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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Friday 21 March 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le vendredi 21 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 and I invite Professor Crawford to continue in his pleading which he started yesterday. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President. Yesterday I outlined our real case in relation to the temporal aspects of the Convention and illustrated some of the difficulties of Serbia's case.

12. I turn now to the arguments Serbia has raised that the Convention is incapable of having effect before its entry into force for the Parties to this case, even in the situation of gradual dissolution. In doing so it is necessary to distinguish between the application of the Convention as such — that is, its substantive provisions — and the application of the dispute settlement provision, Article IX.

(1) The substantive application of the Genocide Convention

13. I turn to the substantive application of the Convention. This is the first and most important question at stake since, as I will demonstrate, if the Convention applied substantively for that date in relation to the Parties, there is very little difficulty in applying Article IX.

14. Professor Zimmermann claimed that you have already decided, at the preliminary objections stage, that Serbia "only" became bound by the Convention "*as of April 1992*"[1]. The word "only" was an addition by Professor Zimmermann. Of course, if you had said "only" that would have ended the question. But you did not. You decided that Serbia became bound by the Convention "from that date onwards"[2], but you expressly left open, for consideration at the merits stage, the question of "the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992"[3].

15. Turning to that question, let me first analyse the position that the FRY itself took at the time. [Screen on] The best evidence is its own Declaration of 27 April 1992 in which it said as follows:

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[1]CR 2014/14, p. 14, para. 26 (Zimmermann).

[2]*Croatia*, p. 454, para. 117.

[3]*Croatia*, p. 460, para. 129.

> "The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally."[4]

16. In its official note to the United Nations on the same date, it said: [Next slide]

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia."[5]

Now it is true that in some respects that proclamation was falsified by events. But it was operative at the time, and at the time Serbia relied on it and was accepted for various purposes including as a litigant before this Court.

17. You previously concluded that the FRY was bound "in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution"[6]. But in fact the two documents of April 1992 are framed in even wider terms. They refer to "*all* the . . . obligations assumed by" the SFRY, "*including* its . . . participation in international treaties". It is obvious that the FRY itself took the position that the substantive obligations of the Genocide Convention, like all other obligations assumed by the SFRY, continued to apply without any kind of temporal break. The phrase "obligations . . . in international relations" is wide enough to cover secondary obligations of responsibility, a matter to which I will return. This is the FRY. [Screen off]

18. Mr. President, Members of the Court, as a matter of principle, the continued substantive application of the Genocide Convention should not be conditioned on proof of recognition or acquiescence by a successor State. It is true that the Convention can be denounced every ten years with six months' notice under Article XIV. But no State has ever denounced it, and a successor State should be presumed not to have done so, or to have performed acts having equivalent effect, tacitly. In fact, at relevant times Serbia never expressed any attitude other than continuity: "all the . . . obligations assumed by the Socialist Federal Republic of Yugoslavia in international

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[4]Joint Declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 Apr. 1992, UN doc. A/46/915, Ann. II.

[5]Note to the United Nations addressed to the Secretary-General, 27 Apr. 1992, UN doc. A/46/915, Ann. I.

[6]*Croatia*, pp. 454–455, para. 117.

relations, including . . . participation in international treaties ratified or acceded to by Yugoslavia"[7]. It cannot be more explicit than that.

19. More fundamentally, however, the Genocide Convention is not just a promise by existing States to do or not to do something; it is a *recognition* by the international community of States as a whole that genocide is not only a crime of individuals but also a fundamentally illegal act by whomever committed. You saw this point in *Bosnia*, when you implied into the Convention an obligation of States not themselves to commit genocide[8]. On this basis, Serbians, including Serbian officials, could not have been freed to commit genocide contrary to the Convention merely because of some equivocation as to its continued application. But there was no such equivocation.

20. But the point is more fundamental still, another layer. The international community of States is not a *numerus clausus*. It is not limited to the States that happen to exist at a given time. When the international community of States — in the white heat of a post-Holocaust world — at the same time defines and declares certain conduct to be already criminal, contrary to the moral law — how often has the General Assembly referred to the moral law? — it is not for this Court — I say this with all due respect — to act as a moral sceptic. The object and purpose of the Convention is too important for that. For example, would Srebrenica have been lawful under the Convention, or not unlawful, if it had happened earlier, before Bosnia and Herzegovina had been established or admitted to the United Nations? Could this Court really incite the Miloševićes of this world to early genocidal action, in the context of dissolving States? Perish the thought, as we look around the world today.

(2) The application of Article IX of the Genocide Convention

21. I turn then to the application of Article IX of the Convention. On the assumption that the substantive provisions of the Convention were in force for all public and private entities located in the SFRY in 1991 and early 1992 — and who can gainsay that? — the argument that Article IX should be interpreted as applying to acts of responsibility then arising is a straightforward one. The only temporal requirement expressed in Article IX is that there be a dispute "between the

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[7]Note to the United Nations addressed to the Secretary-General, 27 Apr. 1992, UN doc. A/46/915, Ann. I.

[8]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 616, para. 32.

Contracting Parties relating to the interpretation, application or fulfilment" of the Convention. The natural interpretation of these words is that they impose two and only two requirements: the dispute should at the time of its submission to the Court be a dispute between Contracting Parties, and the dispute should meet the description in Article IX. There is no warrant for reading into Article IX additional requirements such as that the applicant State must have been in existence as such at the time the genocide was committed. Serbian counsel relied on a dictum of Judge Fitzmaurice in *Northern Cameroons* as authority for that proposition[9], but the Court decided the case on quite different grounds[10]. On the Fitzmaurice view a State could not complain of events directly affecting it prior to its creation — the genocide of its own people during the struggle for independence, for example. Such a finding would be entirely gratuitous, and it would be contrary to your decision in the *Phosphate Lands in Nauru* case[11] — the first time I stood at this Bar, I might say. The "tabulated legalism" of a Fitzmaurice is a fundamentally unsatisfactory way of looking at obligations *erga omnes*, as you effectively admitted in *Barcelona Traction*[12] — an admission made at the first opportunity after the Fitzmaurice-inspired debacle of second *South-West Africa*[13].

22. I was criticized by counsel for citing *Mavrommatis* for the principle that "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to [the Court] after its establishment"[14]. You were told that the case depended on the words of the specific treaty in question and did not stand for any general proposition[15]. But the principle is well-established and is not unique to *Mavrommatis*. I might have taken you, for example, to *Phosphates in Morocco*, where the Permanent Court found that a limitation *ratione temporis* had been inserted

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[9]*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963;* separate opinion of Judge Sir Gerald Fitzmaurice, p. 129.

[10]*Northern Cameroons*, p. 32, analysed in J. Crawford, *The Creation of States in International Law*, 2nd ed., 2006, pp. 584–585, 596–597.

[11]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

[12]*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32.

[13]*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 47.

[14]CR 2014/14, p. 36, paras. 51–52 (Tams), referring to *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35.

[15]CR 2014/14, p. 36, para. 53 (Tams).

into a treaty "with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects"[16]. In other words, it was assumed by the Court that it would have had jurisdiction but for a limitation on jurisdiction expressly inserted into the relevant text.

