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THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Friday 28 March 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le vendredi 28 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		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

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The PRESIDENT: Good morning, please be seated. The sitting is now open. The Court meets this morning in order for Serbia to continue its second round of oral argument and I shall now give the floor to Mr. Jordash. You have the floor.

Mr. JORDASH:

INTRODUCTION

1. Mr. President, Members of the Court, I am grateful for the opportunity once more to address the Court. As outlined yesterday, having asserted that the Respondent does not advance a positive case, the Applicant went onto advance what it termed *its* positive case, namely a "pattern of purposeful action"[1].

2. Taking these 17 factors as its starting-point, the Applicant then identified and addressed three critical issues: (i) context; (ii) patterns of behaviour; and (iii) opportunity[2].

3. I would like to now respond to the Applicant on these issues. As I will demonstrate, the Applicant refuses to address the totality of the evidence on these issues in order to bolster a demonstrably flawed case.

Context

4. Turning to context, the Applicant claims that each of the first four factors, and then all 17 taken together, provide the overwhelming inference that there was genocidal intent[3].

5. As far as the Applicant is concerned, the critical factors are the first four. They are as follows:

(i) The political doctrine of Serbian expansionism which created the climate for genocidal policies aimed at destroying the Croatian population living in areas earmarked to become part of "Greater Serbia";

(ii) The statements of public officials, including demonization of Croats and systematic incitement on the part of State-controlled media; and

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[1]CR 2014/6, p. 30, para. 64 (Starmer).

[2]CR 2014/12, p. 21, para. 31 (Starmer); CR 2014/20, p. 45, para. 1 (Starmer); and CR 2014/19, p. 26, para. 26, (Sands).

[3]CR 2014/12, p. 19, para. 27 (Starmer); CR 2014/20, p. 46, para. 3, (Starmer) and CR 2014/19, p. 26, para. 26, (Sands).

(iii) The fact that the pattern of attacks on groups of Croats far exceeded any legitimate military objective necessary to secure control of the regions concerned; and finally,

(iv) Contemporaneous video footage evidencing the genocidal intent of those carrying out the attacks; (by which I imagine the Applicant means evidence of the ferocity of the military attacks and/or the threat of attack).

6. According to the Applicant's thesis these factors were the cause, or the result, of a singular chain of events that establishes a textbook case of "milestones on the journey towards genocide"[4]. We are told that the identification of the target group became the "the first stage in genocide, as Raphael Lemkin observed back in 1944"[5].

7. Thereafter, this process continued to legitimatize the idea of a Greater Serbia, fuelled by hate speech, and so on, and so forth.

8. We are told that, "those involved in the atrocities . . . might . . . have stopped at the simple removal of the target group from "Greater Serbia" but the political forces in play were too powerful to stop at that . . ."[6].

9. Of course, if there was no other factor or explanation for the excesses of violence and the terrible crimes; if it was as they allege — the unleashing of such a plan on an unsuspecting and peace-loving Croatian Government — then perhaps they might have a point.

10. At least in these four factors, they could, perhaps, demonstrate something of cause and effect, even if such a case is flawed from the outset by a number of obvious factors.

11. However, as the Respondent has consistently argued, this one-dimensional perspective is demonstrably false. It is a caricatured tale of the dissolution of the former Yugoslavia and the genesis of the violence that begins with a James Bond villain in the guise of *Milošević*, surrounded by his henchmen, *Šešelj* and others, stoking the fires of extremist Serbian nationalism with terrible genocidal consequences.

12. The problem, of course, with this account is that the Applicant removes every trace of Tuđman's poisonous régime from this convenient pastiche.

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[4]CR 2014/12, p. 22, para. 35 (Starmer).

[5]*Ibid.*, p. 22, para. 35 (Starmer).

[6]*Ibid.*, para. 36 (Starmer).

13. Compare this with the candour and realism of the Respondent, who has admitted that the Serbian régime at that time was undemocratic and nationalism was a leading political idea. But also asks the Court to accept that "all of them [in power in each Republic] contributed, to a greater or lesser extent, to the incitement of inter-ethnic hatred and the dissolution of Yugoslavia"[7].

14. No doubt, as accepted by the Respondent, all of the people in the former Yugoslavia were ill served by their leaders. However, this is not what you will hear from the Applicant.

15. You will hear nothing but a deafening silence about Tuđman's express support for the fascist Independent State of Croatia[8] or his rumination on "genocidal changes" designed to bring "harmony to the national composition"[9]. A wilful blindness to the Minister of Defence, *Spegelj*'s well-publicized threat in 1991 to "slaughter" the Serbs in the Krajina[10]. Nothing about President Tuđman's hate-filled administration or how it *must* have been received by the ordinary folk of the Krajina and how it *must* have impacted upon the nature and degree of the violence that fanned out across the region.

16. In the Applicant's neat genocidal package, we are asked to disregard how Tuđman and his régime escalated the violence and fuelled the fires of ethnic hatred, and how they encouraged the Croatian forces to persecute the Serbian civilians in order to achieve his misconceived ambition and a place in Croatian history.

17. As Graham Blewitt, a senior prosecutor at the ICTY, noted in November 2010, the Court would have indicted the then late President Tuđman had he still been alive[11]. Who, but the Applicant, having listened to the evidence in this case would disagree with such an assessment?

18. As explained in the Respondent's written pleadings and again during the first round of oral pleadings, from 1990, the Serbs in Croatia were exposed to an atmosphere in which the Independent State of Croatia and the Ustasha Movement was constantly evoked.

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[7]Counter-Memorial of Serbia (CMS), para. 423.

[8]CMS, paras. 417 and 431.

[9]CMS, Ann. 51, citing to Dr. Franjo Tuđman, *Wastelands of Historical Reality*, Nakladni zavod Matice Hrvatske, Zagreb, p. 416.

[10]Used with Witness Paula Milić (CR 2014/9).

[11]"Military to be slashed by one-fifth…". Radio Free Europe Radio Liberty, 10 Nov. 2000. Available at: http://www.rferl.org/content/article/1142280.html

19. Not least through changes in the Constitution, the adoption of a flag and coat of arms reminiscent of the Ustasha régime, tangible discrimination, dismissal from employment, a build-up of military forces, and an adoption of persecutory tactics during combat.

20. The Respondent will not reiterate this evidence, but it is relevant and probative and cannot sensibly be ignored. Instead, the Respondent will address two questions that arise from this evidence that are critical to a proper understanding of the context and the claim:

(i) the claim that the Croat population were unarmed and the helpless victims of the Serbian military; and

(ii) the claim that the Croats were *not* responsible for a myriad of similar crimes.

21. Despite the Applicant's protests, the ICTY and non-ICTY evidence provides clear answers to these questions.

The Applicant's claim that the Croat population was unarmed and the helpless victims of the Serbian military

22. The *Stanišić and Simatović* and *Perišić* findings at the ICTY established ferocious combat on both sides. Despite the claim that all that existed by way of military support for the Croats were lightly-armed "civilian defenders"[12], the evidence of well-armed and well-motivated Croatian military formations is crystal clear.

23. Even if the Applicant's claim was true, it is plain that the relative size of military forces is only a part of the relevant context. History is littered with examples of guerrilla forces withstanding and sometimes defeating much larger and more conventional forces. From the Mujahidin who fought the Russian army in Afghanistan between 1979-1989, the Revolutionary United Front in Sierra Leone, to the present-day Taliban in Afghanistan who for ten years have withstood the might of the largest and most powerful military force that has ever existed. Indeed, it is guerilla forces, lacking an equality of conventional arms, which fall back on terror and persecution as a means of achieving their objectives.

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

24. As found by the *Martić* Trial Chamber, at the same time as the Krajina Serbs were creating the TO and police forces, the Croatian army was, *inter alia*, forming a special military unit, the ZNG, which was employed in the hostilities[13].

25. In January 1991 a Federal Secretary Report reached the SFRY Presidency, reporting that in Croatia arrests had been made for organizing and arming illegal paramilitary formations and preparing "an armed revolt"[14]. Croatian police were training for combat. Members of the illegal HDZ military organization were transferred to reserve police structures at an accelerated pace. Anti-Serbian propaganda was "being radicalized to an extreme". The Serbian populace was subjected to provocations. The resultant fear and uncertainty meant that "the Serbian population [felt] directly threatened, and people . . . [were] already beginning to flee"[15].

26. As Jović, President of the Presidency of the SFRY, confirmed in his "Last days of SFRY, Diary excerpts" the criteria for selecting paramilitaries' included, "national affiliation (Croat); an orientation toward Croatian statehood and toward denying Yugoslavia and the willingness to follow orders unconditionally"[16].

27. As was also confirmed, members of the Croatian Government were involved in distributing weaponry and ammunition across Croatian territory to Croat nationals who were confirmed HDZ activists. As the diary noted: "[T]ens of thousands of [people] have been armed and provided with up to 150 rounds of ammunition each."[17]

28. The diary also noted that on 18 January, Jović had a confrontation with Mesić, the then Croatian President. Jović tried to convince him that the Croats should surrender their weapons, lest the JNA take them by force. In response Mesić threatened to cripple the SFRY, threatening that

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[13]ICTY, *Martić,* Judgement, para. 344.

[14]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13; CMS Ann. 29; Memorial of Croatia (MC), Vol. 5, App. 4.3. Also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts, Exhibit: 00476).

[15]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13; CMS Ann. 29; MC, Vol. 5, App. 4.3, p. 217. Also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

[16]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13; CMS Ann. 29; MC, Vol. 5, App. 4.3; also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

[17]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13; CMS Ann. 29; MC, Vol. 5, App. 4.3; also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

the Croats would "immediately withdraw all their people from federal institutions, they will call on all Croats, Slovenes, and Albanians to desert the army and oppose it, and . . . they will force a direct showdown with the army"[18].

29. After further argument, Mesić agreed to surrender 20,000 weapons[19]. On the subsequent failure to do what he had agreed, Mesić later claimed that the weapons had been gathered up "to the greatest possible extent"[20].

30. There is no dispute in this case, that before the JNA became actively involved in the conflict, Croatian forces successfully blocked the JNA barracks in various parts of Croatia[21]. According to the *Mrkšić* Judgement, from 9 May until 4 August 1991, 340 attacks were carried out against the JNA and staff in Croatia[22].

31. As found by the *Mrkšić* Trial Chamber, by the end of September 1991, the JNA barracks in the city of Vukovar had been "blocked" by Croatian forces for an extended period of time. On 30 September 1991, a JNA unit was deployed from Belgrade on a mission, *inter alia*, to de-block the barracks and relieve the JNA soldiers inside. A unit from Sremska Mitrovica had previously been unsuccessful in a similar attempt[23].

32. As found by the *Mrkšić* Trial Chamber, on 2 October 1991 the JNA unit was able to de-block the barracks[24], but its more extensive offensive in Vukovar was halted by strong resistance from Croatian forces. Within a few hours, 67 JNA men were wounded and one was killed. The JNA requested that Croatian forces put down their weapons and end the fighting but this request was denied and fighting continued. As we know, the battle for Vukovar between the JNA and other Serb forces, and Croat forces on the other, then continued until

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[18]Jović Borisav: "Last days of SFRY, Diary" excerpts, p. 13; CMS Ann. 29; MC, Vol. 5, App. 4.3, p. 227. Also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

[19]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13, CMS Ann. 29, MC, Vol. 5, App. 4.3, p. 227. Also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

[20]Jović Borisav: "Last days of SFRY, Diary excerpts", p. 13, CMS Ann. 29, MC, Vol. 5, App. 4.3, p. 229. Also available at: http://icr.icty.org/frmResultSet.aspx?e=ch5vkz55q2eyhsfvfbivj2ye&StartPage=1&EndPage=10 (IT-95-11 Jović Borisav: Last Days of SFRY, Diary, Excerpts Exhibit: 00476).

[21]CR 2014/15 (Lukić), cite to Rejoinder of Serbia (RS), para. 23.

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

[23]*Mrkšić et al.,*Trial Chamber Judgement, p. 16, para. 44.

[24]*Mrkšić et al.*, Judgement, p. 16, para. 44.

18 November 1991[25]. I will return to this subject later in the morning when considering the patterns of violence.

33. The *Stanišić and Simatović* case also made relevant contextual findings. As discussed yesterday, the Chamber made many findings consistent with widespread combat involving Croat forces[26]. The Trial Chamber accepted as adjudicated facts that there were several ongoing clashes between Croatian armed forces and formations and the forces of the SAO Krajina from the spring of 1991, including in Hrvatska Dubica and Hrvatska Kostajnica, where there was intensive fighting during August and September 1991, which lasted until the beginning of October 1991[27]. In other words, the Chamber took notice that this combat was not subject to reasonable dispute.

34. The Trial Chamber took the same approach with regard to combat between Croatian armed forces and formations and the forces of the SAO Krajina from the spring of 1991[28] in other locations. The Trial Chamber found that in March 1991, there were armed clashes between the Croatian MUP special forces and the police of the SAO Krajina in Pakrac in Western Slavonia and in Plitvice between Titova Korenica and Saborsko. In both of these clashes, the JNA intervened to separate the two sides[29].

35. As found by the *Stanišić and Simatović* Judgement, the attack on the Glina police station in early summer 1991 began as a result of a Croatian police attack. Thereafter, fierce fighting for control over the area around the Glina MUP station and the surrounding fortifications ensued[30]. The Applicant's witness who appeared in this courtroom and testified to these events was not prepared to admit this, although she did admit that Serbian women and children were running from their subjective fear of the Croatian police. The *Stanišić* Trial Chamber found objective facts that explain that fear.

36. I could go on, but the Court may be relieved to know that I will not. Where do we find commentary on these issues in the Applicant's case? Instead, we get the continued insistence, that

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[25]*Mrkšić et al.*, Judgement, p. 17, para. 44.

[26]*Stanišić and Simatović*, Judgement, para. 1001.

[27]*Stanišić and Simatović*, Judgement, para. 189.

[28]*Stanišić and Simatović*, Judgement, p. 97, para. 231.

[29]*Ibid.*

[30]*Ibid.*, para. 173.

all that existed were hapless civilians desperately defending their homesteads, and a rather curious claim that all combatants should be regarded as civilians.

37. Whilst this may have been true on occasion, and it may have been true that for some time the Serb forces outgunned the Croat forces, this is a claim designed for no other reason than to convince the Court that all military action by the Serb forces is evidence of a genocidal plan. Such a claim is not supported by the ICTY or non-ICTY evidence.

38. Moreover, the proposition advanced by the Applicant last week to the effect that the Court should regard those with weapons in precisely the same way as those without is a dangerous submission in the context of basic tenets of international humanitarian law. The Applicant seeks, not only to blur the distinction between civilians and combatants, but also to render opaque basic questions of proportionality.

39. This submission risks creating the very "protection gaps" that the Applicant claims to want to avoid. The clarity of the principles of distinction and proportionality is critical, not only as a protective measure for those not taking part in combat, but also in determining who is legally authorized to take part in hostilities (and who is not), as well as to allow assessments to be made concerning which unlawful conduct gives rise to criminal responsibility. Guantanamo Bay perhaps tells us something about these latter points.

