Corrigé
Corrected

CR 2014/22

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Thursday 27 March 2014, at 3 p.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le jeudi 27 mars 2014, à 15 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
		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
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 afternoon. Please be seated. The sitting is now open. The Court meets this afternoon to hear Serbia begin its second round of oral argument. Judge Gaja, for reasons that have been explained to me is unable to sit today and tomorrow. I shall now give the floor to the Agent of Serbia, Mr. Obradović. You have the floor, Sir.

Mr. OBRADOVIĆ: Thank you, Mr. President.

INTRODUCTION TO THE SECOND ROUND OF ORAL ARGUMENTS OF THE REPUBLIC OF SERBIA

1. Mr. President, distinguished Members of the Court, I am honoured to open the second round of oral arguments of the Republic of Serbia. I have a task to address you in relation to three short points before I respectfully ask you to give the floor to our counsel and advocates. The schedule of our presentation is, first, my topics; a general view to the Applicant's case, second; and, the issue of evidence, in brief, the last one.

Schedule of presentation

2. Following my introductory words, Professors Zimmermann and Tams will re-address the issue of relevance of the events pre-dating 27 April 1992 for the Applicant's claim in light of the arguments advanced by Professor Crawford last week, as well as the issues concerning the obligations to prevent and punish the crime of genocide. Mr. Jordash will continue our oral arguments today and tomorrow morning with regard to the factual and legal rebuttal to the Croatian claim. Professor Schabas will deal with some specific legal arguments, as the interpretation of the Genocide Convention in light of the 2007 Judgment of this Court and the question of standard of proof raised by the Applicant in the second round, including the first question of Judge Cançado Trindade. Mr. Lukić and Mr. Ignjatović will briefly address the rest of the issues of attribution concerning the JNA and paramilitaries. Tomorrow afternoon, Professor Schabas and Mr. Jordash will rebut the Croatian arguments concerning the Serbian counter-claim. The question of Judge Bhandari will be also answered during that sitting. I will finish our presentation with some closing remarks about victims, including the response to the question of Judge Cançado Trindade, concerning the missing persons.

Reconciliation based on historical facts

3. Mr. President, the first round of these hearings was concluded with some remarkable words of the Croatian Agent, Professor Crnić-Grotić, who pleaded for reconciliation that, however, "must be based on historical facts"[1]. We could not agree more. That could be a leitmotif of my further presentation.

4. Thus, I would commence with recalling the statement of the former Agent of Croatia, Professor Šimonović, that this case was submitted to your jurisdiction in 1999 as an attempt to "paralyze cases against Croatians at the ICTY"[2]. It is a historical fact that was not denied by our distinguished opponents. And how could it be?

5. In doing so, Croatia in this case had to demonize Serbs — as I explained in the first round — their policy in the 1990s and to blow up allegations on individual crimes that were certainly committed against the Croat civilians. The allegations are not enough; at a court of law, they must be based on evidence. Some help was found in the documents fabricated by the Croatian police during the war[3]. And when we place on record different views, the Applicant's side offends us as genocidal deniers, and accuses us for "a revisionist history", "a false historical narrative" and "factual manipulations". However, if we say something that sounds acceptable to our opponents, they quickly approach the roster stating — "This is an admission" — "That is a concession" — as if we were in a childish game rather than before the principal judicial organ of the United Nations.

6. Indeed, what is the "game" played by the Applicant in this case? At the very beginning of the first round the Applicant established a mantra: "Genocide is not a numbers game"[4]. In that sense, Professor Sands "improves" the theory of substantiality requirement by the following statement:

> "The intention [*as the element of the crime of genocide*] is connected to the location of an area, to the group that is there located, and to the opportunity. The location can be a state, or a region, or a town, or a village, or a hamlet, or even something smaller."[5]

---

[1]CR 2014/19, p. 17, para. 20 (Crnić-Grotić).

[2]CR 2014/14, p. 11, para. 10 (Zimmermann).

[3]CR 2014/17, pp. 61 and 62, paras. 23-27 (Obradović).

[4]CR 2014/5, p. 18, para. 8 (Crnić-Grotić); CR 2014/8, p. 49, para. 4 (Seršić).

[5]CR 2014/6, p. 22, para. 31(Sands).

How much smaller? It is not quite clear; but anyway, his offer for so broad an interpretation of the Genocide Convention is a very inventive approach which would undoubtedly, if accepted by the Court, push many State clients to knock on the door of the skilful barristers.

7. However, when I thought that I understood what the Applicant's approach to this case was, Professor Sands all of a sudden departed from the thesis of genocide limited to a hamlet or something smaller, claiming that "a large number of genocidal acts" were committed in the occupied regions, which were "very large regions by any standard"[6]. So, no hamlets, no limited areas. "The intention was plain and simple", he said, "to destroy the Croat communities *in their entirety*, and this was *largely achieved*"[7]. The allegations became more and more serious. "Town after town" — he claimed — "Serb forces sought out, identified and then executed Croat civilians who hid from the carnage just because they were Croats"[8]. The other counsel for Croatia continued in the same manner: "Croats were starved, beaten, hanged, stabbed, mutilated, castrated and hacked to death with axes, because they were Croats"[9].

8. Was it really the case? How many of them were hanged, mutilated and castrated? This sort of rhetorical exaggeration blurs the real suffering of many individual victims of that war, Croats and Serbs, those who necessarily are forgotten in this false genocide narrative.

9. Sir Keir Starmer said: "[T]he men were separated from the women and children [in Vukovar], and most were transported to the torture and *death camps* in other places, particularly *in Serbia*."[10] This is untrue. There was not a single camp in Serbia designated for killing. At its highest, one domestic indictment in Croatia contained the allegation of 12 murders of Croatian prisoners of war committed in the whole territory of Serbia[11], which is incomparable with the Holocaust definition of death camps, the examples of which are Auschwitz-Birkenau in Poland or Jasenovac in Croatia[12]. But Serbia, as I said, had to be demonized. That was the 1999 vision of

---

[6]CR 2014/6, p. 54, para. 1 (Sands).

[7]*Ibid.*, p. 56, para. 10 (Sands); emphasis added.

[8]*Ibid.*, p. 64, para. 37 (Sands).

[9]CR 2014/8, p. 25, para. 67 (Ní Ghrálaigh).

[10]*Ibid.*, p. 35, para. 26, (Starmer); emphasis added.

[11]Indictment of the County State Attorney in Osijek, No. K-DO-51/08 dated 11 April 2011.

[12]http://en.wikipedia.org/wiki/List_of_Nazi_concentration_camps.

President Tudjman whose hostages seem to be our colleagues from the other side of the Bar still today. Professor Lapaš so added: "There are too many incidents about which the Respondent still refuses to divulge information, especially those that took place in prison camps within Serbia."[13] This is a very severe accusation of Serbia's current Government. On the other hand, it seems like an excuse for the lack of serious evidence in support to the Applicant's allegations. However, I am in doubt whether this would be the best approach to the "reconciliation based on historical facts".

Issue of evidence in light of the question posed by Judge Greenwood

10. Mr. President, in the first round of oral arguments, I prepared a sample analysis of the shortcomings of evidence on which the speech of Professor Sands was based[14]. Another speech of the Croatian Agent containing the terrible allegations on rapes, torture and imprisonment was the subject of a new review that I submit to your attention today in the form of the judges' folders[15]. The complete analysis can be found in the Counter-Memorial and Rejoinder[16].

11. In answering the question posed by Judge Greenwood concerning the admissibility of unsigned statements before the domestic Croatian courts, Professor Crnić-Grotić apparently was not quite comprehensible[17]. Although she admitted that the police statements — by the way, the question was about unsigned statements — that the *police* statements were not *themselves* admissible in the court proceedings in Croatia, she tried to give some mitigating explanations blurring the core issue. Members of the Court, there has never been such a thing as "police witness statements" in Croatia, as Madam Agent stated. Those were simple police reports[18] containing information collected by the police. Those police reports — signed or unsigned — could not be admitted into evidence before the courts in Croatia, as I have already explained in the first round of our oral pleadings[19]. It is now confirmed by the Croatian Agent. According to the Croatian

---

[13]CR 2014/10, p. 12, para. 7 (Lapaš).

[14]Judges' folders of 10 Mar. 2014: A sample review of the quotes and their sources vis-à-vis CR 2014/6, pp. 56-62, paras. 13-30 (Sands; *The ethnic purpose of the Respondent's campaign*).

[15]Judges' folders of 27 Mar. 2014: A sample review of the sources of evidence vis-à-vis CR 2014/10, pp. 20-32 (Crnić-Grotić; *Rapes, torture, imprisonment and deportations with intent to destroy*).

[16]Counter-Memorial of Serbia (CMS), paras. 153-158; see also, Rejoinder of Serbia (RS), paras. 245-263.

[17]CR 2014/21, pp. 33-34 (Crnić-Grotić).

[18]In Croatian, *Službena zabilješka*, The Official Record.

[19]CR 2014/13, p. 62, para. 27 (Obradović).

Criminal Procedure Code, the police authority may not examine citizens as witnesses[20]. It is a procedural safeguard. Moreover, any information given by the citizens to the police shall be excluded from the Court's file by the investigating judge[21]. However, it seems that for the Applicant in this case, the police authority is still the supreme fact finder. The Croatian counsel thus reminds us that 188 witnesses allegedly confirmed authenticity of their unsigned statements "in the presence of a police officer"[22]. Why do we not go then to that police officer to solve our dispute? Why are we before the United Nations Court? Mr. President, we remain at our position that documents prepared by the Party, especially for the case of so exceptional gravity, is inappropriate to be taken as convincing evidence[23].

12. Furthermore, the Applicant has ignored my argument from the first round that witnesses like Ms Marija Katić cannot give the probative weight to all other witness statements[24]. And after all, should it be the case with witness Marija Katić? With great respect, it seems that the Applicant forgot the question of Judge Greenwood to that witness, as well as many new details that appeared in her live testimony compared with the unsigned written statement given by three persons altogether. This is not a convincing example that such police statements should be of any assistance to the Court.

13. However, the Agent of Croatia did not answer the question concerning the admissibility of unsigned statements, whoever produced them. Let me be brief and clear: if a party appears before the court in Croatia, or elsewhere in the former Yugoslavia, with a piece of paper claiming that it is an out-of-court witness statement, which is unsigned, and request the court to admit it into evidence without calling witness for live testimony, any judge in Croatia, or elsewhere in the former Yugoslavia, would dismiss that request finding that the statement in that form is prima facie without any probative weight. For that reason, it is inadmissible.

---

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

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

[22]CR 2014/20, p. 30, para. 10 (Ní Ghrálaigh).

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

[24]CR 2014/13, p. 59, para. 18 (Obradović); CR 2014/20, p. 30, para. 12 (Ní Ghrálaigh).

14. If these Croatian unsigned statements, either from police or from unknown sources, were really the "basis" for the decisions of domestic judges to open investigations, as Madam Agent suggests, Croatia would furnish those statements from the Court's files, as it did in several cases that were not disputed by the Respondent. But only *in several cases*.

15. From the other point of view, if these Croatian unsigned statements were really confirmed by evidence accepted by the ICTY, as claimed[25], Croatia would submit that ICTY evidence. Indeed, where are the witness statements given before the ICTY that contain the testimonies as "all Ustasha would be killed" or that Serb units were ordered to "kill and slay every living creature of Croat origin"?[26] We cannot see such ICTY witness statements or findings in these proceedings. Please do not tell me that our Croatian colleagues have forgotten to produce them, as they "forgot" to ask their "witnesses" whether they feel "a genuine security risk" when they were asking the Court to protect their names from publication in these proceedings. Excuse me, but I could not believe them.

Allegation that Serbs killed the Serbs

16. Demonization of the Serbian side in the conflict is presented also by arguing that Serbs commonly killed other Serbs. While Croatia admits only that "individual crimes were committed *in the course* of Operation Storm"[27], it claims that Serbs were those who committed the most horrific crimes including those in the Croatian final operation. Thus, Ms Singh has stated with confidence that "a representative of the Croatian Helsinki Committee — relied on so heavily by the Respondent — testified at the Gotovina trial that 100 Serb civilians were run over by Serbian tanks fleeing Sector North"[28].

17. That representative was no one else but Professor Žarko Puhovski, the statement of whom was indeed quoted by our side. But did he really say it? The relevant part of his testimony before the ICTY is now on your screen. I quote:

---

[25]Only four examples have been shown: see CR 2014/20, p. 31, para. 13, fn. 63 (Ní Ghrálaigh).

[26]See judges' folders of Serbia dated 10 Mar. 2014.

[27]CR 2014/19, p. 17, para. 21 (Crnić-Grotić); emphasis added.

[28]*Ibid.*, p. 33, para. 35 (Singh).

"Mr. Mišetić [defence counsel for accused Gotovina]

Question. Now, Mr. Puhovski, do you have, first of all, any information about the number of people that may have been run over there in that column of refugees?

Answer. *I cannot tell you anything with any degree of certainty.* I seem to recall the figure of 82 from the report of the RS Helsinki Committee. However, I saw that report a number of years ago, and *I don't know whether it is correct.* What I am certain though that it was 100. I couldn't verify it any further."[29]

18. Hence, the original information comes from "the RS Helsinki Committee". *RS* can be the Republic of Srpska, but its Helsinki Committee was established in 1996, one year after Operation Storm. *RS* can also be the Republic of Serbia, in which case the organization would be that one led by Ms Sonja Biserko. However, Professor Puhovski did not confirm that information as correct, nor has the ICTY ever come to a finding on this, nor does any serious report contain that finding. The Court deserves an apology by the Applicant for the incorrect and obviously misleading reference to the ICTY statement of Mr. Puhovski.

19. Mr. President, it happens rarely that you have before you so divided parties as is the case now. Solving this dispute, the Court will meet the very substance of its main objective.

I would kindly ask you now to give the floor to Professor Andreas Zimmermann, who will address another important preliminary issue.

The PRESIDENT: Thank you very much, Mr. Obradović. I call on Professor Zimmermann. You have the floor, Sir.

Mr. ZIMMERMANN:

PART 1

I. Introduction

1. Mr. President, Members of the Court, last week you heard Professor Crawford tell you a fairy tale — a fairy tale about two law professors appearing in two ICJ cases, one of them not even charging fees — which in itself shows that it could have been nothing but a fairy tale anyhow.

[29] *Gotovina et al.*, Trial Transcript, p. 15975; emphasis added.

2. Yet that was nothing but a fairy tale — not the reality of international law. Instead of coming up with a mock case, counsel for Croatia should have rather referred you to a real decision that was rendered only 100 metres away from here in the Small Hall of Justice. He should have referred you to this real case decided by the Eritrean-Ethiopian Claims Commission because it has so much in common with the proceedings at hand[30].

3. For one the case involved two States, one of which, Eritrea, had come into existence as the result of the fight of an insurrectional movement against the territorial State. A real insurrectional movement and a successful one.

4. What is more is that the case relates, just like the case at hand, to an ethnically-driven armed conflict involving serious violations of international humanitarian law. And it relates to alleged violations of, *inter alia*, the Geneva Conventions, which, as you have confirmed in your *Wall* Opinion, have as much an *erga omnes* character as the Genocide Convention[31].

5. Furthermore, just as in the present case, the temporal scope of the treaty, the Geneva Conventions, was in dispute. Ethiopia had been bound by the Geneva Conventions since 1969. Eritrea, however, had only become bound by the Conventions as late as August 2000, several years after it had come into existence.

6. Unlike in your *Georgia* v. *Russia* case, automatic succession to the Geneva Conventions was pleaded by the parties — but the Claims Commission rejected it.

