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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

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

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le lundi 10 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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Ms Maja Seršić, Professor of International Law, University of Zagreb,

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Mr. Tomislav Boršić, Ministry of Justice,

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as Counsel and Advocates;

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

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

as Members of the Delegation;

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comme conseillers.

The PRESIDENT: Good morning, please be seated. The sitting is now open. The Court meets today to hear Serbia begin its first round of oral argument. I give the floor to Mr. Saša Obradović, Agent of Serbia. You have the floor, Sir.

Mr. OBRADOVIĆ:

INTRODUCTION

1. Good morning, Mr. President, distinguished Members of the Court; may it please the Court. It is a great honour to appear once again before the principal judicial organ of the United Nations as a representative of the Republic of Serbia. At the outset, I would like also to express the sincere respect for our colleagues representing the Republic of Croatia.

Historical significance of the case at hand

2. Mr. President, the honour and professional privilege I had representing Serbia in several cases before the International Court of Justice could not be at the same time a privilege for my country and its people. The cases in which Serbia was a party were of an exceptional gravity: these were cases born out of the 1990s conflicts in the former Yugoslavia, which left tragic consequences to all Yugoslav peoples and opened important issues of State responsibility. This case is the final one in that sequence. In this instant case Serbia expects — more than in any of its previous cases — that suffering of the Serb people should be also recognized, get due attention, and a remedy.

3. Today it is well known that the conflict in Croatia was followed by grave breaches of international humanitarian law. There is no doubt that Croats suffered a lot in that conflict. This case is an opportunity for all of us to remind ourselves of their tragedy, and our colleagues from the other side were working hard in that course last week. However, the Croatian war caused grave sufferings to Serbs as well, those Serbs who were citizens of the Socialist Republic of Croatia, but who, facing the separatist demands of the Croatian political leadership and the gradual dissolution of the former Yugoslavia, decided to establish their own national entity known as the Republic of Serbian Krajina. We hoped that something would be said in the Great Hall of Justice on their tragedy, but at the sittings last week the Krajina Serbs were not mentioned. This is not fair to them.

What happened in Croatia in the 1990s cannot be reduced to a simplified picture showing a sole perpetrator and a sole victim of genocide.

4. I would like to remind you, distinguished Members of the Court, of the words of my predecessor in this case, Professor Tibor Varady, who said:

> "Misdeeds of one side spurred misdeeds of the other side. At various times, different participants in the conflict got stronger — and those who were stronger inflicted more suffering. . . . It has always been known that misdeeds did take place in Croatia. Some of them amounted to serious crimes. Today, we know more about the character and about the dimensions of these crimes — and we also know more about the perpetrators. But it has also become known that crimes committed against Croats did not reach — let alone pass — the threshold of genocide. What happened is not even *prima facie* genocide."[1]

5. In the name of the Government and the People of the Republic of Serbia, I reiterate the sincere regret for all victims of the war and of the crimes committed during the armed conflict in Croatia, whatever legal characterization of those crimes is adopted, and whatever the national and ethnic origin of the victims. Each victim deserves full respect and remembrance.

6. Mr. President, the case at hand concerns the crime of genocide only, because the Court's jurisdiction is based exclusively on Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide[2]. It seems somehow that this case has always been in the shade of its more important predecessor, the case *Bosnia-Herzegovina* v. *Serbia-Montenegro*, which followed the complex and horrific conflict in Bosnia that caused several times more victims than the conflict in Croatia. In the *Bosnia* case, the Court refused to adopt a simplified characterization of the conflict as one genocidal campaign — the Court denied that genocide was committed throughout Bosnia-Herzegovina, saving that legal characterization only for the notorious massacre of men from Srebrenica that occurred in July 1995[3]. The legal discussion contained in the Judgment of 26 February 2007 quickly became an authoritative jurisprudence for the further interpretations of the Genocide Convention by other international courts and tribunals.

7. However, the case that Croatia, as the Applicant, submitted to the Court at the time of the NATO bombing campaign against Serbia seemed artificial from its very beginning. Not only that

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[1]CR 2008/8, p. 17, paras. 8 and 9 (Varady).

[2]Hereinafter "the Genocide Convention".

[3]*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)*; hereinafter *"Bosnia"*.

no serious commentator from Croatia has ever believed that Croats were victims of genocide, as we emphasized in our Rejoinder[4] but, moreover, the Croatian Application, from the mere historical point of view, seems highly disingenuous and even cynical. In the Application instituting proceedings, Croatia — in addition to the allegations on severe crimes committed against members of the Croatian national and ethnic group — also claimed that Serbia is responsible for the exodus of the "Croatian citizens of Serb ethnicity" in 1995, accusing thus Serbia for the engagement "in conduct amounting to second round of 'ethnic cleansing', in violation of the Genocide Convention"[5]. In other words, Serbs, according to the Applicant's initial claim, conducted ethnic cleansing of other Serbs that should be adjudged as genocide.

8. This accusation for *sui-genocide* does not stay alone as a paradox of the Croatian case. I have a duty to inform the Court that the people of Serbia today mainly believe that the Croatian false Application is a kind of the historical irony. Namely, both Croats and Serbs knew very well what genocide was — in the former Yugoslavia, both peoples were educated about the horrific crimes committed in Jasenovac, Jadovno, Jastrebarsko and other notorious Ustasha concentration camps of World War II (WW II). The tragic experience of the Serb people in the Nazi Independent State of Croatia and genocide committed against Serbs, Jews and Roma people from 1941 to 1945 are described in Serbia's Counter-Memorial as part of the factual background of this case[6]. Our presentation is supported by the reliable historical sources[7]. A chronology of the Ustasha movement after WW II, which was considered as a permanent terrorist threat to Tito's Yugoslavia from 1945 to 1990, is presented in Annex 8 with the Counter-Memorial. Without this piece of information, one can fully understand neither the significance of the 1990s appearance of Dr. Franjo Tudjman as a new political leader in Croatia who advocated the reconciliation between Croatian communists and neo-Ustasha movements, nor the uprising reaction of the Serbs in Croatia to that policy[8].

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[4]Rejoinder of Serbia (RS), paras. 16-18.

[5]Application instituting proceedings, para. 2. See also para. 33.

[6]Counter-Memorial of Serbia (CMS), paras. 397-420.

[7]See CMS, fn. 260–293, pp. 137–144 and Anns. 1–7 to the Counter-Memorial.

[8]CMS, paras. 426-442.

9. Although no acknowledgment of the WW II genocide is to be found anywhere in the Croatian written pleadings, the Respondent observes that the Applicant has neither contested nor denied the presentation of facts concerning the Nazi Government in Croatia between 1941 and 1945, its intent to destroy the Serb people under its authority, and the existence of the Ustasha's view that Serbs were a threat to the Croatian national identity. Consequently, the Respondent considers that the historical background related to the crime of genocide committed in the independent State of Croatia is therefore not in dispute between the Parties.

10. Mr. President, for the sake of clarity, I also have a duty to emphasize that presentation of the factual background relevant to both the claim of Croatia and the counter-claim of Serbia should not lead to a conclusion that these two peoples have a history of hatred and endless conflicts only. Not at all. In spite of many unfortunate events, Serbs and Croats lived in brotherhood for many decades. It is also a historical fact. That friendship was especially strong at the end of World War I (WWI), when the Croatian progressive leaders decided to join the Kingdom of Serbia creating so a unique State for South Slavs. It was further confirmed by their joint struggle for freedom in World War II (WWII), when the Serb rebels against the Ustasha terror were supported by Croatian compatriots in the partisan units.

11. Thus, our adversary in this case is neither the Croatian people nor the Croatian State, but the Croatian extreme nationalism. By challenging the false claim and rigid attitudes of the Croatian Government instituting these proceedings, we will challenge extreme nationalism as such, each and every nationalism, including Serbian, when it is capable to cause suffering to other peoples.

The Applicant's claim

12. On the other hand, the Croatian claim is — from the formal point of view — extremely serious. The Court is requested to adjudge and declare that Serbia is responsible for violations of Articles II and III of the Genocide Convention, as well as Articles I and IV related to the obligations to prevent and punish the acts of genocide. The Applicant claims that the whole political conflict with the complex historical process of dissolution of the former Yugoslavia, as well as the entire military affair with all crimes committed against the members of the Croat

national and ethnic group, must be seen as one and unique crime — genocide. The Applicant's allegations cover a wide time-frame from 1991 to 1995[9].

13. Now, allow me please to present the response of the Republic of Serbia in brief.

(a) Croatia did not produce to the Court any item of evidence, a document or a witness statement, which contains a proof of the existence of *dolus specialis* of the crime of genocide on the side of the leadership of the Republic of Serbia, or the Yugoslav Peoples Army (JNA), or Serbs from Croatia. The Applicant's approach to the method of proof in this case is not in accordance with the well-established practice of this Court in the cases of exceptional gravity, as we demonstrated in our written pleadings[10]. This will be further elaborated today.

(b) Even if we take the allegations of the Applicant at the highest — without taking a look at the probative weight of evidence produced in support of those allegations — the legal elements of the crime of genocide, or of any other act punishable pursuant to Article III of the Genocide Convention, cannot be reasonably inferred from those allegations[11].

(c) In addition, the Respondent considers that it cannot be responsible for acts and omissions that allegedly occurred prior to its existence as a State, i.e. prior to 27 April 1992, when the Federal Republic of Yugoslavia[12] was created, whatever the legal characterizations of those acts and omissions are[13]. This is particularly significant if one bears in mind that a vast majority of the incidents alleged in the Memorial took place in 1991, while a very few of them are alleged to have taken place after April 1992[14]. The allegations on those later incidents cannot be taken, even prima facie, as genocide.

(d) Even if we completely ignore the previous argument, the Respondent considers that the acts conducted in 1991 — as well as all later incidents — cannot be attributed to the Republic of Serbia in accordance with international law on State responsibility[15]. Those who committed the

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[9]Memorial of Croatia (MC), paras. 1.03 and 1.05.

[10]See CMS, Chap. III, "Questions of Proof"; RS, Chap. III, "Evidence produced by the Applicant".

[11]See CMS, Chap. VIII; RS, Chap. IV.

[12]CR 2008/8, p. 15, para. 2 (Varady).

[13]See CMS, Chap. IV; RS, Chap. II.

[14]See RS, para. 427, with subsequent fn. 432.

[15]See CMS, Chap. IX; RS, Chap. V.

crimes in Croatia were neither *de jure* nor *de facto* organs of the Republic of Serbia. Nor were the crimes committed on the instructions of, under the direction or control of, our State, as the recent practice of the International Criminal Tribunal for the former Yugoslavia clearly shows.

14. We believed that our legal arguments were reasonable and convincing enough, and that the new democratic Government of Croatia would withdraw its application lacking any basis in fact and in law. Unfortunately, this was proven not to be the case.

The counter-claim

15. In December 2009, Serbia filed its Counter-Memorial which contained the counter-claim. The Respondent presented many crimes committed by the Croatian governmental forces from 1991 to 1995, which were of the same nature as the crimes described by the Applicant. However, the final acts of mass killing committed during "Operation Storm" in August 1995 and thereafter, in our opinion, went beyond the legal characterizations of other atrocities conducted in that conflict. It is our task in these proceedings to present convincing evidence and legal arguments that the acts of the Croatian Government in "Operation Storm" possess all required elements of the crime of genocide, including its specific *mens rea*: intent to destroy the members of the protected group, in whole or in part, as such.

16. Mr. President, the consequences of "Operation Storm" are severe and lasting. According to the records of the Centre for Collecting Documents and Information *Veritas*, 1,719 Serbs were killed during and after that operation[16]. In total, 6,361 ethnic Serbs were killed or went missing during the entire conflict[17]. The Commission of the Republic of Serbia for Missing Persons has still been searching for more than 1,700 persons who went missing during the conflict in Croatia (around 600 of them in 1991, among whom were not only Serbs, but also a significant number of other ethnicities of the former Yugoslavia, who were the members of the JNA; then, around 110 Serbs in 1992; 35 in 1993; five in 1994, and around 990 Serbs who went missing in 1995, during operations "Flash" and "Storm"). More than 400 corpses exhumed by the Croatian organs have still been waiting to be identified. We hope it will finally be done when these hearings are

[16]The list is publicly available at: http://www.veritas.org.rs/wp-content/uploads/2014/02/Oluja-direktne-zrtve-rev2014.pdf.

[17]Statement of witness-expert Savo Štrbac (4.2.2).

over. Although the Serbian Commission for Missing Persons provided further information concerning several hundred graves on the territory of Croatia where the Serb victims had been buried, the Croatian organs are the last in the region in conducting the process of the requested exhumations.

17. According to the Report of the United Nations Secretary-General of 18 October 1995, approximately 200,000 Krajina Serbs fled from the region attacked by the Croatian Governmental forces in August 1995[18]. It was just a final stage of their decline in Croatia during the twentieth century. In 1931, Serbs made up almost 20 per cent of the total population of Croatia as a part of the Kingdom of Yugoslavia. According to the 2011 Croatian census, Serbs are now at the level of 4.36 per cent of the total number of the Croatian population[19]. The current number of ethnic Serbs in Croatia is three times less than their number in 1991.

18. Members of the Court, this inconvenient truth of statistical data, as well as our presentation of criminal acts committed during and after "Operation Storm", deserved more serious answer than we got from the Applicant in the written proceedings. In their response, we found, *inter alia*, an allegation that the Serb refugees were killed by other Serbs, namely the Bosnian Serbs Army[20], or that the Serbs left Croatia for "a number of reasons including difficult living conditions, poverty and general insecurity in the Republic of Serbian Krajina"[21]. No remorse. Nor forgiveness for Serbs from Krajina.

19. Having in mind the nature of the Croatian response to our counter-claim, one can easily imagine the position of Serbs in Croatia today. While the relationship between these two neighbouring States has been significantly improved in many fields, including the highest political level, the co-operation in the fields of economy and culture — the general position of Serbs in Croatia is still vulnerable. They are exposed to the hate speech from time to time[22]. The official Cyrillic signs on the municipal buildings in several towns have recently been demolished[23]. In

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[18]United Nations doc. A/50/648, para. 27.

[19]Available at the official web site of the Croatian Bureau of Statistics: http://www.dzs.hr/Hrv/censuses/census2011/results/htm/usp_03_HR.htm.

[20]Additional Pleading of Croatia (APC), para. 3.69.

[21]APC, para. 3.47.

[22]For example, see http://danas.net.hr/crna-kronika/foto-sramotan-natpis-osvanuo-na-sred-trga-bana-jelacica.