40. The characteristics of the person at whom a particular military action is directed is relevant to the assessment of the *mens rea* of genocide, or any alleged breach of international humanitarian law. Any weapons are evidence of the intentions of those in possession of them, and patently, of those who administer an attack.

41. The claim that thousands of Croats with hunting rifles, grenades, rocket launchers, anti-tank weapons, armoured vehicles and the like, no doubt infused with the same aims and objectives as Tuđman and his cohorts, should be regarded as civilians, really does risk undermining important principles.

The claim that the Croat forces were *not* responsible for a myriad of similar crimes

42. As the Respondent has argued in its Counter-Memorial, there were a multitude of discriminatory and persecutory crimes committed against the Krajina Serbs by the Croat forces,

ranging from killings, disappearances, detentions, torture, forcible transfer, destruction and plunder. I will not repeat the evidence at this closing stage.

43. However, it is worth turning to the fifth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Mazowiecki, Special Rapporteur of the Commission on Human Rights, dated 17 November 1993[31]. Commenting on the displacements of both Serbian and Croatian populations between 1991 and 1993, the report notes:

> "The present report addresses the main areas of concern of the Special Rapporteur with respect to the situation of human rights in the Republic of Croatia, including the territories under the de facto control of the so-called 'Republic of Serbian Krajina'. The violations of international human rights standards and humanitarian law have been primarily employed as a means for 'ethnic cleansing'. [I pause here to say intriguing that the expert on the ground did not define it then as genocide.] An important indication of the scale of this practice is the massive displacement of persons primarily from areas where they constitute a minority. According to UNHCR statistics, as of October 1993 there was a total of 247,000 Croatian and other non-Serbian displaced persons coming from areas under the control of the so-called 'Republic of Serbian Krajina' and 254,000 Serbian displaced persons and refugees from the rest of Croatia, an estimated 87,000 of which were situated in the United Nations Protected Areas. [I pause again here to note Operation Storm was an attack on refugees.] The situation of the refugees [noted the Rapporteur] and displaced persons has created serious humanitarian problems and constitutes a major burden for society."[32]

44. No doubt, as the *Martić* Judgement found, many other offences were committed along the way and were a foreseeable consequence of these criminal enterprises. Mr. President, Members of the Court, who transferred the quarter of a million Serbian civilians? The "civilian defenders" defending their homesteads?

Conclusion on context

45. So to conclude the question of context. Mr. President, Members of the Court, the Respondent has just laid out a sprinkling of the relevant context that the Applicant hopes you will disregard.

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[31]Fifth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 Feb. 1993, 17 Nov. 1993, UN doc. E/CN.4/1994/47.

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

46. Disturbingly, there is cogent evidence from a number of sources, including Tuđman himself, which confirms that Tuđman wanted and provoked this terrible ethnic war. It was his way of ensuring the independent Croatia that he so desperately sought[33].

47. Tuđman's Minister of Internal Affairs in 1991, Josip Boljkovac, confirmed this in his testimony in 2009 at the trial of former Osijek Mayor Glavaš, who was tried for crimes against local Serbs.

48. He stated, *inter alia*, "[b]ack then in 1991, Serbs and Yugoslavia was under attack, not Croatia" and Tuđman 'wanted the war at any cost'".

49. And further: "The war was not a necessity — it was an intention. According to Tuđman's concept, Serbs had to disappear from Croatia."[34]

50. Tuđman it appears got the war he wished for and his legacy is stained with the blood of his own and that of the Serbian people.

51. Of course, as the ICTY and non-ICTY evidence confirms, he was not the only irresponsible or hate-filled leader. Irresponsible leaders on both sides persuaded the citizenry that they could not live together anymore and fuelled a brutal war for territory and survival, full of violent excesses and persecutory crimes designed to punish and drive the people apart. To now claim that this was not, in part, due to the offensive military and civilian policies of Tuđman and his Government, does a disservice to logic, common sense and the truth. This is the context and it cannot be ignored.

52. And so the Respondent suggests that the Court, instead of only looking at the Applicant's first four factors, looks at them with at least four more in mind. At a minimum, the following needs to be taken into account:

(i) the political doctrine of Croatian expansionism and an ethnically homogenous Croatia;

(ii) the statements of public officials, including demonization of the Serbs and systematic incitement by the Croat leadership which created the climate for war, persecutory crimes, forcible transfer and deportation;

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[33] *Stanišić*, Trial Judgement, JF-40, P951, p. 114. Available at: http://www.youtube.com/watch?v=xwQDoKxJVJ8.

[34] "Tudjman's Police Minister Admits Croatia Started the War by Attacking Serbs", available at: http://de-construct.net/e-zine/?p=4869

(iii) the arming of the Croat population throughout Croatia; and

(iv) the use of the Croatian military forces to intimidate, discriminate and drive a quarter of a million Serbs from their homes in Croatia between 1991 and 1993.

53. Each alone constitutes a strand that is essential to a more balanced account of the sources and patterns of violence that provide a better understanding of intention. Together they constitute a powerful repudiation of the Applicant's claim to be the innocent victim of a genocidal campaign.

Patterns of behaviour

54. Let me now turn to the issue of patterns of behaviour. According to the Applicant, what makes the "case so powerful" is the "interrelationship of ICTY findings and the body of witness evidence" with regard to patterns.

55. However, as a further examination of the *Mrkšić* and *Martić* cases on these issues demonstrates, this claim is without merit. There is nothing in the patterns of conduct identified in the cases that provides support for the Applicant's case.

56. Relying upon *Mrkšic* and secondarily, *Martić*, the Applicant asserts that the pattern was as follows: (screen on)

> ["*(a)* tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour; *(b)* there is then artillery or mortar shelling for several days, mostly aimed at Croatian parts of the village; in this stage churches are often hit and destroyed; *(c)* in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with the JNA do not lead, with the exception of Ilok, to peaceful arrangements; with or without waiting for the results of the ultimata a military attack is carried out; and *(d)* at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varies from murder, killing, burning and looting, to discrimination."[35]]

I am going to just leave it on the screen for a moment but I will not read it; Mr. President, Members of the Court, you are familiar with the pattern as laid out by the *Mrkšic* Judgement. (Screen off)

[35]CR 2014/12, p. 24, para. 44 (Starmer), citing to para. 43 of *Mrkšić.*

57. The Applicant focuses upon phases *(b)* and *(d)*: *(b)* that is the artillery shelling for several days; and *(d)* the last stage where the paramilitaries went in. The Applicant claims that the artillery attacks were so "grossly disproportionate as to refute any notion of a military operation"[36].

58. They also claim that the artillery and the subsequent infantry attack were inconsistent with a plan to forcibly transfer or deport and, if the plan was so limited, the forces would have waited for the results of the ultimata[37].

59. The problem with the Applicant's genocide case on these issues is that this is not what the judgements state nor may these conclusions be reasonably inferred from them. Moreover, as we will see in a moment, the Applicant provided the Court with only half of the picture and failed to remedy this partial portrait in the second round.

60. First, and perhaps the most obvious point, the Applicant claims that the patterns in *Mrkšić* and *Martić* are somehow inconsistent with an intention to commit forcible transfer or deportation, but this inference is precisely what was drawn in both cases. However widespread, stark or horrendous the crime base found, this is the inference the judgements found or implied.

61. And, as the Respondent argued yesterday, the inference that the Applicant suggests is irresistible, namely that the Krajina and Serbian Governments intended the acts that might reasonably constitute the *actus reus* of genocide — murder, physical and mental harm — was not found established in *Martić*, even beyond a reasonable doubt.

62. Second, if we might return to the patterns identified in *Mrkšić* and corroborated by *Martić.* Looking at paragraph 43 of the *Mrkšić* Judgement that sets out the pattern of attacks that we have just seen on the screen. The Trial Chamber supports the finding with one most relevant report: a report by Ambassador Kypr of the European Community Monitoring Mission (ECMM). It is this evidence the Chamber relied upon to find the pattern.

63. It is instructive to view this report. As the Court will see, the ECMM had conducted a four-day investigation consisting of numerous interviews. It concluded — I think that might be difficult to read but I will read the relevant bit:

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[36]CR 2014/12, pp. 25–26 (Starmer).

[37]*Ibid.*

The PRESIDENT: Please, I just wish to tell you. Read because in the verbatim records only what you read is reflected, not what you put on the screen. So, it is up to you.

Mr. JORDASH: Mr. President, thank you.

> "The Monitor Mission is of the opinion that the JNA frequently in close cooperation with Chetniks, (called reservists or territorial troops by the JNA) [and this is the point] *tried to displace as many Croats as possible by creating destruction and/ or panic. This view was also supported by a written report from another area*.
>
> The JNA scenario save the one for Ilok, *often* evolved along the following lines." (Emphasis added.)

64. And thereafter, as you will see, the ECMM details the patterns that they had *often* observed and upon which the Applicant now curiously relies to establish that this pattern had nothing to do with mere dissolution.

65. Of course this report and any four-day investigation has its limitations and we ought to be careful not to draw definitive conclusions from what happens "often". There is nothing in this report or nothing in the *Mrkšić* case to rebut the *Stanišić and Simatović* inference that the remainder of the time, lawful combat was taking place.

66. But the point remains that the *Mrkšić* pattern was a pattern of ethnic cleansing, not crime without a purpose, and not genocide. Once more, experts on the ground at the time failed to observe genocide. As the Applicant admits, this pattern is corroborated by findings in the *Martić* Judgement.

67. As found by the *Martić* Trial Chamber, paragraph 427, the pattern of the attacks led the Chamber to conclude beyond a reasonable doubt that the *"primary objective"* was the removal of the population. Whilst Martić had not been charged with genocide, there was nothing to prevent the Trial Chamber from concluding that the pattern was indicative of an intent to persecute or to exterminate or worse.

68. Moreover, the Chamber went further than the *Mrkšić* Chamber in identifying a pattern. It noted, *inter alia,* that,

> "In some instances the police and the TO of the SAO Krajina organised transport for the non-Serb population in order to remove it from SAO Krajina territory to locations under Croatian control. Moreover, members of the non-Serb population

> would be rounded up and taken away to detention facilities, including in central Knin, and eventually exchanged and transported to areas under Croatian control."[38]

69. The Chamber concluded the following, that "[b]ased on the substantial evidence referred to above, the Trial Chamber finds that due to the coercive atmosphere in the RSK from 1992 through 1995, almost the entire non-Serb population was forcibly removed to territories under the control of Croatia"[39].

70. As I discussed at the beginning, this was mirrored on the Croatian side with an equal number of Serbs being removed from the Croatian areas. Indeed, as the Applicant's Memorial confirms at numerous paragraphs[40], to a large extent one such removal led to another with civilians moving into their counterpart's houses, as happened for example with Serbs who had been removed from Western Slavonia[41] in 1992 who subsequently fled to Eastern Slavonia and removed Croats from their houses. A terrible process of tit for tat.

71. As with the independent ECMM investigation, had the *Martić* Chamber found that the "primary objective" of the pattern was something other than forcible transfer, there was nothing to prevent them from saying so. It would not have prevented them or the independent ECMM, which was not restrained by an indictment, from finding that the accused intended something more.

72. Indeed, we saw a little of these types of additional findings in the *Mrkšić* Judgement. The Trial Chamber identified a pattern that demonstrated that the overall effect of the evidence was to "demonstrate that the city and civilian population of and around Vukovar were being punished"[42]. As we can see, identifying multiple intentions, or alternative motives, does not prevent convictions from being entered on the basis of the indictment.

73. Indeed, the Chamber, arguably, has a duty to do so, to ensure that the accused's culpability is properly described and that sentencing proceeds on the right footing.

74. The Applicant's case is not to be found in the patterns.

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[38] *Martić*, Judgement, para. 427.

[39] *Martić*, Judgement, para. 431.

[40] MC, paras. 4.30, 4.93, 4.46, 4.37, 4.65, 4.132, 4.61, 4.112, 4.106, 4.80.

[41] CIA, Balkan Battlegrounds, p. 102.

[42] *Mrkšić*, Judgement, para. 471.

Vukovar

75. It is worthwhile examining the chronology of the Vukovar case to assess why the Trial Chamber in *Mrkšić* did not arrive at the conclusion that the Serb forces were seeking destruction. It is worthwhile dividing the Vukovar operations into two phases: the first was the fight to take the city and the second was the evacuation and crimes upon the Croat forces that took place after the surrender. I will look at the second phase in my concluding remarks. For the moment my focus is on the three months siege or battle prior to the surrender.

76. The following chronology, taken from the *Mrkšić* Judgement, is instructive:

(i) by the end of September 1991: the JNA barracks in the city of Vukovar had been "blocked" by Croatian forces for an extended period of time[43]. The JNA soldiers were unable to leave. They had no access to water and electricity and were subject to weapons fire[44];

(ii) 30 September 1991: as I have described, a unit was sent from Belgrade to de-block the barracks[45];

(iii) 2 October 1991: the brigade de-blocked the barracks[46];

(iv) from 2 October until 18 November 1991: the JNA was engaged in attack operations in and around the city of Vukovar. This is the beginning of the point. There was strong resistance from the Croatian forces that included the Territorial Defence, members of the Ministry of the Internal Affairs (MUP), the National Guard (ZNG) and a small number of a newly created Croatian defence forces. By the height of the siege of Vukovar, the number of Croat combatants may have reached 1,700 to 1,800[47]. While ceasefire agreements were reached from time to time, both sides violated them[48];

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[43] *Mrkšić*, Judgement, para. 44, citing to Miodrag Panić, T 14268.

[44] *Mrkšić*, Judgement, para. 44, citing to Miodrag Panić, T 14268; Božidar Forca, T 13259.

[45] *Ibid.*, para. 44.

[46] *Mrkšić*, Judgement, para. 44, citing to Miodrag Panić, T 14268.

[47] *Mrkšić*, Judgement, para. 40, citing to Exhibit 391, pp. 207-208.

[48] *Mrkšić*, Judgement, para. 52, citing to Exhibit 88; Exhibit 401, p. 16; Exhibit 798, p. 59 and Exhibit 868, p. 37.

(v) by 8 October, according to the *Mrkšić* Judgement: all villages — Arengrad, Bapska, Mohovo, Tovarnik and Ilica — had been attacked by the JNA, except Ilok. Most of the population was concentrated in Ilok[49];

(vi) 17 October 1991: around 8,000 of the people, mainly Croats who were centred in Ilok, were forced by the circumstances to leave[50];

(vii) by 12 and 13 November: there was street fighting close to the centre of Vukovar[51]; and

(viii) as we know, on 17 November: negotiations for surrender began[52].

77. So a number of brief points if I may. This chronology of findings explains the facts that explain why the Chamber did not find an intention to destroy but only to punish, but it also further undermines the Applicant's case with regard to what this operation involved. It is this chronology that led the Chamber to make the following two pivotal findings with regard to this first phase. First,

> "What occurred was *not*, in the finding of the Chamber, *merely an armed conflict between a military force and an opposing force* in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained."[53]

And,

> "It is in this setting that the Chamber finds that, at the time relevant to the Indictment, there was in fact, *not only* a military operation against the Croat forces in and around Vukovar, but also a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area . . . It was an unlawful attack. Indeed it was also directed *in part* deliberately against the civilian population."[54]

And the emphasis is mine.