7. Obviously, in *both* cases the relevant treaties — the Geneva Conventions in Ethiopia-Eritrea and the Genocide Convention in our case — had previously been applicable to the respective predecessor States before the successor States, Eritrea and Serbia, came into existence. And the Geneva Conventions had, just like the Genocide Convention, been applicable throughout the entire territory of Ethiopia prior to Eritrea's secession. Nevertheless, the Claims Commission still found that there was no continuity of treaty obligations. Indeed, it even found that Eritrea — unlike Serbia — had only become bound several years after its independence. To use Croatia's

---

[30] *Prisoners of War Eritrea's Claim 17* (*The State of Eritrea* v. *The Federal Democratic Republic of Ethiopia*), Partial Award, 1 July 2003, Eritrea-Ethiopia Claims Commission; available at: http://www.pca-cpa.org/showpage.asp?pag_id=1151.

[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155.

terminology, the Claims Commission did thus accept a huge gap in the applicability of the Geneva Conventions, which in cases of armed conflicts are, I submit, as important as the Genocide Convention.

8. The result reached by the Claims Commission then, in turn, raised the obvious question of a possible retroactive application of the Geneva Conventions. Despite what Croatia would certainly call a customary law mooring of the Geneva Conventions, and despite their obvious humanitarian and *erga omnes* character, the Claims Commission still found that the Geneva Conventions did *not* apply retroactively[32]. Again, no continuity of treaty obligations.

9. What is, however, fundamental, even if Professor Crawford might probably again call it banal[33], is this: unlike in our case, Ethiopia and Eritrea had also empowered the Claims Commission to determine possible violations of *customary law*. Under these circumstances, the Claims Commission in Ethiopia and Eritrea could then make findings on violations of customary law — violations of customary law that had occurred prior to the entry into force of the relevant treaty[34].

10. So, it is customary international law that provides for continuous legal protection even where the treaty is not yet in force. And *nothing* precludes international courts and tribunals to pronounce on violations of customary law *if they have* jurisdiction to do so.

11. In our case, too, the customary law prohibition of genocide continuously applied. The only difference is that in our case the *Court's jurisdiction* is limited to making findings as to violations of the Genocide Convention. But would really the Ethiopian Eritrean Claims Commission have been able to pronounce on violations of the Geneva Conventions if the parties had limited its jurisdiction to breaches of treaties — of course not. The Geneva Conventions were not applicable. So perhaps our case is not as *sui generis* as Professor Crawford wants it to be.

---

[32] *Prisoners of War Eritrea's Claim 17 (The State of Eritrea v. The Federal Democratic Republic of Ethiopia)*, Partial Award, 1 July 2003, Eritrea-Ethiopia Claims Commission, p. 9, para. 38, as well as pp. 10-11, para. 42, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1151.

[33] CR 2014/21, p. 17, para. 31 (Crawford).

[34] *Prisoners of War Eritrea's Claim 17 (The State of Eritrea v. The Federal Democratic Republic of Ethiopia)*, Partial Award,1 July 2003, Eritrea-Ethiopia Claims Commission, p. 9, para. 38, as well as p. 9, para. 38, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1151.

12. Mr. President, *this* is the reality of international law, argued and decided just 100 metres from here in the Small Hall of Justice rather than the fairy tale you heard last week in this Great Hall of Justice.

13. And it is this reality that forced Croatia to request the Court to overrule itself on issues of temporal jurisdiction and on standing developed in *Georgia* v. *Russia* and *Belgium* v. *Senegal*. In the last round of Croatia's oral pleadings there was however a novelty. An unveiled attempt by Professor Sands, and by Professor Crawford, to threaten the Court. Both told you that the Court would become "irrelevant"[35], or that it would be "sidelined"[36] should it not follow Croatia's arguments in this case. Yet, as the saying has it, fear is a bad adviser.

14. What is more, Croatia attempted to threaten the Court in a case that has been brought with a very peculiar form of *dolus specialis*, namely the intent to instrumentalize this Court to paralyse ICTY cases against Croatian State officials.

15. Members of the Court, after a week of oral pleadings, Croatia now formally claims that it can also prove acts of genocide occurring *after* 27 April 1992. Obviously, events after that date come within the Court's temporal jurisdiction — just as the crimes committed by Croatia during Operation Storm in 1995. Still, as acknowledged by Croatia's former Agent himself[37], Croatia's case largely depends on acts pre-dating the critical date. Serbia is fully convinced that no genocide at all was committed in Croatia in 1991 and 1992. Still it insists that the Court must, first and foremost, determine the scope of its jurisdiction and the admissibility of Croatia's case, before then dealing with the merits of Croatia's case.

II. Croatia's disregard for its own behaviour

16. Mr. President, while 27 April 1992 constitutes a watershed for the Court's jurisdiction in this case, there is complete continuity in these proceedings on one respect: this is Croatia's complete disregard for its own prior behaviour. Croatia itself has for years — and indeed successfully — rejected the very idea of continuity of treaty obligations when it came to the FRY/Serbia, and it did so specifically concerning human rights treaties.

---

[35]CR 2014/20, p. 19, para. 19 (Sands).

[36]CR 2014/21, p. 17, para. 30 (Crawford).

[37]See CR 2014/14, p. 10, para. 3 (Zimmermann).

17. Let me give you but some examples, *inter alia*, in 1994, in a letter addressed to the Secretary-General of the United Nations, Croatia stated that it would only accept the FRY/Serbia as a party to treaties of the former SFRY provided that a notification of succession was eventually forthcoming — and it would only accept the FRY as a party with effect of 27 April 1992. Croatia, obviously, was then not concerned with the continuity of treaty obligations as it now seems to be for the purpose of this case, and for this purpose only. As Croatia then put it in 1994 — and as you will see: [Slide on]

> "[i]f the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention to be considered . . . a party, by virtue of succession to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State *with effect from 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro) as a new State, assumed responsibility for its international relations*, the Republic of Croatia *would fully respect that notification of succession*".[38] [Slide off]

18. To provide you with a further illustration of the Croatian position on the matter, let me mention an aide-memoire of January 1994 in which the Permanent Mission of Croatia to the United Nations stressed:

> "Since the . . . 'Federal Republic of Yugoslavia' (Serbia and Montenegro) has not notified the Secretary-General of its succession to the International Convention on the Elimination of all Forms of Racial Discrimination as one of the successor States of the former SFRY, *it cannot be considered as one of the parties to the said Convention*."[39]

That was 1994, Croatia considered the FRY not to be a party of CERD.

19. Again, no sign of claimed continuity of treaty obligations, even with regard to most fundamental human rights treaties such as CERD.

20. As a result of Croatia's insistence, the FRY/Serbia, was frequently barred from participating in meetings of contracting parties of human rights treaties[40]. It seems Croatia was

---

[38]Letter dated 16 February 1994 from the permanent representative of Croatia to the United Nations addressed to the Secretary-General, UN doc. S/1994/198, p. 3; see also, Preliminary Objections of Yugoslavia (POY), Ann. 9; emphasis added.

[39]Note Verbale dated 14 January 1994 from the Permanent Mission of the Republic of Croatia to the United Nations addressed to the Secretary General, UN doc. CERD/SP/51, p. 3; see also, POY, Ann. 15; emphasis added.

[40]*Ibid.*, p. 8.

then not so much concerned with time gaps in protection. In a letter dated 30 January 1995, again from the Permanent Representative of Croatia to the United Nations[41], Croatia again stated:

> "[t]he representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) have been prevented from participating in . . . conferences of State parties to multilateral treaties . . . (i.e., . . . Convention on the Rights of the Child, International Convention on Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political rights, etc.) as the Federal Republic of Yugoslavia (Serbia and Montenegro) *had . . . tried to participate in international forums as a State party without having notified its succession . . .*"

21. Again, no claim of continuity — quite to the contrary: Croatia always insisted on discontinuity. What is however most telling, is how Croatia then perceived the legal effect of any eventual succession, by the Respondent, to human rights treaties such as the Genocide Convention. As Croatia stated it: [slide on]

> "Should the Federal Republic of Yugoslavia (Serbia and Montenegro) express its intention to be considered a party, by virtue of succession, to the multilateral treaties of the predecessor State *with effect as of 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations*, the Republic of Croatia would take note of that notification of succession."[42] [Slide off]

22. Mr. President, Members of the Court, Croatia consistently took the position that the FRY would only become bound by the date you have by now heard so often and I apologize for that, namely 27 April 1992. And where was Croatia's claim for continuity then when, as Professor Crawford put it, it was needed most? And does Croatia's insistence on continuity now, when it is serves its purposes in this case, not ring a little hollow?

III. Position taken by third States and the Court

23. As shown, Croatia's position as then taken was shared by all relevant stakeholders, including the Arbitration Commission of the Peace Conference of the Former Yugoslavia[43].

24. Let me just give you one more example: it relates to the reaction of Bosnia and Herzegovina to Serbia's attempt to accede to the Genocide Convention in 2001. Bosnia-Herzegovina stated that the "Agreement on Succession Issues" of 2001 concluded by the

---

[41]Letter dated 30 Jan. 1995 from the Permanent Representative of Croatia to the United Nations, addressed to the Secretary-General, UN doc. A/50/75-E/1995/10, 31 Jan. 1995; see also, POY, Ann. 10; emphasis added.

[42]*Ibid*.; emphasis added.

[43]See CR 2014/14, p. 14, para. 28 (Zimmermann).

successor States of the former Yugoslavia — which obviously Croatia, as a contracting party to — and Bosnia stated, that agreement:

> "implies that the Federal Republic of Yugoslavia has effectively succeeded the former Socialist Federal Republic of Yugoslavia as of 27 April 1992 as a Party to the Genocide Convention".[44]

Bosnia then went on and stated: [slide on] "27 April 1992 [is] the day on which FRY [sic!] became bound to [sic!] the Genocide Convention . . ."[45] [Slide off]

25. Mr. President, let me now consider what this Court, what you said on the matter. Professor Crawford claimed that your 2008 Judgment was irrelevant, quoting its paragraph 129[46]. Let us see what you stated there. You confirmed that 27 April 1992 is to be considered — and you will see it on the screen: [slide on] "27 April 1992 is the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention"[47]. [Slide off]

26. The sole question, according to the Court, that remained was the "question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992"[48].

27. But if the Respondent State — as you put it, as the 2008 Judgment put it — had not even been *capable* of being a party to the Genocide Convention before the date, this question can then only be an issue of the retroactive application of the treaty.

IV. No gap in protection

28. Mr. President, Croatia has argued that if one were to follow Serbia's argument on issues of jurisdiction, States would enjoy impunity when genocide is committed in times of transition[49].

---

[44]Communication of Bosnia-Herzegovina to the Secretary-General dated 27 Dec. 2001 regarding the accession of Yugoslavia to the Genocide Convention, Endnote 14 of the Convention, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en.

[45]*Ibid*.

[46]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 460, para. 129.

[47]*Ibid*.

[48]*Ibid*.

[49]CR 2014/21, p. 22, para. 43 (Crawford).

29. What, however, Croatia disregards is that, as this Court has stressed time and again[5051], a lack of jurisdiction does not mean that States are freed from their obligations under either customary law or under the Genocide Convention.

30. Croatia also disregards the possibility of enforcing obligations through other States rather than through the Court, especially when we deal with obligations *erga omnes*.

31. Croatia also disregards the fact that the Security Council, can take enforcement action when genocide is being committed. Indeed, the Security Council has done so in the past on several occasions, including concerning the conflicts in Bosnia, Rwanda and Sudan.

32. Croatia similarly disregards the possibility of invoking the criminal responsibility of individuals, in particular, in situations of transition. This is confirmed by the very creation of the ICTY by the Council and by the Libyan and the Sudanese ICC referrals.

33. Finally, Croatia also disregards the possibility of the Court exercising jurisdiction other than under Article IX of the Genocide Convention on the basis of jurisdictional titles covering not just treaty breaches. And the Ethiopian-Eritrean example I mentioned in the beginning illustrates this very point.

34. On the whole, the so-called time gap argument simply does not apply if one was willing to look beyond the walls of this Great Hall of Justice, or even if one was willing to take a simple look beyond the Genocide *Convention*. International law constitutes a multi-layer, multi-actor legal régime. While the Court is important, is not the only mechanism to enforce the prohibition of genocide, and the Genocide Convention is not the only source of the prohibition of genocide.

35. Mr. President, this is confirmed by the practice of reservations to the Genocide Convention. States as diverse as, *inter alia*, Algeria, China, India, Morocco, the United States and Venezuela, all have made reservations as to Article IX. They are thereby preventing the Court from exercising jurisdiction under Article IX. The Court has, on several occasions, confirmed the validity of such reservations, including in cases brought by Serbia itself[52]. The Court has thus

---

[50]See e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127.

[51]CR 2014/14, p. 56, para. 38 (Zimmermann).

[52]*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 32-33, paras. 66 ff.; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order, I.C.J. Reports 1999*, p. 772, paras. 32-33.

accepted what Croatia would probably call a permanent and unlimited time gap in the protection under Article IX and the Court accepted it. If Croatia was right, the Court would have certainly nullified such Article IX reservations but you never did.

36. Besides, Croatia itself has frequently accepted such Article IX reservations[53]. It seems that Croatia, outside this courtroom, is not concerned with any gap it now alleges. Croatia did not even object when, in 2006, Montenegro confirmed the Article IX reservation Serbia and Montenegro had made in 2001[54].

37. Summarizing, if one takes a holistic and realistic approach to the matter, it becomes obvious that Croatia's time gap argument ignores the very reality of international law.

V. The 27 April 1992 declaration

38. Mr. President, let me now move on to the 27 April 1992 declaration. I have four points to make. My arguments relate

— first, to the alleged binding force of the declaration,

— second, the content of it, as interpreted by the Court,

— third, Croatia's behavior on the matter,

and, finally,

— fourth, the relevance of the declaration within the context of your 2008 Judgment.

39. As to the alleged binding effect of the declaration, Serbia has dealt with this in detail in its written and oral arguments[55]. Croatia has thought it proper not to deal with these arguments in its second round of oral argument.

40. Second, the Court itself limited the effect of the declaration, as "having had the effects of a notification of succession to treaties"[56]. The Court did so in light of the very limited formal requirements for such notifications set out in Article 2 *(g)* of the 1978 Vienna Convention on State

---

[53]The following States have acceded respectively succeeded to the Genocide Convention *after* Croatia had become a party with an Art. IX reservation without Croatia lodging an objection: Bangladesh, Malaysia, Singapore and Montenegro.

[54]See for further details CR 2008/12, p.41-42, paras. 39-45 (Zimmermann).

[55]See e.g. CR 2014/14, p. 60 *et seq*., paras. 58 ff. (Zimmermann).

[56]*Croatia*, p. 451, para. 111.

Succession to Treaties[57]. Besides, the Court took its position in light of what you called the "essentially confirmatory" character of such notifications of succession[58].

41. Assuming State responsibility for each and every violation of international law allegedly committed by one's predecessor State, is however of a completely different magnitude. It cannot be subject to a similarly low standard of formality. It is for this very reason that the Court limited the effect of the declaration as amounting, at most, to a notification of succession[59] with an effect *ad futurum* only.

42. Third, Croatia again completely disregards its own previous behaviour: it has in the past, as shown, simply rejected *any* legal effect of the declaration whatsoever[60]; it was only in 2010 that it finally referred to the declaration as having had the effect of a binding unilateral declaration. There was accordingly no reliance whatsoever by Croatia. Counsel for Croatia had nothing to say on that either.

43. Finally, fourth, the interpretation of the declaration as constituting an acceptance for State responsibility for acts pre-dating 27 April 1992 is not compatible with your 2008 Judgment. As you will recall, the Court in 2008 found that it needed further information and further arguments to determine whether it has temporal jurisdiction, and whether the Respondent can be held accountable for acts before the critical date. It is for that reason that the Court in 2008 joined Serbia's preliminary objection *ratione temporis* to the merits.

44. Mr. President, if Croatia was right, and if the declaration was indeed meant to assume responsibility, the Court in 2008 would have simply rejected Serbia's third preliminary objection. It would have sufficed to state that the Respondent had, by virtue of its declaration and its subsequent behaviour, already in 1992, accepted State responsibility for acts pre-dating that date, as well as the applicability of the Genocide Convention for that very period. Joining Serbia's temporal preliminary objection to the merits would have been simply redundant and nonsensical. The simple fact that the Court joined Serbia's third preliminary objection to the merits constitutes,

---

[57] *Croatia*, p. 450, para. 109.