23. I previously observed that the principle is recognized in the literature, for example by no lesser authority than Rosenne[17]. Paul Tavernier, citing both *Mavrommatis* and *Phosphates in Morocco*, puts it thus: "une limitation *ratione temporis* devra être expressément prévue dans l'acte attributive de compétence et elle sera interprétée restrictivement"[18]. He adds: "[l]'arrêt *Mavrommatis* a donc énoncé une règle juste à notre avis, car il faut bien distinguer les problèmes de fond des problèmes de procédure"[19], in which he includes jurisdiction; problems of substance must be distinguished from problems of procedure. There is no contradiction between this principle and the principle of non-retroactivity recognized in Article 28 of the Vienna Convention. Under Article 36, paragraphs 2 to 3, of the Statute of the Court, a State can accept your jurisdiction compulsorily, and can do so "unconditionally or on condition of reciprocity . . . or for a certain time". There is no inference of non-retroactivity of the scope of any obligation to accept the Court's jurisdiction when the title of jurisdiction is silent on the point[20].

24. Professor Tams then told you that the principle no longer applies[21]. That is not so. The *Mavrommatis* principle finds expression in your decision in *Bosnia* that "the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*", and you held that you had jurisdiction to give effect to Article IX "with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina", and that that was "in accordance with the object and purpose of the Convention as defined by the Court in

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[16]*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24.

[17]S. Rosenne, *The Law and Practice of the International Court 1920–2005*, Vol. II (Jurisdiction), 4th ed., Brill, 2006, pp. 915 ff., cited in CR 2014/12, p. 47, para. 28 (Crawford).

[18]P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public*, Paris: LGDJ, 1970, pp. 217–218.

[19]*Ibid.*, p. 218.

[20]E. Bjorge, "Right for the wrong reasons: *Šilih* v *Slovenia* and jurisdiction *ratione temporis* in the European Court of Human Rights", *The British Yearbook of International Law (BYIL)*, 2013, Vol. 83 115, pp. 123–124.

[21]CR 2014/14, pp. 36–37, para. 54 (Tams).

1951"[22]. This was despite Serbia's arguments in that case based on non-retroactivity. Eirik Bjorge has described *Bosnia* as "an application of the rule relating to jurisdictional clauses enunciated in *Mavrommatis*"[23]. True, you later clarified that you were not addressing whether the relevant facts "included facts occurring prior to the coming into existence of the FRY"[24]. But it does not detract from the general principle underlying your *Bosnia* decision and articulated in *Mavrommatis*: "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to [you] after its establishment"[25]. The principle applies here.

25. As proof that the Court has — as he put it — "overruled" *Mavrommatis*, Professor Tams directed you to *Georgia* v. *Russia*[26]. But that case did not deal with the point.

26. Professor Tams told you that Georgia "[sought] to rely on facts pre-dating 1999", the time when it became bound by the Convention on the Elimination of Racial Discrimination (CERD)[27]. But the context of the passage he cited was quite specific. Russia had objected to jurisdiction on the ground that "there was no dispute between the parties regarding the interpretation or application of CERD at the date Georgia filed its Application"[28]. Now that objection, if sustained, would have been fatal. In the passage cited, Georgia was invoking evidence from before 1999, not to refute this objection directly, but in order to establish that the dispute was "long-standing and legitimate and not of recent invention"[29]. What you held is that Georgia had not cited evidence from before 1999 establishing that point. You added that even if it had, that "dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction"[30].

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[22]*Bosnia*, p. 617, para. 34.

[23]E. Bjorge, "Right for the wrong reasons: *Šilih v Slovenia* and jurisdiction *ratione temporis* in the European Court of Human Rights", *BYIL*, 2013, Vol. 83 115, p. 126.

[24]*Croatia*, p. 458, para. 123.

[25]*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35.

[26]CR 2014/14, p. 36, para. 54 (Tams).

[27]CR 2014/14, p. 37, para. 54 (Tams).

[28]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 22.

[29]*Georgia* v. *Russia*, p. 86, para. 34 and p. 94, para. 50.

[30]*Ibid.*, p. 100, para. 64.

27. If Professor Tams had extracted from this passage a principle that States cannot be in "dispute" under a treaty while it is not in force between them, that might have been arguable — although I have already said that in any case the declaratory character of the Genocide Convention should lead to a different result. But he relies on the passage for a different proposition. He claims that you made it "very clear" that "both parties had to be bound by CERD when the disputed conduct took place — *and not, as Croatia argues, when the case was brought*"[31]. But you did not say that in *Georgia* v. *Russia*, or anything that could be construed to being to that effect. On the contrary, you said at the beginning of your discussion that "[t]he dispute must in principle exist at the time the Application is submitted to the Court"[32]. That is with respect, absolutely correct, and that requirement is fulfilled here.

28. It is not in doubt that there was a "dispute" at the time Croatia filed its Application. Nor can the distinction between treaty and customary international law take Serbia anywhere. Croatia has referred to the customary prohibition of genocide to establish the object and purpose of the Convention and the temporal scope of the substantive obligations contained in it. But Croatia's submission is that the Convention applies in this case. The passage from *Georgia* v. *Russia* about the existence and characterization of the "dispute" at the time the Application was filed is irrelevant to this question.

29. Russia made a separate objection in *Georgia* v. *Russia* that "any jurisdiction the Court might have is limited *ratione temporis* to the events [that] occurred after the entry into force of CERD as between the parties"[33]. That objection is much more comparable to the point at issue here. But you found that having upheld one of Russia's objections, you were not required to consider that further objection[34]. So it is something of a stretch to present your argument as having "overruled" *Mavrommatis*[35], on a point which you expressly and unambiguously declined to consider.

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[31]CR 2014/14, p. 37, para. 55 (Tams).

[32]*Georgia* v. *Russia*, p. 85, para. 30.

[33]*Ibid.*, p. 81, para. 22.

[34]*Ibid.*, p. 140, para. 185.

[35]CR 2014/14, p. 36, para. 54 (Tams).

30. *Georgia* v. *Russia* was also cited for a further proposition. Professor Zimmermann — on this occasion appearing *with* Professor Tams, and not in parallel — observed that the possibility of automatic succession was not "even argued" or "even consider[ed]" in the case. He then concludes that you "rejected" it[36]. Mr. President, Members of the Court, if *Georgia* v. *Russia* is taken as an authority against every proposition that was neither argued nor considered, you do not really have to consider any more cases; the development of your jurisprudence is complete! But such an argument would have the effect of crippling humanitarian treaties in relation to situations of conflict and dissolution, and of doing so at a time of ethnic violence. I cannot believe that this effect is desired, it is certainly not desirable: it would sideline the Court and would make it less rather than more relevant in our unstable world.

31. The other case heavily relied on by Serbia was *Belgium* v. *Senegal*. They said I did not refer to it, I think on at least five occasions. Several passages were cited. The first, once again, deals with the analytically distinct question of whether there was a "dispute" at the time the Application was filed[37]. All you observe in this passage is that at the time Belgium filed its Application, there was no dispute concerning a particular customary obligation that Senegal allegedly breached, as distinct from obligations under the Convention against Torture[38]. Serbia cites this for the rather banal proposition that the issue of whether a customary obligation exists is distinct from compliance with a treaty obligation. The passage has no other relevance for our case.

32. Professor Zimmermann told you that *Belgium* v. *Senegal* also supports the proposition that Croatia has no standing to request the Court to rule on Serbia's compliance with obligations before Croatia came into existence[39]. But again the passage has been quoted out of context. What Senegal actually argued was that the obligation at issue "belongs to 'the category of divisible *erga omnes* obligations', in that only the injured State could call for its breach to be sanctioned"[40]. The obligations in the Genocide Convention — notably the obligation not to commit genocide — are

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[36]CR 2014/14, pp. 20–21, para. 58 (Zimmermann).

[37]CR 2014/14, p. 16, para. 35 (Zimmermann).