78. Plainly, this does not paint the Serb forces in flattering colours, but once again it does expose the Applicant's rhetoric. Contrary to their claim, the Chamber did not find that there was

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[49] *Mrkšić*, Judgement, para. 46, citing to Exhibit 305, p. 2.

[50] *Mrkšić*, Judgement, para. 46, citing to Exhibit 308, p. 1 and Exhibit 383.

[51] *Mrkšić*, Judgement, para. 50, citing to Aernout van Lynden, T 3107-3109.

[52] *Mrkšić*, Judgement, para. 145.

[53] *Mrkšić*, Judgment, para. 470; emphasis added.

[54] *Mrkšić*, Judgement, para. 472; emphasis added.

no legitimate combat, only that the military operation against the Croat forces in and around Vukovar was made unlawful because *part of it* consisted of an attack on the civilian population, designed to punish them for refusing to surrender.

79. The finding of legitimate combat is entirely consistent with Croatian sources. Two examples will suffice. First, the views expressed by Davor Marjan, one of the leading Croatian historians on the war in Croatia[55]. He stated that, by the beginning of September 1991, the number of Croatian forces in the Vukovar, and neighbouring towns of Vinkovci and Županja, reached 5,000[56]. Battles, important for the seizure of Vukovar, raged along the Vukovar-Bogdanovci-Vinkovci line. By 1 October 1991, Bogdanovci was at the centre of the conflict. It was completely encircled by the JNA but defended heavily by the Croatian forces[57].

80. Just as a brief aside. The Applicant's own historians appear to disagree with the Applicant's case and the witness, Marija Katić, who testified that the crimes in Bogdanovci were unrelated to combat[58]. Undoubtedly horrible crimes were committed in that town, but, once again, the pattern is combat and excesses arising therein.

81. The second source, the Croatian Homeland War Memorial and Documentation Centre in 2001[59] corroborated the views of Davor Marjan. It cites to sources that suggest that a minimum of 1,200 JNA soldiers and 879 Croatian army soldiers were killed and the Croatian forces destroyed as many as 300 to 500 armoured vehicles, including up to 200 tanks and between 20 to 25 planes[60].

82. Is the Applicant really suggesting that those who downed planes, stopped tanks, and killed hundreds, if not thousands, of JNA soldiers, should be accorded civilian status? Is this the protection gap that the Applicant urges upon the Court in its quest to find genocide where none exists?

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[55]See Davor Marijan, "*Bitka za Vukovar 1991*" (The battle of Vukovar 1991), Scrinia Slavonica, Vol. 2, No. 1 Listopad 2002. Available at: http://hrcak.srce.hr/11352.

[56]*Ibid.* p. 371.

[57]*Ibid.*, pp. 374-395.

[58]CR 2014/8, pp. 18-19, paras. 42-43 (Ní Ghrálaigh).

[59]See Anica Marić & Ante Nazor, Greater-Serbian Aggression against Croatia in the 1990s, Croatian Homeland War Memorial and Documentation Centre, Zagreb, 2011. Available at: http://centardomovinskograta.hr/pdf/izdanja2/1-244-Vukovar-engl-FINAL-03-04-11-opt.pdf.

[60]*Ibid.*, pp. 68-72.

83. Another point arises from the Vukovar chronology. As is plain from the chronology, by 8 October 1991, the Chamber found that all the villages had been attacked by the JNA — and I listed the five a moment ago — except Ilok. Most of the population of these villages was concentrated in Ilok[61], as found by the *Mrkšić* Chamber. As confirmed by the Applicant in their written pleadings, Ilok was the "initial site of refuge for Croats banished from other parts of Eastern Slavonia"[62].

84. What happened next will assist the Court in determining whether the intent of the Serb forces in Eastern Slavonia was genocidal or something else?

85. As found by the *Mrkšić* Trial Chamber, on the 17 October 1991: around 8,000 of the people, mainly Croats, were forced by the circumstances to leave Ilok[63]. Interestingly, the Applicant claims that the number who left equalled 15,000[64]. Whether it was 8,000 or 15,000, there is no dispute that the number consisted of civilian refugees who had escaped — or, according to the Applicant, banished — from neighbouring villages. There is no dispute either that the departure of this group was one of the largest single incident of departure of civilians from Eastern Slavonia.

86. As found by the majority in the *Stanišić and Simatović* Trial Chamber, those who left Ilok did so after a referendum was held and that the citizens expressed a wish to leave for Croatia-held territory, as the JNA had issued an ultimatum to the armed formations in Ilok to surrender and disarm and the citizens and had heard of the conditions in the surrounding villages. The Trial Chamber, having considered the evidence, that included detailed evidence relating to the surrounding villages, the majority — I should have said "the majority", not the "Trial Chamber" — found that there was insufficient evidence to conclude that the environment was such that the inhabitants had no choice to leave and declined to enter convictions on the charges[65]. Rather than genocide, or even forcible transfer, the majority found that the combat that led to their departure from their homes, and eventually from Ilok, was in essence lawful.

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[61] *Mrkšić*, Trial Chamber Judgement, para. 46, citing to Exhibit 305, p. 2.

[62] MC, para. 4.62.

[63] ICTY, *Mrkšić*, Judgement, para. 46, citing to exhibit 308, p. 1 and exhibit 383.

[64] MC, para. 4.62.

[65] ICTY, *Stanišić and Simatović*, Judgement, paras. 1047-1048.

87. To conclude on the patterns, there is no easy answer, but genocide is not one of the many answers. From beginning to end, the Applicant's case fails to address the complexity of the ICTY and non-ICTY evidence that shows a multitude of patterns giving rise to inferences of combat and/or forcible transfer and/or punishment, and many others things besides — besides genocide, that is.

88. No one at the time — we have seen that in the reports — no serious commentator concluded genocide was taking place.

Opportunity

89. Let me now turn finally to opportunity. The Applicant stated last week that, "Serbia now accepts the evidence of genocidal intent is to be determined in part by reference to the opportunity that presents itself"[66].

90. This is only partly correct. Serbia accepts that opportunity *might* play a role in the assessment of genocidal intent. However, the Applicant's approach to this issue undermines the Court's reasoning in the *Bosnia* case and risks depriving the Court of any practical means of concretely determining the existence — or non-existence — of genocidal intent.

91. The subject of opportunity arose in the *Bosnia* case in one very specific circumstance, namely whether and, if so, how intent to destroy a part of a group might be inferred if an attack took place in a "geographically limited area". What the Court meant by geographically limited area needs to be explained. And I will do so. However, the point is that it is important to hold on to the questions that we have been asked by the Court.

92. In the *Bosnia* case, the Court observed that it is

> "widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a *geographically limited area*. In the words of the ILC, 'it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe'. *The area of the perpetrator's activity and control are to be considered.*"[67]

"The area of the perpetrator's activity and control are to be considered."

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[66]CR 2014/12, p. 51, para. 19 (Starmer).

[67]*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. 126, para. 199; emphasis added.

93. As must be immediately obvious, this is of little relevance to the Applicant's case, which is premised on an attack throughout thousands of square kilometres of Croatia and without the glimmer of a restriction on the opportunities to destroy. This is the Applicant's case and I will return to it in a moment.

94. The Court went on to say — in the *Bosnia* case:

> "As the ICTY Appeals Chamber [in *Krstić*] has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant. *This criterion of opportunity must however be weighed against the first and essential factor of substantiality*. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber [in *Stakić*] has indeed indicated the need for caution, lest this approach might distort the definition of genocide."[68]

95. So, we see, the Applicant seeks to rest its case on the Court's comments concerning opportunity, whilst disregarding the focus of the Court's discussion, namely how the opportunity is relevant to the "essential factor of substantiality" and the question of intent when the perpetrator's control is limited.

96. Why has the Applicant removed substantiality and control from the equation? Because Croatia knows that on any sensible assessment of their claim, the substantiality criteria has not been satisfied.

97. On their case, it cannot be argued that there was the type of geographical — or any other type of — limitation envisaged in *Bosnia*. Indeed, only last week the Applicant derided the geographical scope of Operation Storm, arguing that it compared unfavourably to Croatia's bigger claim, which "concerns events occurring in six different regions of Croatia, over one-third of its entire territory"[69].

98. The Applicant's claim is premised on the argument that every single action by every Serb military unit or individual across the whole of Dalmatia, and Western and Eastern Slavonia for a period of five years was in furtherance of genocide. And that this overwhelming military force dwarfed the Croatian territory and the civilian population. Where, one might ask, was the opportunity limited?

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[68] *Bosnia*, pp. 126-127, para. 199, citing *Krstić*, Judgement, 19 April 2004, para. 13 and *Stakić*, Judgement, 31 July 2003, para. 523; emphasis added.

[69] CR 2014/19, p. 58, para. 10 (Sands).

99. The Applicant cannot have it both ways. As they argue, the opportunity was as extensive as it could be.

100. However, what is limited on their case, is any coherent pattern of destruction that might reasonably give rise to an inference, whether beyond a reasonable doubt or any other threshold, that the intent was designed to destroy a substantial part of the group. The figures do not add up, and the Applicant knows it.

101. In five years of war, across this vast area, with purportedly overwhelming military might, most of the Croatian civilians were not harmed, leaving aside — and I say this with due respect — forcible transfer and deportation. Most were allowed to leave and most did. Nothing I say is designed to justify the horrendous crimes, but the statistics and the way the Applicant deals with them speak for themselves.

102. During the second round, the Applicant purported to clarify that 12,000 civilians were killed in the alleged genocide throughout the war in Croatia[70]. However, what the Applicant failed to also state is that this same source found that 50 per cent of this total were civilians and the rest were not[71].

103. Moreover, it is safe to assume — and the burden of course is on the Applicant to prove otherwise — that not all of these were killed unlawfully. They may have been the victims of lawful combat.

104. Further, even this figure is thrown into doubt when one considers other sources. According to Mr. Zivic, the leading Croatian demographic expert, 8,147 Croatian soldiers died during the war. If this is correct and contrasted with the other, or with the Applicant's source, this would reduce the number of Croatian civilians killed in the whole five years of war to approximately 4,000 — horrendous for sure, but a small portion of the whole.

105. Of course the Applicant does not only rely only upon killings, and the *actus reus* of genocide is satisfied by other Article II acts provided they are committed with genocidal intent. However, the figures of 4,000-6,000 civilians or less killed across five years of war and throughout

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[70]CR 2012/20, p. 34, para. 21 (Ní Ghrálaigh).

[71]See Anica Marić & Ante Nazor, Greater-Serbian Aggression against Croatia in the 1990s Croatian Homeland War Memorial and Documentation Centre, Zagreb, 2011, p. 368. Available at: **Erreur ! Référence de lien hypertexte non valide.**

vast amounts of territory with such extensive opportunity, especially when compared with those who left or were removed, speaks eloquently to a lack of demonstrable genocidal intent.

106. As an aside, it is important to note that the figures proffered by the Applicant in relation to the Vukovar operation and the numbers given therein appear to be an attempt to remedy this numerical problem. Even though the Applicant claimed that the number of civilians killed in Phase 4 — the Applicant's phase 4, the Vukovar siege — was 2,000, scrutiny of the pleadings will show that there is absolutely no basis for this assertion[72]. The Respondent will return to this issue this afternoon.

107. Having realized this gaping lacuna in their case, the Applicant has sought to shift the law. First, we heard how "substantiality" has never been part of the law. And now this, an attempt to distort the *Bosnia* holding with regard to the significance of "opportunity".

108. And where has the Applicant ended up? In the middle of Professor Sand's "hamlet" thesis, wherein he argued that the intention to destroy the group or a substantial part of the group might be discerned from an attack on a "state, or a region, or a town, or a village, or a hamlet, or even something smaller"[73].

109. Further, the Applicant also distorts the Respondent's submissions on the issue by asserting that the Serbia agrees with this attempt to remove the substantiality requirement because the Respondent "told the Court that the intent to commit genocide can be found where only a 'few Article II attacks occurred'"[74].

110. The Applicant appears to suffer from a bout of wishful thinking, which may easily be cured. This is not what the Respondent said, nor did this Court in the *Bosnia* case. On the contrary, the Court (and the ICTY) ruled that geographically limited areas may well present a problem with regard to inferring such intent: " . . . lest this approach might distort the definition of genocide."[75]

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[72]CR 2014/12, p. 11 (Starmer). No footnote for this claim.

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

[74]CR 2014/20, p. 11, para. 4 (Sands).

[75]*Bosnia*, Judgement, para. 199, p. 127, citing *Stakić*, Judgement, 31 July 2003, para. 523.

111. Of course, this is a question of evidence and not strictly a question of the substantive law: how to infer intent to destroy in whole *or in part* from deeds done. The substantiality factor is critical to this assessment. How else is the Court to distinguish Article II acts from Article II acts committed with the required intent?

112. How can an attack on a hamlet that kills or physically harms four people *for wholly personal reasons* devoid of genocidal intent be distinguished from an attack that results in the same, but committed with genocidal intent? That is the fundamental problem with Professor Sand's "Hamlet thesis": to be or not to be genocide? That is the unanswerable question.

113. Let me take a down to earth example: one of the men from the gang called Šiltovi, who Ms Milić testified to terrorizing her village, breaks into her neighbour's house and steals all the valuable items. In order to destroy any evidence of their crime, they kill every member of the Croat family and burn the house to the ground. They have taken every conceivable opportunity to destroy.

114. On the Applicant's interpretation of the law, they are more likely to have genocidal intent because they took every opportunity available to them *at that* time to destroy. Of course, this does not follow. They no more have genocidal intent, than if they had crept in quietly in the night, and left without anyone noticing.

115. Opportunity when viewed on its own may lead us down a seductive, but wholly erroneous, path, which is where the Applicant wants to take the Court.

116. Contrary to the impression the Applicant wants to convey, removing the substantiality requirement and replacing it with opportunity does not strengthen the Convention. It renders its protections illusory and undermines its utility. Everything and nothing looks like genocide.

117. Substantiality provides the Court with a practical means of determining the question of intent. In this circumstance, the question of overall opportunity may tell us something about intent with regard to the whole or part of the targeted group. It speaks to whether the perpetrator's destruction would have gone further, but for manifest limitations of control.

118. As the Parties have agreed elsewhere, the question of intent to destroy in whole or in part is to be inferred from a range of factors. I will not rehearse them here, I am sure the Court has them in mind. As this Court ruled in the *Bosnia* case, the specific intent to destroy the group in

whole or in part, "has to be convincingly shown by reference to particular circumstances, *unless a general plan* to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent"[76].

119. In circumstances where there is a *general plan to that end* only a "few Article II acts" may be required. Back to the Šiltovi gang example I gave a moment ago. If that gang had destroyed the one house and the Croat family, but had written down a plan explaining that they intended to keep going until they had destroyed every Croat in the area, but were arrested prior to the execution of this plan, then it still might be possible to infer an intent to destroy a substantial part of the group from, what the Respondent stated previously, the plan and relatively "few Article II acts".

120. The Applicant's overall claim that whenever "the advancing Serbs were presented with an opportunity either to move their hapless bombarded victims on, to expel them, or to destroy them. The result was the same in almost every case. They took their opportunity and they destroyed them"[77]. This is obviously not made out on the evidence.

