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Public sitting

held on Friday 7 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 vendredi 7 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Good morning. Please be seated. The sitting is open. The Court meets this morning to hear the conclusion of Croatia's first round of oral argument on its own claim. Yesterday, Sir Keir Starmer started his pleading on the legal basis for responsibility of the Respondent for violations of the Genocide Convention and he can now continue his presentation. You have the floor, Sir.

Sir Keir STARMER: Thank you, Mr. President and Members of the Court. Before resuming my speech, with your permission I propose to deal with two of the questions posed by Members of the Court during the course of the oral hearing. First, on Tuesday, Judge Bhandari posed a question about the probative weight that should be given to three different categories of witness evidence, as follows:

(i) Evidence from witnesses whose statements have been annexed to the pleadings but who have not been called;

(ii) Evidence from witnesses who have been named but not cross-examined; and then

(iii) Evidence from witnesses who have been both named and cross-examined.

The Applicant takes the position that all evidence that is submitted to the Court by the Parties should start with the same probative value, irrespective of the manner in which that evidence was submitted. It will then be for the Court to determine what weight, if any, to attach to that evidence.

Professor Zimmerman's commentary on the Court's Statute states: "The case law of the Court allows the conclusion that the weight of each piece of evidence in proving particular facts will mainly depend on two factors, the reliability and neutrality of the source of such evidence."[1] The majority of this Court in the *Bosnia* case suggested[2] that the following factors may be relevant to probative value of witness evidence; first, whether the statement is given from direct knowledge or hearsay; secondly, the passage of time between the events in question and the testimony; third,

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[1] **M. Benzing, "Evidentiary Issues", in A. Zimmerman et al (eds.),** ***The Statute of the International Court of Justice: A commentary*** **(2012), Ch. 3, p. 1267, MN 114.**

[2] ***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. 135, paras. 226-227.**

whether the statement is from a partisan or neutral source; fourth, the process of generation; and, fifth, the quality or character of the statement, for example, statements against interest.

In our submission, these criteria apply equally to oral testimony and to statements made out of court. A witness statement should not be afforded less probative value simply because the witness was not proposed for live testimony by the party that submitted the statement. In these proceedings, witnesses who were identified for live testimony were selected only as a representative sample of the witness testimony as a whole and not because their testimony was believed to more credible than that of the other witnesses.

The testimony of witnesses who were called for cross-examination, we submit, should be assessed in light of the criteria identified and further assessed for its reliability and credibility in light of the cross-examination.

The testimony of witnesses who were identified for live testimony by a party but not called for cross-examination by the opposite party should be given no more or less weight than any other evidence but must be assessed in light of the criteria identified.

In accordance with many legal systems, a party is permitted to argue about the probative value of any witness's testimony, regardless of whether the party chose to cross-examine the witness.

Can I then turn to a second question. On Wednesday, I think it was, Judge Sir Christopher Greenwood sought clarification on the numbers in relation to Vukovar and, in particular, the number killed during the siege of Vukovar**, *t***he number killed during Phase 4 and the number detained and later released in the aftermath.

First, can I take this opportunity to clarify the audio content of the video clip that was shown about Vukovar. The clip is taken from the BBC documentary "The Death of Yugoslavia", which was made in 1995. The relevant commentary states: "Vukovar finally fell to the Serbs, now they controlled one third of Croatia. The cost to the two sides was 15,000 dead and half a million refugees." We have always understood that to refer to the overall losses in Croatia, probably on both sides, rather than the numbers in Vukovar. I think that is probably right from the transcript, but that is how we have always treated it, and that is the basis upon which we proceed. We never have and, for clarification, we do not suggest that 15,000 were killed in the Vukovar siege.

To clarify the figures with respect to Vukovar. The best figures we have for those killed in the siege are between 1,100 and 1,700 of which, before Phase 4, 70 per cent were civilians. So far as Phase 4 is concerned, it is difficult to estimate with any precision how many were killed during Phase 4. In the pleadings, the assertion is made that 2,000 were killed after the occupation of the city. There is some precision, obviously, in relation to the exhumed bodies from graves. That evidence is as follows: in Vukovar, there were three mass graves, Ovčara, which yielded 194 corpses; the new cemetery with 938 remains[3] *(*and Nova Street, where there were ten [10] remains*)*. Over 200 people from Vukovar city are still missing but it is important to point out that, apart from the aforementioned, victims from Vukovar were also found in a number of graves in the surrounding area of Vukovar. I think they are the best figures that we can put before the Court in answer to that question.

The third question then: statistics on the number of persons detained. The data here is also limited. A list of the 7,708 people who were detained is provided in Annex 42 of the Reply. Some of the records specify the prison camp at which the person was detained. However, the list does not contain information about where each person was taken from. Information about where the person was detained would be of little utility in determining where they were taken from, as many of the detainees were taken east into Serbia for detention. In other words, so far as we can see, you cannot ascertain from the place of the detention camp whether people were necessarily from Vukovar, because they were not necessarily taken to the nearest camp and they may have been taken quite some distance. So, I am afraid what is in Annex 42 is probably the best evidence that can be put before the Court on that issue.

Mr. President, Members of the Court, I will then resume my speech on the Legal Basis for Responsibility of the Respondent for Violations of the Genocide Convention. I think on a number of occasions I have said the "Geneva Convention". I think I am not permitted to correct the transcript in that respect but if I did slip into Geneva Convention, please read "Genocide Convention"!

The PRESIDENT: You can still correct the transcript.

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[3]You will recall that some of those bodies had been moved from primary graves to secondary graves but the total number is 938.

Sir Keir STARMER: Yes, I think I am told that two days ago I slipped in the Geneva Convention inadvertently on a couple of occasions. I hope it was so obvious that it does not need correction.

Mr. President, the text of today's speech is before you as one text, notwithstanding that I did not cover everything I had hoped to cover yesterday. I have now included and incorporated it into today's speech. I am going to deal mainly this morning with the evidence on intent but I will start by just finishing my submissions on my short analysis of the legal aspects and I had reached the question of the meaning of "destroy" and "in whole or in part" in Article II of the Genocide Convention.

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

IV. Genocidal intent

(b) ***The meaning of "destroy" and "in whole or in part"***

1. Article II of the Genocide Convention, as the Court knows, specifies that there must be an intention to "destroy" a protected group or part of a group. However, as Professor Sands has explained, the destruction of a group, or part of a group, does not require extermination of all the members of the group, or even, we say, a substantial part of it. What must be shown is an intention to destroy a group or part of a group as a functioning entity.

2. Whereas the destruction of a group "in whole" is relatively straightforward, this Court in the *Bosnia* case made important findings with respect to the destruction of a group "in part". Professor Sands dealt with that in some detail two days ago and I do not propose to repeat it here.

3. However, clearly numbers are not without some relevance. There must be a destruction of some people who form part of the group. The scale of deaths, and the extent of persecution, contemplated or inflicted on members of the protected group will be important factors in determining whether the acts complained of were — or must have been — committed with an intent to destroy the protected group, or part of it, as such. But, as we have said on a number of occasions, this is not a numbers game. Genocide under the Convention is an inherently inchoate

offence, which criminalizes the doing of particular acts with a particular intent. It is not fixed on a particular result, or a pre-defined threshold[4].

4. The opportunity available to the perpetrator will be highly significant. And I will examine evidence on that later. It may be that the perpetrator only has the opportunity to destroy those members of a group living within a confined geographical area. Thus, in *Bosnia*, the targeting of Bosnian Muslims living in the geographically confined area of Srebrenica was sufficient for the purposes of Article II of the Genocide Convention.

5. In this case the target group identified by the Applicant is the Croat population that was, at the relevant time, living in Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika, and Dalmatia, including those living as groups in individual villages. In other words, those Croats living in areas, towns and villages to be included in "Greater Serbia". There can be no doubt that these groups, some of which were very numerous, constituted a sufficient "part" of the Croat population as a whole for the purposes of Article II of the Genocide Convention.

6. That Serbia did not, in fact, physically destroy all those making up parts of these groups does not rule out a finding of genocide. The question for determination is whether, when the JNA and Serb forces engaged in the conduct prohibited by Article II of the Convention — including killing, seriously harming and removing the basic conditions of life from such members of the group as they were able to, taking into account the opportunities presented to them — they did so with an intent to destroy groups comprising those Croats living in the areas to be included in "Greater Serbia".

7. That is why the Applicant submits that the evidence of each small pocket of atrocities — village by village, town by town — and the patterns of behaviour discernible from them is so telling. If what lay behind these atrocities was a genocidal intent to destroy Croats living in the areas, towns and villages to be included in "Greater Serbia", genocide is made out whether the numbers actually killed, seriously harmed, tortured or persecuted on any given occasion are large or small.

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[4]See, e.g., David L. Nersessian, *Genocide and Political Groups*, 2010, p. 17.

8. To take an obvious example that arises on the facts of this case: if Serb forces advanced on a village or town intent on taking every opportunity to kill or seriously mistreat every Croat living there, but before they arrived, some or even most Croats from the village or town fled in fear of their lives, all that establishes is that the *extent* of the conduct committed in violation of Article II of the Genocide Convention was less than it might otherwise have been. It does not affect the *intention* of those engaging in the conduct. Nor can it be said that intent is to be assessed without reference to the opportunity that arises. In these instances genocide is still made out.

9. Finally, as to the words "as such" in Article II, these were recognized by the Court in the *Bosnia* case as having been included in order to emphasize an "intent to destroy the protected group"[5]. This is understood to mean that the specific intent in Article II requires that the acts in question should have been directed against members of the protected group *as a group*: they were attacked because of their national or ethnic origins, their race or their religion. The words "as such" are included with the intent to highlight the discriminatory and targeted nature that is inherent in the crime of genocide.

(c) ***Genocide and ethnic cleansing***

10. Mr. President, Members of the Court, I turn now to the relationship between genocide and ethnic cleansing. In the *Bosnia* case, this Court considered the relationship between genocide and "ethnic cleansing". ~~***[Plate on]***~~ And you observed that — and hopefully on your screen you have this extract:

> "Neither the intent, as a matter of policy, . . . nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide [they are talking about the policy and operations of ethnic cleansing there]: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."[6] ~~***[Plate off]***~~

11. As Professor Sands has indicated, the words "as such" and "necessarily" in this passage are carefully chosen and obviously important. They imply that while deportation or displacement

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[5] *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. 121, para. 187; hereafter *Bosnia*.