[38]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 445, para. 54.

[39]CR 2014/14, pp. 66–67, paras. 91–95 (Zimmermann).

[40]*Belgium* v. *Senegal*, p. 458, para. 103.

not "divisible" *erga omnes* obligations. Genocide is not relative to any individual State — it is relevant, but not relative. Moreover, you went on to note that Belgium had standing from the date it became party to the Convention, in 1999, and that it had invoked Senegal's responsibility "starting in the year 2000", so again, it can hardly be said that you decided the point[41].

33. Finally, counsel referred you to *Belgium* v. *Senegal* for your analysis of the temporal scope of Article 7 (1) of the Convention against Torture[42]. That provision requires States to prosecute or extradite certain offenders. Article 7 (1) is not about the compromissory clause. It has nothing to do with the presumption, in *Mavrommatis*, that jurisdiction under a compromissory clause embraces all disputes referred to the Court after its establishment. Secondly, you distinguish the obligation to prosecute or extradite from the prohibition of torture used itself. You say that "the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*". You say this apparently by way of contrast with the obligation to prosecute or extradite which, you conclude by reference to Article 28 of the Vienna Convention, "applies only to facts having occurred after its entry into force for the State concerned"[43]. Your discussion was not directed to the temporal scope of the prohibition of torture per se.

34. So even taken at its highest, the discussion in *Belgium* v. *Senegal* is relevant only to the one specific jurisdictional issue: the temporal scope of substantive obligations analogous to the obligation to prosecute or extradite under the Convention against Torture.

35. That analogy is not apposite here. We should look at the approach of the European Court of Human Rights, despite the well-established proposition that the Convention as such is only prospective in effect. In *Šilih* v. *Slovenia*, the question was whether the Convention could apply to facts occurring before Slovenia acceded to it. The obligation at issue was analogous to the obligation to punish under the Genocide Convention, or the obligation to extradite under the Torture Convention. [Screen on] The Court held:

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[41] *Belgium* v. *Senegal*, p. 458, para. 104.

[42] CR 2014/14, p. 16, paras. 36–38; p. 18, paras. 46–49 (Zimmerman); p. 25, para. 14, pp. 27–28, paras. 23–24, p. 33, paras 38–40 (Tams).

[43] *Belgium* v. *Senegal*, p. 457, para. 100.

> "that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent 'interference' within the meaning of the *Blečič* judgment . . . In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."[44]

That is in respect of ***a*** prospective Convention. [Screen off]

36. Let me leave analogies aside and quote Article I of the Genocide Convention: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." They *confirm* that it is a crime; they undertake to punish it. General Assembly resolution 96 (I) similarly "*affirm*[*ed*] that genocide *is* a crime under international law"[45]. The confirmatory, declaratory expression of the Convention, unique in this respect among modern treaties, the expression of a potent and widely held moral outrage at past events, are powerful indications that the Convention lacks the temporal limitations found in other treaties. This was not the case with CERD, which was at issue in *Georgia* v. *Russia*. Nor was it the case with the Convention against Torture, at issue in *Belgium* v. *Senegal*. Previous to the Convention against Torture a single act of State torture would no doubt have been a breach of human rights, but it was only criminal under international law if it was part of an attack on a civilian population, a crime against humanity or a war crime. It was made per se unlawful in 1984. In terms, both treaties made new law. I have already emphasized the different character of the Genocide Convention, which *did* purport to codify an existing crime. Who at the time would have said that genocide as it had occurred was not a crime?

37. Another analogy with human rights law may also be helpful, even though the Genocide Convention is *sui generis*. A potential time gap in the application of a multilateral human rights treaty arose in a different context in *Bijelić* v. *Montenegro and Serbia*[46]. At the time of the application, Montenegro was in a constitutional union with Serbia[47]. After its independence on 3 June 2006, the applicants indicated that they wished to proceed against both States. The potential

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[44]*Šilih* v. *Slovenia*, European Court of Human Rights (ECtHR), Application No. 71463/01, Judgment 9 Apr. 2009.

[45]GA res 96 (I), 11 Dec. 1946.

[46]*Bijelić* v. *Montenegro and Serbia*, ECtHR, App. No. 11890/05, Judgment 28 Apr. 2009.

[47]*Croatia*, pp. 422–423, paras. 27–34.

time gap arose because it was not until 2007 that Montenegro joined the Council of Europe. The Committee of Ministers of the Council of Europe decided, retroactively, that Montenegro could be regarded as a party to the European Convention with effect from 6 June 2006[48]. The European Court had regard to this and to "the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession". It deemed the Convention "as having continuously been in force in respect of Montenegro" as of the date in 2004 when the FRY (Serbia and Montenegro) acceded to it[49].

38. The independence of Montenegro was, of course, very different from the earlier dissolution of the SFRY and the gradual emergence on its territory of new States. You will recall that Croatia has maintained these proceedings against Serbia as the continuator State and has not instituted separate proceedings against Montenegro[50]. But the *Bijelić* case illustrates the importance of the continuity of human rights for the people living in a territory — and we say it is *a fortiori* for the Genocide Convention.

(3) Succession to responsibility

39. I turn to a third issue which is succession to responsibility. Serbia suggests that Croatia should have framed its case as one of succession to responsibility[51]. Croatia's primary submission in this respect is that the Court must look at the practical reality of the situation: during the events of 1991 and early 1992, the SFRY simply was not functioning as a State, and to hold that only the SFRY could have been responsible for conduct by the JNA would be a legal fiction. As Judge Hudson stated in *Lighthouses in Crete and Samos*, "[a] juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities"[52]. The SFRY, by the end of 1991, was the ghost of a hollow sovereignty. In practical terms, the JNA was by now plainly an organ of the nascent Serbian State. This was confirmed after

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[48]Council of Europe doc. CM/Del/Dec (2006) 967/2.3aE, 16 June 2006.

[49]*Bijelić* v. *Montenegro and Serbia*, ECtHR, App. No. 11890/05, Judgment 28 April 2009, para. 69.

[50]*Croatia*, p. 422, para. 30.

[51]CR 2014/14, p. 23, para. 6, p. 39, para. 62 (Tams); pp. 60–64, paras. 58–80 (Zimmermann).

[52]*Lighthouses in Crete and Samos (France* v. *Greece), Judgment, 1937, P.C.I.J., Series A/B, No. 71*; separate opinion of Judge Hudson, p. 127.

27 April 1992, when it was effectively transformed into a *de iure* organ. But, if these submissions — that is our principal case — if these submissions are rejected — if the Court were to find that the SFRY, and only the SFRY, was responsible for conduct by the JNA during the relevant period — then a further finding of succession to responsibility is called for. We make that submission in the alternative.

40. The point was also not decided at the preliminary objections stage[53]. You found that Serbia had succeeded to multilateral treaties to which the SFRY was a party, but you made no finding about succession to responsibility.

41. In this regard we can take some guidance from the *Lighthouses* arbitration. There, the Cretan coastal service had exempted a Greek vessel from payment of light dues in breach of a treaty. Greece was held responsible for this conduct, even though it occurred before Crete was united with Greece in 1913. Among other relevant circumstances, the case had putatively been brought to Greece's attention, and Greece had kept the coastal service concession in force after its succession to Crete. Note the parallel here with the JNA — in practice, it was kept in service under a new name after the proclamation of the FRY. Note also that Greece did not make any *express* declaration of succession to responsibility: such a declaration is evidently not required where conduct is clear enough in itself. The tribunal held that Greece's responsibility could result "only from a transmission of responsibility in accordance with the rules of customary law or the general principles of law regulating the succession of States"[54]. It recognized the *sui generis* character of such situations, saying: "it is no less unjustifiable to admit the principle of transmission as a general rule than to deny it" and that "the solution must depend on the particular circumstances of each case"[55].

