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<tr><td>International Court
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YEAR 2014

Public sitting

held on Tuesday 1 April 2014, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2014

Audience publique

tenue le mardi 1er avril 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The Government of the Republic of Croatia is represented by:

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

as Agent;

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

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

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

as Co-Agents;

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

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

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

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

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

Ms Kate Cook, Barrister, Matrix Chambers, London

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

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London

as Counsel and Advocates;

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

Ms Helen Law, Barrister, Matrix Chambers, London

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

as Counsel;

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

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

as Members of the Delegation;

Le Gouvernement de la République de Croatie est représenté par :

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

comme agent ;

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

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

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

comme coagents ;

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

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

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

comme conseils ;

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

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

comme membres de la délégation ;

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

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

as Advisers;

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

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

Ms Klaudia Sabljak, Ministry of Justice,

Ms Zrinka Salaj, Ministry of Justice,

Mr. Tomislav Boršić, Ministry of Justice,

Mr. Albert Graho, Ministry of Justice,

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

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

Ms Katherine O'Byrne, Doughty Street Chambers,

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

as Assistants;

Ms Victoria Taylor, International Mapping, Maryland,

as Technical Assistant.

The Government of the Republic of Serbia is represented by:

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

as Agent;

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

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

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

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

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

comme conseillers ;

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

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

Mme Klaudia Sabljak, ministère de la justice,

Mme Zrinka Salaj, ministère de la justice,

M. Tomislav Boršić, ministère de la justice,

M. Albert Graho, ministère de la justice,

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

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

Mme Katherine O'Byrne, Doughty Street Chambers,

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

comme assistants ;

Mme Victoria Taylor, International Mapping (Maryland),

comme assistante technique.

Le Gouvernement de la République de Serbie est représenté par :

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

comme agent ;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

as Members of the Delegation;

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

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

Mr. Igor Olujić, Attorney at Law, Belgrade,

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

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

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

as Advisers.

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

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

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

comme conseils et avocats ;

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

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

comme membres de la délégation ;

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

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

M. Igor Olujić, avocat, Belgrade,

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

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

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

comme conseillers.

The PRESIDENT: Good morning. Please be seated. The Court meets this morning to hear Croatia's response to Serbia's counter-claims. I shall now give the floor to Sir Keir Starmer. You have the floor, Sir.

Sir Keir STARMER:

SERBIA'S COUNTER-CLAIM: FACTS AND EVIDENCE

I. Introduction

1. Mr. President, Members of the Court, I will deal with the factual and evidentiary matters arising from the Respondent's counter-claim. Professor Sands will then deal with the legal issues before the Agent of Croatia makes closing submissions.

II. Shelling did not target civilians

2. Mr. President, so far as the counter-claim is concerned the shelling or artillery attacks on towns and villages in the Krajina has always been central to the Respondent's case. But, having carefully read and re-read the transcripts of proceedings in Court last Friday afternoon, one cannot help concluding that the Respondent has lost confidence in its own counter-claim.

3. In its written pleadings, the Respondent always put its case by arguing — and I hope there is a quote on your screens: ~~*[plate on]*~~ "The Krajina Serbs were attacked by deliberate indiscriminate shelling in order to be forced to flee their homes, towns and villages."[1] ~~*[Plate off]*~~ That has been the constant backbone to the whole displacement theory.

4. On Friday, just one half sentence was devoted by Professor Schabas in support of that original position when he said, and this is how he put it: ~~*[Plate on]*~~ "Serbia is not making any concession . . . its position is that the artillery bombardments were unlawful."[2] ~~*[Plate off]*~~ Neither Mr. Jordash nor Mr. Obradović has spent any time trying to sustain the Respondent's original position.

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[1]Rejoinder of Serbia (RS), para. 701; see also Counter-Memorial of Serbia (CMS), para. 1229.

[2]CR 2014/24, p. 15, para. 16 (Schabas).

5. Instead Professor Schabas devoted a considerable part of his speech to a proposition which he sought to maintain was *hypothetical*[3]. The proposition was as follows and, again, I hope this is on your screen:

~~***[Plate on]***~~

> "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."[4]

6. Mr. President, Members of the Court, what led Professor Schabas to devote no less than eight paragraphs — you will see in the transcript — of his final speech, on his final day, to flying this — hypothetical — kite?

7. The answer in part, of course, is the decision of the Appeals Chamber in *Gotovina*. As I demonstrated in my first round speech, unless this Court is tempted into some wholly unconventional judge-ranking exercise, the decision of the Appeals Chamber in *Gotovina* that, firstly, Operation Storm artillery attacks were not unlawful and, secondly, that no intent forcibly to displace Serbs could be inferred are, and remain, "highly persuasive". The point I made last time and I do not repeat now is that that is, in effect, the end of the counter-claim, unless you are persuaded to adopt a different approach to the ICTY findings.

8. But there is another reason why the Respondent has, in reality, abandoned its original position. It is this.

9. Even if, contrary to my argument, you were persuaded by the Respondent to depart from the approach to ICTY findings set out in the *Bosnia* case, the Respondent has, rather embarrassingly, finished its case without setting out how you should approach your task in assessing for yourselves whether the artillery attacks were unlawful. Mr. Obradović simply told you that "this Court can form its own view on this issue"[5]. That is the invitation from the Respondent; this Court can form its own view on this issue. The issue, of course, being whether

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[3]CR 2014/24, p. 15, para. 18 (Schabas).

[4]CR 2014/24, p. 16, para. 21 (Schabas).

[5]CR 2014/17, p. 30, para. 61 (Obradović).

the artillery attacks were legitimate and thus lawful, or indiscriminate and thus unlawful. As to how, absent any assistance from *Gotovina* — which, of course, you are invited to put to one side — the Court should form its own view, the Respondent is conspicuously silent.

10. Mr. President, Members of the Court, in reality, absent *Gotovina*, there are only two real options. Option one, if you abandon the Appeals Chamber in *Gotovina*, is that you could revert to the 200-metre standard used at first instance to distinguish between legitimate and indiscriminate artillery attacks. You could go back to that position, the first instance position. At least there was a comprehensive analysis of where the missiles fell, and the employing of a 200-metre standard to determine whether they were legitimate or not, in terms of target. But, of course, the problem with option one is that, on analysis, the 200-metre standard was found to be without any proper foundation and did not allow for simple variations, such as the distance over which the missiles travelled. So, it was plucked out of the air as a standard and it was applied without variation as to the circumstances. For that reason, not only did all five judges in the ICTY Appeals Chamber rule that it was evidentially groundless, but even the ICTY Prosecutor, by the appeals stage, had abandoned reliance on it. And that, no doubt, is why the Respondent has not invited you to go back to the 200-metre standard. No one in their right mind would go back to *that* standard which has been so heavily criticized by everybody who has looked at it subsequently.

11. But if not the abandoned 200-metre standard, then what? Option two, the only other option left to this Court, is your own assessment on some other basis. But what evidence has the Respondent put before you to advance its case that the artillery attacks were unlawful? To show that the targets were not legitimate, some standard or yardstick is surely needed to distinguish between legitimate and indiscriminate artillery attacks. That distinction has got to be made if the proposition that they are unlawful, on the basis put, is to be sustained. So where is the standard, where is the yardstick and, where is a suitably qualified expert faithfully applying the chosen yardstick to the facts of this case? Non-existent. No standard, no yardstick, no expert. So, in summary, the Appeals Chamber in *Gotovina* does not help the Respondent and they urge you not to follow it, not to treat it as highly persuasive because that ends their case. So the Appeals Chamber does not help, the first instance chamber does not help, because they relied on the flawed 200-metre standard, so you cannot go back to that, and the only other option is some standard of your own,

which you are going to apply to the facts, without any help as to what the standard is or any expert that takes you through the facts to give you findings that can be meaningful to determine whether the targets were legitimate or indiscriminate. How can the Respondent possibly get home on unlawful artillery attacks when they are the only options and none of them help the Respondent?