[23]See http://www.bbc.co.uk/news/world-europe-23934098.

December 2012, 17 years after Operation Storm, the President of Croatia, His Excellency Mr. Ivo Josipović, publicly admitted that the Croatian courts had not convicted as yet anyone for any single murder committed in that operation[24]. Moreover, Operation Storm is still celebrated in Croatia as a public holiday[25]. This case before the world's highest judicial forum will help that the truth about the tragedy of the Serb people in Croatia is revealed.

The Serbian legal team

20. Mr. President, allow me to introduce now our counsel and advocates who will further present our legal arguments in detail. Those are

— Professor William Schabas from the Middlesex University, London, and the Leiden University;

— Professor Andreas Zimmermann from the University of Potsdam;

— Professor Christian Tams from the University of Glasgow;

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

— Mr. Wayne Jordash, Barrister from London, who is also the ICTY defense counsel; and

— Mr. Dušan Ignjatović, Attorney at Law from Belgrade.

I would also mention, with gratitude, members of our team who significantly contributed in preparation of our written pleadings — Mr. Svetislav Rabrenović, Senior Adviser at the Office of the Prosecutor for war crimes of the Republic of Serbia, and Mr. Igor Olujić, Attorney at Law from Belgrade, as well as those who could not be with us until the end of these long-lasting proceedings — I would mention only the most important of them: our former Agent, Professor Tibor Varady, and two Co-Agents at various times, Mr. Vladimir Djerić and Mr. Vladimir Cvetković.

The schedule of presentation

21. Following my introductory words, Professor Schabas will address the Court concerning the interpretation of the Genocide Convention in light of the Court's 2007 Judgment and

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[24]Available on http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=12&dd=07&nav_category=11&nav_id=667053 in Serbian; translation submitted to the Court on 8 Aug. 2013.

[25]See CMS, paras. 1473-1476.

subsequent developments. Our response to the Applicant's claim will be continued by addressing the issue of evidence. Tomorrow, Professors Zimmermann and Tams will address the important question of jurisdiction *ratione temporis* in relation to the conduct preceding 27 April 1992, as well as in relation to the lack of standing of Croatia regarding the events prior to 8 October 1992. Thereafter, Professor Schabas will continue with the response to the Applicant's arguments related to the legal characterization of the allegations presented in the written and oral pleadings, apart from the question of probative weight of the evidence produced in support of those allegations. Finally, our counsel Lukić and Ignjatović will reopen the last line of our arguments concerning the issue of attribution. After their presentation, I will indicate further order of our arguments related to the counter-claim.

Mr. President, I respectfully ask you to give the floor now to Professor William Schabas.

The PRESIDENT: Thank you, Mr. Obradović, and I call now on Professor William Schabas. You have the floor, Sir.

Mr. SCHABAS:

INTERPRETATION OF THE GENOCIDE CONVENTION IN LIGHT OF THE 2007 JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN THE *BOSNIA* CASE AND SUBSEQUENT DEVELOPMENTS

1. Thank you Mr. President. Mr. President, Members of the Court, I am most grateful to you for allowing me the honour of appearing before you today.

2. As Mr. Obradović has reminded you, this is not the first time that the Republic of Serbia finds itself before the International Court of Justice (ICJ) in a case for which the jurisdiction is based on the compromissory clause of the Convention on the Prevention and Punishment of the Crime of Genocide. Indeed, no other State has been so involved in litigation concerning the interpretation and application of the 1948 Convention, be it as applicant, or respondent, or counter-claimant. As the successor of the Socialist Federal Republic of Yugoslavia, the Republic of Serbia can also take some credit for the adoption and entry into force of the Convention. As early as 9 December 1946, at the first session of the United Nations General Assembly, when resolution 96 (I) on the crime of genocide was being debated, Professor Milan Bartos, representing

Yugoslavia, took the floor in the Sixth Committee to ask that the draft be adopted unanimously[26]. Later, during the negotiations of the text of the Convention, Yugoslavia was deeply concerned about the narrowness of the definition of genocide that was being proposed and in particular the exclusion of the concept of cultural genocide, leading it to abstain in the vote on the final draft in the Sixth Committee[27]. Of course, Yugoslavia subsequently voted in favour of the Convention as a whole, which was adopted unanimously[28]. Yugoslavia signed the Convention a few days after its adoption by the General Assembly. And it was one of the 20 States whose ratification led to the entry into force of the Convention in January 1951.

3. Speaking in the General Assembly in December 1946 on behalf of Yugoslavia, Professor Bartos recalled "the great sufferings of the Jewish and Slav Peoples" in this context[29]. There can be little doubt that the terrible atrocities perpetrated by the Nazis and their collaborators during the Second World War directed at the peoples who made up the former Yugoslavia, and particularly those inflicted upon the most vulnerable minorities, the Jews and the Roma, enhanced Yugoslavia's determined support for the adoption of what some have described as the first human rights treaty of the United Nations system.

4. Sadly, when the Convention was adopted on 9 December 1948, at the Palais de Chaillot in Paris, it was premature to believe that violent ethnic conflict in the region was entirely a thing of the past. Yet the tragic wars that consumed the former Yugoslavia during the 1990s are also increasingly distant. Today, the Republic of Serbia affirms its commitment to live in peace with its neighbours within the framework of international law. The dispute that is now before the ICJ is about the rather distant past. It is not about the present and certainly not about the future.

5. Mr. President, Members of the Court, not only does the 1948 Genocide Convention sit at the heart of the present proceedings, as a matter of law, it is the only basis upon which the Court may operate. Much of the factual substrate that concerns the Court in this case has been explored in various judgments and rulings of the International Criminal Tribunal for the former Yugoslavia

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[26]UN doc. A/C.6/127.

[27]UN doc. A/C.6/SR.133.

[28]UN doc. A/PV.179.

[29]UN doc. A/C.6/127.

(ICTY). While there is a great deal of relevance in that material, the Court should never lose sight of the fact that there is no jurisdiction here over war crimes and crimes against humanity. A major difference with the litigation before the ICTY is that when that court is not satisfied, according to the highest standards of evidence, that there is responsibility for genocide, it may nevertheless reach conclusions about other crimes within the Tribunal's jurisdiction that constitute serious violations of international humanitarian law or crimes against humanity. That is not the case before the ICJ.

6. Our attention inexorably focuses on the nebulous zones surrounding the core of the definition of genocide. Depending upon the interpretation that one gives to the Convention provisions, certain acts may or may not fall within its ambit. The other categories of international crime, specifically war crimes and crimes against humanity, were already recognized at the time of adoption of the Genocide Convention. Such crimes under international law may overlap slightly with the definitional provisions of the Genocide Convention. They may also help to frame it, assisting us in understanding both what is included within the scope of genocide as well as what is not included.

7. In its Counter-Memorial, filed in December 2009, the Republic of Serbia reviewed various aspects of the Convention provisions that have a bearing on the present litigation. At the time, the definitive authority on the subject was the 26 February 2007 Judgment of this honourable Court in the *Bosnia* case (*Bosnia and Herzegovina* v. *Serbia*). Nevertheless, there have been developments in the case law of other tribunals, including the ICTY and the International Criminal Tribunal for Rwanda (ICTR), as well as some early decisions from the International Criminal Court (ICC). The European Court of Human Rights (ECHR) has also issued relevant judgments dealing with the case law of this Court on the subject of genocide. And, with the Court's indulgence, it is to that material that I propose to address myself this morning.

8. May I first, however, speak to a few of the issues raised in Professor Sands most learned presentation of early last week. It will not surprise anyone here if I say that Professor Sands and myself, as academics and friends, share many ideas about the international law of human rights. At the same time, inevitably, we differ on some points in our analysis and interpretation.

9. Mr. President, Members of the Court, Professor Sands virtually invited the Court to revise an important finding in its 2007 Judgment with respect to the interpretative addition of the word "substantial" as a modifier of the words "in part" — in whole or in part, in whole or in substantial part. He reviewed a number of sources, suggesting that the notion originated with Benjamin Whitaker, a United Nations expert, in 1985, and then slowly crept — this is the word used by Professor Sands[30] — into the work of the International Law Commission, and then the case law of the *ad hoc* tribunals, and finally the 2007 Judgment of this Court. I think that in his eagerness to state the case for removing the jurisprudential modifier "substantial", Professor Sands has not given adequate attention to the materials going back as far as the adoption of the Convention that support the view he is contesting. On this point I can do no better than cite a favourite source of his, the great man himself, Raphael Lemkin. In a submission to a United States Senate committee in 1950 as part of an effort to promote ratification of the Convention, Lemkin wrote that "the destruction in part must be of a substantial nature so as to affect the entirety"[31] — you have the citation on the screen.

10. The problem with Professor Sands critique is that the words "in part" require some kind of modifier and he has nothing to propose. If we remove the word "substantial", what do we put in its place? Let me note, in passing, that the "in whole or in part" language actually first appeared in the preamble of the 1946 General Assembly resolution, and was not an invention of the drafting process of the Convention in 1947 and 1948. The preamble to the 1946 resolution said that "[m]any instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part". Note here, Mr. President, Members of the Court, that the resolution seems to be concerned with the result, not the intent. It seems to suggest that the intent to destroy the group should aim at the group as a whole although it may not always fully succeed. I would be the first to acknowledge that the drafting history and the surrounding materials do not provide us with an entirely clear view. That must be in the nature of a document that results from diplomatic negotiations, where equivocal terms result from what some have called "constructive ambiguity". But that being said, the weight of authority over the past two decades,

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[30]CR 2014/6, p. 19, para. 23 (Sands).

[31]Two Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976).

culminating in the 2007 decision of this Court, has confirmed the place of "substantial" before "in part". It does not seem at all advisable to start to reconsider this point now. In the 2007 ruling, the Court said that the requirement of substantiality "is demanded by the very nature of the crime of genocide"[32]. There, the Court was looking at context, at object and purpose, and not at the drafting history. Article 31, not Article 32. The general rule of interpretation, not the subsidiary means.

11. Mr. President, Members of the Court, much of this involves a vision of the context of adoption of the Convention. It was indeed a seminal period in the development of international criminal law generally. On this, let me present the matter slightly differently than Professor Sands did. He reminded us that Lemkin was dissatisfied with the Nuremberg judgment. Indeed, it provoked Lemkin to lobby the first session of the General Assembly, in an effort that resulted in resolution 96. Lemkin has been reported as saying that his real objection to the Nuremberg judgment was its refusal to recognize what he described as "peacetime genocide"[33]. It is in the article that Professor Sands cited the other day. It was Lemkin's insistence upon codifying an international crime applicable in peacetime that explains the words "whether committed in time of peace or in time of war" that we find in Article 1 of the Convention. The unhappiness with Nuremberg stemmed from the decision of the four powers that drafted the Charter of the International Military Tribunal to restrict the scope of crimes against humanity to acts associated with aggressive war, a view confirmed in the judgment of the Nuremberg Tribunal. When Ernesto Dihigo of Cuba took the floor in the Sixth Committee at the first session of the General Assembly to propose the genocide resolution, he explained that the Nuremberg trial had precluded punishment of certain crimes of genocide because they had been committed before the beginning of the war, and it was this gap in international law that the resolution was intended to address[34].

12. What international criminal law specialists call the "nexus", that is, the connection between crimes against humanity and armed conflict, had been included at the four-power London

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[32]*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. 126, para. 198; hereafter "*Bosnia*".

[33]Henry T. King Jr., "Origins of the Genocide Convention", (2008) 40 *Case Western Reserve Journal of International Law* 13, p. 13.

[34]UN doc. A/C.6/SR.22.

Conference, where the Charter of the International Military Tribunal was adopted, out of concern that without any such limitation on the scope of crimes against humanity, these four great powers, victorious in the war, might also find themselves exposed to prosecution for acts perpetrated on their own territories and against their own citizens. This can be seen clearly in the records of the London Conference[35] — and the footnote to the transcript will show the authority for this. It would have been quite incredible if only a few years later, when the Genocide Convention was being negotiated in the Sixth Committee of the General Assembly, that these same powers would agree to a treaty of general application containing a broadly defined atrocity crime punishable in peacetime when they had refused to do so at London and at Nuremberg. The result, obviously, can be found in the definition of genocide that they adopted and that this honourable Court is being called upon, once again, to interpret. It is an extreme form of crime against humanity, the only crime against humanity that the international community was prepared to accept in 1948 as being subject to prosecution as an international crime when perpetrated in peacetime as well as in time of war. And because of this, it is not at all unreasonable that genocide has been called "the crime of crimes".

13. In recent times, over the past two decades, during the contemporary renaissance of international criminal law, it has become crystal clear that the nexus between crimes against humanity and armed conflict no longer exists. Crimes against humanity have come into their own as the central and most robust form of atrocity crime. It is the relationship between crimes against humanity and genocide, both historically and in the modern-day understanding, that helps us to interpret the two concepts. Genocide and crimes against humanity are both punishable at the *ad hoc* tribunals. Both are punishable at the International Criminal Court. Both are contemplated by the responsibility to protect. Both are acknowledged as crimes under customary international law. Today, where they part paths is on only a few points, of which the most important is probably Article IX of the Genocide Convention. The door to the International Court of Justice can still be more easily opened, or unlocked, by a charge of genocide rather than one of crimes against humanity or, for that matter, war crimes. That does not mean, however, that this Court should convert the Convention on Genocide into a Convention on Crimes Against Humanity, as I think

[35]For example, "Minutes of Conference Session of 23 July 1945", in *Report of Robert H. Jackson, United States Representative to the International Conference on Military* Trials, Washington: US Government Printing Office, 1949, p. 331.

Croatia is requesting, simply because we are appalled about many atrocities that are more accurately described using other terms: crimes against humanity or war crimes.

14. Mr. President, Members of the Court, the oral presentations of Croatia hinted at an original, indeed a novel, interpretation of the Genocide Convention about which I have a few comments. In his discussion of the interpretation of the Convention last week, Professor Sands said the following:

> "Croatia's approach in these proceedings has been consistent: the requisite intent, which is to destroy a group *in whole or in part*, is not to be equated with the intent to *physically* destroy the entirety of the relevant group, but rather it is to stop it from functioning as a unit."[36]

The authority that he pointed us to, in the footnote to his oral presentation, was Croatia's Memorial and Croatia's Reply. In the Memorial we find something similar but we do not find the word "functioning"[37]. The same is the case for the Reply[38]. And we do not have any authority in the Memorial or in the Reply to assist us in figuring out where this term "functioning" comes from. Last Friday, Sir Keir Starmer returned to this when he said that destruction of a group does not require extermination of all the members of the group, or even a "substantial part" of a group but, and I quote, the perpetrators "must attempt to destroy the group as a functioning entity"[39].

