INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA v. SERBIA)

COUNTER-MEMORIAL

SUBMITTED BY THE REPUBLIC OF SERBIA

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TABLE OF CONTENTS

Part I

CHAPTER I

INTRODUCTION

CHAPTER II

THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

CHAPTER III

QUESTIONS OF PROOF

Part II

CHAPTER IV

APPLICABILITY OF THE OBLIGATIONS UNDER THE GENOCIDE CONVENTION BETWEEN CROATIA AND THE FRY/SERBIA PRIOR TO 27 APRIL 1992 AND PRIOR TO 8 OCTOBER 1991, RESPECTIVELY

CHAPTER V

THE HISTORICAL AND POLITICAL BACKGROUND

CHAPTER VI

PARTICIPANTS IN THE ARMED CONFLICT IN CROATIA 1991-1995

CHAPTER VII

RESPONSE TO THE APPLICANT'S ALLEGATIONS CONCERNING CRIMES COMMITTED AGAINST CROATS

CHAPTER VIII

THE CRIME OF GENOCIDE HAS NOT BEEN COMMITTED AGAINST CROATS

CHAPTER IX

THE QUESTION OF ATTRIBUTION

CHAPTER X

SUBMISSIONS MADE BY THE APPLICANT

Part III

CHAPTER XI

JURISDICTION TO AND ADMISSIBILITY OF SERBIA'S COUNTER-CLAIM

CHAPTER XII

FACTUAL BACKGROUND: CROATIA AND THE SERBS IN THE RSK 1992–1995

CHAPTER XIII

OPERATION *STORM* AS THE NEW GENOCIDE AGAINST SERBS IN CROATIA

CHAPTER XIV

THE CRIME OF GENOCIDE HAS BEEN COMMITTED AGAINST SERBS IN CROATIA BY THE CROATIAN *DE JURE* ORGANS

List of acronyms

Abbreviation	Full name	Comments
ABiH	Army of the Republic of Bosnia and Herzegovina	Bosniak Army involved in the operation *Storm* in August 1995
ECMM	European Community Monitoring Mission	
FRY	Federal Republic of Yugoslavia	Name of Serbia and Montenegro between 27 April 1992 and 3 February 2003
HDZ	Croatian Democratic Union (Hrvatska demokratska zajednica)	Leading political party in Croatia from 1990 to 2000
HHO	Croatian Helsinki Committee for Human Rights	Non governmental organization
HRW	Human Rights Watch	Non governmental organization
HV	Croatian Army (Hrvatska vojska)	Army of the Republic of Croatia (established on 3 November 1991)
HVO	Croatian Defence Council (Hrvatsko vijeće obrane)	Army of the Herzeg-Bosna (Croatian entity in Bosnia and Herzegovina) involved in the operation *Storm*
ICC	International Criminal Court	
ICTR	International Criminal Tribunal for Rwanda	
ICTY	International Criminal Tribunal for the former Yugoslavia	
ILC	International Law Commission	
JNA	Yugoslav People's Army	Army of the SFRY (ceased to exist on 27 April 1992)
MUP	Ministry of the Interior (Ministarstvo unutrašnjih poslova)	Police forces of the former Yugoslav Republics
NDH	Independent State of Croatia (Nezavisna Država Hrvatska)	Nazi puppet State (existed from 1941 to 1945)
RSK	Republika Srpska Krajina	Serb entity in Croatia (existed from 19 December 1991 to 5 August 1995)
SAOs	Serbian Autonomous Regions (Srpske Autonomne Oblasti)	The 1991 Serb entities in Croatia: SAO Krajina (changed its name into RSK on 19 December 1991); SAO Western Slavonia and SAO Slavonia, Baranja and Western Sirmium (both joined to RSK on 26 February 1992)

SDS	Serbian Democratic Party (Srpska demokratska stranka)	Leading political party of the Serbs in Croatia from 1991 to 1995
SFRY	Socialist Federal Republic of Yugoslavia	Federal State composed of six Republics: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia (ceased to exist on 27 April 1992)
SVK	Serbian Army of Krajina (Srpska vojska Krajine)	Army of the Republika Srpska Krajina
TO	Territorial Defence (Teritorijalna odbrana)	Armed forces organized on the territorial basis
UNHCR	United Nations High Commissioner for Refugees	
UNMO	United Nations Military Observers	
UNPA	United Nations Protected Area	Safe heaven in Croatia under the protection of UNPROFOR
UNCRO	United Nations Confidence Restoration Operation	United Nations administration (replaced UNPROFOR on 31 March 1995)
UNPROFOR	United Nations Protection Force	Peace-keeping force in Croatia and Bosnia and Herzegovina from 1991 to 1995
VJ	Yugoslav Army (Vojska Jugoslavije)	Army of the Federal Republic of Yugoslavia
ZNG	National Guard Corps (Zbor narodne garde)	HDZ militia

PART I

CHAPTER I

INTRODUCTION

1. The Procedural History

1. On 2 July 1999, the Government of the Republic of Croatia (hereinafter "the Applicant" or "Croatia") filed an Application instituting proceedings against the Federal Republic of Yugoslavia (hereinafter "the Respondent" or "the FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention").

2. In its Application, Croatia requested the International Court of Justice to adjudge and declare as follows:

> "(*a*) that the Federal Republic of Yugoslavia has breached its legal obligations toward the people and Republic of Croatia under Articles I, II(*a*), II(*b*), II(*c*), II(*d*), III(*a*), III(*b*), III(*c*), III(*d*), III(*e*), IV and V of the Genocide Convention;
>
> (*b*) that the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court."[1]

3. By its Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the FRY.

[1] Application instituting proceedings, para. 36.

4. However, the Applicant requested the Court to extend the fixed time-limit for the filing of the Memorial twice (firstly, by its letter dated 24 February 2000, and for the second time, by its letter dated 26 May 2000). In both cases, the Respondent did not oppose the request of the Applicant. Thus, the Court decided to allow the Croatian requests, for the first time by its Order dated 10 March 2000, and for the second time by its Order dated 27 June 2000. The time-limits were extended to 14 March 2001 and 16 September 2002, respectively, for the filing of the Memorial of Croatia and the Counter-Memorial of the FRY.

5. The Applicant filed its Memorial in the extended time-limit, presenting the following submissions:

> "1. That the Respondent, the Federal Republic of Yugoslavia, is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:
>
> (a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia, including in particular against members of the Croat national or ethnical group on that territory, by
>
> - killing members of the group;
> - causing deliberate bodily or mental harm to members of the group;
> - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> - imposing measures intended to prevent births within the group;
>
> with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;
>
> (b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a),* or in the other acts referred to in paragraph *(b),* and is thus in continuing breach of Articles I and IV of the Convention.

2. That as a consequence of its responsibility for these breaches of the Convention, the Respondent, the Federal Republic of Yugoslavia, is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, in particular Slobodan Milošević, the former president of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case."[2]

6. On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court, as adopted on 14 April 1978, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 November 2002, the Court stated that the proceedings on the merits were suspended, and fixed a new time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the FRY. Croatia filed such a statement on 29 April 2003, in which it requested the Court to reject all preliminary objections of the FRY (with the exception of the claim concerning the submission to trial of Slobodan Milošević, former President of the FRY, who had been transferred to the International Criminal Tribunal for the former Yugoslavia by the Serbian authorities on 29 June 2001).

7. In the meantime, by a letter dated 5 February 2003, the Respondent informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro".

8. By a letter dated 3 June 2006, the President of the Republic of Serbia Mr. Boris Tadić informed the Secretary-General of the United Nations that, following the declaration of independence adopted by the National Assembly of the Republic of Montenegro, "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of the Constitutional Charter of Serbia and Montenegro."[3]

[2] Memorial, Submissions, pp. 413-414.
[3] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 23.

9. Public hearings on the preliminary objections were held from 26 May to 30 May 2008. By its Judgment of 18 November 2008, the Court: 1) rejected the first preliminary objection submitted by the Respondent "in so far as it [related] to its capacity to participate in the proceedings" instituted by the Applicant; 2) rejected the same preliminary objection "in so far as it [related] to the jurisdiction *ratione materiae* of the Court" under Article IX of the Genocide Convention; 3) found that, subject to the following point, the Court had jurisdiction to entertain the Application in this case; 4) found that the second preliminary objection concerning the jurisdiction of the Court and the admissibility of the claims, *ratione temporis*, did not, in the circumstances of the case, possess an exclusively preliminary character, and 5) rejected the third preliminary objection submitted by the Respondent concerning the submission of certain persons to trial, the provision of information on missing Croatian citizens, and the return of cultural property.

10. In the same Judgment, the Court, taking into account the views of the Parties and the fact that the Republic of Serbia had accepted continuity between the State union Serbia and Montenegro and itself, concluded that the Republic of Serbia remained the sole Respondent in this case (para. 34).

11. By an Order of 20 January 2009, the Court fixed 22 March 2010 as the time-limit for the filing of the Counter-Memorial of the Republic of Serbia (hereinafter "the Respondent" or "Serbia"). Within the fixed time-limit, the Respondent duly submits this Counter-Memorial.

2. The Real Reasons for the Institution of Proceedings against the FRY

12. The Application of Croatia is related to crimes committed during the armed conflict in its territory from 1991 to 1995. The allegations against the FRY Government are of exceptional gravity: the Application, and particularly the Memorial, contains assertions on almost all possible violations of the Genocide Convention. It is well-established in international law that genocide is "a denial of the right of existence of entire human groups", which "shocks the conscience of the mankind".[4] From that point of view, it is not expected that a State which seeks to represent victims of genocide need to provide reasons

[4] General Assembly resolution 96(I).

for instituting proceedings against another State that is alleged to be responsible for violations of the Genocide Convention. However, the authors of the Memorial have tried to do just that – to explain why the Croatian Government decided to file the Application and, more importantly, to justify the fact that the Application was produced so late, almost four years after the end of the conflict and the alleged perpetration of genocide.

13. In its Memorial (para. 1.07), the Applicant pointed out that the reasons for the institution of the proceedings against the FRY in 1999 was due to the fact that the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") failed to issue any indictment "against those persons most responsible for genocide in Croatia". This explanation has never been accepted by the Respondent; rather, the reason why the contentious proceedings before the International Court of Justice were instituted so late by Croatia is the international position of the Respondent State at the time of the filing of the Application.

14. The Croatian Application was submitted on 2 July 1999, shortly after the NATO bombing of the FRY. Having in mind the evidently rushed nature of the Applicant's initial submission, it can easily be concluded that a decision to take legal action must have been taken during that bombing, which took place from March to June 1999. During this period President Milošević's rule in the FRY reached its lowest point. The country was completely isolated, its economy destroyed; the number of victims of the NATO bombing increased every day, while the conflict, characterized by serious war crimes in the Serbian Province of Kosovo and Metohija, culminated. In international relations, the FRY regime was almost completely cut-off. For Croatian leaders, this was a good moment for an attempt to reach a solution on the Serbian question in Croatia: the conflict was to end in a legal victory before the principle judicial organ of the United Nations, where the Serbs and their State leadership were to be collectively "convicted" for genocide, the most serious crime in the contemporary world. National history could thus be re-written: the genocide committed in the Independent State of Croatia against the Serbs, Jews and Roma during World War II could be forgotten, or at least, could be equated to the genocide purportedly committed against Croatians. Moreover, the justified requests of the Serbs from Croatia to be allowed to return to their homes and land could be more easily dealt with by the Croatian authorities once the decision on the collective Serbian responsibility for the crime of genocide was rendered.

3. Further Developments between the Parties

15. Although diplomatic relations between Croatia and Serbia were normalized in August 1996,[5] a genuine cooperation began in 2000, following the democratic changes in both States. The positive developments were registered in bilateral economic relations, in political dialogue on the highest level, and particularly in some fields of joint interest directed to the restoration of mutual confidence, such as the cooperation between the war crime prosecutors[6], between commissions for missing persons[7] and through Joint Commission for Restitution of Cultural Heritage.[8]

16. During his visit of Croatia in 2007, Serbian President Boris Tadić, gave the following public statement:

> „I am addressing apologies to all citizens of Croatia, and to everybody belonging to the Croatian nation on whom persons belonging to my nation inflicted misfortune..."[9]

17. Nevertheles, continuing the litigation before the International Court of Justice under the provisions of the Genocide Convention, the Croatian Government has kept the biggest obstacle to further improvement of the relations with Serbia, although it is fully aware that its case is not based in law. In spite of some indications that the Croatian Government could decide to negotiate with the Serbian authorities about the withdrawal of its Application, no formal proposal has ever been made.

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[5] Agreement on Normalization of Relations, Memorial, Annexes, Vol. 4, annex 12.

[6] The last Conference on the improvement of the cooperation among the war crimes prosecutors from the former Yugoslavia, supported by the ICTY, OSCE and EC, was held in Bruxelles in April 2009, http://www.sarajevo-x.com/svijet/clanak/090403113 .

[7] This issue was regulated between Croatia and Serbia by the 1995 Agreement on Cooperation in Tracing Missing Persons and by the 1996 Protocol on Cooperation between the Commission of the Government of the Federal Republic of Yugoslavia for Humanitarian Issues and Missing Persons and the Commission of the Government of the Republic of Croatia for Imprisoned and Missing Persons, see Annex 53 to the Preliminary Objections, p. 367.

[8] The Joint Commission was established in 2003 in accordance with the Agreement on Co-operation in the Field of Culture and Education, *Narodne novine, Medjunarodni ugovori* [Official Gazette, International Treaties], no. 5/2002 & *Sluzbeni list SRJ – Medjunarodni ugovori* [Official Gazette of the FRY – International Treaties], no. 12/2002.

[9] See B92 News, "Tadić appologies to Croatian citizens", 24 June 2007, available at: http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=06&dd=24&nav_id=252551

18. In the meantime, the ICTY has nearly completed its work. It has become evident that what happened in Croatia in 1990's cannot be reduced to a simple picture with one perpetrator and one victim. Information from many independent sources has also become known, enlightening the complex reality of the armed conflict in Croatia and a nature of crimes committed there. Contrary to the attempts of the Croatian authorities to hide the truth about the Operation *Storm*, its plan, specific intent and criminal consequences have become known.

19. Moreover, the Croatian Government has continued preserving the outcome of the 1995 operations *Flash* and *Storm*. According to the UNHCR, 96,739 refugees still live in Serbia today, out of whom 73% are Serbs from Croatia.[10] Their return home have been rendered difficult due to insufficient assurances given by the Croatian authorities with regard to the security of returnees, frequent incidents occurring in the territory of Croatia targeting Serbian nationals, including the existence of secret indictments for war crimes. Numerous administrative barriers still exist in regard to restoration of tenancy rights of the Serb refugees.

20. Under these unfortunate conditions, the Serbian Government did not have any other choice but to respond to the Croatian Memorial in merits, including the submissions of counter-claims established under the same factual and legal grounds. The Respondent argues that if the Court is inclined to accept the claim by Croatia that genocide took place in the armed conflict in its territory, the clearest and the most convincing case of genocide was actually the operation *Storm*. Such a conclusion is easier by having in mind the starting position of the Applicant in this case that the evacuation of "Croatian citizens of Serb ethnicity in the Knin region" [Republika Srpska Krajina] amounted to "a second round of 'ethnic cleansing', *in violation of the Genocide Convention*"[emphasis added].[11]

21. There is no doubt that this case will contribute to the promotion of the respect for all victims whatever is their ethnic origin, as well as for their right that crimes committed in Croatian civil war must not be forgotten. At the same time, this case before the

[10] See UNHCR, Refugees, Table established on 10 June 2009, available at: http://www.unhcr.org/pages/4a0174156.htm ; see also Commission of the European Communities, Croatia 2009 Progress Report, SEC(2009) 1333 dated 14 October 2009, pp.15-16 (Annex 65).
[11] Application instituting proceedings, para. 2.

principal judicial organ of the United Nations will surely further improve the practice of the application of the Genocide Convention, one of the main instrument of humanitarian law in the contemporary World.

4. Summary of Issues and Structure of the Counter-Memorial

22. This Counter-Memorial is divided into three parts. Part I deals with those issues which are related both to the response to the Applicant's allegations and to the counter-claims. Accordingly, Part II deals exclusively with the response to the Applicant's factual and legal allegations, while Part III establishes factual and legal grounds for the counter-claims.

23. Following this introductory Chapter, Part I continues with a review of the interpretation of the relevant provisions of the Genocide Convention, as the applicable law in this case (Chapter II). That Chapter will be based mainly on the findings of the Court in the 2007 Judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, although the legal findings of the international criminal tribunals for the Former Yugoslavia and Rwanda will also be discussed, as well as other relevant documents, such as the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind and the Elements of Crimes of the International Criminal Court.

24. Chapter III will discuss the relevant questions of proof and provide the Respondent's approach to the applicable methods of proof in the case which includes the State responsibility of exceptional gravity. In the same Chapter, the Respondent will address the Applicant's approach to the evidence showing that documentary materials presented in support of the Memorial are either irrelevant or unreliable (for instance, 322 copies of the witness statements in Croatian were not signed by the persons who allegedly gave those statements, while many other shortcomings of the evidentiary materials are also noted). The Respondent submits that the documents presented by the Applicant are inadmissible in the case before any reasonable court, and even less in the international litigation concerning the crime of genocide.

25. Part II begins with a general and preliminary question of the admissibility of the Applicant's claims related to the events that occured before 27 April 1992 (Chapter IV). The Respondent submits that acts and omissions that took place before 27 April 1992, whatever their legal characterization, cannot entail the responsibility of Serbia, because the FRY/Serbia, only came into existence on that date. In the alternative, the Respondent submits that, in any event, acts and omissions prior to 8 October 1991 cannot be used to establish Serbia's responsibility for breaches of the Genocide Convention, as Croatia itself only came into existence – and became bound by the Genocide Convention – on 8 October 1991.

26. The analysis of the misleading and inaccurate assertions of the Memorial concerning the historical and political background is given in Chapter V. The Respondent will present historical facts which can assist the Court to fully understand political events and the origin of the 1990s' armed conflict in Croatia. In Chapter VI, the Respondent will give an overview of all participants in the Croatian civil war and their relations with the Respondent State. It will be proved that the Yugoslav People's Army (hereinafter "the JNA") was not under the control of the Serbian leadership in 1990 and 1991 and that it acted as *de jure* organ of the SFRY and operated as such, under political direction of the SFRY Presidency. The Respondent will also show that the Applicant's claims that the forces of the Serb autonomous regions in Croatia were "controlled" by the Federal State or by the FR Yugoslavia/Serbia are not supported by evidence.

27. Chapter VII gives direct response to the Applicant's factual allegations concerning the crimes, on the area by area basis, following the order of presentation set out by the Applicant's Memorial. The Respondent concludes that, even if the documentary materials submitted by the Applicant are treated as relevant and reliable (*quod non*), they, firstly, do not prove that many of the crimes alleged by the Applicant have taken place and, secondly, they in any case cannot establish the existence of the legal elements of the crime of genocide. Chapter VIII comes to the same conclusion following the general overview of the events in Croatia and a careful legal analysis of the claims of the Applicant in support of the alleged existence of the genocidal intent.

28. Chapter IX demonstrates that crimes committed against Croats from 1991 to 1995, whatever their legal characterization, cannot be attributable to the Respondent State, while Chapter X deals with certain specific requests of the Applicant's Submissions.

29. Part III of the Counter-Memorial begins with the procedural grounds for the submission of the counter-claims (Chapter XI). Chapter XII describes the attacks on the UN protected zones and crimes committed by the Croatian armed forces against the Serb population. It will be proved that this criminal acts committed by the Applicant were an introduction to the final solution of the Serbian question in Croatia through the operation *Storm* in August 1995. Chapter XIII gives a detailed review of the facts concerning the crimes committed against Serbs during and after the operation *Storm*. Finally, Chapter XIV contains the legal analysis which convincingly demonstrates that the criminal acts committed against a substantial and significant part of the Serbian national group in Croatia amounts to genocide.

30. In addition to the text of the Counter-Memorial (Volume I), the Respondent State submits to the Court four volumes of evidence and other relevant documents. Volume II is composed of historical sources and contemporary literature related to the historical background and the 1990s' Croatian historical revisionism as one of the important causes of the armed conflict in the former Yugoslavia. Volume III contains other relevant documents referred to by the Respondent, such as legislative decisions of the Republika Srpska Krajina; relevant SFRY documents which demonstrate that the SFRY was a functioning State till the end of 1991, and documents related to the systematic and widespread crimes perpetrated against Serbs in Croatia from the very beginning of the civil war in 1991 until the operation *Flash* in spring 1995. Volume IV consists of the evidence on the crimes committed during and after the operation *Storm* and contains evidence that originated from neutral international and non-governmental bodies and the production of which is fully in accordance with the previous practice of the International Court of Justice in similar cases. Volume V contains list of all known Serbs from Croatia that were killed or went missing in the Croatian civil war, in total more than 6,000 victims.

CHAPTER II

THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

1. Introduction

31. The present case concerns the application of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "the Genocide Convention"). As the Applicant noted in para. 7.04 of its Memorial, the present case is not concerned with such issues as aggression, the right to use force, violations of the laws of war or crimes against humanity. The Respondent, however, agrees with the Applicant that many acts which are prohibited by the Genocide Convention also involve breaches of international human rights and international humanitarian law and that a certain act can be qualified as either genocide or a crime against humanity or a violation of the laws of war, depending of whether that act was accompanied by the required specific genocidal intent. In Chapter VIII of this Counter-Memorial, the Respondent will show that the acts committed during the conflict in Croatia against Croats did not reach the threshold necessary to be considered as genocide, while in Chapter XIV the Respondent will show that the acts committed against Serbs by the Croatian Government did constitute genocide within the meaning of the Genocide Convention.

32. In this Chapter the Respondent will deal with the general issues concerning the application of the Genocide Convention, such as the scope of the convention, mental and physical elements of the crime of genocide, other acts prohibited by Article III of the Convention and obligation to prevent and to punish genocide. In doing so, the Respondent will base itself mainly on the findings of the Court in the 2007 Judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Respondent considers this judgment to be of paramount importance to the present case, since the Court in the *Bosnia* case dealt with most of the issues which are now raised by both parties to the present dispute. In matters which were not dealt with by the Court in the *Bosnia* case, or only to a minor degree, the Respondent will base itself mainly on the legal findings of the international criminal tribunals for the

Former Yugoslavia and Rwanda – the two tribunals which have, over the past 15 years, issued many judgments which concern different questions related to the crime of genocide and whose work was considered by the Court to be of particular relevance in the *Bosnia* case. The Respondent will also rely on other relevant materials, such as the International Law Commission's (ILC) Draft Code of Crimes against the Peace and Security of Mankind and the International Criminal Court's (ICC) Elements of Crimes.

2. Genocide Convention in Brief

33. The Genocide Convention is one of the most important conventions adopted in the history of mankind. It was adopted shortly after World War II and its adoption was prompted by the terrible atrocities committed during World War II – atrocities in which the Independent State of Croatia, a Nazi puppet state formed during that war, played an important part.[12]

34. The preamble to the Convention refers to UN General Assembly Resolution 96(I) of 11 December 1946, which declares genocide to be a crime under international law, and recognizes that at all periods of history genocide has inflicted great losses to humanity. In Article I, the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law and undertake to prevent and punish that crime. Article II defines genocide and sets out its mental and physical element, while Article III provides the offences which will be punishable in accordance with the Convention – genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

35. Article IV provides that persons committing any of the acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Article V establishes the obligation of the Contracting Parties to enact the necessary legislation to give effect to the Convention and provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that persons charged with any of the acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed

[12] See *infra*, Chapter V, paras. 397-420.

or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. Article VII provides that any of the acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition and places an obligation on the Contracting Parties to grant extradition in such cases, in accordance with their laws and treaties in force.

36. Article VIII gives the Contracting Parties a possibility to call upon the competent organs of the UN to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III. Article IX provides that disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or any of the acts enumerated in Article III, shall be submitted to the Court at the request of any of the parties to the dispute. It is thus based on this article that both the Applicant and the Respondent have brought their claims before the Court in the present case. Articles X-XIX of the Convention contain final clauses.

3. Obligations Imposed by the Convention on the Contracting Parties

37. The Genocide Convention, in the way it was drafted and adopted, sets up quite clearly the obligation of States to prevent and to punish genocide or any other act enumerated in Article III, but remains silent whether States are also under an obligation, by virtue of the Convention, not to commit genocide themselves. As the Court noted in the *Bosnia* case: "It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention".[13]

38. This, accordingly, left open avenues for various interpretations of the Convention and, in the *Bosnia* case, the Respondent argued extensively, both in the preliminary objections and the merits phase, that the Convention does not provide for the responsibility of States for acts of genocide as such. This position was not, however, accepted by the Court. In order to reach its findings, the Court undertook a thorough

[13] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 166.

analysis of the *travaux préparatoires* and other sources and ultimately, taking as a basis the undisputed obligation of States to prevent genocide, reached the conclusion that "the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III."[14]

39. Although this conclusion was not reached with unanimity,[15] the Respondent accepts it fully and will, accordingly, proceeds in this Counter-Memorial on the basis that the Genocide Convention imposes on States the following obligations:

a) not to commit genocide or any of the other acts enumerated in Article III of the Convention;
b) to prevent genocide;
c) to punish genocide.

4. Mental Element (*Mens Rea*)

A. *The Nature of the Required Intent*

40. Article II of the Genocide Convention defines genocide in the following way:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> *(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *(d)* Imposing measures intended to prevent births within the group;
> *(e)* Forcibly transferring children of the group to another group."

[14] *Ibid.*, para. 179.
[15] *Ibid.*, Joint declaration of Judges Shi and Koroma, Separate opinion of Judge Tomka, Declaration of Judge Skotnikov, Separate opinion of Judge *ad hoc* Kreća, and also Separate opinion of Judge Owada (who reached the same conclusion as the majority but for different reasons).

41. As noted by the Court in the *Bosnia* case, it is well established that any of the acts listed in Article II of the Convention includes a mental element. Mental elements are made explicit in paragraphs *(c)* and *(d)*, but acts prohibited by paragraphs *(a)*, *(b)* and *(e)* also must be intentional.[16] In the words of the International Law Commission (referred to also by the Court): "The prohibited acts enumerated in subparagraphs *(a)* to *(e)* are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result."[17]

42. However, the existence of this "simple" intent to commit any of the acts enumerated in subparagraphs *(a)* to *(e)* is not enough for genocide to be established. The definition of genocide requires the establishment of a further, specific intent (*dolus specialis*) to destroy a protected group as such, in whole or in part. Therefore, it is not enough to establish that, for example, deliberate unlawful killings of members of the group have occurred – it is essential that, in addition, genocidal intent is also established. Moreover, this means that it is not enough to simply establish that members of a protected group were targeted just because they belong to that group, in which case the perpetrator had a discriminatory intent. The acts listed in Article II must be committed with intent to destroy the group as such in whole or in part.[18]

43. This specific intent distinguishes genocide from other similar crimes, in particular crimes against humanity, such as persecution and extermination. In order to illustrate the difference between genocide and persecution, in the Judgment in the *Bosnia* case the Court quoted the following passage from the judgment of a Trial Chamber of the ICTY in the *Kupreškić et al.* case:

> "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide.

[16] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 186.
[17] Commentary on Article 17 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, p. 44, para. 5.
[18] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 187.

> Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristic (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the view point of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amount to genocide."[19]

44. Another crime similar to genocide is the crime of extermination (as suggested also by its ominous name). In the words of the ILC:

> "Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristic are killed. It also applies to situations in which some members of a group are killed while others are spared."[20]

[19] ICTY, *Kupreškić et al.,* IT-95-16-T, Trial Chamber Judgment, 14 January 2000, para. 636.
[20] Commentary on Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, p. 48, para. 8.

To this effect, a Trial Chamber of the ICTY in the *Vasiljević* case concluded:

> "This Trial Chamber concludes from the material which it has reviewed that criminal responsibility for 'extermination' only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect. Responsibility for one or for a limited number of such killings is insufficient. The Trial Chamber also concludes that the act of extermination must be collective in nature rather than directed towards singled out individuals. However, contrary to genocide the offender need not have intended to destroy the group or part of the group to which the victims belong."[21]

45. It follows thus that the mere existence of the acts enumerated in Article II of the Genocide Convention is not enough to establish genocide and only if those acts are committed with the intent to destroy the group as such, in whole or in part, can genocide be established.

B. *Proving Genocidal Intent*

46. In para. 7.28 of its Memorial the Applicant stated: "To prove genocide it is necessary to show that one or more of the acts listed in Article II of the Convention were carried out with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The Respondent fully agrees with this contention. However, the Respondent is unable to agree with the method and, in particular, the standard of proof which is subsequently proposed by the Applicant for proving genocidal intent.

47. According to the Applicant:

> "[i]t is unlikely that any State would formally adopt and then publicise any plan or other scheme of organisation to carry out or promote genocide, or otherwise prepare a paper trail which could then lead to its responsibility for failing to prevent genocidal acts committed by persons

[21] ICTY, *Vasiljević*, IT-98-32-T, Trial Chamber Judgment, 29 November 2002, para. 227.

> within its jurisdiction or control. But in the absence of documentary or other material which explicitly evidences a genocidal intent, it is permissible for the specific intent to be ascertained by inference, in particular from a relatively consistent pattern of behaviour involving the prohibited acts and targeted at a protected group."[22]

48. While the Respondent can agree that the existence of a plan or policy to commit genocide is not a formal element of the crime of genocide and that it is indeed quite unlikely that the perpetrators of genocide would leave evidence of such a plan or policy behind, it is even more unlikely that the crime of genocide, taking into consideration its scope and gravity, could be committed if it was not planned, or the result of the policy of a State or some other organized group. To this effect, the International Criminal Tribunal for Rwanda (hereinafter "the ICTR") concluded: "[a]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan, or organisation."[23] Furthermore, it was said that "the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide".[24] This view of a Trial Chamber of the ICTR was echoed by the Appeals Chamber of the ICTY in the *Jelisić* case:

> "The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime."[25]

49. In the present case, as will be demonstrated in more detail later in this Counter-Memorial, the Applicant has not offered any proof which would even remotely point to a plan to commit genocide against Croats. On the other hand, the Respondent will show that the plan to destroy part of the Serbian population in Croatia was designed by the highest officials of the Applicant and will offer proof of the existence of that plan.

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[22] Memorial, p. 339, para. 7.33.
[23] ICTR, *Kayishema and Ruzindana*, ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 94.
[24] *Ibid.*, para. 276.
[25] ICTY, *Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 48.

50. Mindful of the lack of any credible proof of the existence of the genocidal intent or of a plan to commit genocide against Croats, the Applicant requests the Court to establish genocidal intent by drawing inferences from "a relatively consistent pattern of behaviour involving the prohibited acts and targeted at a protected group". This contention was expressed even more specifically in para. 8.16 of the Memorial, where the Applicant claimed the following:

> "While individual acts committed in the course of the campaign might – considered in isolation – have been explained as "common crimes" or as "excesses" committed in the course of a conflict, all of these factors taken together point to the inevitable conclusion that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned. This establishes quite clearly the required element of a specific intent to destroy a protected group in whole or in part."[26]

51. The claim that a plurality of "common crimes", taken together, may constitute genocide is refuted by legal findings of both the ICTY and of the International Court of Justice. Thus, the ICTY Trial Chamber in the *Stakić* case stated:

> "The Trial Chamber has reviewed its factual findings … and a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 emerges that has been proved beyond reasonable doubt. However, in order to prove Dr. Stakić's involvement in the commission of these acts as a co-perpetrator of genocide, the Trial Chamber must be satisfied that he had the requisite intent. Thus, the key and primary question that falls to be considered by the Trial Chamber is whether or not Dr. Stakić possessed the *dolus specialis* for genocide, this *dolus specialis* being the core element of the crime."[27]

And the Trial Chamber went on to acquit Milomir Stakić of genocide.

[26] Memorial, pp. 385-386, para. 8.16; see also Memorial, pp. 372-373, para. 8.03.
[27] ICTY, *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 546.

52. Similarly, in the *Brđanin* case, the ICTY found:

> "While the general and widespread nature of atrocities committed is evidence of a campaign of persecutions, the Trial Chamber holds that, in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied."[28]

Radoslav Brđanin was also acquitted of genocide.

53. Finally, and most importantly, the Court in the *Bosnia* case concluded:

> "Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."[29]

54. The Applicant's contention that the plurality of "common crimes" can constitute genocide is also refuted by the practice of the ICTY, which has indicted, tried and sentenced the highest former officials of both Serbia and the RSK, but none of them for genocide. This will be further elaborated in Chapter VIII.

C. *Intent and "Ethnic Cleansing"*

55. Another point which concerns genocidal intent and the methods by which it must be proved relates to "ethnic cleansing". The Applicant seems to be quite aware that the

[28] ICTY, *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 984.
[29] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 373.

crimes committed in Croatia fall short of genocide and accepts that: "The Serbian military campaign on Croatian territory has been characterized as 'ethnic cleansing'."[30] The Applicant nevertheless goes on to claim:

> "But where, as here, the 'ethnic cleansing' of an entire region is carried out as part of coordinated strategy involving killing of non-combatants and the infliction of torture and brutality on a large scale, solely on account of the victims' ethnic origin, with the plain object and effect of destroying that part of the local population which has a particular ethnic origin, the crime of genocide is established."[31]

56. The contention that "ethnic cleansing" is a form of genocide is not new and it was discussed by both the Court and the ICTY. The conclusions reached, however, do not support the Applicant's claims. Accordingly, in the *Bosnia* case, the Court concluded:

> "It will be convenient at this point to consider what legal significance the expression ['ethnic cleansing'] may have. It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even

[30] Memorial, p. 376, para. 8.09.
[31] *Ibid.*, pp. 376-377, para. 8.09; see also pp. 329-330, para. 7.12, pp. 332-333, para. 7.18.

if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while 'there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'' (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own. That said, it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts."[32]

57. Applying this conclusion to the *Bosnia* case, the Court found the following:

"The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. ... However, even assuming that

[32] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 190.

> deportations and expulsions may be categorized as falling within Article II, paragraph *(c)*, of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part."[33]

58. It thus follows that "ethnic cleansing" can constitute genocide only if accompanied with the intent to destroy the protected group, and not to displace it. In the present case, the Applicant has not offered any credible proof that the expulsion of the Croatian population was accompanied by the intent to destroy that population or that the Croatian population or any of its members were in fact destroyed as the result of the expulsion. On the other hand, the Respondent will show that the "ethnic cleansing" of Serbs was carried out with the intent to destroy that population and that, in fact, a part of Serbian population in Croatia was destroyed as a result of the actions of the Applicant.

D. *Elements of the Genocidal Intent*

59. The Genocide Convention identifies four elements of genocidal intent: "to destroy", "in whole or in part", "a national, ethnical, racial or religious group" and "as such".

1. "To Destroy"

60. The words "to destroy" are a key element of the definition of genocidal intent, since it is precisely the element of destruction of the protected group which distinguishes the genocidal intent from other forms of intent – for example discriminatory intent, even if the latter intent fulfils all the other elements of the definition contained in the Genocide Convention (in which case we could speak of the crime of persecution or extermination).

61. "Destruction" means physical destruction of a group. Thus, "intent to destroy" includes cases where the perpetrator seeks to destroy a group as an entity, even if that perpetrator does not seek physical destruction of most of the individual members of the group.

[33] *Ibid.*, para. 334.

62. Later in this Counter-Memorial, the Respondent will prove that the actions of the Applicant directed towards Serbs were committed with the intent to destroy that group, even if the Applicant did not persist in destroying most of the individual members of the group.

2. "In Whole or in Part"

63. While the destruction of the group "in whole" is more or less self-explanatory, the Genocide Convention does not offer any elements that would help determine what is to be considered a destruction of a group "in part". This issue has been analysed extensively in legal doctrine, where various explanations have been offered. The Respondent will not however go through various explanations proposed since, in the present case, the Court and the parties can benefit from the Court's judgment in the *Bosnia* case, where three criteria relevant to the determination of a part of the group have been identified.[34]

64. According to the Court, the intent must be, in the first place, to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.

65. Secondly, the Court observed that it was widely accepted that genocide may be found to have been committed where the intent was to destroy the group within a geographically limited area, in which case the area of the perpetrator's activity and control, as well as the opportunity available to the perpetrator, were to be considered. However, the Court also concluded that this criterion of opportunity must always be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met.

66. A third criterion that the Court took into consideration is qualitative rather than quantitative. This criterion was particularly elaborated by the ICTY Appeals Chamber in the *Krstić* case, which found that in addition to the numeric size of the targeted

[34] See *ibid.*, paras. 198-201.

portion of the group, the prominence of that portion within the group can be a useful consideration. In that case, if a specific part of the group is emblematic of the overall group or essential to its survival that may support a finding that the part qualifies as substantial within the meaning of the Genocide Convention.[35] However, similar to the previous criterion of opportunity, the Court found that the qualitative approach cannot stand alone and it consequently came to the conclusion that the substantiality criterion is critical and is to be given priority.

67. In its Memorial, the Applicant never clearly stated whether the alleged genocide was committed against the group of Croats in whole or against a part of that group, although it did claim that the goal of the alleged campaign to create "Greater Serbia" was to establish "Serbian control in those parts of the Republic of Croatia in which significant Serb populations were located (including in particular Eastern and Western Slavonia, Banovina, Kordun and Lika and Dalmatia as well as neighbouring areas falling within the arc of 'Greater Serbia')" and eliminate from those areas "as far as possible all or almost all members of the Croatian population", as well as that this alleged campaign was carried out "with the specific intent of achieving the physical destruction and elimination of the Croatian population of the areas in question".[36]

68. The Respondent is of the view that the Applicant should clearly identify whether its claims of the alleged genocide relate to the Croatian population as a whole or to a part of that group and, if latter is the case, clearly identify to which part of the group the claims relate. This, however, is ultimately of no particular significance, since genocide was not committed either against the Croatian population as a whole or against any of its parts.

69. As the counter-claims are concerned, the Respondent will demonstrate below that genocide was committed against a part of the Serbian population from Croatia, namely against the Serbian population in the UN protected zones South and North. This part of the Serbian population clearly satisfies the substantiality criterion, for reasons that will be explained in Chapter XIV.

[35] See ICTY, *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, para. 12.
[36] See Memorial, p. 373, para. 8.03.

3. "National, Ethnical, Racial or Religious Group"

70. As was noted in the judgment in the *Bosnia* case: "When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed."[37] The specific intent to destroy must thus be directed against a national, ethnical, racial or religious group.

71. Legal doctrine and the practice of the international tribunals recognize two approaches concerning the definition of the group – the positive and the negative definition. The positive definition is the predominant view and was also endorsed by the Court in the *Bosnia* case.[38] In the present case, both the Applicant and the Respondent define the protected group in positive terms (although the Applicant does make occasional references to "non-Serbs") and there is accordingly no dispute between the parties on this issue.

72. There is equally no dispute regarding the determination of membership in the protected group. As the Applicant noted, membership may be achieved either on the application of objective or subjective criteria (as well as on the combination of the two), but whichever approach is taken, it is undisputed that Croats and Serbs who lived in Croatia at the time of the armed conflict constituted two separate, clearly identifiable national and ethnical groups.

4. "As Such"

73. The words "as such" complete the definition of the specific intent in the Genocide Convention, but offer very little guidance as to their meaning and as to what they actually add to the other elements of genocidal intent. In legal doctrine, based on the analysis of the *travaux préparatoires*, it is often considered that the two words point to the motive of the perpetrator, meaning that the perpetrator targets members of a certain group specifically because of their membership in the group and not for some other

[37] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 191.
[38] See *ibid.*, para. 196.

reason. Similar view was expressed by the Applicant, who claims that "the phrase clearly requires that the victims of the genocidal acts should have been attacked, in aggregate, because of their identification as members of a protected group".[39] International case law has not dealt with the interpretation of the words "as such" to a large extent, although the following useful passage can be found in the Judgment of the ICTR Appeals Chamber:

> "The words 'as such', however, constitute an important element of genocide, the 'crime of crimes'. It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term 'as such' has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term 'as such' clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting 'as such' to mean that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership."[40]

74. The Court in the *Bosnia* case simply held that the words "as such" emphasize the intent to destroy the protected group.[41] On this basis, the words "as such" could be understood as to point to the discriminatory intent directed against members of a certain group, but this intent by itself (as explained in more details above) is not sufficient to establish genocide if it is not accompanied by the intent to destroy the group.

[39] Memorial, p. 349, para. 7.56.
[40] ICTR, *Niyitegeka*, ICTR-96-14-A, Appeal Court Judgment, 9 July 2004, para. 53 (footnotes omitted).
[41] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 187.

5. Physical Elements (*Actus Reus*)

75. Article II of the Genocide Convention lists five categories of prohibited acts, the commission of which can constitute genocide if these acts are committed with the specific intent to destroy a national, ethnical, racial or religious group. Without that specific intent, however, neither of the acts enumerated in Article II, nor their accumulation, can constitute genocide.

A. *"Killing Members of the Group"*

76. Killing members of the group is the most obvious way of committing genocide, in case of which members of the group are physically destroyed with a view of destroying their group. Killing is also the easiest to define – the Trial Chamber in the *Krstić* judgment defined it as "the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death".[42]

77. In order, however, for a killing to constitute genocide, the ICC Elements of Crimes identify four further requirements which have to be met:

> "1) The perpetrator killed one or more persons.
> 2) Such person or persons belonged to a particular national, ethnical, racial or religious group.
> 3) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group.
> 4) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself affect such destruction."[43]

78. In the present case, the Respondent does not dispute that Croats were killed during the armed conflict in Croatia between 1991 and 1995, although (as will be demonstrated in the following chapters) the number of killings was much smaller than claimed by the

[42] ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 485.
[43] ICC, Elements of Crimes, ICC-ASP/1/3, p. 2.

Applicant. Later in this Counter-Memorial the Respondent will show that the killing of Croats was not committed with the intent to destroy that group and accordingly does not constitute genocide. On the other hand, the Respondent will show that Serbs were killed by the Applicant and that these killing were committed with the intent to destroy the group as such.

B. *Causing Serious Bodily or Mental Harm to Members of the Group*

79. The second group of prohibited acts consists of causing serious bodily or mental harm to members of the group. Building on the *Akayesu* judgment of the ICTR, a Trial Chamber of the ICTY in *Krstić* concluded:

> "The Trial Chamber finds that serious bodily or mental harm for purposes of Article IV [of the ICTY Statute, which is identical to Article II of the Genocide Convention] *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* judgment, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury."[44]

80. The ICC Elements of Crimes require that four conditions be met in order for causing serious bodily or mental harm to members of the group to constitute genocide. These elements are *mutatis mutandis* the same as in the case of killing.[45]

[44] ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 513 (footnote omitted).
[45] See ICC, Elements of Crimes, ICC-ASP/1/3, p. 2.

81. The Respondent does not dispute that serious bodily or mental harm was caused to some members of the Croatian population during the war in Croatia between 1991 and 1995, but submits at the same time that serious bodily or mental harm was also caused to Serbs from Croatia. The Respondent will later demonstrate that the causing of serious bodily or mental harm to members of the Croatian population was not accompanied by the required specific intent, and will further demonstrate that the Applicant caused serious bodily or mental harm to Serbs with the intent to destroy in whole or in part that group, as such.

C. *Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part*

82. The third group of prohibited acts under the Convention consists of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The Trial Chamber of the ICTR defined it in the following terms:

> "The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.
>
> For purposes of interpreting Article 2(2)(c) of the Statute [which is identical to Article II*(c)* of the Genocide Convention], the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[46]

83. The ICC Elements of Crimes state that "the term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for

[46] ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, paras. 505-506.

survival, such as food or medical services, or systematic expulsion from homes".[47] The Elements of Crimes list five requirements which have to be met in order for an act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part to be considered as genocide. These requirements are *mutatis mutandis* the same as in the case of killing or causing serious bodily or mental harm.

84. Consequently, in order for deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part to constitute genocide, the prohibited acts must be accompanied with the intent to destroy the group. This is particularly relevant for the present case, since a large number of crimes committed against both Croats and Serbs could be qualified as "ethnic cleansing", the practice which is usually equated to "systematic expulsion from homes", and which can, according to the Court, constitute genocide, provided such action is carried out with the necessary specific intent. The Applicant, however, failed to prove that the expulsion of Croats, where it has occurred, was accompanied by the intent to destroy that population, while the Respondent will prove that the expulsion of Serbs was carried out with the required specific intent.

D. *Imposing Measures Intended to Prevent Births within the Group*

85. The fourth category of prohibited acts consists of imposing measures intended to prevent births within the group. The *travaux préparatoires*, to which the Applicant also referred, give as examples for such measures: sterilization, compulsory abortion, segregation of sexes and obstacles to marriage. The ICTR in *Akayesu* added rape to this list (but only in patriarchal societies), and continued to find that measures intended to prevent births within the group may even be mental if, for instance, the person raped refuses subsequently to procreate.[48] This view of the ICTR, however, remains isolated and has not been followed in later decisions of either the ICTY or the ICTR.

86. The position of the Respondent regarding measures intended to prevent births within the group is that such measures have to be systematic and widespread, in contrast to

[47] See ICC, Elements of Crimes, ICC-ASP/1/3, p. 3.
[48] See ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, paras. 507-508.

random acts of sexual violence committed sporadically against individual members of the group. As to the Applicant's claim that the "systematic perpetration against Croats of rape and other sex crimes, in particular castration, fall clearly within Article II*(d)* of the Convention",[49] the Respondent, first, disputes that many of the alleged acts actually took place (as explained in details in Chapter VII) and, second, considers that, in any case, the described acts of random sexual violence cannot fall within the meaning of "measures intended to prevent births within the group" in Article II*(d)* of the Genocide Convention. In addition, the Respondent submits that those acts of sexual violence which have been committed, were not committed with intent to destroy the Croatian population as such.

87. The Respondent does not submit that any of the acts committed by the Applicant during the genocidal campaign against Serbs falls within the category of imposing measures intended to prevent births within the group.

E. *Forcibly Transferring Children of the Group to Another Group*

88. The Applicant has not claimed that any of the acts allegedly committed against Croats fell within the category of forcibly transferring children of the group to another group, and neither does the Respondent with respect to the acts committed by the Applicant during the genocidal campaign against Serbs.

6. Other Acts Prohibited by Article III of the Genocide Convention

89. Article III of the Genocide Convention provides as follows:

> "The following acts shall be punishable:
>
> *(a)* Genocide;
>
> *(b)* Conspiracy to commit genocide;
>
> *(c)* Direct and public incitement to commit genocide;
>
> *(d)* Attempt to commit genocide;
>
> *(e)* Complicity in genocide."

[49] Memorial, p. 354, para. 7.73.

90. In the *Bosnia* case, the Court found that "the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III."[50] The Court did not specifically define the other acts (except complicity), but it did offer a very useful explanation of the relationship of genocide and the other acts enumerated in Article III, in particular in terms of State responsibility:

> "Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e),* of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. *(b)*), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under *(b)* and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of 'genocide' (Art. III, para. *(a)*), 'attempt to commit genocide' (Art. III, para. *(d)*), and 'complicity in genocide' (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally."[51]

91. It should be noted here that the Court undertook the quoted legal analysis only with respect to the events in Srebrenica, for which it had previously concluded that they had constituted genocide. The Court did not enter into a similar analysis with respect to other crimes committed in Bosnia and Herzegovina, having previously concluded that they had not been committed with the required genocidal intent.

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[50] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 179.
[51] *Ibid.*, para. 380.

A. *Conspiracy to Commit Genocide*

92. The Trial Chamber of the ICTR in *Musema* defined conspiracy as "an agreement between two or more persons to commit the crime of genocide".[52] The same Trial Chamber analyzed the *mens rea* of conspiracy and found the following:

> "With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto,* the intent required for the crime of genocide, that is the *dolus specialis* of genocide."[53]

93. This conclusion was implicitly confirmed by the Court in the *Bosnia* case, since the Court only considered the FRY's alleged responsibility for conspiracy with respect to Srebrenica and not with respect to other crimes, having previously concluded that the other crimes had not been committed with the necessary genocidal intent. The Court then went on to conclude that it had not been proven that persons whose actions could have been attributed to the FRY committed acts that can be characterized as "conspiracy to commit genocide".[54]

94. The ICTR Trial Chamber in *Musema* considered also the difference between the Civil Law and the Common Law concepts of conspiracy. In the former, conspiracy is a form of participation in a crime which is only punishable if the crime itself is committed (unless specifically incriminated as a separate offence in the law). In the latter, conspiracy is an inchoate offence, punishable by itself. The ICTR Trial Chamber, basing itself on the *travaux préparatoires*, opted for the Common Law notion of conspiracy and concluded "that, as far as the crime of conspiracy to commit genocide is concerned, it is, indeed, the act of conspiracy itself, in other words, the process

[52] ICTR, *Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 191.
[53] *Ibid.*, para. 192.
[54] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 417.

("*procédé*") of conspiracy, which is punishable and not its result."[55] Accordingly, the same Trial Chamber held "that the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated."[56]

95. In light of this, and especially with respect to State responsibility, conspiracy to commit genocide only becomes relevant if genocide has not been committed. Accordingly, conspiracy constitutes a plan or a design that has either not been put into practice or has been put into practice but failed to produce the desired results, in which case attempt to commit genocide may also be established.[57] In any case, however, conspiracy to commit genocide requires the same *dolus specialis* as genocide.

B. *Direct and Public Incitement to Commit Genocide*

96. Incitement to commit genocide is another offense which, like conspiracy, can exist and be punishable even when genocide has not been committed.[58] In fact, in terms of State responsibility, incitement also becomes important only if genocide has not been committed, since it is otherwise absorbed by genocide itself. The Court concluded to this effect in the *Bosnia* case.[59]

97. The ICTR in *Akayesu* defined direct and public incitement to commit genocide as:

> "[d]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication."[60]

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[55] ICTR, *Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 193.
[56] *Ibid.*, para. 194.
[57] This would, on the other hand, raise the question of the relationship between conspiracy and attempt, namely whether an attempt to commit genocide would absorb conspiracy in the same manner as a completed genocide would.
[58] See ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 562.
[59] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 179, quoted above.
[60] ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 559.

98. The same Trial Chamber also identified the required mental element:

> "The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[61]

99. Incitement has to be public, which, according to the ILC, requires "the call for criminal action to a number of individuals in a public place or to members of the general public at large."[62] This further means that "an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as by radio or television."[63]

100. Incitement also has to be direct. In the words of the ILC: "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."[64] This view was shared by the ICTR in *Akayesu*, although the Trial Chamber added that "the direct element of incitement should be viewed in the light of its cultural and linguistic content" and that, accordingly, "incitement may be direct, and nonetheless implicit".[65] The ICTR, therefore, decided to "consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof."[66]

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[61] *Ibid.*, para. 560.
[62] Commentary on Article 2 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, p. 22, para. 16.
[63] *Ibid.*
[64] *Ibid.*
[65] ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 557.
[66] *Ibid.*, para. 558.

101. Nevertheless, even if incitement may take an implicit form, an element that should never be forgotten is the intent of the perpetrator, that is, the person who incites others to commit a certain crime. Only when the incitement in question is done with the intent to destroy a protected group or its part as such can it constitute incitement to commit genocide in terms of Article III*(c)* of the Genocide Convention.

C. *Attempt to Commit Genocide*

102. As the Applicant correctly noted, there has been no case law on the subject of attempted genocide, as there have never been any prosecutions for this crime.[67] Since the Genocide Convention does not offer any definition of attempt, some guidance can be found in the works of the ILC and the Rome Statute of the ICC.

103. The ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

> "An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual … [A]ttempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions."[68]

Similarly, the Rome Statute provides that:

> "[a] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person … [A]ttempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions."[69]

104. Since both the ILC and the Rome Statute incriminate attempt in general, and not exclusively attempt to commit genocide, the quoted definitions do not contain any

[67] See Memorial, p. 358, para. 7.84.
[68] Article 2, para. 3 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, pp. 18-19.
[69] Article 25 of the Rome Statute of the International Criminal Court.

reference to intent. It is, nevertheless, self-evident that an attempt to commit genocide can only be committed with the same *dolus specialis* as genocide itself. In that sense, the ILC commented:

> "This subparagraph [subparagraph *(g)* of Article II] provides for the criminal responsibility of an individual who forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor which prevents him from doing so. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrator's will."[70]

D. *Complicity in Genocide*

105. Unlike conspiracy, incitement and attempt, which can exist independently of the completed genocide (and in the case of attempt only when genocide has not been committed), complicity in genocide exists only when genocide has actually been committed. To this effect, the Trial Chamber of the ICTR concluded that: "in order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed."[71]

106. The same Trial Chamber found "that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[72]

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[70] Commentary on Article 2 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, p. 22, para. 17.
[71] ICTR, *Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 530.
[72] *Ibid.*, para. 545. "Instigation" in this case means instigation in private, in contrast to public instigation which stands as a separate offence of direct and public incitement to commit genocide.

107. While otherwise very useful, the findings of the ICTR (or the ICTY) deal exclusively with individual criminal responsibility. On the other hand, the present case concerns State responsibility and in this regard the most authoritative opinion is the judgment of the Court in the *Bosnia* case, where the issue of complicity was discussed in connection to the FRY's alleged responsibility for events in Srebrenica.

108. Thus, the Court first stated that the question of complicity has to be distinguished from the question of whether the perpetrators of genocide in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. In this respect, the Court found that if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to that State, which would be directly responsible for it and no question of complicity would arise.[73]

109. The Court then concluded that "complicity", in terms of Article III*(e)* of the Convention, includes the provision of means to enable or facilitate the commission of the crime and found further that "complicity" is similar to the category, found among the customary rules constituting the law of State responsibility, of "aid and assistance" furnished by one State for the commission of a wrongful act by another State.[74]

110. The Court used as a starting point for its analysis Article 16 of the ILC Articles on State Responsibility, which provides as follows:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
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> b) The act would be internationally wrongful if committed by that State."

[73] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 419.
[74] *Ibid.*

111. On this basis, the Court found that to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III*(e)* of the Genocide Convention, it must examine whether organs of the Respondent, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of genocide.[75]

112. As a preliminary point, the Court also addressed the required intent of the alleged accomplice, namely whether complicity in genocide presupposes that the accomplice shares the specific intent of the principal perpetrator of genocide. In this regard, the Court found that:

> "[t]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator."[76]

113. In light of this, the question of complicity in the present case can arise only if the Court finds that: (a) genocide has been committed against Croats, (b) it was not committed by organs or persons or groups whose conduct is attributable to the Respondent, and (c) the Respondent knowingly provided assistance to the perpetrators of genocide, aware of their specific intent. In the following Chapters, the Respondent will show that these conditions are not met, starting with the first and the most important one – the alleged commission of genocide.

114. As to the counter-claims, the issue of complicity does not arise for the reason that genocide against Serbs was committed by the Croatian Government itself, on its own territory, and accordingly only the Croatian Government can be the principal perpetrator of that genocide.

[75] *Ibid.*, para. 420.
[76] *Ibid.*, para. 421.

7. Obligation to Prevent and to Punish

115. The obligation of States to prevent and punish the crime of genocide is reflected in the title of the Genocide Convention and further elaborated in most of the substantive articles of the Convention (Articles I, IV, V, VI, VII and VIII).

116. The obligations to prevent and to punish genocide are closely connected, since providing punishment for the crime of genocide (and the other acts enumerated in Article III of the Convention) is one way of preventing the crime from occurring, but this does not mean that the two obligations have no separate legal existence, as will be explained below.

A. *Obligation to Prevent*

117. The obligation to prevent genocide places on the States the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs. This includes, but is not limited to, a possibility provided by Article VIII of the Convention to call upon the competent organs of the UN to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.[77]

118. Since the Court concluded in the *Bosnia* case that the obligation to prevent genocide implies also the obligation not to commit genocide or any other act enumerated in Article III,[78] the first question that arises in terms of State responsibility is whether a State can be held responsible both for genocide (or any other act enumerated in Article III) and for failure to prevent genocide. The Court answered this question in the negative, finding that:

> "If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the

[77] See *ibid.*, para. 427.
[78] See *ibid.*, para. 166 *et seq.*

> Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III."[79]

119. However, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. This, on the other hand, does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences. A State's obligation to prevent genocide and act accordingly arises at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. Nevertheless, if neither genocide nor any other act enumerated in Article III is ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which must occur for there to be a violation of the obligation to prevent.[80]

120. The obligation to prevent is an obligation of conduct and not of result, in the sense that the obligation of a State is to employ all means reasonably available to it to prevent genocide, but without an obligation to succeed in preventing the commission of genocide. In order to assess whether a State has complied with the obligation to prevent, various parameters should be taken into consideration. The first is the capacity to influence effectively the actions of persons likely to commit, or already committing, genocide, which then depends on the geographical distance of the State concerned from the scene of events and on the strength of the political links, as well as links of other kinds, between the authorities of that State and the main actors in the events. Another parameter is the State's legal capacity to prevent genocide, since every State may only act within the limits permitted by international law.[81]

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[79] *Ibid.*, para. 382.
[80] See *ibid.*, para. 431.
[81] See *ibid.*, para. 430.

121. On the other hand, a State which has violated its obligation to prevent genocide cannot escape responsibility even if it proves, and even less claims, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide.[82]

122. Finally, the violation of the obligation to prevent should be distinguished from complicity in genocide. The two main differences consist in the type of action and the *mens rea* of the State concerned. As the Court explained, "[c]omplicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission…"[83]

123. In terms of *mens rea*, while responsibility for complicity requires that an organ or a person (whose actions can be attributed to a State) furnishing aid or assistance to a perpetrator of the crime of genocide acted knowingly, that is to say, was in particular aware of the specific intent *(dolus specialis)* of the principal perpetrator, the same degree of knowledge is not required for a State to be found to have violated its obligation to prevent genocide. In the latter case, it is enough to ascertain that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[84]

124. In the present case, the question of the Respondent's violation of the obligation to prevent genocide can arise only if the Court finds that: (a) genocide has been committed against Croats, (b) it was not committed by organs or persons or groups whose conduct is attributable to the Respondent, (c) the Respondent is not responsible for complicity in genocide, (d) the Respondent was aware of the possibility that genocide would be committed but failed to take reasonable action to prevent it, and (e) the Respondent was in position to influence the actions of the principal perpetrator. In the following Chapters, the Respondent will show that these conditions are not met, starting with the alleged commission of genocide.

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[82] *Ibid.*
[83] *Ibid.*, para. 432.
[84] *Ibid.*

125. With regard to the counter-claims, the issue of the violation of the obligation to prevent genocide does not arise for the reason that genocide against Serbs was committed by the Croatian Government itself, on its own territory, and accordingly only the Croatian Government can be the principal perpetrator of that genocide.

B. *Obligation to Punish*

126. The Genocide Convention requires States to punish persons committing any of the acts enumerated in Article III of the Genocide Convention, whether they are constitutionally responsible rulers, public officials or private individuals. It obliges States to enact the necessary legislation to give effect to the Convention and provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. It also provides that persons charged with any of the acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. Finally, it provides that any of the acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition and places an obligation on the Contracting Parties to grant extradition in such cases, in accordance with their laws and treaties in force.

127. The obligation to punish is, however, limited to the exercise of the territorial criminal jurisdiction of a State. As the Court noted: "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so."[85]

128. The only exception to this rule is when a person is charged with genocide, or any other act enumerated in Article III of the Convention, by such an international penal tribunal as may have jurisdiction with respect to those States which have accepted its jurisdiction. In this case, a State is obliged to cooperate with that tribunal irrespective of

[85] *Ibid.*, para. 442.

whether the alleged crime was committed in the territory of that State. This cooperation includes the obligation to arrest and extradite the persons charged, but only if they are accused of genocide or other acts enumerated in Article III.[86]

129. In the *Bosnia* case, the Court considered the relationship between the violation of the obligation to punish and the other possible violations of the Genocide Convention. In this respect, the Court found that:

> "It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility."[87]

130. Later in this Counter-Memorial, the Respondent will demonstrate that it has not breached its obligation to punish the crime of genocide. At the same time, the Respondent will show that the Applicant has breached this same obligation, in addition to breaching the obligation not to commit genocide itself.

[86] *Ibid.*, para. 443.
[87] *Ibid.*, para. 383.

CHAPTER III

QUESTIONS OF PROOF

1. Introduction

A. *Burden of Proof*

131. As the Court observed several times in its previous cases, "it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it".[88] In other words, "it is the litigant seeking to establish a fact who bears the burden of proving it".[89] According to the principle of equality of parties, this general approach towards the burden of proof should be applied without distinction whether a fact is asserted by the applicant or by the respondent, and nothing in the Statute and Rules of Court can justify a different approach to this question.

B. *The Standard of Proof*

132. The question of standard of proof required in a case involving charges of exceptional gravity against a State was carefully determined by the Court in a previous case concerning genocide:

> "The Court requires that it be *fully convinced* that allegations made in proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts."[90]

133. In the same Judgment, the Court made a sensitive distinction between the required standard of proof for the above mentioned type of responsibility and the responsibility of a State for

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[88] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 204.

[89] ICJ, *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.

[90] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 209 (emphasis added).

breaching its obligation to prevent and punish the crime of genocide, where "the Court requires proof *at a high level of certainty appropriate to the seriousness of the allegation*."[91]

134. Having in mind the same nature and gravity of charges in the Bosnian and this case, the Respondent submits that the same standards of proof should be applied in respect of the claims of Croatia.

135. However, it is well known that proving acts of genocide (*actus reus*), and proving the intent to commit genocide (*mens rea*) is not always equally possible for parties to judicial proceedings. While the acts of genocide enumerated in Article II of the Genocide Convention are often well established by reliable reports of independent experts and international tribunals in the post-conflict period, the intent to commit genocide, as a mental element of this crime, is sometimes difficult to show by direct evidence. In the *Corfu Channel case*, the Court observed that

> "[t]he indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion. [...] The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt."[92]

136. It seems that the previous approach is compatible with the requirements of this case, which is related to the most serious issues of State responsibility. At the same time, the quoted standard of proof applied in the *Corfu Channel case* ("no room for reasonable doubt") is fully equivalent with the standard of proof that is applied in the cases before the International Criminal Tribunal for the former Yugoslavia, which deal with the same events as the Croatian Memorial. Namely, Rule 87(A) of the ICTY Rules of the Procedure and Evidence reads as follows:

> "A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".[93]

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[91] *Ibid.*, para. 210 (emphasis added).
[92] ICJ, *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 18.
[93] See also, the Rome Statute of the Interantional Criminal Court, Art. 66 (3): "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

137. Consequently, this leads to the conclusion that the standard of proof in this case, concerning the crime of genocide, should naturally be the same one as the standard of proof in the criminal proceedings, i.e. it should be the highest standard of proof that could be required in the international litigations.

C. *Methods of Proof*

138. There is no doubt that it is for the Court to make its own determination of facts which are relevant to law in certain case, bearing in mind its specific subject matter. Additionally, as it was stated in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, "[t]he Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged acts."[94]

139. Concerning the methods of proof, the Court, in the same case, said this:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention."[95]

[94] ICJ, *Case concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, 19 December 2005, General List No. 116, para. 58.
[95] *Ibid.*, para. 61.

140. In the case concerning the *Application of the Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*), the Court recapitulated its previous practice as follows:

> "The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)."[96]

141. Concerning the findings of the International Criminal Tribunal for the former Yugoslavia, the Court confirmed that the fact-finding process of the ICTY fell within the Congo-Uganda formulation, as "evidence obtained by persons directly involved, tested by cross-examination, the credibility of which has not been challenged subsequently."[97] However, when deciding upon the probative value of actions and decisions taken at the various stages of the ICTY proceedings, the Court found that

> a) the Prosecution's decisions,
> b) the decision of a judge on reviewing the indictment to confirm it,
> c) the decision of a Trial Chamber to issue an international arrest warrant and
> d) the decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case,

could not be considered as the facts established in a way which met the standard of proof required by the Court in that case.[98] The Court concluded 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

[96] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 227.
[97] *Ibid.*, para. 214.
[98] *Ibid.*, paras. 216-219.

> on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight."[99]

142. Yet, in the same case, the Court carefully determined which findings of the ICTY judgments could be taken as the fullest account in the international litigation:

> "[T]he Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it."[100]

2. Inadmissibility of the Documentary Materials Presented by the Applicant

143. In this Section, the Respondent will demonstrate that the documents presented in Annexes to the Memorial are not admissible, either because they are not relevant to the specific subject matter of this case, or because they do not have a probative value which would be recognized by the previous practice of the International Court of Justice.

A. *The Documents Presented by the Applicant are not Relevant in This Case*

144. Among the several sources of evidence presented by the Applicant in this case, the witness statements have the leading role: altogether 433 statements have been annexed to the Memorial. The vast majority of these statements contain the alleged experiences of the Croatian citizens who lived on the territory of the Republic of Srpska Krajina. At this point, the Respondent will not challenge the veracity and the formal shortcomings of these documents, which will be done below. The aim of this argument is to show that the contents of these statements are not relevant for proving genocide.

[99] *Ibid.*, para. 223.
[100] *Ibid.*, para. 403.

145. Indeed, only a small number of 433 statements contain direct knowledge about the offences that could be seen as the *actus reus* element of the crime of genocide. Any one of the annexed documents can be taken as an example. The witness statement of MK (annex no. 1) contains the names of Serbs who represented the local administration in the village of Tenja. He only heard that one extremist killed several Croats, but without any personal and direct knowledge of that. No crime that constitutes an act of genocide has been confirmed by this document.[101]

146. Witness RJ (annex no. 2) described his arrest in Tenja, his imprisonment in Borovo Selo and torture that he had suffered during the interrogation by the local Serbs. He knows that one person was killed, although he did not see this.[102] The so-called witness statement of IK (annex no. 3) is actually a detailed record of his persecution by the Croatian police for participation in the Yugoslav People's Army (JNA) till 18 February 1992. He was a professional JNA officer of Croatian nationality. Several times in this document he denies that the JNA committed crimes against civilians in Eastern Slavonia.[103] The statement of JP (annex no. 4), recorded by the Croatian Police Department, contains a list of members of the Serb forces in Tenja and no information of crimes that could be determined as acts of genocide.[104] This short review of the first four witness statements can be continued throughout Annexes to the Memorial.

147. The same can be concluded regarding other documents that are annexed to the Memorial, as military documents or statements of the high-level Serbian and Yugoslav officials: not one of them contains facts that provide proof establishing the legal elements of the crime of genocide.

148. The connection between the allegations contained in the Memorial and the attached documents are also highly tenuous; very often the allegations are not supported by the contents of the submitted documents. Sometimes no evidence for some assertions has been submitted. For example, no evidence has been furnished in support of the allegations concerning what occurred in the villages of Antin and Ćelije, described in paragraph 4.17 of the Memorial, nor for the alleged killing of 58 Croat civilians in the village of Aljmaš, mentioned in paragraph 4.18 of the Memorial. Indeed, in many cases,

[101] Memorial, Annexes, Regional Files, Vol. 2, Part I, Eastern Slavonia, annex 1, p. 21.
[102] *Ibid.*, annex 2, p. 22.
[103] *Ibid.*, annex 3, p. 24.
[104] *Ibid.*, annex no. 4, p. 29.

the documents submitted by the Applicant provide information that contradicts the allegations made. This is particularly apparent in relation to the role of the JNA at the Croatian battlefront.[105] Sometimes the contents of the attached documents do not even relate to the assertions made by the Applicant.

149. The Respondent concludes that the documents submitted by the Applicant, particularly the witness statements, are not relevant for the subject matter of this case.

B. *The Applicant's Witnesses are not Disinterested in the Outcome of This Case*

150. In the case concerning *Military and Paramilitary Activities in and against Nicaragua* the Court observed that

> "In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is against its own interest."[106]

151. The Respondent considers that this approach is particularly applicable in a case concerning the conflict as serious as the Croatian civil war. The great reserve a court should have as to the probative value of statements from witnesses who were involved in the conflict in the former Yugoslavia has already been affirmed by the ICTY: "[M]ost witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony."[107]

152. It is obvious that the witnesses whose statements have been submitted by the Applicant are not disinterested in this case. Most of them have been considered as victims of different war crimes, and most of them expect the Applicant State, as their *parens patriae*, to obtain reparation on their behalf. The assertions based on the statements of these witnesses should be confirmed by other impartial and convincing sources of evidence. Without that confirmation, their probative value is seriously undermined.

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[105] For more details see Chapter VI, paras. 578-606.
[106] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 69.
[107] ICTY, *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 15.

C. *Witness Statements do not Fulfill Minimum Evidentiary Requirements and are Accordingly Inadmissible*

153. A large majority of the witness statements submitted as evidence with the Memorial do not fulfill minimum evidentiary requirements, as they are either not signed, or it appears that they were not taken by an authorized domestic organ or in a procedure that would fulfill minimum procedural safeguards.

154. Firstly, none of the 433 written statements contains either an oath or a promise that the truth has been stated, in any recognizable solemn form of Common or Civil Law.[108] In some statements, it is even explicitly noted that a witness did not make an oath (see, for example, annexes nos. 1, 7, 8, 12, 23, 194, 195, 199, 200, 204).[109]

155. But the problem is not only with lack of oath or solemn promise. Originally, only English translations of the statements were submitted – and these copies did not reveal a most consequential shortcoming. When copies of the Croatian originals were also submitted to the Court, some fundamental defects became evident. When one takes a look at the Croatian originals, it becomes apparent that there are problems even with the most elementary requirements of authenticity: 332 out of 433 statements annexed to the Memorial do not contain even the signature of the person who allegedly made the statement! The following statements do not contain the signatures: annexes nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 62, 66, 67, 68, 69, 70, 72, 73, 75, 76, 77, 81, 85, 86, 87, 88, 89, 91, 93, 96, 98, 99, 100, 101, 103, 105, 106, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 120, 121, 125, 127, 128, 130, 137, 138, 140, 142, 143, 144, 145, 146, 148, 151, 152, 153, 154, 155, 156, 157, 157a, 157c, 171, 172, 175, 177, 178, 179, 180, 182, 183, 184, 185, 187, 188, 189, 190, 191, 192, 193, 194, 195, 201, 202, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 217, 218, 221, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 262, 263, 264, 265, 266, 267, 268, 269,

[108] The practice of submitting affidavits have been recognized by the International Court of Justice. The affidavit is a sworn written statement used mainly to support certain applications and, in some circumstances, as evidence in the Common Law court proceedings. The person who makes the affidavit must swear or, at least, affirm that the contents are true before a person authorized to take oaths in respect of the particular kind of affidavit. The expression "affirm" means that a person who makes the affidavit must promise in solemn form to tell the truth (Elizabeth A. Martin (ed.), *A Dictionary of Law*, Oxford University Press, Fifth Edition, pp. 18, 19). However, not one of the 433 written statements, submitted by the Applicant in this case, fulfils the above mentioned requirements of affidavit.

[109] It is likely that the term "oath" should be understood actually as the solemn promise defined by the SFRY Criminal Code, and not in the sense of the Common Law criminal procedure.

270, 271, 272, 275, 276, 277, 278, 279, 281, 282, 282b, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 338, 339, 340, 341, 342, 343, 344, 345, 346, 348, 349, 350, 351, 352, 353, 354, 356, 357, 358, 360, 361, 366, 368, 369, 370, 371, 372, 373, 374, 375, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 395, 397, 398, 429, 431, 432, 433, 434, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 458, 459, 460, 461, 462, 463, 464, 465, 468, 469, 471, 472, 473, 476, 477, 478, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 506, 507, 508, 509, 510, 511, 512, 514, 515, 516, 518, 519, 521, 522, 523, 524, 525 and 526.

156. Furthermore, a lot of statements were not taken by a person authorized by the Croatian domestic rules to do it. In 154 out of 433 statements it is not indicated who was a person or a body which took the statement.[110] In some of the annexes it is noted that the statement was taken by a „Court Council", without any information about the court.[111] The statement submitted in annex no. 19 was taken by the "Church", while annex no. 84 was taken from a „video tape"by an unknown person. In 209 out of 433 statements, the witness statements are actually the official records of the police interrogations, which cannot be used as evidence in cases before the domestic courts, including in Croatia and Serbia.[112] Moreover, 161 out of 433 statements do not contain a signature of a person who allegedly took a statement. Annexes nos. 3, 71, 95, 133 and 134 are not supplied with the copies of the original statements and consequently, they cannot be checked.

157. Thus, the witness statements submitted by the Applicant do not fulfill the elementary requirements to be treated as evidence admissible before the court of law. Consequently,

[110] This is a case in annexes 1, 5, 6, 7, 8, 10, 21, 23, 28, 29, 30, 31, 33, 36, 38, 41, 45, 46, 48, 49, 50, 52, 54, 55, 57, 58, 59, 60, 61, 66, 70, 72, 74, 76, 77, 80, 81, 82, 83, 86, 88, 90, 93, 96, 98, 99, 102, 105, 107, 111, 114, 117, 127, 129, 130, 131, 135, 136, 138, 139, 140, 141, 142, 143, 146, 147, 149, 150, 151, 155, 157a, 157c, 176, 180, 185, 194, 195, 196, 207, 208, 209, 210, 245, 247, 248, 249, 250, 251, 258, 259, 260, 261, 263, 266, 267, 268, 269, 270, 271, 273, 275, 279, 281, 282, 282b, 285, 287, 288, 290, 291, 292, 346, 347, 348, 353, 354, 355, 356, 357, 362, 363, 371, 372, 383, 386, 389, 393, 398, 429, 430, 431, 432, 434, 435, 436, 437, 438, 442, 443, 444, 447, 468, 474, 475, 480, 493, 506, 509, 510, 514, 518, 522.

[111] For example, compare translations of annexes 6, 7, 10 & 23 with the copies of their originals.

[112] This is a case in annexes 2, 4, 9, 11, 13, 14, 15, 17, 18, 22, 24, 25, 32, 35, 39, 40, 42, 43, 44, 47, 51, 53, 62, 63, 67, 68, 69, 73, 85, 87, 89, 91, 97, 101, 104, 106, 108, 109, 110, 112, 113, 116, 118, 119, 120, 121, 122, 125, 126, 137, 145, 148, 152, 154, 170, 171, 172, 173, 174, 175, 177, 178, 179, 181, 182, 183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 198, 201, 202, 205, 206, 212, 213, 214, 215, 216, 217, 218, 221, 243, 244, 246, 252, 253, 254, 255, 256, 257, 262, 264, 276, 277, 278, 283, 284, 286, 289, 293, 294, 295, 296, 339, 340, 341, 342, 343, 344, 345, 349, 350, 358, 368, 369, 370, 373, 374, 375, 377, 378, 379, 380, 381, 382, 385, 387, 388, 390, 391, 392, 394, 395, 396, 397, 433, 439, 440, 441, 445, 446, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 469, 471, 472, 473, 476, 477, 478, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 511, 512, 513, 515, 516, 519, 520, 521, 523, 524, 525, 526.

it becomes clear that a factual findings in a case before the International Court of Justice cannot be based on documents having such elementary shortcomings. In Serbia's submission, the said witness statements are inadmissible in the current proceedings.

158. Having in mind the previous analysis of the formal defects of the submitted documents, one could suppose that the Applicant did not want to submit them in the form of reliable source of evidence, but merely wanted to inform the Court about the witnesses which have been proposed to testify directly before the Court at the oral proceedings.[113] Such an approach, if that was the intention of the Aplicant, did not take into consideration whether the Court has practical possibility to hear 433 witnesses.

D. *Press Reports and Extracts from Books can only be treated as Additional Materials*

159. The Applicant has also submitted to the Court 30 press comments (Volume 4, annexes 16–46), 6 military press comments (Volume 4, annexes 147-152), as well as the extracts from three books (Volume 5) all of them as secondary sources of evidence, which should „confirm or supplement the primary material".[114]

160. According to the previous practice of the Court, press articles and extracts from books have to be treated with great caution. The Court said that

> „even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence."[115]

161. However, the press articles and the extracts from the books presented by the Applicant in this case cannot contribute to any other source of evidence, for the simple reason that documents which should be treated as "the primary material", i.e., the witness

[113] Indeed, the intention of the Applicant cannot be fully understood from the short notice given in paragraph 1.18 of the Memorial.
[114] Memorial, para. 1.20.
[115] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62.

statements, the military documents and the statements of the high-level officials, do not contain any fact that can confirm the existence of the required legal elements of the crime of genocide.

162. Furthermore, the Respondent points out that even the press reports and extracts from the books by themselves do not offer any information to the Court on the existence of the required legal elements of the crime of genocide.

E. *Provenance of Maps, Photos, Lists and Graphics Presented in the Memorial is Unknown*

163. Throughout the text of the Memorial and its annexes, the Applicant uses some maps, photos, lists and graphics. All of them contain certain information and assertions, which are not without significance for the subject matter in this litigation. In the most cases, the presented material is without information on its provenance.

164. Not one of the presented photos contains information on its author or circumstances in which it was created.[116] One of them deserves a particular attention: the photo on the Plate no. 13 contains the following note:

> "Slobodan Milošević, President of FRY, and Željko Ražnjatović Arkan, Serbian parliamentarian and paramilitary leader, at the funeral of Radovan Stojičić Badža, Serbian Deputy Minister of Interior and liaison between Serbian paramilitaries in Croatia and Serbian leadership, Belgrade (FRY), April 1997."[117]

165. The source of this photo was not presented to the Court. Furthermore, it is highly questionable how the conclusion of the liaison between the Serbian paramilitaries in Croatia and the Serbian leadership in Belgrade can be determined by the positions of these two persons at a funeral which occurred two years after the end of all hostilities in Croatia.

[116] See Memorial, Annexes, Vol. 3, Sections 11–18.
[117] Memorial, between pages 114 and 115.

166. Also, the Memorial does not contain information on the sources of the following materials:

- some lists (for instance, the ones presented in Volume 2, annexes 164 and 240);
- the maps with dates of occupation of Croatian towns and villages (presented in Volume 3, Section 5);
- the graphic called „Serbian paramilitary units“ (Volume 3, Section 6, no. 7);
- the graphic called „Camps and prisons under the authority of the JNA and the Serbian paramilitary formations“ (Volume 3, no. 7.6);
- the 94 graphics of the ethnic structure of Croatian towns and villages before the conflict, presented in the Volume 2 of the Memorial.

Under these conditions, the Respondent is not in the position to answer to the data presented in these annexes.

167. Yet, in some cases, the sources of information presented in the Annexes have been provided, but the Court should note that these sources are always Croatian official bodies. For instance, the graphic called „Mass graves“(Volume 3, Section 7) and the „Lists of detained and missing persons“(Volume 6, Appendices) were prepared by the Office for Detained and Missing Persons of the Croatian Government, while the list of „Damage to Cultural Monuments on Croatian Territory“ (Volume 5, Appendix 7) was prepared by the Ministry of Culture of the Republic of Croatia. These sources cannot be treated as impartial in this case, and for that reason, their probative value is problematic. Consequently, these materials, prepared by the Applicant itself, particularly for the reason of this case, should be taken with great reserve.

F. *Conclusions*

168. The Respondent contests the admissibility of all sources of evidence submitted by the Applicant for the following reasons:

1) The witness statements submitted by the Applicant are not reliable evidence before the Court. None of the 433 statements contains either the oath or the promise that the truth has been stated, in any

recognizable solemn form of the Common or Civil Law legal system; the 332 statements are not signed, while in many cases, it is not visible who was a person or body who took the statements.

2) Additionally, most of the witnesses whose statements have been submitted to the Court are obviously persons with a strong interest in this case. That is an additional strong reason why the probative value of their statements is in doubt.

3) Furthermore, most of the submitted witness statements, as well as the copies of the military documents and the press-statements of the high-level Serbian and Yugoslav officials, do not contain evidence on which the legal elements of the crime of genocide can be established, i.e., all of these documents are irrelevant for the subject matter of this case.

4) In the situation of the absence of any relevant direct and convincing peace of evidence, the submitted press-reports and the extracts from the books cannot contribute to corroborating the existence of any directly established fact. Moreover, they do not contain by themselves any relevant information for this case.

5) Provenance of some materials presented in the Memorial (maps, photos, lists and graphics) is unknown.

6) The materials prepared particularly for the purposes of this case by the Office for Detained and Missing Persons of the Croatian Government, as well as by the Ministry of Culture of the Republic of Croatia, cannot be treated as impartial. The allegations contained in these documents must be proved; they cannot be treated as reliable evidence by themselves.

3. The Respondent's Approach to the Methods of Proof

A. *General Approach*

169. The Respondent does not accept that the relevant facts in this case of exceptional gravity can be established by the documents which do not fulfill the elementary conditions of the methods of proof that have so far been recognized by the practice of the International Court of Justice.

170. On the other hand, the Respondent is aware that the facts about the armed conflict in Croatia, as well as about horrible crimes that were committed in it, are well known today, first of all, by the judgments of the International Criminal Tribunal for the former Yugoslavia, and additionally, by many independent expert sources. All of these documents will be at the disposal of the parties in the further proceedings.

171. In order to assist the Court in the fact-finding process in this case, the Respondent declares its willingness to discuss reaching an agreement on relevant facts with the Applicant State. However, that agreement cannot be limited only to the facts related to the suffering of the Croats during the conflict that is the subject matter of the present proceedings, but should also include the facts relevant for the suffering of the Serbs in Croatia.

172. Leaving aside the obvious lack of any reliable evidence presented in Annexes to the Memorial, the Respondent will continue its presentation in Part II of this Counter-Memorial with an examination of the Applicant's assertions, mostly for the reasons of the historical truth. This approach does not mean that the Respondent State in any way accepts the reliability of the documents annexed to the Memorial.

173. Further in this Section, the Respondent will express its view regarding the evidence on which its counter-claims will be based. Additionally, some new documents which have appeared in the meantime, after the filing of the Memorial, will also be discussed in this Section.

B. *Admissibility of the ICTY Documents*

174. The Respondent submits that the Court's approach to the methods of proof in the case concerning *the Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* should be followed in the present case, as well.

175. Having in mind that all the ICTY judgments that have so far been rendered in connection with the Croatian civil war are related to the crimes against the civilians and individuals of the Croatian nationality (namely, *Martić (RSK case)*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007; *Mrkšić et al.* (*Ovčara case*), IT-95-13/1-T, Trial Chamber

Judgment, 27 September 2007; *Strugar* (*Dubrovnik case*), IT-01-42-A, Appeals Chamber Judgment, 17 July 2008, and *Jokić* (*Dubrovnik case*), IT-01-42/1-A, Appeals Chamber Judgment, 30 August 2005), it is for the Applicant, and not for the Respondent, to decide which facts, if any, will be useful to support its allegations in this case.