12. The simple fact of the matter is this. *Gotovina* or not, the Respondent ran this case on a proposition, namely that the artillery attacks were unlawful because they were indiscriminate, which is wholly unsupported on its own evidence. It is all very well inviting this Court to make its own assessment, but on what basis? I reflected on that over the weekend.

13. Mr. President, Members of the Court, the dawning reality is this: the hypothetical to which Professor Schabas devoted so much time in closing is not a hypothetical at all. It *is* now the Respondent's case. They are so far from their original case, that it is impossible to bridge the gap back home. That explains the considerable time and energy spent on the hypothetical, which on any view is a curious way to end a case such as this.

14. So let us examine the hypothetical again. You still have it I hope on your screens.

15. The points I make in response are so obvious that I did wonder about the wisdom of making them at all:

(a) First, for the Respondent to end its case relying on a hypothetical is hardly a show of strength in the arguments once made but now all but abandoned.

(b) Second, even on its own terms, just reading the words on the screen carefully, the *highest* the Respondent puts it is that "those who schemed at Brioni *may* have concluded that lawful shelling would be enough to effect the removal of the Serbs". So they were conspiring, by ***<u>lawful means</u>,*** to commit genocide. That is not an obvious proposition. I pause there. This sinister intent has apparently been hidden so deeply that it was missed by the Prosecutor — the Prosecutor before the ICTY relied on unlawful shelling — it was missed by the Prosecutor, it was missed by the ICTY at first instance, they relied on unlawful shelling, it was missed by the Appeals Chamber because they were analysing unlawful shelling, and it has been missed by every commentator. It was only unearthed by Professor Schabas last Friday — 18 years and eight months after the Brioni meeting. Nobody else before then has suggested that you can commit genocide by lawful shelling. That is the complete contrary of the way the case had

been put. And just staying with the words on the page: "those who schemed may have concluded that lawful shelling would be enough". That is not even proof on the balance of probabilities! I described it as flying a kite, this is flying a kite: if all else fails — which it now has at this stage — try this as an idea.

(c) Third, the whole hypothetical is now based on some unarticulated idea that even if the attacks were not indiscriminate or carried out with the intention to displace the Serbs, they were unlawful in some other way. What other way? And on what evidence? If the shelling was not indiscriminate, the basis upon which everybody has proceeded to date, what is the alternative basis for unlawfulness? And why was it never articulated in the pleadings? ~~*[Plate off]*~~

16. The Brioni Minutes do not help. The Respondent ended its case on Friday accepting, and I quote: ~~*[Plate on]*~~ "Taken in isolation, the Brioni Minutes may indeed lend themselves to different interpretations."[6] ~~*[Plate off]*~~

17. Indeed. But how do artillery attacks which are not unlawful help the Respondent's preferred interpretation? Alternatively, how do minutes, capable even on the Respondent's case of bearing a number of interpretations, show that artillery attacks found by the Appeals Chamber not to have been indiscriminate were otherwise unlawful? One unsustainable proposition does not gain strength by being linked to another unsustainable proposition. To observe that the Respondent's case is hopelessly circular is to state the obvious.

III. No targeting of civilians in columns

18. Mr. President, Members of the Court, let us examine whether the Respondent's case on targeting civilians in the columns breaks the circle.

19. The Respondent claims that the Brioni Minutes should be viewed in light of the subsequent alleged targeting of the columns. The Applicant responded to this allegation on 18 March this year, and the Respondent has offered nothing new in rebuttal. Croatia did not target civilians in the columns, no plan to do so was discussed at Brioni, and the ICTY made no findings to this effect.

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[6]CR 2014/24, p. 21, para. 39 (Schabas).

20. Against that background, Professor Schabas suggested that this Court should infer that Tuđman was "targeting civilians"[7] at Brioni, when he insisted that an escape route should be left for the retreating forces in order to minimize the losses that would have been occasioned by a desperate fight to the death. Anyone who has read Sun Tzu's *The Art of War* would realize that leaving a way out to a surrounded enemy is one of most ancient and uncontroversial humanitarian restrictions on warfare[8]. It is certainly not a basis for inferring genocide.

21. But there is an equally profound problem for the Respondent on the facts. Although the Respondent has not exercised any particular care in the way it puts its case in its oral pleadings, in its written pleadings it relied on four alleged attacks on columns in the territory known as Sector North, and a fifth in Bosnia and Herzegovina, near Petrovac[9]. So five attacks, four in Sector North. That is their case at its highest. But now, it is said to give rise to genocidal intent. Last Friday, Professor Schabas told you that "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"[10]. So deliberate ambushing, shelling, on the way. Four of the five attacks in Sector North. Yet, when he opened the case before this Court, Mr. Obradović was at pains to point out that the Croatian Army commander in Sector North, General Stipetić, did not have any genocidal *mens rea*[11]. He emphasized that point. The only individual he singled out in that way. So the Respondent is inviting you to come to a finding of genocide on the basis of four attacks in Sector North while itself disavowing *mens rea* on the part of the man in charge. That again is a curious way to end your case.

IV. No genocidal campaign in the aftermath

22. Professor Schabas next claimed that the Brioni Minutes should be given a criminal interpretation in light of the killings that took place in the weeks and months after Storm. He made

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[7]CR 2014/24, p. 22, para. 41 (Schabas).

[8]Sun Tzu, *The Art of War*, trans. Samuel B. Griffith, Oxford University Press, 1971, Chap. VII, p. 109, para. 31: "To a surrounded enemy you must leave a way of escape . . . To encamp under the walls of a strong city and attack rebels determined to fight to the death is not a good plan!"

[9]RS, para. 745.

[10]CR 2014/24, p. 26, para. 51 (Schabas).

[11]CR 2014/16, p. 28, para. 56 (Obradović), cited at CR 2014/19, p. 33, para. 34 (Singh).

no attempt to explain how this argument is sustainable in light of the fact that murder and looting were not discussed at Brioni, and in light of the ICTY Trial Chamber's explicit finding that the Brioni participants had no intention to commit murder, destruction or plunder[12]. I anticipate that he would invite you to take a different approach to the ICTY at first instance. I will not repeat the submissions on that.

23. Professor Schabas claimed that most of the Serbs that stayed behind were killed[13], that — and this is how he put it — ~~***[Plate on]***~~ "all of the Serbs who were found in the cities and villages in August 1995 were killed by the Croatian Army" — all the Serbs — and that "[t]he Croatian [soldiers] killed as many civilians as they were able to find or to lure out of hiding" and then "all surviving Serbs in the Krajina, to the extent that Croat forces could find them, were exterminated"[14]. That is what you were told on Friday.