15. Mr. President, Members of the Court, I have looked again at the relevant case law, the *travaux* and the academic literature, and it is my impression that this "functioning entity" notion constitutes an original interpretation by the Croatian team in this case. I cannot be entirely sure, because Croatia has not provided us with references to assist in locating the source of this notion. Possibly, some support for the idea might be found in the *Krstić* Appeals Chamber decision, but on closer examination I do not think this stands up to scrutiny. You will recall that at Srebrenica, which was the case dealt with in *Krstić*, the women and children were removed from the town. They were not physically exterminated. The Trial Chamber held that the murder of the men would "inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica"[40].

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[36]CR 2014/6, p. 15, para. 13 (Sands); italics in the original.

[37]Memorial of Croatia (MC), para. 7.44.

[38]Reply of Croatia (RC), para. 8.9.

[39]CR 2014/12, p. 13, para. 1 (Starmer).

[40]*Prosecutor* v. *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para. 595.

This conclusion was endorsed by the majority of the Appeals Chamber. It said: "This is the type of physical destruction the Genocide Convention is designed to prevent."[41] If there is any doubt about what the Appeals Chamber meant, one need only turn to Judge Shahabuddeen's dissent on this point[42]. Croatia will find support for its position in Judge Shahabuddeen's dissent, but not in the opinion of the majority and not, I dare add, in the Judgment of this Court in 2007.

16. Does the "functioning entity" idea have any merit? It seems to be a repackaged version of cultural genocide, a concept that was favoured by Raphael Lemkin but that was very clearly excluded from the Convention except, as Professor Sands has carefully noted, for the act of forcible transfer of children: the fifth act of genocide. Let me invite the Court to reflect for a minute or two on the two archetypal genocides of the twentieth century. Were the Jews in Germany a "functioning entity"? They were in reality quite an integrated community, participating at all levels of German society. There were religious and community organizations, of course, but there was a huge number of secularized and assimilated Jews as well. I think most German Jews in the 1930s would find the idea that they were a "functioning entity" to be quite puzzling. Much the same can be said about the Rwandan Tutsi. They were essentially integrated with the Hutu population. There was much intermarriage. In many cases, it was impossible to distinguish Hutu from Tutsi in the absence of the notorious identity cards. In 1994, nobody would have described the Rwandan Tutsi as a "functioning entity". Indeed, are we not entirely convinced about the label genocide with respect to the German Jews and the Rwandan Tutsi precisely because this was not a case of an attack on a "functioning entity" but rather something much more arbitrary, an attack directed at the destruction of individuals regardless of the existence of an "entity" or a "community", and solely because of their ethnic or racial identity? Croatia has not provided the Court with an adequate development of this notion of "functioning entity" and my suggestion would be that the Court put this idea to the side. It requires much more thought and study before it should be seriously considered.

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[41] *Prosecutor* v. *Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 29.

[42] *Prosecutor* v. *Krstić* (IT-98-33-A), Judgment, 19 April 2004; dissenting opinion of Judge Shahabuddeen, paras. 45-54.

17. Mr. President, Members of the Court, let me now turn to the post-February 2007 period. Last week we heard talk of reactions to the Judgment of this Court but outside of a legal framework. What should interest us here is not misunderstandings of the Court's findings that come from the uninformed but rather the treatment they have received within the international legal community.

European Court of Human Rights

18. The European Court of Human Rights was the first international judicial body to give consideration to the 2007 Judgment of the ICJ so that is where I will begin. In July 2007, in *Jorgić* v. *Germany*, a seven-judge Chamber of the ECHR cited the February 2007 Judgment of this Court. It was a case involving the application of Article 7 of the European Convention on Human Rights. Article 7, you will recall, enshrines the principle of legality and is very similar to provisions in other international instruments, such as Article 11, paragraph 2, of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Civil and Political Rights. Jorgić had been prosecuted in Germany pursuant to German national law for crimes perpetrated in Bosnia and Herzegovina during the 1992-1995 war, including genocide. He was convicted for acts of "ethnic cleansing" pursuant to what the European Court described as a "wide interpretation of the 'intent to destroy'" as set out in Article 2 of the Genocide Convention[43]. Before the European Court Jorgić argued that the German courts did not respect the principle of legality.

19. In reviewing the relevant legal sources, something that is a typical feature of its judgments, the ECHR cited an excerpt from paragraph 190 of this Court's Judgment[44]. That is the famous paragraph where the notion of "ethnic cleansing" is discussed. I have the citation in my notes but it was presented to you last week and it was on a slide and it is well known, so I do not propose to read it aloud. This is paragraph 45 of the Judgment of 2007[45].

20. The ECHR noted that the case law of the ICTY supported a narrow interpretation whereby genocide "as defined in public international law, comprised only acts aimed at the

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[43] *Jorgić* v. *Germany*, No. 74613/01, para. 112, ECHR 2007-III.

[44] *Bosnia*, p. 122, para. 190.

[45] *Jorgić* v. *Germany*, No. 74613/01, para. 45, ECHR 2007-III.

physical or biological destruction of a protected group"[46]. But it said that the Tribunal's interpretation of the scope of genocide, as well as other decisions taken by national and international courts, and it said, "in particular the International Court of Justice", had been delivered subsequent to the commission of his offences, and consequently "the applicant could not rely on this interpretation being taken by the German courts in respect of German law at the material time, that is, when he committed his offences"[47]. Thus, in the *Jorgić* case the European Court held that a conviction by German courts based upon a broader construction of the scope of genocide than that espoused by the ICTY as well as by this Court in 2007 did not violate the principle of legality. The scope of the European Court's judgment can be easily misunderstood, and has been. It is in no way inconsistent with the February 2007 ruling of the Court. It merely acknowledges the varying interpretations of the crime of genocide that might have existed in national law prior to the February 2007 ruling in the *Bosnia* case.

21. There is also a lengthy reference to the 2007 Judgment of this Court in an admissibility decision of the ECHR issued in July 2013. The application was submitted by an association of survivors of the Srebrenica massacre. It was directed against the Netherlands and concerned conduct attributed to the Dutch units of United Nations peacekeeping troops. A seven-judge Chamber of the European Court reviewed a range of legal materials concerning Srebrenica including relevant judgments of various courts, such as the ICTY, the Human Rights Chamber of Bosnia and Herzegovina, and the ICJ. The admissibility decision contains a five-paragraph overview of the February 2007 Judgment of this Court[48]. Finally, the ECHR declared the case inadmissible based upon the immunities of the United Nations. Aside from a summary of the 2007 Judgment in the *Bosnia* case, presented as background, there is no other relevant reference to the findings of this Court and its Judgment did not bear upon the decision of the European Court.

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[46] *Jorgić* v. *Germany*, No. 74613/01, para. 112, ECHR 2007-III.

[47] *Jorgić* v. *Germany*, No. 74613/01, para. 112, ECHR 2007-III.

[48] *Stichting Mothers of Srebrenica and Others* v. *the Netherlands* (Dec.), No. 65542/12, paras. 49-53, 11 June 2013.

Of course, in that case the ECHR was strongly influenced by rulings of this Court respecting immunities, notably the recent decision in *Jurisdictional Immunities of the State*[49].

22. There are some summary references to the 2007 Judgment by a Chamber of the European Court in a very recent case — December 2013 — directed against Switzerland concerning genocide denial[50]. The 2007 Judgment was also cited by the ECHR with respect to statements on State responsibility, attribution and the "effective control" criterion[51]. In addition, the 1996 interlocutory ruling in the same case was cited by a judge of the ECHR in a separate opinion as authority for the proposition that human rights obligations are not by nature reciprocal[52].

International Criminal Tribunal for Rwanda

23. Mr. President, Members of the Court, I turn now to the International Criminal Tribunal for Rwanda. The International Criminal Tribunal for Rwanda has issued many decisions concerning genocide, at both the trial and the appeals stage, but as a general rule these have contributed only modestly to the interpretation of Articles 2 and 3 of the Genocide Convention. In several of the Appeals Chamber judgements decided since February 2007, the defence has raised very broad and often unsubstantiated allegations that the Trial Chamber had misapplied the law on genocide[53]. In others, issues relating to the definition of genocide do not arise at all[54]. Similarly, there is little of interest in terms of legal development in the Trial Chamber judgements issued in

[49] *Jurisdictional Immunities of the State (Germany* v. *Italy; Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, cited at *Stichting Mothers of Srebrenica and Others* v. *the Netherlands* (Dec.), No. 65542/12, para. 158, 11 June 2013.

[50] *Perinçek* v. *Switzerland*, No. 27510/08, 17 Dec. 2013, para. 23, 83, 116.

[51] *Catan and Others* v. *the Republic of Moldova and Russia* [GC], Nos. 43370/04, 8252/05 and 18454/06, paras. 76, 96, 115, 19 Oct. 2012.

[52] *Vallianatos and Others* v. *Greece* [GC], Nos. 29381/09 and 32684/09, partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, 7 Nov. 2013.

[53] *Simba* v. *Prosecutor* (ICTR-01-76-A), Judgment, 27 Nov. 2007, paras. 256-270; *Bagosora and Nsengiyumva* v. *Prosecutor* (ICTR-98-41-A), Judgment, 14 Dec. 2011, paras. 382-386.

[54] *Karera* v. *Prosecutor* (ICTR-01-74-A), Judgment, 2 Feb. 2009; *Bikindi* v. *Prosecutor* (ICTR-01-72-A), Judgment, 18 Mar. 2010; *Prosecutor* v. *Rukundo* (ICTR-2001-70-A), Judgment, 20 Oct. 2010; *Zigiranyirazo* v. *Prosecutor* (ICTR-01-73-A), Judgment, 18 Dec. 2010; *Muvunyi* v. *Prosecutor* (ICTR-2000-55A-A), Judgment, 1 Apr. 2011; *Mugenzi and Mugiraneza* v. *Prosecutor* (ICTR-99-50-A), Judgment, 4 Feb. 2013.

recent years[55]. These decisions do not address any new questions concerning interpretation of the definition of genocide, as a general rule. Typically, they consist of rather perfunctory recitals of the case law and, for that reason, I will not give them any particular attention here.

24. It may seem astonishing that this Tribunal, whose work has been devoted very largely to the application of the 1948 Genocide Convention, does not appear to have ever made reference to the 2007 Judgment of the ICJ. Indeed, it has virtually never referred to the case law of the ICJ at all[56]. There is one obscure mention of the 1996 Preliminary Objections ruling in the *Bosnia* case, on the *erga omnes* nature of the obligations in the 1948 Convention, but that is only because one of the Parties cited it, prompting the Court to acknowledge the reference in its summary of the positions taken by the Parties[57].

25. Mr. President, Members of the Court, the fact that there is little of interest in the post-February 2007 decisions of the ICTR may only reflect the fact that its case law, at least as the definition of the crime of genocide is concerned, had already become quite developed and detailed, leaving little room for dispute or challenge. Many of the issues and controversies that were so important in the context of the former Yugoslavia, such as the demarcation between genocide and ethnic cleansing and the significance of forcible displacement, never seriously arose in the

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[55] *Prosecutor* v. *François Karera* (ICTR-01-74-T), Judgment and Sentence, 7 Dec. 2007, paras. 533-549; *Prosecutor* v. *Nchamihigo* (ICTR-01-63-T), Judgment and Sentence, 12 Nov. 2008, paras. 329-336; *Prosecutor* v. *Bikindi* (ICTR-01-72-T), Judgment, 2 Dec. 2008, paras. 404-426; *Prosecutor* v. *Théoneste Bagosora et al.* (ICTR-98-41-T), Judgment and Sentence, 18 Dec. 2008, paras. 2084-2163; *Prosecutor* v. *Zigiranyirazo* (ICTR-01-73-T), Judgment, 18 Dec. 2008, paras. 396-428; *Prosecutor* v. *Renzaho* (ICTR-97-31-T), Judgment and Sentence, 14 July 2009, paras. 760-780; *Prosecutor* v. *Nsengimana (*ICTR-01-69-T), Judgment, 17 Nov. 2009, paras. 831-841; *Prosecutor* v. *Rukundo (*ICTR-2001-70-T), Judgment, 27 Feb. 2009, paras. 555-576; *Prosecutor* v. *Ndindiliyimana et al*. (ICTR-00-56-T), Judgment and Sentence, 17 May 2011, paras. 2044-2085; *Prosecutor* v. *Nyiramasuhuko et al*. (ICTR-98-42-T), Judgment and Sentence, 24 June 2011, paras. 5653-6038; *Prosecutor* v. *Bizimungu et al.* (ICTR-99-50-T), Judgment and Sentence, 30 Sept. 2011, paras. 1954-1987; *Prosecutor* v. *Karemera et al.* (ICTR-98-44-T), Judgment and Sentence, 2 Feb. 2012, paras. 1575-1672.

[56] *Prosecutor* v. *Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 Apr. 2007, para. 23, fn. 32, citing *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, para. 47; *Prosecutor* v. *Rwamakuba* (ICTR-98-44C-I), Decision on Appropriate Remedy, 31 Jan. 2007, para. 48, fn. 71, citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73 and *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174; *Prosecutor* v. *Karemera et al.* (ICTR-98-44-T), Decision on Nzirorera's Preliminary Motion to Dismiss the Indictment for Lack of Jurisdiction: Chapter VII of the United Nations Charter, 29 Mar. 2004, para. 10, fn. 4, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Prosecutor* v. *Karemera et al.* (ICTR-98-44-PT), Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 Dec. 2004, para. 22, fn. 22, citing case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15 and *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253.

[57] *Prosecutor* v. *Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 Apr. 2007, para. 23, fn. 33.

Rwandan context. During the period that I am considering today, the major contribution by the Rwanda Tribunal to the development of the law of genocide addressed the crime of direct and public incitement[58], a matter that is not of any great relevance to the present proceedings.

26. One judgement of the Appeals Chamber of the ICTR, issued in March 2008, is of importance for its discussion of the *actus reus* of the second act of genocide, that is, causing serious bodily and mental harm to members of the group. The Chamber said that in its previous Judgements it had not "squarely addressed the definition of such harm"[59]. It said "quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs"[60]. The Appeals Chamber said that serious mental harm includes "more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat"[61]. Noting that nearly all convictions for genocide on the basis of causing serious bodily or mental harm had involved killing or rape, the Chamber said that "[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part"[62]. In a footnote to this remark, the Chamber noted that in a decision concerning a charge of crimes against humanity the Trial Chamber had said it was "not satisfied that [the removal of a church roof depriving Tutsis of an effective hiding place] amount[ed] to an act of similar seriousness to other enumerated acts in the Article"[63]. The Appeals Chamber also cited the commentary on the Code of Crimes in the 1996 report of the International Law Commission[64].