[6] *Bosnia*, p. 123, para. 190.

of members of a group, or part of a group, is not *automatically* to be equated with genocide, it is capable of amounting to genocide. Whether it does so depends on the facts of each case.

12. ~~*[Plate on]*~~ But — and it is an important "but" — there is clearly an overlap. This interpretation is reinforced by the Court's later observation that — and again, I hope you have this on your screens:

> "This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' . . . provided such action is carried out with the necessary specific intent . . ., that is to say with a view to the destruction of the group, as distinct from its removal from the region."[7]

~~*[Next graphic]*~~ And later, the Court went on to say that — again, I hope you have got this quote — "it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts"[8]. [Plate off]

13. So, to be clear, it is not Croatia's position that the forced expulsion and removal of Croats living in areas to be included in "Greater Serbia" *alone* proves genocidal intent: it is those acts coupled with the others that are relied on. The act of forcibly displacing a population may amount to genocide if it is in furtherance of an intent to destroy a group, or a part of a group. The Applicant submits that this was the case in Croatia.

14. For example, in the case of *Krstić* in the ICTY, the Trial Chamber convicted the accused of genocide, using forcible displacement to support a finding of genocidal intent[9]. The Trial Chamber held that the accused had the requisite genocidal intent because he sought to eliminate all of the Bosnian Muslims in Srebrenica as a community. By killing military-aged men and forcibly transferring women, children and the elderly, the Bosnian Serb forces effectively destroyed the community of Bosnian Muslims living in Srebrenica and eliminated all likelihood that the community would be re-established.

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[7] *Bosnia*, p. 123.

[8] *Ibid.*

[9] *Prosecutor* v. *Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, paras. 594-598.

15. That case went on appeal, as you know, and on appeal the accused claimed that the Trial Chamber had impermissibly broadened the definition of genocide by using displacement as evidence of destruction. However the Appeals Chamber affirmed the Trial Chamber's finding that the forcible transfer of women provided evidence of an intent to physically destroy, and we have the extract from the Appeals Chamber, I hope, on your screens:

~~*[Plate on]*~~

> "As the Trial Chamber explained, forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself . . . The Trial Chamber — as the best assessor of the evidence presented at trial — was entitled to conclude that the evidence of the transfer supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff."[10]

~~*[Plate off]*~~

16. My friend and colleague, Professor Schabas, who elsewhere advocates that ethnic cleansing and genocide are wholly separate, has explained his view as follows: ~~*[plate on]*~~

> "The genocidaire seeks to kill individuals with the intent to destroy the group to which they belong, in whole or in part. Herein lies the fundamental difference with ethnic cleansing which generally involves killing, but with the intent to effect forced migration from a territory."[11] ~~*[Plate off]*~~

Mr. President and Members of the Court, that neatly identifies a key question for this Court and let me try to pose that question.

17. The commission of widespread and systematic crimes against the majority Croat population of the territory in question is evidenced in the Applicant's pleaded case and the evidence before this Court, supported by the findings of the ICTY. You have heard, and you have the evidence, that those crimes included extermination, systematic murder, torture, cruel treatment, sexual violence, detention in inhuman conditions, forced expulsion, the destruction of Croat public and private property, the targeting of monuments of cultural and religious significance to Croats as

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[10] *Prosecutor* v. *Krstić*, Case No. IT-98-33-A, Appeals Judgement, 19 April 2004, paras. 31-33.

[11] William A. Schabas, "Problems of International Codification — Were the Atrocities in Cambodia and Kosovo Genocide?", 2001, 35 *New Eng. L. Rev.*, p. 295.

a group, and the establishment of a discriminatory régime of persecution of Croat groups who remained in occupied territory. The question for the Court is whether the commission of those crimes, taken together, was *merely* intended — to borrow my friend's words — "to effect forced migration from the territory" to be included in "Greater Serbia"?

18. Or, is the only safe conclusion the one advocated by the Applicant, namely that when analysed carefully and in context, the real intent is clear: namely, an intention to destroy groups of Croats living across the territory to be included in "Greater Serbia"?

19. The fact that the Respondent can point to underlying acts consistent with ethnic cleansing does not answer that question. What matters is the intention driving the conduct in question. And that can only be discerned from an intense focus on the patterns of behaviour. These must be assessed, not in isolation, but in their proper historical and political context.

20. Moreover, as Professor Schabas has elsewhere accepted, what starts as ethnic cleansing may end up as genocide. He gives this example: "The ethnic cleanser may become frustrated, of course, and evolve into a related but distinct species, the genocidaire"[12]. That raises the important issue of the distinction between motive and intention, to which I now turn.

(d) ***The distinction between motive and intention***

21. In a case such as this, it is essential to draw a distinction between motive and intent. Motive is a person's overall reason for doing something; intent is his purpose or design in doing so. To take an example far removed from this case, a man may kill his wife because he is motivated by jealousy, but that does not mean he lacks the intention to kill necessary to make out the offence of murder.

22. In this case, the motive of the Serbian leadership, in pursuing the joint criminal enterprise which the ICTY has found to have existed, was to secure control of approximately one third of the territory of Croatia, and to transform it into an ethnically homogenous, Serb-dominated State.

23. It can thus be argued that the "motive" for the commission of these crimes was territorial acquisition coupled with the desire of the Serbian leadership for an ethnic purity in "Greater

[12]William A. Schabas, "Problems of International Codification — Were the Atrocities in Cambodia and Kosovo Genocide?", 2001, 35 *New Eng. L. Rev.*, p. 295.

Serbia". But the means by which the Serb forces set about achieving the goal of territorial acquisition and ethnic purity in "Greater Serbia" reveals their "intent". And that can only be discerned from the evidence about the pattern of behaviour. That the Serb forces *could* have achieved their goal without resorting to genocide is nothing to the point.

24. And what the evidence shows is that the "intent" of the Serbian leadership, the JNA and the forces under their control as to how to achieve their goal was permanently to eradicate the majority Croat population then living in the territory. As the ICTY has confirmed, the political and military campaign by which the object of the joint criminal enterprise was to be achieved included the intentional and organized commission of widespread and systematic crimes, acts the Applicant says are specified in Article II of the Genocide Convention against groups of Croats on account of their ethnicity, including killing, shelling, burning, torturing and removing the basic necessities of life.

25. It is the Applicant's case that the scale of the crimes committed, including widespread murder and torture, along with crimes of sexual violence, and forced deportation, taken together, evince a clear intention to bring about the physical destruction of groups of Croats in the identified territories, in whole or in part. This intent was held by the Serbian leadership and/or the JNA and the forces under their control.

(e) ***The evidence of intent***

26. I turn then to the evidence of intent. The Applicant submits that the genocidal intent behind the individual acts relied upon as establishing the *actus reus* of genocide is evidenced by a series of related factors. Each of these may be sufficient to demonstrate genocidal intent; taken together they provide overwhelming evidence of the intent required by Article II.

27. The related factors relied on by the Applicant are listed in both the Memorial and the Reply[13]. In brief summary they are as follows, and ***I've*** these now as a series of four slides, because there are 17 factors in total. So here are factors 1, 2, 3 and 4, and we say each of those on its own, and then all 17 taken together, provide the overwhelming inference that there was a genocidal intent:

[13]Memorial of Croatia (MC), para. 8.16; Reply of Croatia (RC), para. 9.6.

[Plate on]

(1) The political doctrine of Serbian expansionism which created the climate for genocidal policies aimed at destroying the Croatian population living in areas earmarked to become part of "Greater Serbia";

(2) The statements of public officials, including demonization of Croats and systematic incitement on the part of State-controlled media;

(3) The fact that the pattern of attacks on groups of Croats far exceeded any legitimate military objective necessary to secure control of the regions concerned;

(4) Contemporaneous video footage evidencing the genocidal intent of those carrying out the attacks;

[Next graphic]

The next four factors in the list of 17 are these:

(5) The explicit recognition by the JNA that paramilitary groups were engaging in genocidal acts;

(6) The close co-operation between the JNA and the Serb paramilitary groups responsible for some of the worst atrocities, implying close planning and logistical support;

Just pausing there: you heard the evidence of the attacks on the villages across wide regions in a short period of time. Is it seriously to be argued that that is all coincidence and there wasn't any co-ordination behind that — the paramilitaries, the informal groups, had somehow all acted in the same way at the same time across such a wide area? There must have been an organizing force.

(7) The systematic nature and sheer scale of the attacks on groups of Croats;

(8) The fact that ethnic Croats were constantly singled out for attack while local Serbs were excluded;

[Next graphic]

(9) The fact that during the occupation, ethnic Croats were required to identify themselves and their property as such by wearing white ribbons tied around their arms and by affixing white cloths to their homes;

(10) The number of Croats killed and missing as a proportion of the local population;

(11) The nature, degree and extent of the injuries inflicted (through physical attacks, acts of torture, inhuman and degrading treatment, rape and sexual violence) including injuries with recognizable ethnic characteristics;

(12) The use of ethnically derogatory language in the course of acts of killing, torture and rape;

~~***[Next graphic]***~~

(13) The forced displacement of Croats and the organized means adopted to this end;

(14) The systematic looting and destruction of Croatian cultural and religious monuments;

(15) The suppression of Croatian culture and religious practices among the remaining population;

(16) The consequent permanent and evidently intended demographic changes to the regions concerned;

(17) The failure to punish the crimes which the Applicant alleges to be genocide.

~~***[Plate off]***~~

28. The remarkable aspect of this case is that almost all of the 17 elements have been substantially confirmed by judicial findings of the ICTY in proceedings brought against senior Serb officials. The free-standing evidence presented in this case by the Applicant reinforces these findings. And, the Applicant submits, it provides this Court with the opportunity to draw safe conclusions.

29. I am sorry to go through in a list form those factors with the Court, but it is important because the Applicant's submission is straightforward. While individual acts committed in the course of the campaign *might*—if considered in isolation—have been explained as "common crimes" or as "excesses" committed in the course of a conflict, all of the factors relied on by the Applicant, *taken together*, point to the inevitable, overwhelming conclusion that there was a systematic policy of targeting Croats with a view to the elimination of groups of Croats (or parts of groups) as a community within the regions concerned. This establishes quite clearly the required element of a specific intent to destroy a protected group in whole or in part and/or complicity to commit, or failure to prevent, such destructive acts.

30. The detailed evidence of each of these factors is set out in the pleadings. Key aspects have been highlighted in the course of this week before this Court. I do not propose to repeat the detail here.

