Corrigé
Corrected

CR 2014/20

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Thursday 20 March 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le jeudi 20 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of the Republic of Croatia is represented by:

Ms Vesna Crnić-Grotić, Professor of International Law, University of Rijeka,

as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Director General for EU Law, International Law and Consular Affairs, Ministry of Foreign and European Affairs, Zagreb,

Ms Jana Špero, Head of Sector, Ministry of Justice, Zagreb,

Mr. Davorin Lapaš, Professor of International Law, University of Zagreb,

as Co-Agents;

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Mr. Mirjan R. Damaška, Sterling Professor Emeritus of Law and Professorial Lecturer in Law, Yale Law School, New Haven,

Mr. Keir Starmer, Q.C., Barrister, Doughty Street Chambers, London,

Ms Maja Seršić, Professor of International Law, University of Zagreb,

Ms Kate Cook, Barrister, Matrix Chambers, London

Ms Anjolie Singh, Member of the Indian Bar, Delhi,

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London

as Counsel and Advocates;

Mr. Luka Mišetić, Attorney at Law, Law Offices of Luka Misetic, Chicago,

Ms Helen Law, Barrister, Matrix Chambers, London

Mr. Edward Craven, Barrister, Matrix Chambers, London,

as Counsel;

H.E. Mr. Orsat Miljenić, Minister of Justice of the Republic of Croatia,

H.E. Ms Vesela Mrđen Korać, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands, The Hague,

as Members of the Delegation;

Le Gouvernement de la République de Croatie est représenté par :

Mme Vesna Crnić-Grotić, professeur de droit international à l'Université de Rijeka,

comme agent ;

S. Exc. Mme Andreja Metelko-Zgombić, ambassadeur, directeur général de la division de droit communautaire et international et des affaires consulaires du ministère des affaires étrangères et des affaires européennes,

Mme Jana Špero, chef de secteur au ministère de la justice,

M. Davorin Lapaš, professeur de droit international à l'Université de Zagreb,

comme coagents ;

M. James Crawford, A.C., S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat, Matrix Chambers (Londres),

M. Philippe Sands, Q.C., professeur de droit, University College de Londres, avocat, Matrix Chambers (Londres),

M. Mirjan R. Damaška, professeur de droit émérite de l'Université de Yale (chaire Sterling), chargé d'enseignement à l'Université de Yale,

M. Keir Starmer, Q.C., avocat, Doughty Street Chambers (Londres),

Mme Maja Seršić, professeur de droit international à l'Université de Zagreb,

Mme Kate Cook, avocat, Matrix Chambers (Londres),

Mme Anjolie Singh, membre du barreau indien (Delhi),

Mme Blinne Ní Ghrálaigh, avocat, Matrix Chambers (Londres),

comme conseils et avocats ;

M. Luka Mišetić, avocat, Law Offices of Luka Misetic (Chicago),

Mme Helen Law, avocat, Matrix Chambers (Londres),

M. Edward Craven, avocat, Matrix Chambers (Londres),

comme conseils ;

S. Exc. M. Orsat Miljenić, ministre de la justice de la République de Croatie,

S. Exc. Mme Vesela Mrđen Korać, ambassadeur de la République de Croatie auprès du Royaume des Pays-Bas,

comme membres de la délégation ;

Mr. Remi Reichhold, Administrative Assistant, Matrix Chambers, London,

Ms Ruth Kennedy, LL.M., Administrative Assistant, University College London,

as Advisers;

Ms Sanda Šimić Petrinjak, Head of Department, Ministry of Justice,

Ms Sedina Dubravčić, Head of Department, Ministry of Justice,

Ms Klaudia Sabljak, Ministry of Justice,

Ms Zrinka Salaj, Ministry of Justice,

Mr. Tomislav Boršić, Ministry of Justice,

Mr. Albert Graho, Ministry of Justice,

Mr. Nikica Barić, Croatian Institute of History, Zagreb,

Ms Maja Kovač, Head of Service, Ministry of Justice,

Ms Katherine O'Byrne, Doughty Street Chambers,

Mr. Rowan Nicholson, Associate, Lauterpacht Centre for International Law, University of Cambridge,

as Assistants;

Ms Victoria Taylor, International Mapping, Maryland,

as Technical Assistant.

The Government of the Republic of Serbia is represented by:

Mr. Saša Obradović, First Counsellor of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands, former Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Mr. William Schabas, O.C., M.R.I.A., Professor of International Law, Middlesex University (London) and Professor of International Criminal Law and Human Rights, Leiden University,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Centre of Human Rights, Member of the Permanent Court of Arbitration,

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Professor of International Law, University of Glasgow,

M. Remi Reichhold, assistant administratif, Matrix Chambers (Londres),

Mme Ruth Kennedy, LL.M., assistante administrative, University College de Londres,

comme conseillers ;

Mme Sanda Šimić Petrinjak, chef de département au ministère de la justice,

Mme Sedina Dubravčić, chef de département au ministère de la justice,

Mme Klaudia Sabljak, ministère de la justice,

Mme Zrinka Salaj, ministère de la justice,

M. Tomislav Boršić, ministère de la justice,

M. Albert Graho, ministère de la justice,

M. Nikica Barić, Institut croate d'histoire (Zagreb),

Mme Maja Kovač, chef de département au ministère de la justice,

Mme Katherine O'Byrne, Doughty Street Chambers,

M. Rowan Nicholson, *Associate* au Lauterpacht Center for International Law de l'Université de Cambridge,

comme assistants ;

Mme Victoria Taylor, International Mapping (Maryland),

comme assistante technique.

Le Gouvernement de la République de Serbie est représenté par :

M. Saša Obradović, premier conseiller à l'ambassade de la République de Serbie au Royaume des Pays-Bas, ancien conseiller juridique au ministère des affaires étrangères,

comme agent ;

M. William Schabas, O.C., membre de la Royal Irish Academy, professeur de droit international à la Middlesex University (Londres) et professeur de droit pénal international et des droits de l'homme à l'Université de Leyde,

M. Andreas Zimmermann, LL.M. (Université de Harvard), professeur de droit international à l'Université de Potsdam, directeur du centre des droits de l'homme de l'Université de Potsdam, membre de la Cour permanente d'arbitrage,

M. Christian J. Tams, LL.M., Ph.D. (Université de Cambridge), professeur de droit international à l'Université de Glasgow,

Mr. Wayne Jordash, Q.C., Barrister, Doughty Street Chambers, London, Partner at Global Rights Compliance,

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

Mr. Dušan Ignjatović, LL.M. (Notre Dame), Attorney at Law, Belgrade,

as Counsel and Advocates;

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

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

as Members of the Delegation;

Ms Tatiana Bachvarova, LL.M. (London School of Economics and Political Science), LL.M. (St. Kliment Ohridski), Ph.D. candidate (Middlesex University), Judge, Sofia District Court, Bulgaria,

Mr. Svetislav Rabrenović, LL.M. (Michigan), Senior Adviser at the Office of the Prosecutor for War Crimes of the Republic of Serbia,

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Marko Brkić, First Secretary at the Ministry of Foreign Affairs,

Mr. Relja Radović, LL.M. (Novi Sad), LL.M. (Leiden (candidate)),

Mr. Georgios Andriotis, LL.M. (Leiden),

as Advisers.

M. Wayne Jordash, Q.C., avocat, Doughty Street Chambers (Londres), associé du cabinet Global Rights Compliance,

M. Novak Lukić, avocat, Belgrade, ancien président de l'association des conseils de la défense exerçant devant le TPIY,

M. Dušan Ignjatović, LL.M. (Université Notre Dame), avocat, Belgrade,

comme conseils et avocats ;

S. Exc. M. Petar Vico, ambassadeur de la République de Serbie auprès du Royaume des Pays-Bas,

M. Veljko Odalović, secrétaire général du Gouvernement de la République de Serbie, président de la commission pour les personnes disparues,

comme membres de la délégation ;

Mme Tatiana Bachvarova, LL.M. (London School of Economics and Political Science), LL.M. (Université St. Kliment Ohridski), doctorante (Middlesex University) ; juge au tribunal de district de Sofia (Bulgarie),

M. Svetislav Rabrenović, LL.M. (Université du Michigan), conseiller principal au bureau du procureur pour les crimes de guerre de la République de Serbie,

M. Igor Olujić, avocat, Belgrade,

M. Marko Brkić, premier secrétaire au ministère des affaires étrangères,

M. Relja Radović, LL.M. (Université de Novi Sad), LL.M. (Université de Leyde (en cours)),

M. Georgios Andriotis, LL.M. (Université de Leyde),

comme conseillers.

The PRESIDENT: Good morning. Please be seated. The sitting is open. The Court meets this morning to hear Croatia begin the presentation of its second round of oral argument on its own claims. I shall now give the floor to Professor Philippe Sands to start Croatia's argument in the second round. You have the floor, Sir.

Mr. SANDS:

THE GENOCIDE CONVENTION AND THE 2007 *BOSNIA* JUDGMENT

I. Introduction

1. Mr. President, Members of the Court, thank you very much. In opening the second round of Croatia's arguments in support of the claim filed in 1999, I am going to address the Genocide Convention, the Judgment given by the Court in 2007, and a more recent judgement of the ICTY Trial Chamber in the *Tolimir* case. Following my opening, Ms Ní Ghrálaigh will address certain issues related to evidence and facts before the Court. She will be followed by Sir Keir Starmer, who will address issues of legal responsibility and Professor Crawford will then begin his presentations on attribution and jurisdiction, beginning later this morning and completing his presentation tomorrow morning. Our Agent will then set out Croatia's concluding remarks and, of course, in accordance with the requirements of the Court, will present Croatia's final submissions on its claim. We expect to be completed by the coffee break tomorrow morning, in light of the very short amount of time given by Serbia to our claim.

2. Mr. President, the matters that truly divide the Parties have been made rather more clear in light of the arguments over the past three weeks. It is plain too that the Respondent's hopes rest on essentially two arguments: Serbia's first hope is that this Court will rule that it has no jurisdiction over events before 27 April 1992, so that somehow the case could be made to disappear. The difficulty with that argument is that even if Serbia was to prevail on it — and Professor Crawford will explain why it should not — large parts of Croatia's case do remain, including the obligation not to commit genocide, the obligation to prevent the acts that Serbia accepts occurred after 27 April 1992, and its obligation to punish the perpetrators of the genocide that had occurred, as well as the continuing violations of the Genocide Convention that extended beyond that date and

continue right up to this day, not least in relation to missing persons. We are going to say more about these matters in due course. Serbia's second hope is that the Court might adopt the approach it says the Court adopted in its 2007 Judgment, in particular with regard to the standard of proof, and on the basis that no acts of genocide occurred. It is to Serbia's second hope that my submissions this morning are largely addressed.

3. My submissions are in three parts. I am going to start with the 1948 Genocide Convention. I will then address the Court's 2007 Judgment and then, as I mentioned, take you to the judgement [of the ICTY] on which Serbia seems a little skittish. In relation to these submissions and those that will follow, we have sought to avoid repetition and followed the Rules of Court to only respond to that which Serbia has raised in its first round and which are matters that are truly in dispute and divide the Parties. But, for the avoidance of doubt, Croatia, of course, maintains the totality of all of its arguments in first round and in the written pleadings.

II. The 1948 Convention

4. I begin with the 1948 Convention. In certain respects it might be said that there is little that truly divides the Parties, certainly on its negotiating history, on its terms and on the proper approach to its interpretation. You will recall that I addressed the negotiating history on the first and second days of our opening round[1], and it seems that both Parties now embrace the vision of Rafael Lemkin, the Convention's founding spirit for a convention that is real, that is practical and that is effective in producing protections for individuals and groups. I made the point that the negotiating history (and the text of the Convention) confirm "the crime of genocide encompasses the destruction of even a small group of individuals, a subgroup of a larger group, which itself forms a part of the whole group"[2]. One might call that the Norwegian approach, in honour of the proposal that was made in the negotiations by that country's delegation. Serbia has not taken issue with it. To the contrary, it has moved very far and it now appears to agree with the submissions that I made in relation to "substantiality": last Friday Mr. Jordash told the Court that the intent to commit genocide can be found where only a *"few Article II attacks occurred"*[3]. This indicates that

[1]CR 2014/5, pp. 60-65, paras. 4-15 (Sands).

[2]*Ibid*., para. 12.

[3]CR 2014/18, p. 34, para. 131 (Jordash); emphasis added.

Serbia's approach is now aligned with that of Croatia. Indeed, it is very difficult to see how it could not be so, given the facts on which it relies in relation to its own counter-claim: attacks targeted on only a relatively small number of members of a subgroup forming part of a larger group, in only a very small number of locations and giving rise to a relatively small number of casualties. I use the word "relatively" advisedly; needless to say, each casualty is deeply regretted. Indeed, Rafael Lemkin identified numerous acts of genocide in what he called "modern times"[4], as he persuaded countries to ratify the Convention after it had been adopted in 1948. I would note, in relation to a point made by Professor Schabas, that he only sought to persuade the United States Congress of a "substantiality" requirement in 1950, *after* the Convention had already been adopted, and it was in the context of his efforts to persuade Congress to ratify the Convention; that effort took four decades to bear fruit[5].

5. Professor Schabas has helpfully reminded the Court that this commitment to an effective instrument that covered genocidal acts against groups wherever they may be located, and however small they may be in number, was actually reflected in the terms of the resolution by the General Assembly that initiated the negotiating process that led to the Convention, [screen on] resolution 96 of the General Assembly, [next graphic] which you can see on your screens, reflects a commitment of the drafters to respond to the "[m]any instances of such crimes of genocide" which "have occurred when groups have been destroyed 'in whole or in part'". The drafters appeared to have in mind not the occasional, once in a century atrocity, but a crime the occurrence of which they knew to have occurred in "many instances". The point I make is not a complicated one: the origins of the Convention, and the text of the Convention itself, reflect a conception of genocide that is intended to protect individual members of a group, even a small group. At one point Professor Schabas claimed that at the time the concept of genocide was, and I quote him: "for all practical purposes a synonym for the crime against humanity of extermination"[6]. Well, if by extermination he means the total destruction of a group, then plainly that is not correct: one does

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[4]Steven Leonard Jacobs (ed.), *Lemkin on Genocide* (Lexington Books), pp. 19-20, 2012.

[5]The United States ratified the Convention on 25 Nov. 1988, see: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en; and see: http://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html. See also: 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series, 1976, p. 370.

[6]CR 2014/15, p. 24, para. 38 (Schabas).

not need to find an act of total extermination, whatever that may mean. As Articles II *(b)* to II *(d)* make clear, genocide may be committed by acts other than killing. It mentions, for example, "mental harm" as being sufficient and the word "extermination" is not to be found anywhere in the Convention. If he means the extermination of a small number of individuals who are members of a group or a subgroup, as was the case, for example, for the witnesses from whom the Court heard directly, then there is no disagreement between the Parties. [Screen off]

6. What is needed to prove the crime of genocide? In the first round I addressed the principal elements, beginning with the *actus reus*, as set out in Article II of the Convention[7]. I concluded with the observation that it was not arguable, in light of the evidence before this Court, that the necessary *actus reus* has not been proven in respect of Croatia's claim[8]. Mr. President, you heard the Respondent deal with our claim over three sessions last week, and you will have noted that they did not challenge my conclusion. They made no effort to argue that there was no killing, no causing of serious bodily or mental harm to members of the group, or to assert that conditions of life were not deliberately inflicted on the group such as to bring about its destruction in part. Serbia, again, offers that important concession. Given the findings of the ICTY, we do not see how they could possibly adopt a different approach. By contrast, we would say, given the findings in the *Gotovina* case it is rather difficult for the Respondent to persuade the Court, we say, that *actus reus* has been proven in relation to the counter-claim. Ms Ní Ghrálaígh and Sir Keir Starmer will say more about the evidence on *actus reus* later this morning.

