steps within its power to ensure that the genocidal acts — including, but not limited to, those in respect of which its knowledge is irrefutable — were not committed by those within its jurisdiction or control, including the Serbian political leadership, members of the JNA, TO, special forces, paramilitaries, volunteers and local Serbs participating in those acts. The Applicant submits that Serbia had the capacity to take steps to prevent genocidal acts, but manifestly failed to do so. In fact, in face of knowledge of acts that, as you have heard, the JNA *itself* characterized as "genocidal", Serbia continued to provide financial and military support to the perpetrators. So that is the second basis upon which we put our case.

4. The Applicant's third basis is under the doctrines of conspiracy, complicity or attempt to commit genocide under Articles III *(b)*, *(d)* and/or *(e)* of the Convention. The factual findings of the ICTY in the cases of *Martić*[223] and *Babić*[224] clearly establish that there was a joint criminal enterprise between members of the Serbian leadership to commit crimes against the Croat population in the areas claimed as "Greater Serbia". This was done with the aim of destroying parts of Croatian groups, in order to create an ethnically homogenous Serb State. Further, the JNA variously ordered, facilitated and aided and abetted the commission of genocide by the TO, militia groups, paramilitaries and volunteers. So these are the three separate bases upon which we put the case.

5. The evidence that I will highlight in this speech — and as has been highlighted throughout the week — and the arguments that I will develop in this speech apply equally to all three strands of the Applicant's argument. *Actus reus*, as you have heard, is less controversial in these proceedings than *mens rea*. Accordingly, I will deal with *actus reus* first but relatively briefly. I will then turn to the Respondent's case on intent to show that it does not advance a positive case, before then setting out in detail how the Applicant puts its case on this central question of intent and, in particular, the inference of genocidal intent from a pattern of conduct. I will then briefly

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[223] ***Prosecutor* v. *Martić,*** Case No. IT-95-11-T, Judgement, 12 June 2007.

[224] *Prosecutor* v. *Babić*, Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004.

address the remaining bases of responsibility. First, however, may I begin by outlining the ICTY case law that undeniably supports the Applicant's case.

II. The significance of ICTY findings

6. This Court in an unusual and perhaps advantageous position, in that in the 15 years since Croatia introduced its Application, many of the atrocities pleaded and relied on by the Applicant have been adjudicated upon by the ICTY. As determined by the Court in the *Bosnia* case, these findings are "highly persuasive" in the determination of the issues now before this Court. Of particular significance are the factual findings of the ICTY in the cases of *Martić* ~~***and others***~~, *Mrkšić*[225] and *Babić* regarding widespread and systematic crimes committed against groups of Croats carried out in furtherance of the deliberate design of the Serbian leadership.

7. Of course, the ICTY was not asked to consider genocide and, accordingly, has not ruled one way or the other. But, Mr. President, Members of the Court, I do want to just summarize what the ICTY has found and indicate as to how it goes to our argument on responsibility.

8. The ICTY has found as a fact that at all relevant times there was in existence a joint criminal enterprise amongst the Serb political and military leadership[226]. That is in the *Martić* case, at paragraph 446. Its purpose was to destroy the Croat civilian population by killing and removing them from approximately one third of the territory of Croatia, in order to transform that territory into an ethnically homogenous Serb-dominated State. The ICTY found that this was to be achieved through the commission of widespread and systematic crimes against groups of Croats across the territory. And the acts found included extermination, systematic murder, torture, cruel treatment, sexual violence, detention in inhumane conditions, forced expulsion, the destruction of Croat public and private property, the targeting of monuments of cultural and religious significance to the Croat population, and the establishment of a discriminatory régime of persecution of groups of Croats. So that is the first major finding that the Applicant relies on.

9. The ICTY has also found, as a fact, that all of the forces participating in the military operations in Croatia which are the subject of the present application — including Serb militia,

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[225] *Prosecutor* v. *Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13/1-T, Judgement, 27 Sep. 2007.

[226] *Martić, para.* 446; RC, para. 1.6.

special forces, TO and all volunteer and paramilitary formations — operated under the effective command and control of the JNA[227]. That is in the *Martić* case, at paragraph 89. It has further found that the JNA (and all of the combined forces fighting in the Serb cause) operated under the command and control of the members of the joint criminal enterprise amongst the Serbian leadership[228]. The ICTY has held that these combined forces were the instrument through which members of the joint criminal enterprise engaged in acts against groups of Croats on the basis of their ethnicity. It is the Applicant's case that, in *these* proceedings, Serbia thereby incurs primary and, if not, secondary, responsibility for genocide under international law.