31. Instead, I will focus on three critical issues: (i) context; (ii) patterns of behaviour; and (iii) opportunity.

(i) Context

32. The context in which the atrocities that made out the *actus reus* of genocide were committed is clearly relevant to any assessment of the intent behind those atrocities. It is dealt with in detail in the Applicant's pleaded case and three aspects were highlighted in the first three speeches before this Court this week namely: first, the dissolution of the former Yugoslavia; secondly, the rise of Extremist Serbian Nationalism; and, third, the Serbian takeover of the JNA, along with the extension of the JNA's direction and control over the Serb irregular forces and paramilitaries.

33. What is important for the purposes of assessing intent, is an appreciation of how these developments not only set the scene for genocide but defined and then fuelled it. In this regard, I make two broad submissions. First, that political developments, particularly in the period 1986 to 1991, should be seen as a process by which the target group — Croats living in territory to be included in "Greater Serbia" — were first identified, then demonized and daubed with collective guilt for appalling offences, including historical accusations of genocide, and then set aside as a group apart, leading inevitably to them being attacked as the target group.

34. As Ms Law set out in her speech, the period 1986 to 1991 was a period during which extreme nationalism began to develop at a rapid pace in Serbia, fanned by vitriolic hate speech. It was a period during which the initial unfocused ideas of a Serb-only State began to crystallize, accompanied by the build-up of paramilitary forces and their integration into the JNA and/or activities carried out in concert with the JNA.

35. Much has been said of the SANU memorandum in the pleadings and Ms Law dealt with it in her speech. The essential significance of this milestone on the journey towards genocide is that it created a fertile environment for what was to follow. It gave political legitimacy to the idea of a "Greater Serbia". That is why it has rightly been called a political firestorm. Fuelled by hate speech, demonization of Croats and the notion of collective guilt, what was emerging in those years

1986-1991 was the clearer and clearer identification of a target group. This was the first stage in genocide, as Raphael Lemkin observed back in 1944.

36. No doubt some of those involved in the atrocities that you have heard about and that were to follow might initially have stopped at the simple removal of the target group from "Greater Serbia". But the political forces in play were too powerful to stop at that. Having whipped up extreme hatred of the target group, a darker intention began to evolve. Having set up the Croats in "Greater Serbia" as a group apart, collectively demonized and collectively guilty, the designs of the Serbian leadership and the enthusiasm of the paramilitaries turned to destruction rather than mere removal.

37. The examples of this evolution are many. Three will suffice here. First, the replacement of the term "mass Ustasha crimes" to describe the crimes committed during the Second World War, with the term "genocide". As Ms Law demonstrated in her speech, this demonization of the Croats as harbouring genocidal intentions against the Serbs, coupled with the promotion of the idea of the Serbs as victims, played a significant role in preparing the ground for acts of genocide.

38. Next, the notion of the "amputation of Croatia": not just the extension of the Serbian state, but the notion that Croats who stood in the way of the developing Serb ambitions had to be destroyed. Hence the third example, the speech of a member of the Serb Parliament in April 1991, and referred to by Ms Law, in her speech, in which at the village of Jagodnjak in Baranja, he declared that anyone who claimed that the land was theirs "is a usurper, and *you have the right to kill him like a dog*" (emphasis added).

39. These ideas took hold. The examples of hate speech are too numerous to list. But critically they were the leitmoti***f*** not just in the build up to the campaign during which the atrocities were committed, but also in the campaign itself. The Applicant has drawn attention to the very many examples of ethnically derogatory language used in the course of killing, torture and rape. It has done so to reinforce the point. This targeted and extreme hatred of the group as a group drove the subsequent developments and fostered genocide. On its own, it was clearly not enough. And these events, in history, usually only occur when a series of features or factors come together at a moment.

40. And that brings me to my second broad submission, namely that the Serb takeover of the JNA, the integration of "volunteers" within it and the extension of its direction and control over Serb irregular forces and paramilitary groups, resulted in a strong, well-armed and equipped fighting mass which had not only the capacity to carry out the appalling atrocities detailed by the Applicant, but also the opportunity to give effect to the genocidal intent that was taking hold in its ranks. This obviously overlaps with my first submission. The political shift and drive towards the idea not only of creating "Greater Serbia" but also at the same time of destroying the target group was wrapped up with the development of extremist paramilitary groups. The two came together. And when the paramilitaries then became either integrated into or under the direction or control of the JNA, what came together in 1991 was an explosive cocktail, resulting in a campaign of genocide.

(ii) The patterns of behaviour

41. I turn then to the patterns of behaviour. The patterns of behaviour in the campaign during which the atrocities making out the *actus reus* of genocide were committed take their colour from the overall scale and intensity of the brutality. You have been given the overall numbers. As Professor Sands has explained, the Applicant has detailed atrocities over hundreds of towns and villages and multiple municipalities across the other regions in question. The factual speeches not only shed light on the sheer numbers killed, tortured, subjected to sexual violence or detained in appalling conditions, but also bring out in stark terms the relentless rhythm of death and destruction, not only across great areas but over a short and focused period of time.

42. That there were patterns to the behaviour is impossible to refute. The ICTY clearly identified and recorded them. As Ms Ní Ghrálaigh made clear in her speech on genocidal events in Eastern Slavonia, the ICTY set out in some detail the "generally similar pattern" of attacks in that region, Eastern Slavonia, and it also recorded them in the case of *Martić* and others.

43. Mr. President and Members of the Court, the relevant passages in the ICTY judgements have already been brought to your attention. But forgive me for returning to them. I do so for this purpose: to ask whether the patterns described by the ICTY, when considered together, can

sensibly lead to any other conclusion than that there was a genocidal intent behind the acts described.

44. I will start with the ICTY finding in *Mrkšić*. It found that the system of attack employed by the JNA in Eastern Slavonia typically evolved along the following lines. ~~***[Plate on]***~~ Now this is a plate that you have seen before, and I do apologize for going back to it, but my purpose is different. And the pattern is this:

> "*(a)* tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour [and you have seen evidence of that]; *(b)* there is then artillery or mortar shelling for several days, mostly aimed at Croatian parts of the village; in this stage churches are often hit and destroyed; *(c)* in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with the JNA do not lead, *with the exception of Ilok*, to peaceful arrangements [the exception proving the rule: one of the rare examples where stage *(d)* did not follow]; with or without waiting for the results of the ultimata a military attack is carried out; and *(d)* at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varied from murder, killing, burning and looting, to discrimination"[14] (emphasis added).

I make the obvious point that stages *(a)*, *(b)* and *(c)* involve the JNA; stage *(d)*, taking advantage of the situation, is led by the paramilitaries. And yet it is argued that they were not acting in concert. ~~***[Plate off]***~~

45. Let us concentrate on phases *(b)* and *(d)*, taking first the artillery and mortar shelling.

46. The evidence that, village by village and town by town, the artillery attack was so grossly disproportionate as to refute any notion of a military operation is overwhelming. As Ms Ní Ghrálaigh dealt with, in her speech, there are numerous examples. In Bapska, 400 missiles were fired in one day alone. In Tordinci, 100 missiles in one night. In Sotin, the artillery attack went on for over a month. Lovas was shelled for ten continuous days, with many dead and numerous homes destroyed, and Bogdanovci was subject to artillery attack for two months and practically the whole village was destroyed. Professor Sands, too, offered the examples of four villages: Novo Selo Glinsko, Kostrići, Joševica and Baćin. In each of these villages, within a matter of days, the majority Croat populations were systematically obliterated by paramilitaries, who entered the villages and killed every Croat they were able to find.

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[14] *Mrkšić*, Trial Judgement, para. 43.

47. And then there is Vukovar. As I demonstrated in my speech on the events in Vukovar, the artillery attack was so long and intense that it devastated the city in every respect. The ICTY was crystal clear in its assessment in the case of *Mrkšić*: ~~***[Plate on]***~~ And you have the quote there:

> "The events, when viewed overall, disclose an attack by *comparatively massive Serb forces*, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained."[15] (Emphasis added.)

I underline the words "comparatively massive Serb forces". And the words on the plate you have, are telling. Not only a description of gross disproportionality, but also the use of the word "destroyed" to describe the effect on the city and its occupants. ~~***[Plate off]***~~

48. The same description is apt for many other examples of phase *(b)* of the pattern of behaviour identified by the ICTY in Eastern Slavonia. As Ms Ní Ghrálaigh pointed out, the mere fact that in some cases the besieged villagers refused to surrender in response to the JNA ultimata does not transform Serbia's murderous assault on the towns and villages of Eastern Slavonia into a military engagement. The pattern is compelling. The intention is clear: to destroy parts of a terrified Croat group. This is an intent that can only be consistent with genocide.

49. Phase *(d)* of the pattern identified by the ICTY in *Mrkšić*, only goes to reinforce this conclusion. This phase is the post-artillery attack phase when the paramilitaries and JNA entered the villages and towns that they had been shelling. You have heard about the surviving Croats of Vukovar and how they were taken to orchestrated mass killings and torture. You have also heard first-hand the story of a witness whose village, in the same region, was subjected to three months of heavy shelling from August to November 1991. Once the shelling stopped, the JNA entered the village. Instead of being liberated, people were shot in the street and grenades thrown into basement shelters, killing men and women who took refuge there. Let us focus on the words used by the ICTY in *Mrkšić* to describe this phase: "what then follows varied from murder, killing, burning and looting, to discrimination".

50. Murder, killing, burning. Mr. President, Members of the Court, these are acts of destruction. Which of these words is consistent with an intention merely to *persuade* the terrified, already attacked by artillery and mortar, target group to leave the area? Moreover, if that were the

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[15] *Ibid.*, para. 470.

intention, why the "murder, killing and burning" carried out in relation to those remaining after the artillery attack? And why did the ICTY so carefully include in the description that the attacks at phase *(d)* occurred "*with or without waiting for the results of the ultimata*" (emphasis added)? The answer, I would suggest, is that because the outcome of the ultimata made no difference. The intent was always to destroy.

51. Similar patterns can be discerned elsewhere in the disputed regions of Croatia. As Professor Sands demonstrated in his speech on genocidal activities in Dalmatia, Banovina, Western Slavonia, Kordun and Lika, the ICTY Trial Chamber in the *Martić* case, having described the attacks there in question, observed that — and this is a quote then from a different case, different area, different region. ***~~[Plate on]~~***

> "these attacks followed a generally similar pattern which involved the killing and the removal of the Croat population. Furthermore, after these attacks, widespread crimes of violence and intimidation and crimes against private and public property were perpetuated against the Croat population . . ."[16].