27. The Appeals Chamber of the Rwanda Tribunal in this decision referred to statements in the trial judgment that the accused, who was a Catholic priest, had refused to allow Tutsi refugees

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[58] *Nahimana et al.* v. *Prosecutor* (ICTR-99-52-A), Judgment, 28 Nov. 2007.

[59] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 46.

[60] *Ibid.*

[61] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 46.

[62] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 46.

[63] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 46, fn. 117, citing *Prosecutor* v. *Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 Dec. 2004, para. 855.

[64] The reference in *Seromba* is to the Report of the International Law Commission (ILC) on the Work of its Forty-Eighth Session 6 May-26 July 1996, United Nations, *Official Records of the General Assembly*, ILC, 51st Sess., Supp. No. 10, p. 91, United Nations doc. A/51/10 (1996). However the precise reference appears to be erroneous; the statement to which the Appeals Chamber seems to have been referring appears on p. 46.

to get food from a banana plantation, something that contributed to their physical weakening, and that "his order prohibiting refugees from getting food from the banana plantation, his refusal to celebrate mass in Nyange church, and his decision to expel employees and Tutsi refugees" had facilitated the victims "living in a constant state of anxiety"[65]. Mr. President, Members of the Court, I should point out that I am not giving you all of the quote unquote, they will be in the transcript, but it is a little heavy to mention it every time. I am reading the quotations, however. The Appeals Chamber mentioned what they called the "parsimonious statements" of the Trial Chamber about the acts comprising the serious bodily and mental harm, concluding that it could not "equate nebulous invocations of 'weakening' and 'anxiety' with the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture"[66]. And these words were endorsed in the July 2013 ruling of the Appeals Chamber of the ICTY[67].

28. In another decision, the issue of proof of genocidal intent prompted the Appeals Chamber of the ICTR to recall that in the absence of direct evidence,

> "a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts"[68].

The Chamber noted that even facts and events that arose subsequent to the perpetration of the crime itself could be considered as part of the context for this purpose[69].

29. In *Prosecutor* v. *Gatete*, a judgment issued in October 2012, the Appeals Chamber confirmed that in entering convictions for both genocide per se and conspiracy to commit genocide the rule against cumulative convictions was not breached. The Chamber reasoned that conspiracy did not involve commission of the crime as such. It held that the two crimes, genocide and conspiracy, were distinct, and autonomous and that "the crime of genocide has a materially distinct *actus reus* from the crime of conspiracy to commit genocide and both crimes are based on different underlying conduct". According to the Appeals Chamber, "[t]he crime of genocide requires the

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[65] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 47.

[66] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgment, 12 Mar. 2008, para. 48.

[67] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98bis.l), Judgment, 11 July 2013, para. 32, fn. 83.

[68] *Hategekimana* v. *Prosecutor* (ICTR-00-55B-A), Judgment, 8 May 2012, para. 133.

[69] *Hategekimana* v. *Prosecutor* (ICTR-00-55B-A), Judgment, 8 May 2012, para. 133.

commission of one of the enumerated acts in Article 2 (2) of the Statute, while the crime of conspiracy to commit genocide requires the act of entering into an agreement to commit genocide"[70]. And so it overturned the Trial Chamber's holding to convict the accused of genocide but not to enter a conviction for conspiracy because, it said

> "by convicting Gatete only of genocide while he was also found criminally responsible for conspiracy to commit genocide, the Trial Chamber failed to hold him responsible for the totality of his criminal conduct, which included entering into the unlawful agreement to commit genocide"[71].

30. The Appeals Chamber in that decision also explained that by recognizing conspiracy to commit genocide as an inchoate crime, the Genocide Convention "aims to prevent the commission of genocide". However, it said

> "another reason for criminalising conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide. The danger represented by such collaboration itself justifies the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed."[72]

31. One member of the Appeals Chamber, Judge Agius, dissented on these points. Judge Agius had been the presiding judge in the *Popović* trial before the ICTY (and I will return to the *Popović* case in a few minutes when I discuss the case law of the ICTY). In his dissenting opinion in *Gatete*, Judge Agius said that he did not disagree with the majority's statement of the legal principles concerning the distinct nature of the crime of conspiracy to commit genocide. However, he considered that entering a conviction for conspiracy in addition to one of genocide per se raised problems of fairness to the accused[73]. He said he disagreed with the majority's holding that the danger represented by the impugned collaboration itself justified the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed[74]. He repeated the reasoning he had advanced in *Popović* that once a person is convicted for genocide the rationale for adding a conviction for conspiracy becomes "less

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[70] *Prosecutor* v. *Gatete* (ICTR-00-61-A), Judgment, 9 Oct. 2012, para. 260.

[71] *Prosecutor* v. *Gatete* (ICTR-00-61-A), Judgment, 9 Oct. 2012, para. 261.

[72] *Prosecutor* v. *Gatete* (ICTR-00-61-A), Judgment, 9 Oct. 2012, para. 262 (reference omitted).

[73] *Prosecutor* v. *Gatete* (ICTR-00-61-A), dissenting opinion of Judge Agius, 9 Oct. 2012, para. 3.

[74] *Prosecutor* v. *Gatete* (ICTR-00-61-A), dissenting opinion of Judge Agius, 9 Oct. 2012, para. 4.

compelling", especially when the criminal responsibility is based upon participation in a joint criminal enterprise[75].

International Criminal Court

32. Mr. President, Members of the Court, I turn now to the International Criminal Court.

33. At the International Criminal Court, there is a pending charge of genocide in the proceedings directed against the President of Sudan, Omar al-Bashir. Because the Court has been unable to obtain custody over the accused, there have been no developments with respect to interpretation of the crime of genocide since the issuance of the arrest warrant in 2010. Nevertheless, the decisions concerning issuance of the arrest warrant contain a very rich discussion of aspects of the law of genocide including significant references to this Court's 2007 ruling in the *Bosnia* case.

34. Pre-Trial Chamber I, to which the case was initially assigned, concurred with the Prosecutor's application for an arrest warrant with respect to war crimes and crimes against humanity but it declined to authorize a charge of genocide when it issued the arrest warrant in this case[76]. The decision was later overturned, the Appeals Chamber considering that the standard the Pre-Trial Chamber had set for determining the charges it was authorizing was too demanding at such an early stage in the proceedings[77]. The Pre-Trial Chamber subsequently added the genocide charge to the al-Bashir arrest warrant[78], and that is where things stand. Much of the initial ruling, by the Pre-Trial Chamber on the issuance of the arrest warrant consisted of a discussion of the definition of genocide. There was also a substantial dissenting opinion about the majority's exclusion of the crime of genocide from the arrest warrant. The two subsequent decisions, of the Appeals Chamber and the Pre-Trial Chamber, do not really contribute anything of interest with

[75] *Prosecutor* v. *Gatete* (ICTR-00-61-A), dissenting opinion of Judge Agius, 9 Oct. 2012, para. 5. For the discussion to which Judge Agius refers, see: *Prosecutor* v. *Popović et al.* (IT IT-05-88-T), Judgment, 10 June 2010, paras. 2111-2127.

[76] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009.

[77] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir", 3 Feb. 2010.

[78] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 12 July 2010.

respect to these issues and I will not return to them, but I will focus now on the initial Pre-Trial Chamber decision.

35. Mr. President, Members of the Court, the Pre-Trial Chamber invoked the 2007 Judgment of the ICJ on more than 20 occasions. At no point did it suggest that it disagreed with any aspect of the decision of the ICJ[79].

36. An important feature of the ICC's interpretation of the scope of the crime is its consideration of an additional source of law, the Elements of Crimes. This is a secondary instrument adopted by the Assembly of States Parties whose purpose, according to Article 9 (1) of the Rome Statute, is to "assist the Court in the interpretation and application" of the definitions of crimes contained in Articles 6, 7, 8 and 8*bis*. They are required to be "consistent" with the Rome Statute[80], and they are listed in Article 21 as the sources of law to be applied "in the first place"[81], along with the Statute and the Rules of Procedure and Evidence. The Elements of Crimes should be of some interest to this Court to the extent that they may be deemed to contribute to the interpretation of Article 2 of the Genocide Convention.

37. The Elements largely echo Article 6 of the Statute, which is essentially identical to Article 2 of the 1948 Convention. However, the Elements of Crimes also contain some language that is not part of that text. In the *Bashir* arrest warrant decision, the majority said that in this way the Elements of Crimes "elaborate on the definition of genocide provided for in Article 6 of the Statute"[82]. First, they require that the victims belong to the targeted group — no difficulty there. Second, they require that the punishable acts — killings, serious bodily or mental harm, imposition of conditions of life — take place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction" — you have it on the screens in both of the official languages of the Court. Third, they specify that the perpetrator act with intent to destroy the group in whole or in part. The first and third of these Elements do not

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[79]*Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 114, fn. 133; para. 135, fns. 148-150; para. 137, fn. 152; para. 138, fn. 153; para. 139, fn. 154; para. 140, fn. 155; para. 142, fn. 156; para. 143, fn. 157; para. 144, fns. 158-160; para. 146, fns. 161-163; para. 167, fn. 188; para. 182, fns. 202-206; para. 183, fns. 207-208; para. 194, fn. 221.

[80]Rome Statute of the International Criminal Court, (2002) 187 *UNTS* 90, Art. 9 (3).

[81]Rome Statute of the International Criminal Court, (2002) 187 *UNTS* 90, Art. 21 (1) *(a)*.

[82]*Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al- Bashir, 4 Mar. 2009, para. 113.

raise any problems. They find much support in the case law of the *ad hoc* tribunals, the *travaux* and the scholarly literature. It is the second Element that is more controversial.

38. It appears that the second of these Elements, namely the requirement that genocidal acts took place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction", was not included in the original drafts of the Elements of Crimes debated by the Preparatory Commission of the ICC during its 1999 sessions[83]. This Element was added to the draft at the beginning of 2000[84], apparently in reaction to the first judgment of the ICTY that dealt with the merits of a genocide charge[85]. In that ruling, a Trial Chamber of the Tribunal held that genocide could be committed by an individual acting alone, even in the absence of evidence that this was part of some larger policy, plan, or campaign involving others, and without any requirement that the intentions of the individual perpetrator had any reasonable chance of being achieved. Those who drafted the Elements of Crimes appear to have added the requirements of a manifest pattern of similar conduct or conduct that could itself effect such destruction in order to prevent the ICC from adopting a similar construction of the scope of the crime of genocide, to that adopted by a trial chamber of the ICTY.

39. The contextual element set out in the Elements of Crimes was invoked by Pre-Trial Chamber I in its decision on the *Bashir* arrest warrant. The Chamber said that the definition in the Genocide Convention "does not expressly require any contextual element"[86]. It then considered the case law of the *ad hoc* tribunals, which have not insisted upon a plan or policy as an element of the crime of genocide[87]. It must be said that all of the judgments of the *ad hoc* tribunals have a rather theoretical aspect when it comes to this question. To use the common law expression, they represent *obiter dicta*. At the Rwanda Tribunal, there has never really been any doubt that the

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[83]See, e.g., PCNICC/1999/L.5/Rev.1/Add.2, pp. 5-7, issued 22 Dec. 1999. The initial proposal for the Elements of Crimes, submitted by the United States, borrowed the "widespread or systematic" language from the Rome Statute's definition of crimes against humanity: Proposal Submitted by the United States of America, Draft Elements of Crimes, PCNICC/1999/DP.4.

[84]PCNICC/2000/L.1/Rev.1/Add.2, pp. 6-8 (issued 7 Apr. 2000).

[85]*Prosecutor* v. *Jelisić* (IT-95-10-T), Judgment, 14 Dec. 1999.

[86]*Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 117.

[87]*Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 119, citing: *Prosecutor* v. *Jelisić* (IT-95-10-T), Judgment, 14 Dec. 1999, para. 400 (an error; the correct reference is to para. 100); *Prosecutor* v. *Akayesu* (ICTR-96-4-T), Judgment, 2 Sep. 1998, paras. 520 and 523.

killings of several hundred thousand Tutsi in 1994 was the product of a plan or policy. The judgements of the Yugoslavia Tribunal are even more abstract given the fact that the only convictions for genocide concern the Srebrenica massacre, where the existence of a plan or policy is not seriously questioned and it is not suggested that this was the act of a single individual acting alone.

40. In the *Jelisić* case, the 1999 decision of the ICTY that prompted this change in the Elements of Crimes, the Trial Chamber had dismissed a charge of aiding and abetting genocide because of insufficient evidence that the crime was being perpetrated by persons other than the accused. But it then went on to rule that a conviction for genocide was in any event "theoretically possible" because an individual, acting alone, could perpetrate the crime[88]. The Trial Chamber concluded that Jelisić was such a mentally unstable individual that he was not capable of forming a genocidal intent, and he was acquitted of that charge, convicted for crimes against humanity. But the conclusion in *Jelisić* again — this really is *obiter dictum* — that genocide could be convicted by an individual perpetrator, acting alone, and in the absence of a broader plan or policy, still remains the law, officially, of the Yugoslavia Tribunal.

41. In the *Bashir* decision, Pre-Trial Chamber I compared the Elements of Crimes and the case law of the *ad hoc* tribunals, and it observed that, according to the ICTY:

> "the *crime of genocide is completed* [and I am quoting from the decision] by, *inter alia*, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof."[89]

42. Pre-Trial Chamber I said that following this interpretative approach, the crime of genocide depends upon proof that the accused had the intent to destroy the protected group, and that

> "[a]s soon as this intent exists and materializes in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of

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[88] *Prosecutor* v. *Jelisić* (IT-95-10-T), Judgment, 14 Dec. 1999, para. 100; affirmed: *Prosecutor* v. *Jelisić* (IT-95-10-A), Judgment, 5 July 2001.

[89] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 119 (references omitted). *Contra*: *Bashir* (ICC-02/05-01/09), separate and partly dissenting opinion of Judge Anita Ušacka, 4 Mar. 2009, para. 19, fn. 26.

> the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group"[90].

43. Noting what it called "a certain controversy" as to whether the contextual element in the Elements of Crimes should be applied[91], Pre-Trial Chamber I quite clearly distanced itself from the case law of the *ad hoc* tribunals. It highlighted the importance of the contextual element set out expressly in the Elements of Crimes.