[58] *Ibid.*

[59] *Ibid.*, p. 451, para. 111.

[60] *Ibid.*

therefore, unequivocal evidence that Croatia's approach is simply wrong and plainly incompatible with what you decided in 2008.

45. Mr. President, that brings me to the issue of succession to responsibility.

VI. Succession to responsibility

46. Last Friday at precisely 10.35 a.m., i.e. less than half an hour before concluding its case, Croatia, for the first time ever since it submitted its Application in 1999, raised the question of a possible succession, by Serbia, to the obligations incurred by its predecessor State, the SFRY for having allegedly committed genocide prior to its dissolution. That behaviour by the Applicant raises various issues, including those of the proper administration of international justice before this Court.

47. First, Croatia has, at this late stage of the proceedings, introduced a new claim, based on the concept of State succession to responsibility. Yet, as you have confirmed in your jurisprudence, in order to bring such a new claim not already contained in the Application, it must have either, as a matter of substance, been included in the original claim[61], or must arise directly out of the question which is the subject-matter of the Application[62]. That is not the case.

48. Second, as again confirmed in your jurisprudence, the very timing of such a new claim raises serious doubts as to its admissibility as such[63].

49. Third, Croatia had never previously raised the matter with Serbia, and accordingly no dispute had arisen as between the Parties at the relevant date, as required by the compromissory clause under which the case has been brought.

50. Fourth, even if there has been a dispute as to the possible succession, by Serbia, to the obligations of the SFRY at the relevant time, it is not one covered by Article IX of the Genocide Convention since it does not relate to a dispute as to the application, interpretation or fulfilment of the Genocide Convention by the Parties, as you have confirmed, Mr. President[64].

---

[61] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 240 ff.; p. 266, para. 67.

[62] *Ibid.*

[63] See *mutatis mutandis, Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp.138-139, paras. 42-44.

[64] *Croatia;* separate opinion of Judge Tomka, p. 520, para. 13.

51. Fifth, the question whether or not one or more of the successor States of the SFRY might have succeeded to the delictual obligations of the SFRY does not only concern Serbia, but all successor States of the SFRY. Those include Montenegro which, at the relevant date of succession, 27 April 1992, still formed part of the Respondent. Those other successor States are thus to be considered necessary third parties within the meaning of your *Monetary Gold* jurisprudence[65].

52. Six, as already previously mentioned, both Croatia and Serbia are parties to the 2001 "Agreement on Succession Issue"[66] which in Article 2 of its Annex F provides that — and you have it in front of you: [slide on] "All claims against the SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4 of this Agreement."[67] [Slide off]

53. This provision, according to the former Special Negotiator, the late Sir Arthur Watts, governs claims arising out of succession to international responsibility directed against the SFRY[68]. It precludes the submission of the claim in the current proceedings, or, at the very least, presupposes that prior to bringing the matter before the Court, Croatia ought to have seised the Committee set up by the Agreement. Yet, Croatia has so far never done so.

54. Finally, seventh, and on the substance of Croatia's belated claim, as rightly put by the latest edition of Brownlie's *Principles of Public International Law*[69], the better arguments suggest that new States do not succeed to responsibility. In the *Lighthouse Arbitration*, to which counsel for Croatia referred[70], the tribunal specifically referred to the fact that it was dealing with the violation of a private contract[71]. As a matter of fact, France as the applicant State in those proceedings, itself had advocated the principle of non-succession and had proposed a limited exception only for cases of concessions, and it is in light of these considerations that the award has to be seen.

---

[65]*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment, I.C.J. Reports 1954*, p. 32.

[66]Agreement on Succession Issues, adopted 29 June 2001, United Nations, *Treaty Series (UNTS)*, Vol. 2262, p. 251.

[67]*Ibid.*, p. 293.

[68]See P. Dunberry, *State Succession to International Responsibility* (2007), p. 212, fn. 294.

[69]J. Crawford, *Brownlies's Principles of International Law* (8th ed., 2012), p. 442.

[70]CR 2014/21, p. 21, para. 41 (Crawford).

[71]*Lighthouses Arbitration (France* v. *Greece)*, Decision No. 23, *International Law Reports (ILR)*, pp. 81, 92.

55. Mr. President, this brings me to the end of the first part of my presentation of today. I would now kindly request you to call on Professor Tams to the Bar. Thank you.

The PRESIDENT: Thank you very much, Mr. Zimmermann. It is now your turn, Professor Tams, to address the Court. You have the floor.

Mr. TAMS: Thank you, Mr. President.

INTRODUCTION

1. Mr. President, Members of the Court, last week — after years of assertion — you finally heard Croatia engage with the temporal scope of the Convention. My purpose today is to respond to the arguments we have now heard. I will also revert to Article 10, paragraph 2, of the ILC Articles on State Responsibility. After my presentation, Professor Zimmermann will conclude Serbia's argument in so far as it relates to events predating 27 April 1992.

RETROACTIVITY OF THE GENOCIDE CONVENTION AND ITS ARTICLE IX

2. Mr. President, Members of the Court, Professor Crawford last week distinguished between the temporal scope of the Convention as such and that of its jurisdictional clause, Article IX.

The temporal scope of the Convention

3. On the first point, he faithfully reiterated Croatia's mantra that there was no need to discuss retroactivity. All that was required, he said, was the *continuous* application[72] of the Convention. So, continuity is the new watchword. Professor Crawford further sought to alleviate concerns by saying that Croatia did not argue for what he called "full retroactivity", and he understood that to mean the application of the Genocide Convention to events pre-dating 1951[73], when it first entered into force. So the terms of the debate have changed slightly: "retroactivity not properly so-called" has now become "continuity"; and "retroactivity proper" is now "full retroactivity"[74]. But, Mr. President, the substance of Croatia's argument — the substance — has not changed one iota: as before, Croatia's argument depends on an effect that is described in

[72]CR 2014/20, p. 67, para. 11 (Crawford).

[73]CR 2014/20, p. 66, paras. 9-10 (Crawford).

[74]Cf. RC, para. 7.13.

Article 28 of the Vienna Convention: Croatia wants to "bind . . . [Serbia] in relation to acts or facts . . . which took place before the date of the entry into force of the treaty [the Genocide Convention] with respect to that party [Serbia]"[75].

4. Now, Croatia may call this "retroactivity not properly so-called"[76], or lesser retroactivity, or even "continuity"[77]. But international law uses a different term: international law calls this retroactivity. As I have said in the first round: Article 28 defines retroactivity. Its approach is deliberately formal, it is not formalistic, it is formal. Article 28 looks at the State party whose conduct is assessed — that is Serbia. It does not look to predecessor States. It leaves that question to the rules on State succession. Article 28 asks when that State party became bound, which for the case of Serbia the international community says was on 27 April 1992. Mr. President, note that the date on which the treaty as such first entered into force — 1951 in our case, the Genocide Convention — that date does not feature in Article 28; for the purposes of retroactivity in the way international law defines it — not Croatia, but international law — for the purposes of retroactivity the critical date is the date when the treaty entered into force for a particular party, not when it entered into force for the first time. Legal effects preceding that date are called retroactivity, whether they go back to before 1951 or not.

5. And all this is deliberate because the international community wants clarity when identifying the temporal scope of treaty obligations. Customary international law, as Professor Zimmermann has shown, helps avoid the time gaps about which Croatia now, suddenly, is so worried. Rules on State identity and State succession deal with changes in the legal personality of a State party. But treaty law matters here and as far as treaty law is concerned, Article 28 is clear: it identifies the critical date; and it formulates a presumption and two exceptions.

6. Now, Mr. President, Croatia has said nothing on the two exceptions set out in Article 28 — express and implied retroactivity. Last week, you were told again that the

---

[75]Article 28 of the Vienna Convention on the Law of Treaties (VCLT).

[76]RC, para. 7.13.

[77]CR 2014/20, p. 67, para. 11 (Crawford).

Convention was declaratory[78] — and again, we agree. But we maintain that nothing in the text of the treaty, nor in its very nature, mandates the application of the Genocide Convention to acts and facts that pre-date its entry into force for any given State party. And this is the test, Mr. President, this is the test that Croatia's argument simply does not address. As Croatia has now begun to emphasize the duty of prevention[79] — which featured prominently in the second round pleadings — perhaps I may briefly recall my discussion of the temporal scope of that particular obligation. And I can be brief because I have made the point two weeks ago: can we plausibly say that States, when joining the Convention régime — and I gave the examples of the United States or Nigeria, which ratified late in the day — did they plausibly thereby agreed to a duty to have stopped atrocities decades earlier? Most certainly not. If Article 28 is taken seriously, which we say it must, it is clear that the Convention does not apply to events pre-dating 27 April 1992.

The temporal scope of Article IX

7. Mr. President, Members of the Court, Croatia's main argument — I think it is fair to say — focuses not on the Convention as such, but on one of its provisions, Article IX. Last Friday, Professor Crawford defended the view that jurisdictional clauses, like Article IX, follow a separate temporal logic, and he continued to refer to this as the *Mavrommatis* principle[80]. He seemed to accept that this Judgment — *Mavrommatis* — depended on the terms of the specific clause. But the principle, he said, "is well established and is not unique to *Mavrommatis*"[81].

8. Now, Mr. President, before assessing the evidence put forward in support of that statement, perhaps I can invite you to reflect on a preliminary matter? Assume Croatia were correct. Assume the principle existed. Where would we expect this "well-established" principle to be reflected? We are talking about a treaty clause, so I suggest we would look to Article 28 and its customary equivalent. The specific provision that the international community has agreed upon to determine the temporal scope of treaty provisions. Article 28 governs inter-State treaties irrespective of their nature, and irrespective of their character. It applies to the provisions of a

[78]See e.g., CR 2014/21, p. 19, para. 36 (Crawford).

[79]See e.g., CR 2014/20, p. 10, para. 2 (Sands); p. 58, para. 46 (Starmer).

[80]CR 2014/21, pp. 13-14, para. 22 (Crawford).

[81]CR 2014/21, p. 13, para. 22 (Crawford).

treaty, without exception. It sets out a flexible system, a presumption and two exceptions. It was drafted by ILC members and by State delegates with ample experience in treaty making and in international litigation.

9. Mr. President, Members of the Court, when these experts drafted Article 28 of the Vienna Convention, why did they not include a special rule for compromissory clauses? It would have been so easy. [Slide on] On the screen, you can see two versions of Article 28: the real Article 28, below, and a hypothetical version — one based on Croatia's argument. If Croatia were right, if jurisdictional clauses were special, Article 28 would presumably have been drafted as follows — and it is on the screen: "unless a different intention appears from the treaty or is otherwise established, *[its] substantive provisions* . . . do not bind a party in relation to [any] acts [or] facts [which took place, or any situation which ceased to exist before the date into entry into force of the treaty — with respect to that party]". That would have been a rather straightforward way — perhaps even an elegant one, if I may say so — to give effect to what Croatia calls the "*Mavrommatis* principle".

10. But a quick look at the real Article 28 makes clear that the reference is not to the substantive provisions, it is to "its provisions" — "*les* dispositions d'un traité" in French — *all* of them. Now, do jurisdictional clauses not count among "the provisions of a treaty"? What happened to Croatia's "well-established *Mavrommatis* principle"? It seems to have got lost somewhere on the way — on the way from Mr. Mavrommatis' concessions in Palestine to the Vienna Diplomatic Conference — perhaps it was lost on the Balkans, on the way? It does not feature in the ILC commentary either. Perhaps the drafters just forget about jurisdictional, perhaps this was an oversight? [Slide off]

11. Well, Mr. President, Members of the Court, of course it was not an oversight. Of course, the drafters were aware of treaty-based compromissory clauses. Of course, compromissory clauses are "provisions of a treaty" in the sense of Article 28. And of course the Vienna Convention régime applies. *Nothing* in the text, or the context, of Article 28 points to a special rule for compromissory clauses. Nothing supports Croatia's distinction between substantive and jurisdictional clauses of a treaty. Both are subject to the same régime of retroactivity — the régime reflected in Article 28. So unless Croatia can show that, as Article 28 puts it, "a different

interpretation appears from the treaty or is otherwise established", which it does not even try to do. Unless this can be shown, Article IX cannot apply to acts and facts pre-dating 27 April 1992.

12. Mr. President, Members of the Court, when discussing the temporal scope of Article IX, Croatia ignores Article 28. But it points us to two cases, *Mavrommatis* and *Phosphates in Morocco*. The first, as I discussed in the first round, does not support any general proposition. But Professor Crawford was quick to move from *Mavrommatis* to *Phosphates* — from Palestine to Morocco, as it were[82]. So does the *Phosphates* case help Croatia in establishing a legal principle of general application? For three reasons, we submit it provides even less support than *Mavrommatis*.

13. First, *Phosphates in Morocco* was really all about upholding temporal limitations, not about overcoming them: France — the Respondent in that case — had been clear, the PCIJ should only have jurisdiction over "disputes which may arise after the ratification of the present declaration with [respect] to situations or facts subsequent to this ratification"[83]. And the Court upheld that restriction. It gave a fact to a restrictive clause. A special clause. It did not overcome restrictions, it upheld them.

14. Second, contrary to Croatia's assertion, the Court in the *Phosphates* case — if anything — contemplated that generally there should be a restrictive reading of jurisdictional titles. It made clear that — and I quote, and you see it on the screen [slide on]: "[J]urisdiction only exists within the limits within which it has been accepted. [Now of course, and the quote continues.] In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear."[84]

15. And so, because the terms were clear, general principle supporting a restrictive interpretation did not have to be relied on. But, general principles were referred to. The PCIJ spoke of the "restrictive interpretation" — and that too is on the screen — the "restrictive interpretation that, in case of doubt, might be advisable in regard to a clause which must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it"[85].

---

[82]CR 2014/21, p. 13, para. 22 (Crawford).

[83]*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 22.

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

[85]*Ibid.*, pp. 23-24.

16. Now, on no account must such a clause "exceed the intention of States", in subscribing to it or in conferring jurisdiction. That was the PCIJ's concern in the *Phosphates* case — and that is the same concern that this Court shown time and again, for example, in the *Certain Property* case[86] and that is the same concern that we say, should guide you in the present proceedings. [Slide off]

17. Mr. President, Members of the Court, Croatia's attempt to derive a general principle governing compromissory clauses from *Phosphates in Morocco* suffers from a third weakness, and this is perhaps the most obvious one. The *Phosphates in Morocco* case simply was not based on a compromissory clause. The case was based on an Optional Clause declaration: Article 36, paragraph 2, not Article 36, paragraph 1; a different jurisdictional title. Now, both compromissory clauses and Optional Clauses of course are titles of jurisdiction, but beyond that, and you made that clear in the *Certain Property* case, they cannot simply be equated[87].

18. An Optional Clause declaration is a unilateral act, it is not a treaty commitment. An Optional Clause declaration is self-standing, it is not integrated into a treaty. For treaty-based compromissory clauses, we have the clear rule of Article 28 of the Vienna Convention on the Law of Treaties (VCLT). For treaty-based compromissory clauses, we have the guidance you provided in many cases, including the *Georgia* v. *Russia* case[88]. For Optional Clause declarations there is no equivalent. So whatever you make of the *Phosphates* case — in which, I repeat, the PCIJ looked to the terms of the particular jurisdictional title and of which the PCIJ was mindful not to stretch jurisdiction beyond the parties' intentions — whatever you make of the *Phophates* case, it concerned Article 36, paragraph 2, Optional Clauses, not Article 36 (1) compromissory clauses. It does not support Croatia's claim that treaty-based compromissory clauses should apply retroactively.

19. Mr. President, Members of the Court, a brief reprise, as it were, on *Georgia* v. *Russia*. Last Friday, Professor Crawford said I had read too much into your Judgment and he correctly noted that you could leave open Russia's third preliminary objection in that case which had

---

[86] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6.

[87] *Ibid.*, p. 24, para. 43.