42. So let us look at the circumstances in this case. We say the rule of succession can occur in particular circumstances if it is justified. There is no general rule of succession to responsibility but there is no general rule against it either. Say that following the proclamation of the FRY on 27 April 1992, someone had asked President Milošević whether the new FRY was responsible for

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[53]CR 2014/14, pp. 60–61, paras. 58–67 (Zimmermann).

[54]*Lighthouses* arbitration (1956), Decision No. 23 *International Law Reports (ILR)*, pp. 81, 90.

[55]*Ibid.*, 91–92.

the conduct of the old SFRY. What would he have said? The answer is obvious and inescapable. At that time, he rigorously maintained the claim of continuity with the SFRY. Consistent with this claim, Milošević — or any other official of the new FRY — would unquestionably have said "yes, the FRY is responsible in international law for all conduct attributable to the SFRY". This conclusion follows inexorably from the FRY's conduct and statements around that time, in particular from the declaration of 27 April 1992, and the related statement to the United Nations, which reflected the position of the State.

43. The controversy about the status of the FRY between 1992 and 2000 has created some confusion and, to put it mildly, was a source of some difficulty for the Court. But in the last analysis, whatever approach the Court takes, whatever effect the change of Serbian policy in relation to the United Nations in 2000 had, the Serbian leadership and State apparatus should not be granted impunity from international responsibility that they themselves — and everyone else — believed that they had.

III. Jurisdiction over events after 27 April 1992, including continuing breaches

44. Mr. President, Members of the Court, one final point on jurisdiction. Serbia argued that Croatia had "not referred to *any* events that took place after 27 April 1992 as allegedly constituting genocidal acts" so that our case is "fully dependent . . . on a retroactive application of the Genocide Convention"[56]. In fact, Croatia's written pleadings refer to many crimes, many wrongful acts committed after 27 April 1992, as evidence of the continuing genocidal campaign against the Croatian population. In May 1992, for example, Croat residents were forcibly exiled from Berak and then forced to walk over a minefield[57]. In February 1993, members of a Serbian paramilitary group — led by an active officer of what was then the *de iure* army of the FRY — murdered Croats in Puljane. As a result of the massacre, the remaining inhabitants of Puljane fled the following day. The only punishment the murderers received was dismissal from their units[58]. Between May 1992 and February 1993, Croat civilians were massacred in Medviđa and their killers released without

[56]CR 2014/14, p. 11, paras. 6–7 (Zimmermann).

[57]Memorial of Croatia (MC), para. 4.38.

[58]MC, para. 5.207.

charge[59]. Further examples are contained in the footnotes[60]. In any event, it seems that Serbia has changed its position: it conceded last week that at least eight alleged acts of genocide *did* occur after 27 April 1992[61]. So, in the further alternative, if the Court holds that the Convention was applicable only from 27 April 1992, there are still acts you need to deal with. It does not let the Court — if I can say so with the greatest respect — "off the hook".

45. In any event, Serbia has a *continuing* responsibility for breaches of the Genocide Convention. The failure to punish acts of genocide is ongoing irrespective of whether those acts occurred before or after 27 April 1992. [Screen on] This is consistent with Article 14 (2) of the Articles on State Responsibility, which provides:

> "(2) The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."[62]

46. You have heard from Professor Sands that the families whose loved ones have not been accounted for — the disappeared of Croatia — continue to be subjected to "serious . . . mental harm" in breach of Article II of the Convention. The causing of such harm is widely recognized as a violation "having a continuing character". The United Nations Declaration on the Protection of All Persons from Enforced Disappearance, states: "[a]cts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified"[63]. [Next slide] This was confirmed by the Inter-American Court in one of its most important decisions, *Velázquez Rodríguez*, where it says:

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[59]MC, para. 5.220.

[60]MC, paras. 4.93 (May 1995), 5.27 (Sep. 1993), 5.145 (Nov. 1992 and early 1993), 5.210 (1993), 5.212 (various dates between Aug. 1992 and 1996), 5.214 (July 1992), 5.221 (Jan. 1993), 5.223 (Jan. 1993), 5.225 (June to Dec. 1992); Reply of Croatia (RC), paras 6.75 (1993), 6.89 (July 1992 and Jan. 1993).

[61]CR 2014/15, p. 35, para. 7 (Lukić).

[62]Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II (2), Art. 14 (2):

> "(2) La violation d'une obligation internationale par le fait de l'Etat ayant un caractère continu s'étend sur toute la période durant laquelle le fait continue et reste non conforme à l'obligation internationale."

[63]UN Declaration on the Protection of All Persons from Enforced Disappearance, GA res 47/133, 18 Dec. 1992, Art. 17.

> "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."[64]

47. [Screen off] The same reasoning applies to Article II of the Genocide Convention, which provides that the *actus reus* of genocide includes "[c]ausing serious bodily or mental harm to members of the group". So again, Serbia is responsible for such continuing breaches of Article II irrespective of its submission on jurisdiction over events before 27 April 1992.

IV. The *statu nascendi* principle

48. Mr. President, Members of the Court, that concludes my remarks on jurisdiction. I move now to the question of attribution, beginning with the applicability of Article 10 (2) of the Articles on State Responsibility. That may not have been famous before this case; it will be famous now.

49. Here Serbia repeated a number of arguments from its written pleadings which we rebutted in the first round, without dealing with that rebuttal. For example, counsel for Serbia repeatedly referred to what it called "movement responsibility"[65] — a rather curious phrase. But as I said in the first round, Article 10 (2) is "not concerned with the responsibility of a movement *qua* movement", but with the responsibility of a "movement *qua* state in embryo"[66]. Article 10 (2) is not limited to substantive obligations that apply specifically to movements, whether or not they are successful, such as obligations accepted by declaration under Additional Protocol I of the Geneva Conventions. It follows from this clear and straightforward proposition ~~***[which I will not argue again in detail]***~~ that other relevant rules of attribution apply in much the same way as they otherwise would in a situation where Article 10 (2) applies.

50. Mr. Lukić claimed that "there can be no equivalent to Article 8" in the context of movement responsibility and that the ILC Commentary "expressly excluded conduct of individual members of the movement"[67]. It did no such thing. A movement, like a State, can act *only* through

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[64] *Velázquez Rodríguez*, IACtHR, Ser. C, No. 4, Judgment 29 July 1988, para. 181.

[65] E.g., CR 2014/15, p. 37, paras. 18–20 (Lukić).

[66] CR 2014/12, pp. 42–43, paras. 14–15 (Crawford).

[67] CR 2014/15, p. 37, para. 18 (Lukić).

its officials or other human individuals; it is not a mythological creature with its own hands and feet. The commentary cited states that Article 10 (2) covers "conduct of the movement as such and not the individual acts of members of the movement, *acting in their own capacity*"[68]. Exactly the same proposition applies to Article 4 and to Article 7[69]. Members of the JNA were not acting "in their own capacity"; they were acting in their capacity as members of the JNA, a *de facto* organ of the nascent Serbian State. The usual principles of attribution apply.