As the free-standing witness evidence presented by the Applicant to this Court shows, as in Eastern Slavonia, these attacks were usually preceded by grossly disproportionate artillery bombardments. So, a pattern in a different region. ***~~[Plate off]~~***

52. And in *Stanišić and Simatović*, the ICTY came to similar conclusions. As in Professor Seršić's speech focusing on the villages of Škabrnja and Saborsko, she references the ICTY findings that the attack on Škabrnja began with heavy shelling involving cluster bombs and incendiary devices. Equally in Saborsko, 150 km away, the same pattern: from early August 1991, this small village was shelled on a daily basis for three months.

53. What followed in both villages was cold-blooded murder. Mr. President and Members of the Court, you have heard the details. But here a broader question arises: how can these acts, typical across all regions in question as a pattern — village after village, town after town — be reconciled with an intention short of genocide, or steps taken to prevent genocidal acts? The Applicant's answer is clear. They cannot.

54. This part of my analysis, which picks up on the last phase of the pattern described by the ICTY in its findings and replicated in the free-standing evidence presented by the Applicant —

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

namely the physical attacks by the JNA and paramilitaries as they entered the villages and towns — takes me to the issue of opportunity, to which I now turn.

(iii) Opportunity

55. There can be no dispute that, as the JNA and paramilitaries entered the villages and towns that they had been bombarding, they engaged in widespread and systematic acts of torture, murder and sexual violence. I have already referred to the chilling roll-call of death and destruction described by my colleagues in their speeches yesterday morning. The examples are too numerous to recite in detail. Instead I will concentrate on four examples, ranging from a large and significant city to a tiny village. My purpose is to lay bare what happened when the advancing Serbs were presented with an opportunity either to move their hapless bombarded victims on, to expel them, or to destroy them. The result was the same in almost every case. They took their opportunity and they destroyed them.

56. The examples are: Vukovar, Lovas, Škabrnja and Saborsko.

Vukovar

57. As I made clear in my speech on Vukovar, in the unfolding events there came a point after the siege and before the terrible events at Velepromet and Ovčara, when the raw intention of the advancing Serbs came to be tested. The city was on its knees, the population defenceless and captive. You have heard what happened next. If the aim was merely to displace the population, there would be no need to engage in systematic mass killing, repeated torture, brutal rapes, etc. There was a window of opportunity in mid-November 1991 — 18-21 November 1991 — that window was slammed firmly shut.

Lovas

58. The events in Lovas in October 1991 have been spelt out by Ms Ní Ghrálaigh and Professor Lapaš in ***their*** speech***es***. As was emphasized, even against the horrors elsewhere, the atrocities meted out to the defenceless population of Lovas stand out for their brutality.

59. You have heard that Lovas was shelled by the JNA every day for ten days. The village devastated, hundreds of homes destroyed. Twenty-three (23) civilians killed in the initial stages,

including executions by firing squad. Then — and this is the opportunity point — all the Croat males between the ages of 18 and 65 remaining were rounded up, beaten, and subjected to the "minefield massacre"; you have heard the details. As in Vukovar, a window of opportunity a test of intent, an opportunity to displace, not to destroy. As in Vukovar, the window of opportunity slammed firmly shut.

Škabrnja and Saborsko

60. The events in Škabrnja and Saborsko have already been dealt with in some detail and so I can be very brief. In each village, the advancing forces saw an opportunity to destroy their defenceless and captive Croat victims. And they took it; unarmed elderly civilians were no exception. This was not just ethnic cleansing, but the elimination of the Croat population.

61. The ICTY in *Martić* found that the killing of 69 Croats in Škabrnja amounted to murder[17]. It also found that in Saborsko, Croat victims were taken around the side of a house and executed[18]. As with Vukovar, as with Lovas, given the choice, the advancing forces took the opportunity to destroy.

Conclusion on this point

62. There are two reasons why the evidence on opportunity is so important. First, because it is so consistent. Across all the regions in question, the result was the same. Example after example of defenceless and captive Croat victims being killed, tortured or subjected to extreme sexual violence. Mr. President and Members of the Court, the Applicant submits that such consistency entitles this Court to draw strong inferences about the true intent of those perpetrating such atrocities. The intent was genocidal, and steps were not taken to prevent the atrocities committed.

63. The second reason why the evidence on opportunity is so important is because it refutes any suggestion that because some or most Croats living in the disputed regions ultimately survived, albeit in many cases after being subjected to terrible abuse, a genocidal intent cannot be made out. But, as you have heard, proving genocidal intent is not a numbers game. The opportunity

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[17] *Martić*, Trial Judgement, paras. 386-392.

[18] *Ibid.*, paras. 230, 379.

presented to the perpetrator is highly significant, and what happened when that opportunity was presented is obviously important. The fact that many Croats fled before the advancing forces could destroy them, or were saved by isolated examples of great courage by individual JNA officers and soldiers, cannot alter the evidence about what actually happened when the advancing Serbs were presented with opportunities to destroy not displace: they took them. And a part of the group was destroyed.

(iv) Conclusion on context, patterns of behaviour and opportunity

64. In the absence of documentary evidence setting out a clear plan of genocide, the evidence of these patterns of behaviour and opportunity are critical to any assessment by this Court, of intent. The international tribunals have made clear that a genocidal intent can be inferred from "pattern[s] of purposeful action". The Applicant submits that all the evidence in this case points to such a "pattern of purposeful action".

65. Mr. President, Members of the Court, you will recall the slide that I put on your screens yesterday, from the case of *Kayishema and Ruzindana* about the patterns of intent. It is our submission that *every single feature* identified by the ICTR as relevant in discerning a genocidal intent is made out in this case: first, physical targeting of the group or their property — that is undeniable; second, the use of derogatory language towards members of the group — undeniable; the weapons employed and the extent of bodily injury — you have heard the evidence; the methodical way of planning and systematic manner of the killing — again, you have heard the evidence; and the number of victims from the group — you have those numbers. If those are important features in establishing a pattern from which inferences can be drawn, then each of them is made out in this case.

66. It is no answer to this evidence of clear-cut patterns of behaviour but if every attack is taken in isolation, the numbers destroyed on each occasion vary and in some cases are low. First, because the overall numbers, when all the atrocities are considered together, is, in fact, high. Second, because the numbers destroyed on each occasion have to be assessed in light of the opportunities that arose, by reference to the group that was targeted in the area or village.

67. Mr. President, Members of the Court, I have spent some time in my submissions on the pattern of conduct focusing on artillery attacks, and the atrocities committed by the advancing Serb forces as they took each village and each town in the region which was intended to be "Greater Serbia", and I have highlighted the killings that ensued. But let me also address the fate of those who were not killed.

68. This was dealt with in some detail in the submissions yesterday morning, in particular the speech of Professor Crnić-Grotić. So far as the sexual violence is concerned, her submission, which she made good with example after example, was that gang-rapes of Croat women were commonplace. Many of the attacks she listed took place in the victims' homes, in public or in detention camps. And as she made clear, sexual violence has been recognized by the United Nations Security Council as an act capable of being a constitutive act with regard to genocide.

69. The recital of the evidence of widespread and systematic torture was no less gruelling. Brutal and often sadistic violence perpetrated repeatedly over a wide area. The findings of the ICTY were brought to the Court's attention and they speak for themselves.

70. And what of those detained? Their fate was also detailed in the speech of Professor Crnić-Grotić. Over 7,700 Croatian citizens were held in detention camps in occupied Croatia, in Serbia and elsewhere. Based on the evidence before this Court I can do no better than to adopt the description used yesterday morning: incarceration was always a prelude to severe beatings and ill-treatment, in many cases sexual violence, and in some cases summary execution.

71. Then, of course, there are the many tens of thousands who fled from the occupied regions in fear of their lives.

72. All of these acts come within, and have to be seen in the context of, the 17 factors relied on by the Applicant as constituting genocide when taken together. Killing, torture, abuse, sexual violence, detention camps, and terrified fleeing. The relentless evidence from each village, each town and each community across the areas earmarked for "Greater Serbia" reveals vignette after vignette of the cumulative effect of these factors operating on the Croatian people living there. Taken together, we submit, this is powerful and compelling evidence of genocide.

73. In the *Bosnia* case, this Court distinguished between the destruction of a group and its "mere dissolution"[19]. It is the Applicant's submission that it is impossible to describe the striking patterns of behaviour and the widespread taking of opportunities to destroy Croats living in the areas to be included in "Greater Serbia" as in any way consistent with the "mere dissolution" of that group. The evidence does not show "mere dissolution". Mere dissolution would have been achieved by rounding up the groups and transporting them to other places. That did not happen. Instead, the evidence shows systematic destruction deliberately perpetrated by the Serb forces, JNA and the paramilitaries against the group of Croats in issue.

(f) ***The lack of ICTY genocide convictions***

74. The Respondent makes much of the fact that the ICTY has not convicted anyone for the crime of genocide in the cases relied upon by the Applicant as supportive on the facts.

75. In my speech on Tuesday on evidence and issues of proof, I set out why the Applicant submits that, in the circumstances of this case, a prosecutorial decision not to prosecute for genocide should be given no probative value in respect of State responsibility. I do not repeat those submissions here.

76. This Court of course has a different and much wider role. It has also a number of significant advantages.

(1) First, this Court can undertake a holistic assessment of the conduct of all the relevant players and all the relevant events on the totality of the evidence.

(2) Second, this Court has not only the advantage of all the "highly persuasive" findings of the different ICTY cases, but also has the advantage of other evidence which was not before the ICTY at all.

(3) And third, this Court is concerned with State responsibility not individual responsibility: the cumulative impact of multiple acts systematically perpetrated by multiple actors on a large section of the population over a wide geographical area, not a small segment or puzzle piece in a much larger picture.

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[19] *Bosnia*, p. 123, para. 190.

(g) ***Conclusion on the specific intent for genocide***

77. Mr. President, Members of the Court, the ICTY findings relevant to the issues before this case and the free-standing evidence presented by the Applicant establish a very large number of separate genocidal acts committed across the identified regions during the period 1991 onwards. The Applicant submits that they show a consistent pattern of conduct which can lead to only one conclusion about the intention underlying them.