24. The facts are as follows. First, the numbers. On 21 December 1995, the United Nations Secretary-General reported that according to the ICRC, there were slightly more than 9,000 Serbs in the former United Nations Sectors North and South[15]. For his part, Mr. Štrbac, the Respondent's expert witness, claims that 1,662 persons were allegedly killed by Croatian forces during Operation Storm[16] — total 1,662 — of whom 1,513 were killed during the first week[17]. So, on the Respondent's case, at its very highest, *149 people* regrettably lost their life after the first week of the Operation — 149 out of 9,000.

25. Second, the *Gotovina* Trial Chamber cited evidence that 4,000 civilians who were found by the Croatian army in the Krajina region were taken to government-run reception centres to be cared for[18] — 4,000 — and 400 captured Serb combatants were taken to collection centres and processed through the criminal justice system[19]. Pausing there, and just looking again at the screen, 4,000 were taken to a government-run reception centre, and 400 combatants were put

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[12]*Gotovina,* Trial Judgement, para. 2321.

[13]CR 2014/24, p. 27, para. 54 (Schabas).

[14]CR 2014/24, pp. 28-19, paras. 57-58 (Schabas).

[15]*Gotovina*, TJ, para. 1712.

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

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

[18]*Gotovina*, TJ, para. 1648.

[19]*Gotovina*, TJ, para. 1653.

through the criminal justice system. Look again at those three sweeping quotes from Professor Schabas. All surviving Serbs in the Krajina, to the extent the Croat forces could find them, were exterminated. How can that be right? ~~***[Plate off]***~~ Lest there be any suspicion that civilians were taken to the reception centres for some nefarious purpose, we urge the Court to note that the Trial Chamber concluded that civilians were free to leave the reception centres at any time, and that they were not deprived of their liberty[20] — an issue in the case.

26. Mr. Jordash also tried to support this claim of an organized killing campaign by claiming that there was a "pattern of concealment" by the Croatian army, because of alleged restrictions on the movement by United Nations personnel[21]. What Mr. Jordash omitted to advise this Court is that the ICTY Trial Chamber expressly rejected the claim of a pattern of concealment, finding "the Trial Chamber further considers that concealment of crimes is not the only reasonable interpretation of the general evidence regarding movement restrictions"[22]. So again, raised in the ICTY at first instance, dealt with by that Chamber and not accepted.

27. Mr. President, Members of the Court, the Respondent's claims of an organized killing campaign designed to exterminate the Krajina Serbs lacks any basis in evidence or in reality.

28. The Respondent further claims that the Applicant "ignored" the Respondent's allegations of "acts causing serious bodily and mental harm to members of the group of Krajina Serbs"[23]. That is actually wrong. The Applicant has repeatedly noted the *Gotovina* Trial Chamber's specific findings that the Croatian leadership including President Tudjman not only did not intend this destruction, but that they were opposed to it[24].

29. The Respondent's reliance on reports of the ECMM and the United Nations Military Observers concerning the number of burned houses after Operation Storm is equally misplaced. The ICTY had all of this evidence before it, including the documents the Respondent claims support its case. The Trial Chamber did not accept them[25].

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[20] *Gotovina*, TJ, para. 1668.

[21] CR 2014/24, p. 52, paras. 74-76 (Jordash).

[22] *Gotovina*, TJ, para. 2540.

[23] CR 2014/24, p. 29, para. 59 (Schabas).

[24] *Gotovina*, TJ, para. 2313.

[25] See *Gotovina*, TJ, para. 61.

30. Finally, and in any event, however distressing, looting and burning of property is — and of course it is — it is not of course an act that can of itself constitute genocide within the meaning of Article II of the Convention.

V. Conclusion

31. Mr. President, Members of the Court, in conclusion, my submissions make clear that the Respondent's counter-claim based on alleged violations of the Genocide Convention during and after Operation Storm cannot succeed on the facts and evidence presented. Neither the Brioni transcript nor the events that follow it establish genocidal intent. In addition, there is not sufficient evidence in respect of those events for this Court to be fully convinced that genocidal acts have occurred.

32. On a final issue of evidence, we note that the Respondent's earlier enthusiasm for the discredited CHC Report and Veritas has somewhat diminished after our comprehensive exposure of their deficiencies last week. Serbia ended its case, half-heartedly stating that "the CHC report has *not been completely discredited* by the ICTY"; and acknowledges that the Veritas report contained "factual errors"[26] — hardly ending on a high.

33. Mr. President, Members of the Court, thank you for your attention today, and in my previous submissions. Can I now invite you to call on Professor Sands who will deal with the legal issues.

The PRESIDENT: Thank you, Sir K***eir*** Starmer. I now call on Professor Philippe Sands to continue. You have the floor, Sir.

Mr. SANDS:

SERBIA'S COUNTER-CLAIM: THE LEGAL ARGUMENTS

I. Introduction

1. Mr. President, Members of the Court, it falls to me to respond to the legal arguments, such as they were, that the Respondent made in support of its counter-claim, last Friday afternoon. The

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[26]CR 2014/24, p. 55, paras. 90 and 92.

Court will have noted — certainly as did our side of the room — that those arguments were thin, and somewhat novel.

2. Mr. President, Members of the Court, having devoted more than half of its opening round to the counter-claim, the Respondent devoted far less time to the counter-claim in its second round. And, Serbia plainly appears to recognize that its claim is, as we put it in the first round, hopeless. It is without any legal authority. Professor Schabas and Mr. Jordash hardly advanced a positive legal case that events over four days in August 1995 amounted to a genocide. Following the *Gotovina* judgements — and I use the term in the plural — it is difficult to see how it could do otherwise.

3. Professor Schabas was rather defensive in his tone. In opening, he announced that he would address what he called "the limited relevance" of the *Gotovina* decision"[27]. Yet: his first 25 footnotes were all *Gotovina*. Indeed, his speech comprised 112 footnotes, of which *40* made reference to judicial authorities, of those 40, 38 referred to *Gotovina*. He made a single reference to this Court's 2007 Judgment — which he and Serbia obviously do not consider to be helpful to their counter-claim — and a single reference to another judgement of the ICTY — the *Prlić* case — which was to a finding of fact, not of law[28]. Despite the fact that he urged this Court to find that there was, as he put it "essential differences between the *Gotovina* case before the ICTY and the subject-matter of the counter-claim"[29], the only case he dwelt on was *Gotovina*. He complained about what he called a "gaping hole in the picture presented by the ICTY case law"[30]; Mr. President, if there is a "gaping hole", then it is in the Respondent's counter-claim. It is customary, in advancing one's case, to cite to legal authorities that are supportive of the propositions one makes; Professor Schabas was unable to invoke a single legal authority to support Serbia's counter-claim last Friday afternoon.

4. The Respondent is plainly aware that the ICTY's judgements in the *Gotovina* case are fatal to its counter-claim. It has chosen not to address at all the Trial Chamber's findings concerning the lack of intent by Croatia's leaders to kill or injure Serbs, or to destroy their

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[27]CR 2014/24, p. 10, para. 1 (Schabas).

[28]See *ibid.*, p. 17, footnote 27 and p. 22, footnote 36 (Schabas).

[29]CR 2014/24, p. 17, para. 25 (Schabas).

[30]*Ibid.*, p. 19, para. 32 (Schabas).

property. Last Friday, Professor Schabas abandoned completely any continued attempt to argue that the shelling in Operation Storm was unlawful, or that it targeted civilians. But he chose instead, to advance a new theory for the counter-claim. A theory which is in our submission nonsensical — as a matter of law — and totally undermined by the highly persuasive findings of fact and law of the Trial and Appeals Chambers in *Gotovina*.