7. I do need to respond to some remarks made by counsel for Serbia, who on occasion appeared to be proposing a more expansive version of the requirements of *actus reus*. It seemed to us at times that perhaps there was not a great deal of co-ordination between those who were writing and delivering speeches. At one point Professor Schabas told the Court that he had identified what he referred to as an "overarching *actus reus* of the crime of genocide": and he described as "in fact the destruction of the group, in whole or in part", one which involved "a multitude of individual acts that contribute to the physical destruction of the group as such"[9]. That is not what the

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[7]CR 2014/6, pp. 12-13, paras. 6-10 (Sands).

[8]*Ibid*., p. 13, para. 10, (Sands).

[9]CR 2014/15, p. 27, para. 46 (Schabas).

Convention says. It is not necessary, for the *actus reus* of genocide to be established, for there to be an aggregation of different acts. Individual acts on their own are sufficient to constitute genocide. Nor does the Convention provide that the requirements on *actus reus* are met only where the acts achieve "the destruction of the group, in whole or in part", as Professor Schabas seemed to imply: such an approach would mean that only a fully effective genocide would meet the legal definition in the Convention. What Professor Schabas seems to want to do is to elide the *mens rea* requirement and the *actus reus* requirement. But the Convention treats them as distinct. But, in any event, all of this is by the by because Serbia's position has been made clear by Mr. Jordash who, as the Court heard loud and clear last week, confirmed Serbia's view that only "few Article II attacks" are needed[10]. Serbia has jettisoned the argument it made in its written pleadings — it has jettisoned paragraph 322 of its Rejoinder — when it argued that anything short of total physical destruction of the relevant group will not be genocidal. We will happily accept that act of abandonment.

8. Mr. President, Members of the Court, whilst we are on the subject of the Convention's provisions on *actus reus*, there was one aspect that I touched upon but not at length in the first round, and in light of a number of questions from the Bench concerning the fate of disappeared persons, it may useful to offer a little elaboration[11]. Article II of the Convention enumerates amongst the list of genocidal acts the causing of "serious . . . mental harm to members of the group". The questions from Judge Cançado Trindade and others drew us to the case law on the disappearance of persons in relation to other international obligations, but they apply equally we say to the Genocide Convention. A useful starting-point is the decision of the United Nations Human Rights Committee in the case of *Quinteros* v. *Uruguay*, where the Committee found — this was back in 1981, one of the earliest decisions — that a mother who suffered anguish and stress about the fate and whereabouts of her daughter, was a victim of a violation of the International Covenant on Civil and Political Rights (ICCPR), and in particular of Article 7 — on torture and cruel, inhuman or degrading treatment[12]. This was then followed by a very important judgment of

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[10]CR 2014/18, p. 34, para. 131, (Jordash).

[11]CR 2014/18, p. 69 (question by Judge Cançado Trindade).

[12]*María del Carmen Almeida de Quinteros et al.* v. *Uruguay*, Communication No. 107/1981, UN doc. CCPR/C/OP/2 at 138 (1990). See also Rodley, *The Treatment of Prisoners in International Law*, 1999, 2nd ed., p. 261.

the Inter-American Court on Human Rights in *Velasquez Rodriquez* v. *Honduras*[13], and of course that case as we know, some of us in this room, was later relied upon by an English magistrate Ronald Bartle when he allowed Senator Pinochet's extradition to Spain to proceed, in 1999[14]. Disappearance has continuing consequences in several respects.

9. Mr. President, the families of those whose loved ones have not been accounted for — who have, for all intents and purposes, been allowed to disappear — are families and individuals who are subjected to "serious . . . mental harm" within the meaning of Article II of the Convention. And it is harm that is directly connected to the act of genocide that occurred, whenever they occurred. This is compounded by the failure of Serbia to engage in meaningful acts to assist in their location. That failure continues to this day, and it is one for which Serbia has a continuing responsibility. In respect of the European Convention on Human Rights, to which of course both Croatia and Serbia are party, the obligation to investigate a disappearance of this kind has been explicitly recognized by the Grand Chamber of the European Court of Human Rights, in its 2009 judgment most notably in the case of *Varnava* v. *Turkey*. The Grand Chamber called this "a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred". The Court recognized that the situation "is very often drawn out over time, prolonging the torment of the victim's relatives", and that "the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation" one in which "the ongoing failure to provide the requisite investigation will be regarded as a continuing violation"[15].

10. In the present case, the "serious . . . mental harm" being suffered by the relatives of the disappeared is a direct result of acts for which Serbia is either responsible for its own actions or for which it has a responsibility to punish under the Convention. In this way, the continuing failure of Serbia to account for the whereabouts of some 865 disappeared Croats is an act or acts falling

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[13] *Velasquez Rodriguez* case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[14] *R* v. *Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* 3 *WLR* 1,456.

[15] Grand Chamber, European Court of Human Rights, *Varnava* v. *Turkey*, Judgment, 18 Sep. 2009, para. 148.

within Article II *(b)* of the Convention. Professor Crawford will say more about this in relation to the jurisdiction of the Court.

11. Mr. President, I turn to the issue of "intent to destroy" under the Convention, the *mens rea*. This, of course, can be proved by direct evidence, although I think all Parties in this room agree that that is going to be a rare occurrence, as neither States nor individuals are in the habit of publishing their intention to destroy a group in whole or in part. It is therefore necessary for a court that is called upon to determine whether such an "intent" exists to look to indirect evidence, to infer intent from the evidence that is before it.

12. Addressing this matter last week I made the point that intent can be inferred from a pattern of behaviour, and submitted that this was "surely not now in dispute"[16]. It is now clear that there is no dispute between the Parties that it is appropriate for this Court to have regard to patterns of behaviour, amongst other matters. On this aspect, too, the Respondent has abandoned the stance that it took in its written pleadings[17]. [Plate on] Indeed, last Monday, Professor Schabas cited with approval the approach of the ICTR Appeals Chamber in the *Hategekimana* case, to the effect intent to commit genocide — and you can see it on your screens:

> "may be inferred from relevant facts and circumstances, including [(1)] the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts"[18].

You will note that the four factors are not culmulative. [Plate off] On Thursday, Serbia's Agent confirmed explicitly that one should look to what he called a pattern of behaviour[19]. The following day Mr. Jordash confirmed that Serbia's approach was that "[i]ntent may be illuminated by circumstantial evidence, including by words spoken or deeds done or a pattern of purposeful action"[20]. He invited the Court to look for a "pattern of atrocities"[21], and from this, we say, intent

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[16]CR 2014/6, p. 14, para. 12 (Sands).

[17]Counter-Memorial of Serbia (CMS), paras. 939-946; Rejoinder of Serbia (RS), paras. 330-332.

[18]CR 2014/13, p. 31, para. 28 (Schabas).

[19]CR 2014/17, p. 39, para. 91 (Obradovic).

[20]CR 2014/18, p. 13, para. 22 (Jordash).

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

can be inferred. Serbia has thus abandoned the approach it took in its written pleadings, and is now on the same page as Croatia.

13. In relation to the issue of intent, however, the Parties are not in such proximate convergence on some issues, but in particular in relation to the standard of proof that is to be adduced in proving an "intent to destroy" a group in whole or in part. This issue arises because of the terms — the language — of the Court's 2007 Judgment, and in particular the standard set out, according to Serbia, at paragraph 373 of the Judgment. It is to this point that I now turn.

III. The Court's 2007 Judgment

14. Mr. President, Members of the Court, amongst the many curiosities last week was the position that Serbia adopted in relation to its counter-claim, on the one hand, and the standard of proof on the other, that is necessary to be met in proving an "intent to destroy", in the absence of direct evidence. Our position is that the standard that applies to the proving of "intent to destroy" is the same standard whatever the evidence is relied upon: whether it is direct evidence or indirect evidence, the evidence must be "conclusive", as the Court put it in the *Corfu Channel* case[22]. Proof, the Court went on to say in that case "may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt"[23].

15. Serbia now appears to want a much higher standard in respect of Croatia's claim, and perhaps a lower one in relation to its own claim. It seeks to persuade the Court that its interpretation of the Brioni Minutes is the right one, for example, to the effect that they evidence an intent to destroy that part of the Serbian ethnic group located in certain parts of Croatia in August 1995. Of course, the ICTY has directly and decisively rejected that interpretation, in the *Gotovina* case, both at the level of Trial Chamber and Appeals Chamber, yet Serbia clings to the hope that this Court might nevertheless now interpret the Brioni Minutes as offering "conclusive evidence", in the sense of *Corfu Channel*. Yet, at the same time, with respect to Croatia's claim, Serbia seems to take refuge in paragraph 373 of your 2007 Judgment, a paragraph that reflects, as Mr. Jordash put it, with rather gentle understatement, a "high" level of proof[24].

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[22] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 16-17.

[23] *Ibid.*, p. 18.

[24] CR 2014/18, p. 13, para. 23 (Jordash).

16. In the *Bosnia* case, this Court ruled that genocide had occurred at Srebrenica, but not anywhere else[25]. That conclusion was largely based on the ICTY judgement in the *Krstić* case[26]. By a majority the Court rejected Bosnia's argument that "the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent . . . to destroy the group in whole or in part". Now you will, no doubt, be relieved Mr. President that I am not going to invite you to assess the views of different judges on this Court, or grade them out of 10 or anything else. The point is the Court rejected Bosnia's arguments beyond Srebrenica on the basis of a particular approach to the standard of proof: it ruled that, at paragraph 373, the Court [screen on]

> "has to be convincingly shown by reference to particular circumstances, *unless a general plan* to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could *only* point to the existence of such intent". (Emphasis added)

17. I am concerned with the second sentence and I emphasize the word "only". The introduction of that word appears to require the Court, as we understand it, to exclude any possibility that there is another intent, that may, for example, exist in parallel. It is to prove, in effect, an absolute negative, which is a very difficult thing to do. One wonders why the Court appeared to depart from the standard it had applied in the *Corfu Channel* case, where inferences are to be drawn, namely that the evidence should "leave *no room* for reasonable doubt"? Was it really the intention of the Court to set a higher standard for responsibility for genocide than for responsibility for the illegal use of force?

18. In our submission, Croatia meets the standard that is to be applied by this Court, and that the intent to destroy a part of the ethnic Croat group *is* the only conclusion to be drawn from the pattern of behaviour that is attributable to Serbia from the summer of 1991. Yet the standard set out in paragraph 373 seems to offer Serbia the hope, which we say is a misguided hope, that it might not be met in relation to Croatia's claim — of course, quite how it could be met in relation to Serbia's claim is never actually explained. The language in that paragraph appears to be premised

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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. 166, paras. 296-297, pp. 221-222, para. 431.

[26] *Ibid*., pp. 155-166, paras. 278-297; pp. 194-219, paras. 370-424.

on a belief that human nature cannot have two or more intentions that co-exist, and it appears to apply a standard of proof for such evidence that is higher even than the criminal standard of "beyond a reasonable doubt".

19. Curiously — I have read it very carefully — the paragraph does not appear to offer any real authority that supports it. It certainly does not apply the approach of the ICTY, as the paragraphs that follow apparently suggest, but on a careful reading does not point to that conclusion. And so we invite the Court to revisit that paragraph and to clarify what it intended to do. There is a good reason for doing this: since 2007, we have not been able to find any decision of any court, anywhere, national or international, that appears to have followed the standard that is set out in paragraph 373 of that Judgment. The danger, as we see it, is that if the Court interprets and applies the standard identified in that paragraph as Serbia seeks, it risks consigning the Convention to irrelevance, in proceedings before this Court at least, at a time when the Convention may be needed more than ever. One need only look around the world today to see that threats to groups are not diminishing. The related risk is to the Court itself: that it will come to be seen as irrelevant in relation to the prevention and punishment of the crime of genocide, at a time when the Court is needed more than ever. [Screen off]

20. Mr. President, last week counsel for Serbia offered a gentle meander through the judgments of the various international courts and tribunals that have been asked to interpret and apply the concept of genocide as it is defined in the 1948 Convention, in circumstances where direct evidence is missing and it is necessary to infer intent from patterns of behaviour and related matters. Professor Schabas took us on a lengthy excursion through the jurisprudence of the ICTY, the ICTR, the ICC and the ECHR, and he touched on some national decisions; at least one. The purpose of that exercise was not exactly clear to us, not least since the cases that Professor Schabas identified and illuminated tended to support Croatia's claim. The cases were not exactly helpful to Serbia's counter-claim. But it was a striking aspect of that journey, the one on which he took us, that he could not identify a single judgment, anywhere in the world, that had adopted the high standard of proof that Mr. Jordash now urges you to adopt in relation to Croatia's claim. If this Court were to accede to his request, the Court might well find itself in a judicial wilderness, and we say that is not a place that the "principal judicial organ of the United Nations" should be.

21. Professor Schabas began by helpfully reminding us about the European Court of Human Rights, and its judgment in *Jorgic* v. *Germany*. In that case, the Dusseldorf Court of Appeals and then the Federal Court of Justice ruled that the intent to destroy a group in whole or in part (within the meaning of Article 220 *(a)* of the German Criminal Code) meant the "destruction of a group" as "a social unit in its distinctiveness and particularity and its feeling of belonging together", and that a "biological-physical destruction was not necessary"[27]. Germany's Federal Constitutional Court then ruled that the lower courts had construed the notion of "intent to destroy" in the Criminal Code correctly, in a manner that was foreseeable and, in the views of the Constitutional Court that "conformed to that of the prohibition of genocide in public international law . . . by the competent tribunals, several scholars and as reflected in the practice of the United Nations"[28]. The case went on to the European Court of Human Rights, which was then presented with the argument that the German courts had got it wrong, they had applied the wrong definition of genocide, and they had applied a definition that was inconsistent with the approach of this Court. The Court's 2007 Judgment was argued before the European Court of Human Rights, in support of the Claimant's case that the German courts had gone astray, had gone too far. The European Court rejected the argument. It ruled that "the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the [German] Criminal Code had to be construed, was not arbitrary"[29]. Croatia says nothing about the merits of that judgment: we are merely using it to point out that the approach of the German courts to issues of proof related to intent on inferred evidence departed significantly from that of this Court, and that the European Court of Human Rights was content not to interfere with that approach, which it saw as fully consonant with international law.

22. The situation at the ICTY and the ICTR is no more supportive of what Serbia says is the ICJ's approach to proof of inferred intent. Professor Schabas was not generous in his treatment of the International Criminal Tribunal for Rwanda (ICTR); it is an African court that has undoubtedly made a very significant contribution to the jurisprudence on genocide. The judgment in the case of

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[27] *Jorgic* v. *Germany*, ECtHR (Application No. 74612/01), Judgment of 12 July 2007, paras. 19 and 23.

[28] *Ibid.*, para. 27.

[29] *Ibid*., para. 70.