121. Having appreciated this, the Applicant falls back on carefully selecting the worst examples of criminal events (Vukovar, Sarbosko, Lovas, and Skabrnja) arguing that the perpetrators took every opportunity to destroy in these locations. The Applicant hopes that the Court does not cast its eye across the whole territory, the whole range of patterns and the totality of the available control.

122. So to conclude the question of opportunity. The Applicant has offered no explanation as to why an army of this purported size and capability, hell-bent on destruction, would only launch an infantry attack or allegedly send in the paramilitaries after days or weeks of the shelling of the location, the issuance of an ultimata and consultations with the local authorities?

123. The question of whether an attack took place "with or without waiting for the results of the ultimata" does not circumvent the need to answer this question.

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[76] *Bosnia*, Judgement, p. 197, para. 373.

[77] CR 2014/12, pp. 27-28, para. 55 (Starmer).

124. The Applicant has offered no meaningful argument on the *Martić* finding that the overwhelming number of civilians were permitted or allowed or forced to leave the region[78].

125. The Respondent takes no issue with the Applicant's submissions that the *actus reus* for genocide, can be constituted by acts other than killing. Serious bodily and mental harm, for example, are obviously sufficient if committed with genocidal intent"[79] and obviously an assessment of intent, does not require that "the whole group was physically killed"[80].

126. However, the Applicant still needs to explain why when considering the overall geographical level of control, the majority of the civilians were not killed or subject to acts that might give rise to the inference that this was the prevailing intent, whether in the immediate or the longer term.

CONCLUDING REMARKS

127. Moving to my concluding remarks. I want to try to pull all these threads together. The Applicant fails to fairly address the issues that are critical to its claim. As is clear, the real point in this case is not whether the Serb forces did or did not commit crimes, but whether the overall pattern of crimes shows that genocide was taking place. Despite the horrors of widespread crimes, the answer to this question is abundantly clear.

128. Whilst purporting to examine the context, patterns of behaviour and opportunity, the Applicant twists and turns to escape the obvious conclusion.

129. The Applicant's approach to the killings at Ovčara — surely the high point of their claim — is emblematic of this approach. The Applicant's critique of Mr. Obradović's reliance upon two examples of how civilians were evacuated from Eastern Slavonia, including Vukovar, is an example of the alarmingly reductionist approach that the Applicant seeks to adopt.

130. We are being led to believe that because some of the Serb forces committed crimes at Velepromet and Ovčara and took the opportunities to do so, *ipso facto*, genocide is established[81].

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[78] *Martić*, Judgement, para. 431.

[79] CR 2014/20, p. 54, para. 30 (Starmer).

[80] *Ibid.*

[81] CR 2014/10, pp. 51-56, paras. 19-36 (Starmer).

131. The Applicant falls back on this easy critique because an examination of the causes of this incident, situated in the war and the protagonists, the patterns, and a holistic approach to opportunity, exposes the lack of merit in the claim.

132. When one looks at the second phase of the Vukovar operations, the Respondent's second phase when the town had surrendered, and when one looks at it through a less myopic lens, it looks like an evacuation that was overwhelmingly successful, with a small element that went wrong. Very, very, wrong, and I do not mean to demean the personal tragedy. But, nevertheless, a lawful evacuation — negotiated between the JNA, the Croatian leadership, and the international community — in which an excess of violence led to the commission of crimes by the few — directed at a very small fraction of the whole and directed at those who had been in the Croatian forces.

133. The violence cannot be explained as a simple case of planned destruction for destruction sake. This was the case effectively rejected by *Mrkšić,* not only in the finding that there was lawful combat, but also in the reminder of the specific findings.

134. A brief look will suffice. As found by the Trial Chamber, the JNA, the three accused and no one else besides were not a part of a joint criminal enterprise to kill or harm any of the civilians or the prisoners of war. The subsequent violence in Ovčara was not found to be the result of a plan, whether a plan to kill or punish, let alone one that might look like genocide[82].

135. Indeed, the Chamber found that on 20 November 1991, the JNA did delay the ECMM monitors and the ICRC representatives but that was in order to advance a lawful plan[83]. The Chamber found that the plan — and this action, the delay — was in furtherance of the evacuation of the civilians; and to separate the combatants, where they would be investigated for involvement in the war and war crimes. This was perfectly lawful, even if it did not go according to that plan.

136. The Chamber held that the

> "purpose of the selection and removal of not less than 200 members of the Croat forces from the Vukovar hospital was for them to be taken into JNA custody, transferred to a prisoners of war facility, perhaps at least in some cases for questioning

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[82] *Mrksić*, Judgement, para. 608.

[83] *Ibid.*, para. 211.

> as war crimes suspects and trial and subject to that, for a prisoner of war exchange at a later time"[84].

137. The *Mrkšić* Chamber found that:

> "Security measures put in place at times in the afternoon at Ovčara by JNA military police, albeit temporarily and insufficiently, prevented effect being given to any common purpose as alleged, which tends to contradict the proposition that there was any common purpose, as alleged, involving JNA troops under the command of any of the Accused."[85]

It is worth repeating. The Chamber found that the JNA was not part of any plan to kill the men and there was no common criminal purpose at all.

138. When the Applicant talks of a moment to test the true intent of the Serb forces, perhaps we need to look no further. As found by the Trial Chamber, on 18 to 20 November 1991, a system was put in place that was intended and did lead to the evacuation of the vast majority of the civilians, around 4,000 in all, to either Croatia or Serbia. The evacuation was assisted by the JNA[86].

139. At the very least, this pattern of evacuation sits uneasily with the claim that the Serb forces were hell bent on destruction. As the Applicant noted, the city was on its knees, a brutal battle was over, the opportunity for destruction was optimal, yet the pattern was clear: they were almost to a man, woman, and child transferred to Serbia and Croatia.

140. The number of those who were killed was horrendous, but it was a tiny fraction of the whole. It was a personal tragedy for the individuals and their loved ones, but not something that was aimed at or capable of undermining the physical existence or biology of the group.

141. There is also no dispute that the perpetrators of the 194 killings at Ovčara acted in the understanding that their acts were directed against members of the Croatian forces. It was not an attack against the civilian populations as such. That is what the Trial Chamber found and that is why the Trial Chamber declined, in paragraph 481 of the Judgement, to conclude that it was a crime against humanity[87].

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[84] *Mrksić*, Judgement, para. 579.

[85] *Ibid.*, para. 596.

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

[87] *Mrksić*, Judgement, para. 481.

142. The Applicant argues that Mr. Obradović's example of the evacuation of 250 women and children and others on 20 November 1991 is misleading because this evacuation was "heavily monitored" by the ECMM and the ICRC and that this has to be contrasted with what happened at Velepromet and Ovcara[88].

143. However, this analysis, whilst seductive, does not address any of the aforementioned context or patterns. It does not explain why the *Mrkšić* Chamber found that throughout the evacuation the Serb forces distinguished between the civilians and the fighting forces and why all of the civilians and the overwhelming vast majority of the armed forces were all evacuated, with or without monitoring[89].

144. It does not address why the pattern of evacuation looks a little like the *Mrkšić* or *Martić* pattern, or even more like the pattern found by the *Stanišić* Trial Chamber, of lawful evacuations in Ilok in July 1991. The Applicant prefers to focus on the highlights of the abuse, as if this is sufficient to demonstrate genocidal intent.

145. The Applicant takes a similar approach to the Agent of Serbia's second example, namely the fact that 2,786 Croats, including more than 1,000 men imprisoned with Mr. Kožul at Stajićevo, were released, not killed[90]. The Applicant appears to accept that these men were not intentionally killed, and that the ICRC was given access to the camp, but argues that those detained were "mainly civilians" and that the Serb forces took the opportunity to commit other genocidal acts[91].

146. The Applicant makes a valid point, which I have repeated several times, about the need to look beyond the crimes of murder because the *actus reus* of genocide is satisfied by other Article II acts committed with specific intent[92]. However, once more, the Applicant falls back on opportunities taken and the highlights of the abuse, rather than the context, the patterns and other salient issues that might illuminate intent.

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[88]CR 2014/20, pp. 51-54 (Starmer).

[89]*Mrksić*, Judgement, paras. 167, 168, 201, 207 and 474.

[90]CR 2014/13, p. 67, para. 48 (Obradović).

[91]CR 2014/20, p. 57, paras. 40-44 (Starmer).

[92]CR 2014/20, p. 54, para. 30 (Starmer).

147. First, the Applicant asserts that those detained were mainly civilians, but fails to establish this fact. As found by the *Mrkšić* Trial Chamber, there was a clear pattern throughout the evacuation of distinguishing civilians from those suspected of being involved in combat. The men were detained as prisoners of war.

148. As confirmed by Mr. Kožul, the men were separated from the women, children and the elderly and released[93]. True, Mr. Kožul claimed that the men he was detained with were "mostly civilians", but immediately contradicted this claim by admitting that the first major release of detainees was 110 Croatian police[94]. During his testimony, he further contradicted himself by admitting that he did "not know the number of civilians or soldiers in . . . the two stables"[95]. The *Mrkšić* Judgement makes it very clear.

149. Moreover, the men were all questioned by the military intelligence, clearly to establish whether they had participated in combat. Mr. Kožul was eventually exchanged as a member of the Croatian army[96].

150. Therefore, it is plain, we say, that the violence, although inexcusable, is also explainable — in context. While there is no need to establish that the group is killed, there is a need to examine the prevailing circumstances to ascertain whether there are other explanations for the violence. Whether we focus on the beatings, or the handful of killings that resulted, it was plainly the result of excesses during, what would otherwise have been a lawful military action, evacuation, interrogation and release.

151. These circumstances were not about creating or making use of opportunities for destruction, they were about identifying combatants or war criminals. And an excess of violence that did not and was not capable of leading to death or destruction of the group does not change that fact. Upon examination of the issues in context, Mr. Obradović's submission is plainly correct.

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[93]CR 2014/7, p. 16.

[94]MC, Ann. 154, p. 3.

[95]CR 2014/7, p. 17.

[96]MC, Ann. 154, p. 4.

152. And so to conclude. Looking carefully at the ICTY judgements and the non-ICTY evidence, the context and patterns are clear. When looking at the overall opportunity available to the Serb forces and the numbers of those killed or injured, it is clear. When looking at the nature of the crimes, it is clear.

153. It is all pretty horrendous and tragic, no doubt. This is what happens when irresponsible vainglorious men use and abuse their own populations to pursue personal ambitions to make their mark on history.

154. However, it is not genocide. The facts do not fit and the law does not fit. No one then, and no one now, not even the Applicant, really believes that they do. Mr. President, Members of the Court, thank you for the time. I will, with the Court's leave, hand over to Professor Schabas who will deal with further issues in relation to the Applicant's claim.

The PRESIDENT: Thank you very much, Mr. Jordash. I now call on Professor Schabas. He can start and perhaps after 15-20 minutes, at an appropriate place in his pleading, he can pause. You have the floor, Professor Schabas.

Mr. SCHABAS:

RESPONSE TO THE APPLICANT'S SECOND ROUND OF ORAL PLEADINGS ALLEGING THE COMMISSION OF GENOCIDE

Introduction

1. Thank you very much, Mr. President, Members of the Court. This morning, in response to the Applicant's oral pleadings of last week concerning its claim, I would like to draw the attention of the Court to a number of issues. First I will discuss the *actus reus* of the crime of genocide and the interpretation of Article 2 of the Convention. I will then address the relevance of the issue of missing persons to the crime of genocide. Next, I will turn to the standard of proof to be contemplated in light of the Judgement in the *Bosnia* case and relevant case law of other international tribunals, in particular, the regional human rights courts (notably the European and the Inter-American Courts of Human Rights), as well as the ICTY, bearing in mind the question from

Judge Cançado Trindade. And I will conclude my presentation with remarks on the ICTY *Tolimir* case.

The *actus reus* and the interpretation of Article 2 of the Genocide Convention

2. There are differences of opinion between Croatia and Serbia about the construction that is to be given to Article 2 of the Convention. One of these concerns the notion of *actus reus*. On several occasions, reference has been made to the *actus reus*, generally in the context of remarks such as "the *actus reus* is not in dispute" or "the *actus reus* has been admitted". By this, the implication seems to be that one of the punishable acts listed in the five paragraphs of Article 2 of the Convention has been committed. Last week, Croatia spoke to the issue and contended that Serbia had admitted that the *actus reus* of genocide had been committed because it "made no effort to argue that there was no killing, no causing of serious bodily or mental harm to members of the group"[97]. Croatia went on to state: "It is not necessary, for the *actus reus* of genocide to be established, for there to be an aggregation of different acts. Individual acts on their own are sufficient to constitute genocide."[98] Indeed, in answer to Serbia's propositions on the subject concerning the importance of the scale of the crime, Croatia answers "[t]hat is not what the Convention says"[99], as if a purely literal reading of the words of Article 2 is really going to provide us with clarity about its interpretation. The consequence of the interpretation proposed by Croatia seems to be that once the Court determines that there has been a killing of a member of the group — presumably two would be enough, given the plural form of "members" in Article 2, paragraph *(a)* — or an act causing serious bodily or mental harm, the Court is then to move immediately to identification of the mental element that may be associated with this punishable act.

3. Mr. President, Members of the Court, this seems to be a very simplistic and profoundly unworkable approach to Article 2. There must be more to the *actus reus* of genocide than satisfactory proof that one of the acts listed in Article 2 has been perpetrated. Can it really have been the intent of those who drafted the Genocide Convention to view it as an act capable of being perpetrated by one individual who kills — I note that the Convention does not even use the word

[97]CR 2014/20, p. 13, para. 6 (Sands).

[98]CR 2014/20, p. 14, para. 7 (Sands).

[99]*Ibid*.

"murder" — two or more members of a group? Or, for that matter, who perpetrates an act that causes mental harm to two or more members of a group? Such an approach reduces the crime of genocide to an absurdity, and makes the distinction with ordinary crimes almost impossible to discern. The Genocide Convention, let us not forget, was adopted in the context of and largely in reaction to the murder of six million people. This was the nature of the evil that the drafters intended to address. This context of the adoption of the Convention is surely not without relevance to its interpretation.

4. The problem with reducing the *actus reus* of the crime of genocide to a single act involving only a few individuals becomes manifest when the analysis then shifts, as it must do, to locating the *mens rea*. Because the *actus reus* is presented as a single act, or perhaps two acts, with a few victims, there is the implication that it may be perpetrated by a single individual. The question then arises whether the individual had the intent to perpetrate the crime. And, if so, according to this thesis, the terms of Article 2 are fulfilled. And one consequence of such an interpretation is that it unlocks the door to the International Court of Justice pursuant to Article 9, to the extent that the acts of a single individual involving a few victims can be attributed to the State through the rules on State responsibility.