78. Applying the test expounded by this Court in the *Bosnia* case, the facts of this case, prove conclusively that the Serbs perpetrating the atrocities which make out the *actus reus* of genocide harboured an intention to eradicate groups of Croats living in the areas to be included in "Greater Serbia", through a combination of crimes including murder on a wide scale, and the infliction of persecution and destruction of property. The Applicant submits this is sufficient to constitute the specific intent for the crime of genocide.

79. Sometimes a small detail is very revealing. No doubt the descriptions used by the perpetrators to describe their understanding of what they were doing, on their own, would not prove a case such as this. But they are very telling. As you have heard from Professor Sands, the JNA military intelligence report of 13 October 1991 recorded that in "the greater Vukovar, volunteer troops under the command of Arkan . . . are committing uncontrolled genocide and various acts of terrorism"[20]. Their description in an intelligence briefing — "uncontrolled genocide". Elsewhere, a different area, testimony of a Serb TO fighter describing the assault on Saborsko, and this testimony includes the passage where he explains that, his words describing what happened, "*After Saborsko was conquered*, . . . [the TO commander] spent some time there, he issued orders to liquidate the people as well as orders to steal the properties."[21] A TO fighter describing what he was being asked to do. And another former TO fighter has described how, in Četekovci, his words, "[t]he order to commit genocide against the civilian population" was issued by the TO commander[22]. These are descriptions — indeed, admissions — of destruction, nothing less. They are explicit, contemporaneous accounts of genocidal intent being acted upon. That

[20]RC, para. 9.86 (1).

[21]MC, Vol. 2 (II), Ann. 365; emphasis added.

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

those perpetrating the atrocities in issue thought that they were involved in genocide speaks volumes.

V. Failure to prevent genocide

80. Mr. President, Members of the Court, as noted at the outset of this speech, all the arguments I have made and the evidence I have highlighted apply equally to responsibility for failure to prevent, and responsibility under the doctrines of complicity, conspiracy and attempt.

81. Article I of the Genocide Convention imposes two distinct yet connected positive obligations to prevent and punish genocide. The first obligation requires the State to take all steps within its power to ensure that those within its jurisdiction or subject to its control (whether public officials, members of the armed forces or private individuals) do not commit the crime of genocide. The second obligation is to ensure that the perpetrators of genocide and related acts are punished.

82. The obligation to prevent acts of genocide depends on proof that acts of genocide have in fact occurred, and focuses on the State's responsibility for failure to intervene. Obviously if this Court finds that the Applicant has proved its primary case then it is unnecessary to go on to consider the alleged breach of the duty to prevent acts of genocide. But, if not, failure to prevent acts of genocide takes centre stage in the Applicant's argument.

83. The legal framework was dealt with by Professor Sands in his speech on Tuesday. Given the close co-operation between the JNA and the Serbian forces (including volunteer paramilitary forces) of the autonomous Serb authorities, and in particular given the findings of the ICTY in the cases of relevance to the issues before this Court that all military operations were conducted under the effective command of the JNA, the Applicant submits that if the Court were to hold that Serbia is not responsible for the commission of, or complicity in, the acts of genocide, it is nonetheless responsible for a failure to prevent genocide.

84. There can be no doubt that the JNA military hierarchy, and Serb political leadership, were fully aware of a serious risk that acts of genocide were being, or were about to be, committed. In its Reply, the Applicant gives the example of the activities of the "Serbian Guard" in Eastern Slavonia. Three military intelligence reports in October 1991, which expressly refer to acts of genocide and instructions to volunteers to kill everyone found in Croat houses "including children,

elders, disabled people, [and] women"[23], demonstrate clearly that, from at least from 13 October 1991, the JNA leadership and political leadership in Serbia, were aware of the activities of Arkan's paramilitaries, and were aware that they were committing acts that they themselves characterized as genocidal.

85. In light of the ICTY findings in *Mrkšić*, there can be no doubt that the JNA had the capacity to prevent this; the military capabilities of the JNA far outweighed those of the paramilitary groups, including Arkan. In reality, without JNA collaboration or consent, the paramilitary groups, including Arkan, would have been unable to mount sustained attacks on the Croat civilian population. The Trial Chamber in the *Mrkšić* case found that the JNA had the *"military might to enforce"* its effective command and control of "volunteer or paramilitary units fighting in the Serb cause" even though it — and this is the ICTY — "may have been reluctant to be too heavy handed in doing so"[24]. So they are finding, they had the military to do it, but they may have been reluctant. Given the military capability of the JNA, its failure to intervene to prevent genocide, in our submission, amounts to a breach of Article I of the Genocide Convention, a breach which is attributable to Serbia.

86. More generally, as Professor Sands in his overarching speech demonstrated, the evidence that Serb paramilitaries operated with the full knowledge, direction and active control of the Serb authorities is consistent and compelling.

87. Although in its defence the Respondent points to instances where individual JNA soldiers intervened to save Croat civilians from imminent execution or torture, and no one would take away from the courage of those individual soldiers, as Professor Sands exposed, these isolated examples only serve to reinforce the extent of the JNA's knowledge of and control over the atrocities committed by paramilitary forces.

VI. Conspiracy, attempt and complicity

88. I turn briefly to conspiracy, attempt and complicity. Again, the international legal framework was set out by Professor Sands and I do not repeat it.

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[23]RC, para. 9.86 (2).

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

89. It is the Applicant's case that the findings of the ICTY clearly establish that there was a conspiracy between Serb leaders to commit crimes against humanity involving widespread and systematic attack on groups of Croats through the perpetration of acts prohibited by Article I of the Convention. When the findings of all relevant [ICTY] judgements are considered together with the free-standing evidence provided by the Applicant to this Court, it is clear that the conspiracy had as its objective genocide.

90. Equally, the ICTY findings clearly establish complicity. The only question is the intention required of the State to trigger liability. As the Applicant set out in its pleadings, a person is guilty of complicity in genocide if they plan, order, aid or abet, or provide the means to enable or facilitate the commission of the crime of genocide, knowing that that was the principal perpetrator's intention, namely, to destroy a protected group in whole or in part.

91. When the findings of all the ICTY judgements are considered together, again with the free-standing evidence, in particular the evidence about the acts of Serb paramilitary groups, it is clear they not only had as their intention to destroy the Croat civilian population living in the areas claimed as "Greater Serbia", but also that the JNA and Serb political leadership were well aware of that intention.

VII. Failure to punish

92. Finally, I turn to failure to punish. The importance of the obligation in Article I of the Genocide Convention to punish acts of genocide is reflected throughout the Convention's provisions. In this case the Respondent had failed to surrender a number of high-profile suspects when the Applicant submitted its Memorial. Since then, although there have been surrenders, these have been delayed over many years in breach of the obligation clearly set out in Article IV of the Genocide Convention.

Mr. President, Members of the Court, that brings to an end this speech. Thank you for listening to these submissions. With your permission, I will now hand over to Professor Crawford, to deal with the question of jurisdiction but it may be convenient if that commences after the break.

The PRESIDENT: Thank you, Sir Keir. The Court is now going to take a 15-minute break. The hearing is suspended.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

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

Mr. CRAWFORD:

JURISDICTION OVER EVENTS BEFORE 27 APRIL 1992

I. Introduction

1. Thank you, Mr. President. Mr. President, Members of the Court, in his separate opinion on preliminary objections in the *Bosnia* case, Judge Shahabuddeen noted that if Serbia's arguments in that case were correct, they would "lead in one way or another" to "an inescapable time-gap" in the protection afforded by the Genocide Convention to the people in the former SFRY. ~~*[Screen on]*~~ In his words:

> "It is difficult to appreciate how the inevitability of such a break in protection could be consistent with a Convention the object of which was 'on the one hand . . . to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.' . . . [T]he object and purpose of the Genocide Convention required parties to observe it in such a way as to avoid the creation of such a break in the protection which it afforded."[25]

2. I am going to explain why Serbia's jurisdictional arguments in this case are wrong as a matter of law and would undermine the effectiveness of the Convention[26]. Yet again they would result in "an inescapable time-gap". Serbia now claims that it only came into existence on 27 April 1992 and was not bound by the Convention before then. Alternatively, it says that Croatia only came into existence on 8 October 1991 and cannot raise claims based on facts before then. Either situation, Serbia asserts, would require the Court to apply the Convention retroactively, contrary to Article 28 of the Vienna Convention on the Law of Treaties. But in fact the opposite is true. Either situation would frustrate the object and purpose of the Convention, as interpreted in accordance with the law of treaties, and would do so precisely in the circumstances where atrocities

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[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 635, separate opinion of Judge Shahabuddeen.

[26] See further Reply of Croatia (RC), Ch. 7.

such as genocide are most likely to occur. It would open up the possibility that acts of genocide for which States are responsible *erga omnes* could be committed with impunity in circumstances of State dissolution or dysfunction. It would reduce the Convention to a hortatory instrument applicable only to States at peace with themselves and each other. That would be an extraordinary result. ~~*[Screen off]*~~

3. Mr. President, Members of the Court, I have already addressed you on the issues of attribution. These issues and that of the temporal application of the Convention are factually interconnected, though analytically distinct. What I showed earlier is that certain conduct is attributable to Serbia, including conduct before 27 April 1992 while it was in *statu nascendi*. When I did that, I left jurisdiction with respect to that period aside. You also left it aside at the preliminary objections stage, on the ground that it did not have an exclusively preliminary character[27]. I am now going to make two main points. First, the substantive obligations of the Convention apply to conduct by Serbia during the entire period of the dispute. Secondly, the Court has jurisdiction *ratione temporis* in respect of that entire period.

II. Jurisdiction *ratione personae*

4. Mr. President, Members of the Court, before I come to those points, let me briefly discuss jurisdiction *ratione personae*. This was dealt with at the preliminary objections stage. But it is important to recall that the Court's jurisdiction over Serbia in this case arises from succession to the Genocide Convention rather than accession. In other words, it arises by reason of an existing obligation that continued in effect rather than from one newly entered into.

5. When Serbia purported to "accede" to the Convention on 12 March 2001, it made a reservation with respect to Article IX. But as you pointed out, even if that reservation were effective, it would be irrelevant to the jurisdiction already invoked by Croatia[28]. In its Application filed in 1999, Croatia invoked jurisdiction on the basis that the SFRY was a party to the Genocide Convention and that Serbia was bound by it as a successor State to the SFRY[29]. I will not repeat

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[27] *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. 460, para. 130; hereafter *Croatia*.

[28] *Croatia*, *Preliminary Objections*, p. 445, para. 94.

