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YEAR 2014

Public sitting

held on Friday 14 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 14 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
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
	Judges *ad hoc*	Vukas
		Kreća
	Registrar	Couvreur

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

M. Couvreur, greffier

The Government of the Republic of Croatia is represented by:

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

as Agent;

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

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

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

as Co-Agents;

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

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

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

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

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

Ms Kate Cook, Barrister, Matrix Chambers, London

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

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London

as Counsel and Advocates;

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

Ms Helen Law, Barrister, Matrix Chambers, London

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

as Counsel;

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

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

as Members of the Delegation;

Le Gouvernement de la République de Croatie est représenté par :

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

comme agent ;

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

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

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

comme coagents ;

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

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

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

comme conseils ;

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

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

comme membres de la délégation ;

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

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

as Advisers;

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

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

Ms Klaudia Sabljak, Ministry of Justice,

Ms Zrinka Salaj, Ministry of Justice,

Mr. Tomislav Boršić, Ministry of Justice,

Mr. Albert Graho, Ministry of Justice,

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

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

Ms Katherine O'Byrne, Doughty Street Chambers,

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

as Assistants;

Ms Victoria Taylor, International Mapping, Maryland,

as Technical Assistant.

The Government of the Republic of Serbia is represented by:

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

as Agent;

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

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

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

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

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

comme conseillers ;

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

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

Mme Klaudia Sabljak, ministère de la justice,

Mme Zrinka Salaj, ministère de la justice,

M. Tomislav Boršić, ministère de la justice,

M. Albert Graho, ministère de la justice,

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

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

Mme Katherine O'Byrne, Doughty Street Chambers,

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

comme assistants ;

Mme Victoria Taylor, International Mapping (Maryland),

comme assistante technique.

Le Gouvernement de la République de Serbie est représenté par :

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

comme agent ;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

as Members of the Delegation;

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

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

Mr. Igor Olujić, Attorney at Law, Belgrade,

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

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

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

as Advisers.

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

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

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

comme conseils et avocats ;

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

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

comme membres de la délégation ;

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

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

M. Igor Olujić, avocat, Belgrade,

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

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

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

comme conseillers.

The PRESIDENT: Good morning. Please be seated. I declare open this last sitting of the Court devoted to the first round of argument of Serbia and I invite Mr. Jordash, counsel for Serbia to address the Court. You have the floor, Sir.

Mr. JORDASH:

OPERATION STORM

Legal basis for responsibility of the Applicant for violations of the Genocide Convention

1. Thank you, Mr. President, distinguished Members of the Court, it is my honour to address the Court with regard to Serbia's counter-claim.

2. Today, in the next 80 minutes, I am going to address the specific legal basis that establishes the Applicant's responsibility for genocide arising from Operation Storm.

The Respondent's case in summary

3. The Respondent puts its case on three bases, the first two being alternatives. First, that the planning, execution, and aftermath of Operation Storm constituted direct involvement in acts of genocide under Article II *(a)* to *(c)* of the Genocide Convention. The evidence shows "fully conclusively"[1] that the Republic of Croatia has violated its obligations under the Convention by committing during and after Operation Storm the following acts with intent to destroy, as such, the Serb national and ethnic group living in the Krajina region (United Nations Protected Areas North and South) in Croatia: *(a)* killing members of the group; *(b)* causing serious bodily or mental harm to members of the group; and *(c)* deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

4. The Respondent also submits that if the Court is not satisfied on the primary basis, Croatia is also responsible under Articles III *(b)* to *(e)* of the Convention for conspiring, inciting, attempting or being complicit in genocide.

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[1]Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 209 (hereinafter *Bosnia* Judgment).

5. Finally, it is submitted that the evidence is certain[2]. It demonstrates that the Republic of Croatia has violated Articles I and IV of the Convention by having failed to punish acts of genocide.

6. The arguments I will develop apply to each aspect of the counter-claim.

7. Contrary to the approach taken by the Applicant, we do not argue for a lowering of the standard of proof or a change in the applicable law. If there was a genocidal plan put into effect during this civil war, Operation Storm was surely it.

8. A careful analysis of the Croatian leadership's collective, hateful and escalating intent, the Brioni plan and the destruction planned and executed, situated in the prevailing context, demonstrates the merits of this counter-claim.

How the Respondent puts its case

9. I would like to begin by identifying precisely what the counter-claim is and what it is not. In contrast to the Applicant's claim, we do not ask you to consider it in the abstract. The Respondent does not seek to avoid the realities on the ground by removing the context of war or other salient issues that plainly must bear upon the Court's assessment.

10. Contrary to the Applicant's assertion at paragraph 11.127 of the Reply, the counter-claim does not rest upon "proof of indiscriminate shelling resulting in the 'exodus' of the Serbs" and the "systematic and planned killings" of those that remained.

11. Instead, it rests on three chronological phases that may be crystallized as follows: Phase One, the planning at Brioni; Phase Two, the successful execution of that plan between 4 and 8 August 1995; and, Phase Three, the final and devastating destruction of those unfortunate enough to be left behind, lasting for the months beyond.

12. As our pleadings show, these are not the only sources of probative evidence, for example, the legal measures designed to prevent the Krajina Serbs from returning and the failure to punish that extends to this day are also evidence of the specific intent. However, these phases are the most pivotal. Each is sufficient to demonstrate a violation of the Genocide Convention.

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[2] *Bosnia* Judgment, p. 130, para. 210.

Together they provide overwhelming proof of the *actus reus* and *mens rea* of the crime of genocide.

13. It is worth pausing here for a moment to say something about how the Respondent puts its case in relation to each phase, the nature and standard of proof required, and how evidentially they mutually reinforce and support a finding of specific intent.

Phase One: the genocidal plan

14. Phase One, the genocidal plan, rests upon the Brioni transcript, containing an explicit plan to commit genocide. I will examine the terms of that plan to show how the Croatian leadership intended the commission of the acts enumerated in Article II *(a)* to *(c)* of the Genocide Convention in order to destroy the Krajina Serbs, in whole or in part.

15. As noted by the Applicant, and as Judge Bennouna noted in the *Bosnia* Judgment, States tend not to go around proclaiming an intention to destroy a part of a particular group[3]. However, in this instance, Croatia did. It is there, in the Brioni transcript.

16. As noted by the Applicant, citing to Professor Schabas, "the Court is required to find indicators of State policy to deduce what the intention of the State, or those acting on its behalf of, or under its control actually was"[4]. As the ICTR has stated, "the existence of such a plan . . . [is] . . . strong evidence of the specific intent requirement for the crime of genocide"[5]. It is *direct* evidence from which the specific intent to commit genocide may be inferred.

17. Unlike circumstantial evidence, the standard of proof required to prove genocidal intent from this express plan will be met where they may be other possible explanations but, nonetheless, the Court is fully convinced that the only proper inference is that the plan involved the intentional commission of genocidal acts.

18. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to

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[3]*Bosnia* Judgment, p. 362; declaration of Judge Bennouna; Memorial of Croatia (MC), para. 7.34; Reply of Croatia (RC), para. 8.7; Counter-Memorial of Serbia (CMS), para. 48.

[4]Schabas, W., *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2nd ed., 2009, (hereafter Schabas), p. 518.

[5]ICTR, *Kayishema and Ruzindana*, Trial Chamber Judgement, para. 276; CMS, Chap. II, para. 48, citing to *Jelisić*, IT-95-10-A, Appeals Chamber Judgement, 5 July 2001, para. 48.

distinguish *at all times* between the civilian population and combatants and between civilian and military objectives and accordingly to direct their operations only against military objectives[6].

19. As an examination of the plan shows, the Croatian leadership designed a plan to ethnically cleanse the Krajina of all or a substantial part of its Serb population through the removal of this distinction.

20. The plan guaranteed — and was intended to guarantee — that ethnic cleansing and the destruction of a substantial part of the Serb national and ethnic group living in the Krajina region occurred in parallel. The objectives were inextricably linked. The express detail of this plan amounts to conclusive evidence of the genocidal intent of the Croatian military and political leadership[7].

Phase Two: the execution of the plan (between 4 and 8 August)

21. Phase Two of the Applicant's destructive plan was the execution of Operation Storm between 4 and 8 August 1995. The Respondent rejects the Applicant's claim that if the Respondent is unable to prove that a plan or policy to commit genocide was adopted at Brioni, then the case must fail[8].

22. Intent may be illuminated by circumstantial evidence, including by words spoken or deeds done or a pattern of purposeful action[9]. The deed done, the purposeful action, is Phase Two — the plan in action — Operation Storm and the largest, single, ethnic cleansing campaign in living memory, followed by Phase Three, the most brutal of destructive aftermaths.

23. Proof of specific intent in Phases Two and Three, when viewed alone, require an examination of a pattern of atrocities committed over many communities focused on the targeted group[10].

24. The standard of proof is therefore high. As this Court ruled in the *Bosnia* case, the specific intent to destroy the group in whole or in part,

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[6]Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977, (hereafter "AP1"), Art. 48.

[7]CMS, para. 179.

[8]RC, para. 12.6.

[9]*Kayishema and Ruzindana*, Trial Chamber, May 21, 1999, paras. 93, 527.

[10]CMS, Chap. II, para. 53; *Bosnia* Judgment, pp. 196-197, para. 373; emphasis added.

> "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"[11].

25. Lacking any such general plan, the Applicant seeks to lower this strict threshold, arguing, and I quote,

> "that the ICTY has not adopted such a strict rule. And the Applicant submits that the standard of proof required to prove genocidal intent will also be met where there *may* be other possible explanations . . ., but nonetheless the Court is fully convinced, on the facts of the particular case . . ."[12]

26. We urge this Court to resist the Applicant's submission. The Applicant's case does not prove genocide. There is no reason to lower the standard of proof to meet that deficiency.

27. Contrary to the Applicant's submissions last week, this standard of proof is entirely consistent with the ICTY and ICTR's approach to circumstantial evidence[13] and also with this Court's approach in the *Bosnia* case, as well as the *Corfu* case, discussed by Professor Schabas on Wednesday this week. As this Court concluded in the *Bosnia* case the specific intent must be established and "is defined very precisely"[14]. The specific intent is to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent[15].

28. It is the Respondent's case that Phase Two — the widespread and systematic killing, physical and mental harm and the deliberate infliction on the Krajina Serbs of conditions of life calculated to bring about its physical destruction on its own — gives rise to such an inference.

29. The Court need look no further than Phase Two and the relevant indicators that have been discussed in the ICTY and the ICTR jurisprudence. They sum up, as the slide indicates, a range of indicators: "the number of group members affected"; "the physical targeting of the group or their property"; "the use of derogatory language toward members of the targeted group"[16]; "the weapons employed and the extent of bodily injury;" "the systematic manner of killing"; "the

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[11]CMS, Chap. II, para. 53; *Bosnia* Judgment, pp. 196-197, para. 373.

[12]CR 2014/6, pp. 31-32, para. 9 (Starmer).

[13]*Delalić et al.* Appeal Judgement, para. 458.

[14]*Bosnia* Judgment, p. 121, para. 187.

[15]*Ibid.*, pp. 121-122, para. 188, citing from *Kupreškić,* IT-95-16-T, Judgement, 14 Jan. 2000, para. 636.

[16]*Gacumbitsi*, (Appeals Chamber), 7 July 2006, para. 40; *Kamuhanda*, (Trial Chamber), 22 Jan. 2004, para. 625; *Kayishema and Ruzindana*, (Trial Chamber), 21 May 1999, para. 527.

relative proportionate scale of the actual or attempted destruction of a group"[17]; and "the repetition of destructive and discriminatory acts"[18].

Phase Three: The attacks on those that remained

30. Phase Three — the attacks on those that remained — covers the deadly aftermath that took place in the Krajina in the months after the completion of Phase Two.

31. If there was a scintilla of truth to the Applicant's claim that the Operation was merely about a lawful campaign aimed at restoring its internationally recognized borders, and reintegrating those territories, or even that the Operation was merely about expulsion or mere dissolution of the Krajina Serbs, then further violence was no longer required.

32. Instead, having driven out all the able bodied civilians who might have offered some protection; war was unleashed upon the elderly, the disabled and the sick. Anything Serbian was burnt or destroyed in a crescendo of violence that was as motiveless, as it was destructive. It speaks eloquently, yet terribly, about the intent at the heart of Operation Storm.

33. When viewed in isolation, any of the three phases point inexorably to the existence of the required acts and the specific intent. When viewed together, they are overwhelming evidence of a violation of the Genocide Convention.

34. Let me turn now to Phase One.

Phase One: The genocidal plan

35. As submitted by the Respondent, Operation Storm was the final operation in a series of military attacks that had been increasingly aimed at ethnically cleansing the RSK. The predecessor operations, including the attack on the Medak Pocket on 9 September 1993 and Operation Flash on 1 May 1995, involved the commission of a multitude of persecutory acts designed to effect the mass deportation or forcible transfer of tens of thousands of civilians.

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[17] *Kayishema and Ruzindana*, (Trial Chamber), 21 May 1999, paras. 93, 527; *Akayesu*, (Trial Chamber), 2 Sep. 1998, paras. 523-524; *Musema*, (Trial Chamber), 27 Jan. 2000, para. 166; *Muhimana*, (Trial Chamber), 28 Apr. 2005, para. 496; *Kajelijeli*, (Trial Chamber), 1 Dec. 2003, para. 806; *Seromba* (Appeals Chamber), 12 Mar. 2008, para. 176; *Gacumbitsi*, (Appeals Chamber), 7 July 2006, para. 40; *Seromba*, (Trial Chamber), 13 Dec. 2006, para. 320; *Gacumbitsi*, (Trial Chamber), 17 June 2004, para. 252; *Kamuhanda*, (Trial Chamber), 22 Jan. 2004, para. 623; and *Kajelijeli*, (Trial Chamber), 1 Dec. 2003, para. 804.

[18] *Prosecutor* v. *Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28768, lines 5-15.

36. However, Operation Storm was not only a plan to ethnically cleanse the Krajina Serbs. It was different in its scale, wilfulness, deliberateness and design and purpose. Before I examine these differences, it is important to recall this Court's approach to the distinctions between the persecution (that was a central feature of the Applicant's earlier operations) and genocide, as well as the distinctions between ethnic cleansing and genocide.

37. First, persecution: with regard to the *mens rea* distinctions between persecution and genocide, the Court observed in the *Bosnia* case that

> "from the view point of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide"[19].

38. Second, ethnic cleansing and genocide: the relationship between the one and the other is obviously important. Whilst it benefits the Applicant to blur the distinction, the difference between the two must be carefully maintained.

39. On the one hand, the Applicant appears to accept the findings in the *Bosnia* case that forcible removal and deportation will be a genocidal act only when accompanied by the acts listed in Article II, and coupled with an intent to destroy part of the group. On this view, the Applicant accepts and I quote, "evidence of forcible removal and deportation can be taken into account in identifying the existence of a genocidal intent"[20].

40. On the other, the Applicant seeks to argue that there is "no hard and fast distinction between the removal of a population or ethnic cleansing and genocide, as scholars recognize, beyond the element of intent"[21].