5. In a somewhat novel approach, he now rests his case on the argument that this Court should find as a matter of law that the artillery bombardment of the Four Towns were genocidal in character, notwithstanding a hypothesis — and I hesitate to use that word, Mr. President following the Court's Judgment yesterday — that the bombardment was, as he put it, "entirely consistent with the laws or customs of war" and "in compliance with the law of armed conflict"[31]. He posited that even were one to assume — as the ICTY Appeals Chamber held, that "only military objectives were targeted, and that the choice of weapons was proportionate, aimed at minimizing collateral damage, in particular towards non-combatants"[32] — this Court might somehow nevertheless be able to rule that the shelling was genocidal. You are asked, as a court, to find that the Brioni Minutes evidences the *mens rea* of genocide, "regardless of the means", and regardless of the lawfulness of the means, that the Croatian leadership chose to employ to regain control of Croatian territory[33]. On that logic — if it can be called logic — you are asked to believe — and to find — that the *lawful* shelling by the Croatian army during Operation Storm — or, more specifically perhaps, the "great fear"[34] inspired by that *lawful* shelling in those present in the Four Towns — constituted the *actus reus* of genocide.

6. Professor Schabas goes so far as to assert that he "do[es] not think this is a difficult proposition"[35]. Mr. President, Members of the Court, it is not a difficult proposition: it is a hopeless proposition. It is legally and logically impossible as a proposition. It is also an extraordinary proposition for Professor Schabas to attempt to advance before this Court. How can an attack that complies with international humanitarian law be genocidal in nature? It surely

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[31]CR 2014/24, p. 15, para. 16 (Schabas).

[32]*Ibid*.

[33]*Ibid*., pp. 15-16, paras. 19-21 (Schabas).

[34]*Ibid.,* p. 16, para. 20 (Schabas).

[35]*Ibid*., para. 18 (Schabas).

cannot constitute the *actus reus* of genocide. How could an attack be genocidal and yet comply with the laws of war? It is a looking glass proposition: an attack that is both lawful and genocidal — a notion as contradictory and nonsensical as it sounds.

7. This argument is also plainly at odds with the findings of the ICTY in *Gotovina*. Even in relation to the Trial Chamber's limited factual findings that were overturned by the Appeals Chamber — namely its finding that the shelling of the Four Towns was indiscriminate, based on the 200-metre standard — the Trial Chamber repeatedly found the Croatian army's targeting of military objectives to have been "in good faith"[36]. Targeting of military objectives for the purpose of expelling civilians — much less for the purposes of destroying an ethnic group, in whole or in part — can never be conducted "in good faith". These findings further — and fatally — undermine Professor Schabas's argument that lawful shelling was the *actus reus* of genocide. In the face of those findings, all Professor Schabas can do is to boldly assert that the ICTY Appeals Chamber "is wrong"[37]. The Respondent's recourse, once again, is to deny unhelpful ICTY findings, and to ask this Court to go behind them.

8. Instead of a search for authorities, what we heard instead were unfortunate and highly personalized unjustifiable attacks on the former President of Croatia, argument by *ad hominem* assertion, which is unusual for any court of law, let alone this one. There was an expression of surprise that somehow Croatia had not leapt to President Tudjman's defence. The nature of those arguments, if they can be called arguments, speak for themselves. It was unbecoming, in our submission, for a sovereign State to associate itself with such assertions, and they are undeserving of a response in a courtroom. Perhaps this was one element of the speech inserted, as Professor Schabas candidly put it, "because the Agent for Serbia asked me to do this"[38].

9. Equally unhappy was Professor Schabas's return to the events of January 1942[39]. It may be that a retraction of sorts was made: "clumsy" and "inappropriate", his words, might be said to be words of understatement. But perhaps we were not alone in feeling discomforted by the

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[36]*Prosecutor* v. *Gotovina,* IT-06-90-T, 15 April 2011, paras. 1899-1902, 1919, 1930, and 1931.

[37]CR 2014/24, p. 16, para. 21 (Schabas).

[38]CR 2014/23, p. 50, para. 26 (Schabas).

[39]CR 2014/24, p. 21, para. 39 (Schabas).

impression that what counsel gave with one hand he then took away with the other, with most unfortunate references to "Tudjman's 'final solution'"[40], and "*lebensraum*"[41]. Sir Keir Starmer has said more than enough about the Brioni Minutes, and so has the ICTY.

10. About Mr. Jordash and legal authorities, he made one reference to your 2007 Judgment last Friday afternoon, several references to the *Gotovina* judgement, and not a single reference to any other ICTY judgement. Even in dealing with the nine points of comparison that Croatia made — and on which we respectfully submit he made not a dent, as Sir Keir has shown — in respect of the section entitled "ICTY Findings" (point eight of the nine) he was unable to bring himself to refer to a single judgement (other than a relevant passing reference to the *Martić* case) to support the case he advanced. In short, the counter-claim made by Serbia is bereft of any, any, supportive legal authorities.

Missing persons

11. We turn to something briefly about missing persons and the issue of continuing violation, as Serbia has addressed this issue in its counter-claim. Counsel for the Respondent claimed that "the continuing violation argument" was, as he put it, nothing more than an "ill-conceived debating ploy, cooked up over breakfast"[42]. Actually, it was a response to a question put by Judge Cançado Trindade[43]. Croatia addressed the issue of continuing violations in a manner that was intended to be responsive and helpful to an inquiry from the Bench. It is true that neither party had addressed that issue very extensively in its pleadings, but the questions having been put, and the provisions of the Convention speaking in the terms that it does, I refer you to Article 2 *(b)* which refers to "serious . . . mental harm to members of the group", the connection with a continuing violation became rather clear. "It does not belong here", counsel for Serbia said[44]. But why not? Just as with torture, the family of the missing person is a member of the same group, is subject to a continuing mental harm, and it is equally the situation that the failure to account for a

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[40]CR 2014/24, p. 21, para. 39 (Schabas).

[41]*Ibid.*, p. 11, para. 5 (Schabas).

[42]CR 2014/23, p. 44, para. 12 (Schabas).

[43]CR 2014/18, p. 69 (question by Judge Cançado Trindade).

[44]CR 2014/23, p. 45, para. 12 (Schabas).

missing person, or to take reasonable steps to assist in the location of such a person, brings into play the prohibition on acts proscribed by the Genocide Convention, including the obligation to investigate.

12. Serbia too sought to respond to the questions put on missing persons that came from the Bench. And it offered a new list of missing persons. The document was not sourced, and came with no proper accompanying explanation. Since the Agent of Serbia told the Court that he did "not consider that list to be evidence"[45], nothing more need be said of it.

The 2007 Judgment and paragraph 373

13. Mr. President, I turn to the issue of inferring intent to destroy a group in whole or in part, from a pattern of behaviour, a proposition raised by Professor Schabas in the counter-claim, as you have just heard from Sir Keir Starmer. We might call this the paragraph 373 issue. You will of course recall that I had made the submission, on Thursday 20 March, to the effect that no international court or tribunal had applied the very high burden set out in paragraph 373, or had followed the language adopted by this Court seven years ago. I also made the point that some made clear — some court's and tribunal's made clear — that they did not consider themselves to be bound by the approach that is said to have been followed by this Court in 2007[46]. In response to that proposition, Professor Schabas claimed that despite extensive legal research he could not find any instance of any court or tribunal saying it was not bound by the ICJ approach. We were a bit puzzled by his submission, baffled even, because Professor Schabas *himself* expressly referred to such instances in his speech on 10 March 2014[47]. The examples he cited are manifold. For example, in June 2012 the Trial Chamber in *Karadžić*, in its Rule 98 *bis* decision reinstating a genocide charge, stated that the ICJ's 2007 Judgment is "not binding in any way on the Chamber"[48]. Professor Schabas explicitly referred to this ruling in his speech, but a week after he had done so, it seems he had forgotten all about that[49].

