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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2014

Public sitting

held on Tuesday 18 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 mardi 18 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Good morning. Please be seated. The sitting is now open. The Court meets today to hear Croatia's observations on Serbia's counter-claim, which will conclude the first round of oral argument. I call on the Agent of Croatia, Professor Crnić-Grotić. You have the floor, Madam.

Ms CRNIĆ-GROTIĆ: Thank you, Mr. President.

INTRODUCTION AND FACTUAL BACKGROUND

1. Mr. President, Members of the Court, I appear before you this morning to deliver some introductory remarks on the Respondent's counter-claim, and to briefly address the factual background and the events that compelled Croatia to launch a military operation, Operation Storm, against the rebel Serbs of the so-called Republika Srpska Krajina, the "RSK", in 1995. I will also address the issue of the alleged genocidal plan for Operation Storm, and certain issues of evidence relied upon by the Respondent.

2. Following my introductory presentation, Ms Anjolie Singh will address the Court on the planning and implementation of Operation Storm and in doing so respond to some of factual manipulations of last week. Sir Keir Starmer will follow, demonstrating that the Respondent's counter-claim, even taken at its highest, fails to establish either of the two elements of the crime of genocide: the *actus reus* and *mens rea*. Professor Sands will conclude Croatia's submissions by setting out the main features that distinguish the Applicant's claim from the Respondent's counter-claim. The evidence conclusively establishes that the counter-claim is entirely without merit, on the facts and on the law. Unlike the responsibility of Serbia for the operations of the JNA and forces under its control for the acts taken in 1991-1992, the counter-claim has no support from the ICTY.

I. General observations

3. Mr. President, allow me first to present briefly Croatia's reasons for launching Operation Storm. In order to do that, it is important to remember the situation Croatia found itself in mid-1995. [Plate on] Croatia had to provide for almost 400,000 refugees and displaced persons[1];

[1]Branko Pek-Slobodan Lang, "Pravo na dom", Osijek, 2011, p. 38.

one third of the country was still occupied [next graphic] and Serbia continued to provide financial, political and military support to the rebel Serb criminal enterprise. Occupied territories severed Croatia's coast from its hinterland, making travel and economic development all but impossible.

4. Contrary to the Respondent's assertions, the situation in the "RSK" was not "improving"[2]. Life for the few Croats who remained in the ***Republika Srpska Krajina, the*** "RSK"[3] was characterized by violence and discrimination. The United Nations Special Rapporteur for Human Rights reported that of the 44,000 Croats who in 1991 lived in United Nations Sector South, which marked the southern half of the occupied territory, only 1,100 remained in November 1993[4]. By November 1994, that number had fallen to only 800 to 900 Croats[5]. According to the so-called RSK's police reports, 47 per cent of persons murdered in the occupied territories between 1992 and 1994 were non-Serbs, and the perpetrators of these 268 murders went largely unpunished[6]. Croats continued to be forced from their homes and properties. Artillery attacks continued to be launched from the "RSK" on towns and villages in non-occupied areas of Croatia. In late July 1995, news began to emerge about the Srebrenica massacre, along with information that Serbian forces were surrounding Bihać, another Muslim enclave in Bosnia and Herzegovina close to the Croatian border. Croatia's repeated efforts to reach a peaceful solution to this untenable situation were met with repeated rejections by the so-called "RSK" leaders. Croatia had no option but to act.

5. The only realistic option was to reclaim the occupied territories by military force. It launched two military operations — Operation Flash, which lasted from 1 to 4 May 1995, liberating Western Slavonia, as shown on the screen [next graphic] and Operation Storm, from 4 to 8 August 1995, which liberated the territory of the so-called Krajina. [Next graphic] These operations were intended to defeat what the ICTY in the *Martić* case determined to be a ***J***oint ***C***riminal ***E***nterprise (JCE) — the product of which was known as the "RSK" — operating on

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[2]Counter-Memorial of the Republic of Serbia (CMS), para. 1123.

[3]In mid-1993 Croats made up only 7 per cent of the Krajina population. Stanje i osnovni pravci oživljavanja i razvoja privrede RSK, 2 (The state and the basic directions of revitalization and development of the RSK commerce), referred to in N. Barić, Srpska pobuna u Hrvatskoj 1990-1995, p. 384.

[4]Fifth Periodic Report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of the Commission resolution 1993/7, E/CN.4/1994/47, 17 Nov. 1993, para. 147.

[5]Situation of Human Rights in the former Yugoslavia: Note by the Secretary-General, A/49/641, S/1994/1252, 4 Nov. 1994, para. 136.

[6]Report by Gojko Košević, Main Operative for General Criminality, 5 Oct. 1994, referred to in N. Barić, Srpska pobuna u Hrvatskoj 1990-1995, p. 384.

Croatian territory. The "RSK" was not, as Mr. Obradović put it, a State *in statu nascendi* (CR 2014/17, p. 57, para. 153) but the territory illegally occupied by the Respondent. Mr. President, the Respondent's counter-claim alleges that Croatia committed genocide during and after Operation Storm. In fact, Operation Storm was a legitimate military operation during which, let us not forget, 196 Croatian soldiers were killed, 15 disappeared, and more than 1,000 were injured[7]. Operation Storm was thoroughly examined by the ICTY, in proceedings against three Croatian generals: Gotovina, Čermak and Markač[8]. These proceedings took almost seven years to complete and, at the end, the three generals were acquitted of all charges. [Screen off]

6. The account you heard last week — a revisionist history — had no basis in reality. The findings of the Trial Chamber and the Appeals Chamber thoroughly vindicate the Applicant's position in these proceedings.

II. *Gotovina* Trial Chamber findings

7. Turning first to the findings of the *Gotovina* Trial Chamber. You heard the Respondent's claims last week that the intention behind Operation Storm, imputed to President Tuđman and the Croatian leadership, was to drive out Serb civilians from the occupied areas of Croatia, to destroy the Serb population left behind, to destroy their property, their cultural buildings and churches and to treat prisoners cruelly. But, the ICTY Trial Chamber's unanimous findings, not appealed by the Prosecutor, conclusively establish that none of this is true. The *Gotovina* Trial Chamber made a specific finding of fact that President Tuđman and the Croatian leadership did not intend to allow crimes to occur after Operation Storm, much less that they ordered them ***directly***. The Trial Chamber specifically rejected the Prosecution's allegations of Croatian Government intentional complicity in crimes committed after Operation Storm and I quote, the text is on the screen: [screen on]

> "The Trial Chamber finds that the common objective [of the Joint Criminal Enterprise] did not amount to, or involve the commission of the crimes of persecution

[7] "Operation Storm liberated 10,400 sq. km. or 18.4 per cent of the total area of the Republic of Croatia. Losses totalled 0.12 per cent or 1,314 persons: 196 killed, 1,100 wounded (572 severely and 528 lightly), 3 taken prisoner, 15 missing in action . . ." in Davor Marijan, "Oluja" *("Storm")* (Croatian Homeland War Memorial & Documentation Centre, August 2010), p. 159.

[8] See *Prosecutor* v. *Gotovina, Čermak and Markac*, IT-06-90-T, Judgment of the Trial Chamber of 15 April 2011 ("*Gotovina* TJ"). The Trial Chamber acquitted Ivan Čermak of all charges.

(disappearances, wanton destruction, plunder, murder, inhumane acts, ~~***[and]***~~ cruel treatment***, and unlawful detentions), destruction, plunder, murder, inhumane acts, and cruel treatment***." (Judgement, para. 2321.)

8. Contrary to the Respondent's assertions, the *Gotovina* Trial Chamber also found that President Tuđman and the Croatian leadership did *not* have a general policy of non-investigation of crimes committed against Serb civilians in the aftermath of Operation Storm[9]. Similarly, the Trial Chamber noted that [next graphic] "the leadership, including Tudjman, disapproved of the destruction of property" and on the basis of the evidence before it concluded that it "[did] not find that destruction and plunder were within the purpose of the joint criminal enterprise"[10].

9. Moreover, the Prosecution conceded during trial that President Tuđman and the Croatian leadership had issued strict orders for the protection of Serbian Orthodox churches and monuments, and that these orders had been implemented effectively. This fact was not in dispute during the ICTY proceedings[11]. [Screen off]

10. Finally, the Trial Chamber rejected the Prosecution's claim — now revived by the Respondent in the hope that you might offer a further possibility of appeal — that when President Tuđman at Brioni referred to making "Serbs disappear", he was referring to Serb civilians rather than to Serb military forces[12]. Let me repeat that: the central plank of the Respondent's counter-claim of genocide against Croatia has been determined to lack *any* factual basis by the ICTY Trial Chamber — the findings of which the Respondent seeks to bolster and defend in these proceedings.

11. It is true that the Trial Chamber did find that the Croatian Generals and President Tuđman were responsible for deporting Serb civilians from the four Croatian towns of Knin, Benkovac, Obrovac and Gračac due to the unlawful shelling — the so-called Four Towns. Yet even the Trial Chamber ruled decisively with respect to all other towns and villages it considered — namely the towns and villages in the southern part of the territory of the so-called Krajina, that the Serb population on 4 and 5 August left for reasons that could not be attributed to any unlawful conduct of Croatian authorities. Those reasons included the following: [Screen on]

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[9] *Gotovina et al.*, TJ, para. 2203.

[10] *Ibid.*, para. 2313.

[11] Prosecution Final Trial Brief, *Prosecutor* v. *Gotovina*, at paras. 17, 646, 650.

[12] *Gotovina et al.*, TJ, para. 1990.

— "Krajina" Serb officials telling inhabitants to leave the areas (Trial Judgement, paras. 1754, 1762);

— "Fear of the violence commonly associated with armed conflict" (Trial Judgement, para. 1762);

— "General fears of Croatian forces or distrust of Croatian authorities" (Trial Judgement, para. 1762);

— The fact that other Serbs were departing caused some to leave (Trial Judgement, paras. 1754, 1762).

12. The Trial Chamber thus found that in the overwhelming majority of towns, villages and hamlets in southern so-called Krajina on 4 and 5 August, Croatia did not deport the Serb population. [Screen off]

13. The Trial Chamber convicted the Croatian Generals for the alleged deportation from the four towns. It also found them guilty of crimes that were the "foreseeable" consequence of the alleged ***J***oint ***C***riminal ***E***nterprise to expel Serbs from the four towns. The Trial Chamber did not, however, find that they had intended to commit these crimes.

III. Appeal Chamber findings

14. On appeal, the central issue was whether the Croatian Generals were guilty of persecution by means of deportation from the four towns. If the Generals were not guilty of participation in a ***J***oint ***C***riminal ***E***nterprise from the four towns, then their convictions for murder and other alleged crimes would also have to be reversed because these crimes could not have been the "foreseeable consequence" of a ***J***oint ***C***riminal ***E***nterprise that did not exist. The ICTY Appeals Chamber found in favour of the Appellants and reversed all of the Trial Chamber's convictions. It concluded that Croatia's leadership and by implication Croatia — did not deport Serbs from the so-called "Krajina" as alleged in the Indictment.

15. These findings of fact and law by the ICTY Trial and Appeals Chamber are "highly persuasive" for this Court, and totally undermine the Respondent's counter-claim. The Appeals Chamber ***J***udgement highlighted some of the same criticisms of the Trial judgement that Croatia had pointed out in its Additional Pleading[13]. Ms Singh will take you to these findings. It is striking

[13] Additional Pleading of Croatia (APC), pp. 53-63.

that the Respondent should still cling so desperately and steadfastly to the *Gotovina* Trial Chamber judgement in its unfounded efforts to assert genocide: the Trial Chamber itself unanimously found that the most serious forms of persecution — and those capable of being directed at physical destruction of a group such as murder — were not intended in any ***J***oint ***C***riminal ***E***nterprise on the part of the Croatian leadership[14]. These findings were not appealed by the ICTY Prosecutor. And I repeat: there was no ***J***oint ***C***riminal ***E***nterprise.

16. Contrary to the erroneous picture the Respondent has attempted to paint, the ICTY findings demonstrate that Serbia's counter-claim has always been entirely baseless. The unanimous Trial Chamber found that President Tuđman and the Croatian leadership had: no intention to murder Serbs in Operation Storm; no intention to inflict serious bodily harm or ill-treatment on Serbs; no intention to obstruct investigations of crimes against the Serbs; and that they actively opposed the destruction of Serbian property; and protected Serbian Orthodox religious monuments. The Prosecutor did not appeal on any of these findings. Professor Schabas is well aware of those findings. He chose not to mention them to the Court in his speech last Friday. Apparently he did so because those findings in and of themselves are fatal to the Respondent's counter-claim. When the Appeals Chamber ultimately concluded that the Generals were not guilty of persecution through deportation either, the Respondent's case evaporated.

17. The findings in the *Gotovina* judgement concerning President Tuđman's intent, demonstrate that the Brioni Minutes record a discussion about the preparation of a lawful military operation. The Applicant notes with deep regret the comments made by Professor Schabas last week equating those who deny any genocidal reading of the Brioni Minutes, with Holocaust deniers who reject the historical facts about the Wannsee Conference. This is all the more so given Professor Schabas's own statements — outside ***of*** this courtroom — that there was no genocide in Srebrenica[15]. It is a matter of particular regret that Professor Schabas should cast aspersions on the integrity of those who do not view the Brioni Minutes in the manner that he or his client chooses to see them, including Judge Theodor Meron, himself a Holocaust survivor, and

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[14] *Gotovina et al.*, TJ, para. 2321.

[15] William A. Schabas, "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia", 25 *Fordham International Law Journal* 23, 2001, pp. 45, 46, 47.

Judge Patrick Lipton Robinson, former President of the ICTY and a candidate for election to this Court. Professor Schabas's charge is both serious and unworthy of this courtroom.

18. Mr. President, Members of the Court, the only denier in this case is the Respondent. It seeks to deny ICTY judgements and findings. Over the course of the past week, you were repeatedly told that numerous ICTY Trial and Appeals Chambers are wrong. Last Wednesday, Mr. Ignjatović told you that the ICTY was wrong in its assessment of the role of the JNA in the *Mrkšić* case[16]. He told you that Mr. Babić was wrong when he admitted to the criminal character of the so-called RSK[17]. He told you that the *Martić* Trial Chamber also got it wrong. Indeed, Mr. Ignjatović asserted that Serbia challenges the ICTY's unanimous ruling in the *Martić* case that the project called ~~***"Republika Srpska Krajina"***~~ — "RSK" — involved a ***J***oint ***C***riminal ***E***nterprise at all[18].