41. And yet, the Applicant also claims that genocide does not require proof of intent to physically destroy, only intent "to stop it [the group] functioning as a group"[22]. How, in reasonably foreseeable circumstances, this latter intent is to be distinguished from that of forcible transfer or deportation remains unexplained.

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[19]*Bosnia*, Judgment, p 122, para. 188; CMS, Chap. II, para. 43, citing from ICTY, *Kupreškić et al.,* IT-95-16-T, Trial Chamber Judgement, 14 Jan. 2000, para. 636.

[20]CR 2014/5, para. 16 (Sands).

[21]*Ibid.*, para. 17 (Sands).

[22]*Ibid.*, para. 13 (Sands).

42. It is worthwhile returning to this Court's ruling in the *Bosnia* case to ground our view of Phase One of Operation Storm.

43. As this Court ruled,

> "the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction [and I emphasize this point] *an automatic consequence of the displacement*"[23].

44. Further,

> "whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. [However], acts of 'ethnic cleansing' may occur [and I emphasize this point] *in parallel to acts* prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts."[24]

45. To sum up, there is a hard and fast distinction between ethnic cleansing and genocide, except when certain restrictive conditions pertain. Ethnic cleansing may be evidence of a genocidal campaign. When the Article II destructive acts occur *in parallel*, or are an *automatic consequence* of the displacement, this distinction may be a distinction without a difference.

46. Let me now turn to the examination of Phase One, the Brioni plan, with the escalation of persecutory mental states and the intertwining of ethnic cleansing and genocide firmly in mind.

47. With regard to Phase One, I will address you on two principal issues that are pivotal to the issue of an assessment of intent:

(i) the Croatian political and military leadership's mindset at the time of the Brioni planning meeting; and

(ii) the inextricable link between the displacement planned and a genocidal campaign.

The Croatian political and military leadership's mindset at the time of the Brioni planning meeting

48. An examination of the views held by the Croatian leadership and their manifestation, not only in their policies throughout the conflict, but also in the military operations that escalated into

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[23] *Bosnia* Judgment, p. 123, para. 190; emphasis added.

[24] *Ibid*.; emphasis added.

Operation Storm, is instructive. It shines a light on the escalating criminal intent to reveal a hateful collective motive that crystallized into the *dolus specialis* of genocide by the time of Phase One.

49. As the jurisprudence from the ICTY and ICTR shows — and logic dictates — the words of an individual play a critical, sometimes decisive, role in assessing whether the *dolus specialis* may be inferred. Whilst distinctions *may* be drawn between, *inter alia*, hate speech (inciting discrimination or violence)[25] or those that reveal other mental states, such as an "intention to adjust the ethnic composition" of a region[26], and speech that amounts of exhortations to kill or destroy, in short, genocidal intent may be inferred from the dissemination or publication of written or spoken views that display an intention to kill or physically or mentally harm targeted groups[27].

50. As the Court will recall, we heard a lot about Serbian hate speech last week during the Applicant's presentation of their case. In order to provide a solid foundation for their claim, they seek to persuade the Court that this, and not the conduct of Croatia's political and military leadership, was the sole cause of the Krajina Serb's fears and the violence that ensued. I will return to this issue in the second round of these hearings when addressing the claim.

51. Suffice to say at this stage that such a one-sided account is demonstrably flawed from the outset, as Mr. Obradović outlined yesterday. There can be little doubt in this case concerning President Tuđman's views of the Serbian people, the virulent strain of ethnic hatred that permeated his administration from the outset of the war, and the ways in which these gradually infused the conduct and objectives of the military operations.

52. This evidence will help you decide what Tuđman meant when he expressed his fervent desire during the Brioni planning that Operation Storm plan should ensure that the Serbs "would disappear"[28] and also the objectives sought to be achieved.

53. As the evidence shows, President Tuđman, the leader of Croatia and its ruling party, the HDZ, as well as the Supreme Commander of the Croatian forces at the time, saw genocide as a solution to the problem presented by the Krajina Serbs.

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[25]*Nahimana et al.* v. *Prosecutor* (ICTR-99-52-A), Appeals Chamber Judgement of 28 Nov. 2007, paras. 692, 693.

[26]*Stakić*, (Trial Chamber), 31 July 2003, para. 554.

[27]*Nahimana, Barayagwiza and Ngeze*, (Appeals Chamber), 28 Nov. 28, 2007, para 567; *Gacumbitsi*, (Appeals Chamber), 7 July 2006, para. 43 and 259; *Niyitegeka*, (Trial Chamber), 16 May 2003, paras. 427, 436-437; Kamuhanda, (Trial Chamber), 22 Jan. 2004, paras. 643-45.

[28]Brioni Minutes, p. 2; CMS, Ann. 52.

54. Intellectually, if that is the right word, President Tuđman regarded genocide — including the Jewish holocaust and that visited upon the Serbs during World War II — as a pragmatic solution to inter-ethnic conflict or political disputes. In his own words as expressed in his 1990 book, the *Wastelands of Historical Reality*, he noted the benefits of what he quaintly termed "genocidal changes", namely,

> "more harmony in the national composition of the population and state borders of individual countries, thus also having possible positive impact on developments in the future, in the sense of fewer reasons for fresh violence and pretexts for the outbreak of new conflicts and international friction"[29].

55. This literary gem followed hot on the heels of President Tuđman's 1990 election campaign, wherein he announced on national television that the fascist Independent State of Croatia was an expression of the historical aspiration of the Croatian people and that he was happy because his wife was neither a Jew nor a Serb[30].

56. In October 1993, at the Second Congress of the Croatian Democratic Party, one month after the persecutory crimes by Croatian troops at Medak Pocket, which I will come to in a moment, President Tuđman publically proposed that the remains of the Ustasha killed by the Yugoslav Partisans in 1945 be reburied together with the victims of the Ustasha at Jasenovac[31]. Can we reflect on that terrible suggestion for a moment lest its import be watered down by the passage of time? It is akin to a German leader proposing burying the victims of Auschwitz in the same place as a member of German Nazi régime. It does not take much imagination to work out how safe the Jews in Germany would subsequently feel. It also does not take much to see where Tuđman's sympathies were in 1993. The problem was, as noted by Peter Galbraith, the United States Ambassador to Croatia, in his testimony in *Gotovina* at the ICTY, Tuđman "considered both Muslims and Serbs as part of a different civilization than Croats"[32]. This explains how he could harbour and disseminate such hate and how destroying Serbs amounted to little more than cleaning a cupboard of common household pests.

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[29]CMS, Ann. 51, citing to Dr. Franjo Tuđman, *Wastelands of Historical Reality*, Nakladni zavod Matice Hrvatske, Zagreb, p. 163.

[30]CMS, para. 431 and Ann. 51; Rejoinder of Serbia (RS), para. 431.

[31]CMS, para. 417.

[32]*Gotovina et al.*, Trial Chamber Judgement of 15 Apr. 2011; RS, para. 780.

57. Tuđman's Minister for Foreign Affairs, Šarinić, considered the Serbs "a cancer on the stomach of Croatia"[33]. Marjan Jurić, a Deputy in the Croatian Parliament, at a session held on 1 to 3 August 1991, wondered whether the Serbs would come to their senses if "ten civilians were executed for one killed policemen or if a hundred civilians were killed for one solider"[34]. And so it goes on. A further selection has been outlined in our pleadings and I will not burden the Court with more of the same.

58. Of course these views impacted policies; of course they were sharpened by five years of ethnically-based war; of course the belief that genocide could be a solution to a long-standing political problem slowly became evidenced by practice. How, in the circumstances, could they not?

59. 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. Changes in the constitution, the adoption of a flag and coat of arms eerily reminiscent of the Ustasha régime, tangible discrimination, dismissal from employment, an unseemly rush to war, an adoption of persecutory tactics during combat and finally, an operation designed to achieve the "genocidal changes" that Tuđman believed would bring "harmony in the national composition".

60. As the Brioni transcript shows, President Tuđman was no armchair commander in chief. He was well versed in military tactics and every aspect of the recent Croatian military campaign, as well as having the most decisive say concerning Operation Storm. As he announced at the very beginning of the meeting, "[g]entlemen, I have called this meeting to assess the current situation and to hear your views before *I* decide on what our next steps should be in the forthcoming days"[35].

61. As the *Gotovina* Trial Chamber found, when discussing the joint criminal enterprise, Tuđman "ensured that his ideas were transformed into policy and action, through his powerful position as President and Supreme Commander of the armed forces"[36].

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[33] *Gotovina et al.*, Trial Chamber Judgement of 15 Apr. 2011; RS, paras. 1999-2001; footnotes omitted.

[34] CMS, Ann. 51.

[35] Brioni Minutes, p. 1; CMS, Ann. 52.

[36] *Gotovina et al.*, Trial Chamber Judgement, para. 2316.

62. As for the final steps in this transformation of theory into practice, the Croatian leadership's escalating criminal intent is most clearly visible through the operations that preceded Operation Storm, in particular, the Maslenica attack on 22 January 1993; the Medak Pocket operation on 9 September 1993 and Operation Flash on 1 May 1995.

63. Operation Flash was the final turning point from operations designed to persecute and punish to an operation premised on the extreme form of wilful and deliberate acts designed to destroy a group. Genocide became the logical step on a road increasingly littered with Serb victims of persecutory acts and other crimes against humanity, increasingly justified and excused as natural outcomes of a righteous struggle for territorial integrity and self-determination.

The Maslenica Attack: 22 January 1993

64. As the evidence shows, from November 1992 onwards, the United Nations Secretary-General had observed an improvement of law and order in the United Nations Protected Areas[37]. On 22 January 1993, this progress was undermined when the Croatian forces attacked Maslenica and other locations in the southern part of Sector South and the adjacent "pink zones". As confirmed by the Special Rapporteur of the Commission on Human Rights, the Croatian forces committed a range of criminal acts including the destruction of villages and the forced displacement of 11,000 Serbs[38].

65. Even now, the Applicant is unable to accept the illegitimacy of this operation. The Applicant claims that the operation achieved a legitimate humanitarian and military objective by opening up a transport route to Bosnia, and in any event "the UN found that the Serbs were primarily responsible for the difficulties faced by UNPROFOR in fulfilling its mandate"[39].

66. However, as a close examination of the Applicant's evidence shows, the transport route was necessary, not then, not immediately, but in "the long run" as there *were* other routes (that is, through ferry services and over other bridges)[40].

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[37]CMS, paras. 1123-1129.

[38]CMS, para. 1125, citing to 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 para. 32 of Commission resolution 1993/7 of 23 Feb. 1993, 17 Nov. 1993, UN doc. E/CN.4/1994/47 (1993), para. 149.

[39]RC, para. 10.48.

[40]Additional Pleading of Croatia (APC), para. 2.24.

67. In other words, this was nothing more and nothing less than a persecutory campaign designed to force the RSK leadership to agree to political demands.

The Medak Pocket: 9 September 1993

68. The Medak Pocket, 9 September 1993, illuminates a similar intent with the same justification.

69. As discussed by the Respondent in the pleadings[41], the Croatian forces committed a myriad of persecutory acts, including murder, plunder and mass forcible transfer. As the ICTY Prosecutor's indictment stated, based no doubt on lengthy investigations, "as a result of these widespread and systematic unlawful acts" the "villages of Pocket [approximately 164 homes and 148 barns], were completely destroyed"[42]. This cannot seriously be denied.

70. The Applicant carefully avoids addressing the issue. A variety of excuses are employed, designed to avoid addressing the point. We are told that there was no evidence of ethnic cleansing[43]; or it was only a matter of command responsibility[44]; or the operation was justified that because the RSK's artillery fire made normal life in that region impossible.

71. This is a sidestepping of the issue. The claim that the operation was designed to remove the threat of RSK artillery fire is demonstrably false. As we argued in the Respondent's pleadings, despite the devastation wrought, the area still remained within the range of heavy artillery fire[45]. As noted in the final report of the Commission of Experts, "[v]arious contradictory excuses given by the Croats for the destruction suggest the lack of any legitimate excuse for such widespread destruction"[46].

72. Of course, the symbolic conviction of one man, Commander Norac, in 2008 in Croatia (following transfer from the ICTY), for a small proportion of the crimes cannot constitute a genuine expression of regret, let alone a contemporary repudiation of the criminal intent.

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[41]CMS, paras. 1130-1134; RS, paras. 644-650.

[42]CMS, para. 1133.

[43]APC, para. 2.30.

[44]RC, 10.59.

[45]RS, para. 644.

[46]UN doc. S/1994/674.

73. Even less is it evidence that is capable of undermining the conclusion that the Croatian leadership had, by the fall of 1993, adopted a policy of collectively punishing Serbian civilians through the commission of crimes against humanity.

74. However, the subsequent promotion of Norac to Staff Brigadier, and his place at the Brioni planning meeting perhaps does tell us something about the nature of the shared criminal intent[47].

Operation Flash: 1 May 1995

75. The Respondent has outlined the gravity of the crimes committed by the Croatian troops during this operation[48].

76. Even though the Applicant inadvertently acknowledges the nature of the displacement by referring to it as "ethnic cleansing"[49], and despite the demonstrable mass displacement and related crimes against humanity, the Applicant claims that the operation was conducted lawfully[50].

77. The reality is, that while there may be some room for debate about the precise scale of the crimes, there is no room to doubt that persecution and other crimes against humanity were committed on a massive scale and the Serb population was viciously chased out of Western Slavonia.

78. As noted on 14 July 1995 in the periodic report submitted by the United Nations Special Rapporteur of the Commission on Human Rights, a total of 12,000 Serbs were displaced[51].

79. We ask the Court to note certain features of this attack. It was nothing less than a practice run for Storm. Its success an inspiration for bigger and better things.

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[47]RS, para. 631.

[48]CMS, paras. 1142 – 1159.

[49]RS, para. 10.98.

[50]Example, RS, para. 10.91.

[51]Drafted pursuant to para. 42 of Commission resolution 1995/89, 14 July 1995, UN doc. A/50/287-S/1995/575, paras. 28–29.

80. The column of refugees was subject to a massive attack near the bridge on the Sava River[52] and there were executions in the villages of those Serbs who remained[53].

81. In terms reminiscent of the ill-advised explanation for the mass displacement that took place during Operation Storm, the Applicant accepts that the region was emptied of its Serbian population but claims that the rebel Serb leadership planned this exodus[54].

82. Notwithstanding this curious claim, the then Croatian Prime Minister, Mr. Valentić, publically stated after the operation: "[t]he Serb problem in Western Slavonia has been solved"[55]. Echoing this view, Tuđman's chief adviser at the time, Mr. Šarinić, laconically claimed: "we should be inspired by the way it is in Western Slavonia. It was very positive for us, because no one came back"[56].

83. The Applicant justifies the operation because the "existence of the 'RSK' in the heart of the sovereign Republic of Croatia was a critical obstacle to the political and economic development of the country"[57]; because the RSK had adopted a policy "to negotiate with Croatia as representatives of a sovereign state"[58], rather than as citizens of Croatia; they had rejected the operative provisions of Security Council resolution 981 (1995), which treated the rebel Serb-held territories as part of Croatia and established UNCRO's mandate[59]; they had refused to sign the economic agreement[60]; they had closed a motorway through Sector West[61]; they had committed "several criminal acts in the criminal proceedings"[62]. And so, the political justifications go on.