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[45]CR 2014/24, p. 60, para. 6 (Obradović).

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

[47]CR 2014/13, pp. 18 *et seq* (Schabas).

[48]*Prosecutor* v. *Karadžić* Trial Chamber Rule 98 *bis* decision (IT-95-5/18), Transcript, 28 June 2012, pp. 28,763, lines 20-24; emphasis added.

[49]CR 2014/13, p. 45, para. 60 (Schabas).

I would note — in parenthesis — that there appears to be quite a lot that Professor Schabas chooses to forget — last week he told you that your 2007 Judgment has provided "clarity and stability"[50]. Well, that is not what he said two years ago; two years ago he described the approach taken by this Court in its 2007 Judgment as *"incoherent"*, because it rejected the genocide qualification for most of the conflict in Bosnia, "yet applied it to one terrible event during the war that was of short duration and isolated in a geographic sense"[51]. Therein the dangers of writing blogs. Four years before that, in 2008, a year after your Judgment, he submitted an expert opinion to the ICTY in the *Popović* case. What did he say in that expert opinion about the 2007 Judgment? He did not welcome it, he did not say it provided clarity and stability, what he said was that your judgment compels a "reassessment" of the law on genocidal intent[52].

14. Be that as it may, in July 2013 the ICTY Appeals Chamber in the *Karadžić* case, on the same point as the Trial Chamber, stated that it was not bound by *"legal determinations . . . reached . . . by the ICJ"*[53]. Professor Schabas again seems to have forgotten that he told you, in his speech on Monday 10 March 2014, that "the Trial Chamber began by stating that it was not bound either by earlier findings during trials before the Tribunal or by the Judgment of the ICJ of February 2007"[54].

15. The ICTY is not alone in distancing itself from the 2007 Judgment in relation to intent. The ICTR has done the same thing. In *Hategekimana*[55], the ICTR Appeals Chamber did not explicitly state that it is not bound by the ICJ Judgment, but this problem is a necessary implication from the text of the Judgment and the standard that it did apply. The Appeals Chamber referred to the test for inferring genocidal intent in the absence of direct evidence as follows: [screen on]

> "a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the

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[50]CR 2014/23, p. 46, para. 16 (Schabas).

[51]Schabas, "One of the Genocide Counts against Karadzić is Dismissed", Thursday 28 June 2012, available at: http://humanrightsdoctorate.blogspot.nl/2012/06/one-of-genocide-counts-against-karadzic.html

[52]*Prosecutor* v. *Popović*, IT-05-88-T, 1 May 2008, *State Policy as an Element of the Crime of* Genocide, Expert Report by Prof. William A. Schabas (30 April 2008), p. 41.

[53]*Prosecutor* v. *Karadžić* (IT-95-5/18-AR98bis.l), Judgement, 11 July 2013, para. 94; emphasis added, footnotes omitted.

[54]CR 2014/13, p. 45, para. 60 (Schabas).

[55]*Prosecutor* v. *Hategekimana* (ICTR-00-55B-A), Appeal Judgement, 8 May 2012.

systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts"[56]. [Screen off]

16. The Appeals Chamber in that case cited authority in support from the ICTY and the ICTR, but it did not cite the *Bosnia* Judgment of 2007. Nor did it refer to the requirement for genocidal intent to be the "only" possible inference. It is plain from this, as I have already noted[57], that the ICTR Appeals Chamber did not proceed on the basis that it was bound by the ICJ approach to inference of genocidal intent as expressed at paragraph 373 of the *Bosnia* Judgment.

17. So, Professor Schabas offered us another meander through the case law, we waited — and we waited, and we waited, and we waited — for him to take us to *any* judgment or *any* decision, of *any* court or tribunal — national or international — that had invoked paragraph 373 or the standard there set out. It never came. As far as we are aware, there is no such case.

18. So, Professor Schabas tried a different tack. In seeking to argue that "this Court's approach has been very generally accepted"[58] on that issue, notwithstanding the absence of any supportive authorities, he said there was no difference between what the Court said at paragraph 373 and what various ICTY Tribunals have done in practice. To make that point, he took you to a passage of the judgement in the *Tolimir* case — paragraph 745 — in which the Trial Chamber stated that: "Indications of such intent are rarely overt, however, and thus it is permissible to infer the existence of genocidal intent based on 'all of the evidence, taken together', as long as this inference is 'the only reasonable [one] available on the evidence'."[59]

19. He said there was no difference between the two standards. "The Trial Chamber [in *Tolimir*] did not cite the relevant statement by the ICJ, notably paragraph 373 of the 2007 Judgment", "but it might well have done so"[60]. Well, let us compare the two approaches, on the screen. [Slide on]. At the top you can see, in English and in French, what this Court ruled in 2007: "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent". And then below, coming up on the screen now, we can see what the ICTY Trial Chamber said in *Tolimir* in 2012, and I will read it

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[56]*Prosecutor* v. *Hategekimana* (ICTR-00-55B-A), Appeal Judgement, 8 May 2012, para. 133.

[57]CR 2014/20, p. 21, para. 22 (Sands).

[58]CR 2014/23, p. 46, para. 16 (Schabas).

[59]*Prosecutor* v. *Tolimir*, IT-05-88/2-T, 12 Dec. 2012, para. 745, cited at CR 2014/23, p. 52, para. 39 (Schabas).

[60]CR 2014/23, p. 53, para. 40 (Schabas).

again: "it is permissible to infer the existence of genocidal intent based on 'all of the evidence, taken together', as long as this inference is 'the only reasonable [one] available on the evidence'"[61].

20. If I was in a classroom, which I am not, I might turn to my students and say, if I was a devotee of a hardline Socratic method: "Is there a difference between the two standards?" Well, one or two of the students might say "No, Professor, we cannot see any difference between those two standards" and I would turn around the room and I might say "Is there anyone here who does not agree with that view?" Some may eventually put their hands up and say "well, it is true that there are similarities between the two". Both formulations, for example, do use the word "only". That is obviously correct. I might then ask: "Is there anything to be found in the 2012 *Tolimir* standard that is not to be found in the 2007 ICJ standard?" If classes of this year and others are anything to go by, there may be a long initial silence as the two texts were carefully looked at and eventually, some hands would come up around the room and one student might say, in the front row or in the far left, or wherever: "Well, actually, yes, there is a difference between the two standards and the difference is this: in *Tolimir* you find the word 'reasonable' and in *Bosnia* you do not." That is obviously correct; and that is the nub of this.