[29] Application, para. 28.

the complex history of Serbia's claim to constitute the personality of the SFRY or Croatia's arguments as to its legal effect. Having dealt with that issue a number of times, the Court has no doubt heard enough of it. I will limit myself to summarizing your conclusion at the preliminary objections stage. Taking into account the text of Serbia's declaration and note of 27 April 1992 and its "consistent conduct . . . at the time of its making and throughout the years 1992–2001", you held that from that date it had accepted that it would be bound "in respect of all the multilateral conventions to which the SFRY had been a party *at the time of its dissolution*" — I emphasize those last words — including the Genocide Convention[30]. You also held that this situation continued until at least 1 November 2000, when Serbia became a party to the Statute of the Court, with the result that the Court has jurisdiction *ratione personae* over Serbia on the basis of succession to the Genocide Convention[31]. This remains the principal ground on which Croatia says you have jurisdiction.

6. You commented then that in light of the declaration of 27 April 1992 and Serbia's consistent conduct, you did not need to consider whether Serbia would have succeeded to the Genocide Convention *ipso iure* in any event[32]. Every indication, however, is that it would have done so. The relevant principle is recognized in the Vienna Convention on State Succession in Respect of Treaties, to which the SFRY was a party[33]. In the *Čelebići* case, the ICTY Appeals Chamber considered whether Bosnia-Herzegovina had succeeded to the Geneva Conventions.

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[30]*Croatia*, *Preliminary Objections*, pp. 454–455, para. 117; emphasis added.

[31]*Croatia*, *Preliminary Objections*, p. 455, paras. 118–119.

[32]*Croatia*, *Preliminary Objections*, p. 455, para. 117.

[33]Vienna Convention on State Succession in Respect of Treaties, 23 Aug. 1978, 1946 United Nations, *Treaty Series (UNTS)* 3, Art. 34:

"(1) When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

(2) Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

Bosnia-Herzegovina had made a declaration that could have been regarded as a notification of succession. ~~*[Screen on]*~~ But the ICTY was

> "of the view that irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may now be considered in international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of a universal character which express fundamental human rights."[34]

7. Similarly, the Badinter Commission emphasized the need for all human rights treaties to which the SFRY was party to remain in force with respect to all of its territories[35]. The Commission did not identify or foresee any time gap. The same view has been taken by the United Nations Human Rights Committee. ~~*[Next graphic]*~~ Civil and political rights, it has commented,

> "belong to the people living in the territory of the State party . . . [O]nce the people are accorded the protection of the rights under the Covenant [it was the Covenant on Civil and Political Rights], such protection devolves with the territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession . . ."[36]

8. ~~*[Screen off]*~~ The ICTY noted in the *Čelebići* case that Bosnia-Herzegovina had "recognised" the principle before this Court by contending that the Genocide Convention falls within the category of instruments to which it applies[37]. There can be no doubt that this is so. Even if Serbia would not have succeeded to the Convention *ipso iure*, its declaration still had much the same effect: that effect was that Serbia was bound from the moment it came into existence. There was no period during which it was *not* bound as a State.

9. Our submission then is that the Genocide Convention accords jurisdiction to this Court over conduct before 27 April 1992. Only jurisdiction exercised on that basis would resolve the problem of a time gap in the protection afforded by the Convention. But in case of any doubt on this point, I should mention that there would still be an alternative ground for jurisdiction over conduct predating 27 April 1992 in this particular case. This is Serbia's declaration on that date. It

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[34]*Prosecutor* v. *Zejnil Delalić*, 20 Feb. 2001, IT-96-21-A *(Čelebići)*, para. 111.

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

[36]Human Rights Committee, General Comment 26, General Comments under Art. 40 (4) of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1631st meeting, paras. 3–4.

[37]*Čelebići*, para. 111, n. 137.

declared that it "continu[ed] the state, international legal and political personality of the [SFRY]" and that it "shall strictly abide by all the commitments that the [SFRY] assumed internationally"[38]. Its note to the United Nations similarly affirmed that it "shall continue to fulfil all the . . . obligations assumed by [the SFRY] in international relations"[39]. Of course, Serbia's claim to continue the legal personality of the SFRY was eventually abandoned. But its declaration that it would assume the international obligations of the SFRY still constitutes a binding unilateral declaration[40]. It was not conditional. Serbia did not say: "If and insofar as individual states recognize us as continuing the legal personality of the SFRY, we will comply with the SFRY's international obligations towards such states." It affirmed its then position that it was the continuation of the SFRY and it additionally affirmed that it would continue and fulfil the SFRY's legal obligations "in international relations" generally. It did not reduce international relations to a mass of bilateral relations refracted through the cracked mirror of the former Yugoslavia. Nor should this Court do so.

10. Accordingly, if, contrary to our submissions, the Court were to find that some or all of the conduct in breach of the Convention was not attributable to Serbia but to the SFRY, and even if it identified some, for example, limit on the substantive obligations in the Convention, Serbia would still have assumed responsibility for such conduct attributable to the SFRY before 27 April 1992. Its own binding unilateral declaration precludes it from arguing otherwise.

III. Jurisdiction *ratione temporis*

(1) Obligations generally applicable to a nascent State

11. Mr. President, Members of the Court, I now turn to the question of temporal jurisdiction, properly so called.

12. Serbia accuses Croatia of arguing for a form of retroactivity. The characterization is misleading, and the authorities Serbia cites to refute it are largely irrelevant. On Croatia's case, whatever the basis of jurisdiction *ratione personae*, the situation is characterized by continuity.

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[38]Joint Declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 April 1992, United Nations doc. A/46/915, Ann. II.

[39]Joint Declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 April 1992, United Nations doc. A/46/915, Ann. I.

[40]See *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974,* p. 253, paras. 43–51.

The binding unilateral declaration was expressed in terms of continuity with the obligations of the former SFRY and leaves no doubt that Serbia intended to bind itself in respect of earlier conduct. Similarly, if jurisdiction is exercised on the basis that Serbia succeeded to the SFRY as a party to the Genocide Convention, then the obligation is also continuous. So Croatia is not seeking to surprise Serbia by extending the effect of some entirely new obligation back into the past. The situation differs markedly from that of accession, real or contrived. Succession to a treaty applies to the successor State from the very inception of that State. And if the inception of a State involves a process, as commonly it does, it applies throughout that process. It is a form of transmission of *existing* legal obligations in the real circumstances of international relations, and not, as I said yesterday, in relation to a succession of companies registered in New York. It is not a mode of acquiring new obligations, it is a mode of accepting existing ones. The rationale of this rule of succession would be defeated if there was any period during which conduct was attributable to a nascent State but the nascent State was not bound by treaties that it succeeded to on formally proclaiming its existence. Succession is a framework, not a vacuum.

13. So what international obligations are applicable in respect of conduct while a State is in *statu nascendi*? Serbia claims to have a simple answer to that question: that "the insurrectional or other movement must *itself* have committed a violation of an applicable rule of international law"[41]. It adds that Croatia's case is incompatible with the unilateral declarations that national liberation movements may make under the Geneva Conventions to widen the applicability of international humanitarian law[42]. But this is a misunderstanding of Article 10 (2) of the Articles on State Responsibility, and it is a fundamental misunderstanding.

14. The rule reflected in Article 10 (2) is not concerned with the responsibility of a movement *qua* movement whether or not it succeeds. It is concerned with the conduct of a movement *qua* State in embryo — conduct by a movement that eventually attains statehood, which international law treats as conduct of the State and as subject to the international obligations of that State, from the beginning. The ILC commentary recognizes this distinction when it observes that an "insurrectional movement may itself be held responsible for its own conduct under international

[41]Counter-Memorial of Serbia (CMS), para. 346.

[42]CMS, paras. 346–350; Rejoinder of Serbia (RS), para. 182.

law, for example for a breach of international humanitarian law", but "the international responsibility of unsuccessful insurrectional or other movements" falls outside the scope of the Articles, "which are concerned only with the responsibility of States"[43]. Professor Ago's draft commentary, or perhaps I should say more accurately the ILC's draft commentary inspired by Professor Ago, on which Serbia seeks to rely, took the same position. It said: "the question arises in the same way in cases where the insurrectional movement, at a given time in the struggle, constituted an entity which was liable as such to have international responsibility attributed to it, and in the case where that 'intermediary' phase did not occur"[44]. In other words — and with Ago's commentary one often has to use other words — Article 10 (2) may apply even where the movement was *never* capable of attracting any international responsibility *qua* movement. In even clearer terms, the draft commentary added (this was the draft commentary of 1996): "[i]t does not therefore seem entirely correct to refer to these possible cases as though they were cases of State responsibility 'for wrongful acts of an insurrectional movement'"[45].

15. It is international obligations *of the State* that apply to conduct attributable under Article 10 (2). And there must be such obligations or there would be no point in having a rule of attribution, and there would be a vacuum. It is submitted that the same functionalist approach that underpins Article 10 (2) — the same common sense — applies here. The applicable obligations are the obligations of the State that are capable of applying in respect of that period. There is no reason *in principle* to distinguish between treaty and customary obligations that bind a State at the moment it comes into existence, and especially where the State succeeds to treaties "of a universal character which express fundamental human rights"[46].

16. Mr. President, entirely peaceful transitions, well organized, happening at a precise moment in time — such as that from Czechoslovakia at the end of 1992 — may be deemed to have occurred at a single moment, although even in such cases problems can arise. But when new States are born in conflict and disruption, the need for a continuing legal framework is even more

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[43]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (YILC)* 2001, Vol II (2), Art. 10, para. 16.

[44]*YILC*, 1975, Vol. II, pp. 101–102, para. 8.

[45]*YILC*, 1975, Vol. II, p. 101, fn. 269.

[46]*Čelebići*, 20 Feb. 2001, IT-96-21-A, para. 111.

pressing. If such States are considered as born in a vacuum, legal accountability will disappear. So will legal protections, precisely when they are needed most.

17. Of course, the application of a treaty to conduct by a nascent State is subject to the terms of the treaty. I will now establish that there is no applicable temporal limitation in the Genocide Convention. On the contrary, its object and purpose suggest that it was designed to avoid the creation of any time gap and that it would apply to conduct by a nascent State even if that result did not already follow from general principles of succession and continuity.