19. The Respondent denies the ICTY's finding in *Martić* that Serbian President Slobodan Milošević together with Serbian leaders were part of that ***J***oint ***C***riminal ***E***nterprise[19]. Mr. Obradović denied to you that Belgrade was attempting to create a Greater Serbia, now arguing — improbably — that it was no more than an effort to preserve Yugoslavia. This is in direct denial of the ICTY's finding in the *Martić* case, that Belgrade *was* involved in a ***J***oint ***C***riminal ***E***nterprise, the purpose of which was to create "an ethnically Serb territory through the displacement of the Croat and other non-Serb population"[20]. It is also well known that high ***s***tate officials of Serbia to this day continue to deny that genocide was committed at Srebrenica, despite the ruling of this Court and numerous rulings of the ICTY. Mr. Jordash and Professor Schabas last week denied the findings in *Gotovina* of both the ICTY Trial and Appeals Chambers. Yet the ICTY had used ample resources to assess the conduct of Operation Storm. It found that Croatian authorities did not expel Serbian civilians and were not criminally responsible for crimes committed against Serbs. Serbia would like this Court to rule that the ICTY got it wrong in *Mrkšić*; got it wrong in *Martić*; that Milan Babić was wrong when he admitted his guilt and the

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[16]CR 2014/15, pp. 26-27, paras. 44-45 (Schabas).

[17]*Ibid.*, p. 23, para. 34 (Schabas).

[18]*Ibid.*, p. 16, para. 81 (Ignjatović).

[19]*Ibid.*, p. 16, para. 81 (Ignjatović).

[20]*Martić*, Trial Judgement, para. 445.

guilt of the leadership of Serbia; and that the ICTY was wrong in acquitting the Croatian generals in *Gotovina*. Mr. President, the merits of the arguments speak for themselves. Serbia's decades-long pattern of denials, distortions and cover-ups is untenable.

20. Croatia wishes to express to this Court its sincere desire to achieve full reconciliation with Serbia. Our Presidents, Mr. Mesić and Mr. Josipović, have expressed their sincere regret on behalf of the Croatian people for all crimes committed against Serbs — including in Operation Storm. They have done so on official visits to Belgrade. However, reconciliation must be based on historical facts. Seeing Serbia last week deny the criminal nature of the ***J***oint ***C***riminal ***E***nterprise of the Serb leaders known as the "RSK", despite clear, unequivocal ICTY findings, was an affront to the victims of its crimes, who are to be counted in the thousands. It is an affront to the next of kin of those who are still missing. Mr. President, Members of the Court, Operation Storm was the operation that put an end to a criminal enterprise. It marked the beginning of the end for those responsible for the crimes in Srebrenica, and Sarajevo and many other places in Croatia and Bosnia and Herzegovina, many of whom were subsequently convicted by the ICTY.

21. It is a fact that individual crimes were committed in the course of Operation Storm. Croatia deeply regrets the crimes committed and the pain caused to victims during the course of Croatia's liberation in Operation Storm. It has put in place structures to compensate the victims, and to provide redress through criminal and civil proceedings. According to the information provided by the State Attorney Office of Croatia, 33 persons have thus far been prosecuted for murders committed during or after Operation Storm, and more than 2,300 people have been convicted for looting and destroying property. There are also three war crimes cases still pending[21]. According to data provided by the United Nations High Commissioner for Refugees, by June 2013 more than 130,000 Serbs had been registered as returnees to Croatia[22]. Their houses have been repaired or rebuilt at the expense of the Croatian State. These facts speak about the will of Croatia to ensure the return of all of its citizens who wish to return.

[21] Http://www.dorh.hr/DrzavnoOdvjetnistvoRepublikeHrvatskePostupanjeU.

[22] Http://www.unhcr.hr/2012-12-20-09-46-40/statistics.

IV. Issues of proof and evidence

22. Mr. President, Members of the Court, I would like now to address the Respondent's approach to evidence and proof. This issue will be examined in detail by Ms Singh and Sir Keir Starmer.

23. In the Counter-Memorial the Respondent's factual assertions with regard to the counter-claim are essentially based on just two documents:

(i) a list of missing and killed persons compiled by the Serbian NGO, Veritas — so the "Veritas List" — headed by Mr. Savo Štrbac — lately an expert witness for the Respondent in this case; and

(ii) a Report prepared by the Croatian Helsinki Committee for Human Rights — "the CHC Report".

24. Croatia has set out detailed criticisms of both these documents in the written pleadings and called into question the Respondent's reliance on them[23]. An analysis of the CHC Report carried out by the Croatian Directorate for Detained and Missing Persons identified significant methodological and factual flaws[24]. The ICTY has confirmed these flaws. The Trial Chamber in *Gotovina* concluded [screen on] that it could not rely on the CHC Report in relation to information it described "if uncorroborated by other evidence"[25]. In light of this finding we say it is unsafe to rely on this Report. [Screen off]

25. The Respondent offers the list prepared by Veritas as that "corroborating" evidence. First of all, Croatia already set in detail the reasons for which it considers that organization to be neither neutral nor independent. Moreover, the Applicant has also identified serious discrepancies, mistakes and methodological errors whereby, for instance, some of those listed as dead or missing were still alive when the list was published, and there were a number of deaths unconnected to the ***Operation*** Storm[26]. Nevertheless, the Respondent considers that the credibility of Veritas is still valid despite the fact that Mr. Obradović had to admit last week that the Applicant had been right

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[23]For example, see Reply of Croatia (RC), paras. 2.65-2.68, 11.66-11.70, 11.85, 11.91-11.92, 11.95-11.101.

[24]See RC, para. 2.65.

[25]*Gotovina et al.*, TJ, para. 50; emphasis added.

[26]RC, paras. 2.67, 11.68.

showing examples of wrong entries in the Veritas list in its written pleadings. How many more entries are there that the Applicant did not point to?

26. For example, on the website of Veritas, [screen on] Mr. Petar Golubovac, born on 20 October 1947 is listed as No. 1731 and as No. 1732. The same "mistake" is often repeated. There are more examples like this, documenting the credibility of Veritas[27]. [Screen off]

(1) Factual background: the reasons for Operation Storm

27. Mr. President, I will now address the events that led to Operation Storm in more detail. But first it is important to reiterate that Serbia's allegations regarding genocide against the Serbs are restricted to "events which occurred in August 1995 and subsequent months"[28]. The Respondent makes no allegations regarding any breaches of obligations under the Genocide Convention prior to this date, although it sets out various allegations of human rights violations. We have comprehensively responded to these allegations in the written pleadings. However, even the Respondent recognizes that those allegations fall outside the jurisdiction of the Court[29].

(a) ***Plans for the creation of "Greater Serbia" started well before President Tuđman was elected***

28. The Respondent seeks to justify its own earlier actions by claiming that the Serbs in Croatia were only reacting to the election of President Tuđman and their fear of a recurrence of World War II crimes being committed against them. This is wrong. The Serb population's fear was created by the hate-speech campaign against Croats and their demonization as Ustasha, as we demonstrated in our claim.

29. Moreover, Mr. Obradović's claim that Serbs were only reacting to President Tuđman is also false. The Serb rebellion in Croatia goes back to at least 1989, well before President Tuđman was elected. In July 1989 near Knin, thousands of Serbs gathered, carrying photos of Slobodan Milosevic and Chetnik iconography from World War II, chanting "This is Serbia!" These are people who believed their "one country" was Serbia, not Yugoslavia as Mr. Obradović claimed. The event followed a series of similar staged "events of the people" in other parts of the

[27]For example, entries No. 2972/2973; No. 2830/2831.

[28]CMS, paras. 570, 1098, 1102 ,1123, 1165, 1464; Rejoinder of Serbia (RS), para. 688.

[29]CMS, para. 211.

former Yugoslavia where Serbs lived — such as in Kosovo, in Vojvodina and Montenegro — and it caused anxiety among the Croatian population. Why were they rebelling in 1989 not just in Croatia but across former Yugoslavia? Mr. President, Members of the Court, it was Serbian nationalism and the drive for Greater Serbia that destroyed Yugoslavia and brought a war to Croatia that Croatia did not want.

(b) ***Serbian refusal of peaceful settlement***

30. Despite the ongoing failure of the rebel Serbs to demilitarize the United Nations Protected Areas in accordance with the Vance Plan[30], Croatia sought a peaceful solution throughout 1992, 1993 and 1994, while affirming its right to re-establish control over its entire territory. We ***describe*** these attempts in our written pleadings.

31. There was no long-term progress on a political settlement, or on an Economic Agreement. The rebel Serb rejection of any peaceful settlement continued through early 1995. A plan, known as Z4, which offered them exceptionally broad autonomy, was generally accepted by Croatia, but rejected outright by the rebel Serbs.

32. As confirmed by witness Slobodan Lazarevic, who was a member of the Serbian delegation during talks with Croatia in this period: "Belgrade did not want any settlement of the issues that divided the RSK Serbs and the Croatian government." He explained: "[m]ost of the time we were told not to agree to anything"[31]. The account was confirmed by the United States Ambassador in Zagreb, Mr. Peter Galbraith, who told the ICTY at the Milošević trial, and you can read it on the screen [Screen on]

> "The difficulty was that the Krajina Serbs refused to engage seriously for a very long period of time on the economic and confidence-building measures . . . when the time came following the signing of an economic and confidence-building measures to present a political plan, they refused to even receive this plan."[32] [Screen off]

33. Mr. President, we strongly reject accusations made by the Respondent that the peaceful reintegration of the territory of "Krajina" was not an option for Croatia. Croatia ultimately reintegrated the last part of its occupied territories peacefully in 1998. In the run-up to Operation

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[30]APC, para. 2.26.

[31]*Gotovina et al.*, Trial Exhibit D1461, p. 16.

[32]See testimony of Ambassador Galbraith at the *Milošević*, Transcript, 26 June 2003, p. 23149; RC, para. 10.66 (fn. 141).

Storm, Croatia was still willing to negotiate to achieve a peaceful settlement. The rebel Serbs, on the other hand, refused to envisage life under Croatian authority. The "RSK" Serb leadership would never agree to a negotiated settlement because they would never agree to the "peaceful reintegration" of the "RSK" into Croatia, a point which their lead negotiator made clear in Geneva on the night before Operation Storm. And this was also admitted by the Respondent in the Rejoinder.

34. This point is well known to the Serbian team appearing before this Court. Indeed, their so-called "Expert Witness", Mr. Savo Štrbac was at the relevant time the "government secretary" of the Serb para-State on the Croatian territory. In 1994 and early 1995 he told the *New York Times* and Agence France Presse, "It is out of the question for us to return to Croatia", and he said "we don't want to be in Croatia, in any form". These articles are in your judges' folder, at tab 15. Mr. President, Members of the Court, this shows why negotiations with the rebel Serbs were futile.

(c) ***Operation Flash***

35. As for the Operation Flash, it took place in May 1995. Last week you heard claims from Mr. Jordash that Operation Flash amounted to a persecutory ethnic cleansing campaign to wipe out the Serb population from Western Slavonia. This position is completely detached from reality. Special Rapporteur Mr. Mazowiecki of the United Nations Commission for Human Rights reviewed Operation Flash in great detail and reported his findings as follows, and you can read that on your screen: [Screen on]

> "28. [T]he leaders of the 'RSK' insisted that persons left behind, estimated at 3-4,000, be given the opportunity to leave Western Slavonia and join the other refugees in the Serb-held territory of Bosnia and Herzegovina. The United Nations acceded to this demand and initiated the program known as 'Operation Safe Passage'.
>
> 29. Serbs still living in the Sector were advised of their right to remain, and the public assurances of the Government of Croatia that their rights, including the right to citizenship of the Republic of Croatia, would be fully respected. Nevertheless, during the month of May hundreds of Serbs from Sector West applied for inclusion in Operation Safe Passage, and by early June more than 2,000 had left for Serb-held territory in Bosnia and Herzegovina . . ."[33] [Screen off]

[33]Periodic Report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of the Commission resolution 1995/89, E/CN.4/1996/6, 5 July 1995, paras. 28-29.

36. The full text of that part of the report is also found in your folders, at tab 16. Mazowiecki's report makes explicitly clear that the departure of the Serbs from Western Slavonia during and after Operation Flash was not the responsibility of Croatia, but of the rebel Krajina Serb leadership itself. Furthermore, the United Nations Secretary-General praised the Croatian Government's efforts "to achieve high standards of respect for the Serbs' human rights in [Western Slavonia] and to discourage them from moving into Bosnia and Herzegovina".

37. And finally, Mr. President, United States Ambassador Peter Galbraith travelled to the island of Brioni on 1 August 1995, the day after the famous Brioni Meeting, and he told President Tuđman to ensure that Croatian forces in Operation Storm conducted themselves as they had in Operation Flash because that conduct had earned President Tuđman "tremendous credit" in the international community. Ambassador Galbraith confirmed this conversation in his ICTY testimony[34].

38. Yet Mr. Jordash told this Court on Friday that the Serbs in Western Slavonia had been "viciously chased out" in Operation Flash[35], and that Flash had involved "multiple persecutory acts designed to effect the mass deportation or forcible transfer of tens of thousands of civilians"[36]. The only way you could accept Mr. Jordash's view about Operation Flash is if you were to ignore the reports of the Special Rapporteur, the United Nations Secretary-General, and the United States Ambassador, all of whom found the conduct of the Croatian Forces not only to be lawful, but praiseworthy. Another denial?

39. The same pattern was played out in Operation Storm. The "RSK" leaders convinced their compatriots that they could not live together with the Croats and made them leave. This much was admitted also by Mr. Štrbac's televised statement soon after Operation Storm that they were preserving "their biological potential"[37].

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[34] *Gotovina et al.*, Trial Transcript, p. 5031.

[35] CR 2014/18, p. 23, para. 77 (Jordash).

[36] *Ibid*., para. 35.

[37] RC, Ann. 200.

V. Conclusion

40. Mr. President, Members of the Court, in my introductory speech I unmasked some of the misinterpretations and manipulations by the Respondent with regard to the reasons for Operation Storm and some salient findings of the ICTY in the *Gotovina* case. The Respondent offers nothing but denial in its continuing refusal to face and accept its own responsibility for the tragic consequences of extreme Serbian nationalism and manipulation that brought war and violence to Croats, Serbs and other nations in former Yugoslavia. My colleague Ms Singh will now present you with a detailed account of the planning and implementation of Operation Storm.

41. Mr. President, thank you for your attention. I kindly ask you to invite Ms Singh.

The PRESIDENT: Thank you and I now give the floor to Ms Singh. You have the floor, Madam.

Ms SINGH:

THE RESPONDENT'S EVOLVING COUNTER-CLAIM: OPERATION STORM

1. Mr. President, Members of the Court, it is an honour for me to appear before you for the first time and to do so on behalf of the Republic of Croatia. My task is to address the Respondent's account of the planning and conduct of Operation Storm and the events thereafter. In so doing, I will set the record straight.

2. I regret that I am required to go into some detail, given the many factual errors and manipulations from last week. But this is necessary, and I will highlight only the most egregious examples. To be clear, those factual points that Croatia does not address should not be taken as accepted by the Applicant. Croatia maintains, in full, the response set out in its written pleadings.

3. Mr. President, I will begin my presentation by listing certain events that transpired in the days preceding Storm. I will then, very briefly, mention the planning related to Operation Storm. Then I will turn to the conduct of Storm, and respond to the factual allegations identified by the Respondent as establishing genocide. These relate to:

(i) shelling;

(ii) expulsion;

(iii) targeting columns and killings of the Serbs that remained in the "RSK";

(iv) looting; and

(v) legal measures as barriers to the return of the Serbs.

