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Cour internationale de Justice

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Public sitting

held on Friday 28 March 2014, at 3 p.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le vendredi 28 mars 2014, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

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The PRESIDENT: Good afternoon. Please be seated. The sitting is now open and I give the floor to Professor Schabas to continue Serbia's presentation, this time on its counter-claim. You have the floor, Sir.

Mr. SCHABAS:

REBUTTAL TO THE ORAL PLEADINGS OF CROATIA IN RESPONSE TO SERBIA'S COUNTER-CLAIM

Introduction

1. Thank you, Mr. President. Your Excellencies, my second presentation today will deal with issues related to Croatia's first round of arguments concerning the counter-claim. My speech is structured as follows. First, I will speak of the planner of Operation Storm — the Croatian President at the time, Franjo Tudjman. I will then address in turn: the significance of the issue of legality and the shelling of the four towns; I will speak of the limited relevance of the ICTY *Gotovina* decisions in the present proceedings, bearing in mind the question posed by Judge Bhandari; the Brioni Minutes and the broader context of the preparation of Operation Storm; the conduct of Operation Storm itself with special attention to the targeting of retreating columns and the killing of those who were left behind by the Croatian military. And I will conclude my presentation with the issue of returnees and some evidence-related matters and the question of impunity.

The planner of Operation Storm

2. Your Excellencies, given the attention that Serbia had attached to the personal role of President Tudjman, to his central position in the planning and execution of Operation Storm, to his provocative and controversial political views, his racist attitudes towards Serbs, Jews and Muslims that he had manifested, and his sympathies to an extremist organization with fascist roots, it was to be expected that Croatia might provide some kind of explanation and perhaps even a defence of its President during the decade that concerns us. Shouldn't Croatia have addressed the charge about Tudjman's anti-Semitism, explaining perhaps that his remarks had been taken out of context, or that he was misrepresented and that in reality some of his best friends were Jews. Or perhaps when

he spoke about "cancerous Serbs", he was speaking about public health issues and his remarks were misunderstood.

3. Alas, nothing of the sort. Tudjman's name barely appears either in the written submissions or in the transcripts of Croatia's oral presentations. Could this be the first time that the President of a State appearing before the Court was so criticized and yet the State did not come to his defence? Croatia has very ably answered some of the submissions of Serbia with respect to Operation Storm. But it has passed over some others. Tudjman seems to be one element of the picture that it has chosen to ignore.

4. Why is Tudjman so important and why is Croatia's silence on the subject so revealing? May I invite the Court to turn to one aspect of the allegations concerning Operation Storm, one that is deeply influenced by Tudjman himself, and on which we have no explanation from Croatia.

5. There is much evidence that Tudjman intended to settle the Krajina with Croats. This evidence is quite crucial because there was one obstacle standing in the way of Tudjman's plans. Close to 200,000 Serbs were already living there. Operation Storm is described in Croatia's pleadings as a war of "liberation". That may have been one objective. But the other was to create *lebensraum* for hundreds of thousands of Croats.

6. The Court will recall Tudjman's terrible words spoken in Knin, one of the fours towns, in mid-August 1995, a few weeks after the military attack: (screen on)

> "But today it is Croatian Knin and never again it will go back to what was before, when they spread cancer which has been destroying Croatian national being in the middle of Croatia and didn't allow Croatian people to be truly alone on it's *[sic]* own, that Croatia becomes capable of being independent and sovereign state. They were gone in a few days as if they had never been here, as I said. They did not even have time to collect their rotten money and dirty underwear."[1] (Screen off)

7. Peter Galbraith, the United States Ambassador to Croatia from 1993 to 1998, testified before the ICTY that Tudjman preferred "a reasonably or basically homogenous Croatia"[2]. Galbraith said that Tudjman "believed and stated that the Serbs in Croatia were too numerous and constituted a strategic threat to the state"[3]. Tudjman "considered both Muslims and Serbs as part of

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[1] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 April 2011, paras. 2009 and 2306. Also *Prosecutor* v. *Gotovina et al.* (IT-06-90-A), dissenting opinion of Judge Fausto Pocar, 16 Nov. 2012, para. 26.

[2] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 April 2011, para. 1999.

[3] *Ibid.*

a different civilization than Croats" and he "believed in the idea of a "Greater Croatia"[4]. Ambassador Galbraith told the Tribunal that he had frequent contacts with Tudjman and other senior officials, meeting them several times a week and often several times a day[5].

8. Following Operation Storm, Tudjman told Galbraith that the Krajina Serbs could not return[6]. A United States Embassy cable dated 11 December 1995 said Tudjman had told a visiting American Congressman that it would be "impossible for these Serbs to return to the place where their families lived for centuries"[7]. Galbraith explained that Tudjman intended for Croats from the diaspora to settle in Krajina. He took action to prevent the return of Serbs including enacting legislation to confiscate property. Galbraith associated the obstacles to return with crimes committed against Serbs, stating that

> "given the disciplined nature of the HV [Hrvatska Vojska, i.e., the Croatian Army] and the fact that the leadership was fully in command and had full power to prevent crimes, these crimes that were committed, in particular the destruction of Serb property, were either ordered, or it was a matter of policy to tolerate or encourage them"[8].

A cable from the United States Embassy dated 31 August 1995 said "the Croatian public announcement to give security guarantees to the Serbs in the region was intended for Western propaganda purposes and the goal of Croatia was to 'ethnically cleanse' the Krajina to make room for 1,000,000 Croatian refugees"[9]. Ambassador Galbraith said that "in his experience this correctly reflected the thinking of Croatian officials"[10].

9. Meetings of high-level Croatian political and military officials were held in August and September 1995 to address the policy on return of Croats and Serbs to the Krajina[11]. The discussions were about resettling Croats in the homes and villages previously inhabited by Serbs including the development of various incentives to promote this objective[12]. In this context, in the

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[4] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 April 2011, para. 1999.

[5] *Ibid.*, para. 1998.

[6] *Ibid.*, para. 2000.

[7] *Ibid.*

[8] *Ibid.*, para. 2001.

[9] *Ibid.*, para. 2002.

[10] *Ibid.*

[11] *Ibid.*, para. 2027.

[12] *Ibid.*, paras. 2028-2043.

course of a presidential meeting held on 25 October 1995, Tudjman said that "the return of 3,000 Serbs who wished to return, out of a total of 300,000 that had left, did not bother him"[13]. This comes from transcripts of the meeting. The subject was discussed under the euphemisms of addressing "Croatia's demographic situation"[14] and the "demographic future of the liberated areas"[15].

10. Mr. President, at a meeting held on 17 August 1995, Tudjman and Prime Minister Valentić discussed not conducting a population census because it would be "politically damaging"[16]. Later in the year, Tudjman expressed the view that 98 per cent of Serbs had left Croatia[17]. Tudjman called upon Croats not to destroy the homes of Serbs who had left because he said "this is now Croatian property". He planned to resettle hundreds of thousands of Croats in the empty Serb homes[18].

11. The Croatian leadership, including Tudjman, met an American delegation on 18 August 1995 that included Richard Holbrooke. When Holbrooke said that Serbs should be allowed to return, Tudjman replied that he "would be very content if about 10% of them returned"[19].

12. In findings of fact that are in no way disturbed or compromised by the Appeals Chamber ruling, and that have nothing to do with artillery bombardment, the ICTY Trial Chamber in *Gotovina* found, as a question of fact, that following Operation Storm there were "immediate efforts, on a policy and legislative level, to prevent the population from returning"[20]. According to the judgement:

> "Immediately following the forcing out of the Krajina Serbs, members of the Croatian political and military leadership took various measures, on a policy and legislative level, aimed at preventing them from returning. This included restrictive and discriminatory measures with respect to the Krajina Serbs' property and housing.

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[13] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 April 2011, para. 2042.

[14] *Ibid.*, paras. 2035, 2055, 2317.

[15] *Ibid.*, paras. 2063, 2094.

[16] *Ibid.*, para. 2007.

[17] *Ibid.*

[18] *Ibid.*, para. 2008.

[19] *Ibid.*, para. 2004.

[20] *Ibid.*, para. 2310.

> These measures aimed at ensuring that the removal of the Krajina Serb population became permanent."[21]

An important aspect of this finding was that it was clear evidence of State policy. In terms of the criminal proceedings, it was relevant evidence of the common objective of what the Trial Chamber called "the Croatian political and military leadership"[22]. The Chamber also concluded that Tudjman intended to repopulate the Krajina with Croats[23]. The Trial Chamber concluded that because of the policy to encourage resettlement of Croats, "the return of Serbs should be limited to a minimum"[24].

13. This evidence indicates the intent of Tudjman to destroy the Serb population of the Krajina in whole or in part. Operation Storm may well have had more than one objective. There is nothing unusual about this observation. In complex armed conflicts, various forces and motivations may be at work. Multiple motivations are also present in the genocides in Nazi-occupied Europe, in Rwanda and in Armenia.

14. This evidence of Croatia's intent to remove the Serbs from the Krajina and to resettle the region with Croats is a powerful indicator of genocidal intent because it contributes to our understanding of the motivation. It demonstrates the fallacy of the suggestion that there is some plausible benign explanation for the attack. Croatia needs to explain this evidence that the Croatian leadership intended the permanent elimination of the Serb population and it has not done so. It has ignored it.

Jus ad bellum* and *jus in bello

15. Mr. President, Your Excellencies, a great deal has been said during these proceedings about the *Gotovina* decisions. The prosecution's case in *Gotovina* was largely built upon the artillery bombardment of the towns and that was its downfall. This may well have been a tactical decision by the Prosecutor because of the evidence in his possession, the role of the three accused in the military operation, and perhaps simply a professional judgment about the theory of the case. Although the ICTY materials are obviously relevant and need to be addressed, they do not frame

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[21] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 April 2011, para. 2312.

[22] *Ibid.*, para. 2314.

[23] *Ibid.*, para. 2316.

[24] *Ibid.*, para. 2057.

the case that Serbia has submitted to the Court. Serbia's counter-claim cannot be squeezed into the template created by the Prosecutor. It relies upon evidence that was not before the ICTY and on theories of the case that are not the same as those adopted by the Prosecutor.

16. Let us assume, for the sake of argument, that the artillery bombardment of the four towns was entirely consistent with the laws or customs of war. Let us assume that only military objectives were targeted, and that the choice of weapons was proportionate, aimed at minimizing collateral damage, in particular towards non-combatants. Let me be clear, Your Excellencies, that Serbia is not making any concession and that its position is that the artillery bombardments were unlawful. But to illustrate a point, let us assume that they were in compliance with the law of armed conflict.

17. There is nothing inconsistent in the proposition that the law of armed conflict was observed, the *jus in bello*, and yet that the attack itself was unlawful in that it sought to destroy the Serb population of the Krajina, in whole or in part. This is nothing more than a classic proposition of international humanitarian law. A party to a conflict may respect the *jus in bello* yet be in breach of the *jus ad bellum*, just as the opposite may be true.

18. Suppose that Tudjman and his cohorts at Brioni had indeed been insistent upon respect for the law of armed conflict, and that their orders had been observed. Once again, Serbia is not admitting this to be the case, but is submitting the hypothesis in order to demonstrate its point. Could the use of force consistent with international humanitarian law nevertheless be compatible with the plan to remove an ethnic group from a territory? I do not think this is a difficult proposition.

19. The Serb civilians in the four towns would have been — indeed they were — terrified by the artillery bombardment. This would be the case regardless of whether the targeting was lawful or unlawful. Could civilians even be expected to know about the legality of the targeting, with shells whizzing over their heads, some of them inevitably falling wide of the mark? Under such circumstances, when urban centres are being bombarded by heavy guns located 20 km away, do civilians stand by like spectators at a fireworks display, confident that they are in no danger?

20. There is much compelling evidence that the shelling of the four towns had the consequence of terrorizing the civilian inhabitants. In *Gotovina*, the Trial Chamber concluded that

"the artillery attack instilled great fear in those present in Knin on 4 and 5 August 1995. For the vast majority, if not all, of those leaving Knin on 4 and 5 August 1995, this fear was the primary and direct cause of their departure"[25]. This conclusion, Mr. President, Members of the Court, is not dependent upon the legality of the attack and nor is it jeopardized by the Appeals Chamber decision.

21. In its reply to the counter-claim during these hearings, counsel for Croatia stated: "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 ICTY Appeals Chamber rightly concluded."[26] This is not a correct statement of the law and to the extent that Croatia accurately reflects the findings of the Appeals Chamber, the latter's decision is wrong. Even if the shelling was not unlawful, and even if the intent was not to displace the Serbs forcibly — a point which Serbia raises only for the sake of argument — those who schemed at Brioni may have concluded that lawful shelling would be enough to effect the removal of the Serbs, at least from the four towns. If that were their intent, regardless of the means they chose to employ, the conspiracy at Brioni would still be criminal in nature.