(2) Temporal scope of the substantive provisions of the Convention

18. I turn, then, to the substantive obligations of the Convention.

19. The fundamental point here**,** and it has been recognized by this Court as long ago as in 1951, ***is that*** the Convention is not a synallagmatic bargain creating a diffuse bundle of bilateral rights and obligations between States parties. It was specifically designed to apply as broadly as possible, both substantively and in its provision for international dispute settlement. Professor Sands has discussed its development and noted the position you took in 1951. An important point is that the Convention regulates a crime that was conceived of as *already existing* in international law. Thus the preamble refers to the General Assembly's declaration in 1946 "that genocide *is* a crime under international law . . . condemned by the civilized world"[47]. In the words of Article I of the Convention: "[t]he Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law"[48]. Confirm. In 1951 you reiterated that the principles of the Convention bind States "even without any conventional obligation" and that the Convention was intended to be "definitely universal in scope"[49]. In *Bosnia*, you confirmed that the obligations under it are obligations *erga omnes*[50].

20. On Wednesday, Judge Cançado Trindade asked about the relevance of the case law of international human rights tribunals for the international responsibility of States for genocide. The

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[47]Genocide Convention, preambular para. 1; emphasis added.

[48]Genocide Convention, Art I; emphasis added.

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

[50]*Bosnia, Preliminary Objections*, p. 616, para. 31.

short answer is that it is fully consistent with these principles. In your separate opinion in the *Plan de Sánchez Massacre* case in the Inter-American Court, you, Judge Cançado Trindade, affirmed that the Convention reflects a principle of customary international law that binds States in any event[51]. You also pointed out that the prospect of individual criminal responsibility before tribunals such as the ICTY does not replace but co-exists with State responsibility, and that "this is of crucial importance for the eradication of impunity"[52].

21. Serbia claims that the Convention was enacted "to secure that no *future* instances of genocide will take place" — emphasizing the word "future"[53]. That argument conflicts both with the declaratory character of the Convention and with its express extension to the punishment as well as the prevention of genocide. Serbia argues: "this is not a case about compliance with customary obligations governing questions of genocide, even where the treaty-based prohibition and the customary international law prohibition . . . are identical insofar as their content is concerned"[54]. The distinction is merely apologetic and it takes Serbia nowhere. The concept of genocide is identical in custom and treaty. What the Convention added was an authoritative definition of "genocide" — one that has never been questioned since, in principle — and a framework for international co-operation, and it did so *erga omnes* from the date of its entry into force.

22. Of course, the Convention also accords jurisdiction to the Court. But this issue is separate from the temporal scope of the substantive obligations to prevent and punish genocide. Serbia seeks to conflate the two issues when it says: "even if the content of the prohibition . . . under customary international law and in the Convention is identical, it is the Convention that brought fundamental changes as to the enforcement of the prohibition"[55].

23. But the obligation to prevent and punish genocide is capable of encompassing genocide whenever occurring, rather than only genocide occurring in the future, after the Convention enters

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[51] *Plan de Sánchez Massacre* v. *Guatemala*, Inter-American Court of Human Rights, 29 April 2004, separate opinion of Judge Cançado Trindade, para. 26.

[52] *Ibid.*, para. 39.

[53] CMS, para. 237; emphasis in the original.

[54] CMS, para. 211.

[55] CMS, para. 247.

into force for a particular State. As you have twice observed — at the preliminary objections stage in *Bosnia* and the preliminary objections stage in this case — there is no express limitation *ratione temporis* in the Convention[56]. It is to be distinguished from such cases as *Ambatielos*, which Serbia cites for the proposition that "[i]n order to prove a retroactive application . . . one would have to find . . . either 'a different intention appearing from the treaty' or such an intention being 'otherwise established'"[57]. Well, *Ambatielos* concerned a commercial claim, not a claim for breach of an *erga omnes* obligation, and not one under a multilateral human rights treaty falling within the category identified by the ICTY in the *Čelebići* case. The Convention evidences an object and purpose — as identified by Judge Shahabadeen[58], amongst others — requiring States to avoid the creation of a time gap of the kind that would exist if Serbia were not bound by it while *in statu nascendi*. Serbia asked in its Rejoinder what legal significance Croatia attaches to this apprehension of a time gap[59]. The apprehension is of impunity, impunity of the responsible State when the individuals responsible have passed into history.

24. Mr. President, Serbia, relying on comments that you made in ***these*** proceedings, argues that there is no prospect of a gap or hiatus in the protection, since the customary prohibition on genocide continued to apply and the SFRY remained party to the Convention so long as it continued to exist[60]. But the case we have made is that the relevant conduct was conduct of the JNA or under its direction and control, and that the JNA was at that time a *de facto* organ *of the nascent Serbian State*. The apprehended gap in protection is a gap in protection from acts by those *de facto* organs of a nascent Serbia. Provided our arguments about attribution are accepted, it is no answer to this to say that in a formal sense the Convention continued to bind the SFRY, which was undergoing an irreversible process of dissolution. By the relevant time, when the protection of the Convention was needed most, the SFRY was a castle of sand, its putative responsibility transient and worthless.

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[56]*Bosnia*, *Preliminary Objections*, p. 617, para. 34; *Croatia*, *Preliminary Objections*, p. 458, para. 123.

[57]CMS, paras. 233–234 citing *Ambatielos (Greece* v. *UK)*, *Merits*, *Judgment, I.C.J. Reports 1953*, p. 10.

[58]*Bosnia*, *Preliminary Objections*, p. 635, separate opinion of Judge Shahabuddeen.

[59]Rejoinder of Serbia (RS), para. 265.

[60]*Ibid.*, paras. 267–268.

25. So I will repeat the conclusion that we say must be drawn about the temporal scope of the substantive obligations of the Convention. The obligations relate to genocide whenever occurring, not only to genocide occurring after the Convention formally entered into force for Serbia as a new State. It follows that the obligations apply to all conduct applicable to Serbia, including to conduct while it was in *statu nascendi*. International law can do anything in relation to temporal obligations if that is what is intended***, i***f that is the object and purpose of the text. I repeat that these are the *substantive* obligations in the Convention, that are declaratory of custom, in particular the obligations to prevent and punish genocide.

26. Finally, I should note that Croatia argues that Serbia is responsible for continuing breaches of the Convention that do *not* require it to establish jurisdiction in respect of conduct predating 27 April 1992, including the failure to prosecute and punish the perpetrators[61]. Serbia has no answer to that point.

(3) Temporal scope of the compromissory clause

27. Mr. President, Members of the Court, I come to the crucial question, the temporal scope of jurisdiction under the compromissory clause, Article IX.

28. This comes down to the text and to general principles of treaty interpretation. The considerations I have just discussed — the broad terms of the substantive provisions of the Convention, its plainly and strongly expressed object and purpose, the need to avoid "an inescapable time-gap"[62] — these considerations are all relevant, and they all support a broad interpretation. There are also principles of treaty interpretation of particular relevance to compromissory clauses. Rosenne identifies a presumption in favour of the retroactive effect of titles of jurisdiction, on the premise that "the purpose of a clause of jurisdiction is always to confer jurisdiction upon the Court and not to deprive it of jurisdiction"[63]. There is strong support for this in, among other cases, *Mavrommatis*. ***[Screen on]*** There the Permanent Court said:

> "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment . . . The reservation made in many

[61]RC, paras. 8.38–8.46, 9.82–9.94.

[62]*Bosnia, Preliminary Objections*; separate opinion of Judge Shahabuddeen, p. 635.

[63]S. Rosenne, *The Law and Practice of the International Court 1920–2005*, Vol. II (Jurisdiction), 4th ed. (Brill, 2006), pp. 915 *et seq.*

> arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation . . . and, consequently, the correctness of the rule of interpretation enunciated above."[64]
> ~~*[Screen off]*~~

29. Article IX is an example of a wide unqualified compromissory clause. It has been described as "a model of clarity and simplicity, opening the seizing of the Court as largely as possible"[65]. It contains nothing that might be described as a temporal limitation. The negotiating history shows that limited formulations were rejected, for the reasons the United Kingdom and Belgium made clear. This view is reinforced by reading Article IX in conjunction with Article I, which "confirm[s]" that genocide is a crime in both peace and war. In drafting the Convention, the States parties took pains to include every safeguard they could to prevent its temporal scope from being limited.

30. It is not only the substantive provisions that can apply to genocide wherever occurring, but also the compromissory clause. The clause is not limited to "disputes referred to it after its establishment"[66]. It does not exclude claims "arising out of events previous to [its] conclusion"[67]. Under Article IX there are two questions and two questions only. One: was Article IX in force for the State at the time the Court was seised? Two: is the conduct complained of attributable to that State? In the present case the answer to both questions is: yes, unequivocally.

(4) Does it nonetheless matter when Serbia was formally proclaimed?

31. Serbia has raised some objections to this broad interpretation, which I will now consider.

32. You held in *Bosnia* that you had jurisdiction "to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina" and that this was "in accordance with the object and purpose of the Convention as defined by the Court in 1951"[68]. You can be confident that in concluding, once

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[64] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35. See also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 93, 104-107; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 59; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 24, para. 43; and RC, paras. 7.17–7.31.

[65] R. Kolb, "The compromissory clause of the Convention" in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary*, OUP, 2009, p. 420.

[66] *Mavrommatis*, p. 35.

[67] *Ibid.*

[68] *Bosnia, Preliminary Objections*, p. 617, para. 34.

again, that you have jurisdiction over facts going back to "the beginning of the conflict", you are acting consistently with your jurisprudence and with the general principles underlying the *erga omnes* obligations in the Convention. But at the preliminary objections stage of this case, you observed that the finding in *Bosnia* concerned whether the Court, in exercising its jurisdiction, was limited to dealing with events subsequent to when the Convention might have become applicable between the parties[69]. Your comment was not addressed to the question of whether the relevant facts "included facts occurring prior to the coming into existence of the FRY"[70]. So the question left aside at that point might be put as follows. Given that the Convention does not expressly limit jurisdiction *ratione temporis*, and given the Court's previous finding that its temporal scope can extend to facts before it might have become applicable between the parties, does the fact that Serbia was not formally proclaimed until 27 April 1992 nonetheless limit its temporal scope in relation to conduct before that date?

33. As you observed, the question is "closely bound up" with the questions of attribution which I discussed[71]. But Croatia has met the attribution point. Attribution being established, the answer to the question is simple. Certain conduct before 27 April 1992 is plainly attributable to Serbia. That conduct breached applicable substantive obligations under the Convention. Jurisdiction extends to conduct during that period. There is no reason — none in the terms of the Convention, none in the jurisprudence, none in the general principles underlying *erga omnes* obligations — to doubt temporal jurisdiction. You ***would*** be creating a false problem, one that does not exist.