51. Professor Tams argued that a movement under Article 10 (2) cannot be "aligned" to the interests of the State against which it is fighting, yet said that I "emphasized the 'alignment' between the alleged Greater Serbia movement and the SFRY"[70]. That is a distortion of what I said. I used these words: "[t]he alignment of objectives *between the JNA and the Serbian leadership*"[71]. I then referred to the "contempt and disregard of the JNA command for the Constitution and the SFRY Presidency"[72]. I quoted a series of phrases about that contempt, about the transparent device of using the JNA as a real Serbian organ rather than an apparent SFRY one. To none of those quotations was there any response. What I said was the opposite of what Professor Tams claims. The movement in question was led by Serbian political and military leaders in a joint criminal enterprise — so found — whose objectives included a Greater Serbia. That was the movement. And it certainly was aligned against the interests of the SFRY: it rendered the SFRY Presidency effectively impotent, it took *de facto* control of State organs such as the JNA, which it employed for its own political and military objectives. It even attacked a building while the head of State and head of government of the SFRY were inside; that is a curious form of alignment. Perhaps the missile was aligned. Professor Tams advised you to "look at the map" for proof that this movement did not "succeed" in establishing a Greater Serbia[73]. Well, it eventually did not succeed. Anyone who looked at a map between 1992 and 1995, when Serbian and Serb forces

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[68]Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001/II (2), Art. 10, p. 50, para. 4; emphasis added.

[69]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001/II(2), Art. 7~~; ***emphasis added***~~.

[70]CR 2014/14, pp. 46–47, paras. 76–81 (Tams).

[71]CR 2014/5, p. 46, para. 10 (Crawford); emphasis added.

[72]CR 2014/5, p. 46, para. 10 (Crawford).

[73]CR 2014/14, p. 48, para. 83 (Tams).

occupied some one third of Croatia and more than two thirds of Bosnia-Herzegovina, would have drawn a different conclusion. If the conduct was attributable in 1994 it did not cease to be attributable later on because of the defeat of Serbian objectives. The fact is that the movement *did* "succeed[] in establishing a new state", even if it was not the State that Milošević wanted. Those are the words of Article 10 (2); that is the only type of success required. It is a modified success, but not everyone has their own State. The fact that it did not also achieve the full extent of its territorial ambitions cannot relieve it of responsibility for what it actually did[74].

52. Serbia argued that State practice on Article 10 (2) is sparse, as if sparseness in itself could justify the Court in departing from the principle[75]. Yet Serbia has still not pointed to any authority credibly denying the existence of the principle. Nor is it decisive that there is no exact precedent for the *sui generis* situation now before this Court. As this Court knows only too well, principles of international law must constantly be applied to newly arising situations, whether by way of analogy or where a situation falls squarely within a general principle that has previously been applied to a range of other *sui generis* situations. An example is the conduct of the Polish National Committee before the recognition of the new Polish State in 1919. This was cited during the drafting of what is now Article 10 (2) in support of the proposition that, despite the sparseness of State practice, the rule "seemed well-established"[76].

53. Another application of the rule to *sui generis* circumstances is the case of Algeria. The movement in question, the FLN (Front de Libération Nationale) achieved independence for Algeria in 1962. The Évian Accords between France and the provisional government included a declaration that "Algeria assumes the obligation and benefits from the rights contracted in its name, and those of Algerian public establishments by the competent French authorities"[77]. Algeria assumed the obligations and benefited from the rights contracted in its name by France. The

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[74]CR 2014/10, p. 42, para. 24 (Crawford).

[75]CR 2014/14, pp. 41–45, paras. 67–72 (Tams).

[76]*YILC*, 1998, Vol. I, 248, para. 50.

[77]Déclaration de principes relative à la coopération économique et financière, 19 March 1962, [1962] *JORF* 3019, Art. 18.

situation was, in some respects, comparable to Serbia's succession to the Genocide Convention, consistent with its acceptance to be bound by all its international obligations[78].

54. Now it is true that Algeria never formally complied with this declaration with respect to the actions of the FLN before its formal independence. But French courts, in a series of cases, have interpreted it to apply to those actions[79]. Patrick Dumberry observes of the *Grillo* case in 1999 that it seems that "the *Conseil d'Etat* interpreted the internationally wrongful acts committed *before* the independence of Algeria as those of the *future* state of Algeria"[80]. That is the *statu nascendi* rule. It is a necessary construction dealing with the fact that States do not come into existence in situations of belligerency at a single moment in time. In the *Perriquet* case in 1995, the *Conseil d'Etat* was concerned with any potential French responsibility and so did not make an actual finding against Algeria. But its view is expressed clearly enough. It observed that as a result of the declaration, rights and obligations contracted by France in the name of Algeria had been transferred to the Algerian State on independence. It then said: *"l'indemnisation des dommages imputables à des éléments insurrectionnels intéresse l'Etat algérien"*[81].

55. I do not suggest, Mr. President, Members of the Court, that the present situation is precisely the same as the ones I have dealt with — the Polish National Committee, the FLN — or other previous situations where the principle recognized in Article 10 (2) has applied. It is not the same, we can point to differences. But those past situations are further evidence that the assertion that Article 10 (2) represents a new rule and is limited to movements of some very specific type cannot be justified. This is a situation of the same general configuration, the same general principle of attribution applies, and for the same reasons. As Patrick Dumberry, who studied this subject in some detail, says "[t]he new state should remain responsible for acts which took place before its independence because there is a 'structural' and 'organic' continuity of the legal personality of what was then a rebel movement" — or, in this case, an "other" movement with all the relevant

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[78]*Croatia*, pp. 454–455, para. 117.

[79]*Hespel*, Conseil d'Etat, 2/6 SSR, case No. 11092, 5 Dec. 1980, in *Tables du Recueil Lebon*; *Perriquet*, Conseil d'Etat, case No. 119737, 15 March 1995; *Grillo*, Conseil d'Etat, case No. 178498, 28 July 1999. See further P. Dumberry, "New state responsibility for internationally wrongful acts by an insurrectional movement" (2006) 17 *EJIL* 605, pp. 613-615 and other cases cited therein.

[80]P. Dumberry, "New state responsibility for internationally wrongful acts by an insurrectional movement" (2006) 17 *EJIL* 605, p. 615, referring to *Grillo*, Conseil d'Etat, case No. 178498, 28 July 1999.

[81]*Perriquet*, Conseil d'Etat, case No. 119737, 15 March 1995.

characteristics — that "has since successfully become a new independent state"[82]. In our case the "structural" and "organic" continuity between the Serbian military and political leadership and the FRY was complete.

56. In this context, I should say a word, after all these years, about the work of the ILC on attribution, notably Article 10. The fact that the actual language of Article 10 (2) was adopted on Second Reading does not preclude it from being judged to be customary international law. The ILC's function is not simply to record practice and to adopt sparse articles where the practice is sparse. Some of the ILC articles have been criticized for being sparse, but that is not a very good reason for the sparseness. The ILC's function is to rationalize the law and to expose its underlying structure and values for international scrutiny, not least scrutiny by this Court. Anyone looking at the jurisprudence of continuity in contexts such as those covered by Article 10 will be struck by the consistent tendency of courts and tribunals to maintain continuity. *Lighthouses in Crete and Samos* and the *Lighthouses* arbitration are but two examples.

V. Other elements of the attribution of conduct to Serbia

57. Mr. President, Members of the Court, moving away from Article 10, paragraph 2, perhaps slightly reluctantly, I should mention some other elements of Croatia's argument on attribution. It may assist the Court if I summarize again the various grounds on which we say that conduct is attributable to Serbia, since Serbia did not respond to all of our arguments and since it accused us of attempting to sow confusion about which grounds applied[83].