These allegations are entirely without foundation, as you will see. I will address each in turn.

I. Events preceding Operation Storm

4. Turning to the events that preceded Operation Storm: Croatia's Agent has taken you through the reasons that compelled Croatia to launch a military offensive against the "RSK" in August 1995. This followed years of negotiations, hampered by the rebel Serb leadership's refusal to consider options involving reintegration of the occupied territories. The Respondent admits this[38]. Even in the weeks preceding Storm the authorities of the "RSK" (with the support and backing of the FRY/Serbia) continued to do all they could to avoid a settlement. For example:

(i) they re-organized their army under the command of Mrkšić, a Lieutenant-General in the Army of Yugoslavia, the VJ, (he was later convicted by the ICTY)[39];

(ii) the "President" of the "RSK", (Milan Martić, also convicted by the ICTY), declared a state of war throughout the "RSK" and mobilized its army on 28 July 1995;

(iii) Mladić (now on Trial at the ICTY) was in Knin (in the "RSK") to arrange and co-ordinate operations between the two rebel Serb armies of Croatia and Bosnia on 30 July. An appeal was made to all Serbs, including in Serbia, to assist in the defence of Serb territory;

(iv) Mrkšić issued orders for the defence of the "RSK" and plans for evacuation were put in place[40].

5. By 3 August, Serb leaders knew that Operation Storm would commence the next day. Nevertheless, they rejected the Geneva proposals for peaceful reintegration. Croatia's Pleadings offer a detailed rebuttal of the Respondent's submissions in this regard[41]. Martić told a gathering of Serbs that the strategy of the rebel Serb leaders was to wait for Croatia to attack, create a

[38]Counter-Memorial of Serbia (CMS), para. 1160.

[39]Reply of Croatia (RC), para. 10.114.

[40]RC, paras. 11.28-11.37.

[41]RC, paras. 10.112, 11.32-11.35 and Additional Pleading of Croatia (APC), paras. 2.49-2.51.

stalemate, and achieve international recognition for the so-called "RSK"[42]. It was plain that the rebel Serbs had no intention of seeking a peaceful solution.

6. On 3 August — one day before Operation Storm commenced — Serb forces shelled Dubrovnik and its surroundings, killing at least three civilians and wounding others[43]. It was in these circumstances that Croatia acted in legitimate national interest and took lawful and necessary steps to restore control over its territory. Operation Storm began on 4 August 1995.

II. Planning and preparation for Operation Storm

7. I turn now to the planning for Operation Storm which provided for a simultaneous attack by Croatian forces, in all operational and tactical directions, and an advance to the border with Bosnia within seven days. General operational planning was governed by a Croatian Army Directive issued on 26 June 1995[44]. This Directive included guidance on the use of artillery. Following this detailed artillery plans were prepared[45].

8. As you are aware, on 31 July 1995, President Tudjman met with senior military officials to consider military options for retaking Croatian territory at Brioni. Sir Keir Starmer will take the Court through the Brioni Minutes in some detail.

9. On 2 August 1995, at a meeting at the Croatian Ministry of Defence, Mr. Šušak, the Minister, met with operational commanders to discuss combat plans and plans for re-establishing law and order in the liberated territories following Storm. He stressed that all military police be "energetic in its actions and prevent . . . offences". He expressly reiterated a prohibition of any "uncontrolled conduct"[46]. This order was given *after* the Brioni meeting. The final decision to launch Storm was taken at a meeting of Croatia's National Security Council on the evening of 3 August[47].

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[42]RC, para. 11.34 and RC, Ann. 161.

[43]RC, paras. 11.36-11.37.

[44]RC, Ann. 170.

[45]RC, para. 11.57; RC, Ann. 173 (Witness Statement of Rajčić, Chief of Artillery, Split MD).

[46]RC, Ann. 172 and *Gotovina* Trial Judgement ("TJ"), para. 1987.

[47]RC, para. 11.57.

III. Conduct of Operation Storm

10. Mr. President, a full operational account of Operation Storm is set out in the Reply[48]. [Screen on] It was a large operation involving multiple lines of attack across a long confrontation line, as you can see on the graphic[49]. The Respondent has not challenged the Applicant's account of the combatants involved — the Croatian armed forces *and* the army of the "RSK" — known as the SVK — and of their weapons, including rocket systems, tanks and artillery[50].

11. The Split Military District of the Croatian Army started its operation at 5 a.m. on 4 August. In Knin, the "capital" of the "RSK", artillery was directed against military targets spread across the city, including the headquarters of the SVK's General Staff, the Northern Barracks, the TVIK factory and the railway intersection[51]. An artillery barrage followed on the morning of the 5th and the Croatian infantry entered Knin at 11 a.m. the same day. Serb forces withdrew and Knin was liberated[52]. [Screen off] Serbia alleges that through Operation Storm, Croatia "succeeded in its criminal plan to destroy Krajina Serbs"[53]. However, contrary to Serbia's claims, there was no criminal plan, as Sir Keir will demonstrate. There was no "indiscriminate shelling" of towns and villages; no "forcible displacement", no targeting of Serbs who remained and no policy of imposing barriers to the return of Serb refugees. The Applicant took measures to prevent unlawful acts before, during and after Storm. It initiated investigations and legal proceedings to punish individual perpetrators of such acts. I will say something about each of these allegations.

(1) Shelling during Operation Storm

12. The Respondent claims that "artillery fire was of special importance" during Storm and that artillery orders did not specify the targets of artillery attack. It also asserts that certain towns "with no identifiable military targets" were repeatedly shelled[54]. In doing so it repeats the claims

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[48]RC, paras. 11.56 *et seq.*

[49]RC, Ann. 174.

[50]See Davor Marijan, "Storm", Zagreb, August 2010, p. 44 states that in mid-1994, the SVK had 300 tanks, 295 various armoured battle vehicles and 360 artillery pieces of 100 mm and larger calibre. The CIA publication relied upon by Serbia also mentions the comparative armoured strength of the SVK. See, e.g., CIA, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995*, May 2002, Vol. I, pp. 368-369.

[51]RC, para. 11.62. See RC, Anns. 176, and 177.

[52]*Ibid.*

[53]CMS, para. 1356.

[54]CMS, paras. 1215-1216; see also, e.g., CR 2014/18, p. 31, para. 117 (Jordash).

of the ICTY Prosecutor in the *Gotovina* case and asks this Court to review the evidence *de novo.* In effect it invites this Court to act as a court of higher appeal to overturn the findings of the Appellate Chamber of the ICTY.

13. Mr. President, Members of the Court, there was no "deliberate indiscriminate shelling" by Croatian forces. The shelling was carried out in compliance with applicable international rules. Artillery was used to engage legitimate and pre-determined military targets in Knin, Benkovac, Obrovac and Gračac. And the Trial Chamber in *Gotovina* identified legitimate military objectives in each of these towns[55].

14. Croatia's Additional Pleadings — filed before the Appeal Chamber's judgement — set out detailed criticisms of the Trial Chamber's judgement, including its finding that there was "indiscriminate and unlawful" shelling of the four towns — that is Knin, Benkovac, Obrovac and Gračac. Croatia argued that the evidence showed that artillery rounds were not fired indiscriminately; that the Trial Chamber's findings were based on an arbitrary and overly restrictive margin of error; and that the Trial Chamber had improperly decided that projectiles impacting more than 200 meters from known military targets were deliberately fired into civilian areas[56].

15. Croatia's arguments were fully vindicated by the Appeals Chamber's findings, handed down in November 2012. The Appeals Chamber found that the "touchstone" of the Trial Chamber's analysis concerning the existence of a joint criminal enterprise was its conclusion that unlawful artillery attacks had targeted civilians and civilian objects in the Four Towns; that these unlawful attacks caused the deportation of civilians from the "Krajina" region; and that the artillery attacks were unlawful based on a 200-metre range of error for artillery projectiles fired at legitimate targets. The Appeals Chamber *unanimously* overturned this analysis, holding that the Trial Chamber had erred in applying the 200-metre Standard[57]. Having reversed this finding, the

[55] *Gotovina* TJ, paras. 1899-1902, 1919, 1929-1931, 1939.

[56] APC, paras. 3.28-3.45.

[57] See *Gotovina*, Appeals Judgement ("AJ"); separate opinion of Judge Theodor Meron, para. 2.

Appeals Chamber then reversed the Trial Chamber's finding that a joint criminal enterprise existed to permanently remove the Serb civilians from the "Krajina" by force or threat of force[58].

16. Mr. President, you will have noted that the Respondent's engagement with this issue was brief last Friday, compared to the very extensive arguments in the written submissions[59]. The reason is plain: with the decision of the Appeals Chamber the Respondent's case collapses in its entirety. Serbia is bound to admit that the shelling undertaken by Croatian forces during Operation Storm was not criminal, and that it cannot have constituted evidence of genocidal intent per se[60].

(2) The departure of the Serbs

17. The Respondent's second argument is connected to the first: it argues that the departure of the Serbs from the "Krajina" was caused by indiscriminate shelling. Mr. President, this argument is untenable.

18. In so far as the Trial Chamber had found that the Serbs were forcibly deported as a result of unlawful shelling, its findings were limited exclusively to the Four Towns. It held, as fact, that Serbs left all other areas of southern "Krajina" on 4 and 5 August for other reasons. Their departure was *not* the result of any unlawful conduct by Croatian forces. By reversing the Trial Chamber's judgement regarding the unlawful attacks on the Four Towns, the Appeals Chamber also reversed the forcible deportation finding with regard to the Serbs from the Four Towns.

19. The truth is, as the Trial Chamber noted, that some Serbs left "because of a fear of the violence commonly associated with armed conflict, or general fears of Croatian forces or distrust of Croatian authorities"[61]. Some departing Serbs then prompted others to leave[62]. This is corroborated by witness statements filed by Croatia[63].

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[58]*Gotovina*, AJ, paras. 96-97.

[59]CMS, paras. 1215-1228; Rejoinder of Serbia (RS), paras. 723-728.

[60]RS, para. 728.

[61]*Gotovina et al.*, TJ, para. 1762.

[62]*Ibid.*, paras. 1754, 1762.

[63]See e.g. APC, Ann. 22.

20. Second, there was an ongoing departure of Serbs from the RSK throughout the four years of its existence. These departures increased after Operation Flash[64]**, a**nd were the result of years of Serbian claims that co-existence between the Serbs and Croats was impossible. Ms Law referred to the extensive hate speech and demonization of the Croats, as ***has*** Agent[65].

21. Mr. President, Members of the Court, the expert witness for Serbia, Mr. Štrbac, confirmed that the RSK authorities were evacuating the civilian population from Croatia. On the third day of Operation Storm, he stated, and I quote [Screen on]

> "we cannot allow ourselves to live with [the Croats] so that the genocide committed against us in the past would not be repeated, and I use the term we 'cannot allow ourselves' because it has a stronger meaning than 'we do not wish to live with them', we do not and cannot of course live with them and because of this it was necessary first and foremost that we *preserve our biological potential, our people.* We could have died off. The civilian population could have been killed. Our civilians and women could have been killed. We need our biological potential for something that is hopefully yet to come."[66] [Screen off]

Mr. President, I should also add that when Mr. Lukić introduced Mr. Štrbac's expert statement to the Court last week, and gave a detailed account of his *curriculum vitae*, he failed to mention a key fact: Mr. Štrbac, Serbia's "expert witness", was a Secretary in the Government of the RSK[67].

22. Third, there is evidence that some Serbs were compelled to leave by the RSK authorities and its armed forces, as they had been after Operation Flash. This was confirmed by many Serbs who later returned to Croatia and mention leaving pursuant to orders of the "local authorities", pressure from the "Krajina police" and "the military and civilian authorities of the Krajina"[68]. The Trial Chamber also noted that some Serbs left at the behest of the rebel Serb leadership[69].

23. Finally, the RSK had prepared comprehensive evacuation plans[70]. Croatia addressed these in detail in the written pleadings[71]. It is plain from the evidence that the Respondent's

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[64]APC, para. 3.47 and RC, para. 11.82.

[65]CR 2014/5, p. 34, paras. 11 *et seq.* (Law). See Memorial of Croatia (MC), Vol. 5, App. 3 (Hate Speech); RC, Ann. 106 (Professor de la Brosse Report); APC, Ann. 17.

[66]RC, Ann. 200 (transcript, Savo Šrbac TV Studio, Banja Luka, 7 Aug. 1995); emphasis added.

[67]CR 2014/16, pp. 62 *et seq.* (Lukić).

[68]See APC, Ann. 23; Serb returnee states that while in a column on the way to Dvor, Croatian police asked him why they were proceeding to Bosnia when they could go back home? He states that the officers provided them food and water, but despite their requests to remain, he and the others refused "because [they] were afraid of the Army of the Krajina . . . which specifically insisted that [they] leave [Croatia] immediately . . .". See also APC, Anns. 12-14.

[69]*Gotovina et al.*, TJ, para. 1762

[70]CR 2014/17, pp. 62-64, paras. 171-176 (Obradović).

reliance on the Trial Chamber's judgement to show a "massive exodus" brought on by the shelling is without any foundation[72].

(3) Response to claims about the "victims of Storm"

24. I turn now to Serbia's allegations with regard to the victims of Operation Storm. Croatia has never denied that there were victims, and regrets that there should have been any loss of life or other harms. However, Croatia categorically rejects allegations that there was any plan to commit violations of the rules of international humanitarian law, much less to commit genocide.

25. In its Counter-Memorial, Serbia made allegations regarding the numbers of Serbs killed or missing during and after Storm relying on the Croatian Helsinki Committee Report (CHC) and Veritas. These two reports set out widely differing figures. Yet another figure — a different one — was advanced by the Respondent last week[73].

26. The Respondent alleges ***that*** "the killing of Serbs was mainly carried out while Serbs were fleeing the area in columns, or while they were in their houses for those Serbs who did not or could not escape fast enough"[74]. It alleges that there were more killings in Sector North "probably due to the fact that the evacuation started earlier, which gave Croatian forces more time to organise and direct the shelling of columns"[75]. Initially, it provided no direct evidence in support of its claims. It attempted, in its Rejoinder, to rectify this significant lacuna in its pleadings and evidence by submitting 12 witness statements regarding the columns[76]. I will return to them.

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[71]RC, paras. 11.77-11.79 and APC, paras. 3.57-3.64.

[72]RS, para. 740, citing the *Gotovina et al.* TJ, para. 1539. Witnesses at the *Gotovina et al.* Trial, including Mrkšić, testified that the Serbs left pursuant to evacuation orders, with several leaving before the arrival of the Croatian army (*Gotovina et al.* Trial, 19 June 2009, Mrkšić Testimony: 18935:7-14). See also Testimony of Ambassador Galbraith, *Milošević* Trial, Thursday 26 June 2003, pp. 23,181, 23,205. The United Nations Secretary-General informed the Security Council that it was "difficult . . . to determine the extent to which the mass exodus of the Krajina Serb population was brought about by fear of Croatian forces, as opposed to a desire not to live under Croatian authority or encouragement by local leaders to depart" (Report of the United Nations Secretary-General, S/1993/730, dated 23 Aug. 1995, p. 3).