5. With great respect, this does not make much sense. Last Friday, Professor Crawford wisely reminded us of the role of the International Law Commission, saying it was to "rationalize the law and to expose its underlying structure and values for international scrutiny"[100]. If that is true for the Commission, then surely it is all the more true for the Court. The text of the Genocide Convention was an innovative document, as a legal instrument, and those who drafted it had little experience in the preparation of a treaty codifying an international crime intended to apply both to individuals and to States — it is the first time really it had been done. The process of negotiation was cumbersome, with frequent votes and constant amendments as it was concluded line by line, sometimes word by word. This is a method of adopting treaties that has since been forsaken in most international negotiations because of the unpredictable results; we now generally prefer to conclude such texts using the technique of general agreement or consensus, all of this so as to

[100]CR 2014/21, p. 28, para. 56 (Crawford).

secure a more logical and coherent result. May I point out that when the Convention was being drafted, no reference was ever made in the debates or in the preparatory documents to the terms "*actus reus*" and "*mens rea*"[101]. They do not appear.

6. Admittedly, there is some support for the view that genocide can be committed by a single person, acting alone, with his or her own perverse genocidal intent. It is an interpretation of Article 2 that I do not share but I cannot deny, and I did not deny when I spoke earlier on this, that there is some authority for it. During my first presentation to the Court, on 10 March, I referred to some statements of the International Criminal Tribunal for the former Yugoslavia (ICTY) to this effect, and the references appear in the transcript. In practice, Mr. President, Members of the Court, the ICTY has never convicted a single person, acting alone but with genocidal intent, for the crime. So, the statements of the Tribunal entertaining this possibility are quite theoretical. They are *obiter dicta.* But the ICTY has nevertheless made such pronouncements, the leading case being *Prosecutor* v. *Jelisić.*

7. When I addressed this issue in the first round of oral pleadings, I highlighted a real divergence in the law of the ICTY and the law being applied by the International Criminal Court (ICC), where the theory of the single perpetrator and the small number of victims appears to be excluded. This is a consequence both of the text of the Elements of Crimes and the decision of the majority of Pre-Trial Chamber in the *Bashir* arrest warrant case. The Elements of Crimes of the Rome Statute, adopted by consensus by the Preparatory Commission of the Statute, where all States that attended the Rome Conference were invited to participate, require that genocidal conduct "took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction". This is clearly about the *actus reus* of the crime. It is contrary to the view that genocide can be committed by a single individual with a small number of victims. As I pointed out in my remarks on 10 March, these words did not appear in the initial drafts of the Elements of Crimes. They were added to the draft a few weeks after the ICTY Trial Chamber advanced its theory of the single perpetrator. They were added as a reaction to the *Jelisić* decision.

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[101]See Hirad Abtahi and Philippa Webb, *The Genocide Covnention, The Travaux préparatoires*, Leiden and Boston; Martinus Nijhoff, 2008. The terms did not appear in a keyword search of the pdf version. The terms do not appear in the general index prepared by the authors.

8. Croatia's focus on the argument that genocide may amount to killing or even causing serious bodily harm on a very small scale, an argument to which it returned in the second round and where it joined issue, so to speak, with Serbia, is probably driven by its own discomfort with the evidence it has presented in this case. Its sensitivity on the issue suggests its own understanding that this is the weakest link in its Application.

9. Indeed, Mr. President, Members of the Court, it may be on this point where we find one of the significant contrasts between the Application and the counter-claim. The counter-claim presents strong and compelling evidence that the attack on the Krajina Serbs was masterminded at the highest levels of the Croatian State, that it manifested the personal policies of President Tudjman to eliminate the Serbs in the Krajina and to repopulate the entire region with Croats, that it reflected racist views regarding Serbs and others that he held, and that the scheme was prepared at a recorded meeting, the "famous"[102] and, yet at the same time, infamous Brioni conference. Croatia, on the other hand, has little in the way of such similar evidence and so it relies on an accumulation of relatively small and isolated acts that it says together lead to an inference of genocidal intent. It is true, as counsel for Croatia pointed out, that "there is no need for a Wannsee conference"[103] — I'm relieved to see that I'm not the only person to refer to the Wannsee conference on this point. Nevertheless, can there be any quarrel with the proposition that direct evidence of genocidal intent is, as a general rule, stronger and more compelling than "inferences"?

Mr. President, two or three more minutes on missing persons? And then I will propose…

The PRESIDENT: Please proceed.

Mr. SCHABAS:

The issue of missing persons

10. The issue of missing persons has always figured prominently in Croatia's submissions and there is a significant part of its conclusions address to this important issue. However, I do not believe that the Applicant has ever been heard to claim that disappearance itself was an act of

[102]CR 2014/19, p. 22, para. 37 (Crnić-Grotić).

[103]CR 2014/21, p. 29, para. 60 (Crawford).

genocide until its submissions last week[104]. I think it seems a bit clumsy to suggest that cases of missing persons are necessarily equivalent to the crime against humanity of enforced disappearance, which has its own body of sophisticated legal principles. For the purposes of the discussion, let me remind the Court that "enforced disappearance" is defined in the recently adopted United Nations convention where it refers to "abduction or any other form of deprivation of liberty by agents of the State" and then "followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person"[105]. This definition does not apply to all persons who are missing in the course of an armed conflict. Enforced disappearance is not the correct term for all persons missing in war. That would be an unreasonable application of its terms, and one inconsistent with State practice.

11. It is of course quite true that international human rights courts have confirmed that enforced disappearance may be a continuing violation. But of what? Not a violation of the right to life, with which the acts in Article 2 of the Convention bear an analogy. The case law of the Inter-American Court of Human Rights and the European Court bear this out. The reason why it may be a continuing violation of human rights is that the family of the victim is subject to ongoing "mental harm", and this brings into play the prohibition of "ill treatment" or because of the procedural obligation to investigate the crime. This is what the case law of the human rights tribunals shows us.

12. We are not talking about the procedural dimension of a human rights obligation here, but rather about a crime, where continuing proof of intent is required. If the crime continues today, as Croatia seemed to suggest last week, then so must the intent. Is Croatia arguing that the genocidal intent still exists? The Applicant has not previously made such an allegation. And it does not offer an iota of proof in support of such a claim. The continuing violation argument appears to be an ill-conceived debating ploy, cooked up over breakfast as a last-minute addition to Croatia's case, because I cannot believe that the Applicant is seriously contending that Serbia today, in 2014, is perpetrating a continuous violation — an act contemplated by Article 2 of the Convention — with

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[104]CR 2014/20, pp. 15-16, paras. 9-10 (Sands); CR 2014/21, pp. 23-24, paras. 45-47 (Crawford).

[105]International Convention for the Protection of All Persons from Enforced Disappearance, 20 Dec. 2006, United Nations, *Treaty Series (UNTS)*, Vol. 2715, doc. A/61/448, Art. 2.

the intent to destroy the Croats as a group. Mr. President, Members of the Court, the issue of the missing may or may not be a violation of the European Convention on Human Rights but Croatia is in error to attempt to force this issue into the frame of Article 2 of the Genocide Convention, essentially so that it can bolster its argument on temporal jurisdiction. It is an important issue, but it does not belong here, it might belong in Strasbourg, but certainly not in The Hague. Mr. President, this would be a convenient time to take a break.

The PRESIDENT: Thank you, Professor Schabas. The Court now takes a 15-minute break. The hearing is suspended for 15 minutes.

The Court adjourned from 11.30 a.m. to 11.50 a.m.

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

Mr. SCHABAS: Thank you very much, Mr. President, Members of the Court.

Standard of proof

13. In Croatia's oral submissions last week, great emphasis was placed on paragraph 373 of this Court's decision in the *Bosnia* case. That is where the Court said that for a pattern of conduct to be accepted as evidence of the existence of the specific intent to commit genocide, it would have to be such that it could only point to the existence of such intent. And Croatia is particularly disturbed by the word "only". The statement is similar in import to the general rule applied by criminal tribunals with respect to circumstantial evidence[106]. It is also entirely consistent with the rule applied by international criminal tribunals requiring proof beyond a reasonable doubt. May I refer the Court to an early formulation concerning the burden of proof necessary for a conviction that comes from the Appeals Chamber of the ICTY, and you should see it on your screen:

> "It is not sufficient that it is a reasonable conclusion available from [the] evidence. It must be the *only* reasonable conclusion available. If there is another

[106]For example: *Prosecutor* v. *Stakić* (IT-97-24-A), Judgement, 22 Mar. 2006, para. 219; *Prosecutor* v. *Delalić, Mucić et al*. (IT-96-21-A), Judgement, 20 Feb. 2001, para. 458; *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 303; *Prosecutor* v. *Vujadin Popović et al.* (IT-05-88-T), Judgement, 10 June 2010, para. 12.

> conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[107]

And the word "only" is in the original. It has been italicized by the Appeals Chamber.

14. Croatia urged the Court to revise its ruling and to remove the word "only" from paragraph 373 of its statement in the *Bosnia* case. Counsel for Croatia warned the Court that its interpretation would risk "consigning the Convention to irrelevance"[108]. Croatia said the Court "will come to be seen as irrelevant in relation to the prevention and punishment of the crime of genocide, at a time when the Court is needed more than ever"[109]. And it warned that "the Court might well find itself in a judicial wilderness"[110]. Croatia warned of

> "a situation in respect of the necessary proof to infer intent, which will likely be a key issue in any genocide case in which there is one law on genocide as applied, on the one hand, by national courts, by international human rights courts and international criminal tribunals and perhaps by other international courts, and there is another law of genocide as applied by this Court"[111].

And it added rhetorically: "Is that really where the International Court of Justice wants to be?"[112] Croatia spoke of a "dead convention"[113].

15. These harsh and extravagant statements, as I shall now show, are based on a completely inaccurate and incorrect reading of the authorities. Croatia has misrepresented the decisions of major international courts that have ruled in genocide-related cases since 2007.

16. Mr. President, Members of the Court, my presentation on 10 March reviewing developments in the interpretation of Article 2 of the Convention since the 2007 Judgement, attempted to show how this Court's approach has been very generally accepted. Far from suggesting the irrelevance of the Court, its marginalization to the judicial wilderness, the case law of international tribunals since the 2007 Judgement confirms that the Court accomplished precisely what it is supposed to do. It provided clarity and stability to the interpretation and application of Article 2. It provided direction and leadership to other courts.

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[107] *Prosecutor* v. *Delalić et al.* (IT-96-21-A), Judgement, 20 Feb. 2001, para. 458 (***emphasis*** in the original).

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

[109] *Ibid.*

[110] *Ibid.*

[111] CR 2014/20, p. 24, para. 27 (Sands).

[112] *Ibid.*

[113] CR 2014/20, p. 25, para. 30 (Sands).

17. Croatia reviewed the same authorities that were discussed on 10 March in my overview of the evolution of the case law. First, Croatia turned to the *Jorgić* decision of the European Court of Human Rights, as Serbia had done. Croatia said it was referring to *Jorgić*

> "to point out that the approach of the German courts to issues of proof related to intent on inferred evidence departed significantly from that of this Court, and that the European Court of Human Rights was content not to interfere with that approach, which it saw as fully consonant with international law"[114].

This is simply wrong. The issue before the German courts was not about inference of intent. The issue before the European Court of Human Rights was not about inference of intent. There were three issues before the European Court. The first concerned Articles 5 and 6 of the Convention and the claim that the German courts had not complied with that provision because they were acting on the basis of universal jurisdiction. That debate had nothing whatsoever to do with inference of intent. The second point considered by the European Court concerned the fairness of the proceedings and, likewise, it had nothing whatsoever to do with inference of intent. The third concerned Article 7 of the European Convention, which is the principle of legality and *Jorgić* had argued that the German courts had applied a broad definition of genocide, extending it to destruction falling short of physical destruction, and he said that this was inconsistent with Article 2 of the Convention and with customary law. It was in this context, of course, that the Judgment of the ICJ arose. That explains why the European Court cited paragraph 190 of the *Bosnia* Judgement, where the distinction with ethnic cleansing is discussed, and not paragraph 373, with which Croatia seems to be obsessed. I repeat, the *Jorgić* case had nothing whatsoever to do with inference of intent, contrary to what Croatia told the Court last week.

18. Counsel for Croatia then turned to the decisions of the ICTY in the *Karadžić* case that I presented to the Court on 10 March in some detail. It is obvious enough from reading the excerpt of the Appeals Chamber decision produced by Croatia last week that, while the issue concerned the nature of the evidence that might establish genocidal intent, the ruling had nothing to do with the standard of proof required to sustain a conviction. That issue simply does not arise at that stage of the proceedings, in the context of a motion to dismiss charges pursuant to Rule 98*bis* of the Rules of Procedure and Evidence. The only issue before the Tribunal at that stage is whether there is *any*

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[114]CR 2014/20, p. 20, para. 21 (Sands).

evidence that, were it to be believed, could sustain a conviction. At such a stage in the proceedings, the court is never concerned whether an inference is the only inference and nothing in the ruling of the Appeals Chamber disputes what this Court said in paragraph 373 of the 2007 Judgement. Nothing in the ruling is inconsistent with what this Court said.

19. It was with regard to the *Karadžić* proceedings that I had made a reference to *res judicata* in my earlier submissions[115]. In its oral submissions, Croatia had attached significance to the fact that the Appeals Chamber in *Karadžić* had reinstated charges concerning genocide committed against Croats in Bosnia and Herzegovina. In reply, I made the point that this Court has already ruled on the issue and had rejected such an allegation in 2007. Of course, I took care — and it is clear from the transcript — not to say there was *res judicata* in the strict sense and that is because the technical requirements obviously were not met. I invited Croatia to address the substantive issue, but it chose to mock the suggestion with a childish point about pregnancy rather than speak to the substantive issue.

20. Mr. President, Members of the Court, counsel for Croatia then turned to the International Criminal Court (ICC). I had made a number of points that I thought would be helpful to the Court about the law of genocide before the ICC and I note that Croatia has not really taken issue with the vast majority of them. Among them is the ongoing debate about the need for the act to be committed pursuant to a manifest pattern and capable of ensuring completion. That is surely an issue of some significance here, given Croatia's theory about mini- or micro-genocides. It is a pity that Croatia did not speak to that issue so that I could then use this precious time in the second round to respond to its views and clarify the differences between the Parties to the extent that there are any. Instead, Croatia suggested that the *Bashir* arrest warrant decisions — there are three of them — in some way bolster the theory Croatia has adopted about paragraph 373 in the 2007 Judgement.

21. And once again, Croatia has simply misread the authorities. The ICC did not speak to the issue of the evidentiary standard for proof of genocide. That was not an issue before the ICC at that stage of proceedings. The *Bashir* case concerned the evidentiary standard for issuance of an

[115]CR 2014/20, pp, 22-23, para. 24 (Sands).

arrest warrant. It is a matter governed by Article 58 of the Rome Statute, where the words "reasonable grounds" are used. True, the ICC was considering the standard of proof applicable at that procedural stage, that is, the evidentiary threshold for the issuance of an arrest warrant, but not the standard of proof for a conviction. And once again, as in *Jorgić* and *Karadžić* the issue as to whether an inference is the only inference never presents itself.

22. Croatia concluded its brief survey, in which it considered the same cases that I had reviewed on 10 March, with the following: "In short, Mr. President, it appears that no international court or tribunal has applied or followed the language adopted by this Court seven years ago. There are numerous instances of a lower standard being applied . . ."[116]

23. Numerous instances? Did counsel for Croatia really say that "[t]here are numerous instances of a lower standard being applied"? Well what are they? Because Croatia did not cite any, unless the reference is to its careless misreading and misrepresentation of *Jorgić* at the European Court of Human Rights, *Bashir* at the ICC and *Karadžić* at the ICTY.