10. Mr. President, Members of the Court, these factual findings determined in the way that they were determined, before the Tribunal before which they were determined, are, we submit, significant and powerful, and provide a robust platform upon which the Applicant builds its case. But as we have made clear during the course of this week, the Applicant does not rest its case only on the factual findings of the ICTY. It presents further evidence from very many witnesses with documents and other materials, which together manifestly support the Applicant's case.

11. The Respondent in the pleadings quarrels with some of the non-ICTY evidence that the Applicant has put before this Court. But there are two rebuttals to that.

12. First, most of the non-ICTY evidence is so strikingly similar to the findings of the ICTY as to be compelling. You heard what was said about the villages of Škabrnja and Saborsko and that provides a good illustration of this striking similarity. The ICTY found in two judgments that soldiers at Škabrnja threatened villagers with slaughter and that both men and women were called "Ustashas"[229]. Similarly, a witness from the village, relied upon by the Applicant in these proceedings, describes how, and I quote, "armed and uniformed Chetniks with blackened faces . . . came in front of the basement and started shouting at us to come outside", and that they were then obscene about their mothers[230]. At Saborsko, the ICTY found that there had been targeted killings of Croatian villagers[231]. This confirms the facts originally pleaded[232] many years before by the

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[227] *Mrkšić* Trial Judgement, para. 89.

[228] *Ibid.*, paras. 84-86.

[229] *Martić* Trial Judgement, para. 398; *Stanišić and Simatović* Trial Judgement, para. 109.

[230] MC, Vol. 2 (II), Ann. 504.

[231] *Martić* Trial Judgement, para. 379.

Applicant relying on witness evidence which was not before the ICTY. If that exercise is repeated with the very many other witnesses whose evidence deals with matters before the ICTY, the result is the same. I pause here just to note, it is the striking similarity of the evidence of the non-ICTY witnesses which is so evident from a reading of the statement submitted by the Applicant. It chimes with the findings of the ICTY. What I also emphasize at this point, those statements were of course submitted years before the ICTY came to its findings. In a sense the ICTY confirm and affirm the case that the Applicant pleaded so many years ago.

13. In the circumstances, as a general principle, the Applicant invites the Court to accept all of the evidence it relies on, even where it has not been tested in the ICTY, unless the Respondent can show that it is so obviously at odds with the findings of the ICTY that it should be set aside. So far, the Respondent has not come anywhere near being able to do so. On the contrary, as I will show later, it is, on analysis, the Respondent's case which is manifestly at odds with the findings of fact by the ICTY.

14. The second rebuttal of the Respondent's quarrel with some of the detail of the evidence, which you will have seen in the pleadings, is that, with the greatest of respect, the Respondent's arguments are, by and large, an irrelevance. With such compelling findings of fact by the ICTY in the Applicant's favour, the Respondent cannot defend this case on the basis of such minor discrepancies as there may be in the accounts of some of the witnesses. The weight of the evidence is very much against the Respondent. And I say this — even if the Respondent won every argument in the pleadings about every piece of evidence over which it seeks to quibble, it would make no difference to the totality of the evidence and the overall outcome of the case.

15. All of this goes firstly to the question of *actus reus*. Our submission is that, against that background, there can be no doubt that the crimes amounting to the *actus reus* of the crime of genocide were committed by the combined Serb forces on the territory of Croatia pursuant to the joint criminal enterprise. You have heard the number of people killed, you have heard the evidence of graves, you have heard the evidence of missing people and those not accounted for. The Applicant has presented its evidence over the last few days in different ways, partly geographical,

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[232]MC, paras. 4.24, 4.52, 4.77, 8.16 (7).

taking areas or regions in issue and walking the Court through what happened in those geographical areas on a time-based approach. The Applicant has also given specific examples, so having given the global view of a particular region we have, if you like, zoomed in to look at particular detail, in particular villages and particular towns, ranging from the very small village to the city of Vukovar. Finally, this morning you heard the roll call of data, date by date, repeated and relentless, of death, sexual violence and mistreatment. And against that background, we do say there can be no doubt that the *actus reus* of the crime of genocide is made out.