21. What Professor Schabas is asking you to do is to conclude that the use of the word "reasonable" is irrelevant. (I would note that. having sat in this courtroom yesterday, that word got quite a lot of play.) But Professor Schabas's approach is wrong. The standard of proof in criminal matters, before the ICTY, the ICTR, the ICC, as well as many national legal systems, is not a standard of "beyond doubt", it is a standard of "beyond reasonable doubt". The word "reasonable" is not without importance. And that, in simple terms, is a difference, and it is a material difference. Indeed, Professor Schabas himself accepts that: when he invited this Court to review *de novo* the Brioni Minutes, he did not ask you to conclude that there was "no doubt" that those Minutes reflected a desire to impose a "final solution", as he so unhappily put it. No, *he did not do that.* He invited you to conclude that there was "no *reasonable* doubt"[62]. We say, of course, that you cannot so conclude, but the point I make now is a different one: counsel for Serbia accepts that there is a

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[61] *Prosecutor* v. *Tolimir*, IT-05-88/2-T, 12 Dec. 2012, para. 745.

[62] CR 2014/24, p. 23, para. 44 (Schabas); emphasis added.

world of difference between "no doubt" on the one hand and "no reasonable doubt" on the other. [Slide off]

22. Mr. President, we are not asking you to change the law, to rip it up, abandon it, as Serbia claims. We are not asking the Court, certainly, to perform an act of "legal vandalism", as Mr. Jordash bluntly suggested[63]. We are simply asking for a clarification of the standard in paragraph 373, to bring it in line with the standard that appears to be applied everywhere else.

23. For the purposes of the counter-claim made by Serbia, their case is hopeless whichever standard you apply, whether it is the one they say is reflected in paragraph 373, or the one that we say might have been intended to have been reflected in paragraph 373, namely the Court's ordinary approach to conclusive evidence. The standard the Court has adopted is that it must be *"fully convinced"* that the crime of genocide has been committed, and that the acts are attributable to the Respondent. The same standard applies to the proof of special intent or *dolus specialis* in establishing genocide. The Applicant submits that the standard of proof required to prove genocidal intent will be met where there *may* be other possible explanations for a pattern of conduct — and indeed, there will almost certainly be various other motives and intentions, even, behind a pattern of conduct — but nonetheless the Court is fully convinced, on the facts of the particular case, including the destructive methods exhibited by that pattern, that the only reasonable inference properly to be drawn is one of genocidal intent.

24. Which brings me to Žepa, that small town in Bosnia and Herzegovina, which was the subject of that part of the *Tolimir* judgement that Professor Schabas did not address in the first round. The ICTY Trial Chamber did there find that the only reasonable inference was one of genocidal intent. It did so in circumstances where just three individuals were killed — I say just, it is regrettable, of course, that any were killed, but the number is not a large number. On Friday morning Professor Schabas told the Court — in his address on *actus reus* — that to make the killing of a small number of individuals capable of constituting genocide — and he mentioned a figure of two — would make the definition of genocide in Article 2 of the Convention "very simplistic and profoundly unworkable"[64]. That is not what the ICTY Trial Chamber found. On

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[63] CR 2014/24, p. 42, para. 19 (Jordash).

[64] CR 2014/23, p. 40, paras. 2-3 (Schabas).

Friday afternoon he did finally turn to the judgement of the ICTY Trial Chamber in *Tolimir*, that related to the Žepa situation, the very last moment of the entire case — it is a case they would rather you did not turn your minds to — which ruled, of course, that the killing of just three people constituted the *mens rea* and *actus reus* of genocide[65]. A "dramatic departure", he called it, from the 2007 Judgment of this Court — that is a concession[66]. Three people can be a "significant" part of the group, he conceded[67]. An "alternative to the criterion of substantiality", he conceded[68]. Which brings him in line with the submissions we made in our first round on exactly this point where I started nearly a month ago.

25. Where does this leave us, Mr. President, and Members of the Court? For the Respondent's counter-claim to succeed, it would need to produce:

(a) direct evidence of a genocidal plan: it has no such evidence; the ICTY has conclusively determined that the Brioni Minutes are not evidence of unlawfulness, and the Respondent has wisely stepped away, wisely stepped away, from its attempt to treat those Minutes as being no different from the minutes of the Wannsee Conference; and/or

(b) evidence of a pattern of attack from which genocidal intent could be inferred: it has simply not done so in respect of the counter-claim. Despite Mr. Jordash and his heroic attempts to mimic the clear pattern of attack adopted by Serbia in its campaign against Croatia — which does evidence genocidal intent — the Respondent has failed to present *any* evidence on a pattern, much less any pattern from which genocidal intent could be inferred.

26. There is a curious parallel between the Respondent's counter-claim and its defence to Croatia's claim. In both cases, on the law, it seeks to deny the relevance and authority of final, un-appealable ICTY findings. With respect to the claim, they argue that the appellate judgements in *Mrkšić*, *Martić* and *Babić* are "least probative", whereas Trial Chamber judgements in *Stanišić and Simatović* are the "most relevant"[69]. There is also a contradiction on the Serbian side: in its counter-claim it seeks to persuade you of the merits of a first instance ICTY Trial Chamber

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[65]CR 2014/23, p. 54, para. 43 (Schabas).

[66]*Ibid.*, para. 45 (Schabas).

[67]*Ibid.*, para. 44 (Schabas).

[68]*Ibid.*

[69]CR 2014/22, p. 51, para 21 (Jordash).

decision — *Gotovina,* for example, or *Stanišić* — but in defending itself against Croatia's claim, it seeks to diminish the merits of a first instance ICTY Trial Chamber decision — in *Tolimir*. This might be called a rather *a la carte* approach to authorities, but it is not one that can repair the fatal weaknesses of Serbia's counter-claim.

27. Mr. President, Members of the Court, I thank you once again for your kind attention, that completes my presentation this morning. I invite you to call to the Bar, for our final presentation this morning, the Agent of Croatia.

The PRESIDENT: Thank you, Mr. Sands. I will now call on the Agent of the Government of Croatia, in this case: Professor Vesna Crnić-Grotić. You have the floor, Madam.

Ms CRNIĆ-GROTIĆ: Thank you.

SERBIA'S COUNTER-CLAIM: CLOSING REMARKS

1. Mr. President, Members of the Court, it is a pleasure to address you once again on this final day of hearings in which Croatia responds to issues raised by the Respondent on its counter-claim last week. In fact the counter-claim was submitted only after the jurisdiction judgment was delivered by the Court. In the words of the then Serbian Minister of Foreign Affairs Mr. Jeremić, it was a "technical counter-claim"[70]. Mr. Tibor Varady, former Agent for the Respondent in this case, explicitly said that there had been no genocide in Croatia against the Serbs[71]. ***Even*** Mr. Radoslav Stojanović, former Agent for the Respondent in the *Bosnia* case, warned the authorities how futile the counter-claim was[72]. Moreover, even Mr. Obradović explained in 2010 that they had to submit the counter-claim in order to assume the role of plaintiff in these proceedings[73]. It seems that even today he does not believe that the counter-claim is credible[74]. Yet, despite these well-informed views, the counter-claim was brought to this Court.

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[70]Available at: https://www.youtube.com/watch?v=Zftiq1xayts.

[71]Available at: http://www.rts.rs/page/stories/sr/story/9/Politika/1536575/Varadi%3A+Bez+koristi+od+procesa+u+Hagu.html.

[72]Available at: http://www.b92.net/info/vesti/index.php?yyyy=2009&mm=12&dd=26&nav_id=400521.

[73]Available at: http://www.rts.rs/page/stories/sr/story/9/Srbija/412841/Podneta+kontratu%C5%BEba.html.

[74]Available at: http://www.vecernji.hr/hrvatska/obradovic-moguce-je-da-hrvatsku-ne-osude-za-oluju-929761.