[73]See RS, para. 818 and cf., CR 2014/12, p. 46, para. 113 (Obradović).

[74]CMS, para. 1241.

[75]*Ibid.*, para.1243.

[76]APC, para. 3.72.

(a) ***Croatia did not target fleeing Serb civilians***

27. Mr. President, Croatian forces did not target civilian refugee columns. Columns of combatants and civilians passed through areas of ongoing fighting. It is deeply regrettable that, on occasion, some were caught in the crossfire. There is considerable evidence that attests to the fact that armed members of the RSK's army travelling in the columns, continued to attack the Croatian army as they withdrew[77]. The Respondent admits that the columns comprised of civilians and combatants and that the Bosnian army was also involved in the conflict[78]. The Human Rights Watch report relied on by the Respondent last Thursday[79], investigated the matter and found that: [Screen on]

> "Serbian soldiers and heavy artillery, including tanks, were reported to have been part of, or near, the refugee columns. Moreover, Serbian combatants interviewed . . . confirmed that they transported large quantities of ammunition and weaponry from the Krajina and that they transferred these weapons to the Bosnian Serb authorities upon arrival in territory under the latter's control. The materiel was transported within vehicles manned by RSK military forces that were intermingled among the columns of fleeing refugees."[80] [Screen off]

28. This view was entirely corroborated by the final report submitted by the commander of the rebel Serb Army, General Mrkšić, to his commanding officer in Belgrade, General Perišić. In this report, submitted three weeks after Storm, Mrkšić sets out the actions of the retreating rebel army including the fact that they were transporting significant quantities of weapons for the Bosnian Serb army of Ratko Mladić near Petrovac[81].

29. In any event, contrary to Serbia's allegations, the Applicant has never stated that civilians become legitimate targets when they flee with soldiers[82]. The Respondent claims that the targeting of civilians was confirmed by the Trial Chamber in *Gotovina*[83]. It provides no citation in support. The Trial Chamber made no findings that the Croatian army targeted refugee columns.

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[77]APC, para. 3.68.

[78]CMS, paras. 1244, 1243.

[79]CR 2014/17, p. 34, para. 74 (Obradović).

[80]Human Rights Watch, *Impunity for Abuses Committed During "Operation* Storm*" and the Denial of Right of Refugees to Return to the Krajina*, Aug. 1996, at: http://www.hrw.org/reports/1996/Croatia.htm.

[81]RC, Ann. 165.

[82]RS, para. 746.

[83]RS, para. 747.

30. Virtually all of the Respondent's initial allegations with regard to the alleged killing of Serbs "escaping in columns" were based on statements in the CHC Report[84]. As Serbia chose not to annex these statements to its pleadings, it remains unclear when these statements were made, who made them and to whom were they made[85]. It is characteristic of the Respondent's approach to evidence that it should proceed in this way, whilst seeking to criticize the Applicant's witness statements[86].

31. In any event, Croatia has reviewed the Respondent's allegations carefully. An analysis of the CHC Report indicated a multitude of discrepancies and inconsistencies: these were addressed in our written pleadings[87]. The Trial Chamber in *Gotovina* confirmed these flaws. It concluded that it could not rely on the report — in relation to information in the report — if uncorroborated by other evidence[88]. Mr. President, Members of the Court, the Respondent bases a number of its allegations on this report alone. These remain uncorroborated and unsupported by any other evidence. They should be dismissed in their entirety.

32. In its Rejoinder, for the first time, Serbia filed 12 statements regarding the alleged attacks on refugee columns[89]. We set out our response in the Additional Pleading. One of these statements was provided by a former police officer of the "RSK". This statement of Mirko Mrkobrad was referred to by the Respondent last Wednesday[90]. The witness mentions an attack by the Croatian Army on 8 August 1995. He offered what he himself characterized as a "wild guess" that it left at least 30 people dead and many wounded. He goes on to state that once the convoy reached Glina, it was surrounded by the Croatian Army and he said: [Plate on]

> "All of a sudden, a small arms fire was opened at them. People were falling like flies. My *wild guess* was that ***about*** 150 people were killed."[91]

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[84]See CMS, Chap. XIII, (5)(A), pp. 398-404.

[85]RC, paras. 11.91-11.92.

[86]CMS, para. 153.

[87]RC, para. 11.92, and RC, Anns. 204 and 205.

[88]*Gotovina et al.*, TJ, p. 30, para. 50.

[89]RS, paras. 756-760, Anns. 52-66.

[90]CR 2014/16, pp. 61-62.

[91]RS, Ann. 52 (Minutes of a hearing of Mirko Mrkobrad); emphasis added.

Mr. President, Members of the Court, the Respondent did not quote this part of the statement in its Rejoinder despite the very large number of alleged victims. It also offers no corroboration of this event. [Plate off]

33. On Thursday Serbia's Agent accepted the Applicant's account of the surrender of the Serb Army's 21st Kordun Corps to ***C***olonel Stipetić of the Croatian army. He accepted the ***account of the*** treatment of rebel soldiers and civilians, in the midst of fighting, in Topusko in Sector North, on 7 August 1995[92]. Reports show that the Croatian Military Police provided security to moving columns of Serb combatants and civilians. They established reception centres for civilians and took the injured to medical centres[93].

34. In this light, the Respondent's allegation of targeting civilian refugee columns in Sector North is unfounded for at least three reasons. First, there is no evidence that the Croatian Army targeted refugee columns. Second, Serbia acknowledges that the incidents it highlights in Sector North were areas where the Army of Bosnia was also operating[94]. Third, Serbia does not explain why the commander in charge of Sector North, Petar Stipetić, would target refugee columns, when — according to the Respondent's Agent — he did not share the alleged genocidal intent of the Brioni participants[95].

35. There are also reports that the retreating Serb forces caused casualties amongst the fleeing population[96]. A representative of the Croatian Helsinki Committee — relied on so heavily by the Respondent — testified at the *Gotovina* trial that 100 Serb civilians were run over by Serbian tanks fleeing Sector North[97]. Moreover, a Serb returnee testified that "in a column via Žirovac . . . tanks led by [a Serb] Mile Novaković were treading over a part of our column"[98].

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[92]CR 2014/17, p. 27, para. 55 (Obradović).

[93]See APC, Ann. 30 (Report on the Employment of RH Armed Forces Military Police Units in Storm, 11 Aug. 1995).

[94]CR 2014/17, p. 58, paras. 158 ff. (Obradović). See also tabs 7 and 14 of Serbia's judges' folder.

[95]CR 2014/16, p. 28, para. 56 (Obradović).

[96]APC, para. 3.69. See *ibid.*, Anns. 19 and 20.

[97]*Gotovina et al*, Trial Transcript, p. 15975.

[98]APC, Ann. 19. Similarly, another witness refers to the killing of her Serb neighbour, by "members of the Serbian army, that is, 'Arkan's men'", APC, Ann. 20.

36. Last week Serbia also referred to two attacks on columns in Medeno Polje and Svodna in Bosnia[99]. While these actions by the Croatian air force took place in Bosnia, the document Serbia cites in support (filed in the Court last August) does not "confirm" that the actions **"**targeted Serb civilians**"**[100], as the Respondent claims. The document makes clear that the targets were "armoured mechanized" columns and the actions resulted in the destruction of a tank and several vehicles.

37. Finally, the Respondent has also failed to provide any evidence of a "plan" to target the civilian columns.

(b) ***The Serbs that remained were not "systematically" killed***

38. Mr. President, Croatia did not "systematically target" the Serbs who remained during and after Storm. Nor did it carry out a "systematic killing campaign" against the Serbs[101]; this was confirmed by the ICTY in *Gotovina*. No convincing evidence has been tendered in support of these allegations. In its Counter-Memorial, the Respondent relied almost exclusively on the discredited CHC Report[102]. Its allegation that "the majority of killings were committed in August 1995 but continued throughout 1995" lacked any source[103]. In several instances, the Respondent provided no details of the alleged killings — victims without names; events without dates; killings without locations. This argument by assertion, untroubled by any evidence. Equally unfounded — since there is no supporting evidence — is the claim that the alleged killings were systematic.

39. The number of persons killed after Operation Storm is grossly exaggerated by the Respondent. Counsel for the Respondent, Mr. Jordash, referred to the "final and devastating destruction of those left behind"[104]. Professor Schabas told the Court that "Croatian soldiers kill[ed] everyone whom they were able to track down"[105]; adding that the "Croatian army massacred virtually everyone who had stayed behind."[106] Yet the United Nations

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[99]CR 2014/17, p. 61, para. 167 ff. (Obradović).

[100]Letter dated 8 Aug. 2013 from Saša Obradović to the International Court of Justice, Ann. 3.

[101]CMS, para. 1258 and RS, paras. 762 ff.

[102]CMS, para. 1260.

[103]CMS, para. 1259.

[104]CR 2014/18, p. 11, para. 11 (Jordash).

[105]CR 2014/18, p. 66, para. 68 (Schabas).

[106]*Ibid*.

Secretary-General's Report of 21 December 1995 (cited by the *Gotovina* Trial Chamber) found that 9,000 Serbs remained in UN Sectors North and South. For his part, Mr. Štrbac, the Respondent's expert witness, claims that 1,662 persons were allegedly killed by Croatian Forces during Operation Storm[107], of whom 1,513 were killed during the first week[108]. On Serbia's case, at its very highest, 149 people were killed after the first week of the operation. There was no killing campaign.

40. With regard to Sector South, initially the Respondent claimed that civilians in Knin were shot by Croatian forces upon entering the city. You were shown testimony from the *Gotovina* trial to demonstrate the "magnitude of killings". Last week, you saw video testimony of Andrew Leslie at the *Gotovina* trial, in which he claimed to have seen 30 to 60 bodies at Knin Hospital, including women and children. However, Mr. President, the Trial Chamber ultimately rejected this testimony. It noted: [Screen on]

> "In a Canadian radio programme broadcasted [sic] on 21 July 2003, Andrew Leslie stated that during Operation Storm there was a deliberate targeting of residential areas on a massive scale which resulted in the deaths of an estimated 10,000-25,000 people."[109]

As compared with Mr. Leslie's excessive claim, the Trial Chamber was unable to identify a single victim of shelling in Knin. It is easy to see why the ICTY ignored Mr. Leslie's testimony. There is no reason for this Court to depart from the ICTY's assessment of it. [Screen off]

41. Similarly, the crimes alleged to have been committed in Sector North were not supported by reliable evidence. Once again Serbia relied on the CHC Report. Again, it contains numerous unsubstantiated allegations and flaws with respect to acts committed, the perpetrators of the acts and circumstances of death[110].

42. The Respondent also relies on the list prepared by Veritas. The Applicant identified numerous discrepancies and mistakes and noted other flaws, which go to its probative value. We provided examples in the Reply[111]. You can see some of these on your screen. Veritas lists

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[107]Expert witness statement of Savo Štrbac, para. 6.3.2.

[108]*Ibid.*, para. 6.7.

[109]*Gotovina et al.*, TJ, para. 1334.

[110]See CMS, paras. 1301-1311 and response in RC, paras. 11.98 ff. See also RC, Vol. 5, Ann. 207 (List of Persons with Incorrect Personal Data) and Ann. 208 (List of Persons with Incomplete Personal Data).

[111]RC, para. 11.68 and related footnotes.

persons who were alive when the list was published, and who obtained new documents after Storm. As examples:

> Veritas claims that Dušan Korolija died in September 1995, yet his death certificate states that he died in April 2009[112].
>
> It claims that Nikola Kresojević went missing on 5 August 1995, yet he applied for an identity card thirteen years later, in 2008[113]. [Screen off]

43. Veritas also lists persons who died in circumstances unrelated to the operation, including Mirko Rajšić, killed in a traffic accident in 1993[114]; Živko Banda died as a result of falling down the stairs drunk in 1992[115]; examples of ***two*** ladies ~~***who***~~ both of whom died of natural causes in 1993[116]. It also lists several victims twice, as the Agent pointed out~~***[117]***~~. These flaws in the report are typical of its quality. It is entirely unreliable.

44. Mr. President, the two NGOs that the Respondent relies upon, the Croatian Helsinki Committee and Veritas — and which the Respondent claims corroborate each other[118] — are in fact extremely critical of one another. Far from seeing Veritas as "uncovered, and beautiful" holding a mirror "in which misdeeds of everyone are reflected"[119] the CHC has called Veritas "biased" and accuses Veritas of having "made the living dead and turned soldiers into civilians"[120]. Similarly, Serbia's ***expert*** witness, who presides over Veritas has identified flaws in the CHC Report including double entries, incorrect biographical details, and listing people ***alive*** as having died[121]. The only conclusion to be drawn is that the documentation that the Respondent relies upon is inaccurate, unreliable, and biased.

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[112]RC, Ann. 179.

[113]RC, Ann. 180.

[114]RC, Ann.182. See also RSK, Police Department, Letter Confirming the Death of Branko Bajić, 22 Feb. 1995, RC, Ann. 183; Željko Bolić, died in a traffic accident in August 1993, RSK, Regional Centre Vrginmost, Operational Report, 27 Aug. 1993, RC, Ann. 184; Dragan Dobrić who died in 1992, RC, Ann. 186.

[115]RC, Ann. 185.

[116]RC, Anns. 187 and 188.

~~***[117] For example Predrag Krivokuća.***~~

[118]CR 2014/16, p. 40, para. 21 (Obradović).

[119]CR 2014/16, p. 42, para. 28 (Obradović).

[120]CMS, Ann. 62, p. 283 at 287.

[121]Expert witness statement of Savo Štrbac, filed by Serbia on 1 Oct. 2013, Sect. 6.10.

45. The Respondent seems to have recognized this. After the Appeals Chamber acquitted the ***G***enerals, Serbia filed new material to try and rebuild ***a*** case that had fallen apart. In addition to ***the*** documents it filed in August 2013, six months ago, the Respondent filed five new statements. These included the statement of the expert that I have referred to. This purported to set out the particulars of 11 alleged sites of "mass murders"[122]. Three of these sites were not mentioned in the Counter-Memorial. Three others were mentioned but without *any* particulars as to the numbers or identities of victims. With respect to five, the only authority provided was the CHC Report. Serbia's Rejoinder is silent with respect to ten of these sites. It only refers to the events in Kijani[123].