16. The scale and pattern of killing, torture and rape has been disclosed by the evidence submitted by the Applicant, and that clearly, in our submission, makes out the *actus reus* of genocide within the meaning of Articles II *(a)* and *(b)* of the Genocide Convention. To argue otherwise, in our submission, is simply not to be credible.

17. In addition, the conditions of life which were inflicted on the Croat population remaining in Serb-occupied territory, including systematic expulsion from homes, torture, rape and denial of food, access to water, basic sanitation and medical treatment, were calculated to bring about its physical destruction as a group. This, too, amounted to genocide within the meaning of Article II *(c)* of the Convention.

18. Finally, just this morning, you have heard in some detail the evidence of systematic rape of Croatian women and men, the sexual mutilation and castration of Croatian men, and the commission of other sex crimes which, when viewed in the context of the broader genocidal policies of the Serb forces, involved the imposition of measures to prevent births within the Croatian population. This, we say, falls squarely within the meaning of Article II *(d)*.

19. Against that background, the ICTY findings, the mass of evidence in the pleadings, and the ways in which the Applicant has brought it to the attention of the Court this week, it is perhaps understandable that the Respondent is compelled to accept, as it did in its Rejoinder, that it would be "unrealistic to deny"[233] that atrocities were committed against the Croat civilian population. The Respondent in the Rejoinder suggests that that has always been its case; it asserts that a "careful reading" of the Counter-Memorial makes clear that "the Respondent is not denying that

[233]RS, para. 354.

killings took place, that they were methodical, directed at civilians and driven by ethnicity"[234] — that is paragraph 392. So they are "not denying . . . killings took place", "methodical", "directed at civilians", "driven by ethnicity".

20. Whether the Respondent has always accepted that the *actus reus* of genocide is made out on the facts of this case is perhaps a skirmish that this Court does not need to resolve. But the concession in the Rejoinder that acts relied on by the Applicant "theoretically" might "correspond to the *actus reus* of genocide"[235] is worth emphasizing. It was touched on by Professor Sands. The use of the word "theoretically" in this context is, we submit, meaningless. The Respondent appears to use it to mean that the existence of acts constituting the *actus reus* of genocide remain theoretical unless intent is also proved. But that is to mix two issues, the *actus reus* and the *mens rea*. Many facts have been found by the ICTY, many others are clearly pleaded by the Applicant. The Respondent does not deny the overwhelming majority of acts that are in evidence before this Court. Nor does the Respondent invite the Court to set aside the findings of the ICTY. In our submission, the Respondent's concession should be seen for what it is: a concession that the acts relied on by the Applicant *do* "correspond to", or in fact *constitute*, "the *actus reus* of genocide". In truth, Mr. President, Members of the Court, there is no longer any factual dispute between the Parties as to whether atrocities occurred or that the *actus reus* of genocide is made out.

21. That being the case, the remaining and central question for this Court to determine is whether the systematic nature and scale of the crimes committed are such that they lead to the inevitable conclusion that those involved intended to achieve their purpose of a racially homogenous Serb State encompassing approximately one third of Croatia across the occupied regions, not only by means of widespread and systematic crimes against humanity directed against the civilian population on grounds of ethnicity, but also by means of destruction of a part of the group of Croats living in the areas to be included in "Greater Serbia".

22. So that, Mr. President, Members of the Court, is the central question, the intent lying behind the atrocities that are so clearly established on the evidence. In approaching that question, I want to start by stripping back the Respondent's case to demonstrate, first, that it is wholly

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[234]RS, para. 392.

[235]RS, para. 381.

inconsistent with the trenchant findings of the ICTY, and secondly, to expose that the Respondent actually has no positive case to advance on this critical issue of "intent".

III. The Respondent's case stripped back

23. So let me begin by stripping the Respondent's case back. There are four aspects of the Respondent's case that need to be stripped back before any meaningful assessment of the specific intent behind the acts making out the *actus reus* of genocide can be undertaken. And I will deal with them in turn.

24. They are:

(a) First, that the JNA was not a *de facto* State organ of Serbia.

(b) Second, that the JNA played a neutral and (from September 1991) a defensive role in defence of the continuation of the SFRY.