> "In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide — [i]s an *ultima ratio* mechanism to preserve the highest values of the international community — is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical."[92]

44. Dissenting, Judge Ušacka insisted that the role of the Elements of Crimes was only to "assist" the Court, and hinted at the view that in the *Bashir* case they were inconsistent with Article 6 of the Statute, a point she said did not need to be determined in the case at bar[93].

45. The Pre-Trial Chamber, the majority, might well have justified the difference in its approach and that of the *ad hoc* tribunals by relying exclusively on the requirements imposed by the Elements of Crimes, therefore avoiding any implication of disapproval of the interpretation of the ICTY in *Jelisić* and subsequent cases. However, it went on to state that it did not see any "irreconcilable contradiction" between the definition in Article 6 of the Rome Statute and the criterion of a contextual element set out in the Elements[94], and I quote:

> "Quite the contrary, the Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (i) not per se contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22 (2) of the Statute that the definition of the crimes 'shall be strictly construed and shall not be extended by analogy' and '[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated,

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[90] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 120.

[91] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 125.

[92] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 124.

[93] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), separate and partly dissenting opinion of Judge Anita Ušacka, 4 Mar. 2009, para. 20.

[94] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 Mar. 2009, para. 132.

> prosecuted or convicted'; and (iii) [this is the important part] is fully consistent with the traditional consideration of the crime of genocide as the 'crime of the crimes'."[95]

46. Mr. President, Members of the Court, the decision therefore represents an important development in the jurisprudence of the ICC. It departs from the established case law of the *ad hoc* tribunals on a significant substantive legal issue. The debate — and it remains a live one today — is about whether the contextual element contained in the Elements of Crimes represents a clarification of the scope of the definition of genocide taken from Article 2 of the Convention or whether it is a limitation or restriction on it imposed by States in the particular context of the adoption of a supplementary instrument to the Rome Statute. Those who see it as a narrowing of the Convention definition argue that the Elements of Crimes are "jurisdictional" in nature. Their contention, which is often driven by a visceral resistance to anything that appears to narrow or limit definitions of crimes at the international level, is essentially based upon a literal reading of the text of the Convention. They assert that because the contextual element is not set out explicitly in the definition of the crime taken from Article 2, that it therefore represents a change or an alteration.

47. The view that the Elements of Crimes merely clarify the content of Article 2 of the Convention may rely upon them as "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" or "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", well-known concepts set out in Article 31 (3) of the Vienna Convention on the Law of Treaties. There cannot be much doubt that the drafters of the Rome Statute, at the 1998 diplomatic conference and before, treated Article 2 of the 1948 Convention as somewhat of a sacred text that was not to be modified at all. It is striking that Article 6 of the Rome Statute faithfully respects the language of Article 2 of the 1948 Convention, whereas the definitions of the other categories of crime that were adopted at the Rome Conference vary significantly from other models. In effect, they dramatically develop the codifications of both crimes against humanity and war crimes. However, when the Rome Conference turned to the crime of genocide, there was a resistance to any change whatsoever to the 1948 text. There was only one hint that it might be changed, a casual

[95] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 133.

proposal by Cuba to include political and social groups, and that was never even submitted as a formal amendment[96]. Many States took the floor to insist upon fidelity to the 1948 definition[97].

48. Mr. President, Members of the Court, it seems implausible therefore that in June and July 1998, at the Rome Conference, States more or less unanimously expressed their allegiance to the 1948 definition of the Convention but that two years later, when the Preparatory Commission was drafting the Elements of Crimes, they intended to depart from that definition with a so-called "jurisdictional" limitation on the scope of genocide. Pursuant to the Final Act of the Rome Conference, the Preparatory Commission had the same composition as the Rome Conference, so it cannot be argued that it was not as representative or that its membership differed. Nevertheless, the fact that the intent of the Preparatory Commission was to elucidate the scope of the 1948 definition does not necessarily lead to the conclusion that it did not, as a matter of law, effect what amounts to an amendment rather than an interpretative clarification. I will return to the legal significance of the Elements of Crimes in a few minutes when I discuss the case law of the ICTY, where the Elements have been dismissed as constituting a departure from the text of the Convention.

Mr. President, this might be a convenient time to take the morning break?

The PRESIDENT: Certainly, if you wish also to pause a little bit, the Court is going to take 15 minutes' break, so the sitting is suspended for 15 minutes.

Mr. SCHABAS: Thank you very much.

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

The PRESIDENT: Please be seated. The hearing is resumed and Professor Schabas you can continue, please. You have the floor.

Mr. SCHABAS: Thank you very much, Mr. President. I have just a few more minutes on the International Criminal Court and then I turn to the most important of the institutions as far as this Court is concerned, the ICTY.

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[96]UN doc. A/CONF.183/C.1/SR.3, para. 100.

[97]See particularly the debates at UN doc. A/CONF.183/C.1/SR.3, paras. 20-179.

49. In the *Bashir* arrest warrant decision at the ICC, about which I spoke prior to the pause, the Pre-Trial Chamber recognized the development by scholars of what has been identified as a "knowledge-based approach" to genocide[98]. The Pre-Trial Chamber described the approach as facilitating the criminal responsibility of "direct perpetrators and mid-level commanders . . . even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group". It said that, according to the knowledge-based approach,

> "as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy [the group] in whole or in part".

The Pre-Trial Chamber insisted that the so-called knowledge-based approach is not different from the traditional approach in relation to senior political and military leaders who plan and set in motion a genocidal campaign, and who must act with the genocidal intent described in Article 2 of the Convention. Given that in the *Bashir* case, the issue was not the involvement of a mid-level commander or direct perpetrator but rather an individual at the highest leadership level, the Pre-Trial Chamber said the knowledge-based approach was irrelevant to its determination.

50. This may have been underselling the principles of the "knowledge-based approach", bearing in mind that it has been developed by scholars who do not necessarily agree amongst themselves. One feature of the approach is its emphasis not on the specific intent of individual perpetrators but rather on the plan or policy behind the genocidal campaign itself. It is consistent with the controversial Element in the Elements of Crimes because it tends to dismiss the thesis of the lone perpetrator, requiring that the destruction of the group be a feasible outcome of the ensemble of acts of genocide. For all practical purposes, the knowledge-based approach excludes the possibility that genocide is the work of isolated individuals. Genocide results from a plan or policy that is the creation of a State or State-like entity. A focus on the *mens rea* of individuals should only then arise with respect to the knowledge of such individuals of the plan or policy. If they know of the plan or policy and contribute to its implementation, then they have the requisite

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[98] *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, 4 Mar. 2009, para. 139, fn. 154, referring to: Claus Kreβ, "The Darfur Report and Genocidal Intent", (2005) 3 *Journal of International Criminal Justice*, pp. 565-572; William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge: Cambridge University Press, 2009, pp. 241-264.

mens rea. In other words, the starting-point for the analysis should be the existence of a plan or policy of a body with the capacity to destroy a protected group in whole or in part. To the extent that individual criminal responsibility is at issue, the analysis then proceeds to consider the knowledge of the plan by the individual and whether or not he or she could avail of an excuse or justification that might counteract the apparent mental element.

51. The focus on individual intent that features in international criminal law cannot be automatically transposed to the debate about State responsibility for individual crime. In practice, as this Court did in the 2007 Judgment in the *Bosnia* case, the word "intent" and even "specific intent" is used in the context of an analysis of policy. Whether or not one of the individual perpetrators in the Srebrenica massacre manifested the specific intent to commit genocide is really quite secondary to whether the events were the product of a co-ordinated plan perpetrated by an entity rather than the perverse product of a single mind.

52. Mr. President, Members of the Court, aside from the very ample consideration of the 2007 Judgment of this Court in the *Bashir* arrest warrant decision, the only other references to the Judgment in 2007 that I have found appear in last Friday's ruling of a Trial Chamber of the International Criminal Court in the *Katanga* case. Both the majority and dissenting Judge van den Wyngaert referred to the discussion in the 2007 Judgment with respect to the control test[99]. In the majority decision there are also many references to other decisions of the Court, including *Corfu Channel*, *Georgia* v. *Russia* and of course *Armed Activities on the Territory of the Congo*, but none of these are particularly relevant to the discussion of genocide and I will address them no further.

International Criminal Tribunal for the former Yugoslavia

53. Mr. President, Members of the Court, I now turn to the most important of the international criminal tribunals for the purposes of this case, the ICTY. Only a small number of cases at the ICTY have dealt with charges of genocide. It is therefore not unusual that it was only in mid-2010 that the Tribunal considered the Judgment of the ICJ for the first time. The *Popović*

[99] *Prosecutor* v. *Katanga* (ICC-01/04-01/07), Judgment of 7 March 2014 pursuant to Art. 74 of the Statute, para. 1178, fn. 2737; *Prosecutor* v. *Katanga* (ICC-01/04-01/07), minority opinion of Judge Christine van den Wyngaert, 7 Mar. 2014, para. 276, fn. 382.

case, to which I have already referred, concerned seven accused, four of whom were charged with genocide or, in the alternative, aiding and abetting genocide as participants in the Srebrenica massacre. Two of the accused, Popović and Beara, were convicted of genocide, while a third, Nikolić, was convicted of aiding and abetting genocide. Ludomir Borovčanin was acquitted of the genocide charge but convicted of aiding and abetting the crime against humanity of extermination. The Prosecutor did not appeal the acquittal of Borovčanin for genocide. The appeal in *Popović* was argued before the Appeals Chamber in December 2013.

54. The *Popović* Trial Chamber considered the legal elements of the crime of genocide in some detail, reviewing the case law on the subject. It cited the *Bosnia* decision on several occasions[100]. In almost all of these references, the Trial Chamber also referred to rulings of the *ad hoc* institutions, confirming the consistency of the international case law and the agreement of the ICJ with the legal findings of the ICTR and the ICTY.

55. Of particular interest was its consideration of the punishable acts, especially that of causing serious bodily or mental harm. The Trial Chamber approved of the statement by the Appeals Chamber of the ICTR in *Seromba* — to which I referred earlier — that "[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part"[101]. It provided various examples[102] to which I have already referred, citing in support paragraph 319 of the Judgment of the ICJ in *Bosnia.* The Trial Chamber also noted the holding of the Appeals Chamber that forcible transfer "does not constitute in and of itself a genocidal act"[103]. The footnote to this statement said:

> "The International Court of Justice has held that neither the intent to render an area ethnically homogenous nor operations to implement the policy 'can *as such* be designated as genocide: the intent that characterizes genocide is to "destroy, in whole or in part," a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group'."[104]

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[100] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 807, fns. 2910 and 2911; para. 808, fn. 2913; para. 809, fn. 2916; para. 812, fn. 2925; para. 813, fn. 2926; para. 814, fn. 2929; para. 817, fn. 2934; para. 819, fn. 2937; para. 821, fn. 2940; para. 822, fns. 2943 and 2944; para. 827, fn. 2958; para. 831, fn. 2968.

[101] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 811.

[102] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 812.

[103] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 813.

[104] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 813, fn. 2926, citing *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 123, para. 190 (emphasis in the original).

56. Referring to the punishable acts of genocide that are listed in the five paragraphs of Article 2, the Trial Chamber said that the methods of destruction covered in the third act — "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" — are "those seeking a group's physical or biological destruction"[105]. And here it referred to paragraph 344 of this Court's 2007 Judgment, and cited the Court's statement that "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group". The Trial Chamber also considered briefly the fourth act of genocide — "Imposing measures intended to prevent births within the group" — in concluding that, "[t]o amount to a genocidal act, the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group . . . in whole or in part"[106]. It provided as authority two paragraphs from this Court's 2007 Judgment[107].

57. The Trial Chamber also devoted significant attention to the contention by one of the defendants that the crime of genocide comprised an element of State policy. The Trial Chamber rejected this argument, stating that the jurisprudence of the *ad hoc* tribunals had "made it clear that a plan or policy is not a statutory element of the crime of genocide"[108]. The Trial Chamber referred to the Elements of Crimes of the ICC, holding that Article 6 of the Rome Statute, which consists of the definition of genocide drawn from the 1948 Convention, "does not prescribe the requirement of 'manifest pattern' introduced in the ICC Elements of Crimes"[109]. The Trial Chamber said that "the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide"[110]. It said that the Appeals Chamber of the ICTY in *Krstić* had already said "reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite"[111]. Although the

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[105] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 814.

[106] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 819.

[107] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 819, fn. 2937, citing *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 190, para. 355.

[108] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 829.

[109] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 829.

[110] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 829.

[111] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 829.

passage was not cited by the Trial Chamber in *Popović*, the Appeals Chamber in *Krstić* had gone on to say that because "the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber's conclusion"[112]. The *Popović* Trial Chamber concluded "that a plan or policy is not a legal ingredient of the crime of genocide . . . However, the Trial Chamber considers the existence of a plan or policy can be an important factor in inferring genocidal intent"[113]. The *Popović* Trial Chamber did not mention or otherwise consider the ruling of the Pre-Trial Chamber of the ICC issued 15 months earlier in the *Bashir* arrest warrant. Here then there is a very significant contrast in the interpretation of Article 2 of the Convention by Chambers of the ICC and the ICTY.

58. The trial of Radovan Karadžić began in October 2009. The Prosecutor has alleged that Karadžić, as the highest civilian and military authority in the Republika Srpska, participated in an "overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in BiH"[114]. This objective

> "was primarily achieved through a campaign of persecutions as alleged in this indictment. In some municipalities, between 31 March 1992 and 31 December 1992 this campaign of persecutions included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such."[115]

That is the indictment against Karadžić. The genocidal acts that are alleged correspond to the first three paragraphs of Article 2 of the Convention, namely, killing, causing serious bodily or mental harm, and deliberately inflicting conditions of life.

59. On 28 June 2012, after the Prosecutor had concluded the presentation of the case against the accused, the Trial Chamber granted in part the motion to acquit presented pursuant to Rule 98*bis* of the Rules of Procedure and Evidence and removed the charge of genocide with respect to activities of Bosnian Serb forces in the municipalities. It retained the charge of genocide

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[112] *Prosecutor* v. *Krstić* (IT-98-33-A), Judgment, 19 Apr. 2004, para. 224.

[113] *Prosecutor* v. *Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 830.

[114] *Prosecutor* v. *Karadžić* (IT-95-5/18), Prosecution's Marked-Up Indictment, 19 Oct. 2009, para. 8.

[115] *Prosecutor* v. *Karadžić* (IT-95-5/18), Prosecution's Marked-Up Indictment, 19 Oct. 2009, para. 38.

concerning Srebrenica[116]. The Trial Chamber issued its ruling orally, as has been the practice at ICTY for more than a decade.