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[52]Periodic Report by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, 14 July 1995, UN doc. A/50/287-S/1995/575, paras. 7, 8, 28 & 29; affidavits of Petar Božić, CMS, Ann. 48; Savo Počuča, CMS, Ann. 49; Anđelko Đurić, RS, Ann. 37; Milena Milivojević, RS, Ann. 38; Dušan Bošnjak, RS, Ann. 29; and Dušan Kovač, RS, Ann. 40.

[53]Affidavit of Radojica Vuković, RS, Ann. 41.

[54]RS, para. 10.97.

[55]CMS, para. 1153, citing Prosecutor's pre-trial brief in *Gotovina et al.*, IT-06-90-PT, Submission of Public Version of Prosecution Pre-Trial Brief, 23 Mar. 2007, para. 20.

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

[57]RC, para. 3.132.

[58]*Ibid.*, paras. 10.71, 10.79.

[59]*Ibid.*, para. 10.84.

[60]*Ibid.*, para. 10.82

[61]*Ibid.*, paras. 10.86-10.88.

[62]*Ibid.*, para. 10.89.

84. This is where the Croatian leadership was at the time of Brioni. Infused with ethnic hatred and a growing belief in the correctness or utility of devastating and destructive crimes, to achieve the political goals that would bring harmony to the national composition.

The inextricable link between the displacement planned and destruction: the automatic consequence

85. Let us now turn to the plan itself and the inextricable link between the displacement planned and destruction: "the automatic consequence".

86. A careful examination of the plan shows that the plotters intended that Operation Storm would consist of a destructive attack on the Serbian Krajina civilians.

87. The three main elements of the plan involved the following:

(i) attacks on the towns and villages sufficient to defeat the already demoralized military and force the civilians to leave through preordained routes;

(ii) allowing the military to leave by ensuring they were forced down the same escape route as the civilians; and

(iii) effecting the ethnic cleansing through ensuring devastating criminal attacks on the fleeing mixed civilian and military columns by removing any remaining distinction between the civilians and the military.

88. The Brioni leaders targeted the Krajina Serbs for extinction. They removed them from their homes, stripped them of their personal belongings, and deliberately and methodically drove them into columns with the military to optimize the destruction. It was a plan — that if successful — would destroy the group or a substantial part of it.

89. Let me now turn briefly to the transcript of the Brioni meeting to examine its precise terms. Although President Tuđman wanted the civilians to "disappear", he was willing to consider "on a military level, the possibility of leaving" the military a way out, "so they pull out part *of their forces*"[63]. As Zagorec stated, with clear reference to the forces, "[w]hen they start to flee, they will have to flee somewhere . . . we must open a pocket where they will flee"[64].

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[63]Brioni Minutes, p. 7.

[64]*Ibid.*, p. 20.

90. President Tuđman's son, Miroslav, queried whether the routes would be open for the forces to pull out[65]. President Tuđman proposed that they use the civilians as a means of pointing out the escape routes for the forces by announcing over the radio, that "it has been noticed that civilians are getting out using such and such a route"[66].

91. President Tuđman stated that once the civilians and military are in the same columns fleeing for their lives, the Croatian forces and leadership should,

> "make that information public — tanks, artillery batteries, losses, that means, from today, tomorrow, the day after tomorrow, have this constantly repeated on TV and on the radio that *they* are attacking, that *they* are attempting to/by attacking, that *their pull out is just a manoeuvre*"[67].

92. Finally, President Tuđman then recommended, that the civilians should be misled. As he noted at the close of the meeting, the civilians should be duped to cause "general chaos": "[announce] we are appealing to you [the civilians] not to withdraw . . . giving them a way out, while pretending to guarantee civil rights"[68]. This was to involve, "point[ing] out the routes which they could use to pull out, and formulate them in such a manner to double the confusion such as it is"[69].

93. No doubt, as in the *Ndindabahizi* case at the ICTR, Tuđman "was well aware that his remarks and actions were part of a wider context of ethnic violence, killing and massacres" and "*[h]is position as a Minister of Government lent his words considerable authority*"[70]. As in the *Nchamihigo* case at the ICTR, the extermination plan included the idea of *sparing some civilians so as to mislead the international community*[71]. Finally, as in the *Karera* case at the ICTR where the accused's genocidal intent was considered "evident", the plan, not only encouraged attacks on civilians — guaranteed them — but also contained a false and misleading promise to protect the victims from attacks[72].

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[65]Brioni Minutes, p. 20.

[66]*Ibid.*

[67]*Ibid.*, p. 23; emphasis added.

[68]*Ibid.*, p. 29.

[69]*Ibid.*

[70]*Ndindabahizi*, Trial Chamber, 15 July 2004, paras. 462, 461, 463-464; See also *Ndindabahizi*, Appeals Chamber, 16 Jan. 2007, para. 52.

[71]*Nchamihigo*, Trial Chamber, 12 Nov. 2008, paras. 332-336.

[72]*Karera*, Trial Chamber, 7 Dec. 2007, paras. 541-542; See *ibid.*, paras. 543-544.

94. I pause here to ask the question studiously avoided by the Applicant: what did the Brioni planners think would be the result of forcing the civilians and military into the same columns and then announcing that the military was only pretending to pull out and in fact was engaged in ongoing attacks? What would be the result of that plan?

Conclusion: Phase One

95. To conclude Phase One, let me address two final issues. First, the reasons proffered by the Applicant to justify the plan. And second, the *Gotovina et al.* Appeal Judgement that overturned Gotovina and Marcač's JCE convictions.

Reasons: Motive and Intent

96. First, motive and intent, and the reasons proffered by the Applicant. The Applicant advances various claims to justify Operation Storm. The principle claim is that Operation Storm's goal was not the physical destruction of the Serb population of the Krajina, but intended "to achieve the lawful restoration of control over its sovereign territory"[73], etc. The remaining explanations can be found in their pleadings. They are identical to the reasons proffered with regard to the predecessor operations.

97. Apart from exposing the mindset that existed in 1995, that any crime — even genocide — was justified to resolve political aims, of course, they are not relevant to the issues at hand.

98. As determined by the Appeals Chamber at the ICTY in the case of *Jelisić*, the existence of a personal motive of a perpetrator of the crime of genocide "such as to obtain personal economic benefits, or political advantage or some form of power" does not preclude the perpetrator from also having the specific intent to commit genocide[74].

99. As reiterated by the Appeals Chamber of the ICTR in *Kayishema*, "criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2 (2) *(a)* through to *(e)*

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[73]RC, para. 12.3.

[74]*Prosecutor* v. *Jelisić*, Judgement, Appeals Chamber, IT-95-10-A, 5 July 2001, para. 49.

were committed 'with intent to destroy, in whole or in part a national, ethnical, racial or religious group'"[75].

100. The Croatian leadership's Brioni plan was still a genocidal plan.

Significance of the *Gotovina et al.* Appeal Judgment

101. Turning to the significance of the *Gotovina* Appeal judgement. In 2012, as we know, the convictions of *Gotovina* and *Marcač* were controversially overturned. We urge the Court to examine this judgement with care. Of course, some judgements at the ICTY are more puzzling than others. This Appeal judgement, along with aspects of the *Martić* judgement — which I will address you upon in the second round — is one of those.

102. There is no surprise that it contains two of the most trenchant dissents in the history of the ICTY from two of the most experienced judges, Judge Agius and Pocar. Judge Agius described the majority's approach, *inter alia*, as "artificial and defective"[76], observing that it "in no way resembles an application of the proper standard of review applicable to errors of law — or indeed any recognisable standard of review"[77].

103. Judge Pocar went even further chiding the majority for "the paucity of the legal analysis" that "opens more questions than it provides legal answers[78]", noting that he did not "believe that justice is done when findings of guilt not lightly entered by the Trial Chamber in more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful consideration of the trial record and a proper explanation"[79].

104. Let me for the moment compare the views expressed by the Trial Chamber and thereafter by the majority at the Appeals Chamber with regard to the Brioni transcript. It gives you an insight into the disquiet expressed in these minority views.

105. The Trial Chamber held, *inter alia*, that, President Tuđman's comment that Croatia must "inflict such blows that the Serbs will [for] all practical purposes disappear . . . focused

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[75] *Prosecutor* v. *Kayishema and Ruzindana*, Judgement, Appeals Chamber, para. 161.

[76] *Gotovina et. al.,* Appeals Chamber Judgement, dissenting opinion of Judge Carmel Agius, para. 4.

[77] *Ibid.*, para. 7.

[78] *Gotovina et. al.,* Appeals Chamber Judgement, dissenting opinion of Judge Pocar, para. 14.

[79] *Ibid.*, para. 14.

mainly on the Serb military forces, rather than the Serb civilian population"[80]. According to the ICTY Trial Chamber, President Tuđman's comment did refer to civilians, even if this was not at *that* time his main focus. The Trial Chamber would appear to agree with the submissions made yesterday by Mr. Obradović.

106. The Trial Chamber went on to note, *inter alia*, that the minutes of the Brioni meeting show that the participants were

> "aware of the difficult situation for the Krajina Serbs, in particular in Knin, and they knew that it would not require much effort to force them out. Under these circumstances, members of the Croatian political and military leadership took the decision to treat whole towns as target for the initial artillery attack."[81]

107. Summing up its repudiation of Gotovina's case, and the Applicant's defence in this Court, the Trial Chamber held that in light of these remarks, and the fact that "the participants made no reference to how the military operation should be conducted [so] as to avoid or minimize the impact on the civilian population", the creation of corridors and the references to "civilians being shown . . out was not about the protection of civilians but about civilians being forced out". The comments did "not lend support to an interpretation that the discussions at the meeting were about the protection of civilians"[82].

108. Compare this view with the majority view at the Appeals Chamber:

> "it was not reasonable to find that the only possible interpretation of the Brioni Transcript involved a JCE to forcibly deport Serb civilians. Portions of the Brioni Transcript deemed incriminating by the Trial Chamber can be interpreted, absent the context of unlawful artillery attacks, as inconclusive with respect to the existence of a JCE, reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction. Thus discussion of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts."[83]

109. Given the plain words spoken, the Respondent suggests that the minority's view is plainly the correct one. The interpretation placed upon it by the Appeals Chamber is puzzling to say the least.

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[80] *Gotovina et al.*, Trial Chamber Judgement, para. 1990.

[81] *Ibid.*, para. 2311.

[82] *Ibid.*, paras. 1993, 1995.

[83] *Gotovina et. al.*, Appeals Chamber Judgement, para. 93.

110. The Brioni plan is wholly inconsistent with any suggestion of legitimate armed conflict or excesses in an otherwise legitimate operation. Whilst the Applicant will no doubt be able to point to aspects of the *execution* of the plan — Phase Two — that shows that less destruction occurred than might have been predicted, they will do so only by avoiding the words on the page, the plain terms of the plan. The Applicant will spend some time attempting to show how the operation was conducted lawfully. That civilians left for reasons other than indiscriminate attacks, or unlawful attacks. They missed the point. The point is that the plan was premised on a calculated strategy of ensuring by fair or foul play that civilians left, not down safe routes, not to safety, but together with the military before then encouraging, ensuring, directing and planning attacks to be rained down upon the mixed columns.

111. It is worth pausing again to pose the question as yet unanswered by the Applicant: can anyone seriously accept that such a plan — corralling the civilians and the military into selected routes and columns, encouraging military attacks upon them by disseminating misinformation that the military were still attacking — whilst misleading the civilians into believing they were safe — *in the middle of an ethnically driven war* — would not automatically lead to death and destruction on a massive scale? The Applicant ought to address this point.

Phase Two: The execution of the plan

112. As the Respondents have argued in their pleadings, the intent to destroy the group of Krajina Serbs at the heart of the plan for Operation Storm is further confirmed and corroborated by the subsequent execution of the plan and the massive, widespread and systematic crimes committed therein.

113. It is remarkable how the plan became a reality and how the Brioni leadership so efficiently transformed their ideas into action.

114. There is no dispute in this case, no real dispute, that the United Nations Secretary-General's conclusion is correct, and I quote:

> "The exodus of 200,000 Krajina Serbs fleeing the Croatian offensive in early August created a humanitarian crisis of major proportions. It is now estimated that only about 3,000 Krajina Serbs remain in the former Sector North and about 2,000 in the former Sector South . . . "[84]

115. As Tuđman planned, so it was: "It is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other."[85]

116. On the Croatian side there were 150,000 soldiers while on the other there was 30,000 RSK soldiers[86]. As we know from the Brioni transcript, the Croatian leadership knew the latter was a spent force that would flee without any meaningful fight.

117. Despite this, the cities of Knin, Benkovac, and Bosansko Grahovo were subjected to severe shelling during Operation Storm[87]. Other cities and towns were also heavily shelled despite having no identifiable military targets; Obrovac, Gračac, Kistanje, Uzdolje, Kovačić, Plavno, Polača and Buković[88], and it goes on.

118. The Counter-Memorial shows that the killing of Serbs was widespread and systematic during and after Operation Storm. Whether we rely upon the Croatian Helsinki Committee for Human Rights, who calculated that during and in the 100 days after Operation Storm, 677 Serbs civilians were murdered and went missing[89], or figures provided by Veritas, that 1,719 Krajina Serbs were killed[90], either calculation amounts to mass killing, and this was the automatic consequence of the military strategy adopted at Brioni.

119. As discussed in the Counter-Memorial, fleeing civilians were attacked and killed or injured by artillery shelling, bombing from the air, infantry fire and attacks by Croatian forces.

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[84]The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 Oct. 1995, UN doc. A/50/648, para. 27.

[85]Brioni Minutes, p. 15; CMS, Ann. 52.

[86]CMS, para. 1213; O. Žunec, *Naked Life* (Goli život), Zagreb, 2007, p. 842.

[87]CMS, para. 1215.

[88]CMS, para. 1216; *Gotovina et al*., Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para.31.

[89]CMS, para. 1239, citing Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 210; see also Humanitarian Crisis Cell Sitrep, Compilation of Human Rights Reporting, 7 Aug.-11 Sept. 1995; CMS, Ann. 55.

[90]List of direct victims of Operation Storm available on http://www.veritas.org.rs/wp-content/uploads/2013/02/Oluja-spisak-direktnih-zrtava2.pdf.

120. As examples only. On 8 August, a refugee column was shelled between Glina and Dvor, resulting in at least four dead and ten wounded[91].

121. An entry of the 4th Guards Brigade Operative Logbook for 7 August 1995 shows the success of Phase One in removing the principle of distinction. The Logbook entry reads: "our artillery was hitting the column pulling from Petrovac to Grahovo, the score is excellent, the Chetniks have many dead and wounded . . ."[92]

122. Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, concluded that the killing of civilians was the number one human rights violation committed during and after Operation Storm[93]. She confirmed that fleeing civilians were subjected to various forms of harassment, including military assaults and attacks[94].