Akayesu is of singular importance by any standard, not least because it was the first judgment by any international court to interpret genocide under the 1948 Convention; it was also a ground-breaking judgment because it was the first court anywhere to characterize rape and sexual assault as acts of genocide[30]. That is hardly a "modest" contribution, as Professor Schabas put it. Nor do we agree that the subsequent legal developments before that Tribunal can be said to be of "little interest", or, as the Court put it, that it has a "perfunctory" approach to the case law[31]. It is true that the ICTR has chosen not to adopt the language of this Court on standard of proof in relation to inferred intent but, even Professor Schabas did cite with approval the 2012 judgement of the Appeals Chamber, to which I drew your attention, setting out the four factors on inferred intent[32].

23. The language of the 2007 Judgment on inferring intent finds no greater favour at the ICTY, which has broadly adopted a similar approach to the ICTR. In July 2013, the ICTY Appeals Chamber reinstated the genocide charge against Mr. Karadžić, and in so doing it said, explicitly, that it was not bound by this Court's 2007 Judgment[33]. It is plain that it did not follow that Judgment either. Professor Schabas did not tell you that the decision was unanimous — he seems to enjoy the views of minority judges[34]. And he did not direct you to paragraph 99 of that judgement, where the Appeals Chamber unanimously set out the basis for its conclusion that the ICTY Trial Chamber had received and relied upon "extensive indirect evidence from which a reasonable trier of fact could infer genocidal intent". [Plate on] The Appeals Chamber recalled that

> "specific intent may be inferred from 'a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts'. [Just pause there, that is in almost identical terms to the ICTR Appeals Chamber of 2012.] In this regard, the Trial Chamber noted evidence of 'culpable acts systematically directed against Bosnian Muslims and/or Bosnian Croats' in the Municipalities, as well as evidence of repetitive 'discriminatory acts and derogatory language'. In particular, the Appeals Chamber observes that the

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[30]*Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Judgement of 2 Sept. 1998, paras 731 *et seq.*

[31]CR 2014/13, pp. 28-29, para. 23 (Schabas).

[32]CR 2014/13, p. 31, para. 28 (Schabas) citing *Hategekimana* v. *Prosecutor* (ICTR-00-55B-A), Judgement, 8 May 2012, para. 133.

[33]CR 2014/13, p. 46, para. 64 (Schabas).

[34]*Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgement, 11 July 2013, para. 94 (Judges Theodor Meron (Presiding), Patrick Robinson, Liu Daqun, Khalida Rachid Khan, Bakhtiyar Tuzmukhamdov).

> record includes evidence of genocidal and other culpable acts committed against Bosnian Muslims and Bosnian Croats throughout the Municipalities, such as killings, beatings, rape, and sexual violence, as well as evidence of the large scale and discriminatory nature of these acts."[35]

The same pattern that we have in our case.

24. That is the standard that the ICTY applies. We are not resting our case on that decision, but we do say it indicates an approach that is at clear variance with the language adopted by this Court in 2007. Nor do we seek to exaggerate the importance of that decision, given that it is a case that is at an early stage. But it does confirm the language of a standard that indicates a significantly lower threshold than that which Serbia urges this Court to adopt in relation to inferred intent. The ICTY will now proceed to try Mr. Karadžić for the crime of genocide, including against Croats and, in so doing, it will not apply the standard that appears to be reflected paragraph 373. It is worth recalling, as Professor Schabas accepted, that in those proceedings the ICTY Prosecutor alleges that Mr. Karadžić's co-conspirators in a joint criminal enterprise to commit genocide include, Messrs. Milošević, Arkan and Šešelj, three gentlemen, each of whom was directly involved in the acts that are the subject of these proceedings[36]. Indeed, you will remember, the JNA Military Intelligence document that we put up on the screen a couple of times last week, that identified certain acts of a paramilitary group as genocidal. Who was it referring to? It was referring to the acts of Arkan's Tigers[37]. There is an absolute direct overlap of personalities. Different place, perhaps; same individuals, same intent. Professor Schabas was in some difficulty with your 2007 Judgment. At one point he seemed to suggest that this was matter — and I quote him — "as close to *res judicata* as we can get"[38]. Well, I am sorry but he is quite wrong on that. The proceedings against Mr. Karadžić for genocide against Croats in Bosnia are not *res judicata* by reference to the 2007 Judgment of this Court, nor are the proceedings against Serbia for genocide against Croats in Croatia, in *this* case, *res judicata*. *Res judicata*, a bit like being pregnant, is a condition that either exists or does not. There is no question of proximity to *res judicata*; you are

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[35] *Prosecutor* v. *Karadžić* (IT-95-5/18-AR98*bis*.l), Judgement, 11 July 2013, para. 99.

[36] CR 2014/6, pp. 14-15, para. 12 (Sands).

[37] Reply of Croatia (RC), Ann. 63.

[38] CR 2014/13, p. 48, para. 67 (Schabas).

not "approximately pregnant", you are either pregnant or you are not. There is *res judicata* or there is not, and in this case there is no *res judicata*. [Screen off]

25. So, I turn to the ICC. Professor Schabas developed his submissions on this court to very considerable length, no less than eighteen paragraphs of that day's transcript[39]. We have read each of them carefully, more than once. It is not exactly clear what point he was trying to make, not least since only one of those 18 paragraphs is concerned with the Judgment of this Court. Professor Schabas submitted that "[a]t no point did [the ICC Pre-Trial Chamber] suggest that it disagreed with any aspect of the decision of the ICJ"[40]. Well, that is certainly true, but it is equally true that it did not cite this Court's language, or the paragraph to which Mr. Jordash now attaches such importance. Paragraph 373 is not referred to in that decision, despite the fact that the main issue the Pre-Trial Chamber faced was whether there was sufficient evidence before it to infer an intent to commit genocide so as to issue an arrest warrant. But in any event, the Pre-Trial Chamber's decision not to issue an arrest warrant for genocide was then overturned by the Appeals Chamber: and it was overturned by the Appeals Chamber precisely because the Trial Chamber had applied the wrong standard to the task in hand, namely that the evidentiary material provided by the Prosecutor as to the existence of a specific intent to destroy in whole or in part a group must be "the *only* reasonable conclusion to be drawn" from that material[41]. The Appeals Chamber said that that was too high a standard[42]. There has, of course, been no judgment of the ICC on the standard of proof with regard to genocidal intent, or proof by inference, although the Appeals Chamber did note that Article 66 (3) of the Statute of the ICC applies a threshold for conviction of "beyond reasonable doubt"[43]. That is familiar language, it is the normal criminal standard and it is a lower one that Serbia urges you to apply in this case by reference to paragraph 373. The ICC has not applied the ICJ standard, and given the explicit standard set forth in Article 66 (3) of the ICC Statute, it is difficult to envisage circumstances in which it would do so.

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[39]CR 2014/13, pp. 32-41, paras. 33-52 (Schabas).

[40]*Ibid*., p. 34, para. 35 (Schabas).

[41]*Prosecutor* v. *Al-Bashir*, Appeals Chamber, Judgement of 3 Feb. 2010, ICC-02/05-01/09-OA, para. 39.

[42]*Ibid.*, para. 30

[43]*Ibid.*

26. In short, Mr. President, it appears that no international court or tribunal has applied or followed the language adopted by this Court seven years ago. There are numerous instances of a lower standard being applied, and some of these courts and tribunals have gone out of their way to make clear that they do not consider themselves to be bound by the approach that is said to be followed by this Court in 2007.

27. Mr. President, that raises a real challenge for this Court. Serbia says you adopted a high threshold seven years ago, yet it is clear it has not met with approbation by any of your fellow courts and tribunals. So, what is to be done? The Court could of course decide to adopt the same formulation as Serbia urges you to do. That might lead to a situation — in respect of the necessary proof to infer intent, which will likely be a key issue in any genocide case — in which there is one law on genocide as applied, on the one hand, by national courts, by international human rights courts and international criminal tribunals and perhaps by other international courts, and there is another law of genocide as applied by this Court. Is that really where the International Court of Justice wants to be?

28. It is certainly an approach — the Serbian approach — that would lead to a more leisurely life. On Serbia's approach the Court would be less frequently troubled by applicant States knocking on its door and inviting it to interpret and apply the 1948 Convention. On Serbia's approach, genocide might be seen as a 100-year event, as it was said of the floods that occurred this year in England and Wales — although they seem now to occur every two or three years.

29. An *etatique* approach to the Convention, Mr. President, and an *etatique* approach to the Court's judicial function, causing the Court to take refuge in the language of paragraph 373, would have other merits it might be said: States would be said to be off the hook, largely untroubled by the obligation to prevent and punish genocide because it was an act that so rarely happened, on Serbia's approach. So long as they avoid putting their intentions in writing, so long as they and those for whom they are internationally responsible, are careful to limit themselves merely to "patterns of behaviour", which could be interpreted as having other intentions, they will be able to avoid genocide proceedings before this Court.

30. Is that what the drafters of the 1948 Convention intended, is that what its text requires, is that what the Court wants? The Convention is one of the world's great humanitarian instruments, it

was catalysed by the terrible events of the 1930s and the 1940s, and it would be tragic if it came to become a historical monument or a footnote. The preamble to United Nations General Assembly resolution 96 spoke of the need to prevent "losses to humanity", to inspire respect for "moral law", and to give effect to "the spirit and aims of the United Nations". That spirit and those aims include, as the preamble to the Charter puts it, an affirmation of "faith in fundamental human rights, in the dignity and worth of the human person". The Convention of 1948 was adopted to protect the well-being of individuals and groups, not to protect States from the risk of litigation before this Court. It is and should be a living convention, not a dead convention.

31. Mr. President, Members of the Court, we are not asking you to open the floodgates. We are asking you to do no more than clarify the formulation you adopted in paragraph 373 of your 2007 Judgment, and to confirm that the standard that is to be applied on the inferring of intent is consonant with your jurisprudence, with this Court's jurisprudence, in other domains, and with the approach of other international courts in circumstances in which direct evidence of genocidal intent is unlikely ever to pertain and where a court is required to infer from patterns of behaviour and actions. In circumstances where indirect evidence is necessarily going to have to be relied upon, the standard generally to be applied by this Court is one of evidence to a "conclusive" level, and in relation to proof by inference, to a level that leaves "no room for reasonable doubt". That was the standard of *Corfu Channel* and that case has offered a high degree of certainty for six decades or more.

IV. The *Tolimir* case

32. Mr. President, I turn briefly to the third and final part of my presentation, which relates to a part of an ICTY judgement that Serbia somehow missed. In the first round we did mention the judgement of the Trial Chamber of the ICTY in the *Tolimir* case, which ruled that genocide was committed not only in Srebrenica but in a small town, very small town, called Žepa[44]. Curiously, notwithstanding his apparent appreciation for the Trial Chamber, Professor Schabas had nothing to say about that part of the *Tolimir* judgement which dealt with Žepa. He only referred to those parts of the judgement that dealt with Srebrenica. He described the judgement as a "decision of

[44]CR 2014/6, p. 38, para. 4 (Starmer).

interest", and what he said was that "[i]n December 2012, a Trial Chamber convicted Zdravko Tolimir of genocide with respect to crimes perpetrated in Srebrenica in mid-July 1995 and in the days that followed"[45]. Now I am sure it was not intentional, but what he did not tell you was that in Žepa Mr. Tolimir was convicted of the crime of genocide for killing three people. Three people. Not three thousand, not three hundred. Three. If we look in a little more detail at that case you will see why he ignored it. The facts are remarkably similar to those in the present case. Professor Schabas told you that the only ICTY convictions for genocide are in relation to Srebrenica[46]. That is not right.

33. Žepa was a small Muslim enclave in Bosnia and Herzegovina; it had a population of a little more than 2,000 people. The Trial Chamber found that Mr. Tolimir, an Assistant Commander of the Main Staff of the Army of Republika Srpska, was involved in the killing of three Bosnian Muslim leaders. The Trial Chamber, which decided by a majority, characterized that act of killing as a genocide[47]. On the Žepa killings, it had no direct evidence before it, so it had to rely on indirect evidence. The Chamber concluded that it was satisfied "beyond reasonable doubt" that the killing of three leaders of so small a town was a "case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such", and that it was done with "specific genocidal intent"[48]. The Trial Chamber did not apply the ICJ standard on patterns of activity and inference. So, on what basis did it reach the judgement that it did? It found that the acts with which Mr. Tolimir were involved were taken "[t]o ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself"; the Chamber added that in the case of the killings in Žepa — having regard to its small size — "it was sufficient . . . [to do three things,] to remove its civilian population, [to] destroy their homes and their mosque, and murder its most prominent leaders"[49].

34. Mr. President, we do not seek to place excessive reliance on this judgement. It is first instance, it is a majority decision, and it is subject to appeal, and it has been appealed by

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[45]CR 2014/13, pp. 49-50, para. 69 (Schabas).

[46]CR 2014/13, pp. 35-36, para. 39 (Schabas).

[47]*Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-T, 12 Dec. 2012, para. 782.

[48]*Ibid*.

[49]*Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-T, 12 Dec. 2012, para. 781.

Mr. Tolimir: he filed his appeal less than a month ago — on 28 February 2014. That appeal document is worth reading because it is notable that while specifically challenging his conviction for genocide he has not, in that appeal, sought to argue that the Trial Chamber erred by failing to apply the high standard that appears to be set out in paragraph 373 of the Judgment in the *Bosnia* case. What he says is that the Trial Chamber erred in finding that the facts established genocidal intent "beyond reasonable doubt": paragraph 179 of his brief argues that "genocidal intent [on that case, his argument] cannot be inferred beyond reasonable doubt"[50]. That is the standard the Appeals Chamber will apply when it comes to deal with the case.

35. Why do I take you to this case, Mr. President? I do so because it is a world away from the approach set forth by the Court in its 2007 Judgment. It is emblematic of the main themes of my submissions, and in particular our submission that genocidal *mens rea* includes an intent to destroy the effective functioning of a part of an ethnic group. That, in effect, is what the Trial Chamber ruled in the Žepa case, having regard to the killings of three individuals coupled with expulsions, the destruction of homes and the destruction of places of worship.

V. Conclusions

36. Mr. President, Members of the Court, circumstances have changed since 2007. The jurisprudence in relation to the Convention has broadened, and it has deepened. This Court's role continues to be an important one, but new courts and new tribunals continue to spring up, charged with interpreting and applying the essential elements of the crime of genocide, and, of course, national courts become increasingly important with have regard to the international jurisprudence, which they turn to in deciding their own cases. It may be, that as these proceedings approached on the horizon, some may have had a feeling of déjà vu, but what these hearings have served to do is to make clear that the facts in this case are distinct, and that they have not been subject to judicial consideration before, at least by reference to the applicable law of this Court or by this Court. And it is plain too, that the law *has* moved on over the past seven years. The relevance of the Convention is plain, and in that regard we submit the Court has a vital role to play, a role that is not without its challenges.

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[50] *Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-A, Public Redacted Version of the Consolidated Appeal Brief, 28 Feb. 2014, para. 179.

37. Mr. President, Members of the Court, it is time to move to matters of evidence and fact, and I invite you call an appropriately bewigged Ms Ní Ghrálaigh to the Bar.

The PRESIDENT: As you have finished your pleading you may leave the Bar, and I give the floor to Ms Ní Ghrálaigh. You have the floor, Madam.

