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Public sitting

held on Wednesday 12 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 mercredi 12 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
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The PRESIDENT: Good morning. Please be seated. The sitting is now open. The Court meets this morning to hear the continuation of Serbia's argument in the first round. I invite Professor William Schabas to take the floor. You have the floor, Sir.

Mr. SCHABAS:

RESPONSE TO THE CLAIM OF THE APPLICANT ALLEGING THE COMMISSION OF GENOCIDE

1. Thank you, Mr. President. Good morning, Mr. President, Your Excellencies, may it please the Court. On Monday I addressed the Court with respect to legal developments concerning the interpretation and application of the relevant provisions of the Genocide Convention. My presentation reviewed the case law of various specialized international criminal and human rights tribunals since the 2007 Judgment of this Court of this Court. It concluded that although doctrinal debates persist with respect to some issues, the Court's authoritative decision provided great clarification about the terms of the Convention. Since 2007, as a general rule, the path that was cleared by the Court has been followed. In the present case, the central task is to apply the principles set out in the *Bosnia* decision rather than to break new ground or to explore uncharted judicial territory.

2. The claim and the counter-claim each raise distinct problems. On Friday of this week, I will address the Court on the application and interpretation of the substantive provisions of the Genocide Convention with respect to the counter-claim. Today, I confine my remarks to Croatia's claim that Serbia perpetrated genocide on its territory. For your reference, Serbia has addressed Croatia's claims on this matter in Chapter VIII of the Counter-Memorial of December 2009 and in Chapter IV of the Rejoinder of November 2011.

3. The bulk of the events that form the basis of Croatia's Application took place nearly 23 years ago. Some delay at this Court is not unusual, but the time lapse in this case is quite extraordinary. Is there another case that has taken so long to reach the stage of oral hearings? Many factors may explain the delay. The single most important one is the fact that Croatia did not begin proceedings until about eight years after the relevant events. Perhaps when Croatia's archives are opened to historians, many years from now, some plausible explanation for this will

emerge. In its Memorial, Croatia attempted to explain the rather tardy Application, suggesting as one reason that it had been prompted to act because the International Criminal Tribunal for the former Yugoslavia (ICTY) "ha[d] not yet issued indictments against those persons most responsible for genocide in Croatia"[1].

4. What Croatia must have meant by that statement is that the ICTY had not issued indictments concerning Croatia that charged genocide. At the time, there was already significant practice of the Tribunal concerning alleged atrocities committed in Croatia, including events that are at the core of Croatia's claim before this Court. For example, in 1996 four individuals were charged with crimes against humanity and war crimes concerning the Vukovar hospital massacre, notably the president of the Vukovar municipality, Slavko Dokmanović, and three military officers, including Colonel Mrkšić[2].

5. Of course, as we all know they were not charged with genocide. Although Croatia's position, in explaining that it was launching proceedings at the ICJ, might have been taken as some implicit criticism of the Prosecutor of the ICTY, for failing to charge genocide in the Vukovar case, in other respects at the time Croatia spoke quite positively of the Prosecutor's practice. In the Memorial, filed in early 2001, Croatia referred favourably to the Prosecutor on more than one occasion, at least when her practice seemed to support its contentions[3]. Croatia now seems to have since changed its position on the significance of prosecutorial practice.

6. When the archives are opened, it will also be interesting to read the legal opinions that drove Croatia to launch proceedings before this Court nearly four years after the Dayton Peace Agreement. At the time, if Croatia had consulted a well-informed international criminal lawyer, he or she might have explained that the law governing genocide was somewhat uncertain, and that there was little in terms of case law to suggest whether or not the Convention definition could be stretched to cover the factual matrix of the conflict in 1991. In a very general sense, international criminal law was in a state of flux. The developing law on crimes against humanity and war crimes was very dynamic. This Court's interlocutory rulings in the *Bosnia* case, with the exception of the

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[1]Memorial of Croatia (MC), 1 March 2001, para. 1.07.

[2]*Prosecutor* v. *Mrkšić et al.* (IT-95-13a-I), Indictment, 26 March 1996.

[3]MC, paras. 7.48, 7.49.

separate opinion of the *ad hoc* Judge for Bosnia and Herzegovina, did not point in one direction or another. Moreover, although conflicting signals had been sent from within the ICTY, when Croatia's Application was submitted in mid-1999, there had been no final verdict on a genocide prosecution by that body.

7. But within weeks of Croatia's filing of the application in this case, there was a very inconvenient Judgement from a Trial Chamber of the ICTY. In *Prosecutor* v. *Jelisić,* three Judges dismissed genocide charges with respect to atrocities perpetrated in Brčko in north-east Bosnia and Herzegovina[4]. If the Prosecutor could not prove genocide in Bosnia and Herzegovina, where the scale of violence and atrocity greatly exceeded that of the earlier conflict in Croatia, the Application before the International Court of Justice confronted a big hurdle. Croatia's Memorial, filed on 1 March 2001, essentially ignored this first Judgement of the ICTY concerning a genocide indictment. Only a summary mention was made of the single acquittal, but the reference in the Memorial mistakenly referred to an unknown defendant and there was no consideration of the significance of the decision within the general jurisprudence of the Tribunal[5]. I suppose those who drafted Croatia's Memorial hoped that *Jelisić* would be overturned on appeal — it was not — and that a more broad and liberal approach to the definition of genocide would prevail in the Tribunal's jurisprudence.

8. Mr. President, Members of the Court, as you know, the *Jelisić* case was only the first of many ICTY rulings that confirmed the reluctance of that Tribunal to characterize the conflict in Bosnia and Herzegovina as genocide, with the notable exception of the Srebrenica massacre in mid-1995. All of this must have been quite disconcerting to Croatia. Over the years, it was continually forced to repackage its claim before this Court as the international case law evolved and developed in what, from the standpoint of Croatia's claim in the present proceedings, was the wrong direction. The 2007 Judgment of this Court in the *Bosnia* case was the *coup de grâce*.

9. The Applicant is arguing a claim that has been plainly overtaken and outdated by the clarification of the law to the extent that it might ever have been arguable[6]. In our

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

[5]MC, para. 7.22, fn. 50. There are two other references to the *Jelisić* Judgement, at para. 747, fn. 90; para. 754, fn. 105.

[6]RS, November 2011, para. 376.

Rejoinder, we produced evidence that even Croatia does not really believe it has a case. Professor Mirjan Damaška, who appeared for Croatia earlier in the present proceedings, and who is listed as being part of the Croatian team in the present hearings, writing as a guest columnist of the Croatian weekly *Nacional* on 13 March 2007, a few weeks after the *Bosnia* judgment, openly discussed the slim chances of the Croatian Application being upheld by the Court, although he thought it worth continuing because it would result in "a useful defeat" for Croatia[7].

10. In our Counter-Memorial, we entitled the relevant section "The Crimes Were Not Committed with the Genocidal Intent". It should be clear from this expression that Serbia is not denying that crimes were committed. The Agent of Serbia, Mr. Obradović, made the position quite explicit in his presentation on Monday. Several of my colleagues have expressed their great sympathy for the victims of the conflict — both Croat and Serb — and I of course join them in paying my respects. Prosecutions for war crimes and crimes against humanity perpetrated by Serbs in Croatia have taken place before the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as before national courts, including those of Serbia. To that extent, some of the underlying acts listed in the five paragraphs of Article 2 — killing, causing serious bodily and mental harm — were most certainly committed at the relevant time. That is not an issue here. The heart of the debate before this Court is whether such acts are also characterized by the contextual elements set out in the introductory paragraph or *chapeau* of Article 2 of the Convention. That is to say, was killing or serious bodily or mental harm committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such".

NATURE OF THE DESTRUCTION AND MEANING OF THE WORDS "WITH INTENT TO DESTROY" IN THE DEFINITION OF GENOCIDE IN THE GENOCIDE CONVENTION

11. Mr. President, Your Excellencies, the *chapeau* of Article 2 of the Genocide Convention contains the phrase "with intent to destroy". The *chapeau* is followed by the five paragraphs that list the punishable acts of genocide. One of the great challenges to the interpreter had been to fix the place of destruction falling short of physical extermination. Until a corpus of case law developed, essentially over the past 15 years, the main body of material of assistance in the

[7]Mirjan Damaška, 'Hrvatsku tužbu ne treba povući', *Nacional*, No. 591, 13 March 2007, available at http://www.nacional.hr/clanak/print/32333.

construction of Article 2 was the preparatory work. It left no doubt that the intent of the drafters of the Convention was to exclude a concept of genocide that went beyond physical extermination or what was called biological genocide. The drafters quite deliberately decided to exclude the notion of "cultural genocide" as well as forms of forcible transfer falling short of physical destruction. Exceptionally — but it was always clear this was an exception — they agreed to include one punishable act, forcibly transferring children, that did not correspond to biological or physical destruction.

12. Nevertheless, a strictly literal reading of Article 2 left some room for differences of opinion. Depending upon how canons of interpretation were applied to the problem, it was possible, in the past, for reasonable people to differ about the scope of the words "with intent to destroy", and more specifically as to whether the word "physically" should be added as an adverbial modifier of the verb "to destroy". With the clarification provided by case law of the ICTY, crowned by the Judgment of this Court in the *Bosnia* case, there is no longer room for debate. The destruction contemplated by the *chapeau* of Article 2 is physical destruction. Moreover, the punishable acts must be perpetrated with the intent to destroy the group in a physical sense.

13. The first punishable act, "killing members of the group", raises no particular difficulties in this respect. There is a quite logical consistency between the killing of members of the group and their physical extermination. Much the same can be said of the third punishable act — "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". Indeed, in the third act of genocide, the requirement of physical destruction is quite explicit. It is the second act — "[c]ausing serious bodily or mental harm to members of the group" — that sometimes leads to misunderstanding because it does not necessarily seem obvious that "causing serious mental harm", for example, can be associated with physical destruction or extermination. In the submissions on Monday, I referred the Court to the very authoritative judgement of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR), issued since this Court's ruling in the *Bosnia* case. The ICTR Appeals Chamber noted that not only have nearly all convictions for genocide on the basis of causing serious bodily or mental harm involved killing or rape, but 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"[8]. In other words, it is not enough to inflict bodily or mental harm with the intent to destroy the group. The analysis must also consider whether the harm is "of such a serious nature as to threaten its destruction". This important idea, now quite entrenched in the case law of both international *ad hoc* criminal tribunals, seems close in formulation to the words of the Elements of Crimes of the International Criminal Court, namely that the conduct in question "could itself effect such destruction". Here, I refer the Court to my remarks on Monday where this provision of the Elements of Crimes was discussed in more detail.

14. Mr. President, Your Excellencies, Croatia struggles to blur the relevant legal framework by directing the Court's attention to various acts that may arguably meet the criteria in the individual paragraphs of Article 2. It is easier for Croatia to distract the Court by speaking of evidence that physical or mental harm has been caused, or that killings have taken place, than to provide the Court with a coherent and comprehensive analysis whereby it responds to the challenge of linking the elements of the individual paragraphs with those of the *chapeau* of Article 2. But without the *chapeau*, taken at their highest, these acts are ordinary crimes or possibly one or another form of war crimes or even crimes against humanity. Alas, they are not genocide. The claim fails.

15. Even if we consider the authorities that hold there to be no requirement of a genocidal plan or policy — a matter that is of some interest when relatively isolated individuals are being prosecuted — all of the jurisprudence is consistent in stressing the importance of showing such a plan or policy as part of the general evidentiary framework necessary to establish the existence of genocide. Although without acknowledging formally that evidence of a plan is necessary to set out a case for genocide, Croatia itself has recognized the importance of this factor when it speaks of the "genocidal plan"[9] in its submission. But, on this point, the Applicant has utterly failed to prove the existence of any plan or policy to commit genocide on the part of the authorities of the Respondent or the authorities of the Republic of Serbian Krajina (RSK), for whose actions the Applicant claims

[8] *Prosecutor* v. *Seromba* (ICTR-2001-66-A), Judgement, 12 March 2008, para. 46.

[9] CR 2014/10, p. 46, para. 79 (Starmer).

the Respondent is responsible. In particular, the Applicant has not adduced any direct evidence of the alleged intent on the part of the Respondent to commit genocide against Croats.

No evidence of a plan or policy to commit genocide or other manifestations of genocidal intent

16. In an attempt to build its case, Applicant has produced evidence purporting to show statements that may manifest a genocidal intent. Depending upon the context in which they are made and the identity of their author, statements may be an important factor in demonstrating genocidal intent. This has notably been the case in trials before the ICTR. Moreover, statements tending to show genocidal intent are also significant in our counter-claim. I am here referring to the remarks of President Tuđman to military leaders at the Brioni conference, immediately prior to the attack on the Serb population in the Krajina known as Operation Storm. These are solid examples of such evidence and we will discuss this further in our counter-claim.

17. By way of contrast, Applicant's evidence in this respect is quite pathetic. The statements on which Croatia relies are attributable to persons who are not capable of engaging the responsibility of the Respondent in any way, whatever the contents of the statements.