22. Croatia has frequently tried to portray the departure of the Krajina Serbs as something explained by factors independent of the Croatian military attack. It returned to this point in the oral submissions last week. When a targeted population departs from a territory many factors may be at work in motivating the tens of thousands of individual decisions that are taken as to whether to leave or to stay. My own ancestors fled anti-Semitism in Nazi Germany during the 1930s. They are deemed by institutions like the Holocaust Museum in Washington to be genocide survivors. Why did they leave? Perhaps there were complicated reasons. But it strains credulity to think that Nazi anti-Semitism, and quite possibly their fear — justifiable, as it turned out — that much worse awaited them if they remained in Germany, was not a central factor in their decision. Can their departure from Germany, however voluntary it might appear in some respects, be dissociated from the Nazi plan to destroy the Jews?

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[25] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 1743.

[26] CR 2014/19, p. 51, para. 29 (Starmer).

23. The complexity of individual decision-making in the Krajina cannot conceal the fact that at the very time Serbs were fleeing the territory in huge numbers, Tudjman was plotting to remove them permanently. He had a plan not to allow them to return. He intended to use their land and their houses and the property they left behind so that Croats from the diaspora could settle in the Krajina.

The ICTY *Gotovina* decisions (answer to the question posed by Judge Bhandari)

24. I would now turn to the question posed by Judge Bhandari concerning the probative value of the findings contained in the ICTY *Gotovina* Trial Chamber Judgement in light of the Appeals Chamber ruling. In principle, the Respondent agrees with the Applicant that the standard set out in paragraph 223 of the *Bosnia* Judgment is applicable: "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"[27]. The question is what *the relevant findings* in the *Gotovina* case are, in light of Serbia's case before the Court.

25. There are essential differences between the *Gotovina* case before the ICTY and the subject-matter of the counter-claim. The subject-matter of the proceedings before the ICTY is considerably narrower than the subject-matter of the counter-claim. A conspicuous example in this regard is the shelling of the columns of Serb refugees and military personnel during Operation Storm. Although these events took place during the indictment period, they were not charged by the Prosecutor. The ICTY did not make findings in this regard.

26. In addition to relying on the evidentiary material submitted for examination in the ICTY proceedings, Serbia has produced additional evidence before the ICJ. Witnesses presented by Serbia, for example Božo Šuša, Ilija Babić, and Jela Ugarković, did not testify at the ICTY, although they had been approached by the ICTY Prosecutor. In fact, the Respondent's legal team approached these new witnesses through the process of co-operation with the ICTY Office of the Prosecutor. The Applicant chose not to exercise its right of cross-examination.

27. Although both the *Gotovina* case and the counter-claim deal with Operation Storm, *Gotovina* cannot be equated to Serbia's counter-claim. According to counsel for Croatia, who

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[27] *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.

analysed the legal significance of the *Gotovina* decisions, the Trial Chamber found that the accused were

> "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, and by failing to make serious efforts to prevent or investigate crimes committed by [their] subordinates"[28].

Serbia's counter-claim is different. It establishes that Croatia killed and harmed members of the group of Krajina Serbs as part of a wider group of Serbs from Croatia with intent to destroy them as such. In doing so, Croatia applied various measures. Artillery attack was only one of the tools directed to the destruction of the group, while the forcible removal of the population was another one, parallel with the physical destruction of the ethnic Serbs in the Krajina.

28. In *Gotovina*, the ICTY Prosecutor adopted a rather narrow approach without considering in detail other tools employed by the Croatian authorities for the physical destruction of the ethnic Serbs in Krajina, apart from the unlawful artillery shelling of the towns in United Nations Sector South — United Nations Sector North was not investigated by the Prosecutor — and persecution. Serbia has presented to the ICJ two different graphics. One is a map of killings reflected in the *Gotovina* indictment prepared by the Office of the Prosecutor, the other is a map prepared by our team based on evidence in the present proceedings[29]. These were in the judges' folders of 12 and 13 March 2014, items 16 and 17. And they show the differing evidentiary basis of the two proceedings.

29. Mr. President, Members of the Court, when discussing the evidence gathered in the course of the *Gotovina* proceedings, the Agent for Serbia referred to statements of witnesses who testified before the ICTY, and who had perceived and witnessed in person the crimes or — more frequently — the consequences of the crimes. The Respondent observed that the reversal of the Trial judgement by the ICTY Appeals Chamber, thus, acquitting Gotovina and Markač, does not impact upon the probative weight of the witness statements in that case. As the Agent for Serbia emphasized, "[t]he inversion of the ICTY legal position concerning the existence of evidence on

[28]CR 2014/19, p. 42, para. 3 (Starmer).

[29]Judges' folders of 12 and 13 March 2014, items Nos. 16 and 17.

the joint criminal enterprise was not based on a lack of trust in the witnesses, among whom there were many officers of the UN blue helmets".[30]

30. The Respondent sometimes refers to the summary of witness statements that can be found in the *Gotovina* Trial judgement rather than to the transcripts of their statements before the Trial Chamber, such as the statement of Ambassador Galbraith, because this reference, in the Respondent's view, is more convenient to the Court. However, it is for the Court to evaluate the probative weight of each of these statements.

31. One of the very unfortunate consequences of the *Gotovina* judgements is that they have focused the debate on the shelling of the four towns by artillery units. This has led to a very misleading portrait of Operation Storm wherein important elements have been obscured. As I have tried to explain, even if the shelling were entirely lawful, that does not undermine the charge that the attack was directed at the Serb population of the Krajina, that it was unlawful, and that it was genocidal in nature.

32. Distinguished Judges, as things stand today — and this will not change given the completion strategy of the ICTY — there is a gaping hole in the picture presented by the ICTY case law, taken as a whole. Nobody has been convicted for Operation Storm. The message that emerges from the Tribunal, if the majority ruling of the Appeals Chamber in *Gotovina* is taken as being definitive, is that the attack that took place in August 1995 in Krajina was not unlawful. Does this really do justice to the international community's commitment to address impunity, to seek truth, to promote reconciliation, and to assign blame where it is deserved? We know that Operation Storm was intended to remove the Serb population from the Krajina; we know that its masterminds planned to prevent the return of the Serbs and to resettle the territory with Croats; we know that it was attendant with terrible violence including terrifying bombardment of urban centres; we know that it was followed by many cases of murder and summary execution of those who stayed behind, mainly the elderly. We know that the demographic change that was sought by those who organized Operation Storm has been successful, and that the Serb minority population in the Krajina has declined dramatically and, it would appear, permanently. The Court should bear all

[30]CR 2014/16, p. 37, para. 13 (Obradović).

of this in mind when it considers the relevance of the ICTY materials. Sometimes, and this was the case in *Bosnia*, they greatly assist in clarifying the truth. And it seems that sometimes, and it is the case in these proceedings, the ICTY has bequeathed a portrait of the conflict that is incomplete, that has a glaring lacuna.

The Applicant's observations concerning the status of the ICTY Appeals Chamber

33. I would like to comment briefly on some observations advanced by counsel for Croatia last week concerning the status of the ICTY Appeals Chamber.

34. Croatia seems to have misunderstood certain remarks about the electoral process of judges. Of course, we all know that judges are elected in a transparent process. In the case of the ICTY, this has been by the General Assembly. I would just point out, for the sake of accuracy here, that in fact judges at the ICTY are no longer elected by the General Assembly[31], although all of those who sat in the *Gotovina* cases were initially elected. When their terms expired, they were renewed by Security Council resolution and not by the election process set out in the Statute of the Tribunal. Indeed, the Security Council now appoints new judges to the Tribunal. And, of course, that is an entirely transparent process.

35. Be that as it may, the point advanced by the Respondent in the first round of pleadings was that the decision by the judges themselves to designate certain persons among them to sit in the Appeals Chamber is not at all a transparent process. Nothing the Applicant said disputes that assertion. I suppose if Croatia disagreed, it might have indicated the criteria upon which Appeals Chamber members are selected and provide some evidence of this. But it did not and it cannot.

36. In its oral submissions the Respondent urged the Court to take a nuanced approach to the *Gotovina* decisions, bearing in mind the rather complex dynamics. This was not really an arithmetical proposition. That word better describes Croatia's simplistic approach to the two decisions, which ultimately falls back on the assertion that three judges of the Appeals Chamber overrule three judges of the Trial Chamber. I would like to reiterate that this may be true for the parties — the prosecutor and the defendant — but it is not necessarily an appropriate approach for a Court such as the ICJ where the value of decisions taken by other judicial bodies can never be

[31]United Nations Security Council resolution 1837 (2008), operative part (OP) 1 and 2; resolution 1877 (2009), OP 2; resolution 1931 (2010), OP 3, 4; resolution 1993 (2011), OP 1.

anything more than persuasive. Serbia's suggestion is that the composition of the Chambers, the strong dissents, and most of all the fragile reasoning of the Appeals Chamber majority compel this Court to look more closely at the materials as a whole. Dissenting judgments can be very relevant in this context. Even here at the ICJ it is not unknown for a judge to pen a dissent once in a while.

The Brioni transcript

37. One of the important evidentiary components of the counter-claim is the Brioni transcript. Serbia asks the Court to take a fresh look at the Minutes of this infamous meeting. Instead of reading the Brioni Minutes in light of the decisions of the two Chambers of the ICTY, Serbia suggests that the Court take the Minutes as one element of evidence among many others that now make up the record in the present proceedings. In many respects, the ICJ is just as well placed as the Chambers of the ICTY to assess the import of the words spoken at Brioni.

38. I should note at the outset that the ICTY Trial Chamber found that the Brioni transcript accurately reflected the discussions[32], and nothing in the Appeals Chamber decision disputes this. Moreover, Croatia itself filed the Brioni transcript before the Court in the judges' folders. It has raised complaints about the text in its written submissions, but no longer seems to press that point very strongly, if at all.

39. Counsel for the Applicant expressed some indignation at the association made in the first round of the Respondent's oral pleadings between Brioni and Wannsee. The Applicant simply did not pay close attention to what was said. The sense of the comment was not to suggest a clumsy and inappropriate parallel between the Nazi Holocaust and Operation Storm. The comment was about how records of meetings where serious human rights violations and atrocities are plotted may be interpreted perversely by those who seek to minimise or deny their significance. The observation was that, even when the minutes or records of particularly notorious meetings like Wannsee are looked at in isolation and out of context, there are those who attempt to portray them as harmless or innocent. Taken in isolation, the Brioni Minutes may indeed lend themselves to different interpretations, of which only one is that they manifest Tudjman's "final solution" of the Krajina Serb problem. But when taken in context, the available interpretative hypotheses diminish

[32] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 1989.

dramatically. And by context, Your Excellencies, I do not mean simply reading the whole paragraph, or the whole page. Part of the context consists of Tudjman's background, including his known extremist and racist views, manifested in statements both before and after Operation Storm, and his plans to destroy the Serb population and replace it with Croats.

40. Tudjman's views and intentions are very important in assessing whether Croatia attacked the Serb population of the Krajina with the intent to destroy it, in whole or in part. When questioned in the *Gotovina* trial proceedings, Ambassador Galbraith testified that — and you will see it on the screen: "irrespective of formal structures, all decisions were made by Tudjman and his key advisors"[33]. Galbraith also stated that, since the policy to remove the Serbs permanently and to resettle the Krajina with Croats was Tudjman's policy, it was also Croatia's policy[34]. Galbraith added that senior figures in the Croatian leadership, including Šarinić, shared this view. He said that Šarinić had described Serbs as "a cancer on the stomach of Croatia"[35]. Please also recall that last May a Trial Chamber of the ICTY convicted several persons, on the basis of their participation in a joint criminal enterprise with respect to Bosnia and Herzegovina, of which Franjo Tudjman was at the top. The purpose of the joint criminal enterprise was to — and I quote from the French version, there is only a French version of the judgement: "opérer le nettoyage ethnique de la population musulmane sur le territoire revendiqué comme étant croate"[36] — conduct ethnic cleansing of the Muslim population on the territory that is claimed to be Croatian.

41. In its oral submissions, Serbia charged that the illegality of the Brioni meeting was manifested when Tudjman said that as a result, the civilians will set out, "and then the army will follow them, and when the columns set out, they will have a psychological impact on each other"[37]. He was thereby targeting civilians when he should have been protecting them. Although challenged to address this issue in its response to the counter-claim, Croatia said nothing and provided no attempt at an explanation.

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[33] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 1998.

[34] *Ibid*, para. 2000.

[35] *Ibid*.

[36] *Prosecutor* v. *Prlić et al.* (IT-04-74-T), Judgement, 29 May 2013, Vol. 4, para. 1232.

[37] Brioni Minutes, p. 15.

42. The Applicant emphasizes the fact that Tudjman ordered an evacuation corridor to be left to the fleeing Serbs[38]. However, Tudjman's suggestion that the Serbs should be left with an avenue of retreat — an evacuation corridor — does not stem from any humanitarian considerations. Careful perusal of the relevant sections of the transcript reveals that the only motive behind this order was Tudjman's concern that otherwise, if the Serbs were forced to stand and "fight to the bitter end", this would exact "a greater engagement and losses on [the Croatian] side"[39].