58. First, Serbia's failure to prevent and failure to punish acts of genocide amount in themselves to breaches of the Genocide Convention. In addition, Serbia's failure to assist with locating disappeared persons constitutes a continuing breach of Article II. These breaches are self-evidently attributable to Serbia.

59. Secondly, the facts, confirmed in numerous findings ***of*** the ICTY, demonstrate that the JNA directly committed acts which we say amounted to genocide. That ultimate judgement of characterization is for you, the acts themselves are established. It also ordered, facilitated, aided,

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[82]P. Dumberry, "New state responsibility for internationally wrongful acts by an insurrectional movement" (2006) 17 *EJIL* 605, 620.

[83]CR 2014/15, p. 52, paras. 6, 9 (Ignjatović).

abetted and otherwise supported the commission of genocide by other Serb forces, of which the JNA had actual knowledge. This includes acts by the forces of the self-proclaimed Serb entities in Croatia and by Serb paramilitaries. In so far as the conduct of the JNA itself amounts to acts of genocide or to complicity in acts of genocide, all that we are required to establish is that the conduct is attributable to Serbia. We have done this by reference, primarily, to Article 4 and to the jurisprudence of this Court on when an entity can be treated as a *de facto* organ. The JNA was a *de facto* organ of the emergent Serbian State. I have explained why these principles are capable of applying in a situation where a State is in *statu nascendi* in the same way essentially as they apply to other cases of State responsibility. Croatia also suggests that conduct by the JNA may be attributable to Serbia under Article 8, on direction and control. But the primary ground on which we say it is attributable is Article 4.

60. Serbia's refrain that the JNA was *de iure* an organ of the SFRY is simply irrelevant[84]. *Of course* it was *de iure* an organ of the SFRY. But I repeat the test you applied in *Bosnia*:

> "persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instruments"[85].

Serbia responded to this by citing "animosity between Kadijević and Milošević" and arguing that "[n]either influence nor control could exist" in such a relationship[86]. It also asserted that we had provided no "evidence of direct orders"[87]. Mr. President, Members of the Court, we are not required to provide evidence of direct orders. States are responsible for genocide even if they keep the orders tacit or silent. If the genocide is proved there is no need for a Wannsee conference. If an entity can be equated with a State organ, the State is responsible for *all* conduct by that entity as with any other conduct of the State[88]. Whether the Serbian political and military leaders liked each other or not is neither here nor there. They were party to a joint criminal enterprise whose "common purpose . . . was the establishment of an ethnically Serb territory through the

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[84]E.g., CR 2014/15, p. 40, para. 29 (Lukić).

[85]*Bosnia*, para. 392.

[86]CR 2014/15, p. 41, para. 32 (Lukić).

[87]CR 2014/15, p. 39, para. 26 (Lukić).

[88]*Bosnia*, para. 397.

displacement of the Croat and other non-Serb population"[89] — that is from *Martić*. They were the leaders of a movement with that objective, and the JNA was the army of that movement, in complete dependence on it. As Kadijević himself put it, "the Serb and Montenegrin people considered the JNA as their army, in the same way that they considered the Yugoslav state their country" and he saw the JNA's responsibility as being "to secure for the new Yugoslavia [that is the FRY] and the entire Serb population [entire Serb population wherever located] its own army"[90].

61. Let me illustrate where Serbia's approach goes wrong. Mr. Lukić highlighted a comment by the ICTY that the evidence did not establish that "Mrkšić consulted his superiors in Belgrade" about handing over prisoners of war from Vukovar to paramilitary and local SAO forces[91]. It does not matter whether he consulted "his superiors in Belgrade" or not. He was a colonel in the JNA. Under Article 7, "[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority" is attributable to a State if it "*acts in that capacity*, even if it exceeds its authority or contravenes instructions"[92]. Even if Mrkšić had acted contrary to instructions from Belgrade, which the Respondent would know and has not told us, the responsibility would still exist. A more pertinent question is who the "superiors in Belgrade" actually were. The ICTY tells us. It was not the President of the Presidency. By early 1991, the JNA "had come to be typically perceived in Croatia as aligned with Serb interests and effectively commanded from Belgrade by a Serb dominated leadership"[93]. The ICTY later refers to "the Serb controlled Federal government in Belgrade"[94].

62. You heard from Serbia that on 6 January 1992 Kadijević "relinquished the duty of the Federal Secretary" and Milošević "became the absolute commander of the army"[95]. Those are Kadijević's own words, in an interview quoted by Serbia. Of course, we have shown that the JNA

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

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

[91]*Prosecutor* v. *Mrkšić et al*, IT-95-13, Trial Chamber Judgement, 27 Sep. 2007, para. 586, cited in CR 2014/15, p. 46, para. 49 (Lukić).

[92]Articles on the Responsibility of States for Internationally Wrongful Acts, *YILC* 2001/II (2), Art. 7; emphasis added.

[93]*Mrkšić*, para 23.

[94]*Mrkšić*, para 471.

[95]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).

was a *de facto* Serbian State organ even before that date. But from that date onwards, we have direct confirmation from Kadijević that the JNA was following the orders of the Serbian political leadership, of Milošević. That was months before the proclamation of the FRY. It conclusively discredits Serbia's assertion that the JNA continued to function as an organ of the SFRY until 27 April 1992. It belies any suggestion that the apparatus of the new Serb State sprang into being instantaneously, like Athena from the head of Zeus — to take a rather inappropriate example — without any period of gestation.

63. In reality, State dissolution and emergence are often gradual. It was the same with the gradual transformation of the JNA from an organ of the old State into an organ of the new. We were criticized for referring to the centralization of the command structure of the JNA in 1988 and the subsequent Serbianization of its personnel. Those earlier events are relevant as the background to the transformation, to explain how the Serbian military and political leadership was later able to take effective control of the JNA. Serbia accepted that by late 1991 the JNA became an "active participant" in the conflict in Croatia, though it argued that it was reactive rather than proactive: these events "did not arise in a theoretical vacuum"[96]. Croatia, of course, has disputed who was reactive and who was proactive, who was defensive and who was not. But that is not the main point. The main point is that the JNA was doing so as an instrument of Serbian political and military policy and *not* as an organ of the SFRY, whose political institutions had been effectively paralysed or taken over by Serbia. By late 1991 the JNA, under Kadijević's military leadership, was already a *de facto* organ of the emergent Serbian State. After January 1992, Milošević was directly exercising both military and political authority.

64. Finally, there is the third ground on which we argue that conduct is attributable to Serbia. Conduct by other Serb forces breached the Convention *directly*. We do not maintain that the other Serb forces were themselves organs of the emergent Serbian State — with the sole exception of the Territorial Defence of Serbia, which Serbia has accepted "should be equated to the actions of the JNA and attributed to the JNA"[97]. Croatia's argument is that conduct by other Serb forces is

[96]CR 2014/15, p. 42, para. 38 (Lukić).

[97]CR 2014/16, p. 16, para. 83 (Ignjatović).

attributable to Serbia under Article 8, since they operated under the instructions, direction or control of the JNA.

65. Serbia's attack on the Article 8 argument was self-defeating. It quoted the conclusion drawn by the ICTY in *Mrkšić* that "what had been established as the *de facto* reality . . . in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations"[98]. It then showed you some of the evidence leading to that conclusion: the Circular of the Chief of the General Staff and the Order of the Command of the 1st Military District, both of October 1991. These documents in fact support the ICTY's conclusion[99]. They comprise "some of the evidence", because the ICTY said they "serve to confirm . . . what had been established as the *de facto* reality". The ICTY was satisfied of that on the basis of the totality of the evidence before it. Mr. Ignjatović tried to transmogrify this conclusion into its opposite, but without presenting any direct evidence that the principle of "complete command and full control by the JNA of all military operations" was not implemented. The ICTY expressly said it *was* implemented, that it was the "*de facto* reality". The Court lives in the real world.