18. More specifically, Croatia referred the Court to a statement made in April 1991 by Milan Paroški during a talk to Serbs in the village of Jagodnjak in Baranja, in eastern Croatia. In a video displayed by the Applicant in the course of last week's presentations[10], Paroški is recorded saying that anyone who claimed the land as theirs was a usurper whom they had the right to kill "like a dog". The incident was highlighted on the opening day of these hearings where it was presented as a particularly striking example of the rise of extreme Serb nationalism[11]. Mr. President, Members of the Court, Paroški was a marginal politician who was never part of any government structures in Serbia. The statement was certainly aggressive and unacceptable but it is far from an incitement to commit genocide or evidence of some general intent attributable to Serbia to destroy an ethnic group.

[10]CR 2014/5.

[11]CR 2014/5, p. 35, para. 17 (Law).

19. The same observation applies to the statements attributed to Vojislav Šešelj[12]. At the time these were made, in 1991, Šešelj was an opposition politician in the Serbian Parliament in conflict with President Milošević. In its Memorial, and in the course of last week's oral submissions, the Applicant stated that there is "substantial evidence that Šešelj and his paramilitary formations had direct links to, and the support of, the Serbian governments and the JNA"[13]. But, alas, the only evidence that is provided for this mistaken claim is a citation from Šešelj himself. Last Thursday, Croatia provided an answer to Judge Greenwood's question about Šešelj. Croatia conceded that in 1991, at the time of the remarks, Šešelj had no official position in the Government of Serbia. They painted him as a close confidant of Milošević, a description that we think does not accurately reflect the relationship. The Agent for Serbia is going to return to this point in his statement this afternoon.

20. These and other comments made in the context of political crisis and violent conflict are invoked by Croatia. We have to bear in mind that the impending break-up of the former Yugoslavia was unprecedented and catastrophic. Possibly, at their worst, some of these statements were provocative and incendiary. But to transform this into evidence of the "crime of crimes" is quite preposterous. The statements and speeches referred to by Croatia, most of them attributable to individuals without any direct association to the respondent State, prove neither the existence of genocidal intent nor even the existence of "simple criminal intent". As a reference point, we would refer the Court to the transcripts of the Brioni conference, where the statements were made by the President of Croatia, to senior military officials, and where the causal link with the genocidal violence that followed within a few days cannot be disputed. Can there be any serious comparison between the statements by Tuđman at Brioni in 1995, as Croatia schemed to destroy the Serb population of the Krajina, and the remarks that Croatia attributes to Serbia in its submissions.

No evidence of a pattern of events on the basis of which genocidal intent could be inferred

21. Mr. President, Members of the Court, in the absence of any direct evidence of genocidal intent, Croatia falls back on "inferences". Croatia urges the Court to identify a genocidal intent

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[12]MC, para. 3.51.

[13]*Ibid.*

from a "pattern of behaviour involving the prohibited acts and targeted at a protected group"[14]. The Applicant infers the alleged genocidal intent on the basis of this alleged consistent pattern of crimes or culpable acts systematically directed against the Croat group as such. The Applicant relies upon this "cumulative effect" of crimes committed against Croats and invites the Court to consider such a "combination of crimes" as amounting to genocide[15]. This is a risky and uncertain business, involving events and incidents that are characteristic of a large number of ethnic conflicts throughout the world. It takes a big leap of the imagination to bring such claims within the sphere of genocide as it is defined in the Convention.

22. A pattern of behaviour or a pattern of crimes or a plurality of common crimes cannot, in itself, constitute genocide. The broad proposition that "the very pattern of the atrocities committed over . . . a lengthy period, focused on [national or ethnic groups] demonstrates the necessary [genocidal] intent" was explicitly rejected by this Court in *Bosnia*. The Court held that for a pattern of conduct to be accepted as evidence of the existence of the specific intent to destroy the group in whole or in part, the alleged pattern of conduct "would have to be such that it could only point to the existence of such [specific] intent"[16].

ICTY materials

23. Mr. President, Members of the Court, in the *Bosnia* case, the Court found that various aspects of how the ICTY had dealt with the indictments charging genocide proved extremely helpful in assessing whether or not genocide had been committed. Of course, in a sense that door is closed in this case, because there have been no indictments charging genocide with respect to the conflict in Croatia. Despite the very high level of persons who have been indicted by the ICTY with respect to the crimes that form the basis of the Application in this case, the crime of genocide was never charged by the Prosecutor.

24. Croatia seems to have taken a very extreme position, arguing that the Prosecutor's decision not to charge genocide is essentially irrelevant. To be quite clear, Mr. President, Serbia is

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[14]Counter-Memorial submitted by the Republic of Serbia (CMS), Dec. 2009, para. 939.

[15]Reply of the Republic of Croatia (RC), paras. 9.6-9.11, 9.20 *et seq.*; CR 2014/6, p. 40, para. 39 (Starmer); CR 2014/8, p. 47, para. 83 (Starmer); CR 2014/12, p. 31, para. 72 and para. 76 (3) (Starmer).

[16]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 197, para. 373.

not arguing the opposite in the sense that we contend that the Prosecutor's exercise of discretion creates some kind of irrebuttable presumption. But, the position of the Prosecutor is simply a relevant factor, no more and no less. Last Tuesday, Sir Keir Starmer cited Richard Goldstone, who was the first operational prosecutor at the ICTY. Justice Goldstone's comments were made subsequent to this Court's 2007 Judgment and are part of a broad criticism that he made of that Judgment in an academic journal article. I think Justice Goldstone's views about prosecutorial discretion would have been more compelling had he expressed them before the Court's Judgment, and not in 2008 as a way of trying to challenge it. Croatia cited the following words of Justice Goldstone: "the Prosecutor's decision not to charge genocide in an indictment may have nothing at all to do with the absence of evidence that genocide was committed'[17]. We agree. The key word here is "may". But it may also have everything to do with it.

25. Sir Keir told the Court last week that

> "the ICTY Prosecutor is constrained by the available evidence at that stage. That will influence any investigation and, in turn, influence any prosecution decision about the charge. As every prosecutor will appreciate, it is very rare indeed to have all the relevant information available at the beginning of an investigation and, in very many instances, had different information been available at the outset, the investigation would have taken a different course. That is an age-old problem in investigating a [sic] prosecuting crime."[18]

It is an interesting observation. But it is entirely speculative. What exactly is this decisive evidence that Croatia possesses and that forms part of the record before this Court that was not available to the Prosecutor of the ICTY and, for that matter, did not form part of the evidentiary record in the relevant proceedings? Can Croatia point us to this smoking gun that it seems to have found, but that eluded Richard Goldstone, Louise Arbour, Carla del Ponte and Serge Brammertz?

26. The Prosecutor of the ICTY is a responsible international official who will seek indictments and attempt to prove charges that realistically correspond to the acts that were perpetrated. He will, as a general rule, charge the most serious crime that can be sustained with regard to the acts in question. The fact that there have been no charges of genocide with respect to any of the crimes committed against the Croat people indicates that the entity responsible for the

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[17]CR 2014/6, p. 38, para. 32 (Starmer).

[18]CR 2014/6, p. 35, para. 23 (Starmer).

most thorough international investigations into the conflict in Croatia during the 1990s has failed to find evidence of genocide[19]. How can that not be relevant to these proceedings?

27. Mr. President, Members of the Court, I would like to comment on some of Sir Keir's observations concerning this issue. He said "there is a powerful argument for attaching no more significance to the exercise of a prosecutor's discretion to the decisions of the ICTY Prosecutor than would be attached to domestic prosecutorial decisions in other comparable jurisdictions"[20]. Sir Keir did not really set out the grounds for making such an argument, which he seems to have based solely on an assumption that all prosecutors act like those within the English common law system. I do not think that, in fact that is the case, as Professor Damaska, who is a specialist on comparative criminal procedure, could tell us if he were present here.

28. At the ICTY, formal, legal constraints on prosecutorial discretion began with the so-called "completion strategy". When first proposed by the Tribunal itself in 2002, a result of consultation between the judges and the Prosecutor, the Tribunal announced a strategy "focusing the Tribunal's mission on trying the most senior offenders of crimes which most seriously violate international public order"[21]. Less serious crimes are referred to the national courts. The Rules of the Tribunal were amended to authorize the Bureau of the judges to screen applications for an indictment so as to ensure that they concentrate "on one or more of the most senior leaders"[22]. The Prosecutor reports every six months to the Security Council on the implementation of this "completion strategy". These are constraints on discretion without obvious analogy to national justice systems dealing with ordinary crimes.

29. An interesting manifestation of this issue can be seen in the ongoing proceedings against the Bosnian Serb leader Radovan Karadžić. The revised indictment against Karadžić was issued in 2008, a year after the Judgment of this Court in the *Bosnia* case, and following his apprehension and transfer to The Hague[23]. The Prosecutor might well have accepted the finding of the ICJ in the *Bosnia* case and abandoned the allegations of genocide with respect to the municipalities that had

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[19]RS, paras. 282, 288.

[20]CR 2014/6, p. 34, para. 19 (Starmer).

[21]Tenth Annual Report of the ICTY, UN doc. A/58/297-S/2003/829, para. 4.

[22]Rules of Procedure and Evidence, Rule 28 (A), amended 6 April 2004.

[23]*Prosecutor* v. *Karadžić* (IT-95-5/18), Prosecution's Second Amended Indictment, 18 Feb. 2009.

figured in the earlier indictments against Karadžić, retaining only the genocide charges for Srebrenica. But the Prosecutor has insisted on keeping the charges of genocide with respect to the municipalities. Moreover, when these charges were dismissed by the Trial Chamber at the close of the prosecution case, the Prosecutor appealed. I discussed this on Monday and will not repeat my comments on the case. But the example demonstrates the importance of genocide charges for the Prosecutor when, of course, he considers that he has a case to make.

30. Contrary to the Applicant's contentions[24], it is implausible that the ICTY Prosecutor decided not to charge genocide in the cases of *Milošević*, *Babić* and *Martić*, all of which concern the allegations in Croatia's Application before this Court, because of, and I quote Croatia's submission, "the cost, length and manageability of proceedings . . . or the difficulties of identifying and apprehending individual perpetrators or those bearing command responsibility, and the availability of witnesses". In order to sustain such an argument, Croatia might provide the Court with more precise information. In what way would genocide charges have contributed in an unacceptable manner to the "cost, length and manageability of proceedings"? Why would the Prosecutor of the ICTY be reluctant to proceed with genocide charges in cases concerning Croatia because of "cost, length and manageability of proceedings" yet willing to do so in the case of Karadžić? Croatia's contention that the Prosecutor may have felt overly challenged because of "difficulties of identifying and apprehending individual perpetrators or those bearing command responsibility" is quite absurd. The issue here is why he (or she) has not charged genocide with respect to people who are actually detained and facing trial, not phantom officials who are difficult to identify and impossible to apprehend.

31. Finally Mr. President, Members of the Court, if the Prosecutor has difficulty with "availability of witnesses", what does that say about Croatia's own evidentiary problems in the present proceedings. Perhaps when it submitted the Application, Croatia had nurtured the hope that its claim might prosper here because the Court would adopt a much lower evidentiary threshold than what is applied in criminal prosecutions. At the time, some said genocide would be much easier to prove at the ICJ than at the international criminal tribunals because the civil standard of

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

proof of the balance of probabilities would apply[25]. Something argued before this Court in 2006. But any hope for that was quashed by the Judgment in the *Bosnia* case, when the Court confirmed that charges of such exceptional gravity must be "clearly established" and "fully conclusive"[26].

32. Let me make one final observation about the relevance of the ICTY materials. Now I am not going to talk about prosecutorial discretion, but rather of the findings of the judges themselves. In his submission on 5 March, Sir Keir Starmer turned to the major ICTY judgement concerning the events in Vukovar. He dismissed Serbia's explanation, which focuses on the armed conflict itself, on the difficult tactical decisions in what is sometimes called an asymmetric conflict, where the sides are not evenly matched in terms of resources, and fight by different strategies. It is a familiar scenario in many parts of the world where there is armed conflict. But here, as Sir Keir noted, the Trial Chamber of the ICTY did not really accept the defence explanation, that this was simply a feature of armed conflict. He cited, but only in part, some very devastating paragraphs in the judgement that dealt with the approach of the JNA. Part of the sentence was left out and replaced with ellipsis. Here is the entire sentence:

> "In the view of the Chamber the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so, as an example to those who did not accept the Serb controlled Federal government in Belgrade, and its interpretation of the laws of SFRY, or the role of the JNA for which the maintenance of the Yugoslav Federation was a fundamental element in the continued existence of the JNA."[27]

33. The three judges who made this observation about the motivation of the JNA, about the Serb "plan", reached this conclusion after 189 trial days in which 188 witnesses were called and 847 exhibits produced. They were familiar with the details of Vukovar in a way that, with respect, is beyond the reach of the limited inquiry taken here by this Court. Their conclusions are very harsh. Those who were convicted received lengthy prison terms. But if the purpose of the attack on Vukovar had been to destroy, in whole or in part, an ethnic group, would not the judges of the Trial Chamber have made a comment in this sense? Would it not have been reflected when they pronounced the sentence, where they are required to consider aggravating factors?

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[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 208.

[26] *Ibid.*, para. 209.