(c) Third, that the JNA did not exercise direction and control over the Serb irregular forces and paramilitary groups.

(d) And fourth, that the atrocities committed by Serb forces against the Croatian civilian population in issue were mere excesses, whether random or otherwise, taking place in an otherwise legitimate armed conflict and in any case not amounting to genocide.

25. I will detail each of these points in turn.

(a) *Whether the JNA was a* de facto *State organ of Serbia*

26. That was addressed moments ago by Professor James Crawford. He showed that during the relevant period, the JNA was a *de facto* organ of the emergent Serbian ***s***tate and that its conduct is accordingly attributable to Serbia in accordance with the principles recognized in the Articles on State Responsibility.

27. These findings and conclusions are set out in the Applicant's pleaded case. Professor Crawford highlighted, in particular, the finding of the ICTY that the JNA operated under the command of Milošević and other members of the Serbian leadership who it found were party to the joint criminal enterprise. As you have heard the *Milošević* indictment alleged that Milošević ***and others*** and the other participants in the joint criminal enterprise "directed, commanded, controlled or otherwise provided substantial assistance or support to the JNA, the Serb-run TO

staff, and volunteer forces"[236]. That's the end of the quote. And the existence of that joint criminal enterprise was found proven in the case of *Martić*[237].

28. Now in our submission, when it comes to responsibility, that finding is a complete roadblock for the Respondent. It is, in itself, sufficient to establish that the Serbian leadership is responsible under the Genocide Convention for all the combined military operations in Croatia by which members of the joint criminal enterprise inflicted systematic and widespread crimes on the Croat civilian population.

29. Unless the Respondent now seeks to argue before this Court that the ICTY finding is wrong, the evidence before this Court leads to a different conclusion, something it has not sought to do in its pleadings, there is no foundation for its argument that the JNA was not a *de facto* State organ of Serbia.

(b) ***The role of the JNA in the campaign***

30. What about the role of the JNA in the campaign? The second aspect of the Respondent's case that I just want to strip away, before getting to intent. The Respondent's argument, as I say, is that the JNA played a neutral or defensive role in the campaign. That is not only at odds with the Applicant's evidence set out in the pleaded case. It is also at odds with the clear findings of fact by the ICTY on this issue.

31. [Plate on] The ICTY could not have been blunter in the *Mrkšić* case, and you have on your screens the quote: "From July 1991 . . . the JNA became actively involved in conquering territory and not merely in interposing itself between the rebelling Serbs and local Croat authorities . . ."[238] [Next graphic] It was equally blunt in the *Martić* case; again the quote is on your screens:

> "beginning with the armed attack on the predominantly Croat village of Kijevo in August 1991 . . . the JNA was firmly involved on the side of the SAO Krajina authorities in the struggle to take control of territory in order to unite predominantly Serb areas"[239].

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[236] *Prosecutor* v. *Slobodan Milošević*, Second Amended Indictment (Croatia), 23 Oct. 2002, para. 26 (j).

[237] *Martić*, Trial Judgement, para. 445.

[238] *Mrkšić*, Trial Judgement, para. 31.

[239] *Martić*, Trial Judgement, para. 443.

[Plate off]

32. What does the Respondent say about these findings and can the Respondent seriously maintain the contention that the JNA was neutral, moving to defensive during the relevant period. Again, unless the Respondent now seeks to argue that these trenchant findings of the ICTY are wrong and should be set aside or not followed by this Court, there is no foundation for its argument that the JNA played a neutral or defensive role in the campaign. You have heard over the last two days a lot of evidence about the JNA role, in addition, of course to the ICTY findings.

(c) ***Whether the JNA exercised direction and control over the Serb forces and paramilitary groups***

33. When it comes to the paramilitaries and other Serb forces, as you have heard, there are two bases for attribution. The first is straightforward. In so far as some Serb paramilitary groups were formally integrated into the JNA as "volunteers", they operated as part of the JNA and their conduct is attributable to Serbia on the same basis as any other conduct of the JNA.

34. It is the Applicant's case that, where Serb forces and paramilitary groups were not formally integrated into the JNA, their acts are attributable to Serbia under Article 8 of the ILC Articles on State Responsibility, for the reasons advanced this morning by Professor Crawford. Again, as you had highlighted to you this morning, there are strong factual findings of the ICTY in the Applicant's favour on the issue of direction and control[240] and, in particular, the Trial ***C***hamber in the *Mrkšić* case found that there was "unity of command"[241].