[88] *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. 70.

expressly addressed questions *ratione temporis*. But, Mr. President, judgments can make points even without addressing them under a dedicated heading. And, with that in mind, permit me to have a second look at *Georgia* v. *Russia*.

20. You began your analysis by looking at "Documents and Statements from the Period before CERD Entered into Force between the Parties on 2 July 1999"[89]. Why did you do this? You did so with a view to finding whether there was a dispute between the parties, Georgia and Russia, that came within the jurisdictional clause, Article 22 CERD — and Russia had disputed that point; that was its first preliminary objection[90]. You then reviewed a whole range of statements and documents which Georgia felt proved the existence of a long-standing dispute, going back to before 1999; but you held "that none of the documents or statements provides any basis for a finding that there was such a dispute by July 1999"[91] when the Treaty entered into force between the Parties. And this, in turn, meant — and now we come to paragraph 64 which I relied on in my first round pleading — that Georgia had not been able to establish "its contention that 'the dispute with Russia over ethnic cleansing is [a] long-standing and legitimate [dispute]'"[92]. And then you added, still at paragraph 64, that

> "even if this were the case, such 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 by Article 22 of that Convention"[93].

21. Mr. President, Members of the Court, even if Georgia had been able to point to a dispute about racial discrimination at a time before the Convention entered into force for the parties — this "could not have been a dispute with respect to the interpretation or application of CERD". How are we to read this — if not that only disputes arising at a time when both parties are bound are disputes coming within the scope of the jurisdictional clause? You did not need to decide about Russia's third preliminary objection; you made a much more fundamental point: there was no dispute in the sense of the jurisdictional clause, and there could not have been one before the

---

[89] *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. 94, para. 50.

[90] *Ibid.*, p. 81, para. 23.

[91] *Ibid.*, p. 100, para. 63.

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

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

Convention was in force between the parties. That is the relevance of your Judgment in the *Georgia* v. *Russia* case.

22. Mr. President, Members of the Court, if we take stock, what remains of Croatia's "well-established *[Mavrommatis]* principle"[94], the principle that says that compromissory clauses generally apply to prior acts and facts? What evidence is there to suggest such clauses should *not* be governed by the principles set out in Article 28? What evidence is there to refute your holding in the *Georgia* v. *Russia* case? *Mavrommatis* was exceptional and it depended on the special terms of the jurisdictional title. The *Phosphates* Judgment concerned a different jurisdictional title, an optional clause not a compromissory clause and, again, it was narrowly reasoned. Mr. President, Members of the Court, through two rounds of written and oral pleadings Croatia has not been able to come up with any evidence supporting its claim that compromissory clauses are special. Serbia submits that this is indicative. Article IX does not introduce retroactivity through the back door.

CROATIA'S ARGUMENTS RELATING TO ARTICLE 10 (2) ILC ARTICLES

23. Mr. President, Members of the Court, this brings me to my second point, and that is Croatia's attempt to clutch at the straw that is Article 10 (2) of the ILC Articles.

Issues clarified during the first round of oral argument

24. On this I can be relatively brief, because Croatia has said so very little to our arguments. In fact, judging from Croatia's response, the Parties now seem agreed on three basic points and I will quickly go through them.

25. The first is that Article 10 (2) of the ILC Articles was drafted to cover insurrectional movements and national liberation movements. Draft Article 15 (2) from the first reading and Professor Crawford's first report from 1998 faithfully reflect this. That was the drafters intention

26. Second, the addition in 1998 of the words "and other" before movements, so there would be insurrectional and other movements, was a "generic addition". It meant no substantive change, it ensured that the draft could be acceptable to those feeling that national liberation movements

[94]CR 2014/21, p. 13, para. 22 (Crawford).

were separate from insurrectional movements — no substantive change intended. We have not heard anything from Croatia to dispute this reading.

27. Third, there is no practice on "other movements". Again, that is, the application of the purported rule to movements that are neither insurrectional nor liberation movements — there is no practice whatsoever: Croatia was encouraged to point us to examples, but we have heard nothing. Instead, Professor Crawford referred to cases, he called them within "the same general configuration"[95]. So a general configuration, some sort of general principle rather than Article 10 (2) now seems to matter and perhaps that is convenient because that general principle may come with lesser implications, with lesser conditions. If you argue to a principle you need not establish the wording of a clause. Serbia of course does not accept that such a general principle exists — and wonders where it comes from. But that is a separate matter. What Croatia's argument last week suggests is that, unless there is such a general principle, extending beyond Article 10 (2), then Croatia's claim must fail.

28. Mr. President, Members of this Court, these are important interpretative convergences, which we hope will facilitate the Court's task. But many questions of interpretation continue to divide the Parties and in the remainder of my time, I will deal with two of them.

Attribution of conduct allegedly directed or controlled by the movement

29. The first, Mr. President, is fairly discrete but it is important. It concerns the scope of attribution under Article 10 (2) of the ILC Articles: whose conduct is covered by the reference to the "conduct of a movement" that Article 10 (2) speaks of? Addressing that point briefly last week, Professor Crawford likened movements to States, they were just the same. Just like a State could be responsible for conduct of its organs — Articles 4 and 5 — and, exceptionally, for conducts of non-organs, of others, for example under Article 8 — so could a movement. And, he said: "The usual principles of attribution apply"[96]. Serbia respectfully disagrees. We submit that a movement can only be responsible for acts of its organs, not for acts of non-organs. In the exceptional setting

[95]CR 2014/21, p. 27, para. 55 (Crawford).

[96]CR 2014/21, p. 25, para. 50 (Crawford).

of Article 10 (2), which is unusual, not usual, there is no room to apply another exception, Article 8, by analogy.

30. And, Mr. President, the drafting history, is in fact, quite clear on this. The ILC had to address this matter, as so many insurrectional struggles are waged by alliances of factions or alliances of movements, it is not always clear-cut — think of PLO and Hamas to take a recent example. So it was important for the ILC to clarify whose conduct would be transferred to the new State, once emerged: only that of the core movement, or also that of groups making up the penumbra, if you want, if directed and controlled?

31. Now this is what the ILC said in paragraph 6 of its Commentary, and you see it on the screen [Slide 4 on]:

> "The attribution to the new State of the *acts of the organs of the insurrectional movement* which preceded it, *and of such acts only*, is . . . justified by virtue of the continuity between the organization of the insurrectional movement and the organization of the State to which it has given rise."[97]

32. Mr. President, "acts of the organs of the movement . . . and such acts only" — the core movement, not the penumbra. This was no accident, this was deliberate: the notion of "organs of the movement" is used throughout the ILC Commentary[98], and of course Professor Crawford used it in his first report in 1998[99]. The draft provision he put forward refers to "Organs of the movement": that terminology was chosen at a time when the basic framework of the rules of attribution — distinguishing between responsibility for acts of organs, Article 4 (5) and exceptionally responsibly for acts of others, non-organs as it were — was agreed. And faced with this dichotomy — organs versus non-organs — the ILC opted to formulate Article 10 (2) as a rule covering conduct of its organs only. It made clear thereby, by implication, that there was to be no attribution outside the core structures, no attribution of conduct by "non-organs" — such as paramilitary groups. No analogy with Article 8. [Slide 4 off]

33. Mr. President, Members of the Court, tomorrow my colleagues will demonstrate that the alleged Greater Serbia "movement" never controlled or directed paramilitaries in the sense of

---

[97] *Yearbook of the International Law Commission (YILC)*, 1975 Vol. II, p. 101, para. 6.

[98] See, e.g., *YILC*, 1975, Vol. II, pp. 100-101, e.g., at paras. 1, 3, 4 ("ruling organization of the insurrectional movement"), 5 ("organs of the organization which grew up during the insurrection").

[99] *YILC*, 1998, Vol. II (1), 57.

Article 8. My point is separate. Even if it had, and even if Article 10 (2) applied — which, we submit, are two fairly substantial "ifs" — those groups at no time were organs of the movement. Their conduct, for that reason alone, cannot form the basis of a judgment against Serbia.

Article 10 (2) as a rule of attribution, not of responsibility

34. Mr. President, Members of the Court, this leaves one final point in my discussion of Article 10 (2). It is by far the most fundamental disagreement dividing the Parties, and it concerns the legal effects of the provision. As Professor Zimmermann showed in the first round, Article 10 (2) is a rule of attribution — not a provision creating new treaty rules, and certainly not a provision retroactively extending jurisdictional titles. What has been Croatia's response?

35. Curiously, Croatia has remained almost completely silent. To be fair, Professor Crawford did repeat Croatia's claim that "Article 10 (2) is not limited to substantive obligations that apply specifically to movements"[100]. But this is not the same as to say that a State, before it came into existence, was bound by the Genocide Convention and that questions of compliance with this treaty could be litigated before this Court. So does Article 10 (2) really perhaps establish a new way for would-be States to become bound by a treaty, alongside ratification, succession and accession, is it perhaps a retroactivity clause in disguise — whose retroactive effect so far no one has grasped, that escaped the ILC during decades of debate? To call this far-fetched would be a bit of an understatement.

36. And, in fact, even Croatia's own evidence contradicts such far-fetched constructions. Searching for comparable cases, on Friday, Professor Crawford referred you to the emerging State of Poland (after World War I) and to Algeria (prior to and after 1962). Once established, Poland and Algeria, he said, had been held responsible for conduct of insurrectional movements[101]. But being held responsible is not enough, even if this were right. If Croatia wants these cases to support its claim it needs to ask two further questions. Were Poland and Algeria held responsible for treaty breaches and did international courts have jurisdiction to deal with claims against them? And on both questions, we submit, the answer is "No". Of course not. In the *Polish Upper Silesia*

[100]CR 2014/21, p. 24, para. 49, (Crawford).

[101]*Ibid.*, pp. 26-27, paras. 53-54 (Crawford).

case, the PCIJ was distinctly hostile to the idea that the Polish National Committee (or indeed the nascent State of Poland) should have enjoyed any treaty-based rights or duties[102]. As regards Algeria: it is difficult to make much of French court decisions which, as Croatia notes, "did not [usually] make findings against Algeria"[103]. But to the best of our knowledge they certainly have made no findings based on treaty breaches. And, as regards jurisdictional titles, I note in passing that Algeria joined the Genocide Convention in 1963, and it made a reservation to Article 9. France of course had been bound before, without a reservation. Under Croatia's approach Algeria could be held responsible before this Court for acts of the FLN and, incidentally, Croatia could bring such a claim, because nothing depended on its independence in October 1991. But all this is far-fetched.

37. So Mr. President, Members of the Court, after two rounds of written and oral pleadings on Article 10 (2) — the provision which Professor Crawford says will now become famous — Croatia has still not been able to tell us how the principle could apply in the present instance in which responsibility can only be invoked for treaty breaches. If Algeria and Poland are Croatia's best examples of what Professor Crawford referred to as "situation[s] of the same general configuration"[104], if these are the best examples, then, with due respect, all they do is betray the weakness of Croatia's claim.

38. Mr. President, Members of the Court, all this explains Serbia's scepticism with respect to Article 10 (2) of the ILC Articles. Croatia overstretches a narrow provision; it seems now to have stopped caring about its wording; and it has from the beginning, right until the end, ignored the very specific function of Article 10 (2) as a rule of attribution only.

39. Mr. President, Members of the Court, in the Parties' pleadings directed to the merits of this case you have heard a lot about patterns. I have not used that term so far but, in concluding, it seems to me that there may be a certain pattern to Croatia's argument on jurisdiction and admissibility too. Throughout Croatia has postulated general principles that suited its case. The Mavrommatis principle, the principle of continuity, the *statu nascendi* principle, so that, in some

---

[102] *German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 28.

[103] CR 2014/21, p. 27, para. 54 (Crawford) (in relation to the *Perriquet case*).

[104] *Ibid.*, p. 27, para. 55 (Crawford).

ways, seems to have been a pattern. Now these principles sound nice, they may even sound fancy, but there is a certain Potemkin quality to them. Like Potemkin's villages, the façade is perhaps impressive, but there is so little behind that façade. And so, as far as jurisdiction and admissibility are concerned, Serbia respectfully asks this Court to look beyond the façade of Croatia's Potemkin principles. If you do that, you will find what one tends to find behind Potemkin façades: nothing. This, Mr. President, Members of the Court, concludes my presentation today. I am grateful for your kind attention.

The PRESIDENT: Thank you, Professor Tams. Now I call on Professor Zimmerman, if his pleading is not longer than some 15, 20 minutes.

Mr. ZIMMERMANN: Fifteen minutes maybe, Mr. President.

The PRESIDENT: OK. Please, you have the floor.

Mr. ZIMMERMANN:

PART 2

1. Thank you, Mr. President, Members of the Court. Let me now move on to the issue of the obligation to punish and prevent, while my colleague, Professor Schabas, will deal tomorrow with the issue of missing persons.

I. Obligation to punish genocide

2. As to the obligation to punish, I apologize to the Court to revert to the matter. This is only due to the fact that Croatia itself thought it proper to come back to it in its second round of pleading[105]. It seems counsel for Croatia have still not read para. 442 of your Judgment in the *Bosnia* case. It simply and unequivocally states: [Start slide]

> "Art. VI [of the Genocide Convention] *only* obliges the Contracting Parties to institute and exercise *territorial* jurisdiction."[106] [End slide]

---

[105]CR 2014/21, p. 23, para. 45 (Crawford).

[106]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports, 2007 (I)*, p. 226, para. 442; emphasis added.

3. Mr. President, Croatia's allegations almost exclusively relate to events in Croatia. To that extent, Serbia's territorial jurisdiction is simply not implicated and I believe no more comment is needed on the matter. That brings me to the issue of prevention.

II. Obligation to prevent genocide

4. For one, let me reiterate that, as confirmed in your *Bosnia* Judgment, the obligation to prevent genocide does not constitute a continuous violation[107]. Any determination on the matter does accordingly presuppose that the Court's temporal jurisdiction extends to the relevant time. This in turn, as shown, excludes any alleged violation of the obligation to prevent genocide pre-dating 27 April 1992.

5. In order to eventually make a finding on the matter, "which calls for an assessment *in concreto*"[108] as he put it, the Court would have to first determine that in a *specific location* and at a *specific time* genocide had indeed been committed[109]. The Court would then have to consider the specificities of the situation prevailing so as to eventually make a finding on Serbia's obligation to prevent genocide. It is only if it could be proven that Serbia had *manifestly,* as you put it, failed to take appropriate measures[110], when faced with a concrete danger of imminent genocide, in a specific situation, that the Court could then make a finding on a violation of the obligation to prevent.

6. Moreover, in your 2007 *Bosnia* Judgment you considered it to be particularly pertinent that the respondent had, at the relevant time, been subject to a provisional measures order of the Court which had specifically required the FRY to exercise its influence vis-à-vis non-State actors[111]. In the case at hand, which was brought more than five years after the end of the armed conflict, there simply and obviously was no such order by the Court. Put otherwise, for Croatia the matter seems not to have been one of urgency when the acts, which it now claims were genocidal

---

[107] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports, 2007 (I)*, pp. 221-222, para. 431.

[108] *Ibid.*, p. 221, para. 430.

[109] *Ibid.*, pp. 221-222, para. 431.

[110] *Ibid.*, p. 422, para. 430.

[111] *Ibid.*, pp. 223-224, para. 435.

in character, were about to take place. Otherwise they would have asked for a provisional measures order.

7. Besides, in the *Bosnia* case, you also stressed that Serbia, with regard to the genocide in Srebrenica, had been formally put on notice by the international community of the serious risk of the crime to be eventually committed[112]. Again, the situation concerning the armed conflict in Croatia was different in that the international community never warned the Respondent of an imminent genocide — and it did not simply because there was none.

8. Mr. President, the differences between the situation in Srebrenica in 1995, and the one in Croatia in 1991-1992, are striking and Serbia therefore rejects Croatia's claim as to the alleged violation of the obligation to prevent genocide.