46. The Respondent testifies that only one of the 11 sites of "mass murders" were considered in the *Gotovina* indictment[124]. This is incorrect. The Trial Chamber made findings with respect to three further incidents (Palanka, Zrmanja and Mokro Polje). The Trial Chamber noted that a number of criminal investigations were conducted by the Croatian Police in relation to these. It specifically noted one conviction in Zrmanja[125], criminal reports in relation to Mokro Polje[126] and with regard to the events in Kijani, the Trial Chamber found that it was possible that the perpetrator was an ethnic Serb[127]. Last Thursday, Mr. Obradović told the Court that "no one has ever been accused" in relation to the events in Mokro Polje and that Trial Chamber was "unable to draw any conclusion regarding the identity or affiliation of the perpetrator" in Kijani[128]. This is simply not true. ***Moreover, t***he Respondent***'s expert*** fails to mention any of this.

47. Serbia also relies on four new witness statements prepared expressly for this case[129]. We take particular issue with the statement of Božo Suša, who claimed to have witnessed the execution

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[122]Expert witness statement of Savo Štrbac, filed by Serbia on 1 Oct. 2013, Sect. 6.11.

[123]RS, para. 767.

[124]Expert witness statement of Savo Štrbac, filed by Serbia on 1 Oct. 2013, Section 6.11.

[125]*Gotovina et al.*, TJ, paras. 244 ff., 2189.

[126]*Ibid.*, paras. 229-236.

[127]*Ibid.*, paras. 257- 262.

[128]CR 2014/17, p. 39-40, paras. 89-93 (Obradović).

[129]New witnesses Sovilj, Babic, Ugarković, Suša referred to by the Respondent in CR 2014/16, CR 2014/17 and CR 2014/18.

of 15 Serb civilians in a church in Knin. No such incident was mentioned in the *Gotovina* indictment. Another example of a claim made without a shred of evidence.

48. Mr. Obradović claimed last week — for the first time — that Mr. Štrbac had uncovered "70 victims who were killed just in the town of Knin in Operation Storm . . . the majority of whom must be the victims of shelling"[130]. This is most curious, since Mr. Štrbac's statement does not say that — the section relied on by Mr. Obradović makes no reference to shelling[131]. If Serbia and Mr. Štrbac really believed that there was evidence of victims of shelling in Knin, they had until November last year, one year after the *Gotovina* Appeals judgement, to submit that evidence and to seek a review. They did not do so.

49. Mr. President, Members of the Court, the number of those alleged to have been killed is grossly overstated by the Respondent.

50. On a related note, the Respondent has also made allegations regarding Croatia's investigatory policy after Storm. The Trial Chamber considered this issue at length[132], and noted the efforts of the Croatian law enforcement authorities to investigate and prosecute crimes. It found "that the insufficient response by the Croatian law enforcement authorities and judiciary can to some extent be explained by the . . . obstacles they faced and their need to perform other duties in August and September 1995"[133]. The Trial Chamber concluded that it could not establish a policy of non-investigation of crimes committed against Serbs. Mr. President I am wondering if you think that we should take a break now?

The PRESIDENT: How many more minutes ***do*** you have still?

Ms SINGH: Maybe ten.

The PRESIDENT: OK, you can proceed, please.

Ms SINGH: Thank you.

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[130]CR 2014/17, p. 32, para. 67 (Obradović).

[131]*Ibid*., footnote 94.

[132]*Gotovina et al.*, TJ, paras. 2100, 2108, 2137.

[133]*Ibid*., para. 2203.

(4) Response to Allegations of Looting and Destruction of Serb Property

51. The Respondent's expansive allegations regarding looting and the destruction of property were significantly scaled down in its Rejoinder. Croatia maintains its detailed response in its entirety[134]. The evidence demonstrates that acts of looting and destruction were not "planned", "tolerated" or "condoned" by the Croatian government. Mr. Akashi, the United Nations Secretary-General's Special Representative stated that he "did not in any way associate the continued burning and looting . . . with the Government"[135].

52. The Agent has taken you to the Trial Chamber's findings that also did not accept the claims advanced by the Respondent. There is no reason for this Court to adopt a different view.

(5) The Serbs were not Targeted after Operation Storm

53. Finally, there is no evidence to support the allegation that Serbs were targeted after Operation Storm. Contrary to the allegations we heard last week, Croatia did not take legal measures that targeted the Serbs; or use its legal system in a discriminatory manner or prevent their return[136]. Nor did it confiscate Serb property[137].

54. Once again, Serbia referred to certain temporary laws regarding property that were subsequently amended or repealed. This issue has been fully addressed in the written pleadings[138]. Croatia promulgated a law on temporary takeover of property for the protection of abandoned properties irrespective of the ethnicity of the owners. This was done for several reasons including to house refugees and internally displaced persons and to protect the properties from theft[139].

55. A greater obstacle to the return of the Serbs to Croatia was created by the Respondent[140]. Under Serbian law refugees are bound by the same requirements regarding military service as citizens. As a result refugees from the "Krajina" were inducted into military service in Serbia and

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[134]RC, paras. 11.103-11.108.

[135]RC, Ann. 209 (UN, Coded Cable, Meeting with Mr. Šarinić, 9 Sept. 1995)

[136]CMS, paras. 1328, 1329, 1338-1346 and 1347-1352. RS, paras. 776-780, 816, 820, 821-823.

[137]CR 2014/17, p. 16, para. 147 (Orbadović).

[138]RC, paras. 11.115-11.118.

[139]APC, para. 3.96 and Ann. 33.

[140]RC, Ann. 215 and APC, para. 3.93.

sent to fight in Bosnia and Eastern Slavonia (in Croatia) in the late summer and autumn of 1995. The Respondent accepts this[141].

56. As the Agent mentioned during the conflict Croatia provided shelter for over a million people including refugees and internally displaced. The Government was in favour of repatriation once basic infrastructure could be provided, and law and order had been comprehensively restored. The UNHCR has monitored the repatriation. In 2011 a European Commission Progress Report noted that Croatian authorities had registered over 132,000 Serb returnees. More recently UNHCR estimated that the number of Serb returnees is 133,280[142].

57. Almost 150,000 housing units have been reconstructed at a cost of 2.24 billion euros. It is estimated that one-third of this was for the reconstruction of housing units for ~~the~~ ethnic Serbs. These are just some programmes and developments that demonstrate that Croatia did not enact legal measures "to prevent any possibility that Krajina Serbs would reclaim their property" as Serbia alleges[143]. The number of Serb returnees is a testament to this.

58. Contrary to the Respondent's repeated misstatements last week that no one has been held accountable for crimes committed during Storm, Croatia began to prosecute perpetrators of murders, including its soldiers, in 1995 itself[144]. The Agent has referred to various domestic proceedings. I would only add that the Organization for Security and Co-operation in Europe (OSCE) has noted the "significant efforts" of Croatia in the prosecution of war crimes which it has found are "conducted in an impartial manner by . . . independent judicial bodies"[145].

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[141]Expert witness statement of Savo Štrbac filed with the Court on 1 Oct. 2013, section 6.6.4.

[142]The UNHCR statistics are based on data provided by the State Office for Reconstruction and Housing Care. All returnees are registered in UNHCR Field Units' VOLREP Database (as at 15 Dec. 2013). According to the UNHCR Serb refugees returned to Croatia in 1998 (10,048), 1999 (12,378); 2000 (15,619); 2001 (10,888); 2002 (12,230), 2003 (9,591); 2004 (8,198), 2005 (5,612) and every year since. UNHCR Statistical Report June 2013. See: http://www.unhcr.hr/media/com_form2content/documents/c2/a57/f9/UNHCR%20Statistical%20Report%20June%202013.xls.

[143]CMS, para. 1346.

[144]*Gotovina et al.*, TJ, paras. 207, 311, 2172 to 2192.

[145]APC, Ann. 33 (Status Report of the Head of the OSCE Office in Zagreb to the OSCE Permanent Council, 22 Nov. 2011).

IV. Conclusion

59. Mr. President, Members of the Court, this brings me to my conclusions: [Screen on]

(i) The purpose of Operation Storm was to establish the territorial integrity of Croatia. This was accepted by the ICTY's Trial Chamber in *Gotovina*, which found that "the primary focus of the [Brioni] meeting was on whether, how, and when a military operation against the SVK should be launched"[146].

(ii) There was no plan to destroy the rebel Serbs during Operation Storm or thereafter, either at Brioni or anywhere else. [Next graphic]

(iii) There was no indiscriminate shelling of Serb civilians and no forcible displacement. There were various reasons for the departure of the Serbs, not least the fear of an impending military engagement and a refusal to accept Croatian sovereignty. [Next graphic]

(iv) There was no plan to target fleeing Serbs civilians and there was no systematic killing of the Serbs who remained. Croatia took a number of measures to prevent unlawful acts and initiated investigations and legal proceedings to punish individual perpetrators. [Next graphic]

(v) Croatia did not adopt measures to prevent the return of Serb refugees and the return of ***over*** 130,000 Serbs is testament to this fact. [Screen off]

60. Mr. President, Members of the Court, that concludes my presentation. I thank you so much for your kind attention and ask that you call Sir Keir Starmer after the break.

The PRESIDENT: Thank you very much. The Court takes 15 minutes break. After that I will call on Sir Keir Starmer, thank you. The sitting is suspended.

The Court adjourned from 11.25 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. I give the floor to Sir Keir Starmer. Please, you have the floor, Sir.

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[146] *Gotovina et al.*, TJ, para. 1990.

Sir Keir STARMER:

NO GENOCIDE AGAINST THE SERBS IN THE "RSK" AND NO RESPONSIBILITY OF CROATIA

I. Introduction

1. Mr. President, Members of the Court, in this speech I will address the question of whether the Respondent has made out its case that the Applicant committed genocide against the Croatian Serbs living in the area of Croatia declared as the so-called "RSK" during Operation Storm or thereafter.

2. I will analyse, from a legal perspective, the Brioni Minutes and the Respondent's so-called "confirmatory facts", which last Friday transformed, without much explanation, into evidence of "pattern". Before I do either of those things, I will deal with the legal significance of the ICTY Trial and Appeals Chamber decisions in the *Gotovina* case, and will thereby respond to the important question asked by Judge Bhandari on Friday.

II. The *Gotovina* case

3. Let me start my analysis by focusing on the legal significance of the *Gotovina* decisions. As you know, the Trial Chamber found that Mr. Gotovina was part of a joint criminal enterprise, whose common purpose was permanently to remove the Serb civilian population from the Krajina region by ordering unlawful artillery attacks on four towns: Knin, Benkovac, Obravac and — through Mr. Markač — Gračac, and by failing to make serious efforts to prevent or investigate crimes committed by his subordinates.

4. The central issue on the appeal was the alleged unlawful shelling of those "Four Towns" — and I want to just focus on that. The Trial Chamber, as you know, had employed a "200-metre standard", essentially finding that any artillery fire impacting 200 metres or more beyond a military target was evidence of the unlawful targeting of civilians and civilian objects. So, the standard was critical to their approach and their finding in the "Four Towns" that the shelling was unlawful.

5. Last Friday, Professor Schabas referred to the "200-metre standard" used by the ICTY Trial Chamber. He told you — and I will quote him precisely — that "the *majority* of the [ICTY] Appeals Chamber said that this was an error"[147]. That may have been a rather loose summary but it is not accurate. The Appeals Chamber *unanimously* found that the 200-metre standard of artillery accuracy was invalid: that was unanimous; they described it as evidentially groundless[148]. I think that by the time the appeal came on even the Prosecutor had abandoned the standard, so there was no question that this was not a unanimous decision that the starting-point was invalid. The two dissenters disagreed not about the invalidity of the starting-point but about the *legal consequences* of that invalidity[149]. And that in turn developed into a dispute about whether it was an error of law or an error of fact.

6. Since the 200-metre standard was the "cornerstone and organizing principle"[150] of the Trial Chamber's analysis, upon which it had based its findings that the two leaders ordered unlawful artillery and rocket attacks during Operation Storm, the majority ruled that, absent the flawed inferences from the 200-metre standard, no reasonable trier of fact could conclude that Messrs. Gotovina and Markač intended unlawfully shelling civilians or civilian objects. So, once you took away the standard, the unlawfulness of the shelling fell with it. And the majority went on to note that, without the unlawful artillery attacks, no court could reasonably decide that the joint criminal enterprise existed. They then considered whether the convictions could be sustained on any alternative theory of liability, and found that they could not. They *did*, contrary to one of Professor Schabas's submissions[151], specify a "legal error"[152]. Despite the attempts by the Respondent's legal team to characterize this approach as "puzzling"[153], this is self-evidently a rational and entirely conventional approach. As I will show in just a minute, they actually followed the structured analysis of the Trial Chamber in coming to their conclusions.

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[147]CR 2014/18, p. 52, para. 27 (Schabas).

[148]*Gotovina*, Appeals Judgement (AJ), para. 58.

[149]*Gotovina*, AJ; separate opinion of Judge Meron, para. 2.

[150]*Gotovina*, AJ, para. 64.

[151]CR 2014/18, p. 52, para. 28 (Schabas).

[152]*Gotovina*, AJ, para. 64.

[153]CR 2014/18, p. 28, para. 101; p. 29, para. 109 (Jordash).

7. Now, just pausing there: no unlawful shelling, no intention to remove or deport, no joint criminal enterprise (JCE); it is immediately obvious to this Court, as it is to the Respondent, why the ruling of the ICTY Appeals Chamber stops the counter-claim in its tracks.

8. As you have heard, at first instance, the ICTY had already found that the artillery and shelling attacks on all the other towns and villages bar the four were not unlawful; so that was already decided. That was a unanimous decision of the first instance chamber and has not appealed[154]. And, as I will develop in a minute, the Respondent is not really being clear as to what this Court is supposed to do about that finding. On that basis, the ICTY at first instance decided it could not characterize the civilian departures from those towns and villages subject to lawful attacks as forced deportation. So, no unlawful attack, says the ICTY at first instance, cannot lead to a finding of forced displacement. The Appeals Chamber adopted the precise same logic. Having held that because of the flawed 200-metre standard, the shelling of the "Four Towns" was equally lawful and not unlawful, it followed the approach of the court below and held that equally it could not characterize as deportation the leaving of Serbs from those "Four Towns"[155].

9. Mr. President, Members of the Court, that does bring the counter-claim crashing down. For this reason, much of the discussion before this Court in the last two and a half weeks has been about the intention to commit genocide. On the basis of the joint findings of the ICTY at first instance that were not disturbed, and the findings of the appeal court, before even getting to a consideration of the specific intent for genocide, the Respondent is left in the position where even the basic criminality or wrongfulness of the acts it relies on for the *actus reus* is not made out. As Professor Schabas notes in his book on genocide[156], when it comes to killing as conduct contrary to Article II *(a)* of the Genocide Convention, the ICTR in the case of *Akayesu* identified two material elements: the victim must be dead; and the death must have resulted from an *unlawful* act or omission[157]. It is obvious from the reading of Article II. The *actus reus* has got to be an unlawful act. The same applies, obviously, to the other conduct in Article II. If the shelling, which the

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[154]*Gotovina et al.*, TJ, paras. 1162, 1755.

[155]*Gotovina*, AJ, paras. 91, 96.

[156]W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), 179.

[157]*Akayesu*, Trial Judgement, paras. 501, 589.