43. There are many other terrible statements in the Brioni transcript. Aside from the remarks that have already been referred to in the oral submissions, may I draw the attention of ***the*** Members of the Court to Tudjman's explicit admonition to his generals: "remember [in particular] how many Croatian villages and towns have been destroyed [and] that [this] still [was] not the situation in Knin"[40]. Tudjman also called for "complete demoralisation" of the enemy — the Serbs — so that they should **"**get a taste of it**"** and be — he used the term — "paid back"[41]. Tudjman did this in full awareness of the bloodthirsty and revengeful sentiments of some of the Croatian soldiers responsible for the execution of the military operation. At Brioni, Tudjman was informed that the Croatian infantrymen who were heading towards Knin all had reason to fight there and that at the moment "it [was] difficult to keep them on a leash"[42].

44. Admittedly, different interpretations may be adopted if the Brioni Minutes are read in isolation. And the same can be said of Wannsee. But when read in context, bearing in mind Tudjman's chauvinist and racist views, and his desire to resettle the emptied Krajina with Croats, as well as his dominant role within the Croatian military and political hierarchy, any benefit of the doubt dissipates. A correct understanding of Brioni emerges from an appreciation of what went before and what went after, as well as what was said, just as it does with Wannsee. There can be no reasonable doubt about what was being planned. It was the physical destruction of the Krajina Serbs, in whole or in part.

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[38]Reply of the Republic of Croatia (RC), 20 Dec. 2010, para. 12.16; Additional Pleading of the Republic of Croatia (APC), 30 Aug. 2012, para. 4.16; *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 2304.

[39]Brioni transcript, p. 7.

[40]*Ibid.*, p. 10.

[41]*Ibid.*, pp. 10-11.

[42]*Ibid.*, p. 10; statement of Ante Gotovina.

Immediate context preceding Operation Storm

45. Mr. President, Members of the Court, the Brioni Minutes contain unequivocal, clear-cut and straightforward statements of the participants in the meeting which reveal that, at the time of the planning of Operation Storm, the Croatian leadership was well aware of the willingness of the Serb authorities to achieve a peaceful resolution of the conflict[43]. Croatia knew that the Yugoslav Government had condemned Croatian aggression and was calling upon the international community to ensure the cessation of hostilities and a political dialogue[44]. The Croatian leadership knew that the Serbs had accepted the Stoltenberg plan and had allowed the United Nations Confidence Restoration Operation to deploy on the borders as observers[45]. Neither the testimonies of witnesses Slobodan Lazarević and Peter Galbraith, nor the statements of Savo Štrbac, to which the Applicant refers[46], lead to a different conclusion. They all relate to a period preceding the meeting at Brioni. On 31 July 1995 the Serbian willingness to engage in peaceful negotiations was acknowledged by the participants at Brioni as they discussed the launching of Operation Storm.

46. The possibility of a negotiated settlement became a matter of serious concern to the Croatian authorities, who expressed anxiety about the willingness on the part of the Serbs for a peaceful solution of the conflict[47]. The Croatian leadership was alarmed that the Serb attitude at the time was depriving Croatia of the necessary justification to launch a military attack in Krajina[48]. The participants in Brioni were eager to "find some kind of a pretext" for their actions[49]. In the same spirit, on the eve of Operation Storm, Croatia sent a misleading message to the Serbs and to the international community by pretending to be engaged in peace negotiations in Geneva. The Croatian leadership assumed this attitude as a mask — to give the impression of accepting the

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

[44]*Ibid*, p. 2.

[45]*Ibid*, p. 1.

[46]CR 2014/19, p. 20, para. 32 and, accordingly, p. 21, para. 34 (Crnić-Grotić).

[47]Rejoinder of Serbia (RS), para. 682 which reflects the statement of the Croatian Deputy Prime Minister, Mr. Granić, at the 257th closed session of the Croatian Government.

[48]Brioni transcript, p. 1.

[49]*Ibid*.

talks held in Geneva — while preparations for the launch of the military attack were already underway[50].

47. In its efforts to impute unwillingness to negotiate to Serbia, the Applicant refers to the mobilization of the Serb army on 28 July 1995[51]. It should be obvious enough that this was a purely defensive measure. The Krajina Serbs were preparing for defensive action. The Serbs were preparing for retreat, not attack, and Croatia understood this very well.

Targeting of refugee convoys

48. I turn now to the attacks on the refugee convoys, a subject that was not addressed by the ICTY. Applicant reiterates its contention from its written pleadings that "on occasion, some [of the mixed columns] were caught in the crossfire"[52]. In the words of the Applicant, the Respondent "admits" that the columns consisted of civilians and combatants[53]. This is a misconception. Not only has Serbia never denied the mixed character of the columns, it has strongly highlighted this as evidence of the genocidal intent of the Croatian authorities towards the Serbs in Krajina.

49. Although Croatia contends that it has never stated that civilians become legitimate targets when they flee with soldiers, at the same time it puts a strong emphasis on the fact that the armed members of the RSK's army were travelling in the columns and continued to attack the Croatian army as they withdrew. Hence, ultimately, the Applicant seems to imply the existence of some kind of a justification for the shelling of the mixed columns by the Croatian forces.

50. The attacks on the refugee convoys are proved on the basis of the witness statements provided by the Respondent, and I refer the Court to the statements of witnesses Mirko Mrkobrad[54], Božo Šuša[55], the ICTY witnesses: Marija Večerina[56], Dušan Dragićević[57],

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[50]*Ibid*, p. 2; RS, paras. 674-677 referring to the witness testimonies of Babić and Akashi in proceedings before the ICTY.

[51]CR 2014/19, p. 24, para. 4 (Singh).

[52]CR 2014/19, p. 31, para. 27 (Singh) retelling verbatim the Applicant's contentions in: Reply of Croatia (RC), para. 10.101; APC, para. 3.68.

[53]CR 2014/19, p. 31, para. 27 (Singh).

[54]Rejoinder of Serbia (RS), para. 757, District Court in Požarevac, Serbia, Minutes of witness hearing of Mirko Mrkobrad, dated 13 March 1997 (Ann. 52).

[55]CR 2014/17, p. 36, para. 79 (Obradović).

[56]CR 2014/17, p. 36, para. 81 (Obradović); RS, Ann. 47.

[57]CR 2014/17, p. 36, para. 82 (Obradović).

protected witnesses P-001, P-013 and P-056[58], as well as ten affidavits annexed to the Rejoinder[59]. The Applicant has taken issue with the reliability of the account given by Mirko Mrkobrad, since the number of the persons dead and wounded to which he refers was his "wild guess"[60], as the witness himself put it. Serbia adduced the testimony of Mrkobrad for the purpose of establishing the fact of the attacks on the columns, of which he was an eyewitness. Mrkobrad's testimony was submitted to prove the fact of the attack itself, which is undeniable, rather than the exact number of victims of the attack, of which the witness does not have a clear recollection. The statement confirms that the refugee column was attacked by the Croatian Army and that Serbs were killed. It is corroborated by many other statements that have not been denied by the Applicant. It is also confirmed by the United Nations Humanitarian Crisis Cell Sitrep (A Compilation of Human Rights Reporting) at the entries for 7 and 8 August[61], as well as by the Croatian Helsinki Committee (CHC) Report[62], Veritas[63] and the Human Rights Watch report[64].

51. Providing an avenue of retreat to the fleeing Serbs, as agreed upon at Brioni, was not intended for the purpose of guaranteeing the protection of the retreating columns of Serbs. On the contrary, as the events that took place during Operation Storm suggest, the refugee columns were deliberately ambushed, shelled and executed by the Croatian soldiers on the way. The contentions of the Applicant both in its Additional Pleading and in its oral submission that the columns of civilians were inadvertently caught in the crossfire are untenable. The shelling of the refugee columns was neither an incidental nor an unauthorized attitude on the part of the Croatian army.

52. This conclusion also stems from the conduct of the Croatian military during previous offensives, such as Operation Flash. The way Operation Flash had been executed reveals that the shelling of columns of fleeing civilians was a deliberate military tactic on the part of the Croatian army. Thus, Operation Flash provides solid proof of the fact that the shelling of fleeing Serb

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[58]CR 2014/17, p. 36, para. 83 (Obradović). See also RS, Ann. 51.

[59]RS, Anns. 53, 54, 55, 56, 58, 59, 60, 61, 65 and 66.

[60]CR 2014/19, p. 32, para. 32 (Singh).

[61]Counter-Memorial of Serbia (CMS), Ann. 55.

[62]CR 2014/17, p. 35, paras. 75 and 76 (Obradović).

[63]CR 2014/17, p. 35, para. 77 (Obradović).

[64]Human Rights Watch' Report, *Impunity for abuses committed during Operation Storm, and the denial of the right of refugees to return to the Krajina*, August 1996, Vol. 8, No. 13 (D), pp. 11-12; available on www.hrw.org/legacy/reports/1996/Croatia.htm.

civilians by the Croatian army was a pattern of conduct rather than an isolated event. Eyewitness testimonies reveal that during Operation Flash columns of fleeing Serbs were constantly and incessantly targeted all the way until they reached the Sava river.

53. In a similar fashion, the events of Operation Storm reveal that instead of being provided a safe way out of the battlefield, the refugee columns in the routes left open by the Croatian army found themselves entrapped and subjected to deliberate and systematic shelling aimed at their physical destruction. Eyewitness testimony records the fate of a refugee column in the area of Glina. It was allowed to get into Glina but when it was in the centre of the town, it was surrounded from all sides by the Croatian army and shelled[65]. Witness Mrkobrad describes a convoy that consisted of "some 600 refugees, women and children, mainly civilians and a very small number of uniformed people", when "[a]ll of a sudden, a small-arms fire was opened at them . . . [and p]eople [started] falling down like flies"[66].

Killing of those who stayed behind

54. Mr. President, Members of the Court, not very many Serbs stayed behind as the Croatian forces imposed their control over the Krajina. Most of those that did were killed. Not only do these killings provide evidence of the perpetration of punishable acts governed by Article 2 of the Genocide Convention, they also provide further confirmation of the intent of the Croatian leaders to destroy physically the Serb population of the Krajina, in whole or in part. These killings are well documented by the witness statements of Božo Šuša, Ilija Babić, Jela Ugarković and Mile Sovilj, submitted by Serbia, as well as the ICTY witness statements of Milan Ilić[67], Dragutin Junjga[68], Mile Djurić[69], Peter Marti[70] and E. J. Flynn[71]. The Applicant has not denied the report of the United Nations Special Rapporteur Elisabeth Rehn. She recorded that "more than 120 bodies [had]

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[65]RS, para. 757, District Court in Požarevac, Serbia, Minutes of witness hearing of Mirko Mrkobrad, dated 13 March 1997 (Ann. 52).

[66]*Ibid.*

[67]CR 2014/17, p. 41, para. 95 (Obradović).

[68]*Ibid.*, p. 39, para. 88 (Obradović).

[69]RS, Ann. 48.

[70]CR 2014/17, p. 46, para. 111 (Obradović).

[71]Judges' folders of 12 and 13 March 2014, Item No. 18.

been *discovered* by the United Nations . . . [A] common murder method was shots in the back of the head"[72]. Nor has Croatia contested the United Nations report of February 1996 in which 911 victims killed in Operation Storm were admitted[73].

55. The Applicant's observation that the Respondent filed new witness statements in August 2013 "expressly for this case"[74] is not clear enough. For the explanation of that procedural right of a party, the Applicant can consult Article 57 of the Rules of Court and the Agreement on the method of examining witnesses and expert witnesses drafted by its own counsel.

56. In addition to the witness statements submitted by the Respondent, the killing of the Serb civilians who remained in Krajina during and after Operation Storm was confirmed by two non-governmental organizations, the Croatian Helsinki Committee and Veritas, one from Croatia, another from Serbia. These organizations disagree on many things. Yet despite their rivalry and animosity to one another, they each confirm that mass killing was committed by the Croatian armed forces during and after Operation Storm.

57. Mr. President, Members of the Court, Croatia is quite wrong to claim that the number of persons killed during Operation Storm is "grossly exaggerated"[75]. The evidence reveals that during Operation Storm and its immediate aftermath Croatian soldiers killed everyone whom they were able to track down. If they had the opportunity, they killed. On the basis of the evidence adduced by the Respondent, it becomes evident that it was only because they managed to hide that there were survivors of Operation Storm at all. For instance, witness Ilija Babić observed that "[t]he survived residents mostly hid in their homes and in the woods, as I did, and I think that this is why they were not killed".

58. With respect to the allegations that the number of civilians killed in Croatian military operations is not evidence of genocidal intent[76], notwithstanding the actual number of civilian deaths, all of the Serbs who were found in the cities and villages in August 1995 were killed by the Croatian army. The Croatian soldiers killed as many civilians as they were able to find or to lure

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[72]CR 2014/17, p. 47, para. 115 (Obradović); emphasis added.

[73]*Ibid.*, p. 47, para. 116 (Obradović).

[74]CR 2014/19, p. 37, para. 47 (Singh).

[75]*Ibid.*, p. 34, para. 39 (Singh).