III. Croatia's lack of standing as to events prior to 8 October 1991

9. Mr. President, let me now move on to the issue of Croatia's standing related to events pre-dating 8 October 1991 in light of your *Belgium* v. *Senegal* Judgment. It is first worth noting that the Court's Judgment in that case was based on the finding that the obligations arising under the Torture Convention, just like those under the Genocide Convention, are obligations *erga omnes partes*. This included the obligations under Articles 6 (2) and 7 (1)[113], which the Judgment perceived as part and parcel of, as you put it, a "single conventional mechanism"[114]. So there was no distinction drawn — a "single conventional mechanism". And, in the Court's view, this necessarily implied "the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party"[115].

10. But notwithstanding this *erga omnes partes* character of the obligations arising under the Torture Convention, the Judgment still and nevertheless limited the standing of a State to facts "with effect from" — "à compter du" — the date at which it becomes a State party. In our case this is, as far as Croatia is concerned, 8 October 1991.

---

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports, 2007 (I)*, p. 224, paras. 436–437.

[113] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 450, para. 69.

[114] *Ibid*., p. 455, para. 91.

[115] *Ibid*., p. 450, para. 69.

11. Professor Crawford claimed[116] that your *Belgium* v. *Senegal* Judgment, in its paragraph 104, did refer to an entitlement of Belgium, and I quote Professor Crawford "*from the date it became party to the Convention*" (emphasis added). But that is not what the Judgment said. The Judgment did not use the phrase that Belgium has standing "from 25 July — à partir du 25 juillet 1999". That is not what you said. Instead, you stated that Belgium has standing "with effect of — à compter du 25 juillet 1999"[117] and this obviously implies that it is irrelevant when the claim is made. But what is relevant is the time the alleged treaty violations have been committed.

12. Let me also note again that this case is about treaty violations only. Accordingly, the Court is not dealing with the obligation not to commit genocide as such which is owed to the international community — governed by Article 48, paragraph 1 *(b)*, of the ILC Articles. Rather, given the jurisdictional basis under which this case has been brought, the only question that arises are obligations *erga omnes partes*, governed by Article 48, paragraph 1 *(a)*, of the ILC Articles. Yet, prior to October 1991 Croatia was not a party to the Genocide Convention. Accordingly, to use the words of the ILC Commentary on Article 48[118], Croatia was, at the relevant time, not a member of the group to which the treaty-based obligation was owed. And it is for that reason that it lacks standing it this regard.

13. This brings me to the reference by Professor Crawford to the *Nauru* case[119]. I am afraid to say that this reference is nothing but a red herring. Apart from the case not having reached the merits stage, one cannot but note that Nauru itself had claimed violations of obligations applicable specifically in a pre-independence context vis-à-vis a not-yet-existing State such as, *inter alia*, violations of Article 76 of the [United Nations] Charter[120], violations of the principle of self-determination[121], and violations of obligations of a predecessor State owed specifically towards a future successor State[122]. Those were the claims of Nauru and those are exceptional entitlements

---

[116]CR 2014/21, p. 18, para. 32 (Crawford).

[117]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 458, para. 104.

[118]*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part II, p. 126, para. 6.

[119]CR 2014/21, p. 13, para. 21 (Crawford).

[120]*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Application, 19 May 1989, p. 30, para. 43, available at: http://www.icj-cij.org/docket/files/80/6653.pdf.

[121]*Ibid*., p. 30, para. 45.

[122]*Ibid*., p. 30, para. 48.

that do not depend on statehood. In contrast, Mr. President, Croatia invokes rights arising under a treaty that is open to States only and Croatia was not a State at the relevant date.

14. Members of the Court, let us not be mistaken where Croatia's argument on standing would lead us to. Notwithstanding Croatia having become bound by the Genocide Convention as late as October 1991, or Bolivia having become a party in 2005 only, both States could, for example, bring before this Court alleged violations of the Genocide Convention having been committed during the colonial wars in the 1950s and the 1960s.

15. Mr. President, this is precisely what the late Sir Gerald Fitzmaurice had in mind in his separate opinion in *Northern Cameroons* to which I have made reference[123].

IV. Concluding remarks

16. Mr. President, Members of the Court, the allegation that genocide has been committed is a most serious one. It calls for utmost scrutiny, not only on the merits but also when it comes to the Court's jurisdiction and the admissibility of the claim.

17. Croatia, in order to come up with at least an arguable claim that the Court may consider the merits of Croatia's case when it comes to events predating 27 April 1992, requests the Court to ignore not only its own prior behaviour, which I have shown but to also disregard long-standing and firmly established rules of the law of treaties. What is more, Croatia also wants the Court to endorse a novel and almost unlimited rule on attribution, Article 10 (2) of the ILC Articles, which in 1991-1992 had not even addressed the behaviour of so-called "other movements", and Croatia wants it to be combined with other broad rules such as Article 8 of the ILC Articles. Finally, it wants you to also stretch the Court's jurisdiction arising under Article IX of the Genocide Convention not only *ratione temporis*, but also *ratione materiae*.

18. Croatia does so based on two strands of arguments. For one, it says that in a case where genocide is being alleged, specific considerations should apply when it comes to issues of jurisdiction and admissibility, given the seriousness of the crimes, so as to avoid what it calls impunity.

---

[123]CR 2014/14, p. 69, para. 109 (Zimmermann).

19. Second, Croatia argues that this case constitutes a case *sui generis*, unique in its setting, which will not have repercussions beyond this very case. Let me address these two propositions, fundamentally underlying Croatia's case, one by one.

20. As to the first argument, let me first note that it cuts both ways. It is not only most serious for a State to bring a case of genocide, but even more serious to be the Respondent, allegedly being responsible for genocide. I therefore submit to you that there is a bona fide expectation that a State should only be requested to answer such a charge on its merits, once it is beyond doubt that indeed such State has accepted your jurisdiction on the matter.

21. What is more is that Croatia has implied, throughout its pleadings, that there are several layers of *erga omnes* and *jus cogens* obligations, the prohibition of genocide being unique among them. What should one then tell the victims of apartheid and racial discrimination, given that the Charter of the United Nations itself, ever since 1945, had the fight against racial discrimination at its core? Are they victims of *jus cogens* violations not properly so called? And can it really be argued, as Croatia does[124], that as late as 1966, when the Convention on the Elimination of all Forms of Racial Discrimination (CERD) was adopted, racial discrimination, including practices of apartheid, was still lawful under international law?

22. That brings me to the second issue, the so called *sui generis* character of this case[125]. Counsel for both sides agree on one proposition, namely that, as Professor Crawford put it mildly, the various cases dealing with the former Yugoslavia were "a source of some difficulty for the Court"[126]. Still, Croatia invites you to devise yet another *sui generis* solution. Yet, already your "tantalizing brief" paragraph 34 of the 1996 Judgment — "tantalizing brief", that is what Sir Michael Wood called it[127] — your "tantalizing brief" paragraph 34 left it to use the words of Sir Michael Wood "unclear how this finding relates to the normal rules of the temporal application of treaties". And Sir Michael Wood found that its implications should be considered to be

---

[124]CR 2014/21, p. 19, para. 36 (Crawford).

[125]CR 2014/20, p. 63, para.1 (Crawford).

[126]CR 2014/21, p. 22, para. 43 (Crawford).

[127]M. Wood, *Participation of former Yugoslav states in the United Nations and in multilateral treaties*, Max Planck Yearbook of United Nations Law (YB of UN Law), 1997, Vol. 1, p. 231 (253).

"potentially far-reaching"[128]. In your 2008 Judgment you have, as shown, in the meantime obviously confined the legal effects of your previous holding[129], but what the example shows is that *sui generis* answers to alleged *sui generis* situations are prone to eventually cause unforeseen, and indeed unforeseeable, consequences for the larger fabric of international law.

23. It is against this background that Serbia, unlike Croatia, is basing its case on jurisdiction and admissibility on generally accepted and generally applicable rules of international law.

24. Serbia therefore respectfully submits that the Court should stay true to your well-established jurisprudence on matters such as the Court's temporal jurisdiction and obligations *erga omnes*.

25. Serbia further submits that the Court should also stay true to its 2007 Judgment in the *Bosnia* case and its 2008 Judgment in the present case. The Court should not unnecessarily reopen once again old questions relating to statehood, identity and treaty membership in this hopefully last case relating to the dissolution of the former Yugoslavia. Instead this case provides the Court with an opportunity to confirm the considered approach of the international community at large to treat Serbia as a new State that came into existence on — and it is probably the last time that I use the date: 27 April 1992 — a solution Serbia, unlike Croatia which itself had fought for this solution for so long, has come to accept. Serbia has accepted this solution and Croatia had done previously, but not for purposes of these proceedings.

26. What Croatia wants you is to turn a blind eye on this larger picture and on the possible consequences of its approach not only when it comes to the Court's jurisdiction and the law of treaties and the law of State responsibility, but also as to the very concept of genocide.

27. Mr. President, there is one fact that is indeed specific in this case: it is that the Applicant has not come before the Court with clean hands, neither on jurisdiction, nor on the merits. I suppose there is no need to once again remind the Court of Croatia's underlying motivation to bring this case in the first place[130]. Yet, what the Court must ask itself is whether it should then heed the request made by Croatia to stretch the general rules on the temporal application of treaties,

---

[128]M. Wood, *Participation of former Yugoslav states in the United Nations and in multilateral treaties*, Max Planck Yearbook of United Nations Law (YB of UN Law), 1997, Vol. 1, p. 231 (253).

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

[130]See CR 2014/14, p. 11, para. 10 (Zimmermann).

on attribution and, maybe most importantly, on the Court's jurisdiction so as to accommodate the wish of Croatia to approach what constituted an armed conflict governed by international humanitarian law from the angle of the Genocide Convention — an armed conflict in which there have been innocent victims on both sides.

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

The PRESIDENT: Thank you, Professor Zimmermann. It is now time for a 15-minute break. The hearing is suspended for 15 minutes.

The Court adjourned from 4.25 p.m. to 4.40 p.m.

The PRESIDENT: The hearing is resumed and I give the floor to Mr. Jordash. You have the floor, Sir.

Mr. JORDASH: Mr. President, Members of the Court, it is an honour to address the Court once more.

RESPONSE TO THE APPLICANT'S CLAIM IN LIGHT OF THE ICTY JUDGMENTS

Introduction

1. The Applicant asserts that in contrast to the Respondent, it has advanced a positive factual case, namely the description of a "pattern of purposeful action"[131]. This positive case rests on the ICTY findings that allegedly provide "the platform upon which this case proceeds", which along with the remaining evidence proves 17 enumerated factors. According to the Applicant, each of the four on their own, the first four, and then all 17 taken together, give rise to an overwhelming inference that there was genocidal intent[132]. From these 17 factors, the Applicant focused on identifying three issues assessed as critical to this question: (i) context; (ii) patterns of behaviour; and (iii) opportunity[133].

[131]CR 2014/6, p. 63, para. 52 (Starmer).

[132]CR 2014/7, p. 19, para. 27 (Starmer).

[133]CR 2014/7, p. 21, para. 31 (Starmer).

2. In order to advance these submissions, the Applicant claims that Serbia has failed to advance a positive case. According to the Applicant: "It is all very well [Serbia] distancing itself, it is all very well saying the JNA is not our entity, it is all very well saying the JNA does not direct or control the paramilitaries; but if we are wrong about that, what does Serbia say was the true intent behind these atrocities?"[134]

3. As the Respondent will demonstrate once more, despite these bold claims, what we saw last week is more of the same: assertion devoid of real engagement with the law or with the facts with regard to the issue of intent. The Applicant correctly concludes that patterns, context and opportunity are important to a proper understanding of intent and genocide usually occurs when a series of features or factors come together to form an "explosive cocktail"[135] and yet does its best to avoid the facts. If Professor Tams is correct, and he surely is, that the Applicant is frightened of retroactivity, then they run even faster from a proper examination of intent.

4. In the next two speeches, today and tomorrow, I would like to address these questions and reiterate once more the problems with the so-called positive case on both the ICTY findings and the non-ICTY evidence and crystalize, if that was needed, what the Respondent's position is concerning intent.

5. Of course, logic and good old fashioned common sense dictates that an armed conflict that spanned over five years, thousands of square kilometres, a multitude of actors and actions, and terrible crimes on both sides, cannot be summed up by the Applicant's neatly packaged theory.

6. It is important that we avoid the type of blunt assessments and generalities that taint the Applicant's case. It may serve the Applicant to continue to squeeze years of war and ethnic strife into one globalized shape, but this is not the same as a positive case.

The Applicant's proposed methodology: ICTY and non-ICTY evidence

7. Let me address the Applicant's proposed methodology with regard to ICTY and non-ICTY evidence. The Applicant asserts that the combined probative value of the ICTY findings

---

[134]CR 2014/6, p. 61, para. 45 (Starmer).

[135]CR 2014/19, pp. 23-24, para. 40 (Starmer).

from *Martić*, *Mrksić* and *Babić* and the non-ICTY evidence demonstrates the *actus reus* of genocide and provides the requisite material for a finding of intent[136].

8. They argue that the ICTY evidence provides a "robust platform" that is "highly persuasive" with regard to the question of intent.

9. Despite Professor Schabas, and particularly Mr. Ignjatović, raising concerns about the ICTY judgements last week, the Applicant failed to address the issue in their second round. As I will today demonstrate, analysis of the ICTY jurisprudence does not provide a platform for the Applicant, robust or otherwise. In fact, it supports the Respondent's case.

10. Moreover, whilst the non-ICTY evidence may be similar, even strikingly similar, to the ICTY findings, this does not assist the Applicant. The Applicant takes a selective approach to each and fails to miss the overall congruence revealing a multitude of contexts and patterns that demonstrates a number of intents, none of them, resembling anything close to genocide.

ICTY jurisprudence

11. Before I begin looking at the ICTY jurisprudence, I would like to raise a preliminary issue. Last week, the Applicant accused the Respondent of being a "denier"[137]. We were told that Serbia's denial of "the criminal nature of the joint criminal enterprise of the Serb leaders known as the 'RSK', despite clear, unequivocal ICTY findings, was an affront to the victims of its crimes, who are to be counted in the thousands"[138].

12. Of course, that was an unfortunate submission and nothing could be further from the truth. But for the avoidance of doubt, nothing I say about the law or the facts is intended to make light of the suffering of the victims. Each death or injury is a personal tragedy. However, that should not prevent a search for reasonable legal and factual assessment. On the contrary, as mere lawyers, this may be the only way we might contribute in some small way to the healing process. This ought to go without saying. Now turning to the law.

13. As I understand the Applicant's case, they rest their ICTY case on the following three propositions, namely:

---

[136]CR 2014/18, p. 50, paras. 6 and 13 (Starmer).

[137]*Ibid.*, p. 16, para. 19 (Crnić-Grotić).

[138]*Ibid.*, p. 17, para. 20 (Crnić-Grotić).

(i) that the ICTY JCE judgements are inconsistent with any suggestion of legitimate armed conflict or excesses in an otherwise legitimate armed conflict[139];

(ii) that the JCE found in the *Martić* judgement provides a platform for a finding that there existed a criminal enterprise between the Krajina Serbs — Martić, Babić and others — and the Belgrade Serbs — Milošević, the JNA and others — that involved an agreement to destroy[140]; and

(iii) that the *Mrkšić* judgement finding — that all of the forces participating in the military operations in Croatia operated under the effective command and control of the JNA — is fully convincing evidence with respect to each operation during which the alleged violations occurred[141].

14. The Applicant proceeds on the basis that the ICTY jurisprudence supports their case and should be automatically accepted as "highly persuasive". Of course, as we know this Court found at paragraph 223 of the *Bosnia* case, that the ICTY case law should "in principle" be accepted as highly persuasive. However, accepting them at the outset as having this value, obviously does not determine where we finally end up. Of course, this is trite law and I will not labour the point.

15. Bearing this in mind, I turn to the Applicant's first proposition.

The ICTY JCE judgements are inconsistent with legitimate armed conflict?[142]

16. According to the Applicant the JCE findings are "only consistent with the unlawful targeting of civilians"[143]. According to the Applicant, where the question of legitimate armed conflict was raised in the ICTY, it was not accepted[144].