176. The Respondent observes that the crimes committed against the Serbs in Croatia are subject of three cases before the ICTY. The first one is the case no. IT-02-62, *Prosecutor v. Janko Bobetko (Medak Pocket)*. The charges against former Croatian Minister of Defense contained following crimes: persecution on political, racial and religious grounds; murder; plunder of public or private property; wanton destruction of cities, towns or villages. The Croatian authorities failed to arrest and transfer General Bobetko to the ICTY. On 24 June 2003, the Tribunal rendered the Order Terminating Proceedings because Accused died.[118] Another case is related to the same crimes. It is the case no. IT-04-78, *Prosecutor v. Ademi & Norac.* Due to the ICTY completion strategy, this case was transferred to the Croatian authorities in 2005. The Zagreb District Court acquitted General Ademi of all charges, while General Norac was sentenced to seven years' imprisonment.[119]

177. The next case is the *Prosecutor v. Gotovina et al.* (*Operation Storm*), no. IT-06-90, in which the trial is under way.[120] The Respondent understands that this case is very important for the relevant issues of the current proceedings before the International Court of Justice. At this stage of proceedings, the Respondent will found its claims on the ICTY transcripts from the above-mentioned case, which contain witness testimonies before the Trial Chamber. These testimonies are related to the first-hand experiences of impartial persons who were in the direct position to get knowledge about the key events during and after the operation *Storm*. All of them have been cross-examined. Furthermore, the Respondent will rely upon some relevant documents that have been admitted as evidence in Gotovina et al. case. All of them were made immediately after the operation *Storm* by the international monitoring missions (UNMO and ECMM).

[118] http://www.icty.org/case/bobetko/4.
[119] http://www.icty.org/x/cases/ademi/cis/en/cis_ademi_norac.pdf.
[120] http://www.icty.org/case/gotovina/4.

C. *Other Relevant Documents*

178. Additionally to the ICTY documents which can evince the illegal acts of the Croatian Government against the Serbian national group as such, the Respondent will also use other relevant documents which probative value have so far not been contested.

179. First of all, the Respondent's presentation will be based on the statements of the Croatian high State officials which contain their attitudes towards the Serbs in Croatia and from which, the intent to destroy, in whole or in part, the Serbian national and religious group, as such, can be inferred.[121] Some of those statements were directly quoted in Croatian and international press-reports shortly after they had been made,[122] while others were recorded in the official secret documents which later became public and thus, became a part of a publication readily available. Among them, the so-called *Brioni minutes* from the meeting of the Croatian State and military leadership on the Brioni Island before the beginning of the operation *Storm* are of the exceptional importance. The words of the Croatian President Franjo Tuđman at the meeting on Brioni contained a direct order for the destruction of the Serbian population in the Krajina.[123]

180. The Respondent will also support its claims with reliance on expert reports of independent and non-governmental bodies, the reliability of which normally cannot be contested. One of those documents, related to the first investigation of the criminal consequences of the operation *Storm*, is a report of the Croatian Helsinki Committee for Human Rights, a non-governmental organization from Zagreb, whose impartiality cannot be easily contested by the Applicant.[124] Another one is a report prepared by the Krajina Serbs Centre for Collecting Documents and Information "Veritas", which credibility was recommended by the UN Liaison Office in Belgrade, the International Committee of Red Cross and the ICTY. Due to its enormous efforts and high standards in collecting information, this organization is in possession of the most reliable data concerning the victims among the members of the Serbian national group in Croatia from 1991 to 1998.[125]

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[121] See Public Statements which Directly Provoked Perpetrators to Commit Genocide against the Serb National Group in Croatia (Annex 51).
[122] For example, see Annex 56.
[123] See Chapter XIII, paras. 1195–1204.
[124] See Annex 61.
[125] See Annex 62 and Annex 63.

181. Furthermore, the Respondent will produce to the Court a number of witness statements given before the national courts, as well as some press-articles from the Croatian sources which contain unfavorable facts to the Croatian Government concerning the relevant matter of this case, but merely as illustrative materials additional to the other sources of evidence.

182. The Respondent's general position towards the probative value of the factual findings of the judgments before the Croatian domestic courts will be particularly explained below.

183. Finally, Chapter V of this Counter-Memorial, "The analysis of the historical and political background presented in the Memorial", is mainly based on the facts from historical sources which form part of publications readily available. The Respondent has carefully considered this issue using Croatian and international historical books, essays and reports, wherever it was possible.

D. *Overview of the Cases before the Croatian National Courts*

184. According to the list of the Croatian Chief State Attorney,[126] altogether 1.993 persons were indicted for war crimes and genocide before the Croatian domestic courts since the end of the war until 1 September 2004. There is no doubt that the number of prosecuted persons has increased in the meantime. Among them, more than 200 persons were indicted for genocide. All of the accused charged for genocide are Serbs by their national origin.

185. According to the review made by "Veritas", 70 Serbs in total were convicted for the crime of genocide until August 2008. Only 8 Serbs convicted for genocide participated directly at the trials, while all the others were tried *in absentia*. The same rate is present concerning all war crime trials: for example, 90 per cent of all Serbs convicted for war crimes before the Croatian courts in 2003 were also convicted *in absentia*.[127]

[126] Available at http://www.veritas.org.rs/spiskovi/procesuirani/procesuirani.php.
[127] OSCE Mission to Croatia, Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring, 22 June 2004, available at http://www.osce.org/documents/html/pdftohtml/3165_en.pdf_s.html.

186. It is an unfortunate truth that the conflict and tragedy that marked the last decade in the former Yugoslavia yielded a distorted mindset that tainted many people and many institutions – and this particularly applied to Croatian courts. Bearing in mind that the Applicant, in the further proceedings, may decide to use some findings of the judgments of the domestic courts, the Respondent will challenge their credibility for two reasons: firstly, on a substantive level, Croatian law applies a definition of the crime of genocide which is not fully in accordance with the 1948 Genocide Convention, and secondly, on a procedural level, the trials before the Croatian courts have been characterized by a lack of impartiality and fairness.

1. Definition of genocide and its consequence to the applicability of factual findings of the Croatian courts' judgments in this case

187. The Croatian Criminal Code largely reiterates the definition of genocide contained in Article 2 of the Genocide Convention. However, it expands the Convention's definition to include "forcible population displacement."[128] It leads to paradoxical convictions which are not in accordance either with the recent practice of the Court or with the practice of the ICTY and ICTR. This is the reason why the findings of the Croatian domestic judgments are not relevant for the cases before the international courts.

188. For instance, the Croatian Supreme Court upheld the Osijek District Court conviction of 4 Serbs for genocide (*Koprivna* case, no. I Kz-865/01-3, Judgment of 14 January 2004). The trial chamber found that the defendants, "together and in agreement with unknown members of Serb paramilitary groups, with the intention to render life of Croats and other non-Serbs impossible, participated in the arrest and transport of 23 Croats to the 'free' territory of Croatia."[129] A lack of any of the *actus reus* of the crime of genocide contained in Article II of the Genocide Convention in the above-cited conviction is obvious.

189. The same court sentenced Mirko Kozlina to 10-year-imprisonment for genocide for the following acts:

> "In spring 1992, after he had moved into the house of Dragica Culjak... and seized all her property... he expelled Dragica Culjak from her house

[128] The Basic Criminal Code of the Republic of Croatia adopted in April 1993, Article 119.
[129] OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2004, 26 April 2005, p. 21, available at http://www.osce.org/documents/html/pdftohtml/14056_en.pdf_s.html.

> threatening her with weapons. On 3 October 1992, the defendant, who was armed... threatened Dragica Culjak and the family of Daniel Toth to seize their tractor and a trailer. After that, went to the vineyard and threatened to throw a hand grenade against them. At an undetermined date in October 1993, ... the defendant threatened the mentioned family with the following words: 'We will slaughter all you Croats and expel you from your houses', ... whilst Dragica Culjak moved out from Ilok and emigrated to Germany." (The Osijek District Court, *Kozlina* case, no. K 50/96-30, Judgment of April 1999).[130]

190. How little useful for the purpose of this case are the factual findings of the Croatian domestic courts is best visible from the Judgment of the Sisak District Court no. K-15/96 dated 26 September 1996 (*Velemir* case), the full translation of which is annexed to this Counter-Memorial.[131]

191. In its 2004 Report on the Croatian Domestic War Crime Trials, the OSCE Mission to Croatia rightly concludes that "[t]he crimes prosecuted as Genocide before Croatian courts were not of the gravity usually associated with verdicts of international tribunals ascribing genocidal intent. A qualification of the 'expulsion cases' as constituting war crimes appears more appropriate."[132]

2. Lack of impartiality and fairness

192. The lack of impartiality and fairness in the prosecution and trials in genocide and war crime cases before the Croatian national courts is well documented. In its 2005 War Crime Trials Report, the OSCE Mission to Croatia observes as follows:

> "Numerical parity in terms of the ethnic origin of defendants is not required. However, the significant disproportion between the numbers of Serbs and Croats charged with war crimes as well as differences observed in charging, including the prosecution of members of the armed

[130] *Ibid.*, footnote no. 98.
[131] See Annex 33.
[132] OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2004, 26 April 2005, p. 22, available at http://www.osce.org/documents/html/pdftohtml/14056_en.pdf_s.html.

> forces for common crimes, support a conclusion that ethnicity continues to play a role in war crime proceedings. As of the end of July 2006, the Mission is aware of a total of 4 final convictions of Croats for war crimes committed against Serbs since 1991, while there are hundreds of convictions against Serbs for crimes against Croats. Lack of accountability, criminal or otherwise, for crimes and attempts to hide war crimes remains a concern, particularly for possible crimes by the armed forces. Prosecutors continue to encounter difficulties in obtaining sufficient evidence and witness testimony to prosecute certain crimes."[133]

193. This concern can also be found in other reports of the OSCE Monitoring Mission to Croatia regarding the war crime trials. Furthermore, in its 2004 report, the OSCE Mission expressed its concern in the credibility of the Croatian local court trials. The report stated:

> "The extent and intensity of witness intimidation observed by courts and the Mission, even when the trial was moved out of the community where the crimes occurred, support a rebuttable presumption that fair and professional war crime proceedings may not be possible in communities heavily affected by the conflict, such as the Gospic County Court. It appears *prima facie* unlikely that witnesses who live in such small communities testify in those same communities without exposing themselves to outside pressure. Similarly, it seems also likely that prosecutors and judges living in the community might equally be exposed to pressure. This observation warrants consideration of whether some local courts are really capable of conducting credible war crime proceedings, including in several cases in which cases have been up and down to the Supreme Court multiple times."[134]

[133] OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2005, 13 September 2006, p. 29, available at http://www.osce.org/documents/mc/2006/09/20668_en.pdf (Annex 32); also see the Federal Court of Australia, *Snedden case*, Appeal Judgment of 2 September 2009 (Annex 34).
[134] OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2004, 26 April 2005, p. 41, point. 4; available at http://www.osce.org/documents/html/pdftohtml/14056_en.pdf_s.html.

194. The same report added: "Trial court findings that are contrary to the evidence, while procedural mistakes, can also indicate lack of impartiality."[135]

195. The double standard of some Croatian judges regarding the treatment of defendants depending on their national origin will be demonstrated by the following examples. In the statement of reasons in the verdict against Svetozar Karan, a Serb, the Gospić District Court found that the defendant "in the last eighty years, together with his ancestor, was a burden" to the Croatian people and that the case involved the return of criminals [i.e. *witnesses*] to the Republic of Croatia "who performed genocide against Croats, not only during the war ... but for more than 500 years, since the arrival of Turks, when they came together with the Turks and destroyed Croats."[136]

196. On the other side, in the *Lora camp* case before the Split District Court, involving 8 Croats, the president of the panel of judges on more than one occasion shook the hands of the defendants when they entered the courtroom. The judge suggested to a witness who was unable to express clearly what he had witnessed that he should testify that he did not remember rather than giving confusing answers. Furthermore, the judge expressed his opinion that the Serb witnesses must travel to Croatia and rejected their concerns related to personal security although they reported that they had received threats.[137]

197. Paradoxically, the Croatian Ministry of Justice, in its submission to the ICTY, bluntly confirms that ethnic differences in the criminal proceedings are "readily understandable" given the "open wounds of the war".[138]

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[135] *Ibid.,* p. 42, point 5.
[136] *Ibid.,* p. 41, footnote 175.
[137] OSCE Mission to Croatia, Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring, 22 June 2004, p. 13, point 3, available at http://www.osce.org/documents/html/pdftohtml/3165_en.pdf_s.html.
[138] ICTY, *Ademi & Norac*, IT-04-78, Submission of the Republic of Croatia to the Court's Order for Further Information on Certain Jurisprudential Aspects of the Croatian Law in the Context of the Prosecutor's Request under Rule 11*bis*, February 2005, pp. 4-5; quotation from OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2004, 26 April 2005, p. 40 & footnote 174, available at http://www.osce.org/documents/html/pdftohtml/14056_en.pdf_s.html.

198. A lack of some procedural requirements also contributes to the conclusion that the trials against Serbs before the Croatian domestic courts have not been conducted in a fair manner. Thus, the OSCE Mission to Croatia 2005 Report observes:

> "Linked to the *in absentia* cases against Serb defendants is the practice of courts appointing one defense counsel to represent multiple defendants, up to 5 or 10, in the same case. Common sense indicates that the quality of representation provided to any one defendant is compromised by these additional and conflicting responsibilities, casting doubt on the validity of any convictions that might result. Since the defendants are not present they cannot waive these conflicts of interest. A number of cases on appeal at the Supreme Court indicate that this practice has been used by several courts over a period of years."[139]

199. For all above-mentioned reasons, the Respondent submits that the factual findings of the judgments in the proceedings before the Croatia's domestic courts cannot be admissible in the present case.

E. *The Concealed Military and Police Documents of the Applicant State*

200. In the ICTY case *Prosecutor v. Gotovina et al*., the Office of the Prosecutor requested the Croatian Government to produce the artillery diaries of the Croatian military units in the operation *Storm* (the so-called "Artillery Document Request"), as well as the special police documents applied in the same operation ("Request for Assistance no. 739"). These requests, dated 15 May 2007 and 27 June 2007 respectively, have never been substantially fulfilled.

201. In his address to the United Nations Security Council made on 12 December 2008, the ICTY Prosecutor Mr. Serge Brammertz pointed out that his Office

> "continue[s] to seek access to key documents and archives in the Gotovina case. Over the past year and a half, these specific documents have been at

[139] OSCE Mission to Croatia, Background Report: Domestic War Crime Trials 2005, 13 September 2006, p. 29, available at http://www.osce.org/documents/mc/2006/09/20668_en.pdf. Also, in another Background Report dated 3 August 2007, the OSCE Mission to Croatia stated: "The appointment of counsel, while necessary, does not by itself fulfill the State's obligation to provide indigent defendants with representation. Because that representation must be effective, it is relevant to assess the method and standards for appointment, the performance of court-appointed attorneys, and supervision by the appointing courts. Most war crimes defendants represented by court-appointed counsel are tried *in absentia* and are Serbs" (p. 40).

> the centre of discussions with Croatian authorities. After several failed attempts to obtain these documents, at the request of the prosecution, the Trial Chamber ordered Croatia to provide a detailed report specifying the efforts undertaken to obtain the requested documents."[140]

202. In its report to the ICTY dated 14 July 2008, the Croatian Government submitted that some of the documents referred to in the Artillery Document Request "may not or no longer exist due to the conditions prevailing at the time of Operation Storm."[141] However, the ICTY Prosecution took the position that the requested documents existed and that the Croatian authorities were unwilling to supply them and were concealing them. The ICTY Prosecution also stated that the Croatian authorities had not properly investigated their whereabouts.[142]

203. Although observed "various shortcomings in the investigations carried out by Croatia", the ICTY Trial Chamber I decided to give the Croatian Government an opportunity to further investigate the whereabouts of the requested documents, and ordered Croatia "to intensify and broaden its investigation and to provide the Prosecution with all requested documents that it may find during the investigation."[143]

204. Nevertheless, the ICTY Sixteenth annual report dated 31 July 2009 concludes that

> "since 2007, Croatia has continuously failed to hand over key military documents related to Operation Storm. Moreover, progress was limited in the investigation which the Court ordered Croatia to conduct into the missing documents. The Office of the Prosecutor raised with Croatia concerns about the focus, manner, and methodology of the investigation conducted. The matter remains pending before the Chamber."[144]

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[140] Available at http://157.150.195.168/sid/10029.
[141] ICTY, *Gotovina et al.,* IT-06-90-T*,* Order in relation to the Prosecution's Application for an Order pursuant to Rule 54 *bis*, 16 September 2008, para. 7.
[142] *Ibid.*, para. 6.
[143] *Ibid.*, paras. 14, 16 & 17.
[144] Sixteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 31 July 2009, UN Doc. A/64/205 – S/2009/394, para. 65.

205. Whereas the above-mentioned documents have been requested in the case against General Gotovina and other Croatian military and police leaders of the operation *Storm*, it is not difficult to conclude that the critical documents are also relevant to the counter-claims of the Respondent in this case. For that reason, the Respondent reserves its right to rely upon the artillery diaries of the Croatian military units and the special police documents in the operation *Storm,* once they are public and available in the proceedings before the ICTY. Otherwise, if the Applicant decides not to produce the above-mentioned documents to the ICTY or to produce them under the conditions of confidentiality, the Respondent reserves its right to request the Court, in accordance with Article 49 of the Statute of the Court, to call upon the Agent of the Applicant to produce them in this case.

PART II

CHAPTER IV

APPLICABILITY OF THE OBLIGATIONS UNDER THE GENOCIDE CONVENTION BETWEEN CROATIA AND THE FRY/SERBIA PRIOR TO 27 APRIL 1992 AND PRIOR TO 8 OCTOBER 1991, RESPECTIVELY

1. Introduction

206. To a considerable extent, Croatia's claims put forward in its Memorial draw on acts and omissions that took place before 27 April 1992, some even going back to before 8 October 1991. Serbia submits that these acts and omissions, whatever their legal qualification, cannot be used to establish Serbia's responsibility for breaches of the Genocide Convention and that the Court cannot exercise jurisdiction under Article IX of the Genocide Convention in that regard. To support its claim, Serbia relies on two arguments:

(i) The essence of Serbia's main argument can be put in simple and straightforward terms: Acts and omissions that took place before 27 April 1992 cannot entail the responsibility of Serbia because Serbia only came into existence on 27 April 1992 and was not bound by the Genocide Convention at any time before that date;

(ii) In the alternative, Serbia submits that in any event, acts and omissions preceding 8 October 1991 cannot be used to establish Serbia's responsibility for breaches of the Genocide Convention, as Croatia itself only came into existence – and became bound by the Genocide Convention – on 8 October 1991. Serbia submits that Croatia cannot raise claims based on facts preceding its coming into existence.

207. These two arguments will each be dealt with in turn. In presenting them, Serbia draws on fundamental principles governing State succession, international legal personality, the law of treaties and the jurisdiction of this Court. It does so on the basis of the Court's jurisprudence which, after decades of uncertainty, has clarified complex issues of statehood relating to the dissolution of the former Socialist Federal Republic of Yugoslavia.

208. In presenting these considerations, Serbia is mindful of the fact that the present proceedings concern only a very limited part of the many legal issues arising from the break-up of the SFRY. As the title of the case, carefully chosen by the Court, makes clear, the present case is about a specific set of obligations applicable between two specific subjects of international law; it concerns two States that only came into existence in late 1991 and the late spring of 1992 respectively, and concerns alleged breaches of one specific treaty, namely the Convention on the Prevention and Punishment of the Crime of Genocide.

209. From these seemingly obvious statements follow two important consequences which must be underlined.

210. *First*, only the obligations of Serbia and of Croatia, respectively, come within the ambit of the Court's jurisdiction. In particular, this is not a case about the conduct of their joint predecessor State, the SFRY.

211. *Second,* the Court's jurisdiction only covers disputes that relate to the interpretation, application or fulfilment of the Genocide Convention. Any finding on responsibility by this Court in the present proceedings therefore must be based on the non-fulfilment of obligations arising under the Genocide Convention. Consequently, and more specifically, this is not a case about compliance with customary obligations governing questions of genocide, even where the treaty-based prohibition and the customary law prohibition of genocide are identical insofar as their content is concerned. The case at hand is thus fundamentally different from the situation the Court was facing in the *Military and Paramilitary Activities* case, where the Court was indeed entitled to find violations of norms of customary law.[145]

212. Serbia submits that in its attempt to broaden the scope of the proceedings before the Court, Croatia has not always respected these restrictions *ratione materiae* and *ratione personae.*

[145] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 93, at para. 174 *et seq*.

2. Acts and Omissions Preceding 27 April 1992 Cannot Entail the Responsibility of Serbia in the Present Proceedings

A. *General Considerations*

213. The main thrust of Serbia's argument that it cannot be held responsible before the Court for acts and omissions preceding 27 April 1992. As is well known, that is the date on which the Federal Republic of Yugoslavia (FRY) came into existence. As the Court stated in its judgment of 18 November 2008, it is also the date on which the FRY succeeded to obligations incumbent upon the former Socialist Federal Republic of Yugoslavia (SFRY) under the Genocide Convention.[146]

214. It will be recalled that during the preliminary objections phase of the present proceedings, Serbia raised an objection *ratione temporis*, arguing that jurisdiction under Article IX of the Genocide Convention did not extend to acts preceding 27 April 1992. In its judgment of 18 November 2008, the Court considered that "the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* [to] constitute two inseparable issues"[147] and it held that Serbia's objection *ratione temporis* "does not possess, in the circumstances of the case, an exclusively preliminary character."[148]

215. At the present stage of the proceedings, the Court is freed from the limitations imposed by Article 79, para. 7 of its Rules, and it is thus in a position to fully assess whether Croatia can indeed rely on "facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention".[149]

216. While Croatia and Serbia disagree on the question just identified, it should be stressed that there is agreement on three crucial issues.

217. *First,* that the FRY/Serbia came into existence on 27 April 1992 and it did not continue the personality of the former SFRY, but is one of several successor States of the SFRY.

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[146] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 117.
[147] *Ibid*., para. 129.
[148] *Ibid*., para. 130.
[149] *Ibid*., para. 129.

218. *Second,* that the FRY/Serbia succeeded to the Genocide Convention, and that its succession was effective from 27 April 1992. As is well known, during the preliminary stage of the present proceedings, Serbia claimed to have acceded to the Convention. It has since taken due note of the Court's finding on this point. In its Judgment of 18 November 2008 on preliminary objections, the Court clarified that the 1992 declaration "must be considered as having had the effects of a declaration of succession to treaties".[150]

219. Following, in the Court's view, "the 1992 declaration and Note [also] had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention."[151]

220. The Court thus concluded that: "*from that date* [i.e. 27 April 1992] *onwards* the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution".[152]

221. *Third,* the former SFRY had been a contracting party to the Convention since 12 January 1951. As a consequence, the SFRY may well have incurred responsibility for breaches of the Genocide Convention. However, the SFRY has ceased to exist. More importantly, for the reasons set out above, its conduct is outside the scope of the present proceedings.

222. In its Memorial and Written Statement, Croatia seems to have gradually accepted that some explanation on the temporal aspect of its claims may be necessary. In an attempt to circumvent the restriction *ratione temporis*, it has essentially invoked two arguments:

(i) Croatia claims that the application of the Genocide Convention is not limited *ratione temporis* – a matter said to be supported by the Court's judgment on the respondent's preliminary objections in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro);*

and further,

(ii) Croatia argues that the Court should apply a principle of attribution pursuant to which "a state in *statu nascendi* is responsible for

[150] *Ibid*., para. 111.
[151] *Ibid*., para. 117.
[152] *Ibid.* (emphasis added).

conduct carried out by its officials and organs or otherwise under its direction and control", largely supported by reference to Article 10, para. 2 of the ILC's Articles on State Responsibility.

223. Serbia submits that neither of these claims is tenable. The following sections set out the grounds for which they must fail. They also very briefly comment on a third potential approach – identified by Judge Tomka, but not pleaded by Croatia – namely that Serbia had succeeded into responsibility engaged by the former SFRY.

B. *The Genocide Convention Does Not Apply Retroactively*

224. In its Memorial and Written Statement, Croatia claims that the Genocide Convention applied between the parties since the beginning of the conflict. It presents this argument in negative terms, arguing that "the application of the Genocide Convention is not limited *ratione temporis*".[153] In the light of the above considerations, it is however clear that in essence, it does not argue against a limitation *ratione temporis*. Instead, its argument presupposes (even if this is not stated expressly) that Serbia should be bound by the Convention with respect to facts that occurred before Serbia existed as a State and before it became bound by the Convention by means of treaty succession. In effect, Croatia's argument – allegedly rejecting a temporal restriction – implies that the Genocide Convention applies retroactively. It attempts to furnish support for this argument by referring to statements found at para. 34 of the Court's 1996 Judgment in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, and by warning against a time-gap in the application of the Convention.[154]

225. Serbia submits that these arguments provide no basis for the claim of retroactivity. To demonstrate why this claim should be rejected, the international legal rules that govern the question of retroactive treaty application will be examined (1.); potential instances of retroactivity will be analysed (2, 3.), especially in the case of new States (4.), and finally, Croatia's arguments based on the alleged "time gap" and the Court's 1996 judgment will be addressed (5, 6.).

[153] Written Statement, para. 3.10.
[154] See Written Statement, para. 3.10 *et seq.*; Memorial, para. 8.37 *et seq*.

1. The Presumption against Retroactivity

226. The question of a possible retroactive application of any given treaty is regulated by Article 28 of the Vienna Convention on the Law of Treaties, which is generally considered to have enshrined customary international law.[155]

227. Article 28 of the Vienna Convention on the Law of Treaties provides:

> ***"Article 28 Non-retroactivity of treaties***
>
> Unless a different intention appears from the treaty or is otherwise established, *its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*."[156]

The French version of the same article provides:

> "**Article 28 Non-Rétroactivité des Traités**
>
> A moins qu'une intention différente ne ressorte du traité ou ne soit par ailleurs établie, les dispositions d'un traité ne lient pas une partie en ce qui concerne un acte ou fait antérieur à la date d'entrée en vigueur de ce traité au regard de cette partie ou une situation qui avait cessé d'exister à cette date."

228. Article 28 provides a general rule of non-retroactivity unless the parties have otherwise provided for in a given treaty. There is thus a presumption of non-retroactivity, retroactivity being the exception.[157] As Sir Gerald Fitzmaurice, then Special Rapporteur on the law of treaties of the International Law Commission stated: "It is clear that only express terms or an absolutely necessary inference can produce such a result. *The presumption must always be against retroactivity*."[158]

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[155] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 386, marginal note 13, with further references as to statements made in that sense during the drafting process.
[156] Emphasis added.
[157] M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 384, marginal note 6; see also e.g. the statement by R. Ago, *Yearbook of the International Law Commission, 1966,* Vol. I, Part Two, p. 43, para. 51.
[158] Sir G. Fitzmaurice, 4th Report on the Law of Treaties, *Yearbook of the International Law Commission, 1959*, Vol. II, p. 74, para. 122 (emphasis added).

229. This was confirmed by the International Law Commission at large in its Commentary on draft Article 24 [which became Article 28] of the Vienna Convention on the Law of Treaties:

> "The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is *clearly* to be implied from its terms."[159]

230. That non-retroactivity is the general rule, is also underscored by the very title of Article 28 of the Vienna Convention on the Law of Treaties: "Non-retroactivity of treaties/ Non-Rétroactivité des Traités".

231. Accordingly, the burden of proof lies with the applicant to demonstrate that the Genocide Convention falls into one of the two exceptions foreseen in Article 28 of the Vienna Convention on the Law of Treaties, *quod non*.

232. As a matter of fact, even before the Vienna Convention on the Law of Treaties had been drafted, the Court had already stated that a treaty may only be applied retroactively in very limited circumstances.

233. In the *Ambatielos* case*,* the United Kingdom had argued that the relevant treaty providing for the Court's jurisdiction had only come into force in July 1926, and that none of its provisions were thus applicable to events which took place, or acts which were committed, before that date. The Hellenic Government in turn attempted to counter this argument by stating that the 1926 Treaty contained provisions similar to provisions of an 1886 Treaty. The Court however rebutted that argument in the following terms:

> "To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted *if there had been any special clause or any special object*

[159] *Ibid.,* p. 211, para. 1.

> *necessitating retroactive interpretation.* There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier."[160]

234. It should be noted that in order to prove a retroactive application of the Genocide Convention, one would have to find, to use the terms of Article 28 of the Vienna Convention on the Law of Treaties either "a different intention appearing from the treaty" or such an intention being "otherwise established". There is no proof of any such intention from the Genocide Convention, and it cannot otherwise be established.

2. No "Different Intention" Evident in the Genocide Convention that Would Provide for its Retroactive Application

235. The Genocide Convention does not contain any specific clause providing for its retroactive application. Rather, it simply provides in its Article XIII, para. 2:

> "The present Convention shall come into force on the *ninetieth day following the date of deposit of the twentieth instrument of ratification or accession*."

236. *Mutatis mutandis* Article XIII, para. 3 provides:

> "Any ratification or accession effected, subsequent to the latter date shall become effective on the *ninetieth day following the deposit of the instrument of ratification or accession*."[161]

237. None of these two provisions even hint at a retroactive application of the Convention. Rather, the Convention is future-oriented in that it was adopted, according to its preamble, "in order to liberate mankind from such an odious scourge [i.e. genocide]", i.e. to secure that no *future* instances of genocide will take place.

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[160] ICJ, *Ambatielos case (jurisdiction), Judgment of July 1st, 1952, I.C.J. Reports 1952*, p. 40.
[161] Emphasis added.

238. Similarly, Article IV of the Convention provides that

> "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

239. Had the drafters, as alleged by Croatia, wanted to provide for a retroactive application of the Convention, they would have instead formulated this provision to read

> "[p]ersons *having committed or* committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

240. The future-oriented character of the Genocide Convention is also brought out by its Article VIII, whereby any Contracting Party may call upon the competent organs of the United Nations to take appropriate action under the Charter of the United Nations in order to prevent or suppress acts of genocide, which clearly only relates to genocidal acts that are about to occur, but does not relate to acts which have already taken place before the Convention entered into force, which may, unfortunately, no longer be either prevented nor suppressed.

241. This approach underlying the Genocide Convention stands in sharp contrast to e.g. Article I of the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity, which specifically provides that no statutory limitation shall apply to the crimes listed in the Convention "irrespective of the date of their commission" and which, unlike the Genocide Convention, thus provides for a retroactive application. Had the drafters of the Genocide Convention similarly wanted to provide for its retroactive application, they could have included a very similar formula – yet, no such clause was included.

242. This is further confirmed by the *travaux préparatoires* of the Convention, which do not contain any indication suggesting that the drafters had wanted to depart from the presumption against retroactivity now codified in Article 28 of the Vienna Convention on the Law of Treaties.

243. Moreover, it is also telling that none of the contracting parties to the Genocide Convention had ever thought it necessary, when becoming a contracting party, to make any form of declaration excluding a possible retroactive application of the Convention.

244. It is therefore not surprising that already the first commentator of the Genocide Convention took a clear-cut position against any form of retroactive application. Thus, already in 1949, Nehemiah Robinson in his authoritative commentary on the Genocide Convention stated: "… it could hardly be contended that the Convention binds the signatories to punish offenders for acts committed previous to its coming into force for the given country. ..."[162]

245. Another leading author on the Genocide Convention, William Schabas, specifically refers to Article 28 of the Vienna Convention on the Law of Treaties by stating:

> "According to article 28 of the Vienna Convention on the Law of Treaties, '(u)nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. … There is nothing in the Genocide Convention to suggest 'a different intention'. Therefore, '(t)he simple fact is that the Genocide Convention is not applicable to acts committed before its effective date'".[163]

246. He then continues: "… the operative clauses of the Convention, including article IX, can only apply to genocide committed subsequent to its entry into force with respect to a given State party."[164]

247. The conclusion that the Genocide Convention does not apply retroactively is not affected by the fact that the prohibition of genocide enshrined in the Genocide Convention has codified customary international law.[165] This is due to the fact that even

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[162] N. Robinson, *The Genocide Convention* (1960), p. 114.
[163] W. A. Schabas, *Genocide in International Law* (2000), p. 541.
[164] *Ibid*.
[165] Cf. e.g. Article 1, pursuant to which "[t]he Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (emphasis added).

if the content of the prohibition of genocide under customary law and in the Convention is identical, it is the Convention that brought fundamental changes as to the enforcement of the prohibition, notably – in the present context – by providing for the Court's jurisdiction under Article IX of the Convention. As demonstrated, this jurisdiction only encompasses violations of the treaty-based prohibition of genocide.

3. There is No "Different Intention" "Otherwise Established" that Would Provide a Basis for the Retroactive Application of the Genocide Convention

248. The Applicant has also attempted to rely on the object and purpose of the Genocide Convention as a purported basis for the retroactive application of the Convention. However, Article 28 of the Vienna Convention on the Law of Treaties requires a higher threshold than this reliance. In particular, where no different intention appears from the treaty, it must be "otherwise established".

249. As the International Law Commission has confirmed, this formula solely encompasses cases where the retroactivity emanates from the very nature of the treaty.[166] It stated:

> "The general phrase 'unless a different intention appears from the treaty or is otherwise established' is used in preference to 'unless the treaty otherwise provides' in order to allow for cases where the *very nature of the treaty* rather than its specific provisions indicates that it is intended to have certain retroactive effects."[167]

250. There are two types of treaties covered by this notion, namely treaties aimed at interpreting a prior treaty, as well as treaties the provisions of which extend to legal situations dating from a time previous to its own existence.[168] The Genocide Convention does not fall into either of these two categories.

251. As a matter of fact, it made perfect sense, in 1948, for the drafters of the Genocide Convention to provide for the *future* prevention and punishment of the crime of genocide

[166] *Yearbook of the International Law Commission, 1966*, Vol. II, p. 212, para. 4.
[167] *Ibid.*, pp. 212-213, para. 4.
[168] K. Odendahl, 'Article 28, marginal note 11', in Dörr/Schmalenbach (eds.), *Commentary on the Vienna Convention on the Law of Treaties* (forthcoming 2010).

so that acts of genocide, like the genocide committed by Nazi Germany, would not reoccur, without at the same time regulating the consequences of acts of genocide predating the entry into force of the Convention for the respective contracting party.

252. Indeed, providing for a retroactive applicability of the Genocide Convention, be it only implicitly, might have also deterred certain countries from becoming contracting parties of the Genocide Convention in the first place. Yet, as the Court has stated: "[t]he Genocide Convention was … intended by the General Assembly and by the contracting parties to be definitely universal in scope."[169]

253. The Court continued:

> "The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis."[170]

254. This is even more so the case since there is no practice of relevant United Nations organs hinting at a retroactive application of the Genocide Convention as a matter of treaty law, the customary nature of its contents notwithstanding.

4. In Any Event the Genocide Convention and Its Article IX Cannot Apply Retroactively to a Period when the Respondent Did Not Even Exist

255. It has already been demonstrated that the Genocide Convention cannot be applied retroactively. In any event the Genocide Convention cannot apply retroactively with regard to a period of time during which the State concerned, i.e. FRY/ Serbia, did not even exist.

[169] ICJ, *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 23.
[170] *Ibid*., p. 24.

256. The Genocide Convention presupposes that at the relevant time, when acts of genocide are being committed, the entity concerned must constitute a State in order for such acts to be able to amount to violations of obligations arising under the treaty for that same entity.

257. This is brought out by Article IV of the Convention which presupposes the existence of a State at the relevant time, given that it refers to "constitutionally responsible rulers", as well as to "public officials", i.e. State organs.

258. This is further confirmed by Article V of the Genocide Convention which, by requiring "legislation" and "penalties", again presupposes the existence of a State at the time of the occurrence of acts of genocide.

259. Similarly, Article VI of the treaty is not open to a retroactive application with regard to a period during which the State concerned did not yet exist. This is due to the fact that there would be no "competent tribunal of the State *in the territory of which the act was committed*"[171] as required by this provision, since at the relevant point in time there simply would have been no such territorial State.

260. Accepting the idea of a retroactive application of the Genocide Convention with respect to acts that occurred before the State concerned came into existence would also blur the issue of possible violations of treaty obligations on the one hand, with the issue of State succession with regard to responsibility, on the other. Following the approach suggested by Croatia, a successor State which did not yet exist at the time that the alleged acts of genocide were committed would be responsible for these acts by virtue of the proposed retroactive application of the Genocide Convention. At the same time, and additionally, the same State could also eventually be held responsible for these acts by virtue of being a successor State to the predecessor State, the organs of which committed the alleged genocidal acts.

261. Finally, Article IX of the Genocide Convention only provides for the Court's jurisdiction with regard to "disputes *between the Contracting Parties* relating to the interpretation, application or fulfilment of the present Convention".[172] However, the Court does not have jurisdiction over a dispute arising out of facts that occurred when

[171] Emphasis added.
[172] Emphasis added.

one of the States was a contracting party, i.e. Croatia, but the other State did not yet exist, i.e. Serbia prior to 27 April 1992. As Judge Tomka has noted:

> "The Court has determined, as the title of both the case under which it was entered in its General List and of the present Judgment indicate, that the case at hand concerns the application of the Convention. In order to fall within the ambit of Article IX of the Convention, the dispute must be about the interpretation or application of the Convention by the *Contracting Parties*[173] to it, and not about the application of the Convention by the predecessor State of the Contracting Party to the Convention (although such predecessor State may have been, and in our case was, party to the Convention), *nor about its application by an entity which was not the State party to the Convention and which only subsequently came into being as a State and became a party to it.*[174] The constituent units of the SFRY were not the Contracting Parties to the Convention, as only the SFRY itself had that status; the acts of its constituent units were considered as the acts of the SFRY."[175]

262. It accordingly follows that "… the responsibility of an entity for acts committed before it became a State — and thus could have become a party to the Genocide Convention — [does not] fall within the jurisdiction of the Court under Article IX of the Genocide Convention."[176]

5. The So-Called "Time-Gap" Argument

263. Croatia also advanced an argument in favour of a retroactive application of the Genocide Convention, even though the respondent was not a State at the relevant time, on the basis that there would otherwise be a hiatus in the protection afforded by the Genocide Convention.[177]

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[173] Emphasis in the original.
[174] Emphasis added.
[175] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, Separate opinion of Judge Tomka, para. 12.
[176] *Ibid*., para. 13.
[177] See CR 2008/10, pp. 34-36, paras. 19-21 (Sands).

264. Serbia has already *in extenso* addressed this argument,[178] and has demonstrated that it is without foundation.

265. *Firstly*, Croatia has not clarified to what end it has advanced the "time-gap argument". In particular it seems that according to Croatia this argument is supposed to *ipso facto* provide for the Court's jurisdiction under Article IX, which would otherwise not exist and thereby serve as an additional way of extending the Court's otherwise non-existing jurisdiction.

266. *Secondly*, Croatia has neither clarified at what exact point in time the Court's jurisdiction arising by virtue of this time-gap argument would start to exist, nor has it specified the facts that purportedly trigger the Court's jurisdiction.

267. Moreover and *thirdly*, given that the substantive rules prohibiting genocide also form part of customary law and even *jus cogens,* the commission of any of the acts identified in Articles II and III of the Genocide Convention constitutes a violation of customary international law and, as such, may give rise to State responsibility or individual criminal responsibility regardless of the application or non-application of the Genocide Convention as such, and regardless of whether Article IX, providing for the Court's jurisdiction applies. Therefore there simply does not exist any time gap regarding the prohibition of genocide, or regarding responsibility for genocide.

268. Besides, even with regard to the *treaty-based prohibition of genocide* there was never a time-gap. As noted by Judge Tomka:

> "There is no doubt that the Genocide Convention was binding on the SFRY since 12 January 1951, when it entered into force in accordance with Article XIII, until its dissolution and thus was applicable in respect of its entire territory …. *There was not a single day during the armed conflict which broke out in 1991 in the territory of the SFRY and ravaged until 1995 when the Convention would not have been applicable in that territory. This is so because, so long as the SFRY continued to exist, it*

[178] See *inter alia* CR 2008/9, pp. 21–22, paras. 43–49 (Zimmermann) and CR 2008/12, pp. 48–49, paras. 81–90 (Zimmermann).

remained party to the Genocide Convention and thus bound by its provisions. As its constituent republics gradually seceded from the Federation and declared independence, they became parties to the Convention on the basis of succession with effect from the date when these republics assumed responsibility for their international relations … In the present case, the Court determined that the FRY (Serbia and Montenegro) became party to the Genocide Convention by succession, ascribing to the declaration of 27 April 1992 and the Note of the same date 'the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention' (Judgment, para. 117).

Consequently, there was no hiatus or gap in the protection afforded by the Genocide Convention during the conflict, a concern expressed by counsel for Croatia … when addressing the arguments of Serbia regarding the temporal application of the Convention. …

The Convention was applicable at every moment during the prolonged armed conflict in the territory of the former SFRY, but it was to be applied by different States at different periods as the SFRY had been in the process of dissolution and its successor States, on different dates, gradually acquired international legal personality and the status of parties to the Convention from the very moment of their existence as sovereign States."[179]

269. Finally, and *fourthly*, the Croatian time-gap argument consequently only pertains to the question of the Court's jurisdiction provided for in Article IX of the Genocide Convention and an alleged gap in the Court's ability to exercise its jurisdiction arising there under. However, not only has a significant number of States attached reservations to Article IX of the Genocide Convention, but the Court itself has, on frequent occasions, upheld reservations pertaining to Article IX of the Genocide Convention, including in cases brought by the Respondent itself.[180] The Court has thereby accepted the existence of

[179] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008*,* Separate opinion of Judge Tomka, para. 10 (references omitted; emphasis added).

[180] See the two Orders of 2 July 1999 in the *Legality of Use of Force* cases between Yugoslavia and Spain, *ICJ Reports 1999*, p. 761 and between Yugoslavia and the United States, *ICJ Reports 1999*, p. 916, or more recently in the Congo v. Rwanda Judgment (*Armed Activities on the Territory of the Congo (New Application: 2002)*

temporally unlimited time-gaps with regard to the dispute settlement mechanism envisaged in Article IX of the Genocide Convention. In contrast, the alleged time-gap in the case at hand would only cover a limited period having ended on 27 April 1992.

6. The Meaning of Paragraph 34 of the 1996 Judgment in the Bosnia Case

270. Croatia had also argued during the preliminary objections phase of this case that the reasoning underlying para. 34 of the 1996 judgment of the Court in the *Bosnia* case[181] should also apply in the present case and for that reason it has invited the Court to dismiss the Serbian objection relating to the Court's jurisdiction *ratione temporis* with regard to acts predating 27 April 1992.

271. Serbia has already addressed that argument both in the written and the oral part of the preliminary objections phase of this case. In particular, Serbia argued that the only question before the Court in the *Bosnia* case (and the only question which the Court accordingly addressed and decided in 1996) was whether the notification of succession emanating from Bosnia and Herzegovina had the effect of making Bosnia and Herzegovina a party by the time of its independence.

272. As a matter of fact, in 1996, the question whether the jurisdiction of the Court vis-à-vis Serbia could extend to alleged genocidal acts which occurred prior to April 27, 1992, i.e. before Serbia became a State and contracting party to the Genocide Convention, was neither raised, nor was it even discussed, nor could it in any event be binding on the Parties in this case by virtue of Article 59 of the Court's Statute.

273. This position was clearly upheld by the Court, thus rendering Croatia's argument on the basis of para. 34 of the 1996 judgment in the *Bosnia* case moot. The Court stated in its judgment on jurisdiction in the present case:

> "The Court observes however that the temporal questions to be resolved in the present case are not the same as those dealt with by the Court in 1996. At that time, the Court had merely to determine, first whether, at

(Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 3 February 2006, General List No. 126, paras. 28-70).

[181] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 617, para. 34.

> the date that the proceedings in the case were instituted, the Genocide Convention had become applicable between the FRY and Bosnia and Herzegovina, and secondly whether in the exercise of its jurisdiction it was limited to dealing only with events subsequent to the date or dates on which the Convention might thus have become applicable. *That date was, or those dates were, in any event subsequent to the moment at which the FRY had come into existence and had thus become capable of being itself a party to the Convention. Therefore the finding of the Court* that it had jurisdiction "with regard to the relevant facts which have occurred since the beginning of the conflict" (that is to say not merely facts subsequent to the date when the Convention became applicable between the parties) *was not addressed to the question whether these included facts occurring prior to the coming into existence of the FRY. In the present case, the Court therefore cannot draw from that judgment (which, as already noted, does not have the authority of* res judicata *in the present proceedings) any definitive conclusion as to the temporal scope of the jurisdiction it has under the Convention.*"[182]

7. Interim Conclusions

274. The above considerations suggest that statements made in the Court's 1996 judgment in the *Bosnia* case by no means support Croatia's claim of retroactivity. Serbia submits that when approaching that questions afresh, Croatia's claim is flawed for a range of reasons. By presenting its claim of retroactivity (let alone the retroactive application of a treaty to a time preceding statehood) as an argument about temporal restrictions, Croatia seems to suggest that Serbia has to prove such limitations. In reality, as submitted, Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary international law, establishes a strong presumption *against* the retroactive application of treaties. There is no indication that the Genocide Convention should constitute an exception to the well-established rule. Quite to the contrary, its text, context and object, as well as its drafting history, are fully in line with the presumption against retroactivity.

[182] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 123 (emphasis added).

275. This in turn means that, insofar as Croatia's claims are based on facts preceding 27 April 1992, they relate to a period of time during which Serbia was neither in existence, nor bound by the one treaty on which a finding of responsibility can be based in the present proceedings, namely the Genocide Convention.

C. *Responsibility for Breaches of the Genocide Convention preceding 27 April 1992 Cannot be Transferred to Serbia*

1. General Considerations

276. Croatia relies on another argument in order to bring events preceding Serbia's emergence as a State on 27 April 1992 before the Court. In its Memorial, as well as during the oral proceedings before the Court, it has asserted a principle pursuant to which "a state in *statu nascendi* is responsible for conduct carried out by its officials and organs or otherwise under its direction and control".[183]

277. To support the existence of such an alleged principle, Croatia places considerable emphasis on Article 10, para. 2 of the ILC's Articles on State Responsibility, which provides:

> *"Article 10. Conduct of an insurrectional or other movement*
>
> …
>
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."[184]

278. Before addressing these claims, it is important to note what Croatia does *not* say. Neither in its Memorial nor its Written Statement does it suggest that Serbia had succeeded to the international responsibility that was incurred prior to its coming into existence as a State. This is telling because – as Judge Tomka observed in his separate opinion appended to the judgment of 18 November 2008 – the mechanism of State succession might have been a possible argument of attempting to attribute responsibility to a State that came into being by way of succession.

[183] Memorial, para. 8.42.
[184] Annex to General Assembly resolution 56/83, 12 December 2001.

279. Besides, questions of responsibility transferred upon the FRY/Serbia by way of succession would not have been a proper subject of litigation before the Court in the present proceedings. As noted above, the subject-matter of the present proceedings is defined by Article IX of the Genocide Convention. They concern questions "relating to the interpretation, application or fulfilment of the present Convention", but do not extend to questions of succession to responsibility incurred by another State.

280. This point was made with particular clarity by Judge Tomka in his separate opinion appended to the Court's judgment of 18 November. Having raised the possibility of succession into responsibility, Judge Tomka stated that in any event, "clearly", the problem of "succession into responsibility of the predecessor State [does not] fall within the jurisdiction of the Court under Article IX of the Genocide Convention."[185]

281. It is in light of these preliminary considerations, that it is now possible to address the second argument advanced by Croatia in which it asserts facts before the Court that predate 27 April 1992 – namely the claim that Serbia, even prior to 27 April 1992, was a State in *statu nascendi* and as such responsible for conduct carried out by its officials and organs or otherwise under its direction and control.

2. Serbia Cannot Be Held Responsible for Conduct of Organs of the Former SFRY

282. Undoubtedly aware of the substantive and procedural weaknesses of a claim based on succession to responsibility, Croatia, in its Memorial and Written Statement, decided to try to circumvent the issue of State succession altogether by invoking a broad principle pursuant to which "responsibility is not limited to acts or omissions occurring only after the formal establishment of a state, but may also extend to conduct prior to that date".[186]

283. In support of this broad principle, it almost exclusively relies on Article 10, para. 2 of the ILC Articles on State Responsibility, which Croatia considers to sustain the general proposition that "[a] State can be responsible for conduct committed by persons acting on its behalf *prior to the formal date on which it is established or proclaimed*".[187]

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[185] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, Separate opinion of Judge Tomka, para. 13.
[186] Written Statement, para. 3.18.
[187] CR 2008/11, p. 13, para. 19 (Crawford) (emphasis added).

284. This formulation is revealing in its attempt to downplay as a "formality" the key fact of a State's coming into existence. More specifically, Croatia's argument is flawed in four respects:

(i) *First*, it postulates a principle of attribution that does not represent customary international law;

(ii) *Second*, it relies on Article 10, para. 2 of the ILC Articles on State Responsibility even though the requirements of that provision are plainly not met in the case at hand;

(iii) *Third*, it takes Article 10, para. 2 of the ILC Articles on State Responsibility out of its context and grossly over-estimates its real role as a rule of attribution,

and finally,

(iv) *Fourth*, it misinterprets Article 10, para. 2, which does not apply to situations in which a predecessor State is responsible for the alleged acts.

(a) The Rule Contained in Article 10, para. 2 ILC Articles on State Responsibility Does Not Reflect Customary International Law

285. It is well-known that, in accordance with Article 38, paragraph 1, of the Statute, the Court shall apply international conventions, international custom, and the general principles of law "recognized by civilized nations", as well as judicial decisions and teachings of the most qualified jurists as subsidiary means for the determination of rules of law.

286. Clearly, Article 10, paragraph 2, of the ILC Articles on State Responsibility is not a treaty rule, and is not applicable in the present case on that basis. The question is whether this provision reflects international custom, "as evidence of a general practice accepted as law" that existed at the time relevant for the present case, i.e. during the period 1991-1992. In Serbia's submission, it does not.

287. While the Court has never pronounced on the legal status of the rule contained in Article 10, para. 2 of the ILC Articles on State Responsibility, it mentioned this provision in the preliminary objections phase of the present proceedings when discussing whether the Respondent's second preliminary objection was of an exclusively preliminary nature. Its discussion commenced with the following words: "*In so far as* Article 10, paragraph 2, of the ILC Draft Articles on State Responsibility reflects customary international law on the subject ..."[188]

288. As will be seen from the following discussion, the Court's cautious choice of words is telling and, this caution was justified.

289. The principle now contained in Article 10, para.2, of the ILC Articles on States Responsibility first appeared in 1972 in the Fourth Report on State Responsibility by Special Rapporteur Robert Ago.[189] Previous drafts only dealt with the situation now covered by Article 10, para. 1, that deals with responsibility of a State for acts of a successful insurrectional movement establishing a new government of that State.

290. However, while eloquently arguing why the provision on the responsibility of a new State for acts of the insurrectional movement that brought it into existence is desirable, this report provided only one single instance of State practice that directly dealt with the responsibility of a new State for the conduct of the insurrectional movement establishing it. This was an opinion given by the Law Officers of the British Crown during the American Civil War, on 16 October 1863. It dealt with a hypothetical situation in which the confederate insurgents would succeed, and stated that compensation for the losses inflicted to British subjects by the insurgents during the war could be claimed if the Confederate States were *de jure* and *de facto* established.[190] In contrast, other practice cited in the 1972 report dealt with the situation of insurgents that became a new government of an already existing State.[191]

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[188] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008*,* General List No. 118, para. 127 (emphasis added).
[189] *Yearbook of the International Law Commission, 1972*, Vol. II, para. 214. Compare *Yearbook of the International Law Commissio*n, 1961, Vol. II, p. 53.
[190] See *Yearbook of the International Law Commission, 1972*, Vol. II, para. 204, note 467.
[191] *Ibid.*, paras. 200-209.

291. Subsequent reports and, finally, the 2001 ILC commentaries on the Articles on State Responsibility do not add any new evidence of relevant State practice and *opinio juris* supporting the principle that was to become Article 10, paragraph 2.[192]

292. According to a recent article dealing with this issue: "[t]he principle [contained in Article 10(2)] seems to be more a doctrinal construction than one based on actual state practice."[193] Based on his own research, the author concludes that State practice in support of the principle "ultimately consists of one *obiter dictum* by an internal United States compensation commission and one sentence taken from a legal opinion discussing the likely consequences arising from uncertain future events."[194] He also mentions several French municipal decisions that accepted that Algeria could in principle be held responsible for acts of the FLN, but they have "limited concrete implications" as Algeria was not a party to any of these proceedings.[195]

293. The foregoing discussion shows that the rule contained in Article 10, para. 2, of the ILC Articles on State Responsibility is not supported by State practice, which is almost non-existent. Nor is there evidence of States' *opinio juris* in this regard. It is therefore submitted that said rule does not reflect international custom. Also, there is no evidence that this rule is a general principle of law. Accordingly, it cannot be applied by the Court in the resolution of the present dispute. Finally, it should be emphasized that, as a matter of principle, the onus is on Croatia to demonstrate that the rule contained in Article 10, para.2, reflects an international custom binding on the Respondent.[196]

(b) The Rule Contained in Article 10, para. 2 of the ILC Articles on State Responsibility Cannot be Applied Considering Its Own Terms and the Circumstances of the Present Case

294. Supposing *arguendo* that the rule contained in Article 10, para. 2, of the ILC Articles on State Responsibility could be applied as a legal rule in the settlement of the dispute before the Court, the following analysis will show that the present case simply does not fit the terms of this provision.

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[192] See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, pp. 50–52.
[193] Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement', 17 *EJIL* (2006), p. 612.
[194] *Ibid.*, p. 620.
[195] *Ibid.*
[196] See ICJ, *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: ICJ Reports 1950*, p. 276.

295. According to Article 10, para. 2,

> "[t]he conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

296. It follows that there are three essential elements of this rule:

a) the conduct in question has to be the conduct of a movement striving to establish a new State on part of the territory of a pre-existing State or in a territory under its administration;
b) this movement has to be an insurrectional or "other" movement;
c) this movement has to be successful.

297. All three elements are necessary preconditions to the application of the norm formulated in Article 10, para. 2. The conduct of an insurrectional movement can only be ascribed to the new State if the situation matches *all* the elements of the scenario, specified in Article 10, para. 2. The following will demonstrate, however, that *none* of the essential elements described in Article 10, para. 2 are present in the circumstances of the case at hand.

i) There was no "movement" aiming to establish the FRY as a new State

298. In the application of Article 10, para. 2, one must first demonstrate that a movement aiming to establish the FRY as a new State existed. No such movement has, however, been identified, or could have been identified.

299. The Applicant is unclear when describing the "movement" the conduct of which it claims should be attributed to the Respondent, and references in this respect are elusive and unspecified. An attempt to describe the "movement" in question was made in the Written Statement:

> "There can be no doubt that the Serbian nationalist movement that ultimately succeeded in establishing the FRY (Serbia and Montenegro) as a new State can be regarded as falling within the scope of an 'insurrectional or other' movement for the purposes of Article 10, paragraph 2 of the ILC Articles."[197]

[197] Written Statement, para. 3.33.

300. However, there was no movement or structure during the conflict called the "Serbian nationalist movement". Nor does the Applicant define such a movement. The simple reason for this is that no definition can be given which would support the claim of the Applicant. There was no movement which aimed at, and succeeded in, establishing the FRY.

301. Moreover, even if such a movement existed, it would need to be, in the words of the ILC, a movement in "continuing struggle with the constituted authority".[198] This is, however, not the case.

302. The Applicant states that "[t]he Serbian nationalist movement led by President Milošević took control of several of the most significant political and military organs of the former SFRY, including most importantly the JNA."[199] This means that, even according to the Applicant's own account of events, the "movement" in question was in fact in control of the established authority (i.e. the SFRY) rather than in a struggle with it, and in control of the JNA rather than challenging it. What is described by the Applicant is clearly not a movement within the meaning of Article 10, para. 2.

ii) No insurrectional or other movement outside the established State structure

303. Even if the Applicant were able to prove that there was a movement struggling to establish the FRY as a new State, the second element required for the application of Article 10, para. 2 would still be missing. It is submitted that an essential characteristic of the movements that fall within the scope of Article 10, para. 2 is that they exist and operate *outside* and *against* the established structure of the State on whose territory they seek to establish a new State. This is clear from the ILC Commentary:

> "As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include 'insurrectional or other' movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new

[198] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 50. para 2.
[199] Written Statement, para. 3.43.

State. *The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State.*"[200]

304. Therefore, groups of citizens that act within the framework of the predecessor State (in the present case, the SFRY) are not covered by Article 10, para. 2, despite the fact that their actions in the end may result in the formation of a new State on the territory of that predecessor State. Furthermore, the fact that the ILC used the terms "insurrectional or other *revolutionary* movement"[201] in its commentary to characterize the movements falling under Article 10, para. 2, also reflects the idea that these movements must necessarily act outside the framework of the predecessor State. The ILC Commentary also makes it clear that, for the purposes of Article 10, the relevant conduct of insurrectional or other movements is "committed during the *continuing struggle with the constituted authority.*"[202]

305. Clearly, there was no movement that acted outside the framework of the predecessor State (i.e. the SFRY) that resulted in the creation of the FRY. While the Applicant claims that such movement existed and acted through the JNA, i.e. the SFRY army,[203] it is obvious that this army was an organ of the SFRY and acted in that capacity during the relevant period To use the terminology of the ILC commentary, the SFRY army, as well as other federal organs involved in the conflict, acted "within the framework of the predecessor State". The conduct of the SFRY army obviously could not be regarded as, to use the ILC phrase, "the continuing struggle with the constituted authority." Whatever one may think about the JNA and its actions and policies, especially at the time of the dissolution of the SFRY, one thing seems clear: it was neither an insurrectional nor revolutionary force. The JNA was the "constituted authority itself" and not a part of the movement struggling with it, being outside the framework of the predecessor State. In this regard, the present case is clearly distinguishable from the situation of Eritrea invoked by the Applicant, where the Eritrean authorities were outside the established structure of the predecessor State and acted as a *de facto* State before declaring independence.[204]

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[200] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 51, para. 10 (emphasis added).
[201] *Ibid.*, p. 51, para. 8 (emphasis added).
[202] *Ibid.*, p. 51, para. 2 (emphasis added)
[203] Written Statement, para. 3.33.
[204] See CR 2008/11, p. 14 (Prof. Crawford), quoting Eritrea/Ethiopia Claims Commission, Partial Award, *Civilian Claims (Eritrea's Claims 15, 16, 23 & 27-32*), 17 Dec. 2004, 44 *ILM* 601, pp. 610–611.

306. In conclusion, the JNA, and other federal organs *a fortiori*, could not be regarded as a part of "a movement, insurrectional or other" under the terms of Article 10, para. 2, of the ILC Articles on State Responsibility.

307. Thus, it is plainly absurd to propose, as the Applicant does, that the organs, including the army, of the *pre-existing State* (the SFRY) committed acts under the control of a "Serbian nationalist movement", and, at the same time, to posit that this "Serbian nationalist movement" is an insurrectional, a revolutionary or like movement challenging the same pre-existing State.

iii) Lack of success

308. Another indispensable requirement for the operation of Article 10, para. 2, is success. This element, however, is also missing in the circumstances of the present case.

309. In its Memorial, the Applicant first concedes that "the maintenance of the SFRY … was synonymous with the promotion of Serbian interests."[205] It adds, however, that after the withdrawal of the JNA from Slovenia, the Serbian leadership "[t]ook steps to establish the borders of a new Yugoslavia according to the plan for 'Greater Serbia'".[206] There are numerous references in the Applicant's submissions to a "Greater Serbia" as the actual aim of the Serbian nationalist movement (or "of the Serbian leadership", or "of President Milošević", or "of the JNA").[207] In one of its conclusions, the Applicant stresses: "By October 1991 the JNA was acting as an army to promote the establishment of a 'Greater Serbia' controlled by the Serbian leadership."[208]

310. Even if this hypothesis advanced by the Applicant were correct, *quod non*, the requirement of success remains unfulfilled. No "Greater Serbia" came into being and no part of Croatia, Bosnia and Herzegovina, or Macedonia became part of Serbia.

311. The Applicant must be aware of this obvious fact and for this reason it has suggested that "the Serbian nationalist movement ultimately succeeded in establishing the

[205] Memorial, para. 3.03.
[206] *Ibid.*
[207] E.g. Memorial, paras. 2.04, 2.09, 2.44, 2.65, 2.77, 2.78, 2.86, 3.02, 3.03, 3.42, 3.80.
[208] Memorial, para. 3.42.

FRY".[209] However, this "success" does not correspond to any stated or hidden aim or purpose. Indeed, there was no need to have an "insurrection or other movement" in order to establish the FRY as a State, since no one opposed this.

iv) The SFRY existed as a subject of international law in 1991 and early 1992 and no continuity between its organs and those of the FRY can be assumed

312. As the Respondent has already demonstrated at the preliminary objections stage of the proceedings, despite the grave political crisis and armed conflicts on its territory, the SFRY was perceived and recognized as a subject of international law at least until the end of 1991, and even in early 1992. This is evidenced by the fact that the SFRY concluded bilateral and multilateral treaties, attended international conferences and meetings, and also maintained diplomatic relations with other States in late 1991 and early 1992.[210] Thus, the SFRY continued to be recognized as a State with an effective government until much later than mid-1991 as the Applicant claims.[211] This means that acts of the SFRY organs during 1991, and in early 1992, must be considered as acts of the SFRY, and not acts of the FRY (which did not even exist at the time) or any other entity or movement.

313. It is also not accurate to claim, as the Applicant does, that the SFRY organs, in particular the JNA, somehow became "*de facto* organs of the emerging FRY."[212] If they were to be regarded as "*de facto* organs of the emerging FRY", they would need to be in the position of "complete dependence", according to the well-established standard enunciated by the Court.[213] However, as has been demonstrated by the Respondent in the proceedings concerning preliminary objections, as well as in the present Counter-Memorial,[214] the federal organs of the SFRY, as well as their chief officers, were not exclusively Serbian or Serb-dominated, but included individuals from other republics of the SFRY. Some key posts, such as the president of the collective head of State, the prime minister, the minister for foreign affairs and the minister of defence were held by

[209] Written Statement, para. 3.33.
[210] See Annex 23 and Annex 24.
[211] See, e.g. Written Statement, para. 3.33.
[212] *Ibid.*
[213] See ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, 26 February 2007, General List No. 91, p. 141, para. 393; see also, *infra* Chapter V, para. 511.
[214] See Annex 30.

persons whose territorial or ethnic origin was in Croatia.[215] As the Respondent already noted, it is hard to perceive these individuals as acting as *de facto* organs of the emerging FRY and, as the record shows, they certainly did not act in such a way.

314. Although some of these officers may have been in political alliance with the Serbian and Montenegrin leadership at the time, it does not follow that they were under the latter's control. Moreover, it is one thing to speak of a political alliance, and quite another to prove the existence of a structured movement with a specified purpose that is required for the application of Article 10, para. 2 of the ILC Articles on State Responsibility. This is the burden the Applicant fails to carry.

315. Further, as already demonstrated, no identity or "*de facto* continuity" between the SFRY and the FRY[216] can be assumed. In this regard, it is important to note that the Federal Presidency, the Government and the SFRY army did function at least in 1991 and early 1992 and were during the course of 1991 also headed by individuals who came from Croatia.[217] Moreover, the record shows that these individuals were not "nominally in positions of authority" and "stripped of all effective power" by the middle of 1991 as the Applicant claims.[218] For example, both the Federal Prime Minister and the President of the Federal Presidency exercised their functions as federal organs much later than the middle of 1991, as is clear from the record.[219]

316. As already demonstrated during the preliminary objections stage of the proceedings, the evidence presented by the Applicant (a list of "personal continuity: 1991-2001")[220] does not prove personal continuity between office holders in the relevant organs of the SFRY and in the relevant organs of the FRY. In any case, it is contested that such personal continuity could, by itself, serve as evidence of continuity for the purposes of Article 10, para. 2 of the ILC Articles on State Responsibility.

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[215] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, paras. 4.20–4.36.
[216] Written Statement, para. 3.40.
[217] See ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, paras. 4.17–4.36; see, also, *infra* Chapter V, paras. 519–536.
[218] Written Statement, para. 3.48.
[219] See Annexes 26-28.
[220] See Memorial, para. 8.45 & Appendix 8; Written Statement, paras. 3.39–3.40 & 3.45.

v) Interim conclusions

317. It has been demonstrated that Article 10, para. 2, of the ILC Articles on State Responsibility cannot be applied by the Court in the resolution of the present dispute because there is no evidence that it reflects international custom or a general principle of law.

318. Moreover, the circumstances of the present case simply do not fit the requirements of the rule as defined in Article 10, para. 2. Not even a very flexible interpretation of Article 10, para. 2, suggested by the Applicant, could bring the present case within the scope of this provision. Simply, not a single element is fitting to the circumstances of the present case. *First*, there was no Serbian nationalist movement aiming to establish the FRY as a new State. *Second*, there was no "struggle with the constituted authority", and, *third*, there was no success. It follows that the present case does not fall within the terms of Article 10, para. 2 of the ILC Articles on State Responsibility.

319. Finally, the SFRY continued to exist as a subject of international law in 1991 and early 1992, and performed governmental functions at that time. Consequently, any possible responsibility arising from its acts and omissions can only be imputed to the SFRY and not to the FRY, which only came into being on 27 April 1992.

(c) The alleged rule contained in Article 10, para. 2 of the ILC Articles on State Responsibility does not affect the scope of primary rules contained in the Genocide Convention

320. Seeking support for a broad principle of "transferred responsibility", Croatia grossly overstates the role of Article 10, para. 2 of the ILC Articles on State Responsibility. In Croatia's argument, it seems that this provision is said to produce three legal effects:

1) *First*, conduct by persons acting on behalf of a state in *statu nascendi* is attributed to a State once that State has come into existence;
2) *Secondly,* responsibility incurred prior to the State's coming into existence is said to be transferred to the new State; and
3) *Thirdly*, this "tranfer of responsibility" allegedly also applies to responsibility for breaches of treaties to which the State in *statu nascendi* was not and indeed could not even have been a party.

> Hence conduct preceding 27 April 1992 (i.e. a time when Serbia did not yet exist and thus *was not* yet and *could not have been* a contracting party of the Genocide Convention) is, Croatia argues, transformed into a breach of the Genocide Convention for which Serbia is said to be responsible.

321. The argument advanced by Croatia is flawed in a number of respects. Serbia submits that Article 10, para. 2 of the ILC Articles on State Responsibility, even if one were to admit *arguendo* that it represented, as of 1992, customary international law and that it fitted the circumstances of the case at hand, is simply "not capable of carrying the load the Applicants seek to put upon it".[221]

322. In particular, Croatia fails to appreciate that, as a secondary rule of attribution, the provision does not and cannot affect the scope of the primary rules, and it cannot therefore turn conduct occurring prior to 27 April 1992 into a breach of the Genocide Convention that only became binding on Serbia on that date by way of succession (i).

323. Even less can the alleged principle provide for a so-called "transfer of responsibility" in the present proceedings which are exclusively concerned with breaches of the Genocide Convention (ii).

i) Article 10, para. 2 of the ILC Articles on State Responsibility as a special rule of attribution

324. The specific function of Article 10, para. 2 of the ILC's text as a special rule on attribution is brought out and confirmed by the provision's placement within the ILC Articles on State Responsibility, as well as in the Commission's explanatory commentary.

325. Article 10, para. 2 forms part of Chapter II of Part One of the ILC Articles on State Responsibility entitled "Attribution of Conduct to a State". Within the framework of the ILC's text, the specific rules on attribution, laid down in Articles 4 - 11 thereof, implement the essential principle set out in Article 2 – namely that State responsibility arises from conduct that "(*a*) is attributable to the State under international law; and (*b*) constitutes a breach of an international obligation."

[221] Cf. ICJ, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 42, para. 72.

326. More particularly, the rules on attribution, including Article 10, para. 2, give concrete meaning to the first of these two separate elements of State responsibility. Rules of attribution therefore serve a crucial, but at the same time, limited purpose. They set out an essential condition for responsibility, but they are only concerned with one of two such essential conditions, the other being wrongfulness. This in effect is what the Commission in rather straightforward terms, states in the introductory commentary to Part One, Chapter II of its text:

> "[A]ttribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct".[222]

327. As the Commission was at pains to stress throughout its work, that second condition – wrongfulness – depended on the *primary rules* of international law: Chapter III of Part One no doubt adds some clarifications, e.g. by exploring the extension in time of a wrongful act and introducing different categories of special breaches (which may be "completed", "continuing" or "composite"). However, as the Commission noted, "chapter III can only play an ancillary role in determining whether there has been such a breach".[223]

328. This was so because "the articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility".[224]

329. Based on this *fundamental* choice, the introductory commentary to chapter III of Part One "stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States."[225]

330. Within the framework of Part One, Chapter II of the ILC Articles on State Responsibility, the specific rule of attribution to be found in Article 10, para. 2, is quite exceptional.

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[222] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, Introductory commentary to Part One, chapter II, p. 39, para. 4.
[223] *Ibid.*, Introductory commentary to chapter III, p. 54, para. 2.
[224] *Ibid.*
[225] *Ibid.*

331. The general principle underlying Chapter II is that conduct cannot be attributed to an entity that did not exist at the time when the conduct occurred. In line with this guiding principle, Articles 4–6, as well as Articles 8-9 of the ILC Articles on State Responsibility envisage attribution of conduct to an *existing* State. Similarly, Article 10, para. 1 of the said Articles deals with the case of a successful insurrection replacing the *government* of the State, but leaving the State's personality intact – again an instance of attribution to a State that existed at the time the conduct occurred.[226]

332. In sharp contrast, Article 10, para. 2, of the ILC Articles on State Responsibility is the only provision in Chapter II that entails the attribution of conduct to a new State that only came into existence *after the conduct occurred*. As noted above, this has led writers to underline the "quite limited"[227] support it enjoys in State practice. Hence the Commission's explanatory commentary observed:

> "Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish."[228]

333. While the scope of Article 10, para. 2 remains controversial in many respects, it is clear what the provision is *not* about. As a secondary rule of attribution, it does not affect the content of primary rules and therefore it cannot be relied upon to determine whether particular conduct "constitutes a breach of an international obligation of [a] State".[229] That determination depends on the interpretation of applicable primary rules of

[226] See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 50, para. 5.
[227] P. Dumberry, *State Succession to International Responsibility* (2007), at p. 239. See further the same author's comment referred to *supra* at footnote 193.
[228] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 50, para. 5. For a similar observation see para. 4 of the ILC's commentary to Article 10 (*ibid.*):
> "The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government."
[229] Article 2(b).

international law. Just as the other rules of attribution set out in Part One, Chapter II of the ILC Articles on State responsibility, Article 10, para. 2, can neither be invoked to justify otherwise wrongful conduct, nor can it serve to extend the scope of primary rules. This point was made with particular clarity in the ILC's commentary to the first reading of the draft articles, where the ILC itself observed:

> "Also, it should be made clear that *the article under consideration* [i.e. then draft article 15] *relates only to the attribution of certain acts to the State*. It in no way seeks to define at the same time the international responsibility which might possibly derive from this attribution or to determine the amount of compensation due."[230]

ii) The particular focus of responsibility issues arising in the current proceedings

334. The present proceedings do not deal with responsibility in general, but rather only within the confines of the limited jurisdiction of the Court. Having exclusively been brought under Article IX of the Genocide Convention, these proceedings are accordingly solely dealing with the application of this very Convention and possible breaches thereof. As the Permanent Court of International Justice had already put it in the *Case Concerning the Factory at Chorzów*, a dispute concerning the "application" of treaty obligations to a State party entails the adjudication of its responsibility for any breach *of that treaty.* The Court stated:

> "Differences relating to the application of Articles 6 to 22 include not only those relating to the question whether the application of a particular [treaty] clause has or has not been correct, but also those bearing upon the *applicability of these articles*, that is to say, upon any acts or omission creating a situation *contrary to the said articles*."[231]

335. Similarly, in the *LaGrand* case, the Court found that it had jurisdiction under the Optional Protocol to the Consular Convention to consider Germany's claims because

[230] *Yearbook of the International Law Commission, 1975*, Vol. II, p. 102, para. 8 of the commentary to then-draft article 15 (emphasis added).
[231] PCIJ,*Case Concerning the Factory at Chorzów (Claim for Indemnity),* Jurisdiction, Judgment, *PCIJ, Series A, No. 9*, p. 20-21 (emphasis added).

Germany's claims did indeed relate to the Vienna Convention on Consular Relations. The Court held:

> "The dispute between the Parties as to whether Article 36, paragraph 1 (a) and (c), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (b) *does relate to the interpretation and application of the Convention*."[232]

336. Similarly, the Court in the present proceedings, just like the Permanent Court in the *Chorzów* case or this Court in the *LaGrand* case, is concerned only with allegations of violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

337. Concerned generally with the secondary rules of responsibility, the ILC could restrict itself to observing that

> "the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act".[233]

338. In contrast, the Court's jurisdiction is based on Article IX of the Genocide Convention and is accordingly limited to issues "relating to the interpretation, application or fulfilment of the present [Genocide] Convention". It cannot turn a blind eye to the "origin or provenance" of the obligations allegedly breached. Its focus can only be on a specific set of obligations, namely those relating to genocide, and concerning breaches of obligations derived from a particular source, namely a specific treaty, i.e. the Genocide Convention.

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[232] ICJ, *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, pp. 482-483, para. 42 (emphasis added).

[233] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 55, para. 4 of the commentary to Article 12.

339. This restriction, inherent in the fact that the Court may only exercise jurisdiction under Article IX of the Genocide Convention, further undermines Croatia's argument based on Article 10, para. 2 of the ILC Articles on State Responsibility. Thus, in order to establish Serbia's responsibility for acts that occurred prior to 27 April 1992, Croatia has to prove that two requirements are met:

(i) the conduct of a "movement" - even if attributable to a new State after the alleged success of the insurrection - must have amounted to a breach of an international obligation; and

(ii) given the jurisdictional ambit of the present proceedings, the movement's conduct must have amounted to a violation of the 1948 Genocide Convention.

340. This latter requirement, however, would necessarily presuppose that the movement in question was bound by the 1948 Convention as a matter of treaty law.

341. For obvious reasons, this second requirement, directly flowing from fundamental principles governing the jurisdiction of this Court, is not fulfilled. As the Court has clarified, Serbia became a party to the Genocide Convention on 27 April 1992 only, by virtue of its Declaration which the Court has held to amount to a declaration of succession. Conversely, Serbia was not a party to the Genocide Convention prior to 27 April 1992.

342. Even if it is assumed, be it only *arguendo*, that Serbia had been prior to 27 April 1992, a State *in statu nascendi,* then that nascent State (or movement) was not, and could not have been, a party to the Genocide Convention, since only States may become contracting parties.

343. This interpretation of Article 10, para. 2 of the ILC Articles on State Responsibility is borne out by the ILC's debates. Since its work on State responsibility, from the 1960s onwards, was meant to cover the field of responsibility in its entirety, the Commission did not have to distinguish, for the purposes of attribution, between the different sources of an obligation. However, the ILC itself was aware that the rule now enshrined in Article 10, para. 2 of its Articles on State Responsibility only dealt with the transfer of attribution, and not with the issue of responsibility as such, i.e. whether certain acts did (or indeed could) constitute breaches of an international obligation.

344. Hence, the ILC commentary to the first reading of its draft articles dealing with the transfer of attribution from insurrectional movements to a new State observed: "*In truth, the point is* not so much to find a justification for the attribution to the State, as *a possible source of international responsibility*, of conduct engaged in by the organs of an insurrectional movement before the latter has taken power."[234] It thus recognised that the identification of legal obligations binding on the movement is the crucial aspect of invoking responsibility after the success of an insurrection.

345. It is even more telling that the commentary to Article 10 of the ILC Articles on State Responsibility envisaged the "… possibility … that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces", but then found that questions relating to "the international responsibility of unsuccessful insurrectional or other movements, however, [would] fall[s] outside the scope of the present articles, which are concerned only with the responsibility of States."[235]

346. This confirms the fundamental assumption underlying Article 10, para. 2, of the ILC Articles on State Responsibility: the insurrectional or other movement must *itself* have committed a violation of an applicable rule of international law. Responsibility for this breach is then attributed to the newly created State by virtue of Article 10, para. 2, of the ILC Articles on State Responsibility. Conversely, where a movement, insurrectional or other, does not violate its international obligations, Article 10, para. 2, cannot "create" responsibility of the subsequently-emerged State. What is more, in the present case, the international obligation in question must be one imposed by the 1948 Genocide Convention. Since movements could not be bound by that treaty, they could not incur responsibility for treaty breaches. As a consequence, Article 10, para. 2, does not support Croatia's argument.

347. In fact, looked at from a somewhat different angle, Serbia's argument that the primary rules contained in the Genocide Convention cannot be retroactively applied to the acts

[234] *Yearbook of the International Law Commission, 1975*, Vol. II, p. 100, para. 3 of the commentary to then-draft article 15 (emphasis added).
[235] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 52, para. 16 of the commentary to Article 10.

of insurrectional or other movements is further supported by the rules contained in the 1977 Additional Protocol I to the four Geneva Conventions. Article 96, para. 3 of Additional Protocol I provides for the right of certain types of movements to make a unilateral declaration thereby triggering the applicability of the Geneva Conventions and Additional Protocol. It is this declaration which makes the full set of primary rules of international humanitarian law contained in both the Geneva Conventions and Additional Protocol I applicable to an armed conflict. As the authoritative ICRC Commentary on Additional Protocol I clarifies:

> "The declaration [i.e. one made by a national liberation movement engaged in a fight within the meaning of Article 1, para. 4 of Additional Protocol I] is a condition for sub-paragraphs (a)-(c) [of Article 96 of Additional Protocol I] becoming applicable: the status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humanitarian law, *insofar as it goes beyond customary law*".[236]

348. Conversely, national liberation movements that do *not* make a declaration under Additional Protocol I would be only bound, as confirmed by the ICRC's Commentary, by those rules of international humanitarian law which form part of customary law. Assuming *arguendo* that Article 10, para. 2 represented customary international law, if the movement is successful in creating a new State, this new State could accordingly be only held responsible for violations of international humanitarian law committed by said movement, i.e. violations of customary law, even if this State later ratifies Additional Protocol I.

349. In contrast thereto, Croatia's line of argument would lead to the result that a contracting party of Additional Protocol I, which came into existence by way of a successful armed struggle of a movement within the meaning of Article 96 Additional Protocol I, could be held responsible for violations of Additional Protocol I as such, even if the movement concerned which had created the new State, had deliberately decided *not* to make a declaration under Article 96 of Additional Protocol I.

[236] C. Pilloud *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), pp. 1089-1090, Marginal note 3765(emphasis added).

350. During the oral hearings on the preliminary objections raised by Serbia, counsel for Croatia qualified the jurisdictional argument *ratione temporis* as being "lock step logic".[237] Serbia submits that its argument is borne out by a straightforward application of the Court's principles on jurisdiction, as well as by a sober reading of Article 10, para. 2 of the ILC's Articles. It submits that the matter was put most clearly by Judge Tomka in his separate opinion appended to the preliminary objections judgment in the present case. Having considered the potential grounds potentially warranting a transfer of responsibility to Serbia for acts committed prior to 27 April 1992, Judge Tomka drew attention to the jurisdictional principles applicable before the Court. In no unclear terms, these principles of jurisdiction led him to *exclude* that "the responsibility of an entity for acts committed before it became a State – and thus could have become a party to the Genocide Convention – fall[s] within the jurisdiction of the Court under Article IX of the Genocide Convention."[238]

(d) Article 10, para. 2 of the ILC Articles on State Responsibility does not apply where a predecessor State is responsible for the alleged acts

351. Even if it affected the scope of the primary rules in question, *quod non*, the rule contained in Article 10, para. 2 of the ILC's Articles on State Responsibility would still not sustain Croatia's claim. This is due to the fact that Article 10, para. 2 of the ILC Articles on State Responsibility does not apply to situations in which the responsibility of the predecessor State can be established.

352. *First* - as already noted above – it follows from the interpretation of the very term "movement", which – whatever its precise content – does not encompass States.

353. *Second*, it also follows from the object and purpose of the special rule of attribution laid down in Article 10, para. 2, of the ILC Articles on State Responsibility, an argument that will now be addressed.

[237] CR 2008/11, p. 14, para. 23 (Prof. Crawford).
[238] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, Separate Opinion of Judge Tomka, para. 13.

354. The ILC accepted the need for a transfer of attribution, from a movement to a subsequently-emerging State, because this was the only way of avoiding a problematic gap in the attribution of responsibility. Hence the ILC noted that, "[t]he predecessor State will not be responsible for those acts [i.e. acts committed by an insurrectional movement]."[239] As a consequence, "[t]he only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment".[240]

355. This continuity was distinguished sharply from cases of State succession, a point that was made with particular clarity in the commentary to what was then draft article 15 adopted during the first reading:

> "[A]cts committed by agents of the insurrectional movement before the movement takes power are attributed to the State because there is continuity between the apparatus of the insurrectional movement and the new governmental apparatus of the State, *not a succession of the State as one subject of international law to the insurrectional movement as another.*"[241]

356. During the second reading, the Commission continued to accept this distinction. It thus observed, albeit in a somewhat different context, that Article 10, para. 2, did not "cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. *This is essentially a case of succession and outside the scope of the articles*".[242]

357. Accordingly in the present case, Article 10, para. 2, of the ILC Articles on State Responsibility is simply inapplicable since the case at hand differs in two crucial respects from the scenario envisaged by Article 10, para. 2.

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[239] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 51, para. 6 of the commentary to Article 10.
[240] *Ibid.*
[241] *Ibid.* (emphasis added).
[242] *Ibid.*, p. 51, para. 10 of the commentary to Article 10.

358. *First*, unlike in the scenario envisaged in Article 10, para. 2, the Court has to deal with a case of State succession. There existed a predecessor State, the SFRY. There emerged several new successor States, including the FRY/Serbia. As the Court clarified in its judgment of 18 November 2008, on 27 April 1992, the FRY *succeeded* to the rights and obligations of the former SFRY with respect to the Genocide Convention. This is therefore "essentially a case of succession",[243] which Article 10, para. 2, does not attempt to deal with.