[27] *Prosecutor* v. *Mrkšić et al.* (IT-95-13/1-T), Judgement, 27 Sept. 2007, para. 471.

The *Martić* case

34. Mr. President, Members of the Court, the Applicant refers at great length to various findings in another case, that of Milan Martić. Martić was one of the most important and influential political and military leaders during the relevant period[28]. In one of the first indictments of the ICTY, in November 1995, Martić was charged with war crimes and crimes against humanity. He was found guilty by the ICTY Trial Chamber of the murder of 189 people and he was sentenced to 35 years' imprisonment. The word "genocide" did not appear in the indictment or in the judgements of the Trial and Appeals Chambers, except for a few isolated references to the term that are of no relevance here because they concern crimes allegedly committed by Croats and not Serbs[29] or the standard of proof applied by the ICJ in the *Bosnia* case[30].

35. Croatia invokes the *Martić* judgement in support of its claim that genocide was committed[31], that it can be attributed to Serbia[32], and even as a basis for the application of Article 10 (2) of the International Law Commission (ILC) Articles on State Responsibility[33]. In reality, however, the *Martić* judgement proves much less than the Applicant wants to read into it, and with some of its main findings, actually support Serbia's position in this case[34].

36. Martić was convicted of war crimes with respect to the shelling of Zagreb, but was acquitted on the count of persecution as a crime against humanity because of the lack of sufficient evidence of discriminatory intent based upon ethnicity[35]. Martić was also found not guilty of the crime against humanity of extermination because the killings lacked the element of scale that that crime requires[36]. The Prosecutor did not appeal the acquittal on the extermination count, indicating

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[28]On 4 Jan.1991, Milan Martić was appointed as the Secretary for Internal Affairs of the SAO Krajina. On 26 Feb.1992 he was re-elected as Minister of the Interior. On 25 Jan. 1994, Milan Martić was elected President of the Republic of Serbian Krajina (RSK).

[29]*Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007, paras. 331 and 334; *Prosecutor* v. *Martić* (IT-95-11-A), Judgement, 8 Oct. 2008, paras. 32 and 38.

[30]*Prosecutor* v. *Martić* (IT-95-11-A), Judgement, 8 Oct. 2008, para. 50.

[31]RC, paras. 9.34-9.35; as well as in its oral pleadings, see e.g., CR 2014/6, CR 2014/8, CR 2014/10.

[32]RC, paras. 9.67, 9.71, 9.75 etc.; as well as in its oral pleadings, see e.g., CR 2014/6, CR 2014/8, CR 2014/10.

[33]RC, para. 7.62.

[34]RS, para. 417.

[35]*Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007; *Prosecutor* v. *Martić* (IT-95-11-A), Judgement, 8 Oct. 2008.

[36]*Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007, para. 404.

a degree of acquiescence in the verdict of the Trial Chamber and a recognition of the futility of challenging it before the Appeals Chamber.

37. Some of the recent judgements relate genocide to the crime against humanity of persecution. This is because the discriminatory component of the mental element of the two crimes is related. The crime against humanity of persecution must be directed against a group in much the same way as the crime of genocide. But this vision of the relationship has obscured another important connection between genocide and crimes against humanity and that is with respect to the act of extermination. In the absence of the act of extermination, as a crime against humanity, we are outside the scope of genocide because of its requirement of the physical destruction of the group.

38. Mr. President, Your Excellencies, the term "extermination" first appears in positive international criminal law in the definition of crimes against humanity contained in the London Charter, the legal instrument on which the Nuremberg trial was based. The Court will recall that unlike more recent international criminal tribunal statutes, where genocide and crimes against humanity are both listed in the subject-matter jurisdiction, the London Charter did not provide explicitly for the crime of genocide. Robert Jackson, the American negotiator at the London Conference and subsequently the American prosecutor at the trial itself, actually used the term "genocide" on occasion and he was utterly convinced that what today we call the genocide of the European Jews should be punished by the International Military Tribunal. He considered that the concept of genocide was properly framed by the crime against humanity of extermination[37]. In his speech to the Court last week, Professor Sands helpfully referred to the various references to the word "genocide" in the Nuremberg proceedings. The impression that emerges from these materials is that the concept of genocide, yet to be defined in positive international law at the time of the trial, was for all practical purposes a synonym for the crime against humanity of extermination. This understanding of the crime against humanity of extermination is strengthened by our contemporary interpretation of genocide as a crime limited to the physical destruction of the group that is targeted.

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[37]See also the report by Raphael Lemkin on the debates at the time General Assembly resolution 96 (I) was being drafted: Donna-Lee Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin*, New Haven, Yale University Press, 2013, p. 131.

39. This is why the acquittal of Milan Martić on charges of extermination by the ICTY is so relevant to the present proceedings. Applicant contends that genocide can be proven with an accumulation of "physical and psychological methods" falling short of extermination. That may have been consistent with an arguable interpretation of the crime of genocide in 1999, when the Application was first filed, but it is completely at odds with the present state of the law as confirmed by this Court in the 2007 Judgment.

40. Furthermore, the *Martić* judgement provides its own explanation as to why there have been no prosecutions by the ICTY concerning the Municipalities of Šibenik and Drniš. With respect to the Municipality of Drniš the Trial Chamber observed that there was "harassment and intimidation" of the Croat population. Manifestly, the Prosecutor did not consider "harassment and intimidation" to fall within the subject-matter jurisdiction of the Tribunal, which can only prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, crimes against humanity or genocide.

41. The *Martić* Trial Chamber decision does not establish any pattern of events that could amount to genocide. Furthermore, the judgement does not contain any finding, not even a sparse or an unsubstantiated one, that any crime committed in the Serbian Autonomous Oblast (SAO) of Krajina, other than deportation and forcible transfer, can be attributed to anyone apart from Martić himself. Only crimes of deportation and forcible transfer were found by the Trial Chamber to be within the common purpose of the joint criminal enterprise. The latter, according to the findings of the Trial Chamber, was confined to "the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb populations"[38]. Martić was found guilty of crimes outside the common purpose of the joint criminal enterprise, as determined by the ICTY Trial Chamber on the basis of his individual relationship to and knowledge of the crimes, namely because he "willingly took the risk that the crimes which have been found to be outside the common purpose might be perpetrated against the non-Serb population"[39].

42. Mr. President, Members of the Court, the *Martić* decision also provides a more complete understanding of the nature of the attack in Krajina. The judgement refers to evidence of

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[38] *Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007, paras. 445-446.

[39] *Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007, para. 454.

"displacement of the Croat population as a result of harassment and intimidation"[40], to "the displacement of the non-Serb population"[41] and of "such a coercive atmosphere that the Croat and other non-Serb inhabitants of the RSK were left with no option but to flee"[42]. It also says: "Acts of violence and intimidation against the Croat and other non-Serb population, including, beatings, robbery, theft, harassment and destruction of houses and Catholic churches, were prevalent in the RSK during the period between 1992 and 1995, and resulted in an exodus of the Croat and other non-Serb population from the territory of the RSK"[43]. To the extent that such acts took place, they are entirely reprehensible and regrettable. Those responsible should be brought to justice and indeed this has taken place in many cases. But this is far outside the jurisdiction of this Court in the present proceedings.

43. For the reasons set out above, the exaggerated attention given by the Applicant to the *Martić* judgement is not helpful to the Court. The reference advanced by the Applicant to the "eradication" of the Croat population as a factual finding of the ICTY lacks a basis. Quite to the contrary, the judgement in the *Martić* case, as well as in *Mrkšić et al, Jokić* and *Strugar* cases[44], confirm that the acts for which the accused were convicted cannot be legally characterized as genocide.

Alleged inference of genocidal intent

44. Mr. President, Members of the Court, commentators and journalists often say that "it is very difficult to prove genocide", as if this were a crime like child sexual abuse where various factors inherent in the crime, including social stigma and issues of reliability of children as witnesses, complicate the task of investigators, prosecutors and judges. In fact, genocide is easy to prove — when it takes place. The nature of the crime, its scale, its association with racist and xenophobic propaganda, mean that when genocide occurs the evidence is rarely subject to serious challenge and the manifestation of the intentional element is quite obvious. Problems in proving

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[40] *Prosecutor* v. *Martić* (IT-95-11-T), Judgement, 12 June 2007, para. 299.

[41] *Ibid.*, para. 300.

[42] *Ibid.*, para. 444.

[43] *Ibid.*, para. 351.

[44] For more details, see CMS, para. 175.

genocide — and this is the great challenge to the Applicant in the present proceedings — are entirely due to the difficulty of proving something that did not happen.

45. We turn to the familiar statement of this Court in its first contentious proceedings, the *Corfu Channel* case. In *Corfu Channel*, the Court observed that,

> "indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion . . .
>
> The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.[45]"

This is a very cautious and prudent framing of the role of indirect evidence. We should also bear in mind the context of the Court's famous dictum. The issue in *Corfu Channel* was whether or not knowledge of the mine-laying could be attributed to Albania. The evidentiary issues in this case are of a very different nature. There is no single factual issue the knowledge of which is in dispute. Rather, the factual matrix has been well established, largely through the determined efforts of the ICTY. The debate is essentially about the mental element, where the issue of reliance upon inferences of fact is an especially uncertain and indeed dangerous matter.

46. In particular, proof of acts causing serious bodily or mental harm to members of a group, in this case the Croats, is not sufficient to establish the material element of the crime of genocide. Nor is it sufficient to ascertain that members of the group were killed, or that inhumane conditions of life were inflicted. The overarching *actus reus* of the crime of genocide is in fact the destruction of the group, in whole or in part. Such an *actus reus* involves a multitude of individual acts that contribute to the physical destruction of the group as such. Such acts must be capable of effecting such destruction, as the ICTR Appeals Chamber has recently noted.

47. In the present case, however, the mere "cumulative effect" of the alleged widespread and systematic attacks against the Croat population, as asserted by the Applicant, does not in itself suffice to evince either the mental or the material element of the crime of genocide. None of the specific factors that, in the view of the Applicant, "may be sufficient to demonstrate genocidal

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[45] *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 18.

intent"[46], whether considered individually or collectively, are sufficient to prove the existence of either a genocidal intent or the *actus reus* of genocide.

Allegations concerning Eastern Slavonia and other regions[47]

48. Mr. President, Members of the Court, with respect to the conflict in Eastern Slavonia, the Applicant points to criminal prosecutions involving Croatian Serb elements[48]. The Reply contains rather lengthy recitals of alleged atrocities that were committed in the course of an armed conflict. The highlights were repeated in oral argument, completed with videos and other photos. The picture was further completed by some of the witnesses who testified before the Court. It is stating the obvious to observe that the conflict had an important ethnic dimension. Ethnic hatred no doubt figured in much of the behaviour of those responsible for the crimes that were committed, on all sides. But there is nothing new in this material to strengthen the Applicant's case.

49. The discussion concerning events elsewhere in Croatia is similar to the submissions about Eastern Slavonia; Eastern Slavonia has always been the focus of the Applicant's case. The weaknesses in the Applicant's discussion of Eastern Slavonia are repeated in its review of the facts concerning the rest of Croatia. As the Applicant contends, the "same genocidal pattern analysed in detail in the case of Eastern Slavonia, was repeated elsewhere in these other occupied areas"[49].

50. That various crimes may have been committed by forces associated with the Croatian Serbs during the period of the conflict in Croatia is not in question. That the Respondent condemns such activity is established by the existence of prosecutions before the courts of Serbia, of which it is gratifying to see that the Applicant takes due notice[50]. However, none of the prosecutions, be they by the ICTY or by the courts of Serbia, have been for genocide. Nor should the possibility of prosecutions by other States, based upon universal jurisdiction, be entirely overlooked. Although some national jurisdictions outside the region have undertaken universal jurisdiction cases concerning the conflicts in the former Yugoslavia, there have been none with respect to genocide

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[46]MC, para. 8.16.

[47]MC, Chaps. 4 and 5; RC, Chaps. 5 and 6.

[48]RC, paras. 5.7-5.8.

[49]MC, para. 1.30.

[50]RC, para. 5.8.

perpetrated by Serbs in Croatia. Alone in the world, only Croatian courts seem to have considered prosecutions of Serbs for the crime of genocide. The trials were flagrantly politicized and relied upon extravagant definitions of the crime[51].

51. The Applicant refers to new documents emanating from the JNA, claiming that these provide evidence of genocidal intent[52]. The language in these documents is actually quite consistent with purely military objectives and activities. Like most terminology used in military operations, where there is talk of "mopping up" and "destruction" of "the enemy", it is possible to adopt extravagant interpretations, and that is what the Applicant has done. It is also worth noting that the Applicant interprets references to "Ustasha forces" as proof of a genocidal intent, suggesting that this is a reference to the entire Croat population[53]. That is about as absurd a suggestion as to contend that the term "Nazi forces" is in fact a reference to all Germans at the time of the Second World War. Incidentally, the Applicant is a lot more charitable when it comes to interpreting the recorded words of Croatia's former President at Brioni in July 1995.