17. We returned to the same theme last week. We were told that there was "no legitimate armed conflict in the areas in question, in 1991 and 1992"[145]. According to the Applicant, there

---

[139]CR 2014/18, p. 50 (Starmer); CR 2014/20, p. 56, paras. 37-45 (Starmer).

[140]CR 2014/6, p. 50, para. 8 (Starmer).

[141]CR 2014/12, p. 35, para. 85 (Starmer), citing to *Mrkšić*, Trial Judgement, para. 89, para. 400; CR 2014/6, p. 50, para. 9 (Starmer).

[142]CR 2014/18, p. 50. (Starmer); CR 2014/20, pp. 56, paras. 37- 45, (Starmer).

[143]*Ibid.*, p. 50, para. 36 (Starmer).

[144]*Ibid.*, p. 50, para. 38 (Starmer).

[145]CR 2014/20, p. 57, para. 41 (Starmer).

was no war, only attacks by the Serb forces. The Croats had no military forces, only civilians and "civilian defenders"[146].

18. We were told, that all violence against civilians and these so-called civilian defenders should be regarded as unlawful: to hold otherwise, we are told, would create a protection gap whereby "members of the group who attempted, however ineffectively, to defend their group against perpetrators of genocide could not be victims of genocide and would have no protection, legally, against it"[147].

19. Mr. President, Members of the Court, this is a seductive but ill-founded submission. For two reasons. First, the ICTY jurisprudence says precisely the opposite. It confirms that there was lawful combat. Where the ICTY has directly accused members of the Serb Government from Belgrade of responsibility for the unlawful violence in Croatia, they have been acquitted.

20. Second, the Applicant's attempt to support their case by blurring the distinction between combatants and civilians is in fact the most efficient way to create the "protection gap" that the Applicant claims to wish to avoid. The Respondent will address the first issue today and the second tomorrow when I return to the issue of context.

21. First, the Applicant's submission that the jurisprudence excludes a finding that the Belgrade Serbs were engaged in legitimate warfare rests upon a selective reading of the least probative cases of the ICTY, namely *Martić*, *Mrkšić* and *Babić*, and a perfunctory analysis of the most relevant, namely *Stanišić* and *Simatović*, as well as *Perišić*[148].

22. As the Court will see, *Martić*, *Mrkšić* and *Babić* focused on individuals who were either, as in the case of *Martić* and *Babić*, regional leaders from Croatia or, as in the case of *Mrkšić et al.*, relatively low-level commanders, engaged on a specific military operation in a small part of Croatia.

23. None of these three cases involved a *close* examination of the precise role of members of the Serbian Government from Belgrade. Given the narrow focus on the criminal activities in these

[146]CR 2014/20, p. 56, paras. 37-45 (Starmer).

[147]*Ibid.*, p. 56, paras. 39-45 (Starmer).

[148]*Ibid.*, p. 57, para. 41 (Starmer).

localized activities, nor did they have the same focus on the question of whether any of the objectives were legitimate or any aspect of the warfare lawful.

24. Conversely, the *Simatović* and *Stanišić* and *Perišić* trial cases respectively examined the role of members of the Serbian Government. They examined the policies of Milošević's Government and the role of his inner circle. As the ICTY Prosecutor has stated with regard to the *Stanišić* and *Simatović* case, "[t]his case is *the first case* to come to judgement at the Tribunal which examines the culpability of individuals who were at the heart of the common purpose through which crimes were systematically committed against non-Serbs in both Bosnia and Herzegovina and Croatia over a span of five years"[149].

25. For most of the five-year indictment period — 1991-1995 — Stanišić, a Serbian from Belgrade, was the Chief of the Serbian State security service. He was alleged by the ICTY Prosecutor to be Milošević's right hand man[150]. Simatović was alleged to be his immediate subordinate[151].

26. Stanišić and Simatović were charged as participants in a joint criminal enterprise that according to the indictment came into existence no later than April 1991 and continued until at least 31 December 1995. Milošević was alleged to be at the apex of the alleged joint criminal enterprise, whose common criminal purpose was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims, and Bosnian Croats from large areas of Croatia and Bosnia-Herzegovina. According to the indictment, this involved the commission of crimes against humanity under Article 5 of the Statute and violations of the laws or customs of war under Article 3 of the Statute, namely persecutions, murder, deportations, and inhumane acts — forcible transfers. Not genocide.

27. In addition to the charges of individual criminal responsibility under Article 7 (1) for *committing* crimes as part of a joint criminal enterprise, the indictment charged each accused with

---

[149] *Stanišić*, Prosecution Appeal, para. 12.

[150] *Stanišić*; Prosecution's Pre-Trial Brief, para. 53.

[151] *Ibid.*, para. 54.

having planned, ordered, and/or otherwise aided and abetted in the planning, preparation, and/or execution of the crimes described in the indictment[152].

28. It was alleged that, on behalf of Milošević, Stanišić and Simatović commanded, directed, financed, supplied and otherwise facilitated, both State and non-State paramilitary groups, from the Special Purpose Unit of the Ministry of the Interior of Serbia, the Serbian Volunteer Guard, that is, Arkan's Tigers, to other formations, such as, *inter alia*, members of the JNA; the Serb TO in the Krajina, the special police and police forces of the Krajina and other Croatian Serb paramilitary and volunteer formations[153].

29. During the Trial the Prosecution relied upon Babić's plea agreement and the evidence he gave in the *Milošević* and *Martić* cases, to the effect that Stanišić was "the central figure" in command of a "parallel structure of power and authority" allegedly formed and used by Milošević to control the JNA, Martić's police, and paramilitary groups in the Krajina. It was alleged that this parallel structure, with Milošević at the apex, was the primary vehicle for implementing the JCE that intended the crimes, persecutions, murder, deportations, and inhumane acts (forcible transfer)[154].

30. Both Stanišić and Simatović were acquitted of all charges. The majority found that the Accused had not shared the intent to further the common criminal purpose of forcibly and permanently removing the majority of non-Serbs from Croatia[155], or committed any acts that might be a stepping-stone towards destroying the group.

31. The precise terms of the acquittals provide an insight into why the Applicant, throughout its arguments, including last week, have avoided examining these cases, preferring instead to rest their case on the much less relevant cases of regional leaders from the Krajina, such as Martić and Babić, or lower ranking officials such as Mrkšić.

32. Stanišić and Simatović's acquittal was not based on non-involvement in the war or non-interaction with Martić or Babić or others found to be involved in crimes. On the contrary.

---

[152]*Stanišić* Indictment, para. 10.

[153]*Ibid.*, para. 5.

[154]CR 2014/16, p. 20, paras. 99-101 (Ignjatović).

[155]*Stanišić* and *Simatović* Judgement, paras. 2309, 2311-2312, 2314-2336, 2340-2354, 2362-2363.

They were found to have had a significant involvement in the war: supplying men, weapons, ammunition, and logistics in large quantities. However, they were found to be acting in pursuance of lawful military objectives.

33. As illustrations only. The Trial Chamber found that they directed and organized the formation of Martić's police in close co-operation with Martić[156]; they oversaw the delivery of arms and ammunition to the Krajina police[157]; they helped to set up a training camp for Martić and Babić where military training was provided to TO units and members of the police[158]; they used this camp to set up an anti-terrorist unit that participated in military operations in Croatia[159]. None of the findings showed that this assistance was provided with the intent to further any crimes[160].

34. The majority found that a reasonable interpretation of Stanišić and Simatović's conduct was that they had directed their military assistance to military operations "on territory not yet under the exclusive control of the SAO Krajina and SAO SBWS authorities [that is, Eastern Slavonia authorities] and armed forces"[161] and that they only intended to assist the Krajina authorities in establishing and maintaining Serb control over large areas of Croatia[162]. These were lawful objectives.

35. In sum, the majority rejected the Prosecution's (and the Applicant's case in this Court) that all military activity by the Belgrade Serb leadership in Croatia was in furtherance of crime and that there was no legitimate military objectives[163]. As Presiding Judge Orie accurately noted in his separate but concurring opinion, "[h]olding positions of broad influence, and being omnipresent in a war situation, does not necessarily mean that one shares the intent to commit the crimes" — a view that, in light of the burden and standard of proof, and the facts, is undeniably correct[164].

---

[156] *Stanišić* and *Simatović* Judgement, paras. 2159, 2331. See also paras. 2137 (citing AFIII-9), 2147.

[157] *Ibid.*, para. 2154.

[158] *Ibid.*, paras. 1365-1366, 2197, 2327.

[159] *Ibid.*, para. 2325.

[160] *Ibid.*, paras. 402, 1426, 2341.

[161] *Ibid.*, paras. 2325.

[162] *Ibid.*, paras. 2326 and 2332.

[163] *Stanišić* Trial Brief, paras. 234, 243, 247, 256, 997, 1005.

[164] *Stanišić* and *Simatović* Judgement, para. 2418.

36. These findings are corroborated by those enunciated by the Appeals Chamber in *Perišić*. Starting on 26 August 1993 and through to November 1995, Perišić served as Chief of the Yugoslav Army ("VJ") General Staff. He was the VJ's most senior officer[165]. Mr. President, Members of the Court, you may well have heard about this controversial case and its finding that "specific direction" is an element of aiding and abetting. No doubt this customary law debate will rumble on. However, we do not need to concern ourselves with this debate. I rely upon the case for other purposes.

37. Perišić was charged with aiding and abetting crimes in the Bosnian towns of Sarajevo and Srebrenica for his role in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS"). He was charged with a number of crimes arising from these charges, from the facts. He was also charged, more importantly for this case, with charges arising from his alleged effective control over the Krajina army[166].

38. Having reviewed the evidence on the record, the Appeals Chamber acquitted Perišić. The factual basis upon which he was acquitted is of persuasive value for this case. The Appeals Chamber found that the Bosnian Serb army was not an organization whose actions were criminal per se; instead, it was an army fighting a war[167]. More relevantly and more critically the Trial Chamber found that he *was* involved in the war in Croatia but was not responsible for any crimes.

39. To summarize, we need to avoid the Applicant's broad-brush analysis. The three cases that examined the question of whether Milošević's government was engaged in legitimate warfare in Croatia, and which delivered Judgements, came to the same answer. The three individuals have not been found to be part of any criminal agreement with the Krajina leadership and not found to have any intent to commit crimes.

40. Therefore, contrary to the Applicant's claim, the ICTY has not consistently rejected the proposition that the Serbian leadership from Belgrade were engaged in lawful or legitimate conflict, it has consistently accepted it. The findings are consistent with the suggestion of

---

[165] *Stanišić* and *Simatović* Judgement, para. 2418.

[166] *Perišić*, Appeal Judgement, para. 3.

[167] *Perišić*, Appeal Judgement, para. 53.

legitimate armed conflict designed to establish control of territory through fighting the Croat military forces — that the Applicant claims did not exist.

41. This, Mr. President, Members of the Court, is the "robust platform" on which the Applicant's case and the non-ICTY evidence must rest and ultimately flounder. As I will address in due course, the patterns of violence in this case shows that much of the unforgivable violence against civilians *is* explainable from this perspective. Whether I am correct about this or not, the starting-point cannot be the presumption urged upon the Court that all violence was unconnected to military activities.

42. A close examination of the Applicant's favourite cases — *Martić*, *Babić,* and *Mrkšić* — only reinforces the ICTY's findings in *Stanišić* and *Simatović,* and *Perišić*. Not only is the phantom of Greater Serbia that has haunted this Court a total non-issue in these cases[168], they also fail to establish the Applicant's second proposition and to that I now turn.

That the JCE found in the *Martić* judgement provides a platform for a finding that there existed a criminal enterprise between the Krajina Serbs (Martić, Babić and others) and the Belgrade Serbs (Milošević, the JNA and others) that involved an agreement to destroy?[169]

Martić

43. The Applicant submits that the JCE found in the *Martić* Judgement provides a platform for a finding that there existed a criminal enterprise between the Krajinc Serbs and the Belgrade Serbs that involved an agreement to destroy. Let me turn to *Martić* to examine this proposition. According to the Applicant, the *Martić* Judgement, at paragraph 446, established that at all relevant times there was in existence a joint criminal enterprise amongst the Serb political and military leadership "whose purpose was to destroy the Croat civilian population by killing and removing them from approximately one third of the territory of Croatia". This "is the first major finding that the Applicant relies on"[170]. However, we need to be careful. This is not what *Martić* found. In fact it found the opposite.

---

[168]*Martic*, Judgement, paras. 266 and 403; *Stanisic* and *Simatovic*, Judgment, paras. 342, 348, 1250; *Perisic*, Judgment, para. 1340.

[169]CR 2014/6, p. 50, para. 8 (Starmer).

[170]CR 2014/12, p. 51, para. 8 (Starmer).

44. In order to examine this proposition, it is necessary to say a few words about joint criminal enterprise (JCE). Please forgive me for stating the obvious, but it is necessary to keep a hold on what the findings actually mean and what the liability actually does and says. Joint criminal enterprise is a mechanism for assigning individual liability to those charged with "committing" crimes. The ICTY jurisprudence establishes three forms: JCE I, the basic form, JCE II, the systemic form, and the extended form, JCE III[171]. All the ICTY cases relevant to this case concerned JCE I and JCE III. We can leave JCE II to the side.

45. In essence, to prove liability pursuant to JCE I, the prosecution must establish the following three objective elements beyond reasonable doubt:

(i) the existence of a common plan to commit a crime provided for in the Statute[172];

(ii) a group of persons acting together in pursuit of this plan to commit a crime[173]; and

(iii) that the accused significantly contributed to the common plan[174].

46. In addition to establishing these objective elements, a prosecutor must also prove that the accused possessed the requisite *mens rea* for the crimes charged and the overall criminal plan.

47. There is a fundamental difference between JCE I and JCE III liability. Convictions pursuant to JCE I require a different *mens rea* than convictions pursuant to JCE III. JCE I liability attaches when the accused (together with the other members of the JCE) intended the commission of a crime or crimes in pursuit of the jointly agreed criminal plan[175]. Under JCE I, the trier of fact must be satisfied that the criminal intention of the accused is identical to the other JCE participants[176].

48. JCE III is an extension of JCE I. It is further liability that arises when additional crimes occur beyond the scope of the agreed common plan. Courts assess liability for these additional crimes pursuant to a different *mens rea*. For JCE I liability to attach, additional crimes outside the common criminal plan need not be intended by the accused. It is sufficient that they were carried

---

[171]*Martic*, Judgement, para. 190.

[172]*Martić*, Judgement, para. 190; *Tadić*, Appeals Chamber, para. 227.

[173]*Martić,* Judgement, para. 190; *Prosecutor* v. *Krajišnik*, Judgement, Trial Chamber, 27 Sept. 2006, para. 884.

[174]*Martić,* Judgement, para. 190; *Prosecutor* v. *Krajišnik*, Judgement, Trial Chamber, 27 Sept. 2006, para. 884; *Brđanin,* Judgement, Appeals Chamber, 3 April 2007, para. 430 (internal citations omitted)

[175]*Brđanin* , paras. 365, 430-431; Judgement, *Vasiljević*, Appeals Chamber, 25 Feb. 2004, para. 101.

[176]*Tadić*, Appeals Chamber, para. 196.

out in furtherance of the intended common plan, and were the reasonably foreseeable consequence of that common plan[177].

49. Thus, JCE I liability arises from a plan to commit the crime — intention; JCE III arises from crimes that were a reasonably foreseeable consequence of that plan.

50. Holding these thoughts at the forefront, let me turn back to *Martić*. At paragraph 445, the *Martić* Trial Chamber found that the common purpose of the JCE was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population through the crimes of deportation and forcible transfer[178]. They intended deportation and forcible transfer.

51. The shared intent — the criminal agreement — found was not to destroy *or* even to commit any of the Article II acts, without genocidal intent. The 11 JCE members were not found to have agreed or intended to commit murder, or acts of physical or mental harm. They were found responsible pursuant to JCE I for agreeing to deportation and forcible transfer[179]. The other acts, the murder, the physical and mental harm, were deemed to be foreseeable from the plan that was intended.