35. So again, Mr. President, Members of the Court, the same exercise. Unless the Respondent seeks to argue before you that these strong findings should be set aside or not followed, it has no case or no basis for arguing that the JNA did not exercise direction and control over the Serb forces. Those issues have been dealt with by the ICTY.

(d) ***Whether the atrocities were simply the excesses of an otherwise legitimate armed conflict***

36. Then, fourthly, whether the atrocities were simply the excesses of an otherwise legitimate armed conflict. On this issue, the evidence is all one way. The ICTY has made strong

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[240] *Mrkšić* Trial Judgement, paras. 89.

[241] *Ibid.*, paras. 84-86.

findings of a joint criminal enterprise. Those three words have been said many times in the last three days but they do bear emphasis. A "joint criminal enterprise". The extent of that enterprise, the duration of that enterprise and the acts that were said to come within that enterprise, are wholly inconsistent with any suggestion of legitimate armed conflict or excesses in an otherwise legitimate conflict. They are only consistent with the unlawful targeting of civilians. A "joint criminal enterprise" — one cannot have a legitimate armed conflict with excesses by some against that strong finding of joint criminal enterprise. The people involved, the duration and the acts that came within that enterprise speak for themselves. Moreover, as the ICTY has held, the presence of defenders or soldiers does not transform a village into a legitimate military target[242].

37. If detail were needed on this question of whether the atrocities were excesses in an otherwise legitimate armed conflict, the detail is there. Yesterday I took you to the relevant passages in the ICTY findings relating to Vukovar, where it was suggested before that Tribunal that somehow what was in issue in Vukovar was a battle between two forces, one trying to take the city, the other not.

38. Before I leave this fourth aspect of the Respondent's case, can I just deal with one issue that cropped up yesterday in cross-examination and that is the question of whether some villagers fought back when tanks, the JNA and paramilitaries came to their villages. Judge Greenwood, I think, asked a specific question about the destruction of a tank at Bogdanovci. Can I just deal with it in this way. Firstly, one has to ask: what does the evidence that some villagers may have fought back in isolated incidents go to? There can surely be no defence being advanced of self-defence for the JNA or advancing paramilitaries, that somehow they were under attack and merely responding to that attack. There is no evidence supportive of that. Any such suggestion is wholly inconsistent with the joint criminal enterprise that was found by the ICTY. As I have said, where the question of legitimate armed conflict was raised in the ICTY, it was not accepted[243].

39. The Respondent, as I have indicated in the pleadings, has accepted that the atrocities were driven by ethnicity and therefore, Mr. President and Members of the Court, I do ask that we step back here and ask what this evidence of some villagers fighting back goes to? The first

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[242] *Martić*, Trial Judgement, para. 350.

[243] *Ibid.*, para. 472.

question, where there are isolated incidents, is when did it happen? Is there evidence before you of villagers attacking the JNA and paramilitaries first? The JNA and paramilitaries therefore being forced to the villages to deal with the threat to them? I would suggest there is none. Bogdanovci, the evidence you heard yesterday: the air attack, the artillery attack, the missiles, started in August. The incident when the tank was destroyed was September, two months afterwards. It cannot sensibly be suggested that those tanks came to that village to deal with the threat that that village posed to *them*.

40. Secondly, Mr. President, Members of the Court, you are entitled to look at the totality of the evidence and ask yourself whether the pattern of conduct varied. Was it *only* in those villages where somebody fought back that all those remaining were killed? Or was that the pattern across every town and village, irrespective of the action taken by the villagers? Mr. President and Members of the Court, I would suggest that there is only one answer to that.

41. And finally on this point, I do, in a very straightforward, common sense way, ask that we all take a reality check. Across the areas in issue were terrified villagers, in their villages. Almost certainly the only topic of discussion in those villages at this time would have been: "What is happening elsewhere?" "What is happening in the other villages?" The discussion and rumours of the actions of the JNA and the paramilitaries would have been rife. No doubt they were terrified, no doubt they spoke to each other: "What are we going to do if the army and the paramilitaries come to our village?" "We have heard what they have done elsewhere." And so, Mr. President, Members of the Court, when those tanks turned up and the paramilitaries turned up, those in the villages could be forgiven for thinking that was their last day on this planet, having heard what happened elsewhere. It is hardly surprising they took what measures they could to stop that happening to them and their families. And I say this, partly in jest, but just to emphasize the point, what were the villagers in Bogdanovci to say when that tank reached that crucifix, knowing what had happened elsewhere? "Please come this way?" Unrealistic, and what does it add on the question of intention that some villagers understandably fought back against what was happening to them, their families and their communities?