Alleged incitement and hate speech[54]

52. Both in its written and oral submissions the Applicant has made some rather summary allegations identifying acts of "incitement" and "hate speech"[55]. Certainly the existence of strong, compelling evidence of racist propaganda associated with violence could be a relevant indicator of genocidal intent, bearing in mind that hate speech takes many forms. Hate speech is sometimes described as a risk factor for genocide[56]. That is surely true, in a general sense, although it is stretching things to suggest a direct causal link between hate speech and genocide. It is rather like arguing that there is a direct relationship between the common cold and life-threatening respiratory disease.

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[51]See CMS, paras. 184-199.

[52]RC, paras. 5.9 to 5.11.

[53]RC, paras. 11.40-11.45; see e.g. CR 2014/6, p. 26, para. 43; p. 58, para. 17 (Sands); p. 44, para. 10 (Špero).

[54]MC, para. 8.16.2; RC, Chap. 9, para. 9.6 *(b)*.

[55]MC, paras. 7.79-7.82, 8.23-8.26; CR 2014/6, CR 2014/10, CR 2014/12.

[56]See, for example, United Nations Special Advisor on the Prevention of Genocide, "Preventing incitement: Policy options for action", Nov. 2013, available at: http://www.un.org/en/preventgenocide/adviser/documents.shtml.

53. At this point, let me turn to the Applicant's assessment of the *Babić* case before the ICTY, and in particular its contention that the plea agreement included an acknowledgment that the accused had participated in "making ethnically inflammatory speeches aimed at fomenting an atmosphere of fear and hatred amongst the Serb population"[57]. The Applicant's claim that the admissions in the *Babić* plea agreement should be taken as "further evidence of direct and public incitement" is plainly incorrect. Further in the present context it is relevant to note that while there has been occasional evidence of "hate speech" in the case law of the ICTY, there have been no indictments for "direct and public incitement to commit genocide", even in the *Srebrenica* cases. And finally, a note of caution about reliance on plea agreements for evidence of fact. A willingness to drop genocide charges and accept guilty pleas on lesser charges is of interest in the same way that the inclusion of genocide charges in the indictment may be relevant. A bargain between Prosecutor and defendant associated with an agreed statement of facts that is only summarily endorsed by judges, who have not actually heard the evidence, should not be given too much weight.

Failure to punish?

54. Mr. President, Members of the Court, finally, there is the strange allegation that by failing to prosecute genocidal acts, the Respondent is violating the 1948 Convention. We have shown that various crimes perpetrated by Serb combatants and others during the conflict have indeed been prosecuted, by both the ICTY and by Serbia's own courts. But obviously, they have not been punished as genocide. But is this really a serious charge? Does the Applicant contend that the ICTY Prosecutor is also breaching the Genocide Convention by his failure to prosecute the crime?

Concluding remarks

55. Last week, the Court listened to many hours of oral submissions in which the horrors of war were recounted. At times it bordered on the sensationalist. Counsel for Croatia apologized in advance when ugly and disturbing pictures were displayed, but perhaps some of this was not

[57] RC, para. 9.52.

entirely necessary. It was painful to watch. The details are adequately set out in the written materials. Confronting this is difficult for all of us who cherish human life and who are repulsed by war and racism, and the horrors that are associated with them.

56. Mr. President, Your Excellencies, over the weekend, I re-read the *Bosnia* decision that this Court issued in 2007. I asked myself whether a well-informed observer who had attended these proceedings and studied the file would consider a case of genocide to be made out during the Croatian conflict in 1991 and early 1992, in light of the fact that, in the 2007 Judgment, the Court had concluded that it had not been made out during the Bosnian conflict from 1992 until 1995, prior to the Srebrenica massacre. In 2007, the Court had detailed materials from ICTY to draw upon, just as it does today, with respect to the events in Croatia. The only difference is the absence of prosecutions for genocide with respect to Croatia, a fact that counsel for Croatia have rather slyly tried to turn to their advantage, by suggesting that this time the ICJ has its hands free as a court of first instance.

57. I would urge the Court to revisit the material on which it relied in the *Bosnia* case. There too we find the JNA, we find Arkan, we find Šešelj: they are all there. This honourable Court relied on findings of fact by the Trial Chambers in the *Bosnia* case, where conclusions were reached about terrible atrocities, where convictions were recorded for war crimes and crimes against humanity, and where the highest sentences were recorded — higher, indeed, than anything imposed in the Croatian prosecutions. This Court considered the terrible siege of Sarajevo, as you will consider here the siege of Vukovar. In the *Bosnia* Judgment, the Court referred to the report of the Commission of Experts that 10,000 people were killed or missing in Sarajevo. It also cited the *Galić* Trial Chamber decision that reported a monthly average of over 100 killed from September to December 1992 and an average of 64 per month throughout 1993[58]. An expert report submitted by the Prosecution in the Milošević trial estimated 9,502 casualties, divided almost equally between civilians and combatants[59]. These numbers exceed considerably those in evidence before the Court concerning the siege of Vukovar. Of course, for each individual victim, the grief and

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[58]*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. 144, para. 247.

[59]ICTY, *Slobodan Milošević* case, Prosecutor Ex. 548, Death toll in the Siege of Sarajevo, April 1992 to December 1995, A Study of Mortality based on Eight Large Data Sources, 18 Aug. 2003.

suffering is the same. I do not mean, in offering this comparison, that the tragic consequences for the individual Croats in Vukovar were any less than those of the inhabitants of Sarajevo. But this Court did not conclude that genocide was perpetrated during the siege of Sarajevo. Why would it decide otherwise with respect to Vukovar?

58. In the *Bosnia* case, the Court cited, and accepted, a finding of the ICTY Trial Chamber that "a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt"[60]. This Court adopted the conclusions of another Trial Chamber, that, in the Omarska camp "evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale"[61]. I would submit to the distinguished Members of the Court that the evidence they have before them in this case does not, either in quantity or quality, go beyond what you considered and accepted in the *Bosnia* case. Yet in 2007, this honourable Court said it was not convinced that it has been "conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such". The Court concluded: "The killings outlined . . . may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so."[62]

59. Mr. President, Your Excellencies, in Croatia's oral submissions last week, it never spoke to this problem with its case. Was not the Court entitled at the very least to an attempt to differentiate the facts in this case from those that were studied and considered in the 2007 Judgment? Because, if Croatia cannot explain the distinctions, it is legitimate to ask why this Application is before the Court at all. Unless, of course, Croatia is inviting the Court to discard its Judgment in *Bosnia* and set out in a new direction. But it has not dared to make such a suggestion. What we are left with, then, is a warmed-over version of the plate that the Court was served in

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[60] *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. 149, para. 261.

[61] *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. 150, para. 264.

[62] *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. 155, para. 277.

2007, taken out of the refrigerator where it was put in 1999 and reheated in the microwave. This is a case, as a famous baseball player once said, of *déjà vu* all over again.

60. Mr. President, Members of the Court, it is difficult to see how this Court can reach any different conclusion with respect to Croatia's claim in these proceedings than what it decided in the *Bosnia* case. Croatia's claim, premised on the Genocide Convention, is unfounded. It always was, although as the law has developed over the past 15 years, with clarifications in the case law of this Court and of the specialized international criminal tribunals, this has become clearer and clearer, and clearer.

61. Mr. President, this concludes my presentation this morning. May I kindly invite you to give the floor to Mr. Lukić.

The PRESIDENT: Thank you very much, Professor Schabas. In order not to interrupt the pleading of Mr. Lukić, the Court will take a break now for 15 minutes and then he will have an opportunity to address the Court. So the sitting is suspended for 15 minutes.

The Court adjourned from 11.10 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Mr. Lukić. You have the floor, Sir.

Mr. LUKIĆ:

THE QUESTION OF THE STATE RESPONSIBILITY

1. The alleged control of the Respondent over the JNA

Introduction

1. Mr. President, distinguished Members of the Court. It is my great honour and privilege to appear again before this Court. My colleague, Mr. Dušan Ignjatović and I will be addressing the Court on behalf of the Respondent on the issue of attribution. Our arguments will cover two separate and distinct issues, namely:

(a) the Respondent's alleged responsibility for alleged crimes committed by the Yugoslav People's Army (hereinafter "the JNA") and the Yugoslav Army (hereafter "the VJ"), which I will be presenting; and

(b) the Respondent's alleged responsibility for alleged crimes committed by other participants of the armed conflict, which will be presented by Mr. Ignjatović. You will also, later on, hear from Mr. Ignjatović on the issue of the obligation to prevent and punish the crime of genocide.

2. At the outset, the Respondent wishes to note, however, that it stands by the positions and the arguments related to attribution expressed in great detail in the Counter-Memorial and, more specifically, in Chapter V of the Rejoinder. It nevertheless firmly believes that the Court will not need to go into the issue of attribution, since the arguments presented to you up until now will surely suffice to convince the Court that there is no basis for considering Serbia's responsibility pursuant to the Applicant's allegations.

Attribution on the basis of Customary international Law

3. Mr. President, unless there are special reasons to depart from them (as Professor Tams has discussed yesterday), the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereafter "the ILC Articles")[63], adopted in 2001, represent the legal framework within which the issue of attribution is to be discussed, as noted by the Court in the *Bosnia* case[64]. The same test should be applied here in order to give an answer on whether the acts of individuals or organs who might have been, according to the findings of the Court, physical perpetrators of the alleged crimes could be attributed to the Respondent and whether the Republic of Serbia should carry responsibility under international law for such alleged crimes.

4. According to the Applicant's submissions, the JNA was the Respondent's organ in the sense of Article 4 of the ILC Articles throughout the time period in question[65]. This represents the

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[63]"Responsibility of States for Internationally Wrongful Acts", General Assembly resolution 56/83 of 12 Dec. 2001, UN doc. A/RES/56/83, Annex (hereafter "ILC Articles").

[64]*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. 199, para. 379 (hereafter "*Bosnia* Judgment").

[65]See Memorial of Croatia (MC), para. 8.47.

primary basis for a finding of attribution, according to the Applicant. Nonetheless, the Applicant also offers an alternative theory by invoking Article 8 and Article 10 (2) of ILC Articles[66].

5. As a matter of fact, the Respondent did not exist prior to 27 April 1992 and cannot be therefore held liable, in any form or manner, for any of the acts or omissions noted by the Applicant. The time frame in which the alleged events took place and the status of the Respondent are therefore central to establishing parameters of possible attribution.

6. That having been said, the Respondent in no way concedes to the position that the acts which took place *after* the creation of the FRY, Federal Republic of Yugoslavia, on 27 April 1992, could be attributable to the Respondent. The Respondent merely wishes to underline that international law sets an absolute bar as to the consideration of events which pre-date the creation of the Respondent.

7. Let me reiterate that, in the Memorial, the Applicant refers to roughly 120 events as alleged acts of genocide. Out of those 120, only eight took place after 27 April 1992. Indeed, the vast majority of those 120 events actually happened already in 1991. What is more, the Applicant has not provided any evidence to show that after the creation of the FRY, members of the VJ, as an organ of FRY, were involved in any alleged crimes.

8. Mr. President, Members of the Court, before addressing the Applicant's argument on attribution in detail, allow me to make a preliminary point — a preliminary point that is however of considerable importance.

9. In essence, in its pleadings on attribution, the Applicant ignores an essential distinction drawn in the law of State responsibility, namely that between conduct attributable *to a State* on the one hand, and conduct attributable *to a movement* on the other. My colleagues, Professors Zimmermann and Tams, have addressed various aspects of this point already; but it arises here in a separate way and is worth further exploring.

10. As my colleagues have shown, for a whole range of reasons, the Applicant's claim relating to the events pre-dating 27 April 1992 cannot be based on Article 10 (2) ILC Articles since *(a)* that provision did not reflect customary international law in 1991;

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[66]See Reply of Croatia (RC), para. 9.67; CR 2014/10, p. 38, para. 15.

(b) The provision is no substitute for rules of State succession; and

(c) the provision simply does not cover instances like the present one where there was no "movement" in the sense of Article 10 (2) of the ILC Articles; and if there was one, it certainly did not succeed.

11. Of course, if only one of these arguments is upheld, we need not to go any further. As a matter of fact the Applicant's claim, which, as shown, almost exclusively draws on conduct pre-dating 27 April 1992, depends on its stretched construction of an already highly exceptional attribution rule.

12. Mr. President, Members of the Court, at the present stage, the Respondent would like to draw the Court's attention to a separate, albeit closely related, matter. Even when addressing attribution proper (as opposed to questions of jurisdiction and admissibility), the Applicant's attempt to stretch the law of State responsibility continues — and continues in an aggravated form.

13. In the sections on jurisdiction and admissibility, Croatia at least engaged with Article 10 (2) ILC Articles — accepting that it was not a regular rule of attribution. Yet, when arguing attribution of conduct in detail, this caution was abandoned. Instead of applying Article 10 (2), dealing with movement responsibility, we see Croatia invokes Articles 4, 5 and 8 of ILC Articles — the normal rules of attribution developed for States. It is simply taken for granted that the JNA was a part of Serbia — it was said to have been a State organ, in the sense of Article 4 ILC Articles, of a State that did not exist yet.

14. Mr. President, attribution in this case is exclusively to a movement, not to a State. No State of Serbia existed before 27 April 1992. The SFRY existed. And Serbia submits that when confronted with that exceptional case of movement responsibility, we cannot simply apply the standard rules of attribution in the way that Croatia does.