2. In these oral pleadings the Respondent has been trying to convince the Court that Croatia brought its claim "as an attempt to paralyze cases against Croatians" before the ICTY[75]. Mr. President, Croatia's claim has been pending for 13 years since the ICTY asserted jurisdiction over Croatian cases. So, any assertion that Croatia has maintained this case for improper reasons is plainly wrong. There is only one reason for the claim — to establish the Respondent's responsibility for the genocide committed against Croatians.

3. Last week, the Respondent told us again the same story and repeated the same ***manipulative*** arguments. The Respondent produced a new list of people missing on the territory of Croatia, in response to Judge Cançado Trindade's question. It was submitted in the Cyrillic script, so not in one of the official languages of the Court. The list sets out 1,747 people as missing. Is it really necessary to invent new lists every time the question of the number of Serbian victims is raised? The manipulations with numbers have to stop.

4. The *Book of the Missing on the Territory of Croatia* from 2012, submitted by Croatia to the Court two weeks ago[76], is an authoritative publication on persons missing from the territory of Croatia, including both Croats and Serbs. The data contained in this book has been consolidated through co-operation with the Croatian Red Cross Tracing Service and the Administration of the Detained and Missing Persons of the Croatian Ministry of Veterans, and cross-checked by the International Committee of the Red Cross, the Red Cross of Serbia and the Commission for Missing Persons of Serbia, and thus, this edition is the result of a joint effort of all these stakeholders[77]. It contains the names of all people who were last seen on Croatian territory and who are still missing and it is the authoritative source for the numbers of the missing in Croatia. We emphasized that the number of 865 missing, provided orally to the Court, related only to those who disappeared in 1991-1992 and who are still missing[78]. The current overall number of missing persons, accurate as of 31 December last year, ***is*** 1,663[79]. This includes all those who were

[75]CR 2014/22, p. 11, para. 4 (Obradović).

[76]CR 2014/20, pp. 34-35, para. 23 (Ní Ghrálaigh).

[77]*Book of Missing Persons on the Territory of the Republic of Croatia*, April 2012, p. 1; available at: http://www.branitelji.hr/arhiva/p2515/dokument/1117/knjiga.nestalih-pdf.pdf.

[78]CR 2014/20, p. 35, para. 24 (Ní Ghrálaigh).

[79]https://www.branitelji.hr/nestali.

reported missing on the territory of Croatia from 1991-1995, including Croats, Serbs and people of other ethnicities and nationalities.

5. Last Thursday and Friday, you heard a series of unfounded, inflammatory allegations against the Republic of Croatia. It is an indisputable fact that, for many years during and after the wars of the 1990s, many in Serbia denied that Serbians committed crimes at all during the course of the conflicts, as well as denied that they had committed crimes of the scale that occurred. Thus, it was common in Serbia to argue that the Srebrenica massacre was a "myth" concocted by foreign intelligence services, or that Vukovar was "liberated" by Serb forces in 1991, or that the massacres of civilians in the shelling of Sarajevo was nothing but a staged production designed to "demonize the Serbs". You have heard some echoes of this in this Court.

6. With the work of the ICTY, however, these denials became less and less plausible. So within the past five to ten years, Serbia has adopted a new approach: it no longer denies that crimes were committed, but instead argues, that all sides suffer in war, and all sides commit crimes in war[80], that is what we heard in this courtroom as well. We are told that no one has "clean hands" from the break-up of Yugoslavia, and therefore you should simply condemn everyone with the same broad brush, rather than singling out the Serbian leadership. It is an appealing proposition to the uninformed observer. But it is not based on any facts. Mr. President, Members of the Court, Serbia and its satellites in Croatia committed crimes, including genocidal crimes, as a matter of deliberate governmental policy, to achieve the political goal of an ethnically pure Greater Serbia. As we have explained during these proceedings, Croatia had no criminal policies towards Serbs at any point in the wars of the 1990s — a point confirmed by the work of the ICTY. We are not "all the same", despite the Respondent's protests to the contrary. The Respondent's counter-claim will not succeed in masking Serbia's responsibility for its criminal policies.

Background to Operation Storm

7. Pursuing the strategy of equalization of guilt, on Thursday, Mr. Jordash told you that this was "a complex war, with a multitude of actors and a myriad of intentions"[81]. We were told,

[80]CR 2014/13, pp. 10-11, para. 3 (Obradović); CR 2014/23, p. 12, para. 13 (Jordash).

[81]CR 2014/22, p. 74, para. 130 (Jordash).

"Tudjman wanted and provoked this terrible ethnic war"[82]. Finally, Mr. Jordash told us that Croatia's perspective is "one dimensional" and is a "caricatured tale of the dissolution of the former Yugoslavia and the genesis of the violence that begins with a James Bond villain in the guise of Milošević. . ." He asserted that: "The problem, of course, with this account is that the Applicant removes every trace of Tudjman's poisonous regime."[83]

8. One needs look no further than the findings of the ICTY to determine the accurate account as to the root causes of the conflict. Professor Schabas told this Court that the ICTY is a specialized court set up to specifically investigate the events in the wars of the former Yugoslavia, and that the ICTY is "familiar with the details . . . in a way that, with respect, is beyond the reach of the limited inquiry taken here by this Court"[84]. So after 21 years, what does the work of the ICTY tell us?

9. With respect to the conflict between Croatia and Serbia that occurred in 1991 and 1992, the ICTY Prosecutor did not indict a single Croatian nor did it find any JCE in relation to the conflict in Croatia involving any Croat, living or dead, including President Tudjman.

10. In contrast, on the Serbian side the ICTY indicted and convicted a number of Serbian political and military leaders for the events in 1991 in Croatia. Many were found to have participated in the JCE. ***T***his speaks volumes about the nature of the conflict in Croatia in 1991 and 1992, despite the Respondent's protestations to the contrary.

11. Scholars also disagree with what Mr. Jordash claimed, that President Tudjman was responsible for provoking the conflict. One such scholar who assists Croatia on this point is Professor Schabas himself, who co-authored a book with Michael Scharf in 2002 entitled, "Slobodan Milosevic on Trial: A Companion"[85]. You might say that Professor Schabas's own book portrays Milošević as a "James Bond villain", although the villain in Professor Schabas' book was all too real for his victims across the former Yugoslavia. Professor Schabas informs us in the book that the root of the conflict lay in the 1986 SANU Memorandum, which "became the

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[82]CR 2014/23, p. 19, para. 46 (Jordash).

[83]CR 2014/23, p. 11, paras. 11-12 (Jordash).

[84]CR 2014/15, p. 22, para. 33 (Schabas).

[85]Michael P. Scharf and William A. Schabas, *Slobodan Milosevic On Trial: A Companion*. The Continuum International Publishing Group Inc, 2002.

manifesto of the Serb nationalist movement" and "pav[ed] the way for Slobodan Milosevic's rise to power"[86]. According to Professor Schabas, from 23 September 1987,

> "Milosevic, with the counsel of his wife, whipped Serbia into a nationalist frenzy that ultimately contributed to the disintegration of Yugoslavia and the economic and physical destruction of Serbia . . . After succeeding Stambolić as president of Serbia in 1989, Milosevic employed nationalist sentiment to wage war on the independence-minded republics . . ."[87],

and as you can see all exactly as our expert witness Ms Sonja Biserko explained to you. Professor Schabas then expressly states that Milošević started the war when he personally sent the JNA first into Slovenia, and then into Croatia in the summer of 1991[88].