123. As for the mental harm that the evidence shows inevitably arises from being driven from your home like cattle to the slaughterhouse, the Respondent can do no better than rely upon the powerful summation from the Trial Chamber in the *Blagojević* case, that noted,

> "the trauma and wounds suffered by those individuals who managed to survive the mass executions . . . The fear of being captured, and . . . the sense of utter helplessness and extreme fear for their family and friends' safety as well as for their own safety, is a traumatic experience from which one will not quickly — if ever — recover."[95]

124. Whilst, of course, the *exact* number of dead and physically and mentally injured will remain a point of contention and impossible to determine, in the circumstances, this does not undermine the Respondent's case. We urge the following approach.

125. First, as admitted by the Applicant, for some time after the killings that occurred on the territory during Operation Storm, the terrain was sealed from the view of the international

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[91]List of direct victims of Operation Storm available on http://www.veritas.org.rs/wp-content/uploads/2013/02/Oluja-spisak-direktnih-zrtava2.pdf.

[92]*Gotovina et al.,* Reynaud Theunens, Expert report: Croatian Armed Forces and Operation Storm, Part II, p. 189.

[93]Report on the situation of human rights in the territory of the former Yugoslavia submitted by Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89 and Economic and Social Council decision 1995/290, UN doc. S/1995/933, 7 Nov. 1995, p. 8.

[94]CMS, para. 1242; Report on the situation of human rights in the territory of the former Yugoslavia submitted by Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89 and Economic and Social Council decision 1995/290, 7 Nov. 1995, UN doc. S/1995/933, p. 7, para. 18.

[95]*Blagojević et al.,* IT-02-60-T, Trial Chamber Judgement, 17 Jan. 2005, para. 647.

community (purportedly due to "ongoing combat and in order to prevent any UNCRO casualties and later for mop up operations"[96]).

126. So even though the Respondent accepts in general that it must establish that crimes that satisfy Article II of the Convention were committed with intent, the "determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court"[97]. This Court in the *Guinea* case decided that, as noted, the rule should be applied "flexibly" when the opposing party is "in a better position to establish certain facts"[98].

127. Accordingly, the Applicant's reliance on the fact that "no precise data on the numbers of Serbs killed or missing during Storm has been established"[99] is entirely misplaced. It is, at the very least, instructive, that the Applicant is well placed to assist the Court with an assessment, but has declined to do so[100].

128. However, it should also be borne in mind, that whilst most of the 200,000 civilians mercifully, if that is the right word, avoided death, this fact alone does not undermine the Respondent's case.

129. Although as argued earlier, the ICTR and ICTY indicators that allow inferences to be drawn from the nature and scale of the attacks are all there and plentiful, during Phase Two; we say plentiful and sufficient.

130. Given the express terms of the Brioni plan — Phase One — there is no need to discern intent from only indirect or circumstantial evidence. The Court need not trouble itself with resolving Professor Sands "hamlet" thesis, wherein he argued that intention 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"[101] or the less expansive thesis advanced by Sir Keir Starmer, who acknowledged that "numbers are not without some relevance"[102].

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[96]RC, para. 11.107.

[97]*Ahmadou Sadio Diallo, (Republic of Guinea* v. *Democratic Republic of Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660, para. 54.

[98]*Ahmadou Sadio Diallo, (Republic of Guinea* v. *Democratic Republic of Congo), Compensation, Judgment, ICJ Reports 2012 (I)*, p. 332, para. 15.

[99]RC, para. 11.85.

[100]RC, paras. 11.87-11.93.

[101]CR 2014/6, para. 31 (Sands).

[102]CR 2014/12, para. 3 (Starmer).

131. In the counter-claim the Court is entitled to find intent when they are satisfied that relatively few Article II attacks occurred, but that they were a virtual certainty (barring some unforeseen circumstance or intervention) as a result of the Applicant's plan and the actions and that the Applicant appreciated that such was the case[103].

132. Moreover, as this Court has found, "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 . . . As the ICTY Appeals Chamber has said, and . . . the Respondent accepts, the opportunity available to the perpetrators is significant."[104]

133. That the Croatian planners were thwarted in their plans, by a number of factors, not least of which was the speed in which they emptied the towns, the configuration of the terrain, the resourcefulness of those fleeing, the watchful eye of the international community, or even the unwillingness of the ground commanders to follow through the logic of this plan, is little more than a twist of fortune that does not cast a more favourable light on the prevailing criminal intent.

134. There is no question that the Article II acts were random acts of violence, accidental consequences of lawful military action or excesses of war. We know that the plan was directed at the 200,000 individuals or at least a substantial part of them, whatever the final success of the plan. We know that the plan was an escalation, and the violence was an automatic consequence of its terms.

Phase Three: the attacks on those that remained

135. Phase Three, the attacks on those that remained. Phase Three, the deadly aftermath, took place in the Krajina for several months after the initial operations were completed.

136. Let me borrow, if I may, a perspective employed by Sir Keir Starmer when analysing the Vukovar operation: "[l]et us look backwards as to what had happened and then look forward to see what happened next"[105]. So far as the look backwards is concerned, our submission is that it exposes the Applicant's case for what it is — very far removed from reality.

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[103]See *R* v. *Woollin* [1999] 1 Cr App. R 8, HL for an enunciation of the test for ascertaining intention in the UK jurisdiction.

[104]*Bosnia* Judgment, pp. 126-127, para. 199.

[105]CR 2014/8, para. 33 (Starmer).

137. The Applicant's principle claim is that Operation Storm was not the physical destruction of the Serb population of the Krajina, but a lawful operation designed to "to achieve the lawful restoration of control over its sovereign territory"[106]. Failing this explanation, they might settle with it being an ethnic cleansing campaign, rather than a genocidal one, since it avoids the Court's jurisdiction.

138. I am inviting the Court to examine both propositions. Looking back, by 8 August 1995, Operation Storm with regard to either objective was an unmitigated success. In the words of General Leslie, it was "conducted with a high degree of expertise. If the aim was to ensure that the local population was cleansed from the region."[107]

139. I now want to look forward, because, on any view, whether my analysis of Phase One or Two is right or wrong, on 8 August, nobody could argue with the proposition that the Krajina Serbs were on their knees. Nearly 200,000 civilians had been humiliated, tortured, killed, or removed in three or four devastating days. Cold-hearted efficiency does not begin to describe the look backwards. A five-year struggle brutally ended. Demoralized and running for their lives with the few belongings and shreds of dignity that could be carried along.

140. Mr. President, Members of the Court, if there was ever an opportunity to test the real intent of the Croatian forces, this was it. They had recovered their territory; they had cleansed their territory. This ought to have been the end of the violence.

141. What happened next is undoubtedly the most shocking aspect of this whole operation and will assist this Court in deciding the real intent.

142. Those that remained were those who could not leave; the most vulnerable, the elderly, the disabled and the infirm. Unlike the unfortunate victims in Phase Four of the Vukovar operations, these were not selected because they were known or suspected to have involvement in military activities[108].

143. There can be no pretence that the Croatian leadership had not planned it this way. As noted by General Janko Bobetko, Chief of the Croatian Main Staff at that time, in his book *All My*

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[106]RC, para. 12.3.

[107]See ICTY, *Gotovina et al.*, testimony of witness Andrew Leslie, 22 Apr. 2008, Transcript, p. 2015.

[108]ICTY, *Mrkšić*, Trial Chamber Judgement, para 476.

Battles, the operations from 1994 through to Operation Storm were part of a concerted plan that had "worked out all the assignments to the minutest detail"[109].

144. As noted by Gotovina during the Brioni planning Phase One, if they "continued the pressure, there won't be so many civilians just those who have to stay, who have no possibility of leaving"[110].

145. No doubt those, like Mile Sovilj and Božo Šuša, whose evidence was summarized to you on Wednesday, had been persuaded to stay because as Tuđman had claimed, those who "had not bloodied their hands" were permitted to remain. As the *Gotovina* Trial Chamber found — paragraph 2373 — Gotovina was aware of the likelihood of attacks; of course, we do not need a finding in a judgment to know that.

146. The moment in history we heard from Sir Keir Starmer prior to the Applicant's Phase Four, was but one moment in this horrible civil war. *This* was the moment, more chilling than any in the Croatian war.

147. As President Tuđman noted, during the Brioni meeting, with regard to the Croatian forces prior to the Operation, "it was difficult to keep them on a leash"[111]. This was the moment when the Croatian forces were well and truly off that leash.

148. The abled bodied driven out. Five thousand (5,000) trapped. No threat to any territorial integrity, no threat to independence, no threat to man or beast. Surrounded, defenceless, waiting.

149. Independent evidence from Croatian organizations and United Nations personnel demonstrate that the abandoned population that remained in Sector South and North were systematically targeted by Croatian forces, which worked hard to prevent the United Nations from entering the towns and villages, to conceal this genocidal conduct. At least 120 were found with shots in the back of the head. Hundreds were killed in Sector South and Sector North. The true number will probably never be known[112].

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[109]CMS, fn. 1040.

[110]Brioni Minutes, p. 15.

[111]Brioni Minutes, p. 10.

[112]Example, CMS, paras. 1258-1312.

150. As reported by the European Community Monitoring Mission (ECMM), by the end of September 1995, 73 per cent of Serb houses were burned and looted in the 243 villages investigated[113]. This means thousands of homes. As reported by the United Nations on the 4 November 1995, in Sector South alone, 17,270 houses were destroyed or damaged after the commencement of Operation Storm[114].

151. Although denying responsibility, the Applicant admits that there was "continued burning and looting" as late as 9 September 1995[115]. Over a month after this alleged cleansing operation was supposed to be completed, when the area was under the control of the Applicant, the Krajina, the Serbs and their property continued to burn.

152. And it did not end there; Croatian forces killed livestock, polluted wells and waterways, stole and removed property, including firewood stored for the upcoming winter[116]. Symbols of the Serbian community in the area were also destroyed during and in the aftermath of the operation — houses, churches, monasteries and cultural monuments were devastated and burnt[117].

153. The United Nations report noted that virtually every abandoned Serb property was looted[118]. The looting of Serb property decreased only in October, but according to the report only because "there was nothing left to loot"[119].

154. This evidence is corroborated by the *Gotovina* Trial Chamber judgement, which found that Croatian military forces and Special Police continued to target the Krajina Serb civilian population. They committed a large number of murders, inhumane acts, cruel treatment, acts of

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[113]CMS, para. 1325; RS, para. 773.

[114]CMS, Ann. 58.

[115]RC, paras. 11.103-11.108.

[116]CMS, fn. 1271.

[117]CMS, fn. 1272.

[118]Report on the situation of human rights in Croatia pursuant to Security Council resolution 1019 (1995), 25 Dec. 1995, UN doc. S/1995/1051, p. 5.

[119]UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 Oct.-4 Nov. 1995 (drafted by Major Peter Marti and Captain Kari Anttila) (CMS, Ann. 58).

destruction and plunder throughout August and September 1995[120]. Nothing in the *Gotovina* Appeal judgement touches this finding.

155. These findings and the totality of evidence shows the horrendous destruction and, *inter alia*, the systematic expulsion from homes, the denial of basic services, the deprivation of proper housing, clothing and hygiene[121], and otherwise the creation of circumstances that would have led to a slow death for this already ailing population.

156. As the Krajina and its people burnt, what did Tuđman do? Did he take steps to calm the situation or did he fan the flames of these genocidal acts?

157. As found by the Gotovina Trial Chamber, and not disputed by the Applicant, a few weeks after Operation Storm, Tuđman spoke at a public gathering in Knin. With regard to the town he stated:

> "But today it is Croatian Knin and never again it will go back to what was before, when they spread cancer which has been destroying Croatian national being in the middle of Croatia and didn't allow Croatian people to be truly alone on it's [sic] own, that Croatia becomes capable of being independent and sovereign state. . . . They were gone in a few days as if they had never been here, as I said . . . They did not even have time to collect their rotten money and dirty underwear."[122]

158. And so ends my look forward. As Croatian Defence Minister, Špegelj stated in 1991:

"Listen to me Commander. First, your entire Command will be defeated, no one will survive, we will spare no one. Give up all illusion on raising alarm."[123]

159. And so what had been promised had finally been accomplished. If any doubt could remain that the intent underpinning Operation Storm was not limited to only the expulsion or mere dissolution of the Krajina Serbs but their physical destruction, this final phase — Phase Three — ought to well and truly dispel it.

Concluding Remarks

160. So, to conclude: most of the 200,000 men, women, and children, who were living in the area, were uprooted and, in an atmosphere of terror, forced out of their homes to be killed,

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[120]ICTY, *Gotovina et al*., Trial Chamber Judgement, para. 2307.

[121]*Akayesu*, Trial Judgement, 2 Sept. 1998, para. 506; see also *Kayishema and Ruzindana*, Trial Judgement, 21 May 1999, para. 116; and *Brđanin*, Trial Chamber Judgement, 1 Sept. 2004, para. 619.

[122]*Gotovina et al*., Trial Chamber Judgement, para. 2306.

[123]MC, Ann. 148.

physically and mentally harmed or forced to leave Croatia. The elderly, the sick and the disabled, however, were consigned to a separate fate, subjected to pitiless and chilling attacks that made continued existence impossible. The Respondent submits there can be no doubt that all these acts constituted a single operation, planned at Brioni, executed with the intent to destroy the Krajina Serbs. The Croatian leadership knew that the combination of the crimes would inevitably result in the physical disappearance of the Serbians from Croatia and clearly intended through these acts to physically destroy this group.

Article III of the Genocide Convention

161. The Respondent also submits that if the Court is not satisfied on the primary case, Croatia is responsible under Article III *(b)* to *(e)* of the Convention for conspiring, incitement, attempting or complicity in genocide. All the arguments I have made apply to these forms of responsibility.

Article IV: failure to punish Genocide

162. Finally, I turn to the Applicant's failure to punish. As noted by the Applicant,

> "[T]he importance of the obligation in Article I to punish acts of genocide is reflected throughout the Convention's provisions. Article IV expressly requires that persons committing acts of genocide or any of the other acts enumerated under Article III shall be punished, 'whether they are constitutionally responsible rulers, public officials or private citizens'."[124]

163. As was shown in the Respondent's Counter-Memorial, the Croatian judiciary has never initiated proper criminal proceedings against the perpetrators of crimes committed during and after the operation Storm, even for war crimes or crimes against humanity.

164. The evidence relied upon by the Applicant to suggest that it has fulfilled its obligation to prosecute should be approached with healthy scepticism.

165. The Applicant relies upon the "OSCE Report on war crimes proceedings in Croatia, dated 27 October 2009". However, this report advances an unresolved contradiction. On the one hand, it suggests that Croatia is "working towards judicial addressing of war incidents as comprehensively as possible"; on the other, the report suggests that "serious unprosecuted war

[124]RC, para. 9.82.

crimes" remain as a "main issue"[125]. None of the Applicant's evidence appears to deal with this issue or provide evidence that shows that this has been resolved[126].