15. To be specific in rebutting Croatia's claims is difficult because Croatia does not clearly identify the movement in question. As Professor Tams noted yesterday, at times it refers to the alleged Greater Serbia movement in a very loose way, seeking to bring all forms of activity under

Article 10 (2). Professor Tams has already shown that this attempt must fail as the loose grouping is not a movement. It lacks distinct structures[67].

16. Croatia at the same time also refers to the Socialist Republic of Serbia, one of the six constituent Republics of the SFRY, a non-State entity until April 1992. So perhaps that is the alleged movement? But if it is, then how can conduct of the JNA, on which Croatia relies, be relevant? The JNA may have been many things, but it never was an organ of the Socialist Republic of Serbia. Its conduct could only be attributed to Article 10 (2) permitted the attribution, to a movement (in the exceptional case of movement responsibility) of equivalents to the Articles 5 and 8 of the ILC text.

17. On all those questions we have heard very little from Croatia. In response to what we have heard, Serbia puts two legal proposals to you:

18. First, in Serbia's reading, in the exceptional case of movement responsibility, there can be no equivalent to Article 8 of the ILC text. The movements responsibility is for, as Special Rapporteur Crawford put it in 1998, "organs" of the movement[68]. Or as the ILC Commentary states, it is for the "apparatus" to the movement[69]. It is not for acts of the non-State actors outside of the movement structures. The ILC Commentary expressly excluded conduct of individual members of the movement[70].

19. Second, in Serbia's submission, even if the regular rules on attribution could be adapted and made to fit the situation covered with Article 10 (2), it is clear that in applying it by analogy, the Court must take account of the special nature of Article 10 (2) of the ILC Articles.

20. Mr. President, to re-iterate the point, this is an exceptional case, not a regular form of attribution to a State. Therefore, to the extent that an equivalent to Article 8 (or 5 for that matter) exists at all, these analogous cases must certainly be interpreted restrictively, if they apply at all. In the light of these considerations — and by subsidiary argument, permit me now to address in more detail the substance of the Applicant's claims relating to the conduct of the JNA.

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[67]CR 2014/14 (Tams).

[68]*Yearbook of the International Law Commission (YILC)*, 1998, Vol. II (1), 57.

[69]*YILC*, 2001, Vol. II (2), 50, para. 4.

[70]*YILC*, 2001, Vol. II (2), 50, para. 5.

The JNA was not an organ of the Respondent

21. Mr. President, Members of the Court, the Applicant makes numerous submissions in relation to the involvement of the JNA, namely that the JNA had played a "central role . . . in Genocidal conflict in Croatia"[71]. Yet, it misrepresents the role and the actions of the JNA. As a matter of fact, during the time when the JNA existed, its members were involved in not more than 38 incidents, even accounting to the claim presented by Croatia[72]. As a result, it creates a distorted narrative of the JNA, preventing an objective and reasoned analysis. This needs to be corrected. The actions and roles of the Parties during the conflict, as presented by the Applicant, are inaccurate and placed out of context, forming a misleading picture and providing a one-sided version of events. The Respondent proceeds to addressing this issue.

22. As we have already noted, in order for one to claim that the JNA was the organ of the Republic of Serbia in the sense of Articles 4 and 5 of the ILC Articles, one must prove that it was such an organ either *de jure*, based on internal regulations in force in Serbia at that time, or, irrespective of such regulations, a *de facto* organ, based on the "complete dependence" test[73].

23. The role and the status of the military in the former Yugoslavia during the period covered in the Memorial was regulated by the Constitution and the relevant laws of States which existed during the time period in question, namely the SFRY before 27 April 1992, and the FRY thereafter. The main role of both armies, the JNA during the existence of the SFRY, and the VJ after the creation of the FRY, was defined as securing independence, sovereignty, territorial integrity, and public order, as is the case with numerous other armies around the world[74].

24. Legislative changes which took place after April 1992 were substantive, not mere window dressing. The position of the Federal Secretary for National Defense, held by General Veljko Kadijević during the relevant time period, was abolished. During the SFRY, this position encompassed great power and was formally a superior to the JNA. The Federal Secretary for National Defense was subordinate to the Presidency of the SFRY. Once this position was

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[71]See RC, para. 4.133.

[72]See RS, para. 1010.

[73]*Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 205, paras. 392-393.

[74]Constitution of the SFRY, Art. 240.

abolished by law, the relationship between the military and the Government at that time became structurally different. The position of the Chief of General Staff became the highest position in the Army. The General Staff ceased to be subordinated to the Ministry of Defense, and became subordinate to the Supreme Defense Council and the President of the Republic[75].

25. The Applicant's assertion that the JNA and VJ are one and the same entity is simply not supported by facts, irrespective of the theoretical basis for responsibility relied on by the Applicant. The JNA was not an organ of the Respondent in the sense of Articles 4 and 5 of the ILC Articles.

26. The Applicant argues that the JNA, while active in Croatia, acted upon the direct orders of the Serbian leadership, in furtherance of a plan to create the Greater Serbia and to get rid of Croatian from the area in question[76]. The Applicant has not provided any evidence of such direct orders. The position that as of July 1991, the Republic of Serbia assumed control over the JNA, which became its *de facto* military force, is incorrect[77]. The Respondent has shown that the SFRY organs continued to operate during 1991 and early 1992, and that the JNA was not a *de facto* organ of the emerging FRY, or Serbia, but rather a *de jure* and *de facto* organ of the SFRY, the joint State of both Serbia and Croatia, but also the other nations[78].

27. The Applicant goes on to argue that "Serbianization" of the JNA started in the late 1980s, and that the JNA thereafter emerged as a Serb-dominated army with an ideological commitment of the goal of Greater Serbia[79]. The Respondent has however presented evidence of structural changes in the JNA which took place in 1988, at the time when the SFRY Presidency exercised "full jurisdiction" over the JNA. We even showed that the Croatian member of the SFRY Presidency at that time gave his consent to the said restructuring of the JNA[80].

28. Evidence provided by Croatian State officials contradicts the Applicant's thesis on the "Serbianization" of the JNA. In the letter signed by Želimir Latković, President of the Croatian Military Property Succession Council, the following is stated: "out of 235 generals from Croatia at

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[75]ICTY *Perišić* Trial Chamber Judgement, paras. 205 and 223.

[76]See MC, paras. 8.47 and 8.54.

[77]See RC, paras. 4.45.

[78]Volumes of evidence citied in Counter-Memorial of Serbia (CMS), paras. 519-537.

[79]See RC, para. 4.130.

[80]See Rejoinder of Serbia (RS), para. 442.

the onset of the war, less than 7, or expressed in percentages, 3 per cent, joined the Croatian army. Other generals stayed with the other warring party"[81]. Based on these figures is it reasonable to believe, as the Applicant suggests, that 97 per cent of the Croatian generals who stayed in the JNA did so in order to further a genocidal plan against their own people? Certainly, a more credible explanation would be that the remaining 222 generals believed in the SFRY, did not wish to become part of an army which supported secession from the SFRY, and neither supported nor condoned the dissolution of the SFRY and the break-up of the armed forces they had served in, the JNA.

29. The evidence presented established that the JNA was, throughout the existence of the SRFY an organ of the SFRY, financed from the federal budget. The federal budget was administrated by the federal Government. The federal Government was chaired by the Prime Minister, a Croat, Ante Marković, who resigned as the SFRY Prime Minister on 20 December 1991[82], but the federal Government continued to exist. All actions taken by the JNA were conducted pursuant to decisions rendered by federal institutions of the SFRY. The JNA reported to these institutions.

30. The Presidency of the SFRY worked in full or almost full composition until the beginning of October 1991[83]. For example, President Mesić signed a ceasefire agreement on 1 September 1991[84], while his second order from 11 September 1991 was rejected by the SFRY Presidency[85]. The Presidency also continued to function as a body in early 1992[86].

31. The Presidency, as a collective body, had the authority of a commander-in-chief of the JNA. The Croatian member, Mr. Mesić, was one of its members, but the decisions were rendered collectively[87]. Accordingly, disagreements with the decisions voted out by the majority of its

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[81]RC, Ann. 108.

[82]See CMS, para. 530.

[83]See CMS, paras. 522-529.

[84]See Ceasefire Agreement, Belgrade, 1 Sept. 1991, reprinted in S. Trifunovska, *Yugoslavia Through Documents —From its creation to its dissolution*, 1994, pp. 334-335.

[85]See Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995*, 2002, Vol. I, pp. 94–95 (Peace Palace Library).

[86]Letter of Mr. Mesić to the SFRY Presidency, 9 Jan. 1992, Ann. 26.

[87]See CMS, para. 524; also Arts. 313 (3) and 328 (2) & (4) of the Constitution of the SFRY, *Official Gazette of the SFRY*, No. 9/1974.

members could not have meant that the body did not have legitimacy or that it ceased to function when Croatian representatives were against the decisions being considered.

32. Documents invoked by the Applicant have been analysed in paragraphs 458 to 462 of Rejoinder. These documents show that the Serbian leadership did not have any authority or control over General Kadijević. The Applicant's submissions, such as the often quoted diary of Borislav Jović, as well as the book by General Kadijević, clearly show that the Serbian leadership did not have significant influence, let alone control over the JNA. The animosity between Kadijević and Milošević was clear. Neither influence nor control could exist in a relationship described by Borislav Jović on 25 October 1991 in his diary as, "latent distrust and close to conflict"[88].

33. This description was confirmed by Kadijević himself. In the interview he gave in 2007, answering to the question which Members of this Court would doubtless ask him. According to Kadijević, Milošević and Jović did not try to keep him, but they "could not wait for him to leave and take over the command of the JNA", and on 6 January 1992, he relinquished the duty of the Federal Secretary. In that interview, Kadijević precisely said that, "Milošević did not really command the JNA when I was the Federal Secretary, and from the moment I resigned, he became the absolute commander of the army."[89]

34. This statement, made by a direct and major participant in events, who was so often cited by the Applicant, goes to the crux of the case of attribution. Moreover, it wholly contradicts the thesis advanced by Babić, who testified as part of the deal he struck in his plea agreement, as well as by expert witness, Theunens, who testified as an employee of Prosecutor of ICTY.

35. Kadijević and JNA were not organs of Serbian leadership, neither *de jure* neither *de facto*. Let me use the language of Professor Crawford — "perfectly clear".

36. The JNA was not acting in Croatia following any previous designed plan of Greater Serbia. It is beyond doubt that the two concurred on important issues, such as a wish for the SFRY to persevere and on the need to protect parts of the population that supported the SFRY and was placed at risk by those who wanted the Federation to dissolve through conflict. Those acts of JNA

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[88]Borislav Jović, *Poslednji dani SFRJ*, p. 402, CMS, Ann. 29.

[89]http://www.novinar.de/2007/10/07/kadijevic-odbio-sam-vojni-puc.html.

were sometimes in correlation with interest of Serbian leadership, but never on the direction, or through control, or orders, or otherwise as a result of any dependence.

37. At the outset of the conflict, acting pursuant to orders issued by its commander, the SFRY Presidency, the JNA played the role of a neutral peacekeeper[90]. The intention behind the actions of the JNA, contrary to the claims expressed by the Applicant, was clearly visible and cannot be ignored. In the ICTY *Mrkšić et al.* and *Martić* cases the Trial Chambers found that during the time period in question the JNA was operating as a "peacekeeping force"[91].

38. The Respondent does not dispute the allegations that in late 1991 the JNA became an active participant in the conflict in Croatia. However, the involvement of the JNA did not come as a consequence or was part of an alleged systematic genocidal plan, as the Applicant claims[92]. It was in fact a direct reaction to actions taken by Croatian forces that started targeting the JNA. These incidents cannot be ignored or considered to be of a lesser value. Participation of the JNA in the conflict in Croatia did not arise in a theoretical vacuum.

39. Croatian armed forces did not emerge suddenly. Croatia began purchasing weapons for its armed forces in late 1990 or early 1991[93]. This was illegal[94]. Croatian armed forces gradually grew. By January 1992, the Croatian army had around 200,000 troops, while the Ministry of Interior (MUP) had over 40,000 employees[95]. This expansion of Croatian armed forces was not solely motivated, as asserted by the Applicant, by a necessity to defend itself and out of fear from the existing threat. Another relevant factor is that the new Croatian leadership had political and military aspirations towards the territories located outside of the borders of Croatia.

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[90]See RS, para. 450, quoting the Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, pp. 89, 91-92 (Peace Palace Library).

[91]ICTY *Mrkšić et al.*, Trial Chamber Judgement, para. 31; also ICTY *Martić* Trial Chamber Judgement, paras. 162, 165.

[92]See MC, para. 3.07.

[93]ICTY *Mrkšić et al.*, Trial Chamber Judgement, para. 22.

[94]See CMS, paras. 467-472; also M. Špegelj, *Soldier's Memoirs (Sjećanja vojnika)*, Zagreb, 2001, p. 288, table IV: Weapons purchased with support of the Ministry of Defense of the Republic of Croatia between 5 Oct. 1990 and 15 Jan. 1991, Ann. 36.

[95]Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995*, 2002, Vol. I, p. 96 (Peace Palace Library).