60. With respect to the charge of genocide perpetrated in the municipalities over the course of the war as a whole, the Trial Chamber began by stating that it was not bound either by earlier findings during trials before the Tribunal or by the Judgment of the ICJ of February 2007[117]. The Chamber said that the evidence submitted to the Tribunal by the Prosecutor indicated "that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the municipalities during and after their alleged take-over and while in detention"[118]. It said this evidence was "capable of supporting a conclusion that Bosnian Muslims and/or Bosnian Croats were killed on a large scale with the intent to kill with persecutory intent"[119], crimes against humanity language. Furthermore,

> "the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold. However, the evidence the Chamber received in relation to the municipalities, even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such."[120]

61. Turning to the punishable acts of genocide that are enumerated in the five paragraphs of Article 2 of the Convention, the Trial Chamber made comments about "serious bodily harm" and repeated the statement that "in order to support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part"[121]. Referring to the jurisprudence of the Tribunal, and specifically the Appeals Chamber ruling in *Krstić* and the Trial Chamber Judgement in *Popović*, the Trial Chamber said this

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[116]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,751, lines 23-25; p. 28,752, line 1, p. 28,757, line 25; p. 28,758, lines 1-10.

[117]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,763, lines 20-24.

[118]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,764, lines 22-25.

[119]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,765, lines 1-4.

[120]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,765, lines 4-13.

[121]*Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,766, lines 3-6.

established "that forcible transfer does not constitute in and of itself a genocidal act"[122]. It said the Chamber had not

> "heard evidence which rises to the level which could sustain a conclusion that the serious bodily or mental harm suffered by those forcibly transferred in the municipalities was attended by such circumstances as to lead to the death of the whole or part of the displaced population"[123].

62. Speaking of the issue of genocidal intent, the Trial Chamber said:

> "[I]n the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence."[124]

63. And again it said that there was "there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such"[125].

64. The Prosecutor appealed the acquittal on the charge of genocide by the Trial Chamber and, on 11 July 2013, the Appeals Chamber ordered that the charge be reinstated[126]. In other words, the defence now has a case to answer on the point. The Appeals Chamber considered the Trial Chamber decision by first examining the findings with respect to evidence of the three punishable acts of genocide. Like the Trial Chamber, it insisted it was not bound by the factual findings and evidentiary assessments in earlier decisions of the Tribunal or by the ruling of the ICJ[127]. The Appeals Chamber noted that the Trial Chamber had concluded there was evidence that

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[122] *Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,766, lines 12-18.

[123] *Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,766, lines 23-25; p. 28,767, lines 1-3.

[124] *Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,768, lines 5-15.

[125] *Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28,769, lines 3-6.

[126] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013.

[127] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, para. 94.

the *actus reus* of the genocidal act of killing had been perpetrated[128]. Turning to the punishable act of causing serious bodily and mental harm, it referred to evidence of beatings and other forms of physical abuse as well as rapes[129]. The Appeals Chamber said that,

> "[w]hile the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide"[130].

The Appeals Chamber reached a similar conclusion with respect to the third act of genocide[131].

65. The Appeals Chamber concluded that "the evidence on the record, taken at its highest, could indicate that Karadzic possessed genocidal intent". It said, [o]ther evidence on the record indicates that other alleged members of the [joint criminal enterprise] also possessed such intent"[132]. The Appeals Chamber granted the appeal of the Prosecutor on the genocide charge relating to the municipalities.

66. Mr. President, Members of the Court, the significance of this decision of the Appeals Chamber could easily be exaggerated and it was certainly misunderstood by many observers of the proceedings. The test that is to be applied for such motions formulated during the trial and before the defence has presented its case and its evidence is "whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question and not whether an accused's guilt has been established beyond reasonable doubt"[133]. Indeed, an erroneous understanding of such Rule 98*bis* decisions was presented to the Court last week by Ms Law in her submissions. She was discussing

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[128] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, para. 25. This is probably a misreading of the Trial Chamber's position. Like the Appeals Chamber, the Trial Chamber methodically examined the relevance of each of the three punishable acts of genocide. Before turning to causing serious bodily and mental harm (beginning at p. 28,765, line 14), it discussed killing in the previous paragraph (beginning at p. 28,764, line 19). There it concluded, in language similar to what it used for the other two acts of genocide further on in the ruling, that "even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such" (p. 28,764, lines 8-13).

[129] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, paras. 34-36.

[130] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, para. 37 (reference omitted).

[131] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, paras. 47-48.

[132] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgment, 11 July 2013, para. 100.

[133] *Prosecutor* v. *Delalić et al.* (IT-96-21-A), Judgment, 20 Feb. 2001, para. 434 (emphasis in original). See also: *Prosecutor* v. *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 37.

the de la Brosse report, presented by the Prosecutor in the Milošević case. Citing the 2004 decision at the conclusion of the Prosecution's case, she said: "In 2004 the Trial Chamber adopted the conclusions of the report"[134]. That is of course not correct. The Trial Chamber did no such thing. It did not adopt anything. It merely enumerated the totality of the evidence that the Prosecutor had submitted, noting that, were it to be believed, it could sustain a conviction. In explaining the significance of the report to the Court, counsel for Croatia should have said that the report was prepared for, and submitted by the Prosecutor, and that we have no idea what the judges thought of it.

67. Professor Sands also referred to the Rule 98*bis* decision in the *Karadžić* case. He ascribed some weight to the fact that a charge involving genocide perpetrated against Croats within Bosnia and Herzegovina had been reinstated by the Appeals Chamber. Professor Sands was trying to make the point that if Serbs were perpetrating genocide against Croats in Bosnia, why would they behave differently in Croatia. He was probably exaggerating the significance of the decision of the Appeals Chamber to reinstate the genocide charge. Genocide of Croats in Bosnia in the municipalities has not been proved in *Karadžić*. Neither the Appeals Chamber nor the Trial Chamber has ever said it was proven. Indeed, it has never been proven at the ICTY in any of the cases. But, Mr. President, Members of the Court, there is no need for me to defend the charge here because this issue has already been decided by the International Court of Justice. It is as close to being *res judicata* as we can get. In February of 2007, this Court dismissed that part of the application by Bosnia and Herzegovina that alleged genocide against Croats. Even those judges, some of them here today, who disagreed with parts of the majority ruling, did not subscribe to the claim that Croats in Bosnia had been victims of genocide. So let me turn Professor Sands's argument around. I like Professor Sands's way of viewing this. If Serbs were not responsible for genocide against Croats in Bosnia and Herzegovina, as this Court has already ruled, why would they behave differently in Croatia? And indeed, it is this question that really strikes at the heart of Croatia's problem before the Court.

[134]CR 2014/5, p. 33, para. 6 (Law).

68. Mr. President, Members of the Court, motions to dismiss after the Prosecutor has concluded his case rarely succeed. Some defence lawyers prefer not to file them at all. The decisions often bear little or no resemblance to the final judgment on guilt or innocence. Indeed, until *Karadžić*, no such motion seeking dismissal of genocide charges had previously been successful before the Tribunal, and yet, as you know, as you have seen, it was overturned on appeal[135]. Yet none of the genocide charges containing the municipalities has ever resulted in a conviction. Thus, although the Appeals Chamber has said that statements attributed to Karadžić, Mladić and Krajišnik could show genocidal intent, it was in no way suggesting that a Trial Chamber would in fact consider this to be decisive evidence.

69. I turn to the final decision of interest at the ICTY. In December 2012, a Trial Chamber convicted Zdravko Tolimir of genocide with respect to crimes perpetrated in Srebrenica in mid-July 1995 and in the days that followed. It referred to the February 2007 Judgment of the ICJ as authority for the proposition that "[a] perpetrator's specific intent to destroy can be distinguished from the intent required for persecutions as a crime against humanity on the basis that a perpetrator who possesses genocidal intent has formed more than an intent to harm a group by virtue of his discriminatory acts; he actually intends to *destroy* the group itself"[136]. To an extent the Trial Chamber in *Tolimir* departed from earlier precedent by taking the view that "forcible transfer" could be "an additional means by which to ensure the physical destruction of a group"[137]. It endorsed the words of an earlier Trial Chamber decision in *Blagojević and Jokić* where it held "that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population . . ."[138]. The *Tolimir* Trial Chamber said it was "particularly guided" by this finding of the Trial Chamber in *Blagojević and Jokić*[139]. What it does not say is that this aspect of the

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[135]Judge Kwon, dissenting, voted to dismiss a genocide charge against Slobodan Milošević after the Prosecutor had completed her evidence. In *Prosecutor* v. *Milošević et al.* (IT-99-37-I); dissenting opinion of Judge O-Gon Kwon, 16 June 2004, para. 3, he wrote: "Taking the evidence from the Prosecution's case at its highest, the furthest that a Trial Chamber could infer in relation to the *mens rea* requirement is the knowledge of the Accused that genocide was being committed in the specified municipalities in Bosnia and Herzegovina, but not the genocidal intent of the Accused himself."

[136]*Prosecutor* v. *Tolimir (*IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 746 (emphasis in the original), citing *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 43, para. 187.

[137]*Prosecutor* v. *Tolimir (*IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 765.

[138]*Prosecutor* v. *Tolimir (*IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 764, citing *Prosecutor* v. *Blagojević and Jokić* (IT-02-60-T), Judgment, 17 Jan. 2005.

[139]*Prosecutor* v. *Tolimir (*IT-05-88/2-T), Judgment, 12 Dec. 2012, para. 764.

Blagojević and Jokić Trial Chamber judgment was reversed on appeal. The *Tolimir* Trial Chamber only states that it is "cognizant" of the holding by the Appeals Chamber that displacement of a people is not equivalent to destruction and that forcible transfer in and of itself is not a genocidal act[140]. One of the five members of the Appeals Chamber in the *Blagojević and Jokić* ruling was in dissent. Judge Shahabuddeen would have upheld a conviction of complicity in genocide, following a broader approach to the definition of the crime than his four colleagues[141]. As is often the case with dissenting opinions, they sharpen the debate and clarify any possible ambiguity about the intent of the majority judgment. Just as there can be no question that the Appeals Chamber in *Blagojević and Jokić* did not confirm the broad and liberal approach to genocide adopted by the Trial Chamber, there can also be little doubt that the Trial Chamber in *Tolimir* is promoting a similarly broad and liberal approach to genocide, thereby inviting the ICTY Appeals Chamber to reconsider its position.

Concluding observations

70. Mr. President, Members of the Court, in the 2007 Judgment in the *Bosnia* case, the Court built upon the case law of the ICTY. To that extent, it is almost inevitable that its analysis would use individual rather than State responsibility as the starting point. One of the very commendable features of the 2007 Judgment was its effort at reconciling the interpretation of international legal provisions by international tribunals, thereby addressing the problem of fragmentation and encouraging the development of a holistic system despite the absence of structural unity in the hierarchical sense of domestic legal systems. In the *Diallo* case, the Court said that while it was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation" of the International Covenant on Civil and Political Rights on that of the United Nations Human Rights Committee, it said it "should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty". The Court said this would help "to achieve the necessary clarity and the essential consistency of international law,

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[140] *Prosecutor* v. *Blagojević and Jokić* (IT-02-60-A), Judgment, 9 May 2007, para. 123. Note that this judgment was issued several weeks after the Feb. 2007 Judgment of the ICJ. The Judgment is listed as an authority at the end of the Appeals Chamber's judgment but it is not in fact cited anywhere in the reasons of the Appeals Chamber.

[141] *Prosecutor* v. *Blagojević and Jokić* (IT-02-60-A), partly dissenting opinion of Judge Shahabuddeen, 9 May 2007.

as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled"[142]. But, Mr. President, Members of the Court, there is a slight difference in this respect between the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Because the latter contemplates not one but two tribunals with authority for its interpretation without indicating a preference as to which is more authoritative: an "international penal tribunal", in Article 6, and the ICJ, in Article 9. Let me note in passing that last week Judge Cançado Trindade raised a question about the significance of the case law of international human rights tribunals, and I propose to address this point, but not in today's submission.

71. Mr. President, Members of the Court, in the *Bosnia* case this Court held that the ICTY was an "international penal tribunal" contemplated by Article 6 of the Genocide Convention. Although it did not speak directly to the point in that judgment, it is obvious that the ICC is also a tribunal within the meaning of Article 6 of the Genocide Convention. In other words, the situation is slightly more complicated than it was in the *Diallo* case, because of the multiplicity of international tribunals with responsibility for the interpretation of the norm. Moreover, even within the frame of the international penal tribunals contemplated by Article 6, as this oral presentation has attempted to show, there are conflicts in the interpretations proposed by the ICTY and the ICC. Nor can the issues be neatly parcelled out, letting the international criminal tribunals deal with matters of individual criminal liability while reserving State responsibility for the ICJ. The issue of the mental element of the crime of genocide may look somewhat different depending upon whether it is approached from the angle of individual intent, as has been the tendency at the ICTR, and the ICTY, or State policy, as may be the correct approach when examined from the perspective of State responsibility. The "knowledge-based" approach, to which I alluded earlier, may be of some assistance in solving the problem, thereby promoting the unification of international law, an objective that the Court endorsed in the *Diallo* case.

72. The Judgment of the ICJ in the *Bosnia* case met with considerable disappointment in some circles where a broad and expansive definition of genocide had been advocated. For decades,

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[142] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66.

basically from the time of adoption of the 1948 Convention, frustration with the narrow terms of Article 2 had frequently been expressed. Indeed, the Genocide Convention was only intended to cover a narrow range of atrocity crimes. At the time of its adoption, it was impossible to achieve any broader consensus within the United Nations General Assembly on the punishment of international atrocity crimes. Anxiety about an extensive reach of international criminal justice had prompted the four Powers at the London Conference, in 1945, to limit the scope of crimes against humanity, as I explained earlier in my presentation. Three years later, the General Assembly reflected similar concerns by defining genocide narrowly and seemingly excluding such corollaries as the exercise of universal jurisdiction.

73. In the decades that followed, dismay with such restrictions manifested itself in calls for the definition of genocide to be interpreted very broadly or, alternatively, to be amended. There was little in the way of similar initiatives concerning crimes against humanity because of the absence of an international treaty for that broader category that would be similar to the Genocide Convention.

74. When international justice revived, in the 1990s, the impetus for expanding the scope of crimes manifested itself, largely, in the enlargement of the definition of crimes against humanity and the extension of war crimes to situations of non-international armed conflict. The Rome Statute of 1998 confirmed this very dramatic legal evolution, or perhaps revolution is more accurate. One consequence was to relieve the pressure to expand the definition of genocide, either through amendment or by interpretation. The impunity gap left by the initial codification of the 1940s was filled in the 1990s, but by the development of crimes against humanity and war crimes rather than that of genocide.