24. Moreover, counsel for Croatia said "some of these courts and tribunals have gone out of their way to make clear that they do not consider themselves to be bound by the approach that is said to be followed by this Court in 2007". But again I did not find any examples, any references to this in the Applicant's submissions. Which courts and tribunals are we speaking about? Where have these unnamed courts and tribunals gone out of their way to make clear that they are not bound by the Court in 2007? I suppose Croatia is being strategic, saving up these cases to spring them on the Court on the final day, next Tuesday, when it is too late for Serbia to reply. I wish I could anticipate what it will be citing. I am anxious to read the list of all of these cases that have eluded my best efforts at legal research. I have no idea what Croatia is talking about.

25. Mr. President, Members of the Court, Croatia has gone from one proposition that no court has applied the evidentiary standard of the ICJ in *Bosnia* — to another one, which does not follow logically — namely that many courts have rejected its evidentiary standard. That is to say, Croatia's rather insulting statements about the Court being irrelevant and being stuck in a judicial wilderness rest on a manifestly incorrect assessment of international case law.

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[116]CR 2014/20, p. 24, para. 26 (Sands).

26. Mr. President, Members of the Court, the reason I delivered what Croatia dismissed as a "meandering" speech about the legal developments on the crime of genocide since the 2007 Judgement was because the Agent for Serbia had asked me to do this, insisting that it should be as neutral, impartial and scholarly as possible. And that is what I attempted to do. Croatia suggests that the standard this Court adopted was rejected by other national and international courts and tribunals. I did not enumerate any examples of this because I do not know of them. Croatia was quite free to provide such a list in its response, in its oral submissions last week and it has not done so.

27. Mr. President, Members of the Court, early in the proceedings, Judge Cançado Trindade asked a question about evidentiary standards and the contribution that may be made by international human rights courts and I promised to address this and although it is rather late in the day I have not forgotten the question.

28. Courts in the international human rights system do not normally pronounce themselves on State responsibility for international crimes. Nevertheless, they do deal with charges of exceptional gravity and they often consider issues of individual criminality. If there have been individual prosecutions at the national level, where the reasonable doubt standard should apply as a corollary of the presumption of innocence, the international human rights courts will not normally attempt to reconsider the evidentiary issues. These are matters for national courts; international human rights tribunals do not assume the role of courts of fourth instance[117].

29. The human rights tribunals have not, to my knowledge, suggested that there should be a different and more demanding evidentiary standard with respect to what this Court has described as "charges of exceptional gravity". In the case law of the Court, this idea goes right back to *Corfu Channel*.

30. At the European Court of Human Rights, when evidentiary issues arise, the standard of proof is described as being that of beyond reasonable doubt, the criminal standard. Let me quote from the recent *Varnava* case of the Grand Chamber of the European Court, incidentally a case to which counsel for Croatia referred in the context of the missing persons:

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[117] *Edwards* v. *the United Kingdom*, 16 Dec. 1992, § 34, Series A, No. 247-B; *Klaas* v. *Germany*, 22 Sept. 1993, § 29, Series A, No. 269.

> "In response to the respondent Government's argument about the burden of proof, [it is on the screen] the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt — though this also applies equally in inter-State cases."[118]

31. And, Mr. President, authority for this goes right back to the "Greek case" before the European Commission on Human Rights[119]. In one of the most celebrated inter-State cases heard by the European Court, *Ireland* v. *the United Kingdom*, the Applicant urged the Court not to set such a high standard of proof. But the Court followed the Commission and adopted the "beyond reasonable doubt" standard, adding that "such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"[120].

32. The Inter-American Court of Human Rights has taken a somewhat different approach to this issue. In early cases, it insisted upon a distinction between the standard of proof applied to individuals in a criminal law prosecution and the standard applicable in human rights litigation directed where States are the respondent.

33. More recently, the Court has spoken directly to the issue of the standard of proof. In the case of *Gutierrez and Family* v. *Argentina*, decided in November 2013, the Court referred to evidence that was "able to create the conviction of the truth of the alleged facts".[121]

34. It should be borne in mind when comparing these two different approaches that the international human rights tribunals are not assessing responsibility for an international crime, and the statements seem to be intended to apply to all types of human rights violation. Nevertheless, the cases cited concern serious allegations, generally involving the norms prohibiting torture or ill treatment.

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[118] *Varnava and Others* v. *Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, *ECHR* 2009.

[119] *The Greek Case*, Report of 5 November 1968, *Yearbook* XII (1969), p. 186, para. 30.

[120] *Ireland* v. *the United Kingdom*, 18 Jan. 1978, § 161, Series A, No. 25. Followed: *Cyprus* v. *Turkey* [GC], No. 25781/94, § 112, ECHR 2001-IV.

[121] *Gutierrez and Family* v. *Argentina*, Judgement, 25 Nov. 2013, Series C, No. 271, § 79. Also: *J. c. Peru*, Judgement, 27 Nov. 2013, Series C, No. 275, §305 (internal references omitted):

> "La Corte debe aplicar una valoración de la prueba que tenga en cuenta la gravedad de la atribución de responsabilidad internacional a un Estado y que, sin perjuicio de ello, sea capaz de crear la convicción de la verdad de los hechos alegados. Para establecer que se ha producido una violación de los derechos consagrados en la Convención no es necesario que se pruebe la responsabilidad del Estado más allá de toda duda razonable ni que se identifique individualmente a los agentes a los cuales se atribuyen los hechos violatorios."

35. This Court's relevant pronouncements have not concerned State responsibility in general but rather allegations that amount to a charge of State criminality. The high standard is justified by the terrible stigma associated with a finding of responsibility. It is also rationally connected to the fact that an assessment of State responsibility under the Genocide Convention may take place in parallel with determinations of individual criminal liability, where the high standard of proof beyond reasonable doubt must be applied.

36. I note in passing, Mr. President, that although Croatia has taken issue with the Court's approach to inferences of genocidal intent, it has itself chosen to formulate the Court's evidentiary standard in a genocide case as one of proof beyond a reasonable doubt[122].

The *Tolimir* case

37. Mr. President, Members of the Court, Croatia was quite right to note that in my very brief review of the *Tolimir* case at the ICTY I did not speak to the charge of genocide with respect to the town of ***Žepa***. A considerable amount of my material in the written speech actually did address this. In my concern about finishing on time — and perhaps this is just my inexperience in appearing before the Court — I had to jettison some paragraphs at the end of my speech. And so I am very grateful to Croatia for raising the issue as it provides me with the opportunity to discuss the ICTY Judgement in *Tolimir* in greater depth. I would refer the Court to my earlier remarks on this case[123], which I will not repeat, but which I will complete, responding to Croatia's observations of last week.

39. Let me speak to two issues that may be of interest to the Court. First, the ICTY Trial Chamber in *Tolimir* actually addressed the issue of evidentiary inferences. Given Croatia's particular interest in the issue of evidentiary inferences, and its unhappiness with paragraph 373 of the 2007 Judgement in the *Bosnia* case, it might have been expected that counsel for Croatia would have drawn the Court's attention to the relevant passage in the *Tolimir* decision. The Applicant overlooked the point, however, and you will see why when I cite the text in *Tolimir*. The Trial Chamber in *Tolimir* entitled a section of its judgement "Genocidal intent". It specifically addressed

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[122]CR 2014/20, p. 50, para. 17 (Starmer).

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

the issue of inference of such intent. And here is what it said: "Indications of such intent are rarely overt, however, and thus it is permissible to infer the existence of genocidal intent based on 'all of the evidence, taken together', as long as this inference is 'the only reasonable [one] available on the evidence'"[124]. The Trial Chamber went on to discuss a number of elements of evidence. It concluded that acts were calculated to lead to the physical destruction of the group. This was a finding of genocidal intent based upon circumstantial evidence. The majority of the Trial Chamber said it was "the only reasonable inference to draw from the evidence"[125].

40. Mr. President, Members of the Court, may I linger on the word "only" that precedes "reasonable inference" in both of these statements. The Trial Chamber did not cite the relevant statement by the ICJ, notably paragraph 373 of the 2007 Judgement, but it might well have done so. Perhaps it did not because the judges in *Tolimir* were not big fans of the *Bosnia* case, subscribing, as they did, to a much broader conception of genocide that includes ethnic cleansing and cultural genocide. But on the issue of inference of genocidal intent, they seem to be singing from the very same hymn sheet as this honourable Court.

41. As I mentioned before, counsel for Croatia did not draw your attention to the passages in the *Tolimir* Trial Chamber decision where the issues of drawing inferences of genocidal intent were discussed. Croatia confined itself to stating: "The Trial Chamber did not apply the ICJ standard on patterns of activity and inference."[126] As you can see from the excerpts I have cited, Croatia did not provided the Court with an accurate description of the *Tolimir* Judgement on this point.

42. Mr. President, Members of the Court, although the *Tolimir* Trial Chamber did not cite the ICJ on the inference of genocidal intent, it did not claim to have cut from whole cloth the notion that genocidal intent must be the "only inference". It cited a 2004 Judgement of another Trial Chamber of the ICTY, where it is stated that "[w]here an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence*"[127]. And these words are italicized in the original.

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[124] *Prosecutor* v. *Tolimir* (IT-05-88/2-T), Judgement, 12 Dec. 2012, para. 745 (references omitted).

[125] *Ibid.*, para. 766. See, also, paras. 786, 791, 1166, 1172.

[126] CR 2014/20, p. 26, para. 33 (Sands).

[127] *Prosecutor* v. *Brdjanin* (IT-99-36-T), Judgement, 1 Sep. 2004, para. 970 (emphasis in the original).

43. As counsel for the Applicant pointed out on 19 March, the *Tolimir* case concerned not only Srebrenica but also the attacks in ***Žepa***, which followed in late July 1995. It seems that there were no mass killings in ***Žepa***. Nevertheless, three community leaders were murdered by Bosnian Serb forces. Holding that there was genocidal intent associated with the attacks on ***Žepa***, the majority of the Trial Chamber said that

> "to ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient — in the case of ***Žepa*** — to remove its civilian population, destroy their homes and their mosque, and murder *its most prominent leaders*"[128].

In this respect, it endorsed an interpretative approach whereby the words "in whole or in part" in Article 2 refer not only to a "substantial part" but, in the alternative, to a "significant part". It concluded: "The Majority has no doubt that the murder of Hajrić, Palić and Imamović was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such."[129] The legal finding by the Trial Chamber on this point is innovative but questionable. The inference that the murder of three community leaders constitutes the *mens rea* and the *actus reus* of genocide because of the alleged impact this may have on the survival of the group is a rather large interpretative step that broadens significantly the scope of the crime.

44. Be that as it may, regardless of the questionable correctness of the findings of the Trial Chamber with respect to *Žepa*, they do not provide support to the claim of Croatia, contrary to what was said last week. The Applicant relied upon *Tolimir* to make the point that genocide could be committed even when there were very low numbers of victims. But *Tolimir* is not an authority for that proposition, at least stated in such a bald and simplistic manner. *Tolimir* is based on the theory that the words "in part" may refer to a "significant" part of the group and not just a "substantial" part of the group. The part of the group is "significant" because of the role that the victims play within the community. And it is presented as an alternative to the criterion of substantiality.

45. Because of its quite dramatic departure from the precedents of the Appeals Chamber of the ICTY, not to mention the Judgement of this Court in *Bosnia*, I would suggest that the *Tolimir*

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[128] *Prosecutor* v. *Tolimir* (IT-05-88/2-T), Judgement, 12 Dec. 2012, para. 781 (emphasis added).

[129] *Ibid.*, para. 782.

Trial Chamber decision be handled with great caution. I note that even Croatia is rather qualified in its reliance upon *Tolimir*, acknowledging that it is on appeal, and that one of three Trial Chamber judges voted for a full acquittal[130].

Conclusions

46. Mr. President, Members of the Court, after reviewing the recent case law on the subject of genocide and the interpretation of Article 2 of the Convention subsequent to the 2007 Judgement, Croatia said: "The jurisprudence in relation to the Convention has broadened, and it has deepened."[131] It claimed that "circumstances have changed since 2007" but without telling the Court what those circumstances were. It said: "This Court's role continues to be an important one, but new courts and new tribunals continue to spring up, charged with interpreting and applying the essential elements of the crime of genocide . . ." The implication was that the views of the ICJ on Article 2 of the Convention have been increasingly forsaken, at both the national and the international level. But again, Croatia did not mention these "new courts and new tribunals", it did not cite their decisions, and it did not make any reference to decisions of national courts.

47. Mr. President, Members of the Court, Croatia's assessment could not be more inaccurate. I do not believe its submissions in this area have been helpful to the Court. The point of Serbia's review of the case law, post 2007, was that the Court's approach to Article 2 has, on the whole, been followed and respected. There are exceptions. It is not unanimous. But by and large the Court's interpretation of the scope of Article 2 has been sustained and confirmed. The Court has defined the case law, not isolated itself.

48. Mr. President, Members of the Court, this concludes my remarks on Croatia's Application. May I ask you, please, to give the floor to Mr. Lukić.

The PRESIDENT: Thank you, Professor Schabas. I give the floor to Mr. Novak Lukić. You have the floor, Sir.

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[130]CR 2014/20, pp. 26-27, para. 34 (Sands).

[131]*Ibid.*, para. 36 (Sands).

Mr. LUKIĆ:

SERBIA CANNOT BE RESPONSIBLE FOR THE ACTS OF THE JNA

Introduction

1. Mr. President, Members of the Court, allow me to continue with the presentation of the Respondent's arguments. I will concentrate on the issues concerning the rules of State responsibility, which were invoked by the Applicant seeking to attribute the acts of the JNA to the Respondent. In their written as well as oral arguments, the Parties have shown complete agreement on one matter. Both Parties are calling upon the same principles of establishing the status of the entities alleged to have committed crimes and their relationship with a State. Both Parties quoted the same paragraphs of the Judgements of this Court in cases of *Bosnia*[132] and *Nicaragua*[133].

2. However, that is the point where the agreement between the Parties ceases to exist. Is it in misunderstanding of the principles stated in the mentioned paragraphs, or is it in the Applicant's intentional distancing from the application of the test established by the Court in the named cases?

3. In this last addressing to the Court in regard to the question of State responsibility, the Respondent will precisely show that the Applicant has omitted to apply the standards invoked by itself to the alleged facts and presented evidence in this case. Also, the Respondent will show that the Applicant has omitted to engage in making an argument in regard to the written and oral submissions of the Respondent.

The Applicant has not shown that the JNA was a *de facto* organ of the Respondent

4. Mr. President, Members of the Court, the Parties are in the agreement that the conditions for attribution of acts of a *de facto* organ to the State and attribution of acts on the basis of instruction or direction or control are completely different. The sole and exclusive test for establishing the status of a *de facto* organ of a State is the one of "complete dependence", and it does not have any correlation with conditions for attribution on the basis of direction and control[134].

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[132]CR 2014/21, p. 29, para. 60 (Crawford); CR 2014/15, p. 38, para. 22 (Lukić).