359. More importantly, there is in the present case, no "responsibility gap" to be filled, and there is therefore no need to apply an exceptional rule such as Article 10, para. 2, that seeks to close such a gap. Unlike in the scenario envisaged in Article 10, para. 2, at all relevant times, there existed a State for the purposes of State responsibility, and at all relevant times this State could be held responsible for internationally wrongful acts.[244]

360. The rationale requiring, in view of the ILC, an exceptional transfer of attribution from a movement to a new State therefore does not apply in the present case. To repeat the Commission's formulation, the principle enshrined in Article 10, para. 2, of the ILC Articles on State Responsibility had to be accepted because this was "[t]he only possibility"[245] to close the "responsibility gap" which might otherwise exist, because "[t]he predecessor State will not be responsible for those acts [i.e. acts committed by an insurrectional movement]."[246]

361. Article 10, para. 2 of the ILC Articles on State Responsibility, provided it forms part of customary law and further provided it matches the facts of a given case, *quod non*, might justify the exceptional transfer of attribution in cases where there might otherwise be a gap in responsibility. It does not, however, cover instances of State succession and it is by no means intended to provide applicants in proceedings addressing breaches of one specific treaty (the Genocide Convention) with a multitude of respondents among which it may choose.

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[243] *Cf. ibid.*
[244] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, Separate Opinion of Judge Tomka, para. 10.
[245] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 51, para. 6 of the commentary to Article 10.
[246] *Ibid.*

(e) The irrelevance of the Gabčíkovo-Nagymaros proceedings

362. In order to circumvent the manifold problems inherent in the application of Article 10, para. 2, of the ILC Articles on State Responsibility to the case at hand outlined above, Croatia also tried to place emphasis on the Court's proceedings in the *Gabčíkovo-Nagymaros case.* It rightly stressed that during those proceedings, the Court considered acts of the former Czechoslovakia to be imputable to Slovakia, and noted that "Slovakia (…) may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia".[247]

363. However, that pronouncement must be situated within its proper context. It was made in a case in which the jurisdiction-conferring instrument, the Slovak-Hungarian *compromis*, specifically empowered the Court to take account of conduct preceding the dissolution of the Czech and Slovak Federal Republic. The Court's jurisdiction therefore was deliberately extended to cover acts and omissions (as well as responsibility flowing therefrom) of a predecessor State. This exceptional situation simply cannot be compared to the present case, in which the jurisdictional clause in question, Article IX, is *not* retrospective in nature.

364. The matter was addressed in Judge Tomka's separate opinion appended to the judgment of 18 November 2008. Having himself participated in the *Gabčíkovo-Nagymaros case*, Judge Tomka was adamant to distinguish it from the present proceedings. He noted:

> "The situation in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* was different. There, although the relevant acts occurred before the dissolution of Czechoslovakia, the Court was given the jurisdiction and *specifically* asked in the Special Agreement (Art. 2), concluded by Hungary and Slovakia on 7 April 1993, "whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system" (*Judgment, I.C.J. Reports 1997*, p. 11, para. 2). It is to be noted that the acts, despite in reality being performed on the ground by Slovak authorities, were always considered by the Court as those of Czechoslovakia (*ibid.*, pp. 46-57, paras. 60-88) and, in relation to them, the Court refers to Czechoslovakia and not to Slovakia in the operative clause (*ibid*., p. 82, para. 155 (1) B and C). When the Court

[247] ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 81, para. 151.

addressed the issue of the consequences of its Judgment, as it was asked in Article 2, paragraph 2, of the Special Agreement, it recalled that: "According to the Preamble of the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project." *(Ibid.*, p. 81, para. 151.) The Court therefore considered that:

'Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.' *(Ibid.)*

In the present case, the Court was not given jurisdiction by the FRY to consider the acts of the predecessor State, the SFRY. Nor is Serbia the sole successor of the SFRY; it is one of the five equal successors of the SFRY."[248]

D. *Conclusions*

365. Summarizing this part of its argument, Serbia therefore respectfully submits that:

1) *First*, the Genocide Convention, and in particular its Article IX, cannot be applied with regard to acts the occurred before 27 April 1992, i.e. the date upon which Serbia came into existence as a State and became bound by the Genocide Convention; and

2) *Second*, Croatia cannot rely on Article 10, para. 2, of the ILC Articles on State Responsibility in order to transfer allegations of responsibility to Serbia for acts that occurred before 27 April 1992, because

   (i) the principle underlying Article 10, para. 2, of the ILC Articles on State Responsibility does not represent customary international law;

   (ii) the requirements of Article 10, para. 2, of the ILC Articles on State Responsibility are in any event not met in the case at hand;

[248] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, Separate opinion of Judge Tomka, paras. 14-15.

(iii) Article 10, para. 2, of the ILC Articles on State Responsibility presupposes a violation of a primary rule of international law by the "movement" over which the Court can exercise jurisdiction, which is not the case in these proceedings;

and finally also because

(iv) Article 10, para. 2, does not apply to situations in which a predecessor State is responsible for the alleged acts.

366. By way of a subsidiary argument, Serbia will now demonstrate that the Court cannot entertain claims as to alleged violations of the Genocide Convention that occurred prior to 8 October 1991, i.e. the coming into existence of Croatia as a State.

3. In the Alternative, Croatia Cannot Claim Violations of the Genocide Convention allegedly Committed prior to 8 October 1991

A. *Introduction*

367. As outlined above, Croatia alleges that the FRY/Serbia has committed, and is responsible for, alleged violations of the Genocide Convention which are said to have occurred before the FRY/ Serbia becoming a contracting party to the Genocide Convention and even before the FRY/ Serbia existed as a State,[249] i.e. prior to April 27, 1992, and that the Court has jurisdiction *ratione temporis* to entertain these claims. Serbia has already addressed these arguments in the previous part of this Counter-Memorial.

368. However, Croatia goes even further. It also claims that the FRY/Serbia is responsible vis-à-vis Croatia for alleged violations of the Genocide Convention, and that the Court has jurisdiction *ratione temporis* with regard to acts, that took place before Croatia itself became bound by the Genocide Convention, and indeed before Croatia itself even existed as a State under international law – an argument that Serbia will now address.

[249] See notably the references, in Croatia's Memorial, to the dates of the events at Vukovar and Dubrovnik (especially at paras. 4.147, 4.153, 4.158, 4.161, 4.164, 4.173 & 5.235).

369. In its judgment on Serbia's preliminary objections, the Court dealt with Croatia's status vis-à-vis the Genocide Convention in the following terms:

> "Croatia deposited a notification of succession with the Secretary-General of the United Nations on 12 October 1992. It asserted that it had already been a party prior thereto as a successor State to the SFRY from the date it assumed responsibility for its international relations with respect to its territory, namely from 8 October 1991."[250]

370. Serbia does not contest that Croatia could become a contracting party to the Genocide Convention by submitting a declaration of succession and that Croatia could thereby become a contracting party thereof, effective 8 October 1991.

371. At the same time, it is obvious that Croatia was not a contracting party to the Genocide Convention *prior to that date*. Indeed, Croatia itself does not even claim to have existed as a State prior to 8 October 1991.[251] Nevertheless, it its Memorial Croatia alleges manifold violations of the Genocide Convention, which, even according to Croatia itself, occurred before this date. This includes *inter alia*, alleged "genocidal activities" in Eastern Slavonia, which Croatia claims to have taken place between May 1991 and November 1991,[252] other "genocidal activities" in Western Slavonia,[253] and finally acts that are said to have taken place in Dalmatia,[254] all of which do not in any event, as will be demonstrated below, constitute acts of genocide.

372. It is against this background that Serbia will now argue in the alternative that the Court - at the very least - lacks jurisdiction *ratione temporis* with regard to any alleged violations of the Genocide Convention that have occurred prior to the coming into existence of Croatia as an independent State and thus also prior to it becoming a contracting party to the Genocide Convention, namely on 8 October 1991.

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[250] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 94.
[251] Memorial, para. 6.08.
[252] Memorial, para. 4.01 *et seq*.; see in particular paras. 4.14, 4.15, 4.17, 4.18, 4.22, 4.29, 4.32, 4.35, 4.40, 4.41, 4.48, 4.49, 4.40, 4.57, 4.58, 4.59, 4.64, 4.65-4.72, 4.74, 4.83 *et seq*., 4.95, 4.100,4.102, 4.104, 4.109, 4.113., 4.117- 4.118, 4.134, 4.147, 4.149, 4.153.
[253] Memorial, paras. 5.16, 5.17, 5.19, 5.26-5.27, 5.29-5.33, 5.37-5.40, 5.43-5.44, 5.46, 5.48-5.49, 5.52-5.55, 5.58, 5.64 , 5.70, 5.80, 5.82, 5.90, 5.93, 5.95, 5.97-5.98, 5.103-5.106, 5.108-5.109, 5.111, 5.118-5.119, 5.122, 5.139, 5.140, 5.517, 5.160, 5.163, 5.166-5.168, 5.174, 5.177, 5.184-5.186.
[254] Memorial, paras. 5.207, 5.209, 5.217, 5.219, 5.233, 5.236-5.237.

373. This additional argument, which Serbia had already briefly touched upon during the oral proceedings on preliminary objections,[255] is only raised in the event that the Court should find that it has jurisdiction to consider alleged acts that took place prior to 27 April 1992, i.e. the date the FRY/Serbia had become a State and had become bound by the Genocide Convention, *quod non*.

B. *The Court Cannot Entertain Alleged Violations of the Genocide Convention which Occurred prior to Croatia Becoming a Contracting Party of the Genocide Convention*

374. Serbia has already demonstrated that the Genocide Convention cannot be applied retroactively vis-à-vis Serbia and that, in particular, it cannot be applied retroactively with regard to a period in time when the FRY/ Serbia did not yet exist as a State.

375. The very same considerations apply *mutatis mutandis* and indeed *a fortiori* to Croatia as the Applicant. It is thus for the very same reasons that Croatia cannot be considered to have been bound by the Genocide Convention before 8 October 1991 leading to the necessary conclusion that the Court lacks jurisdiction *ratione temporis* with regard to events that occurred prior to this date.

376. In the case of Croatia, the arguments against any form of retroactive application of the Genocide Convention are further supported by three additional reasons, namely

1) the lack of reciprocity as to the Court's jurisdiction;

2) the fact that *both the Applicant as well as the Respondent* were not contracting parties to the Genocide Convention prior to 8 October 1991; and

3) to accept Croatia's argument would result in the declaration of succession having a retroactive effect *and* the purported retroactive application of the Genocide Convention.

[255] See CR 2008/9, pp. 9-10 (Đerić).

1. The Lack of Reciprocity as to the Court's Jurisdiction

377. By bringing a case relating to alleged violations of the Genocide Convention that occurred prior to 8 October 1991, Croatia takes the position that it can bring a case against other contracting parties to the Genocide Convention even with regard to acts that occurred prior to Croatia itself having acquired that status and, indeed, before it even existed as a State.

378. However, the very fact that it was not a party to the Genocide Convention prior to 8 October 1991, and indeed, that it was not even a State (and thus could not have been a party to the Convention), means that Croatia could not have been a respondent in proceedings before the Court prior to 8 October 1991, nor could it now be named as a respondent in a case involving Croatian violations of the Genocide Convention that occurred prior to 8 October 1991. Accordingly, the Court is not in a position to make determinations as to the possible responsibility of Croatia for violations of the Genocide Convention that occurred before 8 October 1991.

379. At the same time, Croatia claims to be entitled to do just this with respect to another State, i.e. to bring a case against Serbia with regard to acts that are alleged to have occurred prior to 8 October 1991, and thus during the same identical period of time that Croatia itself cannot be held responsible before the Court.

380. However, as Shabtai Rosenne has put it: "The starting point is that reciprocity is inherent in the very notion of the jurisdiction of the Court."[256]

381. Accordingly, acknowledging Croatia's right to bring a case for alleged violations of the Genocide Convention that allegedly occurred prior to 8 October, 1991 would not only lead to a fundamental imbalance, but it would also contradict the principle of reciprocity, a principle which fundamentally underpins the Court's jurisdictional scheme.

[256] S. Rosenne, *The Law and Practice of the International Court of Justice 1920-2005* (2006), Vol. III, p. 736.

2. Neither Croatia nor the FRY/Serbia Were Contracting Parties to the Genocide Convention prior to 8 October 1991

382. Serbia has already demonstrated that Croatia only came into existence as a State and was bound by the Genocide Convention as of 8 October 1991, while for Serbia it was 27 April 1992. Accordingly, before 8 October 1991, both the Applicant, as well as the Respondent, were not contracting parties to the Genocide Convention which makes it even more problematic to argue, as Croatia does, that treaty obligations under the Genocide Convention could have existed between two non-State entities prior to 8 October 1991. As a matter of fact, Croatia wants the Court to apply the Genocide Convention concerning a period where *not one* of the parties to these proceedings existed.

3. Accepting Croatia's argument would lead to a combined retroactive effect of both its declaration of succession, and the Genocide Convention

383. Croatia deposited a notification of succession with regard to the Genocide Convention with the Secretary-General of the United Nations on 12 October 1992,[257] i.e. not only more than one year after its independence, but also subsequent to the acts Croatia alleges have been committed before 8 October 1991. Accordingly, it not only has to rely on the retroactive application of the Genocide Convention, but it also implicitly seems to suggest that it could, by way of a unilateral act, retroactively establish the Court's jurisdiction *ex post facto* vis-à-vis all the other contracting parties to the Genocide Convention.

384. What is more, and as previously discussed, Croatia also argues that the Genocide Convention itself provides for its own retroactive applicability even concerning acts predating the existence of the State or States concerned, i.e. predating 8 October 1991, without indicating any temporal limitation for any such retroactive effect.

385. The implications of this "combined retroactivity" argument are astounding. If one were to follow Croatia's argument, it could have, in 1992, unilaterally provided for the Court's jurisdiction vis-à-vis more than 140 contracting parties to the Genocide Convention, regardless of when these other parties had themselves become contracting parties.

[257] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, General List No. 118, para. 94.

Accordingly, the Croatian unilateral act of notifying its succession to the Genocide Convention would have triggered, in Croatia's view, a retroactive applicability of the Genocide Convention covering a period of more than 40 years, i.e. covering the years 1951 to 1992. As a matter of fact, Croatia's approach would even lead to a retroactive applicability of the Convention with regard to events predating its entry into force, i.e. 12 January, 1951, and eventually even its adoption, due to a mere unilateral act by one single State, namely the Croatian notification of succession dated 12 October 1992.

386. Moreover, accepting the Croatian argument would also mean that Croatia could have, by a unilateral act, provided for the Court's jurisdiction vis-à-vis all other contracting parties concerning all possible violations of the Genocide Convention stretching from 1948 to 1992, and perhaps even before this period.

C. *Conclusion*

387. Accordingly, should the Court find that it is not barred from considering alleged violations of the Genocide Convention predating 27 April 1992, it would, at the very least, lack jurisdiction with regard to those acts that have allegedly occurred prior to 8 October 1991, i.e. the date at which Croatia came into existence as a State and itself became bound by the Genocide Convention.

CHAPTER V

THE HISTORICAL AND POLITICAL BACKGROUND

1. Introduction

388. This Chapter will discuss Chapter 2 of the Memorial that deals with the historical and political background to the conflict that is the subject-matter of the present dispute.

389. At the outset, it should be noted that the presentation of facts in this chapter of the Memorial has apparently been drafted as the Applicant's "official" and definitive interpretation of events leading to the break up of the former Yugoslavia. As such, it also deals with the events that are largely irrelevant to the present dispute which only concerns the crime of genocide.

390. More importantly, the Applicant's presentation of events serves as part of a one-sided, biased account, designed to portray Serbia and the Serbs as having the sole responsibility for the break up of the former SFRY and the crimes committed during the armed conflicts connected with it. In general, it seems that the Applicant tried not just to prove the alleged genocide but rather to justify its official claim that an aggression by the JNA and Serbia against Croatia took place in 1991. However, this claim is not only irrelevant for the present proceedings, but it also utterly fails to take into account the complexity of the break up of the SFRY. In any case, as will be demonstrated in this Counter-Memorial, even if all the allegations presented by the Applicant were accurate (*quod non*), it does still not follow that the alleged conduct amounts to genocide.

391. In addition, the Memorial fails to deal with facts that are clearly relevant, but are not favorable to the Applicant, such as the advent and the rule of Croatian nationalism and the crimes against the Serbs in Croatia during the war 1991-1995. Similarly, as will be discussed below, the genocide against the Serbs in Croatia committed by the Independent State of Croatia during World War II is dealt with in a single sentence.[258]

[258] Memorial, para. 2.08.

392. The present chapter will deal only with those allegations in Chapter 2 that are relevant to the present case. In any event, the Respondent expressly denies all the Applicant's claims that are not confirmed by the presentation of facts contained in the present Counter-Memorial.

393. The order of presentation in the present chapter will be as follows. Firstly, it will deal with the Nazi-puppet Independent State of Croatia and its genocide against the Serbs during the period 1941–1945, because these events had a significant influence over the events of 1991–1995.

394. Secondly, it will be demonstrated that the Memorial not only presents a distorted and at times inaccurate picture of Serbian nationalism, but it also fails to mention the rise of Croatian nationalism that had a major impact on the conflict in Croatia. In this regard, this chapter will deal with the rise of Croatian nationalism, and the discriminatory policies and practices of the Croatian nationalist government elected in 1990 that were directed against the Serbs in Croatia.

395. Thirdly, this chapter will deal with the development of the Serb movement in Croatia and its activity during the escalation of the crisis in the SFRY in 1989–1991.

396. Fourthly, this chapter will expose certain inaccuracies and omissions in the Applicant's overview of the political and military developments during the armed conflict in Croatia in 1991–1995. In particular, it will deal with the existence of the SFRY as a subject of international law in 1991 and early 1992, as well as with the other relevant developments in the period 1992–1995, such as the establishment of the UN protected areas in Croatia, and the establishment of the Republic of Serbian Krajina.

2. The Independent State of Croatia and the Genocide against Serbs 1941–1945

397. The Memorial devotes only one single paragraph to the Independent State of Croatia and only one sentence in this paragraph to the genocide it committed against the Serbs: "Ustashas implemented Nazi policies and persecuted Serbs, Jews, Roma/Gypsies and anti-fascist Croats".[259] However, the Respondent considers that that the Independent

[259] *Ibid*.

State of Croatia and the genocide against the Serbs had such an influence on the actors of events of 1991-1995 on all sides that they must be discussed and taken into account in any consideration of these events. The present section will provide some basic facts about the Independent State of Croatia and the genocide it committed. The present section is followed by a section dealing with nationalism that will show to what extent the Independent State of Croatia and the Ustashe movement were rehabilitated during the time that the Croatian nationalist government was in power in the 1990s.

A. *The Creation of the Independent State of Croatia*

398. The Independent State of Croatia ("Nezavisna država Hrvatska")[260] was proclaimed by the Ustashe on 10 April 1941 with the support of Nazi Germany, Italy and other Axis powers occupying Yugoslavia. The Ustashe was a terrorist organization created in 1931 that sought to create an independent and ethnically cleansed Croatian state.[261] The movement's founder and leader, Dr. Ante Pavelić, headed the Independent State of Croatia as its "Poglavnik" ("Führer").

399. The Independent State of Croatia encompassed most of the present-day Republic of Croatia, all of Bosnia and Herzegovina, as well as Srem (Sirmium), part of present-day Serbia, stretching all the way to the town of Zemun, near Belgrade.[262] The Independent State of Croatia was a Fascist puppet state that served the political interests of Fascist Italy and Nazi Germany.[263]

B. *The Genocidal Policies*

400. Upon the assumption of his office as prime minister of the Independent State of Croatia, Pavelić was sworn-in on the "Principles of the Ustashe Movement", a document which was signed with his own hand in 1931.[264] This document envisaged the creation of a

[260] For more, see L. Hory & M. Broszat, *Der Kroatische Ustascha-Staat 1941-1945* (1964); S.G. Payne, *A History of Fascism 1914–1945* (1995), pp. 405-411; I. Gutman (Editor-in-chief), *Encyclopaedia of the Holocaust*, Vol. 2, pp.739-740; *Encyclopaedia Britannica, 1943 – Book of the Year*, p. 215, Entry: *Croatia*; M.A. Hoare, 'The Ustashe Genocide', *South Slav Journal*, Vol. 25, No. 1-2, 2004, pp. 29-38.
[261] F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 21.
[262] Map of the Independent State of Croatia (Annex 1).
[263] See, e.g. J.H.W. Verzijl, *International Law in Historical Perspective* (1974), p. 313.
[264] A. Pavelić, *The Principles of the Ustashe Movement*, 1931, translated by Siniša Đurić, available at http://pavelic-papers.com/documents/pavelic/ap0040.html.

Greater Croatia within its "historical boundaries", a state in which only Croats by birth or origin would make decisions. The Ustashe ideology created a theory about a pseudo-Gothic origin of the Croats in order to raise their standing on the Aryan ladder.[265] Ethnic cleansing and land gain were at the centre of the Ustashe agenda.[266]

401. According to the data of the Nazi Germany Ministry of Foreign Affairs, the population of the Independent State of Croatia in April 1941 was 6,285,000 people, out of which there were 3,300,000 Croats (52.50%); 1,925,000 Serbs (30.62%); 700,000 Muslims (11.13%) and 360,000 others (5.72%).[267] It is apparent that the main obstacle in the Ustashe's plan to establish an ethnically pure Croatian state was the large number of Serbs in the Independent State of Croatia.

402. Soon after it was created, the Independent State of Croatia adopted a number of decrees that were to provide a legal framework for a state of terror and the genocide that was to follow.[268] At the same time, the Ustashe were ready to put this legalized system of terror into practice.

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[265] Statement of Ante Pavelić given on 13 April 1941: "We do not have and we have never had anything to do with Serbs. We are distinguished from Serbs by our religion and our physical appearance. It is difficult to mistake a Croat for a Serb. We are not Slavs", in F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 139.

[266] A. Pavelić, *The Principles of the Ustashe Movement*, 1931, paras. 8 & 11.

[267] F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 106.

[268] A brief survey of names and abstracts of some of the NDH decrees will unmistakably show the nature of this "State" and its intentions:

- The Legal Decree on the Defence of the People and the State of 17 April 1941 practically introduced a permanent state of emergency: "Whoever violates or has violated or who offends or has offended in any way the honour, life's interest of the Croatian people or who threatens in anyway the survival of the Independent State of Croatia or its state authorities, even if such an act is only attempted, shall be held accountable for the crime of high treason." As is clear, this decree was applied retroactively, and the sentence for this offence was death.
- The Legal Decree on Courts Marshal of 17 May 1941 and the Legal Decree on an *impromptu* Court Marshal of 24 June 1941 were intended to ensure as effective as possible carrying out of terror, based on the previous legal decree. Such courts pronounced only one type of sanctions – the death penalty to be executed three hours after the sentence was passed.

  "[These] methods were initially applied on a massive scale, especially against the Serbs and Jews, and later on, against the Croats as well. Thousands of innocent people – only because they were born as Orthodox Christians or Jews, or simply because they were not Ustashe – were killed by firing squads or slain for no reason whatsoever." Šime Balen, *Pavelić*, Zagreb, 1952, p. 65.

– The Legal Decree on the Prohibition of the Cyrillic Script of 25 April 1941 revoked the right of Serbs to use their own alphabet;
– The Legal Decree on Protecting Croatian People's Property of 18 April 1941, as well as three legal decrees of 30 April 1941 – on citizenship, on race and on the protection of Aryan blood and honour of the Croatian people, embodied a number of provisions on discrimination against Jews and Roma;
– The Legal Decree on Sending Disobedient and Dangerous Persons to Forced Labour at Concentration and Labour Camps, dated 25 November 1941, introduced a system of camps run by the Ustashe Surveillance, as one of the legal characteristics of this state. No legal remedy was available against decisions based on this legal decree;

403. The genocidal plan began to be implemented as soon as the Government took office. In preparation for the commission of crimes, Ustashe leaders held many rallies where the Croats were pitted against the Serbs with inflammatory speeches. The press served as an important method in the achievement of this plan.[269] What followed immediately were the dismissals of Serbs from public services; the imposition of a ban on their movement; Serbs had to wear special bands around their arms; and eventually they were expelled from the country.[270]

404. The State policy concerning the Serbs was decreed by Dr. Mladen Lorković, the NDH Minister of Foreign Affairs, in his speech in Donji Miholjac on 6 June 1941. He said:

> "Croatian people must clean itself from all elements which are its misfortune; which are foreign and strange to that people; which dissolute the fresh powers of that people; which were pushing that people from one evil to another through decades and centuries. Those are our Serbs and our Jews."[271]

405. On 22 July 1941, the genocidal policy was clearly announced by Mile Budak, Minister of Religion and Education of the Independent State of Croatia, in his widely documented speech at Gospić Town:

> "For the rest – Serbs, Jews and Gypsies – we have three million bullets. We will kill one part of the Serbs, the other part we will resettle, and the remaining ones we will convert to the Catholic faith, and thus make Croats of them."[272]

- The Legal Decree on the Confiscation of the Property of Persons Disturbing Public Peace and Order, dated 27 December 1941, formalized robbery in the name of the Croatian state;
- The Legal Decree on the Suppression of Violent and Punishable Acts against the State, Certain Individuals or Property, dated 20 July 1942, was a response to the increasingly spreading of the Serb rebellion in the NDH, which extended the sending to camps of the families of persons "disturbing public law and security or violating peace and tranquility of the Croatian people";
- The Legal Decree on the Nationalization of Jewish Property, dated 30 October 1942, had a title which spoke for itself.

See Annex 2. The full texts of these decrees are available in Croatian in *Zbornik zakona i naredaba Nezavisne Države Hrvatske, izdanje Ministarstva pravosudja i bogoštovlja, Zagreb, 1941 i 1942* [Code of Legal Decrees and Orders of the Independent State of Croatia, edition of the Ministry for Justice and Religion, Zagreb, 1941-1942]; also available at http://www.crohis.com/izvori/ustzk.pdf.

[269] As early as 11 April 1941, an editorial comment published in the leading daily of the *Croatian People* branded Serbs collectively as the greatest and perennial enemy of Croats, sounding a warning that "they will be judged by the righteous Croatian people". Quoted by F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 163.

[270] *Ibid*. p. 165.

[271] The speech was published in *Croatian People* on 28 June 1941. Quoted by F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 164, note 95.

[272] M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, p. 20; also see, H. Neubacher, *Sonderaufrsgsudost* 1940-45, *Bericht eines fligenden Diplomaten* (1956), p. 18 and ICTY, *Tadić*, IT-94-1-T, Trial Chamber Opinion and Judgement, 7 May 1997, para. 62.

C. *Genocide Against the Serbs*

406. The Independent State of Croatia perpetrated genocide against the Serbs on a massive scale.[273] The parts that follow will present basic information about the ways in which this was carried out.

1. Massacres and Death Camps

407. The Ustashe committed the first massacres in the spring of 1941, killing 196 Serbs at the village of Gudovac near Bjelovar and around 400 at the village of Blagaj near Slunj.[274] In the following months, the mass-killings became commonplace, particularly in Herzegovina: thus, in June 1941 Ustashe executed 140 Serb peasants near Ljubinje; 180 Serbs from village Korita near Gacko; another 160 Serbs near Ljubinje; a further 80 Serbs near Gacko; approximately 280 Serbs near Opuzen; 90 Serbs near Ljubuško, etc.[275]

408. Approximately two thousand Serbs were executed in the town of Glina, in central Croatia. Firstly, the Ustashe arrested and shot several hundred Serbs from the Glina area in May 1941. Most of the Serb population then went into hiding in the forests. The Ustashe responded by offering to spare those Serbs who would convert to Roman Catholicism. Many Serbs took up this offer and presented themselves at the local church in Glina, in August 1941. After the last one had entered into the church, the doors locked shut. The Ustashe began to massacre the victims using knives and clubs. Hundreds of Serbs were brutally killed. Only one of the victims, Ljuban Jednak, survived by pretending to be dead. [276]

409. Jadovno was set up as a death camp in May 1941 in the open, on Mount Velebit, in Croatia's Lika region. Many Serbs and Jews from the Gospić town prison were temporarily deported to Jadovno in order to await their turn for execution. From 11 May

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[273] "Accurate figures will probably never be known, but it is clear that Pavelic's Ustashe massacred huge numbers of Serbs wherever they could be found." Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 81 (Peace Palace Library).

[274] I. Goldstein, 'Nezavisna Država Hrvatska 1941: put prema katastrofi' (The Independent State of Croatia 1941: A Road to Disaster), in I. Graovac (ed.), *Dijalog povijesničara-istoričara* (Dialogue of Historians), No. 7, Friedrich Naumann Stiftung, Zagreb, 2002, p. 144.

[275] M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, pp. 38-39; see also F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, pp. 166-167.

[276] Statement no. 33 of the State Commission for the Determination of the Crimes of the Occupation Forces and their Collaborators, D. no. 406/45, dated 2 March 1945.

to 21 August 1941, Jadovno was the place where thousands of victims were killed. Estimations of the number of victims made by historians vary from 15-25,000[277] to 35,000,[278] and even 40,000.[279]

410. Besides Jadovno, there were other camps for Serbs, Jews, Roma and anti-fascist Croats in the Independent State of Croatia.[280] A massive armed rebellion of Serbs in Eastern Herzegovina in June 1941 accelerated the preparations for a solution of the Serbian question through concentration camps. The most notorious one was the Jasenovac camp complex, which will be discussed below.

411. In addition to the listed camps, there were special camps for children who were separated from their parents. Such camps existed in the town of Sisak and a small place called Jastrebarsko, on the road between Zagreb and Karlovac, in which children were detained in dire conditions. In Sisak, 5,000 – 7,000 Serbian, Jewish and Roma children were sent to the camp, according to the estimates made by historians.[281] Some 1,600 of these children died in the camp itself.[282] In the period from 12 July to 26 August 1942, a total of 3,336 children were sent to Jastrebarsko.[283] In the words of the gravedigger Franjo Ilovar, who was paid for his labour by the number of bodies he buried, in less than a month and a half, 468 children died of starvation and disease in the camp.[284]

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[277] M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, p. 102.
[278] F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 186.
[279] Djuro Zatezalo, *Jadovno, Kompleks ustaških logora 1941* (*Jadovno: A Complex of Ustashe Camps, 1941*), Vol. I, Muzej žrtava genocida (Genocide Victims Museum), Belgrade, 2007, pp. 382-383 stating that 40,123 people, including 38,010 Serbs, 1,988 Jews and 124 other nationalities were killed in Jadovno.
[280] They were established already in the spring of 1941, in a place called Danica near Koprivnica, in the island of Pag (which also served for the extermination of Serbs and Jews from the areas of Lika and Dalmatia); in Lobograd, in Zagorje region, Tenja near Osijek, and in Travnik and Djakovo. Furthermore, pre-war prisons in Lepoglava near Varaždin, Kerestinec near Zagreb and Kruščica near Vitez were also used for this purpose (M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, p. 44.).
[281] M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, p. 290.
[282] *Ibid.,* p. 291. This is how General Edmund Glaise von Horstenau, the representative of the German army in Serbia and Croatia, described his experience with the inspection of the Sisak concentration camp in November 1942:

> "We now went into the concentration camp in a converted factory. Frightful conditions! Few men, many women and children, without sufficient clothing, sleeping on stone at night, pining away, wailing and crying! … And then the worst of all: a room along whose walls, lying on straw which had just been laid down because of my inspection, something like fifty naked children, half of them dead, the other half dying. One should not forget that the inventors of the KZ were the British in the Boer War. However, such places have reached their peak of abomination here in Croatia, under the Poglavnik installed by us. The most wicked of all must be Jasenovac, where no ordinary mortal is allowed to peer in." (Translated from Peter Broucek (editor), *Ein General in Zweilicht: Die Erinnerungen von Edmund Glaise von Horstenau,* Vienna, 1980, Vol. 3, p. 167).

[283] M. Peršen, *Ustashe's camps* [Ustaški logori], Zagreb, 1990, p. 288.
[284] Notebook of Franjo Ilovar, a grave digger, exibited in the Musem *Kozara*, Mrakovica, reprinted in R. Milosavljevic, *Dečji ustaški koncentracioni logor Jastrebarsko (Jastrebarsko. The Ustashe Concentration Camp for Children)*, 2009, p. 81.

2. Jasenovac

412. In July 1941, the Ustashe government decided to build a new complex of camps, which stretched along the banks of the River Sava, in Slavonia.[285] Jasenovac was the largest complex of concentration camps in the Independent State of Croatia during the Second World War,[286] and as such it needs to be addressed separately.

413. As was the case in other concentration camps in the Independent State of Croatia, the Serbs constituted the majority of prisoners in Jasenovac, where they found themselves alongside Jews, Roma and anti-Fascist Croats.

414. The majority of inmates in Jasenovac were destined to perish in systematic executions that took place at various locations in the camps complex. Killings were conducted with cruelty and outright sadism.[287] In order to accelerate the executions, from 1942 the Ustashe cremated corpses of many of their victims, as well as live inmates.[288]

415. The Report of the State Commission of Croatia for the Investigation of the Crimes of the Occupation Forces and their Collaborators, dated 15 November 1945, stated as follows:

> "[I]t is not possible to answer the question of precisely how many victims died in Jasenovac. Few prisoners who spent some time in the camp were released, and less than a hundred managed to break out of the camp in the final moments.

[285] For a map of the location of the Jasenovac concentration camps, see A. Miletić, *Koncentracioni logor Jasenovac 1941–1945. Dokumenti* [Concentration Camp Jasenovac 1941–1945. Documents] (1986).
[286] F. Jelić-Butić, *Ustaše i NDH* [Ustashe and the Independent State of Croatia], Zagreb, 1977, p. 186. This complex of camps was composed of Camp no. I (Krapje), Camp no. II (Bročica), Camp no. III (Brick Factory also known as Jasenovac, Camp of Death), Labour Camp. No. IV (Tannery) and Camp no. V (Stara Gradiška), with some places of mass-executions: Mlaka, Jablanac, Uštica, Košutarica, Granik and the biggest one - Gradina.
[287] This is how the witness Jakob Finzi described his experience at the camp:
"I worked as an undertaker in the camp graveyard only for ten days. During that period of time I buried corpses without heads, without arms, with crushed skulls, with missing fingers and toes, with nails driven into their chest, with missing sexual organs, mutilated corpses black and blue from beatings. During those ten days we buried about 3,000 corpses. Among them I recognized the corpses of five undertakers finished off by the Ustashe." Zemaljska komisija Hrvatske za utvrđivanje zločina okupatora i njihovih pomagača, Zločini u logoru Jasenovac [The State Commission of Croatia for the Determination of the Crimes of the Occupation Forces and their Collaborators, Crimes in the Jasenovac Camp], Zagreb, 1946, p. 26 ("State Commission of Croatia").
[288] A. Miletić, *Koncentracioni logor Jasenovac 1941–1945. Dokumenti* [Concentration Camp Jasenovac 1941–1945. Documents] (1986), Vol. I, pp. 30, 557–558.

> It was pointed out earlier that the Ustashe sent prisoners to Jasenovac for labor, but it has also been stated that many transports of men, women and children arrived at Jasenovac only to be taken inside and liquidated by the Ustashe, or killed nearby without being seen inside the camp at all.
>
> The most intense years of the Ustashe terror and mass crimes were 1941 and 1942. The whole of 1943 and half of 1944 were marked by relative moderation, which means that mass executions of inmates were not carried out as often and on such a scale as before. From August of 1944 until April of 1945, large transports began to arrive and liquidations were repeated again *en masse*. ...
>
> We will mention below some fifty mass crimes carried out by the Ustashe in Jasenovac, and if we add the number of prisoners who were killed individually to the number of victims killed in mass executions, we arrive at the figure of *approximately 500,000 to 600,000* [emphasis added]**.**
>
> As we have pointed out, it will never be possible to determine the exact number of victims swallowed up by Jasenovac. However, based on the research conducted by this State Commission, we can conclude that the above figure approaches reality. "[289]

416. This estimation was accepted by the Yugoslav Government, and thus became the sole official estimation of the number of Jasenovac victims. The estimation of hundreds of thousands of victims has been accepted and cited by the Yad Vashem Encyclopedia of the Holocaust[290] and by Israel Gutman.[291] The large number of victims in the Jasenovac camp of death was confirmed by many witnesses who testified before the different international and domestic courts.

417. In this context, it should be noted that the exact number and ethnic origin of victims in the Jasenovac camp and in the Independent State of Croatia has been the subject of a bitter debate, in particular in the years before the armed conflict in Croatia in 1991. As one could expect, this debate was not confined to academia and it has had serious

[289] Report of the State Commission of Croatia, *op.cit.*, p. 33.
[290] Encyclopedia Entries, International School for Holocaust Studies, Yad Vashem – Jasenovac, available at – http://www1.yadvashem.org/education/entries/english/29.asp
[291] Encyclopedia of the Holocaust, edited by Israel Gutman, Vol. 1, 1995, pp. 739-740, available at – http://www.jasenovac.org/whatwasjasenovac.php

political repercussions. Indeed, the late President of Croatia, Dr. Franjo Tuđman, made a name for himself at the time when he was a dissident and a historian, by advocating an extreme downward revision of the number of victims.[292] It is worth noting that President Tudjman in 1993 again stirred passions by proposing that the remains of the Ustashe killed by the Yugoslav Partisans in 1945 be reburied together with the victims of the Ustashe at Jasenovac.[293] This met with resistance, both from the Serbs and anti-Fascist Croats.

3. Conclusion

418. The total number of victims of genocide in the Independent State of Croatia is difficult to precisely establish. It is however a well-known fact that sometimes entire villages perished without an eye-witness to testify later about the victims. In particular, it is difficult to establish the precise number of the victims who were killed in the largest death camp in Jasenovac. Leaving aside discussions about the exact number of victims, the fact that genocide was committed against the Serbs in the Independent State of Croatia during World War II is not seriously contested.

419. The genocide left an indelible mark on the consciences of the Serbs in Croatia and elsewhere. The events leading to the conflict of 1991–1995 and the conflict itself cannot be understood without taking this into account. However, as already mentioned, the Memorial fails to discuss either this genocide or the Independent State of Croatia in any meaningful detail.

420. As will be discussed in the next section, Serbian and Croatian nationalism went hand in hand as the crisis in the former SFRY aggravated to the level of an armed conflict. For

[292] See K. Pfeifer, 'Croatia – Tudjman and the genesis of Croatian revisionism', *Searchlight Magazine*, 2003 (Annex 10).
Tuđman's estimation is based on the work of the Croatian researcher Vladimir Žerjavić, who used statistical methods to obtain information that between 83,000 and 100,000 people were killed at Jasenovac, see Memorial, para. 2.53. However, the District Court in Zagreb, which tried and convicted Dinko Ljubomir Šakić, one of the commandants of the Jasenovac camp, in 1998, did not accept Žerjavić's analysis and results. Namely, the court expert Dr. Josip Jurčević, lecturer on the general history of the twentieth century at Croatian University in Zagreb, denied Žerjavić's and all other demographic estimations, concluding that all of them, given the present level of research, were not scientifically based. The District Court in Zagreb, Trial of Dinko Ljubomir Šakić, Judgement No. V K-242/98-257, dated 1 October 1999, p. 34.
[293] Speech of Dr. Franjo Tuđman at the Second Congress of the Croatian Democratic Party, October 1993, cited in Viktor Ivančić, *Točka na U* , Split, 1998 (Annex 11).

their own purposes, both nationalisms made references to the genocide of 1941–1945 and the Independent State of Croatia. It is not contested that Serbian nationalists misused the recollections of these past events, although the claims made in this regard by the Applicant are not always accurate, as will be demonstrated in the next section. What is important in the present context, however, is that the Memorial completely fails to mention the role that the Croatian nationalism had in the events that are the subject-matter of the present dispute and in particular its rehabilitation of the Independent State of Croatia, Ustashe movement and its symbols.

3. The Rise of Nationalism in the SFRY

A. *Introduction*

421. According to the Memorial, the sole cause of the armed conflict in Croatia was Serbian nationalism, personified by Slobodan Milošević, the former president of Serbia. This is evident from the titles of sections dealing with the events from Tito's death in 1980 to the beginning of the conflict in 1990-1991: "Phase One: The Rise of Greater-Serbian Nationalism 1981–87", "Phase Two: Slobodan Milošević's Rise to Power".[294]

422. As will be shown below, the Applicant's account of the rise of Serbian nationalism is frequently misleading and inaccurate. But even more importantly, the Memorial completely fails to mention Croatian nationalism and its rise at the end of the 1980s. The present section will also discuss this lacuna by showing that Croatian nationalism, led by the Croatian nationalist government, is directly responsible for the outbreak of the conflict in Croatia by its rehabilitation of the Ustashe movement and its iconography; by pursuing the idea that Croatia should be an ethno-centric State of ethnic Croats; and by abolishing long-standing national rights of the Serbs in Croatia.

423. This is of course not to say that Croatian nationalism bears the sole responsibility for the conflict. This Counter-Memorial will not attempt to justify or defend the undemocratic regime in Serbia before October 2000 in which Serbian nationalism was the leading political idea. However, Serbian nationalism was accompanied and mutually re-

[294] See Memorial, pp. 31 & 41.

enforced by the nationalisms that flared up in Croatia and in other parts of the SFRY. All those in power in the former Yugoslav republics became nationalistic in the late 1980s, although their methods and capabilities differed; all of them contributed, to a greater or lesser extent, to the incitement of inter-ethnic hatred and the dissolution of Yugoslavia.

424. Although the responsibility of political leaders and their governments cannot *a priori* be equated, it is also clear that none of the parties can be held solely accountable for the conflict. A slow reaction by the international community also contributed to the outbreak and protracted duration of the conflicts in the former Yugoslavia.

425. The Respondent would like to emphasize that the wars in the territory of the former Yugoslavia did not involve peoples as such, but only those who professed to represent the peoples. The responsibility for the misdeeds perpetrated during the conflicts of 1991-1999 is individual and the Government of Serbia strongly supports all efforts to bring those responsible to justice, both before the International Criminal Tribunal for the Former Yugoslavia and national courts.

B. *The Rise of Nationalism*

1. Introduction

426. As already noted, the account of events leading to the conflict in Croatia in 1991-1995 presented in the Memorial fails even to mention the role played by Croatian nationalism. In fact, the method used by the Memorial is to provide a simplified and exaggerated account of Serbian nationalism, while concealing the role played by the Croatian one or providing a "sterilized" account of events, such as in its depiction of the Independent State of Croatia. The result is a one-sided and obviously inaccurate presentation of the facts. In this section, the Respondent will provide additional facts and analysis that will contribute to a more complete picture of the relevant events.

427. The Memorial marks the beginning of the rise of Serbian nationalism in Serbia's questioning of the basic principles of the 1974 SFRY Constitution at the beginning of

the 1980s.[295] However, in its effort to portray all Serbian leaders as nationalists and legitimate Serbian grievances as intrinsically nationalistic, the Memorial fails to distinguish between the initiative of Serbian communist politicians who were not nationalists to review the constitutional position of Serbia under the 1974 Yugoslav constitution and the positions later adopted by the Memorandum of the Serbian Academy of Arts and Sciences, which were in fact in opposition to the Communist government.[296]

428. As far as the 1986 Memorandum of the Serbian Academy of Arts and Sciences is concerned, the Memorial devotes 4 pages to discussing this document. According to the Memorial, this was "a catalytic event" in respect of the genocidal acts perpetrated by the Serbs against the Croats in 1991–1995 and "one of the key developments which gave rise to the circumstances in which a genocide [sic] could be perpetrated in Croatia."[297] This, however, is an enormous exaggeration, as evinced even by the Applicant's description of its contents.[298] Neither did the Serbs have any intent to perpetrate genocide against Croats nor was the Memorandum a document which contemplated any such event.

429. While the Applicant sees the roots of the Serbian nationalistic movement in Serbian challenges to the 1974 Constitution, it fails to mention that this constitution, which had substantial confederal elements, was adopted partly in response to the rise of nationalism in the SFRY in the early 1970. Nationalism was particularly strong in Croatia, with a popular nationalist movement "Maspok" which was suppressed by Tito in 1971. The Memorial, however, describes this movement as a likeable champion of decentralization and democratization of the communist society, without mentioning its nationalistic elements.[299] It is a fact that Croatian nationalism never altogether disappeared after World War II, in particular its extremist forms embodied in various Ustashe terrorist groups, which committed numerous terrorist acts against the SFRY and its citizens.[300]

[295] See Memorial, paras. 2.39 & 2.41.
[296] See Memorial, paras. 2.39, note 27, 2.41–2.42 & 2.47.
[297] See Memorial, para. 2.43.
[298] See Memorial, paras. 2.45-2.47.
[299] See Memorial, para. 2.11.
[300] See Chronology of the Ustashe Movement after World War II (Annex 8), and E. Zuroff, *Operation Last Chance*, New York, 2009, pp. 131–150 (Annex 9).

2. The Revival of Croatian Nationalism

430. In 1989, the creation of the Croatian Democratic Community ("Hrvatska demokratska zajednica", "HDZ") marked the revival of the Croatian nationalism. The leader of the HDZ was Dr. Franjo Tuđman who advocated for Croatia's right to self-determination and sovereignty.[301] Ultimately, this meant the independence of Croatia from the SFRY. Dr. Tuđman was a nationalist dissident and historian who was known for his view which reduced the number of victims killed in the Jasenovac concentration camp.[302]

431. The first congress of the HDZ was held on 24-25 February 1990[303] "in an atmosphere of intense emotion and nationalism..."[304] On that occasion, Dr. Tuđman made clear that he thought that the fascist Independent State of Croatia was "an expression of the historical aspirations of the Croatian people".[305] Soon afterwards, he volunteered the following remark: "Thank God, my wife is not a Serb or a Jew."[306] These were the first signs of the rehabilitation of the Independent State of Croatia and, with it, the Ustashe Movement, that was to take place while Dr. Tuđman was President of Croatia from 1990 to 1999.[307]

432. Moreover, the rhetoric of the HDZ was clearly inflammable and led to ethnically motivated incidents against the Serbs already in 1989. According to one observer,

> "During the summer of 1989, extremist followers of the HDZ in Dalmatia mounted enough physical attacks on local Serbs to make the new party's nationalist rhetoric seem truly threatening. Krajina Serbs staged their own confrontations with the local Croats and, encouraged by the Milosevic media, began to demand autonomy within Croatia, cultural if part of Yugoslavia and political if not."[308]

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[301] See L. Silber & A. Little, *The Death of Yugoslavia* (1996), p. 86, Preliminary Objections, Annex 1.
[302] See *supra* footnote 295.
[303] See http://www.hdz.hr/default.aspx?id=100 .
[304] See L. Silber & A. Little, *The Death of Yugoslavia* (1996), p. 87, Preliminary Objections, Annex 1.
[305] The relevant part of the speech is reprinted in N. Barić, *The Serb Rebellion in Croatia 1990–1995 (Srpska pobuna u Hrvatskoj 1990-1995.),* Zagreb, 2005, p. 58.
[306] See L. Silber & A. Little, *The Death of Yugoslavia* (1996), p. 86, Preliminary Objections, Annex 1.
[307] See also Efraim Zuroff, *op.cit.* (Annex 9).
[308] J. Lampe, *Yugoslavia as History: Twice There was a Country* (2nd ed., 2000), p. 354. See, also. S. Woodward, *Balkan Tragedy* (1995), p. 107.

433. It is important to note that the rise of the HDZ took place at a time when inter-ethnic tensions were already running high in the SFRY. It is not contested that, at the time, the government of Mr. Milošević stirred nationalist passions in Serbia. But it is equally clear that the overwhelming election victory of the HDZ in April - May 1990 had created Mr. Milošević's counter-part in Croatia. In such situation, minorities found themselves in a particularly precarious position. Being a Croat in Serbia under Tito was not a disadvantage; it became one during the rule of Mr. Milošević. Likewise, in times of ostentatious and aggressive Croatian nationalism, which strived for independence, the Serbs in Croatia reacted with anxiety to the prospect of becoming a minority in Mr. Tuđman's Croatia, separated from Yugoslavia.

3. Hate Speech

434. The Memorial has a whole section dealing with "The Demonization of the Croats" as one element of Serbian nationalism.[309] The Respondent does not dispute that hate speech was abundant in Serbian media at the end of the 1980s and during the 1990s, but this phenomenon was not confined to Serbia. As will be seen below, Croatia did not lag behind in this regard at all.

435. As far as the claims related to hate speech in the Serbian media are concerned, including a study of hate speech annexed to the Memorial,[310] none of the evidence presented therein fall under the legal elements of the crime of genocide. Although this 26 pages-long study has a part specifically entitled "Articles aimed at inciting genocide", this part is only one and a half pages long and contains no analysis whatsoever. It merely reproduces titles of certain newspaper articles, without however providing any reference as to their origin, and also provides certain quotes which clearly do not constitute incitement to genocide.

436. The principal evidence of "demonization" of Croats provided in the Memorial concerns the claims made by a Serbian historian about the genesis of the 1941 genocide in Croatia, which are never actually refuted by the Applicant, not even in a footnote.[311] Significantly, no acknowledgment of the 1941 genocide against the Serbs is to be found anywhere in the Memorial.

[309] See Memorial, p. 38.
[310] Memorial, Appendices, Vol. 5, appendix 3.
[311] See Memorial, paras. 2.51–2.52.

437. According to the Memorial, further evidence of "demonization" of the Croats concerns inflammatory articles about the Ustashe concentration camp in Jasenovac, in particular allegedly exaggerated numbers of those murdered in the camp.[312] However, these numbers actually correspond to the official figures of those killed, as mentioned by the Applicant itself.[313] In fact, the Applicant criticizes "Serb historians and commentators" for not accepting the number of victims established by certain subsequent studies, which were later however not even accepted by the Zagreb District Court.[314]

438. In line with its one-sided approach, the Memorial makes no mention of the hate speech in Croatia that was directed against Serbs. Particularly notorious example in this regard was *Slobodni tjednik* [Free Weekly], a tabloid which not only published inflammatory articles about Serbs but also lists of the "disloyal" prominent Serbs in various Croatian towns.[315]

439. It is notable that the hate speech against Serbs came personally from the highest Croatian officials, which provided it with an added force. The racism against the Serbs (and the Jews) is evident in the above-mentioned statement by President Tuđman ("Thank God, my wife is neither a Serb nor a Jew").[316] Another example are statements of Mr. Stjepan Mesić, then a HDZ leader, who went on to become the President of the SFRY Presidency, and now the President of Croatia, saying that "the Serbs from Krajina plow the soil in Croatia, but pray to God that it rains in Serbia", and that "the Serbs will carry from Croatia as much land, as they brought on their 'opanci' [traditional Serbian shoes]"[317]

440. The hate speech towards the Serbs in Croatia could also be heard in the Croatian parliament at the time. For example, Mr. Jurić, a member of the Parliament, in his speech stated the following:

> "But I am asking these same Serbs whether it will dawn on them when they - and I am just wondering - and I'm not making a statement [sic!] - whether they would come to their senses if ten civilians were

[312] Memorial, para. 2.53.
[313] Memorial, para. 2.53 ("official figures gave the number as between 600,000 and 700,000").
[314] See *supra* footnote 295.
[315] For more, see B. Rašeta, "*Slobodni tjednik* i Srbi u Hrvatskoj", *Ljetopis Srpskog kulturnog drustva Prosvjeta 1998*, p. 140 *et seq*.
[316] See L. Silber & A. Little, *The Death of Yugoslavia,* BBC Books, London, 1995, p.86 (Annex 1 to the Preliminary Objections); also E. Zuroff, *Operation Last Chance,* New York, 2009, p. 134 (Annex 9).
[317] See S. Letica, 'Tko je doista Stjepan Mesić' (Who is really Stjepan Mesić), *Vijenac*, no. 385, Matica Hrvatska, Zagreb, 4 December 2008, available at http://www.matica.hr/Vijenac/vijenac385.nsf.

> executed for one killed policeman or if a hundred civilians were killed for one [National] Guard officer! This is something that my Christian, Catholic faith would not let me, because Father Stanko Bogeljic has taught me that there is one commandment in those ten commandments: "thou shall not kill", and it does not allow me to say that this is right, but it would be right for me if ten Serb intellectuals would get the sack in Zagreb, Rijeka, Split or Osijek for every policeman killed. For, intellectuals cannot go to the woods. They are not like those ignorant Banija peasants who could go to bed without washing their feet for a month! Intellectuals must be sacked, because Chetnik ringleaders live in the big cities and we must prevent it. [...] Our almighty God has created at the same time both good people and a lot of vermin. One of such vermin is the moth which, when let into the closet, in fact when it comes into it, it eats at the shirt, then it turns to the pullover; it eats and eats until it has eaten everything away. The same is true of those who came to us as our guest-workers."[318]

441. Another form of the hate speech against Serbs manifested itself in the rehabilitation of the Independent State of Croatia. This was visible already at the first HDZ congress in the speech by President Tuđman himself, when he described the Independent State of Croatia as an expression of the historical aspirations of the Croatian people.[319] Later on, Mr. Mesić said the following:

> "You see, in the World War II Croats won twice and we have no reason to apologize to anyone. What they are asking of Croats is to

[318] The speech of Mr. Marjan Jurić at the session of the Croatian parliament held on 1–3 August 1991, reprinted in J. Bošković, *NDH drugi put: Lux Croatiae* (1999), p. 63. The original text reads as follows:

> "Ali, pitam ja te iste Srbe, da li bi se oni opametili kad bi – ali ovo pitam – i da li bi – ne konstatiram – da li bi se oni opametili kada bi za ubijenog redarstvenika bilo streljano 10 civila, za ubijenog časnika garde da se strijelja 100 civila! Meni to moja kršćanska, katolička vjera ne dozvoljava, jer me to fra Stanko Bogeljić naučio da ima zapovijed u onih deset – 'ne ubij' i ona mi ne dozvoljava da kažem da je to ispravno, ali za mene bi bilo ispravno da za svakog ubijenog redarstvenika deset Srba intelektualaca dobije otkaz u Zagrebu, Rijeci, Splitu ili Osijeku. Jer, intelektualci ne mogu otići u šumu, oni nisu kao oni neupućeni seljaci iz Banije koji mogu mjesec dana ne prati noge pa otići u krevet! Intelektualci moraju dobiti dokaze, jer legla četnika nalaze se u velikim gradovima i mi to moramo spriječiti... Dragi Bog je u svojoj dobroti stvorio sa ljudima i dosta gamadi. Jedna od gamadi je i moljac koji, kad ga pustite u ormar, zapravo kad sam dođe, onda nagrize košulju, pa grize poslije vestu, grize dalje i grize, grize dok ne izgrize sve. Takvi su i oni koji su došli k nama kao gastarbajteri."

See also, Public Statements which Directly Provoked Perpetrators to Commit Genocide against the Serbs in Croatia (Annex 51).

[319] See *supra* para. 431.

> kneel down at Jasenovac, to kneel down here... We have no reason to be down on our knees in front of anybody! We have won twice and everybody else just once. We won on 10 April [the date in 1941 when the Independent State of Croatia was created] when the Axis Powers recognized the Croatian State and we won again because, after the war, we were on the winning side sitting at the table with the victorious powers."[320]

442. The rehabilitation of the Independent State of Croatia was not merely a reinterpretation of history – it also legitimized the Ustashe movement and the genocide perpetrated against the Serbs, Jews and Roma in Croatia in 1941-1945.[321] For the Serbs, this was a terrifying sign. While one cannot deny that the fears held by the Serbs in Croatia were further spurred by the propaganda from the Serbian media controlled by Mr. Milošević, it is clear from the above that their fears and apprehensions were not fuelled solely from Belgrade. The attitudes of the highest Croatian officials, the inflammable articles about Serbs in the Croatian media and the revocation of their acquired rights instigated fear in a community that was scarred by the still vivid memories of the World War II genocide.

4. The "Relativisation" of Borders between Republics

443. The Memorial devotes much attention to the debate about the internal borders between the Yugoslav republics that grew stronger as it was becoming clear that certain republics intended to leave the SFRY.[322] This debate and its outcome are clearly irrelevant for the present dispute which concerns allegations of genocide. What should be noted, however, is that the challenge to the internal borders of the SFRY republics was a legitimate political claim, as was the effort to preserve these borders as their external borders by the republics wishing to leave the SFRY. Indeed, as a matter of

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[320] See http://www.index.hr/vijesti/clanak.aspx?id=334481 . The original statement reads as follows:
"U Drugom svjetskom ratu, vidite, Hrvati su dva puta pobijedili i mi nemamo razloga se nikom ispričavati. Ovo što skroz traže od Hrvata - ajde idite kleknuti u Jasenovac, kleknite ovdje... Mi nemamo pred kim šta klečati! Mi smo dva puta pobijedili, a svi drugi samo jednom. Mi smo pobijedili 10. travnja kad su nam Sile osovine priznale Hrvatsku državu i pobijedili smo jer smo se našli poslije rata, opet s pobjednicima, za pobjedničkim stolom."
Mr. Mesić has in the meantime apologized for this statement, see http://www.predsjednik.hr/default.asp?mode=1&gl=200612100000002&jezik=1&sid

[321] See Annexes, Section II, The 1990's Croatian Historical Revisionism and the Revival of the Ustashe Principles.

[322] See Memorial, para. 2.72. *et seq*.

international law, it was only on 11 January 1992 that the Badinter Commission held in its Opinion No. 3 that "[e]xcept where otherwise agreed, the former boundaries become frontiers protected by international law."[323]

444. The Applicant tries to link the subject-matter of the present dispute with the border issue by claiming that attempts at changing internal borders were motivated by the idea that different ethnicities cannot live together, which in turn implied that non-Serb populations should leave voluntarily, or be forced out, or be destroyed.[324] This, however, has not been substantiated by any evidence provided by the Applicant.

445. Thus, the Applicant fails to provide evidence for its claim that "[p]ro-Milošević politicians in Serbia began to propose the revision of borders on grounds of ethnicity."[325] By implication, as it is mentioned in the same paragraph followed by a quote, this seems to apply to Mr. Vojislav Šešelj, the leader of the Serbian Radical Party, and his ideas about the "Greater Serbia" and the claim that the border should be along the line Karlobag-Ogulin-Karlovac-Virovitica. However, this is misleading because the Applicant fails to mention that, at the time, Mr. Šešelj was not "a pro-Milošević politician", but in opposition to the Serbian government and President Milošević. For example, in August 1991 Mr. Šešelj stated in an interview with *Spiegel* that if he ever came to power he would "probably arrest Milosevic." Previously, his party was refused registration in 1990. He would become Milošević's ally only later.[326]

446. More importantly, the Applicant fails to provide any evidence for its claim that Šešelj's statement was supported by President Milošević, as the reference to the book "The Death of Yugoslavia" given by the Applicant does not support this claim.[327] In contrast to that, when on 1 April 1991 the SAO (Serbian Autonomous Region) of Krajina adopted a decision to join the Republic of Serbia,[328] the following day, 2 April 1991, the National Assembly of the Republic of Serbia adopted the Declaration on the Peaceful Settlement of the Yugoslav Crisis, which basically rejected this idea.[329]

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[323] 31 I.L.M. 1488 (1992) at p. 1500.
[324] Memorial, para. 2.78.
[325] Memorial, para. 2.76.
[326] See R. Hislope, 'Intra-ethnic conflict in Croatia and Serbia: Flanking and the Consequences for Democracy', *East European Quarterly*, Vol. 30, no. 4 (1997), p. 483.
[327] See Memorial, para. 2.76. and note 103, referring to L. Silber / A. Little, *The Death of Yugoslavia* (1996), at p. 161, which however deal with Serbia's consent to Slovenia's departure from the SFRY in June 1991.
[328] See ICTY, *Milošević,* IT-02-54-T, Order concerning chronology of events in the Croatia, number 30.
[329] Ibid,.

447. Also in relation to the borders issue, the Memorial is silent about the fact that Dr. Tuđman, President of Croatia from 1990 to 1999, was one of the most enthusiastic proponents of a change of borders along ethnic lines, as were other prominent members of his party. Already at the first congress of HDZ in 1990, he stated that the party's goal was Croatia in its historical and natural borders.[330]

448. At a public rally in Zagreb in 1990, Šime Đodan, one of the HDZ leaders, and subsequently Croatia's minister of defense in 1991, said that everyone knew where the "boundaries of the ancient Croatian state" were and told "Chetniks" that the Croatian boundary (with Bosnia and Herzegovina) would not "forever" be on the River Una, but "less than five years [would] pass", and a Croatian flag would fly atop Mount Romanija, in eastern Bosnia.[331]

449. Finally, when President Tuđman and his generals planned the genocidal operation *Storm* at Brioni, Croatia, on 31 July 1995, he unequivocally stated that the success of that operation would liberate forces "to tailor the Croatian borders in Bosnia".[332]

5. The Discriminatory Policies of the HDZ Government

450. The HDZ won Croatia's elections held in spring 1990 and formed government, while Dr. Tuđman became President of Croatia.

451. In January 1990 the League of Communists of Yugoslavia was torn along ethnic lines at its 14th Congress, and effectively disappeared as a cohesive force of the federation, which made clear that the very survival of the SFRY might be at stake. This, in itself, was an additional reason for the insecurity felt by Serbs in Croatia. They felt their position was jeopardized as the existence of the SFRY was put into question.

452. As already discussed, before the 1990 Croatian elections the HDZ had already contributed to creating an atmosphere in which the Serbs felt insecure and vulnerable. Once it came to power, the threatening rhetoric of the HDZ was turned into government actions with the introduction of discriminatory policies that were clearly aimed at Serbs.

[330] O. Žunec, *Goli život*, Zagreb, 2007, p. 103.
[331] N. Barić, *The Serb Rebellion in Croatia 1990–1995 (Srpska pobuna u Hrvatskoj 1990–1995.),* Zagreb, 2005, p. 60.
[332] See Brioni Minutes, p. 21, (Annex 52).

As will be seen below, they were fired *en masse* from the state administration and public services. At the same time, the rights they held as a community were also taken away or reduced. This was accompanied by acts aimed at rehabilitation of the Independent State of Croatia. Together, these events cemented the insecurity of the Serbs in Croatia and made them feel threatened as a community. As will be seen below, this threat was real and tangible despite the fact that these events were also manipulated by the propaganda of the state-controlled media in Serbia.

(a) Mass Dismissal of Serbs

453. Once they came into office in 1990, the new HDZ government and the President Tuđman started to implement policies that were designed to reverse the ethnic structure in the state administration and public services for the benefit of ethnic Croats. They claimed that the Serbs were over-represented and conducted a campaign for their dismissal from their positions in the state administration and the police, health services, public education and the media. One Croatian author describes the situation as follows:

> "Immediately after the election in 1990, Tudjan vowed to redress the 'reversed discrimination' or overrepresentation of Serbs in the organs of power, police and the mass media by saying: 'We want to achieve that a Croatian man has the same rights in Croatia like everybody else'.
>
> ...
>
> In such a situation it was as early as 1990 that ethnically motivated job dismissals began, especially from the government administration and the security sensitive structures which were under the Croatian authorities (police), but also from public services such as health, education and the media. Vacancies in the police service were filled in by Croats. Those Serbs who stayed on as workers and employees were asked to take an oath of loyalty to the state of Croatia, if they wanted to keep their jobs."[333]

[333] O. Žunec, *Goli život*, Zagreb, 2007, p. 572. The Croatian original reads as follows:

454. According to another author,

> "Although the new government did not conduct a referendum proposing independence until May 1991, its media campaign exulted in 'a Croatia for Croatians only.' Such slogans encouraged the excesses of local supporters and returning émigrés. They forced Serbs not only out of local police forces as authorized, but from administrative and enterprise positions as well. In the areas where the Serbs were most concentrated, along the old Habsburg Military Border, such wholesale dismissals seemed to confirm the worst local fears. At the same time, local Croats also sacked or seized Serbian-owned vacation houses along the Adriatic coast."[334]

455. Therefore, already in 1990, the Serbs in Croatia were not only exposed to an atmosphere in which the Independent State of Croatia and the Ustashe Movement were rehabilitated and occasionally even glorified. They were also the target of very tangible discrimination threatening their and their families' everyday existence, as many of them were dismissed simply because they were members of the Serbian national group.

(b) Constitutional amendments and the new Constitution

456. Soon after coming to power in spring of 1990, President Tuđman and his HDZ government embarked on constitutional changes, which included the provisions that reduced the rights and affected the position of Serbs in Croatia.

i) The constitutional amendments of 25 July 1990

"Tudjman se odmah nakon izbora 1990. godine zarekao da ce poraditi na ispravljanju 'obratne diskriminacije' odnosno nadzastupljenosti Srba u organima vlasti, policije i masovnim medijima: 'Želimo postići to da hrvatski čovjek u Hrvatskoj ima ista prava kao i svatko drugi'
(...)
U takvoj su situaciji već 1990. godine započela otpuštanja po nacionalnoj osnovi, osobito iz državne administracije i sigurnosno osjetljivijih struktura koje su bile u nadležnosti hrvatskih vlasti (policija), a onda i iz državnih službi u zdravstvu, obrazovanju i medijima. Popuna policije novim ljudima vršila se Hrvatima. Od zadržanih srpskih radnika i namještenika tražilo se polaganje prisege lojalnosti državi Hrvatskoj, ako žele zadržati posao." (references omitted)

[334] J. Lampe. *Yugoslavia as History: Twice There was a Country* (Cambridge University Press, 2000 2nd ed.), p. 360.

457. Amendments LXIV to LXXV to the Constitution of the Socialist Republic of Croatia were adopted on 25 July 1990.[335] Particularly controversial was Amendment LXVI which introduced the new flag and the coat of arms of Croatia that were dominated by the red and white checkerboard ("šahovnica"). While it is not disputed that "šahovnica" was historically one of Croatia's symbols, the newly introduced designs of the flag and the coat of arms were similar to the flag and the coat of arms of the Independent State of Croatia.[336] The introduction of "šahovnica" met with the fierce reaction from Serbs in Croatia. Together with the rehabilitation of the Independent State of Croatia, this change was perceived as a signal of outright hostility towards Serbs.

ii) The new Constitution of Croatia of 22 December 1990

458. On 22 December 1990, Croatia adopted its new constitution.[337] It not only confirmed the previous constitutional changes concerning Croatia's state symbols[338] but further reduced the rights of the Serb community in Croatia.

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[335] See *Narodne novine* [Official Gazette], no. 31/1990. By Amendment LXIV, Croatia became "The Republic of Croatia."

[336] The flag of the Independent State of Croatia 1941–1945:

The flag of the Republic of Croatia introduced on 25 July 1990:

The flag of Croatia valid until 25 July 1990:

The current flag of Croatia adopted on 21 December 1990:

Source: http://hr.wikipedia.org/wiki/Zastava_Republike_Hrvatske

[337] *Narodne novine* [Official Gazette], no. 56/1990.

[338] See Article 11.

459. Firstly, the Serbs in Croatia lost the constitutional guarantee that they, as a national group, were a constituent element of the Croatian state. The previous 1974 Constitution of Croatia defined Croatia as follows:

> "The Socialist Republic of Croatia is the national state of the Croatian people, the state of the Serbian people in Croatia and the state of other peoples and nationalities living in it."[339]

460. The new 1990 Constitution defined Croatia as

> "... the national state of the Croatian people and the state of members of other peoples and minorities, who are its citizens: Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Jews and others, which are guaranteed equality with the citizens of Croatian nationality and the implementation of the national rights in accordance with the democratic norms of the OUN and the countries of the free world."[340]

461. This way, the new Croatian constitution removed the constitutional guarantee of the position of the Serbs in Croatia as the constituent element of the Croatian state. As a result they were now only considered to be a national minority. Even more importantly, in the light of their treatment during World War II, this also meant that Serbs had lost the constitutional guarantee of their collective rights in Croatia. Previously, Croatia was defined as also being "the state of the Serbian people in Croatia", now it was "the state of *members* of other peoples and minorities: Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Jews and others..." (emphasis added).

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[339] Article 1, Constitution of the Socialist Republic of Croatia, *Ustav Socijalističke Federativne Republike Jugoslavije. Ustav Socijalističke Republike Hrvatske*, Narodne novine, Zagreb, 1974, p. 226. The original text reads as follows:
"Socijalistička Republika Hrvatska je država utemeljena na suverenosti naroda i na vlasti i samoupravljanju radničke klase i svih radnih ljudi te socijalistička samoupravna demokratska zajednica radnih ljudi i građana i ravnopravnih naroda i narodnosti.
Socijalistička Republika Hrvatska je nacionalna država hrvatskog naroda, država srpskog naroda u Hrvatskoj i država narodnosti koje u njoj žive.
Socijalistička Republika Hrvatska je u sastavu Socijalističke Federativne Republike Jugoslavije."

[340] Preamble, Constitution of the Republic of Croatia, 1990, *Narodne novine* [Official Gazette], no. 56/1990. The original text reads as follows:
"Polazeći od iznesenih povijesnih činjenica, te od opće prihvaćenih načela u suvremenu svijetu i neotuđivosti i nedjeljivosti, neprenosivosti i nepotrošivosti prava na samoodredenje i državnu suverenost hrvatskoga naroda, uključujući i neokrnjeno pravo na odcjepljenje i na udruživanje, kao osnovnih preduvjeta za mir i stabilnost međunarodnog poretka, Republika Hrvatska ustanovljuje se kao nacionalna država hrvatskoga naroda i država pripadnika inih naroda i manjina, koji su njezini državljani: Srba, Muslimana, Slovenaca, Čeha, Slovaka, Talijana, Madžara, Židova i drugih, kojima se jamči ravnopravnost s građanima hrvatske narodnosti i ostvarivanje nacionalnih prava u skladu s demokratskim normama OUN i zemalja slobodnoga svijeta."

462. These changes in fact stripped the Serbs in Croatia of their long-standing acquired rights that they enjoyed as a *group*, most recently by the explicit definition of Croatia as "the state of the Croatian people and the state of the Serbian people in Croatia..." in the 1974 Constitution of Croatia. It should however be mentioned that as early as 1867 the Croatian Parliament determined that it "recognized the Serbian people dwelling in Croatia as a people that is the same and equal with the Croatian people."[341] Similarly, the Declaration of the basic rights of the peoples and citizens of the Democratic Croatia adopted on 9 May 1944 proclaimed that the Croatian people and the Serbian people in Croatia are equal, while national minorities shall have all rights.[342] This clearly demonstrated that, from at least 1867 until the constitutional changes in 1990, the Serbs in Croatia were never regarded as a national minority but as a people equal with the Croatian people and as a constituent element of the Croatian State. The only exception was the period 1941-1945, during which time the Independent State of Croatia was in existence, when Serbs were the victims of genocide.

463. Furthermore, the new 1990 Constitution of Croatia took away the explicit constitutional guarantee of the use of the Serbian language. The previous 1974 Constitution of Croatia provided that the languages for public use in Croatia were "Croatian literary language – the standard form of the people's language of the Croats and the Serbs in Croatia, which is called Croatian or Serbian."[343] The new Constitution simply provided that the Croatian language and the Latin script were in official use in Croatia, while the use of other languages and scripts could be introduced in local communities under the conditions stipulated by law.[344]

464. By abolishing the constitutional guarantee on the use of the Serbian language and the Cyrillic script, and by stipulating that their use would be regulated by law, the new Constitution drastically reduced the rights of Serbs in Croatia, which were no longer constitutionally entrenched but at the mercy of the Croatian parliament. Significantly, the nationalist HDZ controlled the majority in the Croatian parliament at the time.

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[341] Translation of the Croatian text quoted in O. Žunec, *Goli život*, Zagreb, 2007, p. 559, note 1091.
[342] See *ibid.,* p. 559.
[343] Article 138, paragraph 1, of the 1974 Constitution of Croatia, *Ustav Socijalističke Federativne Republike Jugoslavije. Ustav Socijalističke Republike Hrvatske*, Narodne novine, Zagreb, 1974, p. 284. The original text reads as follows: "U Socijalističkoj Republici Hrvatskoj u javnoj je upotrebi hrvatski književni jezik – standardni oblik narodnog jezika Hrvata i Srba u Hrvatskoj, koji se naziva hrvatski ili srpski."
[344] Article 12 of the 1990 Constitution of Croatia.

(c) Other examples of discrimination and persecution against the Serbs

465. In addition to massive lay offs of Serbs and the constitutional changes that reduced or abolished their acquired rights, Serbs were also discriminated against or threatened in other ways. As the crisis progressed, the Serbs were increasingly harassed and intimidated, while their property was damaged and their houses were marked as belonging to Serbs.[345] This went hand in hand with a campaign of hate speech that had already begun during the rise of the HDZ.[346] Pressure against Serbs was such that thousands of them changed their names in order to conceal their Serbian identity so as to avoid discrimination and persecution.[347]

466. The discrimination and persecution of the Serbs increased at the beginning of the armed conflict in 1991. There were ethnically motivated killing campaigns against Serbs in some Croatian cities, which were not connected with military operations, while thousands of Serb houses were blown up during 1991 and 1992.[348] As will be discussed below, the persecution of Serbs would eventually result in genocide in 1995 during the operation *Storm*.[349]

6. Croatia's Preparations for the War

467. In accordance with its generally biased approach, the Memorial also fails to mention that the HDZ government in Croatia started to prepare for armed conflict already in 1990, after it took office. In particular, this was done

- by enlarging the Ministry of the Interior ("MUP") forces and creating special force units, and subsequently through the formation of parallel military structures and forces;
- by cleansing the police forces of the Serbs;
- by illegally arming Croatian forces.

[345] See O. Žunec, *Goli život*, Zagreb, 2007, pp. 572-573. S. Woodward, *Balkan Tragedy* (1995), p. 107; J. Lampe, *Yugoslavia as History: Twice There was a Country* (2nd ed., 2000), p. 354.
[346] See *supra* paras. 434–441.
[347] See O. Žunec, *Goli život*, Zagreb, 2007, p. 575, who mentions the number of 25.786 persons that changed their names in Croatia during the period 1990-1992, but states that it still remains to be determined how many of them were the Serbs concealing their identity and how many did so for other reasons.
[348] See more in Annex 37.
[349] See *infra* Chapters XIII and XIV.

468. This is how the CIA study *Balkan Battlegrounds* describes the expanding of the police force in Croatia in 1990:

> "Impervious to ethnic Serb reactions, when the Croatian Republic Government first moved to expand the MUP's regular police force, it dismissed many of the Serb policemen while increasing the number of police stations throughout the country as a demonstration of Croatian sovereignty and to enforce Croatian rule, particularly in Serb populated areas. By January 1991 the original force of 10,000 or so police had been expanded to close to 20,000 personnel."[350]

469. This shows that the massive lay offs of Serbs from the state administration, particularly the police, were not motivated by a desire to create a more balanced multi-ethnic force, but rather took place with the intention of creating an ethnically Croat military force. The degree of expansion of the number of policemen is also astounding, as the police force doubled in little more than 6 months.

470. The fact that the HDZ government was set to create a combat military force is also evident in the fact that the special forces of the MUP were greatly expanded:

> "The center-piece of the MUP's efforts to develop a military force, however, was the expansion of its single antiterrorist unit into a number of 'special police' battalions organized along military lines. By January 1991, the program had produced 3,000 regular soldiers formed into a dozen battalion-sized units."[351]

471. In addition to the regular police force, the MUP also had about 10,000 reserve personnel. The police reserve and the special police of the MUP were in May 1991 transformed into the Croatian National Guard Corps ("ZNG" – "Zbor narodne garde"), which was organized as a military force and subordinated to the Ministry of Defense of Croatia.[352]

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[350] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 86 (Peace Palace Library).
[351] *Ibid.*
[352] *Ibid.*

472. In parallel with the formation and preparation of its armed forces, the Croatian government undertook to arm them. This was done illegally and in a clandestine manner. The Memorial mentions that the JNA detected the illegal arming of Croatia, but seeks to portray the JNA's actions as finding a pretext for the proclamation of a state of emergency in Croatia.[353] What the Memorial omits to mention is that the weapons were indeed illegally imported and that the Croatian Minister of Defense Špegelj was behind this illegal importation of weapons.[354]

4. The Organizing of Serbs in Croatia (1989-1991)

A. *Introduction*

473. This section will describe developments of the Serb movement in Croatia and its activity during the escalation of the crisis in the SFRY in 1989-1991. As elsewhere in this discussion of the background facts to the present case, the Respondent does not purport to provide a comprehensive analysis but will rather present a summary of the relevant events in order to assist the Court in gaining a more balanced picture of the events. Within this framework and to the extent that it is necessary and relevant for the present proceedings, inaccurate or misleading claims made by the Applicant will be identified and refuted.

474. This section will discuss the following:

- the emergence of the Serb movement in Croatia;
- the creation of the Serb regions in Croatia and their unification into the Republic of Srpska Krajina; and
- the reactions of the Croatian government.

B. *Political Organizing of the Serbs in Croatia*

475. The democratization of the SFRY in the second half of the 1980s went hand in hand with the revival of nationalism that spread all over the country and the growth of inter-ethnic tensions. The first manifestations of national sentiments of the Serbs in Croatia

[353] Memorial, para. 2.97.
[354] M. Špegelj, *Soldier's Memoirs (Sjećanja vojnika),* Zagreb, 2001, p.288, table IV: Weapons purchased in the organization of the Ministry of Defence of the Republic of Croatia between 5 October 1990 and 15 January 1991 (Annex 36).

took place in 1989,[355] which led to their political organizing on an ethnic basis at the beginning of 1990, notably with the founding of the Serbian Democratic Party (hereinafter "SDS" – "Srpska demokratska stranka") on 17 February 1990.

476. However, during the Croatian elections held in April-May 1990, the majority of Serbs in Croatia voted for the Social-Democratic Party of Croatia, the former League of Communists of Croatia, which was perceived as being multi-ethnic, anti-Fascist, and pro-Yugoslav, and, as such, against both Serbian and Croatian nationalism. Following the elections, this political party had counted 24 Serbs among its deputies in the Croatian Parliament, in comparison with 5 deputies of the SDS. At the local elections held at the same time, the Social-Democratic Party won in most of the municipalities with a substantial Serb population, while the Serbian Democratic Party formed local government in three municipalities (Knin, Gračac and Donji Lapac).[356]

477. The elections brought the nationalist HDZ government to power in Croatia. As already discussed, Serbs felt threatened by the HDZ rhetoric, and these fears were reinforced by the discriminatory governmental measures introduced against Serbs and the reduction of their constitutional rights.[357] This contributed to a further aggravation of the inter-ethnic conflict in Croatia in 1990 and also led to the strengthening of the Serbian Democratic Party, since the Social-Democratic Party was perceived as weak and indecisive.

478. As the new Croatian government started to reassert Croatian sovereignty in relation to the SFRY, and as it was preparing to adopt constitutional amendments that would approve the design of the flag and coat of arms in a way reminiscent of the symbols of the Independent State of Croatia,[358] the Serbian Democratic Party started to seek autonomy for the Serbs in Croatia. Indeed, its leader, Mr. Jovan Rašković, and the Croatian President Tuđman discussed this prospect in July 1990[359] but without result.

479. As tensions mounted and the constitutional amendments were imminent, the three municipalities controlled by SDS decided to form the Union of municipalities of the

[355] See S. Radulović, *Sudbina Krajine*, Belgrade,1996, pp. 11–13.
[356] See O. Žunec, *Goli život*, Zagreb, 2007, p. 262–263.
[357] See *supra* paras. 456–464.
[358] See *supra* footnote. 336.
[359] The transcript of a meeting between the two was published in the Croatian press in July 1990 and is reproduced in S. Radulović, *Sudbina Krajine* (1996), p. 111 *et seq*.

Northern Dalmatia and Lika which was proclaimed on 1 July 1990. Other municipalities with a Serb majority from the region of Northern Dalmatia and Lika followed suit and joined the Union. The Memorial presents this as an incitement to "rebellion".[360] However, this can hardly be qualified as a "rebellion" or an incitement to it, since the establishment of the Union of municipalities was completely lawful. Moreover, this was largely a symbolic expression of the Serb protest because unions of municipalities were voluntary associations without much power.

480. As the amendments to the Croatian constitution were adopted by the HDZ dominated Croatian Parliament on 25 July 1990 – without in any way addressing the Serb anxieties and fears – the Serbs held a mass protest rally in the village of Srb. On this occasion, their political leaders adopted the Declaration on the sovereignty and autonomy of the Serbs in Croatia, which was supported at the rally.[361] The Declaration provided that the Serbian people "within the borders of the Socialist Republic of Croatia" were a sovereign people that, as such, had the right to take part in the decision on whether the SFRY would constitute a federation or a confederation.[362] They had the right to autonomy the content of which depended on how the SFRY was to be constituted: if the SFRY were to remain a federation, the Serbs in Croatia had the right to use their language, script, to have their educational and cultural institutions and media; if the SFRY were to become a confederation, the Serbs in Croatia would have "political-territorial autonomy."[363] The Declaration also rejected the constitutional amendments.[364]

481. The Declaration established the "Serbian parliament" ("Srpski sabor") as a representative body of the Serb people in Croatia, whose executive organ was the Serbian National Council.

482. The Memorial claims that the formation of the Serbian National Council turned "the Union of Serbian districts... into the 'government' of a break away state" and that the Declaration declared "independence" of the Serb nation in Croatia.[365] This is inaccurate. As has just been discussed, the Declaration neither declared independence nor was it an act of state creation, but set forth political aspirations of the Serbs in Croatia.

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[360] Memorial, para. 2.88.
[361] The text of the Declaration on the sovereignty and autonomy of the Serbs in Croatia ("Declaration") is reprinted in S. Radulović, *Sudbina Krajine* (1996), pp. 123–124.
[362] Declaration, para. 1.
[363] Declaration, para. 2.
[364] Declaration, para. 5.
[365] Memorial, para. 2.89.

C. *The Escalation of the Crisis in August – September 1990*

483. August 1990 brought about a further escalation of the crisis. The Memorial describes the relevant events as a series of incidents by the rebel Serbs who seized the weapons, ignited panic among the population, resisted the Croatian government (with the assistance of the JNA) and ultimately set up barricades in the areas of Knin, Obrovac and Benkovac.[366] This is an inaccurate description of events.