Ms NÍ GHRÁLAIGH:

FACTS AND EVIDENCE

Introduction

1. Mr. President, Members of the Court, as Croatia begins its second round of oral arguments, the detail of its factual case remains almost entirely unchallenged. That acts which are capable of constituting the *actus reus* of genocide were committed against the Croat population of Croatia is accepted by the Respondent[51]. So too is the fact that they were driven by ethnic hatred[52]. So too is the fact that members of the JNA and other Serb forces were involved in their commission. The Respondent does not deny that the JNA leadership and Serb political authorities had knowledge — as early as October 1991 — that acts being characterized by its own officers in the field as genocide were being committed[53].

2. The Respondent has been compelled to make these concessions regarding the Applicant's substantive factual case by the weight of the evidence before the Court, backed up by clear ICTY findings. It has, however, sought to neutralize those concessions, by mounting sweeping procedural challenges to the Applicant's evidence, including to its witnesses' statements and to the calibre of its expert witnesses. It has also sought to undermine the findings of fact by the ICTY, which support Croatia's claim and which are particularly troublesome to the Respondent's defence, asking the Court to go behind them.

3. My presentation deals with those challenges. It proceeds in three stages. First, I will consider the main technical challenges that the Respondent has made to the Applicant's evidence.

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[51]CR 2014/15, p. 11, para. 13 (Schabas).

[52]CR 2014/15, p. 28, para. 48 (Schabas).

[53]See, for example, the JNA military intelligence report dated 13 Oct. 1991, Reply of Croatia (RC), Vol. 4, Ann. 63.

Second, I will address the Respondent's challenges to the nature of the JNA and the commanding role it played in the genocide in Croatia. Third, I will conclude by briefly restating the facts and evidence before the Court as they currently stand.

I. Evidential Challenges Mounted by the Respondent

4. I turn first to the four main evidential challenges that the Respondent has made:

A. first, to the witness statements appended to the Applicant's pleadings;

B. second, to the inclusion of hearsay in the Applicant's evidence;

C. third to numbers asserted by Croatia in relation to those killed and seriously physically and mentally harmed in the genocide; and

D. fourth, to Croatia's expert witnesses.

5. I deal with each of those challenges in turn.

A. Witness Statements

6. I begin with the Respondent's continued challenge to the Croatia's witness statements. The Respondent has continued in its oral presentations to take issue with the witness statements, appended to the Applicant's pleadings. Indeed Serbia's Agent has gone so far as to assert before this Court that the Applicant's evidence is but a "message of 'demonization' of Serbs, founded upon fabricated and false documents"[54].

7. Given the serious allegations made by the Respondent, I hope the Court will forgive me for providing a brief history and chronology of the submission to the Court of witness statements and evidence by Croatia.

8. Croatia's Memorial was submitted to the Court 13 years ago this month, in March 2001. It appended over 400 witness statements, many of them taken in the early 1990s, as the conflict still raged in Croatia, long before the case before the Court was contemplated.

9. In its Counter-Memorial, the Respondent called on the Court to dismiss the evidence of these hundreds of victims and witnesses of its atrocities. It asserted that the statements were "not

[54]CR 2014/13, p.54, para. 2, (Obradović).

relevant in this case"[55], that the witnesses were not "disinterested" in the outcome of the case[56], and that their statements did not comply with "minimum evidentiary requirements"[57], including on the basis that many of them were unsigned.

10. In order to respond to those challenges, the Applicant appended to its Reply, filed in December 2010, supplementary witness statements from 188 of the original witnesses, whose statements were criticized by the Respondent[58]. Regrettably, by the time of filing the Reply, 106 of the original witnesses had passed away in the interim. Others were outside Croatia's jurisdiction or otherwise un-contactable. The Respondent's Agent has sought to mischaracterize the entirety of these supplementary statements as an exercise in "collecting signatures . . . appropriate for a petition to the local government"[59]. They are nothing of the sort. They are all set out at Annex 30 of the Applicant's Reply. As they make clear, each and every witness confirmed, in the presence of a police officer, that their original statement, appended to the Applicant's pleadings, was given voluntarily and that the facts contained within it were true.

11. This is not sufficient for the Respondent. It has chosen to ignore those confirmatory statements in its oral submissions to the Court. It has therefore repeatedly drawn the Court's attention to unsigned original statements, without reference to the fact that their authors have subsequently confirmed both the accuracy and the truth of their statements[60].

12. In the course of these oral proceedings, the Applicant also called a number of those witnesses, whose original statements were unsigned, to appear as witnesses of fact before the Court. I will take Ms Marija Katić, who gave evidence in open court, as an example. Ms Katić gave her original statement to the Croatian police on 24 June 1997. She signed a confirmatory statement, verifying the truth and accuracy of her original statement, 13 years later, on 13 September 2010[61]. She testified before the Court on 5 March 2014, 17 years after she gave her

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[55]Counter-Memorial of Serbia (CMS), paras. 144-149.

[56]CMS, paras. 150-152.

[57]CMS, paras. 153-158.

[58]RC, Vol. 2, Ann. 30.

[59]CR 2014/13, p. 59, paras. 17-18 (Obradović).

[60]See, e.g., Memorial of Croatia (MC), Anns. 30, 143 and 189 (original statements), and RC, Ann. 30, pp. 170, 228 and 245 (confirmatory statements).

[61]MC, Vol. 2 (I), Ann. 40; RC, Vol. 2, Ann. 30, p. 176.

original, unsigned statement. She once again confirmed the truth and accuracy of her original statement, and adopted it as her evidence before this Court. It is of course for the Court to consider the truthfulness of her evidence before it. However, Croatia's view is that Ms Katić's testimony was honest, clear, and consistent both with her previous written statement and with the other evidence before the Court regarding the genocidal atrocities committed in her home village of Bogdanovci. Mr. Kožul's original statement to the Court was also unsigned. While Mr. Kožul was shown one unsigned document which he asserted was not accurate, and which he therefore had not signed, and would not sign, he did adopt another originally unsigned statement as his evidence before the Court. That statement was dated 29 March 1993, it was translated and appended to Croatia's Memorial, as Mr. Kožul's statement at Annex 114. Mr. Kožul confirmed the truth and accuracy of that statement by way of a supplementary statement, dated 14 September 2010, which is appended to Croatia's Reply at Annex 30, page 213. He subsequently adopted it as his evidence before the Court. The Respondent has described Mr. Kožul as "obviously an honest man, and . . . the victim of a terrible crime"[62].

13. Some other witnesses, whose original unsigned statements were appended to the Applicant's pleadings, have gone on to testify before the ICTY[63]. Their evidence to the Tribunal — a form of evidence to which the Respondent has urged the Court to give particular attention and consideration[64] — has remained consistent with their original witness statements — all of which were unsigned and a number of which were unsigned police statements.

14. So that is the account of what has in fact happened with the Applicant's witness evidence in this case. It bears very little resemblance to the spurious prediction made by the Respondent's Agent that if the "alleged authors" of the all the unsigned original statements taken by the police: [Screen on]

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[62]CR 2014/13, p. 54, para. 1 (Obradović).

[63]See, e.g., (1) MC, Ann. 296 (original unsigned statement); (no confirmatory statement); *Martić*, 6 Apr. 2006, p. 3293 (ICTY evidence); ~~***and***~~ (2) MC, Ann. 485 (original unsigned statement); RC, Ann. 30, p. 325 (confirmatory statement); *Martić*, 23 Mar. 2006, p. 2462 (ICTY evidence); ***(3)*** MC, Ann. 339 (original unsigned statement); (no confirmatory statement); *Milošević*, 11 Nov. 2002, p. 12732 (ICTY evidence); ***and (4)*** MC, Ann. 360 (original unsigned statement); (no confirmatory statement); *Milošević*, 28 Aug. 2003, p. 25515 (ICTY evidence).

[64]CR 2014/13, p. 64, para. 35 (Obradović): "In the Respondent's view, the Court should give a special attention to the transcripts of testimonies accepted before the International Criminal Tribunal for the former Yugoslavia. Those transcripts were made by the United Nations professional staff, while the testimony under solemn declaration was tested through cross-examination, re-examination and additional questions posed sometimes by the ICTY judges."

> "had been called to testify, and if they had testified honestly . . . the fact that these unsigned statements were all prepared by the police and are entirely unreliable, would be quite clear"[65].

15. That assertion by Mr. Obradović is particularly unfortunate, given the imputation it casts on Ms Katić, who is one such "alleged author" of an original unsigned police statement who *was* called to testify before the Court. She did not repudiate her original police statement or suggest that it was in any way "unreliable". Mr. Jordash did not put to her that her original statement was fabricated. Neither did he put to her that her testimony was dishonest. It is deeply regrettable that the Respondent should now seek to impugn her honesty in such a way, without giving her the opportunity to respond to such imputations. [Screen off]

16. Serbia's continued exhortations to the Court to disregard the statements of hundreds of victims and witnesses to its atrocities on the basis that their unsigned original statements — taken together with their confirmatory statements — are in a form which "cannot be used before a court of law" are entirely without merit. These statements *are* in a form that *can* be — and indeed *have been* — used before a court of law. *This* Court has itself accepted those statements as proper and sufficient witness statements for its own purposes. It did so in relation to the witness statements submitted to the Court for the Applicant's witnesses of fact. It did so in relation to Ms Katić. And it also did so in relation to Mr. Kožul. The Respondent's objection is moot.

17. The weight to be attached to the evidence of the witnesses who have testified before the Court and of the witnesses whose statements are appended to the Parties' pleadings is of course a matter for the Court, to be established on conventional principles, as enunciated by Sir Keir Starmer in his response to Judge Bhandari's question on 7 March. The Respondent would clearly prefer it was not so. It is aware that the hundreds of statements annexed to the Applicant's proceedings evidence the widespread, systematic pattern of atrocities which Serbia committed against the Croat population. That is why it has not just continued, but has escalated its attempts to persuade this Court to disregard them.

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[65] CR 2014/13, p. 54 para. 2 (Obradović).

B. Hearsay

18. I respond only briefly to the Respondent's second challenge to the Applicant's evidence, on grounds of hearsay. The Respondent's submissions in this regard are misconceived — particularly in light of its own statements: the Court will have noted when Mr. Jordash summarized Serbia's own witness statements that they included considerable sections of hearsay evidence themselves. As the Applicant has set out in its written pleadings, the jurisprudence of the principal international criminal courts and tribunals make clear that hearsay evidence is relevant and admissible, and should be assessed in the light of its content and the circumstances in which it was obtained[66].

C. Numbers of Victims

(1) ***The Respondent's challenge to the numbers of victims asserted by Croatia***

19. I also deal briefly with the third challenge the Respondent makes to the Applicant's evidence, relating to the number of victims of Serbia's genocide asserted by Croatia. The Respondent's Agent has "draw[n] your attention to the allegation" made by Croatia's Co-Agent, that the "JNA and subordinate Serb forces killed over 12,500 Croats", that "they caused serious mental and physical harm to tens of thousands" and "raped more Croat women than can be known"[67]. Mr. Obradović states that he has "not seen yet any single piece of evidence that contains these estimations" and asserts: "I am sure today that such evidence does not exist."[68]

20. Once again, the Respondent's predictions and assurances to the Court have proven to be misguided. Such evidence does indeed exist. Evidence of mental and physical harm and rape is drawn, *inter alia*, from the hundreds of victim and witness statements appended to and referenced in the Applicant's pleadings, which the Respondent has tried so hard to get you to disregard. It is also drawn from the repeated findings of the ICTY of "the commission of widespread and grave crimes"[69], "severe mistreatment"[70] and "widespread crimes of violence and intimidation . . .

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[66]RC, para. 2.44.

[67]CR 2014/13, p. 65, para. 43 (Obradović).

[68]*Ibid*.

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

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

perpetrated against the Croat population"[71]. Mr. President, Members of the Court, given the widespread and systematic pattern of the atrocities committed by Serbia and the nature of the harm caused to the Croat population, it is impossible to provide an exact figure or to account for every victim to the last. The Applicant has not sought to do so; it has not sought to provide an exact figure.

21. Estimates concerning killings, however, are capable of being more precise. The estimate provided by the Applicant concerning the number of persons *killed* in the genocide is drawn, *inter alia*, from the extensive research of historians and Croatian State ministries. The figure of 12,500, to which Croatia's Co-Agent referred, is provided by the Croatian Memorial Documentation Centre, a public institution founded by the Government of Croatia, the role of which is to collect and archive data relating to the conflict[72]. A footnote to that source is provided in the text of my speech.

(2) ***Numbers of missing people***

22. Mr. President, Members of the Court, since I am dealing with the question of numbers of victims of the conflict, it is an opportune moment for me to respond to Judge Cançado Trindade's question. That is whether there is "any additional, and more precise updated information that can be presented to the Court by both Parties on this particular issue of disappeared or missing persons to date"[73].

23. The answer to that question, Your Excellency, is yes. Additional, more precise information is set out in the updated *Book of Missing Persons on the Territory of the Republic of Croatia*, published by Croatia's Directorate for Detained and Missing Persons, in conjunction with the Croatian Red Cross and the International Committee of the Red Cross[74]. The book sets out detailed data on those who were still missing as of April 2012. It lists the names of the disappeared and breaks down the data on missing persons according to whether they were last seen *alive* (in

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

[72] Ante Nazor, *Greater-Serbian Aggression against Croatia in the 1990s*, Croatian Homeland War Memorial and Documentation Centre (2011), p. 368.

[73] CR 2014/18, p. 69 (Judge Cançado Trindade).

[74] *Book of Missing Persons on the Territory of the Republic of Croatia* (April 2012), available at: http://www.branitelji.hr/arhiva/p2515/dokument/1117/knjiga.nestalih-pdf.pdf.

which case it lists them alphabetically by the place of their disappearance), or whether they are known or thought to be *dead* (in which case it lists them alphabetically by the place where their body was last seen). We have printed one copy for the Registry, and have provided a link in the footnote to this presentation. We can provide more hard copies if that would be helpful to the Court.

24. As Mr. Grujić explained when he gave evidence, the figures of the disappeared are constantly updating: as graves are uncovered, the numbers of persons exhumed and identified *increases* and the numbers of those missing *decreases*. The numbers provided in the 2012 book are therefore already out of date, as are the figures provided by Croatia to the Court, which were accurate to December 2013. We have contacted the Directorate for Detained and Missing Persons in response to Judge Cançado Trindade's question. We can confirm that the most up-to-date figures, as of Tuesday 17 March 2014, relating to persons killed during the course of Serbia's attacks on Croatian territory in 1991-1992, are as follows:

— The bodies of 3,680 persons who were buried irregularly have been exhumed from 142 mass graves and many more individual graves.

— Of those, 3,144 have been positively identified.

— However, 865 persons who disappeared during that period are still missing.

I should correct myself that the most up-to-date figures are correct as of *Monday* 17 March 2014, Saint Patrick's day.

25. Croatia's Agent, Professor Crnić-Grotić, will respond tomorrow to Judge Cançado Trindade's additional question regarding initiatives to identify and clarify the fate of the disappeared.

D. The Respondent's challenges to Croatia's expert witnesses

26. That response leads me to the Respondent's fourth area of challenge, which is to Croatia's expert witnesses. The numbers that I have just supplied to the Court are numbers provided by Croatia's Directorate for Missing and Detained Persons, of which Mr. Ivan Grujić — Croatia's expert witness who testified to the Court the week before last — is the Head. The Respondent's Agent has sought to challenge Mr. Grujić both for *not* providing figures regarding

the overall number of those killed during Serbia's attack on and occupation of Croatian territory, and *for* providing figures relating to the numbers of disappeared persons and those exhumed from mass and individual graves. Both challenges are without merit.