[76]RC, para. 12.28 *et seq.*

out of hiding. Consequently, just as the lack of enough ammunition prevented the Croatian army from causing complete destruction of the cities by way of shelling during Operation Storm, the massacre of the Serb population that had remained did not reach the intended magnitude due to the specific topographic terrain of Krajina[77], as well as due to the fact that at the time of the attacks most of the civilians had wisely fled the region, if they could. This was not destruction "in whole or in part". It was destruction "in whole". All of them. During Operation Storm and its immediate aftermath, all surviving Serbs in the Krajina, to the extent that the Croat forces could find them, were exterminated.

Other incriminating acts

59. Mr. President, the Applicant has not commented on Serbia's submissions concerning acts causing serious bodily and mental harm to members of the group of Krajina Serbs[78]. The Applicant has simply ignored that issue. Even if this is a deliberate strategy on the part of a country charged with genocide, it is difficult for a Government seeking reconciliation that "must be based on historical facts"[79] to defend such an indifferent attitude to the suffering of the victims.

60. Nor has the Applicant commented on the statements of witnesses Hill, Dreyer and Ugarković, according to which the Croatian Army killed all animals in the region of Krajina[80]. Can anyone who really seeks reconciliation based on historical facts claim, after examining these statements, that Operation Storm was lawful, as counsel for the Applicant suggests?

61. Further, the Applicant has not spoken to Serbia's statement that at the end of September 1995, the European Community Monitoring Mission (ECMM) reported that 73 per cent of Serb houses were burned and looted in 243 villages that were investigated[81]. The Report of the United Nations Military Observers (UNMO) from 4 November 1995 states that 17,270 houses were

[77]CR 2014/17, p. 42, para. 99 (Obradović).

[78]*Ibid.*, pp. 50 and 51, paras. 123-131 (Obradović).

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

[80]CR 2014/17, p. 52, paras. 133 and 134 (Obradović).

[81]The situation in the occupied territories of Croatia: Report of the Secretary-General, dated 18 Oct. 1995, UN doc. A/50/648, para. 33.

destroyed or damaged after the commencement of Operation Storm in United Nations Sector South[82].

The issue of the returnees

62. Mr. President, Members of the Court, let me turn now to the issue of those who returned. When Croatia responded to the counter-claim, it addressed the issue of the population changes within Croatia by stating that 130,000 Serbs had returned[83]. Counsel for Croatia said that the facts spoke of the will of Croatia to ensure the return of all of its citizens who wish to return. To the extent that Croatia is making efforts in this respect, Serbia is most appreciative. This can be an important measure to encourage reconciliation of the two peoples. However, policies of the current Government of Croatia do not shed much light on the issue that concerns the Court, namely the existence of genocidal intent in 1995. Croatia has really left unchallenged the evidence that in 1995 its rulers sought to effect a demographic transformation of the Krajina, removing the Serbs and effectively destroying them as a community, in whole or in part, and replacing them with Croat settlers.

63. Evidence of the profound changes in the ethnic composition of the Krajina as a result of Operation Storm comes from many sources. United Nations sources referred to by the *Gotovina* Trial Chamber indicate that about 180,000 Serbs were in the Krajina region prior to Operation Storm and that about 2,000 remained in Sector South[84]. ~~***and***~~ 5,000 ***remained*** in Krajina as a whole, that is, ***in*** both sectors. In January 1998, the Special Rapporteur of the United Nations Commission on Human Rights (UNCHR), Elisabeth Rehn, reported that less than 10 per cent of the Krajina Serbs had returned[85]. A comparison of the census figures for 1991 and 2001 in Croatia shows the huge change in the number of ethnic Serbs. That map that you see on the screen is also in your folders with one slight change: we thought it wise to put the red box there so that you can see more clearly the Krajina region, although you will see that there are also other regions where the demographic transformations were very, very important. But you can see in 1991, this is the Croat

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[82]CMS, Ann. 58.

[83]CR 2014/19, p. 17, para. 21 (Crnić-Grotić).

[84]*Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. ***2080***.

[85]Report of Special Rapporteur Elisabeth Rehn, 14 Jan. 1998, para. 32.

population — the ethnic Croat population is quite small in the Krajina region in the red box and it is really utterly transformed a decade later. If we take the four towns, the four towns that were subject to the shelling, the Serb population in Knin declined from 19,679 to 3,164; of Benkovac from 16,583 to 730; of Gračac from 10,805 to 1,523 and of Obrovac from 6,981 to 435. In total, the Serb population of the four towns declined from 54,048 to 5,852, a drop of about 89 per cent.

64. In 2011, the United Nations High Commissioner for Refugees (UNHCR) published a report that indicated that only about one-third of the registered returnees actually live in Croatia[86]. Of the registered returnees, the study concluded that about 38 per cent were permanently residing in Croatia, while 45 per cent lived outside the country and 17 per cent had passed away. The relatively large number of deceased returnees seems to highlight the fact that a large proportion of those who have returned are elderly. The study concluded that one-third of the returnee population is older than 65 years of age, while persons under 19 represent only 12 per cent of the returnee population — about half what it is in the normal population of Croatia. It is not possible to present the detailed findings of the UNHCR report here: it runs to more than 200 pages. But it presents a very grim picture of the biological sustainability of the Serb communities within Croatia, including the Krajina. This is not to suggest that Croatia is today doing anything to aggravate the process. I do not want to be misunderstood on this point. But the simple recital of a number of 130,000 returnees, as provided by the Applicant in its rebuttal to the counter-claim, does not really give the Court an accurate picture of the situation. Serbia's Agent noted the dramatic decline in the Serb population within Croatia[87] from almost 20 per cent before the Second World War, to about 12 per cent in 1991, to a little over 4 per cent today. The UNHCR survey suggests that the age distribution will contribute to further decline. The decisive blow in this process was Operation Storm.

Evidentiary issues

65. Mr. President, Members of the Court, two reports submitted by Serbia and upon which it relies have been unfairly attacked by the Applicant. The first is the report of the Croatian Helsinki

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[86]UNHCR, Minority Return to Croatia — Study of an Open Process, 2011.

[87]CR 2014/13, p. 16, para. 17 (Obradović).

Committee — the CHC report. Croatia has pointed to the statement by the ICTY in *Gotovina* that it would not rely upon the report "if uncorroborated by other evidence"[88]. Croatia concludes that "it is unsafe to rely on this Report"[89]. If all that Croatia is saying is that the report should not be relied upon, in the absence of corroborating evidence, then its statement is consistent with what the Trial Chamber said, and Serbia has no particular difficulty with this position. But the tone of Croatia's comment seems to suggest that the Court should disregard the report, we would submit that this is going much too far. The CHC report should be treated as a useful piece of evidence, one that contributes to an understanding of the events. Words like "uncorroborated" and "rely" simply send a message indicating that care should be taken if it is the only element of proof establishing a particular fact. Let us note that the CHC report was not the only piece of evidence that the Trial Chamber declared should be subject to a requirement of corroboration. It did the same with a United Nations Military Observer Team report and reports from international NGOs such as Human Rights Watch and the International Helsinki Federation for Human Rights[90]. If it had meant for such evidence to be disregarded altogether, I think it would have said so.

66. The CHC report provides evidence of Croatia's responsibility for the attacks on refugee convoys. The information contained in this report is corroborated by the following sources: eyewitness testimony attesting to the fact that the convoys of refugees fleeing from Knin were shelled by the Croatian army[91] and the excerpt from the 4th HV Guards Brigade Operative Logbook for 7 August 1995[92].

67. Applicant continues to vigorously attack the personality of Savo Štrbac and the list of victims of Operation Storm prepared by the NGO Veritas. The Applicant discovered three new double entries in the Veritas list of more than 6,000 Serb victims of the war in Croatia, and presented it to the Court to attack the credibility of that organization[93]. Both Parties said a lot on

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[88]CR 2014/19, p. 18, para. 24 (Crnić-Grotić) referring to *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 50.

[89]CR 2014/19, p. 18, para. 24 (Crnić-Grotić).

[90]*Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, paras. 52, 55, 57.

[91]RS, paras. 733 and 759.

[92]*Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 189; CMS, Ann. 64.

[93]CR 2014/19, p. 19, para. 26 (Crnić-Grotić).

the issue in the written pleadings. The Applicant has not advanced a new argument; it rather repeated something that had already been set out in the written pleadings.

68. Mr. President, Members of the Court, the three double entries are not proof of methodological flows. These are technical errors that can emerge in any statistical report. That is obvious: the double names of the victims are listed one after another, under entries Nos. 1731 and 1732, as you saw on the screen last week[94]. No one would do this deliberately. There is no deception or misrepresentation involved.

69. The mistake shown to the Court is not contained in the list of direct victims of Operation Storm. The mistakes, asserted by Croatia, are in the section on the indirect victims of the war and post-war — an expression used by Veritas as its statistical methodology, that is explained in the expert statement of Savo Štrbac. In order to find such a mistake, one ought to review the whole list of more than 6,000 names of victims. That only three mistakes were found should really confirm the validity of the Veritas work and report. The Applicant's complaint is really quite petty.

70. Serbia does not seek to prove an exact number of the victims of Operation Storm. The Respondent claims that the Krajina Serbs were killed on a massive scale during and after the operation. The Veritas list is corroborated by many other documents. It would be much better if the Applicant honestly transferred Mr. Štrbac's statement to its own national prosecutor for war crimes. It is well known which units of the Croatian army and police operated in the villages.

71. With respect to the testimony provided by witness General Andrew Leslie in the *Gotovina* case, the Applicant contends that "the Trial Chamber ultimately rejected [witness Leslie's] testimony [that he had seen 30 to 60 bodies at Knin Hospital]" by noting another statement of witness Leslie given in 2003 in a Canadian radio programme. According to that statement, reproduced in the ICTY Trial Chamber ***Judgment*** in paragraph 1334, the deliberate targeting of residential areas on a massive scale during Operation Storm was estimated by Andrew Leslie to have resulted in the deaths of 10,000-25,000 people. The Applicant further alleges that "[a]s compared with Mr. Leslie's excessive claim, the Trial Chamber was unable to

[94]Judges' folders prepared by the Applicant, tab 17.

identify a single victim of shelling in Knin". And the Applicant continues, "It is easy to see why the ICTY ignored Mr. Leslie's testimony."

72. Mr. President, on the contrary, the Trial Chamber Judgement in *Gotovina* explicitly states that

> "based on the evidence of Dawes, Al-Alfi, *and Leslie*, [we have added that emphasis to the quotation] the Trial Chamber finds that there were a number of dead bodies, some in civilian clothes, some in at least partial military uniform, immediately next to and in an area (marked B on P984) within approximately 200 metres of the SVK headquarters on 4 August 1995. *Based on the aforementioned evidence*, the Trial Chamber finds that the HV fired the artillery projectiles which impacted in this area.'[95]

Thus, firstly, the Trial Chamber did not ignore the testimony of witness Leslie, as the Applicant suggests, and secondly, the Trial Chamber found that there were a number of dead bodies as a result of the artillery attack. The fact that the Trial Chamber was unable to *identify* those victims by gender, age or name has no bearing on the fact that the shelling caused a number of casualties, some of whom were civilians.

Impunity and Croatian trials

73. Let me turn now to the issue of impunity and of the lack of Croatian prosecutions. The Court was told that 2,300 people have been convicted for looting and destroying property, in a purportedly lawful military operation known as Operation Storm. Also, Croatia said that 33 persons have so far been prosecuted for murders committed during and after that allegedly lawful operation[96]. But we have not been informed by the Applicant how many Croatians have been convicted ***by a final decision*** for murders in Operation Storm. If no one has been convicted, the Respondent submits, the Court should be told why.

74. As with the issue of the obstacles to return of the population, the relevance of this issue is its relationship to the question of genocidal intent. It is Serbia's contention that impunity within Croatia for killings and other atrocities provides confirmation of the intent to destroy the Serb population within the Krajina.

75. Many of the facts are already in the record or appear in the ICTY materials. For example, the United Nations Commission on Human Rights Special Rapporteur, Elisabeth Rehn,

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[95] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 1375; emphasis added.

[96] CR 2014/19, p. 17, para. 21 (Crnić-Grotić).

testified in *Gotovina* that, on 4 December 1995, she had meetings with several officials including Tudjman, and she was given the impression that they were not interested in investigating and prosecuting members of the Croatian military for crimes committed during Operation Storm "beyond what was necessary to keep up appearances to the international community"[97]. The Minister of the Interior, Jarnjak, told Elizabeth Rehn that criminal investigations against perpetrators of crimes such as looting and arson had been launched, but left her with the impression that he did not want to investigate reports of mass graves[98]. We know that the Croatian authorities were concerned about property crimes because they intended to use the Serb property for new settlers in Krajina. A report by the United Nations Secretary-General of 14 February 1996 said that prosecutions had been pursued in "the most dramatic cases" but that "there is little evidence of progress in resolving the many other reported cases of individual killings"[99]. Ambassador Galbraith said "[i]n connection with the atrocities that occurred after Operation Storm, Tudjman acknowledged that there were problems, although he discounted them and would not do anything about them"[100]. The figures that the Court was given by counsel for Croatia on 18 March seem to correspond to those that were provided by Croatia in 1996 and that are referred to in *Gotovina*. They are essentially about property crimes such as looting and arson. There are also reports of a relatively small number of persons being brought to trial for murder, but there are no reports of final convictions.