484. In fact, according to Croatian accounts, the Croatian Ministry of the Interior on 16 August 1990 "decided to remove the weapons of the police reserve from the police stations on the territory of *possible* rebellion."[367] On the morning of 17 August 1990, a hidden group of Croat policemen tried to enter Knin for that purpose but failed. However, the Croatian Ministry of the Interior (MUP) succeeded in removing the weapons from Benkovac and part of the Lika region, but not in Obrovac.[368] All this sparked demonstrations in areas with Serb populations, with the local policemen joining in. In the anticipation of a new attack by the Croatian MUP, improvised barricades were set up on the roads. On the same day, a heavily armed column of MUP forces set off from the capital, Zagreb, to enter the Serb municipalities but were stopped in the Lika region. At the same time, the SFRY air force intercepted 3 MUP helicopters and made them return to Zagreb.[369]

485. In September 1990, the MUP again tried to remove the weapons of the reserve police from the police stations in the Serb municipalities. This attempt was only partly successful, but at the same time it sparked new demonstrations by Serbs, where demonstrators seized some of the weapons.[370]

D. *The Serb Autonomous Regions on the Territory of Croatia*

486. In December 1990, as the Serbs in Knin lived under a permanent threat of the Croatian MUP attack,[371] and as the new Constitution of Croatia was about to be adopted, the Union of the Municipalities of the Northern Dalmatia and Lika and the Serbian National

[366] See Memorial, paras. 2.90–2.91.
[367] N. Barić, *Srpska pobuna u Hrvatskoj 1990–1995* (2005), p. 78 (emphasis added).
[368] *Ibid*., pp. 78–79.
[369] *Ibid*., pp. 79–80.
[370] *Ibid*., p. 83.
[371] *Ibid.*

Council decided to transform the Union into the Serbian Autonomous Region of Krajina ("SAO Krajina") on 21 December 1990.[372] The statute[373] of the new region envisaged this regional autonomy as part of Croatia and as part of the Croatian legal system.[374] An early version of the statute was sent to Croatian President Tuđman and the Speaker of Croatian Parliament, as well as to the federal authorities.[375] This testifies that, at the time, the Serbs in Croatia continued to perceive themselves and their autonomy as part of the Republic of Croatia, in a federal Yugoslavia. In this regard, the observation in the Memorial that the territory of SAO Krajina corresponded with the "borders" of a "Greater Serbia" proposed by Šešelj[376] is immaterial, as the borders he imagined roughly corresponded to the actual territorial allocation of ethnic Serbs at the time.

487. The SAO Krajina had an Assembly and an Executive Council. On 4 January 1991, the SAO Krajina formed its own Secretariat of the Internal Affairs with its own police force and state security affairs. The authority of the Croatian MUP on the territory of the SAO Krajina was revoked.[377]

488. By the end of 1990, the SAO Krajina comprised the municipalities of Benkovac, Donji Lapac, Dvor na Uni, Gračac, Knin, Obrovac, Titova Korenica and Vojnić.[378] Additional municipalities or parts thereof with the Serb majority in Dalmatia, Lika, Banija and Kordun and Western Slavonia joined the SAO Krajina in 1991. On 13 August 1991, the Serbian Autonomous Region of Western Slavonia was established ("SAO Western Slavonia").[379]

489. The municipalities with a Serb majority in Eastern Slavonia, Baranja and Western Sirmium formed their own Serbian National Council on 7 January 1991.[380] On 26 February 1991, the Serbian National Council adopted a Declaration on Sovereign Self-

[372] ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 20.
[373] The Memorial inaccurately refers to it as "constitution", see Memorial, para. 2.94.
[374] See Article 1, the Statute of the Serbian Autonomous Region of Krajina, Basic Provisions, reprinted in S. Radulović, *Sudbina Krajine* (1996), p. 140 (Annex 13).
[375] See N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* (2005), p. 93.
[376] Memorial, para. 2.95.
[377] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 131.
[378] See M. Dakić, *Srpska krajina – Istorijski temelji i nastanak* (1994), pp. 52–53; N. Barić, *Srpska pobuna u Hrvatskoj 1991-1995* (2005), p. 95.
[379] See ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 47.
[380] *Ibid.*, number 23.

rule of the Serbian People of Slavonia, Baranja and Western Sirmium.[381] The Declaration envisaged that the autonomous organs of the region were the assembly, government and judiciary.[382]

490. On 21 February 1991, the Croatian Parliament adopted a resolution in which it declared its support for the disassociation ("razdruživanje") of the SFRY into its constituent republics which were to become sovereign and independent States, that could link themselves into a league of States (confederation).[383] This was an openly declared intention of the Croatian government to create an independent Croatia outside the SFRY. In response, on 28 February 1991, the Executive Council of the SAO Krajina adopted a resolution of disassociation ("razdruživanje") between Croatia and SAO Krajina, in which it refused to accept the resolution of the Croatian Parliament and declared the wish of the SAO Krajina to remain in the SFRY, while the Croatian people could form their independent state on their ethnic territories.[384]

491. The beginning of 1991 also brought about a further aggravation in relations between Croatia and the federal authorities, in particular the JNA, over the issue of the illegal armament of the paramilitary formations and requests for their disarmament. First armed clashes between the Croatian Government forces and the SAO Krajina police occurred in March 1991, with the JNA intervening and positioning itself as a buffer between the conflicting parties.[385]

492. On 1 April 1991, the Executive Council of the SAO Krajina decided to join the region to the Republic of Serbia,[386] but this was not accepted as the National Assembly of Serbia on 2 April 1991 adopted a declaration on the peaceful resolution of the Yugoslav

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[381] *Службени гласник Српске области Славонија, Барања и Западни Срем* [Official Gazette of the Serbian Region Slavonia, Baranja and Western Sirmium], no. 1/1991, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1991%20godina/Sg_91_SBZS_01.pdf (Annex 18)
[382] *Ibid*., para. 6.
[383] See Rezolucija o prihvaćanju postupka za razdruživanje SFRJ i o mogućem udruživanju u savez suverenih republika [Resolution on the acceptance of the procedure for disassociation of the SFRY and on a possible association into a league of sovereign republics], *Narodne novine* [Official Gazette], no. 8/1991, available at www.nn.hr.
[384] Резолуција о раздруживању Р. Хрватске и САО Крајине [Resolution on disassociation between the Republic of Croatia and the SAO Krajina], paras. 1-3, *Гласник Крајине* [The Gazette of Krajina], no. 1/1991, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1991%20godina/Sg_91_01.pdf . (Annex 14).
[385] See *infra* para. 501.
[386] See ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 30.

crisis.[387] Nevertheless, on 12 May 1991, the SAO Krajina held a referendum on the union with Serbia which was supported by an overwhelming majority.[388] The Serbian President Milošević publicly opposed the referendum on the SAO Krajina's joining Serbia, and stated that the question instead should refer to the SAO Krajina's remaining in Yugoslavia.[389] However, the SAO Krajina leadership retained the question on joining Serbia, although in a slightly modified version, adding a reference to "staying in Yugoslavia".[390]

493. One week after the SAO Krajina referendum, on 19 May 1991, Croatia held a referendum in which the electorate voted for independence from the SFRY, which was followed by a proclamation of independence on 25 June 1991.[391]

494. Simultaneously, on 29 May 1991, the Statute of the SAO Krajina was declared to be the Constitutional Law, while the Executive Council became the Government with ministries, including a Ministry of Defense.[392] The same day, the Assembly of the SAO Krajina established "special purpose units" named "Milicija Krajine", which were within the framework of the MUP Krajine but under the authority of the Ministry of Defense.[393] Their establishment was in addition to the already existing police and state security forces functioning within the MUP Krajine. Subsequently, on 1 August 1991, the Government of the SAO Krajina proclaimed that the TO forces of Krajina and the "special purpose units" of the Ministry of the Internal Affairs were the armed forces of the SAO Krajina.[394] These armed forces were under the command of the President of the Government of the SAO Krajina, who was also the commander of the TO forces. [395]

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[387] *Službeni glasnik Republike Srbije* [Official Gazette of the Republic of Serbia], no. 20/1991.
[388] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 134.
[389] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 133.
[390] The question on which the referendum was held was: "[a]re you in favour of the SAO Krajina joining the Republic of Serbia and staying in Yugoslavia with Serbia, Montenegro and other who wish to preserve Yugoslavia", see ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 134.
[391] ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 39, ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 134.
[392] See *Гласник Крајине* [The Gazette of Krajina], no. 4/1991, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1991%20godina/Sg_91_04.pdf (Annex 15).
[393] See Annex 16.
[394] See Одлука о примјени Закона о одбрани Републике Србије на територији Српске аутономне области Крајине [Decision on the Implementation of the Law on Defence of the Republic of Serbia on the Territory of the Serbian Autonomous Region of Krajina], Article 5, *Гласник Крајине* [The Gazette of Krajina], no. 8/1991, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1991%20godina/Sg_91_08.pdf (Annex 17).
[395] See *ibid*., Article 6.

495. On 23 July 1991, the Serbian National Council for Eastern Slavonia, Baranja and Western Sirmium became the Government of the Serbian Region of Slavonia, Baranja and Western Sirmium.[396] As already mentioned, the SAO Western Slavonia was formed on 13 August 1991.[397]

496. Without entering into further discussion of events in late 1991 which will be dealt with in the next section, it should be noted at this juncture that on 19 December the Assembly of the SAO Krajina proclaimed the Republic of the Serbian Krajina (RSK).[398] The SAO Western Slavonia and the Serbian Region of Slavonia, Baranja and Western Sirmium joined the RSK on 26 February 1992.[399]

E. *Conclusion*

497. This section has chartered the development of the Serb movement in Croatia from its beginning in 1989 to 1991. In its discussion of the same period, the Applicant takes the position that the "conflict between Serbia and Croatia was inevitable" due to Serbia's policy and that an important element of that policy was the encouragement and logistical support of the Serb rebellion in Croatia.[400] However, the Applicant apparently fails to recognize that a genuine political, and later armed, conflict existed in Croatia between the local Serb community and the nationalist HDZ government. The nationalism of the government, its rhetoric, its discriminatory policies, its turning a blind eye to the concerns of the Serbs – all significantly contributed to the eruption of the conflict and its aggravation. This is not to say that the regime of Mr. Milošević in Serbia did not manipulate the fears and anxieties of the Serbs in Croatia, and did not misuse their troubles for its own purposes. But one must also recognize that the ostentatious and aggressive Croatian nationalism promoted and applied by President Tuđman and the Croatian government made no effort to establish better relations with the Serbs or to alleviate their fears and anxieties. On the contrary, the Serb request for autonomy was ignored and, when they started to organize themselves and the municipalities in which they lived in as a majority, the government responded with armed force.

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[396] *Службени гласник Српске области Славонија, Барања и Западни Срем* [Official Gazette of the Serbian Region Slavonia, Baranja and Western Sirmium], no. 1/1991, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1991%20godina/Sg_91_SBZS_01.pdf (Annex 18).
[397] ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 47.
[398] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 149.
[399] *Ibid.*, para. 151.
[400] Memorial, paras. 2.85-2.86.

498. The chronology of the establishment of Serb territorial autonomy in Croatia shows that the steps taken by Serbs towards achieving greater autonomy took place as Croatia in turn took steps to dissociate itself from the SFRY.[401] Initially, the Serbs sought preservation of their acquired constitutional rights and guarantees of their cultural identity but as Croatia abolished these guarantees and started to dissociate itself from the SFRY, the Serbs sought and established territorial autonomy comprising municipalities in which they were in the majority. By May 1991, the SAO Krajina had its Parliament, Government, a court system and a state administration. While it was not recognized as an autonomy or federal entity under the SFRY constitutional order, it was *de facto* an autonomous region existing on the territory of the Republic of Croatia.

5. The Armed Conflict in Croatia and Deployment of UNPROFOR

499. The following section will deal with the armed conflict in Croatia, in particular with the events of 1991-1992. Its purpose is not to provide a comprehensive account of these events, but to discuss matters that are either inaccurately presented or not presented at all in the Memorial. First, it will deal with the role of the JNA during the war in Croatia. Secondly, it will demonstrate that the SFRY existed as subject of international law in 1991 and 1992. Thirdly, it will deal with human rights situation of the Serbs in Croatia during the war. Finally, it will discuss events leading to the deployment of UNPROFOR in 1992.

A. *The Role of the JNA during the War*

500. The first armed clashes between Croatian forces, on the one side, and the Territorial Defense and MUP forces of the SAO Krajina, on the other, took place in the spring of 1991 in Pakrac, Plitvice and Borovo Selo, respectively. In all these cases, the JNA units intervened as peacekeepers by positioning themselves as a buffer between the conflicting parties. The Memorial, however, claims that the JNA was assisting the "Serb rebels" and "protecting the Serbian side".[402]

[401] Thus, the Declaration on sovereignty and autonomy of the Serbian people was adopted in parallel with the amendments to the Constitution of Croatia on 25 July 1990. The SAO Krajina was proclaimed in December 1990, as Croatia adopted its new constitution stripping the Serbs from their constitutional position. The decision to dissociate the SAO Krajina from Croatia was adopted in parallel with the declaration of Croatia that it will dissociate itself from the SFRY in February 1991. The referendum on the joining of Serbia was held in parallel with the referendum for independence of Croatia in May 1991. Finally, the Republic of the Serb Krajina will be proclaimed at the time when Croatia received international recognition as a State, at the beginning of 1992.
[402] Memorial, para. 2.101.

501. However, third-party sources state that the JNA indeed acted as a neutral peacekeeping force in spring 1991, and that both sides were dissatisfied with its role:

> "After these actions [in Pakrac, Plitvice and Borovo Selo], both Serbs and Croatians realized that all-out war was likely, and emotions reached the boiling point. Their fights and threats drew the JNA's Croatian garrisons into the role of peacekeepers, a role that did not fully satisfy the Croatian Serbs – who wanted the JNA to defend them – or the Croatians – who believed the JNA was explicitly or tacitly backing the rebellious Serbs."[403]

502. The JNA continued to act as a peacekeeper throughout the summer of 1991 – until the Croatian side mounted an all out attack on the JNA barracks and facilities in Croatia on 14 September 1991. The situation during the summer was described as follows:

> "During much of the summer fighting in Croatia, the JNA was stuck in the middle, ordered to act as a buffer force (as it had at Pakrac, Plitvice and Borovo Selo) yet distrusted by the Croatians and criticized by the local Serbs for not helping them more. Firmly devoted to its ideal of a Federal Yugoslavia, the JNA by and large did try to act as a neutral peacekeeping force during this period, but the fog of war and biases on all three sides led to repeated misunderstandings among the contenders."[404]

503. The account of events presented in the Memorial creates the impression that there were two sides to the conflict in Croatia – the Croatian side and the Serbian side – and that the federal authorities acted on the Serbian side as *de facto* Serbian organs under the direct control of the Serbian leadership. The reality, however, was much more complex, as is also evidenced by the above account of events in the spring and summer of 1991, showing that the JNA played a peacekeeping role during the conflict. Of course, the sympathies of the JNA and its officers could not be on the side of the Croatian government which was openly hostile towards the federal army. A campaign of harassment and attacks against the JNA members was ongoing in Croatia in the summer

[403] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 89 (Peace Palace Library).
[404] *Ibid.*, pp. 91–92.

of 1991. Still, as emphasized in the CIA's analysis of events, the JNA "conscientiously tried to remain an unbiased federal force in Croatia" while "most JNA commanders appear to have rigorously followed orders to act solely as peacekeepers".[405]

504. However, Croatia mounted an all-out attack on the JNA barracks and facilities in Croatia on 14 September 1991. According to the then Croatian Minister of Defense Luka Bebić, the day before, on 13 September 1991,

> "The Croatian Ministry of Defense issued an order to all ZNG units and to all Crisis Headquarters according to which, on the basis of a decree from the President of the Republic and the Supreme Command, the implementation of appropriate measures was initiated. These included turning off all municipal services and the supply of fuel to the Yugoslav Army, and the passive blocking of barracks, storage depots, and all routes used for movements of the enemy; commanders in the field were also to undertake appropriate actions if this became necessary. That is the basic order that was issued and forwarded on 13 September."[406]

505. Acting pursuant to this order, the Croatian forces surrounded and blockaded every JNA barracks or facilities on the territory of Croatia and overran many of the isolated JNA posts. They also seized a large number of weapons.[407] It was only at this time that the JNA started a general military action against the Croatian government forces.

506. During the Croatian blockade, a number of barracks surrendered or were overtaken by the Croatian forces which, in some cases, committed massacres of the soldiers. For example, on 21 September 1991 in the town of Karlovac, the Croatian forces killed 13 JNA soldiers that surrendered their weapons and were promised free passage out of the town. Only one perpetrator of this crime has been recently convicted, after having been three times found not guilty.[408] When the JNA

[405] *Ibid.*, p. 92.
[406] Cited in *ibid.*, p. 95.
[407] *Ibid.*, p. 95.
[408] See, e.g., N. Barić, *Srpska pobuna u Hrvatskoj 1990–1995*, p. 137, and the report of the Croatian non-governmental organization, Centre for Peace, Non-Violence and Human Rights, available at http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=28&article_id=48&lang=hr.

barracks in the town of Bjelovar surrendered to the Croatian forces on 29 September 1991, three commanding JNA officers were taken away from other prisoners of war and killed.[409]

507. In conclusion, the JNA was a peacekeeping force and not a fighting party in the conflict in Croatia until mid-September 1991. From that time on, as a result of being attacked by Croatian government forces, it became a party to the conflict. However, it was not "a Serbian Army" as suggested by the Applicant. As will be discussed below, the JNA remained a *de jure* organ of the SFRY, acting under the political guidance of the Presidency of the SFRY. As such, it fought in alliance with the forces of the Serbian autonomous regions in Croatia, but these forces were not part of the JNA.[410]

508. Finally, it is important to note that the JNA's participation in the armed conflict in Croatia was effectively over by the end of 1991 after the ceasefire agreement concluded in Sarajevo on 2 January 1992.[411] It mostly withdrew from Croatia by mid-1992, as UNPROFOR arrived and UN protected areas were established in the Serb-populated parts of Croatia.[412]

B. *The SFRY Existed As Subject of International Law in 1991 and Early 1992 and Its Organs Continued to Function as the SFRY Organs*

1. Introduction

509. The Applicant's view on the dissolution of the SFRY has been summarized as follows:

> "(a) from mid-1991 the SFRY ceased to operate as a functioning State and was authoritatively recognized as in a 'process of dissolution';
>
> (b) thereafter, and in particular from October 1991, the relevant organs of government and other federal authorities of the SFRY ceased to function as such and became *de facto* organs

[409] See, e.g., I. Đikić, 'Prijeki sud pred sudom', Feral.hr, 11 May 2006, available at http://feral.audiolinux.com/tpl/weekly1/article.tpl?IdLanguage=7&NrIssue=1077&NrSection=1&NrArticle=13457.
[410] See *infra,* Chapter VI, paras. 621–633.
[411] Accord implementing the cease-fire agreement of 23 November 1991, Sarajevo, 2 January 1992, reprinted in S. Trifunovska, *Yugoslavia through documents from its creation to its dissolution* (1994), pp. 468–469.
[412] See *infra* paras. 560–570.

and authorities of the emerging FRY acting under the direct control of the Serbian leadership, embodied in particular in the President of Serbia but extending also to relevant officials in Ministries of Defense and Interior;

(c) the JNA ceased to be the army of the SFRY and became, initially, a *de facto* organ of the emerging FRY (comprised of the Republics of Serbia and Montenegro) taking instructions directly from, and acting in the service of, the Serbian leadership."[413]

510. The Respondent strongly opposes this view which is designed to make the FRY/Serbia responsible for the conduct of the SFRY organs and of the organs of the emerging Serb entity in Croatia, which took place before the FRY came into being on 27 April 1992. However, the SFRY continued to exist in 1991 and early 1992 and responsibility for its actions, if this can be established, can only be attributed to the SFRY. As will be demonstrated below,

- the dissolution of the SFRY was an extended and complicated process;
- during the late 1991 and early 1992 the SFRY was perceived and accepted as a subject of international law;
- the SFRY federal organs continued to function and were headed by individuals coming from different republics of the SFRY; they exercised public authority on behalf of the SFRY and were not *de facto* organs of the "emerging FRY" or Serbia.

511. At the outset, however, it should be noted that the Applicant repeatedly uses the legal category of "*de facto* organs" in its description of the facts. As is well-known, this category is used to describe a situation in which the conduct of persons or entities that are not *de jure* organs of a State is nevertheless attributable to the State because these persons or entities are in a relationship of "complete dependence" with the State. However, this requires "a particularly great degree of State control" over such persons or entities in which they are "mere instruments" and "lacking any real autonomy."[414]

[413] Memorial, para. 8.40.
[414] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, paras. 393 & 394.

512. With this in mind, it is clear that the Applicant misleadingly uses the term "*de facto* organs" in the present case. What is alleged is that certain *de jure* organs (the SFRY Presidency and the JNA) were "under direct control" of certain persons or entities ("the Serbian leadership"), which is exactly the opposite from the situation of *de facto* organs where it is *de jure* organs that control certain persons or entities. In this way, the Applicant attempts to reverse the fundamental rule that a State is responsible for the conduct of its organs, as it tries to attribute international legal responsibility for conduct of *de jure* organs of an existing State (SFRY) to persons ("the Serbian leadership") that may have politically influenced their conduct.

2. The Dissolution of the SFRY Was An Extended Process

513. In 1991, the SFRY faced not only the continuation of bitter political struggles between the Yugoslav republics and within them, but also, in the second half of the year, a short armed conflict in Slovenia, as well as the beginning and escalation of the armed conflict in Croatia. During 1991, the SFRY federal authorities continued to function and exercise public authority on behalf of the federation. However, by the end of 1991 and in early 1992, the SFRY federal authorities were facing substantial difficulties in their work. These difficulties ranged from the lack of support to the outright resistance, including armed resistance, by the governments of the Yugoslav republics. Members of the federal organs from different republics started to leave these posts as "their" republics became independent in the period from October 1991 onwards. This was a gradual process and, as will be demonstrated below, most of the SFRY organs continued to function *as SFRY organs* until the end of 1991 and in early 1992.

514. According to assessment of an outside body, the arbitration commission of the EC peace conference on Yugoslavia (known as the "Badinter Commission" after its president)[415], it was not before 29 November 1991 that "the SFRY was in the process of dissolution" ("la République fédérative de Yougoslavie est engagée dans un processus de dissolution").[416] Thus, on 29 November 1991, the SFRY was still in existence and not yet dissolved, but rather in the process of dissolution. This is in contrast to the Applicant's erroneous claim that the SFRY was in the process of dissolution "from mid-1991".[417]

[415] European Community Declaration, adopted at EPC Extraordinary Ministerial Meeting, Brussels, 27 August 1991 (EPC Press Release P. 82/91), reprinted in Snežana Trifunovska, *Yugoslavia through documents from its creation to its dissolution* (1994), pp. 333–334.
[416] 97 *RGDIP* (1993), 264, 265, reprinted in Annex 11 to the Preliminary Objections.
[417] Memorial, para. 8.40.

515. With this in mind, it comes as no surprise that the Security Council, which had been closely involved in the crisis in the SFRY since September 1991,[418] for the first time used the term "former Yugoslavia", indicating the disappearance of the SFRY, as late as 15 May 1992.[419] Further, it was on 4 July 1992 that the Badinter Commission concluded that the process of dissolution of the SFRY was completed:

> "En conséquence, la Commission d'Arbitrage est d'avis:
> que le processus de dissolution da la R.S.F.Y. mentionné dans l'Avis n° 1 du 29 Novembre 1991 est arrivé à son terme et qu'il faut constater que la R.S.F.Y n'existe plus."[420]

3. The SFRY Was Accepted as Subject of International Law in 1991 and Early 1992

516. The Respondent has already presented evidence during the preliminary objections proceedings demonstrating that the SFRY was regarded as a functioning State and subject of international law in 1991 and early 1992.[421] This section will therefore briefly summarize the evidence already provided to the Court. It should be noted that this evidence has not been contested by the Applicant during the preliminary objections proceedings.

517. The fact that the SFRY was perceived and recognized as a subject of international law in 1991 and early 1992 is evinced by the fact that during this period:

- the SFRY concluded bilateral and multilateral agreements and undertook various treaty actions, which were recognized and accepted as valid by other States and international organizations;[422]

[418] Security Council resolution 713 (1991) of 25 September 1991.
[419] Security Council resolution 752 (1992) of 15 May 1992.
[420] 97 *RGDIP* (1993), 588, 590, reprinted in Annex to the Preliminary Objections.
[421] Preliminary Objections, para. 4.16 *et seq.*; CR 2008/8, pp. 56-58 (Đerić).
[422] See, e.g., Agreement between the Federal Executive Council of the Assembly of the Socialist Federal Republic of Yugoslavia and the Government of the United States of America concerning the Program of the United States Peace Corps in the Socialist Federal Republic of Yugoslavia, dated 1 July 1991; METAP Grant Agreement (Environment Management Project) between Socialist Federal Republic of Yugoslavia and International Bank for Reconstruction and Development, dated 4 October 1991, and the facsimile cover sheet and message from the World Bank/IFC/M.I.G.A. dated 11 October 1991; Protocol between the Federal Executive Council of the Assembly of the Socialist Federal Republic of Yugoslavia and the Government of Romania on Trade in Goods and Services, dated 27 November 1991; the SFRY became a party to the

- the SFRY continued to take part in diplomatic conferences and meetings;[423]
- States continued to maintain their diplomatic missions to the SFRY, while new heads of missions continued to be accredited by notifications to the SFRY Presidency until early 1992.[424]

518. All this shows that the SFRY continued to be recognized as a subject of international law with an effective government in 1991 and early 1992.

4. The SFRY Organs Continued to Function and Were Headed by Individuals Coming from Different SFRY Republics

(a) Introduction

519. As already discussed in the preliminary objections proceedings,[425] the SFRY federal organs continued to function after mid-1991, were headed by individuals coming from different republics of the SFRY, and exercised public authority on behalf of the SFRY. They were not *de facto* organs of the "emerging FRY" or Serbia, as the Applicant erroneously contends.

520. Indeed, during 1991, the most important SFRY officials originated from Croatia, most of them being ethnic Croats: the president of the SFRY Presidency (Mr. Stjepan Mesić, now the President of Croatia), the SFRY Prime Minister (Mr. Ante Marković), the SFRY Foreign Minister (Mr. Budimir Lončar), and the SFRY Defence Minister (Mr. Veljko Kadijević). While political affiliation and the conduct of individuals do not necessarily depend on their ethnic or territorial origin (although this has been a

Convention on the Civil Aspects of International Child Abduction on 1 December 1991, see http://hcch.e-vision.nl/index_en.php?act=conventions.statusprint&cid=24; all reproduced in Annex 23.

[423] For example, in December 1991, the SFRY still chaired the Coordinating Bureau of Non-Aligned Countries in New York, whose members on 13 December 1991 adopted a "Statement on the situation in Yugoslavia", UN doc. S/23289 (1991); on 16-17 December 1991, the SFRY participated at a conference that adopted the European Energy Charter, which was on that occasion signed by the SFRY, see http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211 (p. 211).

[424] See letter from Mr. Mikhail Gorbachev, President of the USSR to the Presidency of the SFRY, dated 5 November 1991, and letter from Mr. Soeharto, President of Indonesia, to the Presidency of the SFRY dated 15 January 1992; letter from the President of Mali to the Presidency of the SFRY dated 18 January 1992; all reproduced in Annex 24.

[425] Preliminary Objections, para. 416 *et seq.*; CR 2008/8, p. 56 *et seq.* (Đerić).

prevailing reality during the dissolution of the former Yugoslavia), the above facts clearly show that chief State officials of the SFRY were not exclusively Serbian after mid-1991, as the Applicant claims.

521. The Respondent has already submitted extensive evidence on the functioning of the SFRY organs during 1991 and in early 1992.[426] This evidence may be summarized as follows.

(b) The SFRY Presidency

522. The SFRY Presidency was the collective head of State of the SFRY. It was composed of members coming from each of the six republics and the two provinces, Kosovo and Vojvodina, which were part of the Socialist Republic of Serbia. From 30 June 1991, Mr. Stjepan Mesić from Croatia was the President of the Presidency. Although his election to this post was delayed due to political conflict between the republics, it is important to note that this did not impair Croatia's participation in the work and decision-making of the Presidency.[427] It is also important to note that the President of the Presidency was *primus inter pares* and bound to follow decisions of the Presidency as a collegial body.[428] For example, as the supreme commander of the JNA, the SFRY Presidency was a party to a cease-fire agreement of 1 September 1991, which was signed by Mr. Mesić on behalf of the Presidency.[429]

523. Until the beginning of October 1991, the SFRY Presidency operated in full or near to full composition. Despite deep disagreements and conflicts within the Presidency, it is uncontested that its sessions were attended and decisions were taken by members from different Yugoslav republics, including Croatia. It is also uncontested that from 30 June 1991, Mr. Mesić from Croatia was the President of the Presidency. It is therefore incorrect to assert, as the Applicant does, that during this time the Presidency was under the direct control of the Serbian leadership, because that would mean that this control extended to members from Croatia, Bosnia and Herzegovina, Macedonia, and Slovenia (while its member participated in the sessions), which would be plainly absurd.

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[426] See *ibid.*

[427] As a member of the Presidency, Mr. Mesić was in any case entitled to participate in its work, while in his absence Croatia could be represented by the President of Croatia, see Article 324, paragraph 4, of the 1974 Constitution of the SFRY, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 9/1974.

[428] See Article 328 of the 1974 Constitution of the SFRY, *ibid.*

[429] See Cease-Fire Agreement, Belgrade, 1 September 1991, reprinted in S. Trifunovska, *Yugoslavia Through Documents – From its creation to its dissolution* (1994), pp. 334-335.

524. Being aware of this, the Applicant states that Mr. Mesić, once he was elected President of the Presidency, found out that "*he was not* in control of the JNA"[430] and that the JNA ignored his order of 11 September 1991 to return to the barracks.[431] However, as already mentioned, the Presidency was a collegial organ, and its President personally was neither in control of the JNA nor had the authority to issue orders, such as the one mentioned by the Applicant. The authority of the commander-in-chief belonged to the Presidency as such and the President could only act upon its instructions or pursuant to its authorization.[432] Indeed, for this reason Mesić's order of 11 September 1991 was rejected by the Presidency.[433]

525. This is an example of an incorrect assumption that is used by the Applicant to support its claim about the "decline in authority of the President of the Presidency".[434] Additionally, the Applicant tries to support this claim by pure conjectures – such as when it implies that a choice of particular wording in an agreement, or the fact that the Minister of Defense and presidents of Croatia and Serbia signed a cease-fire agreement, were examples of increasing control of the Serbian authorities over the federal structures.[435]

526. As already noted, the Presidency had worked in its full or near to full composition, until the beginning of October 1991, when Mr. Mesić and other members of the Presidency could not agree on a venue for its meetings. Mr. Mesić claimed he was impeded to come to Belgrade due to the JNA blockades of traffic and proposed a Croatian island on the Adriatic Sea as a venue,[436] while four Presidency members from Serbia, Montenegro, Kosovo and Vojvodina took the position that the Presidency should meet in Belgrade.[437] The Presidency meetings indeed continued to be held in Belgrade, while Mesić protested.[438] Members from Serbia, Montenegro, Kosovo and Vojvodina attended the Presidency meetings. In this way, the Presidency continued to function and take decisions despite the absence of some of its members, which also enabled it to continue to act as the supreme commander of the JNA.

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[430] Memorial, para. 2.106 (emphasis added).
[431] Memorial, para. 2.107.
[432] Constitution of the SFRY, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 9/1974, Articles 313, paragraph 3, and 328, paragraphs 2 & 4.
[433] See Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, pp. 94–95 (Peace Palace Library).
[434] See Memorial, para. 2.108.
[435] See Memorial, paras. 2.108 & 2.109.
[436] ICTY, *Milošević*, IT-02-54, testimony of Mr. Stjepan Mesić, 1 October 2002, Transcript pp. 10568-10569.
[437] B. Jović, *Last Days of the SFRY, Excerpts from Diary (Poslednji dani SFRJ, izvodi iz dnevnika),* pp. 392–393.
[438] ICTY, *Milošević*, IT-02-54, testimony of Mr. Stjepan Mesić, Transcript pp. 10568-10569.

527. This was condemned by the European Communities' Member States, which on 5 October 1991 refused to acknowledge decisions of the SFRY Presidency.[439] However, most other States continued to recognize the SFRY Presidency as the legitimate *de jure* organ of the existing SFRY. This is clear from the fact that its members were received officially as representatives of the SFRY[440] and that foreign ambassadors to the SFRY were accredited to the SFRY Presidency in late 1991 and early 1992.[441]

528. Finally, it should be noted that Mr. Mesić was recalled from the Presidency by the Croatian parliament only on 5 December 1991,[442] while he himself claimed a salary as a member of the Presidency for the period until 1 January 1992.[443] Mr. Vasil Tupurkovski from Macedonia resigned from the Presidency on 8 January 1992.[444]

529. The Applicant asserts that, as of October 1991, the leadership of Serbia had taken control of the federal institutions of the SFRY, including the Presidency.[445] However, as will be demonstrated below, some of the most important federal institutions were until the end of 1991 headed by individuals that could not be, on any account, regarded as under control of the Serbian leadership. While it is true that the members who remained active in the SFRY Presidency were political allies of the Serbian President, this does not mean that the SFRY Presidency as such ceased to be a *de jure* organ of the SFRY. In this regard, the Memorial is deliberately (mis)using the legal terminology of State responsibility (*de facto* organs, direct control) to describe political allegiances of these members of the SFRY Presidency in order to signal that their acts should be attributed to the Serbian leadership and, then, to the FRY.

(c) The SFRY Government

530. As already mentioned, the federal government (whose full name was the Federal Executive Council) was headed by Mr. Ante Marković from Croatia. He resigned as the SFRY Prime Minister on 20 December 1991. In the course of the summer and the fall of

[439] See EC Declaration concerning the SFRY Presidency, adopted at the Informal meeting of Ministers for Foreign Affairs Haarzuilens, 5 October 1991, reprinted in Written Statement, Annexes, Vol. 2, Annex 12.
[440] For example, Mr. Jović, a member of the SFRY Presidency, was in the official visit to China on 23 November 1991, and at the official summit of the Group of 15 Non-Aligned Countries on 28-29 November 1991 in Venezuela, see B. Jović, *Poslednji dani SFRJ*, pp. 411 & 414.
[441] Such as in the case of the USSR, Indonesia, Mali and Pakistan (Annex 24).
[442] See *Narodne novine* [Official Gazette], no. 66/1991, available at www.nn.hr . This decision was to have "retroactive effect" as of 8 October 1991.
[443] Letter of Mr. Mesić to the SFRY Presidency, 9 January 1992 (Annex 26).
[444] Stenographic notes of the 31st session of the Parliament of the Republic of Macedonia held on 10 January, p. 3, (Annex 27).
[445] Memorial, para. 2.110.

1991 the Federal Executive Council continued to function and adopted various decisions which were signed by Mr. Marković.[446] These include the decision of 25 June 1991 on the participation of the federal police in the action to return control over the border crossings in Slovenia that had been seized by the Slovenian authorities.[447] This action marked the beginning of the war in Slovenia. The Prime Minister also signed a cease-fire agreement to stop the armed conflict in Croatia on 1 September 1991, together with the President of the Presidency, Mr. Mesić, on behalf of the SFRY, and the representatives of the republics.[448]

(d) The JNA[449]

531. In 1991 and early 1992, the JNA was headed by the Defense Minister, Mr. Veljko Kadijević, a general coming from Croatia, with a mixed ethnic background.[450] It is thus patently incorrect to refer to him as a "Serbian general" as stated in the Memorial.[451] His deputy was Admiral Stane Brovet, a Slovene. During 1991, the federal air force was commanded by General Anton Tus, who later went on to fight on the side of the Croatian government, and then was succeeded by another general of Croat origin, General Zvonko Jurjević, who commanded the SFRY air force during the armed conflict in Croatia in 1991.[452]

532. Not even in conditions of direct clashes between the JNA and Croatian armed forces, did the Federal Army lose its Yugoslav character: the 17th Tuzla Corps of the JNA from Bosnia and Herzegovina, also took part in the operations around Vukovar.[453] The operations around Dubrovnik involved Operational Group 2 of the JNA, made up of JNA units and the Territorial Defense from Montenegro.[454]

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[446] See, e.g., "Decision on determining the border crossings on which customs officers carry pistols and on conditions for keeping and carrying pistols in the exercise of tasks and affairs", dated 17 December 1991, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 95/1991; also, various acts entitled "Decision on appointment of ambassador in the Federal Secretariat for Foreign Affairs" dated 30 October 1991, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 88/1991; "Decision on the amendment of the decision on classification of goods on forms of export and import" dated 20 November 1991, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 86/1991.
[447] See *Službeni list SFRJ* [Official Gazette of the SFRY], no. 47/1991 (25 June 1991).
[448] Preliminary Objections, para. 4.21.
[449] For the JNA, see also Chapter VI.
[450] See Preliminary Objections, para. 4.33.
[451] See Memorial, para. 2.109.
[452] See Annex 30.
[453] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 442 (Peace Palace Library).
[454] See, e.g., ICTY, *Strugar*, IT-01-42-T, Trial Chamber Judgment, 31 January 2005, paras. 32–37.

533. As will be demonstrated in more detail in the next chapter, although the JNA leadership and the Serbian leadership were political allies during the armed conflict in Croatia in 1991, their relationship was tense and precarious, even conflicting. The evidence shows that the JNA was not a *de facto* organ of the Serbian leadership, but a *de jure* organ of the SFRY.

(e) The Federal Ministry of Foreign Affairs

534. The Federal Ministry (Secretariat) of Foreign Affairs was headed by Mr. Budimir Lončar, from Croatia, whose work in the ministry was concluded in February 1992.[455] In 1991 and in early 1992, the SFRY had 41 Ambassadors from republics other than Serbia and Montenegro.[456]

(f) The Constitutional Court of Yugoslavia

535. The Constitutional Court of Yugoslavia (SFRY) also performed its functions in 1991 and the early 1992 and resisted violations of the federal constitution by all republics of the SFRY, including Serbia. As mentioned in the Preliminary Objections, a growing number of legislative acts in Slovenia, Croatia, but also in Serbia, began to contest the federal constitutional system. These legislative acts were declared unconstitutional, including 24 Serbian acts in 1991 alone.[457] The Constitutional Court was thus trying to protect the federal constitutional system against interests of *all* republic governments, including the Serbian republic. The judges of the Constitutional Court came from various parts of the SFRY, and not only from Serbia and Montenegro. According to the SFRY Constitution, 2 judges came from each of six republics and one from each of the two autonomous provinces within Serbia (Kosovo and Vojvodina).[458] All fourteen judges of the Constitutional Court stayed in office until 1 August 1991, while eleven of them remained in office until the founding of the FRY on 27 April 1992.[459]

[455] See Annex 28.
[456] See Preliminary Objections, para. 4.23.
[457] See Preliminary Objections, para. 4.24 and note 115.
[458] Article 381, paragraph 1, of the 1974 Constitution of the SFRY, *Službeni list SFRJ* [Official Gazette of the SFRY], no. 9/1974.
[459] See Preliminary Objections, para. 4.26.

536. In conclusion, the SFRY was not only recognized as subject of international law in 1991 and early 1992, but its federal organs continued to function after mid-1991 and were headed by individuals coming from different republics of the SFRY, thereby retaining their federal character for much longer than the Applicant would like to admit.

(g) Conclusion

537. In conclusion, the Applicant has failed to provide evidence that the SFRY organs, in particular the Presidency and the JNA, were *de facto* organs of the "emerging FRY" or Serbia during the 1991 conflict. In particular,

(a) The dissolution of the SFRY was an extended process which was completed in April 1992 when the FRY came into being, as confirmed by the fact that the Security Council started to refer to the "former Yugoslavia" only on 15 May 1992;
(b) In 1991 and early 1992, the SFRY was still recognized as a functioning State and a subject of international law, and as such participated in international relations;
(c) In 1991 and early 1992, the SFRY organs continued to function and were headed by individuals coming from different SFRY republics;
(d) These organs, in particular the JNA, were not *de facto* organs of the "emerging FRY" or Serbia but *de jure* organs of the SFRY.

C. *Human Rights Situation of the Serbs in Croatia*

1. Introduction

538. As already discussed above, Serbs in Croatia were from 1990 onwards exposed to discriminatory policies of the new Croatian government of President Tudjman and HDZ and their position was becoming increasingly difficult.[460] With the outbreak of the war in 1991, the situation further deteriorated leading to systematic violations of human rights of the Serbs.[461] The Serbs in the areas where the fighting took place

[460] See *supra* paras. 450–455.
[461] See Examples of Attacks on the Serbs in Croatian Towns 1990-1991 according to the Croatian Press (Annex 37).

were victims of numerous violations of international human rights, some of which will be discussed in more detail in Chapter XII, dealing with the factual background to Serbia's counter-claims. The present section, however, will discuss violations of human rights of Serbs in Croatia that were not directly connected with the fighting. It does not intend to provide a comprehensive account of the situation but rather an overview of the most characteristic events which should serve as part of the background to the present case.

539. This section's focus on human rights of the Serbs should not be taken to imply a minimization or relativization of human rights violations committed against the non-Serbs, in particular Croats, in the Serb-held regions in Croatia in the period 1991-1995. Rather, its purpose is to contribute to a more balanced picture of events than the one presented in the Memorial and to indicate the reasons why in 1993 there where almost equal numbers of the Croat refugees from the Serb-held areas and the Serb refugees from the rest of Croatia.[462]

2. Extrajudicial Executions and Disappearances

540. There is evidence of numerous extrajudicial executions and disappearances of Serbs in Croatia, in particular during 1991-1992. Most of these crimes have not received proper investigation nor have the perpetrators been punished, although the Croatian authorities have resolved some of these cases in recent years. Evidence reveals that massive killing campaigns against Serbs were conducted in several Croatian towns in 1991 and 1992 by local military or political officials. The relationship of the central Croatian government and these campaigns remains to be determined, but it is already clear that, at least in some cases, the government was aware of what was going on but did nothing to stop the killings.

[462] The UN Special Rapporteur on human rights in the former Yugoslavia refers to UNHCR statistics stating that as of October 1993 there was "a total of 247,000 Croatian and other non-Serbian displaced persons coming from areas under the control of the co-called 'Republic of Srpska Krajina' and 254,000 Serbian displaced persons and refugees from the rest of Croatia", 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47, para. 99. The number of Serb refugees would drastically increase after the subsequent Croatian military operations in 1995, see *infra* Chapters XII and XIII.

541. Such a killing campaign took place in the Eastern Slavonian town of Osijek where, according to some estimates, more than 50 Serbs were killed during 1991 and 1992.[463] A recent trial of one of the local HDZ leaders at the time, Mr. Branimir Glavaš, revealed that he personally established a special military unit which he directed to detain torture and kill civilians. The trial established his responsibility for the killings of 6 individuals, mostly Serbs, by this unit, as well as for the killing of 1 Serb and torture of others by his subordinates in a related case.[464]

542. A massacre of Serbs took place in Paulin Dvor, which is located on the road between Osijek and Vinkovci, on 11-12 November 1991. Members of the Croatian army, after having heard that their fellow soldier was killed, went to Paulin Dvor to take revenge against the Serb inhabitants and killed 18 of them by automatic gun fire and bombs.[465] Subsequently, the Croatian authorities organized a secret removal of the bodies to a location at the other end of Croatia to hide the traces of the massacre.[466]

543. The killings of Serbs were also committed in Vukovar[467], Sarvas[468], Cerna[469] and other places in Eastern Slavonia. It is estimated that more than 50 Serb civilians were killed or disappeared in Vukovar in 1991.[470]

544. In Western Slavonia, a number of Serbs was killed after being detained in improvised prisons in Marino Selo and Pakračka Poljana.[471] The UN Commission of Experts

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[463] See Report of the Non-Governmental Organization "Veritas", Serb Victims of War and Post-War in the Territories of Croatia and the former Republic of Serbian Krajina 1990-1998 dated 31 October 2009 (Annex 66).
[464] Both cases were tried together, for the text of the judgment see http://www.centar-za-mir.hr/uploads/OSIJEK_izvjestaji_za_2009._godinu.doc; see also Annex 38.
[465] For a summary of facts and criminal proceedings where two persons were accussed, see http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=31&article_id=48&lang=hr (Annex 39).
[466] See D. Hedl, '12 Year Prison Sentence', *Feral Tribune*, 15 April 2004, available at http://www.ex-yupress.com/feral/feral245.html.
[467] See V. Dabic & K. Lukic, *Crimes Without Punishment* (Vukovar 1997), available at http://archive.serbianunity.net/politics/war_crimes/vukovar/index.html.
[468] See, e.g., a report by Croatian weekly *Nacional*, 15 May 2006, available at http://www.nacional.hr/clanak/print/25184.
[469] In the village of Cerna, Županja municipality, the members of the Croatian army killed 4 members of the Olujić family on 8 February 1992, for details of this incident and of the criminal proceedings which were completed in 2009, see http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=39&article_id=48&lang=hr.
[470] See Report of the Non-Governmental Organization "Veritas", Serb Victims of War and Post-War in the Territories of Croatia and the former Republic of Serbian Krajina 1990-1998 dated 31 October 2009 (Annex 66).
[471] *Ibid*; according to "Veritas", the number of the Serbs killed was over 100; see also report by the Centre for Peace, Non-Violance and Human Rights from Osijek, Monitoring war crime trials: The war crime in Marino Selo (Annex 40).

established that 19 individuals were buried in nine separate graves in a field south of Pakračka Poljana, while the area around the graves was used as an execution site.[472] In 2009, six Croatian military policemen were convicted for war crimes in relation to the killing of 17 Serbs in Pakračka Poljana.[473]

545. Various sources indicate that there were more than 100 killings and disappearances of civilians, mostly Serbs, in the town of Sisak in the second half of 1991.[474] Some of them have been reported by Amnesty International, whose 2004 report concluded that despite information about widespread human rights violations against the Serbs in Sisak, Croatian authorities have failed to bring the perpetrators of these crimes to justice.[475] It should be noted, however, that Croatian authorities, including President Tuđman, were informed about some of the crimes in Osijek already in 1991, at the time when this killing campaign was unfolding, but did nothing to stop it.[476]

546. A similar killing campaign took place in Gospić in the second half of 1991. The criminal proceedings against so-called "Gospić group" confirmed that at least 50 civilians, mostly Serbs, were abducted and killed in organized fashion by the members of the Croatian army.[477] According to various sources, the total number of the killed Serbs in Gospić at the time may be between 100 and 200.[478]

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[472] Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, Addendum, Volume V, 28 December 1994, UN Doc. S/1994/674/Add.2(Vol.V), para. 259.
[473] See RTL, 'Za zlocin kod Pakracke poljane osudjena sestorica', 13 March 2009, available at http://www.rtl.hr/index.php?cmd=show_clanak&clanak_id=5538 . At another trial, 5 former members of the Croatian police reserve were convicted for crimes related to Pakracka poljana, see Index.hr, 'Optuzenici krivi za slucaj 'Pakracka poljana'', 15 September 2005, available at http://www.index.hr/vijesti/clanak/optuzenici-krivi-za-slucaj-pakracka-poljana/282856.aspx.
[474] "Veritas" Report (Annex 66); see also, *Hrvatska ljevica*, 1-31 July 2002, no. 7, pp. 19-21.
[475] Amnesty International, 'A shadow on Croatia's future: Continuing impunity for war crimes and crimes against humanity' (13 Dec. 2004), p. 17, available at http://www.amnesty.org/en/library/asset/EUR64/005/2004/en/dae5645d-d54c-11dd-8a23-d58a49c0d652/eur640052004en.pdf (Annex 42).
[476] See *Hrvatska ljevica*, 1-31 August 2002, no. 8, p. 17.
[477] See excerpt from District Court of Rijeka, *Orešković et al.* case, Judgment of 24 March 2003 (Annex 41).
[478] The UN Special Rapporteur on human rights in the former Yugoslavia received information that between 100 and 200 Serbs were killed in Gospić in mid-October 1991 by Croatian army soldiers, see Tenth 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 37 of Commission resolution 1994/72 of 9 March 1994, 16 January 1995, UN doc. E/CN.4/1995/57, para. 52. The non-governmental organization Veritas estimates that the number of the Serbs killed in Gospic in 1991 is more than 120, see "Veritas" Report (Annex 66).

547. Killings of Serbs were also committed in Zagreb, Split, and Zadar,[479] as well as in Virovitica, Šibenik, Otočac, Karlovac, Ogulin, Grubišno polje, Daruvar and Podravska Slatina[480] and other places in Croatia. A well-known example is the killing of Mr. and Mrs. Zec and their 12-year-old daughter in Zagreb, in December 1991. The suspected perpetrators, members of a special unit of the Croatian police, were acquitted due to procedural irregularities, although they confessed the crime.[481]

3. Prison Camps

548. As already mentioned, the Croatian authorities formed a number of improvised prison camps during the war, in which they detained captured or surrendered members of the local Serb forces, JNA, as well as Serb civilians.[482] Serious violations of human rights and humanitarian law took place at these sites, even leading to massacres of detainees, such as in the case of Pakracka Poljana, in Western Slavonia.[483]

549. A notorious prison camp was established in Split, in "Lora", the former JNA barracks and port. An undetermined number of inmates was held in "Lora" from 1992 onwards in the custody of the Croatian Army. They were subjected to torture, inhuman and degrading treatment, while some of them were killed. The commander of the camp and a number of guards were indicted only in 2002, and convicted for war crimes in 2006.[484]

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[479] M. Pupovac, "A Settlement for the Serbs", in Yugofax: A project of War Report and the Helsinki Citizens Assembly (London, 1992), p. 17 *quoted in* M. Tanner, *Croatia: A Nation Forged in War*, Yale University Press, New Haven and London, 1997 p. 282; M. Ljubičić – L. Šušak, "Serija optuženih i selekcija oštećenih", *Pravi odgovor*, no. 38 (2002), pp.14-16.

[480] M. Ljubičić – L. Šušak, "Serija optuženih i selekcija oštećenih", *Pravi odgovor*, no. 38 (2002) pp.14-16.

[481] Ninth 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 37 of Commission resolution 1994/72 of 9 March 1994 and Economic and Social Council decision 1994/262 of 22 July 1994 , 4 November 1994, UN doc. A/49/641-S/1994/1252, para. 98. See, also, Amnesty International, "A shadow on Croatia's future: Continuing impunity for war crimes and crimes against humanity" (13 Dec. 2004), pp. 10-11, available at http://www.amnesty.org/en/library/asset/EUR64/005/2004/en/dae5645d-d54c-11dd-8a23-d58a49c0d652/eur640052004en.pdf.

[482] See Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, Addendum, Volume V, 28 December 1994, UN Doc. S/1994/674/Add.2(Vol.IV), Annex VIII, Prison camps, para. 167.

[483] See *supra* para.544.

[484] For more details about the proceedings, see http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=16&article_id=48&lang=hr; see also Hearing Minutes of Witness Milanče Tošić (Annex 44) and Witness Vojkan Živković (Annex 45).

550. Another prison camp was in Kerestinec, in the vicinity of the Croatian capital, Zagreb. This camp was also run by the Croatian Army. According to press reports, the prisoners in Kerestinec were subjected to torture, maltreatment, rapes and killings at the beginning of 1992.[485] Until today, no one was indicted for the crimes in Kerestinec[486] although it is known who were the officers in charge of the camp at the relevant time.

551. There are reports that serious violations of human rights and humanitarian law were committed in other prisons in Croatia, such as the "Red Barracks" (*Crvena kasarna*) facility in Osijek. Former inmates testify about torture, maltreatment and rapes in the "Red Barracks"[487] but there is no information that this has been investigated by the Croatian authorities.

4. A Pattern of Discrimination

552. During the war, the Croatian authorities conducted or tolerated numerous and systematic violations of human rights of the Serbs, in addition to arbitrary killings and torture described above. In late 1992, the UN Rapporteur for human rights in the former Yugoslavia stated that "[d]iscrimination, harassment and maltreatment of ethnic Serbs are also serious and widespread problems" and reported that lists of citizens indicating their ethnic origin were circulating in Croatia.[488] The present section will briefly outline the main elements of the pattern of discrimination against the Serbs at the time.

553. Thousands of houses of the Croatian citizens of Serb ethnic origin were destroyed deliberately, with no connection to the fighting, by explosive or arson.[489] It is reported that 7,489 such buildings were destroyed in 1992 alone.[490] According to the UN Special Rapporteur on human rights in the former Yugoslavia, "on the whole, the authorities have not demonstrated a serious willingness to suppress such acts."[491]

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[485] See "Bajic na tragu monstrumima iz vojnog logora Kerestinec", Nacional, 7 April 2008, available at http://www.nacional.hr/clanak/44286/bajic-na-tragu-monstrumima-iz-vojnog-logora-kerestinec .
[486] Although there are recent reports from unofficial sources that investigation in this case has begun, see Radio Free Europe, 'Pocela istraga o mucenjima u Kerestincu', 7 April 2009, available at http://www.danas.org/content/kerestinec/1603434.html?page=3.
[487] See testimony of Mirko Borota, a former prisoner of war, available at http://www.b92.net/info/emisije/istrazuje.php?yyyy=2006&mm=07&nav_id=205466.
[488] 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 14 of Commission resolution 1992/S-1/1, 3 September 1992, UN Doc. A/47/418-S/24516, paras. 26-27.
[489] See Examples of Attacks on the Serbs in Croatian Towns 1990-1991 according to the Croatian Press (Annex 37).
[490] 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 February 1993, 17 November 1993, UN Doc. E/CN4/1994/47, para. 131.
[491] *Ibid*., para. 132.

554. The Serbs were also evicted from their apartments, sometimes with brutal force. These evictions were not conducted solely by rogue individuals, although there were many such cases tolerated by the Government,[492] but were mainly the result of actions of the authorities.[493] In 1994, the UN Special Rapporteur on human rights in the former Yugoslavia warned the Croatian Government that

> "the practice of illegal and forced evictions constitutes a violation of the right not to be subjected to arbitrary or unlawful interference with privacy, family or home, as well as the principle of non-discrimination."[494]

555. The Serbs in Croatia also faced difficulties in acquiring Croatian citizenship. During the former SFRY, the citizens had, in addition to the SFRY citizenship, also a republican citizenship which was of little legal significance. A large number of persons did not have the republican citizenship of the republic in which they lived. However, when the SFRY dissolved, the citizenship legislation of Croatia provided that Croatian citizens would be those individuals holding the republican citizenship of the Socialist Republic of Croatia, as well as ethnic Croats residing in Croatia at the time the law took effect. All others were required to go through the process of naturalization in order to acquire Croatian citizenship, despite the fact that they had been lawfully resident in Croatia for years, as SFRY citizens. In the meantime, they were in the position of aliens and denied rights such as social allowance, including medical care and pension.[495] In the application of Croatia's citizenship law, many Serbs were deprived of or denied Croatian citizenship.[496]

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[492] See 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 Commission resolution 1992/S-1/1 of 14 August 1992, 10 February 1993, UN Doc. E/CN.4/1993/50, para. 121, reporting forced evictions in the Dubrovnik area.

[493] For more, see, e.g., 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47, para. 126 *et seq.*

[494] Sixth 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 February 1993, 21 February 1994, UN Doc. E/CN.4/1994/110, para. 99.

[495] For more, see, e.g., 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47, para. 115 *et seq.*

[496] *Ibid.*, para. 123.

556. The discrimination and persecution of the Serbs were encouraged by a climate of intolerance and hate speech towards them. The attitude of ethnic differentiation was expressed even by government officials. For example, in connection with an incident involving some Serb medical staff in the Rovinj hospital in 1994, Mr. Andrija Hebrang, the minister of justice at the time,[497] stated the following: "In the middle of Istria, in Rovinj, you have a national composition where 30 per cent of the staff in the hospital is not of Croatian origin; this is not a situation which was created by chance by the former Yugoslav regime."[498]

557. According to the UN Special Rapporteur, "[t]he general attitude pervading the Croatian media vis-à-vis the Serb people is negative."[499] As an extreme example, he mentioned *Hrvatski vjesnik*, a weekly whose front page carried the headline "Serbs – be damned, wherever you are" below which was the following text, quoted by the UN report:

> "I congratulate all Serb readers of Hrvatski vjesnik on their holiday, 22 April, which they are celebrating in occupied Vrbograd (now called Jasenovac) [the chief concentration camp in Croatia during the Second World War]. To remind you, I publish this picture [of war criminals Ante Pavelic, Rafael Boban and Jure Francetic, who were affiliated with the Ustashe]. This is the beginning of the end for the criminal people in these territories, the beginning of the end for the Serbs [sic], the reason for everything that has happened to us".[500]

558. This text was followed by a "poem" on the last page which was an invitation to kill and rape Serbs.[501] *Hrvatski vjesnik* received financial support from the government-controlled companies, while the authorities never condemned, let alone prosecuted those responsible for the hate speech.[502]

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[497] Mr. Hebrang is the HDZ candidate at Croatia's 2009 presidential elections, see www.hebrang.com.
[498] Ninth 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 37 of Commission resolution 1994/72 of 9 March 1994 and Economic and Social Council decision 1994/262 of 22 July 1994 , 4 November 1994, A/49/641-S/1994/1252, para. 103.
[499] Situation of human rights in the territory of the former Yugoslavia, Special report on the media, Report of the Special Rapporteur submitted pursuant to Commission resolution 1994/72, 13 December 1994, UN Doc. E/CN.4/1995/54, para. 93.
[500] *Ibid*., para. 94 (comments in the original).
[501] *Ibid.*
[502] *Ibid.*, para. 95 ; see also Public Statements which Directly Provoked Perpetrators to Commit Genocide against the Serb National Group in Croatia (Annex 51).

7. Conclusion

559. The above overview testifies that there was a pattern of serious violations of human rights of the Serbs in Croatia, unconnected to combat operations, during the period1991-1995. Particularly striking is the horrendous nature of the killing campaigns against Serb residents in some Croatian cities. Despite the fact that Croatia has made some progress over the last years in bringing those responsible for the crimes against the Serbs to justice, it seems that concerns voiced in 2004 by the UN Committee against Torture remain:

> "The Committee is concerned about the following:
>
> (a) In connection with torture and ill-treatment which reportedly occurred during the 1991-1995 armed conflict in the former Yugoslavia:
>
> (i) The reported failure of the State party to carry out prompt, impartial and full investigations, to prosecute the perpetrators and to provide fair and adequate compensation to the victims;
>
> (ii) Allegations that double standards were applied at all stages of the proceedings against Serb defendants and in favour of Croat defendants in war crime trials;
>
> (iii) The reported harassment, intimidation and threats faced by witnesses and victims testifying in proceedings and the lack of adequate protection from the State party [.]"[503]

D. *UNPROFOR*

560. In the present context, it is important to note that the major hostilities of the 1991 war in Croatia were effectively over by the beginning of December that year.[504] After a series of unsuccessful cease-fire agreements, the ceasefire agreement concluded in Sarajevo on 2 January 1992 was to be generally respected by the parties in the conflict.[505]

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[503] Consideration of reports submitted by states parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, Croatia, 11 June 2004, UN Doc. CAT/C/CR/32/3, para. 8.
[504] A cease-fire in Dubrovnik was agreed on 5 December 1991, see ICTY, *Milošević*, IT-02-54-T, Order concerning a chronology of events in the Croatia part of the case, number 77.
[505] Accord implementing the cease-fire agreement of 23 November 1991, Sarajevo, 2 January 1992, reprinted in S. Trifunovska, *Yugoslavia through documents*, pp. 468–469.

561. On 15 January 1992, the member States of the European Community recognized Croatia as an independent State, with Germany already having recognized it on 23 December 1991.[506]

562. As already mentioned, on 19 December 1991, the Assembly of the SAO Krajina proclaimed the RSK, which was joined by the SAO Western Slavonia and SAO Slavonia, Baranja and Western Sirmium on 26 February 1992. The Constitution of the RSK defined it as the "national state of the Serbian people and the state of all citizens living in it."[507] The legislative and constitutional powers belonged to the RSK Assembly, while the government had executive powers. The RSK was represented by its President.[508] The RSK President commanded the armed forces in peace and war, as well as the "people's resistance" during the war.[509] The armed forces of the RSK consisted of its territorial defense (TO).[510] Amendments to the RSK Constitution established the Serb Army of Krajina ("SVK") on 18 May 1992.[511] In 1993, further constitutional amendments introduced a Supreme Defense Council. The SVK was commanded by the president of the RSK on the basis of the RSK Constitution and decisions taken by the Supreme Defense Council.[512] While the RSK was never recognized as a State, it had *de facto* control over substantial territory and enjoyed loyalty of its population. While it enjoyed political and financial support of the FRY, the RSK was neither a part of the FRY nor an entity under its control, but a *de facto* State entity on the territory of Croatia.

563. Already by the end of November 1991, the SFRY Government requested the UN Security Council to establish a peace-keeping operation in Yugoslavia.[513] The UN Secretary-General's Special Representative for Yugoslavia, Cyrus Vance, devised a

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[506] Statement by the Presidency [of the European Community] on the Recognition of Yugoslav Republics, Brussels, 15 January 1992 (EPC Press Release, P. 9/92), reprinted in S. Trifunovska, *Yugoslavia through documents*, p. 501.
[507] Article 1, Устав Републике Српске Крајине [Constitution of the Republic of Serbian Krajina], *Службени гласник РСК* [Official Gazette of the RSK], no. 1/1992, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1992%20godina/Sg_92_01.pdf (Annex 19).
[508] *Ibid*., Article 8.
[509] *Ibid*., Article 78, para. 1 (5).
[510] *Ibid*., Article, 102, para. 1.
[511] Amendment VIII of 18 May 1992, *Службени гласник РСК* [Official Gazette of the RSKrajina], no. 9/1992, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1992%20godina/Sg_92_09.pdf (Annex 20)
[512] See Amendments XII-XIV of 20 April 1993, *Службени гласник РСК* [Official Gazette of the RSK], no. 2/1993, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1993%20godina/Sg_93_02.pdf (Annex 22).
[513] See Security Council resolution 721 (1991), Preamble, para. 2.

plan for such an operation ("Vance Plan").[514] On 15 December 1991, the Security Council approved the establishment of a peace-keeping operation in Yugoslavia, but also agreed with the Secretary-General's view that the conditions for it still did not exist.[515]

564. Initially, both Croatia and the RSK had reservations about the Vance plan.[516] The RSK leadership was reluctant to accept the plan *inter alia* because it envisaged the demilitarization of the UN protected zones, while the UN forces were considered as not able to provide sufficient protection to the population from a Croatian attack.[517] The main opponent of the Vance Plan was RSK's President Milan Babić. The SFRY and Serbian leaders had to invest enormous political capital in order to procure the consent of the RSK to the Vance Plan. Eventually, the RSK Assembly removed Babic from the office of President, and accepted the Vance Plan.[518]

565. Following the establishment of a sustained cease-fire and the acceptance of the plan for a UN peacekeeping mission by all parties to the conflict, the UN Security Council established UNPROFOR on 21 February 1992.[519]

566. United Nations peacekeeping troops and police monitors were deployed in those areas of Croatia where Serbs constituted the majority or a substantial minority of the population and "where inter-communal tensions have led to armed conflict in the recent past." These areas were designated as "United Nations Protected Areas" ("UNPAs"). The idea was to stop the armed conflict and to prevent it from spreading further, which would create the necessary conditions "for successful negotiations on an overall settlement of the Yugoslav crisis."[520]

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[514] See Report of the Secretary-General pursuant to Security Council Resolution 721 (1991), UN Doc. S/23280, 11 December 1991, Annex III.
[515] Security Council resolution 724 (1991), para. 2.
[516] Further Report of the Secretary-General pursuant to Security Council Resolution 721 (1992), UN Doc. S/23513, 4 February 1992, para. 19.
[517] *Ibid.*, para. 12.
[518] See Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23592, 15 February 1992, paras. 7–8; ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 149.
[519] Security Council resolution 743 (1992), para. 2.
[520] Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23280, 11 December 1991, paras. 11–12.

567. The UNPAs were to be fully demilitarized and all armed forces on their territory would either be withdrawn or disbanded. The role of the United Nations troops was to ensure that UNPAs remain demilitarized and "that all persons residing in them were protected from fear of armed attack."[521] The role of the United Nations police monitors was to ensure that the local police carried out their duty without discriminating against persons of any nationality or abusing anyone's human rights.[522]

568. There were three UNPAs, which covered four sectors:

1) UNPA Krajina covering Sector South (Lika and Dalmatia) and Sector North (Banija and Kordun);
2) UNPA Western Slavonia covering Sector West;
3) UNPA Eastern Slavonia covering Sector East.[523]

569. The UNPAs did not encompass all areas of the conflict that were outside the control of the Croatian government. Subsequently, UNPROFOR's authority was also extended to these areas, which were called the "pink zones".[524]

570. The events following the deployment of UNPROFOR are discussed in more detail in Chapters XII and XIII, as they are particularly relevant in the context of Serbia's counter-claims. What followed after the deployment of UNPROFOR were almost 4 years of tensions, armed confrontations but also negotiations between the parties. UNPROFOR had difficulties in fulfilling its mandate, with the demilitarization of UNPAs remaining a thorny and unresolved issue. Despite considerable progress made between the parties in 1994 in establishing a permanent cease-fire and cooperating in economic matters, Croatia decided to resolve the problem of the RSK by the use of force. As will be discussed in detail in the context of Serbia's counter-claims, this lead to genocide against the Krajina Serbs during the operation *Storm* in 1995.

[521] *Ibid.*, para. 12.
[522] *Ibid.*
[523] See ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 150.
[524] For more, see *infra* Chapter XII, para. 1118.

CHAPTER VI

PARTICIPANTS IN THE ARMED CONFLICT IN CROATIA 1991-1995

1. Introduction

571. The present chapter will discuss the main participants in the armed conflict in Croatia in 1991-1995. It will deal primarily with allegations made in Chapter 3 of the Memorial which is entitled "The JNA and the Paramilitary Groups". However, for the sake of completeness, the present chapter will also briefly mention the participants in the armed conflict on the Croatian side.

572. As a general comment, it should be noted that the simplified and biased approach taken by the Applicant in its Memorial is also prevalent in its Chapter 3. For example, the Applicant bundles together all the different volunteer groups fighting against the Croatian government and the forces of the SAO Krajina and the RSK into one group which it calls "Serb paramilitary groups".[525] By treating these groups as one single category, by mixing evidence relating to various armed groups and formations, and by alleging that all these forces and groups were part of the JNA,[526] the Applicant attempts to attribute the responsibility for the conduct of all these groups to the JNA and, in line with its *in statu nascendi* theory, to the FRY. In fact, the Applicant tries to create an impression that all these groups and forces acted as part of one unified force, and, in this way, it tries to avoid providing specific evidence related to each of them, in particular proof of their relationship with the JNA. This comes as no surprise, considering that the evidence put forward by the Applicant in this regard is clearly insufficient to support its claims.

573. In this regard, it should be noted that the Applicant came into possession of large quantities of documentation from the archives of the RSK and its municipalities, after it militarily defeated the RSK in 1995.[527] Since it is presumed that the Applicant would rely upon the best evidence available to support its claims if such evidence actually exists, the Applicant's failure to provide sufficient evidence in this chapter and elsewhere in the Memorial implies that its claims find insufficient support in the facts.

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[525] Memorial, para. 3.49.
[526] See Memorial, para. 3.54. *et seq*.
[527] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* (2005), pp. 15–16.

574. The present chapter will firstly provide a brief outline of the forces fighting on the side of the Government of Croatia. Secondly, it will discuss the role of the JNA and, thirdly, the armed formations of the Serbian autonomous regions in Croatia and the RSK. Fourthly, the present chapter will discuss the allegations made about volunteer formations that were fighting against the Government of Croatia.

2. Forces of the Government of Croatia

575. As already discussed,[528] the HDZ government in Croatia started to prepare for an armed conflict soon after its formation in mid-1990. Initially, its armed combat forces were developed within the Ministry of the Interior (MUP) where the number of policemen almost doubled, while at the same time the Serbs were cleansed from the force. The special antiterrorist unit of the MUP was hugely expanded into a number of special battalions. In May 1991, these special forces, together with the MUP reserve police, were transformed into the Croatian National Guard Corps. By the end of 1991, the National Guard changed its name into the Croatian Army ("Hrvatska vojska" – "HV"). In the fall of 1991, the Croatian army underwent restructuring and by January 1992 numbered some 200,000 troops, while the MUP had over 40,000 personnel.[529]

576. In addition, there were also paramilitary forces fighting on the side of the Croatian government during the war in Croatia in 1991–1995. These included the forces of the Croatian Defence Council from Bosnia and Herzegovina ("Hrvatsko vijece obrane" – "HVO"), which were described as the "surrogate forces" of the Croatian Government.[530]

577. Another group that needs to be mentioned is the HOS ("Hrvatske obrambene snage" – the Croatian Defence Forces), the paramilitary wing of the Croatian Party of Rights (HSP). The HOS fought in Croatia and Bosnia and Herzegovina against the Serbs. Its

[528] See *supra* paras. 467–472.
[529] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 96 (Peace Palace Library).
[530] See Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), 31 May 1995, UN Doc. S/1994/674/Add.2(Vol.I), Annex III, p. 30, para. 164; The HVO units openly accepted the Ustashe traditions from the World War II: they created a battalion at Vitez which bore the name "Jure Francetić" (Commander of the Ustashe Black Shirts), and a brigade named after Eugen Kvaternik, one of the Ustashe leaders, at Bugojno. See Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military H istory of the Yugoslav Conflict 1990–1995*, Vol. I, pp. 198 & 484 (Peace Palace Library).

soldiers wore black uniforms bearing the Croatian checkered shield, similar to those worn by the Ustashe in World War II, and used the Ustashe form of saluting. They reportedly operated under command of the Croatian Army. After 1993 its soldiers were integrated into the HVO.[531]

3. The JNA

578. In Chapter 3 of the Memorial, the Applicant claims that the JNA was from the mid-1980 gradually transformed into a "Serbian Army".[532] This is in line with the Applicant's general claim that the SFRY organs, including the JNA, became *de facto* organs of the emerging FRY under the control of the Serbian leadership. This has already been refuted in the previous chapter.[533]

579. With respect to the JNA in particular, the Applicant claims that it underwent a process of "Serbianisation" which was reflected in (a) changes to the JNA's ethnic composition and management and (b) its restructuring in 1988.[534] Furthermore, the Applicant provides an inaccurate and misleading interpretation of events up to and during the war in Croatia in 1991, in order to show that the JNA was completely controlled by Serbia.[535] As will be demonstrated below, these claims are mere conjectures:

- the JNA ethnic composition started to change only in 1991;
- the JNA's senior commanding officers reflected the ethnic diversity of the SFRY;
- the JNA's restructuring in 1988 was the result of a decision taken by representatives of all SFRY republics and autonomous provinces;
- the JNA was a *de jure* organ of the SFRY.

[531] See Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), 31 May 1995, UN Doc. S/1994/674/Add.2(Vol.I), Annex III. A, p. 19, para. 61 *et seq.*
[532] Memorial, para. 3.14. *et seq*.
[533] See Memorial, para. 8.40, and *supra* Chapter V.
[534] Memorial, para. 3.14. *et seq*.
[535] Memorial, para. 3.22. *et seq*.

A. *Ethnic Composition of the JNA*

580. The Applicant provides the following data on the ethnic composition of the JNA officer corps: 63.2% Serbs and 6.3% Croats before 1986, and 70% Serbs after 1986.[536] However, according to the data obtained by the Respondent, in the period before the conflict the percentage of Serbs in the officer corps was significantly lower (56% instead of 63.2%), while the percentage of Croats was significantly higher (11.5 % instead of 6.3%),[537] than the Applicant claims. Importantly, this ratio remained unchanged during the period in question, which refutes the Applicant's claim that the JNA "[underwent] a process of 'Serbianisation' beginning in the mid-1980's".[538]

581. While it is true that in the SFRY the share of the Serbs in the officer corps of the JNA was higher than their share in the SFRY population (approximately 56% in the officer corps in comparison with 36 % in the overall population[539]), this should be understood in light of the fact that over the years the number of Croats and Slovenes who applied to military schools and academies had been much lower than their ratio in the overall population.[540] This led to their relatively lower numbers in the officer corps as well. Among the JNA generals, however, the ratio of Serbs and Croats better reflected the ratio of these groups in the overall population: out of a total of 162 generals on 1 January 1990, there were 23 Croats (14.2%) and 86 Serbs (53.1%).[541]

582. In this context, one should also consider some of the top positions in the JNA that were held by non-Serbs at the beginning of 1991: Defense Minister (General Kadijević), Deputy Defense Minister (Admiral Brovet), Air Force Commander (General Tus), Commander of the 1st Military District (General Spirkovski), Commander of the 5th Military District (General Kolšek), Commander of the Fleet of Military-Naval District (Vice-Admiral Fridrih Moreti), and the president of the Committee of the League of Communists of Yugoslavia in the JNA (Admiral Grubišić).[542]

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[536] Memorial, para. 3.15.
[537] See Annex 30; This information was received from the Ministry of Defence of the Republic of Serbia. On the yearly basis the data on the ratio of the Serbs and Croats in the officer corps of the JNA was as follows:
1987: 56.3% Serbs and 11.5% Croats; 1988: 55.9% Serbs and 11.6% Croats; 1989: 55.25% Serbs and 11.51 Croats; 1990: 55.92% Serbs and 11.58% Croats.0
[538] See Memorial, para. 3.13.
[539] See 'The National Composition of Yugoslavia's Population, 1991', *Yugoslav Survey*, Vol. 33, no. 1 (1992), p. 12, Table VII.
[540] See Annex 30.
[541] *Ibid*.
[542] See Annex 30.

583. All this indicates that it is inaccurate to claim, as the Applicant does, that "JNA officers who had indicated support for the idea of 'Greater Serbia' were elevated."[543]

584. In conclusion, the Applicant's claim concerning a purported change of ethnic structure of the JNA in order to make it a Serbian army simply is not supported by the facts. The ethnic structure of the JNA remained unchanged during the 1980s and up to 1991. It was only with the outbreak of ethnic conflicts in the SFRY that the JNA's ethnic structure began to change.

B. *The JNA's Restructuring in 1988*

585. The Applicant heavily relies on the JNA's restructuring in 1988, which it regards as a "further shift towards the promotion of Serbian interests".[544] In particular, it is implied that the new division of military districts was deliberately made in such a way to correspond to the borders of the "Greater Serbia".[545]

586. This is nothing more than a mere conjecture. The Applicant fails to appreciate the fact that the JNA's restructuring in 1988 was done pursuant to a decision adopted by the SFRY Presidency, which consisted of representatives of all republics and autonomous provinces.[546] Accordingly, it is inaccurate to say, as the Applicant does, without providing any evidence for this, that "[t]hese changes were badly received by the Republics, with the exception of Serbia..."[547]

587. The Applicant's claims about the JNA's "Serbianisation" are not only inaccurate but they also completely fail to take into account the fact that the JNA was an important integrative factor of the SFRY, which "...viewed itself both as the protector and the embodiment of the Socialist Federal Republic of Yugoslavia (SFRY), with a special role in safeguarding the Yugoslav state and identity."[548]

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[543] Memorial, para. 3.21.
[544] See Memorial, para. 3.17. *et seq*.
[545] *Ibid.*, para. 3.19.
[546] This is confirmed by the Applicant, see Memorial, para. 3.17, note 31.
[547] Memorial, para. 3.18.
[548] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 46 (Peace Palace Library).

C. *The Applicant's Misleading Interpretation of Events up to and including the War in Croatia*

588. As will be demonstrated below, the Applicant provides a misleading interpretation of the events leading to the war in Croatia, which is also designed to show that the JNA promoted Serbian interests and ultimately came under "full" control of the Serbian leadership.

589. Despite the dramatic heading ("Purpose of Reorganisation and the Preparations for the Genocide"), the section of the Memorial that discusses the events that took place in 1990 lends no support to the claim that a genocide had indeed been planned. Instead, it shows that the JNA's actions in 1990 were supported by the entire SFRY Presidency, including the transfer of military equipment from the Territorial Defense ("TO") depots to those controlled by the JNA.[549] In the same section the Applicant mentions the decision of the Presidency that paramilitary units be disarmed, and it also notes that charges for incitement to armed rebellion were brought against the Croatian Defense Minister, a former JNA General Špegelj.[550] What the Applicant does not mention is that Mr. Špegelj was caught *in flagranti* illegally importing weapons from abroad, and organizing Croatian paramilitary forces and attacks on the JNA.[551]

590. Further, the Applicant describes the 1990 changes to the organization of the JNA's 5th Military District, which covered most of Croatia, and concludes that these were intended to prepare the JNA for the role it was to assume from the summer of 1991.[552] Without entering into the veracity of the Applicant's allegations in this part which are not directly relevant for the present case (and in relation to which the Respondent reserves its position), it suffices to note that these organizational changes, which supposedly were preparations for the achievement of Serbian territorial objectives, were made at the time when the commander of the 5th Military District was General-Colonel Konrad Kolšek, an ethnic Slovene.[553]

[549] Memorial, para. 3.24 ("This decision was endorsed by the Presidency of the SFRY.").
[550] Memorial, para. 3.29.
[551] See Annex 36.
[552] Memorial, para. 3.27.
[553] See Memorial, para. 3.36.

591. Moving to events in 1991, the Applicant claims that the JNA was by the end of July 1991 "completely controlled by the President of Serbia – Slobodan Milošević – in Belgrade (*sic!*)".[554] As will be demonstrated below, the Applicant's claim is inaccurate, and the Applicant misinterprets and at times manipulates evidence in order to support this erroneous claim.

592. The Applicant mentions that in March 1991 the JNA requested the SFRY Presidency to proclaim a state of emergency and that this was refused.[555] It should be noted that this episode – the Presidency's decision to refuse the JNA's request and the JNA's compliance with this decision – clearly shows that the Presidency, despite political infighting, was functioning and that it had control over the JNA.

593. The Applicant however tries to interpret this episode as showing that the JNA was already at that time promoting a plan for a "Greater Serbia". In this regard, the Applicant quotes a sentence from General Kadijević's book and interprets it in the following way:

> "Having failed to obtain the declaration of a state of emergency the JNA implemented a contingency plan for 'the protection and defence of the Serbian people out of Serbia and the gathering of the JNA within the borders of the <u>future</u> Yugoslavia', implying that FRY in *statu nascendi* would territorially correspond with the planned 'Greater Serbia'. This represented another step towards the JNA's transformation from its obligations under the 1974 Constitution, towards its new role as a Serbian Army demonstrating its support for the rebel Serbs in Croatia and serving the cause of 'Greater Serbia'."[556]

594. However, the Applicant's quote from General Kadijević's book is incomplete and, when read together with the preceding sentence and in its context, it conveys a rather different meaning from the one suggested by the Applicant:

> "The second option[[557]] included that the army, with the support of political forces in the Federation and in the Republics representing those nations who

[554] Memorial, para. 3.40.
[555] Memorial, para. 3.32.
[556] Memorial, para. 3.32 (footnote omitted, underlined text in the Memorial).
[557] The "first option" was resignation of the JNA leadership or Kadijević alone but this was abandoned, see V. Kadijević, *Moje vidjenje raspada* (1993), pp. 113–114.

> want to live in Yugoslavia, through a peaceful separation of those who wanted to leave it, continues to secure such politics. This among other things means, practically translated into the then current situation, *the protection and defence of the Serb people outside of Serbia and the gathering of the JNA inside the borders of the future Yugoslavia*."[558]

595. The quoted text shows that in March 1991 the JNA was not even contemplating a "new role as a Serbian Army" as the Applicant claims. Instead it was ready to defend the SFRY and was looking for support of "the Republics representing those nations who want to live in Yugoslavia", which included Macedonia and Bosnia and Herzegovina in addition to Serbia and Montenegro.[559] This also meant that the JNA would protect and defend "the Serb people outside Serbia", who were not only in favour of the SFRY, but who were also perceived to be in danger from the advancing Croatian nationalism whose proponents were in government in Croatia at the time.

596. The Applicant claims that "in application of this contingency plan" the JNA organized the transfer of arms and ammunition to the Serbian Democratic Party in Croatia. In support of this claim, the Applicant provides one letter from a former JNA Colonel, written in 1994.[560] However, the text of the letter clearly states that the alleged transfer of arms and ammunition was done "illegally", i.e. as a private act of the said individual undertaken without orders from his JNA superiors.[561]

597. As already noted, third party sources have described the role of the JNA in Croatia during the spring and summer of 1991 as that of a peacekeeper who "conscientiously tried to remain an unbiased federal force".[562] It was only after an all-out attack by the Croatian forces on the JNA's barracks and facilities in September 1991, that the JNA began to take general military action against the Croatian government.

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[558] *Ibid.*, p. 114, reprinted in Memorial, Annexes, Vol. 5, Appendix 4.1 (emphasis added).
[559] At the time, Macedonia and Bosnia and Herzegovina were still very much supporting the maintenance of a Yugoslav State, and in the Summer of 1991 their leaders Gligorov and Izetbegovic proposed a plan which envisaged maintenance of the SFRY as an "asymmetrical federation", see L. Silber & A. Little, *The Death of Yugoslavia* (1996) p. 148.
[560] See Memorial, para. 3.32, note 70. In addition to the letter, in note 70 the Applicant also refers to another document which was apparently not submitted as an annex to the Memorial.
[561] "I got in touch, *illegally* with the leaders of the SDS... At the end of April and the beginning of May I started with the *illegal* arming of the Serbian people from then our warehouses..." Memorial, Annexes, Vol. 4, annex 65, p. 162 (emphasis added).
[562] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 92 (Peace Palace Library);

598. Further, the Applicant claims that the JNA's tacit acceptance of the departure of Slovenia from the SFRY in July 1991 meant that the JNA "was abandoning its commitment to maintain the unity of the SFRY and shifting its support to the 'Greater Serbian' version of Yugoslavia."[563] This is again a mere conjecture about the motives and policies of the JNA leadership for which the Applicant provides no concrete proof. What is important for the purposes of the present case, however, is that the record shows that the JNA obeyed a political decision to withdraw from Slovenia adopted on 18 July 1991 by its commander-in-chief, the Presidency, and that this decision was reached with the participation of all members of the Presidency.[564] This again shows that neither the Presidency nor the JNA were under the direct control of the Serbian leadership, as the Applicant claims, and that they were functioning as the SFRY organs.

599. After mentioning the JNA's withdrawal from Slovenia, the account of events given by the Applicant then stresses the military preparations of the JNA units in and around Croatia during the summer of 1991.[565] However, it should be noted that, at that time, it was clear that an all-out conflict might be imminent in Croatia, where the JNA was subject to constant harassment and attacks. Thus, it seems prudent for a military force to prepare for such contingency. This in no way casts doubt on the conclusion of the third-party observers that the JNA acted in a neutral manner as a buffer between the two sides to the conflict – Serbs in Croatia and the Croatian government's forces.