Respondent relies on as prohibited conduct and as *causing* the displacement of Serbs from the so-called "Krajina" was not even unlawful, the Respondent's case on genocide is, quite literally, hopeless. You cannot mount a case to prove genocidal intent on lawful acts.

10. That is why the Respondent's legal team spent so much time, energy and ingenuity in trying to convince this Court to depart from the clear approach set out in the *Bosnia* case and spent so much time seeking to persuade you not to treat the ICTY Appeal Chamber decision in *Gotovina* as "highly persuasive". That is *clear evidence* that they understand only too well the significance of the case for the prospects of success of their counter-claim.

11. They have to convince you *not* to treat as highly persuasive: ***[Screen on]***

(a) First — and this I hope is now coming up on your screen — so, first they have to persuade you *not* to treat as highly persuasive, the unanimous decision of the ICTY at first instance that the shelling of all the towns and villages other than the Four Towns was lawful — so that was the first thing; and it is obvious that no amount of criticism heaped on the Appeals Chamber helps them with that. ***[Next graphic]***

(b) Second, they have to persuade you not to treat as highly persuasive the unanimous decision of the ICTY at first instance that accordingly the attacks on those other towns and villages were *not* carried out with the intention to forcibly displace Serb citizens living there; again, no amount of criticism heaped on the Appeals Chamber helps them with that. ***[Next graphic]***

(c) Thirdly, they have to persuade you not to treat as highly persuasive the Appeals Chamber decision that the shelling of the Four Towns was lawful, thus completing the picture. ***[Next graphic]***

(d) And fourth, they have to persuade you not to treat as highly persuasive the Appeals Chamber decision that accordingly the attacks on the Four Towns were *not* carried out with the intention forcibly to displace the Serb citizens living there.

12. Now if I may just leave those on your screen for a moment. Despite the lengthy exposition of the Respondent's case on genocide last Friday, Mr. Jordash did not even begin to articulate how he says the Court should deal with the findings of the ICTY set out at *(a)* and *(b)* on your screen; what guidance, what approach does he put to you on that? If he invites you to treat them as highly persuasive, that cut rights through his argument. If he invites you to ignore them,

he is essentially asking you to depart from that unanimous finding. Perhaps even the findings of the ICTY at first instance are, like the findings of the Appeals Chamber, to be ignored when inconvenient to the Respondent's case. I note that when Mr. Jordash, in his speech, asserted that the other towns were heavily shelled despite having no identifiable military objects, if you trace the footnote in his speech it actually goes back to the Prosecutor's pre-trial brief in *Gotovina*[158] — you will not find there a finding of fact. He makes that assertion — he footnotes it — look at the footnote, and where does the footnote take you? It takes you to the Prosecutor's pre-trial brief in *Gotovina*. That, of course, set out the case the Prosecution *hoped*, but in the end *failed*, to succeed on, even at first instance. And whilst I still have that plate still up, can I remind the Court that — again at first instance — the ICTY found that the joint criminal enterprise did not extend to crimes of persecution, destruction, plunder, murder, inhuman acts, and cruel treatment. So, a further powerful finding of the ICTY at first instance. ***[Screen off]***

13. Mr. President, Members of the Court, it gets even worse for the Respondent. Having decided as it did about the lawfulness of the shelling and the lack of intent forcibly to displace Serbs from Krajina, the ICTY Appeals Chamber went on to hold as follows — the next part of the logic: ***[Screen on]***

> "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. Other parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the town of Knin, could be reasonably construed as using shorthand to describe the military forces stationed in an area, or intending to demonstrate potential military power in the context of planning a military operation."[159] ***[Screen off]***

14. In other words, the Respondent's case on the Brioni Minutes falls as well. The position could not be worse for the Respondent. Every factor they rely on to prove their case of genocide has been tested and clear findings have been entered which contradict their case.

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[158]CR 2014/18, p. 31, para. 117, fn. 88 (Jordash).

[159]*Gotovina*, AJ, para. 93.

15. No wonder Mr. Obradović, Mr. Jordash and Professor Schabas took turns tilting at the decisions in *Gotovina*. That is what happened on Thursday and Friday. Mr. Obradović tried to persuade you to adopt a purely mathematical approach: add the two dissenters in the Appeals Chamber to the three judges at first instance and claim victory. Well, if this Court adopts that approach we can all rewrite our CVs to claim success in the cases we actually lost. Perhaps unpersuaded by his own argument, Mr. Obradović also adopted the tactic of carrying on regardless. Sweeping statements were made about Article II conduct without any attempt being made before this Court to make out its basic wrongfulness required as a matter of law, or to relate it to the findings of the ICTY either at first instance or on appeal.

16. Mr. Jordash obviously took the decision not to follow Mr. Obradović's crude, mathematical approach, emphasizing instead the trenchant terms of the dissent in the Appeals Chamber. Mr. President, Members of the Court, the Applicant accepts that parts of the dissent were trenchant. But that is hardly novel or unique. Dissenters usually dissent because they think the majority got it completely wrong. If they did not think that, they would not dissent. Trenchant dissents litter the law books.

17. Professor Schabas, for his part, adopted what one might call a "mathematics plus" approach. He tried to persuade this Court that in deciding whether to treat the decision of the Appeals Chamber as "highly persuasive", you should take into account not only the numbers of judges at first instance and/or on appeal whose comments the Respondent thinks helpful to its case, but also the personal and professional qualities of the dissenters when compared with the qualities of the majority, as well as the volume of their dissent.

18. Although he, of course, disavowed any intention of doing so, Professor Schabas invited this Court to *rank* the judges of the ICTY at first instance and on appeal. To this end, he recited to you some of the judges' career credentials. He described Judge Orie, the presiding judge at trial, as "very distinguished"[160]; the dissenters Judge Pocar and Judge Agius as "legal minds of great distinction and authority"[161]; but President Theodor Meron, in the majority in the Appeals Court, whilst "a great jurist", is someone who Professor Schabas invites you to consider as a judge whose

[160]CR 2014/18, p. 44, para. 9 (Schabas).

[161]*Ibid.*

judgments have been "controversial" and who "may well have been mistaken" in the *Gotovina* case[162]. He even managed to track down, I think, a subsequent case of his that had been overturned, as evidence of his quality. Something, of course, all judges are familiar with. And, like Mr. Jordash, Professor Schabas relied on the terms of the dissent, presumably on the basis that the louder the dissent, the more weight that should be given to it.

19. Mr. President, Members of the Court, Professor Schabas did not go into the mechanics of how you should approach your task. Assuming for the moment that he is content for each of your opinions to carry equal weight — which is by no means a given on his own analysis — presumably the first thing you have to do on retiring to consider this case is to indicate what you personally think of the quality of each of the judges at first instance and on appeal? And where on a scale of one to 10 would you put the volume of the dissents?

20. These are obvious pitfalls. You might not all agree. What do you do on this thesis ***a***bout the good quality dissenter who dissents quietly? We all know that some of the most powerful dissents in legal history have been expressed in the politest of terms. And equally, what do you do about the not such good quality dissenter who dissents loudly? Presumably you can take into account what you know of the general demeanour of each of the judges when coming to your view about their dissent.

21. Frankly, that Professor Schabas should advocate an approach that descends into such absurdity serves only to underline just how desperate he is that the Court should not follow the established course, and treat the Appeals Chamber decision as "highly persuasive". He knows the consequences for the counter-claim if you follow the established approach adopted and followed in the *Bosnia* case.

22. Professor Schabas seeked to legitimize his novel approach on the basis that an appeal from the ICTY at first instance to the Appeals Chamber is quite unlike an appeal in a domestic jurisdiction. He suggests that it is some special process whereby, in reality, the Appeals Chamber is not really an appellate body, but really just adding a few more judges to the Bench. He gave the example of the Grand Chamber in the European Court of Human Rights.

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[162]CR 2014/18, p. 45, para. 10 (Schabas).

23. Mr. President, Members of the Court, Professor Schabas is plain wrong. The ICTY Appeals Chamber is not merely an enlarged Bench. It is an appeal court. Its function and standard of review make that clear. The Appeals Chamber hears appeals on errors of law invalidating the decision or errors of fact occasioning a miscarriage of justice[163] — as set out in the Statute. Where the Appeals Chamber finds an error of law, it articulates the correct legal standard and reviews the relevant factual findings of the Trial Chamber[164]. When considering alleged errors of fact, the Appeals Chamber applies a standard of reasonableness[165], and only substitutes its own findings for those of the Trial Chamber when no reasonable trier of fact could have reached the original decision[166]. That is a classic appellate function. Contrary to Professor Schabas' assertion, the Appeals Chamber operates in exactly the same way as many appeal courts in many jurisdictions across the world. In this respect, the example Professor Schabas gave of the Grand Chamber of the European Court of Human Rights is not a good one. The Grand Chamber, hearing a case referred or relinquished to it, is engaged in a wholly different exercise to the ICTY Appeals Chamber, because it is involving itself in a fresh consideration of the whole case rather than an appeal[167].

24. Against that background, the Applicant submits that there is simply no good reason for this Court to depart from the approach it took in *Bosnia*. The process for appointing judges is not opaque, as was suggested. It is set out in the ICTY Statute[168]. And the Statute clearly specifies the experience, abilities and status required of all of the judges[169]. They are all respected judges, properly appointed, and the Applicant submits that it is invidious to invite this Court to afford more weight to the opinions of some judges than to others. In approaching its task, this Court should

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[163]ICTY Statute, Art. 25.

[164]*Gotovina*, AJ, para. 12; *Haradinaj et al.*, Appeals Judgement, para. 11; *Boškoski and Tarčulovski*, Appeals Judgement, para. 11.

[165]*Boškoski and Tarčulovski*, Appeals Judgement, para. 13; *D. Milošević*, Appeals Judgement, para. 15; *Mrkšić and Šljivančanin*, Appeals Judgement, para. 13; *Krajišnik*, Appeals Judgement, para. 14; *Martić*, Appeals Judgement, para. 11; *Strugar*, Appeals Judgement, para. 13; *Hadihasanović and Kubura*, Appeals Judgement, para. 10.

[166]*Boškoski and Tarčulovski*, Appeals Judgement, para. 13; *D. Milošević*, Appeals Judgement, para. 15; *Mrkšić and Šljivančanin*, Appeals Judgement, para. 13; *Krajišnik*, Appeals Judgement, para. 14; *Martić*, Appeals Judgement, para. 11; *Strugar*, Appeals Judgement, para. 13; *Orić*, Appeals Judgement, para. 10; *Nchamihigo*, Appeals Judgement, para. 10; *Zigiranyirazo*, Appeals Judgement, para. 11.

[167]European Convention on Human Rights and Fundamental Freedoms, Arts. 30 and 43; *K. and T.* v. *Finland*, App. No. 25702/94, 12 July 2001 [GC], para. 140.

[168]See ICTY Statute, Arts. 13*bis*, 13*ter*, 14 (3) and (4).

[169]ICTY Statute, Arts. 13, 13*quater*.

recognize the difference functions of the ICTY Trial Chamber, and the Appeals Chamber. If on review by the Appeals Chamber, a finding of the ICTY Trial Chamber is found wanting, and not upheld, it defies logic to give that original finding highly persuasive status. Let me be clear, the Applicant does not suggest to this Court that it is *bound* by the undisturbed findings of the ICTY at first instance or by the Appeals Chamber decision in *Gotovina*, but they *are* "highly persuasive". The more so because they deal in detail with the very issues which are central to the disposal of the Respondent's counter-claim before you.

25. This is an appropriate moment for me to deal, if I may, with the question posed by Judge Bhandari on Friday, which reads as follows:

> "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?"

26. In response, the Applicant makes two brief points:

(a) first, the Applicant draws the Court's attention to paragraph 223 of the *Bosnia* case, where — and I will quote exactly from ***here on***, where the Court said: "the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, *unless of course they have been upset on appeal*"[170] (emphasis added). So, when the Court in *Bosnia* was considering this, they expressly made an exception for findings that had been set aside on appeal, which reinforces our submission, that it defies logic to give those findings a persuasive status. This Court has therefore held that the *undisturbed* findings of the Trial Chamber will remain highly persuasive even when there is a successful appeal on other issues. So our submission is, if upset on appeal, the finding loses its highly persuasive status. If not upset on appeal, it retains it;

(b) secondly, we point out that it is evident from the preceding passage of the same Judgment — and this paragraphs 221 to 222 — that this Court deliberately contemplated the probative value

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[170] *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. 134, para. 223.

of ICTY trial and appeal judgments which contain dissenting opinions, and determined to give such judgments no lesser value than unanimous judgments. That is obviously an important point. Part of the rationale behind the Court's decision in *Bosnia*, that findings should have highly persuasive status, was because there were recent judgments and there were dissenters. So this Court could have full transparency about the finding. So, it contemplated dissent, it used that, as a reason for saying the findings should be highly persuasive. The Respondent can hardly say now, to this Court, because in this case there is dissent, something in *Bosnia* that was contemplated, you should not follow the approach that was set out in the *Bosnia* case. The Court had contemplated just this situation.

27. The Applicant's submission is therefore straightforward, in accordance with this standard, and absent compelling new evidence from the Respondent, of which there is none, the ICTY findings and Appeals Chamber decision in *Gotovina* is fatal to the Respondent's case. It cannot succeed in the face of those findings.

28. I turn now to my consideration of the Brioni Minutes.

III. The Brioni Minutes: no genocidal intent

29. The starting-point is, of course, the Appeals Chamber's ruling to which I have already referred. Absent unlawful shelling and absent an intention forcibly to displace Serbs from the Krajina, an incriminating reading of the Brioni Minutes is not possible, as the Appeals Chamber rightly concluded. That accords with a common sense and an objective reading of the Minutes. And that is actually an end of the case on the Brioni Minutes.

30. From the date of the first pleading put forward by the Respondent in this case, the Respondent has always insisted that the Brioni Minutes are the sole basis for its conclusion that the Croatian political and military leadership harboured genocidal intent vis-à-vis Croatian Serbs, and that that intent was confirmed but not established by certain additional facts. In the Counter-Memorial, the Respondent submitted, and I hope this is on your screens: ***[Screen on]***

> "1430. It should be stressed . . . that, in accordance with the practice of the Court[171], *none of these elements* [and by these elements the Respondent was referring to the nature of the acts committed after the plan, the so-called deportation of Serbs and the scale of destruction of property, none of these elements, so says the Counter-Memorial] *could prove the genocidal intent by itself, either viewed individually or collectively* [and it then gives a reason], since all these elements could equally, without other evidence, indicate the existence of a discriminatory intent, instead of a genocidal intent." (Emphasis added.)

This is the Respondent's case. At that time putting all its eggs in the basket of the Brioni Minutes.

31. And that was affirmed in the Rejoinder[172]. The three elements became six factors, spelling out the acts in question, as they did in the Agent's speech, but they are essentially the same elements. The acts that follow the plan.