76. In his book on war crimes prosecutions and the International Criminal Court, Professor Ivo Josipović — now the country's president — commented on the failings of the Croatian justice system with respect to accountability for the conflict. He noted the paucity of prosecutions concerning Operation Storm and, in particular, the fact that they were not classified as war crimes. Speaking of a White Paper issued by the Croatian Government, Professor Josipović said

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[97] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 2102.

[98] *Ibid.*

[99] Further Report on the Situation of Human Rights in Croatia Pursuant to Security Council Resolution 1019 (1995), UN doc. S/1996/109, 14 Feb. 1996, para. 13.

[100] *Prosecutor* v. *Gotovina et al.* (IT-06-90-T), Judgement, 15 Apr. 2011, para. 2104.

> "a serious drawback is the fact that the data on the most serious crimes and their victims do not contain the crimes that the public believes had been committed against the Serbian population. In addition, the victims and the suffering 'of the opposite side' (although this is a question of Croatian citizens!) are not included in the data on the hardships during the war."[101]

Conclusions

77. Mr. President, Members of the Court, I have reached the conclusion. Neither in its written nor in its oral submissions has the Applicant denied the following:

(i) statements of Croatian public persons in which the Croatian Serbs were treated as a group of less human values[102];

(ii) the recorded statement of the Croatian Minister of Defence from 1991 that no one from Krajina would survive[103];

(iii) statements concerning the general situation in Croatia before Operation Storm, from Professor Puhovski[104] and in Krajina after the operation, from United Nations General Forand[105] and United States Ambassador Galbraith[106];

(iv) statements from the Brioni meeting that the Geneva negotiations would be only a mask for the attack on Krajina[107];

(v) statements of the Croatian officers and soldiers during the operation that they would kill all Serbs[108] and that all Serbs are terrorists[109];

(vi) statements of the Croatian President at the time Tudjman and the Minister for Foreign Affairs that the Serbs were a cancer in the stomach of Croatia[110];

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[101]Ivo Josipović, *The Hague Implementing Criminal Law, The Comparative and Croatian Implementing Legislation and the Constitutional Act on the Cooperation of the Republic of Croatia with the International Criminal Tribunal*, Zagreb: Informator Hrvatski Pravni Centar, 2000, p. 253.

[102]CR 2014/17, p. 17, para. 20 (Obradović).

[103]CR 2014/18, p. 38, para. 158 (Jordash).

[104]CR 2014/17, p. 16, para. 17 (Obradović) according to *Gotovina et al*, Transcripts, 13 Feb. 2009, p. 15901.

[105]CR 2014/17, pp. 52-53, para. 135 (Obradović); judges' folders, item No. 19.

[106]*Ibid.*, p. 57, para. 150 (Obradović).

[107]*Ibid.*, p. 25, para. 48 (Obradović).

[108]*Ibid.*, pp. 53-54, paras. 137-141 (Obradović).

[109]CR 2014/16, p. 47, para. 16 (Jordash).

[110]CR 2014/17, p. 54, para. 142, and p. 55. para. 144 (Obradović).

(vii) statements containing Tudjman's ideological attitudes concerning Serbs[111] and concerning genocide as a tool for ethnic homogenization[112].

Croatia has simply ignored this evidence. The Applicant has not addressed any of these issues, either in its written or oral submissions.

78. Let me return briefly to the other half of these proceedings, to Croatia's Application. It contains evidence of many violations of international humanitarian law and international human rights law. Serbia does not contest much of this evidence. Indeed, it has regularly expressed its sincere regrets and, to the extent that it bears a share of the responsibility, its contrition and remorse. This process of acknowledgment can only contribute to reconciliation within the region. Where Serbia takes issue with Croatia in this respect is on the attempt to qualify the events that took place in 1991 as genocide. Besides discussing the application of the law on genocide to the relevant events, Serbia has also indicated that no genocide prosecutions have ever been undertaken before the ICTY about the subject-matter of the Croatian claim. Nor has the Tribunal in its many judgements respecting Croatia ever suggested that the Prosecutor had miscast the charges. The legal status of these events became even clearer following this Court's Judgment in the *Bosnia* case. And Croatia has not made a serious effort in the present proceedings to demonstrate how its case differs in any significant way from that presented by Bosnia and Herzegovina with respect to the violations that took place in the municipalities. Nor has it attempted to claim that the violations that took place in Croatia bear any meaningful relationship to the Srebrenica massacre, which this Court has qualified as genocide.

79. Well, Mr. President, Honourable Judges, the obvious question that arises in the context of the counter-claim is that if Croatia's Application is not well founded, as Serbia asserts, and for the reasons that it has advanced, does this not also fatally undermine the counter-claim. In its reply to the counter-claim, counsel for the Applicant seemed to attempt to get at this point, suggesting that Serbia's arguments on the counter-claim were in fact helpful to Croatia. These proceedings are far too solemn to be reduced to sophomoric debating points. The observations of the Court will undoubtedly impact upon the understanding of the conflicts of the 1990s within the region, and

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[111] *Ibid.*, p. 57, para. 150 (Obradović).

[112] *Ibid.*, p. 23 para. 40 (Obradović).

beyond. They may well contribute to the historical narrative of the armed conflicts associated with the break-up of the former Yugoslavia.

80. In his concluding submissions on the counter-claim, Serbia's Agent clarified the position. The Respondent's Agent noted that Serbia had not sought to settle these disputes before the International Court of Justice. Nevertheless, given Croatia's insistence upon proceeding, even in light of the 2007 Judgment, Serbia felt compelled to file its own counter-claim. In addition, Serbia submits that the counter-claim serves the need to establish the truth about all the events that took place during the period of the conflict. Serbia owes it to all victims, in particular, to the victims of Operation Storm.

81. Turning back to the substance of the counter-claim, the Agent for Serbia pointed out that the counter-claim, assessed in light of the required elements of the crime of genocide, is much stronger than the claim submitted by Croatia. He explained that the scale of the violence in Operation Storm, the number of the victims in a short period of time and under limited opportunities on the side of the perpetrators, as well as the consequences upon the life of the attacked ethnic group cannot be compared when any of the massive crimes described by the Applicant's claim which covered the time period of five years is set side by side.

82. The position taken by Serbia with respect to the counter-claim and the position it takes concerning the claim could appear to be inconsistent. However, this is not the case and it is not difficult to explain. Serbia's position is that the cautious and prudent interpretation of the crime of genocide adopted by the Court in 2007 is correct as a matter of international law. Serbia is not asking the Court to revise or change its legal findings in that Judgment. The interpretative approach that the ICJ took to the crime of genocide, especially within the framework of State responsibility, was consistent with most of the case law developed by specialized tribunals over the previous decade. It provided clarity and legal certainty.

83. If the position adopted by this Court in 2007 is maintained, then Croatia's claim must be rejected. Croatia is encouraging the Court to revise its jurisprudence. Were the ICJ to do so, it might find this hard to explain to the people of Bosnia and Herzegovina. The Respondent contends that should the Court adjust its interpretation of the crime of genocide in a way that favours the

position of Croatia, there cannot be much doubt that Serbia's counter-claim is indeed much stronger than the Application in several important respects.

84. Mr. President, Members of the Court, I come to end then of my presentation this afternoon and this is the final opportunity I will have to address the Court in these proceedings. I look forward to returning to the Court in the future, but I greatly hope that it is not in a case concerning genocide. I hope that this is the last case that the Court ever has to hear concerning the Convention on the Crime of Genocide.

85. It was suggested by the counsel for Croatia that the Convention risked becoming a dead instrument, or a dead treaty, but over the past decade there have been more trials and more prosecutions before criminal courts, both at the national level and the international level for the crime of genocide than in the previous 50 years. There are more people serving lengthy sentences for the crime of genocide than ever before in history. At the United Nations and in Africa there are serious robust organizations directed to the prevention of genocide and to early warning of genocide and, of course, there is more academic activity and research, both into the law of genocide and the causes of genocide than ever before. It may be that no more cases will come to this Court and that is my hope. I do not think that we should measure the effectiveness of the Convention on Genocide by the number of cases that come before this Court, pursuant to Article 9. Respectfully submitted.

The PRESIDENT: Thank you, Professor Schabas.

Mr. SCHABAS: Mr. President, I think that perhaps that it is time for a pause?

The PRESIDENT: Yes, the Court is now going to take a 15-minute break, and afterwards I will give the floor to Mr. Jordash. The hearing is suspended for 15 minutes.

The Court adjourned from 4.20 p.m. to 4.35 p.m.

The PRESIDENT: Please be seated. The hearing is resumed. Mr. Jordash, you may proceed.

Mr. JORDASH:

OPERATION STORM — A GENOCIDAL CAMPAIGN IN LIGHT OF THE APPLICANT'S COMPARISON

1. Mr. President, Members of the Court, I am grateful. Before leaving the floor to Mr. Obradović to conclude Serbia's submissions, I would like to draw some strands together concerning Serbia's counter-claim.

2. In order to do so and in order to address some of the unhelpful points made by the Applicant, I will address directly the nine points of comparison that Professor Sands raised concerning the differences between the Respondent's counter-claim and the Applicant's claim[113].

3. Of course, the value of such a comparison does not depend, as the Applicant appeared to believe, on size but also on probative value, and it is to this I will direct the Court's attention.

4. As a brief examination of the nine points addressed by Professor Sands during the second round shows, once again, the Applicant's claim does not rely upon anything that might constitute a plan, and the totality of the context and patterns provides no basis upon which an inference of genocidal intent might be inferred.

5. By contrast, the Respondent's counter-claim, rather than a "diversionary" tactic — as unhappily alleged by the Applicant[114] — when looked at in context, contains a clear plan, which in conjunction with the patterns of crimes and avoidance, meet the required threshold for establishing the *actus reus* and *mens rea* of genocide.

6. Before, moving to Professor Sands's nine points, I would like to make some preliminary remarks that go to the issue of "diversionary tactics", raised by the Applicant. Croatia argues that the counter-claim was filed as a diversionary tactic, whereas, in contrast, it asserts, the claim was filed to vindicate the rights of the victims and to deter the commission of genocide in the future. Fine sentiments, but, as we have seen throughout these proceedings, not matched by word or deed.

7. First, as the Respondent has detailed, we know one of the reasons why the Applicant filed the claim. The Croatian Government admitted that

> "While B[osnia] [and] H[erzgegovina] filed its case in 1993 . . . Croatia did not file until 1999, and only then after being convinced by an American attorney that accusations of S[erbia] a[nd] M[ontenegro's] responsibility for genocide . . . on

[113] CR 2014/19, pp. 57-65 (Sands).

[114] *Ibid.*, pp. 57-58, para. 3 (Sands).

> Croatian territory would paralyze cases against Croatians at the International Criminal Tribunal for the former Yugoslavia (ICTY)." [115]

It has been said before and I do not labour the point.

8. However, it is not just in these words that the true intent behind the filing of the claim can be seen. It is also in the way it has been advanced. The Applicant has strained every sinew to persuade the Court to abandon basic tenets of the law, as well as doing its best to obscure the facts.

9. Moreover, the Applicant has taken a decision, we submit, not to assist the Court with issues that are relevant to both the claim and the Respondent's counter-claim. Even if it was correct, that the Respondent had filed its counter-claim as a diversionary tactic, which it is not, this is not likely to have had an impact upon the legal and evidential assessments made by the Court. It does not jettison the law or avoid the truth.

10. In contrast to this, we submit, the diversionary tactics deployed by the Applicant gives rise to a real risk that the utility of the Convention is undermined, the truth is concealed and the rights important for victims, past and future, are diminished under a barrage of eloquent but distracting speeches.

11. Let me turn first to the Applicant's continued attempts to change the law and the consistent attempts to avoid providing precise information or even make reasonable concessions.

Abandoning the law

12. Of course, any progressive system of law crystallizes, develops and is refined as time goes on. But that is not what the Applicant is requesting of the Court.

13. The Applicant is not at all happy with the law. Croatia wants to abandon or erode this Court's enunciation of the standard of proof, the substantiality requirement, and the law relating to the role of "opportunity"; the principle of distinction and proportionality, the methodology for assessing "effective control". It also wants the Court to set aside regular rules on the temporal application of treaties, on attribution and rules relating to the Court's jurisdiction.

14. The Applicant is not asking for the law to be further constructed, refined or tweaked, but instead seeks for key aspects of the law to be abandoned, torn up and thrown away. Did this Court

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[115] CR 2014/14, p. 11, para. 10 (Zimmerman), citing to cable No. 06ZAGREB366 of 17 Mar. 2006 from the US Embassy in Zagreb to the US State Department, para. 8; available at: http://wikileaks.org/cable/2006/03/06ZAGREB366.html.

get it so wrong only seven years ago in the *Bosnia* case? Is international humanitarian law so deficient we need to cast away time-honoured basic tenets?

15. No, the Applicant simply wants to get rid of the law to encompass the facts of this case. If this were not the case, the Applicant would have explained what should replace that which is to be abandoned. In the main, we have heard no such reasoned elucidation.