600. The Memorial also makes allegations about changes in the JNA's commanding staff in June 1991,[566] trying to show that, in this way, the JNA was brought under full control of the Serbian leadership. In this regard, the Applicant concludes that "[t]he national structure of the CO's staff in the JNA in Slovenia and Croatia at this time [June 1991] was absolutely weighted in favour of Serb officers who accounted for 57% of the officer cadre, whereas the Croats made up just 12%." However, this ratio between the Serb and the Croat officers corresponds to the ratio that already existed during the peaceful period between 1987 and 1990.[567] Moreover, individual replacements mentioned by the

[563] Memorial, para. 3.34.
[564] All members of the Presidency were present at the session, which was chaired by Mr. Mesić from Croatia, the President of the Presidency. The vote was 6 in favor (members from Kosovo, Macedonia, Montenegro, Serbia, Slovenia, and Vojvodina) , 1 abstaining (member from Bosnia and Herzegovina) and 1 against (member from Croatia), see Annex 25.
[565] Memorial, paras. 3.35 & 3.37-3.38.
[566] Memorial, para. 3.36.
[567] See Annex 30.

Applicant do not change the overall picture. Although two Slovene Generals were replaced by Serbs as the commanders of the 5th Military District covering Croatia, and its Air Force Corps, respectively, this could not change much as far as the command and control was concerned. The JNA continued to be under the command of its pro-Yugoslav leadership, while the Air Force was commanded by ethnic Croats during the whole of 1991.[568] The Applicant therefore has failed to provide convincing evidence to support its claim that there were substantial changes in the JNA's command structure in favor of the Serbs in June of 1991.

601. It is a fact that, in the course of 1991, only Serbia and Montenegro remained firm in their support for the SFRY, while Macedonia and Bosnia and Herzegovina gradually shifted their position towards independence, Croatia and Slovenia having already declared their independence. In such a situation, the JNA and the Serbian leadership found themselves in a political alliance, but their relationship was the one of distrust and uneasiness. This is particularly well illustrated by the following excerpt from the diary of Mr. Jović, the member of the SFRY Presidency from Serbia, that was recorded on 25 October 1991:

> "I will also record an observation from the last, not so short period of our drama, about a latent distrust and almost conflict between Slobodan Milošević and the military, in particular, General Kadijević. Their conflict and distrust are less felt at the meetings attended by all of us (six), and much more when one of them is alone – with me."[569]

602. This clearly shows how precarious the relationship between the military and the Serbian leadership was. Mr. Jović's recollections about his political discussions with General Kadijević and the President of Serbia, quoted by the Applicant, reveal that these individuals were at most uneasy political allies, but they do not demonstrate that the Serbian leadership had complete control over the JNA.[570] As already noted during the Preliminary Objections proceedings, these conversations also show that the Serbian leadership had to *ask* the generals "to give us a precise answer on whether they will

[568] *Ibid.*
[569] B. Jović, *Poslednji dani SFRJ, izvodi iz dnevnika*, p. 402 (Annex 29)
[570] See Memorial, para. 3.34.

conduct a redeployment of the military".[571] If the JNA were under full control of the Serbian leadership, the latter would certainly not have to ask the generals about their plans and to wait for an answer from them.

603. Finally, it should also be noted that the Applicant itself is not clear as to when the Serbian leadership allegedly assumed control over the JNA. In paragraph 3.02, for example, it claims first that "[i]n mid-1991... the Serbian leadership... took over control of the JNA", but in the very next sentence implies that this occurred earlier by stating that "[f]rom spring 1991 onwards the JNA operated as a *de facto* 'Serbian Army'."[572] Later on, however, the Applicant claims that it was by the end of July 1991 that the activities of the JNA "were completely controlled by the President of Serbia",[573] but in the next paragraph states that "[w]ith the final collapse of the SFRY Presidency in October 1991, the Serbian leadership obtained full control of the JNA."[574]

604. It is submitted that the JNA was a *de jure* organ of the SFRY and operated as such. It was under political direction of another *de jure* organ of the SFRY, the Presidency, which was recognized as such until early 1992.[575]

D. *Conclusion*

605. The Applicant misleadingly uses terminology employed in the context of State responsibility ("*de facto* organs") to suggest that the FRY or Serbia should be held responsible for the conduct of *de jure* organs of the SFRY during the latter's existence due to the fact that the Serbian leadership allegedly controlled their acts. It is clear, however, that responsibility for the conduct of the SFRY organs cannot be established on that basis. It has already been demonstrated that the Applicant's account of the working of the SFRY Presidency is misleading and inaccurate and fails to appreciate the fact that this organ functioned as a *de jure* organ of the existing SFRY in 1991 and early 1992.[576]

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[571] Quoted in *ibid.*.
[572] Memorial, para. 3.02.
[573] Memorial, paras. 3.39-3.40. The Applicant's claim that Mr. Milošević completely controlled the JNA by the end of July 1991 is supported by the transcript of a conversation between Mr. Milošević and Mr. Karadžić which took place on 20 December 1991 and dealt with current events without containing any reference to the events that took place in summer of 1991.
[574] Memorial, para. 3.41.
[575] See Annexes 24, 25, 26 and 27.
[576] *Ibid.*

606. It has been demonstrated that the Applicant has failed to provide evidentiary support for its contentions that the JNA was transformed into a Serbian army under complete control of the Serbian leadership in 1991. There is no support in the evidence for the claim that there was a "Serbianisation" of the JNA officer corps, or that the reorganization of the JNA was made for the same purpose, and, finally, that the Serbian leadership exercised complete or "full" control over the JNA. It has also been demonstrated that neither the Presidency of the SFRY nor the JNA were *de facto* organs of the Serbian leadership, as the Applicant erroneously contends.

4. The Armed Forces of the Serb Autonomous Regions in Croatia/RSK

607. As already noted, the Memorial deliberately confuses all groups and formations, other than the JNA, that were fighting against the Croatian Government during the conflict of 1991–1995, by labeling them simply as "paramilitary groups". The purpose of this deliberate confusion is to try to connect all these groups to the JNA and ultimately the FRY.[577]

608. The confusing use of the term "paramilitary groups" in the Memorial leads to a failure to distinguish between the allegations and evidence related to the armed forces of the Serb autonomous regions in Croatia and the RSK, and the evidence related to volunteers and paramilitaries. The present section will deal with the armed forces of the Serb autonomous regions in Croatia and the RSK and it will demonstrate that they must be distinguished from the JNA, volunteers and volunteer units. The next section will discuss volunteers and volunteer units.

A. *The Armed Forces in the Serb Autonomous Regions*

609. The local TO and MUP units or parts thereof on the territory of municipalities in Croatia with a majority or a substantial minority of Serbs started to operate as TO and MUP units of the emerging Serb regions in Croatia, with the spreading of the conflict in Croatia in 1991.

[577] Memorial, para. 3.49.

610. As already mentioned,[578] the SAO Krajina was proclaimed on 21 December 1990, following which, on 4 January 1991, it established its own Secretariat of the Internal Affairs (MUP Krajina) dealing with police and state security affairs. The MUP Krajina operated independently, outside the control of the Croatian MUP. Starting from March 1991, the MUP Krajina was involved in armed clashes with the Croatian Government forces.[579]

611. On 29 May 1991, the Assembly of Krajina established "special purpose units" ("*Milicija Krajine*") within the MUP Krajina, which were however under the authority of the Ministry of Defense of the SAO Krajina.[580] *Milicija Krajine* had *inter alia* the task to defend the territorial integrity of the SAO Krajina and to secure vital objects and regional institutions.[581] The members of the *Milicija Krajine* wore distinctive force signs.[582]

612. On 1 August 1991, the Government of the SAO Krajina proclaimed *Milicija Krajine* and the Territorial Defense ("TO") forces of Krajina (formerly part of the TO forces of Croatia) to be "armed forces" of the SAO Krajina. These armed forces were under the command of the president of the government of the SAO Krajina, who was also the commander of the TO forces.[583]

613. When the JNA started to fight the Croatian government forces, it cooperated with the TO Krajina and the MUP Krajina. The TO and the MUP units could be subordinated to the JNA, but this required a prior approval of the relevant TO commander[584] or the Minister of Interior of the SAO Krajina, respectively.[585]

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[578] See *supra* Chapter V, paras. 473–482.
[579] See *supra* Chapter V, para. 491.
[580] See *Гласник Крајине* [Gazette of Krajina], no. 4/1991, p. 188 (Annex 16).
[581] *Ibid.*
[582] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 135.
[583] See *supra* Chapter V, para. 494.
[584] See ICTY, *Martić*, IT-95-11, testimony of Radoslav Maksić, the former Chief of TO Staff of the SAO Krajina, on 6 February 2006, Transcript pp. 1162-1163:
Q. I have one specific question about this document. And it?
A. Yes.
Q. This is in relation to assignment of TO units to military operation, their assignment to the respective military units. What would be the right procedure if a command of a military unit wanted to use a TO unit?
A. The unit would ask the commander to resubordinate the given TO unit and once it is resubordinated to that particular person, he will then issue orders and tasks to the TO unit, because all TO units can be resubordinated to a different commander, but not the command itself. All of its units can be resubordinated. If you look at what it says here, the 1st joint TO detachment and all the other units, they have all been resubordinated but not the staff.

614. Local TO units were also established and operating in two other Serbian autonomous regions on the territory of Croatia, *viz.* the Serbian Region of Slavonia, Baranja and Western Sirmium and the SAO Western Slavonia. As in the SAO Krajina, most of these TO local units originated *de facto* from the former TO units of the TO Croatia that existed in these regions, as a way of organizing the Serb population. On 10 October 1991, the Great Assembly of the Serbian Region of Slavonia, Baranja and Western Sirmium decided to attach the regional TO to the armed forces of the SFRY, i.e. the JNA.[586] However, there is evidence that it was not before the end of October 1991 that the local TO units in this region were subordinated to the JNA in the operation of Vukovar.[587] The local TO units also operated on the territory of the SAO Western Slavonia.[588]

615. In conclusion, the TO and MUP units in the Serb autonomous regions in Croatia were under the command and control of the local Serb authorities, or the regional authorities such as those of the SAO Krajina and of the Serbian Region of Slavonia, Baranja and Western Sirmium. Evidence shows that these units fought either alone or in coordination with the JNA once the JNA started to fight the Croatian government forces. They could also be subordinated to the JNA, but only on the basis of a decision of the local authorities or TO commanders.

B. *The Serb Army of Krajina ("SVK")*

616. As already mentioned, the SAO Krajina was transformed into the RSK on 19 December 1991. Subsequently, on 26 February 1992, the RSK was joined by the SAO Western Slavonia and the Serbian Regions of Slavonia, Baranja and Western Sirmium. The RSK exercised *de facto* control over substantial territory and had an independent government with organized armed forces under its control.[589]

Q. Mr. Maksic, you said the unit would ask the commander. Which commander?
A. Of these units. I don't know who this document was intended for. It says delivered but delivered to whom? Which area of responsibility is this? And why is this being delivered?
Q. Mr. Maksic – Mr. Maksic, you meant the unit would ask the respective TO commander?
A. Yes.
Q. Thank you."

[585] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 142.

[586] Одлука о припајању територијалне одбране Српске Облаасти Славонија, Барања и Западни Срем оружаним снагама СФРЈ, *Службени гласник Српске области Славонија, Барања и Западни Срем* [Official Gazette of the Serbian Region of Slavonia, Baranja and Western Sirmium], no. 1/1991, p. 20.

[587] JNA, Operation Group South Command, Decision for Continuation of Assault Operation Vukovar, no. 235-1, 29 October 1991 (Annex 31).

[588] This is confirmed by the Applicant in the Memorial, at para. 3.85, but at the same time accompanied with allegations of their genocidal activities which are denied.

[589] See *supra* Chapter V, para. 494.

617. The armed forces of the RSK consisted of its territorial defense ("TO").[590] According to Article 78, paragraph 1(5) of the RSK Constitution, the President of the RSK

> "commands the armed forces in peace and war and [commands] the people's resistance in war; orders general and partial mobilisation; organizes preparations for defence in accordance with law".[591]

618. On 18 May 1992, an amendment to the RSK Constitution established the Serb Army of Krajina ("SVK").[592] The SVK comprised TO units, while in the event of the imminent threat of war and during wartime special police units would join the SVK.[593]

619. With the arrival of UNPROFOR, a number of members of the RSK TO were transferred to police units. While the Secretary-General in his report of 28 September 1992 stated that UNPROFOR considered this a violation of the Vance Plan, the RSK authorities argued that it was necessary for the protection of the population from possible Croatian attacks.[594] In this regard, it should be noted that the Croatian forces had in April and June 1992 grossly violated the cease-fire.[595] Nevertheless, the situation apparently had been stabilizing until 22 January 1993 when Croatia attacked Maslenica and other locations in the southern part of Sector South and the adjacent "pink zones". The Croatian offensive resulted in the deaths of two UNPROFOR soldiers and injuries to four others,[596] and the death of hundreds on the Serbian side.[597] Croatia's forces never retreated to previously held lines after any of these attacks, despite calls to do so emanating from the Security Council.[598]

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[590] Constitution of the RSK, Article 102 (Annex 19).
[591] *Ibid.*, Article. 78, para 1(5).
[592] Amendment VIII of 18 May 1992, *Службени гласник РСК* [Official Gazette of the RSK], no. 9/1992, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1992%20godina/Sg_92_09.pdf (Annex 20).
[593] See amendments to the RSK Law on Defense, Article 1, *Службени гласник РСК* [Official Gazette of the RSK], no. 9/1992, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1992%20godina/Sg_92_09.pdf .
[594] See Further Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992) and 762 (1992), 28 September 1992, UN Doc. S/24600, paras. 4 & 7.
[595] See Further Report of the Secretary-General Pursuant to Security Council Resolution 752 (1992), 26 June 1992, UN Doc. S/24188, para. 7; see, also, Security Council resolution 762 (1992), para. 3.
[596] See Further Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, paras. 13–14.
[597] For more see Chapter XII, paras.1123-1129.
[598] Security Council resolution 762 (1992), para. 3 and resolution 802 (1993), para. 1.

620. The amendments to the RSK Constitution adopted on 20 April 1993 introduced further changes to the SVK structure. They introduced a Supreme Defense Council, which was composed of the President, Prime Minister, Minister of Defense, and the Minister of the Interior of the RSK, as well as of the Commander of the SVK.[599] The commander of the SVK was appointed by the Assembly on the proposal of the Supreme Defense Council.[600] The SVK was led by the president of the RSK on the basis of the RSK Constitution and decisions taken by the Supreme Defense Council.[601]

C. *Control over the Armed Forces of the Serb Autonomous Regions and the RSK*

621. The Applicant is unclear as to whether the JNA "supported",[602] "coordinated their activities with"[603] or "controlled"[604] TO Krajina and the SVK. The Applicant also contends that the TO Krajina was in September 1991 "formally incorporated" into the JNA.[605]

622. However, as is clear from the preceding discussion, TO Krajina and later the SVK were under the control of the SAO Krajina and the RSK leadership, as the case may be, and not under the control of the JNA or the SFRY or, later on, the FRY. The evidence adduced by the Applicant does not change this conclusion.

623. Further, it should be noted that the Applicant is deliberately mixing evidence relating to the SFRY and the JNA with evidence related to the FRY and its army, in an attempt to extend the FRY's liability to the events that took place before its creation. As already discussed, the FRY cannot be held responsible for the acts of the SFRY organs, including the JNA.[606] Nevertheless, for the sake of completeness, the Respondent will, in addition to the evidence that concerns the FRY, also discuss evidence adduced by the Applicant as a proof of the JNA's and SFRY's alleged control over the TO Krajina, and will demonstrate that said evidence is insufficient to support the Applicant's claims.

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[599] Amendment XIV of 20 April 1993, *Службени гласник РСК* [Official Gazette of the RSK], no. 2/1993, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1993%20godina/Sg_93_02.pdf.
[600] Amendment XII of 20 April 1993, *Службени гласник РСК* [Official Gazette of the RSK], no. 2/1993, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1993%20godina/Sg_93_02.pdf.
[601] See Amendment XIII of 20 April 1993, *Службени гласник РСК* [Official Gazette of the RSK], no. 2/1993, available at http://www.hic.hr/ratni-zlocini/sluzbeni%20glasnici/1993%20godina/Sg_93_02.pdf.
[602] Memorial, para. 3.54.
[603] Memorial, para. 3.55.
[604] Memorial, para. 356.
[605] Memorial, para. 3.81.
[606] See *supra* Chapter IV.

624. In support of its claim that TO Krajina was "formally incorporated into the JNA", the Applicant cites an order of the president of the SAO Krajina government on the appointment of the commander of the TO Krajina,[607] which in fact refutes the Applicant's claim, as it rather shows that it was the SAO Krajina authorities that appointed commanding officers of the TO Krajina, which clearly demonstrates that the latter were subordinated to the SAO Krajina authorities.

625. The evidence adduced by the Applicant with respect to the issue of control over the TO Krajina and the SVK includes an exchange of military information between the authorities in Knin and Belgrade[608] which does not prove control. Moreover, the SVK report cited in support of this claim has not been translated in its entirety by the Applicant, probably because the omitted parts clearly show that the SVK and the Yugoslav Army were two separate military forces and because, in particular, the report refers to a very small number of Yugoslav Army officers who volunteered to work in the SVK.[609]

626. The Applicant has adduced further evidence to support the claim of "control" over the TO Krajina and the SVK in the form of various communications between the Krajina/RSK and the Serbian leadership. Again, communications between political and military leaders are not unusual and cannot as such prove "control" of one ally over another. Moreover, the content of the documents adduced by the Applicant provides no evidence of such control:

- a (likely) intercepted conversation between the RSK leaders Hadžić and Martić, only refers to a forthcoming meeting with President Milošević; this "intercept" is, in any case, inadmissible as evidence because there is no indication of its source;[610]
- the letter sent to President Milošević by RSK President Hadžić shows that Mr. Hadžić was asking for Milošević's support in obtaining military assistance from the FRY;[611]

[607] See Memorial, para. 3.81, note 190, referring to Annexes, Vol. 4, annex 101.
[608] See Memorial, para. 3.56, note 134, referring to Annexes, Vol. 4, annex 67.
[609] See the original of the document reproduced in annex 67 to the Memorial.
[610] See Memorial, para. 3.57, note 136, referring to Annexes, Vol. 4, annex 68.
[611] *Ibid.*, referring to Annexes, Vol. 4, annex 69.

- the "order" "summoning" RSK Minister of the Interior, Mr. Martić, to a meeting of the SFRY Presidency, in reality was only a communication ("obaveštenje") informing that the SFRY Presidency session would take place and including an invitation to participate in this meeting[612] – the said session concerned the effort of the SFRY leadership to convince the RSK leaders to accept the Vance Plan;[613]
- a note from the meeting between the Serbian President Milošević and the RSK leadership concerning financial assistance only shows that Mr. Milošević agreed with the latter's concept of the RSK army that was to be financially supported by Serbia;[614]
- a RSK Assembly resolution of 18 August 1994 proposing integration of Serbia, Montenegro, the Republic of Srpska and the Republic of Srpska Krajina into one State,[615] which is a political document without any practical consequences; moreover, this document is misleadingly cited by the Applicant as evidence of "Serbian political support" when it is clear that it emanated from the RSK.

627. The Applicant also claims that the JNA provided weapons to TO units of Croatian Serbs from as early as 1990s,[616] but fails to provide evidence for this. Additional evidence adduced by the Applicant in this regard, *viz.* witness statement of one Novak Višeković, is inadmissible as the Applicant has not even supplied the text of the statement.[617]

628. Most of the evidence presented by the Applicant relates to the provision of arms in 1992 and late 1991.[618] This evidence (if it is authentic) must be situated in its proper context – the planned withdrawal of the JNA from Croatia pursuant to the Vance plan, which necessitated leaving behind obsolete military equipment, as is clear from the documents provided by the Applicant.[619] In any case, it should be noted that the provision of military equipment does not amount to proof of control.

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[612] See Memorial, para. 3.57, note 137, referring to Annexes, Vol. 4, annex 70 and the original document reproduced in annex 70.
[613] See *supra* Chapter V, para. 564.
[614] See Memorial, para. 3.57, note 138, referring to Annexes, Vol. 4, annex 71.
[615] See Memorial, para. 3.57, note 139, referring to Annexes, Vol. 5, annex 72.
[616] Memorial, para. 3.59-3.60.
[617] See Memorial, para. 3.60, note 145.
[618] See Memorial, paras. 3.59-3.60, referring to Annexes, Vol. 4, annexes 75-77. It should be noted that annex 77 does not refer to arms or to transfer of military equipment from the JNA, Serbia or the SFRY to the TO Krajina. .
[619] See Memorial, Annexes, Vol. 4, annex 90.

629. The Applicant also provides evidence about financial aid that was extended to the RSK by the authorities of the SFRY or the FRY.[620] However, the fact that such financial aid was provided to the RSK does not of itself prove control. On the contrary, the evidence provided by the Applicant (to the extent that it is considered authentic) demonstrates that the RSK was clearly separate from both the SFRY and the FRY.

630. Further evidence provided by the Applicant relates to the assistance given by the Yugoslav Federal Ministry of Defense in the restructuring of TO Krajina at the time of implementation of the Vance plan in spring 1992.[621] It is also related to the withdrawal of the Yugoslav Army from Croatia, which had been recognized as an independent State, to the territory of the FRY in May 1992.[622] What this evidence indicates is that the SFRY supported the re-organization of the TO Krajina. Moreover, it should be noted that the evidence referred to is less abundant than may appear from the references in the Memorial, as different annexes contain identical documents.[623]

631. Further, the fact that the Yugoslav army members who originated from the RSK or volunteers would serve in the SVK does not show the FRY's control over the SVK, as claimed by the Applicant.[624] While in the service of the SVK, these individuals were subordinated to the authorities of the RSK and not the FRY, and they acted on behalf of the RSK. For example, they could not leave their posts in the SVK without the consent of the RSK authorities, as is clear from the evidence provided in the Memorial itself.[625] This is further evidenced by the fact that their appointments and promotions had been made by the authorities of the RSK, while promotions were only subsequently confirmed by the Yugoslav army.[626]

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[620] See Memorial, paras. 3.61–3.62. & 3.99.
[621] See Memorial, paras. 3.66–3.67, notes 157–158, referring to Annexes, Vol. 4, annexes 87–89 & Memorial, para. 3.92, notes 208–211, referring to Annexes, vol. 4, annexes 109–111; para. 3.93, notes 212–213, referring to Annexes, vol. 4, annexes 88 & 112.
[622] See Memorial, para. 3.67, note 160.
[623] In this regard, it should be noted that annex 109 merely contains an information that the forming of the TO units, border units and the police brigades is at a final stage and not that this was done by the JNA. Further, annex 111 contains the same document as annex 87, while annex 112 contains the same document as annex 89, see Memorial, Annexes, vol. 4, annexes 87, 88 &109–112.
[624] See Memorial, paras 3.67–3.68 & 3.97.
[625] See Memorial, para. 3.97, note 223, referring to Annexes, vol. 4, annex 116.
[626] See documents presented in Memorial, Annexes, Vol. 4, annexes 128–131, referred to in the Memorial, para. 3.68, notes 164–165.

632. In this regard, it should be noted that part of the evidence adduced by the Applicant is misleading as it in fact relates to the transfer of officers from one JNA unit to another in January 1992, at the time when the JNA was present in Croatia, and the SFRY was still in existence.[627] Other evidence relates to technical assistance given by the Yugoslav Army in accepting the SVK conscripts present on the territory of the FRY until their sending to the RSK.[628] This, of course, is not evidence of "the deployment of conscripted soldiers from the FRY to the occupied territory of Croatia", as the Memorial inaccurately claims.

633. The Applicant also presents evidence related to the payment of salaries of the active military personnel in the SVK by the FRY.[629] This, in itself, is neither evidence of control nor proof that these officers were organs of the FRY.[630] The presentation of evidence by the Applicant is particularly misleading when the claim that "[s]oldiers of the JNA and then the Yugoslav Army who were seconded or transferred to active service in occupied Croatia … continued to benefit from the service conditions and status applicable in the FRY" is supported by evidence emanating from as early as 24 November 1991,[631] when the FRY did not yet exist.

D. *Conclusion*

634. The Serb regions in Croatia had their own TO and MUP forces. These forces were under the command and control of the local or regional Serb authorities, such as in the case of the SAO Krajina. These forces cooperated with the JNA, once the JNA started fighting the Croatian government forces. They could be subordinated to the JNA but only on the basis of a decision of the local authorities or TO commanders.

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[627] See Memorial, para. 3.68, note 162 referring to Annexes, Vol. 4, annex 94, containing document dated 24 January 1992.
[628] See Memorial, para. 3.68, note 163 referring to Annexes, Vol. 4, annex 95.
[629] Memorial, para. 3.69, note 167, referring to Annexes, Vol. 4, annex 140 & para. 3.97, note 222, referring to Annexes, Vol. 4, annex 115.
[630] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 388.
[631] See Memorial, para. 3.70, notes 168 & 169 referring to Annexes, Vol. 4, annexes 96-97; see, also, Memorial, para. 3.97.

635. After the creation of the RSK, all TO forces were unified in the SVK, which was led by the President of the RSK. Command over the SVK and its organization was governed by the Constitution of the RSK.

636. Both the TO Krajina, and later the SVK, were under the control of the SAO Krajina and the RSK authorities, as the case may be. The Applicant makes different claims as to the relationship between the TO Krajina and the SVK, on the one hand, and the authorities in the SFRY or the FRY, on the other, and in particular it claims that the former were "controlled" by the latter. As has been demonstrated above, these claims are not supported by evidence. Indeed, some of the evidence presented by the Applicant shows a clear separation between the TO Krajina/SVK, on the one side, and the SFRY and later the FRY, on the other. Finally, and in any event, the FRY cannot be held responsible for the acts of the SFRY organs.[632]

5. Volunteers and Volunteer Units

637. As mentioned above, the Memorial deliberately confuses volunteers and volunteer units with the forces of the Serb regions in Croatia/RSK and uses the term "paramilitaries" to refer to all of these different groups. This section will deal with the allegations made in the Memorial concerning volunteers and volunteer units. It will be demonstrated that (a) evidence about volunteers and volunteer units provided by the Memorial is mostly inadmissible, insufficient or inaccurate; and (b) the fact that certain volunteers were part of the JNA must be established in each specific case.

A. *Sources*

638. In its discussion of the volunteer units in Croatia between 1990-1997, the Memorial primarily relies on two sources. The first source is a list and information concerning "32 different volunteer paramilitary units" which is supplied by "Croatian intelligence sources".[633] No further information about the "Croatian intelligence sources" is provided in the Memorial. It is submitted that this evidence is inadmissible because it does not provide the slightest indication of its origin, much less the name of the Croatian government agency that produced it. Thus, all claims supported by this evidence, in particular the allegations concerning "32 different volunteer paramilitary units", are unproven.

[632] See *supra* Chapter III.
[633] See Memorial, para. 3.47 and plate 12, and Memorial, Annexes, Vol. 3, plate 6.7.

639. The second source relied upon by the Applicant is the Final Report of the United Nations Commission of Experts established pursuant to Security Council resolution 780 (1992), specifically its annex dealing with special forces.[634] Before discussing the evidentiary value of the UN Commission of Experts' report in the present proceedings, it should be noted that references to the report made in the Memorial are so insufficient that they render impossible any meaningful analysis of the related claims made by the Applicant. The reason is that the Memorial makes references to the whole annex of the UN Commission of Experts' report dealing with special forces, without specifying relevant pages or paragraphs.[635] Such references are simply meaningless, considering that this annex is 251 pages long[636] and that it deals not only with Serb paramilitaries but also with Croatian and Bosniac ones. Therefore, it is submitted that the Applicant should provide more specific references to the UN Commission of Experts' report if it intends to use this report as a source of evidence in the present proceedings.

640. It is also submitted that the Experts' report, including the relevant annex, does not provide evidence that would meet the high standard of proof required in the present proceedings. This was also the position of the Serbian government in the proceedings in the *Bosnia* case.[637] The charges of exceptional gravity, such as genocide, must be proved by evidence that is "fully conclusive".[638] However, according to the Experts' report, the Commission of Experts "was not able to verify much of the information that it received".[639] Moreover, "[i]t was not the Commission's intention or part of its responsibility to prepare cases for criminal prosecution..."[640] With this in mind, it is submitted that the UN Commission of Experts' report cannot be considered as a reliable source of evidence in the present proceedings, unless its allegations have been confirmed in criminal proceedings before the ICTY.

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[634] See Memorial, para. 3.48, note 109, referring to UN Doc. S/1994/674/Add.2 (vol. I), Annex IIIA, Special Forces.
[635] See Memorial, Chapter 3, notes 109-114, 119, 127, 133, and accompanying claims.
[636] See UN Doc. S/1994/674/Add.2 (Vol. I), Annex Summaries and Conclusions, p. 11, para. 49.
[637] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* CR 2006/12, p. 28, para. 25 *et seq.* (Obradović).
[638] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 209.
[639] UN Doc. S/1994/674/Add.2 (Vol. I), Annex Summaries and Conclusions, p. 13, para. 58.
[640] UN Doc. S/1994/674/Add.2 (Vol. I), Introduction to Annexes, para. 11.

B. *The Applicant's Overview of the Principal Paramilitary Groups*

641. As already noted, the Applicant's overview of the principal paramilitary volunteer groups begins with the claim that there were 32 such groups, which relies on unidentified Croatian intelligence sources and therefore should be considered as unsubstantiated. Further, the Memorial deals in detail with the volunteer units organized by two individuals: Vojislav Šešelj and Željko Ražnatović a.k.a. "Arkan".[641]

642. As far as Mr. Šešelj is concerned, the Applicant claims that his activities ("organizing volunteers to support the Serbian rebels in Knin") by the summer of 1991 "enjoyed official approval from Serbia." This claim is supported by a reference to a book which, in turn, contains a reference to Mr. Šešelj's interview given in 1994.[642] Indeed, other claims related to Mr. Šešelj's paramilitary group are also supported by the reference to the same source,[643] or to other public statements made by Mr. Šešelj.[644]

643. First, it should be noted that all these claims relate to the period before 1992, i.e. when the FRY was not in existence. Second, the evidence given in support of them are public statements of Mr. Šešelj, who has a record of retracting his statements. This is evidenced by his testimony at the Milošević trial before the ICTY in 2005:

> "Q: Mr. Šešelj, in the course of that answer to Laura Silber on The Death of Yugoslavia tape, you said that you were getting weapons from Milošević's police, from the then Minister of Internal Affairs, Radmilo Bogdanovic, and then from his successor. True or false?
> A: This entire interview, which lasted about one hour, is one I published in one of my books. And you could have found that too. So I'm not challenging the fact that I gave this interview, however, for reasons of political propaganda, I threw Mr. Milošević and Radmilo Bogdanovic into the entire story, wanting to annoy them and to cause on their part an improper political reaction."[645]

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[641] Memorial, paras. 3.51–3.53.
[642] See Memorial, para. 3.51, note 116 referring to R. Thompson [Thomas], *Serbia under Milosevic*, pp. 96–97, which in footnote 11 refers to the book *Guja u Nedrima* – Vojislav Šešelj inteviewed by Mirjana Bobić Mojsilović (1994), pp. 76–77.
[643] See Memorial, para. 3.51, notes 121–122.
[644] *Ibid.*, notes. 118–122.
[645] ICTY, *Milošević*, IT-02-54, testimony of Vojislav Šešelj, 7 September 2005, Transcript p. 11917.

644. As already noted by the co-agent of Serbia at the 2006 hearings in the *Bosnia* case,

> "The whole [ICTY] testimony of Vojislav Šešelj, which lasted for several weeks during the months of August and September 2005, is full of denial of his previous statements in which he had implicated Slobodan Milošević and the State security service of the Serbian police in arming and support of his units. Of course, it is quite possible that Mr. Šešelj lied during his testimony before the ICTY. But then again, it is possible that he lied when he gave those previous interviews. We do not intend to claim that the truth is one way or the other; we just want to demonstrate that such serious issues as State responsibility cannot be determined from statements of a former politician, indicted by the ICTY, who often changed those statements according to what he thought opportune."[646]

645. It must be stressed that the evidence in the Memorial about Mr. Šešelj's paramilitary units and their links with the Serbian authorities comes from Mr. Šešelj himself. Considering his record of retracting public statements and apparently changing them in accordance with his needs, it is submitted that these statements should not be treated as reliable evidence. Finally, it should be noted that Mr. Šešelj is currently on trial before the ICTY. With respect to Croatia, his indictment contains charges related solely to events in Vukovar in November 1991.[647]

646. Concerning the activities of Mr. Željko Ražnjatović a.k.a. "Arkan", the Respondent accepts that Arkan and his paramilitary group participated in armed conflicts on the territory of the former Yugoslavia. However, the Applicant's claim that there is "overwhelming evidence of Arkan's ties with the Governments of Serbia and the FRY" is wholly unsubstantiated as it contains no source whatsoever for this "overwhelming evidence".[648] Also, the claim that "Serbia's Defence Minister... stated that Arkan was

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[646] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* CR 2006/40, p. 28, para. 86 (Cvetković).

[647] ICTY, *Šešelj,* IT-03-67, Third Amended Indictment, 7 December 2007, available at http://www.icty.org/x/cases/seselj/ind/en/seslj3rdind071207e.pdf. The initial indictment against Mr. Šešelj dated 15 January 2003 also charged him for crimes committed in certain other places in Croatia (see http://www.icty.org/x/cases/seselj/ind/en/ses-ii030115e.pdf) but these charges were subsequently left out.

[648] See Memorial, para. 3.52, note 126 and accompanying text. The note simply states that "[t]his is supported both by Šešelj and by Dragoslav Bokan, the leader of the 'White Eagles'" – without identifying any source for this claim.

protected by Interior Ministry officials" is supported by a reference to the UN Commission of Experts report without indicating the relevant page in this 250-page long document, which in any case contains a considerable amount of unverified information. What is then left as evidence of Arkan's connections with the then Serbian authorities is one photograph taken at a funeral in 1997, long after the conflict in Croatia was over.[649] The photograph shows the former Serbian President Milošević, with Arkan standing behind him in a large group of people. Needless to say, this photograph cannot support the Applicant's claim.

647. As far as Arkan's activities on the territory of Croatia are concerned, it should be noted that, before he died in 2000, Arkan was indicted by the ICTY Prosecutor, but not in connection with the events that took place in Croatia.[650]

C. *The Issue of Control over Volunteers and Volunteer Groups*

648. The Applicant claims that members of volunteer paramilitary groups were integrated into the JNA by an order of the Federal Secretariat for National Defense of the SFRY dated 13 September 1991. According to the Applicant, this order is "of singular importance in establishing the 'effective control' of the Serb-controlled JNA over Serbian paramilitary forces."[651]

649. However, according to the order of 13 September 1991, volunteers were *individually* integrated into the JNA and had to file an individual application (the relevant form was appended to the order).[652] This is conceded by the Applicant.[653] The volunteers that applied would be accepted to the JNA upon a decision of an appropriate military officer and would be assigned to a JNA unit.[654] Such volunteers would be equal to other JNA members.[655]

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[649] See Memorial, plate 13.
[650] See ICTY, *Željko Ražnjatović – "Arkan"*, IT-97-27, Indictment.
[651] See Memorial, para. 3.80; see, also, paras. 3.63-3.64.
[652] See Memorial, Annexes, Vol. 4, annex 73, article 2.
[653] Memorial, para. 3.80 ("[e]very volunteer had to submit an admission form").
[654] Memorial, Annexes, Vol. 4, annex 73, paras. 3 & 11.
[655] *Ibid*., para. 10.

650. This means that for each volunteer that was integrated into the JNA there would be an individual decision to that effect. The Applicant broadly claims that "the JNA incorporated into its fold various Serbian paramilitary groups" by the order of 13 September 1991.[656] However, rather than making such broad, sweeping claims, the Applicant must identify specific instances in which volunteers were incorporated into the JNA and then demonstrate that it was indeed these volunteers that committed the alleged violations.

651. Alternatively, the Applicant will have to provide other evidence showing that certain volunteer paramilitary groups were acting under the effective control of the JNA.[657] In this context, it is worth noting that the JNA indeed did not have volunteer paramilitary groups under its control, as is clear from the fact that as late as 10 December 1991, General Kadijević was still issuing instructions that volunteer units either accept the JNA command or be disarmed and removed from the battlefield.[658]

652. However, and as already discussed, all this would only be relevant if the FRY could be held responsible for the acts of the SFRY organs (*quod non*).[659]

6. Conclusion

653. On the basis of the foregoing discussion, it may be concluded that:

(a) The Applicant's claim that the JNA had been transformed into a "Serbian army" starting from the mid-1980s does not withstand scrutiny, as the JNA's ethnic structure remain unchanged during the 1980s and up to 1991, and its restructuring in 1988 was agreed upon by all the SFRY republics;

(b) The JNA was not under the control of the Serbian leadership in 1990 and 1991; it acted as *de jure* organ of the SFRY and operated as such, under political direction of the SFRY Presidency;

[656] Memorial, para. 3.80.
[657] For example, Applicant provides evidence showing that members of Arkan's "Tigers" were expressly permitted to "participate in combat at JNA and TO positions in the Petrinja municipality" in Croatia, and were subordinated to the commanding JNA officer, see Memorial, para. 3.65, referring to Annexes, Vol. 4, annex 82.
[658] See Memorial, Annexes, Vol. 4, annex 74, para. 6.
[659] See *supra* Chapter IV.

(c) The Memorial misleadingly places different volunteer units, the armed forces of the Serb regions in Croatia, and the RSK in the same and single category of "Serbian paramilitary groups", and tries to create an impression that all of these groups were part of the JNA and, later, the Yugoslav Army, in order to avoid providing the necessary evidence concerning each specific group, and in particular, evidence of their relationship with the JNA;

(d) The TO and MUP units in the Serb autonomous regions in Croatia were under the command and control of the local or regional Serb authorities; they fought alone or in coordination with the JNA, and could be subordinated to the JNA only on the basis of a decision of the local authorities or TO commanders;

(e) After the creation of the RSK, all TO forces were unified in the SVK in spring 1992; the SVK was led by the President of the RSK;

(f) The Applicant's claims that the forces of the Serb autonomous regions were "controlled" by the SFRY or the FRY are not supported by evidence;

(g) Important evidence adduced by the Applicant in relation to the volunteer paramilitary groups does not meet the high standard of proof required in the present proceedings, or is plainly inadmissible as its source is not identified;

(h) The Applicant's claims concerning the connections between certain volunteer paramilitary groups and the Serbian authorities remain unsubstantiated or are supported by unreliable evidence;

(i) The documents regulating the relationship between the JNA and various volunteer paramilitary groups show that individual volunteers were accepted into the JNA on the basis of a decision of an appropriate JNA officer, which means that in each case of alleged violations committed by volunteers it has to be shown that they were actually accepted into the JNA or acted under its effective control. The fact that the JNA did not have volunteer paramilitary groups under its control is evidenced by the instruction issued as late as 10 December 1991, requiring that these units either accept to be put under the JNA command, or they would be disarmed and removed from the battlefield.

CHAPTER VII

RESPONSE TO THE APPLICANT'S ALLEGATIONS CONCERNING CRIMES COMMITTED AGAINST CROATS

1. Introduction

654. In Chapters 4 and 5 of the Memorial, the Applicant presented its view of the facts which, according to the Applicant, represent genocidal activities in Eastern Slavonia and the rest of Croatia. The Respondent respectfully submits that even if the facts presented by the Applicant in these Chapters were to be treated as reliable, *quod non*, they do not support the Applicant's claims that the incidents in question, even if taken on a cumulative basis, could be qualified as genocide.

655. The claims that were presented by the Applicant will be analyzed in detail in the present Chapter. It will be shown that the facts presented by the Applicant are to a large extent supported solely by witness statements and documents produced either by the Applicant itself or by individuals/entities close to the Applicant, who cannot be regarded as disinterested persons in the present case. Those witness statements will be analyzed in details. Several conclusions should however be stressed at this point. For one, as a rule, statements provided by the Applicant do not fulfill the minimum evidentiary requirements of affidavit. Furthermore, in many cases, they solely or predominantly contain hearsay evidence. Lastly, a noticeable percentage of statements have been given in the course of criminal proceedings before Croatian authorities by persons facing criminal charges, which brings into question the voluntary nature of the statements given. Accordingly, such documents are, for these and other reasons that will be explained further, inadmissible.

656. Moreover, the analysis of evidence offered by the Applicant, both witness statements and other documents, will show a vast number of inconsistencies contained either in individual pieces of evidence or visible when documents are cross-referenced with others. This analysis will also reveal a considerable number of mistakes and misrepresentations. Some claims made in the Memorial are, furthermore, not even corroborated by any evidence offered by the Applicant. Having in mind, however, that the Applicant

submitted 433 statements, the Respondent will point out only the most obvious inconsistencies. The Respondent will also compare the claims of the Applicant with the relevant judgments and indictments of the ICTY. Finally, the Respondent will briefly address the allegations on the involvement of the JNA in the alleged crimes, while this issue will be dealt with more extensively in other Chapters of this Counter-Memorial.

657. Because of the inconsistencies, mistakes and sometimes misrepresentations made by the Applicant, it is very hard to reach a general conclusion as to the number of persons killed in the events described in the Memorial. From the analysis of the facts, as presented by the Applicant, it seems that the number of the persons allegedly killed[660] includes all war related casualties on the territory of Croatia – civilians and combatants alike. Furthermore, it is more than likely that this number also includes persons of Serb ethnicity who were the victims of acts committed by the Applicant. In any case, however, it is for the Applicant to produce evidence in support of its claims concerning the alleged killings, and the Applicant failed to do so to a large extent.

658. The following analysis contained in the Chapters 4 and 5 of the Applicant's Memorial will, for ease of reference, follow the order of presentation, subtitles and the style of references applied in the Memorial.

2. Response to the Applicant's Allegations Concerning Crimes Committed in Eastern Slavonia

TENJA

(Memorial, paras. 4.20 – 4.30)

659. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Tenja, the Applicant alleges:

a) Random murder of Croatian civilians in the period between 6 October 1991 and 20 April 1992 (the names of 30 victims have been provided);

[660] See Memorial, para. 1.09, "This case has far-reaching legal and historical relevance for Croatia. Croatia suffered great losses that can be attributed to the war of aggression and genocidal campaign launched against it in 1991 by the Serbian leadership. These losses include 10,572 persons killed, 1,419 persons still missing and unaccounted for, and 7,624 imprisoned in various camps and detention centres, a majority of them on the territory of FRY."

b) Killing of a number of civilians and 3 defenders after the attack on the cattle-raising farm "Orlovnjak" on 6 October 1991 (the names of 7 persons have been provided);

c) Rape of Croatian women and beating of detainees.

660. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes nos. 1, 2, 4 – 18, a letter from the Ministry of Defence of the Republic of Croatia, and the list of exhumed mass graves.[661] What should be noted in relation to these witness statements is that they do not fulfill the minimum evidentiary requirements of affidavit.[662] These documents are accordingly inadmissible.

661. Even if these witness statements are to be treated as reliable, they do not support the Applicant's claims. Only witnesses LjB (annex 5), ZM (annex 15), JK (annex 16) and LR (annex 17) allegedly have direct knowledge about the alleged murders, but each of them only about one murder. The police record of interrogation of II* (annex 11) contains only a general allegation that "about 40 people were buried in Orthodox cemetery, few of which died a natural death, while the others were probably killed in the armed clashes or in some other way", but offers nothing further on how and where the buried people died, or even what is their ethnicity.[663]

662. There is no document that would confirm that Croatian women were raped in Tenja.

663. Allegations contained in documents of Croatian official bodies (annexes 163, 165 and 166) must be proved by evidence from an independent source; they cannot alone be treated as reliable evidence, because they have been generated by the Applicant itself.

664. The crimes alleged to have been committed in Tenja are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Tenja. In any

[661] The letter from the Ministry of Defence of the Republic of Croatia, annex 163; List of exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia, annexes 165 & 166.

[662] The copies of the original witness statements contained in annexes 1- 2, 4-10, 12-18 do not even contain signatures of persons who allegedly gave those statements. In annexes 1, 5-8, 10, 12 & 18 there is no signature of person(s) who took the statements while from annexes 1, 5-8 & 10 it is even not visible who was a person or body who took these statements. None of the offered statements contains either an oath or a solemn promise that the truth has been stated.

[663] One has to have in mind that Serbs are of Orthodox religion, while Croats are of Catholic religion. It is thus more likely that people buried in the Orthodox cemetery would be Serbs rather than Croats

event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Tenja should be dismissed in their entirety.

DALJ

(Memorial, paras. 4.31 – 4.37)

665. In support of its claims that the *actus reus* of the crime of genocide was fulfilled in relation to Dalj the Applicant alleges:

a) Murder of 16 MUP and ZNG members, a number of whom were killed after their surrender on 1 August 1991;
b) Killing of a number of civilians during the attack on 1 August 1991 (three individuals are identified);
c) Total of 56 or 57 Croat victims in and after the 1 August attack;
d) Disappearance of 300 persons;
e) Torture and murders of the detainees brought to Dalj from Vukovar.

666. The evidence adduced by the Applicant in support of these claims are witness statements contained in annexes 21 – 27 and four other documents.[664] Again, these witness statements do not fulfill the minimum evidentiary requirements of affidavit[665] and are accordingly inadmissible.

667. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. From the Applicant's description of the events in Dalj on 1 August

[664] A number of autopsy records of the bodies of the members of ZNG and MUP of RH contained in the file of the District Court in Osijek no. K-95/94, Memorial, Annexes, Vol. 2(I), annex 168; Mass Killing and Genocide in Croatia 1991/92, p. 112; *Croatian Medical Journal*, War Suppl. 1, 1992 which states that on 3 August 1991 autopsies were performed on Petar Đevlekaj and Nikola Tadijan at the Ward for Pathology and Forensic medicine in the Osijek hospital; List of exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 166; Diocese Đakovo and Srijem War Damages 1991-1994, Đakovo 1994.

[665] None of the seven offered statements contains signatures of persons who allegedly gave those statements. In annexes 21, 23, 26 & 27 there is no signature of person(s) who took those statements while from annexes 21 & 23 it is even not visible who was a person or body who took the statements.

1991, it is obvious that an armed conflict took place in this village, with the Croatian forces constituting one side in that conflict. The Applicant did not offer any credible support of its claims that some of the 16 MUP and ZNG members were executed after they surrendered (see annex 168). Witness HS stated that she saw 37 corpses on the Catholic cemetery. The Applicant, however, does not provide any further evidence on whom did those bodies belonged to or how they were killed (see annex 22). Out of 25 bodies that were, according to the Applicant, transferred to the Osijek hospital, only 2 were identified as civilians, while the rest were obviously members of the MUP and ZNG forces that were involved in the armed conflict.[666] Statement of witness AK does not contain any first hand information about the alleged murders, and instead contains only hearsay evidence without further corroboration (see annex 21).

668. Applicant did not offer any evidence in support of the alleged acts of torture. Witness SD gave only a general statement that Croats were tortured without providing any facts to corroborate this allegation and is not specific enough about the perpetrators (see annex 23).

669. Allegations contained in document of Croatian official body (annex 166) must be proved by evidence from an independent source; they themselves cannot be treated as reliable evidence because they have been generated by the Applicant.

670. Crimes in Dalj were included among the charges in the Indictment against Slobodan Milošević before the ICTY.[667] The time-frame covered by the Indictment, however, does not coincide with the time period that the Applicant is alleging in its Memorial.

671. The crimes alleged to have been committed in Dalj are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. Even from the Applicant's description of the events it is obvious that the majority of deaths

[666] *Croatian Medical Journal* that is cited as a source for this allegation is not attached to the Memorial.
[667] See ICTY, *Milošević*, IT-02-54, Indictment: Croatia, paras 50 and 51; also see ICTY, *Stanišić et al.,* IT-03-69, Third Ammended Indictment, 10 July 2008, paras. 36 and 37.

occurred during the armed conflict which involved considerable numbers of forces from the Croatian MUP and ZNG. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Dalj should be dismissed in their entirety.

BERAK

(Memorial, paras. 4.38 – 4.46)

672. In relation to Berak, in support of its claims pertaining to fulfillment of the *actus reus* of the crime of genocide the Applicant alleges:

a) Random murder of Croats in the period beginning with 2 September 1991 and ending with 1 December 1992 (the names of 10 victims have been alleged);
b) 4 cases of rape committed by "White Eagles", a paramilitary unit;
c) Disappearance of 44 women, older men and children from the basement camp and beatings of the detainees.

673. In support of its claims the Applicant offered as evidence witness statements contained in annexes 28 – 36 and specific record of exhumation.[668] These statements do not fulfill the minimum evidentiary requirements of affidavit[669] and are accordingly inadmissible.

674. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. The Applicant's allegation that bodies of approximately 44 women, older men and children, who had been detained in the basement camp (basement of the Drago Penavić house), were found in a mass grave is inconsistent with other facts given by the Applicant in relation to Berak. Namely, 5 out of 10 persons identified in the mass grave were, according to the Applicant, killed before 30 September, the day when the basement camp was allegedly established,[670] while the sixth identified person from the mass grave is Nada Juratovac who hung herself after his

[668] Records of the exhumation of human post-mortem remains from 25 March 1998, Memorial, Annexes, Vol. 2(I), annex 167.
[669] None of them contains either an oath or a solemn promise that the truth has been stated while the copies of the original witness statements contained in annexes 28, 30, 32, 33, 35 & 36 do not even contain signatures of persons who allegedly gave those statements. In annexes 28, 30, 33, 34 & 36 there is no signature of person(s) who took those statements, while from annexes 28, 29, 30, 31, 33 & 36 it is even not visible who was a person or body who took the statements.
[670] Memorial, para.4.41.

release from the camp.[671] Furthermore, from the injuries described in the autopsy reports it is reasonable to conclude that most of the deaths can be linked to combat activity. The witness statements offered by the Applicant in relation to the killing of Kata Garvranović are vague and inconsistent (see annexes 29 and 36).

675. The Applicant failed to support its allegation about the 44 missing persons with any type of source.

676. The crimes alleged to have been committed in Berak are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Berak. In any case, the Applicant has not showed that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Berak should be dismissed in their entirety.

BOGDANOVCI

(Memorial, paras. 4.47 – 4.55)

677. In relation to Bogdanovci, in support of its claims pertaining to the *actus reus* of the crime of genocide the Applicant alleges:

a) Killings during the attack on 2 October 1991 (the names of 21 victims have been alleged);
b) Killing during the attack on 10 November 1991 (at least 15 members of the ZNG, 10 members of an Albanian family and three identified Croats have been listed as victims of the attack);
c) A total of 84 killed or disappeared Croatian civilians during the occupation;
d) Beating of detainees.

[671] Memorial, para. 4.42.

678. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes 38 – 45 and a list of exhumed mass graves.[672] However, witness statements offered by the Applicant in support of its claims do not fulfill the minimum evidentiary requirements of affidavit.[673] These documents are accordingly inadmissible.

679. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Even from the Applicant's description of the events, it is obvious that an armed conflict took place in the village, with Croatian forces heavily involved in the fighting. Accordingly, witness MM stated that she found out that during the first attack on Bogdanovci several Croatian police officers were killed while trying to enter the village to provide assistance,[674] while during the second attack at least 15 members of the ZNG were killed. Statement of witness ZP (annex no. 44) reveals that ZNG forces in Bogdanovci were reinforced by the ZNG's from Vinkovci, Nuštra, Ivankova and Županje and that they were successful in destroying armed vehicles and tanks and inflicting heavy losses to Serbian forces.

680. The Applicant's allegation that about 84 Croatian civilians were killed or disappeared is based on the testimony of witness AC that does not provide any details and seems to be based solely on hearsay evidence (see annex 38). Statements offered by the Applicant in relation to the killing of Zvonko Vuković, Dominko Ceranac, Silvester Edelinski and Stjepan Bartulović are completely imprecise regarding the circumstances of the alleged killings and based on hearsay information (see annexes nos. 39 and 42).

681. Witness statements that were provided by the Applicant are not consistent. While witness VS (annex 42) gave a statement to the effect that Đurica Katić, Zdravko Katić and Ivan Križanović were killed in the courtyard of Antun Kobasić, witness AT (annex 39) gave statement that Đurica Katić, Zdravko Katić, Ivan Križanović were killed from fire weapons together with one defender (member of Croatian armed forces) inside the house of Antun Markobašić. Finally, the Applicant claims that Đurica Katić, Zdravko Katić and Ivan Križanović were killed while hiding in the basement of Antun

[672] List of exhumed mass graves of the Government office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 166.
[673] None of the eight offered statements contains signatures of persons who allegedly gave those statements and from annexes 38, 41 & 45 it is even not possible to see who a person or body who took the statements was.
[674] Memorial, para. 4.50.

Markobašić house.[675] The statement of MB was used by the Applicant several times despite the fact that he was not in Bogdanovci at the time of the events and that he was only providing an interpretation of what he had heard from others (see annex 41).

682. The crimes alleged to have been committed in Bogdanovci are not sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Bogdanovci. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Bogdanovci should be dismissed in their entirety.

ŠARENGRAD

(Memorial, paras. 4.56 – 4.61)

683. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Šarengrad, the Applicant alleges:

a) Killings during mortar attack on 10 September 1991 (the names of 4 victims have been provided, two unidentified members of the ZNG are also listed as victims);
b) Killing of three Croats in subsequent months;
c) One instance of rape and random beatings.

684. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes 46 – 54, one book and one war chronicle.[676] Again, the Court should note that witness statements do not fulfill the minimum evidentiary requirements of affidavit[677] and are accordingly inadmissible.

[675] Memorial, para. 4.49.
[676] M. Kevo & D. Hečimović, *The Wounded Church in Croatia, the Destruction of Sacral Monuments in Croatia, 1991–1995*, Zagreb, 1996; and *The War for Croatia – a war chronicle of Eastern Slavonia*, Vinkovci/Osijek, 1992.
[677] None of the copies of the original witness statements contained in annexes 47, 49, 50, 51, 52, 53 & 54 do not even contain signatures of persons who allegedly gave those statements. From annexes 46, 48, 49, 50, 52 & 54 it is not even possible to see who was a person or body who took the statements.

685. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Even the Applicant's description of the events reveals that Croatian forces were engaged in the fighting at Šarengrad. According to the witness ŽM, four out of six victims who were identified by the Applicant died as a result of a mortar attack (see annex 46).

686. Allegations contained in the document "*The Wounded Church in Croatia, the Destruction of Sacral Monuments in Croatia, 1991–1995*, Zagreb, 1996" originate from a Croatian body that is close to the Applicant and must be proved by evidence from an independent source; the document itself cannot be treated as reliable evidence because it had not been generated by a disinterested organ.

687. The Prosecutor of the ICTY charged Slobodan Milošević with destruction of homes, religious buildings and other property in Šarengrad.[678] The Indictment, however, did not include any charge of murder in relation to Šarengrad.

688. The crimes alleged to have been committed in Šarengrad are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Šarengrad should be dismissed in their entirety.

ILOK

(Memorial, paras. 4.62 – 4.72)

689. Concerning the *actus reus* of the crime of genocide in relation to the Ilok municipality the Applicant alleges the following:

a) Killings of Croats after the voluntary exodus of Croat population on 17 October 1991 (graves containing 17 bodies were exhumed in the area of Ilok);
b) Random beatings and maltreatment.

[678] ICTY, *Milošević,* IT-02-54-T, Indictment, para. 36(l) and 72.

690. Evidence offered by the Applicant in support of its claims are witness statements contained in annexes 55 – 60, followed by the list of exhumed mass graves and the book "Mass killing and genocide in Croatia".[679] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[680] and are accordingly inadmissible.

691. Even if the witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. The Applicant bases its allegations about four killings on the statement of FD (annex 55) who, judging by his statement, could only provide hearsay evidence on the alleged killings, since he also claims to have been in prison when the killings took place. Further, the alleged killings of Daniel Toth's grandmother and grandfather are not mentioned in any of the witness statements enclosed by the Applicant.

692. Allegations contained in annex 166, a document of Croatian official body, must be proved by evidence from an independent source. This annex cannot by itself be treated as reliable evidence because it has been generated by the Applicant.

693. The Prosecutor of the ICTY charged Slobodan Milošević for deportation or forcible transfer of inhabitants from Ilok.[681] The Indictment, however, did not include any charge of murder with respect to Ilok.

694. The crimes alleged to have been committed in Ilok are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed, they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Ilok should be dismissed in their entirety.

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[679] The book "Mass killing and genocide in Croatia 1991/92"; the "List of the exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia", Memorial, Annexes, Vol. 2(I), annex 166.

[680] The copies of the original witness statements contained in annexes 57, 58, 59 & 60, do not even contain signatures of persons who allegedly gave those statements while in annexes 55, 57, 58, 59 & 60 it is even not visible who was a person or body who took the statements.

[681] ICTY, *Milošević,* IT-02-54-T, Indictment, para. 36(k).

TOMPOJEVCI

(Memorial, paras. 4.73 – 4.80)

695. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Tompojevci the Applicant alleges:

a) Killings in March 1992 (the names of 7 victims and 2 missing persons have been alleged);
b) Random maltreatment.

696. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes 61 – 65 and the book *The Wounded Church in Croatia, the Destruction of Sacral Monuments in Croatia, 1991–1995*. None of the witness statements fulfills the minimum evidentiary requirements of affidavit.[682] These statements are accordingly inadmissible.

697. Even if the witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Witness statements enclosed by the Applicant in relation to the alleged killings and missing persons are testimonies of persons who only have circumstantial knowledge about the events. Furthermore, the alleged killing of Đuro Havidić is not mentioned in any of the witness statements enclosed by the Applicant. From the statement of witness VV (annex 62) it is obvious that Croatian forces were engaged in fighting over Tompojevci.

698. Allegations contained in the document *The Wounded Church in Croatia, the Destruction of Sacral Monuments in Croatia, 1991–1995* originate from a Croatian body that is close to the Applicant and must be proved by evidence from an independent source; the document itself cannot be treated as reliable evidence because it had not been generated by a neutral organ.

[682] Namely, none of them contains either an oath or a solemn promise that the truth has been stated. The copies of the original witness statement contained in annex 62 do not contain signature of person who allegedly gave that statement. In annexes 61 & 64 there is no signature of persons(s) who took the statement while in annex 61 it is even not visible who a person or body that took the statements was.

699. The crimes alleged to have been committed in Tompojevci are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Tompojevci. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Tompojevci should be dismissed in their entirety.

BAPSKA

(Memorial, paras. 4.81 – 4.93)

700. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Bapska the Applicant alleges:

a) Random murder of Croats during November and December 1991 (killing of 17 victims has been alleged out of which 6 civilians have been identified; in addition to that the Applicant alleges killing of commanding officer of the Croatian army in Ilok, Šarengrad, Bapska and Mohovo);
b) Use of people as human shields;
c) Random beating of civilians.

701. Evidence produced by the Applicant in support of its claims are witness statements contained in annexes 66 – 74 and the book *The Wounded Church in Croatia, the Destruction of Sacral Monuments in Croatia, 1991–1995*. The witness statements do not fulfill the minimum evidentiary requirements of affidavit[683] and are accordingly inadmissible.

702. Even if the witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. Namely, once more, even the statements offered by the Applicant show that in the village of Bapska Croatian armed forces were engaged in heavy fighting with

[683] The copies of the original witness statements contained in annexes 66, 67, 68, 69, 70, 72 & 73, do not contain signatures of persons who allegedly gave those statements. In annexes 66, 70 &72 there is no signature of person(s) who took those statements, while it is even not visible from annexes 66, 70, 72 & 74 who a person or body that took the statements was.

Serb forces and that both sides had loses (see annex 74, statement of FK*). According to the witness statements offered by the Applicant, five out of 17 Croats that were allegedly killed in Bapska were killed in the fighting and only three out of those 17 people are claimed to have been killed after the Serb forces entered the village. (see annexes 68 and 69).

703. The ICTY Indictment charges Slobodan Milošević for deliberate destruction of property in Bapska.[684] The Indictment, however, did not include any charge of murder in relation to Bapska.

704. The crimes alleged to have been committed in Bapska are not sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Bapska should be dismissed in their entirety.

TOVARNIK

(Memorial, paras. 4.94 – 4.106)

705. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Tovarnik the Applicant alleges:

a) Random murder of Croats in the period from 23 September 1991 to October 1991 (24 identified victims while 61 person has been allegedly killed);
b) Random beatings of prisoners;
c) Infliction of bodily injuries to three persons from 28 September and 1 October 1991.

706. The evidence produced by the Applicant in support of its claims are witness statements contained in annexes 75 – 87, the book "Mass killings and genocide in Croatia", and the list of the exhumed mass graves of the Government Office for Detained and Missing

[684] ICTY, *Milošević,* IT-02-54-T, Indictment, para. 36(l) and 72.

Persons of the Republic of Croatia.[685] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[686] and are accordingly inadmissible.

707. Even if the witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Witness BH* (see annex 81) thus stated that Croatian forces received an order to attack the tank column and it was the Croatian forces from Tovarnik who first killed the Serb Major, which led to subsequent heavy fighting. According to his statement, this witness only had 60 people under his command. He further stated that he subsequently heard on CNN news that the JNA endured 250 casualties in the battle for Tovarnik.

708. Witness statements offered by the Applicant do not support a general claim that 61 persons were killed in Tovarnik. Witness MD stated that he buried 32 bodies, but did not say anything about the circumstances under which the deceased lost their lives (see annex 83).

709. Allegations contained in annex 166, document of a Croatian official body, must be proved by evidence from an independent source. This document by itself cannot be treated as reliable evidence because the Applicant produced it.

710. The ICTY Prosecutor charged Slobodan Milošević with the destruction of homes, religious buildings and other property in Tovarnik.[687] The Indictment, however, did not include any charge of murder in relation to Tovarnik.

711. The crimes alleged to have been committed in Tovarnik are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Tovarnik should be dismissed in their entirety.

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[685] The list of the exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 166.
[686] The copies of the original witness statements contained in annexes 75, 76, 77, 81, 85, 86 & 87 do not contain signatures of persons who allegedly gave those statements. Statements in annexes 76, 77, 80, 81, 82, 83 & 86 contain no signature of person(s) who took those statements, while from annexes 76, 77, 80, 81, 82, 83 & 86 it is even not possible to see who a person or body that took the statements was.
[687] ICTY, *Milošević,* IT-02-54-T, Indictment, para. 36(l) and 72.

SOTIN

(Memorial, paras. 4.107 – 4.115)

712. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Sotin the Applicant alleges:

a) Random murder of Croats in the period from 28 August 1991 to 14 October 1991 (3 identified victims),
b) Disappearance of 33 people, while 12 bodies were exhumed of which 7 have been identified;
c) Random beatings and torture of prisoners;
d) 2 cases of rapes.

713. Evidence offered by the Applicant in support of its claims are witness statements contained in annexes 89 – 94 and the list of the exhumed mass graves.[688] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[689] and are accordingly inadmissible.

714. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. Sotin was a village where heavy fighting took place, which can be seen from the fact that the fighting lasted from 28 August until 14 October. Witness BM (see annex 93) testified about a large number of Croats allegedly killed in Sotin. However, most of the incidents he mentioned happened after 4 October, the date when he had left Sotin, which makes his statement unreliable. Similar is the situation with witnesses HV* and SL (see annexes 90 and 91), who both gave evidence about events in October even though they were, according to their statements, arrested on 30 September 1991.

715. Once more, the Respondent stresses that the allegations contained in annex no. 166, document of a Croatian official body, must be proved by evidence from an independent source. This document by itself cannot be treated as reliable evidence because it was produced by the Applicant.

[688] The list of the exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 166.
[689] None of the statements contains either an oath or a solemn promise that the truth has been stated; the copies of the original witness statements contained in annexes 89, 91 and 93 do not even contain signatures of persons who allegedly gave those statements; in annexes 90 and 93 it is not visible who a person or body who took the statements was.

716. The crimes alleged to have been committed in Sotin are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Sotin. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Sotin should be dismissed in their entirety.

LOVAS

(Memorial, paras. 4.116 – 4.132)

717. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Lovas the Applicant alleges:

a) Murder of 23 Croats on 10 October 1991;
b) Murder of 32 Croats on 18 October 1991 in the morning, first in the town and later in the minefield;
c) Murder of 69 Croats between 19 October 1991 and the New Year;
d) Random beatings and torture of prisoners;
e) Random rapes.

718. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes 95 - 103, 105 – 111. In addition, the Applicant refers to the list of exhumed mass graves and the book "Mass killing and genocide in Croatia".[690] Again, witness statements offered by the Applicant in relation to Lovas do not fulfill the minimum evidentiary requirements of affidavit[691] and are accordingly inadmissible.

719. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. The Applicant's contention that there was no fighting in Lovas on 10

[690] List of exhumed mass graves of the Government Office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 166 and Record of exhumation, Memorial, Annexes, Vol. 2(I), annex 168B; and the book "Mass killing and genocide in Croatia 1991/92".

[691] The copies of the original witness statements contained in annexes 96, 98, 99, 100, 101, 103, 105, 106, 108, 109 & 110 do not even contain signatures of persons who allegedly gave those statements; in annexes 96, 99, 100, 101, 103 & 105 there is no signature of person(s) who took those statements, while from annexes 96, 98, 99, 102, 105, 107 & 111 one cannot see who a person or body who took the statements was.

October is not supported by its own witness statements. Hence, witness LjS (see annex 98) stated that there the resistance was week, but said at the same time that, for example, a real battle, that had lasted for a whole hour, went on around his house.

720. The Applicant's allegation that, from 19 October until the New Year, 69 Croats were killed is not supported with any reliable evidence. However, fourteen accused are currently standing trial before the Belgrade District Court for the alleged killing of 68 Croat victims from the village of Lovas.[692]

721. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Lovas should be dismissed in their entirety.

TORDINCI

(Memorial, paras. 4.133 – 4.138)

722. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Tordinci the Applicant alleges:

a) Murder of 11 Croats on 25 October 1991;
b) Disappearance of 29 persons;
c) Random beatings and torture of prisoners.

723. Evidence produced by the Applicant in support of these claims are witness statements contained in annexes 112 and 113. These witness statements do not fulfill the minimum evidentiary requirements of affidavit[693] and are accordingly inadmissible.

724. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Thus, witness TR (see annex 112) gave 11 names of Croats from Tordinci who had allegedly been killed, but did not offer any further information as to how, under what circumstances or by whom they were killed.

[692] Belgrade District Court, *Devetak et al. case*, Indictment, available at <http://okruznisudbg.rs/content/2008/devetakljubaniostali>.

[693] Copies of the two original witness statement do not contain signature of person who allegedly gave that statements. In addition both statements put forward by the Applicant were taken by police without the involvement of judicial organs.

725. Concerning the allegation about 29 missing persons from Tordinci, the Applicant did not produce any evidence regarding the time or the circumstances under which they had gone missing.

726. Crimes alleged to have been committed in Tordinci are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Tordinci. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Tordinci should be dismissed in their entirety.

VUKOVAR

(Memorial, paras. 4.139 – 4.192)

727. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to the Vukovar municipality the Applicant alleges the following:

a) In relation to the battle for Vukovar and the suburb of Sajmiste:
   i. Killing of a total of 529 people in the fighting between Croatian and Serb forces;
   ii. 90 Croatian civilians killed in the fighting in the suburb Sajmiste on 5 September, and additional 30 Croats killed in the next couple of days;
   iii. Rapes and killing of eight persons in different Vukovar suburbs;
b) In Mitnica, killing of several Croats during the shelling before 18 November;
c) In relation to Borovo Naselje:
   i. Killing of at least 7 or 8 people during the attack on the Commerce building;
   ii. Killing of 10 to 22 prisoners in Stajićevo and Sremska Mitrovica (Serbia), after they had been taken prisoners in Borovo Naselje on 19 November 1991;
   iii. Killing of one Croat women in Negoslavci (Serbia);

d) In Central Vukovar:
    i. Random killings of Croats which took place from 18 until 21 November 1991 (8 members of Barković family and another 5 identified persons);
    ii. Random torture and several cases of rape;
e) In Ovčara, killing of 260 men taken from the Vukovar hospital on 20 November 2001.
f) In Velepromet:
    i. Killing of 350 Croats at Velepromet detention facility;
    ii. Unspecified number of rapes.

728. Evidence produced by the Applicant in support of its claims are witness statements contained in annexes 114 – 152 and 155 – 157, the book "Mass killings and genocide in Croatia", and the list of exhumed mass graves.[694] For the reasons previously explained, the witness statements do not fulfill the minimum evidentiary requirements of affidavit[695] and are accordingly inadmissible.

729. Even if the witnesses are to be treated as reliable*, quod non*, their statements do not support the Applicant's claims, as will be explained in the following paragraphs.

The battle for Vukovar and the suburb of Sajmište

730. The Applicant has not provided a single piece of evidence to support its claims on the killing of 120 Croats in the suburb of Sajmište.[696] The statements concerning the events during the battle for Vukovar are, to a large extent, unreliable and based on hearsay information. They also include statements given to Croatian armed forces by Serbs

[694] List of exhumed mass graves pf the Government Office for Detained and Missing Persons of the Republic of Croatia, Memorial, Annexes, Vol. 2(I), annex 164.
[695] The copies of the original witness statements contained in annexes 114, 115, 116, 117, 118, 120, 121, 125, 127, 128, 130, 137, 138, 140, 142, 143, 144, 145, 146, 148, 151, 152, 153, 154, 155, 156, 157, 157a & 157c do not contain signatures of persons who allegedly gave those statements. In annexes 114, 115, 117, 127, 128, 130, 135, 136, 137, 138, 140, 142, 144, 146, 151, 155, 156, 157, 157a & 157c there is no signature of person(s) who took those statements, while from annexes nos. 114, 117, 127, 129, 130, 131, 135, 136, 138, 139, 140, 141, 142, 143, 146, 147, 149, 150, 151, 155, 157a & 157c one cannot even see who a person or body who took the statements was.
[696] According to the Applicant, 90 Croatian civilians were killed in the fighting on 5 September, and additional 30 people were killed in the next couple of days, see Memorial, p.199, para. 4.153.

being held in detention.[697] The evidence is also frequently misused, for example, the Applicant claims that there were several accounts of Croats being crucified, but the witnesses offered in support of these claims are actually all talking about one and the same victim, called "Cigo" (see annexes 129 and 132, statements of FJ and AD);

Mitnica

731. Witness statements produced by the Applicant in relation to Mitnica reveal that heavy fighting was underway at the time, which was also the reason for negotiations between Croatian and Serbian forces (see annexes 132 and 133, statements of AD and SR). All Croats who were identified as victims in the statement of MŠ died in the shelling (see annex 124). Statement of MM (see annex 122), describing how Jovo Savić bragged about killing Croats, was taken by Croatian Police while MM was in their custody and accordingly have only limited evidentiary value.

Borovo Naselje

732. The Applicant alleges that at least 7 or 8 people were killed during the attack on the Commerce building, but the statement of KO reveals that those people died in the fighting between Serbian and Croatian forces. The alleged killings were not mentioned by other Croatian witnesses who were present or fought in the Commerce building (see annexes 134 and 135).

733. Applicant further claims that 10 to 20 Croats were killed on Stajićevo farm in Serbia. This claim is based on the statement of only one witness, DK, who claims that he knows that 10 to 20 people were killed. The witness, however, did not give any details as to how and by whom were those people killed, nor he was able to identify the victims, and the one he did identify is actually a person who died a couple of weeks after the alleged beating took place (see annex 138). The other witnesses who testified about Stajićevo did not mention this number of people killed on the farm (see annexes 134, 136 and 137). It should be noted here that the ICTY Prosecutor charged Slobodan Milošević

[697] See annex 119, witness statement of VĐ.

with unlawful confinement, imprisonment and torture in connection to Croats who were held on Stajićevo farm, but not for murder of any of the prisoners.[698]

Central Vukovar

734. The Applicant's allegation that 8 members of the Barković family were killed in the Central Vukovar was not directly mentioned in the statement of witness VO, to which the Applicant referred in support of its claims (see annex 131). The claims of witness LjD concerning a pregnant woman whose stomach was cut open is hearsay evidence, apparently based on something that her son-in-law had told her. It is neither corroborated anywhere else nor mentioned by any other witness (see annex 143). Similar, the statement of witness BR, who claims that he saw about 40 guardsmen mutilated in a drainage ditch, is vague and not corroborated by other evidence. (see annex 115).

735. In general, the witness statements which the Applicant produced as evidence are vague in the part which describes the alleged killings and they never say where did the alleged killing take place. In addition, they relate to captured Croatian defenders and not to civilians.

Velepromet

736. Witnesses whose statements the Applicant offered as evidence in support of its claims concerning the alleged crimes in Velepromet do not support the general claim of the Applicant that 350 people were killed there (see annexes 121, 123, 147). Only witness AH (annex149) claims that she saw more than a thousand corpses, but this statement is obviously so unfounded that even the Applicant did not quote it in the Memorial.

737. Allegations contained in the document of a Croatian official body, annex 164, must be corroborated by evidence from an independent source. The document alone cannot be treated as reliable evidence because it has been generated by the Applicant.

[698] ICTY, *Milošević,* IT-02-54-T, Indictment, paras. 63–66.

738. Events in Vukovar were the subject matter of the *Mrkšić et al.* case before the ICTY. Although one of the accused in the case was Mile Mrkšić, at the time the commander of the JNA Operational Group South (and thus possibly responsible for all the crimes in Vukovar), the Prosecution did not charge him with any of the crimes that were allegedly committed in Velepromet. The ICTY Trial Chamber, however, discussed crimes committed at Velepromet, even though they were not included in the Indictment.[699] The Trial Chamber found that 15 Croatian men have been found in a grave at the rear of Velepromet, while Ivan Grujić testified that these persons were listed as having gone missing between 18 and 21 November 1991.[700] The Trial Chamber found that many, if not all, of the persons responsible for the crimes were members of the Serb TO or paramilitary units.[701] The obvious discrepancy between the Applicant's claims and the ICTY Judgment clearly demonstrates how exaggerated the Applicant's claims that 350 people were killed at Velepromet actually are.

739. The Trial Chamber also addressed Mitnica, a part of Vukovar, referring to it as the stronghold of Croatian forces.[702] The Trial Chamber, however, did not mention any of the killings alleged by the Applicant.

740. Finally, neither the ICTY Prosecution nor the Trial Chamber discussed the alleged killings of 529 victims in the fighting between Croatian and Serbian forces or 120 Croatian civilians allegedly killed in the suburb of Sajmište. While the Respondent does not dispute that many people died as a consequence of the fighting in Vukovar, it is submitted that the Applicant has failed to produce credible evidence on the exact or even approximate number of the people killed, and in particular on whether the deaths occurred as a consequence of a legitimate use of force or from a criminal action of the forces attacking Vukovar. Furthermore, the Applicant failed to specify how many of the alleged victims were civilians and how many of them were combatants and, in addition, failed to specify whether Serbs, who stayed in Vukovar during the siege in large numbers, are also included in the number of victims alleged.

[699] ICTY, *Mrkšić et al.,* IT-95-13/1, Trial Chamber Judgment, 27 September 2007, para. 163
[700] *Ibid.,* para. 165.
[701] *Ibid.,* para. 167.
[702] ICTY, *Mrkšić et al.,* IT-95-13/1, Trial Chamber Judgment, 27 September 2007, para. 54.

741. It follows, thus, that the crimes alleged to have been committed in Vukovar are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has indicted several people for the crimes allegedly committed in Vukovar, but the number of deaths for which the accused are charged is significantly smaller than claimed by the Applicant.[703] Furthermore, in the case against Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić, the accused Mrkšić and Šljivančanin were found guilty for aiding and abetting murder, torture and cruel treatment of 194 Croatian prisoners of war at the Ovčara farm, but the Trial Chamber found (and the Appeals Chamber confirmed) that neither the joint criminal enterprise existed, nor that the crimes committed at Ovčara, taking into consideration the status of victims, could qualify even as crimes against humanity, but only as violations of laws and customs of war.[704]

742. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that the Applicant's allegations that the crime of genocide has been committed in Vukovar should be dismissed in their entirety.

General observations in relation to Eastern Slavonia

743. The above analysis of the Applicant's claims has shown that a number of these claims are imprecise, based on hearsay evidence and statements of persons who did not have direct knowledge of the events. Furthermore, a number of allegations pertaining to events in Eastern Slavonia are not corroborated by additional evidence.

744. As can be seen, the majority of the allegations of killings in Eastern Slavonia relate to the city of Vukovar. It was already explained that Vukovar was a place where fierce fighting between Croatian and Serbian forces took place. It is obvious that Croatian forces were strong enough to inflict heavy losses on Serbian forces and that vast number of Croat victims died as a result of the fighting. A similar situation was common to many places throughout Eastern Slavonia. In Bogdanovci, for example, many Croats died in combat with the Serbian forces. Accordingly, persons who lost their lives under these circumstances cannot even theoretically be treated as victims of genocide.

[703] See ICTY, *Milošević,* IT-02-54-T, Indictment, paras. 49–60.
[704] ICTY, *Mrkšić et al.,* IT-95-13/1, Trial Chamber Judgment, 27 September 2007, paras. 482 & 608; see also Appeals Chamber Judgment, para. 44.

745. As to the Vukovar casualties, the above analysis has shown that the Applicant's allegations on the high numbers of Croats killed in Velepromet and other parts of Vukovar are not supported by any evidence examined in the Mrkšić et al. case.

746. Most of the crimes alleged by the Applicant are not even included in the indictments of the ICTY Prosecutor. Thus, despite the fact that the indictment against Slobodan Milošević covers the whole of Eastern Slavonia (and the whole of Croatia for that matter), and mentions the majority of locations covered by the Memorial (Dalj, Bapska, Šarengrad, Tovarnik, Ilok, Lovas and Vukovar), the ICTY Prosecutor has not charged Slobodan Milošević for the majority of the killings that the Applicant alleges in relation to Eastern Slavonia.

747. Finally, the witness statements of the Applicant, even if taken as reliable (*quod non*) show that most of the alleged crimes were committed by the forces of local Serbs and not by the JNA.[705] The issues of attribution and the relationship of those forces and the JNA are addressed in Chapters V and IX. It should be stressed here, however, that the witness statements offered by the Applicant contain very little, and mostly unreliable, evidence that the paramilitary and local Serb forces acted under the directions or instructions of the JNA.

748. As a conclusion, it is submitted that the Applicant has failed to prove that genocide had been committed in Eastern Slavonia.

3. Response to the Applicant's Allegations Concerning Crimes Committed in Western Slavonia

PAKRAC MUNICIPALITY
(Memorial, paras. 5.15 – 5.27)

749. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Pakrac municipality, the Applicant alleges the following:

a) In Pakrac:
   i. Abduction and alleged murder of 6 men on 7 September and 1 man on 14 September, all identified (but not all listed within 22 names of persons exhumed in 1995);

[705] For example see witness statements in relation to Tenja, Tompojevci, Lovas.

ii. Attack on a Croatian household on September 15 in Pakrac which resulted in rape, torture and murder of one person (alias provided) and detention of 4 persons;

iii. Murder of two more persons (named) on the same night;

iv. Attack on a Croatian household in course of which two persons were killed (one name and one alias provided);

v. Murder of 22 Croatian civilians whose bodies were exhumed in 1995, who were, according to forensic analysis, killed at close range (the 22 listed names include some victims listed in previous incidents);

vi. Alleged killing of 49 persons whose bodies were exhumed in the period from 1992 to 1998 (no names have been provided);

vii. Alleged killing of the total of 176 civilians in the municipality;

b) In Veberov Sokak (suburb of Pakrac), murder of 4 and wounding of 2 people (all identified) on 15 December;

c) In Kusonje:

i. Killing of 21 soldiers (not all identified), a number of whom had been tortured prior to dying (6 persons identified);

ii. Killing of 3 persons and wounding of 11 when giving tribute to soldiers killed in 1993.

750. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes 172 – 185, the list of dead civilians in Pakrac and a video record of the exhumation.[706] The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[707] These documents are accordingly inadmissible.

[706] Report of the MOI Bjelovar on events that took place on Sept. 15 (annex 181); 'Dead Civilians in the former municipality of Pakrac', Memorial, Annexes, Vol. 2(II), annex 240 and VHS/280192/III-8, Video record of the exhumation, autopsy and identification.

[707] None of them contains either an oath or a solemn promise that the truth has been stated. The copies of the original witness statements contained in annexes 172, 175, 177, 178, 179, 180, 182, 183, 184 & 185 do not contain signatures of persons who allegedly gave those statements. In annexes 177, 180 & 185 there is no signature of person(s) who took those statements, while in annexes 176, 180 & 185 it is even not visible who a person or body who took the statements was.

751. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. The Applicant's allegation about 176 Croats killed in the Pakrac municipality is based on the document "Dead Civilians in the Former Municipality of Pakrac" (annex 240) that does not provide sufficient information on the circumstances under which the alleged killings occurred. Similarly, in relation to the 49 exhumed bodies no evidence was offered that would confirm the Applicant's allegation that the cause of death was shooting from close range, and there is equally no information as to the circumstances surrounding the killings or the alleged perpetrators.

752. Only four witnesses: SP* (annex 173), AP* (no. 174), MZ (annex 179) and MV (annex 180) seem to have some direct knowledge about the murders. However, their statements pertain only to two events, that of 15 September and 15 December. Other statements of persons who apparently had direct knowledge of the alleged incidents are those of the alleged perpetrators – MK (annex 176) and MĐ (annex 182), given to the Croatian Police without involvement of the judiciary organs, which makes them inadmissible. In addition, the statement of witness MK is so short and unclear that it cannot even be analysed, since it lacks most of the basic information about the events in question.

753. The list of 176 names contained in the annex entitled "Dead Civilians in the former municipality of Pakrac" (Annexes, Vol. 2(II), annex 240) could also include names of persons of non-Croatian nationality. The document contains insufficient information regarding the manner in which the listed persons lost their lives. In many cases, there is absolutely no information on how a particular person died or how that persons' death can be linked to this case.

754. In addition, the allegations contained in the annex "Dead Civilians in the former municipality of Pakrac" have to be supported by an independent source; this document cannot be treated as reliable evidence by itself, since it was generated by the Applicant.

755. The crimes alleged to have been committed in Pakrac are not sufficiently supported by evidence presented by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Pakrac. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can

be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Pakrac should be dismissed in their entirety.