32. And that has been the consistent way that the Respondent put its case until, by my watch, approximately 10.15 a.m. last Friday morning when, in his speech last Friday, Mr. Jordash swapped horses and radically departed from that consistent approach. He said, and this is paragraph 23 in the transcript, having identified his three phases, and Phase Two, just to remind you was the execution of the plan, the carrying out of Operation Storm and Phase Three was the aftermath, he said: ~~***[Next graphic]***~~

> "23. *Proof of specific intent* in Phases Two and Three, [so after the plan] when viewed alone, *require an examination of a pattern of atrocities* committed over many communities focused on the targeted group."[173]

So he is clearly loosening the grip of the pleaded case.

33. And then later he said: ~~***[Next graphic]***~~

> "33. *When viewed in isolation, any of the three phases* [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."[174] (Emphasis added.) [Screen off]

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[171]This footnote in the Counter-Memorial reads:

> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent." (Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007 [*I.C.J. Reports 2007 (I)*, pp. 196-197], General List No. 91, para. 373; see also Chapter II, paras. 46-58.

[172]RS, para. 721.

[173]CR2014/18, p. 13, para. 23 (Jordash).

[174]*Ibid.*, p. 15, para. 33 (Jordash); footnotes omitted.

How can paragraph 1430 and 33 sit together? One says it is the Minutes with confirmatory acts, not what follows, with real clarity in the Counter-Memorial. Last Friday it changes to a reliance on the acts after the plan, rather than the plan itself.

34. No doubt this seismic shift in the Respondent's case is reflective of the collective assessment by the Respondent's team of the likelihood of success if they continue to base their case solely on the Brioni Minutes. However, it in no way begins to deal with the express finding of the ICTY Appeals Chamber already referred to which did not uphold the findings that incriminatory intent could be found in the Minutes.

35. Mr. President, we have set out our detailed views in the pleadings and I will not go through them in detail at this stage[175]. I will, however, take you to the Brioni Minutes themselves, they are Annex 52 of the Respondent's Counter-Memorial. They are also in your folders today. And I will just focus on the key passages cited by the Respondent in its written pleadings and oral arguments, and in particular the sentence quoted 13 times in the written pleadings. This is this statement by President Tudjman that, and I hope this is now on your screen: [Screen on] "We have to inflict such blows that the Serbs will to all practical purposes disappear."[176] You have heard this emphasized to you repeatedly last week, you have seen it in the pleadings, and all the weight is on the word "disappear". Mr. President, Members of the Court, the Respondent takes this statement out of context. When the next few sentences are added to the passage, the context becomes clear. And I will just focus, if I may, on the first and the fourth paragraph. You have had the first paragraph read to you, but can I just emphasize there is in there a verb, ***~~[Next graphic]~~***

> "We have to ***inflict*** such blows [there is an object] that ***the Serbs*** will to all practical purposes [and there is an intended consequence] ***disappear***, that is to say, [so there is a comma, i.e., let me explain what we mean by that] the areas we do not take at once must *capitulate* within a few days."

So immediately after the word "disappear" is an explanation of what is meant by that in this context.

If you then go to the fourth paragraph you have a paragraph which is so strikingly similar, that it is almost impossible not to conclude that it is referring to precisely the same thing.

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[175]RC, paras. 11.40-11.55, 12.4-12.18; APC, paras. 3.10-3.11, 4.8-4.19.

[176]CMS, para. 1197.

> "We have to [verb] ***inflict*** such powerful blows [using the same words] in several directions that [object] ***Serbian*** *forces* [obviously underlined by us] will no longer be able to recover but will have to [intended consequence] ***capitulate***."

The very word used to explain what was meant in paragraph 1.

36. Thus a more complete textual analysis makes it clear that the President's reference to "Serbs" in paragraph 1 is, in truth a reference to Serbian military forces and not Serb civilians[177]. [Screen off]

37. This was confirmed in fact by the ICTY Trial Chamber in *Gotovina*, even as it convicted Gotovina himself. The full context of the Trial Chamber's finding is coming up on your screen, this is what the Trial Chamber said: [Screen on]

> "[The Trial Chamber] duly considered this context . . . For example [and then the very passage] . . . [Croatia must] 'inflict such blows . . . [that the Serbs will . . . disappear]'. In its Final Brief, the Prosecution appears to suggest that this refers to Serb Civilians. However, the end of the sentence reads 'that is to say, the areas we do not take at once must capitulate within a few days' . . [And then again] the expression 'blows' [he referred explicitly to 'the Serbian forces']. When read in context, the Trial Chamber considers that this particular statement focused mainly on the Serb military forces, rather than the Serb civilian population."[178]

So that is the ICTY at first instance.

38. But despite that, on Friday Mr. Jordash's continued to insist, and I quote what he said "President Tudjman's comment ***did*** refer to civilians, even if this was not at that time his main focus"[179]. That, with respect, is a very strained interpretation of the ICTY judgement, which was was clearly rejecting the Prosecution case, not somehow accepting it. [Screen off]

39. And just pausing there, for the ICTY at first instance to have taken any other view would have been entirely inconsistent with its own approach. It had just found that the shelling of other than the four towns was lawful, and thus there was no intention forcibly to deport. So any other reading of those minutes would not have been consistent internally with the logic of its own judgement. And this Court does not need reminding that the Appeals Chamber obviously went one step further.

40. The Minutes do need to be read carefully. It is clear from the opening statement of the Minutes, that the President was calling on the military leadership to "carry out/the

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[177]CR 2014/15 (12 March 2014), p. 54, para. 23 (Obradović).

[178]*Gotovina et al.*, TJ, para. 1990 (internal references omitted).

[179]CR 2014/18, p. 29, para. 105 (Jordash).

operation/professionally"[180]. And the remarks are entirely consistent with the stated purpose of Operation Storm — namely to liberate occupied areas[181]. And there was an interchange with Admiral Domazet and, during that interchange, he was interrupted by President Tudjman who said, and this is a quote that you saw on Friday, and I just put it up to remind the Court what the President said about exits and providing the forces with an exit and a strategy to prevent the Serb forces fighting to the bitter end, and to allow them to retreat. ~~*[Screen on]*~~

41. The Respondent's invitation to the Court to infer the existence of a genocidal plan from the Minutes is, we submit, contrary to the plain reading therefore of the document, and ignores the finding by the ICTY Trial Chamber in *Gotovina* and that is a plate you have seen. ~~*[Screen on]*~~ Forgive me for coming back to it and I will not read it[182] but Mr. Jordash focused on the corralling together of civilians and military forces into one column or set of columns and invited the question: what could conceivably have been the purpose of that if there was not a clear intention to destroy those in the columns? There is nothing in the Minutes that supports that and whilst that is on your screen, how can that possibly sit with this finding of the ICTY at first instance — unanimous, unappealed and highly persuasive?

42. Obviously the Trial Chamber's finding that a joint criminal enterprise existed at all was reversed on appeal with the Appeals Chamber concluding that: ~~*[screen on]*~~

> "no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force"[183]. ~~*[Screen off]*~~

43. Mr. President, Members of the Court, that concludes the Applicant's submissions in relation to the Brioni Minutes. As for the confirmatory facts, everything that followed — the attacks on the column, the alleged persecution and killing of those that remained — all of that has been dealt with in considerable detail by my colleague Ms Singh and, in the circumstances, I will thank the Court for your kind attention and ask that Professor Sands now be heard to complete this part of the Applicant's submissions.

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[180]CMS, Ann. 52, p. 1.

[181]*Ibid.*, p. 2.

[182]*Gotovina et al.*, TJ, para. 2321.

[183]*Gotovina*, AJ, para. 96.

The PRESIDENT: Thank you very much, Sir Keir Starmer. I now call on Professor Sands. You have the floor, Sir.

Mr. SANDS:

CLAIM AND COUNTER-CLAIM: A COMPARISON —

NO GENOCIDE WAS COMMITTED THROUGH OPERATION STORM

I. Introduction

1. Mr. President, Members of the Court, Croatia's presentation today concludes with a closer comparison of the Applicant's claim and the Respondent's counter-claim. The exercise of comparison has merit in two respects. First, it makes abundantly clear that, even taken at its highest, the counter-claim does not come close to making out a case under the Genocide Convention and second — and significantly — it serves to reinforce Croatia's claim against Serbia, by highlighting the vast differences in respect of the Parties' conduct and intentions during the relevant periods but also by requiring Serbia to make numerous concessions in respect of the interpretation and application of the Genocide Convention, concessions which we accept.

2. The three presentations you have heard this morning set out the reasons for and context of Operation Storm; planning, conduct and the fact that no genocide was committed by the Applicant. I am going to try and draw these threads together, and show you the *stark contrast* between Croatia's claim and Serbia's counter-claim. I will proceed in nine points.

3. But before doing so, let us note the very difficult line that Serbia has sought to walk. In response to Croatia's claim, it argued the exceptional gravity of the charge of genocide. You heard rather less about that when it argued its own claim. The purpose of that claim, as the Agent of Serbia has now made clear, was not to vindicate the rights of victims, or deter the commission of genocide in future, it was entirely tactical, to divert this Court's attention from the charges levelled against Serbia. This Court was used as a platform from which to reach the public in Serbia. Serbia employed the very same diversionary — and equally unsuccessful — tactic against Bosnia when it

filed another hopeless counter-claim[184]. You heard the diversionary tactics in this courtroom last week, not least from the Agent. If you wish to do so, you can read about it in the news reports in the Serbian media, as the Agent and then Professor Schabas and even Mr. Jordash, offered a running commentary outside this courtroom as to what was going on inside this courtroom.

4. The aim is clear: the counter-claim is what might be called a "Morton's fork" — I must say, for breakfast this morning I was trying to work out how one might translate that into French but I suppose it is a "fourchette de Morton" — on which either outcome, Serbia is off the hook for its own genocidal conduct between 1991 and 1995. On Serbia's approach, this Court has either to accept its claim that Operation Storm was genocide — which it manifestly was not — or reject it on its claim and, as a necessary consequence, it argues, reject also the Applicant's claim. It is interesting that Serbia criticizes Croatia, quite trenchantly even, for the supposed late filing of its claim, but then has nothing to say about the fact that its own counter-claim was filed more than *ten years* after Croatia's claim, but just 14 months after Serbia's preliminary objections on jurisdiction were rejected by this Court. On that it was silent.

II. Substantial areas of difference

1. The temporal scope

5. So, let us turn to the nine points of difference. First point: the temporal scope of the claim. Serbia argues that claim and counter-claim are based on what it calls the same "factual complex" and on facts that have a "common territorial and temporal setting"[185]. Is that really the case?

6. Croatia's claim concerns events occurring over a period of four years, between 1991 and 1995, primarily but not exclusively in the first two years of the illegal Serb occupation, and then extending throughout 1993 and into 1994, until the eventual liberation of the occupied regions in August 1995[186], with disappearances continuing still today of a large number of people, with all that implies under the Convention, a point we will come back to later in the week.

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[184] *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. 243.

[185] Counter-Memorial of Serbia (CMS), paras. 1108-1109.

[186] Memorial of Croatia (MC), paras. 1.03-1.05.

7. By contrast, the focus of Serbia's counter-claim is, in large measure, basically a short, four-day period in August 1995, bolstered by the occasional reference to a sprinkle of what are called "confirmatory" acts occurring in the months thereafter[187].

8. There is no common temporal ground between the two proceedings, as Serbia claims. Croatia's claim ends in large part before Serbia's even begins. Serbia's case on genocidal intent — that a State can hatch and then implement a genocidal plan to destroy the entire Serb population of the "Krajina" in the space of little over half a week — is not immediately plausible.

9. By contrast, the temporal scope of Croatia's claim reflects the calculated and systematic nature of Serbia's policy, implemented from the summer of 1991 onwards. In *Stanišić and Simatović* the ICTY found as fact that, from April 1991 to April 1992, there were widespread "attacks on villages and towns with substantial or completely Croat populations . . . killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment (including coercive measures) of Croat persons . . ."[188]. The ICTY made similar findings regarding the situation prevailing in the territory of the SAO Krajina portion of the so-called RSK from 1992 to 1995[189]. It has made no such findings in relation to Operation Storm or any other such acts.

2. The geographic scope

10. Second point: the geographical scope of the claims. Obviously, these are markedly different. Croatia's claim concerns events occurring in six different regions of Croatia, over one-third of its entire territory. By contrast, Serbia claims a genocide occurred in the so-called Krajina portion of the RSK — just one of the three areas of the illegal Serb "republic". It is a fraction, *a fraction*, of the area covered by Croatia's claim, and no doubt that is the reason why Serbia has had to change position again and conceded that intent can be found even where "few Article II attacks occurred"[190]. I am going to return to this point.

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[187]See the opening remarks of the Respondent's Agent: "Mr. President, allow me to start presenting now the Serbian counter-claim, which is related to Operation Storm and genocide committed against the Krajina Serbs." (CR 2014/16, p. 34, para. 1.) See also, CMS, para. 1427: "It is thus no surprise that the entire operation *Storm* lasted only 4 days and that the main goal, the takeover of Knin, was fulfilled within 30 hours from the onset of the operation."

[188]*Prosecutor* v. *Jovica Stanišić and Franko Simatović*, (IT-03-69-T), Trial Chamber Judgement, 30 May 2013, para. 404.

[189]*Ibid.*, para. 406.

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

3. Purpose of the armed campaigns

11. Third point of difference: the nature of the armed campaigns that occurred respectively in the periods 1991 to 1995, and then in August 1995. These were markedly different and obviously so. Croatia's Operation Storm was a conventional military operation for the sole purpose of restoring control over Croatia's sovereign territory, within internationally recognized boundaries. It was a legitimate military response to an illegal occupation[191], carried out — as the ICTY ruled — lawfully. There was no objective of ethnic destruction, as the tribunal ruled in *Gotovina*, at the Trial Chamber level: "the common objective did not amount to, or involve the commission of the crimes of persecution . . ."[192]. The Appeals Chamber, of course, subsequently overturned the Trial Chamber and ruled beyond that there was no joint criminal enterprise, you have heard from Sir Keir just before me.

12. By contrast, the operations undertaken by or with the support of Serbia occurred in the context of an unlawful invasion of a sovereign State, with the objective of achieving a "Greater Serbia" within the territory of Croatia. Serbia did not claim last week or in its pleadings — nor could it plausibly do so — that it was acting lawfully when it invaded and occupied parts of Croatia for four years from 1991. The attacks on Croat towns and villages served no legitimate military purpose. [Screen on] The ICTY Trial Chamber made this clear in *Mrkšić* — you will see on your screens now a quotation — I will simply take you to the last sentence: "It was an unlawful attack."[193] [Screen off] Where is the ICTY's equivalent condemnation of Croatia in relation to Operation Storm? Search for it and you will search in vain, because it does not exist.

4. The identity of the protagonists

13. Turning to the fourth point of difference: the protagonists in the two situations were different. The *protagonists* of Serbia's genocidal campaign were the JNA — which had been co-opted as the national army of Serbia — and TO forces and paramilitary forces operating under its direction and command. The *victims* were predominantly unarmed Croat civilians, many of them elderly, many of them killed while sheltering from the violence. This was not, as the

[191]Reply of Croatia (RC), para. 12.3; Additional Pleading of Croatia (APC), para. 3.12.