34. Any other approach would be paradoxical. Say there were some special rule to the effect that jurisdiction could not be invoked against a State on the ground that the State was not formally established at the time. That would peremptorily exclude from jurisdiction any conduct potentially attributable under Article 10 (2) of the Articles on State Responsibility. Article 10 (2) would be rendered completely impotent. We would have a rule of attribution saying that a State is responsible. We would have a case of indisputable succession to the treaty, a treaty designed to

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[69] *Croatia*, *Preliminary Objections*, p. 458, para. 123.

[70] *Ibid.*, p. 458, para. 123.

[71] *Ibid.*, p. 458, para. 124.

ensure continuity of obligations. Yet it would be logically impossible to hold the State to account, even if the temporal scope of the applicable jurisdictional instrument was as wide as it could conceivably be. In this case, the result would be a time gap, imposed by operation of law, that would defeat the law — a true gap that would undermine the object and purpose of the Convention precisely when its protection was needed. That would be a mockery of formalism.

35. Serbia argues in its Rejoinder that the references in Article IV to "constitutionally responsible rulers" and "public officials" presuppose "the existence of a State at the relevant time"[72]. What Article IV actually says is that persons committing genocide or other prohibited acts shall be punished, "whether they are constitutionally responsible rulers, public officials or private individuals". Serbia completely misses the point of the *statu nascendi* rule, which is that a State, along with its organs and officials, may exist in a *de facto* sense and attract international responsibility, before it was formally proclaimed. In fact there is nothing in the Convention to suggest that it was intended to depart from the widely recognized principle that conduct may be attributed to a State during the period it is *in statu nascendi*, or that it was intended that its jurisdictional clause should have a narrower scope. Was President Milošević a public official in October 1991? Of course he was, even while he was destroying the SFRY Constitution and proclaiming his allegiance to Serbia. At this time his sole effective responsibility was to Serbia, not to the old constitutional order he was responsible for eviscerating. Did the JNA exist as an army subject to official decision-making? Of course it did. Professor Sands reminded you that Milan Babić testified to the ICTY that, in August 1991, Milošević was the "Commander in Chief" with ultimate control of the JNA and other Serb forces[73].

36. If the law is incapable of dealing with violent transitions, it will fail in its task. A State cannot disclaim responsibility for its own conduct by post-dating its formal existence, like a villain post-dating a cheque in order to escape liability.

37. In short, the date of the formal proclamation of a State cannot be decisive of temporal jurisdiction. Where conduct is specifically attributable on the basis that it occurred while the State was in the process of emerging, the date of formal proclamation is irrelevant. The question simply

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[72]RS, para. 257.

[73]CR 2014/6, p. 66, para. 44 (Sands), citing testimony of Milan Babić, 20 November 2002, 13129–13130.

comes down to the temporal scope of the applicable jurisdictional instrument. As the Court affirmed in *Bosnia*, temporal jurisdiction can extend to conduct before the Genocide Convention might have become applicable to the parties***, as between them.***

38. Before I move on, I should also comment briefly on a related point made by you, President Tomka, in your separate opinion on preliminary objections.

39. You referred to the question of attribution: "the responsibility of an entity for acts committed before it became a State — and thus could have become a party to the Genocide Convention"[74]. You then said that that issue and the issue of succession to responsibility do not fall "within the jurisdiction of the Court under Article IX", since "[t]hat jurisdiction covers 'disputes between the Contracting Parties" and Serbia did not become a "Contracting Party" until 27 April 1992[75]. With respect, Sir, the answer to this lies in the remaining words of Article IX. It is expressed to extend to disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". And the dispute must be "between" contracting parties — as this dispute is. But the provision is not further limited as to the responsibility of a State *that was a contracting party at the time*. It just refers to the "responsibility of a State". The basis for that responsibility — whether it is the *statu nascendi* rule or some other basis recognized in the Articles on State Responsibility — does not affect the Court's jurisdiction from this perspective either.

40. Let me give it as an example. A dispute arises under the Convention at a time when one of the disputing States has a reservation in force under Article IX. Assume further that that reservation is subsequently withdrawn. Can you doubt that there could be a dispute between those two States as to matters which occurred when the reservation was in force? To say otherwise would be to create wholly unnecessary gaps in the accountability Article IX was intended to achieve.

41. In other words, this Court certainly has jurisdiction in a dispute about conduct that is attributable to a State on whatever basis, and that is said to have breached the Convention during the whole period over which the Convention establishes temporal jurisdiction.

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[74]*Croatia*, *Preliminary Objections*, p. 520, para. 13, separate opinion of Judge Tomka.

[75]*Ibid*.

IV. The date of Croatia's independence is irrelevant

42. Mr. President, Members of the Court, what I have said answers Serbia's point that it only came into existence on 27 April 1992. Let me explain why, in light of these conclusions, Serbia's further objection that Croatia only came into existence on 8 October 1991[76] is irrelevant.

43. Croatia, like Serbia, succeeded to the Convention as a successor State to the SFRY. It formally notified the United Nations of its succession in 1992. The date of succession was the date of independence of Croatia, on 8 October 1991[77].

44. Again, Serbia's argument that Croatia cannot invoke responsibility in respect of conduct before that date falls into the error of treating the Genocide Convention as a bundle of synallagmatic obligations. We know that the substantive obligations reflected in the Convention do not require States to a dispute to be parties to it at a particular time. I have already established that. We know the compromissory clause has complete temporal coverage of genocide whenever occurring, in particular where a State becomes party to it by means of succession. We know that it reflects *erga omnes* obligations, owed to the international community as a whole rather than to a specific State. And we know that *any* State can invoke responsibility for breach. This accords with what you said in *Barcelona Traction*[78] and what is spelt out in Article 48 of the Articles on State Responsibility: if an obligation is "owed to the international community as a whole", a "State other than an injured State is entitled to invoke the responsibility of another State"[79] for breach of that obligation. It would directly contradict these principles to manufacture a requirement that the invoking State have been formally independent at the time of breach.

45. To put it simply: any genocide that occurred was not genocide vis-à-vis Croatia or another particular State. Unlike a breach of a bilateral treaty, the identity of that State and the identity of the State invoking responsibility make no difference to the content of the obligation. Claims of genocide have nothing to do with diplomatic protection; they have nothing to do with nationality. They are not merely relative.

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[76]CMS, paras. 367–387.

[77]MC, para. 6.08.

[78]*Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain), Second Phase Judgment, I.C.J. Reports 1970*, p. 3. See also Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 48, para. 2.

[79]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 48.

46. It might be suggested that *erga omnes* obligations are owed to the "international community of *States* as a whole". The Vienna Convention on the Law of Treaties uses that phrase; the Articles on State Responsibility just refer to "the international community as a whole"[80]. But that theological difference makes no difference in this case. Croatia is a State. There is no basis for distinguishing between new States and old for this purpose. Croatia is, in any event, also an "injured State" within the terms of Article 42 of the Articles on State Responsibility.

47. So this further argument by Serbia must also be rejected.

V. Conclusion

48. Mr. President, Members of the Court, the interdependence of the jurisdictional and related issues that I have discussed may obscure their essential simplicity. I will finish by setting out, in the terms of a series of six propositions, why Serbia's argument that it was only formally proclaimed on 27 April 1992 does not in any way bar the exercise of jurisdiction in this case.

48.1. Proposition One: You have held that you have jurisdiction *ratione personae* over Serbia on the basis of treaty succession. Arguably succession could have occurred *ipso iure* even if Serbia had not accepted it. Additionally, even if you held (contrary to our case) that this did not apply to conduct pre-dating 27 April 1992, you would still have jurisdiction on the basis of a binding unilateral declaration.

48.2. Proposition Two: Croatia has made the case that certain conduct, including conduct before Serbia's formal proclamation on 27 April 1992, is attributable to Serbia, in particular pursuant to Article 10 (2). This conduct is subject to the applicable international obligations of the Serbian State.

48.3. Proposition Three: Croatia has made the case that the conduct is inconsistent with substantive obligations of the Genocide Convention. These apply to all conduct attributable to Serbia — whatever the basis on which it is attributable — during the relevant period, in accordance with the object and purpose of the Convention. To hold otherwise would defeat the object and purpose and would also defeat the rationale for the principle of succession to humanitarian treaties.

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[80]Vienna Convention on the Law of Treaties, 22 May 1969, 1155 *UNTS* 331, Art. 53; Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC*, 2001, Vol. II (2), Art. 48.

48.4. Proposition Four: Consistent with the scope of the substantive obligations and with the *Bosnia* decision, Article IX can accord jurisdiction *ratione temporis* in respect of events before the Convention might have become applicable to the parties in their *inter se* relations.

48.5. Proposition Five: If conduct is applicable to a State, there is no separate rule of jurisdiction which requires it to have formally and definitively been constituted as a State at that time. Serbia cannot have abrogated its responsibility for an independence really established at an earlier date, and never disputed by any other State, merely by postponing its formal declaration of that fact. That point bears repeating. Serbia's independence was never disputed, nor its being bound by the Genocide Convention. What was in dispute was which State Serbia was. But its being bound by the Convention did not depend upon which State it was. New or old, it was bound.

48.6. Proposition Six: The date of Croatia's independence is irrelevant, in part because the relevant obligations are *erga omnes* and can be invoked by any State.

49. Mr. President, Members of the Court, these propositions do not lead to any novel or surprising conclusion. They lead to exactly the conclusion that one would expect having regard to the object and purpose of the Genocide Convention and the need to avoid an "inescapable time-gap"[81] in its protection. The conclusion is that, with respect to the entire period of this dispute, the substantive obligations in the Convention bound Serbia and the Court has jurisdiction over all and any breaches attributable to Serbia during that period.

50. Mr. President, this concludes Croatia's first round of oral argument, and may I on behalf of my colleagues thank the Court for its careful attention during what has been, in some respects, a difficult week. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Professor Crawford. This, indeed, brings to an end the first round of oral argument of Croatia on its own claims. The Court will meet again on Monday 10 March at 10 a.m. to hear Serbia begin its first round of oral argument. Thank you, the Court is adjourned.

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[81] *Bosnia*, *Preliminary Objections*, p. 635, separate opinion of Judge Shahabuddeen.

The Court rose at 12.30 p.m.

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