PODRAVSKA SLATINA

(Memorial, paras. 5.28 – 5.49)

756. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to the Podravska Slatina municipality the Applicant alleges the following:

a) In Voćin:
   i. Detention and torture of 5 persons on 14 and 19 August (names provided);
   ii. Abduction, detention and maltreatment of 35 men in September 1991 (names not provided), out of whom 15 were allegedly also subjected to forced labour (names not provided);
   iii. Killing of four Croats on 3 December (names of victims provided);
   iv. Disappearance of one person (name provided) on September 18; torture and brutal murder of one person (no name or date provided);
   v. Abduction of 35 persons from 12 to 14 December, these people are allegedly still missing (no names provided);
   vi. Murder of 3 identified persons in the same time period;

b) In Hum:
   i. Apprehension of one person (named) on 23 August, the person was allegedly later taken to Voćin and murdered there;
   ii. Abduction, detention, and torture of 2 Croats, one of whom was allegedly slaughtered (names provided) on 24 August;
   iii. Arrest of one person (named) on September 1991 and his alleged disappearance;
   iv. Murder of 4 men on 13 December 1991 (names provided).

c) In Ćetekovac:

i. Capture of 12 persons, who were later used as human shields (one person named), September 1991;
ii. Murder of two persons,
iii. One person allegedly beaten to death (named), September 1991;
iv. Killing of "a number" of Croatian civilians from an ambush, names of 7 victims provided.

d) In Balinci:
i. Murder of 20 civilians and 2 police officers in Balinci and Ćetekovac, 10 names provided (allegedly killed on 5 September);
ii. Murder of one unnamed person on 4 September.

e) In Donji Čaglić, murder of 10 civilians on 2 October 1991.[708]

757. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes nos. 186-210, 212-213 and 215; books "The Anatomy of Deceit" and "Mass killing and genocide in Croatia", the newspaper article "Chronology of War", the document "War Crimes of the Serbian Military and Paramilitary Forces in Western Slavonia and Banovina 1991-1995" and one video cassette recording of the 4 September events.[709] As far as the witness statements offered by the Applicant are concerned, they do not fulfill the minimum evidentiary requirements of affidavit[710] and are accordingly inadmissible.

758. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. The great majority of statements contain only hearsay evidence.

[708] See Memorial, para. 5.48

[709] The Anatomy of Deceit, Dr. Jerry Blaskovich, Modern Times; Chronology of War, HIC, Zagreb 1998, p. 350, – segment from the newspaper article, interview with the refugee Pero Ajkić from Voćin and an anonymous person from Voćin; "War Crimes of the Serbian Military and Paramilitary Forces in Western Slavonia and Banovina 1991-1995"; VHS/050991/III-ll, No 155, (According to the Applicant the video cassette is alleged recording of the killings of several Croats who tried to escape the village perpetrated by the paramilitaries and the video cassette is at the disposal of the Office for the Cooperation with International Court of Justice and the ICTY); the book "Mass killing and genocide in Croatia 1991/92".

[710] The copies of the original witness statements contained in annexes nos. 187 - 195, 201, 202, 205 – 210, 212, 213 and 215 do not even contain signatures of persons who allegedly gave those statements. In annexes nos. 194, 195, 203, 207, 208, 209, 210 and 212 there is no signature of person(s) who took those statements, while in annexes nos. 194, 195, 196, 207, 208, 209 and 210 it is even not possible to see who a person or body who took the statements was.

759. With respect to Voćin, six witnesses provided direct testimonies regarding some of the alleged events in the village.[711] All the other witnesses had only second-hand knowledge of the events.

760. With respect to Hum, only two witnesses provide direct testimony about the alleged events. Other witnesses only testify about the overall conditions in Hum at the time and give hearsay evidence on the alleged crimes.[712]

761. With respect to Ćetekovac, witnesses ĐI (annex no. 208) and MB (annex no. 209) provide direct knowledge about 5 murders (ĐI about 4 and MB about one). However, as admitted also by the Applicant, there are no witness statements in support of the alleged massacre of persons whose names should be listed in the document "War Crimes of the Serbian Military and Paramilitary Forces in Western Slavonia and Banovina 1991-1995".[713]

762. With respect to Balinci, the Applicant does not provide sufficient evidence in support of its allegations on the events. Namely, witness MB (annex no. 210) provides names of a number of persons killed in Balinci, including her husband, but gives no first hand knowledge as to how they lost their lives. The same applies to witness AM (annex 211). Witness MK (annex 202) provides hearsay evidence on a number of killings in Balinci, but gives no names of the alleged victims.

763. The Allegations contained in the book "The Anatomy of Deceit" by Dr. Jerry Blaskovich are based on the second-hand knowledge of the events. The document "War Crimes of the Serbian Military and Paramilitary Forces in Western Slavonia and Banovina 1991-1995" was produced by a party that cannot be regarded as neutral in the present case and, in any case, contains only hearsay evidence. Newspaper article "Chronology of War" also contains only hearsay evidence.

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[711] Witnesses KT (annex no. 196) and ID (no. 197) confirmed that Branko Ilić was taken away on 14.08.1991. Witness FD (annex no. 186) testified about maltreatment and beatings he was subjected to. Witnesses MS (annex no. 190), MP (no. 192), VS (no. 193) and JT (no. 199) testified about the destruction of the Voćin church.

[712] In relation to Hum witness statements of NI (annex no.201), MK* (annex no. 202), IK (annex no. 203), AŽ (annex no. 204), MB (annex no.205).

[713] The cited document "War Crimes of the Serbian Military and Paramilitary Forces in Western Slavonia and Banovina 1991-1995" was not attached to the Memorial.

764. The allegations contained in the document "List of Killed Persons" (annex no. 241), originates from a Croatian official body. They must be proved by evidence from an independent source and this document cannot be treated as reliable evidence by itself, since it was generated by the Applicant.

765. The Trial Chamber in the *Milošević* case dealt with the events in broader area of Voćin. Milošević Indictment alleged that 32 Croats were killed and the alleged perpetrators were identified as volunteer units – "Šešelj's men" and "White Eagles".[714] The other crimes alleged by the Applicant to have occurred in the Podravska Slatina municipality are, however, not covered by any judgment or an indictment of the ICTY.

766. It follows thus that the crimes alleged to have been committed in Podravska Slatina have not been sufficiently supported by evidence submitted by the Applicant. The Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Podravska Slatina should be dismissed in their entirety.

DARUVAR
(Memorial, paras.5.50 – 5.64)

767. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Daruvar municipality, the Applicant alleges the following:

a) In Đulovac:
   i. Capture, detention and torture of 23 civilians and disappearance of 11 civilians (names provided) who were previously incarcerated and tortured;
   ii. Killing of one person on 7 September 1991;
   iii. Killing of the Blazan family in December (names provided);
   iv. Murder of "at least" 10 civilians in December (names provided) by the paramilitaries.

[714] ICTY, *Milošević,* IT-02-54-T, Indictment, para. 39.

b) In Doljani:
    i. Killing of four civilians in the attack on 16 September 1991 (names provided),
    ii. Multiple rape of one woman.
c) In Vukovije, murder of 3 civilians on 19 November (names provided).
d) In Veliki Miletinac, murder of 3 civilians on and after 23 September 1991 (names provided), and incarceration and torture of one person.

768. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 216-230. These witness statements do not fulfill the minimum evidentiary requirements of affidavit[715] and are accordingly inadmissible.

769. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims.

770. With respect to Đulovac, only some cases of torture of civilians and the murder of the Blazan family is supported by direct evidence of witnesses BB (annex no. 219), SA* (annex 220) and FS (annex 223). However, witnesses BB (annex 218), and FS (annex 223) testified that local Serbs were detained and tortured along with local Croats, in the same facilities. Witness BB furthermore stated that two Serbs were killed after having been tortured along with Croats. The other crimes alleged by the Applicant are not corroborated by direct evidence, but only by hearsay evidence and speculations.

771. With respect to Doljani, witnesses IM* (annex no. 224) and AK* (annex 226) provide direct accounts of some of the events, but offer no information on the perpetrators of the crimes they witnessed. The rest of the testimonies contain only second-hand knowledge.

772. With respect to Vukovije, all witnesses had direct knowledge only about the plunder and destruction of personal property (witnesses JK (annex 227), MO (annex 228) and MH (annex 229)). Witnesses MO and MH testified that they were involved in the burial of some people, but gave no information as to how those people were killed.

[715] The copies of the original witness statements contained in annexes nos. 217, 218 and 221 do not even contain signatures of persons who allegedly gave those statements. Statements in annexes nos. 216, 217, 218 and 221 were taken by the police organs and without the involvement of the judges or prosecutor.

773. The crimes alleged to have been committed in the Daruvar municipality are not sufficiently supported by evidence provided by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Daruvar. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Daruvar municipality should be dismissed in their entirety.

General observations in relation to Western Slavonia

774. The Evidence presented by the Applicant in support of its allegations pertaining to Western Slavonia is to a large extent similar to the evidence produced for other events covered by the Memorial. For the reasons stated in the introductory part of this Chapter, this evidence (mainly witness statements and document produced by the Applicant) should be treated as inadmissible by the Court. Furthermore, the above analysis of the Applicant's claims has shown that a number of those claims are imprecise, based on hearsay evidence and statements of persons who did not have direct knowledge of the events.

775. Most of the crimes alleged by the Applicant are not even included in the indictments of the ICTY Prosecutor. Thus, despite the fact that the indictment against Slobodan Milošević covers the whole of Western Slavonia (and the whole of Croatia for that matter), the ICTY Prosecutor did not charged Slobodan Milošević with the majority of the killings and the other crimes that the Applicant alleges in relation to Western Slavonia.

776. Even if all of the Applicant's allegations are to be taken as accurate, it is obvious that the alleged killings in Western Slavonia were perpetrated on a random basis and over a longer period of time, which only points to the absence of any genocidal intent on behalf of the perpetrators. Furthermore, most of the witnesses identify as perpetrators of those crimes voluntary units and local Serbs, for whose actions the Respondent incurs no responsibility. The involvement of the JNA in the killings is mentioned on only three occasions, but the evidence offered in support of these claims is very vague.

4. Response to the Applicant's Allegations Concerning Crimes Committed in Banija[716]

GLINA
(Memorial, paras. 5.78 – 5.93)

777. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Glina municipality the Applicant alleges that following occurred:

a) In Glina:
   i. Torture of 16 officers on 26 June 1991;
   ii. Killing or disappearance of 18 Croats (not identified);
   iii. Discovery of two dead Croats in August 1991 (names provided).
b) In Novo Selo Glinsko:
   i. Killing of one Croat on 26 September 1991;
   ii. Killing of 32 Croats on 2 October 1991.
c) In Joševica:
   i. Killing of three Croats on 5 November 1991 (names provided);
   ii. Killing of 21 Croats on 16 December 1991;
   iii. Killing of four Croats during 1992 (names provided).
d) In Gornje and Donje Jame:
   i. Killing or disappearance of 30 Croats in the village of Jame (names not provided);
   ii. Killing of 14 Croats on 3 October 1991 (names provided);
   iii. 11 disappearances on 11 December 1991 (names provided).
e) In Skela:
   i. Killing of 10 Croats (no name provided);
   ii. 7 disappearances (no name provided).

778. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 247 -266. In addition, the Applicant submitted several domestic court records, the book "Mass killing and genocide in Croatia" and a list of banished, killed and missing persons compiled by the Republic of Croatia.[717]

[716] Banovina, in Croatian.
[717] The book "Mass killing and genocide in Croatia 1991/92, p. 126"; Specifications of the Banished, Killed and Missing Persons from the area of Municipality of Glina, 23 June 1993 Annexes, vol 2(II), annex 321; Record

779. Witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[718] These documents are accordingly inadmissible.

780. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims.

781. Glina – The Applicant did not provide the names of 17 Croats who were allegedly killed in Glina or with the details on how they died. The allegation is based solely on the report made by the internal organs of the Applicant (see annex no. 321). The statement of witness AB, which relates to events in the village Maje, lacks details in relation to the alleged discovery of two bodies, circumstances under which they were killed, or possible perpetrators (see annex no. 250).

782. Novo Selo Glinsko – The Applicant offered very little detail regarding the alleged killing of 32 Croats from Novo Selo. Witnesses that gave statements about these events only testified to hearing the shooting and explosions and having subsequently heard stories that the villagers were killed (see annexes nos. 253, 254, 255).

783. Joševica – The majority of the statements concerning the alleged killings on 5 November do not contain direct knowledge about the killings of Krestalica family but only assume that the perpetrators were local Serbs (see witness statement of PM* in annex no. 259). On the other hand, one of the witnesses said that Gina Krestalica, who was a victim, was a Serb and that this was told to the perpetrators who wanted to steal her husband's car. She was also killed on the spot irrespective of her Serbian ethnicity (see annex no. 263). The killing of four Croats, allegedly committed in 1992, is not supported by any detailed information (see annex no. 264).

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of the District Court in Sisak from 13 March 1996, Annexes, vol 2(II), annex 322; Judicial Document Annexes, vol 2(II) annex 323; Record of the Municipal Court in Sisak, 8–9 August 1996., Annexes, vol 2(II) annex 324 and 325 and Record of the District Court in Sisak on the exhumation of the mortal remains in Donje and Gornje Jame from 22 April 1996, 27 April 1996 and 20 September 1996, Annexes, vol 2(II), annexes 326, 327, 328.

[718] None of them contains either an oath or a solemn promise that the truth has been stated; 19 out of 20 copies of the original witness statements contained in annexes nos. 247–266 do not even contain signatures of persons who allegedly gave those statements; in annexes nos. 247, 248, 249, 250, 251, 258, 259, 260, 263, 265 and 266 there is no signature of person(s) who took those statements; while in annexes nos. 247, 248, 249, 250, 251, 258, 259, 260, 261, 263 and 266 it is even not possible to tell who was a person or body that took the statements.

784. Gornje i Donje Jame – The killing of Croats from the village of Jame on 3 October was described by witness JF. The witness identified the perpetrators as members of the "Šiltovi" paramilitary unit, led by a local Serb Siniša Martić. Furthermore, witness JF said that a Serb Gojko Pavlović was killed together with the Croats (see annex no. 265). The same witness thinks that "Šiltovi" were also responsible for the disappearance and the subsequent killing of 11 Croats on 11 December. The witness, however, has no direct knowledge of the event and states only her assumptions.

785. Skela – In relation to the village of Skela and the alleged killing of at least 10 Croats, the only evidence offered by the Applicant in support of these claims is the book "Mass killings and genocide in Croatia". The Applicant has not provided the names of the alleged victims, the dates when they were alleged to have been killed, nor the names of the alleged perpetrators. The statement of witness ZR, which possibly relates to the same events, is so short and vague that it cannot be taken as reliable evidence (see annex no. 266).

786. The Allegations contained in the document of the Croatian official body (annex no. 321) must be proved by evidence from an independent source.

787. The crimes alleged to have been committed in Glina have not been sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Glina municipality. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Glina should be dismissed in their entirety.

PETRINJA
(Memorial, paras. 5.94 – 5.101)

788. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Petrinja municipality the Applicant alleges that following occurred:

a) In Petrinja:
   i. Killing of many civilians during the attack on 16 September 1991 (no names provided);
   ii. Execution of 19 captured Croat fighters (names provided in the exhumation report).

b) In Kraljevčani:
   i. Killing of five Croats on 15 August 1991 (names provided);
   ii. Random maltreatment and looting, and one instance of rape.
c) In Glinska Poljana:
   i. Killing of 13 Croats in 1992 (names provided);
   ii. Disappearance of 6 Croats.

789. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 267 - 272. The Applicant also submitted the book "Mass killings and genocide in Croatia", two investigative records of Croatian courts and the document entitled "Survey of the Documentation of Mr. Grujić Managed by the Office for Detained and Missing Persons of the Government of the Republic of Croatia". [719] The witness statements submitted by the Applicant do not fulfill the minimum evidentiary requirements of affidavit[720] and are accordingly inadmissible.

790. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims.

791. Petrinja – The claims of the Applicant concerning Petrinja are imprecise as to the number of people killed or the circumstances in which they lost their lives. The witness statements offered in support of these claims show that heavy fighting occurred between Serb and Croatian forces over the town of Petrinja (see annexes 267 and 268).

792. Kraljevčani – The evidence produced by the Applicant in relation to the alleged killing in Kraljevčani on 15 August does not contain precise information on the circumstances under which the deaths occurred or on the perpetrators (see annexes 269, 270 and 271).

[719] The book "Mass killings and Genocide in Croatia 1991/92"; Record of the Investigation Department of the District Court in Sisak from 14 September 1995, Memorial, Annexes, Vol. 2(II), annex 330; Official Note and Record of Investigation from 2 October 1992, Memorial, Annexes, Vol. 2(II), annex 331; Survey of the documentation of Mr. Grujić managed by the Office for Detained and Missing Persons of the Government of the Republic of Croatia, Memorial, Annexes, Vol. 2(II), annex 332; List of missing persons in the Office for Detained and Missing Persons from 12 July 1996, Vol. 2(II), annex 332.

[720] Namely, none of the six copies of the original witness statements contained in annexes 267–272 contain signatures of persons who allegedly gave those statements. None of the six statement found in annexes 267–272 contain signature of person(s) who took those statements and in annexes 267, 268, 269, 270 & 271 it is even not visible who a person or body who took the statements was.

793. Glinska Poljana – The witness statements submitted in support of the Applicant's claims of the killings in Glinska Poljana contain hearsay and indirect evidence about the events. According to witness ID, the killings were perpetrated by the members of the "Šiltovi" paramilitary unit, but the witness has no direct knowledge about the events (see annex 272).

794. The allegations contained in the document of Croatian official body (annex no. 331) must be proved by evidence from an independent source; the documents themselves cannot be treated as reliable because they were generated by the Applicant.

795. The crimes alleged to have been committed in Petrinja have not been sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Petrinja Municipality. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Petrinja should be dismissed in their entirety.

DVOR NA UNI
(Memorial, paras. 5.102–5.109)

796. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Dvor na Uni municipality the Applicant alleges that following occurred:

a) In the villages Dvor na Uni, Zamlača and Struga Banska, killing of nine Croats on 26 June 1991 (six names provided).
b) In Divuša killing of three Croats in August 1991 (names provided).
c) In Kozibrod, Unčani and Gvozdansko killing of 7 Croats from August to October 1991 (names provided).

797. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes nos. 244, 273–282 and the book "Mass killings and genocide in Croatia". The witness statements do not fulfill the minimum evidentiary requirements of affidavit[721] and are accordingly inadmissible.

[721]None of the six copies of the original witness statements contained in annexes 267–272 contain signatures of persons who allegedly gave those statements. None of the six statement found in annexes 267–272 contain signature of person(s) who took those statements while in annexes 267, 268, 269, 270 & 271 it is even not visible who a person or body that took the statements was.

798. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims.

799. Dvor na Uni – The evidence offered by the Applicant is unclear as to the identity of the three members of the Croatian police who were included in nine allegedly killed, as well as to who the perpetrators of those killings were (see annex 274). The description of the events, as given in the Memorial, shows that fighting between Croatian and Serb forces took place in Dvor na Uni and that Croats, like witness TB, had weapons when they were arrested (annex no. 275).

800. Divuša – Witness statement of LjV in relation to the killing of Ankica and Jura Jugović is based on information obtained from a third source and does not contain information about the circumstances surrounding the event (see annex no. 282).

801. The claims on the alleged crimes in other locations in the Dvor na Uni municipality (namely Unčani and Gvozdansko) are supported only by the book "Mass killing and Genocide". The claims on the alleged killings in Kozibrod are not supported by the evidence to which the Applicant referred, since the witness statement of JS (annex 279) actually places these killing in Divuša, but offers no details about the alleged events.

802. The crimes alleged to have been committed in Dvor na Uni have not been sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Dvor na Uni municipality. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Dvor na Uni should be dismissed in their entirety.

HRVATSKA KOSTAJNICA
(Memorial, paras.5.110–5.122)

803. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Hrvatska Kostajnica municipality the Applicant alleges that following occurred:

a) In Hrvatska Kostajnica killing of two Croats on 13 September 1991;
b) In Baćin killing of 60 Croats on 28 October 1991;
c) In Kostrići killing of 15 Croats on 19 November 1991 (names provided).
d) In Kostajnički Majur:
   i. Killing of two Croats at the beginning of August 1991;
   ii. Disappearance of five Croats on 7 October 1991 (names provided);
   iii. Killing of four Croats on 14 October 1991 (names provided);
   iv. Killing of five Croats in November 1991;
   v. Disappearance of two persons (names provided).
e) In other locations mentioned by the Applicant (villages of Stubalj, Graboštani, Panjani, Cerovljani, Hrvatska Dubica and Predore) killing of 21 Croats in the period from September 1991 to January 1992 (names provided).

804. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 282B- 296. In addition, the Applicant submitted the book "Mass killings and genocide in Croatia", list of missing persons, two reports on killed and missing persons in the Municipality of Hrvatska Kostajnica, one record of exhumation and one information document, all of which documents were created by organs of the Croatian Government.[722] The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit[723] and are accordingly inadmissible.

[722] The book "Mass killings and genocide in Croatia 1991/92"; List of missing persons from the Hrvatska Kostajnica municipality issued by the Commission of the Hrvatska Kostajnica municipality on 1 March 1993, Annexes, vol 2(II), annex 333; The record of the investigative exhumation conducted from 13 March until 1 April 1997 on the location of Hrvatska Dubica – Skelište, Annexes, vol 2(II), annex 334; Report of the Killed and Missing Persons in the Municipality of Hrvatska Kostajnica-Kostrići, Annexes, vol 2(II), annex 335; Report of Killed and Missing Persons in the area of Hrvatska Kostajnica Municipality-Kostajnički Majur, Annexes, vol 2(II), annex 336 and Information Document District of Sisak-Moslavina from 7 July 1993, Annexes, vol 2(II), annex 337.
[723] None of the fifteen copies of the original witness statements contained in annexes nos. 282B- 296 even contain signatures of persons who allegedly gave those statements. The statements found in annexes nos. 282b, 284, 285, 287, 288, 289, 290, 291, 292 and 294 do not contain signature of person(s) who took those statements while in annexes nos. 282b, 285, 287, 288, 290, 291 and 292 it is even not visible who a person or body who took the statements was.

805. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims.

806. Witness statements offered by the Applicant in relation to the killings in the village Kostrići are not based on direct knowledge and do not contain information as to how and by whom the victims were killed (see annexes nos. 285 and 286).

807. In relation to Kostajnički Majur, the witness statements offered by the Applicant contain names of the Croats killed in October and November 1991, however only statement of MG (annex 287) contain direct knowledge about the killing of one person while other statements do not contain the description of the circumstances surrounding the other killing or any information on the potential perpetrators (see annexes nos. 288 and 289).

808. In relation to the village of Stubalj, the names of the victims were also provided, but not the circumstances surrounding their killing, and the witness only heard that the perpetrators were local Serbs (see annex no. 290). The claim on the murder of Petar Vujčić is not supported by either of the two witness statements to which the Applicant referred.

809. In relation to Cerovljani, the witnesses again did not have any direct knowledge about the alleged crimes, but they only said that they had heard from others that the perpetrators were local Serbs (see annex no 293, also see statement of AB annex no. 294).

810. Hrvatska Dubica – The witnesses referred to by the Applicant (TK, annex no. 295, and JJ, annex no. 284) did not have direct knowledge on the alleged killings in Hrvatska Dubica and they only heard that the perpetrators were local Serbs.

811. The allegations contained in documents of the Croatian official bodies (annexes nos. 333, 335 - 337) must be proved by evidence from an independent source; the documents themselves cannot be treated as reliable evidence because they have been generated by the Applicant.

812. The events in Hrvatska Kostajnica municipality were dealt with by the ICTY in the Martić case. The Judgment of the Trial Chamber addressed the killings that followed the detention of people in a fire station in Hrvatska Dubica and in Krečane near Baćin.[724] The Trial Chamber found that 41 Croats were killed on 20 October 1991.[725]

[724] ICTY, *Martić,* IT-95-11-T, Trial Judgment, 12 June 2007, paras. 181–182.

The Trial Chamber also found that 13 Croats from village of Cerovljani were killed in October 1991.[726] In addition to that, the Trial Chamber found that 31 villagers from Baćin were killed sometime in October 1991.[727]

813. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Hrvatska Kostajnica should be dismissed in their entirety.

General observations in relation to the area of Banija

814. As is the case with other areas, the evidence submitted by the Applicant in support of the alleged crimes in Banija should be declared inadmissible due to the reasons stated in the introductory remarks.

815. Even if all of the Applicant's allegations are to be taken as accurate, it is obvious that the alleged killings in Banija were perpetrated on a random basis and in a longer period of time, which only points to the absence of any genocidal intent on behalf of the perpetrators. Moreover, the random nature of the acts strongly implies that they were not part of a genocidal plan or policy imputable to the Respondent.

816. Most of the crimes alleged by the Applicant are not even included in the indictments of the ICTY Prosecutor. Thus, despite the fact that the indictment against Slobodan Milošević covers the whole of Banija (and the whole of Croatia for that matter), the ICTY Prosecutor did not charge Slobodan Milošević with the majority of the killings and the other crimes that the Applicant alleges in relation to this region.

817. The events in Banija were also examined by the ICTY in the Martic case. After examining the alleged crimes, including those in the area of Banija, the Tribunal concluded that they did not fulfill the requirements of extermination as crimes against humanity. Namely, the Trial Chamber noted that the element of crimes against humanity requiring that the killings be committed on a large scale had not been met.[728]

[725] *Ibid.*, para.183.
[726] *Ibid.*, paras. 187–188.
[727] *Ibid.*, paras. 189–191.
[728] *Ibid.,* para. 404.

818. In the same case, the Prosecutor in the alternative argued that, should the Trial Chamber not find that extermination had taken place based on the accumulation of all killings that Martić was charged with, it should at least be declared that the killings committed in Baćin, a place in Banija, ammounted to extermination in their own right. The Trial Chamber, however, rejected the Prosecutor's arguments and found that the killings committed at Krečane near Baćin do not meet the requirement of massiveness associated with extermination.[729]

819. With respect to the issue of the Respondent's responsibility for the alleged crimes, most of the witnesses identified as perpetrators of those crimes voluntary units of local Serbs or forces of the RSK, for whose actions the Respondent bears no responsibility.

820. The Applicant alleges the involvement of the JNA in the alleged crimes in Glina. However, according to the witness statement of ŽL (annex no. 247), paramilitary forces and local population were those ones who committed the crimes, while the JNA units were helping the Croats at that particular time. The Applicant did not offer any proof that would support the JNA involvement in the alleged killings in Novo Selo, Joševica, Gornje and Donje Jame, and Skela.

821. With regards to the Petrinja municipality, the Applicant alleges the involvement of the JNA in fighting around villages in Petrinja, but does not provide evidence that the JNA was involved in the killings or other alleged crimes. Hence, the Applicant does not claim that the JNA was involved in the killings either in Petrinja or in Glinska Poljana, while it states that killings in Kraljevčani were committed by paramilitaries and that JNA supervised the burials. Similarly, in relation to Dvor na Uni municipality, the evidence submitted by the Applicant, namely witness statements, identify members of the local population as the perpetrators of crimes that took place.[730] Finally, in relation to the Hrvatska Kostajnica municipality, the JNA involvement is mentioned only in relation to the village of Kostajnički Majur, and only in relation to the fighting over the village, but not in relation to the alleged killings that were, according to the witnesses, perpetrated by the paramilitaries.

[729] *Ibid.,* para. 405.
[730] See annexes 278 and 280.

5. Response to the Applicant's Allegations Concerning Crimes Committed in Kordun and Lika

VRGINMOST

(Memorial, paras. 5.138 – 5.140)

822. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Vrginmost the Applicant alleges the murder of two inhabitants of the village Crna Draga which occurred after October 1991 (names provided).

823. The evidence submitted by the Applicant in support of these claims are witness statements contained in annexes nos. 341-343. These witness statements do not fulfill the minimum evidentiary requirements of affidavit[731] and are accordingly inadmissible.

824. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Two witnesses who provide accounts of the killing of the Britvec family in Crna Draga (witness IB, annex no. 341, and SČ, annex no. 342) do not have direct knowledge as to how the victims died and they also point to different persons as responsible for the killings.

825. The Applicant's claim concerning the involvement of the JNA in the forced expulsion of civilians from Selo Lasinjsko and Lasinja is not supported by the evidence submitted by the Applicant, since witness RM (annex no. 343) is not clear were there any fighting in the villages, he speaks of the RSK forces and his testimony in general pertains to the time period after 20 March 1992.

826. The crimes alleged to have been committed in Vrginmost have not been sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Vrginmost. In any event, the Applicant has not shown that if crimes were committed they were committed with the genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to Vrginmost should be dismissed in their entirety.

[731] Namely, none of them contains either an oath or a solemn promise that the truth has been stated, nor do they contain signatures of persons who allegedly gave the statements. Finally, all three statements were taken by police organs and without the involvement of a judge or a prosecutor.

SLUNJ

(Memorial, paras. 5.141 – 5.147)

827. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to the Slunj municipality the Applicant alleges that the following had occurred:

a) In Lipovača:
   i. Physical and psychological torture of remaining Croats in the village;
   ii. Murder of 7 civilians on 28 October 1991 (names provided);
   iii. Murder of 5 civilians on New Year's eve (names provided).

b) In Lađevac:
   i. Exposure of remaining inhabitants to systematic looting and violence;
   ii. Alleged murder of 7 persons (names provided);
   iii. Murder of 12 persons in the period beginning with October 1992 through to June 1993 (names provided);
   iv. Sexual harassment of one women and murder of one person who intervened (names and alias provided),
   v. Murder of 2 persons whose bodies were exhumed along with the bodies of the above noted persons (names provided).

c) In Arapovac, the alleged disappearance of one person (name provided).

d) In Gornji Popovac, the rape of 2 women in 1993 (alias name provided for one).

e) In Gornji Furjan, the murder of 6 persons in April 1992 (names provided).

828. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 344–357 and exhumation records contained in annexes 416, 418 and 419.[732] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[733] and are accordingly inadmissible.

[732] Record of Exhumations on 16th, 17th, 18th and 19lh June 1997, Annexes, vol 2(III), annex 416; Record of Exhumations on 25th, 26th and 27th September 1996, Annexes, vol 2(III), annex 418; Record of Exhumations on 2nd, 4th and 5th July 1996, Annexes, vol 2(III), annex 419.

[733] Namely, the copies of the original witness statements contained in annexes nos. 344–346 and 348–357 do not even contain signatures of persons who allegedly gave those statements; in annexes nos. 344, 345, 346, 348, 351, 352, 353, 354, 356 and 357 there is no signature of person(s) who took those statements, while in annexes nos. 346, 347, 348, 353, 354, 355, 356 and 357 it is even not visible who a person or body who took the statements was.

829. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. Most of the events alleged by the Applicant are supported by hearsay evidence or not supported at all.

830. Witnesses who testified about the events in Lađevac provided only second-hand accounts of the alleged killings. For example, witness MP (annex 346) and witness MG (annex 347) only stated the names of three persons killed in November 1992, June 1992 and in February 1993. Witness MS (annex 350) speaks of having found the bodies of 3 women who were brutally killed, but offers no information on how, when or by whom those women were killed. Witness MM (annex 351) speaks of hearing about murder and burning of houses of two families, but again has no direct knowledge of the events. Witnesses JT (annex 354) and AK (annex 348) also provide only second hand evidence of the alleged events.

831. In relation to Arapovac, witness AK (annex 348) testified about the alleged killing of the Morosavljević family. However, he did not see the killing and has no direct knowledge about it. The same witness testified about looting and battering that happened in the village and identified the perpetrators as local Serbs.

832. Witness AŽ (annex 357) testified about the events in Gornji Furjan. In her statement witness AŽ talks about looting, houses being set on fire and about the arrest by local Serbs of 6 persons whose bodies were later dug up in one of the mass graves in Lađevac. She however has no knowledge as to how and under what circumstances these persons lost their lives.

833. The ICTY Judgment in the Martić case confirmed only a small part of the allegations made by the Applicant, namely the killing of 7 civilians in Lipovača at the end of October 1991 and the existence of a mass grave in Lipovača Drežnička. According to the Judgment, killings were perpetrated by "Serb paramilitary forces". The ICTY has qualified events in Lipovača as crimes against humanity (persecution) and violation of rules or customs of war.[734] The said murders have also been covered by the Indictment against Milan Babić.[735]

[734] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 367–371.
[735] ICTY, *Babić,* IT-03-72, Indictment, 6 November 2003, para. 15.

834. The Martić Judgment confirms the JNA's presence in Lipovača however, but only for a very short period of time (7 to 8 days).[736]

835. The majority of the crimes alleged to be committed in the Slunj municipality have not been sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that the Applicant's allegations relating to Slunj should be dismissed.

OGULIN

(Memorial, paras. 5.148 – 5.152)

836. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to the Ogulin municipality the Applicant alleges that in Saborsko the following crimes occurred:

a) Destruction of the village;
b) Execution of 9 persons on 12 November 1991 (names provided);
c) Killing of 2 persons (names provided);
d) Extermination of the entire population of Saborsko;
e) Disappearance of 11 persons (names provided), and exhumation of 23 identified persons from mass and individual graves.

837. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 358-365, and the list of missing persons.[737] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[738] and are accordingly inadmissible.

838. Even if witnesses were to be treated as reliable, their statements do not support the Applicant's claims. While witnesses provide unanimous accounts about the attack on the village and the destruction of property, only several witnesses provide direct

[736] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 202.
[737] "Lists of detained and missing persons" (Memorial, Vol. 6, Appendices).
[738] Namely, the copies of the original witness statements contained in annexes 358, 360 and 361 do not even contain signatures of persons who allegedly gave those statements; in annexes 360 and 361 there is no signature of person(s) who took those statements, while in annexes 362 and 363 it is not even possible to tell a person or a body who took the statements.

evidence in support of alleged killings of the local population and their imprisonment. Witness AB (annex no. 360) testifies to hearing 6 men being killed by gunshots who were previously separated from a group in which she was in, while witness MM (annex no. 362) testifies to seeing his sister and her husband killed by a neighbor. All other accounts of alleged killings provided by the Applicant represent either hearsay evidence or accounts of witness who had seen dead bodies but do not know how those persons met their faith. As for allegations on forced captivity, while witness MD (annex no. 361) provides an account of being imprisoned in a local school with additional seven people, witness AŠ (annex no. 363) mentions time spent in the school but not in the context of being forcefully kept there, rather being provided shelter there. Accounts of all witnesses do not provide support for the Applicant's allegation regarding the extermination of the entire village. One witness, PM (annex no. 359) testifies to seeing the destruction of the graveyard. A number of witnesses points to specific culprits, many of which were, according to these witness accounts, local Serbs.

839. The allegations contained in the document of Croatian official bodies (List of missing persons, Appendices, vol. 6) must be corroborated by the evidence from an independent source; the document cannot be treated as reliable evidence by itself because it has been generated by the Applicant.

840. The events in Saborsko, Ogulin municipality, are covered by two judgments of the ICTY.[739] The Judgment of the Trial Chamber in the Martic case confirms the November 1991 attack on the village of Saborsko, murder of 9 persons whose names are listed in the Memorial[740] and the murder of additional 2 persons, also listed in the Memorial[741]. The judgment also confirms the existence of three grave-sites noted by the Applicant, from which bodies of 27 civilians were exhumed. The Trial Chamber established that out of the 27 people exhumed, 20 lost their lives in November 1991 in Saborsko.[742] The Trial Chamber was not satisfied that the destruction of the local churches was collaborated by evidence, particularly since it had established that the churches had been used as military posts during November attacks and one even prior to that.[743] No evidence was presented

[739] ICTY, *Martić,* IT-95-11, Trial Chamber Judgment, 12 June 2007; also ICTY, *Babić,* IT-03-72-S, Sentencing Judgment, 29 June 2004.
[740] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 230–233.
[741] *Ibid.,* para. 233.
[742] *Ibid.,* paras. 225-244.
[743] *Ibid.,* para. 380.

or cited by the Trial Chamber that would support Applicant allegations of extermination of the whole village of Saborsko. Milan Martić was found guilty of crimes against humanity and violation of rules or customs of war in relation to Saborsko.[744]

841. While most of the acts alleged to have taken place in Saborsko have been confirmed by the judgment of the ICTY, the Applicant has not shown that any of the crimes were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that the allegations of the Applicant relating to Ogulin should be dismissed in their entirety.

KARLOVAC

(Memorial, paras. 5.153 – 5.157)

842. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to the Karlovac municipality, the Applicant alleges that the following had occurred:

a) In Karlovac, killing of 42 civilians (one name provided in the Memorial) from October to December 1991 and injuring of 95 persons.
b) In Banski Kovačevac, killing of 6 persons (names provided), maltreatment of remaining civilian population and rape of one person.

843. In support of its claims the Applicant produced witness statements, contained in annexes 343 and 366 -370. These witness statements do not fulfill the minimum evidentiary requirements of affidavit[745] and are accordingly inadmissible.

844. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. The Applicant does not provide any direct evidence in support of the alleged killings that took place in Karlovac. Witness ML mentioned the killing of Croat police officers in the village Žuta Lokva and killing of one member of the Croatian Army (see annex 366). Witness DP mainly talked about fighting and

[744] *Ibid.,* para. 379.
[745] The copies of the original witness statements contained in annexes 343, 366, 368, 369 & 370 do not even contain a signature of persons who allegedly gave those statements; in annex no. 366 there is no signature of person who took that statement, while statements in annexes 343, 368, 369 & 370 were taken by the police organs without involvement of judicial organs.

acknowledged attacks on the JNA barracks and killing of JNA reservist by the Croatian forces. DP's general statement about 300 killed people in Karlovac out of which some were civilians, was not even given weigh by the Applicant (see annex 367).

845. For the reasons explained above, the crimes alleged to have been committed in Karlovac have not been sufficiently supported by evidence submitted by the Applicant. No case before the ICTY has dealt with the alleged crimes in the Karlovac municipality. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all allegations made by the Applicant relating to Karlovac should be dismissed in their entirety.

OTOČAC

(Memorial, paras.5.158 – 5.163)

846. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Otočac municipality the Applicant alleges that following occurred:

a) In Dabar:
   i. Killing of four Croats after 27 August 1991 (one name provided in the Memorial);
   ii. Killing of seven Croats (names provided) on or after 19 November 1991;
   iii. Killing of two Croats (names provided but no date).
b) In Vrhovine, disappearance of five Croats after being taken from the village by the Martić's group at the beginning of October 1991.

847. In support of its claims the Applicant offered witness statements contained in annexes nos. 371–375 and one police record.[746] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[747] and are accordingly inadmissible.

[746] Official record of the Police Section from 27 February 1992, Annexes, vol 2(III), annex 417.
[747] None of the five copies of the original witness statements contained in annexes nos. 371–375 do not even contain signatures of persons who allegedly gave those statements; in annexes nos. 371 and 372 there is no signature of a person who took those statements, while in annexes nos. 371 and 372 it is not even possible to tell who was the person or the body that took the statements was.

848. Moreover, even if the witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. Regarding the killing of Marija Draženović and Marija Klišanin, only the hearsay evidence of witness SD was submitted by the Applicant. The witness was, however, not certain whether the two victims were killed by shelling or were caught and thrown in a fire (see annex 371). Similarly, statements in relation to the alleged killing of seven Croats, that were allegedly first abducted, represent hearsay evidence and do not stipulate the circumstances under which these persons were killed (see annexes nos. 371, 372 and 373). In relation to the five missing Croats from Vrhovine, the only evidence that was submitted is that they were taken by the Martić's group (see annexes nos. 374 and 375).

849. The ICTY has dealt with the alleged crimes in the Otočac municipality and the Trial Chamber in the Martić case found that only one person, Stipe Brajković, was killed on 21 November by the group led by Predrag Baklajić.[748]

850. The crimes alleged to have been committed in the municipality of Otočac have not been sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all allegations made by the Applicant relating to Otočac should be dismissed in their entirety.

GOSPIĆ

(Memorial, paras. 5.164 - 5.171)

851. Applicant alleges that in relation to the Gospić municipality the following acts of genocide were committed:

a) In Široka Kula:
   i. Six Croats went missing as of September;
   ii. One Croat women was killed on 25 September 1991;
   iii. Two older Croat women have been missing since 25 September 1991;
   iv. Eight Croats were killed on 13 October 1991, while seven Croats were killed and two disappeared in different hamlets on unidentified dates.

[748] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 326.

852. In support of its claims the Applicant offered witness statements contained in annexes 376 – 380. In addition, the Applicant submitted the book "Mass killings and genocide in Croatia", the letter to the Parliamentary Commissioner for the exchange of prisoners written by the Ministry of Defense of the Republic of Croatia, and the letter from members of the families of the dead and missing from Široka Kula.[749]

853. The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[750] These documents are accordingly inadmissible.

854. The Allegations contained in the document of Croatian official bodies (annex 420) and the book Mass killings and genocide in Croatia must be corroborated by evidence from an independent source. These documents cannot alone be treated as reliable evidence because they have been generated by the Applicant.

855. As a part of elaboration on the overall context in SAO Krajina and the RSK at the beginning of 1990s, the Trial Chamber in *Martić* case mentioned the killing of 13 persons in Široka Kula by Serbian police officer which was organized by a Serbian leader of the local police.[751] This crime was generally qualified by the Trial Chamber as acts of persecution.[752] Martić was however never indicted nor convicted for this particular crime.

856. The crimes alleged to have been committed in the municipality of Gospić are not sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Gospić should be dismissed in their entirety.

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[749] The book "Mass killing and genocide in Croatia 1991/92"; Letter to the Parliamentary Commissioner for the exchange of Prisoners, Annexes, vol 2(III), annex 420; Letter from Members of the Families of the Dead and Missing from Široka Kula, 13th October 2000, Annexes, vol 2(III), annex 421.

[750] None of the statements contains either an oath or a solemn promise that the truth has been stated; the copies of the original witness statements contained in annexes nos. 377–380 do not even contain signatures of persons who allegedly gave those statements; witness statements in annexes nos. 377–380 have all been taken by the police organs without the involvement of the judicial organs.

[751] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 324, footnote 1002.

[752] *Ibid.,* paras. 323–324.

TITOVA KORENICA

(Memorial, paras.5.172 – 5.181)

857. The Applicant alleges that in relation to the Titova Korenica municipality the following acts of genocide were committed:

a) In Korenica, the torture of detained Croats;
b) In Vaganac, the killing of eight Croats on 9 October 1991;
c) In Poljanak:
   i. Killing of two Croats on 6 October 1991;
   ii. Hanging of two Croats on 24 October 1991;
   iii. Killing of eleven Croats on 7 November 1991;
d) In Smoljanac:
   i. Killing of two Croats on 8 October 1991;
   ii. Killing of two Croats on 2 December 1991.

858. In support of its claims the Applicant submitted witness statements contained in annexes 381 – 392 and investigation and exhumation records contained in annexes 422–424.[753] The witness statements submitted by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[754] These documents are accordingly inadmissible.

859. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. Witnesses whose statements are offered by the Applicant as evidence of the alleged crimes committed in Vaganac provide only circumstantial information about the alleged killings, without giving direct information as to how and under what circumstances these Croats were killed (see annexes 381 and 382, statements of JJ and IK).

860. In relation to the alleged killings of two Croats during the fighting on 8 October in Smoljanac, the witnesses did not offer information on the specific circumstances under

[753] Investigation Records (exhumation), Kir-632/96 and Kir-469/96, Memorial, Annexes, Vol. 2(III), annexes 422 & 423; Report of Exhumation, 13th August 1996, Memorial, Annexes, Vol. 2(III), annex 424.

[754] None of the 12 copies of the original witness statements contained in annexes relating to municipality Titova Korenica do not even contain signatures of persons who allegedly gave those statements; in annexes nos. 383, 384, 386 and 389 there is no signature of person(s) who took those statements, while in annexes nos. 383, 386 and 389 it is not even possible to see who the person or the body which took the statements was.

which the killings took place (see annexes nos. 390, 391 and 392). Their statements, however, reveal that heavy fighting occurred in Smoljanac on the date of the alleged killings, i.e. on 8 October 1991 (see annexes nos. 390 and 391).

861. The ICTY has dealt with the alleged crimes in the municipality of Titova Korenica. Trial Chamber in the *Martić* case confirmed the killings in Poljanak and its hamlet Vuković.[755] The Trial Chamber did not find enough evidence to support the charges concerning the destruction and looting in Vaganac.[756] Milan Martić was found guilty of persecution in relation to the village of Poljanak.[757] He was found not guilty of extermination.[758]

862. The majority of the crimes alleged to have been committed in the municipality of Titova Korenica are not sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Titova Korenica should be dismissed in their entirety.

GRAČAC

(Memorial paras. 5.182 – 5.186)

863. Applicant alleges that in relation to the Gračac municipality the following acts of genocide were committed in the village of Lovinac:

a) Killing of one Croat on 20 July 1991;
b) Killing of six Croats on 5 August 1991;
c) Killing of three Croats in surrounding villages Sr. Rok and Smokrić at unknown time;
d) Killing of three Croats in September 1991.

[755] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 210-214; also see ICTY, *Stanišić et al.,* IT-03-69, Third Ammended Indictment, 10 July 2008, para. 30.
[756] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 385.
[757] *Ibid.,* para. 378.
[758] *Ibid.,* paras. 404–406 & para. 479.

864. In support of its claims the Applicant submitted witness statements contained in annexes 393 – 398 and one investigative report and one special report of the Croatian Police (annexes 426 and 427).[759]

865. The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[760] These documents are accordingly inadmissible.

866. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. There is no evidence as to the circumstances under which three Croats, Mate Kovačević and brothers Pavičić, were allegedly killed in surrounding villages Rok and Smokrić (see annexes 395, 426 and 427). Witness MR testified about the taking of five Croats and subsequent discovery of their bodies, but did not provide specific circumstances under which the killings occurred.

867. As a part of elaboration on the overall context in SAO Krajina and RSK at the beginning of 1990s the Trial Chamber in *Martić* case mentioned that five Croats were killed in village of Lovinac between 5 and 14 August 1991 by Serbian paramilitary groups.[761] Martić was however never indicted and consequentially not convicted for this particular crime.

868. The crimes alleged to have been committed in the municipality of Gračac are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Gračac should be dismissed in their entirety.

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[759] Investigative Report, 22nd August 1996, Memorial, Annexes, Vol. 2(III), annex 426 and Special Report, Memorial, Annexes, Vol. 2(III), annex 427.
[760] The copies of the original witness statements contained in annexes 393, 395, 397 & 398 do not even contain signatures of persons who allegedly gave those statements; while in annexes 393 & 398 it is even not possible to tell who the person or the body that took the statements was.
[761] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 324, footnote 1002.

General observation in relation to the area of Kordun and Lika

869. Even if all of the Applicant's allegations are to be taken as accurate, it is obvious that the alleged killings in Kordun and Lika were perpetrated on a random basis and in a longer period of time, which points to the absence of any genocidal intent on behalf of the perpetrators.

870. Furthermore, it is clear, even from the evidence offered by the Applicant, that in some places mentioned in the Memorial heavy fighting took place at the time when the alleged crimes were committed. For example, the Trial Chamber in the Martić case found that Croatian armed forces and units consisting of several hundred men were present in Saborsko and that those members of the Croatian armed forces remained present in Saborsko after the attack on 12 November 1991.[762] Accordingly, it is more than likely that all war related casualties are included as victims in the Memorial.

871. The events in Kordun and Lika were examined by the ICTY in the Milan Martić case. After examining the alleged crimes, including those in the area of Kordun and Lika, the Tribunal concluded that they did not fulfill the requirements of extermination as crimes against humanity. Namely, the Trial Chamber noted that the element of crimes against humanity requiring that the killings be committed on a large scale had not been met.[763]

872. With respect to the possible involvement of the JNA in the events, even the Applicant acknowledges that there was no involvement of the JNA in the alleged crimes committed in the municipalities of Vrgin Most, Slunj, Otočac, Gospić and Gračac,. In relation to Karlovac, the Applicant mentioned that JNA was involved in the occupation of the town but no evidence was offered that the JNA units were involved in the actual crimes described by the Applicant's witnesses. The Applicant alleges that the attack on the municipality of Ogulin, more concretely the village of Saborsko, was executed by the JNA and Serb paramilitaries.[764] However, the Judgment in the Martić case only established that the killings in Saborsko on 12 November 1991 were committed by two soldiers wearing Serbian dark grey uniforms.[765]

[762] *Ibid.,* paras 350 and 379.
[763] *Ibid.,* para.404.
[764] Memorial, para. 5.151.
[765] *ICTY, Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 230.

873. In relation to the municipality of Titova Korenica, where the Applicant claims that the JNA and paramilitary forces fought together against the Croatian forces[766], witness statements offered by the Applicant do not support such conclusion.[767]

6. Response to the Applicant's Allegations Concerning Crimes Committed in Dalmatia

ŠIBENIK
(Memorial paras. 5.202 – 5.205)

874. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Šibenik municipality the Applicant alleges that following occurred:

a) In Piramatovci killing of three Croats and killing of three Croats in the hamlet Bilostanović;
b) In Cicvare killing of two Croats in January 1992;
c) In Sonković killing of six Croats in January 1992;
d) In all other locations, namely Rupe, Ićevo and Čista Velika, the Applicant alleges the killing of six Croats.

875. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 432, 433 and 523, the book "Mass killing and genocide in Croatia", three death reports, five Investigation records and one minute of investigation.[768] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[769] and are accordingly inadmissible.

[766] See Memorial, paras. 5.174 – 5.179.
[767] Witness JJ (annex 381) only mentioned „former JNA", witness MK (annex 386) stated that it was the paramilitaries and not the JNA that was attacking, while witness SR (annex 390) stated that the JNA was patrolling the village and warned the villagers that they should beware of the "Martic people".
[768] The book "Mass killing and genocide in Croatia, 1991/92" page 145; "Minutes of investigation", District Court in Knin, 13 April 1992, Memorial, Annexes, Vol. 2(III), annex 539; Death Report, 18 March 1992, Memorial, Annexes, Vol. 2(III), annex 540; Investigation Record, Municipal Court in Benkovac, 14 March 1992, Memorial, Annexes, Vol. 2(III), annex 541; Investigation Record, 22 June 1992, Memorial, Annexes, Vol. 2(III), annex 542; Investigation Record, District Court in Knin, 15 January 1992, Memorial, Annexes, Vol. 2(III), annex 543; Investigation Record, District Court in Knin, 2 January 1993, Memorial, Annexes, Vol. 2(III), annex 544; Investigation Record, District Court in Knin, 16 January 1992, Memorial, Annexes, Vol. 2(III), annex 546; Death Report, 26th December 1991, Memorial, Annexes, Vol. 2(III), annex 547; Death Report, 26 December 1991, Memorial, Annexes, Vol. 2(III), annex 548.
[769] None of the three copies of the original witness statements contained in annexes 432, 433 & 523 contain signatures of persons who allegedly gave those statements.

876. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims. None of the witnesses whose statements are offered by the Applicant had direct knowledge as to how and under what circumstances the alleged killings occurred. Instead, the witnesses speculated on who was responsible for the crimes and provided no information on the dates of the alleged crimes.

877. The crimes allegedly committed in the municipality of Šibenik are not sufficiently supported by the evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Šibenik. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Šibenik should be dismissed in their entirety.

DRNIŠ

(Memorial, paras. 5.206 – 5.212)

878. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Drniš municipality the Applicant alleges that the following occurred:

a) In Puljane killing of ten Croats (five identified) on 2 August 1993;
b) In Siverić several instances of rapes and beatings;
c) In Drniš killing of three identified Croats during 1993 and one instance of rape;
d) In Miljevci killing of eight identified Croats, mostly during 1992;
e) In all other locations, namely Trbounje, Kadina Glavica, Kričke, Žitnić, Oklaj, Lukari, Razvođe, Ljubotic, Matase, Otavice - killing of 32 Croats.[770]

[770] The alleged killings in Kadina Glavica occurred in January 1993, in Kričke in 1992, in Žitnić killings were perpetrated on unknown time, in Oklaj killings were mostly perpetrated during November 1992 and after, in Lukari on unknown time, in Razvođe in June 1992, in Ljubotić on unknown date, in Matase on unknown date, and killings in Otavice occurred in January and February 1993.

879. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 434 - 461, 514, 515, 519 - 521, three books [771] and several reports,[772] originating from different RSK or Croatian bodies.

880. The witness statements submitted by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[773] These documents are accordingly inadmissible.

881. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims.

882. With respect to Drniš, the crimes involving three deaths according to one witness occurred in 1993. The witness MP did not provide information about the circumstances surrounding these killings (see annex no. 442).

883. Witness statements given in relation to several killings in Miljevci in majority of the cases do not reveal the circumstances of the killings or the perpetrators. Incidents, according to witnesses, took place in 1991, 1992 and 1993.

884. All other cited locations - the allegations relating to the alleged crimes in Kričke - are based on the hearsay evidence (see annex no. 450). The same applies in relation to Žitnić (the allegation that three Croats might have been killed and buried in a well, see annex no. 452). In relation to Razvođe, the Applicant claims that four Croats were killed, while the witness

[771] The book "Mass killing and genocide in Croatia 1991/92", Croatian University Press, Zagreb, 1992, page 160; "Wounded Church in Croatia - Destruction of the Sacral Buildings in Croatia (1991 - 1995)", Croatian Bishop's conference and others, Zagreb, 1996, p. 247; Vladimira Pavić, "Register of War Damages on Museums and Galleries", Museum Documentation Centre, Zagreb, 1997, pp. 118-121.

[772] "Ivan Bračić and other murders", Secretariat of Interior, 1 March 1993, Annexes, vol 2(III), annex 531; "Violence and the murders of the citizens of Croatian nationality", Security and Intelligence Agency, 1 March 1993, Annexes, vol 2 (III), annex 532; Resolution on presence in combat, General-Major of the Serbian Army of Krajina Milan Čeleketić, 9 September 1994, Annexes, vol 2 (III), annex 533; Military Police MP Knin, "The minutes on the investigation", 1 February 1992, Annexes, vol 2(III), annex 534; UN, The Ministry of the Defense of the Republic of Croatia's Office in Šibenik, 8th June 1995, Annexes, vol 2 (III), annex 535; Daily Report, Security and Intelligence Agency, 3 February 1993, Annexes, vol 2(III), annex 537; Official Note, Police station Drniš, 4 March 1994, Annexes, vol 2(III), annex 581; Report, 3rd police station Drniš, 11 March 1996, Annexes, vol 2(III), annex 550; Record, 3rd police station Drniš, 12 March 1996, Annexes, vol 2(III), annex 549; Record, 3rd police station in Drniš, 11 March 1996, Annexes, vol 2 (III), annex 582; Official report on bodies found, 3rd police station Drniš, 19 September 1996, Annexes, vol 2 (III), annex 551.

[773] The copies of original witness statements contained in annexes nos. 434, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 458, 459, 460, 461, 514, 515, 519 and 521 do not even contain signatures of persons who allegedly gave those statements. In annexes nos. 434, 437, 438, 447, 461 and 514 there is no signature of person(s) who took those statements, while in annexes nos. 434, 435, 436, 437, 438, 442, 443, 444, 447 and 514 it is even not visible who a person or body that took the statements was.

MD, to which the Applicant referred, only confirmed one death, and the woman who died actually died by stepping on a mine (see annex no. 456). Similarly, the allegation that five Croats were killed in the village of Otavice is not supported by the statement of witness IG. The witness testified about three of the alleged murders, but his statement seems to be based on hearsay evidence (see annex no. 460).

885. The Allegations contained in documents of Croatian official bodies (annexes nos. 534 and 535) must be corroborated by evidence from an independent source; these documents alone cannot be treated as reliable evidence because they have been generated by the Applicant.

886. The crimes alleged to have been committed in municipality of Drniš are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Drniš. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. This is particularly the case since most of the incidents described by witnesses took place between 1992 and 1993. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Drniš should be dismissed in their entirety.

KNIN

(Memorial paras.5.213 – 5.216)

887. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Knin municipality the Applicant alleges that the following occurred:

a) In Kninsko Polje, the killing of two identified Croats;
b) In Kijevo, the killing of ten identified Croats from June 1992 until January 1993;
c) In Ervenik, the killing of five identified Croats on 18 January 1992.

888. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 462 - 468, 516 and 518 and a record on the

external examination of a corpse.[774] The witness statements do not fulfill the minimum evidentiary requirements of affidavit[775] and are accordingly inadmissible.

889. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims.

890. Witness statements in relation to Kijevo mostly contain hearsay information without accurate description of how killings occurred and by whom were they committed (see annexes nos. 463 and 464).

891. The ICTY dealt with the attack on Kijevo in the Martic case, but did not deal with the alleged killings. The killing of members of the Čengić family in the village of Ervenik on 18 January committed by three members of the TO, was mentioned as evidence of persecution in addition to other separate counts.[776] Martić was however not charged in relation to killings in Kijevo and Ervenik and consequentially not convicted for them.

892. The crimes alleged to have been committed in the municipality of Knin are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Knin should be dismissed in their entirety.

OBROVAC

(Memorial paras.5.217 – 5.221)

893. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Obrovac municipality the Applicant alleges that following occurred:

a) In Jasenice, the killing of ten Croats (7 identified) on 11 September 1991;

[774] Record on the external examination of the corps, 1992, Memorial, Annexes, Vol. 2(III), annex 554.
[775] The copies of the original witness statements contained in annexes nos. 462, 463, 464, 465, 468, 516 & 518 do not even contain signatures of persons who allegedly gave those statements. In annexes 468, 516 & 518 there is no signature of person(s) who took those statements, while in annexes 468 & 518 it is even not visible who a person or body who took the statements was.
[776] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 327, footnote 1012.

b) In Medviđa:
   i. Killing of four identified Croats between 9 May 1992 and 3 February 1993;
   ii. Killing of 9 identified Croats on 9 February 1993.

c) In all other locations mentioned by the Applicant, namely Zaton Obrovački and Kruševo, the killing of nine Croats (four of them were identified). The killings in Zaton Obrovački were perpetrated in January 1993 while one killing in Kruševo occured on an uncertain date.

894. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 469 - 483, and 517 [777] and several investigative minutes and exhumation records created by the organs of Republic of Croatia.[778]

895. The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[779] These documents are accordingly inadmissible.

896. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims.

897. The exhumation records offered by the Applicant confirm the killing of six elderly Croats in the village of Jasenica, but they cannot provide any information under what circumstances and by whom were the victims killed.

898. The crimes alleged to have been committed in municipality of Obrovac are not sufficiently supported by evidence submitted by the Applicant for the reasons explained above. The ICTY has neither indicted nor sentenced anyone with respect to the alleged crimes in Obrovac. In any event, the Applicant has not shown that if crimes were committed they were committed

[777] Annex 471 is not referenced in the Memorial but is attached in vol 2(III).
[778] Minutes on the investigation, District Court in Zadar, 22 January 1997, Annexes, vol 2(III), annex 555; Minutes on the Autopsy - Stipe Zubak, Annexes, vol 2(III), annex 557; Autopsy Report - Ivan Maruna, Annexes, vol 2(III), annex 558; Record of Exhumation - Božica Juričević, Zorka Zubak, Martin Bužonja, Manda Maruna, Annexes, vol 2(III), annex 556; Minutes of investigation, District Court in Zadar, 22 January 1997, Annexes, vol 2(III), annex 584.
[779] The copies of the original witness statements contained in annexes nos. 469, 471, 472, 473, 476, 477, 478, 481, 482 and 483 do not even contain signatures of persons who allegedly gave those statements. In annexes nos. 474, 475 and 480 it is even not visible who was a person or body who took the statements.

with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Obrovac should be dismissed in their entirety.

BENKOVAC

(Memorial paras. 5.222 – 5.225)

899. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Benkovac municipality the Applicant alleges that following occurred:

a) In Bruška, the killing of nine identified Croats on 21 December 1991 and one Croat in June 1992.
b) In Korlat, the killing of nine identified Croats.
c) In Smilčić, the killing of six Croats (3 identified) and two instances of rapes.
d) In all other locations belonging to the municipality of Benkovac (Lišane Ostrovičke, Rodaljice, Lisičić, Perušić Benkovački and Šopot), the killing of 20 Croats and one instance of rape in Lisičić.

900. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 484–502, along with several minutes of investigation and exhumation reports.[780]

901. The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[781] These documents are accordingly inadmissible.

[780] Commentary, Crime in the Village of Bruška, Annexes, vol 2(III), annex 559; Minutes of Investigation, District Court in Zadar, 26 April 1996 - Dušan Marinović, Roko Marinović, Annexes, vol 2(III), annex 560; Minutes of Investigation, District Court in *Zadar,* 26 April 1996 – Petar Marinović, Krsto Marinović, Draginja Marinović, Annexes, vol 2(III), annex 561; Minutes of Investigation, District Court in *Zadar, 26* April 1996 - Manda Marinović, Stana Marinović, Annexes, vol 2(III), annex 562; Minutes of Investigation, District Court in Zadar, 26 April 1996 - Dragan Marinović, Ika Marinović, Annexes, vol 2(III), annex 563; Minutes of Investigation, 26 April 1996, Annexes, vol 2 (III), annex 564; Report of Death, 27th March 1992, Annexes, vol 2(III), annex 565; Investigation Record, 24 April 1996, Annexes, vol 2(III), annex 566; Record of Investigation, 26 November 1992, Annexes, vol 2(III), annex 568; Minutes of Exhumation, 24 May 1996, Annex 569; Minutes of Investigations dated 26 March 1992, 11 August 1992 and 30 November 1992, Annexes, vol 2(III), annexes 587, 588, 589; Record of the Performed Burial, 12 June 1992, Annexes, vol 2(III), annex 570; Record of the Autopsy (Exhumation), 28 October 1995, Annexes, vol 2(III), annex 571; Record of External Examination of Corpses, Annexes, vol 2(III), annex 585; Criminal charges, *ibid.,* annex 586.

[781] None of the 19 copies of the original witness statements contained in annexes contain signatures of persons who allegedly gave those statements, while 18 out of 19 statements contained in annexes offered by the Applicant were taken by the police organs.

902. Even if witnesses are to be treated as reliable, their statements do not support the Applicant's claims. Thus, in relation to the alleged killings of six Croats in the Smilčić village, the Applicant provided an investigation report (from the organs of the RSK), which confirms the deaths of three victims, but not under which circumstances the victims died (annex 568). Witness BA mentioned that Marinko and Ljubica Arnabas were killed, but did not provide any facts or direct knowledge about their alleged killings (see annex no. 495).

903. *Other locations:* In relation to the alleged killings in the village of Lišane Ostrovičke, the Applicant submitted an exhumation report, but no information on under which circumstances the people were killed. In relation to the village of Šopot, the Applicant's allegations on the killing of 8 Croats are based on the witness statements of KV (annexes 501 and 502), which contains only hearsay evidence.

904. The Trial Chamber in the Martić case discussed the events in the Benkovac municipality and found that 9 Croats were killed in Bruška. The Trial Chamber found that the perpetrators also killed Sveto Drača, a Serb who was wearing a JNA olive-drab uniform.[782]

905. For the reasons explained above, the majority of the crimes alleged to have been committed in municipality of Benkovac are not sufficiently supported by the evidence submitted by the Applicant. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to the municipality of Benkovac should be dismissed in their entirety.

ZADAR

(Memorial paras. 5.226 – 5.231)

906. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Zadar municipality the Applicant alleges that following occurred:

a) In Škabrnja and Nadin, the killing of 48 Croats[783];

b) In other locations of Zadar municipality, Zemunik Gornji and Donji, the killing of six identified Croats.

[782] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 267-268; see also ICTY, *Stanišić et al.,* IT-03-69, Third Ammended Indictment, 10 July 2008, para. 35.
[783] See Memorial, para. 5.229. This is the number of bodies that were delivered to Croatian Government according to the Applicant.

907. The evidence produced by the Applicant in support of these claims are witness statements contained in annexes nos. 503 - 512,[784] and six other documents of different origin and nature.[785] Again, the witness statements do not fulfill the minimum evidentiary requirements of affidavit[786] and are accordingly inadmissible.

908. Even if witnesses are to be treated as reliable, *quod non*, their statements do not support the Applicant's claims.

909. From the statements offered by the Applicant it can be seen that the fierce fighting occurred before the Serb forces entered the village of Škabrnja (see annex 504) and that they managed to inflict heavy losses to the Serbian forces and that some of the Croatian fighters were in the civilian clothes (see annex no. 505). Furthermore, the fighting started when the First Lieutenant Stefanović of the JNA unit was shot by the Croats from Škabrnja (see annex no. 503). While the ten Croat victims are identified by their names, the circumstances of killing are not provided by the Applicant.

910. The Trial Chambers of the ICTY in the Martić case dealt with the events in Škabrnja and Nadin on 18 and 19 November 1991. The Trial Chamber found that 14 Croats were killed in Škabrnja on 18 November and that 6 Croats were killed in Nadin on 19 November 1991.[787] The Trial Chamber further found that an additional 26 Croats were killed on 18 or 19 November in Škabrnja, Nadin or Benkovac, while 11 Croatian defenders were killed on 18 and 19 November 1991.[788] The Trial Chamber found that between 18 November 1991 and 11 March 1992, 19 Croats were killed.[789] Milan Martić

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[784] Witness statement of DI (annex 506) is not referenced in the Memorial but it is attached as annex.
[785] Extract from the Report of Helsinki Watch, 4th February 1992, Annexes, vol 2(III), annex 572; the book "Mass killing and genocide in Croatia 1991/92", pp. 140-144; Record of the Sanitation made on the spot in the village of Škabrnja, Annexes, vol 2 (III), annex 575; Massacre of the Civilian Population from Škabrnja and Nadin on 18 and 19 November 1991, Medical Center Zadar, The Pathology Department: Annexes, vol 2(III), annex 576; The Office of the Detained and Missing Persons of the Government of the Republic of Croatia: The list of the exhumed and identified persons from Škabrnja, Annexes, vol 2(III), annex 577; Record of Exhumation; Record of witnessing (the exhumation), Annexes, vol 2(III), annex 578.
[786] None of them contains either an oath or a solemn promise that the truth has been stated. The copies of the original witness statements contained in annexes nos. 503, 504, 506, 507, 508, 509, 510, 511 and 512 do not even contain signatures of persons who allegedly gave those statements. In annexes nos. 503, 504, 506, 507, 508, 509 and 510 there is no signature of person(s) who took those statements, while in annexes nos. 506, 509 and 510 it is even not visible who was a person or body who took the statements.
[787] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 386-388; also in the Indictment against Jovica Stanišić in relation to Škabrnja the Prosecution alleged killing of at least 38 civilians, ICTY, *Stanišić et al.,* IT-03-69, Third Ammended Indictment, 10 July 2008, para. 32.
[788] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 389-390.
[789] *Ibid.,* para. 392.

was sentenced for persecution as a crime against humanity and was acquitted of extermination, since the Trial Chamber concluded that the element that the killings be committed on a large scale has not been met.[790]

911. While the majority of the Applicant's claims on the crimes in the Zadar municipality has been confirmed by the ICTY Judgment in the Martić case, the Applicant has failed to show that any of the crimes were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to the municipality of Zadar should be dismissed in their entirety.

SINJ

(Memorial paras. 5.232 – 5.234)

912. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Sinj, the Applicant alleges in relation to Peruča an attempt to destruct the dam in Peruča.

913. The evidence produced by the Applicant in support of these claims are witness statement contained in annex no. 513, three estimates done by Croatian related organs and one transcript of conversation.[791]

914. The witness statement offered by the Applicant does not fulfill the minimum evidentiary requirements of affidavit. It does not contain either an oath or a solemn promise that the truth has been stated. The statement was taken by members of the police, without the involvement of members of the judiciary. Such a statement is accordingly inadmissible.

915. The Applicant's allegations and estimations in relation to the Peruča dam are based on documents created by the organs of the Applicant or persons working for the Croatian official bodies and as such cannot be treated as reliable. Furthermore, the mentioned

[790] *Ibid.,* para. 404.

[791] 'Facts and Estimates of the Consequences Resulting form Mining of the Peruča Dam by Serbian Forces on January 28, 1993', *Croatian Medical Journal*, Vol. 34(4), 1993, pp. 280-4; 'A chronological narrative on the events at the dam from the occupation until the mining', Josip Macan, Croatian National Electricity (on file with the Office for Cooperation with the ICTY and ICJ, Zagreb); 'Consequences if the Peruča dam was destroyed', Zvonimir Sever, Elektroprojekt; Conversation transcript Mladić-Novaković, Memorial, Annexes, Vol. 2(III), annex 529.

documents were not even submitted with the Memorial. The allegations contained in these documents must be corroborated by evidence from an independent source; the documents alone cannot be treated as reliable evidence because they have been generated by the Applicant.

916. The ICTY has neither indicted nor sentenced anyone with respect to the alleged attempt to destruct the dam in Peruča.

917. In any event, the Applicant has not shown that the destruction of the dam was attempted with genocidal intent, or that the attempt can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Sinj should be dismissed in their entirety.

DUBROVNIK

(Memorial paras. 5.235 – 5.241)

918. In support of its claims pertaining to the *actus reus* of the crime of genocide in relation to Dubrovnik the Applicant alleges killing of 161 Croats.

919. Evidence offered by the Applicant in support of these claims are witness statements contained in annexes nos. 524 – 526 and several official records.[792]

920. The witness statements offered by the Applicant do not fulfill the minimum evidentiary requirements of affidavit.[793] These documents are accordingly inadmissible.

921. The Applicant's allegation concerning the killing of 161 civilians is based on the records of the Police Station of the Dubrovnik – Neretva District. This document was, however, not attached to the Memorial. The witness statements do not support the

[792] Republic of Croatia, Ministry of Culture, Board for Protection of the Cultural Heritage, War Damages of the Immovable Cultural Monuments (by counties), Zagreb, September 2000; Official Record on the Operations of the Aggressor, 28 October 1992, Annexes, vol 2(III), annex 590; Official Record on the Operations of the Aggressor, 26 October 1991, Annexes, vol 2(III), annex 591; Official Record on the Operations of the Aggressor, 17 December 1992, Annexes, vol 2(III), annex 592; Official Record, 11 November 1992, Annexes, vol 2(III), annex 593; Official Record on the Operations of the Aggressor, 28 October 1999, Annexes, vol 2(III), annex 594; Investigation Record, 11 November 1992, Annexes, vol 2(III), annex 595.

[793] None of the three copies of the original witness statements contained in annexes offered by the Applicant contain signatures of persons who allegedly gave those statements. Furthermore, all three witness statements were taken by the police organ without the involvement of the judiciary organ.

Applicant's claims on the number of killings in Dubrovnik area, but only provide information about one disappearance, one recovery of a dead body and one killing due to the beatings (see annexes nos. 525 and 526).

922. The allegations contained in the documents of the Croatian official bodies (War Damages of the Immovable Cultural Monuments (by counties), Zagreb, September 2000 and records contained in annexes nos. 590 - 595) must be corroborated by evidence from an independent source; these documents alone cannot be treated as reliable evidence, because they have been generated by the Applicant.

923. The ICTY has dealt with the alleged crimes in Dubrovnik. The ICTY has convicted and sentenced Miodrag Jokić to seven years of prison and Pavle Strugar to seven and a half years for the violations of the laws or customs of war in relation to Dubrovnik, and more specifically for the shelling of the Old Town on 6 December 1991.[794] According to the Judgments, during the shelling on 6 December 1991 two civilians were killed and three were wounded, while damage was sustained to cultural heritage.[795]

924. The events in Dubrovnik were also included in the Indictment against Slobodan Milošević where the Prosecution alleged that 43 Croat civilians were killed during the shelling campaign.[796] However, although the same number of victims was initially alleged in the indictment against the JNA officers who commanded the attack on Dubrovnik (Strugar and Jokić), the Prosecution later withdrew most of the charges except the charges for murder of two persons.[797]

925. For the reasons explained above, the majority of the crimes alleged to have been committed in Dubrovnik are not sufficiently supported by evidence submitted by the Applicant. In any event, the Applicant has not shown that if crimes were committed they were committed with genocidal intent, or that the crimes or the alleged genocidal

[794] ICTY, *Jokić,* IT-01-42/1, Sentencing Judgment, 18 March 2004; see also ICTY, *Strugar,* IT-01-42, Appeals Chamber Judgment, 17 July 2008 (Strugar was acquitted of the murder charges while Miodrag Jokić pleaded guilty for six counts of violations of the laws or customs of war perpetrated on 6 December 1991 including charges for murder).
[795] See ICTY, *Strugar,* IT-01-42, Appeals Chamber Judgment, 17 July 2008.
[796] See ICTY, *Milošević*, IT-02-54-T, Indictment, para. 75.
[797] See ICTY, *Strugar et al.,* IT-01-42, Initial Indictment, 22 February 2001, para. 23 (both Pavle Strugar and Miodrag Jokić were indicted); see also ICTY, *Strugar,* IT-01-42-PT, Third Amended Indictment, 10 December 2003; see also ICTY, *Jokić,* IT-01-42, Second Amended Indictment, 26 August 2003.

intent can be attributed to the Respondent. For these reasons, the Respondent submits that all of the Applicant's allegations relating to municipality of Dubrovnik should be dismissed in their entirety.

General observation in relation to the area of Dalmatia

926. Similar to other areas of Croatia, the alleged crimes in Dalmatia, even if taken as having been proved, were committed over a long period of time, extending from 1991 until 1993, and on a random basis, which points to the absence of any genocidal intent on behalf of the perpetrators.

927. The events in Dalmatia were examined by the ICTY in the Milan Martić case. After examining the alleged crimes, including those in the area of Dalmatia, the Tribunal concluded that they did not fulfill the requirements of extermination as crimes against humanity. Namely, the Trial Chamber noted that the element of crimes against humanity requiring that the killings be committed on a large scale had not been met.[798]

928. As to the possible involvement of the JNA in the alleged crimes, it was confirmed only in relation to Dubrovnik. Regarding the other locations, the Applicant itself alleged that in only three out of 41 listed locations the JNA was involved in some way (Škabrnja, Nadin and Puljane).

929. However, even the witness statements offered by the Applicant show that the JNA officers and soldiers tried to stop paramilitaries who committed crimes in Škabrnja and Nadin (see annexes 509, 573 and 574). In relation to the village of Puljane, even though the Applicant alleges the involvement of the JNA in the attack on the village, the actual crimes were perpetrated in 1993, long after the JNA had withdrawn from Croatia.[799]

930. It is therefore respectfully submitted that the Respondent entails no responsibility for the crimes allegedly committed in the area of Dalmatia as alleged by the Applicant.

[798] ICTY, *Martić,* IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 404.
[799] Memorial, para. 5.207.

7. Conclusion

931. On the basis of all of the above, it can be concluded that:

a) The evidence submitted by the Applicant is mostly comprised of documents generated either by the Applicant or organs close to the Applicant. As such, this evidence is not reliable and its quality, taken as a whole, is such that the Court cannot use it in reaching any conclusion.

b) The witness statements and other documents are often inconsistent with the allegations stated in the Memorial or with each other and many of the Applicant's allegations are not corroborated by any evidence.

c) The majority of the claims of the Applicant are not supported by the judgments or even by the indictments of the ICTY.

d) The Applicant has failed to prove that many of the alleged crimes occurred and, in any case, it has failed to prove that any of the crimes were committed with genocidal intent, or that the crimes or the alleged genocidal intent can be attributed to the Respondent.

CHAPTER VIII

THE CRIME OF GENOCIDE HAS NOT BEEN COMMITTED AGAINST CROATS

932. In Chapter II the Respondent analyzed the law on genocide through the practice of the Court, as well as of the *ad hoc* Tribunals and other relevant international bodies, and recalled that the crucial requirement for the crime of genocide to be established is the existence of the genocidal intent – the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. In this Chapter, the Respondent will show that the Applicant failed to prove that the crimes which were committed against Croats were committed with that necessary intent.

1. The Crimes Were Not Committed with the Genocidal Intent

A. *No Direct Evidence of the Alleged Genocidal Intent*

933. The Applicant has failed to submit any direct evidence of the alleged intent to commit genocide against Croats. In the first place, the Applicant has not offered any evidence whatsoever of the existence of the alleged genocidal plan on the part of the authorities of the Respondent or of the authorities of the Republika Srpska Krajina (RSK), for whose actions the Applicant claims the Respondent is responsible.

934. The Applicant has, equally, failed to identify any statement of any person that could engage the responsibility of the Respondent in which even a remote indication of the genocidal intent can be found. For example, in para. 8.04 of its Memorial, when summarizing the evidence of the alleged genocide, the Applicant referred to several previously quoted statements of Serbian politicians (Slobodan Milošević, Mihajlo Marković, Borislav Jović) or other persons (Jovan Ilić, Đoko Jovanić).

935. In the beginning, it should be noted that neither Mr. Jovan Ilić, the former president of the Serbian Geographic Society, nor the (already at that time) retired general Đoko Jovanić

could, in any way, engage the responsibility of the Respondent. But even if they could, what they said does not even remotely point out to the existence of the genocidal intent.[800]

936. The same applies to the other three statements referred to in para. 8.04 of the Memorial. Thus, in his speeches of March and April 1991, quoted in more detail in para. 2.98 of the Memorial, Slobodan Milošević simply spoke of the defense of the interests of the Serbian people in the SFRY and no reference whatsoever was made to the destruction of other peoples in Yugoslavia, in particular of the Croatian people. The interest of the Serbian people, according to Milošević, was to "resist any act of dismantling our homeland", this homeland being the SFRY and not some "Greater Serbia" as the Applicant claims.[801]

937. The statement of Mr. Mihajlo Marković, referred to more extensively in para. 2.79 of the Memorial, indeed spoke of the new borders in the SFRY, but it contains absolutely nothing that could suggest the existence of the intent to destroy the Croatian people.[802] The same goes for the entry from Mr. Jović's memoirs, referred to in para. 3.36 of the Memorial, which actually speaks about the changes in the JNA which occurred as the result of the escalation of the conflict in the SFRY.[803]

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[800] According to the quotation given by the Applicant in para. 2.103 of the Memorial, Mr. Jovan Ilić said the following:
"… I feel that it would be a just solution if a large part of Eastern Slavonia were to be united with Serbia and that the Serbs from the [crisis] areas and Western Slavonia, who want to be citizens of the Third Yugoslavia, move into that area. Vinkovci, Vukovar and Osijek, as important towns would be included in that part of Slavonia so that the urban Serbs from Zagreb, Rijeka and other Croatian towns would have a place to move to…"
And also:
"…the part of Eastern Slavonia which remains a part of the Third Yugoslavia has to be considerably larger and to include the municipalities of Slavonski Brod, Đakovo, Donji Miholjac, Valpovo, Našice and everything else that lies east of that line. The Serbs from Western Slavonia, Croatian towns and the Diaspora would move into that area, everyone who wants to, except the Serbs in the SAO Krajina, which remains a part of the Serbian nation."
Retired General Djoko Jovanić, according to the Applicant (see para. 3.39 of the Memorial), "called upon those present [at the celebration of the 50th anniversary of the 1941 insurrection in Croatia] to re-unite the JNA's 6th Unit from Lika Division with the aim to 'finally bring to an end the started work – the liberation from the vampire Ustashas'."

[801] According to the quotation given by the Applicant in para. 2.98 of the Memorial, in March 1991 Milošević said the following:
"I have asked the Serbian government to carry out all preparations for the formation of additional forces whose volume and strength would guarantee the protection of the interests of Serbia and the Serbian people … The citizens of Serbia can be sure that the Republic of Serbia is capable of ensuring the protection of its own interests and those of all its citizens and the entire Serbian people. The Republic of Serbia, the citizens of Serbia and the Serbian people will resist any act of dismantling our homeland."
In April, also according to the Applicant, Milošević "told the Serbian Assembly that the reserve police were being mobilised to: 'enable us in every case to be secure, and to be able to defend the interests of our Republic and, by God, the interests of the Serbian people outside Serbia'."

[802] According to the Applicant's quotation (see para. 2.79 of the Memorial), Mr. Marković said the following:
"Those nations, who want to leave, will do so, and those who prefer to stay, will stay in Yugoslavia. Yugoslavia must determine its new borders… That new border must follow the line of the border determination between the Serbian and the Croatian people. The JNA must take control of the new border."

[803] The Applicant's quotation (see para. 3.36 of the Memorial) of Mr. Jović's memoirs reads:

938. Having in mind that these statements were referred to in the Chapter that summarizes the claims of the alleged genocide against Croats, the only conclusion is that they are the strongest evidence the Applicant could come up with in order to prove the alleged genocidal intent. But, not only do they fail to do so – they fail to prove even the existence of a "simple" criminal intent.

B. *No Evidence of a Pattern of Events Amounting to Genocide*

939. Having failed to prove the existence of a plan to commit genocide or offer any other direct evidence of the alleged genocidal intent, the Applicant proposed that the Court infer specific intent from the "pattern of behaviour involving the prohibited acts and targeted at a protected group".[804]

940. In Chapter II, the Respondent demonstrated that the practice of both the ICTY and the Court require that the genocidal intent be convincingly shown, and the Court's conclusion to that end from the *Bosnia* case is worth repeating here:

> "Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent".[805]

"We really have no alternative but to intensively expel the Croats and Slovenes from the military, pull the military back to the territory that we will definitely defend, and furiously purge it of HDZ forces. Anything else is a rambling approach and a waste of time. Little by little, but slowly, this is in fact taking place."

[804] Memorial, p. 339, para. 7.33.

[805] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 373.

941. The contention that a pattern of crimes, or a plurality of common crimes, can constitute genocide is in this particular case further refuted by the practice of the ICTY. Namely, the ICTY Prosecutor has, in the last 15 years, charged a number of former highest officials of both Serbia and the RSK for crimes committed in Croatia. Among the accused are:

- Milan Martić, former President of the RSK and former Minister of Interior and Minister of Defence of the same entity, charged with crimes against humanity and violations of the laws and customs of war with respect to the whole of the RSK, except Eastern and Western Slavonia;
- Milan Babić, former President, Prime Minister and Minister of Foreign Affairs of the RSK and the President of the Knin Municipal Assembly, charged with crimes against humanity and violations of the laws and customs of war with respect to the same territory as Milan Martić;
- Goran Hadžić, another former President of the RSK, but also former President of the Serbian Autonomous Region of Slavonia, Baranja and Western Sirmium (SAO SBWS), charged with crimes against humanity and violations of the laws and customs of war with respect to the whole territory of Eastern Slavonia;
- Jovica Stanišić, former Head of the State Security Service of Serbia (DB), and Franko Simatović, former high official of the same Service and alleged commander of that Service's Special Operations Unit, charged with crimes against humanity and violations of the laws and customs of war with respect to certain crimes on the territory of the whole RSK.

942. Most importantly, the list of indictees includes Slobodan Milošević, former President of Serbia and the alleged "key individual responsible for war crimes and genocide",[806] who was charged with crimes against humanity, grave breaches of the Geneva conventions and violations of the laws and customs of war with respect to the whole of the territory of the RSK in Croatia.

[806] Memorial, p. 3, para. 1.07.