12. As for Croatia's President, Professor Schabas writes that it was the rise of the hard line nationalist government in Serbia that provoked anti-Serb nationalism in Slovenia and Croatia, and not the other way around, as the Respondent would have it in this Court. Rather than portraying President Tudjman as a war-monger, Professor Schabas writes that the Presidents of Croatia and Slovenia "sought to convert Yugoslavia into a loose confederation where Serbian influence would be diluted"[89].

13. The ICTY's work is highly persuasive evidence that Croatia's arguments are correct, and Serbia's are nothing more than a tactical diversion from Serbia's responsibility. The views of Milošević by Professor Schabas, version 2002, also find support in the work of the ICTY. ~~***The views by Professor Schabas, version 2002, also finds support in the work of the ICTY.***~~ The views espoused last week by Mr. Jordash and Professor Schabas, version 2014**,** finds support only in the Serbian nationalist myth.

14. Let me also note that the ICTY did not convict a single Croatian concerning the war in Croatia from 1991 to 1995. This is no mistake. While there is no doubt that individual crimes were perpetrated by Croatians against Serb civilians, these crimes did not occur as part of any State policy.

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[86]Michael P. Scharf and William A. Schabas, *Slobodan Milosevic On Trial: A Companion*. The Continuum International Publishing Group Inc, 2002, p. 18.

[87]*Ibid*., p. 11.

[88]*Ibid*., pp. 19-20.

[89]*Ibid*., pp. 18-19.

The *Gotovina* Trial Chamber findings

15. The Court will recall that in its first round response to the Respondent's counter-claim, Croatia emphasized the *Gotovina* Trial Chamber's unanimous findings, not appealed by the Prosecutor, that President Tudjman and the Croatian leadership did not intend to (1) murder Serbs, (2) inflict cruel or inhuman treatment on Serbs, or (3) destroy the property of Serbs. We also noted that the Trial Chamber found that it could not find a general policy of non-investigation of crimes against Serbs, and that the parties in the *Gotovina* case all agreed that the Croatian authorities had issued effective orders to protect Serbian churches and religious monuments. The task for the Respondent's legal team in round ***2*** was to explain to the Court how these highly persuasive findings could possibly be consistent with the Respondent's claim that the Croatian leadership harboured genocidal intent towards the Krajina Serbs in Operation Storm. Can leaders who do not intend to kill or injure or destroy, and who protect religious institutions of an ethnic group, nevertheless harbour genocidal intent towards that group?

16. Of course not. Perhaps this is why the Respondent's legal team chose to ignore these Trial Chamber findings entirely. The closest they came to addressing these undisputed findings of the *Gotovina* Trial Chamber was Mr. Jordash's comment, made in passing, that Serbia "must live with the controversy of the *Gotovina* judgement"[90]. However, there is absolutely nothing controversial about these findings. The *Gotovina* Trial Chamber delivered them unanimously, they were not appealed by the Prosecutor, and therefore these findings were not even in dispute during the proceedings before the Appeals Chamber. How the Respondent reconciles the unanimous ICTY view that President Tudjman and the Croatian leadership did not intend to kill or injure Serbs or destroy their property, with the Respondent's claim that President Tudjman and the Croatian leadership intended to destroy the Krajina Serbs, in whole or in part, is a mystery, and a mystery unaddressed by Serbia in its second round. Croatia submits that the Respondent's silence on this fundamental point is effectively a concession by Serbia that its counter-claim has no merit at all.

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[90]CR 2014/24, pp. 55-56, para. 95 (Jordash).

President Tudjman

17. Croatia has always believed that its role in these oral proceedings is to assist the Court in its effort to resolve the legal issues in dispute between the Parties. To that end, we have avoided discussions about oblique matters that only distract from the real issues. Unfortunately, our colleagues on the other side have not done the same. Rather than providing useful assistance to the Court — like, for instance, explaining why the Respondent believes the *Gotovina* Trial Chamber's findings are not fatal to the Respondent's counter-claim — the Respondent generally, and Professor Schabas specifically, have used inflammatory rhetoric in an effort to play to the Serbian audience back home. For Professor Schabas to lace his speech with loaded words like "*lebensraum*", "Wannsee", ***and*** "Final Solution", while simultaneously being unable to deal with the *Gotovina* Trial Chamber's findings on the lawful intent of the Croatian leadership, was telling.

18. Moreover, Professor Schabas seems eager to draw Croatia into a debate about President Franjo Tudjman. To set the record straight: President Tudjman was a distinguished partisan fighter in World War II. When he attended the 50th Anniversary of the Allied Victory in Europe in World War II on 8 May 1995 in London (just days after Operation Flash), he was the only participating head of State who had actually fought in the defence of Europe against the scourge of Nazi fascism. His resolve to base Croatia on an anti-fascist foundation is visible in the preamble of the Croatian Constitution adopted in 1990[91].

19. As for his conduct during the war in Croatia, the ICTY record speaks for itself. Concerning Operation Storm, President Tudjman was vindicated by both the Trial and Appeals Chamber judgements in *Gotovina*. The Respondent nevertheless wants to draw Croatia into a debate about President Tudjman, but the ICTY's findings — and the Respondent's complete inability to address them — ended such debate well before these proceedings even began.

20. Let me repeat that Operation Storm was the operation that put an end to the criminal enterprise of the "RSK". It marked the beginning of the political end for those responsible for the crimes in Croatia and Bosnia and Herzegovina, many of whom were subsequently convicted by the ICTY. Operation Storm was the last resort for Croatia facing the constant and well-documented refusal by the "RSK" leaders to accept peaceful reintegration into Croatia. Croatia has clearly

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[91] See Reply of Croatia (RC), p. 55, footnote 61.

proved its willingness to peacefully reintegrate its occupied territories: it did so in 1998 with Eastern Slavonia, when it was successfully reintegrated into Croatia in a peaceful manner. Finally, Operation Storm made the signing of the Dayton Peace Accord possible and led to the end of the war in the region.

21. Mr. President, Members of the Court, this brings me to our concluding submissions in relation to the counter-claim brought by Serbia. But before that, allow me to thank the distinguished members of the Serbian delegation; I thank the Registry for its assistance; I thank the interpreters and the security staff for their services during these proceedings; and, finally, Mr. President, Members of the Court, I thank you for your attention.

22. And now, if you allow me, I will read the final submissions of the Republic of Croatia in relation to the Respondent's counter-claim.

The PRESIDENT: Please proceed. It is even a requirement under the Rules.

Ms CRNIĆ-GROTIĆ: Thank you.

SUBMISSIONS

On the basis of the facts and legal arguments presented by the Applicant, it respectfully requests the International Court of Justice to adjudge and declare:

> That, in relation to the counter-claims put forward in the Counter-Memorial, the Rejoinder and during these proceedings, it rejects in their entirety the sixth, the seventh, the eighth and the ninth submissions of the Respondent on the grounds that they are not founded in fact or law.

Thank you, Mr. President.

The PRESIDENT: Thank you, Madam. The Court takes note of the final submissions which you have now read on behalf of Croatia with respect to the counter-claims of Serbia, as it took note on Friday 21 March of the final submissions of Croatia on its own claims, as well as on Friday 28 March of the final submissions presented by Serbia on Croatia's claims and Serbia's counter-claims.

This brings us to the end of the oral proceedings; I should like to thank the Agents, counsel and advocates for their statements.

In accordance with practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is closed.

The Court rose at 11.20 a.m.

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