27. The simple reason why Mr. Grujić's expert statement did not deal with the overall statistics of persons killed, wounded and raped, is that this is not his particular area of expertise. It goes without saying that the Respondent's counsel could have cross-examined Mr. Grujić about this perceived *lacuna*. It chose not to do so. Mr. Grujić is, however, an expert — and indeed the leading expert — on matters relating to missing and detained persons, exhumations and graves in Croatia. He has appeared as an expert witness before the ICTY on multiple occasions[75]. The Directorate over which he presides is a Croatian governmental body, and — as the Respondent correctly asserts — Mr. Grujić, as its Head, is a State official. However, the Respondent's attempts to question his evidence on this basis are again without merit: the exhumation of bodies on a State territory is necessarily a State function; as is the maintenance of records of citizens and other missing persons from a State's territory. The Respondent has not identified any challenges to the substance of Mr. Grujić's evidence on missing or exhumed persons, or to the procedure set out in his statement. Once again, it seems, that technical challenges are being advanced by the Respondent in the face of, and in order to obviate focus from, facts which are deeply uncomfortable and damaging to its defence.

28. The Respondent's *ad hominem* attacks against Croatia's second expert witness, Ms Sonja Biserko, are also without merit. The Respondent's charges of bias, corruption and ignorance against her are unsupported and unsubstantiated[76]. They are also not shared by the United Nations. Ms Biserko's degree in economics from the University of Belgrade has proven no impediment to her appointment to the high-level Commission of Inquiry set up by the United Nations Human Rights Council to investigate violations of human rights in North Korea. She was appointed alongside a former Justice of the High Court of Australia and a former United Nations Special Representative on Human Rights in Cambodia, and alongside the United Nations Special

[75]For example, *Prosecutor* v. *Milošević*, IT-02-54; *Prosecutor* v. *Martić*, IT-95-11; *Prosecutor* v. *Mrkšić*, IT-95-13-1.

[76]CR 2014/13, pp. 58-59, paras. 13-14 (Obradović).

Rapporteur on the situation of human rights in North Korea. Given what has emerged about the views and the official role of the Respondent's own expert witness — including that he was secretary to the criminal joint enterprise of the RSK — one might have expected the Respondent to be more circumspect in its attempts to discredit Ms Biserko.

29. Mr. President, Members of the Court, the formalistic challenges made to Croatia's evidence by the Respondent's Agent are unfounded and regrettable. They are regrettable for the serious, unsubstantiated allegations they level against Croatia and its witnesses, and they are regrettable for the Respondent's attempts to silence and disregard the accounts of hundreds of victims of its atrocities.

30. However, they leave the substance of Croatia's claim essentially unchallenged.

II. The Respondent's challenges to the JNA's role in Croatia

31. Mr. President, Members of the Court, I now turn to the second part of my presentation which is to address a number of challenges the Respondent has made to the evidence concerning the role of the JNA in the genocidal activities in Croatia.

A. First, I deal with the Respondent's challenges to the Applicant's evidence concerning the Serbianization of the JNA.

B. Second, I respond to its attempts to downplay the ICTY findings of the JNA's full command and control over operations in Croatia[77].

A. Serbianization of the JNA

32. I begin by correcting an error in numbers in the Respondent's presentation regarding the JNA, which has led it — erroneously — to dispute the Applicant's evidence regarding the Serbianization of the JNA. On the morning of 12 March, the Respondent challenged the Applicant's case regarding the Serbianization of the JNA. The Respondent's counsel, Mr. Lukić purported to quote directly from a document, appended to the Applicant's Reply. He stated — and here I quote from your screens — [screen on]

> "Evidence provided by Croatian State officials contradicts the Applicant's thesis . . . In the letter signed by . . ., President of the Croatian Military Property

[77] CR 2014/15, p. 59, paras. 44-55 (Ignjatović).

> Succession Council, the following is stated: [and here he purports to quote from the document] 'out of 235 generals from Croatia at 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.'"[78]

33. Relying on this purported quotation, Mr. Lukić asked the Court the following rhetorical question [next graphic]:

> "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?"

34. What the portion of the document which Mr. Lukić quoted, translated at Annex 108 actually says is [next graphic]:

> "out of **a total of** 235 generals ~~from Croatia~~ **who were active during the said period** ~~at the onset of the war~~, ~~less than~~ only 7 **generals or admirals**, i.e. ~~or expressed in percentages~~, **around** three per cent **of the total general corps… joined the ranks of HV** [the "Croatian army"]. **All o**ther **active** generals **and admirals** stayed ~~with the other warring party~~ **on the opposite side (in active service or retired or they stayed on in the Republic of Croatia and did not put themselves at the disposal of the HV . . .) . . ."**[79]**.**

35. As the correctly quoted text makes clear, the figure of 235 referred to the total number of generals in the JNA — of all nationalities and ethnicities — of whom seven joined the Croatian forces. The published source from which Annex 108 is drawn makes clear that only 27 of the total 235 JNA generals were in fact Croats[80]. The correctly quoted text that I have put on your screens further makes clear that not all of the remaining 228 generals continued in active service with the JNA, much less in active service in Serbia's genocidal campaign in Croatia[81].

The Applicant's case on the Serbianization of the JNA is unchallenged by the Respondent's misquotation. [Screen off]

B. Full command and control by the JNA over military operations in Croatia

36. Mr. President, Members of the Court, I turn now to my second point which is to address the Respondent's attempt to underplay the central role played by the JNA in Serbia's campaign in Croatia, in particular its challenge to the ICTY Trial judgement in *Mrkšić.* Sir Keir Starmer will

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[78]CR 2014/15, pp. 39-40, para. 28 (Lukić).

[79]RC, Ann. 108.

[80]*Zapovjedni vrh JNA: siječanj 1990.-svibanj 1992*, Ministarstvo obrane RH, Hrvatski memorijalno-dokumentacijski centar Domovinskog rata, Zagreb, 2010.

[81]RC, Ann. 108.

later this morning deal with the Respondent's similar challenge to the findings of the ICTY in *Martić*. The findings of fact by the Trial Chamber in *Mrkšić* are particularly troublesome for the Respondent's defence. The Court will recall that the Tribunal found that — and here I read from your screens: [screen on]

> "the *de facto* reality, not only in the zone of operations of OG South, but, generally, in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations"[82].

37. The ICTY further determined that this *de facto* reality of "complete command and full control by the JNA" was a reality — I emphasize the word reality — "which the JNA had the might to enforce". [Screen off] Although the Tribunal added that the JNA "may well have been reluctant to be too heavy handed in doing so, against TO and volunteer or paramilitary units fighting in the Serb cause"[83].

38. Applying those findings to the specific facts of the case before it, the Trial Chamber in *Mrkšić* held that, in respect of the Serb operation to capture Vukovar between 8 October and 24 November 1991 — here again I quote from your screens — [Screen on]

> "Mile Mrkšić as the commander of OG South, had the *sole command of all JNA and all TO including volunteer or paramilitary units.* Accordingly, he had *de jure* authority to issue orders to all JNA, TO and paramilitary units in the zone of responsibility of OG South in combat operations."[84] [Screen off]

39. Lest there be any doubt about the Trial Chamber's conclusions on this issue, it went on to repeat that — this is again on your screens: [Next graphic]

> "in the final analysis the JNA under the command of Mile Mrkšić not only had *de jure* authority as identified above, but also had the manpower, armament and organisation to exercise effective *de facto* control over all TO and volunteer or paramilitary units in the zone of responsibility of OG South"[85]. [Screen off]

40. The Tribunal's findings about the JNA's command over Serb paramilitaries were unequivocal. Indeed, in his submissions last week, counsel for the Respondent, Mr. Ignjatović, acknowledged the force of what he called "such a robust finding"[86], even as he sought to cast doubt

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[82] *Prosecutor* v. *Mrkšić*, IT-95-13-1, Trial Chamber Judgement, 27 Sep. 2007.

[83] *Mrkšić*, para. 89.

[84] *Mrkšić*, ~~***Trial Chamber Judgement,***~~ para. 86; emphasis added.

[85] *Ibid.*, para. 89.

[86] CR 2014/15, p. 59, para 45 (Ignjatović).

on its evidential foundation. Mr. Ignjatović suggested that the Trial Chamber's analysis was "a very unusual one"[87], as he joined the ranks of his colleagues who have sought to invite the Court to assume the role of unofficial appeal chamber for ICTY findings unhelpful to the Respondent's case.

41. On this occasion, the Respondent seeks to impugn the Trial Chamber's analysis on two primary bases: first, that its findings were based on flimsy evidence and, second, that its findings regarding command and control had been too widely enunciated. Once again, neither of the Respondent's challenges has any merit.

(1) ***Flimsy evidence challenge***

42. I deal first with the flimsy evidence point. The Respondent criticizes the Trial Chamber for purportedly basing its assessment on, I quote: "only two documents, or to be more specific, only two sentences of these documents"[88]. The first document identified was a circular issued by the JNA Chief of Staff on 12 October 1991. It stated that: "All armed units, be they JNA, TO or volunteer units must act under the single command of the JNA." The second document identified was an order issued by the command of the JNA 1st Military District on 15 October 1991, which ordered all units subordinated to it to establish "full control" within their various zones of responsibility. Any paramilitary units who refused to submit to JNA authority were to be removed from the battlefield[89].

43. These documents are official JNA orders issued by senior JNA commanders, including the JNA Chief of Staff, who was held by the ICTY in *Martić* to have been a participant in the joint criminal enterprise to rid the "SAO Krajina" of ethnic Croats[90]. The Respondent has not and cannot contest the authenticity of the documents. There is therefore no reason to doubt their probative value, or the picture they paint regarding the JNA's relationship with TO and paramilitary forces.

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[87]CR 2014/15, p. 59, para 44 (Ignjatović).

[88]*Ibid.*, para 45 (Ignjatović).

[89]*Mrkšić*, ~~***Trial Chamber Judgement,***~~ para. 85.

[90]*Ibid.*, para. 446.

44. The Respondent instead attempts to reinterpret the JNA documents, to turn them on their head, such that they might evidence the opposite of what they in fact say. Thus, while the 12 October order clearly states that all JNA, TO and combat units were to be placed under the unified command of the JNA, the Respondent argues that the order "does not say that such command was actually put in place". The Respondent argues, in fact, that the orders are not evidence of the fact that the JNA *was* in control but, rather, that it *was not*. The Respondent's counsel asks the Court to speculate that the orders were issued in order to "fix" problems of "lack of discipline and lack of control" amongst the various Serb forces[91]. However, this is not what the orders say expressly. The evidence on which the Respondent's assertion is based is more than flimsy evidence — the very alleged deficiency for which it attempts to call the Trial Chamber's finding into question.

45. The Respondent's references to instances of scuffles or stand-offs between members of the JNA and paramilitaries and TOs are of little assistance to it. On the contrary. The example of the TO "drag[ged] off the bus" by a JNA officer when he challenged the authority of the JNA Colonel; the example of JNA soldiers preventing TOs and paramilitaries from abusing Croat men arriving at JNA barracks in Vukovar: these examples only serve to confirm the control of the JNA officers in question. Indeed, they stand as evidence of the Trial Chamber's findings that the JNA had the might to enforce its complete command and control.

(2) ***Factual enquiry limited to Ovčara***

46. The Respondent's second challenge to the ICTY findings in *Mrkšić* — that the Tribunal's findings of command and control should here be limited to the circumstances that prevailed at Ovčara — is also meritless.

47. As you have heard, the Tribunal in *Mrkšić* expressly held that it is, I quote: "misleading to view the events in Vukovar in isolation or to imagine they were only governed by local factors. They were but part of a much wider political and military struggle." Therefore, as the judgement made clear, and as the Respondent is well aware, the Trial Chamber considered and made factual findings well beyond the events of Ovčara, relating not only to the rest of Eastern Slavonia, but

[91]CR 2014/15, p. 59, para. 47 (Ignjatović).

also to the rest of the targeted areas of Croatia[92]. In particular, it made factual findings regarding the pattern of JNA-led attacks across Eastern Slavonia, about which the Court heard last week[93]. The evidence before the Tribunal — including that evidence relating to JNA structures of command and control — was not limited to the situation prevailing at Ovčara. Indeed, as counsel for the Respondent himself noted, the order of 15 October, to which he was keen to draw the Court's attention, applied "to Eastern Slavonia" as a whole, not just to Vukovar, and certainly not just to Ovčara[94].

48. The relationship of command and control described in the two orders considered by the Tribunal was also plainly consistent with the JNA's governing regulations. These included Rule 108 of the JNA Brigade Rules, which provided that operations must be conducted "on the basis of unity or singleness of command". There is no reason to suggest — and nothing before the Court to evidence — that the principle of unity of command in JNA operations in Croatia was merely aspirational. Rather, as the ICTY in *Mrkšić* determined — on the basis of the totality of the evidence before it — the JNA was in "complete command and full control . . . of all military operations" in Croatia. [Screen on] "This, in the Chamber's finding, reflects the reality" — and again, I emphasize the word "reality" — "of what had been established"[95]. [Screen off]

49. In short, the evidence before the ICTY and the evidence before this Court establishes — unequivocally and indeed expressly — that the JNA was in effective command and control over all Serb paramilitary and military forces engaged in the campaign in Croatia. Its role in the conflict was an extensive one. No amount of criticism, speculation, or attempts to impugn the reasoning or factual findings of a judicial body that has carefully considered all of the evidence, can displace that fact. Professor Crawford will develop the Applicant's arguments on attribution that flow from that fact. Mr. President, I am about to turn to the third and final part of my presentation. I wonder if this would be an opportune moment for the coffee break?

The PRESIDENT: How many more minutes do you expect your pleading will take?

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[92] *Mrkšić,* para. 19.

[93] *Mrkšić,* paras. 34, 471-472.

[94] CR 2014/15, p. 59, para. 48 (Ignjatović).

[95] *Mrkšić*, ~~***Trial Chamber Judgement,***~~ para. 89.

Ms NÍ GHRÁLAIGH: Maybe five.

The PRESIDENT: OK. Please continue.

Ms Ní GHRÁLAIGH:

III. Conclusion

50. I conclude this presentation as I began it. After a week of arguments by the Respondent, the Applicant's case on the facts remains substantively unchallenged; rather, the Respondent has made a number of critical concessions in oral argument which serve to further narrow the issues in dispute between the Parties. The Respondent has conceded all of the following facts, and the words which you will see in quotation marks on your screen are reported verbatim from the transcripts of the Respondent's oral arguments. The Respondent has conceded:

(1) that "the leadership of the Republic of Serbia at the time, headed by Slobodan Milošević, publicly or covertly, politically**,** and financially, supported the establishment of the Serb territorial autonomy in Croatia"[96];

(2) that "Serbia provided some support to the Croatian Serbs for the establishment of their armed forces . . . which took the form of occasional combat training and the occasional provision of weapons and other material"[97];

(3) that "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". The Respondent acknowledges that "[t]hat is not ***an*** issue here"[98];

(4) that "serious crimes were perpetrated against the members of the Croatian national and ethnic group"[99]; that is concession number four;

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[96]CR 2014/16, p. 17, para. 85 ***(Ignjatović)***.