166. There is no evidence that Croatia has prosecuted perpetrators of crimes committed during Operation Storm. Confirming that it accepts something of the scale of the destruction in Phase Three, the Applicant claims in the Reply that, "the Croatian police and judiciary instituted several hundred proceedings concerning the destruction of Serb property"[127]. However, the Applicant tiptoes around the subject and fails to provide any corroborative detail.

167. The Applicant avoids quantifying any evidence in support of the claim. Despite being singularly in control of the whole region from 5 August 1995 onwards, the Applicant does not assist the Court with any details of these "several hundred cases", the precise destruction that occurred, or otherwise explaining how, despite 150,000 military forces in the region, this destruction was allowed to occur.

168. The Applicant claims that its obligation, if it exists, has "been discharged by the Applicant's co-operation with the ICTY in its prosecution of Gotovina, Markać and Čermak"[128]. In light of the undoubted hundreds of perpetrators, this could not stand as adequate discharge of its international obligation.

169. There is not a single admission in hundreds of pages of pleadings that might suggest that the Applicant for one moment accepts that the Republic of Croatia, Tuđman's leadership, did anything wrong during Operation Storm.

170. Of course, the Applicant has not fulfilled this obligation: 5 August is a day of public celebration. The participants in Operation Storm are heroes, not suspects or criminals. Plainly the Applicant has breached its obligation to punish, as provided by Articles I and IV of the Convention.

171. Thank you for the time, Mr. President, honourable Judges, Perhaps it is time for a break.

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[125]RC, para. 2.69(2), citing OSCE Status Report on Mandate-related Developments and Activities, 27 Oct. 2009, p. 2.

[126]*Ibid.*, paras. 2.70 – 2.80.

[127]RC, paras. 11.106, 11.108.

[128]APC, para. 4.42.

The PRESIDENT: Thank you, Mr. Jordash. The sitting is suspended for 15 minutes.

The Court adjourned from 11.20 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and Professor Schabas, I give you the floor. Please, proceed.

Mr. SCHABAS: Thank you very much, Mr. President, Your Excellencies, may it please the Court. This is Serbia's final presentation in this first round of pleadings, with the exception of a few brief comments by the Agent that will follow my remarks this morning.

REBUTTAL TO CROATIA'S ARGUMENTS CONCERNING SERBIA'S COUNTER-CLAIM

1. I will focus on the Additional Pleading filed in August 2012 by Croatia, as well as on an even more recent development that is not addressed in any of the written submissions. I am referring, of course, to the judgement of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Gotovina* and *Markač* issued in November 2012.

2. Members of the Court, Serbia did not choose to institute proceedings before the International Court of Justice (ICJ). It would have been Serbia's hope that after the decision of this Court in the *Bosnia* case, Croatia would have understood the fragility of its reliance upon the terms of the 1948 Genocide Convention and discontinued these proceedings. That did not prove to be the case. Serbia has therefore set out its own counter-claim. It is of course distinct from a defence on the merits, but the counter-claim is also related to it in the sense that, to use the words employed by the Court, the counter-claim "reacts" to the claim[129]. The Court has noted the dual functions of a counter-claim. It attempts to obtain the dismissal of the Application on the merits, thereby resembling a defence, but it also goes further by widening the original subject-matter of the dispute[130], as is the case in these proceedings. Of course, a counter-claim alleging genocide can never provide a full defence to a charge of genocide, the prohibition of which is an *erga omnes*

[129] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27.

[130] *Ibid.*

obligation[131]. But it is an entirely legitimate and proper as a response by a Respondent who has been compelled to appear before the Court by an unfounded and legally unsound application.

3. The narrative that emerges from various sources, including the 2007 Judgment of this Court and the case law of the ICTY, presents the Court with a complex conflict beginning in 1991 and concluding with the Dayton Agreement in late 1995, and one that has often been characterized by the label "ethnic cleansing". As the former Yugoslavia broke apart and new States were created, various actors resorted to the use of force, including serious violations of international humanitarian law and international human rights law, in order to promote new State formations that were more homogeneous in an ethnic sense than had previously been the case in the multi-national State created in 1919 upon the ruins of the old empires in Eastern and Central Europe. One of the largest single episodes of ethnic cleansing in the conflict took place in August 1995 when 200,000 residents of the Krajina were, in the space of a few days, driven from their ancestral homes, most of them never to return. The 2011 census of Croatia presents us with the scale of the transformation that has taken place within that country's borders: there were 186,633 ethnic Serbs living in Croatia in 2011, about 32 per cent of the total of ethnic Serbs who were living in the country twenty years earlier. A large proportion of this is a consequence of Operation Storm.

4. In the 2007 Judgment, the Court discussed the concept of "ethnic cleansing", noting that in practice it meant "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area". I will not refer in detail to paragraph 190 of the 2007 Judgment; it has already been cited abundantly in these proceedings. There is no disagreement among the Parties that although genocide and ethnic cleansing are not synonymous — to use the words of the Court in the *Bosnia* Judgment — "acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent . . . inspiring those acts"[132]. In other words, acts of ethnic cleansing may provide evidence of an attempt to destroy the group. This is what the Court

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[131] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35.

[132] *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. 122, para. 190.

said in 2007. And it is especially relevant, I would submit, Mr. President, Members of the Court, when the group is in fact destroyed, as is with the case of the Krajina Serbs.

The *Gotovina* Judgements

5. Let me turn to the problems posed by the *Gotovina* judgements. Since the last written submissions were filed in this case, there have been important developments in the case law of the ICTY. The *Gotovina* case was a proceeding involving three defendants in the Croatian military and civilian hierarchy that was concerned essentially with conduct during Operation Storm. When the Applicant made its final written submissions in the Additional Pleading of the Republic of Croatia, dated 30 August 2012, the Trial Chamber judgement in *Gotovina* had already been issued. The Applicant claimed to find determinations and assessments of the unanimous Trial Chamber that it said were helpful to its case and damaging to the counter-claim, but this was putting a brave face on what was a very inconvenient decision for Croatia.

6. Because of this, in Applicant's final submission, the Court was continually reminded of the fact that the *Gotovina* Trial Chamber decision was under appeal. Rather detailed attention was given to some of the materials submitted by the appellant in that case, by the Prosecutor, especially the reports generated from military experts in the United States[133]. Obviously, Serbia would have preferred that the *Gotovina* Trial Chamber judgement be confirmed by the Appeals Chamber, and it would have if one judge had gone in the other direction. Perhaps if it had, it would have been easier to convince the Applicant of the futility of its claim. Applicant was itself actually quite nervous about the Appeals Chamber proceedings. And in words that it probably now regrets having included in its written pleadings, the Applicant warned this Court about attaching too much authority to the Appeals Chamber decision yet to be issued[134].

7. Things did change dramatically with the Appeals Chamber judgement in *Gotovina*. There were only two defendants by this point, because one of the three accused had been acquitted by the Trial Chamber, and that part of the decision was not appealed by the Prosecutor. The two remaining defendants were both acquitted by the Appeals Chamber. And it is an understatement to

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[133]Additional Pleading of the Republic of Croatia (APC), paras. 3.38-3.39.

[134]APC, para. 4.12 *(b)*.

say that the Appeals Chamber judgement was controversial. Two dissenting judges used exceedingly strong language in their opinions, harsh language that is very uncharacteristic of the separate and dissenting opinions of the Chamber when we look at the ensemble of the jurisprudence of the Appeals Chamber. Judge Pocar, a former president of the ICTY, wrote: "I fundamentally dissent from the entire Appeal Judgement, which contradicts any sense of justice.'[135] Judge Agius, currently the Vice-President of the Tribunal, wrote: "I respectfully but strongly disagree with almost all of the conclusions reached by the Majority in this Appeal Judgement."[136]

8. Mr. President, Your Excellencies, much has been said in these proceedings about the significance of the ICTY materials, and I will not repeat my remarks of earlier in the week. In the *Bosnia* case, the Court said that it attached "the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it", adding that "in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute". And therein lies the rub. In the *Bosnia* case, the trial and appellate judgments were relatively consistent with respect to determining the scope of the crime of genocide. The Court was not dealing with a matter where the Tribunal was itself sharply divided. In the present proceedings, the divergent views of the Trial Chamber and the majority of the Appeals Chamber, not to mention the two ferocious dissenting opinions, present the Court with a dilemma that it did not encounter in 2007.

Authority of the Appeals Chamber

9. Of the eight judges of the ICTY who sat in *Gotovina*, at the Trial and Appeals Chamber, three in the Trial Chamber and five in the Appeals Chamber, five of them were in favour of convicting Gotovina and Markač. The Trial Chamber was presided by Alphonsus Orie, a very distinguished Dutch criminal law specialist who worked, in his capacity as a defence lawyer, in the early years of the Tribunal. Judge Orie was elected to the ICTY in 2001 and has served as a Trial Chamber judge on many of its important cases. You may remember seeing him on the video two days ago when there was an examination and cross-examination of the witnesses. Judge Orie's

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[135] *Prosecutor* v. *Gotovina et al.*, IT-06-90-A; dissenting opinion of Judge Fausto Pocar, para. 39.

[136] *Ibid.*; dissenting opinion of Judge Carmel Agius, para. 1.

views, and those of his two colleagues of the Trial Chamber — admittedly disputed by three judges on the Appeals Chamber — are nevertheless still deserving of this Court's attention. In the Appeals Chamber, the two dissenting judges are also legal minds of great distinction and authority. Judge Fausto Pocar, who was originally elected to complete the term of the late Antonio Cassese, has himself served as President and was, before that, a member and also chairman of the United Nations Human Rights Committee. Judge Carmel Agius served as a senior trial and appellate judge in Malta for more than two decades before being elected to the ICTY, where he is currently the Vice-President. Their views are not to be taken lightly either.

10. Let me make it clear that I do not in any way mean to cast aspersions on the credentials of three judges in the majority in *Gotovina*, and especially to suggest any reproach directed against President Theodor Meron, who is a great jurist and someone who has made huge contributions to international law. But his judgments are sometimes controversial and he may well have been mistaken in *Gotovina*. One much disputed ruling that he made a few months after *Gotovina* was recently declared by the Appeals Chamber to have been wrongly decided, founded upon what the Chamber called a "flawed premise"[137].

11. Mr. President, Members of the Court, within national justice systems, there is a general sense that the judgments of the highest courts, the apex courts, the supreme courts, are superior not only to the extent that they trump the judgments of the lower courts as a matter of law but also because they are of finer quality and therefore more authoritative in a substantive sense. The reason for this view is that by and large the members of the highest courts are drawn from among the most experienced, senior and sophisticated jurists in the land. Indeed, were this not so, the highest courts would lack the gravitas that is essential for them to fulfil their role as the supreme arbiters. But this is not necessarily the case at the international criminal tribunals.

12. The first international criminal tribunals, the International Military Tribunal and the International Military Tribunal for the Far East, had no appeals chamber. There was no right of appeal. The ICTY was the first international criminal tribunal with a right of appeal. The Statute of that Tribunal, as proposed by the Secretary-General and adopted by the Security Council,

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[137] *Prosecutor* v. *Šainović* (ICTR- IT-05-87-A), Judgement, para. 1623.

provided that there be an appeals chamber because it was necessary to ensure a right of appeal to a convicted person. The Secretary-General said this was because the right of appeal was a fundamental element of individual civil and political rights[138]. The Statute of the Yugoslavia and Rwanda Tribunals, the same could be said about the ICC, does not make any distinction between the experience, abilities or status of judges at the Appeals Chamber. How are the members of the Appeals Chamber selected? This is decided internally, amongst the judges themselves, in the most opaque manner, where a variety of factors unrelated to the knowledge and abilities of the individual may come into play. All of this is to say that the presumptions that we may have about the qualities of the individuals making up the higher and supreme judicial bodies at the national level are not necessarily applicable at the ICTY. It seems from the Statute that the superior status of the Appeals Chamber is established by virtue of only one principle: it is larger. Whereas there are three judges in a Trial Chamber of the Tribunal, there are five at the Appeals Chamber. This is not unlike the situation at the European Court of Human Rights, where the judges are all equal but where the Grand Chamber is more authoritative because it is more than twice the size of a Chamber.

13. As far as the Prosecutor and the defendant — the Parties to the case — are concerned, a three-judge majority of the Appeals Chamber overturns a unanimous three-judge Trial Chamber, as is the case in *Gotovina*. But the Court here is not concerned with the binding effect of the judgment. Rather, the question is whether or not the various determinations of the Trial and Appeals Chambers are persuasive. From that perspective, viewing the reasons of the three-judge majority of the Appeals Chamber as triumphing over those of the unanimous Trial Chamber is, I would submit, simplistic, and mechanistic as a way of analysing these complex cases. It is for that reason that the more accurate view of *Gotovina* may require us to describe the Tribunal as a division of five judges to three, with a majority concluding there was a joint criminal enterprise involving the highest levels of the Croatian régime aimed at removing Serbs from the Krajina.

14. Mr. President, Your Excellencies, ultimately, the value that this Court may extract from the *Gotovina* jurisprudence will be rooted in its assessment of the quality of the reasoning of the

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[138]Report of the Secretary-General pursuant to para. 2 of the Security Council resolution 808 (1993), UN doc. S/25704, 3 May 1993, para. 116.

various opinions. Here, the detailed and lengthy consideration of evidence by the Trial Chamber ought to weigh heavily in its appreciation by the International Court of Justice. This Court may also attach some significance to the very laconic, summary nature of the reasons of the Appeals Chamber majority, a flaw that is cited by both dissenting judges. Indeed, the Appeals Chamber majority was silent on many significant issues of fact that were in fact determined by the Trial Chamber when it found Gotovina and Markač guilty.

15. For these reasons, the Court should adopt a careful and nuanced approach to the disputed message that emerges from the ICTY in the *Gotovina* decisions.

The crime against humanity of persecution

16. In its Supplementary Observations, filed several months before the Appeals Chamber issued its decision in *Gotovina* — the additional pleading — the Applicant stated that even if the decision were to be upheld it would not be helpful to the counter-claim[139]. Croatia rejected the idea that the crime against humanity of persecution had been perpetrated as part of the joint criminal enterprise that involved President Tudjman and other high officials in the Croatian régime. *Ergo*, the Trial Chamber undermined the proposition that even a "lesser" form of genocide took place during Operation Storm, this was Croatia's position.

17. Croatia's thesis rested on two fundamental errors, derived from misreading not only the decision of the Trial Chamber but also the Judgment of this Court in the 2007 *Bosnia* case. First, Applicant has misunderstood the relationship between genocide and crimes against humanity. Second, Croatia's selective reading of the *Gotovina* Trial Chamber decision overlooked the fact that on several occasions the Tribunal concluded that the crime against humanity of persecution was indeed part of the joint criminal enterprise.

18. Mr. President, Your Excellencies, on more than one occasion in its submissions, Croatia has described genocide as an extreme form of crime against humanity, relying here upon reference to the 2007 Judgment of this Court. Applicant associates genocide with the crime against humanity of persecution[140]. Applicant attaches considerable importance to this point, saying that this

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[139]APC, paras. 1.3, 4.11, 4.16, 4.19.

[140]*Ibid.*, paras. 1.3, 4.15.