40. The Trial Chamber in ICTY *Kordić* case found that: "President Tuđman harboured territorial ambitions in respect of Bosnia and Herzegovina, and that was part of his dream of a Greater Croatia, including Western Herzegovina and Central Bosnia."[96]

41. According to the ICTY *Mrkšić et al.* Trial Judgement, from 9 May until 4 August 1991, 340 attacks were carried out against the JNA units and staff in Croatia, in which six JNA soldiers and officers were killed and 83 were wounded[97]. Croatian forces committed massacre of 13 JNA solders in Karlovac, after promised free passage[98]. In March of 1991, before the JNA got actively engaged in the conflict, Croatian forces successfully blocked JNA barracks in various parts of Croatia[99]. The general strategy was to block JNA barracks on Croatian territory by cutting off water, electricity, food supply, and communications[100]. On 14 September 1991, Croatian forces performed a sweeping attack on the JNA barracks and other facilities[101]. The Croatian leadership started treating the JNA as the enemy[102]. The only reasonable and an objective conclusion that can be reached regarding the role of the JNA in the conflict is that it happened as a result of robust and violent actions taken by Croatian forces that targeted the JNA.

The JNA did not act on the instructions of, under the direction or control of the Respondent

42. Mr. President, Members of the Court, in order to establish responsibility of the Respondent pursuant to Article 8 of the ILC Articles, the Applicant must meet very high standards. The Court must be presented with fully convincing evidence[103] in respect to each operation during which the alleged violations occurred, and not generally, in respect of all the actions taken by persons or groups who allegedly committed such violations[104]. The Applicant agrees with this

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[96]ICTY *Kordić*, Trial Chamber Judgement, para. 142.

[97]ICTY *Mrkšić et al.*, Trial Chamber Judgement, para. 26.

[98]See RS, para. 453.

[99]*Ibid.*, para. 23.

[100]*Ibid.*

[101]Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995*, 2002, Vol. I, p. 95 (Peace Palace Library).

[102]The Applicant offered as evidence in App. 1 — Daily Report of the Federal Secretary for National Defense — Operational Center No. 1-260 dated 17 Sep., which describes 19 incidents, attacks of Croatian armed forces on the JNA facilities. Those incidents took place only 48 hours prior to the Report being issued.

[103]*Bosnia* Judgment, p. 129, para. 209.

[104]*Ibid.*, p. 208, para. 400.

legal standard and requirement[105]. It however failed to meet this standard. There is no evidence on specific operations and violations in which the JNA took part, based on instructions of, under direction or control of Milošević and the Serbian leadership. Allegations on Article 8 responsibility are in fact being intentionally mixed, due to lack of evidence, with a thesis on a *de facto* organ of the Respondent, which are two completely separate issues.

Role of the JNA in the commission of the alleged crimes according to ICTY findings

43. Mr. President, Members of the Court, as already stated in its written submissions, the Respondent does not dispute the fact that individual members of the JNA were involved in commission of crimes in Croatia in the second half of 1991[106]. Their criminal responsibility was established both by the ICTY and national courts. When establishing criminal liability of individual perpetrators of crimes, none of the said courts found any connection of those crimes to an alleged plan to commit genocide, nor had they established individual involvement in genocidal acts. The Respondent highlights once again that none of the individuals charged with crimes committed in Croatia were ever charged with genocide, as Professor Schabas just showed, in the previous session. Furthermore, in the case concerning events in Croatia it was never established that the actions taken by individuals involving members of the JNA were undertaken upon instructions of, under direction or control of the Respondent.

44. Nonetheless, one of the ICTY cases very relevant to the case before this Court, *Mrkšić et al.*, is the best example of a marked difference between the allegations being made by the Applicant regarding the role and involvement of the JNA in the events in Croatia and the actual findings of a court of law.

45. The Respondent has analysed the findings of the *Mrkšić* trial judgement in regard to the role of JNA in the events that took place in Vukovar, and its final findings in regard to the liability of the convicted JNA officers[107]. However, in our oral submissions we need to pay attention particularly to certain arguments of the Applicant in regard to the role of the JNA in the events in Ovčara and Velepromet. According to the Applicant, the findings of the *Mrkšić* judgement

[105]See RC, para. 9.61.

[106]See RS, para. 470.

[107]RS, paras. 509-514.

regarding these crimes are the "worst examples of Phase 4 of the events at Vukovar"[108]. Also, the Applicant's claim that the Respondent is trying "to minimize the factual findings of the Trial Chamber in the *Mrkšić* judgment . . . they powerfully support the Applicant case"[109]. These allegations by the Applicant raise serious concerns.

46. Mr. President and Members of the Court, let us look together whether the *Mrkšić et al.* judgement indeed does support the Applicant's case. The question is: are there any findings of the *Mrkšić* judgement that were omitted by the Applicant in the case study? And how do these findings undermine the Applicant's case of *actus reus* and *mens rea* of genocide?

47. First, the Trial Chamber in *Mrkšić et al.* case found that Serb forces treated the victims of the crimes charged in the indictment differently from the civilian population. They were selected and separated because of their known or believed involvement in the Croatian resistance against the Serb forces[110]. Those members of the Croatian armed forces tried to find shelter in the local hospital, by taking patient's clothes and disguising themselves as patients[111]. The objective of the JNA was to remove all persons, including patients, who it believed were involved as combatants in the Croat forces, from the hospital in order to send them to the prison camp operated by the JNA and located in Sremska Mitrovica[112].

48. Second, the Applicant, through Sir Kier Starmer, claimed that the ICTY found that Major Šljvančanin played a key role in preventing the European Community Monitoring Mission (ECMM) and ICRC representatives from stopping the "Death trips to Ovčara"[113]. However this is not correct. The Trial Chamber found that Major Šljivančanin did not bear any responsibility for the murders of those prisoners, neither through the participation in joint criminal enterprise, or aiding and abetting or any other mode of responsibility. The *Mrkšić et al.* Trial Chamber explicitly found that Major Šljivančanin, when preventing the ECMM and ICRC from acting and denying them access to hospital was not conducted with the purpose or intention of

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[108]CR 2014/8, p. 45, para. 76 (Starmer).

[109]*Ibid.*, p. 46, para. 80.

[110]*Mrkšić et al.*, Trial Chamber Judgement, para. 476.

[111]*Ibid.*, paras. 109 and 602.

[112]*Ibid.*, para, 657.

[113]CR 2014/8, p. 40, para. 51 (Starmer).

committing the killings[114]. Plainly, the Applicant's allegations to the contrary are unsupported by the ICTY[115]. True, such acts were not in conformity with the Zagreb agreement, however they had nothing to do with the *dolus specialis* of genocide.

49. The Trial Chamber also found that Colonel Mrkšić, Commander of the JNA forces in Vukovar, had changed the initial plan of transporting the detainees to a detention facility, without prior consultations with any of the authorities in Belgrade[116]. That was his personal decision[117]. He gave no order to the Serb TO and the paramilitary forces that were then at Ovčara and who later executed the prisoners of war[118].

50. Third, contrary to the Applicant's claims[119], the ICTY findings do not support the claim that the JNA officers endorsed or were involved in beatings in Ovčara, nor is there any evidence of the involvement of any JNA personnel in the excavating machine engagement[120].

51. Mr. President, Members of the Court, all these findings constituted the basis for the final conclusion in the *Mrkšić* trial judgement that the joint criminal enterprise to kill the persons taken from Vukovar Hospital did not exist, or that it involved any of the JNA officials[121]. It is noteworthy that the Prosecution before the ICTY did not appeal this finding in the judgement.

52. Finally, regarding Velepromet, the Trial Chamber findings, which concern the role of the JNA, were also omitted by the Applicant. The Applicant did mention the finding of the Trial Chamber that Velepromet was not within the JNA's authority, however it did not mention that the prisoners, who were presented in Velepromet during the night of 19 November 1991, were taken away from Velepromet during the same night by the JNA, despite the attack conducted by the paramilitaries[122]. Mr. Ignjatović will address this issue with more details.

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[114] *Mrkšić et al.*, Trial Chamber Judgement, paras. 604 and 658.

[115] CR 2014/8, p. 40, paras. 51-53.

[116] *Mrkšić et al.*, Trial Chamber Judgement, para. 586.

[117] *Ibid.*

[118] *Ibid.*, para. 617.

[119] CR 2014/8, p. 44, para. 68.

[120] *Mrkšić et al.*, Trial Chamber Judgement, paras. 596 and 601.

[121] *Ibid.*, paras. 569-608.

[122] *Mrkšić et al.*, Trial Chamber Judgement, para. 171.

53. In addition, the Trial Chamber also found that all 181 members of the Croatian forces who surrendered two days before these events, had been transferred in the detention facility in Mitrovica[123]. Civilians not suspected of involvement in the Croatian forces were evacuated from Velepromet at some time on 19 and 20 November 1991 to the destinations in Serbia and other parts of Croatia, in accordance with their free choice[124]. All the references you can find in the footnotes for these findings in the judgement. These findings confirm that acts of JNA were carried out without any discriminatory intent, and especially without required *mens rea* for genocide.

54. Mr. President and Members of the Court, as you can see the Applicant's reliance on the *Mrkšić* judgement is not accurate. It is based on a selective reading of the Judgement out of context and in part. In the end of this analysis of the *Mrkšić* judgement, we will ask the same question as Mr. Starmer: "What a test of Serb intent this would prove to be?"[125] Yes, Mr. President, Members of the Court, as Mr. Starmer said, you know the answer.

55. The Applicant relies heavily on the ICTY judgement in the *Martić* case when it comes to the question of attribution of responsibility to the Respondent and the JNA. In the case of Mr. Martić, as Professor Schabas just explained, the Trial Chamber rendered the conviction finding that he was part of a joint criminal enterprise. He was convicted of crimes against humanity and violation of laws and customs of war. The Applicant however misinterprets and misapplies the factual findings from the judgement in this case in respect to its genocide claim due to the fundamental misunderstanding of the Chamber's findings, and an incorrect interpretation of the evidence regarding the common plan and the goal of the joint criminal enterprise and the conclusions reached by the Chamber.

56. The Applicant concedes that forcible transfer or displacement (ethnic cleansing) may in certain circumstances constitute a genocidal act contrary to Article II *(c)* of the Genocide Convention, if committed with the necessary intent[126]. The ICTY Trial Chamber in the *Martić* case found that the execution of a political goal uniting all territories populated by Serbs in Croatia and

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[123] *Ibid.*, para. 155.

[124] *Ibid.*, paras. 168 and 160.

[125] CR 2014/8, p. 39, para. 47.

[126] See RC, para. 9.47 (iii).

Bosnia and Herzegovina with Serbia proper did necessitate forcible removal of non-Serbian population from SAO Krajina and the Republic Srpska Krajina[127]. The judgement however does not mention at any point the element of "destroying the group", as the Applicant claims. It is not mentioned in respect to any findings or a single piece of evidence. On the contrary, an analysis of the findings of the Trial Chambers can only lead to the same conclusion regarding the exercise of a joint criminal enterprise to forcibly remove non-Serbian population and individual responsibility of Milan Martić, a participant in that joint criminal enterprise. The crimes Milan Martić was convicted of under the joint criminal enterprise theory of liability are deportation and forcible transfer. He was also convicted of other crimes, namely murder, illegal imprisonment and torture, plunder and destruction but, according to the Chamber, these crimes fell outside of the scope of the common purpose of joint criminal enterprise (JCE)[128]. An equally important finding of this judgement, contrary to the position taken by the Applicant, is that the common purpose of creating one State was being executed through a plan which involved displacement of the people, not destruction of the group.

57. This, obviously significant distinction was crucial for this Court in the *Bosnia* case. The Court at that junction referred to the findings in the *Stakić* case which states: "[t]he expulsion of a group or part of a group does not in itself suffice for genocide"[129].

58. Since the Applicant is primarily relying on the joint criminal enterprise theory of liability in its genocide thesis, the Respondent wishes to refer, at this point, to statements made by the Applicant:

> "The ICTY's jurisprudence in relation to joint criminal enterprise theory and provision of the Statute in which this theory is alleged contain by 'implication' *is not in unison and is not consistent with the principles of legal certainty and justice*." (Emphasis added.)

and

> "The extensive application of JCE theory to the entire political and military structures of state and to other 'known and unknown' persons does not fulfill the requirement of precise charges and *may produce wrong impression of 'political influence' on international criminal justice system*." (Emphasis added.)

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[127] *Martić*, Trial Chamber Judgement, para. 445.

[128] *Ibid.*, para. 454.

[129] *Bosnia* Judgment, p. 123, para. 190.

59. These two sentences represent the official position of the Government of Republic of Croatia, stated in its Conclusions dated 15 August 2011 (hereafter "Conclusions"), which were distributed to all diplomatic missions in the Republic of Croatia[130]. In the said Conclusions, Croatia's Government fiercely criticized the decision of the ICTY in the case of Croatian generals Gotovina and Markač dated 15 April 2011, which was rendered based on the joint criminal enterprise theory of liability. Opinions expressed in the Conclusions are clearly contradictory to the Applicant's submissions in this case which extensively refer to the ICTY jurisprudence on joint criminal enterprise.