(e) ***Conclusion on these aspects of the case***

42. Mr. President, Members of the Court, naturally, this Court will want to make its own factual findings, and Croatia has presented free-standing evidence to support them. But, on any view, the ICTY findings on these aspects of the case are devastating for the Respondent's arguments. And this Court, whilst making its own factual findings, will have to consider what approach it takes to the ICTY findings. They are strong findings, they are in the Applicant's favour on these issues and we invite this Court to afford them very great weight.

43. If proper weight is given to those findings, as the case law suggests it should, and if the Respondent is not able before you to displace those findings, then our submission is that it is safe for this Court to proceed in analysing intention on the following basis: [plate on]

(i) The *actus reus* of the offence of genocide is clearly established. We say that is the starting-point for this analysis, for the reasons I summarized at the beginning of my speech.

(ii) Unless the ICTY findings are to be displaced, that the JNA was a *de facto* State organ of Serbia.

(iii) The JNA did not play a neutral or defensive role in the campaign during which the atrocities making out the *actus reus* were committed.

(iv) The JNA exercised direction and control over the Serb irregular forces and paramilitary groups.

(v) The atrocities in question were not the excesses of an otherwise legitimate armed conflict.

[Plate off]

All of that, we submit, follows from the findings of the ICTY supported by the evidence in this case and unless those findings are to be set aside or not followed, that is the platform upon which this case proceeds.

44. And that does bring into very sharp focus the question of what is the Respondent's case on intention.

45. Because on that analysis, and if the ICTY is to be followed, then the Respondent is unable to distance itself from the JNA, unable to suggest that the JNA was neutral or defensive, it is unable to defend the atrocities as mere excesses, so what did it say lay behind the atrocities? It is

all very well distancing yourself, it is all very well saying the JNA is not our entity, it is all very well saying the JNA does not direct or control the paramilitaries; but if you are wrong about that, what is your case on intent? What do you now say was the true intent behind these atrocities?

46. Our submission is the Respondent advances no positive case. On analysis, it does no more than cling, more or less as its only point, to the fact that the ICTY has not yet convicted anyone of genocide for the events in question[244]. That is what it is pushed back to. I dealt with the weaknesses of that bland assertion in my speech on evidence and issues of proof and I will touch on it briefly again later in this speech.

47. And in those circumstances, Mr. President and Members of the Court, the Applicant respectfully submits that, in a case such as this where the Respondent cannot bring itself to make a positive argument on intent — assuming it loses on distancing itself — this Court should be reticent and reluctant to find that whilst the Respondent bears full responsibility for the atrocities in issue, the underlying intent was merely to *persuade* a reluctant group of Croats, in villages, towns and across the regions, to move from the regions in question, not an intention to destroy them.

48. Far more compelling is the positive case that the Applicant does advance, namely that only one conclusion can be drawn from the facts: genocidal intent. And I now turn to that positive case.

IV. Genocidal intent

(a) *The way the Applicant puts its case on intent*

49. Mr. President, Members of the Court, the way the Applicant puts its case on intent is set out in Chapter 7 of the Memorial and Chapter 8 of the Reply and the applicable legal framework has been clearly articulated by Professor Sands.

50. The Court is familiar with the need for specific intent and the Applicant accepts that it is not simply sufficient to prove that individuals were targeted because of their identification as members of a distinct national or ethnic group. There must be an intention to destroy the targeted group in whole or in part.

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[244] RS, para. 420.