"undermines" the counter-claim[141]. Even if in reality the point may not have much bearing on the decision to be reached in this case, it seems prudent to address it, if for no other reason than to assist the Court, should the matter be addressed in your judgment. In the 2007 Judgment, the Court spoke of the relationship between genocide and crimes against humanity and did in fact cite a decision of a Trial Chamber of the ICTY where this was discussed[142]. We may dispute whether or not the Court meant to incorporate everything in the lengthy citation as its own view on the matter. Be that as it may, there is much other authority within the case law of the international criminal tribunals for viewing the two categories, genocide and crimes against humanity, as having a certain degree of autonomy.

19. The Appeals Chamber of the ICTY, in the leading case, *Prosecutor* v. *Krstić*, could not have been more unequivocal: "The offence of genocide does not subsume that of persecution."[143] The Appeals Chamber noted differences in the intent requirement, explaining, for example, that unlike crimes against humanity "the intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians"[144]. Another useful authority is the Report of the International Commission of Inquiry into Darfur, presided over by the late Antonio Cassese, set up pursuant to a Security Council resolution in 2004. It noted that "[g]enocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*."[145] I submit this material to the Court to be of assistance in studying this problem.

20. In the Additional Pleading, Applicant states that the Trial Chamber "rejected . . . in their entirety" the contention that "persecution by murder, inhumane acts, cruel treatment, disappearances, plunder or wanton destruction" made up part of the joint criminal enterprise[146]. Applicant contends that the Trial Chamber only entered convictions for the "less serious form" of

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[141]APC, paras. 4.15-4.16.

[142]*Bosnia*, p. 121, para. 188.

[143]*Prosecutor* v. *Krstić* (IT-98-33-A), Judgement, para. 229.

[144]*Ibid.*, para. 226.

[145]Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN doc. S/2005/60, para. 522; emphasis in the original.

[146]APC, para. 4.13.

the crime against humanity of persecution[147]. Let me quote from the *Gotovina* Trial Chamber judgement's discussion of the joint criminal enterprise. At paragraph 2310, this is on your screens, the Trial Chamber states:

> "the crimes of deportation and forcible transfer were central to the joint criminal enterprise. The acts taken by members of the political and military leadership in this respect aimed to target, and did target Krajina Serbs and were therefore discriminatory. The Trial Chamber therefore finds the objective of the joint criminal enterprise also amounted to the crime of persecution (deportation and forcible transfer)."

I apologize to the Court, there is no French-language version of this judgement available, so we have no official translation. The next paragraph, paragraph 2311:

> "[M]embers of the Croatian political and military leadership took the decision to treat whole towns as target for the initial artillery attack. Deportation of the Krajina Serb population was to a large extent achieved through the unlawful attacks against civilians and civilian objects in Knin, Benkovac, Obrovac, and Gračac, which the Trial Chamber has found were carried out on discriminatory grounds. Based on the foregoing, the Trial Chamber finds that unlawful attacks against civilians and civilian objects, as the crime against humanity of persecution, were also intended and within the purpose of the joint criminal enterprise."

And further [Paragraph 2312] the "joint criminal enterprise also amounted to, or involved, imposition of restrictive and discriminatory measures as the crime against humanity of persecution". And finally, paragraph 2314:

> "the Trial Chamber finds that members of the Croatian political and military leadership shared the common objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer."

None of this can be surprising in light of the materials that have been presented to you over the last two days.

21. Applicant distorts the import of the Trial Chamber judgement by focusing on what appears to be a largely technical distinction that was made with respect to forms of persecution. Gotovina and Markač were indeed convicted of the crime against humanity of murder[148]. The Trial Chamber said that "the murders as set out in chapter 5.3.2 and the murder of Petar Bota constitute

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[147] APC, para. 4.15.

[148] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, paras. 1726-1736.

persecution as a crime against humanity"[149]. They were also convicted of the crime against humanity of "inhumane acts" and of the war crime of "cruel treatment"[150]. The Chamber concluded that "the inhumane acts and cruel treatment . . . constitute persecution as a crime against humanity"[151]. The murders, inhumane acts and cruel treatment for which Gotovina and Markač were convicted under the general heading "crimes against humanity" were not part of the joint criminal enterprise as such, but they were deemed to be the natural and foreseeable consequences of the joint criminal enterprise to remove permanently the Serbs from the Krajina[152].

22. Mr. President, Members of the Court, this is how the theory of the joint criminal enterprise operates. An individual who participates in a joint criminal enterprise can be convicted not only of the crimes he or she intended and that were part of the joint criminal enterprise, but also those that were natural and foreseeable consequences. The Trial Chamber did not, of course, conclude that the joint criminal enterprise included genocide, which was not charged in the indictment. But its finding that there was a joint criminal enterprise aimed at the permanent removal of the Serb population from the Krajina can hardly be said to undermine the counter-claim.

The 200-metre issue

23. The Applicant briefly raised the issue of the 200-metre standard that had been applied by the Trial Chamber in *Gotovina*. The Trial Chamber established a kind of evidentiary presumption that artillery shells landing more than 200 metres from a legitimate military target were either aimed at civilian objects or were fired with indifference or disregard for civilian objects. This matter became the heart of the Appeals Chamber ruling and, inevitably, of the two dissenting opinions. The three judges of the majority of the Appeals Chamber in *Gotovina* said the 200-metre limit adopted by the Trial Chamber was arbitrary and without foundation, although it did not propose anything to take its place. Had the present case, this case, been heard by the International Court of Justice two years ago, I doubt that we would have lingered on the 200-metre issue. Perhaps it would not have been discussed at all.

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[149] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, para. 1855.

[150] *Ibid.*, paras. 1792-1800.

[151] *Ibid.*, para. 1861.

[152] *Ibid.*, para. 2601.

24. The Counter-Memorial explained that "artillery fire was of special importance for the Croatian army in operation *Storm*"[153]. Serbia cited the incendiary remarks of President Tudjman at the Brioni Conference and Gotovina's loyal response that he could destroy Knin in the entirety in a few hours[154]. Serbia referred to the statements of independent international observers and monitors who were present in Knin during the artillery bombardment[155]. The Counter-Memorial described the indiscriminate shelling of other towns[156]. No mention was made anywhere of a 200-metre standard. The elements of evidence that Serbia invoked were discussed in great detail by the Trial Chamber and in the dissenting opinions in the Appeals Chamber, especially the opinion of Judge Agius, but we could not of course have known that because the Counter-Memorial was filed nearly a year and a half before the Trial Chamber Judgement was issued.

25. The 200-metre limit did not figure in the Reply of the Applicant either. The Reply was filed four months before the *Gotovina* Trial Chamber decision[157].

26. Serbia did not even mention a 200-metre limit in the Rejoinder, filed six months after the Trial Chamber decision. Serbia did refer to the judgement, of course, but it selected as an exemplary citation a discussion of the shelling in which the Trial Chamber said "that at distances of 300 to 700 metres" the impacts were "relatively far away from identified artillery targets", and that a significant number of shells fell within that zone[158].

27. The 200-metre limit was one component of the analysis adopted by the *Gotovina* Trial Chamber in its assessment of a variety of evidentiary sources. It was only one component and, as I have just mentioned, in at least one other part of the judgement the Trial Chamber seems to have looked at another standard, of 300 to 700 metres. Taken as a whole, these elements resulted in the conclusion that the artillery bombardment of Knin and of other cities was at times indiscriminate but that, even worse, it actually targeted non-military objectives. And, as the Court has seen, there is other evidence besides a presumption about the radius of targeting that supports this observation.

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[153]Counter-Memorial of Serbia (CMS), Vol. I, para. 1215.

[154]CMS, para. 1217.

[155]CMS, para. 1223.

[156]CMS, paras. 1225-1228.

[157]Reply of Croatia (RC), paras. 11.71-11.75.

[158]Rejoinder of Serbia (RS), para. 726.

In a part of its judgement, the Trial Chamber spoke of the 200-metre standard[159]. And the majority of the Appeals Chamber said that this was an error, moreover that it was decisive in tipping the opinion of the Trial Chamber to concluding that the artillery attack was indiscriminate, and that this in turn tipped the opinion of the Trial Chamber in its assessment of a range of other evidence indicating the brutal ethnic cleansing of Operation Storm, and that this in turn tipped the opinion of the Trial Chamber in concluding that Operation Storm was itself a "joint criminal enterprise" to remove ethnic Serbs from the Krajina.

28. As the dissenting judges point out, this was an extraordinary and unprecedented move by the Appeals Chamber, using one flaw in a massive judgment, pulling at it like a loose thread until the entire garment unravelled. Judge Agius noted the legal sleight of hand by which the three-judge majority used the 200-metre standard, as a pretext to review all of the evidence rather than articulate the correct legal standard, which it never actually did. He noted how the majority faulted the Trial Chamber for failing to justify its 200-metre standard, yet then concluded that there is no such standard and that, accordingly, the shelling could not be deemed indiscriminate. He said:

> "I find the fact that the Majority feels it can conduct a *de novo* review and come to its conclusions within just three paragraphs of the Appeal Judgement to be quite staggering, and, in my view, unfairly dismissive of the Trial Chamber's findings. I note that the Trial Judgement totals over 1,300 pages, with the evidence and Trial Chamber's findings on the unlawfulness of the attacks on the Four Towns set out over 200 pages."[160]

Judge Agius concluded that "the Majority has impermissibly tied all of the Trial Chamber's findings to the 200 Metre Standard, and then simply dismissed them, when it should instead have formulated and applied its own legal standard"[161].

29. Mr. President, Your Excellencies, I cannot do justice to the debate in the various opinions, majority and minority, in the Appeals Chamber decision as well as the exhaustive analysis of the facts in the more than 1,300 pages of the Trial Chamber judgement. They will no doubt be consulted by the Court as it deliberates on this case. I would only make one final

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[159] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, para. 1898.

[160] *Prosecutor* v. *Gotovina et al.* (IT-06-90-A); dissenting opinion of Judge Carmel Agius, para. 12 (reference omitted).

[161] *Ibid.*, para. 14.

observation on this subject. Because the majority of the Appeals Chamber hinged its entire analysis on the 200-metre issue, it did not discuss in any depth the other findings of the Trial Chamber. Consequently it did not really find fault with most of it, other than in a wholesale dismissal of the material because it said this was a logical consequence of the rejection of the 200-metre standard. In other words, should this Court be attracted by the analysis of the dissenting judges in the Appeals Chamber, it will then find that the bulk of the findings of the Trial Chamber on a range of issues concerning Operation Storm are unchallenged and compelling. As a general proposition, its findings are very supportive of the evidentiary submissions and the legal analysis associated with the counter-claim. The Trial Chamber did not, of course, pronounce itself on the genocide issue, but that is because genocide had not been charged.

30. In challenging the basis of the counter-claim, the Applicant says that Serbia bases its argument on only one episode, Operation Storm, which took place over a period of several days, contrasting this with its claim which recites a litany of abuses over a much longer period of time. Croatia seems to have lost sight of the case law of this Court. Presumably Croatia would also dismiss the view that genocide took place at Srebrenica because of the short duration of the violent attack. In its Additional Pleading, the Applicant seems to suggest that we have not produced evidence before the Court, and that we rely entirely on factual findings by the Trial Chamber in *Gotovina*[162], and Mr. President, Members of the Court, you know that this is not the case. It is an absurd suggestion. Our counter-claim with supporting evidence was filed here at the Court long before the *Gotovina* judgement. Much of the most valuable evidence, of course, was produced during the trial of Gotovina and the others, but surely that is to be expected. The Prosecutor did not charge genocide, but most of the facts that he used to make his case for crimes against humanity are also germane to proof of the crime of genocide. Serbia's case certainly does not stand or fall on evidentiary findings by the Trial Chamber in *Gotovina* about killings, serious bodily and mental harm and conditions of life calculated to destroy the group.

[162]APC, paras. 4.23-4.30.

Brioni

31. Mr. President, Members of the Court, I now turn to the Brioni meeting, the Brioni transcript. In the annals of genocide, ethnic cleansing and related atrocities, it is rare to be able to pinpoint a meeting where a plan to destroy a group was prepared, presented and discussed. The celebrated example, of course, is the Wannsee Conference of February 1942. This meeting of senior Nazis plotted the destruction of the Jews in Europe using the notorious euphemism of the "final solution". Some so-called historians who deny or trivialize the persecution and destruction of the Jews argue that the conference was ambiguous, anodyne and insignificant, and that the words used and the records kept defy interpretation, raising questions about what was meant rather than providing answers. But taken in its context, including the racist campaign that preceded it as well as an understanding of the tragedy that followed, there is no doubt about the core of what was decided at Wannsee.

32. Is Brioni any different? The Applicant argues that the meeting has been misrepresented, that the records are complete and equivocal. In passing, it should be noted that when the Brioni transcript appears to be helpful, for example in its suggestion that an escape route be left, the Applicant is more than happy to rely upon it[163]. The Applicant also claims that our case stands or falls on Brioni, as if evidence of a planning meeting is required in order to make a case that genocide has been committed. But were that the case, the Applicant would be better to fold its tents and return home, because there is no such planning meeting alleged in the Application.

33. As it was with Wannsee, in understanding the significance of Brioni the context is everything. But I would submit that the fog of the meeting's transcript lifts when framed by what we know about what came after as well as what came before.

34. The Applicant alleges that the Brioni meeting contains no evidence of intent on the part of the Croatian leadership to bring about the physical destruction of the Serb civilian population of Krajina. Croatia maintains that it was no part of its political or military strategy to eradicate the Serb civilian population. The Applicant contends that the Respondent relies on a single sentence uttered by President Tudjman[164]. It further alleges a tortuous and disingenuous misreading on the

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[163]APC, para. 4.16.

[164]RC, para. 12.13.

part of the Respondent[165]. The Applicant claims that read objectively and in context, the words of President Tudjman during the meeting were directed to the lawful military objective of securing the defeat, retreat and expulsion of Serb military forces from the territory of Croatia.

35. Mr. President, Members of the Court, the Applicant attempts to characterize Operation Storm as the exercise of Croatia's legitimate right to liberate occupied territory[166]. It is portrayed as a just war. But Operation Storm was planned by a meeting of criminals, at Brioni. Whatever conclusion is reached about the existence of a genocidal plan — I will come to that in a moment — there can be no doubt that this was a meeting at which criminal acts were planned. Consider President Tudjman's remark at the meeting where he mixes civilians and combatants, saying that as a result of the attack, the civilians will set out, "and then the army will follow them, and when the columns set out, they will have a psychological impact on each other"[167]. This, by the way, is a remark that Applicant cites in support, curiously. But Tudjman, in those words, is targeting civilians, something whose prohibition by international law is beyond dispute. The Applicant has tried to portray Brioni as an innocent strategy meeting where lawful acts of war were organized. But in reality, as this remark by President Tudjman makes clear — although there is a mass of other evidence — it was a criminal conspiracy. Croatia may contend that this was not a meeting at which genocide was planned, a position that we obviously dispute. But it cannot argue that nothing unlawful happened at Brioni.