16. Instead, the Applicant comes to the Court with an insistence that their case has merit accompanied with such a request to jettison essential law; an illusory stand-alone test of opportunity; a request to treat combatants in the same way as civilians; a circumvention of the "effective control" test; and Professor Sands's hamlet test of no utility at all.

17. Of course, these are not serious propositions. It is not that the Applicant believes that abandoning the law on so many fronts, fortifies or protects the utility of the Convention or strengthens humanitarian law's essential protections, or, beyond this case, expands the rights of victims. That would be a fanciful perspective.

18. Why, we might ask ourselves, has so much effort been expended trying to change the law? To ask the question is to answer it.

19. With the greatest respect, it is a form of legal vandalism that promotes the very "protection gaps" that the Applicant claims to be seeking to avoid, designed only to force a square pole into a round hole. Abandoning the law in the way requested risks turning the Genocide Convention from a living instrument with the practical means of distinguishing genocidal intent from other lesser or different intents, ensuring that those who violate the Convention can be distinguished from those whose intent is different, into an aspirational document containing illusory rights that fails to draw the required distinctions.

Camouflaging the facts

20. We submit the Applicant takes the same devil-may-care approach to the facts.

21. Tudjman's political and military administration had no problem with the Serbs; they had no army; they were not perpetrators themselves; each of the thousands of Serbs who fled the Krajina before and after Operation Storm did so because the Serb leadership requested that they did

so; every Serbian attack was disproportionate; every crime committed was done with genocidal intent.

22. This opaqueness continues with regard to the number of civilians allegedly killed in the Croatian conflict, with regard to the 12,500 statistic[116]. I addressed that issue this morning and I do not repeat it. Suffice to say, the approach taken should not be permitted to go unnoticed.

23. The Applicant takes the same approach to the unfortunate events in Vukovar. According to the Applicant, in its Application instituting proceedings, 1,700 people were killed in Vukovar alone, 1,100 of them were civilians[117]. According to the Memorial, as "many as 2,000 other people were killed after the occupation of the city"[118].

24. When Judge Greenwood requested clarification on these issues[119], the Applicant repeated the aforementioned and then stated,

> "To clarify the figures with respect to Vukovar. The best figures we have for those killed in the siege are between 1,100 and 1,700 of which, before Phase 4, 70 per cent were civilians. So far as Phase 4 is concerned, it is difficult to estimate with any precision how many were killed during Phase 4. [And this is the point] In the pleadings, the assertion is made that 2,000 were killed after the occupation of the city."[120]

25. Indeed, the assertion that 2,000 were killed after the occupation *was* made in the Applicant's Memorial. However, it is untroubled by any source or evidence in support. As an examination of the Applicant's pleadings show, all these figures are mere assertions or opinions. Nevertheless, this does not prevent the Applicant from claiming them as fact.

26. As Professor Schabas has just outlined, the same approach exists with regard to the claim that there were 130,000 returnees to Croatia. Mr. Obradović will address other issues in a moment.

27. The Applicant's approach stands in stark contrast to the Respondent on these issues. The Respondent does not seek to abandon the law, only have it applied. The Respondent has attempted to assist the process with a reasonable approach to the facts — not least by advancing a realistic appraisal of the Serbian and Krajina Governments of that terrible time. The Respondent has not

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

[117]Application of Croatia (AC), p. 8, para. 17; no footnote for this claim.

[118]Memorial of Croatia (MC), para. 4.139; no footnote for this claim.

[119]CR 2014/8, Judge Greenwood Question, pp. 59-60.

[120]CR 2014/12, pp. 11-12 (Starmer); no footnote for this claim.

veered from this course, even when, as has now become the norm, the Applicant has leapt on perceived concessions with evident and unseemly pleasure.

28. As the Respondent has argued, this approach undermines their case, but it ought to not be allowed to undermine the counter-claim. To advance and defend a claim of genocide, without coming to the Court with openness, or as Professor Zimmermann correctly called it — clean hands — ought not to go unnoticed. It certainly has legal consequences, as the Respondent has previously explained and as I will further address during the discussion of Professor Sands' nine points.

29. So when the Applicant alleges that the filing of the counter-claim was nothing more than a diversionary tactic, perhaps Croatia needs to look closer to home. It is the Applicant, not the Respondent, who appears to be constrained, who appears to have a misguided belief in the correctness of the conduct of every Croatian leader or combatant during this conflict.

30. Despite what we know in this Courtroom, Tudjman remains a hero, and the Serbians are to blame for everything. With the greatest respect, a genocide finding would unfairly vindicate this unhelpful belief. That is one of the reasons this claim was brought.

31. Having addressed this preliminary issue, let us now turn to the nine points addressed by Professor Sands.

Temporal framework

32. The first point. The temporal framework. Last week, the Applicant tried to demonstrate that Croatia's claim and Serbia's counter-claim were not part of the same "factual complex" by arguing that there was no common temporal ground between the two proceedings as "Croatia's claim ends in large part before Serbia's even begins"[121].

33. Croatia contradicts itself once more in attempting to deny the temporal connection. In Croatia's Application instituting proceedings, Croatia recognized the close interrelationship between the facts. At that time, the Applicant was prepared to acknowledge that Operation Storm was an integral part of the overall military conflict that took place in Croatia from 1991 onwards[122].

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[121]CR 2014/19, p. 58, para. 8 (Sands).

[122]AC, para. 2.

34. Contrary to the Applicant's latest submission, the facts have a common temporal setting, they are also based on the same historical background, and they took place within the framework of the same overall political process. The acts forming the background of Serbia's counter-claim concern exactly the same armed conflict that began in mid-1991 and culminated in Operation Storm in August 1995.

35. Of course, this is not the only volte-face, the Respondent has observed in the Applicant's approach to the proceedings and the merits of the counter-claim. At the time Croatia filed their Application instituting proceedings, on 2 July 1999, it was willing to admit that the evacuation of the Krajina Serbs from Croatia during Operation Storm was "conduct amounting to a second round of 'ethnic cleansing', in violation of the Genocide Convention"[123]. True, the Applicant retreated somewhat, but nonetheless this was said.

36. Of course, at that time Croatia advanced the claim that it was Serbia that cleansed its own people from Croatia. Having wisely abandoned legal proceedings on that basis, the Applicant quickly retreated from such an admission. But it should be examined.

37. Presumably, it was made in good faith. It is a statement against interest. Consistent with the approach taken in various cases, including the *Bosnia* case, we invite the Court to examine it and take it into account. Unlike in the *Bosnia* case, the statement under consideration is not a political statement; it was intended to have "legal effect", even if the Applicant retreated from it. It sits in complete contradiction to the submissions made by the Applicant in response to the counter-claim[124]. At the very least it illuminates something of the Applicant's approach to the merits of its own and Serbia's case.

38. It certainly casts doubt on the forthrightness of the Applicant's attempt to characterize the Respondent's counter-claim as a mere four-day period with a mere "sprinkling" of confirmatory acts occurring afterwards[125]. Of course, we do not need this statement against interest to tell us that.

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[123]AC, para. 2. See also MC, paras. 1.03-1.06.

[124]*Bosnia*, Judgment, para. 378.

[125]CR 2014/19, pp. 57-58, paras. 6 and 7 (Sands).

39. As the Respondent explained during its first round, Phase III of Operation Storm was undoubtedly the most brutal phase. As found by the *Gotovina* Trial Chamber, for months afterwards, the Croatian military forces and Special Police continued to target the Krajina Serb civilian population.

40. Whereas the Applicant refers to these events as a "sprinkling of confirmatory acts", the Trial Chamber called them: "a large number of murders, inhumane acts, cruel treatment, and acts of destruction and plunder against Krajina Serb civilians throughout August and September 1995"[126]. The Applicant has provided no reason in its lengthy commentary on the *Gotovina* judgements why this aspect of the Trial Chamber's findings should be discarded and none is reasonably apparent from the Appeals Chamber's judgement.

41. Be that as it may, the temporal connection is clear. The Respondent submits that the Court needs to examine the totality of the overlapping background to ascertain the Croatian leaders' real intent.

42. Croatia started planning Operation Storm in 1992, as admitted in its Reply[127]. These plans were in part confirmed by General Bobetko, Chief of the Croatian Main Staff at that time, in his book *All My Battles;* the operations from 1994 through to Operation Storm were part of a concerted plan that had "worked out all the assignments to the minutest detail"[128].

43. Mr. Galbraith's testimony at the ICTY confirms this temporal overlap: the plan to attack Krajina was adopted by President Tudjman in 1994, well before Operation Storm[129], as he confirmed.

44. As for the final steps in the transformation of Tudjman's genocidal theory into practice, the Croatian leadership's escalating criminal intent is most clearly visible through an examination of the operations that preceded Operation Storm, as far back as 1992, but in particular, the Maslenica attack in January 1993; the Medak Pocket operation in September 1993 and Operation Flash in May 1995.

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

[127] RC, para. 11.56.

[128] CMS, p. 371, fn. 1040.

[129] RS, p. 295, para. 680; citing to *Prosecutor* v. *Gotovina*, Transcripts, 23 June 2008, witness Galbraith, pp. 4921-4922.

45. The claim and the counter-claim represent various phases of the same conflict involving the same armed groups taking place on the same territory of the same State. The Applicant's latest submissions on this issue have no merit.

Geographic scope

46. The second point raised by the Applicant concerns the alleged differences in the geographic scope of the claims.

47. According to the Applicant, the claim concerns "over one third of its entire territory"[130] whereas Serbia's claim only concerns, "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'"[131].

48. The Applicant proceeds as if biggest is best. However, as explained this morning, the Applicant's submissions do not assist its case. The Applicant's submissions on geographic scope suggest that Serbia had overwhelming territorial control and its opportunities for destruction were optimal. Yet the numbers killed in five years of conflict, whilst terrible, are proportionately small.

49. However, the Applicant's analysis is correct inasmuch as it describes the efficiency of the Croatian plan that scooped the hapless civilians from huge swathes of the Croatian territory and swept them into small areas, where it could optimize destruction.

50. Operation Storm was conducted from four different directions in the same territory. The attack from the north was aimed at Petrinja and Kostajnica. The attack from the north-west went from Karlovci to Vojnić. The western attack, supported by the infamous Bosnian Muslim Army of the 5th Corps, moved from Gospić to Gračac, Udbine and Plitvica lakes. Finally the south direction started from the territory of Bosnia and Herzegovina and Dalmatia and was aimed towards the city of Knin and areas of Benkovac and Obrovac[132].

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

[131]*Ibid.*

[132]See map No. 9; also, in addition, special police units under the command of Mladen Markač were given orders to carry out an offensive operation from the area of Mount Velebit in order to seize control of the area of Mali Golić — Sveti Rok — Gračac, to cut the Gospić – Gračac road, and to link up with the forces of the Split MD; see *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 265.

51. A pincer movement that placed the civilians into a geographically limited area that left no way out. There can be no doubt in this case that the Croatian forces planned it that way.

52. As the Veritas and CHC figures show, the result of this destructive operation was *inter alia* mass killing. According to the Veritas report they were able to confirm that there were 1,719 killed or missing persons[133]. According to the Croatian Helsinki Committee for Human Rights, "during and in the 100 days after operation *Storm*, 677 Serb civilians were murdered and went missing"[134]. As the Court knows, the Respondent relies upon the *Gotovina* finding of "a large number of murders, inhumane acts, cruel treatment, and acts of destruction and plunder against Krajina Serb civilians throughout August and September 1995"[135].

53. Moreover, as confirmed by the Special Rapporteur of the Commission on Human Rights more than 120 bodies had been discovered by the United Nations with a common murder method: a shot in the back of the head[136]. Further, as evidence presented in our Counter-Memorial shows, at least 430 Serbs who remained in the UNPA areas in Sectors South and North were murdered[137]. More specifically, places like Knin[138], Dvor[139], Donji Lapac[140], and Korenica[141] were the unfortunate focus of this killing campaign. In relation to this evidence Croatia has not commented or been able to cast any real aspersions upon it.

54. The Applicant has studiously avoided proffering any figures on these issues that might assist the Court and has avoided explaining how any of these killings or attacks were permitted to occur. Nonetheless, even if the lower figures are accepted, this was a remarkably efficient

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[133]The list is publicly available at: http://www.veritas.org.rs/wp-content/uploads/2014/02/Oluja-direktne-zrtve-rev2014.pdf.

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

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

[136]Report on the Situation of Human Rights in the Territory of the former Yugoslavia submitted by Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89 and Economic and Social Council decision 1995/290, 7 Nov. 1995, UN doc. S/1995/933, p. 9, para. 24. 1196 Croatian Helsinki Committee for Human Rights, Military Operation Storm and its Aftermath; Zagreb, 2001, p. 46.

[137]CMS, paras. 1258-1311.

[138]*Ibid*., paras. 1261-1283.

[139]*Ibid*., paras. 1302, 1311.

[140]*Ibid*., paras. 1286-1289.

[141]*Ibid*., paras. 1293-1296.

operation. It seems unseemly to compare crimes, or events such as these, but taking the statistics at their highest, in five years of war, over 6,000 Croatian civilians were killed by Serbian forces. In three months or so of Operation Storm taking the figures at their lowest, the Croatian forces killed over 1,000 civilians.