75. Mr. President, Members of the Court, when the Rome Statute was concluded in 1998, 50 years after the adoption of the Genocide Convention, there had been very little judicial interpretation of the crime of genocide by international courts and tribunals. This Court had discussed the substance of the crime but only in the most general terms in the Advisory Opinion of 1951. There was also some limited consideration in the preliminary rulings in the *Bosnia* case. The *ad hoc* tribunals had yet to complete a trial where genocide was charged. Since 1998, there has been a huge body of legal interpretation. This submission has dealt with only the most recent

highlights, confining itself to decisions and judgments, since the February 2007 Judgment, by international courts and tribunals.

76. The Judgment of this Court in the *Bosnia* case of February 2007 had the effect of consolidating a process of stabilization in the definition of genocide that had been underway for several years at the *ad hoc* tribunals. When the *ad hoc* tribunals began issuing judgments on the interpretation of the definition of genocide, there was initially no clarity about the direction this would take. For decades, there had been controversy resulting from the narrow scope of the definition in Article 2 of the Convention. For proponents of a broad construction of the crime, there may have been some hope that this would be achieved through the work of the *ad hoc* tribunals. They were disappointed; this did not prove to be the case. The leading decision of the Appeals Chamber of the ICTY, in *Krstić* in April 2004, left no question about the direction that was being taken. A rear-guard effort by one Trial Chamber, in *Blagojević and Jokić*, to reverse the trend towards a relatively narrow and strict interpretation, was quickly corrected by the Appeals Chamber. Although debates remain about some issues, the broad principles set out in the February 2007 Judgment made a great contribution to the consolidation of a body of law that is now relatively clear and, above all, foreseeable and predictable in its application and consequences. The challenge, in this case as in others, is to understand and apply the facts to an established body of law rather than to break new ground through radical or novel interpretations.

77. Mr. President, Members of the Court, I am grateful to you for giving me the opportunity to present this rather academic discussion on the law of genocide. I hope it is of assistance in your deliberations. May I now ask you to give the floor to the Agent of Serbia, Mr. Obradović.

The PRESIDENT: Thank you very much, Professor Schabas. I now give the floor to the Agent, Mr. Obradović; you have the floor.

Mr. OBRADOVIĆ: Thank you very much, Mr. President.

THE ISSUE OF EVIDENCE PRODUCED BY THE APPLICANT

1. Introduction

1. Mr. President, allow me to turn now to another important issue: the issue of evidence. Last week, the Court could hear Mr. Kožul, the witness called by Croatia, who testified about his tragic experience in Vukovar. However, the witness commenced his testimony by denying that the copy of the original statement shown to him was *his* statement. Sir Keir Starmer was assisted a little bit by the interpreter who clarified that there were actually two statements in front of the witness. One of them was the statement of 23 March 1993, which had been translated into English, and to which he referred in his testimony. This was the document he was invited to adopt by counsel for Croatia. But he also spoke of another statement that was shown to him because it somehow also appeared with the Croatian original. It was a statement of 20 May 1992 prepared by the Croatian police. Now, the witness who is obviously an honest man, and who is the victim of a terrible crime, said that the police statement was not accurate, that he had not signed it, and that he would never sign it[143]. The first page of that statement fabricated by the Croatian police is shown on your screen[144].

2. The next statement on the screen is the first page of the original of Annex 189 to the Memorial, to which Professor Sands referred in his recital of "well-documented" atrocities[145]. They are so similar. "Coincidence? Surely not!" In these proceedings, the Applicant has referred to 209 such domestic police reports made during the war, out of which 189 originals in the Croatian language were delivered to the Court as unsigned[146]. The document that Mr. Kožul refused to adopt is one such document. There is no doubt that, if the alleged authors of the other, similar police statements had also been called to testify, and if they had testified honestly, as did

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[143]CR 2014/7, p. 13.

[144]Copy of the original delivered by Croatia as Annex 154 to the Memorial and shown to the witness Kožul before his testimony.

[145]Copy of the original delivered by Croatia as Annex 189 to the Memorial, referred to by Prof. Sands (CR 2014/6, p. 58, para. 18).

[146]See, for examples, copies of the originals delivered by Croatia as Annexes Nos. 35, 202 & 254 to which Prof. Sands referred (CR 2014/6, paras. 22, 29 & 32).

Mr. Kožul, the fact that these unsigned statements were all prepared by the police and are entirely unreliable, would be quite clear. This is so characteristic of the Applicant's evidence. It is a message of "demonization" of Serbs, founded upon fabricated and false documents.

3. At the same time, this reflects how strong disagreement remains between the Parties concerning this issue. The Parties have so far applied the fundamentally different approaches to the presentation of evidence. Serbia respectfully requests the Court to give a proper weight to this important question. Otherwise, the dispute concerning genocide would be transformed into a new and never-ending quarrel vis-à-vis reliability of the Croatian evidence. Moreover, we think that the significance of this question goes even beyond the interest of the subject-matter of the case at hand, and that the Court, by determining its position to the issues raised by Serbia, can give guidance to the parties for future international litigations.

2. The Applicant's odd approach to the method of proof

4. Last week, Sir Keir Starmer criticized our approach to this issue, and said that "even if the Respondent won every argument in the pleadings about every piece of evidence over which it seeks to quibble, it would make no difference to the totality of the evidence and the overall outcome of the case"[147]. Firstly, I do not quibble; I defend my country charged with genocide. I have a strong view that the Applicant's claim is based on the problematic evidence that cannot be used before a court of law. Secondly, if one won every argument about every piece of evidence, what would be then the totality of evidence left behind? Those evidence accepted by the ICTY? Thirdly, Serbia, as I will later explain in detail, does not challenge that serious crimes were committed against the Croats, but tries to protect itself from exaggerations and a "cherry picking" tactic used by the Croatian counsel: when they find an encouraging sentence for the Applicant's case in the ICTY judgements, they take it and put on the screen; but when the ICTY findings are silent or say something that is not in favour of the Applicant's claim, our learned opponents seek help of the unsigned statements and the reports of their State bodies.

[147]CR 2014/10, p. 53, para.14 (Starmer).

5. In our written pleadings, we expressed the view that Croatia produced a great number of documents which cannot be used as evidence because they do not fulfil minimum evidentiary requirements; those are the documents without any probative weight. *Nota nostra manet*[148].

6. Serbia also emphasized the importance of discussions on the method of proof contained in the judgments of this Court. In our view, the Court has established a useful practice emanating from the general principles of evidence law. Unfortunately, it seems that Croatia in these proceedings has persistently demonstrated a lack of respect for all those good rules on evidence, even those existing before its own judiciary.

2.1. Documents prepared by a party especially for the case ought to be treated with caution

7. For example, in spite of the Court's practice that it would "treat with caution evidentiary materials specially prepared for [the case in question]"[149], the Applicant produced extensively its own lists, graphics, official reports and statements, aiming to prove by those home-made documents the existence of crimes, victims, mass graves, detention camps, or simply, the alleged names of paramilitary units[150]. Many of the Applicant's lists appear as inaccurate and unreliable, as we explained in the Rejoinder[151].

2.2. The lack of information about the circumstances under which documents have been generated

8. The Court's interest to review the process in which the document tendered as evidence has been generated[152] has also been neglected by the Croatian side. In 154 affidavits annexed to the Memorial, the Applicant did not indicate who was the person or the body that took the alleged statement, in which procedure, and under which circumstances[153]. The provenance of many maps, photos and graphics presented in the Memorial is also unknown.

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[148]See Counter-Memorial of the Republic of Serbia (CMS), Chap. III, and Rejoinder (RS), Chap. III.

[149]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[150]See judges' folders of 6 Mar. 2014: map of mass graves, map of individual graves, table of camps; see also plate 12 in the Memorial.

[151]RS, paras. 265-271.

[152]*Bosnia*, *Judgment, I.C.J. Reports 2007 (I)*, p. 135, para. 227.

[153]The numbers of those statements are listed in fn. 110 on p. 67 of the Counter-Memorial.

2.3. Hearsay is not conclusive evidence

9. The affidavits produced by the Applicant are also full of hearsay. While the Court prefers "contemporaneous evidence from persons with direct knowledge"[154], or, in other words, "evidence obtained by . . . persons directly involved"[155], and assesses hearsay "as allegations falling short of conclusive evidence"[156], Croatian team urges reliance upon such materials before the international courts and tribunals[157]. Our view to this issue is also given in the Rejoinder in detail[158].

2.4. The testimony of State officials in favour of their Governments cannot be taken as reliable

10. Although the Court calls for evidence confirmed by impartial persons[159], and reasonably points out that the value of presented reports depends, among other things, on the source of the item of evidence[160], Croatia continues to rely on partisan opinions: it has called its deputy minister to testify here as an "expert witness". In *Military and Paramilitary Activities in and against Nicaragua*, as well as in *Armed Activities on the Territory of the Congo*, the Court found that it was inappropriate to rely on the testimony of State officials. The Court said that a

> "member of the government of a State engaged . . . in litigation [before this Court and especially] litigation relating to armed conflict [would] probably tend to identify himself with the interests of his country . . ."[161].

We could not agree more. Serbia did not call its officials to testify. With due respect to Colonel Grujić, Serbia questions the wisdom of reliance on his statement. The exception, of course, ought to be made for the statements of Colonel Grujić which were against the interests of his State in this case[162].

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[154] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[155] *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 131, para. 214.

[156] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17.

[157] Reply of Croatia (RC), para. 2.44.

[158] RS, paras. 256-258.

[159] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[160] *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 135, para. 227.

[161] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 70; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[162] See *Bosnia, Judgment, I.C.J. Reports 2007 (I)*, p. 135, para. 227.

11. On Friday, Croatia answered the question of Judge Greenwood concerning relevant numbers of killed and imprisoned in relation to the events in Vukovar[163]. It was clearly shown that the Croatian State records were far away from completeness. But that is not the main problem. By avoiding to call a neutral expert who would test the method of collecting data, Croatia actually deprived the Court from the opportunity to evaluate the figures presented in the Grujić report.

12. I would not like to be answered next week that our position is defensive. In paragraph 171 of the Counter-Memorial, Serbia declared its willingness to discuss reaching an agreement on relevant facts with Croatia. It was in January 2010. Could we offer more in the interest of reconciliation? But the other side was silent because the agreement could not be limited to the facts related to the crimes against the Croat population; it should also include the facts relevant to suffering of the Serbs in Croatia.

2.5. Who can be an expert witness before the Court?

13. Calling Ms Biserko, a human rights activist, who has a degree in economics, to be an expert on political, historical and constitutional issues, goes even beyond the ideas on the method of proof that have so far been recorded among the Parties before this Court. Ms Biserko does not possess the appropriate level of knowledge and professional skills in the fields of politics, contemporary history and constitutional law of the former Yugoslavia which should enable her to be an expert — or expert witness — whose opinion, whatever it is, could be accepted by a court of law. This was clearly shown during cross-examination.

14. The statement of Ms Biserko is problematic in many ways. I would just remind the Court of the introductory sentence of her opinion:

> "I have been asked by the Croatian legal team to provide a statement which will bear light on the Serbian national program which was the main trigger for the war in the former Yugoslavia."

Hence, it seems obvious that the Applicant provided her with a task to elaborate its own thesis in this case, instead of asking her for an objective analysis. She got the task, but also an outcome, as many campaigners dependent on the sources of donors work today. It was clearly shown in her

[163]CR 2014/12, p. 11 (Starmer).

reluctance to answer the question about the task that President Mesić had got in the process of disintegration of the Federal State. She was biased.

15. Members of the Court, in addition to these several observations, the Respondent considers that two problems require your special attention.

3. The lack of signatures on the originals of affidavits produced by Croatia

16. The first problem is related to affidavits produced by Croatia. The Respondent observes that 332 affidavits annexed to the Memorial do not contain the signature of the person who allegedly gave the statement[164], while 161 affidavits do not contain the signature of the person who allegedly took those records. Ten years after the submission of the Memorial, the Croatian police, in response to the objection raised by the Respondent, collected 188 signatures missing from the affidavits that were originally made in Croatian[165].

17. Distinguished Members of the Court, collecting the signatures can be appropriate for a petition to the local government, but not for the case concerning the Genocide Convention. If collecting the signatures among the citizens was a proper method for supporting a claim in the inter-State litigations, the overpopulated countries, I suppose, would always win their cases.

18. The Respondent reiterates that the affidavits submitted by the Applicant do not fulfil minimum evidentiary requirements. As such, those materials cannot be treated as documents equal to, for example, exhumation reports, military orders or decisions by a government. They also cannot be equated with the public statements of a head of State recorded by press. These affidavits are rather out-of-court testimonies, taken without any procedural safeguards — they cannot be tested for their authenticity and veracity through cross-examination. Seven witnesses called by the Applicant to testify in the course of these oral proceedings may improve the formal shortcomings of their own written statements, but not the rest of unsigned statements, especially not in the cases in which the majority of those statements is not related to the events described by these seven witnesses.

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[164]The numbers of those affidavits are listed in para. 155 of the Counter-Memorial.

[165]RC, Ann. 30.

19. Moreover, I would like to emphasize that the written records submitted with the Memorial and Reply were even not taken in accordance with the rules of the Croatian domestic legal proceedings. Even when the statements were recorded on the court-like formularies, typical for all courts in the former Yugoslavia, they do not contain the signatures of the judges who allegedly took them[166]. This is evident from the copies of the originals delivered by the Applicant separately from the annexes to the Memorial.

20. I will give one example. In the Memorial, the Applicant quotes a horror statement contained in Annex 143. That was the statement of an individual who allegedly reported that in Vukovar,

> "many dead, bloody people were found and one woman had a cut abdomen, her baby was taken out and replaced with a dog with the sign: 'This is what Croatian mothers give birth to.' The container was full of hands, heads, legs, sticking out . . .'"[167]

21. The Respondent observes as follows.

(a) The copy of the original statement given in Croatian does not have the signature of the person who allegedly gave that statement.

(b) Nor can we find from that document in which procedure and under which circumstances her statement was recorded.

(c) The quotation in the Memorial is not quite accurate — it does meet neither the text of the original nor its translation.

(d) From the information contained in the statement, it seems that the person named in that document as a source of information was not an eyewitness of the reported horror — it was hearsay.

(e) That allegation has never been repeated in any of the three courtrooms of the neighbouring Tribunal.

(f) The *alleged* bearer of the *alleged* information has not been called to testify in these hearings.

(g) Nor has the person who allegedly recorded her statement been called to testify.