VI. Conclusion

66. Mr. President, Members of the Court, I conclude where my submissions began: with the danger, identified by Judge Shahabuddeen, that Serbia's arguments in the *Bosnia* case — and repeated here — could "lead in one way or another" to an "inescapable time-gap" that would undermine the object and purpose of the Genocide Convention, "to safeguard the very existence of certain human groups and . . . to confirm and endorse the most elementary principles of morality"[100]. That remains an apt description of where Serbia's arguments in this case would lead. Serbia has quibbled with our arguments on attribution and jurisdiction, and I have shown that its quibbling does not stand up to scrutiny. But Serbia has nothing at all to say on this fundamental point. The word "continuity" did not pass its lips despite what it said on 27 April, on which it now relies. However you choose to frame the legal issues in this case, Mr. President, Members of the

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

[99] CR 2014/15, pp. 59–60, paras. 45–48 (Ignjatović).

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

Court, you cannot allow the Genocide Convention to sink into irrelevance in the circumstances of State dissolution where it is most needed, to tremble and retreat before "a ghost of a hollow sovereignty"[101].

67. Mr. President, Members of the Court, thank you for your attention. I ask you to call upon the Agent.

The PRESIDENT: Thank you, Professor Crawford. I now call on the Agent of Croatia. Madam, you have the floor.

Ms CRNIĆ-GROTIĆ: Good morning to you. Thank you, Mr. President, for allowing me now to, first of all, reply to Judge Greenwood's question on 20 March. He asked about the unsigned witness statements that were attached to the Croatian Memorial. And the question was: "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?" And the answer provided by Croatia is as follows.

The criminal legal system in Croatia is, and was in the early 1990s, based on the ***C***ivil ***L***aw which affords a central role to the investigating judge. It therefore follows a very different approach to the collection of evidence, including witness statements, than that adopted by international courts and tribunals, or indeed courts in common law jurisdictions.

Police witness statements — or records — taken from victims and witnesses are sent together with the police file to the State Prosecutor and, if charges are laid, to the investigating judge. There is no requirement that these police statements be signed by the victim or witness.

The investigating judge will then decide on the basis of the information before him or her, including the police witness statements, what witnesses he or she wishes to interrogate. Following such interrogation, formal statements are drawn up for each of the witnesses which are then admissible in a court of law. As such, while the police statements are admitted into the court process, and form the basis for the statements admitted in court, they are not themselves admissible in court proceedings in Croatia, and the same applies to non-police statements.

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[101] *Lighthouses in Crete and Samos (France* v. *Greece), Judgment, 1937, P.C.I.J., Series A/B, No. 71*; separate opinion of Judge Hudson, p. 127.

The unsigned police witness statements included in the Applicant's Memorial, and addressed by Judge Greenwood's question, have been prepared in accordance with the Croatian Criminal Procedure Code[102] ~~*in force*~~. They are part of the formal, initial stages of a criminal investigation as carried out by the police authorities.

Croatia's understanding is that procedures before international courts, including the ICTY and the ICJ, follow a different procedure from that of national legal systems. Its case has been prepared on the basis of the approach taken by such courts**,** in circumstances in which they do not allocate a role for an investigating judge to gather evidence, including witness statements. In any event, as you heard, the additional step has been taken for the purposes of these proceedings of requiring witnesses to sign confirmatory statements indicating that the content of their original statement is true.

As highlighted by Ms Ní Ghrálaigh yesterday, this Court has accepted witness statements of Croatia's witnesses of fact without following the Croatian procedure**s**[103].

Croatia would be pleased to respond to this question in greater detail, if that would be of assistance to the Court. Thank you.

And now, if you will allow me, I will proceed with the closing remarks on behalf of Croatia.

The PRESIDENT: Please proceed, Madam Professor. You have the floor.

Ms CRNIĆ-GROTIĆ: Thank you.

CLOSING REMARKS

1. Mr. President, Members of the Court, over the last few weeks Croatia addressed the events and circumstances that caused us to come to this Court. We have presented you with evidence that the Respondent is responsible for the crime of genocide against the Croats living in the area that was intended to be a part of a Greater Serbia. We have also shown you, by contrast, that there was no crime of genocide committed against the Serbs during or after Operation Storm in August 1995.

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[102] ***Criminal Procedure Code of the Republic of Croatia (Official Gazette Nos. 53/91, 91/92), Article 142; Criminal Procedure Code of the Republic of Croatia (Official Gazette No. 110/97), Article 177; Criminal Procedure of Croatia (Official Gazette No. 152/08), Article 207.***

[103] ***Cite transcript.***

2. Croatia submitted its application in 1999, when Mr. Milošević was still in power in Serbia. Even though he was removed from office in 2000, the change in government did not bring about a change in attitudes regarding the events in Croatia, despite our initial hopes. Denial seems to be the constant in the string of governments in Serbia resulting in continued and ongoing setbacks in negotiations. We have witnessed similar denials in this courtroom over these last few weeks.

3. Over the years, since the filing of the Application, the ***case-law*** of the ICTY has developed significantly. Through that development, Croatia's claims have been corroborated and substantiated. A number of Serb perpetrators have been found guilty, and have been convicted for the most egregious crimes committed against Croatia and its citizens. The ICTY has found the existence of a ***J***oint ***C***riminal ***E***nterprise of the Serbian political and military leadership, which had as its common purpose the establishment of an ethnically Serb territory through the displacement of the non-Serb population — that is a quote from the ICTY. It is true that nobody has ever been charged with genocide and the Respondent seems to give great weight to that fact. It does not seem to be as appreciative of the fact that nobody has ever been convicted by the ICTY for *any* crime against the Serbs in Croatia, let alone the crime of genocide that it claims. The reality is that the ICTY judges have never been asked to consider that the events we have brought to this Court ~~to~~ include acts of genocide. You are the first international court or tribunal to address these issues by reference to the crime of genocide.

4. The ***case-law*** of the ICTY has also contributed greatly in establishing the facts regarding what happened in the region. As this Court has put it, its findings are *highly persuasive* and the Applicant has relied on them as part of its evidence. The ICTY has used extensive resources and time to establish facts in cases that it has examined. However, as Croatia has explained, its findings on the law and the legal characterization of the established crimes cannot serve to provide answers for all the issues which arise before this Court. The ICTY deals exclusively with the individual criminal responsibility of the accused. ***(***Its view may be narrowly focused as it considers only those crimes that are included in the indictments***.)*** The ICTY, unlike this Court, has no jurisdiction over ***s***tates.

5. The Applicant looks to this Court to take a more all-embracing view of the events from 1991 to 1995, to take them in their totality, and in the context of the political situation that

prevailed at that time in the aftermath of the fall of the Berlin Wall and communism in Europe, democratic elections in former communist states, and to take account of the new realities that some were not ready to accept. We ask the Court to look into the "*sui generis*" situation in the specific context of the disintegration of the SFRY and the emergence on its territory of five new States amidst great violence and disorder. We ask the Court to see the role of extreme Serbian nationalism for what it was — a criminal attempt to create "one state for all Serbs" by pursuing the project of Greater Serbia through genocidal acts, not only in Croatia but also in Bosnia and Herzegovina and Kosovo.