60. It seems obvious that the Applicant is seeking application of double standards when it comes to interpretation of international law. Accordingly, if Croatians are facing charges based on joint criminal enterprise theory of responsibility, the applicable legal standards are seen as not unified and inconsistent with principles of legal certainty and justice. The Applicant is thereby revealing that its general approach and interpretation of applicable legal standards, factual findings, and jurisprudence of the ICTY is wholly dependent on its interests in a particular case[131].

Conclusions advanced by the Respondent in the light of the ICTY findings

61. Mr. President, allow me to make conclusions of the role of the JNA in the light of the ICTY findings. After a thorough analysis of and comparison between the evidence presented in this case and the findings of the ICTY in its cases which deal with crimes committed in the Republic of Croatia, in the period from 1991 to 1995, the following conclusions can be drawn:

(a) individual members of the JNA, including a number of senior officers, were involved in a number of crimes listed by the Applicant;

(b) a number of senior officers of the JNA were found to be members of the joint criminal enterprise, whose goal was the creation of one State which would bring together all Serbs and was being implemented through deportation and forcible transfer of non-Serbian population. Nonetheless, none of those officers faced charges before the ICTY for those crimes;

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[130]Conclusions of the Government of the Republic of Croatia dated 15 April 2011, communicated to the diplomatic missions accredited in Croatia with the Diplomatic Note No. 2081/11 of 19 April 2011 (Ann. 75). For the full referenced text, see RS, para. 422.

[131]The Respondent wishes to remind the Court that the Applicant claimed that the Respondent is the one who "distorts the ICTY case law" (see RC, para. 5.83).

(c) crimes against humanity were committed exclusively on the territory of SAO Krajina, in the period from late 1991 to early 1992. There were no other convictions for commission of crimes against humanity in other parts of Croatian territory within the time frame offered in the Memorial;

(d) there were no convictions for extermination, as a crime against humanity, within the set time frame;

(e) members of the JNA who were convicted of violation of the laws and customs of war were found guilty only for aiding and abetting through failure to act, and pursuant to command responsibility doctrine in relation to crimes committed in Vukovar and Dubrovnik.

Conclusion

62. Mr. President, Members of the Court, at the very end of my presentation, I would like to stress the following once again. The Applicant has not provided legal or factual support for attribution of responsibility to the Republic of Serbia for alleged actions taken by the JNA, whether it be direct responsibility or responsibility through the Respondent's alleged control over the JNA, as required by the ILC Articles. As for the VJ, which was an organ of the Respondent in the sense of ILC Articles, the Applicant has not provided legal or factual support for claiming that members of the VJ took part in acts prescribed by Articles 2 and 3 of the Genocide Convention.

63. With this I conclude my presentation, Mr. President. I am grateful for your attention and I would appreciate it if you would like to give the floor to my colleague, Mr. Ignjatović. Thank you.

The PRESIDENT: Thank you very much Mr. Lukić and I call on Mr. Ignjatović. You have the floor, Sir.

Mr. IGNJATOVIĆ: Mr. President, distinguished Members of the Court, it is my privilege and honour to appear before you for the first time.

2. Alleged Responsibility for Other Participants in the Conflict

1. I will present the Respondent's position regarding the alleged responsibility of the Republic of Serbia for actions taken by other participants of the armed conflict identified by the Applicant in the Memorial, its subsequent submission and the oral arguments. By other participants of the armed conflict we are namely referring to Krajina armed forces, volunteer or "paramilitary" formations, and the Territorial Defence of Serbia, units of "TO Serbia". Krajina armed forces ~~which~~ included local territorial defence forces (TOs)[132], Krajina Militia — or "Milicija Krajine" — and the Krajina Ministry of Internal Affairs — or "Krajina MUP"[133]. They were subsequently organized as the Serbian Army of Krajina (SVK) and Krajina MUP.

2. In addition to the above-mentioned, I will also present actions taken by the Republic of Serbia aimed at prosecuting and punishing those responsible for crimes committed in the territory of the former Yugoslavia. These actions entail both co-operation with the International Criminal Tribunal for the former Yugoslavia, "the ICTY", and war crimes trials before domestic courts.

3. We emphasize that the questions related to attribution are elaborated in detail in the Counter-Memorial and, more specifically, in Chapter V of the Rejoinder. The Respondent stands by the positions and the arguments expressed in its written submissions.

4. Let me also note that, obviously, as far as acts pre-dating 27 April 1992 are concerned, these questions will only arise should you find that, indeed, Serbia in these proceedings, arising under the Genocide Convention only, can be held responsible, as a matter of law, for events prior to this date, prior to 27 April 1992.

5. Mr. President, Members of the Court, the Applicant's approach to identifying participants of the armed conflict in Croatia is overly simplified and partisan. In the third chapter of the Memorial entitled "The JNA and the Paramilitary Groups", the Applicant deliberately mixes together all the different volunteer groups that were fighting against Croatian forces together with forces of SAO Krajina and the RSK, referring to them as "Serb paramilitary groups". The Applicant is thereby intentionally trying to hide and misrepresent facts that do not support its

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[132]Territorial Defence (Teritorijalna odbrana) — armed forces organized on the territorial basis.

[133]MUP (Ministarstvo unutrašnjih poslova) — Ministry of Internal Affairs.

version of the events. More specifically, by referring to various formations as one group, omitting to note their key and obvious differences, the Applicant is in fact trying to show that they were all part or under the control of the JNA which should accordingly be held responsible for all of their actions.

6. But the confusion related to the differentiation of armed groups is not only confusion deliberately created by the Applicant. It also mixes the grounds for the alleged responsibility of the Republic of Serbia, leaving it open to what is the relevant norm of attribution so as to provide for the alleged responsibility of the Respondent.

7. In particular, as shown this morning by Mr. Lukić, Croatia has not said anything on how acts could be attributed to the alleged movement in the first place and how they could then, under Article 10 (2) of the ILC Articles on State Responsibility — if that norm applied — be attributed to the Respondent. Indeed, to reiterate the questions raised by my colleague, can a movement have *de facto* organs and if it can, could *de facto* organs of a movement then additionally control some other external actors — and all this within the narrow parameters of movement responsibility?

8. Even if the regular rules of attribution were to apply in a scenario covered by Article 10 (2) of the ILC Articles on State Responsibility, as Croatia seems to assume, it has remained deliberately vague whether it is Article 4, or Article 5, or Article 8 of the ILC Rules on State Responsibility that Applicant Croatia wants the Court to apply to the acts of the actors I have mentioned.

9. Once again we believe that the behaviour of the Applicant is deliberate and intentional directed to additionally confuse the Court.

10. The Respondent, however, takes the position that it is not responsible for actions taken by the above-mentioned participants of the conflict and that their actions cannot be attributed to it either pursuant to either Article 4 or Article 8 or some other norm of attribution, even if the regular rules of responsibility were to apply. These participants were neither *de jure* nor *de facto* organs of the Respondent, nor had they acted on the instructions, or under the directions or control of the Respondent. The Respondent therefore cannot be held responsible for their actions either directly or indirectly — through the alleged responsibility of the JNA/SFRY.

11. In order to elaborate our position, I will go through the facts as they relate to the conduct of the above-mentioned participants to the conflict, focusing on control allegedly exercised by the JNA and the Respondent.

The PRESIDENT: Mr. Ignjatović, I think the interpreters into French would appreciate it if you were to speak a little more slowly, please.

Mr. IGNJATOVIĆ: Sorry.

The PRESIDENT: Please, proceed.

Mr. IGNJATOVIĆ:

2.1. Alleged control exercised by the JNA

12. The Applicant claims that the JNA had command and control over all joint military operations of SAO Krajina armed forces. This claim is, however, not based on facts, nor is it supported by evidence. For this reason, it must be dismissed.

13. As previously mentioned, in addition to the JNA, other relevant participants of the conflict in Croatia were: *(a)* Krajina armed forces, including forces of MUP Krajina, *(b)* volunteer, or "paramilitary" units, and *(c)* TO Serbia units, that is the Territorial Defence units of Serbia.

14. As a first step, it is important to analyse the relationship of each of these participants with the JNA separately. And I will turn now to the relationship between the JNA and Croatian Serb Forces.

Relationship between the JNA and Croatian Serb forces

15. During the period of 1990 to 1991 the Serb population in Croatia has been establishing its own political and armed structures — Serbian autonomous regions (SAO) and military forces.

16. Local Serb forces have been emerging from the local Territorial Defence units and MUP units on the territory of municipalities in Croatia with majority or a substantial minority of Serbs.

17. The SAO Krajina — Serbian autonomous regions Krajina — was proclaimed on 21 December 1990[134].

18. On 4 January 1991 SAO Krajina established the Secretariat or Ministry of the Internal Affairs (MUP Krajina)[135].

19. On 29 May 1991 the Krajina Assembly established "special purpose units" and named it Militia of Krajine, or "Milicija Krajine". Milicija Krajine was under the authority of the SAO Krajina Ministry of Defense[136].

20. On 1 August 1991 the Krajina Government proclaimed Milicija Krajine and TO Krajina forces to be Krajina armed forces. The Krajina armed forces were under the command of the SAO Krajina Prime Minister[137].

21. Local TO units were also established in two other Serbian autonomous regions on the territory of Croatia — that is, SAO Western Slavonia and SAO Slavonia, Baranja and Western Sirmium~~, or Western Syrmia~~. Most of these units originated *de facto* from the former TO units of the TO Croatia.

22. The SAO Krajina was transformed into the Republic of Srpska Krajina (RSK) on 19 December 1991 and it was subsequently joined by the other two Serbian autonomous regions in Croatia in February 1992[138].

23. The RSK exercised *de facto* control over substantial territory and had an independent government and organized armed forces.

24. The process of formation of the Serbian Army of Krajina (SVK) was formally finished on 18 May 1992, with the amendments to the RSK Constitution[139].

25. Military and police units in the Serbian autonomous regions and subsequently in the RSK were created and organized according to the laws of these regions and then of the Republic of Srpska Krajina, and not under the internal law of either the SFRY or the Federal Republic of

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[134]See Counter-Memorial of Serbia (CMS), para. 610.

[135]See CMS, para. 610.

[136]See CMS, paras. 494 and 611.

[137]See CMS, para. 612.

[138]See CMS, para. 496.

[139]See CMS, para. 618.

Yugoslavia or the Republic of Croatia. Consequently, the armed forces of the SAO Krajina, and other Serb regions in Croatia, as well as the RSK, were not *de jure* organs of either the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia.

26. The forces of the SAO Krajina and other ethnic Serb regions in Croatia, as well as the Krajina MUP units, fought against the Croatian forces at the beginning of the conflict independently of the JNA. When the JNA started to fight the Croatian Government forces, it co-operated with the TO Krajina and MUP Krajina. On some occasions the TO and the MUP units of Krajina were subordinated to the JNA, but this required prior approval of the relevant TO commander or the SAO Krajina Minister of Interior, respectively[140].

27. Cases of such subordination could occur only during the period of 1991 to 1992, when the JNA was there, and in this regard only the responsibility of the SFRY and not of the FRY, i.e. of Serbia.

28. In order to attribute the conduct of the Krajina and other Serb regions in Croatia TO and MUP units to the SFRY, the Applicant needed to prove in each specific case not only that the Croatian Serb units were actually fighting together with the JNA, but also needed to specify the nature of their relationship — was it co-ordination, subordination or something else. Only then could one possibly discuss whether those units perhaps in concrete specific occasions acted as *de facto* organs of the SFRY or were under its direction or control.

29. Surprisingly, the Applicant did nothing of that sort in its written submissions.

30. The Applicant claims that "the ICTY has found as a fact that the participation of the TO (volunteer groups), the *Milicija Krajine*, the MUP, and paramilitary groups in the commission of the crimes in Croatia invariably occurred under the direction and control of the JNA". As the proof for this assertion the Applicant offers the ICTY judgements in the case of *Martić* and in the case *Mrkšić et al*.

31. The Applicant's claim is, however, misleading and it is wrong. The above-mentioned ICTY judgements do not prove that the crimes found to be committed by the forces of Croatian

[140] *Prosecutor* v. *Milan Martić*, IT-95-11, Judgement, 12 June 2007, para. 135 and para. 142.

Serbs can be attributed to the JNA/SFRY either on the basis of Article 4 or on the basis of Article 8 of the ILC Articles on State Responsibility.

32. The judgement in *Martić* makes a clear distinction between the JNA and the forces of Croatian Serbs. Thus, in paragraph 344 of the judgement, the Trial Chamber concludes: "Furthermore, evidence shows that the [SAO Krajina] leadership established the armed forces of the SAO Krajina, made up of the TO and the Milicija Krajine, and co-operated with the JNA in organizing operations on the ground."

33. This is completely in line with the Respondent's position that the forces of Croatian Serbs were established by their leadership and that they fought in co-operation, and not under the command of the JNA.