How can we believe then in this horrific allegation from the Memorial? And should we continue with this analysis for each and every piece of evidence? Instead of that, we prepared a table

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[166]See RS, para. 248.

[167]MC, para. 4.166.

submitted in the judges' folders, which contains a sample review of the sources of quotations used by Professor Sands last week in his speech, under the subheading "The ethnic purpose of the Respondent's campaign"[168]. I think it is a representative example of the way in which Croatia has used evidence in this case.

22. Mr. President, let me assure you that it is not our intention to undermine the importance of the victims' testimonies. It may be that ***some*** of those statements are true and accurate, but they cannot be checked. Consequently, this is not an appropriate method of proof in the case before the International Court of Justice.

4. Documents prepared by the Croatian police

23. The second problem that I would like to emphasize today comes with the documents generated by the Croatian police. Namely, 209 documents annexed to the Memorial[169], as well as 23 annexed to the Reply, are the official records of the police interrogations.

24. The Respondent respectfully submits that those official records, even if they were signed — rarely — by the persons who allegedly gave the statements, must be disregarded for the following reasons. Firstly, there is no doubt that the police of the State engaged in the so important international litigation cannot be seen as impartial. Serbia does not use in this case materials generated by its own security services.

25. Secondly, it is evident today that Croatia's official organs were secretly engaged in the large-scale assistance and support to the defence of the Croatian Generals accused before the ICTY. This is confirmed by many secret Croatian documents which can be found today in public domain, as for example, the letter of Deputy Minister of Defence, Mr. Markica Rebić, addressed to President Tudjman on 4 June 1998, in which the defence of the accused Croats before the ICTY was associated with the national interest of the Republic of Croatia[170].

26. Thirdly, the current President of Croatia, H.E. Mr. Ivo Josipović, in his statement to the B92 TV station in December 2012, admitted that it was "absolutely clear" that until 2000 the

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[168]CR 2014/6, pp. 56-62, paras. 13-30 (Sands).

[169]The numbers of those statements are listed in fn. 112 on page 67 of the Counter-Memorial.

[170]ICTY, *Mrkšić et al.*, Exhibit No. 299, available on http://icr.icty.org/frmResultSet.aspx?e=fteplm32o5xojx451dhuswji&StartPage=1&EndPage=10.

co-operation of the Republic of Croatia with the ICTY had been "faked", characterized even with the gathering of false evidence[171]. I would point out that most of the evidence that I objected to now was prepared by the Croatian police within the same time period, that is to say until the year 2000.

27. Last but not least[172], the official records of the police interrogations cannot be used as evidence even before the Croatian courts. According to the Croatian Criminal Procedure Code, the police authority may not examine citizens in the role of defendants, *witnesses* or expert witnesses[173]. Any information given by the citizens to the Police shall be excluded from the Court's file by the investigating judge[174]. The same rules are applicable in Serbia[175]. This is an important procedural safeguard based on the principle of direct testimony before the trial chamber. What the Police recorded for the Prosecutor must be later proven at the trial. It cannot be taken as a proof by itself.

5. Conclusion

28. In our written pleadings we called this sort of evidence produced by Croatia "inadmissible", in a general meaning of that term, but with a full awareness that the International Court of Justice, apart from the requirement for certification of copies of the documents annexed to the written pleadings, contained in Article 50 of the Rules of Court, and the requirement contained in Article 56 of the Rules of Court that stipulates the limited opportunities for production of documents in the oral proceedings, does not contain any formal prohibition vis-à-vis the submission of evidence in the written phase. This means that all those unreliable papers remain in the Court's file, and I hereby respectfully claim that they are inappropriate to be used as evidence.

29. The Respondent considers that the production of such a large amount of documents without any probative weight has been directed merely to confuse the Court in its evaluation.

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[171] Available on http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=12&dd=07&nav_category=11&nav_id=667053in Serbian; translation into English submitted to the Court on 8 August 2013.

[172] See RS, paras. 254 & 255.

[173] Criminal Procedure Code of the Republic of Croatia, Art. 208(4); translation into English available on - legislationline.org/.../id/.../Croatia_Criminal_proc_code_am2009_en.pdf

[174] *Ibid.*, Art. 86 (3).

[175] Criminal Procedure Code of the Republic of Serbia, Art. 288(2) and Art. 237(3); translation into English available on - http://legislationline.org/download/action/download/id/3560/file/Serbia_2011%20CPC%20English_.pdf.

ANSWER TO THE QUESTION POSED BY JUDGE BHANDARI

30. With your permission, Mr. President, I would now deal with the question posed by Judge Bhandari about the probative weight that should be given to the three different categories of evidence.

31. Firstly, the Respondent shares the Applicant's view that the testimony of witnesses who were called for cross-examination should be assessed in light of their reliability and credibility, as it is common in all judicial systems.

32. Secondly, the Respondent submits that the testimony of witnesses who were identified for live testimony by a party but not called for cross-examination by the opposite party should not be given less probative weight only for that reason. The Parties in this case adopted last year the Agreement on method of examining the witnesses and expert-witnesses, by which they agreed that the written statement of witnesses called to testify in the oral proceedings should be given in lieu of examination-in-chief. That agreement was recognized by the Court's decision regarding the conduct of the witness testimony. The Parties also agreed that those witnesses for whom the other side does not wish cross-examination should not come to The Hague. That was so decided in order to accelerate the oral proceedings. The Parties did not intend, as the Applicant confirmed last week, that their choice not to cross-examine a witness should undermine the probative weight of the written statement given in lieu of examination-in-chief. Such a view would not be fair, and the Respondent considered that the Court was not in doubt in relation to this procedural issue. Otherwise, the Respondent would reconsider its position vis-à-vis the need for live testimony of its seven witnesses and expert-witness for whom Croatia has not wished cross-examination.

33. Of course, the written statement of the witnesses given in the course of the oral proceedings may be of less probative value if they are inconsistent with other evidence produced by the Parties and assessed by the Court as fully convincing evidence, or if those statements possess shortcomings that are self-evident, as it is the case with the poor substance of the statement of expert-witness George-Mary Chenu, called by Croatia.

34. Thirdly, the statements that have been annexed to the written pleadings should be treated as out-of-court testimonies, also known as affidavits. The Respondent agrees in principle with the

Applicant that all those statements should be assessed in light of the criteria established in the *Bosnia* case[176], in the same way as all other documents furnished by the Parties.

35. In the Respondent's view, the Court should give a special attention to the transcripts of testimonies accepted before the International Criminal Tribunal for the former Yugoslavia. Those transcripts were made by the United Nations professional staff, while the testimony under the solemn declaration was tested through cross-examination, re-examination and additional questions posed sometimes by the ICTY judges.

36. The testimonies given before the municipal courts, in accordance with the domestic rules of procedure, should also take the significant attention of the Court.

37. Finally, the unsigned statements, the statements made in unknown procedure, as well as the statements fabricated by the official bodies lacking the proof of impartiality, should be disregarded, in light of my previous explanation.

A GENERAL VIEW TO THE APPLICANT'S FACTUAL ALLEGATIONS

38. Mr. President, the fundamental disagreement of the respondent State with the Applicant's approach to the unsigned statements and police reports does not mean that the Serbian Government denies that serious crimes were committed during the armed conflict in Croatia. Yes, the serious crimes were perpetrated against the members of the Croatian national and ethnic group. They were committed by groups and individuals of Serb ethnicity. It goes without saying that Serbia condemns such crimes, regrets that they were committed, and sympathizes profoundly with the victims and their families for the suffering that they have experienced.

39. The Higher Court in Belgrade has so far convicted and imprisoned 15 Serbs for the war crimes against prisoners of war at the farm Ovčara near Vukovar, and another 14 for the war crimes against civilians in the village of Lovas in Eastern Slavonia. The second judgment has recently been quashed by the Court of Appeal due to the shortcomings concerning the explanation of the individual criminal liability for each accused, and the trial must be held again. An additional ten cases for the war crimes committed by Serbs in Croatia have been concluded before the Higher Court in Belgrade. In total, 31 individuals of Serb nationality have so far been convicted and

[176] *Bosnia*, *Judgment, I.C.J. Reports, 2007 (I)*, p. 135, para. 227.

imprisoned, while there are others being accused[177]. Investigations on several crimes are under way, including the crime in Bogdanovci.

40. Thus, despite the careless approach to the presentation of evidence by the Applicant, it is not in dispute that murders of Croatian civilians and prisoners of war took place during the conflict. This was established also in the ICTY Judgment against Milan Martić, who was convicted as the former Minister of Interior of the Republic of Serbian Krajina, as well as in the case *Mrkšić et al.*; the last case is also known as "Ovčara"[178]. In that notorious crime, the ICTY recorded 194 prisoners of war who were killed. This was the gravest mass murder in which Croats were the victims during the entire conflict.

41. If one carefully makes a review of all ICTY indictments in which the crimes against Croats were alleged, he or she will find many victims, indeed. There is no doubt that many Croats also died in the combat activities during the five-year conflict. Yet, from the point of view of the subject-matter of this case, those numbers of victims are of an entirely different magnitude than the many those killed in Srebrenica — or in Krajina — over the course of several days.

42. Mr. President, I am fully aware of the possibility that more murders of the Croatian civilians and prisoners of war were committed, but we cannot see reliable evidence on that. As I have already stated, the other documents produced by the Applicant with the written pleadings containing allegations on killing cannot be taken as verifiable and reliable.

43. Now, in light of all of these necessary observations, allow me to draw your attention to the allegation that "JNA and subordinate Serb forces killed over 12,500 Croats", that "they caused serious mental and physical harm to tens of thousands" and "raped more Croat women than can be known"[179]. We have not seen yet any single piece of evidence that contains these estimations, and I am sure today that such evidence does not exist. Moreover, Colonel Grujić, as the Applicant's State official, testified here about the exhumed bodies and missing persons in accordance with the Croatian official records, but he did neither confirm nor claim any figure of over 12,500 victims

[177]See http://www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm.

[178]See more, RS, paras. 476-486.

[179]CR 2014/6, p. 45, para. 13 (Špero).

killed. Does it mean maybe that the Croatian legal team representing the people who are alleged victim of genocide forgot to ask the expert witness for that relevant data?

44. This was the Respondent's general position to the Applicant's allegation concerning the killing as one of the *actus reus* of the crime of genocide on which the Applicant's claim is primarily based. The Respondent also observes that the Applicant last week heavily relied on one sentence from the Rejoinder that the acts described in the Croatian pleadings theoretically might correspond to the *actus reus* of genocide. It may be that the word "theoretically" was not the right one. "Conditionally" would be better choice because the crime of murder can be the act of genocide indeed, *if* it was perpetrated with intent required for that crime. Without that *dolus specialis*, murder remains murder, it can be characterized either as a war crime or an act of the crimes against humanity. This could be a task for Croatia to comment next week, but definitely, it cannot seek proving a half of genocide: the *actus reus* cannot exist as such without the required intent.

45. Indeed, the Applicant has not produced any single document or statement containing evidence on the *dolus specialis* of the crime of genocide. The JNA intelligence report contained in Annex 63 to the Reply and shown on the screen last week several times, is nothing else but a faithful attempt of one colonel to warn the JNA command in Belgrade that paramilitaries in Eastern Slavonia committed horrific crimes, outside the JNA control. I cannot believe that the Applicant really expects that the legal characterization of those crimes as adopted by the JNA Colonel Djokovic binds the International Court of Justice. Nor can it be treated as an admission of State responsibility, as the Applicant submits. And which State, after all? SFRY?

46. In the absence of the Serbian plan to commit genocide, the Applicant seeks to find a shortcut through the pattern of behaviour of the perpetrators. Yet, it is a long way; the pattern in this case does not convincingly demonstrate the genocidal intent. Following what we heard in the Great Hall of Justice last week, it is obvious that neither a substantial, nor a significant part of the Croatian national and ethnical group was destroyed. It was clear. The last attempt of the Applicant was to invoke the opportunity factor. The Croatian counsel said: "The opportunity presented to the perpetrator is highly significant, and what happened when that opportunity was presented is

obviously important."[180] We cannot agree more. It is just at the opportunity factor where the Croatian claim definitely crashed. Allow me to give you a couple of examples.

47. Firstly, the Applicant has not shown evidence that the Croat population was not given a way out from Eastern Slavonia during the heavy battles for the towns and villages. The civilian population during the shelling of Vukovar was in the shelters and, after the fall of the town, the JNA conducted the evacuation of women and children from the destroyed town. The ICTY in *Mrkšić* found: "The women and children, who, with some others, were being *evacuated* had to board different buses depending on whether *they wanted* to go to Croatia or to Serbia."[181] Hence, they were not killed. Nor were they attacked while being in the refugee columns as it was the case with the Krajina Serbs during "Operation Storm".

48. Secondly, witness Kožul testified about more than 1,000 men imprisoned with him in Serbia, in Stajićevo. They were released, not killed[182]. The Applicant produced to the Court a list of the persons detained on the territory of Serbia in 1991/1992, with names of 2,786 Croats[183]. Were they killed or released? If the intent to destroy the group existed, the civilians and detainees could be the easiest target for the alleged perpetrators of genocide, and the opportunity for their destruction was in place.

49. Thirdly, the Respondent produced to the Court a document of the Military Medical Centre in Novi Sad, Serbia, which contains a list of individuals arrested in Croatia who received professional medical treatment in that hospital[184]. In the witness statement of the late Stjepan Peulić, the Court can also find that after the crime in Lovas, the wounded civilians were brought to the hospital in Sremska Mitrovica, also in Serbia. This is not how an army which possesses intent to commit genocide usually conducts itself.

50. According to the Applicant, the remaining Croat civilians in many villages of Eastern Slavonia were displaced from March to May 1992, about six months after the takeover of their

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[180]CR 2014/12, p. 29, para. 63 (Starmer).

[181]ICTY, *Mrkšić et al.,* Trial Judgment, 27 Sept. 2007, para. 213; emphasis added.

[182]CR 2014/7.

[183]RC, Ann. 47.

[184]RS, Ann. 47.

villages[185]. It can be found in the Memorial. Should I say again that all opportunities were in place during those six months for their physical destruction, if such intent existed? We kindly ask the Applicant to respond to these observations in the second round.

51. Mr. President, this concludes our presentation today. Thank you very much for your kind attention.

The PRESIDENT: Thank you, Mr. Obradović. The Court will meet again tomorrow at 10 a.m to hear the continuation of Serbia's first round of oral argument. Thank you.

The Court is adjourned.

The Court rose at 1 p.m.

[185]See MC, paras. 4.30, 4.37, 4.46, 4.61, 4.80, 4.93.