[97]*Ibid.*, p. 19, para. 94 ***(Ignjatović)***.

[98]***CR 2014/15***, p. 1***3***, para. 1***0 (Schabas)***.

[99]CR 2014/13, p. 64, para. 38 ***(Obradović)***.

(5) that "[t]hey were committed by groups and individuals of Serb ethnicity"[100], including by "members of the JNA"[101], and "forces associated with the Croatian Serbs"[102];

(6) that the "***t***he factual matrix has been well established, largely through the determined efforts of the ICTY"[103];

(7) that "***[i]***t is stating the obvious to observe that the conflict had an important ethnic dimension" and that "[e]thnic hatred no doubt figured in much of the behaviour of those responsible for the crimes that were committed"[104];

(8) that there was **"**talk of **'**mopping up**'** and **'**destruction**'** of **'**the enemy**'"**[105];

(9) that "the existence of strong, compelling evidence of racist propaganda, associated with violence could be a relevant indicator of genocidal intent"[106];

(10) and, critically and importantly, that "[i]ntent may be illuminated by circumstantial evidence, including by words spoken or deeds done or a pattern of purposeful action"[107];

(11) that "[p]roof of specific intent . . . require[s] an examination of a pattern of atrocities committed over many communities focused on the targeted group"[108]; and

(12) finally, that "widespread and systematic killing, physical and mental harm and the deliberate infliction . . . of conditions of life calculated to bring about . . . physical destruction on its own — gives rise to such an inference"***[109]***.

51. Mr. President, Members of the Court, I note that the footnotes to those statements have not replicated on the slide; they are contained in the footnotes to my presentation. The ICTY has confirmed the existence of such a pattern of atrocities committed against many communities in Croatia and focused on its Croat population. The ICTY has also confirmed that widespread and

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[100] *Ibid.*

[101] ***CR 2014/15, p. 44***, para. 43 ***(Lukić)***.

[102] ***CR 2014/15***, p. 28, para. 50 ***(Schabas)***.

[103] *Ibid.*, p. 27***, para. 45 (Schabas)***.

[104] *Ibid.*, p. 28, para. 48 ***(Schabas)***.

[105] *Ibid.*, p. 29, para. 51 ***(Schabas)***.

[106] *Ibid.*, p. 29, para. 52 ***(Schabas)***.

[107] CR 2014/18, p. 13, para. 22 (Jordash).

[108] ***Ibid.***, p. 13, para. 23 (Jordash).

[109] Ibid., p. 14, para. 28 (Jordash).

systematic killing, and infliction of physical and mental harm was committed against the Croat population. The Applicant has set out further clear evidence of that staged pattern of attack, led by the JNA, together with other Serb forces against the Croat population of Vukovar, Eastern Slavonia, and the rest of Croatia. The Respondent has failed to mount any substantive challenge to that pattern, indeed Eastern Slavonia barely featured in its oral response. To raise such a challenge in its second round denies the Applicant the opportunity to respond to such challenge. The unchallenged pattern of attack gives rise to the inference of specific intent**,** on Mr. Jordash's own submissions.

52. The Respondent's concessions, taken alone, are sufficient to establish the Applicant's case on the merits, as Sir Keir Starmer will explain after the coffee break.

The PRESIDENT: Thank you, Ms Ní Ghrálaigh. Sir Keir Starmer will address the Court after the coffee break. The sitting is suspended for 15 minutes.

The Court adjourned from 11.35 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I invite Sir Keir Starmer to address the Court. You have the floor, Sir.

Sir Keir STARMER:

LEGAL RESPONSIBILITY

I. Introduction

1. Mr. President, Members of the Court, I will address the points made by the Respondent and by the Court about responsibility for genocide arising out of the Applicant's claim, in this order:

(a) first, pattern;

(b) second, opportunity;

(c) third, genocide against defenders; and

(d) fourth, failure to prevent.

2. As Professor Sands has warned me, without a wig I now stand or fall on the quality of my submissions alone. Mr. President, as you have heard from Mr. Obradović, the *actus reus* of genocide is no longer in issue. He[110] and Professor Schabas[111] conceded that the *actus reus* is conditionally made out, subject to proof of intent, and therefore with your permission I will focus only on the question of intent and say no more about *actus reus.*

3. Absent explicit evidence of intent, it can be inferred from words, from deeds or a pattern of purposeful action[112]. And this Court will recall that, in developing the Applicant's case on inferred intent, I relied on five features:

(a) first, the 17 related factors[113] evidencing intent, and you will recall I put them up on the screen in batches of four;

(b) secondly, the strong patterns of conduct across all the regions in question — village after village, town after town;

(c) third, the evidence that where opportunities were open to Serb forces to destroy Croats in the regions in issue, that they took them, pointing to the examples to Vukovar, Lovas, Škabrnja and Saborsko;

(d) fourth, the general evidence of events across regions such as Eastern Slavonia and the close-up examination of individual villages; and

(e) fifth, the chilling roll-call of death and destruction described by my colleagues in their first round speeches on the *actus reus*.

So that was the case put up by the Applicant on inferred intent.

4. In response, I think it is fair to say, that the Respondent has, by and large, chosen not to engage with the evidence, preferring to shelter behind sweeping but unanchored statements. Limited points were made about proving intent from a pattern of conduct, with some reference by Professor Schabas to the case of *Martić*, and Mr. Obradović put forward three instances where he suggested an opportunity to destroy Croats was presented but not taken, namely Vukovar, Stajićevo

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[110]CR 2014/13, p. 66, para. 44 (Obradović).

[111]CR 2014/15, p. 27, para 45 (Schabas).

[112]*Kayishema* Trial Judgement, para. 93.

[113]CR 2014/12, p. 19, para. 27 (Starmer).

and Lovas. And I will obviously deal with each of those points that have been made in response in turn.

5. Before doing so, I am bound to observe that, by mirroring the Applicant's case on proof of genocidal intent when presenting the legal arguments in support of the counter-claim, the Respondent has put itself in a position where it cannot now dispute that:

(a) first genocidal intent can properly and legitimately be proven by evidence of a purposeful pattern of action; or that

(b) opportunities available to the perpetrator are highly relevant to any assessment of genocidal intent.

6. I turn then to the question of pattern.

II. Pattern

7. Last week you heard the Respondent address the ICTY's judgement in the *Martić* case. And that was really the only real argument, the only point at which they substantively engaged in the question of pattern and what could be drawn from pattern. Professor Schabas told the Court that the judgement "does not establish any pattern of events that could amount to genocide"[114]. Nor, according to him, does it contain any finding that any crime committed in the "SAO Krajina", apart from the deportation or forcible transfer, can be attributed to anyone other than Martić himself. In the circumstances, he concluded by saying that the *Martić* judgement "is not helpful to the Court"[115]. Let us briefly examine those propositions.

8. I should add in passing, that in his presentation on Friday on the counter-claim, Mr. Jordash indicated that he intended to deal with *Martić* in the second round. Mr. President I hope that new points are not going to be introduced at that stage, leaving the Applicant with no opportunity to respond on that or any other point. Allow me to remind the Court of some of the ICTY's key findings in *Martić*. First, the Trial Chamber found the existence of a joint criminal enterprise whose common purpose was to establish an "ethnically Serb territory" through the removal of the Croat and non-Serb population from the territory of the "SAO Krajina"/"RSK".

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[114]CR 2014/15, p. 25, para. 41 (Schabas).

[115]*Ibid.*, p. 26, para. 43 (Schabas).

The list of participants in that joint criminal enterprise reads as a roll-call of senior Serb leaders including, of course, the Serbian President, Slobodan Milošević[116].

9. Second, the ICTY made detailed findings of fact about the attacks committed by Serb forces across the region in 1991 and 1992. Those findings echo the findings in *Mrkšić* regarding the pattern and ethnically targeted nature of Serb attacks in Eastern Slavonia — Mr. President, Members of the Court, you will remember I took you to that pattern in the first round. And that is obviously important because we have two significant cases in different areas of the regions in issue, both setting out clear patterns. In the *Martić* case, the Trial Chamber held that from August 1991 armed forces of the "SAO Krajina", TO and JNA attacked Croat-majority villages across the region. The "primary objective" of those attacks was the removal of the non-Serb civilian population. And the Trial Chamber noted that the attacks followed — and these are their words — "a generally similar pattern" whereby, and I hope this is on your screens, their description of the pattern:

~~***[Plate on]***~~

> "The area or village in question would be shelled, after which ground units would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to prevent their return and widespread looting would be carried out."[117]

10. A few paragraphs later, the ICTY referred again to the consistent pattern of attack in these terms: ~~***[next graphic]***~~ "these attacks followed a generally similar pattern, which involved the killing and the removal of the Croat population"[118]. ~~***[Plate off]***~~ So, no question about pattern on the Applicant's case in any part of the regions in issue.

11. Third, in *Martić*, the Trial Chamber found that ethnically persecutory murders were committed by Serb forces against scores of Croat civilians in numerous Croat villages[119]. The evidence also established that imprisonment, torture, inhumane acts, and cruel treatment were

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[116]Also the Serbian nationalist politician, Vojislav Šešelj; the paramilitary leader, Captain Dragan Vasiljković; the SFRY Defence Minister, Veljiko Kadijević; the former President of the Serbian Democratic Party, Radovan Karadžić (currently on trial for genocide before the ICTY); the former president of the "SAO Krajina" and "RSK", Milan Babić; and several other senior Serb leaders.

[117]*Martić*, Trial Judgement, para. 427.

[118]*Ibid.*, para. 443.

[119]Hrvatska Dubica (para. 358), Cerovljani (para. 364), Baćin (para. 367), Lipovača (para. 370), Vukovići and Poljanak (para. 377), Saborsko (para. 383), Škabrnja (para. 398) and Bruška (para. 403).

carried out with intent to discriminate on the basis of ethnicity against Croat detainees[120]. Across the region, the ICTY concluded, "the non-Serb population was subjected to widespread and systematic crimes, including killings, beatings and crimes against property"[121].

12. Fourth, the ICTY held that the government of the "SAO Krajina" and "RSK" received "significant financial, logistical and military support from Serbia". Co-operation between the JNA and the armed forces of the "SAO Krajina" and "RSK" was "extensive", and included "major military operations" in a number of towns and villages[122] — military operations, you will recall, that left scores of defenceless Croat civilians dead. For example, the ICTY expressly found that the JNA was "in command of" the Serb forces that attacked the village of Kijevo on 26 August 1991[123]. The decision to attack that village was "taken by Milan Martić in coordination with the JNA"[124].

13. Fifth, the Trial Chamber held that Martić was guilty of murder, imprisonment, torture, inhumane acts, cruel treatment, attacks on civilians, deportation, forcible transfer, wanton destruction of villages, destruction of religious or educational institutions, attacks on civilians and persecutions[125]. The majority of the victims were detainees or elderly civilians[126] and, reflecting the "appalling" and "especially grave" nature of the crimes, Martić was sentenced to 35 years imprisonment[127].

14. Mr. President, Members of the Court, the Applicant has highlighted cases such as *Martić* where a joint criminal enterprise was found for obvious reasons, but joint criminal enterprise (JCE) is an instrument of the criminal law. It regulates the criminal liability of individuals, not the international responsibility of States. Croatia does not need to establish the existence of any JCE to demonstrate Serbia's liability under the Genocide Convention. However, the ICTY's findings about the joint criminal enterprise involving the senior Serbian leadership are not irrelevant or

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[120] *Martić*, Trial Judgement, para. 416.

[121] *Martić*, Trial Judgement, para. 489.

[122] *Martić*, Trial Judgement, para. 446: Kijevo, Hrvatska Kostajnica, Saborsko and Škabrnja.

[123] *Ibid.*, para. 167.

[124] *Ibid.*, para. 166.

[125] *Ibid.*, para. 480.

[126] *Ibid.*, para. 490.

[127] *Ibid.*, paras. 491 and 519.

unhelpful, as the Respondent seeks to suggest. On the contrary, they provide irrefutable proof of the bonds of allegiance and control that existed between the Serbian leadership in Belgrade and the forces of the "SAO Krajina" and "RSK", and their shared objective of ridding a substantial portion of Croatian territory of ethnic Croats.

15. Professor Schabas ended his remarks about the *Martić* case by saying that the judgement in that case, as well as in *Mrkšić* and other cases, and I quote him directly, "confirm that the acts for which the accused were convicted cannot legally be characterized as genocide"[128]. That is how he ended his assessment and analysis of the cases. That is, of course, wrong, and betrays either a misunderstanding or a mischaracterization of the Applicant's case.

16. Since genocide was not charged in those cases, the fact that the ICTY Trial Chamber did not express a view, one way or the other, on genocidal intent is hardly surprising. But to conclude from that that the Chamber's findings "confirm" that the acts cannot be characterized as genocide is a complete ***non sequitur***. Moreover, the Applicant has throughout made it very clear that it does not simply rely on one set of factual findings in any ICTY case. That is the unfortunate position that the Respondent finds itself in. It started its case in reliance on the first instance decision on *Gotovina* and that probably explains why, at the time, it did not append any witness statements to its Counter-Memorial. It relied solely on one ICTY case. Unfortunately, of course, that was overturned on appeal, leading to the introduction of some witness statements. But the Applicant has always put its case very differently and never sought to rely on one finding of the ICTY. It relies on all of the relevant factual findings, across all the relevant cases, taken together as a set of ICTY factual findings, and taken together with the voluminous other evidence, including the hundreds of witness statements submitted in support of the case. That is what makes the Applicant's case so powerful, that interrelationship of ICTY findings and the body of witness evidence. The Respondent has singularly failed to meet this cumulative case.

17. Professor Sands made a compelling case for the appropriate standard of proof to be applied in this case, namely, "beyond reasonable doubt". There can be no doubt that the strong evidence of pattern in support of the Applicant's case, found in the ICTY judgements and the

[128]CR 2014/15, p. 26, para. 43 (Schabas).

witness evidence, reaches that threshold. If, in paragraph 373 of the *Bosnia* Judgment, the Court has by the inclusion of the word "only" raised the necessary standard of proof, the Applicant submits that its case clearly meets that standard as well.

18. I now turn to the question of opportunity which, as Professor Sands has demonstrated by reference to the case of *Tolimir*, remains an important consideration in any assessment of genocidal intent.

III. Opportunity

19. Serbia now accepts the evidence of genocidal intent is to be determined in part by reference to the opportunity that presents itself. In his speech last Monday, Mr. Obradović gave three examples of "opportunity" where, he says, the Serb forces could have committed genocide, and *would* have done if genocidal intent had existed, but where they did not take the opportunity and thus, he suggests, genocidal intent did not exist. I will address each of these in turn.

20. The first example that was put forward was taken from a quote of part of a sentence from paragraph 213 of the *Mrkšić* judgement about the evacuation of women and children who, Mr. Obradović emphasized — and you may remember this: he said that they were able to *choose* whether they were to be evacuated to Croatia or to Serbia, rather like choosing which bus to take from Vukovar[129]. This was a very telling example for the Respondent to have picked.

21. The incident to which Mr. Obradović refers is the transportation of five buses from Vukovar Hospital on 20 November 1991 — the date is critically important. The *Mrkšić* Trial Chamber noted that the buses contained "about 250 people in all, mostly women and children but including doctors, nurses and their husbands and children"[130]. And on 20 November 1991, they started boarding between 11 and -11.30 a.m. and they left at about 2 p.m.[131]. This is the example that is put before you to demonstrate that genocidal intent never existed, by reference to what happened to that group.