[133]CMS, p. 324, para. 1024; RC, p. 322, para. 9.61.

[134]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)* (hereinafter *Bosnia*), p. 207, para. 397.

For that reason, the conditions for two different modes of attribution must not be mixed. In their arguments on a *de facto* organ, the Applicant is actually calling upon either the effective control test[135], or the findings on existence of joint criminal enterprise[136]. However, the Applicant does not make any effort to explain or to prove that the JNA was completely dependent upon Serbian leadership. The sole sentence of Professor Crawford where he did mention the "complete dependence" test was when he called upon the common purpose of the joint criminal enterprise and stated that "JNA was the army of that movement [that is the movement allegedly led by the Serbian leadership], in complete dependence on it". However, there was no reference to this conclusion. Not even a single authority.

5. Then, Professor Crawford once again called upon a quotation from General Kadijević's book, which was previously already presented to the Court[137]. Mr. President, Members of the Court, let us look at it again:

> "The Serb and Montenegrin people considered the JNA as their army, in the same way that they considered the Yugoslav state their country. In accordance with this, the JNA's responsibility was to secure for th(is) new Yugoslavia and the entire Serb population its own army."

6. Obviously, for the Applicant this is an important evidence, bearing in mind that it was quoted two times in only a few days. However, how do these words of General Kadijević show that the JNA was completely dependent upon Serbian leadership? Mr. President, Members of the Court, you did not get an answer. As it is the case with other allegations of the Applicant concerning the status of the JNA as a *de facto* organ of the Respondent, you were denied any evidence which supports these allegations. Both Parties actually do agree that the status of a *de facto* organ of a State is reserved for exceptional situations only, as well as that, in order to establish such status of an entity or person, it has to be shown that the degree of dependence does not exist in any other quantity, but complete.

7. Contrary to the Applicant, the Respondent has approached the analysis of the evidence in relation to the "complete dependence" test by considering factors referred to by this Court in the

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[135]CR 2014/21, p. 31, para. 63 (Crawford).

[136]*Ibid.*, p. 29, para. 60 (Crawford).

[137]*Ibid.*, p. 30, para. 60 (Crawford); CR 2014/10, p. 37, para. 11 (Crawford).

Bosnia case[138]. Although these are not the sole factors of existence of the complete dependence of the JNA upon the Respondent, in the absence of any arguments of the Applicant in this regard, it remains for the said factors, as determined by this Court, to be applied in the present case.

8. For the analysis at hand, it is necessary to determine the period in which the alleged acts of genocide took place, as well as what status in relation to the State concerned had the entity for whose acts the attribution to the State is requested. In general, the Applicant seeks to stretch the period of the alleged genocidal acts from 1991 to 1995. However, when presenting its oral arguments the Applicant finally specified when the key acts, of *actus reus* of genocide — meaning murders — were committed. Professor Lapaš by presenting the murders in chronological order, specified that the critical period concerned "[o]ver the six months of its [meaning the JNA's] campaign"[139], and further he analysed the period from August 1991 to December 1991[140].

9. As I already said in the beginning of my presentation, the Respondent wishes to be concrete and to convince the Court that the allegations that Serbia did not answer the arguments of the Applicant, simply are not true[141]. By applying the "complete dependence" test, the Respondent claims that the Applicant has not shown that the JNA was financially dependent exclusively upon the Respondent. The Respondent's claim that during the critical period, as well as during the whole period of existence of the federal State and federal government, the JNA was funded from the existing federal budget, and not from Serbia, was not challenged in any way[142].

10. Furthermore, the Applicant failed to provide any evidence to the Court in regard to many important aspects necessary to apply the "complete dependence" test. Thus, firstly, the Applicant did not offer any evidence that the JNA was dependent upon Serbia during any period of time, in regard to logistics or in regard to weapons and military equipment.

11. Second, the Applicant did not offer any evidence that the JNA's personnel policy was dependent in any way upon the Serbian leadership, in regard to selection, appointment and dismissal of personnel in the critical period.

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[138] *Bosnia*, pp. 205-206, para. 394.

[139] CR 2014/10, p. 18, para. 38 (Lapaš).

[140] *Ibid.*, paras. 8-38 (Lapaš).

[141] CR 2014/21, p. 28, para. 57 (Crawford).

[142] CR 2014/15, p. 40, para. 29 (Lukić).

12. Finally, no evidence was offered which would show a certain degree of influence on other factors, and certainly not to the degree of control which was defined by this Court in the *Nicaragua* case, and I will paraphrase, so the degree of control must be exercised in all fields as to justify treating JNA as acting on behalf of Serbia[143].

13. Professor Crawford claims that the Applicant is not required to offer any evidence on the direct orders issued by the Respondent to the JNA[144]. But that was not the reason why the Respondent invoked the issue of the alleged direct orders[145]. The claim that the JNA was acting under the direct orders of Serbia was submitted by the Applicant itself, and it can be found in its Memorial[146]. However, Mr. President, Members of the Court, once again such a strong statement is not based on any single piece of evidence.

14. Professor Crawford claims that "[b]y late 1991 the JNA . . . was already a *de facto* organ of the emergent Serbian State"[147]. He referred to the Theunens report, stating that the JNA ceased to operate as the Yugoslav army and *de facto* served Serbian goals[148]. The language used in the report — specially referring to the link made by the Applicant with the concept of "*de facto* organ" — can wrongly be identified as that concept in the sense of Article 4 of the ILC Articles. However, by carefully reading the Theunens report, and specially his testimony in the *Milošević* case before the ICTY, this statement cannot be of any help in regard to issues of State responsibility. His conclusion is based solely on the books written by Jović and Kadijević, and furthermore the report itself was made before, and thus without taking into account Kadijević's interview in 2007. According to Theunens' claims, his expertise was focused solely on military structure of the JNA and Serb forces, and in accordance with the task given to him by his employer — the OTP, Office of the Prosecutor of the ICTY[149]. He did not provide an "original

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[143]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, (hereinafter *Nicaragua*), p. 62, para. 109.

[144]CR 2014/21, p. 29, para. 60 (Crawford).

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

[146]Memorial of Croatia (MC), p. 397, para. 8.47.

[147]CR 2014/21, p. 31, para. 63 (Crawford).

[148]CR 2014/5, p. 45, para. 8 (Crawford); Reply, p. 112, para. 4.52.

[149]*Prosecutor* v. *Milošević*, IT-02-54-T, 27 Jan. 2004, T 31542.

analysis of the conflict itself"[150]. Also, he confirmed that the "analysis of the creation of armed forces in Croatia was not part of [his] task and that's why it has not been discussed in this report"[151]. Further, he confirmed that the "report did not include an analysis of the — I think over 100 — 100 Security Council resolutions that were adopted between the end of 1991 and mid-1995 related to the conflict"[152]. Finally, Theunens in his testimony stated: "So I assume there's also responsibility for the political leadership on that level. And I'm not a political analyst, I'm employed here as a military analyst."[153] The extent of Theunens's conclusions on the legal matters — concerning *de facto* organ, specially in the light of the test amounting to State responsibility — exceeds his competence, his expertise and his reasoning. Perhaps that was the reason why the ICTY in its findings in the *Martić* and *Mrkšić* Judgements did not include this conclusion from his report.

The Applicant has not shown that the JNA was under direction and control of the Respondent

15. Mr. President, Members of the Court, allow me now to turn to the question of the alleged instruction, direction or control of the Respondent over the JNA. Last Friday, Professor Crawford said that "Croatia also suggests that conduct by the JNA may be attributable to Serbia under Article 8, on direction and control[, b]ut the *primary* ground on which we [that is Croatia] say it is attributable is Article 4."[154] As already stated, Croatia was previously trying to apply the same test to both modes of attribution, by making simple reference to the alleged control, and such strange approach can be found in the Applicant's Memorial and Reply[155].

16. However, as said, thanks to Professor Crawford's clarification, it appears now that there is an agreement between the Parties on the test that should be applied to the issue of *de facto* organ. Consequently, the Applicant acknowledges that the issue of control represents a distinct question, itself not be capable of establishing "complete dependence". So, what test should be applied to the

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[150] *Prosecutor* v. *Milošević*, IT-02-54-T, 27 Jan. 2004, T 31542.

[151] *Ibid.*, T 31540.

[152] *Prosecutor* v. *Milošević*, IT-02-54-T, 28 Jan. 2004, T 31686.

[153] *Ibid.*, T 31698.

[154] CR 2014/21, p. 29, para. 59 (Crawford); emphasis added.

[155] MC, p. 397, para. 8.47; RC, p. 325, para. 9.67.

question of attribution under Article 8 of the ILC Articles? The Respondent's position is that the well-established effective control test should be applied in this case as well, meaning that it has to be shown that the perpetrator was acting under instructions or directions or control of the State for every single incident or operation that is being examined, as it is well established in the practice of this Court[156]. And the Applicant actually acknowledges that approach in its Reply[157]. However it is the Respondent's view that the Applicant's claim is constructed in such manner that it rather asks the Court to abandon its well-established practice and rules concerning the effective control test, which will be discussed in turn.

17. Mr. President, Members of the Court, before moving to examination of the Applicant's approach in detail, attention also has to be dedicated to the developments made in this case during both the written and the oral phases. As said, the Respondent is of the view that the effective control test is applicable. Accordingly, the degree of control over the entity or person concerned — here the JNA — has to be proved for and in *every single incident*. In accordance with that approach, the Respondent kindly invited the Applicant to provide any evidence that Serbia exercised control over the JNA in particular incidents[158]. Moreover, such invitation was repeated by the Respondent during the oral phase of these proceedings[159]. However, last Friday Professor Crawford did not even make any effort to mention the issue of control in particular incidents. The Applicant can argue many things, but Mr. President, Members of the Court, this is a fact — the Applicant never made any attempt to provide any evidence that Serbia exercised control over the JNA in particular incidents. The reason is very simple — the Applicant has no such evidence.

18. In the absence of any concrete evidence, the Applicant took an approach which, in the view of the Respondent, is simply wrong. In many occasions the Applicant invoked the *Martić* Judgement and the joint criminal enterprise which was found in that case. According to the Applicant, the existence of joint criminal enterprise, as found in *Martić*, "is sufficient to establish

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[156]*Bosnia*, p. 208, para. 400.

[157]RC, p. 323, para. 9.61.

[158]Rejoinder of Serbia (RS), p. 176, para. 470.

[159]CR 2014/15, p. 44, para. 42 (Lukić).

that the JNA was at the relevant time, operating under the command and control of the FRY leadership"[160]. This approach goes wrong on two basis. First, it is very interesting that the Applicant uses the concept of join criminal enterprise in almost all occasions, however without any effort to explain its legal relevance. Such explanation is most needed when the question of attribution is concerned. And indeed, the question is: What is the relevance of joint criminal enterprise for the question of State responsibility? Or more precisely: Can mere existence of joint criminal enterprise establish control of one of its members over another? Can it establish effective control? Can it do so in regard to every single incident? Of course not. The joint criminal enterprise is irrelevant. As is probably known to our learned colleagues, the concept of control itself underlines not only high dependence, but also the relation of giving directions by one side to the other[161]. How is it possible to conclude that if two persons share a common intent one is automatically dependent, directed or controlled by the other? In whose favour does the presumption of direction or control go? Mr. President, Members of the Court, the question of joint criminal enterprise for the issue of attribution is without merit. It is very interesting that the opposing Party is actually using the concept of joint criminal enterprise for the question of State responsibility, although they opposed the concept itself even for the question of individual criminal responsibility[162], as already noticed[163].

19. The second point of concern is the Applicant's attempt to convince the Court to abandon the effective control test and its well-established practice, and to apply something more likely to be the overall control test. The Respondent is aware that this test was explicitly rejected by this Court in the *Bosnia* case. However, our learned colleagues have a different view. The Applicant invokes the *Martić* Judgement and aims to prove that the Respondent had control, merely by arguing that the JNA took part in the attacks[164]. Mr. President, Members of the Court, this is a clear argument in favour of overturning the effective control test. As already mentioned, the Applicant neither has, nor has provided, any evidence that Serbia had control over the JNA in particular incidents.

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[160]RC, p. 325, para. 9.67.

[161]*Nicaragua*, pp. 64-65, para. 115.

[162]RS, pp. 181-182, para. 422.

[163]CR 2014/15, pp. 48-49, paras. 58-60 (Lukić).

[164]RC, pp. 325-326, paras. 9.67-70.

However, this is not the problem of lack of evidence. This is a problem in the Applicant's approach. The Applicant expects from this Court to find that Serbia directed and controlled the JNA during the critical period, basing its reasoning on the presumption that the JNA was active or "co-operated" in some attacks. Let us be clear here, in the Respondent's view the alleged acts cannot amount to any kind of control, neither overall, nor effective. However, the Applicant is actually trying to convince the Court to apply the overall control test, by making its own conclusion that "the judgements of the ICTY leave no room for doubt that the Serb leadership had effective control over all of the military operations which are the subject of the Applicant's complaint under the Genocide Convention, and over the acts and conduct of all of the perpetrators"[165]. Yes, the Applicant might use the word "effective" but their approach rather leads to different test, the one rejected by this Court in the *Bosnia* case[166], and you will have the opportunity to hear more on this issue from Mr. Ignjatović. Thus, the mere approach taken by the Applicant is problematic and cannot be supported in any way.

Conclusion

20. Mr. President, Members of the Court, allow me to conclude. The Respondent remains at its previous claims. Although the Applicant rightly concluded that the test of "complete dependence" should be applied in respect to attribution in accordance with Article 4 of the ILC Articles, it did not call upon any facts or evidence which would be capable of proving that the JNA was a *de facto* organ of the Respondent. Furthermore, the Applicant did not even make any effort to convince the Court that the effective control test could be satisfied for the purposes of Article 8 of the ILC Articles. Rather, it tried to rely on inappropriate legal standards, some even already rejected by this Court. It seems that even Croatia itself does not have great expectations of its argument, bearing in mind the extent of the argument itself and the effort it made to advance it. Accordingly, the Croatian claims should be dismissed. Thank you, Mr. President. I kindly ask you now to give the floor to Mr. Ignjatović.

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[165]RC, p. 323, para. 9.62.

[166]*Bosnia*, pp. 209-210, paras. 402-406.

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

Mr. IGNJATOVIĆ:

THE QUESTION OF STATE RESPONSIBILITY IN LIGHT OF THE ACTS OF DIFFERENT PARTICIPANTS IN THE CONFLICT

Mr. President, distinguished Members of the Court, allow me to proceed with presenting arguments related to the question of attribution of responsibility for the alleged misdeeds of other participants in the conflict — Krajina Serb forces and volunteer — or paramilitary — formations.

The ICTY indirect findings and their probative value in these proceedings

1. Last week the Applicant claimed that the Respondent "seeks to deny ICTY judgements and findings"[167]. With all due respect, the Applicant's claim is misleading. The Respondent is not seeking to deny any of the ICTY judgements, but it is rather of the view that some of the ICTY's findings cannot be taken for granted.