36. The Brioni meeting transcript provides conclusive evidence of the existence of a policy on the part of the Croatian leadership to eradicate the Serbs living in Krajina — military personnel and civilian population alike. The policy adopted at Brioni went beyond the aim of rendering the region "ethnically homogenous"[168]. The communication at Brioni reveals the intent to bring about the disappearance of the Serb population not simply through their removal, but likewise through their physical destruction.

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[165]RC, paras. 12.7 and 12.8; APC, para. 4.8.

[166]RC, para. 11.41 ff.

[167]Brioni transcript, p. 15.

[168]See the Applicant's contention to the contrary, APC, para. 4.9 ff.

37. Mr. President, Members of the Court, although the Applicant contends that the Brioni transcript should be read contextually and not selectively[169] — a position with which we of course agree — the Applicant fails to take into consideration the particular political, military and social background against the backdrop of which the Croatian Commander-in-Chief and the military leadership devised and planned Operation Storm. The determination of a State's responsibility under the Genocide Convention entails an analysis of the propensity of the State apparatus as a whole towards a particular attitude and treatment of an ethnic or national group — or a substantial part thereof — on a State level. Such a propensity is to be inferred from the general context and background against which concrete military actions are planned, devised and executed. Consequently, the determination of a pattern of conduct with respect to a specific national/ethnic group at a State level necessitates a thorough and comprehensive account of the overall political and social circumstances and sentiments that prevailed.

38. It is true that some of the statements made may lend themselves to more than one interpretation. Applicant has attached considerable significance to the remark by President Tudjman about leaving civilians a way out[170]. Here is what he said:

> "[W]e must take those points in order to completely vanquish the enemy later and force him to capitulate. But I've said, and we've said here, that they should be given a way out . . . Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other."[171]

It is posited that this shows some sort of charitable, humanitarian and benevolent spirit on his part. The overall context, however, leaves no doubt about what was going on. I can do no better here than to cite Judge Fausto Pocar in his dissent in *Gotovina*, highlighting a passage in the Trial Chamber judgement, to the effect that "the references at the meeting to civilians being shown a way out was not about the protection of civilians but about civilians being forced out"[172]. Judge Pocar said, "In light of the Trial Chamber's careful and detailed review of the minutes of the

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[169]APC, para. 4.8.

[170]RC, para. 11.50.

[171]Brioni transcript, p. 15.

[172]*Prosecutor* v. *Gotovina et al.*, IT-06-90-A; dissenting opinion of Judge Fausto Pocar, para. 26, citing *Prosecutor* v. *Gotovina et al.*, IT-06-90-T, Judgement, para. 1995.

Brioni Transcript", he said it was "simply grotesque" to attach any benign interpretation to the Brioni transcript — "simply grotesque"[173].

39. Careful perusal of the relevant sections of the Brioni meeting transcript reveals that Tudjman's only concern was if the Serbs were forced to stand and "fight to the bitter end", this would exact "a greater engagement and losses on [the Croatian] side"[174].

40. Similarly, purely practical considerations underlie the insistence of Tudjman at Brioni that artillery should be used sparingly during the attacks, a statement to which Applicant attaches significance[175]. Tudjman was cognizant of the fact that at the time the Croatian military lacked enough ammunition. This was the only reason why the artillery attacks during Operation Storm did not reach the extreme magnitude of inflicting complete destruction on the Serbian side. Solid proof in this regard is provided by Tudjman's own words, reference to which has already been made by Mr. Obradović yesterday[176]. Let me briefly remind the Court what Tudjman said: "If we had enough [ammunition], I too would be in favour of destroying everything by shelling prior to advancing."[177]

41. In assessing the context, we turn first to the man who presided, the man who was in charge. And perhaps, had Franjo Tudjman lived longer, he would have found himself in the dock here in The Hague, perhaps charged with genocide. We might then benefit from his own attempts to explain the words he used at Brioni. Such an account might or might not be reliable, as is often the case when individuals attempt to explain and rationalize the awkward and discomforting comments they have made. But, the absence of Tudjman does not mean we cannot understand what he meant.

42. As a starting-point, it is to be noted that, albeit not direct evidence in itself, the character of a person may nevertheless provide an indication as to that person's propensity towards a particular pattern of behaviour or conduct — this is straightforward criminal law. The character of

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[173]*Prosecutor* v. *Gotovina et al.,* IT-06-90-A; dissenting opinion of Judge Fausto Pocar, para. 26, citing *Prosecutor* v. *Gotovina et al.*, IT-06-90-T, Judgement, para. 1995.

[174]Brioni transcript, p. 7.

[175]RC, para. 12.23.

[176]CR 2014/17, para. 31 (Obradović).

[177]Brioni transcript, p. 22.

a person may be relevant in the assessment of other circumstances, such as motive and intent, depending on the circumstances at hand. Although the subject-matter of the ICJ proceedings does not concern the individual criminal responsibility of the participants at the Brioni meeting, the ideological background of the person assuming the highest political and military position in the hierarchy of the Croatian State, thus, in a position implying the power to devise the State policy, is of undoubted relevance. The position of Head of State and Commander-in-Chief is in and of itself a powerful tool for implanting and promoting the personal beliefs and ideology of then President Tudjman as the policy of the Croatian State towards the ethnic Serb minority within its territory.

43. Mr. President, Your Excellencies, our written submissions, as well as remarks of my colleagues during these hearings, have drawn attention to Tudjman's character and his ideological outlook. I will not belabour the point any more here today except that there is nothing in Tudjman's profile to suggest any particular incompatibility between his world view and genocidal intent. That is probably an understatement.

44. As a member of the Croatian Democratic Union (*Hrvatska demokratska zajednica*, or *HDZ)* Tudjman was an ideologue who promoted reconciliation with the Ustashe movement. During the Second World War the Ustashe collaborated with the Nazis; after the war, it constituted a permanent terrorist threat to Yugoslavia until the country broke up. Tudjman's notorious racist views about both Muslims and Serbs have already been discussed by Mr. Obradović yesterday[178] and Mr. Jordash this morning.

45. Serbs were not the only targets of this monstrous and violent chauvinist, by the way. Last May, a Trial Chamber of the ICTY convicted several persons on the basis of their participation in a joint criminal enterprise with respect to Bosnia and Herzegovina of which Franjo Tudjman was at the top. The purpose of the joint criminal enterprise was, and I quote from the French because there is only a French language version of the judgement: "opérer le nettoyage ethnique de la population musulmane sur le territoire revendiqué comme étant croate"[179]; to

[178]CMS, para. 431; CR 2014/17, para. 150 (Obradović).

[179]*Prosecutor* v. *Prlić et al.*, IT-04-74-T, Judgement, Vol. 4, para. 1232.

conduct ethnic cleansing of the Muslim population on the territory claimed as being Croatian. Ethnic cleansing was this man's trademark, his "marc de commerce", his *modus operandi*.

46. Tudjman's perception of the Serbs was of persons — and you heard the quote — "spreading cancer in the heart of Croatia, cancer which was destroying the Croatian national being and which did not allow the Croatian people to be the master in its own house . . .'[180] The Court will find similar statements in the case law of the International Criminal Tribunal for Rwanda.

47. When Tudjman says, at Brioni, "we have to inflict such blows that the Serbs will to all practical purposes disappear"[181], his words were being understood and digested by other participants in the meeting who knew of his racist views and of his vision of the future of Croatia. The suggestion that he was inadvertently ambiguous strains credulity.

48. Often, when the application of the Genocide Convention is considered, there is a tendency to focus on the immediate circumstances, the acts of killing, causing mental and bodily harm, and deprivation of the means of survival, and on the number of victims and their geographic location. Sometimes this can distract us from the broader issue. Genocide is above all a crime of racial hatred. This is the feature that prompted the General Assembly, in the aftermath of the terrible crimes of the Second World War, to condemn it at its first session as an international crime[182] and to proceed, two years later, to adopt the Convention. It is the racial hatred associated with the acts that enables conclusions to be drawn about the intent behind them. The Brioni meeting is part of the context of Operation Storm. But the words spoken there need to be interpreted within this broader background of anti-Serb policy at a State level in Croatia.

49. The specific intent to destroy the Serb population of the Krajina is also suggested by the thirst of the Croatian leadership for a military attack. History provides other examples of the refusal of extremists, themselves bent on genocidal destruction of an ethnic group perceived as an enemy, to reach a negotiated settlement because it frustrates their ultimate goal. Only a year before Operation Storm, *génocidaires* in Rwanda sabotaged a process of peaceful settlement involving a

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[180]BBC Summary of World Broadcasts, 28 Aug. 1995, Part 2 Central Europe, the Balkans; Former Yugoslavia; Croatia; EE/D2393/C. Available at: http://emperors-clothes.com/docs/tudj.htm; video available at: http://www.youtube.com/watch?v=OOqB4sQ5am4. Speech of Tudjman in Knin on 26 Aug. 1995; CR 2014/17, para. 142 (Obradović).

[181]Brioni transcript, p. 2.

[182]UN doc. A/RES/96/I.

power-sharing régime in order to proceed with their "final solution" of what they called the "Tutsi problem". Perhaps Tudjman and his henchman had studied this case from Africa. What we can say is that a negotiated settlement was not sought by the Croatian leaders. We can even sense this in part of the Applicant's submissions, where there is talk of Croatia's right to retake territory and of the alleged validity of the military action and the use of force under international law. In fact, there was an adamant unwillingness on the part of Croatia to genuinely engage in negotiations for the peaceful resolution of the conflict with the ethnic Serbs living in Croatia.

50. The meeting of the Croatian leadership on 31 July 1995 and the subsequent events contemplated at Brioni, taken individually and in conjunction with each other, disclose the specific intent of the Croatian authorities to bring about the disappearance of the ethnic Serbs of the Krajina. The intent was to effect the disappearance from the region without differentiation as to Serb rebel forces or civilian population, including through their physical destruction. The Brioni communication entails a number of manifestations of genocidal intent each of which finds further reflection in the subsequent events that took place on the ground.

Krajina Serbs as an "ethnic group"

51. Mr. President, Members of the Court, another point to which the Applicant attaches some importance concerns the identity of the victims of Operation Storm. The Applicant begins Chapter 4 of the Additional Pleading by contesting Serbia's affirmation that the Serbs of the Krajina constitute a distinct community with its own historical significance. This is in a section entitled the "protected group". The relevant paragraphs[183] are not at all germane to the debate before the Court and I would suggest that you disregard them, except for the acknowledgment by the Applicant that the Krajina Serbs constitute an ethnic group for the purposes of applying Article 2 of the Convention. The two countries, Serbia and Croatia, may not agree about the historical description of the former and present residents of the Krajina who are of Serb ethnicity. This will come as no surprise to anyone. But of course that is not an issue that the Court needs to resolve. The only question is whether those peoples constitute one of the four groups protected by

[183]APC, paras. 4.3-4.4.

Article 2 of the Convention. Does Croatia really mean to suggest in those paragraphs that this is a matter of dispute?

52. The Applicant admits the following: that Croatian Serbs constituted a separate national or ethnic group and that the Serb civilian population in the Krajina "represented a substantial part of that group"[184]. Where the Applicant tries to obscure or muddy this point, and therefore distract the Court from its solemn task, is by quarrelling about whether the Serbs of the Krajina constitute a separate ethnic or national group. In the relevant paragraphs of the Applicant's final submission there is a hint that this point is of legal relevance to the dispute before the Court. The Applicant seems to concede that there are individuals that it describes as the "Serb civilian population" ordinarily resident in the part of Croatia that was defined as the RSK from 1992 to 1995. But, Mr. President, Your Excellencies, this "Serb civilian population" can only be one of two things: a distinct national, ethnic, racial or religious group or a substantial part of a distinct, national, ethnic, racial or religious group.

53. This is an issue to which the Court turned in the 2007 case when it considered that the Muslim population in Srebrenica and the surrounding region was a significant part of a group. In light of that precedent, it cannot be in dispute that the "Serb civilian population" ordinarily resident in the part of Croatia that was defined as the RSK, that Serbia has elected to describe as the "Krajina Serbs", falls within the scope of Article 2 of the Genocide Convention. Applicant would have saved us some time if it had just made this admission in a simple sentence instead of two rather distracting paragraphs that consume the better part of a page in the Additional Pleading.

54. Finally, let us note that the ICTY regularly uses the term "Krajina Serbs" without resorting to inverted commas, which one might expect if the expression were contentious or in some way loaded with political connotations.

Reasons for military intervention in the Krajina and the goals of Operation Storm

55. Regaining control over Krajina militarily was a long-standing plan of the Croatian political leadership. The peaceful reintegration of the territory of Krajina was not an option for Croatia. The Croatian authorities were determined to gain control over Krajina by force.

[184] APC, para. 4.4.

Indicative in this respect is President Tudjman's opening statement at the Brioni meeting[185], as well as the testimony of witness Galbraith — the American Ambassador — who when questioned in the ICTY *Gotovina* case stated: "Let me clarify. I knew substantially before June 10th, and this is reflected in lots of documents, that it was Tuđman's plan in 1994 to take the Krajina militarily."[186] It was, therefore, not the Serb, but the Croatian side that was intransigent and stalling for time, unwilling to engage in peaceful negotiation in good faith. And the Brioni transcript also attests to the fact that the Croatian political and military leadership were well aware of the Serb authorities' willingness to achieve peaceful resolution of the conflict[187]. The Croatian authorities knew that the Yugoslav Government was condemning the Croatian aggression and was calling upon the international community to ensure the cessation of hostilities and a political dialogue. The Croatian leadership was also aware that the Serbs had accepted the Stoltenberg plan, that they would not attack, that they had allowed the United Nations Confidence Restoration Operation in Croatia (UNCRO) to deploy on the borders as observers. This is all in the Brioni transcripts[188].

56. The Croatian political and military leadership were seriously concerned with the willingness on the part of the Serbs for peaceful solution of the conflict[189]. The Croatian authorities were alarmed that the Serb attitude at the time was depriving Croatia from the necessary justification to launch a military attack. The Croatian political and military leadership acknowledged the need to "find some kind of a pretext" for their actions, for their "venture in order to proceed according to plan"[190]. Here is what President Tudjman said: "So, I [want] to hide what we are preparing for the day after. And we can rebut any argument in the world about how we didn't want to talk . . ."[191]

57. This was nothing new. Operation Flash, some months earlier, also provides evidence of the planning and manufacture of pretexts for the ignition of hostilities and the initiation of military

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[185]Brioni transcript, p. 1.

[186]*Prosecutor* v. *Gotovina*, transcripts, 23 June 2008, witness Galbraith, pp. 4921-4922; RS, para. 680.

[187]Brioni transcript, pp. 1-2.

[188]*Ibid.*

[189]See the statement of the Croatian Deputy Prime Minister, Mate Granić, at a closed session of the Croatian Government discussed in RS, para. 682.

[190]Brioni transcript, p. 1.