943. It is evident that the charges against the above mentioned accused relate to wider regions of Croatia and, in the case of Milošević, cover all of Croatia's territory and all the crimes alleged to have been committed there. Therefore, these cases do not involve individual perpetrators accused of individual crimes but, on the contrary, the highest officials and leaders of Serbia and the RSK – the people whom one would have expected to have had the genocidal intent if such an intent had existed.

944. In the *Bosnia* case, the Court found that the decision of the ICTY Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide may be significant to the Court when evaluating the case-law of the ICTY and accepting its findings.[807] And in the case of Croatia, it should be noted that, despite the high level of the people who have been indicted, the ICTY Prosecutor did not charge anyone for genocide.

945. The cases completed before the ICTY in connection to Croatia further show that, although the crimes were established to have been committed, their gravity and legal qualification was usually milder than originally charged by the Prosecutor. Thus, Milan Martić, former President, Minister of Interior and Minister of Defence of the RSK, who was charged with all the crimes that were committed in the regions of Banovina, Kordun, Lika and Dalmatia (excluding Dubrovnik), was found guilty in the first instance for the murder of 189 people and sentenced to 35 years imprisonment.[808] This sentence was, to the most part, confirmed by the Appeals Chamber.[809]

946. The Trial Chamber found that Martić "[w]as one of the most important and influential political figures in the SAO Krajina and the RSK Government and that as Minister of Interior he exercised absolute authority over the MUP",[810] while as the President of the RSK he "held the highest political office and controlled the armed forces of the RSK."[811] Still, Martić was not even charged with genocide and, furthermore, he was found not guilty of extermination, the crime which is, according to the International Law

[807] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 223.
[808] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007.
[809] *Ibid.*, IT-95-11-A, Appeals Chamber Judgment, 8 October 2008.
[810] *Ibid.*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 498.
[811] *Ibid.*

Commission, "closely related to the crime of genocide in that both crimes are directed against a large number of victims".[812] As a matter of fact, the Trial Chamber acquitted Martić of extermination precisely because it found that "[t]he element that the killings be committed on large scale has not been met."[813]

C. Some Specific Factors on Which the Applicant Wishes to Establish the Genocidal Intent Do Not Prove the Existence of Such Intent

947. In para.8.16 of the Memorial, the Applicant identified 16 specific factors which, according to the Applicant, "may be sufficient to demonstrate genocidal intent". The Respondent will now analyze each of those 16 factors and show that none of these factors proves the existence of the alleged genocidal intent, whether they are considered individually or collectively.

948. It is important to note, however, that these factors are listed in para.8.16 without any explanation of the individual factors in the main text of the Memorial. Some explanations are contained in the corresponding footnotes, but those footnotes mainly consist of a number of cross-references to other chapters of the Memorial. This manner of presentation of the most important evidence for the present case – the evidence which is supposed to prove the existence of the alleged genocidal intent – is not only rather unusual and quite unhelpful to the Court; it is also probably the result of the Applicant's deliberate intention to create a false picture of a large body of evidence on the existence of the alleged genocidal intent, while, in fact, none of the evidence presented proves the existence of such an intent. Furthermore, in many cases (as will be demonstrated below), the presented evidence is partially or completely misinterpreted by the Applicant.

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

949. The evidence to which the Applicant refers in support of these claims are general assertions concerning the Serbian Academy of Arts and Sciences (SANU) Memorandum and the proposals for redrawing the borders of the SFRY, presented in

[812] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 48.
[813] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 404.

Chapter 2 of the Memorial. The Respondent already addressed these claims in Chapter V[814] and showed that neither the SANU Memorandum, nor the proposals for border changes in the SFRY contained anything illegal, and that in any case they did not contain even an indication of the intent to destroy the Croats.

950. In para.8.16, however, the Applicant attempts to link the SANU Memorandum and the proposals for border changes with the events during the war in Croatia. The Applicant does this in a manner which is typical of the entire Memorial – by making a general overarching conclusion based on only two witness statements, both relating to the same village (Tovarnik) and both of an extremely suspicious reliability.[815] In this way the Applicant actually demonstrated the full weakness of its claims, especially those attempting to link the events of 1991 with the alleged "Serbian expansionism".

2. "The statements of public officials, including systematic incitement on the part of State-controlled media"

951. In the first place, it should be repeated that the Applicant failed to present any statement of any of the persons capable of engaging the Respondent's responsibility that would demonstrate the existence of the genocidal intent or could be qualified as incitement to genocide. The Respondent has analyzed above (in paras.934-937) a few public statements of Serbian officials to which the Applicant pointed out as examples of genocidal intent and showed that neither of those statements contained even a criminal intent, let alone a genocidal intent.

952. Aware of this, the Applicant turns to the media and persons who were outside of the state structures of the Respondent in order to try to find some justification for its claims. However, even there the Applicant manages to find only a few examples and none of them actually proves the existence of the genocidal intent. The Applicant, thus, refers to the so called "Hate Speech" in the Serbian media but, in spite of the lengthy analysis submitted in the appendices, fails to offer anything that would prove the genocidal intent.

[814] See *supra*, Chapter V, paras. 427-428.
[815] The statement of witness JV is particularly telling in this respect. Not only did she claim that a JNA reservist had told her that their task had been to "kill and destroy everything Croatian", she also claimed that the soldier had told her that this task had been given to them directly by Milošević (see para. 4.95 of the Memorial). The probability of this being the truth is such that the Respondent does not even feel the need to try to challenge it.

953. The Applicant also gives a lot of prominence to the speech of Mr. Milan Paroški from April 1991, when he said, while talking to Serbs in the village of Jagodnjak in Baranja, that anyone who claimed the land as theirs is a usurper whom they have the right to kill "like a dog".[816] At the outset, the Respondent wishes to point out that Mr. Paroški, although indeed a member of the Serbian Parliament in 1991, was an opposition politician who was never part of any of the government structures in Serbia and whose influence on the political decisions made in Serbia was marginal and reduced only to one vote that he had in the Parliament of 250 deputies. In any case, however, what he said in Jagodnjak was far from an incitement to genocide.

954. One statement to which the Applicant refers to in the "Hate Speech" Appendix, as well as in the section of the Memorial dealing with the incitement to genocide,[817] is the alleged statement of a leader of the party called Serbian National Renewal (Srpska Narodna Obnova – SNO), who reportedly stated in an interview to an unknown newspaper: "I am for genocide against the Croats". However, the Applicant has never identified the person who had allegedly made this statement nor has it ever submitted the copy of the original interview. The only thing the Applicant did was to quote a book by a late Serbian journalist, Mr. Stojan Cerović, in which this statement was retold. However, the quotation offers no clue whatsoever as to how the author found out about the alleged statement of the SNO leader, nor does it offer any reference to the newspaper (or any other media) where the original interview was published.[818] For these reasons, the Applicant's claims in connection to this statement are completely unsupported, but even if they had some basis in the truth, a statement of a leader of a nationalistic opposition party, which had no members in the Parliament and no influence on the political decision-making process in Serbia, is not capable of engaging the responsibility of the Respondent in any way.

3. "The fact that the pattern of attacks on the Croat civilian population far exceeded any legitimate military objectives necessary to secure control of the regions concerned"

955. The Applicant refers here to the battle for Vukovar, which is dealt with in more detail in Chapter 4 of the Memorial. The Respondent already addressed the events concerning Vukovar in Chapter VII and showed that the facts were much different than how the

[816] See Memorial, para. 2.56.
[817] See para. 50 of the "Hate Speech" Appendix, Appendices, Vol. 5, and para. 8.24 of the Memorial.
[818] See Appendices, Vol. 4, annex no. 28, where Mr. Cerović's book was quoted.

Applicant seeks to portray them. The battle for Vukovar was, thus, a battle between two opposing military forces, one trying to capture a town and the other one trying to defend it, even when it became obvious that the defense was not possible. In this context, while the use of force by the attacking forces may have exceeded the needs of a normal military operation, and while it has certainly caused grave suffering to the civilian population of Vukovar, regardless of that population's ethnicity,[819] there is nothing to suggest that the attack on Vukovar was carried out with the intent to destroy the Croats of Vukovar as such. This was, in a way, confirmed by the practice of the ICTY, whose Prosecutor has indicted a number of people for the crimes committed in Vukovar, but none of them for genocide.

4. "Contemporaneous videotaped evidence of the genocidal intent of those carrying out the attacks"

956. The Applicant here refers again to the battle for Vukovar and to one statement of the paramilitary leader Željko Ražnjatović Arkan. In this case, the Applicant again draws general conclusions based on one single statement of one leader of a paramilitary unit. But even this statement, quoted in para. 3.57 of the Memorial, concerns the armed conflict between Serbian and Croatian forces, while the "Ustashas", referred to by Arkan, are Croatian fighters who had barricaded themselves on first floors of the buildings. The statement, accordingly, does not prove the existence of the genocidal intent.

5. "The close co-operation between the JNA and the Serbian paramilitary groups responsible for some of the worst atrocities, implying close planning and logistical support"

957. The question of the relationship between the JNA, the TO of the RSK and the paramilitary units was addressed in Chapter VI of this Counter-Memorial and will be further addressed in the next Chapter, together with the relevant law on the subject. Here it suffices to say that, whatever that relationship may have been, it cannot, in any way, be considered as a proof of genocidal intent.

[819] The Applicant constantly fails to mention that Serbs were present in Vukovar during the siege of the town as well and that they suffered both from the JNA artillery attacks and from the Croatian forces that ruled the town.

6. "The systematic nature and the sheer scale of the attacks on Croatian civilians"

958. The systematic manner and the large scale of crimes is an element of crimes against humanity.[820] It is not, however, an element of the crime of genocide, where the existence of the specific intent to destroy the group in whole or in part has to be convincingly shown.[821] In the particular case, even if it is established that the crimes committed against Croats were systematic and/or committed on the large scale, these two elements cannot substitute the necessary requirement that the crimes be committed with the genocidal intent – the element which the Applicant failed to prove.

959. In fact, the Applicant's request that the Court infer the genocidal intent from the alleged systematic nature and the scale of the crimes is nothing but a repetition of the claims on the existence of a pattern of criminal conduct that would amount to genocide on the basis of accumulation of "simple crimes". The erroneousness of this approach was explained above, in paras.939-946.

7. "The fact that ethnic Croats were consistently singled out for attack whilst local Serbs were excluded"

960. Again, the fact that most of the crimes committed were indeed directed against ethnic Croats and not against Serbs is not enough to prove the existence of the genocidal intent. In the circumstances of a civil war between two ethnic groups, victims of the most of the crimes committed by Serbs were ethnic Croats, as members of the opposing faction in the civil war, just as most of the victims of the crimes committed by Croats were ethnic Serbs. While this, of course, does not justify any of the crimes, and in particular those crimes committed against civilian population, it still does not prove that the genocidal intent existed. At the most, this can prove that the crimes were committed with the discriminatory intent, which is not enough for the crime of genocide to be established.

961. To this effect, the Court concluded in the *Bosnia* case:

> "In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or

[820] See e.g. Commentary on Article 17 of the Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996,* Vol. II, Part Two, p. 47, paras. 3–4.
[821] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 373.

> in part, … [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the "specific intent *(dolus specialis)*". It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group."[822]

8. "The fact that during the occupation, ethnic Croats were required to identify themselves and their property as such by wearing white ribbons tied around their arms and by affixing white cloths to their home"

962. In the first place, it should be noted that the Applicant's claims with respect to this element of the alleged genocidal intent are based on the witness statements of a highly suspicious reliability.[823] But even if those witness statements were admissible and reliable (*quod non*), they would only prove that the alleged practice of identification of Croats and their property was effected in three villages, and not as a general rule throughout the whole territory of the RSK. In any case, however, if Croats were indeed required to identify themselves and their property in the manner suggested by the Applicant, this would still only prove the existence of a discriminatory intent (and this only if some crimes were indeed committed against the people who wore the ribbons), but not the existence of a genocidal intent.

9. "The number of Croats killed and missing as a proportion of the local population"

963. The Applicant here repeats the claim from the beginning of the Memorial that 10,572 persons were killed and 1,419 are still missing. The Applicant, however, does not offer any proof that would confirm the alleged number of people killed, while the only evidence on the number of the missing comes from the Applicant's own government.[824]

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[822] *Ibid.*, para. 187.
[823] See *supra* Chapter III, paras.153–158.
[824] See Memorial, p. 4, para. 1.09.

964. According to the judgments and the indictments of the ICTY, the number of people killed in crimes committed by Serbs during the war in Croatia is significantly smaller than claimed by the Applicant. For example, Slobodan Milošević, who was charged with all the crimes alleged to have been committed in the territory of the Republic of Croatia, was charged with the murder of 716 people,[825] which is more than 14 times less than the number of killings alleged by the Applicant.

965. Even the evidence submitted by the Applicant in the form of witness statements does not support its claims on the number of people killed. In this respect, some evidence (regardless of its reliability) was presented only in connection to between 2,500 and 3,000 people killed and about 400 missing.[826]

966. In legal terms, the number of people killed as a proportion to local population could indeed be an element on which the genocidal intent could be inferred.[827] But then, the facts of this case, even as presented by the Applicant, actually point out to the non-existence of the genocidal intent.

967. Thus, with respect to the very first village mentioned in Chapter 4 of the Memorial, the village of Tenja, the Applicant offered some evidence for the killing of 37 people. On the other hand, the statistics provided by the Applicant and referred to in para.4.20 of the Memorial, show that 2,813 Croats lived in Tenja before the war. It follows thus that the number of people killed (even if the Applicant's claims are accepted as true) stands for 1.31% of the Croatian population of Tenja.[828]

968. With respect to the whole of Eastern Slavonia, the region in Croatia where, according to the Applicant, most of the crimes were committed, some evidence was offered in

[825] In the Milošević Indictment, the number of deaths is not given as a single figure, but it can be calculated by adding individual figures related to specific incidents. In this way, one comes to the figure of "at least" 716 people for whose murder Milošević was charged. "At least" in this context means that the number of victims could be higher, but that the Prosecutor only had sufficient proof for 716 victims. See ICTY, *Milošević*, IT-02-54, Initial Indictment "Croatia", 27 September 2001.
[826] These numbers cannot be calculated precisely, since the witness statements (and the corresponding claims of the Applicant) often overlap and sometimes do not give even an approximate number, while the Applicant never made an effort to state precisely how many people were allegedly killed in particular towns or villages.
[827] See e.g. ICTR, *Kayishema and Ruzindana*, ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 93.
[828] It should not be forgotten, however, that the ICTY has never indicted anyone for the crimes allegedly committed in Tenja, while the Applicant claims on the crimes allegedly committed in Tenja are based on highly unreliable evidence. For more details see Chapter VII, paras. 659–664.

connection to approximately 1,700 people killed.[829] On the other hand, the statistical data presented by the Applicant[830] (based on the 1991 census) shows that 420,359 Croats lived in Eastern Slavonia before the conflict. Thus, even if one accepts that all 1,700 people were killed as the Applicant suggests (*quod non*), and that they were all Croats (which was not the case even according to the Applicant), this would still amount to no more than 0.4% of the Croatian population of Eastern Slavonia.

969. While every loss of life requires regret and every crime requires punishment, the above percentage could hardly qualify as a proof of the alleged genocidal intent. On the contrary, it could only be a clear proof of the absence of such intent, since it shows that the number of people killed (even according to the Applicant) was relatively small as a proportion to the whole population, despite the fact that the opportunity to kill much more people undoubtedly existed.

10. "The nature and extent of the injuries inflicted, including injuries with recognisably ethnic characteristics"

970. The Applicant here refers to a couple of crimes which, if they had been committed as the Applicant claims they were, would qualify as some of the most monstrous crimes in the conflicts in the former Yugoslavia (even though they would, by themselves, still not be able to prove the existence of the genocidal intent). However, the evidence which the Applicant offered in support of its claims is completely insufficient to prove the crimes.

971. The Applicant, thus, refers to the alleged mutilation of a Croat in the village of Voćin, elaborated in more details in para.5.33 of the Memorial. However, the only evidence which the Applicant offered in support of its claim concerning the monstrous crime is a book by an American physician of Croatian origin, Dr. Jerry Blaskovich. However, if one reads Dr. Blaskovich's book, one may see that he was not present in Voćin when this crime allegedly took place and that the only evidence he offered in respect of the claims about the mutilation were unidentified witness statements.[831] But if there were

[829] Once again it is difficult to establish the exact number of victims mentioned in the witness statements that the Applicant submitted as evidence, since the statements often overlap or give only approximate numbers.
[830] Memorial, Annexes, Regional Files, Vol. 2, Part 1, p. 3.
[831] See Dr. Jerry Blaskovich, *Anatomy of Deceit*, pp. 37-41, available at www.jblaskovich.com/PDF/AnatomyofDeceit.pdf

witnesses to this alleged atrocity, why has the Applicant not submitted any statement of any of those witnesses, especially having in mind that all the other evidence which the Applicant has submitted in connection to its claims on Voćin are witness statements?[832] Or why was this alleged mutilation never discussed before the ICTY, where charges for crimes committed in Voćin were brought against Slobodan Milošević and Vojislav Šešelj? In fact, this was the only reference the Applicant made to the book of Dr. Blaskovich, conveniently entitled *Anatomy of Deceit*.

972. Equally misleading is the claim that a pregnant woman was mutilated post mortem in Vukovar, referred to in somewhat more details in para.4.166 of the Memorial. The claim concerning this horrific crime comes from a witness LjD, but her statement, notably shorter than most of the other witness statements submitted by the Applicant[833], does not offer any credible information about the alleged crime. In fact, from the statement of LjD it is impossible to conclude either where or when the alleged crime took place, or whether the witness saw the crime or heard about it from her son in law or from some other person. Nobody else ever claimed that a crime like this had taken place, nor was anything of the kind mentioned before the ICTY, where a number of people were tried for crimes committed in Vukovar. Consequently, the inclusion of this witness statement in the Memorial is a good example of both the unreliability of the evidence submitted by the Applicant, and of the Applicant's completely uncritical approach to evidence, which serves no purpose to the Court.[834]

973. Also unsupported are claims on Croats being crucified in Vukovar. In support of these claims the Applicant offers only two statements and both of them relate to the murder of the same person, called "Cigo".[835] However, the first statement, that of a certain MD, was not even submitted by the Applicant (although it was referred to first in para.4.157 and then referred back in para.8.16)[836], while the other statement, that of the victim's

[832] See Memorial, paras. 5.28–5.35.
[833] See Memorial, Annexes, Regional Files, Vol. 2, Part 1, annex no. 143.
[834] Interestingly, in the Hate Speech Apendix (at para. 55), the Applicant devotes a lot of attention to the case of a Serbian photographer who fabricated a story on the slaughter of 41 Serbian children in Borovo Naselje near Vukovar, giving this as an example of incitement to hatred against Croats. On the other hand, the Applicant uses similar fabricated stories in the Memorial with no other purpose than to shock the Court.
[835] See Memorial, para. 4.157.
[836] The Applicant did submit a statement of witness AD, who did mention the killing of a person called "Cigo", but it is completely unclear from the statement whether the witness saw the alleged killing or only heard about it. See Memorial, Annexes, Regional Files, Vol. 2, Part 1, annex no. 132.

wife FJ, contains no direct evidence of the event.[837] Once again, the evidence presented by the Applicant is not only unreliable, but it was also used in a both uncritical and misleading manner. Furthermore, it is completely unclear why would a crucifixion, even if it happened, be an "injury with ethnic characteristics", since Serbs and Croats are both Christians, albeit of different denominations (Serbs being Orthodox and Croats Catholic).

11. "The use of ethnically derogatory language in the course of acts of killing, torture and rape"

974. The Respondent has already pointed out to the unreliability of the evidence submitted by the Applicant and the evidence offered in support of the claims on the use of ethnically derogatory language is not an exception. However, the Respondent is ready to accept that some crimes that were committed against ethnic Croats were indeed accompanied by the use of such language. Nevertheless, these isolated incidents can, at the most, be a proof of the existence of a discriminatory intent (and that only on the part of the individual perpetrators), but they cannot prove the existence of a genocidal intent to destroy the Croatian population. The difference between the discriminatory intent and the genocidal intent has already been addressed above, in paras. 960–961.

12. "The forced displacement of the Croat population and the means adopted to that end"

975. The Respondent does not contest that a large part of the Croatian population was displaced from the areas which formed part of the RSK. However, forcible transfer as such is not an *actus reus* of genocide, as the Court noted in the *Bosnia* case (when making the distinction between genocide and "ethnic cleansing"):

> "It will be convenient at this point to consider what legal significance the expression ['ethnic cleansing'] may have. It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the

[837] See Memorial, Annexes, Regional Files, Vol. 2, Part 1, annex no. 129.

> Convention to include in the definition 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."[838]

976. The "ethnic cleansing" may, however, constitute genocide, but only if it can be characterized as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (Art. II*(c)* of the Convention), and only if such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region.[839]

977. In the present case, the Applicant has failed to prove: a) that the displacement of Croats from the territories under the control of Serbian forces can be characterized as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"; b) that the forcible displacement (or any other crime, for that matter) was carried out with the intent to destroy the Croatian population. Therefore, in the case of forcible transfer of Croats neither the physical nor the mental element of the crime of genocide have been met. Consequently, forcible transfer can neither be genocide by itself nor can it serve as inferential evidence on the existence of the genocidal intent which the Applicant failed to prove otherwise.

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[838] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 190.
[839] *Ibid.*

13. "The systematic looting and destruction of Croatian cultural and religious monuments"

978. The Respondent does not contest that some of the Croatian cultural and religious monuments were looted, damaged and, in some cases, destroyed during the war. However, unlike forcible transfer of the population, which can, under certain circumstances, be considered as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", destruction of historical, cultural or religious property can never be considered as one of the genocidal acts within the meaning of the Genocide Convention.[840] In light of that, destruction of historical, cultural or religious property can even less serve as inferential evidence on the existence of the genocidal intent when no other convincing evidence on the existence of such intent has been offered.

14. "The suppression of Croatian culture and religious practices among the remaining population"

979. The evidence to which the Applicant refers in support of its claims on the "suppression of Croatian culture" is a very illustrative example of the Applicant's malicious and misleading use of the evidence, where general and erroneous conclusions are drawn based on single, often tendentiously interpreted witness statement. Actually, none of the witnesses to which the Applicant referred to in the footnote 68 on page 385 of the Memorial confirmed the Applicant's allegations, and the differences between what was said by some witnesses and what the Applicant seeks to draw out of it are so striking that they cannot be interpreted as anything else but example of *mala fides* on the part of the Applicant.[841]

980. In any case, the Applicant failed to prove the existence of a policy of suppression of the Croatian language and culture, but even if the allegations were true (*quod non*), that would still not be a proof on the existence of the genocidal intent, nor could the alleged practices qualify as any of the acts falling under Article II of the Genocide Convention.

[840] See *ibid.*, para. 344.

[841] For example, the Applicant referred to the witness statement of ML, as a proof of "the forced use of Cyrillic in Tompojevci". In fact, Ms. ML's statement contains no such allegation, even if it is accepted as fully accurate. What she actually said was that during an interrogation by the local Serb leader, that person shouted at her telling her that "Latin letters won't be written in this village anymore". Neither Ms. ML nor any other witness provided evidence that this was actually put into practice and it is obvious that the witness statement does not prove, as the Applicant alleges, that the use of Cyrillic was forced in Tompojevci.

981. Additionally, it is important to note that the Applicant puts a lot of negative emphasis on the use of Cyrillic script in the areas which formed part of the RSK, but offers no real evidence that the use of Latin script was indeed forbidden in those areas. On the other hand, one of the constitutional changes that the Croatian government adopted in the new Constitution of December 1990 was exactly the abolishment of the constitutional guarantee on the use of the Serbian language and the Cyrillic script.[842]

16. "The consequent, permanent and evidently intended demographic changes in the regions concerned"

982. This is essentially a repetition of the claims on the forcible displacement of the Croatian population. These claims were addressed above, in paras. 975-977.

17. "The failure to punish genocidal acts"

983. The Applicant's claims on the alleged failure to punish genocidal acts are addressed below (in Chapter IX).

D. Conclusion

984. On the basis of the arguments set above, it can be concluded that:

a) The Applicant has, in the first place, failed to offer credible proof that many of the alleged crimes were committed or that they were committed in the way it was claimed by the Applicant;
b) More importantly, the Applicant has failed to prove that the crimes that were committed in Croatia were committed with the intent to destroy the Croats, either in whole or in part;
c) The Applicant has offered no proof on the existence of the plan to commit genocide against Croats, nor has it offered any other credible proof on the existence of the genocidal intent on the part of either the authorities of the Respondent or on the part of the authorities of the RSK, for whose actions the Applicant claims the Respondent is responsible;

[842] See *supra*, Chapter V, para. 463.

d) The Applicant's claims on the existence of the pattern of acts that would prove the existence of the genocidal intent are equally erroneous and are legally not supported by the practice of either the Court or the ICTY;

e) Some specific allegations from which the Applicant seeks to infer the genocidal intent are not sufficient, either taken individually or collectively, to establish the existence of such intent;

f) The only possible conclusion is that the crime of genocide was not committed against the Croats by either the Respondent or by the Serbs from Croatia.

2. The Crimes of Conspiracy, Incitement, Attempt and Complicity were not Committed either

985. In the previous paragraphs of this Chapter, the Respondent demonstrated that the crime of genocide was not committed against Croats. In the following paragraphs, the Respondent will show that the other offences, prohibited by Article III of the Genocide Convention, were not committed either.

A. *Conspiracy*

986. In Chapter II of this Counter-Memorial, the Respondent analyzed the findings of the Court concerning conspiracy, as well as other relevant case law on the subject.[843] Accordingly, the crime of conspiracy to commit genocide, which is usually defined as "an agreement between two or more persons to commit the crime of genocide",[844] can, in the view of the Court, be committed either simultaneously with genocide, or independently, if genocide was not committed, but, in terms of state responsibility, becomes relevant only in the latter case, since it is otherwise absorbed by the crime of genocide itself.[845]

[843] See Chapter II, paras. 92–95.
[844] ICTR, *Musema*, ICTR-96-13-A, Judgment and Sentence, 27 January 2000, para. 191.
[845] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List. No. 91, para. 380.

987. In its Memorial, the Applicant claims that the act of genocide itself has been committed[846] and offers no particular proof on the existence of the preceding conspiracy to commit that alleged genocide. The evidence that the Applicant offers in support of its claims on conspiracy is, actually, nothing but a repetition of previously stated arguments with which the Applicant seeks to prove the existence of the genocidal intent. The Applicant therefore claims that:

> "The systematic and co-ordinated nature of these crimes was achieved – and could only have been achieved – through the adoption of a policy on the part of the FRY and Serbian leadership, the JNA and paramilitary commanders of committing, or deliberately authorizing and facilitating the commission of, the crimes concerned."[847]

988. The Applicant, however, offers no evidence whatsoever that the alleged policy was adopted, but what it actually does is simply repeat the contention that the genocidal intent should be inferred from a certain pattern of behavior, without offering any convincing evidence on the existence of such intent. The erroneousness of this contention was already explained earlier in this Chapter.

989. The Applicant also refers to the alleged failure of the FRY to punish the individuals allegedly responsible for genocidal acts, the public speeches of some Serbian opposition politicians and "the honours bestowed upon the members of the JNA involved in the acts"[848]. In para. 22 of this Chapter, the Respondent already addressed the speech of Mr. Paroški and showed that neither could his speech be qualified as an incitement to genocide nor is Mr. Paroški capable of engaging the responsibility of the Respondent in any way. The same applies for the speech of Mr. Šešelj, which is addressed in more details in Chapter V of this Counter-Memorial.[849] The allegations concerning the alleged honors for the members of the JNA involved in the alleged genocidal acts are addressed in Chapter IX,[850] while the claims on the failure to punish are addressed further in Chapter IX, paras. 1051–1057. None of these claims, however, is even theoretically

[846] See Memorial, para. 8.20.
[847] *Ibid.*
[848] *Ibid.*
[849] See Chapter VI, paras. 642–645.
[850] See Chapter IX, paras. 1035–1037.

capable of proving conspiracy to commit genocide, since they contain absolutely nothing that could prove the existence of an agreement between two or more persons to commit the crime of genocide against Croats.

990. It follows, thus, that the Applicant has failed to offer any evidence on the existence of a plan or of any type of agreement, between any of the persons capable of engaging the responsibility of the Respondent, that would even remotely resemble the conspiracy to commit genocide. In as much as the claims presented by the Applicant on the existence of conspiracy actually relate to the alleged genocide itself, they have already been addressed in various sections of this Counter-Memorial.

B. *Incitement*

991. What is apparent from the section in which the Applicant attempts to address the alleged incitement to genocide is that it contains absolutely no reference to any speech or a similar public statement of any of the officials of either the Respondent or the SFRY or the JNA or even the RSK. Instead, the Applicant refers to the "hate speech" in the Serbian media and quotes again the speech of Mr. Paroški from April 1991. This speech, which was given by a marginal politician who was never part of any of the government structures in Serbia, is, in turn, used by the Applicant as a "proof" for the crime of genocide itself, conspiracy to commit genocide and incitement to genocide.[851] This is the best illustration of how weak the Applicant's case actually is.

992. The other examples from the Hate speech Appendix equally offer nothing that would prove the incitement to commit genocide, while one example that could, on a *prima facie* basis, look as if it contains an incitement to commit genocide, was actually not proved by the Applicant. This particular statement of a leader of an extreme-right opposition party allegedly saying in an interview that he was for genocide against the Croats was addressed above in para. 954. The Respondent showed that the Applicant did not prove in a reliable manner that the alleged statement was indeed given and that, in any case, the person who had allegedly given that statement could not engage the responsibility of the Respondent.

[851] See Memorial, paras. 8.16, 8.20 & 8.24.

993. Finally, the Applicant referred to an order which was given by a paramilitary leader Željko Ražnjatović Arkan during the battle of Vukovar, and which was also captured on video. This order was addressed above in para. 956, where it was demonstrated that it contained nothing that would prove the genocidal intent, even if Arkan's action could be attributed to the Respondent (*quod non*). At this point, it should also be noted that this statement could not even legally qualify as incitement to genocide, since the statement was not public in terms of the Genocide Convention and the subsequent interpretation of the word "public".[852]

C. *Attempt*

994. The Applicant devotes only one paragraph of its Memorial to the allegation that attempt to commit genocide was also committed by the Respondent. This is, of course, for the reason that the Applicant claims that genocide itself was committed, in which case the claims on the attempted genocide would be unnecessary and, as the Court put it in the *Bosnia* case, "untenable both logically and legally".[853] Still, the Applicant does not follow this logic to the end, since it claims that in some parts of Croatia, such as Dubrovnik, "genocide was attempted but not completed".[854] This claim of the Applicant, however, is quite illogical from the legal point of view and in complete disagreement with other parts of the Memorial, since it implies that not one genocide was committed or attempted against Croats, but that there was a series of "mini-genocides" in various parts of Croatia, some of which were completed and some only attempted.

995. Nevertheless, whatever is the position of the Applicant on this issue, it is ultimately of no significance for the outcome of the case. In Chapter II,[855] the Respondent analyzed the existing law on the attempted genocide and showed that attempt to commit genocide requires the same intent as genocide itself – the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The Applicant has failed to prove that any of the crimes against Croats was committed or attempted with such intent and has, thus, failed to prove that either genocide or attempted genocide were committed.

[852] See Chapter II, para. 99.
[853] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 380.
[854] See Memorial, para. 8.27.
[855] See Chapter II, paras. 102–104.

D. *Complicity*

996. The Applicant claims that the Respondent is also responsible for complicity in genocide, although it does not elaborate the subject in much detail, since it essentially claims that the Respondent itself committed genocide.

997. In light of the Court's decision in the *Bosnia* case,[856] the question of the Respondent's responsibility for complicity in genocide could arise if the Court finds that genocide against Croats was indeed committed, but that it was committed by (for example) the RSK and not by the Respondent and that the actions of the RSK could not be attributed to the Respondent. While the Respondent fully agrees that the second condition has been met, namely that the actions of the RSK cannot be attributed to the Respondent,[857] the first and the more important condition has not – genocide was not committed against Croats and, as a result, the question of the Respondent's responsibility for complicity cannot arise even theoretically.

998. In addition, the Court's reasoning from the *Bosnia* case would require a third condition to be met in order for the Respondent to be held responsible for complicity in genocide – the Respondent would have to be aware of the genocidal intent of the principal perpetrator,[858] in this case the RSK. The Applicant has, however, failed to offer any proof that the Respondent was aware of the existence of the genocidal intent on the part of the RSK authorities, which, admittedly, would in any case be impossible to prove since the Applicant failed to offer any proof on the existence of the genocidal intent in the first place.

E. Conclusion

999. For the reasons set above, it can be concluded that:

a) The Applicant has failed to prove the existence of a plan or of any type of agreement, between any of the persons capable of engaging the responsibility of the Respondent, that could qualify as conspiracy to commit genocide;

[856] For more detailed legal analysis of the subject see Chapter II, paras. 105–114.
[857] The question of attribution is addressed in Chapter IX of this Counter-Memorial.
[858] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List. No. 91, para. 421.

b) The Applicant has failed to prove that any of the persons capable of engaging theresponsibility of the Respondent incited the commission of genocide;

c) The Applicant has failed to prove that the crime of attempt to commit genocide was committed since it has failed to prove that any crime against the Croats was committed or attempted with the genocidal intent;

d) The Applicant has failed to prove the Respondent's responsibility for complicity in genocide, since it has failed to prove that genocide was committed in the first place, or if genocide was committed (*quod non*), it has failed to prove that the Respondent was aware of the genocidal intent of the principal perpetrator.

CHAPTER IX

THE QUESTION OF ATTRIBUTION

1. The Applicable Law

1000. The responsibility of the Respondent for the breaches of the Genocide Convention alleged by the Applicant depends on whether such acts, to the extent they are proved and to the extent the Genocide Convention is applicable as a matter of treaty law, can be attributed to the Respondent under the rules of customary international law of State responsibility. As the Court stated in the *Bosnia* case,

> "First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide."[859]

1001. On this basis, the Court proceeded to consider issues of attribution in the *Bosnia* case and in that context applied Article 4, as well as Article 8, of the ILC Articles on State Responsibility.[860] According to these provisions, conduct is attributable to a State if (a) it is the conduct of any State organ (Article 4), or (b) it is the conduct of the person or group of persons acting on the instructions of, or under the direction or control of, the State in question (Article 8). The Court confirmed that these two rules reflect customary international law.[861]

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[859] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 379.
[860] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, paras. 385 & 398.
[861] *Ibid.*

1002. The Applicant and Respondent are in agreement that these two rules are relevant and may be applied in the present case.[862] This is also the case with the principle contained in Article 11 of the ILC Articles on State Responsibility which provides that the conduct, which is otherwise not attributable to the State, if acknowledged and adopted by the State as its own shall be considered an act of that State.[863]

1003. However, the Respondent does not agree with the Applicant's erroneous claim that Article 10, paragraph 2, of the ILC Articles on State Responsibility is also applicable in the present case.[864] According to this provision, the conduct of an insurrectional or other movement which subsequently succeeds in establishing a new State shall be considered an act of that new State under international law. As already discussed, the principle contained in Article 10, paragraph 2, does not reflect a rule of customary international law and, as such, it cannot be applied in the present case. It has also been demonstrated that the said provision is not applicable considering its own terms and the circumstances of the present case. Consequently, Article 10, paragraph 2, of the ILC Articles on State Responsibility is not applicable in the present case.[865]

2. The Principles of Attribution Applied in the Present Case

A. *General Remarks*

1004. Starting from the legally and factually erroneous assumption that the FRY could be held responsible for all acts of the SFRY organs since mid-1991, the Applicant claims that "the FRY is accordingly responsible for the conduct of its organs and officials as regards any breaches of the Convention committed by them, or by persons under their direction or control, at any time after May 1991. Evidently this covers the conduct of the Serbian political leadership, namely President Milošević and others."[866]

1005. As already demonstrated, this thesis is deeply flawed. It does not hold as a matter of fact and it does not hold as a matter of law. There is simply no legal or factual basis to link the FRY with the conduct of the SFRY authorities in the way the Applicant does. Moreover, since the FRY did not even exist before 27 April 1992, there is even less

[862] See Memorial, para. 8.33 (a)-(b).
[863] See Memorial, para. 8.33 (d).
[864] See Memorial, para. 8.33 (c).
[865] See *supra* Chapter IV, para. 365 (2).
[866] Memorial, para. 8.46.

basis to regard the SFRY organs as the FRY organs, as the Applicant misleadingly does ("the FRY is accordingly responsible for the conduct of *its organs and officials*... at any time *after May 1991*" (emphasis added)). The SFRY existed as a subject of international law in 1991 and in early 1992, and consequently the conduct of the SFRY organs must be attributed to the SFRY and not to the FRY. This conclusion is equally valid for the conduct of all SFRY organs, including those belonging to "the Serbian political leadership namely President Milošević and others." Only once the FRY was created on 27 April 1992 could it have its own organs and entail responsibility for the conduct of these organs (including those belonging to the Serbian political leadership).

1006. That the FRY cannot entail responsibility for the conduct of SFRY organs is a crucial consideration for questions of responsibility that arise in the present case. It necessitates making a clear distinction between the conduct of the SFRY organs and other acts that may be attributed to the SFRY, on the one hand, and the conduct of the FRY organs and other acts that are attributable to the FRY, on the other. This distinction must be applied to the facts in the present case and must lead to a dismissal of the Applicant's claims related to the possible responsibility of the SFRY, for which the Court does not have jurisdiction and which cannot be attributed to the FRY.

B. *Alleged Acts of State Organs*

1007. In accordance with the preceding discussion, the conduct of the State organs alleged by the Applicant in the present case must be divided into two groups: (a) conduct of the SFRY State organs, and (b) conduct of the FRY State organs. It is clearly erroneous and misleading to merge them into one category as the Applicant has purported to do ("Acts of the Armed Forces (JNA/VJ)"[867]).

1008. Most of the events that are claimed to be "genocidal activities" by the Applicant relate to a period of time (the year 1991 in its entirety and early 1992) in which the alleged conduct could, as a matter of principle, only be attributed to the SFRY and not to the FRY. Thus, out of approximately 120 incidents described in the Memorial, only 8 are alleged to have taken place after April 1992. Indeed, a vast majority of the incidents described in the Memorial took place in 1991.

[867] See Memorial, at p. 397.

1009. With respect to all the events that took place before the FRY came into existence, on 27 April 1992, no question of possible international responsibility of the FRY can arise as a matter of principle. With respect to the incidents mentioned in the Memorial that took place after 27 April 1992, it is submitted that none of these were committed by FRY organs, nor can be attributed to the FRY on any other basis.

1010. While the responsibility of the SFRY is not and cannot be the subject-matter of the present case, it should nevertheless be noted for the record that in relation to many events that took place before 27 April 1992 the Applicant has not provided evidence showing that the conduct alleged was indeed the conduct of the SFRY organs. According to the account given in the Memorial, only 38 out of a total of 120 of these events actually involved the JNA, and in many cases it is not even claimed that the JNA committed the crimes alleged.

1011. Further, the Applicant claims that "Article 4 [of the ILC Draft Articles on State Responsibility] also governs the attribution to the FRY of the acts of Serb and Serbian paramilitary groups in Croatia, to the extent that they were in fact treated as part of the armed forces of the FRY."[868]

1012. The Respondent denies that any of the paramilitary groups in Croatia were in fact part of the armed forces of the FRY. Moreover, it should be noted that the quoted statement is misleading as it clearly confuses the possible responsibility of the SFRY with that of the FRY. The present case can only concern claims relating to the possible responsibility of the FRY for events that occurred after it came into existence on 27 April 1992.

1013. It should be emphasized that the Applicant's statement purports to introduce an incorrect standard of attribution when it claims that State responsibility should be incurred for acts of paramilitary groups "to the extent they were *in fact treated as part of the armed forces of the FRY*." This claim does not conform to the high standard applied by the Court for attributing conduct of *de facto* organs to a State:

> "to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's [*Nicaragua*] Judgment quoted above expressly described as 'complete dependence'."[869]

[868] Memorial, para. 8.48.
[869] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 393.

1014. It is therefore clear that attribution in such cases is "exceptional" and the required standard of attribution is not, as Croatia erroneously suggests, "[being] in fact treated as part of the armed forces", but rather, the strict requirement of being in a relationship of "complete dependence" with the State.

1015. Further, the Memorial uses the term "paramilitary groups" in a general and deliberately confusing fashion, without distinguishing between different units or groups that were involved in the armed conflict in Croatia and that were fighting against the forces of the Croatian republican government.[870] Apart from the SFRY organs, these included armed forces (TO and MUP units) of the SAO Krajina and other Serb regions in Croatia, the army of the RSK, as well as different volunteer groups.

1016. As has been discussed in Chapter VI, the local TO and MUP units or parts thereof on the territory of municipalities in Croatia that had a majority or a substantial minority of the Serb population started to operate as TO and MUP units of the emerging Serb regions in Croatia, with the spreading of the conflict in 1991. As the SAO Krajina and other Serb autonomous regions in Croatia were established at the end of 1990 and during the course of 1991, and subsequently when the RSK was established on 19 December 1991, these units were created and organized according to the laws of these regions and then of the RSK, and not under the internal law of either the SFRY or the FRY or Croatia. Consequently, the armed forces of the SAO Krajina and other Serb regions in Croatia, as well as the RSK, were not *de jure* organs of either the SFRY or the FRY.[871]

1017. The TO units of the SAO Krajina and other ethnic Serb regions in Croatia, as well as the MUP units of the SAO Krajina, fought independently or in cooperation with the JNA. At times these units were subordinated to the JNA, which was done on the basis of a decision of the relevant authority of the RSK/Serb region in Croatia.[872] Moreover, the cases of such subordination could occur only during the period of the 1991-1992 conflict in Croatia, when the JNA was there, and in this regard only the responsibility of the SFRY, and not of the FRY, is at issue. Although the potential responsibility of the FRY does not even arise for events that occurred during the said period, for the sake of

[870] See Chapter VI.
[871] See *supra* Chapter VI, paras. 621–633.
[872] See *supra* Chapter VI, para. 634.

completeness a number of observations will be made concerning the lack of proof for establishing the responsibility of the SFRY for these events. In order to attribute the conduct of the TO and MUP units of the RSK/Serb regions in Croatia to the SFRY, the Applicant would need to prove, in each specific case, not only that the TO or MUP unit was actually fighting together with the JNA, but would also have to specify the nature of their relationship (coordination, subordination etc.). Only then could one possibly discuss whether those units were perhaps, on these occasions, acting as *de facto* organs of the SFRY, or were under its direction or control, and thus whether the responsibility of the SFRY could have arisen.

1018. However, the Applicant does nothing of the sort. Its Memorial discusses questions of attribution only in very general terms without providing more specific proof. This is in sharp contrast with the standard of proof that is required for proving that certain persons or groups were *de facto* organs of a State. As already quoted above, the Court stated that this "requires proof of a particularly great degree of State control over them..."[873] Moreover, in cases involving charges of exceptional gravity, such as genocide, these charges must be proved by evidence that is fully conclusive.[874] The Applicant utterly fails to meet the required standard.

1019. Moreover, as will be discussed in the next section, the Applicant fails to provide particulars of the cases in which it alleges that the SFRY organs exercised direction or control over the TO or MUP units of the SAO Krajina and other ethnic Serb regions in Croatia.

1020. Another claim made by the Applicant is that "a number of the paramilitary groups were formally integrated into the JNA as 'volunteers' pursuant to the Order adopted on [13] September 1991."[875] However, this order alone simply does not provide any proof concerning the responsibility of the SFRY for the specific events alleged in the Memorial.

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[873] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 393.
[874] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 209.
[875] Memorial, para. 8.48 (footnote omitted).

1021. As is clear from the Order of 13 September 1991, volunteers were *individually* integrated into the JNA.[876] There is even an individual application form appended to the Order. Volunteers were accepted into the JNA by a decision of an appropriate military officer, and were then assigned to a JNA unit, having equal rights as other military personnel.[877]

1022. In order to attribute certain conduct to the SFRY, the Applicant would have to show that the acts alleged were committed by individual volunteers, who were in fact accepted into the JNA. However, in line with the general approach taken in the Memorial, the Applicant deliberately fails to distinguish between the acts committed by volunteers that were accepted into the JNA, and the conduct of persons that acted outside the JNA structure. Without making this distinction and without determining whether certain acts were indeed committed by the volunteers who were accepted into the JNA, the Applicant simply cannot attribute these acts to the SFRY, and even less can it attribute all acts of the so-called ”paramilitaries” to the SFRY. In any case, it should be recalled that the FRY is in no way responsible for events that occurred before it came into existence, which includes conduct attributable to the SFRY.

C. *Acts Allegedly Performed under the Direction and Control of State Organs*

1023. The Applicant also alleges that the Respondent is responsible on the basis that perpetrators of “genocidal acts” acted under its direction and control. In this regard, the Applicant relies on the rule contained in the present Article 8 of the ILC Draft Articles on State responsibility. This rule provides that

> “[t]he conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.”

[876] See Memorial, Annexes, Vol. 4, annex no. 73, article 2.
[877] *Ibid.*, articles 3, 6, 10 & 11.

1024. As the Court emphasized in the *Bosnia* case, "[t]his provision must be understood in the light of the Court's jurisprudence on the subject",[878] in particular its 1986 judgment in the *Nicaragua* case, which stated:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[879]

1025. In the *Bosnia* case, the Court further clarified that

> "it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, *in respect of each operation in which the alleged violations occurred*, not generally in respect of the overall actions taken by the person or groups of persons having committed the violations."[880]

1026. Therefore, in order to attribute a conduct to a state – be it the SFRY or the FRY – the Applicant would have to show with respect to each particular operation in which the alleged violations occurred, either (a) the exercise of the State's "effective control" over the person or groups of persons committing the violation or (b) the existence of the State's instructions to them to commit the violation.

1027. According to the Applicant,

> "The evidence set forth in this Memorial – including in particular witness statements of persons directly involved and corroborating independent reports – discloses the direct participation or involvement of the JNA side

[878] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 399.
[879] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 65, para. 115.
[880] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 400 (emphasis added).

> by side with Serb and Serbian paramilitary groups when the most extreme violence was inflicted. It is clear that the JNA military commanders not only failed to intervene to prevent paramilitary genocidal acts, but actively cooperated with paramilitary groups and provided logistical and direct military support. In many instances, there is clear evidence that paramilitary organisations were involved in joint planning with the JNA and VJ. In most instances, operations were jointly carried out."[881]

1028. Surprisingly, the above statement constitutes almost everything that the Memorial had to say in support of the contention that the Respondent had directed or controlled the conduct of "paramilitary groups" in an armed conflict that involved hundreds if not thousands of individual operations and concomitant "genocidal acts" alleged by the Applicant. Moreover, this statement contains a series of propositions, none of which is supported by evidence.

1029. The Applicant's first proposition is that the JNA military commanders "failed to intervene to prevent paramilitary genocidal acts", which is not only unsupported by any reference or evidence but also completely irrelevant for the discussion of attribution on the basis of direction and control.

1030. Secondly, according to the Applicant, the JNA military commanders "actively cooperated with paramilitary groups and provided logistical and direct military support". This is also irrelevant for the present discussion, because, as seen above, the required standard is the existence of "effective control" or instructions, and not mere cooperation or support.

1031. Thirdly, the Applicant alleges that "there is clear evidence that paramilitary organisations were involved in joint planning with the JNA and VJ." However, it fails to provide such evidence. Also, as a matter of law, joint planning in no way implies "effective control". Indeed, it contradicts the idea of the State organs giving "instructions" to persons or groups of persons, which would entail its responsibility on the basis of Article 8 of the ILC Articles on State Responsibility.

[881] Memorial, para. 8.51 (footnotes omitted).

1032. Finally, the Applicant alleges that "[i]n most instances, operations were jointly carried out" and that there was "the direct participation or involvement of the JNA side by side with Serb and Serbian paramilitary groups when the most extreme violence was inflicted." Again, this does not as such entail a State's responsibility on the basis of direction or control for which proof of "effective control" or "instructions" of the State organs to the "paramilitaries" is required. The Applicant fails to present this necessary proof. Of course, the State remains responsible for the conduct of its organs, but this is different from the issue of direction and control over other persons or groups of persons. Finally, virtually all the operations that are said to have been "jointly carried out" took place in 1991,[882] while the SFRY still existed, and it is thus only the potential responsibility of the SFRY, and not the FRY, that is called into question.

1033. Considering how little the Applicant has to say about the attribution of acts on the basis of direction and control, it is not surprising that in this section of its Memorial the Applicant suddenly turns to the question of responsibility on the basis of failure to punish breaches of the Genocide Convention.[883] This question is discussed in Chapter X of this Counter-Memorial.

D. *Subsequent Adoption and Ratification*

1034. As an alternative, the Applicant also alleges the Respondent's responsibility on the basis that it subsequently acknowledged and adopted individual "genocidal acts".[884] This proposition must be rejected because it is without basis in law and fact.

1035. First, according to the Applicant, the adoption and ratification of the genocidal acts is reflected

> "in the honours and decorations bestowed by the Serbian leadership and the JNA (and then the Yugoslav Army [*sic*]) on many of those persons involved in the genocidal campaign, including those involved in the attacks on the Croat and other populations of Vukovar."[885]

[882] See Memorial, para. 8.51, note 127.
[883] Memorial, para. 8.52.
[884] *Ibid*. para. 8.53.
[885] *Ibid*.

1036. The sole reference provided here by the Applicant is to congratulations conveyed to the JNA forces by the SFRY Minister of Defense, General Kadijević, after they captured Vukovar. At the outset, it should be recalled that the congratulations were conveyed by an organ of the SFRY on 21 November 1991, and cannot in any way be attributed to the Respondent. Also, the congratulations related to the actions of the JNA in Vukovar which were *a fortiori* acts of a SFRY organ that did not need to be adopted or acknowledged by another SFRY organ in order to be attributed to the SFRY, so Article 11 of the ILC Articles of State Responsibility is inapplicable in this context.

1037. Finally, the congratulations were made with respect to the capture of Vukovar, which, regardless of how one may look at it from the political or military point of view, was a military action and not a genocidal act. No congratulations were made or honors given with regard to any acts that may have been contrary to international law, including genocide.

1038. Secondly, the Applicant alleges responsibility of the FRY on the following basis:

> "Any doubt as to the attribution of this plan to the FRY is resolved by the subsequent conduct of the FRY leadership in its establishment, direction and control of the Serb authorities on the territories concerned and the attempt to integrate those territories into the 'administrative, military, educational, transportation and communication systems of the Federal Republic of Yugoslavia (Serbia and Montenegro).'"[886]

1039. According to the Applicant, this conduct is analogous to the conduct of the Islamic Republic of Iran in the second stage of the hostage crisis, considered by the Court in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[887]

1040. According to the ILC commentary on Article 11,

> "*In international controversies, States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption',*

[886] Memorial, para. 8.54.
[887] *Ibid.*, quoting ICJ, *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 35, para. 74.

> *on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct.* Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term 'acknowledges and adopts' in article 11 makes it clear that *what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own*."[888]

1041. It clearly follows that Article 11 concerns particular "conduct" and its acknowledgement and adoption by a State "as, in effect, its own conduct". The said rule does not apply to the State's "acknowledgement of a factual situation". Therefore, the fact that the FRY acknowledged the existence of the RSK and cooperated with it, does not amount to "acknowledgment and adoption" in the sense of Article 11, unless the FRY "acknowledged and adopted" some specific conduct of the RSK "as, in effect, its own conduct". The Applicant does not provide any evidence for this.

1042. Further, the Applicant does not in fact identify the specific conduct that may have been "acknowledged and adopted" by the FRY, which is a necessary precondition for the application of Article 11 of the ILC Draft Articles. Perhaps one could construe that in the Applicant's view this "conduct" consisted of the very existence and operation of the "Serb authorities" and the RSK on the territories concerned, but this would be irrelevant for the purpose of the present proceedings which solely concern obligations under the Genocide Convention.

1043. This also shows that the Applicant's reference to the *United States Diplomatic and Consular Staff in Tehran* in inapposite. In that case, the acts of militants (occupation of the United States Embassy and detention of its inmates) were *per se* illegal under international law and once they were adopted by the State, this gave rise to State

[888] See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 53 (emphasis added).

responsibility. In the present case, even if one were to accept the factual allegations of the Applicant (which are denied), the underlying acts whose adoption is alleged, such as the establishment and maintenance of the Serb authorities on the territory of Croatia, do not incur any breach of obligations under the Genocide Convention. Finally, such acts and their alleged "endorsing and supporting" cannot provide support to the conjecture that the FRY ordered "genocidal activities" in the first place,[889] for which the Applicant does not offer even a shred of evidence.

3. Conclusion

1044. On the basis of the arguments set out above, it can be concluded that:

(a) Responsibility in the present case must be determined on the basis of rules of international customary law;

(b) Article 10, paragraph 2, of the ILC Articles on State Responsibility does not reflect international customary law; further, this provision cannot be applied in the present case considering its terms and the circumstances of the case;

(c) The SFRY existed as a subject of international law in 1991 and early 1992;

(d) Consequently, there is no legal or factual basis to attribute to the Respondent the responsibility for events that occurred before 27 April 1992, the date on which the Respondent came into existence;

(e) As far as the events that took place after 27 April 1992 are concerned, none of them were committed by the FRY organs, nor can they be attributed to the FRY on any other basis;

(f) As far as the events that took place before 27 April 1992 are concerned, these concern the responsibility of the SFRY, and cannot therefore be addressed by the Court in the present case;

(g) In any event, it should be noted that, in relation to most events that took place before 27 April 1992, the Applicant has not proved that the conduct alleged was actually the conduct of the SFRY organs;

[889] Memorial, para. 8.55.

(h) The TO units of the SAO Krajina and other regions with an ethnic Serb population in Croatia, the Army of the RSK, the MUP units of SAO Krajina/RSK, as well as paramilitary formations, were neither *de jure* nor *de facto* organs of either the SFRY (before 27 April 1992) or the FRY (after 27 April 1992);

(i) Consequently, the conduct of these formations in individual operations may be attributed to either the SFRY (before 27 April 1992) or the FRY (after 27 April 1992) only on the basis that they exercised "effective control" or gave instructions to commit violations in respect to a particular operation, for which, however, the Applicant does not provide any evidence;

(j) The breaches of the Genocide Convention that are alleged by the Applicant cannot be attributed to the Respondent on the basis that it subsequently adopted them as its own, because the Applicant's claims in this regard relate either to the conduct of the SFRY organs or to the alleged adoption of acts that are not breaches of the Genocide Convention.

4. The Respondent has not Violated Its Obligations to Prevent and to Punish the Crime of Genocide

1045. The legal elements of the obligations, under the Genocide Convention, to prevent and to punish the crime of genocide have been analyzed in Chapter II.[890] In the following paragraphs, the Respondent will show that it has not violated its obligations to prevent and to punish genocide.

A. *Obligation to Prevent*

1046. In accordance with the Court's judgment in the *Bosnia* case, the question of the Respondent's violation of the obligation to prevent genocide can arise only if the Court finds that: (a) genocide has been committed against Croats, (b) it was not committed by organs or persons or groups whose conduct is attributable to the Respondent, (c) the

[890] See Chapter II, paras. 115–130.

Respondent is not responsible for complicity in genocide, (d) the Respondent was aware of the possibility that genocide would be committed but failed to take reasonable action to prevent it, and (e) the Respondent was in a position to influence the actions of the principal perpetrator.

1047. Having in mind that the existence of the violation of the obligation to prevent genocide primarily depends on the fulfillment of the first of the above-listed conditions, the actual commission of genocide, and having in mind that in Chapter VIII the Respondent convincingly demonstrated that neither genocide nor any other act prohibited by the Genocide Convention was committed against Croats, the only possible conclusion is that the Respondent has, accordingly, not violated its obligation to prevent genocide, since there was nothing to prevent in the first place.

1048. Nevertheless, the Respondent will, *ex abundanti cautela*, address some specific allegations on the alleged failure to prevent genocide, contained in paras. 8.57–8.63 of the Memorial. The Applicant, thus, claims that:

> "The Serbian leadership, the Republics of Serbia and Montenegro, and the FRY are responsible under Article I of the Genocide Convention for failing to control the JNA (and those with whom it was collaborating) and for failing to prevent the direct participation of the JNA – and the paramilitaries over which the Serbian leadership had "effective control" – in the planning and execution of the genocide which occurred".[891]

1049. Firstly, it should be noted that the Applicant here actually confirmed what is explained by the Respondent in this Chapter, namely that neither the Serbian leadership, nor the Republics of Serbia and Montenegro, nor the FRY had control over the JNA. However, none of the three entities referred to by the Applicant had even the obligation to control the JNA, since it was the SFRY which was in command of the JNA, and the FRY did not even exist at the same time when the JNA existed.

[891] Memorial, para. 8.62.

1050. Finally, the Applicant's contention that the Respondent violated its obligation to prevent genocide by failing to prevent the actions of the paramilitaries "over which the Serbian leadership had effective control" is logically untenable, since the alleged existence of effective control would involve the Respondent's responsibility for the commission of genocide itself, and not for the failure to prevent it. In any case, however, genocide was not committed and, for that reason, the Respondent cannot be held responsible for the failure to prevent it.

A. Obligation to Punish

1051. The Applicant also alleges that the Respondent has violated its obligation to punish genocide. The Applicant's allegations are unfounded for the reasons that will be addressed in the following paragraphs.

1052. In the first place, for a State to be held responsible for failing to punish genocide, that crime or any of the acts enumerated in Article III of the Genocide Convention have to be committed. In Chapter VIII, the Respondent showed that neither genocide nor any other act prohibited by the Convention had been committed and for that reason the question of the Respondent's responsibility for the failure to punish does not even arise.

1053. Nevertheless, even if the Court would find that some of the acts prohibited by the Genocide Convention have been committed (*quod non*), the Respondent would still not be responsible for failure to punish them. Namely, according to the Court's findings, a State can be held responsible for the violation of the obligation to punish genocide or any of the acts prohibited by the Convention: a) if the crime was committed in its own territory, or b) when a person is charged with genocide, or any other act enumerated in Article III of the Convention, by such an international penal tribunal as may have jurisdiction with respect to those states which have accepted its jurisdiction.[892]

[892] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List. No. 91, paras. 442-443.

1054. In the present case, the alleged genocide was not committed in the territory of the Respondent and for that reason the Respondent was not obliged to try or to punish anyone for the commission of that alleged genocide or any other act prohibited by the Convention.

1055. The Respondent is, on the other hand, obliged to cooperate with the ICTY, which, in this case, can be qualified as "an international penal tribunal as may have jurisdiction with respect to those states which have accepted its jurisdiction". However, as already pointed out on several occasions in this Counter-Memorial, the ICTY has not charged anyone for genocide committed against the Croats in Croatia and, accordingly, any possible failure of the Respondent to arrest any of the persons accused for crimes in Croatia by the ICTY could not even theoretically qualify as a violation of the obligation to punish.

1056. Nevertheless, even if no one was charged by the ICTY with genocide against the Croats, the Respondent did cooperate with that Tribunal in the course of the past years and many persons accused by the Tribunal for crimes in Croatia have been transferred to the ICTY. That includes the former President of Serbia, Slobodan Milošević, the person charged for all the crimes allegedly committed against the Croats during the war in that country.

1057. The only conclusion, thus, is that the Respondent has not violated its obligation to punish genocide, just as it has not violated any other obligation imposed on it by the Genocide Convention.

CHAPTER X

SUBMISSIONS MADE BY THE APPLICANT

1. Introduction

1058. This chapter will deal with the Applicant's formal submissions made in the Memorial,[893] as well as with its discussion of obligations of cessation and reparation.[894] During the preliminary objections proceedings, the Respondent submitted as a preliminary objection the argument that some of the submissions made in the Memorial concerning the putting on trial of certain persons within the jurisdiction of Serbia, providing information about missing Croatian citizens, and the return of cultural property, were beyond the jurisdiction of the Court and inadmissible.[895] The Court rejected this preliminary objection.[896] The Respondent will therefore in the present chapter address these three claims, as well as the Applicant's general approach towards the issue of reparation and its various forms. The discussion will deal with the following topics:

a) first, the Applicant's general approach towards the issue of reparation;
b) second, the alleged continuing violations of the Genocide Convention that concern the failure to punish the perpetrators of genocide and provide information on the whereabouts of missing persons;
c) third, the Applicant's submission concerning the return of cultural property.

1059. From the outset, however, it should be reiterated that the discussion of reparation in the current case is wholly hypothetical since none of the necessary preconditions for the responsibility of the Respondent are present: there was neither genocide committed against Croats; nor are acts alleged by the Applicant attributable to Serbia.

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[893] Memorial, pp. 413-414.
[894] *Ibid.*, para. 8.71 *et seq.*
[895] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 131.; Preliminary Objections, para. 5.1 *et seq.*
[896] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 146(5).

2. The Applicant's General Approach towards the Issue of Reparation

1060. In the Memorial, Croatia has chosen not to provide a full argument about the question of reparation in the present case but "merely outlines the various heads under which the principles of reparation fall to be determined."[897] For this reason, Serbia will not at this stage address this topic in detail, apart from certain specific submissions of the Applicant that have already been discussed at the preliminary objections stage of the proceedings. However, certain general comments are warranted.

1061. The general principle concerning reparation is enunciated in Article 31 of the ILC Articles on State Responsibility which states as follows:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

1062. The ILC Commentary to this provision makes clear that "... the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."[898]

1063. Clearly, the injury which must be remedied by reparation is the one "resulting from and ascribable to the wrongful act" and not just any of its consequences. Also, the injury must be caused by the wrongful act, which in the circumstances of the present case, means that it must be caused by a violation of the Genocide Convention.

1064. However, the Applicant's approach is different. First, it claims reparation not only for the injuries caused by alleged violations of the Convention, but for "those acts which are *connected* to the Serbian genocidal campaign".[899] This clearly includes not only acts that could constitute the *actus reus* elements of genocide but also acts such as imprisonment and the destruction of cultural property,[900] which do not fall under the

[897] Memorial, para. 8.76.
[898] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 92, para. 9 of the commentary to Article 31.
[899] Memorial, para. 8.79 (emphasis added).
[900] *Ibid.*

scope of the Genocide Convention. The obvious problem with the Applicant's approach is that it tries to extend the reach of the present claims to include alleged wrongful acts that cannot constitute violations of the Genocide Convention, and to claim reparation for these acts.

1065. Secondly, the Applicant claims restitution in kind which includes "the return of all property and goods stolen in connection with the genocidal acts for which the FRY is responsible."[901] Here, as well, the Applicant is trying to extend its claim to cover acts which cannot constitute violations of the Genocide Convention (stealing of property and goods).

1066. Further, where damage is not repaired by restitution in kind, the Applicant claims compensation from Serbia for violations of the Genocide Convention. While this may, at first sight, look like a properly tailored claim under the Genocide Convention, it immediately becomes clear that it is not, because in view of the Applicant, such damage includes "damage to the territory of Croatia and to its property, including cultural property", "damage to the cultural and natural heritage of Croatia", "damage to the economy of Croatia", "damage and losses to the citizens of Croatia, including damage to property", and "all damage caused to the physical and moral integrity and well-being of the citizens of Croatia".[902]

1067. It is obvious that what the Applicant is claiming is not reparation for damages caused by violations of the Genocide Convention, but rather reparations for all possible damages that may have been caused by the war in Croatia. The Applicant's approach in this regard is completely unjustified and contrary to the established rules of international law. As already discussed, reparation must be given only for the injury "resulting from and ascribable to the wrongful act" and not for any and all possible and imagined consequences of the wrongful act, as the Applicant would in reality like to achieve.

1068. In fact, the Applicant's claim for damages follows the same line as the Memorial in general – what is presented is a case concerning Serbia's purported responsibility for the armed conflict in Croatia and what is claimed are war damages from Serbia. However, neither are Croatia's arguments and claims justified, nor do they fall to be determined by the Court whose jurisdiction exclusively concerns possible violations of the Genocide Convention.

[901] *Ibid.*, para. 8.80.
[902] Memorial, paras. 8.81 and 8.82.

3. Alleged Continuing Violations of the Genocide Convention

1069. The Applicant further claims that the Respondent has violated and continues to violate its obligations under the Genocide Convention by failing a) to punish perpetrators of alleged genocidal acts, and b) to provide whereabouts of Croatian citizens that went missing in the alleged genocide.[903] These two claims will be discussed in turn.

A. *Obligation to Punish the Perpetrators of the Alleged Genocide*

1070. The Applicant claims that the Respondent is responsible for its failure to submit to trial those suspected of committing genocide in Croatia. As has already been discussed in Chapter IX, the Genocide Convention requires the contracting parties to try and punish persons charged with genocide and other acts enumerated in Article III of the Convention committed *on its own territory*. It also provides that such persons may be tried by "such international penal tribunal as may have jurisdiction with respect to those states which have accepted its jurisdiction". The latter obligation implies that the States parties which are subject to the jurisdiction of such international tribunal have the obligation to cooperate with it, which in the circumstances of the present case means the obligation to cooperate with the ICTY.[904]

1071. Even if a genocide was committed in Croatia against Croats (*quod non*), as alleged by the Applicant, it is obvious that such a genocide did not take part on the territory of the Respondent. Consequently, the Respondent would not have the obligation under the Genocide Convention to try and punish the perpetrators of this alleged genocide. It is for these reasons that the central point made by the Applicant – that its case "is concerned with those persons who have not been surrendered for trial in Croatia or to the ICTY"[905] – is untenable and irrelevant.

1072. As far as the obligation to cooperate with the ICTY is concerned, it is also uncontested that the ICTY has not indicted any persons for genocide committed against Croats on the territory of Croatia, and the issue of the Respondent's obligation to cooperate with the ICTY, as required by the Genocide Convention, does not even arise.

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[903] Memorial, para. 8.78 and pp. 413-414, at paras. 1(d) and 2(a) & (b).
[904] See *supra* Chapter IX, paras.1055; and ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, paras. 442–447.
[905] Written Statement, paras. 4.3 & 4.11.

1073. In any case, it should be noted that the Respondent fully cooperates with the ICTY and, in particular, it has transferred, or cooperated in the transfer, of 12 out of the 13 persons indicted by the ICTY for war crimes and crimes against humanity in Croatia.[906] The one remaining indictee, Mr. Goran Hadzić, is in hiding and is being actively pursued by the Serbian law enforcement agencies.[907] As soon as he is apprehended by the Respondent, he will be transferred to the ICTY. Furthermore, it is important to note that Serbia's judicial organs have initiated a number of proceedings against individuals charged with crimes other than genocide in relation to the armed conflict in Croatia, some of whom have already been convicted. The same is the case with Croatia, which has started to try and punish persons responsible for crimes against Serbs, such as in the cases of Osijek and the Medak Pocket. Further, there is ongoing cooperation between Serbia and Croatia in the prosecution of violations of international humanitarian law committed during the armed conflict in Croatia.[908]

1074. For all of the foregoing reasons, it is submitted that there is no basis in law or in fact for the Applicant's claims concerning the alleged continuing violation of the Genocide Convention by the Respondent for its failure to try and to punish perpetrators of genocide.[909] Consequently, the Court should reject the Applicant's submission 2(a).

B. *Obligation to Provide Information on Missing Persons*

1075. The Memorial contends that as the result of "Serbia's genocidal campaign" 1,419[910] Croatian citizens remain missing and that there is an obligation for Serbia "to take all steps at its disposal to provide an immediate and full account to Croatia of the whereabouts of each and every one of these missing persons".[911]

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[906] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings, CR 2008/9, p. 23, paras. 52–53 (Zimmermann).

[907] According to the report of the ICTY to the Security Council and the General Assembly:

> "The most critical aspect of Serbia's cooperation remains the apprehension of the fugitives, Ratko Mladić and Goran Hadžić. During the reporting period, the Office of the Prosecutor closely followed the work of the Serbian authorities to locate these fugitives and was regularly briefed on their activities. During the reporting period, Serbia's National Security Council and Action Team in charge of tracking the fugitives led complex and widespread search operations against the two accused and their support networks."

Sixteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 31 July 2009, UN Doc. A/64/205-S/2009/394, para. 62.

[908] For data, see http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.htm

[909] Memorial, pp. 413–414, paras. 1 (d) & 2 (a).

[910] Memorial, para. 8.78. In the preliminary objections proceedings, Croatia reduced this number to 1,185 missing persons, see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings, CR 2008/10, p. 15, para. 35 (Šimonović). The current situation is that Croatia requests from Serbia information about 1,042 missing persons (Annex 35).

[911] Memorial, para. 8.78; see, also, *ibid.*, p. 414, para. 2(b).

1076. The Respondent submits that the provision of information about missing persons does not fall within the scope of the obligations set forth in the Genocide Convention. This also means that a possible failure to provide information of the kind referred to above cannot, as a matter of principle, amount to a continuing violation of the Genocide Convention, as the Applicant claims in the Memorial.[912] Indeed, in the formal submissions it makes in the Memorial, the Applicant does not request the Court to declare that the failure to provide the information in question amounts to a violation of the Genocide Convention, but rather that this be ordered as a form of reparation.[913]

1077. The Court has made it clear that the Genocide Convention does not specifically prescribe a duty to provide information of this kind.[914] In its written statement in response to Serbia's preliminary objections, the Applicant accepted that position and claimed that the provision of information about the whereabouts of missing persons could be a remedy stemming from violations of the Genocide Convention.[915]

1078. Although the Respondent accepts that the provision of information about persons missing as a result of violations of the Genocide Convention could, as a matter of principle, be a remedy for violations of the Genocide Convention, this is not so in the circumstances of the present case. First, there was no genocide against the Croats so the issue of reparations (including this particular claim of the Applicant) does not arise at all in the present case. Second, Serbia has in fact provided, and continues to provide, Croatia with information about those persons missing in connection with the armed conflict in Croatia. Third, the parties have agreed to pursue this matter through avenues of bilateral cooperation and not through judicial proceedings. Finally, and in any event, the provision of information about missing persons would not be an appropriate remedy in the circumstances of the present case.

1079. The Court has already been provided with details about the cooperation between Serbia and Croatia on the issue of missing persons as a result of the conflict in Croatia, and they will not be repeated here.[916] It should be added, however, that on 30 July 2009 the entities

[912] See Memorial, para. 8.78.
[913] See Memorial, pp. 413–414.
[914] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 138. See, also, Preliminary Objections, para. 5.7.
[915] Written Statement, para. 4.15.
[916] Preliminary Objections, paras. 5.7–5.10 and accompanying annexes; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings, , CR 2008/9, pp. 25–27, paras. 64–71 (Zimmermann).

of both sides dealing with the issue of missing persons held yet another regular meeting with the participation of relevant international organizations. On that occasion, the two sides expressed their satisfaction with the fulfillment of the obligations undertaken at the previous meeting held on 13–14 March 2007.[917] While the record of the 30 July 2009 meeting shows that there are certain questions that remain open, it should be noted that such questions were raised by both sides: Croatia and Serbia. Currently, Croatia requests from Serbia information about 1,042 missing persons, whilst Serbia requests from Croatia information about 1,226 persons.[918] In any event, progress in securing information is apparent. For example, the number of missing persons sought by Croatia was reduced by one third in recent years, from 1,419 in 2001 to 1,042 in 2009.[919]

1080. In its final submissions in the Memorial, the Applicant requests the Court to adjudge and declare that the Respondent is under an obligation "to provide forthwith to the Applicant all information within its possession or control" about the missing persons and "generally to cooperate" with Croatia in that regard.[920] Clearly, the latter request is moot as it is obvious that general cooperation between Serbia and Croatia exists with respect to the issue of missing persons. The former request is also moot, because Serbia has already undertaken *bona fide* efforts to provide Croatia with all the information it has about missing persons. While it is uncontested that certain requests made by Croatia have not yet been fulfilled, it is also clear that the provision of such information in some cases requires extensive time and resources. In any case, at a recent meeting concerning missing persons, Croatia has expressed its satisfaction as to the fulfillment of obligations previously undertaken by Serbia.[921] The Applicant's submission, therefore, would amount to asking the Court to order Serbia to fulfill an obligation that the Applicant itself considers as being satisfactory fulfilled, and for that reason it is moot.

1081. Further, as Serbia has already demonstrated during the preliminary objections phase of this case, agreements between the parties demonstrate that their intention was to resolve the problem of missing persons and the provision of information about their whereabouts through direct bilateral cooperation and through the work of their respective commissions

[917] See Annex 35.
[918] *Ibid*. This number includes Serbia's request for information about 823 missing ethnic Serbs from Croatia.
[919] *Compare* Memorial, para. 8.78 and Annex 35 to the present Counter-Memorial.
[920] Memorial, p. 414, "Submissions", para. 2(b).
[921] Annex 35.

on missing persons, and not before the International Court of Justice.[922] Their 1996 agreement on normalization of relations already contained an unconditional obligation of both parties to provide all available information about missing persons.[923] This obligation was reaffirmed in the subsequent Protocol concluded on 17 April 1996.[924] These agreements are unlimited in duration, unconditional and were concluded before Croatia submitted its Application in the present case in 1999.

1082. The Applicant contends that these agreements do not render moot the relevant aspect of the proceedings before the Court and cites in support the *Fisheries Jurisdiction* case between Iceland and the United Kingdom.[925] However, as Serbia demonstrated in the preliminary objections proceedings, the interim agreement between the parties in the *Fisheries Jurisdiction* case cannot be compared with the agreements entered into by the parties in the present case.[926] In the former case, the agreement was concluded while the case was already *sub judice*, it was of a provisional nature and contained an express saving clause, whereas in the present case none of these factors are present. Rather, it is clear that the parties have decided to resolve the issue through bilateral cooperation.

1083. The Applicant states that the 1996 protocol between the parties is limited to providing "available information" and does not commit Serbia to ascertain the whereabouts of the missing persons pursuant to obligations under the Genocide Convention. In response, it should first be recalled that there are no such obligations under the Genocide Convention. Secondly, the provision of "available information" required under existing agreements between the parties is almost identical to the provision of "all information within [Serbia's] possession or control" requested by Croatia in its formal submissions.[927] In other words, the object of Serbia's and Croatia's obligations relating to missing persons under existing agreements is identical to the object of Croatia's claim in question.

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[922] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings, CR 2008/9, pp. 27–28, paras. 73–82 (Zimmermann).
[923] See Annex 10 to Preliminary Objections, Agreement on Normalization of Relations between the FRY and the Republic of Croatia, Article 6.
[924] See Annex 53 to Preliminary Objections, Protocol on Cooperation between the Commission of the Government of the Federal Republic of Yugoslavia for Humanitarian Issues and Missing Persons and the Commission of the Government of the Republic of Croatia for Imprisoned and Missing Persons of 17 April 1996, Article 2, paragraph 1.
[925] Written Statement, para. 4.17.
[926] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings,, CR 2008/9, pp. 27–28, paras. 75–79. (Zimmermann).
[927] See Memorial, p. 414, "Submissions", para. 2(b).

1084. This means that the Applicant's claim in question would be inappropriate as a modality of satisfaction in the present case, as its object would be the same as the object of existing obligations of the Respondent, which, in addition, the Applicant's competent body considers as being satisfactory fulfilled.

1085. Finally, it should be noted that both sides request information about approximately the same number of missing persons (Croatia: 1,042; Serbia: 1,226). In such circumstances, the Respondent submits that singling out only those missing persons whose whereabouts are sought by Croatia would be unfair, in particular in a situation where there is steady progress being made in mutual cooperation between the parties. For this reason, it is submitted that, in any event, the remedy sought by Croatia in this regard would not be an appropriate modality of satisfaction in the circumstances of the present case, as required by Article 37, paragraph 2, of the ILC Articles on State Responsibility.[928]

1086. In conclusion, the Applicant respectfully submits that the Court should reject the submission 2(b) made by the Applicant.

4. The Submission Concerning the Return of Cultural Property

1087. The Applicant's submission under 2(c) asks the Court to adjudge and declare that, as a consequence of the Respondent's alleged responsibility for breaches of the Genocide Convention, the Respondent is under an obligation to return "any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible."[929] While this submission is formulated as a form of remedy in the present case, the Applicant has elsewhere argued that genocide may be committed through the destruction of a group's cultural identity and that the Respondent has the obligation, under the Genocide Convention, to return all missing artifacts.[930] This contention was plainly rejected by the Court in its judgment on jurisdiction in the present case, where it reaffirmed the position taken in the *Bosnia* case

[928] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 106, para. 5 of the commentary to Article 37.
[929] Memorial, p. 414, para. 2(c).
[930] See Written Statement, paras. 4.26 & 4.30.

that even "a 'deliberate destruction of the historical, cultural and religious heritage of the... group [protected by the Convention]' … '... does not fall within the categories of acts of genocide set out in Article II of the Convention.'"[931] In conclusion, the return of cultural property is not an obligation under the Genocide Convention and, as such, does not fall within the scope of the present case.

1088. A wholly different issue is the return of items of cultural property as a remedy in cases of breach of the Genocide Convention. However, this issue could arise only if the Court were to found in the present case that genocide had been committed against Croats, and was attributable to the Respondent (*quod non*).

1089. As a remedy, the return of items of cultural property would be a modality of restitution regulated by Article 35 of the ILC Articles on State Responsibility. As is well known, restitution is a form of reparation for an injury caused by an internationally wrongful act, which entails the re-establishment of the situation which existed before the wrongful act was committed.[932] However, as will be demonstrated below, restitution in the case of genocide would not include the return of cultural property.

1090. As already mentioned, according to the general principle enunciated by Article 31 of the ILC Articles on State Responsibility, the responsible State's obligation to make full reparation relates to the injury caused by its "internationally wrongful act". In other words, the injury is only such injury that was caused by the illegal act, or in the words of the ILC, "the injury resulting from and ascribable to the wrongful act". [933] The issue of possible restitution in the case of violations of the Genocide Convention must be approached with this in mind.

1091. At the present stage, where the Applicant has merely provided an outline of its argument in this regard,[934] it suffices to note that the injury caused by violations of the

[931] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, General List No. 118, para. 141.
[932] Responsibility of States for Internationally Wrongful Acts, Articles 34 & 35, *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two.
[933] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 92, para. 9 of the commentary to Article 31.
[934] See Memorial, para. 8.76.

Genocide Convention is the one "resulting from and ascribable to" the wrongful acts under the Convention, in particular those acts outlined in its Articles II and III. In this regard, it should be recalled that the destruction or removal of cultural property are not acts which are prohibited by the Genocide Convention. The injuries resulting or ascribable to acts that are wrongful under the Convention (e.g. killing or causing serious bodily or mental harm to members of the group) do not relate to cultural property. Since the restitution as a form of reparation is by necessity closely related to the injury, it appears that the restitution in the case of such injuries could not include the return of cultural property.

1092. Finally, the facts show that there is not even a dispute between the parties to the effect that cultural property relocated in connection with the armed conflict in Croatia must be returned, regardless of the different legal qualifications given to the underlying conflict by the parties. Both parties have concluded an agreement on cooperation in the field of culture and education, which provides that cultural property of one party shall be returned to the other party in accordance with the relevant international agreements. The parties have also established an intergovernmental commission for the restitution of cultural property.[935] Both before and after this agreement was concluded, cultural property originating from the territory of Croatia has to a large extent been returned to the Applicant.[936] This means that apart from not falling within the scope of the present case, which is limited to the interpretation and application of the Genocide Convention, the above Applicant's request is also moot.

1093. Further, even if one were to assume *arguendo* that the return of cultural property could constitute a form of remedy for alleged violations of the Genocide Convention (*quod non*), it should be noted that a number of the cultural items sought by Croatia do not originate from the protected group in the present case, i.e. ethnic Croats, as they belong to the Serbian Orthodox Church and form part of the Serbian cultural identity. These cultural objects were taken from a number of Serbian orthodox churches in Croatia and brought to Serbia, as these Orthodox churches were destroyed, damaged or abandoned.

[935] See Agreement on Co-operation in the Field of Culture and Education, *Narodne novine, Međunarodni ugovori* [Official Gazette, International Treaties], no. 15/2002 & *Službeni list SRJ – Međunarodni ugovori* [Official Gazette of the FRY – International Treaties], no. 12/2002, Articles 10 & 16, para. 2.
[936] For more details, see PO Serbia, paras. 5.12 *et seq*. and *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Oral Pleadings, CR 2008/9, pp. 29–30, paras. 84–95 (Zimmermann).

The return of these items of property cannot even *prima facie* constitute a remedy in the case of the alleged genocide against Croats. Notwithstanding this legal clarification, such items of cultural property are still in the process of being returned to Croatia on the basis of the aforementioned bilateral agreement.

5. Conclusion

1094. Serbia submits that there was no genocide against Croats and that, in any case, there are no grounds to establish the responsibility of the Respondent under the Genocide Convention. Consequently, the submissions made by the Applicant in the present proceedings are unfounded.

1095. Furthermore, it has been demonstrated that

a) Croatia's claims for reparation are not in accordance with established rules of international law, since they also concern injuries allegedly caused by acts other than those prohibited under the Genocide Convention, which acts are not the subject-matter of the present case; or that it seeks reparation for injuries not caused by acts prohibited under the Genocide Convention;

b) Croatia's claim relating to Serbia's alleged failure to punish perpetrators of the alleged genocide in Croatia is unfounded, as this obligation under the Genocide Convention only requires Serbia to exercise territorial jurisdiction, and to cooperate with a relevant international tribunal;

c) Croatia's claim relating to the provision of information about missing persons does not constitute an appropriate remedy in the circumstances of the present case;

d) Croatia's claim relating to the return of cultural property cannot be a remedy in the circumstances of the present case.

PART III

CHAPTER XI

JURISDICTION TO AND ADMISSIBILITY OF SERBIA'S COUNTER-CLAIM

1. Introduction

1096. In its Preliminary Objection dated September 2002, the Respondent had "expressly reserve[d] its right to bring counter-claims against the Applicant, regarding acts of genocide committed by the Applicant on the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter "SFRY")".[937]

1097. In light of the Court's finding that it has jurisdiction to deal with the application brought by Croatia against the FRY (now Serbia) under Article IX of the Genocide Convention, the Respondent, exercising its rights under Article 80 of the Rules of Court, now brings counter-claims against Croatia for acts of genocide for which Croatia is responsible.