34. In another paragraph, quoted also by the Applicant in paragraph 4.40 of the Reply, the Trial Chamber analysed the conduct of operations in Krajina and concluded:

> "There is evidence that beginning after the summer of 1991, the SAO Krajina TO was subordinate to the JNA. There is also evidence of operational cooperation between the JNA and the armed forces of the SAO Krajina. Any resubordination of MUP units to the JNA for temporary assignment required prior approval of the Minister of Interior of the SAO Krajina. When resubordinated, the MUP unit would be under the command of the JNA unit commander. However, if the MUP unit was merely acting in cooperation or concert with the JNA unit, it would remain under the command of the MUP commander. After the completion of a mission where it had been resubordinated, the MUP unit would return into the structure of the MUP. For the purpose of combat operations, TO units could also be resubordinated to JNA units. When resubordinating, the largest unit of either the TO or the JNA would command, which would normally be the JNA unit in a given area. Such resubordination of TO units would be carried out by the JNA."[141]

35. While the Applicant quotes this paragraph as a proof of the JNA's control over the Krajina armed forces, the findings of the Trial Chamber actually show that both the MUP and the TO of Krajina were independent units which could, under particular circumstances and subject to decisions of their commanders, be subordinated to the JNA units for the conduct of particular operations, or simply participate in the operations in co-operation with the JNA.

36. It is clear from the two quoted findings of the Trial Chamber in *Martić* that neither MUP nor TO of Krajina formed part of the JNA and, for that reason, they cannot be considered as nor equated with *de jure* or *de facto* organs of the SFRY.

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[141] *Prosecutor* v. *Milan Martić*, IT-95-11, Judgement, 12 June 2007, para. 142.

37. The judgement in *Mrkšić* does not alter this conclusion. Namely, although the Trial Chamber did find that the local TO units, as well as volunteer and paramilitary units, had been subordinated to the JNA during the entire battle for Vukovar, it still made a clear distinction, throughout the judgement, between the JNA units, on the one side, and the local TO units, volunteers and paramilitaries on the other. This further means that neither of the latter units formed part of the JNA and thus the responsibility of the JNA/SFRY for their actions cannot be based on Article 4 of the ILC Articles on State Responsibility, even if it were applicable as such in a scenario alleged covered by Article 10 (2) of the ILC Articles on State Responsibility.

38. Finally, the document of the JNA 1st Military District confirms that the local TO units of Croatian Serbs were never considered as part of the JNA[142]. This document gives the full overview of the JNA units that were engaged in Eastern Slavonia on 16 November 1991 and shows a clear difference in the status and the relationship with the JNA between TO units from Serbia and TO units composed of Croatian Serbs. While the document gives a comprehensive overview of the forces under the command of the JNA, including the units of TO Serbia, none of the TO units of Croatian Serbs was listed in the document and it is obvious that the JNA did not consider these units as its part. The TO units of Croatian Serbs were formed independently as the armed forces of the emerging Serb regions in Croatia with the spreading of the conflict in 1991 and they were never integrated in the JNA, although they were occasionally subordinated to the JNA for the conduct of particular operations.

39. All of the above-mentioned shows that neither MUP nor TO of Krajina became part of the JNA, which lead to conclusion they were not *de jure* or *de facto* organs of the SFRY. Consequently, Article 4 of the ILC Articles on State Responsibility cannot apply.

40. It remains, therefore, to be seen whether the responsibility of the JNA, and consequently the SFRY, can be established on the basis of Article 8 of the ILC Articles on State Responsibility, that is whether the units of the Croatian Serbs acted on the instructions of, or under the direction or control of the JNA/SFRY. In this regard, the Respondent first recalls the Court's interpretation of Article 8 of the ILC Articles on State Responsibility, according to which: "it would in principle

[142]RS, Ann. 9, Command of 1st Military District, Strictly Confidential No. 1614-162, 16 Nov. 1991.

have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed"[143]. And that:

> "it has to be proved that they [the persons who performed the acts] acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[144]

41. The *Martić* judgement is not very useful since the Trial Chamber in *Martić* was not directly concerned with the JNA's participation and involvement in the crimes found to have been committed and it did not analyse, with respect to any of the individual crimes, whether the crimes had been committed while the JNA exercised its effective control over the forces who committed the crimes or whether the JNA had specifically instructed the commission of the crimes.

42. The situation is, however, entirely different when it comes to the *Mrkšić* judgement[145]. In this case, the Trial Chamber analysed, in respect of almost every detail possible, the events relevant to the crimes committed at "Ovčara", and the findings of the Trial Chamber are such that they only confirm that these crimes cannot be attributed to the JNA/SFRY. The ICTY has concluded that the killings at "Ovčara" had been perpetrated by local TO members and paramiliatires, and also that there was no joint criminal enterprise for the commission of crimes at "Ovčara" and that Mrkšić (nor other accused) did not order that the prisoners of war be murdered[146]. Mr. Lukić has already discussed in more details about the JNA responsibility related to "Ovčara".

43. It is, thus, submitted that the findings of the Trial Chamber in *Mrkšić* clearly point to the conclusion that the crime committed at "Ovčara" was neither committed under the instructions of the JNA nor that the JNA exercised its effective control over the Serb TO and paramilitary forces at

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[143]Case concerning the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 65, para. 115; emphasis added.

[144]Case concerning *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. 208, para. 400.

[145]*Prosecutor* v. *Mrkšić et al.*, Judgement, 27 Sept. 2007.

[146]*Ibid.*, para. 608 and paras. 615-617.

the time when the crime was committed[147]. Accordingly, the crime cannot be attributed to the JNA/SFRY on the basis of Article 8 of the ILC Articles on State Responsibility.

44. In its oral arguments, the Applicant heavily relied on the conclusion of the ICTY Trial Chamber in *Mrkšić et al.* that, during the Serb military operations in Croatia, the JNA had complete command and full control over all military operations[148]. The *Mrkšić* case relates to the crime committed at Ovčara — an event that happened in a very short period of time. Since the case does not relate to the siege of Vukovar in its entirety, nor to other events that occurred in Eastern Slavonia, not to mention other parts of Croatia, the above-mentioned Trial Chamber conclusion seems a very unusual one. What evidence did the ICTY Trial Chamber use as a basis for such a conclusion?

45. [Screen on] The Applicant avoided citing the first sentence of paragraph 89 of the *Mrkšić et al.* judgement, which reveals that only two documents or, to be more specific, only two sentences of these documents, represent the basis for such a robust finding — the Circular of the Chief of the General Staff of 12 October 1991 and the Order of the Command of 1st Military District of 15 October 1991[149]. You can see that on your screen.

46. Let us take a closer look at these documents.

47. General Adzic's circular dated 12 October 1991, among many things, states — only one sentence — that all combat units, no matter if they are part of the JNA, TO or volunteers, have to be placed under the unified command of the JNA. It does not say that such command was actually put in place. One of the reasons for issuing the circular was an obvious need to suppress the lack of discipline and lack of control. [Screen off]

48. [Screen on] Order of the Command of 1st Military District of 15 October 1991[150] applied only to Eastern Slavonia, and it is not directed to JNA units elsewhere in Croatia. With this document, the Commander of the 1st Military District, General Panić, among other things, ordered two things: first, establishment of full control over the area under the responsibility of the Unit;

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[147]See RS, paras. 301-303.

[148]*Mrksic et al.*, Judgement of 2007, para 89.

[149]*Ibid.*

[150]Command of the 1st Military District, Strictly Confidential No. 1614-82 27, 15 Oct. 1991, Ann. 67 with the Reply.

and second, removal of paramilitary and volunteer units that rejected the command of the JNA from the area of its responsibility. The order was issued due to the emerging problems, with a goal of regulating life, work, order and discipline. [Screen off]

49. Both documents show that, in mid-October 1991, the JNA was clearly experiencing problems in the field with units which were not part of the JNA. The JNA commanding officers were obviously of the opinion that those problems needed to be fixed and, for that reason, the order and the circular were issued. The two documents are therefore not proof of the JNA control over local TOs and paramilitaries in mid-October 1991 but, rather, proof of the JNA's intent to assert control at the time.

50. However, did the JNA manage to establish control in the aftermath of October 1991? And that is the real question.

51. I would wish to remind the Court at this point of the fact that, on 10 December 1991, the SFRY Minister of Defence, General Veljko Kadijevic, issued another order containing an almost identical sentence — that all of the volunteer or paramilitary units that do not accept JNA control should be removed from the battlefield[151]. And you have the exact quotation on your screens. The problems with the irregular forces was mentioned in the United Nations Secretary-General's Report of February 1992: "[the] military forces on both sides continue to include irregular armed elements who are not fully under the control of the established military commands and who have been responsible for a substantial proportion of the alleged cease-fire violations"[152]. This represents clear evidence that the JNA did not manage to establish control over the paramilitaries — or at least for a substantial number of volunteer or paramilitary units — throughout the entire 1991.

52. The Respondent also believes that the conclusion stated in paragraph 89 of the *Mrkšić et al.* judgement is inconsistent with the conclusions expressed in other paragraphs of the same judgement. The Trial Chamber describes several serious conflicts between members of the JNA and members of the other units. For example, it described a physical conflict between a JNA

[151]Federal Secretariat for National Defence, Order of 10 Dec. 1991, Ann. 74 with the Memorial.

[152]Further Report of the Secretary-General to the Security Council Pursuant to SC UN res. 721 (1991) of 4 Feb. 1992, para. 7.

officer and a local TO member that took place when the JNA was transporting prisoners from Velepromet:

> A group of Serb paramilitaries and TOs actually interrupted the meeting and told the counter-intelligence officers [these are officers of the JNA] that they would not be allowed to take PoW [prisoners of war] to the prison of Sremska Mitrovica in Serbia"

and that: [Screen on]

> "After the counter-intelligence officers had visited the detention rooms, military police of the GMTBR [mechanized brigade] began loading prisoners of war onto buses. While the boarding was underway, Colonel Vujic [of the JNA] and other counter-intelligence officers were threatened by Serb TOs and paramilitaries. Colonel Vujic sent an officer to the OG [operational group] South command at Negoslavci to ask for reinforcements, and to report the situation at Velepromet to Mile Mrksic. Following this, he was on board one of the buses loaded with prisoners of war registering names when 'Duke Topola', a TO, boarded the bus. Topola physically lifted Colonel Vujic, put a knife to his neck and told him that he would not be able to take the 'Ustashas and criminals out' since '[t]hey ha[d] to pay for what they did to the Serbian people'. Another officer managed to drag Topola off the bus which then departed without further obstruction."[153]

53. The ICTY established that when the buses carrying the male evacuees arrived at the JNA barracks in Vukovar, local TOs and paramilitaries started to threaten and verbally abuse the men on the buses. The paramilitaries and TO members were trying to get into the buses. The JNA soldiers on the buses did not allow that to happen[154].

54. Those are not, by any means, pictures of a relationship in which the JNA had any, let alone full control over local TOs and paramilitaries. [Screen off]

55. The Applicant's argument that the principle of unity and singleness of command found to be proven in *Mrkšić et al.*[155] is therefore misleading. The principle of unity and singleness of command was one of the key principles embodied in the JNA doctrine, as is probably the case with many other armies. As it was noted in the 2003 Theunens Report:

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[153] *Mrkšić* Trial Judgement, para.171.

[154] *Mrkšić* Trial Judgement, para. 216.

[155] CR 2014/10, p. 46, para. 36 (Crawford).

> "The principle of command and control identified in these JNA publications can be considered universal. It is valid for any armed force, be it NATO, the JNA, or (former) Warsaw Pact, at any given time, and for every possible operational scenario."[156]

However, it is obvious that the reality on the ground in 1991 differed significantly from the doctrine.

56. The Applicant is trying to use one sentence from paragraph 89 of the *Mrkšić et al.* judgement as a vehicle to overcome the requirements of Article 8 of the ILC Articles on State Responsibility. Article 8 deals with effective control that needs to be established and proven in every individual and concrete situation. The Respondent's position has not changed — in order to attribute responsibility, different armed groups have to be identified and distinguished, and it must be proven that they acted under the direction or control of the Respondent. The Applicant admits failing to do so by saying that Croatia sought to identify all relevant groups as far as it was possible. What the Applicant is however now suggesting is that for considering attribution at this stage, this is not even necessary[157]. The Applicant is suggesting that the Article 8 test is met by a mere proclamation that a *de facto* Serbian State organ — the JNA — either gave instructions or directions pursuant to which such other forces had acted, or had otherwise exercised effective control over military actions during which such forces committed the acts. The Respondent does not share that position.

The PRESIDENT: Mr. Ignjatović, you have some six or seven minutes and I understand that you are to address another issue. So, it is up to you whether you would then interrupt in the middle of the presentation.

Mr. IGNJATOVIĆ: It is the last sentence, Mr. President.

The PRESIDENT: That is fine. Thank you.

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[156] *Prosecutor* v. *Slobodan Milošević*, IT-02-54-T, Expert Report of R. Theunens of 16 Dec. 2003 (submitted by the prosecution), p. 56.

[157] CR 2014/10, p. 46, para. 36 (Crawford).

Mr. IGNJATOVIĆ: The Respondent does not share the position of the Applicant. The conditions provided in Article 8 are far from fulfilled in these proceedings. And this would be a proper time, if you wish.

The PRESIDENT: Certainly, and you will have an opportunity to continue in the afternoon. Thank you very much. So, this sitting is adjourned.

The Court rose at 12.55 p.m.

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