[191]*Ibid.*, p. 32.

operations. There were also provocations of incidents on the part of Croatia aimed at imputing to the Serbian forces the initiation of hostilities. Let us recall Tudjman's remark when Operation Flash was being conceived: "[W]e should say Serbian forces caused an incident again. I told Ministers that they should go in two or three cars and let [the Serbs] shoot at them . . ."[192] Scenarios were devised and incidents concocted for the purpose of insinuating offensive conduct on the part of the Serb forces. See the statement, Mr. President, Members of the Court, by Gojko Šušak during the same discussion contemplating Operation Flash: "Mr. President, the worst case scenario would be to go in, let's say, two cars, two vans, leave them, have them riddled all over with bullets, and film this for television . . ."[193]

58. On the eve of Operation Storm, less than a day before the actual commencement of the military operation, the Croatian leadership sent a misleading message to the Serbs and to the international community by pretending to be engaged in the peaceful negotiations in Geneva. The Croatian leadership assumed this attitude as a mask — to give the impression of accepting the talks held in Geneva — while preparations for the launch of the military attack were already underway[194].

59. Living peacefully together with the ethnic Serbs was simply not an option for the Croatian leadership. A military operation which would eradicate the Serbs was the only course of action contemplated by the Croatian leadership. Despite the combined efforts of Serbia and of the international community for peaceful resolution of the Krajina conflict, Croatia stood adamant on its decision to proceed with military intervention against the ethnic Serbs. The disappearance of the ethnic Serbs from the region was a deliberate policy on the part of the Croatian leadership, something that emerged and ripened over the years within a conflict of ethnic hatred, as has happened in other countries where genocide has occurred. The genocidal intent crystallized during the Brioni discussion.

60. The Applicant itself acknowledges the extreme magnitude of the intended military intervention by using the word "overwhelming" with respect to the attack on the Serbs planned by

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[192]RS, paras. 661 ff.

[193]*Ibid.*

[194]Brioni transcript, p. 2; RS, paras. 674-677, referring to the testimonies of Babić and Akashi in the ICTY *Babić* case.

the Croatian leadership[195]. Consequently, the only way in which the military operation was to be conducted, as articulated by the commander-in-chief, was through the inflictions of "such blows that the Serbs [would] to all practical purposes disappear, that is to say, the areas [the Croats] [did] not take at once [had to] capitulate within a few days"[196]. The intended blows on the Serbs were to be of such magnitude which would prevent the Serb forces from recovering and would compel them to capitulate, and that, Mr. President, Members of the Court, is what happened.

61. It is important to note that at the time these statements were made the Croatian political and military leadership were well aware of the considerable demoralization and internal disorganization of the Serb forces, as well as of the Croatian military superiority, both in quantitative and qualitative aspects. As has already been noted by Mr. Obradović, on one side were 150,000 soldiers, while on the other were around 30,000 soldiers of the Serbian army of the Krajina[197]. The Serbian army was suffering structural weaknesses and did not have enough combat formations to maintain the depth and mobility needed to contain a penetration of the adversary[198].

62. During the Brioni meeting it was acknowledged that the primary concern of the Serbian forces at the time was not how to fight, but how to flee. Still, the Croatian political and military leadership insisted on the extreme magnitude of the military operation. Consequently, the eradication of the Serbs from the region was an easily conceivable and most logical consequence of the intended military attack.

63. Applicant has replied to the counter-claim by producing two documents suggesting Croatian officers were to ensure compliance with international humanitarian law[199]. But the existence of written orders does not prove in itself that instructions to observe humanitarian law did in fact reach those to whom they were addressed — the Croatian soldiers. In fact, the written

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[195]RC, para. 12.14, where it is observed that the President was "instructing his senior military personnel that Croatian forces were to use overwhelming force in order to subdue the Serb forces".

[196]Brioni transcript, p. 2.

[197]CMS, para. 1213; CR 2014/17, para. 51 (Obradović).

[198]Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (Washington, 2002), Vol. I, p. 375, see further, pp. 367-376 (hereinafter "CIA Report"; available at the Peace Palace Library); CR 2014/17, para. 51 (Obradović).

[199]RC, Anns. 170 and 172.

orders were no more than a component of the camouflage for an attack whose very raison d'être was an attack on non-combatants and therefore in breach of the laws of armed conflict *ab initio.*

64. We know that the soldier on the ground got a different message. As the evidence submitted by the Respondent and discussed at length by Mr. Jordash and Mr. Obradović attests[200], the message must not have reached soldiers on the ground that they were to observe humanitarian law. Quite the contrary.

65. Respondent has provided a wealth of evidence that portrays the real perception of the Croatian soldiers towards the Serb civilians. The Croatian army viewed all Serbs as enemies who had to be eliminated. And you saw the video of Witness Hill, whose testimony was reviewed by Mr. Jordash on Wednesday afternoon[201], it portrays the eagerness of the Croatian soldiers to enter into combat and kill "all the Serbs". As we can see in his testimony[202], even a United Nations official — an interpreter — was perceived as a lawful military target: he was to be killed on account of his Serbian origin[203].

66. Mr. President, Members of the Court, the vicious artillery attack on civilian targets is of course only one part of the evidence pointing to the subjective element of the crime of genocide. Mass expulsion of the civilian population from Krajina was also carefully orchestrated by the Croatian authorities. The refugee columns were deliberately ambushed, shelled and executed by the Croatian soldiers on the way. The Croatian leadership at Brioni was well aware that the retreating columns would consist of civilians as well as of fleeing military personnel. This is clear from Tudjman's insistence on the importance that the civilians set out and then be followed by the military[204]. Providing an avenue of retreat, as agreed upon at Brioni, was not intended to guarantee the protection of the fleeing columns. Given Tudjman's insistence at the meeting that the civilians be given a way out, it is clear that the Croatian authorities not only anticipated the mixed character of the columns, but very deliberately devised a scenario whereby the Serb forces would intermingle with the Serbs civilians in the refugee columns. Furthermore, as the events that took place during

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[200]CR 2014/16, paras. 30 ff. (Jordash), CR 2014/17, para. 79 and para. 130 (Obradović).

[201]CR 2014/16, paras. 5 ff. (Jordash).

[202]*Ibid.*, para. 14 (Jordash).

[203]See also RS, paras. 718-719.

[204]Brioni transcript, p. 15.

Operation Storm suggest, the refugee columns were deliberately ambushed, shelled and those in them were executed by Croatian soldiers.

67. The mass killings of the Serbs who remained in the region represent a clear illustration of the genocidal intent of the Croatian leadership towards the Serbs in the Krajina. While the presence of Serb military personnel intermingled with civilians in the refugee columns may have provided some form of a pretext for attacks on the fleeing civilians by the Croatian army, it was impossible to mask the attacks on the population that remained behind in the region. The attitude of the Croatian military towards the Serbs who stayed behind is an unambiguous manifestation of the intent to destroy the group as such rather than merely to deport or displace it by force. The force used by the Croatian military went beyond the aim of motivating those Serbs who had remained to leave the region. The force employed during the military operation was intended to physically destroy the population that had stayed behind.

68. Most of the Serbs who did not flee and did not hide from the Croatian forces fell prey to the army or police and lost their lives. The population in the cities and villages was targeted and killed indiscriminately simply on account of Serb origin. The Serbs who remained in Krajina were tracked down and executed because of their ethnicity. The persons who stayed behind were those who were either unable to flee (due to advanced age or a disability) or those who had followed the appeal of the Croatian leadership in the media not to withdraw, relying on the illusory assurance that their rights would be protected. Not only did the Croatian soldiers kill everyone whom they were able to track down, but they also lured those who had escaped from the massacres to come out of hiding. Such, for instance, was the case of some shepherds from Gračac. Those shepherds were urged by the Croatian military to come down from the mountain pasture under the pretext that they would be provided with new identification documents[205]. The moment the shepherds returned to the village, they were executed by Croatian soldiers. The manner in which the majority of the killings were committed — through shots in the back of the head[206] — proves, first and foremost, the massive and uniform character of the executions and, second, the lack of any resistance, let alone any hostility, on the part of the victims towards their executioners. Irrespective of the exact

[205]CR 2014/17, p. 42, para. 100 (Obradović).

[206]*Ibid.*, p. 47, para. 115 (Obradović).

number of civilians killed, the manner in which the executions were conducted, as well as the fact that the Croatian army massacred virtually everyone who had stayed behind, is in and of itself evidence of genocidal intent. The legal barriers imposed by the Croatian authorities for the purpose of preventing the return of the Serb refugees in the aftermath of Operation Storm also belong to the wider context surrounding the Brioni meeting and the military offensive devised by the Croatian leadership. It too helps us to identify the criminal intent and may I remind the Court one more time that *nobody* has been held accountable for this.

Conclusion

69. I come to my conclusions. Mr. President, Members of the Court, when the first session of the United Nations General Assembly, meeting in New York in 1946, condemned genocide as an international crime, it spoke of "denial of the right of existence of entire human groups". The General Assembly said that such denial not only shocked the conscience of mankind but that it "result[ed] in great losses to humanity in the form of cultural and other contributions represented by these human groups". A century ago, the territory that is today Croatia was the home not only to a Croatian majority but also to an important Serb ethnic minority. An initial genocidal attack, during the Second World War, involved the mass murder of Croatian Serbs whose population declined from about 17 per cent to less than 15 per cent of the overall population.

70. But the Nazis and their local allies did not succeed in totally destroying the Serb population of Croatia. When Yugoslavia began to break up, in 1991, Serbs represented about 12 per cent of the Croatian population. After the war, they are barely 4 per cent of the total. It is a tragic loss, for the individual victims, for a Croatia that is less and less diverse, and for humanity as a whole, as the General Assembly resolution reminds us. It is also an individual crime, about whose planning we know a great deal. Where we lack direct evidence of all aspects of the genocidal scheme and intent, we can nevertheless draw the inexorable conclusions that flow from the nature of the attack, the means that were used, the propaganda that accompanied it and the tragic result. The definition of genocide in Article II of the Convention uses the famous phrase "in whole or in part". And, indeed, most genocides are arrested before they are fully carried out. They are committed in part. But the intentional destruction of the Krajina Serbs stands as a tragic and

barbaric example of a genocide where the sinister plan to destroy an ethnic group is now virtually complete. Nothing comparable — I repeat, Mr. President, Members of the Court — nothing comparable, has taken place anywhere in Europe since 1945.

71. Mr. President, Members of the Court, I am most grateful for your attention. This completes my submission and I would ask if you would give the floor to Mr. Obradović for a few more minutes.

The PRESIDENT: Thank you, Professor Schabas. I call on the Agent, Mr. Obradović for his concluding remarks. Mr. Obradović, you have the floor.

Mr. OBRADOVIĆ:

CONCLUSION

1. Thank you Mr. President. Mr. President, Members of the Court, as Professor Schabas emphasized it was not our choice to come before the Court to litigate these issues. Many peoples have differences about their view of the past. Croatia and Serbia are no exception. Over time, such matters require our attention, although it is important that we not be distracted from our shared objective, which is focused on the future, on peace and prosperity.

2. As this Court knows very well, another of our neighbours chose to debate the aspects of the conflict here in The Hague. The limited jurisdictional framework of the Genocide Convention is hardly suited for such complex discussions. We think that the issues about responsibility for violations and abuses committed in that conflict, and in the conflict with Croatia, are better addressed through other mechanisms and in other forums.

3. Unfortunately, despite our best efforts to find an appropriate approach that would not require us to appear before the Court, Croatia has insisted upon a debate in this august forum. It is for that reason that we have chosen, as is our right, to meet the claim with a counter-claim. This is a time-honoured response, available in virtually all legal systems. We are saying: It was not our choice to come before you, but if the other party insists, we too have a claim related to the dispute.

4. Indeed, we consider that our counter-claim, assessed in light of the required elements of the crime of genocide, is much stronger than the claim submitted by Croatia. The scale of the violence in Operation Storm, the number of the victims in a short period of time and under limited

opportunities on the side of the perpetrators, as well as the consequences upon the life of the attacked group cannot be compared when any of the massive crimes described by the Applicant's claim which covered the time period of five years is set side by side.

5. The size of the Serb ethnic group in Croatia has shrunk enormously since 1991. If President Tudjman had his way, it would have disappeared entirely. Nothing remotely similar can be said of the victim group that is the object of Croatia's claim. Of course, the result is not the only way of measuring the scale of violence and atrocity. But it cannot be denied that the Serb people in Croatia now joins the list of other ethnic groups — we do not need to mention them, the examples are well known to the Members of the Court — who once lived in dynamic historic communities that barely exist today. The destruction of an ethnic group is a loss not only for the victims themselves but for all of humanity. Indeed, it is to prevent such tragedies that Raphael Lemkin proposed, in 1944, the recognition of the crime of genocide. His efforts led to General Assembly resolution 96 (I) of December 1946 and, two years later, to the adoption of the Convention itself.

6. Mr. President, this concludes our presentation in the first round of these oral proceedings. I am grateful for your attention and patience.

The PRESIDENT: Thank you very much, Mr. Obradović. Before adjourning, I give the floor to two Members of the Court, who have questions. The first one is Judge Cançado Trindade. You have the floor, Sir, please.

Judge CANÇADO TRINDADE: Thank you, Mr. President.

My questions are addressed to both Parties.

> "During the written phase, both Croatia (in its Memorial and in its Reply) and Serbia (in its Rejoinder) refer to the issue of the disappeared or missing persons to date. Both again refer to this issue in their oral arguments.
>
> — Have there been any recent initiatives to identify, and to clarify further the fate of the disappeared persons still missing to date?
>
> — Is there any additional, and more precise updated information that can be presented to the Court by both Parties on this particular issue of disappeared or missing persons to date?"

Thank you.

The PRESIDENT: Thank you very much, Judge Cançado Trindade. Next I will give the floor to Judge Bhandari. Judge Bhandari, you have the floor.

Judge BHANDARI: Thank you Mr. President.

The question is put to both Parties.

> "Both Parties have made frequent reference in their written pleadings to the findings made by the *Gotovina* Trial Chamber Judgement of the ICTY.
>
> Since the close of written pleadings in these proceedings, the Appeals Chamber of the ICTY has set aside the Judgement of the Trial Chamber in the *Gotovina* case and acquitted the accused.
>
> In view of this development, what would be the probative value of the findings contained in the Trial Judgement?"

Thank you.

The PRESIDENT: Thank you, Judge Bhandari. The written text of these questions will be sent to the Parties as soon as possible.

In relation to the information sought by Judge Cançado Trindade, it would be appreciated if the Parties could provide that during the second round of argument. Certainly, I and my colleagues on the Bench have noted the extensive argument by Serbia on the *Gotovina* judgements — Trial Chamber judgement and Appeals Chamber judgement. One of them, namely the Appeals Chamber judgement, was rendered subsequently to the closure of written proceedings in this case in August 2012. So, it is expected that Croatia will address these issues raised by Judge Bhandari during its first round on Serbia's counter-claim so that Serbia can subsequently comment, if needed, on the position of Croatia and certainly Croatia will have the last word on the issue of counter-claim at the sitting on 1 April.

This brings to an end the first round of oral argument of Serbia. The Court will meet again on Tuesday 18 March at 10 a.m. to hear Croatia's observations on Serbia's counter-claims. Thank you.

The Court is adjourned.

The Court rose at 1 p.m.