22. What Mr. Obradović did not tell you about his carefully selected example is that this particular instance of evacuation, on 20 November 1991, was heavily monitored. The findings in

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[129]CR 2014/13, p. 67, para. 47 (Obradović).

[130]*Mrkšić* Trial Judgement, para. 213.

[131]*Ibid.*

Mrkšić and the evidence before this Court reveal that the ECMM monitors and the ICRC monitors had arrived at Vukovar hospital at 10.30 that morning[132]. You may recall that, when I was describing Vukovar, I was commenting on the fact that the buses containing the men destined for Velepromet and Ovčara were arriving at those destinations at 10.30. So we have — at the hospital, at 10.30 a.m. — the monitors arrive. The example put before you is what happened one hour later as they monitored what was happening to the individuals going onto those five buses. The monitors were present for the entire evacuation at that stage and, moreover, at around 1 o'clock or 2 o'clock, so before the buses left, "a team from Sky News . . . arrived"[133]. So, of course, this was hardly an opportunity to commit genocidal acts. In fact, after the hospital employees and other women got on the bus, the monitors *followed* the bus into Serbia[134]. There, lists were made of evacuees[135]. The convoy then drove on to Croatia[136]. When and where was the so-called genocidal "opportunity" that was passed up so as to disprove genocidal intent? There was none. How Mr. Obradović hopes to help his own case by demonstrating that when the monitors and cameras were there, the behaviour of the Serb forces was not genocidal is a question only he can answer. The example proved nothing, other than to provide the Applicant with an opportunity to contrast the behaviour of the Serb forces when the monitors and cameras were not in attendance, an opportunity I am not going to pass up.

23. Let us examine what happened to another group of men, women and children who were evacuated from the hospital just one day before. On 19 November, before the ECMM and ICRC monitors arrived, the Trial Chamber in *Mrkšić* found that a group of "some hundreds"[137] — so a comprobable group — mostly civilians but also Croatian forces[138], was taken from the hospital to Velepromet by the JNA[139]. No monitors, no cameras.

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[132] *Mrkšić* Trial Judgement, para. 213.

[133] *Ibid.*, para. 214.

[134] *Ibid.*, para. 213.

[135] *Ibid.*

[136] *Ibid.*

[137] *Ibid.*, para. 167.

[138] *Ibid.*, para. 188.

[139] *Ibid.*, para. 161.

24. Through the findings of the Trial Chamber and the Applicant's evidence before this Court, we can trace the very different journey of this first group of men, women and children evacuated 24 hours earlier on 19 November. They were taken to the camp at Velepromet. The elderly, women and children were separated from the men[140]. At Velepromet they were deprived of food, interrogated and beaten[141], threatened with knives and their mothers were called "Ustashas"[142]. Women were raped. One witness saw a woman she knew being taken away; she later heard volunteers bragging about the fact that 15 of them had raped her[143]. That witness was raped on the floor by five men[144]. Some prisoners were then taken away and not seen again[145]. Other women were forced to watch groups of Croat men as they were executed[146]. So, absent the monitors, absent the cameras, a very different story.

25. We can take the example of another group: the tragic victims executed at Ovčara, taken just before the monitors arrived 20 November. You have heard those distressing details.

26. There was no genocidal "opportunity" in Mr. Obradović's example. But there *was* opportunity in relation to groups taken to Velepromet and Ovčara. The JNA had deliberately *created* that opportunity. And given the opportunity to destroy, it was taken. Croats were massacred, executed, raped, mistreated, and vilified. These were acts directed at the destruction of the group through killings and serious bodily and mental harm. Mr. Obradović's example proves the very point he is seeking to disprove.

27. Mr. Obradović's second example was that there were persons detained by the Serbs who were not in fact killed but after several months in a detention facility finally exchanged. As the witness's statement reveals, conditions in the detention camps were horrific. The first stop for those coming out of Vukovar was Velepromet. There, prisoners, mostly civilians, were threatened, interrogated and constantly beaten. They were crammed with 50 others into what was called the

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[140] *Mrkšić Trial Judgement*, para. 162, and see para. 188.

[141] MC, Ann. 37; Ann. 151.

[142] MC, Ann. 37.

[143] MC, Ann. 151.

[144] MC, Ann. 151.

[145] MC, Ann. 117.

[146] MC, Ann. 37; Ann. 123; Ann. 157B.

"death room", threatened with violence and told by a soldier with a gun that they would be executed. Franjo Kožul, who came and gave evidence to you, described in his witness statement seeing a man, an individual, carrying the head of a man who had been decapitated[147]. None of what is in his witness statement about what happened on the journey to the detention camps or at the detention camps was challenged. He was brought here to be questioned before this Court, and he was not challenged about any of that account, nor could he have been.

28. He, along with others, was then transported on to the detention camp at Stajićevo. The unchallenged evidence from him and others was that there the prisoners continued to be subjected to physical and psychological torture. They were deprived of food, abused, threatened, kicked and severely beaten with wooden sticks on the body and genitals. People were dying from the beatings. And there is plenty of evidence in the witness statements before you that it was no different in other camps[148].

29. These killings stopped, as is set out in the witness statement of Mr. Kožul, only when the ICRC came to the camp[149]. Only when the ICRC came to the camp. That might have prevented the intended destruction of an even larger part of the group than had already been killed. There was also political pressure. Stajićevo, which one of the ICRC officials described as the worst conditions he had ever seen at any camp except one in Bangladesh, had to be closed and the detainees were transferred. The witness, Mr. Kožul, was later released, like some of the other detainees on the list, through a prisoner exchange deal[150].

30. The *actus reus* for genocide, as we know, can be constituted by acts other than killing. Serious bodily and mental harm are sufficient if committed with genocidal intent. The opportunity was taken for those acts. The fact that the witness and some of the detainees on the list were released is not the test for genocide. There is no need to establish that the whole group was physically killed.

31. Again, Mr. Obradović's example proves the point he seeks to dispute.

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[147]MC, Ann. 114.

[148]MC, Anns.153, 155, 156, 157.

[149]MC, Ann. 114.

[150]MC, Ann. 114.

32. Mr. Obradović's third example is from the statement of a witness from Lovas[151]. At Lovas, the witness says, a group of wounded civilians were brought to the hospital in Sremska Mitrovica[152]. How can that be consistent with genocidal intent? Mr. Obradović asks of you.

33. Again, Mr. Obradović has pinpointed a selective, and telling, example. You have before you unchallenged evidence of what happened at Lovas both before and after the example he puts to you to demonstrate his case[153]. On 10 October 1991, Serb forces attacked Lovas with grenades and mortars. They entered the village shooting people in the street[154]. Croats were forced to mark their houses with white cloths[155] and tie white cloths around their arms[156], you will recall the pictures you have already seen. People were dragged from their basements and shot[157]. A week later, 17 October, all men between the ages of 17 and 50 remaining were rounded up. They were beaten with iron pipes until some of them fell unconscious[158], stabbed with bayonets, tortured and interrogated. On 18 October, eight days after the original entry, they were lined up two-by-two and forced to walk through a minefield. One witness describes mines going off and dead bodies lying all over, and Serb forces were firing at them[159].

34. Some of the wounded were loaded onto a truck and taken for treatment. But even this was not a simple humanitarian gesture, as Mr. Obradović would have you believe. On the road, the prisoners were constantly harassed by the Serb forces, told they were Ustashas and should be executed and not treated. Eventually they escaped through their own ingenuity[160]. Later, a number were imprisoned and their torture continued[161].

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[151]MC, Ann. 97.

[152]CR 2014/13, p. 67, para. 49 (Obradović).

[153]MC, Anns. 95-111, especially 98, 101, 102.

[154]MC, Ann. 98.

[155]MC, Ann. 97.

[156]MC, Ann. 98.

[157]MC, Ann. 98.

[158]MC, Ann. 98.

[159]MC, Ann. 98.

[160]MC, Ann. 98.

[161]MC, Ann. 97.

35. And as you know, subsequently scores of dead bodies were exhumed from a mass grave at Lovas[162]. The fact that the whole population was not *in fact* destroyed is not the test for genocide. Events at Lovas already establish the commission of genocidal acts with intent to destroy a group in whole or in part. If Mr. Obradović was trying to put an example before the Court of a place during this conflict where Croat victims were treated rather well and where genocidal acts were not committed, he could hardly have picked a worse example than Lovas.

36. The evidence of pattern and opportunity is compounded by the evidence of missing people, which of course is directly connected to the original acts, and gives rise to a continuing breach of Article II *(b)* of the Convention.

IV. Genocide against defenders

37. Mr. President, Members of the Court, at this point I will say a brief word about victims of the genocide who bore arms. This issue has not been mentioned at all by the Respondent, but it has been touched on in questions from the Court, so I address it for that purpose.

38. The Applicant's starting-point is that, as I explained on Tuesday, the underlying acts making out the *actus reus* of genocide must be unlawful[163]. In that regard, the Applicant notes that Article I of the Genocide Convention establishes that genocide is a crime "whether committed in time of peace or in time of war"; and records that, unlike under international humanitarian law, the law on genocide makes no distinction between the protection of civilians[164] and the protection of combatants.

39. That is sound as a matter of principle. To hold otherwise would be to create a "protection gap" whereby members of the group who attempted, however ineffectively, to defend their group against perpetrators of genocide could not be victims of genocide and would have no protection, legally, against it — as I say, a "protection gap". It would also have the unfortunate effect of implying that the deliberate destruction of an ethnic group is less objectionable in some circumstances than in others. It is not. Article II acts committed with the intent to destroy a group "as such" will be sufficient to meet the definition of genocide regardless of the status of the

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[162]MC, Ann. 168B.

[163]*Prosecutor* v. *Jean-Paul Akayesu*, ICTR Trial Judgement, paras. 501, 589.

[164]Cf. e.g., ICTY Statute, Art. 5; *Mrkšić*, ICTY Trial Judgement, para. 463.

victims. In this case, the precise classification of each victim of the genocidal acts makes no difference.

40. The Applicant's case is that the genocidal intent of the Serbian leadership is made out in relation to the group or groups of Croats living in the areas claimed as "Greater Serbia"[165]. Those groups were mainly civilian, but included those who bore arms.

41. The Applicant submits that there was no legitimate armed conflict in the areas in question, in 1991 and 1992. Rather, there was a widespread and systematic attack against the Croat group or groups living in those areas. That submission by the Applicant is entirely consistent with the multiple rulings of the ICTY. In *Stanišić and Simatović*, the Trial Chamber held that there was a widespread attack directed at Croats in the SAO Krajina and SAO SBWS[166]. In *Mrkšić*, in relation to Vukovar, the Trial Chamber found that there was "a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area" which was indiscriminate and contrary to international law[167].

42. The Applicant has given example after example of villages that were indiscriminately and disproportionately attacked by Serb forces despite containing no military targets, in clear violation of international humanitarian law[168]. The task of those defending the villages — a task that they ascribed to themselves — was to ward off or resist the Serb forces. Invariably, and inevitably, resistance was short-lived.

43. Killings of civilian defenders in each of those villages were carried out in furtherance of unlawful attacks and were not justified under international humanitarian law. Those killings, like the killings of civilians who had not taken up arms, were unlawful acts.

44. Accordingly, unlawful killing or unlawful harm is made out in relation to both civilians and civilian defenders in those villages. Combined with genocidal intent, that is sufficient to meet the definition of genocide in Article II.

45. I now turn to failure to prevent genocide.

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[165]CR 2014/12, p. 19, para. 27 (Starmer).

[166]*Stanišić and Simatović*, paras. 971-972.

[167]*Mrkšić*, para. 472.

[168]Additional Protocol I to the Geneva Conventions, Arts. 51 (4) *(a)*, 51 (5) *(b)*, 57.

V. Failure to prevent

46. In the first round, Croatia showed that the Respondent failed to prevent genocide committed by paramilitaries against ethnic Croats on the basis that the military capabilities of the JNA far outweighed those of the paramilitary groups[169] and that the Respondent knew, or should have known, that there was a serious risk that genocide would be committed or was being committed against Croats by paramilitaries, including the "uncontrolled genocide" being committed by volunteer troops under the command of Arkan in the greater area of Vukovar[170].

47. You will recall that Professor Sands took you to a Military Intelligence Report of 13 October 1991 which referred explicitly to the "uncontrolled genocide" committed by Arkan. If you accept Croatia's case that genocidal acts were committed by Arkan's Tigers in Vukovar, the identification of Arkan's activities in this way clearly meets the threshold test by the Court set in *Bosnia* that, where a State learns of a serious risk that genocide will be committed. And you have on your screens, the threshold and duty: ***~~[plate on]~~***

> "From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is [and I probably should have underlined this] under a duty to make such use of these means as the circumstances permit."[171]

So there is the clear articulation of the test in the *Bosnia* case, and the duty. And I will leave that, if I may, on your screens just for a few moments, because I want to contrast it with the next plate.

48. Croatia has presented extensive evidence of genocidal acts committed by paramilitaries in circumstances where, frankly, it is simply not credible to argue that the JNA command did not know these actions were being or were likely to be committed. *That* is not credible and, to a large extent, the Respondent does not make that case. It is unarguable that the JNA did not know what the paramilitaries were up to.

49. Accordingly, Respondent has not put any evidence before you that any steps were taken to deter the continuation of the genocidal activities — where is the schedule of evidence, before

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[169] CR 2014/6, p. 25, para. 42 (Sands).

[170] *Ibid.*, para. 43 (Sands).

[171] *Bosnia*, para. 431.

this Court, of the action taken to deal with the known acts of the paramilitaries; it is missing; it is not there.

50. The Respondent has advanced a very limp alternative case — a *very* limp alternative case. It seeks to persuade you that the JNA had no control over the paramilitaries. Not that they were not doing it, but that the JNA had no control. This flies, of course, in the face of clear ICTY findings — not that that seems to trouble the Respondent in this particular case.

51. The Respondent, in fact, addressed the issue of failure to prevent genocide fleetingly. Mr. Ignjatović addressed the duty to prevent it literally in a couple of brief general remarks[172] in which he asserted that having demonstrated that neither genocide nor any other act prohibited by the Convention had been committed, the Respondent had not violated its obligation to prevent genocide and also that the issue does not arise as the events in question occurred before 27 April 1992. Those were the two short submissions at that point. The way in which he addressed the issue of whether the JNA exercised control over the paramilitary units, however, reveals a fundamental weakness in the Respondent's case.

52. Without referring to the Military Intelligence Report dated 13 October 1991 — the report that records uncontrolled genocide by Arkan — Mr. Ignjatović referred to a military order adopted just two days later, on 15 October 1991, and you saw that in the previous presentation[173]. The order provided that volunteer and paramilitary units either accept the JNA command or — and the *or* is really important — be disarmed and removed from the field. And whatever the evidence is up until *before* that point, it is clear that the position being taken by mid-October is: *either* come under the command, assume command, *or* they must be disarmed and removed from the field.

53. So here we have the Respondent setting out for itself what needs to be done. This order was presented as being issued, curiously, as "due to the emerging problems, with a goal of regulating life, work, order and discipline"[174].