2. It is obvious that the Parties to these proceedings cannot agree on the weight that should be given to indirect findings of the ICTY judgements. To clarify, the Respondent considers direct findings to be those which relate to key points in criminal proceedings, namely whether the alleged crime, or crimes, occurred and whether the defendant can be held responsible for what had happened. Contrary to that, we consider indirect findings to be covering other issues. The Respondent's position remains the same in respect of the latter category — such findings should be viewed with great caution.

3. A number of such indirect ICTY findings were explicitly or implicitly altered in subsequent ICTY judgements, while others were undermined by the later developments. A very good example of this and, at the same time, a clear point of contention, is the ICTY finding regarding the joint criminal enterprise ("JCE") in *Martić*. Mr. Jordash has already presented the Respondent's position on that issue.

[167] CR 2014/19, p. 16, para. 18 (Crnić Grotić).

4. The other point of contention between the Parties before the Court is disagreement over the findings in *Mrkšić* that "in the Serb Military operations in Croatia was the complete command and full control by the JNA of all military operations"[168]. Professor Crawford stated that the Respondent has presented *some of the evidence* that led the ICTY to a conclusion that the JNA had full control over all Serb military operations in Croatia[169]. The term "some of the evidence" is inaccurate since the Respondent has provided the Court with all the evidence that the ICTY relied on in reaching the above-mentioned finding. And the totality of the evidence are in fact only two documents — Circular dated 12 October 1991 issued by General Adžić and Order dated 15 October 1991 issued by General Panić. Therefore, although criticized by the Applicant's counsel, the Respondent's position remains intact on this issue. The ICTY Trial Chamber finding that the JNA had full control over all military operations in Croatia is at the same time far-fetching, misleading, and I would say quite unusual and rather too ambitious. In the first round of our oral arguments we elaborated our position on this issue in great detail and we believe that there is no need to repeat it[170].

5. Last Thursday Ms Ní Ghrálaigh stated that the Respondent is attempting to reinterpret the JNA documents and "to turn them on their head, such that they might evidence the opposite of what they in fact say"[171]. She continued to argue that the Respondent is asking the Court to speculate that the orders were issued in order to "fix" problems of "lack of discipline and lack of control" amongst various Serb forces and concluded that "this is not what the orders say expressly"[172].

6. [Screen on] It seems that counsel for Croatia did not read the Order dated 15 October 1991. As the Order[173] itself says, it was issued "due to the emerging problems, with a goal of regulating life, work, order and discipline". The Respondent did not invent these words and did not ask the Court *to speculate*. [Screen off]

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

[169] CR 2014/21, para. 65 (Crawford).

[170] CR 2014/15, paras. 44-56 (Ignjatović).

[171] CR 2014/20, para. 44 (Ní Ghrálaigh).

[172] *Ibid.*

[173] Command of the 1st Military District, Strictly Confidential No. 1614-82 27, 15 Oct. 1991; RC, Ann. 67.

7. The Applicant is trying to persuade the Court that the responsibility for actions taken by other forces in 1991-1992 period can be attributed to the Respondent on the basis of a single paragraph of the ICTY judgement. It is trying to present the paragraph in question as the ultimate truth, and any attempt to analyse its merits a heresy and consequently — the denial of the truth.

8. The Applicant, however, remains silent regarding the ICTY findings in *Martić*[174]. The ICTY Trial Chamber, among many things, found the existence of "operational cooperation between the JNA and the armed forces of ~~...~~ Krajina"[175]. On some occasions the TO and MUP units of Krajina were subordinated to the JNA, but this required prior approval of an authorized TO commander or the SAO Krajina Minister of Interior, respectively. This clearly shows not only that on various situations Krajina Armed Forces fought in co-operation and not under the command of the JNA, but also that in some situations they fought against Croatian forces without support of the JNA.

9. It seems that the ICTY findings in *Martić* are obviously contradictory to the above discussed findings in *Mrkšić* since either the JNA had full control over other forces throughout 1991-1992 period or such command of the JNA over Krajina Serb forces was being instituted on a case-by-case basis. Both *Mrkšić et al*. Judgement and *Martić* Judgement were rendered in 2007 and both were confirmed by the ICTY Appeals Chambers. In order to decide which of the two findings should be accepted, one has to look closely at the substance and supporting evidence for each.

10. For the above reasons, the Respondent is not denying any ICTY judgements and findings, as claimed by the Applicant. On the contrary, it is our position that questions and issues raised in the above-mentioned cases are relevant for the case before this Court and should be thoroughly analysed and assessed.

The Criteria set in Article 8 of the ILC Articles was not met — the actions of other participants to the conflict cannot be attributed to the Respondent

11. Last week Professor Crawford clarified that the Applicant no longer "maintain[s] that the other Serb forces were themselves organs of the emergent Serbian State" but rather takes the

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

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

position that "the conduct of other Serbian forces is attributable to Serbia under Article 8, since they operated under the instructions, direction or control of the JNA"[176]. However, the Applicant did not provide any reliable evidence in support of its claim that the JNA controlled or instructed and directed the Krajina Serb forces and paramilitaries.

12. This Court will also have to decide whether this ICTY finding of full control over all military operations[177] corresponds to the standard of effective control applied by this Court in *Nicaragua* and *Bosnia* cases. It seems that the Applicant is taking for granted that the response is positive. The Respondent, however, disagrees.

13. Mr. President, Members of the Court, in the *Bosnia* case you clearly stated that it must be shown

> "that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, *not generally in respect of the overall actions taken by the person or groups of persons having committed the violations*"[178].

Can the ICTY full control finding in *Mrkšić*, based on vague and scarce evidence, therefore really be equated with a finding of effective control that has to be established in respect to each individual operation? Or is the "full control" finding much more akin to a finding of overall control in respect to all actions taken? Or it is perhaps even broader than that?

14. One of the Applicant's hopes for success in this respect would be with the replacement of the effective control test with the overall control test. The Respondent tried to get an answer from the Applicant during the first round of oral arguments on whether it is pursuing this track, but the Applicant remained silent on the issue. The Respondent's position remains the same — the overall control test was rejected by this Court in the 2007 *Bosnia* Judgment and there is no reason for the Court to take a different approach now.

15. A second option for the Applicant would be to manage to shift the burden of proof to the Respondent and this is obviously a goal that the Applicant is trying to achieve. In specific instances, this would mean that the Respondent would need to prove negative facts, for example

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[176]CR 2014/21, para. 64 (Crawford).

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

[178]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 208, para. 400; emphasis added.

that the JNA did not have control over other participants to the conflict, as opposed to the general rule whereby it would be on the plaintiff, that is, the Applicant, to prove positive facts, or in this case that the Respondent controlled or directed or instructed other participants to the conflict in each specific situation. There is no basis to justify the shift of the burden of proof from the Applicant to the Respondent in these proceedings.

16. Failure to provide relevant evidence on the issues of JNA control over other participants in specific situations can only lead to one inevitable outcome — a finding that the Applicant did not prove that the conditions set by Article 8 have been met. This is an obvious weak point of the Applicant's case and an obstacle that the Applicant cannot overcome.

Mr. President, distinguished Members of the Court, I will now discuss the Applicant's claims with the respect to the Serbian Volunteer Guard.

Genocide case as presented by the Applicant — example of the Serbian Volunteer Guard (SDG)

17. Sir Keir Starmer asked the Court "if you [the Court] accept Croatia's case that genocidal acts were committed by Arkan's Tigers in Vukovar . . ."[179]. This very sentence speaks a lot about the Applicant's position in this case.

18. The paramilitary unit that the Applicant refers to so many times in its written submissions and oral arguments is the Serbian Volunteer Guard (SDG), also known as Arkan's Tigers. The Applicant's position is that the SDG committed genocide in Vukovar in 1991. As proof for this allegation the Applicant provides the report of the JNA officer Colonel Djoković dated 13 October 1991[180]. To remind the Court in the report it is stated that Arkan's troops were committing an *uncontrolled genocide* in the greater area of Vukovar.

19. The Applicant is going further with this point by trying to argue that the same applies to all other volunteer/paramilitary units, ***i.e.***, that they were all involved in the perpetration of genocide. The Applicant is accordingly suggesting that all paramilitary units, known or unknown, which participated in the armed conflict were of criminal character — with no exception — and were not only committing crimes, but were also involved in committing genocide in Croatia in

[179]CR 2014/20, para. 47 (Starmer)

[180]Report of Col. Djoković, 13 Oct. 1991; RC, Ann. 63.

1991. The foundation for such a conclusion is rather vague since the Applicant does not provide any evidence for it.

20. From there, the Applicant builds on its conclusion that since all paramilitary units and units of Krajina TO and MUP Krajina were under full control of the JNA, as claimed in *Mrkšić*, the Respondent must be responsible under Article 8 of the ILC Articles on State Responsibility for all of their misdeeds.

21. The Applicant's approach is obviously far-reaching and it faces significant difficulties which the Respondent proceeds to outline.

22. The Respondent believes that the standards from Article 8 were not met by the Applicant. The Applicant relies on the ICTY finding in *Mrkšić* that the JNA had full control over Krajina Serb forces and volunteer/paramilitary units. As previously demonstrated, that finding is merely a vague conclusion. It is however the only hope for the Applicant since it has not provided any relevant and reliable evidence of specific instances where other participants to the conflict, including the Serbian Volunteer Guard, were under the control of the JNA.

23. [Screen on] If we look closely at the document produced by Colonel Djoković, we can see that the document is marked and contains numbers. I refer to the BCS and ENG marks and numbers that you can see on the screen. These marks are a sign of ICTY evidence. This shows, among other things, that: *(a)* the ICTY Office of the Prosecutor was in possession of the document in question, and *(b)* that the Applicant obtained the Djoković's report from the ICTY. [Screen off] It is also evident that despite the fact that the ICTY Office of the Prosecutor was in possession of the 13 October report it did not accept the qualification of genocide contained therein since it did not charge Arkan nor anyone else with genocide for events which took place in Eastern Slavonia, or anywhere else in Croatia. Arkan was indicted by the ICTY Office of the Prosecutor, but not in relation to any of the events in Croatia[181].

24. Presently, the former President of the Republika Srpska Krajina, Goran Hadžić, is standing trial before the ICTY[182]. He is charged with crimes against humanity and violations of the laws or customs of war. He has not been charged with genocide. For some counts of the

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[181] *Prosecutor* v. *Željko Ražnatović Arkan*, case No. IT-97-27.

[182] *Prosecutor* v. *Goran Hadžić*, case No. IT-04-75-PT, Indictment.

indictment the Office of the Prosecutor is alleging the involvement of "Arkan's men" in crimes committed not in Vukovar, but exclusively in the towns of Erdut and Dalj from September 1991 to June 1992. No evidence was presented that "Arkan's men" were involved in any of the crimes committed in the city of Vukovar, that is, crime committed at Ovčara or any other crime in any other site in the city of Vukovar. The perpetrators were tried and convicted before Serbian courts[183]. No member of the Serbian Volunteer Guard was among individuals tried for crimes committed in the city of Vukovar[184].

25. Crimes listed in the Hadžić indictment committed with alleged participation of "Arkan's men" pertain to nine incidents which occurred at Erdut and Dalj in the period of ten months — from September 1991 to June 1992 — in which 74 persons were allegedly killed. At least eight of those allegedly killed were not of Croatian origin. Even if we presume that the Office of the Prosecutor has a strong case, that is, that it can undoubtedly prove that "Arkan's men" took part in the murders and that 74 persons were killed, it is still obvious that those crimes could not possibly be qualified as genocide. The Office of the Prosecutor must have come to the same conclusion after analysing the evidence in its possession since it did not indict Hadžić for genocide.

26. The assessment made by the ICTY Office of the Prosecutor in this respect is especially relevant since it is well known that the OTP analysed thousands of documents related to the 1991 events. To remind the Court, there was not a single document that the OTP requested from Serbia that Serbia failed to provide. There is not a single document or any other piece of evidence that can show: *(a)* the involvement of the Serbian Volunteer Guard in combat which took place in the city of Vukovar in 1991; *(b)* the involvement of the Serbian Volunteer Guard in crimes committed in Ovčara nor anywhere else in the city of Vukovar; *(c)* the alleged control of the Respondent over the Serbian Volunteer Guard; and *(d)* that the crimes allegedly or really committed by the Serbian Volunteer Guard could be qualified as genocide. This is why the

[183] Three criminal cases were brought for the crime at Ovčara before the Serbian courts and 17 perpetuators were convicted and sentenced. Source: the Office of the War Crimes Prosecutor of the Republic of Serbia, available at: http://www.tuzilastvorz.org.rs/html_trz/predmeti_eng.htm.

[184] *Mrkšić et al.*, IT-95-13, Trial Chamber Judgement, 27 Sep. 2007; data provided by the Office of the War Crimes Prosecutor of the Republic of Serbia — see *supra* fn. ***183***.

Applicant is still heavily relying on a single document, the report dated 13 October 1991, even though the documents collected by the ICTY were obviously at the Applicant's disposal.

27. The Respondent's position is further supported by the fact that on 30 May 2013 the ICTY acquitted two officials of the Serbian State Security Service of all charges, including allegations that they or the Serbian State Security Service had directed the involvement of the Serbian Volunteer Guard in Slavonia, Baranja and Western ***Srem***[185]. The Respondent did not control the Serbian Volunteer Guard and therefore the responsibility for the Serbian Volunteer Guard's alleged or true misdeeds cannot be attributed to the Respondent.

28. Returning back to Sir Keir's question "if you [the Court] accept Croatia's case that genocidal acts were committed by Arkan's Tigers in Vukovar . . .", the Respondent can only say that it would be exceptionally difficult for the Court to accept the Croatian case given its inherent shortcomings. There is no evidence that shows that Arkan's Tigers participated in the combat in the city of Vukovar, nor that they were even present in the city of Vukovar. It would be very hard to accept the argument that they committed acts of genocide in the location that they were not even in. No member of the SDG was indicted for crimes committed at Ovčara or for any other crime allegedly committed elsewhere in Vukovar, during or after the battle for Vukovar. Furthermore, it has been well established that Arkan's Tigers did not commit genocide anywhere else in Eastern Slavonia or the other parts of Croatia.

29. The above analysis leads us to the conclusion that the Applicant's presumption on which it has based its case — that is, since Arkan's paramilitary unit was committing "uncontrolled genocide" in Vukovar all other paramilitary units were also committing genocide — is simply null and void. The same obviously applies to the claim that all actions of all other participants to the conflict are attributable to the Respondent.

30. Mr. President, distinguished Members of the Court, instead of a conclusion, I will repeat Professor Crawford's words: "[t]he Court lives in the real world"[186] and, if I may add, the Court lives in the real world and it applies existing and strict rules of international law. The Respondent believes that the just application of those rules does not lend support to the Applicant's case.

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[185] *Prosecutor* v. *Stanišić and Simatović*, IT-03-69, Judgement, 30 May 2013, para. 1789.

[186] CR 2014/21, para. 65 (Crawford).

Mr. President, Members of the Court, this concludes my presentation. I would like to thank the Court once again for its patience.

The PRESIDENT: Thank you, Mr. Ignjatović. This indeed concludes this morning's sitting. The Court will meet again this afternoon from 3 p.m. to 6 p.m. to hear the conclusion of Serbia's second round of oral argument. Thank you.

The Court is adjourned.

The Court rose at 1 p.m.

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