[192]*Prosecutor* v. *Gotovina et al.*, IT-06-90-T, 15 Apr. 2011, Trial Chamber Judgement, para. 2321.

[193]*Prosecutor* v. *Mrkšić*, IT-95-13/1-T, 27 Sep. 2007, Trial Chamber Judgement, para. 472.

Respondent seeks to argue in rather distorted terms, a conventional armed conflict between equally matched armies[194]. Again, the ICTY's findings in the *Mrkšić* case regarding the Serbian attack on Vukovar are worth recalling, and you can see that on your screen: [Screen on]

> "What occurred was not in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained. While the view is advanced before the Chamber that the Serb forces were merely liberating besieged and wronged Serb citizens who were victims of Croatian oppressiveness and discrimination, this is a significant distortion of the true position as revealed by the evidence, when reviewed impartially."[195] [Screen off]

You heard the very same distortions last week. They were rejected then and they should be rejected again now.

14. By contrast, however, Operation Storm was a focused military operation carried out by the Croatian army (HV) soldiers to restore Croatia's sovereign territory illegally occupied by Serb forces. In *Gotovina* all parties agreed that it occurred in the context of an armed conflict between Croatia and Serbia[196]. Moreover, it is now clear that Croatian military commanders instructed soldiers to respect the rules of humanitarian law, including the treatment of POWs and civilians[197]. Commanders were also directed, instructed, to prohibit uncontrolled conduct[198]. The differences between the two situations could not be more stark.

5. Existence of a systematic pattern of attack

15. I turn to my fifth point: the systematic pattern of attack. In the first week, Ms Ní Ghrálaigh provided a detailed description of the systematic pattern of attack repeated in village after village across large parts of Croatia[199]. The pattern was expressly identified by the ICTY Trial Chamber in the *Mrkšić* case, it echoed the description of the European Community

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[194]CMS, para. 1109.

[195]*Mrkšić*, Trial Chamber Judgement, para. 470.

[196]*Gotovina et al.*, Trial Chamber Judgement, para. 1681.

[197]RC, Vol. 5, Ann. 170, Ministry of Defence Directive Op. No. 12-4/95, 26 June 1995.

[198]RC, Vol. 5, Ann. 172, minutes of the meeting held at the Defence Ministry of the Republic of Croatia on 2 Aug. 1995.

[199]CR 2014/8, pp. 13-26, paras. 20-70 (Ní Ghrálaigh).

Monitoring Mission that was on the ground observing the events[200]. The existence of that pattern — a tried and tested formula for the destruction of parts of an ethnic group — belies any claim to a legitimate military purpose.

16. By contrast, the Respondent did not in its pleadings or last week in the hearing assert any systematic pattern of attack, of the kind that might be expected of an armed campaign that was designed to eliminate the entirety of an ethnic group from a particular region. The only "pattern" referred to by the Respondent in the written pleadings in relation to the counter-claim was that of the artillery shelling of a single town — Knin — which it asserted then was deliberately indiscriminate[201]. As you have heard, that allegation has been rejected in the *Gotovina* case[202]. Yet last week, Mr. Jordash characterized — apparently for the first time in this case on the part of Serbia — an alleged genocidal campaign by Croatia as a three-phase process — a three-phase process the Court will note which bore a rather striking similarity to that enunciated by Croatia just a week earlier. Mr. Jordash argued, apparently for the first time on the part of Serbia, that "[i]ntent may be illuminated by circumstantial evidence, including by words spoken or deeds done or a pattern of purposeful action"[203]. What Mr. Jordash singularly failed to do, however, was to identify the existence of such a pattern by reference to the evidence before the Court. There is no such evidence.

17. Mr. President, Mr. Jordash's argument is nevertheless significant for another a number of reasons: it contains a bundle of concessions, an acceptance of Croatia's legal arguments as to how an "intent to destroy" may be proven, an acceptance that "a pattern of purposeful action" can be relied upon to prove genocidal intent. We will take those concessions. The Parties are now in agreement on these points, which has the merit of making this Court's task a lot easier.

6. Instances of ethnically motivated killing, serious violence and destruction

18. I turn to my sixth point of difference: there is a world of difference between the two claims as to the instances of *ethically* motivated killing on which each Party relies. Croatia's claim

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[200] *Mrkšić*, Trial Chamber Judgement, para. 43.

[201] CMS, para. 1220.

[202] *Prosecutor* v. *Gotovina and Markač*, Appeals Chamber Judgement, IT-06-90-A, 16 Nov. 2012, paras. 77-84.

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

focuses on a great mass of distinct and separate instances of killings, beatings, torture and so on, designed to impose conditions of life that would result in the destruction of the Croat ethnic group. I do not need to set out the facts again. The point is a simple one: in making its counter-claim, Serbia concedes that genocide can take place on a limited scale of facts like the one it alleges. Even if those facts are not proven, in Serbia's case, as they are not, we will take that concession too: Serbia now accepts that acts on the scale of those proven by Croatia, in evidence before this Court, can amount to genocide.

19. Yet Serbia's case on *actus reus* largely rests on just two specific acts: deliberate indiscriminate shelling and forced expulsion. You have heard from Sir Keir Starmer on those two issues: the case collapses.

7. Evidence and materials

20. I turn to my seventh point of difference: the nature and volume of the evidence and related material before the Court. In support of its claim, the Applicant adduced more than 450 witness statements and hundreds of political, military and intelligence documents; it adduced reports of international organizations and independent humanitarian bodies; expert reports; detailed mass grave and exhumation data and a large volume of contemporary newspaper and media articles. These materials — most of which are contemporaneous or near-contemporaneous accounts of events in Croatia from 1991 onwards — provide extensive first-hand descriptions of the crimes committed by Serb forces against the Croat population. The reliability of that body of evidence has been confirmed by the subsequent findings of the ICTY. It was also demonstrated by the live witness testimony of six of Croatia's witnesses during the first round, whom you had an opportunity to question — and did question.

21. In stark contrast, the evidential basis for the Respondent's counter-claim is, to put it mildly, remarkably thin. Mr. President, Serbia's Counter-Memorial when it set out its counter-claim was not accompanied by a single witness statement — *not a single witness statement*. Subsequently they realized they were in difficulty so they scrabbled to find what they could and they found 24 witness statements — prepared for the purposes of the Rejoinder, the CHC Report — which, of course has been completely discredited by the ICTY as a reliable basis for

finding fact — and a wholly inaccurate Veritas report prepared by an individual who is manifestly ***unreliable*** and self-interested[204].

22. The conclusion is plain: the documentation that the Respondent relies upon is inaccurate, unreliable, insufficient and biased. It offers a manifestly inadequate basis to assert genocide and it is striking that any State could come before this international court on so thin a basis and make such a claim.

8. ICTY findings

23. I turn to my eighth point of difference: the findings of the ICTY. In support of its claim, the Applicant has made detailed references to factual findings of the ICTY Trial and Appeals Chambers in *Babić*, *Martić*, *Mirkšić* and *Stanišić and Simatović* and references were made to other cases such as the Tolimir cases. Those judgements, which run to over 1,600 pages of factual and legal analysis, provide an evidential foundation that is consistent with and strongly supportive of the Applicant's case, both on fact and law. I will not take you back over those cases but it has allowed Croatia to invite this Court to take account of those persuasive factual findings, in support of the claims by Croatia in relation to the *actus reus* of genocide.

24. By contrast, what is available for the Respondent to rely on? Nothing, Mr. President. In support of its counter-claim at this hearing it has not been able to rely on a single conviction by the ICTY of any person — not one — in relation to the events of August 1995. Not one person. Last week you heard Professor Schabas offer a long excursus on the merits of a judgement of the ICTY Trial Chamber in *Gotovina*, but of course that was overturned by the Appeals Chamber. Then he said you might pay careful attention to the views of the minority and then he suggested you engage in some creative exercise of arithmetic: you have heard from Sir Keir Starmer on that. Such an approach, frankly, has no merit whatsoever and is completely unbecoming of a court such as this.

25. But whilst I am on the subject of that presentation, Mr. President, please allow me to express the very real regret that Professor Schabas sought to compare the Holocaust of the Jews between 1933 and 1945 with the events of August 1995. He referred the Court to the minutes of

[204]CMS, Ann. 62, p. 287.

the Wannsee Conference, and he then asked: "Is Brioni any different?"[205] That was a breathtaking and terribly unfortunate question to ask and, through you, Mr. President, we express the sincere hope that Professor Schabas will withdraw that question — and the implication he invited the Court to draw from it — when he next addresses the Court. Professor Schabas well knows that if the Respondent's characterization of Operation Storm were correct — or even half correct — that it was the most serious and blatant example of genocide to occur in Europe since the Second World War — one might have expected to see, to say the least, a substantial body of case law in relation to crimes against humanity and war crimes, if not genocide, in respect of those factual matters. There is nothing. Not a single conviction at the ICTY for any action taken in relation to the events in that period. No amount of legal sophistry, no amount of creative juridical arithmetic, no amount of reliance on terribly unfortunate analogies on the part of the Respondent or a solitary member of its legal team can displace that plain and harsh fact.

9. Intent to destroy

26. I turn to my ninth point, the final point: the intent to destroy. Mr. President, Members of the Court, in the first week Sir Keir Starmer listed 17 factors that offered evidence of Serbia's genocidal *mens rea*[206]. You have heard about the conduct that revealed the unmistakable *animus* underlying the Respondent's attacks against the Croat civilian population[207], a pattern of conduct in the face of the opportunities that presented themselves.

27. By contrast, the Respondent has adduced no equivalent evidence. The minutes of the Brioni Meeting — on which the totality of Serbia's pleaded case hangs sadly, pathetically — manifestly fails to support its case. The ICTY made that very clear, as did Sir Keir Starmer earlier this morning.

28. Serbia's treatment of Vukovar stands in stark contrast to Croatia's treatment of Knin, the so-called capital of the so-called RSK. The nature, duration and consequences of the parties' activities were vastly different:

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[205]CR 2014/18, p. 54, paras. 31–33 (Schabas).

[206]CR 2014/12, pp. 19–21, para. 27 (Starmer).

[207]CR 2014/6, pp. 56–65, paras. 13–42 (Sands).

(a) Serb forces, firstly, laid siege to Vukovar for three months; the Croatian operations in Knin lasted a day and a half;

(b) the shelling of Vukovar was indiscriminate and resulted in hundreds of casualties. In Knin, the ICTY was unable to identify a single civilian casualty caused by shelling in the town;

(c) when Vukovar fell on 18 November 1991, Serb forces entered and unleashed a brutal campaign of violence and killing against the remaining Croat inhabitants; by contrast, in Knin civilians were permitted to remain — or to leave if they wanted — and many of them chose to do so in United Nations compounds;

(d) one thousand Croats or more were killed in the siege of Vukovar[208], the Respondent's own written pleadings refer to a report describing 13 deaths in Knin[209]. Last week the Agent told the Court that he was upping the number to 36 [210]. In *Gotovina*, the Trial Chamber found evidence of a total of three deaths — civilian deaths, in the town of Knin; none of them caused by indiscriminate shelling;

(e) in support of its case on Vukovar, the Applicant submitted more than 40 witness statements from eye-witnesses to Serb attacks. What did the Respondent offer in relation to Knin? One, a single eye-witness account.

29. Mr. President, the question of "intent to destroy" lies at the heart of this case. On one side you have a great volume of evidence[211]; on the other you have basically a single minute and a few scraps of paper that do not amount to a claim for genocide. There is no evidence to support an "intent to destroy" in relation to the events of 1995.

30. But there is here a related question to ask: if the Respondent believes that its solitary document, its one document, is sufficient to prove intent, on what basis does it then argue that the evidence provided by Croatia is insufficient? It has offered no answer to that question.

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[208]MC, para. 4.149; *Battle for Vukovar* (2002), Davor Marijan, Croatian Institute for History, p. 284.

[209]CMS, para. 1261; RS, para. 769.

[210]CR 2014/17, p. 32, para. 67.

[211]See, for example, RC Vol. 4, Ann. 63, the JNA military intelligence report dated 13 October 1991.

III. Conclusion

31. [Screen on] Allow me to conclude, Mr. President, briefly. These nine points of comparison reveal Serbia's counter-claim for what it really is: contrived, diversionary, wholly inadequate device intended to create a platform from which to deflect attention away from the events of 1991 and after, for which it is internationally responsible. The claim is unarguable. In any reasonable domestic court it would have been struck out at an early stage.

32. That is not to say, however, that the claim is not without some utility to these proceedings. Serbia has been required to walk a very difficult line. The very making of the claim by the Respondent offers unwitting support to the claim put forward by Croatia. It does so by confirming the legal foundations of Croatia's claim. Serbia has rather helpfully confirmed that genocide is established even where there exists an intention to destroy a relatively small part of a group in a narrowly defined area, and only a small number of individuals are targeted or killed. That is now Serbia's position. It has confirmed that an intention to destroy may be established by inference and on the basis of circumstantial evidence[212]. It has confirmed that a "pattern of purposeful action" may be taken into account in proving an intent. And it has confirmed that available "opportunities on the side of the perpetrator" are an element to take into account in determining whether a genocide has occurred. In the course of these proceedings it has come to accept that intent can be inferred from a staged pattern of actions taken against civilian populations of a particular ethnic composition. Its rather curious reliance on dissenting opinions in ICTY judgements — without any actual judgements in its favour to rely upon — seems only to reinforce the point that the findings of the majority in those cases (and the judgements that followed, and the convictions) on which Croatia has squarely based its claim are entitled to be given far greater weight by this Court.

33. Mr. President, the points of difference between the Parties are very great when it comes to the facts and to the evidence. There is some agreement between them, however, on the elements that are to be taken into account in determining whether a genocide case occurred, within the meaning of the Convention. So, in this sense at least, Croatia has reason to be grateful to the Respondent for its apparently ill-considered decision to put forward a counter-claim. Croatia also

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[212]CR 2014/18, pp. 68-69, paras. 4.20–4.70 (Obradović).

has particular reason to thank Professor Schabas and Mr. Jordash for associating themselves with the legal arguments that underpin Serbia's supposed counter-claim and which, in this way, by logic if not by design, offer considerable support to Croatia's claim.

34. This lays the way for the Court to rule, that the acts of genocide which occurred in and after 1991 were attributable to Serbia and it is internationally responsible for them. To those matters we will turn on Thursday and Friday. This concludes our presentation, Mr. President, Members of the Court; again I thank you for your kind attention and invite you to conclude the session. [Screen off]

The PRESIDENT: Thank you, Professor Sands. It brings to an end Croatia's observations on Serbia's counter-claim, and the first round of oral argument. The Court will meet again on Thursday 20 March at 10 a.m. when Croatia will begin its second round of oral argument on its own claims. Thank you.

The Court is adjourned.

The Court rose at 1.05 p.m.

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