54. Mr. Ignjatović then asserted that the order, together with the one issued in December, which he also showed you: "clearly demonstrates that during the 1991 conflict JNA did not control

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[172]CR 2014/16, pp. 21-22, paras. 104-106 (Ignjatović).

[173]CR 2014/5, pp. 54-55, para. 35 (Crawford).

[174]CR 2014/16, p. 48, para. 60 (Ignjatović).

paramilitary formations"[175]. So that single sentence is the Respondent's defence on the case of failure to prevent. Not that the paramilitaries were not engaging in atrocities, not that they did not know about them, but that they did not have control over them.

55. We say that those orders prove nothing of the kind and at this point I am going to ask you please, just to look again, one last lingering look at the plate that is already on your screen, when you know that genocide is or may be about to be committed, from that moment, what must the State do? If it has available to it the means of doing something, it is under a duty to make such use of those means at the circumstances permit. So there is the duty. ~~***[Plate off]***~~

56. The next plate I am going to put up is the finding of the ICTY in the *Mrkšić* case: ~~***[Plate on]***~~

> "in the final analysis the JNA under the command of Mile Mrkšić not only had *de jure* authority as identified above, but also had the manpower, armament and organisation to exercise effective *de facto* control over all TO and volunteer or paramilitary units in the zone of responsibility of OG South"[176].

Now, I know you have seen this plate before, I apologize for putting it up again but you only have to see these two plates, back-to-back, to see just how compelling the Applicant's argument of failure to prevent is. The duty is clear, the ICTY has heard the evidence and come to this strong ruling. How can it be seriously argued by the Respondent that it is not responsible for the acts of the paramilitaries because they were not under their control or, alternatively, that it could not control them? Or is this yet another finding that is just to be put on one side? [Plate off]

57. In an attempt to undermine that clear finding in the *Mrkšić* case, the Respondent refers to a number of instances of conflicts or stand-offs between the JNA and paramilitary forces but can it really be suggested that those few instances are capable of establishing that the JNA could not have acted to control the paramilitaries if the commanders had so decided? The ICTY Trial Chamber did not think so and nor do we. My colleague Ms Ní Ghrálaigh has already addressed the issue of JNA command and control over the paramilitaries, but let us consider the implications of this clear ICTY finding in the context of the duty to prevent genocide.

58. The evidence before you establishes that: ~~***[plate on]***~~

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[175]CR 2014/16, p. 11, para. 63 (Ignjatović).

[176]*Mrkšić* Trial Judgement, para. 89, cited at CR 2014/5, p. 55, para. 36.

(a) Serb paramilitary units were involved in genocidal acts against ethnic Croats throughout the conflict; ~~*[next graphic]*~~

(b) on 13 October 1991, JNA military intelligence had specifically reported that Arkan was committing uncontrolled genocide in the Vukovar area; ~~*[next graphic]*~~

(c) on 15 October 1991, a JNA order was adopted which required that all units establish "full control" within their respective zones of responsibility. Pursuant to this order, paramilitary units which refused to submit themselves under the command of the JNA were to be removed from the territory. Where is the evidence of that?; ~~*[next graphic]*~~

(d) it follows that genocidal acts committed at the very least after 15 October 1991 were either committed under the full control of the JNA or were committed outside its control in defiance of the order in circumstances where, as the ICTY has found, the JNA was in a position to exercise *de facto* control over paramilitary units; ~~*[next graphic]*~~

(e) there is no reason to suppose the position was any different in the other areas controlled by the JNA; ~~*[next graphic]*~~

(f) and, on any view, the JNA did not take the measures available to it to prevent the genocidal acts committed by the paramilitary units and thus violated its duty under Article I of the Genocide Convention. ~~*[Plate off]*~~

59. I will finish by referring to a couple of striking examples of acts committed by paramilitary units in circumstances where the JNA was clearly aware of their activities, having already shelled and encircled the villages in question. You will recall that in the first round Ms Ní Ghrálaigh described **"**phase 3**"** of the pattern of attacks as the occupation of villages by paramilitaries and other Serb forces[177]. One example she referred the Court to was the village of Bogdanovci, where paramilitaries massacred all or almost all of the Croats remaining in the village[178]. In Erdut, Arkan ran a prison in the training centre, where Croats were brutally mistreated and murdered[179].

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[177]CR 2014/8, para. 61 *et seq.* (Ní Ghrálaigh).

[178]CR 2014/8, para. 62 (Ní Ghrálaigh).

[179]CR 2014/8, para. 68 (Ní Ghrálaigh).

60. In relation to Vukovar, you will recall what I described as "phase 4" of the attack during which the withdrawal of the JNA, who had control of the prisoners, provided Serb paramilitaries with the opportunity to murder and attack them arriving at Velepromet[180]. And I just pause again with that example. This is after October, after the order, and it was the JNA who took the men to Velepromet and Ovčara. They took them there; then the paramilitaries executed them. How did that happen? This was a month after that order was issued. How did they find themselves passing this group of men over to the paramilitaries in those circumstances? They had them in their buses. It is not as if the paramilitaries had got to a village first with the JNA coming up fast behind trying to stop what was happening. They had them on the buses. They passed them over[181].

61. In all these cases, and many others, we say that the JNA could have acted to prevent genocide but did not do so.

VI. Conclusion

62. So, Mr. President and Members of the Court, I return to where I started:

(a) the Respondent has not disputed the 17 factors evidencing intent — the height of the challenge was Professor Schabas asking whether hate speech alone made out genocide;

(b) the evidence of strong patterns of conduct remains intact, bolstered as it is by the findings of the ICTY;

(c) the Respondent's attempt to identify three examples where an opportunity not to commit genocide arose have backfired spectacularly;

(d) the fact that some victims took up arms to defend their villages and families is irrelevant to the issues before this Court;

(e) the case put by the Applicant that the Respondent failed to prevent genocide has in fact been strengthened not weakened by the Respondent's submissions.

63. Mr. President, Members of the Court, thank you for your kind attention. Can I now invite you now to call on Professor Crawford who will deal with jurisdiction and attribution, unless this Court feels that it would be better to start that substantive submission tomorrow morning.

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[180]CR 2014/8, para. 57 (Starmer).

[181]CR 2014/8, paras. 68, 73 (Starmer).

The PRESIDENT: Thank you very much, Sir Keir Starmer. As we still have some 20 minutes and Professor Crawford is to address two questions, two issues, we can perhaps start today. I give him the floor.

Mr. CRAWFORD:

JURISDICTION OVER AND ATTRIBUTION OF CONDUCT TO SERBIA (TO BE CONTINUED)

I. Introduction

1. Thank you Mr. President. Mr. President, Members of the Court, Croatia has argued that the Genocide Convention applied continuously in what this Court has on multiple occasions described as "a *sui generis*" situation[182], the dissolution of the SFRY and the emergence on its territory of five states amidst great violence and disorder. Serbia argues that a Yugoslav Republic, claiming continuity with the SFRY, was nonetheless not bound by the Convention but was, from a treaty point of view, free to commit genocide. There was, notwithstanding the FRY's assumption of continuity and its continuous statements in that regard, an inevitable discontinuity — a discontinuity in the law by operation of the law. Serbia is thus not responsible for its own conduct, nor did it succeed to any responsibility of the SFRY under the Convention.

2. Let me illustrate the discontinuity problem with a parable. Assume that on 6 January 1992, Milošević, President of Serbia (not, it should be stressed, President of the Presidency of the SFRY, which is now all but defunct) finally gets his unfettered hands on the JNA; he becomes its "absolute commander". Serbia recited to you the statement of General Kadijević to that effect[183]. Milošević continues and intensifies the genocidal campaign across Croatia. Croatia immediately starts proceedings before this Court against the SFRY. The Milošević Government appears, claiming to represent the SFRY, bound — unquestionably — by the Genocide Convention, including its Article IX. Then there is the proclamation of the FRY on

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[182]E.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 427, para. 49; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 71.

[183]General Kadijević, interview, 2007, http://www.novinar.de/2007/10/07/kadijevic-odbio-sam-vojni-puc.html, quoted in CR 2014/15, p. 41, para. 33 (Lukić).

27 April 1992. The Agent of the SFRY writes to the Registrar asking that the change of the Respondent's name be recorded. But Croatia, opposing the claim of the FRY to continue the legal personality of the SFRY, commences new proceedings on the same claim against the FRY. You join the two cases on the ground that they involve exactly the same claim. Ten years later the merits come on for hearing, the FRY by now having been admitted to the United Nations. Professors Zimmermann and Tams appear respectively for the SFRY and the FRY. Professor Zimmermann, speaking for the SFRY, says the case cannot proceed against his client, which since 27 April 1992 no longer exists. (The Court is too polite to ask him who is paying him: perhaps he is acting *pro bono*!) Anyway, he says, the genocide was not committed by the SFRY but avowedly by the FRY. For his part, Professor Tams says that the case cannot proceed against his client — even though the admitted genocide was committed by FRY officials — because the FRY did not exist at the time, the Genocide Convention is not retrospective, and the FRY was not then bound by the Convention. Anyway, he says, the genocide was not attributable to the FRY because ILC Article 10 (2) is, or then was, not the law. Their logic is devastating, and the Court capitulates. Judgment for the Respondent, or the Respondents, as the case may be!

3. Note that in this hypothetical situation, precisely the same people acting in precisely the same capacities did precisely the same thing — they committed genocide, a universal crime. But not, unfortunately, universal when States are being formed and reformed — at least, not according to Serbia. The arguments I have summarized — as made by the good professors last Tuesday — would have precisely this consequence and I challenge them to point otherwise.

4. Mr. President, Members of the Court, if this is the law, then the law is an ass. But it is not the law, as I will again show. In a situation of dissolution where new States gradually emerge and become parties to the Convention on a territory where it previously applied, there is no temporal gap in protection. International law looks to the reality of the situation. If Serbia were granted impunity in respect of this period when it was *in statu nascendi*, that would create a time gap in the otherwise-continuous application of the Convention, and such a time gap would be incompatible with the object and purpose of the Convention.

5. In this context it should be noted that Article IX refers to the "responsibility of a State", not just of a Contracting Party. The drafters of the Convention opted to use the word "State" rather

than "Contracting Party" in Articles VI and IX. There could be a dispute between Croatia and Serbia as to whether the SFRY had committed genocide: consequences for the obligations of Serbia could arise from such a conclusion — including, for example, obligations to punish and to provide information about disappeared persons — and so it would not merely be a historical controversy with no legal consequences. Nor would the monetary gold principle be applicable in such a case. The monetary gold principle does not protect defunct States. Yet none of the objections made by Serbia would apply in such a case. Can Serbia object to the jurisdiction on the ground that the genocide was committed *by Serbia*? Obviously not!

II. Jurisdiction over events before 27 April 1992

6. Mr. President, Members of the Court, in proceedings under Article IX, there are only three preliminary questions. One: did the Convention apply at the relevant time and place? Answer: yes. Two: was Article IX in force for the Applicant and Respondent at the time when the proceedings were commenced. Answer: yes. Three: are the acts of genocide attributable to the Respondent? Answer: yes. These three questions being answered in the affirmative, international law imposes no barrier to a finding of responsibility, neither the terms of the Convention itself, nor general international law. Any "logic" which leads to any other conclusion is spurious, as my parable shows.

7. Serbia has said nothing in answer to Croatia's argument that this is a situation of continuity. It did not use the word "continuity" even once during its submissions on jurisdiction[184]. Instead Serbia presents Croatia as taking the view that the Convention applies "retroactively". That characterization ignores the *sui generis* character of these circumstances of State dissolution.

8. It should be noted, however, that in light of its object and purpose, there is good support for the view that the Convention does apply retroactively. Professor Schabas, to take only an example of the present commentators, concludes in a 2010 article that "the general rule for treaties dealing with international criminal liability for atrocity crimes actually seems to favor retrospective application"[185]. [Screen on] He notes that when the Convention was adopted, there were three

[184]CR 2014/14.

[185]W. Schabas, "Retroactive application of the Genocide Convention", *University of St Thomas Journal of Law and Public Policy*, Vol. 4 (2), spring 2010, pp. 36 and 41.

international instruments defining atrocity crimes, and all three provided expressly or impliedly for retrospective effect: the Treaty of Versailles, the Treaty of Sèvres, and the Charter of the International Military Tribunal. He concludes, from this and other evidence:

> "with respect to this specialized area of international law, the exception would seem to be the rule; that is, treaties are retroactive absent some evidence of a clear intention to the contrary. Accordingly, the argument that the Convention applies retroactively should not be so cavalierly dismissed. There is at least an arguable case for retroactive application, based upon treaty practice."[186] [Screen off]

9. Professor Schabas analyses, in particular, whether the Convention is "applicable to acts that took place prior to its ratification, to the extent that there is an ongoing or prospective procedural obligation to investigate and punish acts of genocide"[187]. He notes that many States have incorporated the crime of genocide into domestic legislation, often with retroactive effect, and that this State practice "probably confirms" the existence of a positive obligation to investigate and prosecute crimes of genocide, extending to genocide "*committed prior to 1951*" — that is, even before the Convention itself came into existence[188]. That logic must apply at least equally to obligations under the Convention that relate to members of a group who have disappeared in the course of genocidal actions.

10. For the removal of doubt, the question in this case is *not* whether the temporal scope of the Convention extends to events before 1951, such as the Holocaust or atrocities during the colonial period, the genocide of the Harero, for example. On Croatia's case it is not necessary to find — although it may well be the case — that the Convention has full retroactive effect. It is nonetheless worth emphasizing that according to Serbia, Adolf Eichmann could, consistently with the Convention, be given public asylum by a State party because it is not retroactive in any respect. Lord, let us not tolerate genocide, but only in future.

11. Serbia's argument about retroactivity is an attempt to obscure the more limited question which is actually before you. If the State practice considered by Professor Schabas in his article confirms that the Convention generally, and the obligation to punish in particular, apply to acts of genocide whenever occurring, if it would really be "cavalier" to dismiss that view, then it would be

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[186] W. Schabas, "Retroactive application of the Genocide Convention", p. 42.

[187] *Ibid.*, p. 40.

[188] *Ibid.*, p. 41; emphasis added.

even more cavalier to dismiss the more limited proposition that Croatia actually advances. That is the proposition that the Convention applies continuously — that it does not somehow cease to apply — that people are not absolved in a situation of dissolution where new States gradually emerge and become parties to the Convention on the territory where the Convention has applied. Mr. President, Members of the Court, that would be an appropriate moment to break.

The PRESIDENT: Thank you, Professor Crawford. Before adjourning, I will give the floor to Judge Greenwood who would like to ask a question. Judge Greenwood, you have the floor, please.

Judge GREENWOOD: Thank you very much, President. My question is to Croatia and it concerns only the unsigned witness statements that were attached to the Croatian Memorial. I have read what was said about those in the Croatian Reply, Chapter 2. But I would like clarification of this point:

> "Would statements of that kind be admissible in proceedings in the courts of Croatia, and would they have been admissible in such proceedings at the time that the statements were taken?"

The PRESIDENT: Thank you very much. The text of the question will be sent to the Parties as soon as possible. As it is a legal question, Croatia is invited to provide the answer tomorrow during the morning's sitting, and certainly Serbia will have the opportunity to comment, if it wishes, on the answer. The Court will meet again tomorrow at 10 a.m. to hear, as I now understand, most likely the conclusion of Croatia's second round of oral argument on its own claims. Thank you. The Court is adjourned.

The Court rose at 1 p.m.