6. As you will have seen for yourselves, there are still public officials and others in Serbia who are unwilling to confront the truth about the events that began more than two decades ago. For this reason the past remains present, and cannot be consigned to history. As we stated at the beginning of these proceedings, they continue to resonate. The Court continues to have an important role in addressing the facts and confirming, once and for all, that the requirements of the 1948 Convention have been met in relation to Croatia's application (and not met in relation to Serbia's counter-claim). The Applicant believes that the Parties to this case need the judgment of this Court to close this chapter and to move forward in their mutual relations.

7. Croatia has moved forward. It is now a member of the European Union (EU), after passing through the intensive scrutiny involved in applying for accession to the EU, with its long-established democratic institutions, with the high degree of human rights protection, and with the protection of its minorities, both at national and international level. Serbia apparently wants to do the same, but this may prove to be difficult if it continues down its path of denials and of refusing to confront realities. As I stated at the beginning of oral pleadings, Croatia wishes to achieve full reconciliation with Serbia. We are neighbouring countries; we have many ties — human, economic, cultural and others. But our relations are also burdened by Serbia's refusal to confront its past and resolve the unresolved issues of the 1990s, including Serbia's refusal to accept the judgements of the ICTY and of this Court. We look to this Court for its assistance in handing down a judgment that will assist our two States to address the past and resolve the issues that continue to divide us.

8. There is an outstanding issue that is particularly painful — this is the issue of missing persons, who are missing because of genocidal acts in 1991-1992. Almost 20 years after the cessation of hostilities there are some 865 Croats missing from that period, with families and friends looking for closure. There are a number of initiatives which aim at resolving their fate, which I describe to the Court by way of replying to the second part of the question put by Judge Cançado Trindade to the Parties on 14 March 2014. So, the question was:

> "Have there been any recent initiatives to identify, and to clarify further the fate of the disappeared persons still missing to date?"

9. In 1995, in Dayton, Croatia and Serbia concluded an agreement, the purpose of which was to establish the fate of all missing persons and to release the prisoners[104]. As a result of the agreement, a joint commission was established**,** and some progress was made with respect to missing persons:

(i) from August 1996 till 1998 Croatia was given access to information, the so-called protocols, for 1,063 persons who were buried at the Vukovar New Cemetery and these protocols helped in the identification of 938 people;

(ii) in 2001, exhumations started with respect to unidentified bodies buried in the Republic of Serbia ***(***at marked gravesites***)***. Thus far, the remains of 394 persons have been exhumed, but it is regrettable that only 103 bodies have been handed over to the Republic of Croatia;

(iii) to date only one mass grave has been discovered in Croatia, with 13 bodies, as a result ***of*** information provided by Serbia. This was in 2013 in Sotin in Eastern Slavonia.

10. Whilst there has been some progress, there are a number of outstanding issues that need to be resolved. Recently, the Commission in Belgrade is, once again, seeking to act as representative of all missing persons of Serb ethnicity, including those who are citizens of Croatia. This is contrary to what was agreed in 1995, when the parties decided that all missing persons who disappeared in Croatia fell within the competence of Croatian authorities which, for their part, recognized Serbia's interest and role with regard to persons of Serbian ethnicity.

11. There are other outstanding issues. These include:

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[104]Agreement on Co-operation in Finding Missing Persons in 1995. M. Granić–M. Milutinović, Dayton, 17 Nov. 1995.

(i) our request for the return of documents seized by the JNA from the Vukovar hospital in 1991, which are essential for identification of the people removed from the hospital. They are still not delivered. When the President of the Republic of Serbia, Boris Tadić, visited Vukovar in November 2010, a small part of these documents was returned, following which there has been no progress at all;

(ii) one of the outstanding issues is also the provision of information on the locations of mass graves and individual graves in the territory of the Republic of Croatia, as well as the so-called "secondary" graves, into which the bodies from primary mass and individual graves were moved and also the issue of the unmarked graves in Serbia.

12. So, the issue of the missing persons ***thus*** remains one of the key problems in these proceedings. Croatia started a campaign, with the view to making more discoveries and to help members of the families of the missing persons. As part of the campaign, public meetings are organized in places where information might be available both for the missing Croats and the Serbs. Leaflets and telephone lines are available, inviting people to provide information that would lead to the discovery of these sites.

13. Mr. President, there is no dispute between the Parties that serious crimes were perpetrated against the members of the Croat ethnic group, capable of constituting the underlying acts listed in the five paragraphs of Article II of the Convention including killings, causing serious bodily and mental harm. The Respondent accepts that these acts were committed by members of the JNA and forces associated with it. These acts were widespread *and* systematic. They caused physical and mental harm, and resulted in killings and in the deliberate infliction of conditions of life calculated to bring about physical destruction of groups of ethnic Croats. Article I of the Genocide Convention imposes two distinct yet connected positive obligations to prevent and to punish genocide. We have set out why the Respondent has failed to meet its obligations on both accounts.

14. Mr. President, genocide was committed on the territory of Croatia, by or on behalf of the Respondent. The evidence on that is conclusive. The Respondent, acting through the JNA and other organs of the State, is responsible under international law for those acts of genocide. It is also responsible for having failed to prevent genocide from being committed against ethnic Croats. The

Applicant has shown 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. We have given clear examples of that, during these proceedings. Moreover, the importance of the obligation in Article I of the Genocide Convention, to punish acts of genocide, is reflected throughout the Convention's provisions. In this case, the Respondent has failed to indict and prosecute any of the high-profile military or political figures responsible for the crimes committed.

15. Furthermore, Croatia still demands the return of its cultural properties seized in the course of the genocidal campaign in Croatia. Although some of it has been returned from 2001 to 2013, there are still almost 25,000 items from 45 museums and 1,000 cultural and religious artefacts, as well as a number of private collections, archives and libraries.

16. Mr. President, Members of the Court, Croatia believes that this long-standing dispute between the two States should be resolved in accordance with the requirements of the Genocide Convention, and international law. This case has great importance for the Croatian people and for the stability and peaceful co-existence in the region. The Court has a role to play, and we permit ourselves to express the hope that it will fulfil its role as guardian of the Convention.

17. And now, this brings me to our concluding submissions. I limit myself today to the submissions in relation to our claim, and on Tuesday 1 April, I will read out the submissions in relation to the counter-claim brought by Serbia.

SUBMISSIONS

So the submissions are as follows. On the basis of the facts and legal arguments presented by the Applicant, it respectfully requests the International Court of Justice to adjudge and declare:

1. That it has jurisdiction over all the claims raised by the Applicant, and there exists no bar to admissibility in respect of any of them.
2. That the Respondent is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia against members of the Croat ethnic group on that territory, by:

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b)*, and is thus in continuing breach of Articles I and IV of the Convention;

(e) in that it has failed to conduct an effective investigation into the fate of Croatian citizens who are missing as a result of the genocidal acts referred to in paragraphs *(a)* and *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.

3. That as a consequence of its responsibility for these breaches of the Convention, the Respondent is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction including but not limited to the leadership of the JNA during the relevant time period who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, and to ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, to investigate and generally to ***cooperate*** with the authorities of the Applicant to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant all remaining items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Professor Crnić-Grotić. The Court takes note of the final submissions which you have now read on behalf of Croatia on its own claims. The Court will meet again on Thursday 27 March 2014, between 3.00 p.m. and 6.00 p.m. to hear Serbia begin the presentation of its second round of oral argument. Thank you. The Court is adjourned.

The Court rose at 11.25 a.m.

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