55. The Croatian forces designed Operation Storm to be efficient. It compensated for the lack of control over the disputed territories. Having solved that problem by corralling the civilians into a small geographic space, the Croatian forces optimally utilized their activity and control to affect the genocidal plan.

Purpose of the armed campaigns

56. The Applicant claims that this is a third point of difference. The Applicant is most certainly correct. As the ICTY has found, and as the Respondent has set out, there were many different purposes and motives that underpinned the violence that engulfed Croatia before Operation Storm. None of them are close to being consistent with genocide. There was no plan and the context and patterns do not support the claim.

57. The Applicant insists that Operation Storm was lawful because it was for "the sole purpose of restoring Croatia's sovereign territory"[142]. This is the continuous refrain that goes to motive and not intent.

58. The remaining reasons proffered by the Applicant are equally irrelevant and shown to be false. Chief amongst them is the astonishing claim that Operation Storm was a humanitarian mission to save civilians in Bihać from a massacre and to avert a refugee crisis[143].

59. As noted by the Tudjman at Brioni, and consistently ignored by the Applicant throughout these proceedings, "it is my opinion that our main objective can no longer be to break through to Bihać. The breakthrough is now only a secondary concern. We would now have to find some kind of an [sic] pretext for our actions . . ."[144]

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[142]CR 2014/19, p. 59, para. 11 (Sands).

[143]Reply of Croatia, para. 11.9.

[144]Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 31 July 1995 at Brioni; Ann. 52, p. 1.

60. Let me state the obvious. One does not avoid the risk of a refugee crisis by causing an even bigger one.

The identity of the protagonists

61. Moving to the Applicant's fourth point of difference: the identity of the protagonists. From beginning to end, the Applicant clings onto the fiction that throughout 1991 until Operation Storm there was no equality between the fighting forces. Professor Sands insists that "[t]his was not, as the Respondent seeks to argue in rather distorted terms, a conventional armed conflict between equally matched armies"[145].

62. According to the Applicant, the Court "heard the very same distortions last week. They were rejected then and they should be rejected again now."[146]

63. As the Respondent discussed this morning, the Applicant closes its eyes to the obvious context and in doing so avoids the salient issues.

64. As illustrations only: during the Maslenica attack in January of 1993, 11,000 Serbs were transferred, forcibly[147]. During the attack on the Medak Pocket, 164 homes and 148 barns were completely destroyed[148]. During Operation Flash in May of 1995, a total of 12,000 Serbs were displaced[149].

65. Even suspending disbelief for a moment, and assuming the crimes were somehow accidental, the Applicant's case fails to explain who overran the RSK's army and who was responsible for the destruction?

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[145]CR 2014/19, p. 60, para. 13 (Sands).

[146]*Ibid*.

[147]CMS, p. 356, para. 1125, citing to Fifth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 Feb. 1993, 17 Nov. 1993, UN doc. E/CN.4/1994/47 (1993), para. 149.

[148]CMS, p. 360, para. 1133, citing to ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Consolidated Indictment.

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

66. And why was President Tudjman so confident at Brioni that the Croatian army could "inflict such blows that the Serbs will to all practical purpose disappear, that is to say, the areas we do not take at once must capitulate within a few days"[150].

67. And why was Minister Radić at Brioni so confident of success that he planned for the adjustment in the national composition and the harmony that they fully expected would result. As he explained:

> "I conclude, therefore, that red and blue areas should promptly and, as a matter of priority, be populated by Croats, as far as possible. These areas are marked, including Zrinska Gora, which I skipped for the time being, and areas such as Lapac and Knin, namely the hinterland and the Herzegovina region, which should be given secondary priority, and this empty area in Lika as much as possible . . . "[151]

68. If the Applicant lives in the real world, then it is, indeed, a curious one.

Evidence of a systematic pattern of attack

69. Turning to the fifth point: the systematic pattern of attack. I will not reiterate the Respondent's submissions on the patterns that underpin the Applicant's claim. Suffice to reiterate that the ICTY judgements and the non-ICTY evidence do not support the claim of a pattern that gives rise to an inference of genocide.

70. The Applicant claims that the Respondent in the first round

> "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 — . . . [yet]…singularly failed to . . . identify the existence of such a pattern by reference to the evidence before the Court. There is no such evidence"[152].

71. However, once again Croatia closes its eyes to the obvious. Whereas their claim rests or falls on the patterns, the Respondent's claim is evidenced by an express plan *and* patterns of crimes and concealment. As discussed this morning, a plan provides a cogent basis for demonstrating intent and means that the Respondent may prove genocidal intent from "relatively few genocidal acts".

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[150]Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 31 July 1995 at Brioni; Ann. 52, p. 2.

[151]Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 23 Aug. 1995 in Zagreb, pp. 01325991, 01325993-01325997; Ann. 53, pp. 4–7.

[152]CR 2014/19, p. 61, para. 16 (Sands).

72. The plan led to the expulsion. United Nations witnesses confirmed the psychological effect of the shelling. They confirmed it was sustained and forced them to seek protection in United Nations bunkers[153]. Many witnesses in the *Gotovina* trial confirmed the same[154].

73. The plan led to a pattern of mass killing and injury.

74. The plan led to a pattern of concealment that the Applicant has studiously avoided addressing[155].

75. Although the Applicant itself admits that the terrain was sealed from view for some time afterwards, it claims this was done because of *"ongoing combat and in order to prevent any UNCRO casualties and later for mop up operations"*[156]. However, we have heard nothing about these operations — nothing to explain who was being mopped up and why. The United Nations witnesses on the ground agreed to take responsibility for their own safety. They did not believe the concealment was legitimate and, absent further explanation from the Applicant, neither should this Court. It is a pattern of concealment from which appropriate inferences may be drawn. I will return to this in a moment.

76. The plan led to a pattern of deliberate destruction in the ensuing months. Professor Schabas has just dealt with some of that destruction from the ECMM report: 73 per cent of Serb houses were burned and looted in the 243 villages investigated[157]. It is the same ECMM that the Applicant places so much weight on for its finding in *Mrkšić*. In Sector South alone, 17,270 houses were destroyed or damaged[158].

77. That is why, we submit, it is important to draw reasonable inferences from the pattern of concealment. The Croatian Government could remove the bodies, but they could not hide the

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[153]ICTY, *Gotovina et al.*, IT-060-90, testimony of witness John Geoffrey William Hill, 27 May 2008, Transcript pp. 3738.

[154]ICTY, *Gotovina et al.*, IT-060-90, testimony of witness Jovan Dopud, 8 July 2008, Transcript pp. 5981, 6000-6001.

[155]ICTY, *Gotovina et al.*, IT-060-90, testimony of witness Ton Minkuielien, 15 April 2008, Transcript p. 1501 (witness was UN military observer in Sector South).

[156]RC, p. 439, para. 11.107.

[157]CMS, p. 423, para. 1325, citing to "The situation in the occupied territories of Croatia": Report of the Secretary-General, UN doc. A/50/648, 18 Oct. 1995, para. 33. See, also, RS, p. 337, para. 773.

[158]CMS, Ann. 58, p. 127.

burning or hide this damage. It was the tip of a very large and sinister plan. It does not take much to imagine the destructive fury that led to this destruction.

78. Finally, the plan led to a pattern of keeping the Krajina Serbs from returning home. As we have seen, as confirmed by Minister Radić at Brioni, this was part of the plan. As found by the *Gotavina* Trial Chamber, Tudjman tellingly confirmed to Peter Galbraith, the Krajina Serbs that left Croatia in August 1995 would not be allowed to return[159].

79. And so, as must be apparent to all, and contrary to Professor Sands's claim, Serbia's case does not rest on just "just two specific acts: deliberate indiscriminate shelling and forced expulsion"[160]. It rests on the plan and on these patterns.

Instances of ethnically motivated killing, serious violence and destruction

80. I turn to the Applicant's sixth point: instances of ethnically motivated killing, serious violence and destruction. The Applicant claims that there "is a world of difference between the two claims as to the instances of *ethnically* motivated killing on which each Party relies"[161]. The Applicant then suggests that "Croatia's claim 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"[162].

81. Nonetheless, as if appreciating that this submission lacks merit, the Applicant falls back on the distorted claim that "in making its counter-claim, Serbia concedes that genocide can take place on a limited scale of facts like the one it alleges" and "Serbia now accepts that acts on the scale of those proven by Croatia, in evidence before this Court, can amount to genocide"[163].

82. I will not reiterate the Respondent's submissions on this issue, but Croatia once more fails to appreciate the legal significance of the existence of a plan and its nexus and interrelationship with the great mass of distinct and separate instances of killings, beatings, torture and the destruction of property.

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[159]ICTY, *Gotovina et al.*, Trial Chamber Judgement, paras. 1999-2000.

[160]CR 2014/19, p. 61, para. 19 (Sands).

[161]*Ibid.*, p. 61, para. 18 (Sands).

[162]*Ibid.*, pp. 61-62, para. 18 (Sands).

[163]*Ibid.*, p. 62, para. 18 (Sands).

83. In contrast, in the absence of an express plan, Croatia must do more and it has failed to do so.

Evidence and materials

84. Turning to the seventh point that the Applicant claims is a point of difference, evidence and materials. The Applicant claims that it has produced a volume of evidence, including more than 450 witness statements, that "provides extensive first-hand descriptions of the crimes committed by Serb forces against the Croat population", the reliability of which has been confirmed by the subsequent findings of the ICTY and the six live witnesses who testified during the first round[164].

85. As the Respondent has argued, even if the Applicant's evidence is reliable, and even if it is confirmed by the ICTY findings, the ICTY does not support their case. A proper examination and analysis of both sources undermines it.

86. As the Respondent has also pointed out, drowning the Court in a mass of crimes, as if the volume could replace the missing context or patterns, the Applicant has failed to adhere to basic procedural requirements.

87. As the Applicant's explanation last week in response to Judge Greenwood's question — concerning whether their statements would have been admissible in the courts of Croatia — showed[165], and Mr. Obradović confirmed yesterday, much of the evidence adduced would not be admissible in the Croatian courts. And yet, the Applicant expects it to be admissible, and probative of these serious claims, in this Court.

88. In contrast, the Respondent relies upon a plan and ample evidence that abides by basic procedural requirements whose reliability can be tested. And the Applicant was presented with an opportunity to test the evidence of the United Nations personnel and key witnesses who support the Respondent's case. Mr. President, Members of the Court, why did they avoid that confrontation? What was it that they were shying away from?

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[164]CR 2014/19, p. 62, para. 20 (Sands).

[165]CR 2014/20, p. 67 (Crnić-Grotić).

89. Croatia must live with the combined force of the Veritas report collated by the Krajina Serbs Centre for Collecting Documents and Information and the report of the Croatian Helsinki Committee for Human Rights ("CHC")[166], that confirms that mass killing did occur.

90. As Professor Schabas outlined, the CHC report has not been completely discredited by the ICTY as a reliable basis for finding fact, nor might the Veritas report be so easily dismissed by attacks on the impartiality of the Director of the organization[167].

91. Contrary to the approach taken by the Applicant, finding errors concerning dates of birth or father's names and the like[168], in the CHC report containing hundreds of points of data, is not the same as finding "methodological flaws". The CHC report represents a significant effort by an independent, *Croatian* non-governmental organization, to record what the Government does not want the world to see.

92. As for the Veritas report, Professor Schabas has dealt with that but a handful of factual errors out of a total of 6,119 Serbian victims — 2,372 of them civilians — does not provide the basis for ignoring the report[169]. Attacking the author of a report for bias, without providing real evidence, also fails to explain, let alone prove, any "methodological flaws[170].

93. The work of this significant NGO, Veritas, has been praised over the years by a number of international actors such as the United Nations Liaison Office in Belgrade, the ICTY's Prosecutor's Office, and the International Committee of the Red Cross[171]. It remains deserving of such praise.

94. Of course, the Applicant could have assisted either organization to obtain a fuller or more accurate picture, but declined to do so. Adverse inferences surely should be drawn.

ICTY FINDINGS

95. Turning to the eighth point of alleged difference addressed by the Applicant: the findings of the ICTY. As demonstrated over the last three weeks, the ICTY judgements do not

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[166]RC, para. 1.9.

[167]CR 2014/19, pp. 62-63, para. 21 (Sands).

[168]RC, para. 2.65.

[169]CMS, Ann. 66, p. 16; RS, para. 592; RC, para. 11.68.

[170]RC, paras. 2.66-2.68.

[171]CMS, Ann. 63.

support the Applicant's case. While the Respondent must live with the controversy of the *Gotovina* judgement, the Applicant must live with fact that none of the ICTY judgements come close to providing a platform for their theory.

96. They confirm that there was lawful combat, they confirm that there were excesses in combat, the patterns confirmed deny the Applicant a framework for their non-ICTY evidence to cleave. The *Martić* Trial Chamber asked and answered the critical gateway question that is essential if the Applicant is to succeed. The ICTY rejected that question, answered it in the negative, and the similarity of the Applicant's non-ICTY evidence, if reliable, is proof they got it right.