52. Therefore, even if, as a general proposition, JCE findings could be used to establish the type of "effective control" we are concerned with here, which in many cases is legally and factually untenable, or even if the *Martić* Judgement specifically could stand, as the Applicant claimed last week, as evidence of "irrefutable proof of the bonds of allegiance and control that existed between the Serbian leadership in Belgrade and the forces of the 'SAO Krajina' and 'RSK'"[180], it is proof of nothing more than a shared intention to forcibly transfer or deport. Nothing else.

53. The Trial Chamber found that the JCE members from Belgrade and the Krajina intended persecution but the constituent acts were forcible transfer and deportation. None of the other acts of persecution, murder, torture, inhumane acts, cruel treatment, wanton destruction of villages,

---

[177] *Tadić*, Appeals Chamber, para. 204.

[178] *Martić*, Judgement, paras. 452–455, 518.

[179] *Ibid.*, paras. 445–446.

[180] CR 2014/7, pp. 49-50, para. 14 (Starmer).

wilful damage to institutions, plunder, etc., were found to have been perpetrated and intended or agreed to by the members of the JCE[181].

54. Put simply: neither Martić nor any member of the criminal enterprise found intended to commit the crimes that are the constituent foundation of the Applicant's claim. The Trial Chamber found them responsible for these types of crimes on the basis of foreseeability only[182].

55. Further, even on this extremely low and controversial foreseeability threshold, that is, imputing crimes, even crimes of specific intent, such as persecution, on the basis of foreseeability, and without a showing of shared intent, the Trial Chamber ruled that none, I repeat none, of the JCE members, neither Martić, the leaders of the JNA or Milošević, intended to commit extermination, nor was it foreseeable, nor had it in fact occurred.

56. As to the last point, as Professor Schabas highlighted in the first round[183], the Trial Chamber found that the evidence did not support a finding that the *actus reus* of extermination was established. The Trial Chamber ruled that the killings that had been foreseeable, but not intended, did not occur on a "large scale" or "an accumulated basis"[184].

57. The Applicant's claim therefore that the JCE found in the *Martić* Judgement that there existed a criminal enterprise between the Krajina Serbs (Martić, Babić and others) and the Belgrade Serbs (Milošević, the JNA and others) that involved an agreement that might be equated or give rise to an inference of destruction[185] is wrong. Not only was there no intention to destroy, there was not even an intent to commit Article II acts without genocidal intent.

58. Therefore we find ourselves in the unusual position of agreeing with the Applicant on an issue, namely that the *Martić* Judgement is *highly* persuasive. However, not for the reasons advanced by the Applicant. In fact, the *Martić* Judgement has answered one of the precise question that this Court has been called upon to address.

59. One question, the first question, perhaps: were Article II acts committed? The second perhaps is the one asked and answered by the *Martić* Judgement: did the Belgrade Government

---

[181] *Martić*, Judgement, paras. 454-455.

[182] *Martić*, Judgment, para. 454.

[183] CR 2014/15, para. 36, p.23

[184] *Martić*, Judgment, para. 404.

[185] CR 2014/6, p. 50, para. 8 (Starmer).

intend the commission of the Article II acts? This gateway question has been answered with a resounding "No".

60. The Applicant faces an additional problem with *Martić*, not quite as devastating as that but, nonetheless, still significant. The problem with the *Martić* finding implicating the Belgrade Serbs is that there are manifest flaws in the judgement with regard to the membership of the JCE found, and there is little within or external to the judgement to corroborate the findings. First, I will deal with the problems and then I will move to the lack of corroboration.

The PRESIDENT: Excuse me. Can we have it a little bit more slowly please. It will facilitate the interpretation into French.

Mr. JORDASH: I beg your pardon.

61. As discussed earlier, to prove liability under JCE I, the existence of a common plan to commit a crime; a group of persons acting together in pursuit of the crime; and that the accused significantly contributed to the common plan, must be established *beyond a reasonable doubt.*

62. Of course, the degree of certainty of proof that might be established on each element is, as of necessity, variable. Often in a case, areas that are non-contentious are not given the same "airplay" as others and certain findings are based on evidence that has not been subject to the same degree of challenge or scrutiny. One such area is the identification of JCE members and the establishment of their conduct.

63. Why does the Respondent say this? In any JCE trial involving individuals alleged to be part of an agreement to commit crime, the accused tends not to focus on proving that there was no criminal agreement or that certain individuals were not part of it, but, instead, focuses on seeking to show that *he* was not part of it.

64. As a consequence, the Trial Chamber is optimally assisted with regard to resolving *this* contentious issue, and less so with regard to others. The Trial Chamber gets all sides of this issue, sees witnesses challenged, and makes their mind up accordingly. The Trial is about his guilt or innocence, not the others.

65. The accused, frankly, does not care one way or another about the external issues. All he cares about is showing the court that *he* was not part of the criminal enterprise and that his

contribution to the crimes was not significant. If he succeeds on these issues, he will be acquitted of responsibility pursuant to the JCE.

66. No doubt the Applicant will deride such an analysis, claiming that it is only speculative. Another attempt by the Respondent to wriggle out of the JCE judgements?

67. However, as recognized by this Court in the *Bosnia* case, ICTY judgements *may* be highly persuasive, in part because the accused has the right to examine witnesses against them. Thus, the Court recognizes that the presence or absence of cross-examination is a valuable indicator of reliability and weight[186]. Therefore, if you come to the conclusion that the Respondent is right with regard to the lack of cross-examination or challenge on the membership of the JCE, and for those of you involved in these types of trials, I am confident you will agree with my proposition, then it follows. So less an attempt to wriggle, more a corollary of this Court's findings.

68. Moreover, this is not just theory. The frailties of the *Martić* judgement with regard to the findings on the involvement of members of the Serbian government in a criminal agreement with the Krajina Serbs are manifest. This is clear from the findings with regard to Stanišić and Simatović.

69. As this Court knows, as I have addressed you upon, these men were alleged to have been at the core of the JCE. Their acquittal sits completely at odds with the *Martić* trial judgement that found them to be members of the 11-man group engaged in pursuing a criminal enterprise[187]. So which decision, I pause to ask, does the Applicant claim is "highly persuasive"? The one that examined Stanišić and Simatović's alleged criminal liability at close hand, or the one that almost certainly only addresses one side of the story.

70. If this is not sufficient to raise serious concerns with regard to placing too much weight on the findings that appear to implicate the Belgrade Government, it is worthwhile examining the Trial Chamber's reasoning with regard to why it found that the Belgrade Serbs shared the intent to commit forcible transfer and deportation. Whilst brevity of legal reasoning may be considered a

---

[186] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I)* (hereafter *Bosnia*), p. 133, para. 220.

[187] *Martić*, Judgement, paras. 445-446.

virtue, the Trial Chamber's reasoning on this critical aspect is almost absent. The Trial Chamber's factual and legal findings concerning the existence of a joint criminal enterprise was analysed in 13 paragraphs of a 520-paragraph judgement[188].

71. As an examination of these 13 paragraphs shows, there is little that explains why the Chamber was persuaded beyond a reasonable doubt that the co-operation of the Krajina and Belgrade political and military leadership was actually in pursuit of a crime. This lack of reasoning is important. As noted in the *Bosnia* case at paragraph 221, one of the reasons ICTY judgements start out as highly persuasive is that reasons are given in writing. In this instance, they were not.

72. Of particular concern, is the one paragraph finding that the members of the joint criminal enterprise consisted of "at least" 11 individuals[189]. Whilst this finding was globally referenced to the Factual Findings in Section III of the judgement, the Trial Chamber failed to specify which particular findings, or paragraphs, were relevant and how it reasoned from the factual findings to the legal finding — that a particular JCE member's conduct demonstrated his shared criminal intent at the core of the JCE. There is nothing in the paragraph to show that the Trial Chamber's grappled with the central question.

73. An examination of the Factual Findings in Section III provides an insight, but only just, into four members of the JCE — Babić[190], Adžić[191], Kadijević[192] and Milošević. In relation to others, as Mr. Ignjatović outlined during the first round[193], and the Applicant ignored in the second, the analysis is weak to say the least.

74. Let me take one example. The Trial Chamber found, purportedly beyond a reasonable doubt, that Šešelj was one of the 11 and acting in furtherance of the criminal enterprise and intended the crimes of forcible transfer and deportation.

75. However, as discussed, the paragraph that made the finding of the 11 contained no reasoning. More importantly for this discussion, the remainder of the judgement — Section III,

---

[188] *Martić*, Judgement, paras. 442-455.

[189] *Ibid.*, paras. 445-446.

[190] *Ibid.*, para. 333.

[191] *Ibid.*, para. 331.

[192] *Ibid.*, para. 330.

[193] CR 2014/16, pp. 15-16, paras. 79-81 (Ignjatović).

Factual Findings — made only *one* factual finding in relation to Šešelj, namely that he visited a hospital which was being used as detention centre in Knin[194] on one occasion and insulted the non-Serb detainees[195]. His shared intent for the criminal enterprise was established on the basis of this single factual finding.

76. Is this an example of the *Martić* judgement's persuasive value, showing "irrefutable proof of the bonds of allegiance and control that existed between the Serbian leadership in Belgrade and the forces of the 'SAO Krajina' and 'RSK' . . ."?[196]

77. Moving to corroboration, this can be dealt with simply, as it was by Mr. Ignjatović during the first round. The Applicant failed to respond in the second round, but the points cannot be so easily ignored.

78. Of the 11 JCE members, only eight — Adžić, Bogdanović, Kadijević, Milošević, Mladić, Šešelj, Stanišić, and Simatović — were alleged to be part of the Serbian leadership. The remainder were part of the local leadership. It is useful to examine what happened at the ICTY with regard to the whole 11, but with particular focus on the eight. As we can see:

(i) Adžić, Chief of Staff until May 1992: not indicted by the ICTY Prosecutor;

(ii) Bogdanović, Minister of Interior of Serbia until March 1991: not indicted by the ICTY Prosecutor;

(iii) Kadijević, SFRY Federal Secretary for Defence until January 1992: not indicted by the ICTY Prosecutor;

(iv) Milošević, President of Serbia: died before the trial was completed;

(v) Mladić, Commander of the 9th Corps of the JNA in Knin in 1991: on trial at the ICTY, but not for events in Croatia;

(vi) Šešelj, Deputy Prime Minister of Serbia later in March 1998 until October 2000: on trial at the ICTY;

(vii) Simatović: acquitted by the ICTY;

---

[194] *Martić*, Judgement, para. 288.

[195] *Ibid.*, paras. 288, 416.

[196] CR 2014/7, pp. 49-50, para. 14 (Starmer).

(viii) Stanišić: acquitted by the ICTY — and that is the eight that we are really concerned with in this submission;

(ix) Babić, President of the RSK and other leadership roles in the Krajina: pleaded guilty to a JCE. I will come back to that in a moment. Although he pleaded guilty to a JCE, it was not the same as that found by Martić;

(x) Karadžić, Bosnian Serb President: on trial at the ICTY, but not for Croatia;

(xi) Vasiljković[197], alleged paramilitary leader: not indicted by the ICTY Prosecutor.

In other words, none of the eight dealt with in *Martić* have been convicted and most have not even been tried.

79. And so again I ask, does the *Martić* finding, when looked at in the totality of the circumstances, really provide "irrefutable proof" of the guilt of the Serbian leadership — even when looked at through the narrow lens of forcible transfer or deportation? It looks more like highly persuasive evidence that the Milošević government was not involved in any criminal way with the events in Croatia.

80. And so we are left with the *Babić* case, another of the Applicant's favourite cases. Unfortunately for the Applicant, this plea agreement only muddies their waters even further. The Applicant claims that this judgement corroborates the findings in *Martić* of the existence of a joint criminal enterprise that involved an agreement between the Krajina Serb and the Belgrade leadership. However, it does not.

81. While the Respondent accepts this Court's finding in the *Bosnia* case, that plea agreements and the associated sentencing judgements, where relevant, start with a certain weight[198], the question, of course remains, what that weight will finally accrue.

82. An examination of the *Babić* plea agreement and judgement, alongside the other ICTY cases, especially *Martić* and *Stanišić* and *Simatović* really does raise more questions than it answers and shows, if more evidence was needed, the dangers in the Applicant's approach to the ICTY jurisprudence and the shifting sand upon which they have built their house.

---

[197] *Martić*, Judgement, paras. 445-446.

[198] *Bosnia* Judgment, para. 224.

83. On 22 January 2004, Babić pleaded guilty to being a co-perpetrator of a joint criminal enterprise[199]. However, the joint criminal enterprise he pleaded guilty to did not place him into the same criminal plan as that found in *Martić*.

84. First, Babić's JCE consisted of an agreement to commit persecutions as a crime against humanity[200]. He alleged and admitted that his criminal agreement, which purportedly involved Martić and others as we will see in a moment, involved not only persecution constituted from acts of transfer and deportation, like the *Martić* finding, but also "[t]he extermination or murder of hundreds of Croat and other non-Serb civilians . . .[201]. Obviously different to the findings in *Martić*.

85. Second, as part of his plea agreement, Babić and the Prosecutor, and this is expressed in the agreement, agreed that the evidence showed beyond a reasonable doubt that,

> "From August 1990, a parallel structure started emerging in the Krajina comprised of members of the Ministry of Interior of Serbia, the State Security service of Serbia, the SDS in Croatia and policemen in the Serbian municipalities in Croatia which ultimately answered directly and exclusively to Slobodan Milošević. The central figures of this parallel structure in Serbia, aside from Milošević himself, were Jovica Stanišić from the Serbian DB and his subordinate Franko 'Frenki' Simatović. In the Krajina, the central figures were Milan Martić and Dragan Vasiljković, aka Captain Dragan."[202]

Obviously, this is not what was shown in the *Stanišić* and *Simatović* case, nor is it consistent with the ICTY Prosecutor's decision not to indict Vasiljković.

86. Several points therefore arise that are relevant to the Applicant's case and which they continue to avoid. The first one is one of principle: in light of the fact that Babić was a self-confessed criminal, how much probative weight can properly be given to those aspects of his plea agreement that implicate others?

87. International criminal law takes a common sense approach to this issue. Any evidence that emerges from such accomplices and implicates others, requires cogent corroboration from a

---

[199] *Babić*, Plea Agreement, para. 3.

[200] *Babić*, Indictment, para. 16.

[201] *Babić*, Appeals Judgement on Sentencing, para. 3.

[202] *Babić*, Factual Statement to the Plea, paras. 16 and 17.

reliable source[203]. In the *Martić* Trial, the Chamber went one step further with Babić's plea and took into account the fact that Babić had testified pursuant to a plea agreement and that some of the charges were dropped against him as a result of that plea agreement[204].

88. Whether it was due to these admonishments that his evidence was rejected, in both *Martić* and *Stanišić and Simatović*, is not immediately apparent, but rejected it was. Babić's plea agreement, and his allegations against others, stands in splendid isolation to the remainder of the relevant ICTY findings.

89. In relation to the benefit that Babić obtained from advancing these allegations, it is worthwhile returning to the *Martić* case. Whether they are directly comparable is a complex question. However, Babić was the President of the RSK and Martić was, at least *de jure*, Babić's subordinate. Martić was convicted and received a sentence of 35 years. Babić's arrangements led to a sentence of only 13.

90. Therefore, the problem of the reliability of his allegations against others is, perhaps, an obvious one. As part of Babić's plea agreement, he had to co-operate with the prosecutor and testify against the Serb leadership. He had to be useful. Only then would he receive his reduced sentence. There can be no surprise that his allegations turned out to be overblown and found to be in large part false. Be that as it may, they cannot corroborate the finding in *Martić*. *Martić* stands alone as highly persuasive evidence against the Applicant.

91. I will now turn to the Applicant's third remaining proposition, that the *Mrkšić* Judgement's finding that all of the forces participating in the military operations in Croatia operated under the effective command and control of the JNA and that this is fully convincing evidence in respect to each operation during which the alleged violations occurred[205].