51. Proving that specific intent is rarely straightforward. The Genocide Convention is itself silent as to the manner in which genocide is to be proved. By reason of the special nature of the act of genocide, it is unlikely that any State would formally adopt and then publicize any plan or other scheme of organization to carry out or promote genocide, or otherwise prepare a paper trail which could then lead to its responsibility for failing to prevent genocidal acts committed by others. As the ICTY/ICTR Appeals Chamber has put it: [plate on]

> "By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must . . . be inferred."[245]

That is entirely consistent with other statements approved by the ICTY and the Appeals Chamber. [Plate off]

52. Thus, in the absence of documentary or other material which expressly evidences genocidal intent, specific intent can only be ascertained by inference; in particular, from a consistent pattern of behaviour involving the prohibited acts and targeted at a protected group. In *Kayishema and Ruzindana* the ICTR put it in this way — that is I hope on your screens — I take this relatively slowly: [plate on]

> "intent could be inferred from words or deeds and may be demonstrated by a pattern of *purposeful* action [and I obviously underline the word purposeful]. In particular, the Chamber considers evidence such as [(1)] physical targeting of the group or their property; [(2)] the use of derogatory language towards members of the group; [(3)] the weapons employed and the extent of bodily injury; [(4)] the methodical way of planning; [(5)] the systematic manner of the killing . . . [and (6)] the number of victims from the group is also important."[246] [Plate off]

And I am sure as I run through that list, Mr. President and Members of the Court, you will immediately recall some of the evidence that you have heard in the past few days that go to those very issues, those very characteristics that could be used to infer intent.

53. The Respondent accepts in the pleadings[247] the implausibility of a State formally and publicly putting into place a plan with the stated intention to destroy in whole or in part a group which falls to be protected under the Genocide Convention. Yet, at the same time, and in the face

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[245] *Prosecutor* v. *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para. 40.

[246] *Prosecutor* v. *Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, para. 93; affirmed by ICTY/ICTR Appeals Chamber in Case No. ICTR-95-1-A, Appeal Judgement, 1 June 2001, para. 159; emphasis added.

[247] CMS, para. 48.

of overwhelming international practice to the contrary, the Respondent seeks to argue that genocidal intent cannot or should not be inferred from "a relatively consistent pattern of behaviour involving the prohibited acts and targeted at a protected group"[248]. As the Applicant sets out in Chapter 8 of the Reply[249], the Respondent's contention is based on a flawed and selective reading of the authorities. Moreover, the Respondent's Rejoinder makes no attempt to address the Applicant's case on the inference of intention from the patterns of behaviour.

54. In the *Bosnia* case, this Court did not reject, in principle, an inferential approach to the establishment of facts to prove a genocidal intent; rather, it held that for a "pattern of conduct to be accepted as evidence" of a specific intent to destroy the group in whole or in part, "it would have to be such that it could only point to the existence of such intent"[250]. It makes clear this Court's recognition that a relatively consistent and widespread pattern of prohibited acts targeted at a protected group, taken as a whole, may provide evidence of specific intent to destroy that group as such, in part or in whole.

55. The patterns of behaviour relied on by the Applicant in this case are set out in the pleadings and have been highlighted throughout the factual speeches. The Applicant's submission is that the *only* conclusion that can be drawn from these patterns of behaviour — across areas hundreds of kilometres apart, against dozens and dozens of disparate groups of ethnic Croats in many villages and towns — is that they were driven by genocidal intent. That requires a careful analysis of the patterns of behaviour in their historical and political context. Looking at the matter broadly, it is extraordinary in the evidence that you have had recited to you in the last few days that the pattern is so similar across such a wide area at more or less the same time. What is happening in one village one day is happening in another village hundreds of kilometres away the next day. The same pattern, the same result. The patterns, Mr. President, Members of the Court, are very strong. In the evidence you heard this morning from Professor Lapaš there was what he called the repeated and relentless targeting of the Croat population. Before I move to the evidence on patterns of conduct and the inferences that can be drawn, it is necessary for me to "clear the decks"

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[248]MC, para. 7.33.

[249]RC, para. 8.51.

[250]*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. 197, para. 373.

by briefly summarizing the Applicant's submissions on: (1) the meaning of the words "destroy" and "in whole or in part"; (2) the relationship between "ethnic cleansing" and genocide; and (3) the distinction between motive and intent. Mr. President, it may be more appropriate if I picked that part of my speech up tomorrow morning.

The PRESIDENT: Yes, as you have been left with just two or three minutes, I am not sure whether you can summarize briefly in just two or three minutes.

Sir Keir STARMER: I think it is better to start again tomorrow.

The PRESIDENT: Thank you. This completes this morning's sitting.

The sitting is now adjourned.

The Court rose at 1 p.m.

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