Intent to destroy

97. And so finally I turn to the ninth point: the intent to destroy. The Respondent has set out its case with clarity and will not reiterate it here. It does not rely upon only one plan, but concerted action that removed 200,000 civilians from their homes, efficiently corralled them into columns and ensured that they were attacked. Having driven out all the able-bodied, the Croatian forces attacked and killed the elderly and the weak. The destruction was an intended consequence of the plan.

98. By contrast, the Applicant fails to explain how genocidal intent might be inferred from ICTY findings that do not offer a glimmer of support and from patterns of crimes that do not resemble the required intent.

99. As I touched upon at the commencement of this address, the Applicant then falls back on denial and opaqueness to support its own case and undermine the counter-claim.

100. The Applicant's opaque approach to the counter-claim should not be permitted to be without legal consequence.

101. As we submitted previously, the Respondent accepts that in general that it must establish that crimes that satisfy Article II of the Genocide Convention were committed with intent[172], however, as this Court decided in the *Congo* case, the "determination of the burden of

[172] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101

proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court"[173].

102. As noted, the burden of proof rule should be applied "flexibly" when the opposing Party is "in a better position to establish certain facts"[174].

103. At the very least, as the Applicant preached in its Reply, but, unfortunately, did not turn into practice:

> "Whilst the party asserting a claim generally has the burden of proving it, the other party also has obligations in relation to the evidence related to that claim. The latter should cooperate in putting before the tribunal all relevant evidence. In this way, both parties assist the Court in establishing the truth."[175]

104. Therefore, as I touched upon a moment ago, the Respondent relies upon an additional pattern to prove intent: a pattern of failing to provide answers or information that would assist the Court to understand the precise scale of the attacks upon civilians that took place during the phase two and three of Operation Storm.

105. The Respondent submits that the Applicant must know the precise scale of the destruction caused by the Croatian forces and those under their direction and control. Croatia sealed off its territory and hid it from the view of the international community for some time after Operation Storm. Croatia must know how many bodies were found; how many civilians were attacked and injured; the scale of burning and destruction and plunder. It has chosen not to assist.

106. We submit that in order to safeguard the utility and legitimacy of the Convention, this should not be without legal consequence, lest future perpetrators be encouraged to evade responsibility by sealing off territory; lest future perpetrators be encouraged to evade responsibility by hiding the crime.

107. This Court should draw appropriate inferences against the Applicant. It cannot be right that the Respondent's claim succeeds because the Applicant was able to investigate the dead and the injured. It cannot be right that the counter-claim is allowed to fail because only the perpetrator has had access to the scene of the crimes. The application of the Convention and the detection of

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

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

[175] RC, p. 40, para. 2.81.

violations must not rest on the ingenuity of the offending State. To conclude, whether the Applicant's comparative approach has value is, of course, a matter for the Court. However, if efficiency and calculation are indicators of a genocidal plan, then Operation Storm wins hands down. We urge the Court to reject the proposition that the counter-claim is a diversionary tactic and see it for what it shows: an extremely successful, ethnic cleansing campaign that had, as an automatic consequence of its execution, destruction. As Professor Schabas' map has shown a moment ago, Tudjman got the harmony in the national composition and it came at a terrible cost to the Krajina Serbs.

108. Mr. President, Members of the Court, I am grateful for the time. With the Court's leave, Mr. Obradović would like to close.

The PRESIDENT: Thank you very much, Mr. Jordash. I now call on Mr. Obradović to perform his task as Agent, to present final observations and, in particular, final submissions. You have the floor, Sir.

Mr. OBRADOVIĆ:

CLOSING REMARKS

1. Mr. President, we are almost at the end of these long but important proceedings. As I said in my closing remarks in the first round, it was not our choice to appear before this Court, but we are now here, with a serious counter-claim based on well-documented atrocities of the Croatian Government led by its President Franjo Tudjman, the criminal mastermind of Operation Storm. Distinguished Members of the Court, you have already heard a lot in these proceedings about criminal acts and two legal claims that follow the atrocities. If you allow me, I would avoid a classic conclusion, but rather dedicate my closing remarks to the victims. My long work on this case was particularly difficult because of the deep tragedy which stands beyond this legal matter. That is the feeling shared by the members of our legal team.

2. A short interview has appeared on the website of the Serbian National TV. The name of one of the young persons whose photo you can see now on the screen is Aleksandra Stjelja. She is 22. When she was a three-year-old, on 7 August 1995, her father and grandfather were killed in

the refugee convoy[176]. She, her brother and her pregnant mother were injured in the same attack by shrapnel. Her mother died in the same year in childbirth. Aleksandra now lives in Serbia, in the family of her uncle. She still remembers the Croatian aircraft flying over the convoy. Before August 2013, the Croatian legal team would probably say it was a warplane of the Bosnian Serb Army[177]. But in August last year, I produced the article by Mr. Mario Werhas that contained the list of actions of the Croatian air forces in Operation Storm[178]. By the letter of the Croatian Agent sent to the Court on 10 September 2013, it is finally confirmed that the action in which Aleksandra's family was destroyed was conducted by the Croatian forces.

3. In 2002, Aleksandra Stjelja was involved in the process of tracing the human remains of her father. In 2014, she and other people from refugee convoys feel disappointment: they do not believe in justice and they do not expect much from the courts. They have in mind the ICTY *Gotovina* case as the failure of international justice[179].

4. But this is only one of the tragic stories. I remember vividly a scene from the documentary film "Storm over Krajina"[180] in which a young woman cried on the road near a tractor. She was asked by a journalist who was responsible for her suffering. She answered: "Politicians. Have they ever thought that their children could be like this?", and she pointed to her small daughter on the tractor trailer.

5. Members of the Court, the children of the former Yugoslav politicians from the 1990s were not among the refugees. They enjoyed the benefits that their parents provided to them through the corruption of power. This case should be seen as a warning to all politicians and all peoples how tragic consequences could be if they follow dictators and the ideas of extreme nationalism. It is without saying that many Croat mothers cried, as bitter as that Serb woman.

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[176]RS, Anns. 65 and 66; *Gotovina et al.*, testimony of witness 56, 23 May 2008, Transcript, p. 3,546; Statement of the expert witness Savo Štrbac (6.6.2).

[177]See RC, para. 11.87 and APC, para. 3.69.

[178]My letter of 8 Aug. 2013, with Mr. Werhas, *Operation Storm —Actions of the Croatian Air Forces*, Magazine for Military History, Zagreb, Aug. 2012.

[179]See http://files.snstatic.fi/HS/2013/4/jugoslavia/en.html.

[180]Božidar Knežević, Storm Over Krajina, documentary; the quoted dialogue is available at: http://www.youtube.com/watch?v=IulcmlI1DC0.

6. This leads me to the question of distinguished Judge Cançado Trindade concerning the missing persons[181] as one part of our joint tragedy. The information I presented to the Court on 10 March[182] was in conformity with the updated report that I received from the Serbian Commission for Missing Persons in February 2014. In the meantime, the report has been translated and submitted to your attention as item No. 2 of the judges' folders. The Serbian list of missing persons in the territory of Croatia that today contains 1,748 names is also submitted, in two copies — one for the Court and one for the Applicant. We do not consider that list to be evidence for the crime, or for the State responsibility, in that sense we refer to the Veritas list of direct victims of Operation Storm. This list is only a contribution to the complete answer to the question posed by Judge Cançado Trindade seeking the updated information by the Government.

7. As you could realize from the presentation of the Croatian Agent[183], tracing missing persons is not a matter of initiatives; it is a complex and long-lasting process of co-operation between two sides based on the 1995 Bilateral Agreement on Co-operation in Tracing Missing Persons and the 1996 Protocol on Co-operation between two State Commissions[184]. Although the significant achievement have so far been made, it is obvious from the statement of Madam Agent, as well as from our report that you can find in the judges' folders now, that each side is unsatisfied with the efforts and activities of the other. Thus, Professor Crnić-Grotić mentioned the case of Sotin in 2013 as the only one in which the Serbian side assisted in discovering the mass grave. But that was done in co-operation with the Serbian Office of the Prosecutor for War Crimes which brought the perpetrator of the crime to Croatia. After some difficulties, he finally managed to show the place of the hidden grave, and the exhumation could commence. It is not easy to provide regularly that the perpetrators of notorious crimes show such a level of co-operation as it was in the case of Sotin.

8. Furthermore, the Croatian Agent stated that 394 human remains were exhumed in Serbia, out of which "only 103" have been handed over to Croatia. I would like to inform the Court that

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[181]CR 2014/18, p. 69.

[182]CR 2014/13, p. 15, para. 16 (Obradović).

[183]CR 2014/21, p. 37, para. 9 (Crnić-Grotić).

[184]Preliminary Objections of Serbia (POS); Ann. 53, p. 367.

that is so because only 103 DNA profiles have matched the DNA samples of the Croatian missing persons. Of course, all available DNA profiles have been duly delivered to the Croatian authorities.

9. Finally, the Croatian Agent complained that the Serbian Commission for Missing Persons seeks to act as the representative of all missing Serbs, "including those who are citizens of Croatia"[185]. Yet, that seems still necessary because the representatives of Croatia come before this Court with an allegation of 865 Croats still missing until the beginning of these hearings[186]. However, in the Croatian list of missing persons that we received last week, the number of missing is 1,868. Who are those others on the list? Serbs from Croatia? According to their family names, the answer would be yes. Who represents that rest of 1,000, if the Agent of Croatia forgot to mention their destiny before the United Nations Court? And how could we believe then in the good intention of the Croatian Government in relation to those forgotten missing persons? Finally, who killed them? The Croatian Government?

10. Nevertheless, allow me to assure you, Members of the Court, that the Government of Serbia is fully aware of its task in the process of tracing missing persons regardless of their nationality and ethnic origin. The interest of families of the missing persons is a joint interest of Serbia and Croatia. It is also the interest of humanity as a whole, and the Republic of Serbia is dedicated to that task.

11. This brings me to the end of our presentation and to the final defeat of the Croatian false application. Would that defeat be "useful", as the former Croatian Agent hoped in 2007?[187] Of course, it depends on the Court, but also on the future readers of the records of these hearings. I hope they will be able to make a difference between the strong rhetoric and the quality of evidence presented in the case file. But how will the future generations understand why the witnesses on whom Serbia relied are always mentioned by their full names, while those referred by Croatia remain hidden? It will be a burden left to the Court.

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[185]CR 2014/21, p. 37, para. 10 (Crnić-Grotić).

[186]CR 2014/6, p. 45, para. 13 (Špero); CR 2014/5, p. 18, para. 6 (Crnić-Grotić); CR 2014/20, p. 15, para. 10 (Sands); CR 2014/20, p. 35, para. 24 (Ní Ghrálaigh).

[187]Rejoinder of Serbia (RS), para. 17.

12. Mr. President, allow me now to read the final submissions on behalf of the Republic of Serbia.

SUBMISSIONS

On the basis of the facts and legal arguments presented in its written and oral pleadings, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the Court lacks jurisdiction to entertain the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State and became bound by the Convention on the Prevention and Punishment of the Crime of Genocide.
2. In the alternative, that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State and became bound by the Genocide Convention, are inadmissible.
3. That the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.
4. In the further alternative, that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 8 October 1991, i.e., prior to the date when Croatia came into existence as a State and became bound by the Genocide Convention, are inadmissible.
5. In the final alternative, should the Court find that it has jurisdiction concerning the requests relating to acts and omissions that took place before 27 April 1992 and that they are admissible, respectively that they are admissible in so far as they relate to acts and omissions that took

place before 8 October 1991, that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

6. That the Republic of Croatia has violated its obligations under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation Storm in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina region:

— killing members of the group;

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

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

7. Alternatively, that the Republic of Croatia has violated its obligations under Article III *(b)*, *(c)*, *(d)* and *(e)* of the Convention on the Prevention and Punishment of the Crime of Genocide through the acts of conspiracy, direct and public incitement and attempt to commit genocide, as well as complicity in genocide, against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina region.

8. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina region.

9. That the violations of international law set out in paragraphs 6, 7 and 8 of these Submissions constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

   (1) that the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts enumerated in Article III of the Convention committed on its territory during and after Operation Storm;

(2) that the Republic of Croatia shall immediately amend its Law on Public Holidays, Remembrance Days and Non-Working Days, by way of removing the "Day of Victory and Homeland Gratitude" and the "Day of Croatian Defenders", celebrated on 5 August, as a day of victory in the genocidal Operation Storm, from its list of public holidays; and

(3) that the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide, in a sum and in a procedure to be determined by the Court in a subsequent phase of this case; and

(b) establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights.

Mr. President, distinguished Members of the Court, I am grateful for your kind attention. Allow me to express my sincere gratitude to the Registry for the excellent organization of these hearings, as well as to our distinguished colleagues from the Croatian delegation.

The PRESIDENT: Thank you, Mr. Obradović. The Court takes note of the final submissions which you have now read on behalf of Serbia on the claims of Croatia and on Serbia's counter-claim. The Court will meet again on Tuesday 1 April 2014, between 10.00 and 11.30 a.m. to hear Croatia's response to Serbia's counter-claims. Thank you.

The Court is adjourned.

The Court rose at 5.40 p.m.