---

[203]Accomplice evidence needs to be approached with caution, see *Lukić* and *Lukić*, Appeal Judgement, para. 128; *Krajišnik*, Appeal Judgement, para. 146; *Blagojević*, Appeal Judgement, para.82; *Haradinaj et al.*, Appeal Judgement (retrial), para. 145; *Blagojević and Jokić*, Appeal Judgement, para. 82.

[204]*Martić,* Judgement, para. 34.

[205]CR 2014/12, p. 44, para. 22 (Ignjatović), citing to *Mrkšić*, Trial Judgement, para. 89; CR 2014/6, p. 50, para. 9 (Starmer).

Mrkšić

92. I will make a number of observations that I hope will assist this Court in deciding what weight to place on the *Mrkšić* finding.

93. Of course, we know why the Applicant places such overweening weight upon a single paragraph — paragraph 89. As Mr. Ignjatović correctly noted, "[t]he Applicant is trying to use one sentence from paragraph 89 of the *Mrkšić et al.* Judgment as a vehicle to overcome the requirements of Article 8 of the ILC Articles on State Responsibility"[206].

94. The Applicant's attempt must be rejected. According to this Court's jurisprudence, effective control is required and needs to be established and proven in every individual and concrete situation. The Applicant must meet very high standards. But the Court must be presented with fully convincing evidence in respect to each operation during which the alleged violations occurred, and not generally, in respect of all the actions taken by persons or groups who allegedly committed such violations[207].

95. Therefore in a case full of astonishing claims, the Applicant's reliance on paragraph 89 of the *Mrkšić* Judgement must be vying for the top spot. It must be the most overused and shamelessly abused paragraph of any judgment ever written at the ICTY. I almost feel embarrassed putting its contents back on the screen. However, in order to lay this argument to bed once and for all, put it back, I must.

96. Paragraph 89, consists of three elements:

"(i) that the Court had found that "the *de facto* reality" was that not only in the zone of operations of OG South, but, generally, in the Serb military operations in Croatia, the JNA had complete command and full control of all military operations;

(ii) that the circular of the Chief of the General Staff of 12 October 1991 and the order of the command of the First Military District (1 MD) of 15 October 1991, confirmed this to be correct; and,

---

[206]CR 2014/15, p. 62, para. 56 (Ignjatović).

[207]CR 2014/15, para. 42, p. 43 (Lukić), citing to *Bosnia* Judgment, p. 129, para. 209; p. 208, para. 400.

(iii) that the JNA had the military might to enforce its will, even though it may well have been reluctant to be too heavy handed in doing so, upon the TO and volunteer or paramilitary units fighting in the Serb cause."

97. As a preliminary matter, I would adopt, once again, Sir Keir Starmer's words, let us have a reality check. The proposition that a single judgment, let alone a single paragraph, could bear such a heavy probative load is asking perhaps a little too much. That the Applicant takes this approach, speaks eloquently to the frailty of its case.

98. Even if the *Mrkšić* Judgement actually involved a detailed consideration of each and every corner of Croatia, which it plainly does not, the proposition that the *de facto* reality of this armed conflict could be neatly analysed and summed up in a single paragraph is curious to say the least.

99. Leaving State responsibility aside as an examination of international criminal law jurisprudence shows, command ability requires a careful examination of actual concrete circumstances and an examination of the *de facto* reality of fluctuating war. Such questions cannot be subordinated to singular considerations of how large or how well resourced a military organization might be in relation to putative subordinates.

100. As the jurisprudence of the ICTY and ICTR *ad hoc* tells us, and common sense dictates, an analysis of "*de facto* control" or "effective command" is a complex business that cannot be reduced to such generalities.

101. Given the Applicant's refusal to follow the operation-by-operation methodology of assessing effective control outlined in the *Nicaragua* case, it may not be necessary in this case to fully resolve the precise applicability of the international criminal law threshold for "effective control" underpinning superior responsibility. Nonetheless, similar questions are addressed in international criminal law, such as whether alleged subordinates were acting "on the instructions", or "under the direction" or "under the control" of alleged superiors. International criminal law's careful approach to examining on a case-by-case basis these questions, sits in stark contrast to the approach urged by the Respondent in this case with regard to State responsibility.

102. In international criminal law distinctions are drawn between *de jure* status and *de facto* reality. Substantial influence must be distinguished from effective control[208]. A trier of fact must examine indices of effective control or authority[209]. Factors to be considered in determining authority and effective control include, *inter alia*, the official position held by the alleged commanders; the capacity to issue orders; the procedure for appointment; the position of the accused within the military or political structure; and the actual tasks performed[210] [211].

103. Factors considered to determine whether particular units are under the effective control of the regular army include, *inter alia*, any compliance or non-compliance with army orders or procedures; the precise participation in combat with the regular army; the access of the army to premises and prisoners; the recruitment of civilians and soldiers; mutual assistance; reporting procedures; the ability to investigate and punish unit members; the appointment of the members of the unit; and the disbanding of units[212].

104. The fact that a unit fought alongside a unit of the regular Army is insufficient to establish *de facto* control over that unit[213]. Merely being tasked with co-ordination does not necessarily mean command and control[214]. Mere participation in joint combat operations is not sufficient to find that commanders of different units exercise effective control over all participants in a battle[215]. And so it goes on.

105. The Applicant wants to discard *all* these types of *de facto* considerations on the basis of a single paragraph in a judgement that was plainly not focused on this issue.

106. Which brings me to the question of what the finding of *Mrkšić is* based on. Last week we were told by the Applicant that the Tribunal's findings in *Mrkšić* about "the JNA's command

---

[208]*Prosecutor* v. *Delalic*, Judgement, 20 Feb. 2001, paras. 266, 300; *Prosecutor* v. *Blagojevic & Jokic*, Judgement, 17 Jan. 2005, para. 791; *Prosecutor* v. *Halilovic*, Judgement, 16 Nov. 2005, para. 59; *Prosecutor* v. *Limaj et al.*, Judgment, 27 Sept. 2007, para. 273; *Prosecutor* v. *Blagojevic & Jokic*, Judgment, 17 Jan. 2005, para. 791; *Prosecutor* v. *Oric*, Judgment, 30 June 2006, paras. 309 and 311.

[209]*Prosecutor* v. *Hadzihasanovic & Kubura*, Judgement, 22 April 2008, para. 199.

[210]*Prosecutor* v. *Halilovic*, Judgement, 16 Nov. 2005, para. 58.

[211]*Prosecutor* v. *Hadzihasanovic & Kubura*, Judgement, 15 March 2006, para. 83.

[212]*Prosecutor* v. *Delic*, Judgement, 15 Sept. 2008, para. 368.

[213]*Prosecutor* v. *Delic*, Judgement, 15 Sept. 2008, para. 345; *Prosecutor* v. *Hadzihasanovic & Kubura*, Judgement, 22 April 2008, para. 209.

[214]*Prosecutor* v. *Oric*, Judgement, 30 June 2006, para. 311.

[215]*Prosecutor* v. *Hadzihasanovic & Kubura*, Judgement, 15 March 2006, para. 84.

over Serb paramilitaries [in the whole of Croatia throughout 1991] were unequivocal" [216] and that by casting doubt over it the Respondent was seeking to invite the Court to "assume the role of unofficial Appeal Chamber for ICTY findings unhelpful to the Respondent's case"[217]. Professor Crawford told us that this finding of fact should be accepted: "the Court lives in the real world"[218].

107. And yet the Respondent does not dispute that this finding is based upon only two documents. It cannot dispute this, because despite the Court's finding, neither the subject-matter of the trial, the submissions of the parties, the contentious issues that required resolution, or the cases of the accused, involved evidence that directly addressed the issue of the wider command responsibilities throughout Croatia.

108. And so we are left with the Applicant clinging desperately to two documents. That a finding of this breadth and import could conceivably be based on two documents is an astonishing proposition. The Applicant's continued reliance upon it is as ambitious a legal submission as we are likely to find in any international court.

109. Even if this was slightly plausible, these documents do not even come close to possessing that definitive character. On the contrary, as observed by Mr. Ignjatović, they are aspirational documents, and do not purport to describe a given moment or situation in time. This is not to "turn them on their head" or to "speculate that the orders were issued in order to 'fix' problems of 'lack of discipline and [a] lack of control'", as the Applicant claimed[219], but merely to read the plain words on the page.

110. The circular of the Chief of the General Staff of 12 October 1991 is largely irrelevant to the issue of command. Other than stating:

> "All armed units, be they JNA, TO or voluntary units, *must* act under the single command of the JNA. They should behave and act according to the rules that apply in the army, showing full respect for military discipline hierarchy, military laws and regulations, in all circumstances of life, work and combat activities. These positions should [and this is the critical bit] *immediately* be communicated to the JNA officers,

---

[216]CR 2014/20, p. 39, para. 40 (Ní Ghrálaigh).

[217]CR 2014/20, p. 40, para. 40 (Ní Ghrálaigh).

[218]CR2014/21, p. 32, para. 65 (Crawford).

[219]CR2014/20, para. 46, p. 41 (Ní Ghrálaigh); CR 2014/15, p. 59, para. 47 (Ignjatović).

> and *subsequently*, in the most suitable manner, to soldiers and civilians [subsequently they shall be communicated to soldiers and civilians]."[220]

111. The 15 October 1991 order of the command of the First Military District (1 MD) of 15 October 1991 — the second document — does not take the Applicant's case any further. It shows that the command of the first military district observed that "[p]ursuant to recent problems in the zones of combat activities" they now order that the JNA should "[e]stablish full control in the [area of responsibility] of the units"; order that "[a]ll paramilitary compositions and the voluntary detachments which refuse to put themselves under the command of the JNA units are to be removed from the territory". It ordered that the JNA *should* establish full control, not that the JNA *had* full control.

112. Plainly, the documents do not purport to describe an existing *de facto* situation in the whole of Croatia. They are orders for the future — nothing more, nothing less. Is the Applicant really saying that these two orders prove the *de facto* reality for each and every operation in Croatia? Are they really saying that this Trial Chamber, asked to examine events that occurred in Vukovar over a restricted period, heard evidence of command from all over Croatia? And, if so, where is this evidence? Why does it not appear in the judgement? How are we to know whether it was correct? How do we test its reliability? With the greatest of respect to the Trial Chamber, it is assertion devoid of evidence other than to aspirational documents.

113. Moreover, as Mr. Ignjatović pointed out in the first round, nothing in the remaining ICTY jurisprudence supports this assertion[221]. Where the situation was concretely examined in *Martić* and *Stanišić* and *Simatović*, the Trial Chambers disagreed with the *Mrkšić* judgement, yet offered detailed and logical reasoning in support. As noted at paragraph 142 of the *Martić* judgement, there:

> "is evidence that beginning of the summer of 1991, the SAO Krajina TO was subordinated to the JNA. There is also evidence of operational cooperation between the JNA and the armed forces of the SAO Krajina. Any resubordination of MUP units to the JNA for temporary assignment required prior approval of the Minister of Interior of the SAO Krajina. When resubordinated, the MUP unit would be acting in cooperation or [in] concert with the JNA unit, it would remain under the command of the MUP commander."

114. Subordination as such did not even equate to subordination proper. And more:

---

[220]Federal Secretariat for National Defence, Order 12 October 1991, p. 2.

[221]CR 2014/15, p. 55, para. 31 (Ignjatović).

> "For the purpose of combat operations, TO units could also be resubordinated to JNA units. When resubordinating, the largest unit of either the TO or the JNA would command, which would normally be the JNA unit in a given area."

These show the fluctuating nature of subordination. That is why examination of concrete operations is essential.

115. The *Stanišić* Trial Chamber agreed with these findings. The *Stanišić* Trial Chamber found that any "resubordination of MUP units to the JNA for temporary assignment required prior approval of the Minister of Interior of the SAO Krajina"[222]. In other words, the *de jure* superior, at least, was not the JNA. The MUP units were expected to act "on the instructions", or "under the direction" or "under the control" of the Ministry of the Interior which was Martić.

116. Finally, the Applicant alleges that the Respondent's claim — that the Tribunal's finding of command and control in reality relates only to the circumstances that prevailed at Ovčara — is "meritless"[223]. Strong words, but plainly two Trial Chambers who descended to reasoning do not agree.

117. True, as the Applicant pointed out, the *Mrkšić* Chamber did state, that it is, "misleading to view the events in Vukovar in isolation or to imagine they were only governed by local factors. They were but part of a much wider political and military struggle."[224] As pointed out also by the Applicant, the Chamber also made some limited findings contained in two paragraphs of the *existence* of military attacks in five named towns in Eastern Slavonia[225].

118. However, there is nothing in these meagre descriptions to suggest that the Chamber had examined the narrative of the attacks, let alone examined the nature of the command. The only other reference to military operations by the JNA in other locations in Croatia is a wholly unsupported single sentence: "At the same time military operations by the JNA were occurring elsewhere in Croatia."[226] No footnote, no evidence, no support.

119. The Applicant avoids addressing these issues.

---

[222] *Stanišić*, Judgement, para. 2162.

[223] CR 2014/20, p. 41, para. 46 (Ní Ghrálaigh).

[224] CR 2014/20, p. 41, para. 47 (Ní Ghrálaigh), citing to *Mrkšić*, para. 19.

[225] *Mrkšić*, Judgement, paras. 34-35.

[226] *Mrkšić,* Judgement, para. 34.

Conclusion: the Applicant's "robust platform"

120. So to conclude, the Applicant's robust platform with regard to the ICTY evidence and the three propositions.

Proposition one

121. That the ICTY jurisprudence excludes the possibility of lawful combat or excludes the possibility that the Serbian leadership or in fact any of the Serb leadership from the Krajina or any Serb individual was engaged in lawful combat has been roundly rejected by the ICTY.

Proposition two

122. The Applicant claims that the JCE found in the *Martić* Judgement provides a platform for finding that there existed a criminal enterprise between the Krajina Serbs (Martić, Babić and others) and the Belgrade Serbs (Milošević, the JNA and others) that involved an agreement to destroy[227].

123. The Applicant only gets home with this argument, by ignoring the plain terms of the *Martić* findings and how it sits with the other salient judgements.

124. As I have shown, the *Martić* Judgement assessed the gateway question for the Applicant's genocide claim and rejected it. It asked the question "did the Belgrade Serbian and Krajina leadership share an intention to commit murder or serious physical and mental harm", and answered that it did not.

125. Where the *Martić* Judgement might have proffered some support for the Applicant's case, inasmuch as it offered some support for the proposition that the Belgrade leadership formed an agreement to commit the crime of forcible transfer or deportation, it can be shown to be unreliable at best, wholly contradicted by the *Stanišić* and *Simatović* and *Babić* cases.

Proposition three

126. That the *Mrkšić* Judgement's finding can be relied upon[228].

127. The Applicant proffers nothing in support of this proposition other than two documents.

---

[227]CR 2014/6, p. 50, para. 8 (Starmer).

[228]CR 2014/12, p. 35, para. 85 (Starmer), citing to *Mrkšić*, Trial Judgement, para. 89, para. 400; CR 2014/6, p. 50, para. 9 (Starmer).

128. This is the platform that the Applicant's case rests upon: it is no platform at all.

129. And so, having addressed the foundation of the Applicant's case, tomorrow, I will turn to the remainder of the evidence and address the intent, through the prism of the context, the patterns and the issue of opportunity.

130. As the Respondent has constantly asserted, we do not suggest there is one easy answer, and certainly not the one that the Applicant attempts to dish up to this Court. This was a complex war, with a multitude of actors and a myriad of intentions. None of them looking very much or at all like genocide. If the Applicant expects a one dimensional or singular theory on intent, then they will be disappointed. The Respondent lives in the real world. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Jordash. This completes today's hearing. The Court will meet again tomorrow morning at 10 a.m. to hear the continuation of the second round of oral argument by Serbia. Thank you, the Court is adjourned.

The Court rose at 6.00 p.m.

_____