1098. The relevant acts, forming the subject-matter of Serbia's counter-claims, were committed in 1995 during the operation *Storm*. During that military operation and thereafter, Croatian armed forces and police units deliberately drove around 200,000 persons of Serb ethnicity out of their homes and expelled them from the area. Their houses and property were looted and burned, and around 2000 members of the ethnic Serb population of Krajina were killed by the Croatian Governmental forces, with intent to destroy a substantial and significant part of the Serb national group in Croatia.[938]

2. Jurisdiction of the Court (Article 80, paragraph 1, of the Rules of Court)

1099. Jurisdiction over the counter-claim submitted by Serbia is based on Art. IX of the Genocide Convention. As the Court is well aware, Art. IX of the Genocide Convention provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those

[937] Preliminary Objections, para. 1.7.
[938] For details see *infra* Chapter XIII.

relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

1100. In its decision on jurisdiction in the case at hand[939], the Court rejected the view of Serbia that it lacks jurisdiction with regard to Art. IX of the Genocide Convention as between the parties. Rather, it found that a jurisdictional link had been established between Croatia on the one hand and the FRY (now: Serbia) on the other at least from 27 April 1992 onwards[940], and that the Court was thus, as a matter of principle, entitled to exercise its jurisdiction as to the alleged violations of the Genocide Convention for which Serbia is allegedly responsible.

1101. It is on the basis of this jurisdictional finding by the Court that Serbia submits that Croatia has violated the Genocide Convention, in connection with operation *Storm* by committing acts of genocide within the meaning of Articles II and III of the Convention by acts of its organs and by not punishing individuals bearing responsibility for these genocidal acts committed on the territory of Croatia.

1102. All relevant acts forming part of operation *Storm* were committed well after 27 April 1992, *i.e.* the date at which the Respondent came into existence as a State under international law, which constitutes the earliest point in time at which the Genocide Convention could have entered into force between the parties.

1103. Accordingly, Serbia's counter-claim clearly comes within the jurisdiction of the Court, as required by Article. 80, para. 1, of the Rules of Court.

3. The Counter-Claim is Directly Connected with the Subject-Matter of Croatia's Claim, Both in Law and in Fact

1104. The legal considerations and the facts upon which Serbia's counter-claim is based are intimately connected with the original claim put forward by Croatia, both in law and in fact.

[939] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia), (Preliminary Objections), Judgment of 18 November 2008.
[940] *Ibid.,* para. 146.

A. *Both Parties Pursue the Same Legal Aims*

1105. With regard to both Croatia's application, as well as Serbia's counter-claim hereinafter presented, Article IX of the Genocide Convention is the only provision on the basis of which the Court may exercise its jurisdiction. Accordingly, the extent and scope of the Court's jurisdiction is identical with respect to both the claim and the counter-claim.

1106. Moreover, both the original claim put forward by Croatia, as well as Serbia's counter-claim, raise virtually identical legal issues related to the interpretation of the Genocide Convention, including the interpretation of the notion of genocide itself, as well as related issues of State responsibility arising under the Convention and general international law.

1107. Accordingly, each party seeks to establish the other's responsibility based on a violation of the very same norms of international law and thus pursues the same legal aims, as required by Article 80, para. 1, of the Rules of Court.

B. *Both Claims Form Part of the Same Factual Complex*

1108. Croatia's case and Serbia's counter-claim are also closely interconnected as far as the respective factual circumstances are concerned. The disputed facts of Croatia's claim and Serbia's counter-claim relate to one single conflict, i.e. the armed conflict that took place on the territory of Croatia. These facts have a common territorial and temporal setting, they are based on the same historical background, and they took place within the framework of the same overall political process.

1109. More specifically, they both relate to the same geographical area commonly referred to as the Krajina region of Croatia. Moreover, the acts Croatia alleges, as well as those forming the background of Serbia's counter-claim, also relate to the same armed conflict involving the same armed entities, namely the Croatian armed forces on the one hand, and the armed forces belonging to the Republika Srpska Krajina on the other. This conflict had begun in mid-1991 and culminated in operation *Storm* undertaken by the Croatian armed forces in August 1995. Moreover, this armed conflict also formed part of one single political process that arose from the dissolution of the former Yugoslavia.

1110. Accordingly, both claims relate to facts of the very same nature, namely acts of genocide, and concern a conflict continuously in existence in the area in various forms from 1991 to 1995 when operation *Storm* took place.

1111. As a matter of fact, Croatia itself has recognized this close interrelationship. In both its original Application, as well as in its Memorial, Croatia itself, treated operation *Storm* as an integral part of the overall military conflict that took place in Croatia from 1991 onwards. Indeed, it even went so far as to consider the events surrounding operation *Storm* as constituting acts of genocide committed by and attributable to the FRY/ Republic of Serbia.[941]

1112. Moreover, and again from Croatia's own standpoint, even the conflicts in Croatia on the one hand, and the one in Bosnia and Herzegovina on the other, were similar in nature and character[942] and formed part of a single theatre of war.[943] Various phases of the very *same* conflict involving the same armed groups taking place on the very *same* territory of the *same* State must then even more clearly be considered to form part of the same factual complex.

1113. Finally, the acts described in Croatia's memorial, portrayed by Croatia as constituting acts of genocide allegedly committed by the Respondent, are also relevant for identifying the motives and intentions that led Croatia to undertake operation *Storm*. As a matter of fact, Croatia itself has acknowledged that the ethnic Serb population of the Republika Srpska Krajina had left their homes for "fear of reprisals"[944] which again confirms the close factual interrelationship between the alleged genocidal acts: Croatia claims Serbia is responsible for on the one hand, and the crimes committed by Croatia during operation *Storm* on the other.

C. *Conclusion*

1114. In light of the foregoing, Serbia's counter-claim satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court.

[941] See Application instituting proceedings, paras. 2 & 33.
[942] See CR 2007/10, p. 19 *et seq*., para. 8 *et seq*. (Metelko-Zgombić).
[943] CR 2007/10, p. 10 *et seq*., para. 11 *et seq*. (Šimonović).
[944] Memorial, para. 1.06.

CHAPTER XII

FACTUAL BACKGROUND: CROATIA AND THE SERBS IN THE RSK 1992-1995

1. Introduction

1115. This chapter will cover the period between 1992 and 1995, from the deployment of UNPROFOR in the spring and summer of 1992 to the operation *Storm* in August 1995. Its purpose is to provide factual background to the counterclaims submitted against Croatia for its conduct in the operation *Storm*. In particular, the present chapter will discuss the attitude and actions of the Croatian Government towards the Serbs in the RSK, which comprised UNPAs Krajina, Eastern Slavonia and part of UNPA Western Slavonia. However, the present chapter will not deal with the events in late 1991 and early 1992 leading to the deployment of UNPROFOR, nor with violations of human rights of Serbs who were not directly connected with the fighting, which have already been discussed in more detail in Chapter V.[945]

1116. At the outset, however, it should be noted that in the period between 1992 and 1995, the general discriminatory and intolerant attitude of the government of President Tudjman towards the Serbs in Croatia, accompanied with the rehabilitation of the Independent State of Croatia,[946] was continued and aggravated by war crimes and serious violations of human rights. This lead to their massive exodus, as evidenced by the fact that in 1993 there were 254,000 Serb refugees and displaced persons that fled Croatia, which equaled the number of the Croats that fled the Serb-held areas of the country.[947]

2. Croatia and the RSK 1992-1995

A. *The Deployment of UNPROFOR and Related Issues (1992)*

1117. As already discussed, the fact that from the beginning of 1992 all parties to the conflict in Croatia generally respected the cease-fire, as well as the acceptance of the Vance plan by all relevant actors, led to the deployment of UNPROFOR and the creation of three

[945] See *supra* Chapter V, paras. 540–551.
[946] See *supra* Chapter V, paras. 552–558; see also Annexes 9–12.
[947] See 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47, para. 99.

UNPAs in Croatia. The UNPAs were created in the areas in which the Serbs constituted the majority or a substantial minority of the population and "where inter-communal tensions have led to armed conflict in the recent past." There were three UNPAs: Krajina, covering Sector South (Lika and Dalmatia) and Sector North (Banija and Kordun); Western Slavonia, covering Sector West; and Eastern Slavonia, covering Sector East. The UNPAs were to be fully demilitarized and all armed forces in them were to be either withdrawn or disbanded.[948]

1. The "Pink Zones"

1118. Certain areas in Croatia which were largely populated by Serbs, and which were under the control of the RSK and not of the Croatian government, remained outside the agreed UNPA boundaries. These areas came to be known as "pink zones".[949] In these areas, local Serb authorities resisted the reestablishment of Croatian authority, while Croatia resisted the change in UNPA boundaries that would encompass the "pink zones".[950] This posed a significant challenge to UNPROFOR, in particular with regard to its deployment in the Sectors North and South (UNPA Krajina).[951] Eventually, on 30 June 1992, the Security Council approved the Secretary-General's proposal to extend UNPROFOR's mandate to the "pink zones" where, *inter alia*, UNPROFOR military observers and civilian police would undertake monitoring and patrolling, while various armed forces would withdraw.[952]

2. The Miljevci Plateau attack

1119. Previously, on 21 June 1992, Croatian forces attacked positions of the RSK at Miljevci Plateau, in the "pink zone" near Drniš, south of Sector South, and made an advance of several kilometers. This violation of the cease-fire was conducted in a well-planned manner, according to UNPROFOR.[953] The Security Council urged Croatia to withdraw its army to previous positions[954] but Croatia did not comply.

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[948] See Map no. 6.
[949] For more on this, see Further Report of the Secretary-General pursuant to Security Council resolution 752 (1992), 26 June 1992, UN Doc. S/24188.
[950] *Ibid.*, para. 2.
[951] See *ibid*. para. 5.
[952] Security Council resolution 762 (1992), paras. 5-7 & Further Report of the Secretary-General pursuant to Security Council Resolution 752 (1992), 26 June 1992, UN Doc. S/24188, para. 16.
[953] Further Report of the Secretary-General pursuant to Security Council Resolution 752 (1992), 26 June 1992, UN Doc. S/24188, para. 7.
[954] See Security Council resolution 762 (1992), para. 3.

1120. According to information collected by non-governmental organization "Veritas", forty members of the RSK TO were killed or disappeared during the Croatian attack at Miljevci Plateau.[955] Eye-witness statements indicate that a number of Serb soldiers were not killed in combat but as prisoners of war. Others were tortured and maltreated.[956]

3. Demilitarization

1121. As already mentioned, the UNPAs were to be demilitarized according to the Vance plan. Most of the JNA forces withdrew from UNPAs in the spring of 1992.957 As far as the RSK TO was concerned, a number of its members were transferred to the RSK police units. This was considered a violation of the Vance Plan, but the RSK authorities argued that their population had to be protected from a possible Croatian attack.958 Evidently, the above described events at Miljevci Plateau only confirmed these fears. According to the Secretary-General,

> "[t]he Serb local authorities have taken the position that official and public threats by the Croatian authorities to resort to force, frequent cease-fire violations and repeated armed incursions have made it impossible for them to implement full demilitarization."[959]

1122. This would remain the position of the RSK, despite repeated calls for demilitarization from the United Nations.[960] As will be seen below, the fears of Serbs in the RSK found justification in the fact that each time there was a progress in relations between the parties, including towards full demilitarization, the Croatian authorities would undertake armed attacks against Serbs in the UNPAs, accompanied with ethnic cleansing of the Serb population.

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[955] See List of members of the TO RSK killed or disappeared at Miljevci Plateau (Annex 46), available at http://www.veritas.org.rs/publikacije/Miljevci/Tekstovi/miljevci.htm).
[956] See Annex 47;http://www.veritas.org.rs/publikacije/Miljevci/Tekstovi/miljevci.htm .
[957] See Further Report of the Secretary-General pursuant to Security Council Resolution 752 (1992), UN Doc. S/24188, para. 4.
[958] See Further Report of the Secretary-General pursuant to Security Council Resolutions 743 (1992) and 762 (1992), 28 September 1992, UN Doc. S/24600, paras. 4 & 7; Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, para. 12.
[959] Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, para. 12.
[960] See, e.g., Security Council resolution 802 (1993), para. 4 and resolution 871 (1993), para. 4.

B. *The Resumption of Hostilities - 1993*

1. The Maslenica Attack

1123. Despite problems, the situation in the UNPAs had stabilized and even started to improve in the course of the second part of 1992.[961] Even with respect to the very difficult human rights situation in the RSK, which was characterized by discrimination, abuse and numerous crimes against non-Serbs (but not genocide), the United Nations was able to conclude that improvements had been made:

> "... from November 1992 onwards, the situation improved in all but a few areas. The maintenance of law and order was gradually enhanced through the reorganization and redeployment of the local police. The carrying of 'long arms', in breach of the agreed plan, greatly diminished, and by January 1993 such arms were being carried only by the 'border militia'. The Serb authorities had informed UNPROFOR that these, too, would be withdrawn once they were sure that UNPROFOR could exercise full protection against Croatian incursions across the line of confrontation."[962]

1124. However, the improvement of the situation in late 1992 came to an abrupt halt when, on 22 January 1993, the Croatian forces launched an offensive and attacked Maslenica and other locations in the southern part of Sector South and the adjacent "pink zones". Two UNPROFOR soldiers were killed and four more injured in this offensive.[963] On 27 January 1993, the Croatian forces captured the Peruća dam. The RSK Serbs responded by removing their stored weapons, including heavy ones, from UN controlled storage areas.[964]

1125. The Croatian offensive led to the destruction of the villages Smoković, Islam Grčki, and Kašić.[965] Over 11,000 Serbs were displaced as the result of the Croatian attack and found refuge in other parts of the RSK.[966]

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[961] See Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, paras. 12–13.
[962] *Ibid.*, para. 13.
[963] *Ibid.*, para. 14.
[964] *Ibid.*
[965] See http://www.veritas.org.rs/publikacije/Maslenica/Tekstovi/maslenica.htm.

1126. After the events at Maslenica, the painstakingly achieved progress in the disarmament process was shattered, since the RSK lost confidence in UNPROFOR's ability to protect the Serb population.[967] Croatian forces never retreated to the positions they held before the Maslenica attack, despite having been called upon to do so by the Security Council.[968] Moreover, President Tuđman threatened publicly that Croatia would attack the UNPAs if it considered that UNPROFOR was unable to fulfill its mandate.[969] This threat was to be fulfilled in the coming period through several attacks that successively cleansed the captured UNPAs or parts of them from the Serb population and finally lead to the operation *Storm* in Krajina in 1995.

1127. The Croatian attack at Maslenica led to the resumption of armed clashes between Croatia and the RSK with heavy fighting around Zadar in Dalmatia during January and February 1993.[970] The situation was described as follows:

> "The HV operation at Maslenica not only revived fighting in Dalmatia but also brought a remobilization of Croatian and Serb forces throughout the country. As the armies took up their old positions and the SVK withdrew its heavy weapons from UN control, clashes began anew at many of the same old hot spots, despite the continued presence of UN at outposts all along the frontline. Serb artillery and mortar fire erupted throughout UN Sectors North and South, covering Banija, Lika and Northern Dalmatia regions, and the Croatians responded in kind."[971]

1128. Afterwards, the hostilities continued, although there would be no major ground operations until September 1993. On 15 May 1993, the Secretary-General reported that "[t]he continuance of hostilities despite resolution 802 (1993), including repeated shelling, by both sides, of purely civilian targets, and reports of further imminent incursions, have caused tensions in the UNPAs to rise to a degree not previously encountered since the establishment of UNPROFOR."[972]

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[966] See 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47 (1993), para. 149.
[967] Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, para. 16.
[968] Security Council resolution 802 (1993), para. 1.
[969] Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, para. 24.
[970] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military H istory of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 268 (Peace Palace Library).
[971] *Ibid.*
[972] Further Report of the Secretary-General pursuant to Security Council Resolution 815 (1993), 15 May 1993, UN Doc. S/25777, para. 13.

1129. At the same time, efforts undertaken by UNPROFOR and within the framework of the International Conference on the Former Yugoslavia to bring about a cease-fire and a restoration of *status quo ante* by UNPROFOR were not successful despite intensive negotiations.[973]

2. The Medak Pocket

1130. On 9 September 1993, the Croatian forces attacked the area of Medak Pocket which was located in the "pink zone" near Sector South.[974] The RSK retaliated by shelling Croat frontline and urban targets.[975] After capturing the villages of Divoselo, Čitluk and part of Počitelj, the Croatian advance halted. Following international mediation, an agreement between the Croatian and RSK side was signed on 15 September 1993, under which a cease-fire was to take effect on 15 September, while the Croatian forces would simultaneously withdraw from the territory entered on 9 September 1993.[976] The Croatian forces actually withdrew on 17 September, but before that they attacked UNPROFOR's Canadian battalion when it tried to enter the area, which led to a virtual armed battle on 15–16 September.[977]

1131. It is likely that the Croatian forces were actually preventing the entry of UNPROFOR into the area whilst trying to complete the ethnic cleansing. This is how the Canadian account of this event describes what UNPROFOR's Canadian battalion found in the area from which the Croatian forces had withdrawn:

> "The sheer magnitude of the devastation they found, and the eerie silence after the noise of explosions and shootings in the morning, was crushing. They had arrived too late to help the Serbs in the Medak Pocket, but they had forced their way in before the Croatian Special Police could complete their clean-up. Every building had been burned or flattened by mines. Now they understood the truckloads of wood they

[973] See Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 20 September 1993, UN Doc. S/26470, paras. 6–7.
[974] *Ibid*., para. 9 & 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47, para. 100 *et seq*.
[975] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military H istory of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 269.
[976] ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Consolidated Indictment, paras. 44–45.
[977] For more on this event, see http://www.army.forces.gc.ca/2PPCLI/RH-United_Nations.asp.

had seen the Croats trucking in - tinder to light the sturdy stone and mortar farmhouses of the Medak. Everywhere there were shell casings, accompanied by a similar number of disposable latex gloves, indicating that the Croats had been moving bodies to hide evidence. Grisly, burned corpses were found, 29 in all. Hundreds of Serbs went missing, and were never to return. Thousands had been displaced from their homes, which were systematically razed. Even the farm animals that could not be taken had been shot. There was no life in the Medak Pocket."[978]

1132. The Special Rapporteur of the UN Commission for Human Rights also reported that the Croatian attack in the Medak Pocket was accompanied by ethnic cleansing and the arbitrary execution of members of the Serb population in the villages of Divoselo, Čitluk and Počitelj, situated in the Medak Pocket.[979] Further, the UN Rapporteur determined that the following hamlets in the Medak Pocket – Sitnik, Drijići, Vuksani, Donje Selo, Uzelci, Raičevići, Rogići, Budići, Lički Čitluk and Krajinovići – were either entirely destroyed or sustained heavy damage. The destruction was effected not only by shelling, but also by the systematic destruction with explosives carried out by Croatian forces upon entering the villages.[980] It should also be noted that seven elderly persons of Serb origin were found dead near the village of Mirlović Polje in the region of Sector South, after an earlier attack on the village by the Croatian forces on 6 September 1993.[981]

1133. The ICTY Prosecutor indicted Croatian generals Ademi and Norac in relation to the events in the Medak Pocket.[982] This is how the ICTY Indictment described the crimes in the Medak Pocket:

> "46. During the Croatian military operation in the Medak Pocket, at least 29 local Serb civilians were unlawfully killed and others sustained serious injury. Many of the killed and wounded civilians were women and elderly people. Croatian forces also killed at least five Serb soldiers who had been captured and/or wounded. (...)

[978] See *ibid.*
[979] 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 February 1993, 17 November 1993, UN Doc. E/CN.4/1994/47 (1993), para. 100.
[980] *Ibid*., para. 104.
[981] *Ibid*., para. 106.
[982] ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Consolidated Indictment.

47. Approximately 164 homes and 148 barns and outbuildings, being a majority of buildings in the villages within the Medak Pocket were destroyed, mostly by fire and explosives, after the Croatian forces had taken effective control. A substantial portion of this destruction took place between the cease-fire on 15 September 1993 and the completion of the Croatian withdrawal at 1800 hours on 17 September 1993.

48. Between 9 and 17 September 1993, property belonging to Serb civilians was plundered by the Croatian forces, or by persons in civilian clothes under the supervision of the Croatian forces, for anything of value. These included personal belongings, household goods, furniture, housing items, farm animals, farm machinery and other equipment.

49. Serb-owned civilian property that was not subjected to plunder as described above was burned or otherwise destroyed. Household goods and furniture were destroyed, farm machinery was damaged or destroyed with bullets, farm animals were killed and wells were polluted.

50. As a result of these widespread and systematic unlawful acts during the Croatian military operation, the Medak Pocket became uninhabitable. The villages of the Pocket were completely destroyed, thereby depriving the Serbian civilian population of their homes and livelihood. "

1134. The ICTY transferred the Norac and Ademi case for trial before Croatian courts in 2005.[983] Norac was found guilty of war crimes and sentenced to 7 years imprisonment, while Ademi was acquitted.[984]

C. *The Cease-Fire and Gradual Stabilization* (1993–1994)

1135. As already mentioned, a cease-fire concluded on 15 September 1993 brought to an end the fighting in the Medak Pocket. A series of local cease-fires was in place in all UNPAs by the end of 1993.[985] This was accompanied by talks within the framework of

[983] ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule *11bis*.
[984] See http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/mirko_norac_619.html.
[985] See Report of the Secretary-General pursuant to Security Council Resolution 871 (1993), 1 December 1993, UN Doc. S/26828, para. 10.

the International Conference on the Former Yugoslavia with the aim to achieve a comprehensive cease-fire and to initiate discussion on confidence-building steps.[986] The talks were conducted on the basis of a three-step strategy: first, discussion of a cease-fire, second, of economic reconstruction, and finally, of political questions.[987] During November 1993, the two parties held talks at which they discussed a cease-fire agreement and economic matters, in particular issues related to infrastructure and communications, energy and water supply. The parties also agreed to establish a military joint commission to take on practical work on details of a cease-fire.[988]

1136. While from 1992 onwards the United Nations had repeatedly expressed their dissatisfaction with the fulfillment of UNPROFOR's mandate,[989] it seems that the three-step strategy, after difficult negotiations, did yield progress. On 29 March 1994, the Croatian and RSK representatives signed a general cease-fire agreement which was aimed to achieve and ensure a lasting cessation of hostilities.[990] In the subsequent period, both parties generally observed the cease-fire.[991]

1137. The international negotiators then focused on an economic cooperation agreement between the parties and, after months of negotiations, the parties finally made the agreement on economic issues on 2 December 1994.[992] It envisaged cooperation with respect to the supply of water and electricity, the opening of the Adriatic oil pipeline and the highway.[993] Shortly afterwards, on 21 December 1994, the highway Zagreb-Belgrade was opened in Sectors East and West and other provisions of the agreement started to be implemented.[994] This led the Secretary-General to express cautious optimism as to the possibilities of further progress in the fulfillment of UNPROFOR's mandate.[995]

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[986] See *ibid.*, para. 2 *et seq.*
[987] *Ibid.*, para. 4.
[988] *Ibid.*, paras. 4–8.
[989] See, e.g., Security Council resolution 871 (1993), preambular para. 5; Security Council resolution 947 (1994), preambular para. 6; see, also, Report of the Secretary-General pursuant to Resolution 871 (1993), 16 March 1994, UN Doc. S/1994/300, para. 8.
[990] For the text, see Letter dated 30 March 1994 from the Secretary-General addressed to the President of the Security-Council, 30 March 1994, UN Doc. S/1994/367.
[991] Report of the Secretary-General pursuant to Resolution 908 (1994), 17 September 1994, UN Doc. S/1994/1067, para. 3; Report of the Secretary-General pursuant to Paragraph 4 of Security Council Resolution 947 (1994), 14 January 1995, UN Doc. S/1995/38, para. 6.
[992] See Letter dated 2 December 1994 from the Secretary-General addressed to the President of the Security Council, 2 December 1994, UN Doc. S/1994/1375.
[993] For the text of the agreement, see *ibid.*, Appendix 1.
[994] Report of the Secretary-General pursuant to Paragraph 4 of Security Council Resolution 947 (1994), 14 January 1995, UN Doc. S/1995/38, paras. 12 & 14–17.
[995] *Ibid.*, paras. 26–27.

1138. However, on 12 January 1995, President Tuđman and the Croatian government declared that Croatia would not agree to a further extension of UNPROFOR's mandate,[996] which caused grave concern for the Secretary-General about the risk of renewed hostilities, should UNPROFOR be withdrawn from Croatia.[997] In fact, already at that time, Croatia was preparing to take over the Serb-held areas by armed force.[998] In hindsight, it appears that at least by the end of 1994 Croatia decided to pursue a *de facto* policy of taking the Serb-held areas by force, while simultaneously participating in the negotiations with the other party led by international mediators.

1139. A subsequent report of the Secretary-General states that there had been "a significant escalation in military activity and tension between the two sides" following President Tudjman's announcement.[999] While on 26 January 1995 the Adriatic pipeline was opened through Sector North, on 8 February 1995 the Assembly of the RSK decided to postpone further negotiations and implementation of the economic agreement, except with respect to the highway and the pipeline, until UNPROFOR's future presence was assured.[1000] The uncertainty over the extension of UNPROFOR's mandate also affected further negotiations on a political agreement. On 30 January 1995, international mediators, the "Zagreb-4" ambassadors, presented a "Draft agreement on the Krajina, Slavonia, Southern Baranja and Western Sirmium" to both sides. The Croatian government accepted the draft as a basis for negotiations, but expressed reservations about it, with some in the government considering that the agreement was utterly unacceptable as it amounted to the creation of a bi-national federation in the country.[1001] The RSK officials refused to receive the draft until UNPROFOR's mandate was renewed.[1002] In the opinion of the Secretary-General, the events following President Tudjman's announcement that Croatia would not agree on a further extension of UNPROFOR's mandate led the parties to the brink of a major war.[1003]

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[996] *Ibid.*, para. 4.
[997] *Ibid.*, para. 5.
[998] J. Bobetko, *All My Battles (Sve moje bitke)*, Zagreb, 1996, pp.400 & 407 (Annex 50).
[999] Report of the Secretary-General pursuant to Security Council Resolution 947 (1994), 22 March 1995, UN Doc. S/1995/222, para. 3.
[1000] *Ibid.*, paras. 7–8.
[1001] See M. Klemencic & C. Schofield, "An UNhappy Birthday in former Yugoslavia: A Croatian Border War", *IBRU Boundary and Security Bulletin Summer 1995*, p. 50, available at http://www.dur.ac.uk/resources/ibru/publications/full/bsb3-2_klemencic.pdf.
[1002] Report of the Secretary-General pursuant to Security Council Resolution 947 (1994), 22 March 1995, UN Doc. S/1995/222, para. 11.
[1003] *Ibid.*, para. 60.

1140. Eventually, after energetic efforts on the part of international mediators, Croatia accepted that UN peacekeepers could stay. A new UN force, known as UNCRO, was created by Security Council resolution 981 (1995). UNCRO mandate differed from that of UNPROFOR, and included performing the functions envisaged in the cease-fire agreement of 29 March 1994, facilitating implementation of the economic agreement of 2 December 1994, and of all relevant Security Council resolutions, and assisting in border control.[1004]

1141. However, soon after it agreed to the extension of the UN peacekeepers' mandate and the establishment of UNCRO, Croatia would grossly violate its international obligations by conducting an all-out armed attack against the Serb-held part of UNPA Western Slavonia.

D. *Operation* Flash

1. Operation Flash *and the Reaction of the Security Council*

1142. On 1 May 1995, about 2,500 Croatian army and police with heavy equipment and air support entered Sector West (Western Slavonia) from both directions of the Zagreb-Belgrade highway. The explanation given was that this was a police action to restore security on the highway which was closed after inter-ethnic incidents that had taken place in the previous days, notably the stabbing of a Serb on 28 April which was followed by a retaliatory killing of three Croats by Serbs on 30 April.[1005] Soon it became clear that the Croatian government intended to secure complete control over Sector West, which was accomplished within days. The RSK responded by firing missiles on 2 and 3 May on Zagreb and the Pleso airfield, as well as shelling Karlovac and Sisak.[1006] The Croatian forces also made some advances in Sectors North, South and East.[1007] Operation *Flash* ended around 4 May 1995, with the RSK losing control over Western Slavonia, while the area was practically emptied of its Serb population.

[1004] Security Council resolution 981 (1995), para. 3.
[1005] Report of the Secretary-General Submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, para. 5.
[1006] *Ibid.* Seven persons were killed in the shelling of Zagreb, with over two hundred people injured. ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 308 & 313.
[1007] Report of the Secretary-General Submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, para. 7.

1143. There is evidence that the operation *Flash* had been planned long before the incidents that served as a pretext for its launch took place. According to General Janko Bobetko, Chief of the Main Staff of the Croatian Army during the operation, the initial operation was planned as early as 5 December 1994, as part of the overall plan of preparations for the final operations of the Croatian army for taking of Serb-held areas by force.[1008] This means that Croatia was preparing the forcible takeover of the Serb-held areas at the time when it concluded the economic agreement with the RSK and when a political solution for the crisis was discussed with the help of international mediators.

1144. The Security Council immediately responded to the Croatian attack on the Western Slavonia, demanding on 1 May 1995 "... that the Government of the Republic of Croatia put an end immediately to the military offensive launched by its forces in the area of Western Slavonia known as Sector West which started on the morning of 1 May 1995 in violation of the cease-fire agreement of 29 March 1994."[1009]

1145. On 4 May 1995, the Security Council *inter alia* reaffirmed its previous statement, demanded immediate compliance by the parties and condemned the bombardment of Zagreb and other places by the RSK forces. The Security Council also stated that it was "deeply concerned by reports that the human rights of the Serb population of Western Slavonia are being violated" and demanded from the Croatian government full respect of their rights.[1010] These presidential statements were reaffirmed by Security Council resolution 994 (1995) of 17 May 1995, including the demand to the Croatian government to "respect fully the rights of the Serb population".[1011]

2. Exodus of the Serb Population and Violations of Humanitarian Law

1146. The Croatian takeover of Western Slavonia led to the exodus of its Serb population. In July 1995, the Special Rapporteur on human rights in the former Yugoslavia estimated that no more than 1,000 Serbs remained in the area. In the first two days of the operation 10,000 Serbs left, and were followed by two thousand more in the weeks that followed.[1012]

[1008] ICTY, *Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 302, note 941, referring to Mr. Bobetko's book *Sve moje bitke* [All my battles]. The relevant excerpts are reproduced in Annex 50 to this Counter-Memorial.
[1009] Statement by the President of the Security Council, 1 May 1995, UN Doc. S/PRST/1995/23, para. 2.
[1010] Statement by the President of the Security Council, 4 May 1995, UN Doc. S/PRST/1995/26, paras. 2, 4 & 6.
[1011] Security Council resolution 994 (1995), paras. 1 & 6.
[1012] Periodic report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of Commission resolution 1995/89, 14 July 1995, UN Doc. A/50/287-S/1995/575, paras. 28–29.

1147. The Western Slavonia's Serb population that was fleeing the Croatian attack across the river Sava into Bosnia and Herzegovina was targeted by the Croatian forces who committed numerous violations of humanitarian law. According to the UN Special Rapporteur on human rights in the former Yugoslavia:

> "The road from Okucani to the crossing into this territory [Bosnia and Herzegovina] at the Sava River bridge sustained heavy shelling by Croatian forces during this period, and Croatian warplanes bombarded both sides of the river. To date it has not been possible to establish the exact number of civilians killed in the course of these events. According to Croatian government sources, some 20 'RSK' civilians were killed in the Sector during the entire operation; however, reports from refugees who succeeded in crossing the river indicate the number along the Okucani-Sava River road alone may have been considerably higher."[1013]

1148. At another location, withdrawing United Nations troops on 2 August 1995 "reported seeing numerous bodies of civilians scattered along the road between the river and Novi Varos, south of Okucani". In the village of Nova Varoš, they saw "as many as 30 dead civilians in vehicles clustered in a group".[1014] Further north on the same road, Croatian forces killed as many as 10 refugees.[1015]

1149. Witnesses provided disturbing accounts of the crimes committed in Nova Varoš on 2 August 1995, where Croatian forces attacked refugee column some kilometers long, consisting mainly of passenger vehicles and tractors. The attackers also used mortar and artillery fire, killing and wounding civilians in their vehicles or as they were trying to flee.[1016]

1150. Killings of Serb civilians were also reported elsewhere in Okučani and Pakrac areas in Western Slavonia.[1017]

[1013] *Ibid.*, para. 7.
[1014] *Ibid.*, para. 8
[1015] *Ibid*.
[1016] See Witness Statement of Petar Božić (Annex 48) and Witness Statement of Savo Počuča (Annex 49).
[1017] Periodic report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of Commission resolution 1995/89, 14 July 1995, UN Doc. A/50/287-S/1995/575, paras. 9–12 & 14.

1151. As in the case of the Medak Pocket operation, the Croatian forces apparently tried to remove evidence of their crimes. According to the UN Special Rapporteur,

> "Between 2 and 4 May 1995, the Croatian military reportedly conducted an intensive clean-up operation in the areas around Okucani, west towards Novska and south towards the Sava River bridge. A chemical disinfectant machine was reported in the area, bodies were seen being loaded into trucks and, according to one reliable account, a convoy of refrigerator trucks was seen on 3 May 1995 heading west from Okucani along the main highway towards Zagreb. By the time international observers were permitted entry to the area after 4 May 1995, no signs of possible breaches of humanitarian law were visible."[1018]

1152. There is conflicting information about the number of persons killed during operation *Flash*. The Croatian authorities were reported to estimate the number of Serbs dead at 188, but this information was doubted by the UN Special Rapporteur, who considered that the number of dead exceeded the Government figures.[1019] According to "Veritas", a non-governmental organization, the number of the dead and missing Serbs is at least 281.[1020]

1153. After operation *Flash*, Western Slavonia was for all practical purposes cleansed of its Serb population. The Croatian Prime Minister at the time, Mr. Nikica Valentić, boasted after the operation: "The Serb problem in Western Slavonia has been solved. There's no more than a thousand of them including old women and the elderly, and there are no more than 300 to 400 people who are political factors."[1021]

1154. Similarly, Tudjman's chief advisor at the time, Mr. Hrvoje Šarinić, noted that "we should be inspired by the way it is in Western Slavonia. It was very positive for us, because no one came back."[1022]

[1018] *Ibid.*, para. 12.
[1019] *Ibid.*, paras. 15 & 53.
[1020] See http://www.veritas.org.rs/publikacije/Bljesak/Tekstovi/bljesak.htm
[1021] As quoted in Prosecutor's pre-trial brief in ICTY, *Gotovina et al.*, IT-06-90-PT, Submission of Public Version of Prosecution Pre-Trial Brief, 23 March 2007, para. 20.
[1022] As quoted in *ibid.*, para. 26.

3. *Aftermath of Operation* Flash

1155. Operation *Flash* once again confirmed to Serbs in the RSK that the UN peacekeepers were not able to protect them from a Croatian attack. As the Secretary-General reported on 9 June 1995,

> "On the Serb side, there is continued anger and hostility at UNCRO's inability to prevent the Croatian offensive or fulfil its role under the cessation-of-hostilities agreement of 3 May 1995. In meetings with my Special Representative, Krajina Serb leaders have emphasized that this was the fourth major military offensive by Croatia (following on those at the Milavjeci [Miljevci] Plateau in June 1992, around Maslenica in January 1993 and in the Medak pocket in September 1993) since United Nations peace-keeping forces were deployed."[1023]

1156. Following operation *Flash*, the tensions between the parties remained high, with nearly continuous small-scale violations of the cease-fire agreement by both sides.[1024] While the RSK forces were fighting in the Bihać pocket, in Bosnia and Herzegovina, supporting Mr. Fikret Abdić forces against the Bosnian Government, the Croatian army continued its gradual advance into the Sector South in June and July 1995.[1025] The Security Council, in a presidential statement issued on 19 June 1995, called upon "the parties, and in particular the Government of Croatia, to cease all military action in and around Sector South."[1026] However, the Croatian forces continued with their advance in disregard of the Security Council presidential statement and despite assurances given by the Croatian government.[1027] This was to be one of the last steps in the preparation of the final military action against the RSK, operation *Storm*.[1028]

[1023] Report of the Secretary-General Submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995. UN Doc. S/1995/467, para. 18.
[1024] Report of the Secretary-General Submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, para. 4.
[1025] *Ibid.*, paras. 5& 9. See also Report of the Secretary-General submitted pursuant to Security Council resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, para. 9 and Map no. 8.
[1026] Statement by the President of the Security Council, 19 June 1995, UN Doc. S/PRST/1995/30, para. 2.
[1027] Report of the Secretary-General Submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, para. 5.
[1028] See *infra* Chapter XIII, paras. 1178–1179.

1157. Simultaneously, international mediators made utmost efforts to stop the escalation of the crisis by their activities both on the ground and under the auspices of the International Conference on the Former Yugoslavia. As will be seen in Chapter XIII, these efforts ultimately proved unsuccessful.[1029] In this context, it is important to recall that the draft political agreement (usually referred to as Z[agreb]-4 plan) was presented to the parties in January 1995. The Croatian government accepted the plan as a basis for negotiations, but expressed reservations, with certain elements in the government considering that it was utterly unacceptable as it amounted to the creation of a bi-national federation in Croatia.[1030] The RSK refused to receive the draft until the UN peacekeepers' mandate was renewed. Subsequently, some RSK leaders were more amenable to the plan, while others rejected it. It is a fact, however, that on 2 August 1995, Milan Babić, as Prime Minister of the RSK, accepted the Z-4 plan.[1031]

1158. The next day, at a meeting held on 3 August 1995 in Geneva, on the eve of operation *Storm*, Mr. Stoltenberg, the Co-Chairman of the International Conference on the Former Yugoslavia, presented the parties with a seven-point proposal designed to preclude the Croatian military action and resolve the crisis peacefully. It envisaged, *inter alia*, negotiations on a final settlement on the basis of the "Z-4" plan and the reopening of the Zagreb-Knin-Split railway and the oil pipeline, which was very similar to the set of conditions Croatia expected the Serbs to fulfill and that President Tuđman had shortly before presented to the Secretary-General's Special Representative Yasushi Akashi.[1032]

1159. However, while the RSK delegation was inclined to accept the Stoltenberg proposal, subject to clearance by its political leadership, the Croatian delegation rejected it straight away.[1033] Operation *Storm* commenced the next day in the early morning.

3. Conclusion

1160. The preceding overview of the relations between the Croatian government and the Serbs in the UNPAs, which formed the RSK, is by no means exhaustive and does not

[1029] See Chapter XIII, para. 1181.
[1030] See M. Klemencic & C. Schofield, "An UNhappy Birthday in former Yugoslavia: A Croatian Border War", *IBRU Boundary and Security Bulletin Summer 1995*, p. 50, available at http://www.dur.ac.uk/resources/ibru/publications/full/bsb3-2_klemencic.pdf.
[1031] *Ibid.*, para. 158.
[1032] These were presented by President Tuđman to Mr. Akashi on 29 July 1995, see Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, p. 2.
[1033] *Ibid.*

attempt to discuss all the details of almost 4 years of tensions, armed clashes, and negotiations between the parties. As already noted, UNPROFOR had difficulties in fulfilling its mandate from the very beginning of its deployment in spring 1992. This was to a considerable extent due to the attitude of the RSK authorities. In that regard, of particular importance was the RSK's failure to fully demilitarize the UNPAs, and the refusal until 1995 to consider options involving reintegration of these territories into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected.[1034] At the same time, the RSK concerns found their justification in the attitude of the Croatian government, which not only threatened from the very outset that it would integrate the UNPAs by force,[1035] but on four occasions before the operation *Storm* actually undertook large military operations for that very purpose. As the above overview demonstrates, it was Croatia's major military actions that halted progress made at the negotiating table or on the ground, as was the case with the Maslenica Attack in January 1993 and operation *Flash* in 1995.

1161. It seems that the Secretary-General's report to the Security Council of 16 March 1994 fairly summarized the situation from the deployment of UNPROFOR in 1992 to 1994:

> "The only major success achieved in relation to UNPROFOR's basic mandate in Croatia has been the withdrawal of JNA forces from Croatian territory. In the absence of a comprehensive political settlement, however, both sides have sought to use UNPROFOR to achieve their political goals. The Serb side has taken advantage of the presence of UNPROFOR in its efforts to freeze the status quo, under UNPROFOR 'protection', while establishing a self-proclaimed 'State' of the 'Republic of Serb Krajina' in UNPROFOR's area of responsibility. The Government of Croatia has in turn insisted on the reintegration of these areas into Croatia according to its internationally recognized borders and demanded that refugees and displaced persons be returned to their homes in the UNPAs. On four occasions, it has launched military incursions in pursuit of these goals, which has further intensified Serb hostility. Such actions, compounded by the lack of

[1034] See e.g. Security Council resolution 815 (1993), preambular para. 2.
[1035] See e.g. Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), 10 February 1993, UN Doc. S/25264, para. 24.

> cooperation from the local Serb authorities, who still maintain effective military control over most of the areas occupied by them during the war of 1991, have made UNPROFOR's mandates in Croatia all but impossible to fulfill."[1036]

1162. The rapprochement of the parties made in the course of 1994, and the cease-fire and economic agreements concluded by them, gave rise to a cautious optimism by the Secretary-General. However, regardless of the political progress being made, Croatia decided to solve the RSK problem by resorting to the use of military force and not by peaceful and gradual economic and political integration, which was the approach taken by the international community and also verbally accepted by the Croatian government. Croatia's real position at the time is revealed in the Memorial: "the Republic of Croatia resolved to address the problem directly through the use of military force and in 1995 Croatian forces, in two key operations, regained control of the UN Protected Areas."[1037]

1163. Evidence shows that the decision to use military force in retaking the UNPAs was already made by the end of 1994 at the latest.[1038] From that time onwards, Croatia was preparing an all out military takeover of the UNPAs, regardless of the progress made in the negotiations. As General Bobetko testified in his memoirs, operation *Flash* was one element of a total plan of preparations by the Croatian army to take over the UNPAs. According to him, "[t]he 'Flash' was introduction into the 'Storm'".[1039]

1164. The operations taken in pursuance of this plan, first *Flash* and then *Storm*, were much larger than previous Croatian incursions at Miljevci Plateau, Maslenica and Medak Pocket. But these previous operations also involved gross violations of international humanitarian law and the territories taken by the Croatian forces were emptied of the Serbs and even made uninhabitable, such as in the case of the Medak Pocket. It was therefore clear that, as an alternative to a peaceful and gradual integration of the UNPAs into Croatia pursued by the international community, the military takeover of these territories and their integration by force necessarily meant that the Serbs living there would not stay to await the destiny already suffered by the inhabitants of Miljevci

[1036] Report of the Secretary-General pursuant to Resolution 871 (1993), 16 March 1994, UN Doc. S/1994/300, para. 8.
[1037] Memorial, para. 2.149.
[1038] See *supra* para. 1138.
[1039] See J. Bobetko, *Sve moje bitke* [All My Battles], p. 407 (Annex 50).

Plateau, Maslenica and the Medak Pocket. It also meant that the Croatian forces, as was clear from their conduct in operation *Flash*, would not hesitate in indiscriminately targeting all those who were not able to leave the territory of Croatia in time. As Bobetko testifies, the operations were to be conducted "with the cleansing of that whole territory."[1040]

[1040] *Ibid.* According to Bobetko, "It worked out all the assignments to the minutest detail; it was practically constantly perfected from 1994 up to the very moment of its execution, because it was a part of the overall plan of preparations for the final operation of the Croatian Army that subsequently turned into "Storm" with the cleansing of the whole territory." The original text reads as follows: "U njoj su razrađeni svi zadaci do detalja, gotovo od 1994. do samoga izvođenja stalno je usavršavana, jer je ulazila u ukupan plan priprema završnih operacija Hrvatske vojske, koje će se posle pretočiti u "Oluju", uz čišćenje tog celog teritorija."

CHAPTER XIII

OPERATION *STORM* AS THE NEW GENOCIDE AGAINST SERBS IN CROATIA

1. Introduction

1165. Chapter XIII will deal with events which occurred in August 1995 and subsequent months and will provide the Court with a factual basis that will be used to further argue that genocide was committed against part of the Serbian population in Croatia, namely Serbs living in the territory of Krajina (Krajina Serbs). Term Krajina will be used throughout the text as reference to territories of UNPAs Sectors South and North as well as the surrounding "pink zones".[1041] Sector South covered geographical areas of Lika and Dalmatia while Sector North covered areas of Banija and Kordun.[1042] "Pink zones"represent territories under Serb control, parts of different municipalities with Serbian population which were also under UN protection despite the fact that they were situated outside of the UNPAs.[1043]

1166. As reported in the 1991 census 580.000 Serbs lived in Croatia and as such constituted around 12% of the population of the Republic of Croatia.[1044] As will be shown *infra,* Krajina Serbs made up a substantial percentage of Serbs in Croatia in 1995 when genocide was committed against that part of the group.

1167. Serbs resided in Krajina since the establishment of the Military Krajina, a border district dividing the Ottoman and the Habsburg Empire, in XVI century.[1045] Because of the

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[1041] See *supra* Chapter V, paras. 566-569, also see *supra* Chapter XII, paras. 1117–1118.

[1042] Sector South geographically encompassed areas of Northern Dalmatia (municipalities Knin, Benkovac and Obrovac) and Lika (municipalities Gračac, Donji Lapac and Korenica) and Sector North geographically encompassed areas of Banija (municipalities Dvor, Glina, Kostajnica and Petrinja) and Kordun (municipalities Vojnić, Vrginmost, Slunj); see Report of the Secretary-General pursuant to Security Council resolution 721 (1991), 11 December 1991, UN Doc. S/23280, Annex III; for the division of the municipalities in Sectors South and North see N. Barić, *Srpska pobuna u Hrvatskoj 1991–1995*, Zagreb, 2005, pp. 172–174, see also Hrvatski informacioni centar (HIC)UNPA, Sector South available at: http://www.hic.hr/ratni-zlocini/hrvatska/dalmacija/unpa.htm, UNPA Sector North available at: http://www.hic.hr/ratni-zlocini/hrvatska/banovina/unpasjever.htm; See also Map no.6.

[1043] See *supra* Chapter V, paras. 566–569; see also Further Report of the Secretary General submitted pursuant to Security Council Resolution 752 (1992), 26 June 1992, UN Doc. S/24188.

[1044] R. Petrović , 'The national composition of Yugoslavia's population 1991', *Yugoslav survey*, 1992, No. 1, p. 12.

[1045] P.H. Liotta, *The Wreckage Reconsidered: Five Oxymorons from Balkan Deconstruction*, Lanham, Maryland: Lexington Books, 1999, p. 38; some authors also use the term "Military Frontier – the Vojna Krajina", see T. Judah, *The Serbs : History, Myth and the Destruction of Yugoslavia*, New Haven: Yale University Press, 1997, p. 13; the term "Military Border" is also used, see J. R. Lampe, *Yugoslavia as History : Twice There was a Country*, Cambridge: Cambridge University Press, 2000, 2nd ed., p. 30; D. Pavličević (ed.), *Vojna Krajina, Povijesni pregled- historiografija-rasprave*, Sveučilišna naknada Liber, Zagreb, 1984, F. Maočanin, *Vojna Krajina do kantonskog uredjenja 1787*, p. 23; See also Map no.1.

specific historical characteristics of this area, namely it being a border between two great empires, the Military Frontier was a specific geographical territory populated by people with specific social development, different from that of the rest of the population in Croatia. Krajina was for Serbs living in that territory through centuries a center of cultural, religious and political life.[1046]

1168. This Chapter will be structured as follows. Firstly, it will be demonstrated how the Croatian military leadership prepared for the final strike against the Krajina Serbs by conducting preparatory military operations.

1169. Secondly, the Court will be presented with the relevant parts of the Brioni meeting during which, as will be submitted, a genocidal plan was envisaged among the top Croatian political and military leadership. This section also shows how the final agreement and final details of the operation *Storm* were agreed.

1170. Thirdly, the operation *Storm* will be described, as well as its effects on the Krajina Serbs.

1171. Fourthly, the Applicant will submit the number of Serbian victims and provide a timeline of when their killings were perpetrated. This section will deal first with the killing of the Serbs that took place when they were evacuating in refugee columns and then with the subsequent killings of the Serbs that remained in former Sectors South and North.

1172. The fifth section will deal with the destruction of Serbian property that occurred both during and after operation *Storm*.

1173. The sixth section will show the after-effects of operation *Storm*. This section will also explain the measures implemented by the Croatian Government which targeted Serbs, their aim being to prevent Serbs from ever reestablishing their community in Krajina. In this context, the discussion will also mention the criminal impunity enjoyed by the Croatian perpetrators of most heinous crimes against Serbs.

[1046] See *infra* Chapter XIV, paras. 1381–1382.

2. Military Actions Conducted in Preparation of Operation *Storm*

1174. As explained previously, Croatia started preparations for the military takeover of the UNPAs long before operation *Storm* started.[1047] In particular, the target of these military operations was Krajina as defined *supra*.[1048]

1175. From the end of 1994 Croatia started conducting tactical military operations in the territory of Bosnia and Herzegovina (BiH) with the goal of creating conditions for an efficient attack against the Krajina and more specifically on the city of Knin that was positioned close to the border between BiH and Croatia.[1049]

1176. One of the leading Croatian commanders Ante Gotovina led the operation "Zima 94" from November 1994 onwards, the goal of which was to seize the Livno valley in BiH. According to the CIA analysis of the events in Croatia, the operation was designed first to relieve pressure on the Bihać pocket that was controlled by the Bosnian Army V Corps that was in conflict with Muslim forces loyal to Fikret Abdić, who were in alliance with Serbs. This being a short-term goal, the second was to position HV forces for a later advance to Knin.[1050] The forces led by Gotovina (which included Bosnian Croat forces, under the command of Major General Tihomir Blaškić, and the HVO Main Staff) employed in the "Zima 94" operation counted as many as 3,000 to 4,000 troops for the main attack force, with more in reserve.[1051] The Operation was successful and lasted for 27 days.[1052]

1177. As in the case of the operation "Zima 94", other Croatian operations that were planned and subsequently carried out, threatened the UNPA Sector South and again the city of Knin, the main symbol of the Krajina Serbs. Operation "Skok -1" was carried out in early April 1995 and was preceded by attacks and the seizure of key tactical points of VRS/SVK units by General Gotovina's forces. Operation "Skok-1" began on 7 April

[1047] See *supra* Chapter XII.
[1048] See Map no. 6
[1049] See Map no. 8
[1050] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 250 (Peace Palace Library); see also A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 25.
[1051] *Ibid.*
[1052] A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 32.

1995 covering the border area at Mount Dinara, extending into the RSK.[1053] The goals of the operation were fulfilled in one day.[1054]

1178. Part of the UNPA Sector South territory was attacked at the beginning of June 1995 during the operation "Skok-2". According to the analysis of the CIA the primary objective of the operation was to secure the main pass out of the Livno Valley and key mountains above Glamoč, which would put HV troops in a position to take over Bosansko Grahovo and Glamoč. The operation began on 4 June 1995 and lasted one week[1055] and Croatian forces managed to take over more then 450 square kilometers of the area under Serbian control.[1056]

1179. With the completion of the "Skok-2", the HV was ready to take Bosansko Grahovo and then Knin.[1057] The international community also recognized the danger that after the military successes of the Croatian Army in Sector West, the Croatian authorities would be motivated to conduct a similar campaign in Sector South, notwithstanding assurances by the Croatian Government that it would not pursue further military objectives. The Secretary-General's report to the Security Council noted two Croatian army attacks on 4 and 6 June when the Kenyan battalion camp at Civljane sustained shelling from the Croat army.[1058]

1180. The placing of UNCRO forces at risk, the military actions of the Croatian Army on the territory of Bosnia and Herzegovina, and an obvious threat to the Sector South by the Croatian army, prompted the President of the Security Council to issue the following warning to Croatia:

> "The Security Council looks to the parties to cooperate fully and unconditionally with UNCRO in the performance of its mandate and to ensure the safety, security and freedom of movement of its personnel.

[1053] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 296 (Peace Palace Library).
[1054] A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 40.
[1055] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 300 (Peace Palace Library); see also A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 45.
[1056] A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja, Split, Knin, 1996, p. 50.
[1057] *Ibid*.; see also A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 45.
[1058] Report of the Secretary-General submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, para. 9.

> The Council demands that they fulfill their commitment under the cease-fire agreement of 29 March 1994, in particular in respect of the withdrawal of all forces and heavy weapons from the zones of separation, and fully implement the 2 December 1994 agreement on economic confidence-building measures**.** *It calls upon the parties and in particular the Government of Croatia, to cease all military action in and around Sector South.* It also calls upon all parties to respect fully the international border between the Republic of Croatia and the Republic of Bosnia and Herzegovina and to stop any action which extends the conflict across this border…**"**[1059]

1181. However, despite these warnings the UN bodies were unable to prevent Croatia carrying out its plans to destroy the Krajina. UN Secretary General noted that:

> "Despite assurances by the Croatian Government that it would not pursue military objectives before the end of the present UNCRO mandate period and in disregard of the statement by the President of the Security Council on 16 June 1995 (S/PRST/1995/30), the combined attack of the Bosnian Croat forces and the Croatian Army, launched on 4 June 1995 in the Dinara mountains area, has continued and has resulted in the seizure and occupation of positions inside areas covered by the cease-fire agreement. It also indicates a possible decision by the Government to use force to reintegrate the Serb Krajina region…"[1060]

1182. Moreover, Croatia ignored all warnings while pursuing its plan to eradicate Krajina. It used time to regroup its forces and to enter into the Split agreement on 22 July 1991 which was concluded between Croatian President Franjo Tudjman, Bosnia and Herzegovina President Alija Izetbegović and representative of Bosnian Croats Krešimir Zubak.[1061] Even though the official explanation for concluding this agreement was the lending of military support to the Bosnian Army, it is now obvious that for the Croatian

[1059] Statement by the President of the Security Council, 19 June 1995, UN Doc. S/PRST/1995/30 (emphasis added).
[1060] Report of the Secretary-General submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, p. 2, para 5.
[1061] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 364 (Peace Palace Library).

Government this agreement was only another step towards achieving their primary goal – the takeover of the Krajina by force. As noted in the CIA analysis:

> "In making common cause with the Bosnians against the Serbs of Bosnia and Yugoslavia, however, President Tudjman intended also to make an opportunity of the crisis aimed to achieving the Croatia's consummate political objective- the destruction of the Republic of Serbian Krajina."[1062]

1183. At the same time, the RSK, pressured by Croatian military actions, conducted – together with Muslim forces loyal to Mr. Fikret Abdić – military action against the Bosnian Army V Corps in the Bihać pocket. Combat activity in Bihać was used by the Croatian Government as a pretext for operation *Storm*.[1063]

1184. The Croatian plan required one final step before their forces would storm Krajina and that step was gaining control over Glamoč and Grahovo in Bosnia and Herzegovina. Operation "Ljeto – 95" was conducted between 25-28 July 1995 in cooperation with the Bosnian Croat forces. According to Ante Gotovina, one of the goals of the operation was to create conditions for the subsequent takeover of Knin and the areas that were in Northern Dalmatia and Lika under the control of the Serbs.[1064] The strategic importance of the operation for the final attack on Serbs in Krajina was noted by the UN Secretary General:

> "Bosnian Croat forces, apparently supported by Croatian Army elements, have also continued their attacks in the Livansko Polje area adjacent to the Croatian border in Bosnia and Herzegovina, capturing Bosansko Grahovo and Glamoc, putting their forces in a position to threaten Knin directly and cutting the main supply route from Knin to Banja Luka. These forces have now moved closer to the international border and established a blocking position near Strmica. Between 25 June and 30 July, approximately 2,861 Croatian army troops as well as vehicles and equipment have been observed crossing into Bosnia and Herzegovina at Kamensko. As a result of this fighting, 12,000 to 14,000 Serb refugees are now moving in the direction of Banja Luka."[1065]

[1062] *Ibid*.
[1063] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, p. 1.
[1064] A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 58.
[1065] Report of the Secretary-General submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, p. 2, para. 6.

1185. At the same time, on its own territory Croatian Army continued a major build-up of troops around Sectors North and South.[1066] According to the CIA analysis: "…The HV in fact began to mobilize its forces and move units into position for this strategic offensive – already dubbed 'Oluja' – even as it was launching "Ljeto 95"…."[1067]

1186. Following such military actions the international community tried once more to negotiate a peaceful solution. Negotiations between President Tudjman and UN Secretary General Special Representative, Mr. Yasushi Akashi, had shown that at that point in time Croatia was by no means ready to accept a peaceful solution. In his Letter dated 7 August 1995, the UN Secretary-General explains Tudjman's attitude and referred to warnings he had been given about further actions:

> "Meanwhile, on 29 July, my Special Representative, Mr. Yasushi Akashi, had met with President Tudjman to forestall what appeared to be an imminent military confrontation. President Tudjman expressed his Government's willingness to participate in political and military talks with Knin, but stressed that progress on the ground must necessarily follow. If such progress was not achieved in a matter of days, Croatia would take whatever measures it deemed necessary to redress the situation. Specifically the President insisted on the reopening of the Adriatic oil pipeline within 24 hours, rapid agreement on the opening of the Zagreb-Knin-Split railway and immediate progress on political re-integration of the Serbs on the basis of Croatia's Constitution and Law on Minorities. President Tudjman did, however, agree to send representatives to Geneva for the meeting sponsored by the International Conference on 3 August."[1068]

1187. On 30 July emergency talks were held between Akashi and the RSK leaders in Knin. These talks secured a six-point commitment including a guarantee that Serbian forces

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[1066] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alain Robert Forand, 3 June 2008, Transcript 4108.

[1067] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 365 (Peace Palace Library).

[1068] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, p. 2, para 3.

would withdraw fully from the Bihać pocket and desist from further cross-border interference.[1069] CIA analysis found that:

> "On 30 July, President Martić and General Mrkšić met with UN Special Representative Yasushi Akashi and agreed to withdraw from Bihac as part of six-part accord that, from the UN's point of view, might avert the danger of wider war posed by the sudden threat of a Croatian offensive."[1070]

1188. Despite the fact that Serb forces started to withdraw from Bihać on the same day,[1071] the Croatian Government was not even contemplating abandoning its plan to attack Krajina. President Tudjman kept setting new conditions. As stated by the Secretary General:

> "However, the Croatian Government considered these commitments insufficient. In a written reply, President Tudjman rejected the agreement, on the grounds that it did not meet the terms he had presented to my Special Representative (see annex II). The Croatian Government did, however, reaffirm its readiness to participate in the talks at Geneva."[1072]

1189. On 3 August 1995, at the meeting chaired by Mr. Stoltenberg[1073] between the Croatian Government and the Serb delegation, the Croatian delegation took the position that the Croatian Serb leadership had to immediately accept reintegration into Croatia. On the other hand, the Serb delegation requested that there first be a cessation of hostilities. This is how the Secretary-General describes what happened next:

> "After a series of bilateral meetings, the Co-Chairman presented to the two delegations a list of seven points covering, inter alia, the reopening of the oil pipeline, the reopening of the Zagreb-Knin-Split railway and negotiations on a final settlement on the basis of the 'Zagreb-4' plan. The

[1069] *Ibid*., see Annex 1 of the Letter (text of the 30 July Agreement).
[1070] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 367 (Peace Palace Library).
[1071] *Ibid*.
[1072] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, p. 2, para. 4.
[1073] Mr. Stoltenberg was the Co-Chairmen of the International Conference's on Former Yugoslavia Steering Committee.

> Croatian Serb delegation was inclined to accept the paper as a useful basis for progress, subject to clearance by its political leadership, but the Croatian Government delegation's view was that the paper did not address its fundamental concern for the Krajina Serbs to be reintegrated under the Croatian Constitution and Laws."[1074]

1190. The next day, on 4 August 1995, early in the morning, the Croatian Army launched a major offensive against Krajina.[1075] The timing of the event confirms that the Croatian side only participated in the negotiations for tactical reasons, while at the same time it had already decided to destroy Krajina Serbs by the use of military force.

3. Plan and Preparation for Operation *Storm*

A. *Introduction*

1191. The plan for operation *Storm* was finalized during the Brioni meeting but the decision to use military force in retaking the UNPAs was made much earlier, by the end of 1994 at the latest.[1076] The efforts to strengthen the Croatian army had been continuously going on since 1992. As explained by the Croatian official:

> "during 1992, and in 1993 in particular, training courses for the Staff commanding officers and non-commissioned officers were intensified at all levels in an attempt to create a valid basis for further studies of the entire military system in order to get prepared for the forthcoming events and operations that were before us and eventually did take place".[1077]

1192. According to one of the Applicant's highest army officials at the time, General Bobetko, the signed Vance plan represented a mere "pause"[1078] which required the improvement of Croatian Army combat readiness through carefully developed educational

[1074] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, p. 2, para. 5.
[1075] *Ibid*.
[1076] See *supra* Chapter XII, para. 1163.
[1077] ICTY, *Gotovina et al*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 27.
[1078] J. Bobetko, *All my battles, (Sve moje bitke),* Zagreb, 1996, p. 502.

programs,[1079] the improvement of operational capacity and mobility,[1080] reorganization and staffing,[1081] and the improvement of anti-armor combat and engineering support systems,[1082] among other things. Steps taken to that effect were further supplemented with engagement of the private military contractors from the US, *Military Professional Resources Incorporated (MPRI),* which assisted Croatian authorities in the reorganization of its armed forces and the enhancement of its combat effectiveness and efficiency.[1083]

1193. Efforts taken to achieve the set goal were tested on a number of occasions throughout 1993 and 1994 through combat operations that were conducted, among other places, in Miljevci, Maslenica, Medak Pocket, South Dalmatia and Konavle.[1084] They were considered to be "merely tactical and operational at best" in preparation for implementation of the operation that would satisfy Croatia's "strategic interests" – operation *Storm*:

> "These activities and operations served only to test the offensive capabilities of the Croatian Army; the conclusion was that a solid preparatory work, an intensive preparation might end with the creation of units capable of performing any such task".[1085]

1194. Thus, when the decision to take Krajina by military force was made in 1994, Croatia had the military capabilities to perform this task. What is significant, however, is that these operations were clearly not intended solely to regain territories held by the Serbs, but also to remove the Serbs themselves. This is clear from the attitude of the Croatian authorities to the flight of the Serbian population from Western Slavonia during operation *Flash*.[1086] This attitude crystallized into genocidal intent at the time of operation *Storm* as is evident from the transcript of a meeting of the Croatian leadership that preceded the operation.

[1079] *Ibid.*
[1080] See ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens: Expert report, *Croatian Armed Forces and Operation Storm*, Part II, p. 27.
[1081] *Ibid.*
[1082] *Ibid.*
[1083] See J. Bobetko, *All my battles, (Sve moje bitke),* Zagreb, 1996, pp. 507-508; see also ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 28.
[1084] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 31.
[1085] *Ibid.*
[1086] See *supra* Chapter XII, paras. 1142–1153.

B. *The Brioni Meeting*

1195. A meeting of the highest Croatian leaders was held at Brioni on 31 July 1995 and during that meeting President Tudjman agreed with his closest associates about the goals of the forthcoming military operation.[1087] First, the transcript shows that Croatia was not negotiating with the Serbs *bona fide* but just in order to appear cooperative in the eyes of the international community. As President Tudjman noted at that time:

> "Franjo Tudjman (FT):
> I told Sarinic that in principle we favor negotiations if they accept the conditions I have set out in my reply to Akashi, but that he will not head the delegation if the meeting is held. So we can do that, he will call today, and *we can accept this as a mask, that we are accepting the talks, and even designate our own delegation, but let us discuss whether we will undertake an operation tomorrow or in the next few days* to liberate the area from Banija to Kordun to Lika and from Dalmatia to Knin..."[1088]

1196. Later at the meeting, President Tudjman stated: "FT**:** Hold on, I'm going to Geneva to hide this, and not to talk. I won't send Minister but the Assistant Foreign Minister. That's on Thursday. *So, I /want/ to hide what we are preparing for the day after.* And we can rebut any argument in the world about how we didn't want to talk, but that we only wanted what…"[1089]

1197. Further, and more importantly, President Tudjman stated his criminal goal very clearly at the meeting:

> "FT: But if in the forthcoming days we are to undertake further operations, then Bihać can only serve as some sort of pretext and something of a secondary nature. We must inflict total defeat upon the enemy in the south and north, just so we understand each other, leaving the east side aside for the time being.[1090]

[1087] At the very beginning ot the meeting, President Tudjman declared: "Gentlemen, I have called this meeting to assess the current situation and to hear your views *before I decide on what our next steps should be in the forthcoming days*" (Annex 52, p. 1, emphasis added). The meeting was concluded with the following statement of President Tudjman: "So *agree in principle*, in the spirit of what we have now discussed" (Annex 52, p. 44, emphasis added).
[1088] 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, p. 2 (Annex 52, emphasis added).
[1089] *Ibid*., p. 32 (emphasis added)
[1090] *Ibid*., p. 1

…

FT: In which way do we resolve it? This is the subject of our discussion today. *We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must capitulate within a few days*."[1091]

1198. It clearly follows that the goal of the forthcoming military action was not only to achieve military control over Krajina and its reintegration to Croatia, but "to inflict such blows that the Serbs will to all practical purposes disappear." It can be seen from the transcripts that none of the participants opposed such a plan but, after President Tudjman spoke, they discussed methods of how to implement it.

1199. Development of a plan targeted against Krajina Serbs was also related to guarantees prescribed by the Constitutional Law on Minorities that was enacted in 1992. According to this law, Croatia was obliged to assign a proportionate number of seats in the Parliament to any minority counting more than 8% of the total population.[1092] This meant that the reintegration of the Krajina Serbs into Croatia would lead to them being a significant political factor, considering that Serbs made up about 12% of the entire population in Croatia at the time. This was an additional incentive for attempting to destroy Krajina Serbs.

1200. The participants of the "Brioni meeting" were aware that a great numbers of Serbs would flee as soon as the attack began in order to save themselves from the Croatian forces. Thus, the participants at the meeting discussed whether they should open a corridor for the Serbs in order to avoid bigger losses to the Croatian side. According to President Tudjman,

"FT: It's all very well that the Admiral is now supposed to close off their remaining three exits, but you are not providing them with an exit anywhere. There is no way out to go… (to close it off). To pull about and flee, instead, you are forcing them to fight to the bitter end, which exacts

[1091] *Ibid.*, p. 2

[1092] Ustavni zakon o ljudskim pravima i slobodama i pravima etničkih i nacionalnih zajednica ili manjina u Republici Hrvatskoj [Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia], *Narodne novine* [Official Gazzette], no. 34/92, entered into force on 17 June 1992 .

> a greater engagement and greater losses on our side. Therefore, let us also please take this into consideration… Accordingly, let us take into consideration, on a military level, the possibility of leaving them a way out somewhere, so they can pull out part/of their forces …"[1093]

1201. Operation *Storm* was preceded by psychological warfare the goal of which was to create fear among the Krajina Serbs.

1202. Psychological warfare conducted through the use of local media, documents, and contacts with local Serbs was used to "create disorientation; weaken will, morale and motivation in the enemy Army and among the population" while at the same time "strengthening combat readiness of the HV units".[1094] These operations ran concurrently from approximately the end of 1994 through to the beginning of June 1995.[1095]

1203. The printing of leaflets and their content were accordingly discussed during the Brioni meeting. On that occassion, President Tudjman stated his views about the rights of the Krajina Serbs:

> "FT: A leaflet of this sort - general chaos, the victory of the Croatian Army supported by the international community and so forth (Serbs, you are already withdrawing, and so forth), and we are appealing to you not to withdraw, we guarantee … This means giving them a way out, *while pretending to guarantee civil rights*, etc."[1096]

1204. Neither President Tudjman nor any other participant at the meeting invited Croatian commandants to respect the rules of humanitarian law during the forthcoming operation. Moreover, President Tudjman clearly provoked the military officers to think about revenge: "And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today..."[1097] Later, at the meeting, President Tudjman pointed out: "If we had enough [ammunition], then *I too would be in favour of destroying everything* by shelling prior to advancing."[1098]

[1093] 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, p. 7 (Annex 52).
[1094] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 39.
[1095] *Ibid.*, pp. 39–40.
[1096] 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 p. 29 (Annex 52).
[1097] *Ibid*, p. 11.
[1098] *Ibid*, p. 26 (emphasis added).

4. Operation *Storm*

A. *General*

1205. Operation *Storm* began on 4 August and was over by 8 August 1995. The attack on Krajina was one of the largest European land offensives since World War II. Preparations for it took place from December 1994 through to August 1995.[1099] In the words of Croatian army officials, the attack on Krajina was "the grand finale" and all actions taken prior to it were geared toward the "preparation and development of Croatian Army" for it.[1100]

1206. The importance of the operation *Storm* can be seen from its comparison to previous Croatian operations.

> "Some less important operations from that period such as Maslenica, Miljevac Heights, Medak Pocket, Liberation of South Dalmatia and liberation of Konavle, after the JNA pulled out, liberation of Prevlaka, driving out the East Herzegovina Chetnics were renowned. However, all these operations were merely tactical or operational at best, whereas the strategic interests were realized much later."[1101]

1207. The following military districts (MD) of the Croatian army took part in the operation *Storm*: Zagreb district under the Command of Major General Ivan Basarac,[1102] Karlovac district under the command of Major General Miljenko Crnjan,[1103] Gospić district under the command of Colonel General Mirko Norac,[1104] and Split District under command of Major General Ante Gotovina.[1105]

[1099] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 95.
[1100] *Ibid.*, p. 76.
[1101] *Ibid.*, pp. 30–31.
[1102] Zagreb Military District units that were supported with 2nd Guard Brigade and 81st Independent Guards Battalion (MUP Special Police), two reserve infantry brigades, and five Home Defense regiments, see Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 368 (Peace Palace Library).
[1103] Karlovac MD units that were supported with MUP Special police Battalion, two reserve infantry brigades and antitank battalion. Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, p. 368 (Peace Palace Library).
[1104] Gospić MD units that were supported with 1st Guard Brigade, one conscript infantry brigade, two reserve infantry brigades and six Home Defense regiments. Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), Vol. I, p. 368 (Peace Palace Library).
[1105] Split MD included following units: 4th Guards Brigade, 7th Guards Brigade, 2nd Guards Battalion, 81st Guards Battalion, 1st Croatian Guards, 112th Brigade (Zadar), 113th Infantry Brigade (Šibenik), 114th Brigade, 6th Home Guard Regiment (Split), 7th Home Guard Regiment (Zadar), 15th Home Guard Regiment (Šibenik), 126th Guard Regiment (Šinj), 134th Home Guard Regiment (Biograd), 142nd Home Guard Regiment (Drniš), 14th Artillery

1208. Croatian special police was also involved in the operation *Storm* and was under the command and control of the Colonel General Mladen Markač. Markač who was subordinated to Zvonimir Červenko, Chief of the Croatian Army, received orders to coordinate the preparation for the operation *Storm* with the Command of Split and Gospić Military Districts.[1106] The Special police after commencment of the operation *Storm* also used its artilery and was involved in taking control of Serbian towns in next couple of days.[1107]

1209. Operation *Storm* was conducted from four different directions. The attack from the north was aimed at Petrinja and Kostajnica. The attack from northwest went from Karlovci to Vojnić. The western attack, supported by ABiH, moved from Gospić to Gračac, Udbine and Plitvica lakes. Finally the south direction of the attack started from the territory of BiH and Dalmatia and was aimed towards the city of Knin and areas of Benkovac and Obrovac.[1108]

1210. Numerous towns in both UNPA Sectors North and South fell one by one. Knin, Obrovac, Benkovac, Gračac and Dubica fell as early as 5 August 1995. Petrinja, Udbina, Slunj, Glina, Kostajnica on 6 August, while Vojnić and Topusko were conquered on 7 August.[1109]

1211. The Croatian forces also targeted UN peacekeepers. According to a UN report:

> "Numerous United Nations observation posts were captured, in some cases after being deliberately fired upon by the Croatian army. Four United Nations peace-keepers were killed and a number of others were

Battalion, 20th Artillery Battalion (Split), 204th Artillery and Rocket Brigade (Air defence) (Šibenik), 72nd MP Battalion (Split), 11th anti tank artillery and rocket Battalion, 73rd MP Battalion (Split), 264 Reconnaissance and Sabotage Company, 306th Logistic Base (list includes units that were resubordinated to Split MD) see ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, pp. 100–104.

[1106] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 265.

[1107] *Ibid*., p. 266.

[1108] See Map no.9; also, in addition, Special police units under the command of Mladen Markač were given order 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 of the Split MD, see ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 265.

[1109] For detailed information on military aspect of the operation *Storm* see Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995* (2002), Vol. I, pp. 367–376 (Peace Palace Library).

wounded. Seven Danish peace-keepers were used as human shields when they were forced by a Croatian officer to walk at the front of a group of advancing soldiers in Bosanka Dubica."[1110]

1212. Krajina Serbs were left with no other choice but to run before the Croat forces leaving virtually everything behind. The formation of columns in the areas that were most in danger from the Croatian forces quickly became a chaotic escape of the complete Serb population of Krajina. Mr. Andrew Lesli, Chief of Staff of the UNPROFOR Sector South, when asked whether he agrees that the operation *Storm* was conducted with a high degree of expertise, stated that he would agree that certain elements of operation *Storm* were conducted with a high degree of expertise if the aim of such an operation was to ensure that the local population was cleansed from the region.[1111]

1213. The outcome of operation *Storm* was never in serious doubt. On the one side were 150,000 soldiers (135,000 members of the HV and 15,000 members of the Bosnian Army), while on the other were around 30,000 RSK soldiers.[1112] Moreover, the average age of Serbian soldiers was around 50 years.[1113] According to General Gotovina only his unit, MD Split, had 2.1 men for every member of VRSK forces, which was the "most optimum extent of forces if compared to previous offensive operations".[1114] The entire operation lasted only 4 days, and the main goal, takeover of Knin, was fulfilled within the 30 hours from the onset of the operation,[1115] while the Croatian forces incurred only 0.12% of losses in total.[1116]

1214. It is evident simply on the face value of these figures that a serious response from the Serbian Army of Krajina ("SVK") was hardly possible.

[1110] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7, para 16.
[1111] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andrew Lesli, 22 April 2008, Transcript p. 2015.
[1112] O. Žunec, *Naked Life (Goli život),* Zagreb, 2007, p. 842.
[1113] M. Sekulić, *Knin fell in Belgrade (Knin je pao u Beogradu),* pp. 145-146; also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Roland Dangerfield, 24 July 2008, Transcript pp. 7153-7154 (witness was a liason officer in UN Sector South Headquater in Knin and testified that ARSK was under-equipped).
[1114] A. Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 72.
[1115] *Ibid.,* p. 76.
[1116] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 95.

B. *Deliberate Indiscriminate Shelling*

1. Introduction

1215. Artillery fire was of special importance for the Croatian Army in operation *Storm*, which is clear from the fact that the entire artillery mechanism of the Split Military District was used during the operation.[1117] The cities of Knin, Benkovac and Bosansko Grahovo were shelled during the operation. These cities, as well as the roads linking them, were also shelled during operations "Skok 1" and "Skok 2".[1118]

1216. The Split Military District Attack issued the order relating to the artillery support of combat activity during operation *Storm*, which stipulated that artillery groups and artillery rocket groups were to be established. These groups were tasked with placing the towns of Drvar, Knin, Benkovac, Obrovac and Gračac under artillery fire. However, it is possible to see from the Order that the targets of artillery attack were not specified[1119] and that such information was also not included as an attachment to the Order.[1120] Thus, Benkovac, Obrovac, Gračac, Kistanje, Uzdolje, Kovačić, Plavno, Polača and Buković were shelled repeatedly despite having no identifiable military targets.[1121]

2. The Shelling of Knin

1217. Knin, as the main city of the RSK, had a special importance for the Croatian forces. A closer look at the Brioni transcript makes it clear why subsequently thousands of grenades fell on Knin, as evidenced from the following exchange between President Tudjman and General Gotovina:

> "FT: There is something still missing, and that is the fact that in such a situation when we undertake a general offensive in the entire area, even greater panic will break out in Knin than has to date. *Accordingly, we*

[1117] A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, p. 118.
[1118] *Ibid.*
[1119] ICTY, *Gotovina et al*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II,, p. 109; also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mile Sovilj, 24 April 2008, Transcript pp. 2213–2215.
[1120] *Ibid*.
[1121] ICTY, *Gotovina et al.*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para.31.

should provide for certain forces which will be directly engaged in the direction of Knin. And particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation with Knin today… Therefore, we will have to resolve that with UNCRO, this matter as well, and so forth. But their counterattack from Knin and so forth, it would provide very good justification for this action and accordingly, we have the pretext to strike, if we can with artillery, you can… for complete demoralization… not just this… (as printed).

Ante Gotovina (AG): Mr. President, at this moment we completely control Knin with our hardware. That's not a problem, if there is an order to strike at Knin we will destroy it in its entirety in a few hours… That means that we have somewhere around 1.000 good infantryman, trained for assault operations, for quick transfers on this difficult terrain; we can easily take Knin, without any problem. "[1122]

1218. Out of thousands of grenades directed towards Knin less then 250 hit military objects. In the words of the General Alain Forand, UNCRO Sector South Commander, "since the issue of being a poor shot was out of the question, it seems that the civilian objects were shot on purpose"[1123] Knin was completely abandoned as early as 5 August, Friday morning, around 10 o'clock.[1124]

1219. A statement of the ICTY witness in *Gotovina*, Andreas Dreyer, UN Security coordinator in Sector South, provides a very good description of how the shelling of Knin was conducted. When answering a question on what areas of Knin were most affected by shelling, he stated as follows:

"On your question was anywhere in Knin safe at the time while I was driving around for the duration of the 4th of August, my answer to your question would be no. What I did over here is I was really trying to be as

[1122] 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, p. 10, (emphasis added) (Annex 52).
[1123] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 28.
[1124] *Ibid.*; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Roland Dangerfield, 24 July 2008, Transcript p. 7151 (witness testified how Croatian forces entered Knin on 5 August without expecting any resistance).

specific as I could. What I should have done is I should have taken a big pen and drawn a circle right around Knin and not specify and say: This is the area of impact. Because that was the area of impact. Knin itself, in all directions where I travelled, at any given time during the 4th of August, my life and the life of my staff members were at peril".[1125]

1220. In the opinion of another ICTY witness, Joseph Bellarose, who used to be a UN sector engineer for the entire Sector South, the shelling of Knin was not directed at specific military targets but was deliberate harassment shelling.[1126] In the opinion of yet another witness, Peter Marti, UN military observer in Sector South, the shelling of Knin took place without a goal, was carried out randomly, and was carried out above all to intimidate the people and to force them out.[1127] Another UN witness, John William Hill, the Commander of UN Military police (UNMPOL) in Sector South, described the shelling of Knin in the morning of 4 August as "a massive salvo of hundreds and hundreds and hundreds of rounds",[1128] while witness Alun Roberts estimated that about 200 civilian locations were hit during the shelling of Knin.[1129] Witness Andrew Lesli similarly testified that during the morning hours of 4 August he observed explosions all over the city of consistent nature while later the shelling became grouped across specific regions of the city.[1130] Another witness testified to the same pattern of artillery shelling during the following day.[1131] In addition to the use of mortars, the shelling was conducted with multiple rocket launchers that were in the sole possession of Croatian forces,[1132] and other indiscriminate artillery weapon designed for open field battle and inappropriate for use in populated civilian areas.[1133]

[1125] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andreas Dreyer, 16 April 2008, Transcript pp. 1740–1741.
[1126] See also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Joseph Bellarose, 7 July 2008, Transcript p. 5871.
[1127] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Peter Marti, 9 June 2008, Transcript p. 4633.
[1128] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness John William Hill, 27 May 2008, Transcript pp. 3738–3739 .
[1129] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alun Roberts, 21 July 2008, Transcript pp. 6818, (witness was a member of the UN forces journalist and reporter).
[1130] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andrew Lesli, 22 April 2008, Transcript pp. 1942.
[1131] *Ibid*., pp. 1965-6; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Roland Dangerfield, 24 July 2008, Transcript p. 7149.
[1132] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Jacques Morneau, 29 May 2008, Transcript pp. 4014-4015 (witness was the Commander of Canadian Battalion in Sector South).
[1133] ICTY, *Gotovina et al.*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para.31.

1221. In the words of protected witness "6", apartment buildings in Knin were struck by shells on 4 August and the pause in shelling took place only around noon. When he got out from the basement he observed buildings hit by shells, houses on fire and people running between buildings.[1134] Witness Mira Grubor testified before the ICTY that a civilian vehicle that stopped near the Knin hospital was directly hit by a bomb which killed a man and his son who just brought a pregnant woman to the hospital.[1135] Witness Joseph Bellarose testified before the ICTY Trial Chamber that there were no military targets around the Knin hospital.[1136]

1222. The effects of the indiscriminate shelling are best evidenced by the UNMO report which stated that the Croatian army shelled the vicinity of a UN base where wounded and civilian refugees were taking shelter. Witness Mira Grubor testified that a convoy of vehicles and tractors transporting people who were waiting for the shelling to stop was directly hit by a bomb in the vicinity of the UN compound.[1137] Indiscriminate shelling close to the UN camp was more precisely described by John William Hill who, after the shell landed close to the UN camp, saw at the intersection 6 people killed and 4 injured, a mixture of civilian and military personnel. According to the witness, bodies were put in black body-bags. He also received information that later on, Croatian soldiers fired AKs into the dead bodies, and urinated and defecated on the bodies.[1138]

1223. According to witness Mira Grubor that testified before the ICTY Trial Chamber in the *Gotovina* case, on 4 August approximately 120 dead bodies were brought into the Knin hospital along with in between 160 and 180 injured people. In the opinion of Ms. Grubor all of the dead and injured people were victims of shelling.[1139] The testimony of Ms. Grubor was supported by witness Andrew Lesli who described that when he entered the Knin hospital on 5 August he saw "large quantities of dead, men, women and children, stacked in the hospital corridors in a pile".[1140] The witness clarified that there were between 30 and 60 dead bodies and around 25 patients in absolutely critical condition.[1141]

[1134] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness 6, 7 April 2008, Transcript p. 882; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alain Robert Forand, 3 June 2008, Transcript pp. 4114–4115 (testifying that shelling was also targeted within the civilian population).
[1135] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mira Grubor, 14 April 2008, Transcript p. 1390.
[1136] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Joseph Bellarose, 7 July 2008, Transcript p. 5867.
[1137] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mira Grubor, 14 April 2008, Transcript p. 1397.
[1138] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness John William Hill, 27 May 2008, Transcript pp. 3749-3750.
[1139] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mira Grubor, 14 April 2008, Transcript pp. 1387–1388.
[1140] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andrew Lesli, 22 April 2008, Transcript p. 1967.
[1141] *Ibid*. p. 1968.

1224. The importance of the early capture of Knin and the effect this had can be seen from a report of a Croatian Army commander who wrote "[b]ecause of the fall of Knin, the troops' adrenalin is going through the roof. We need to take advantage of euphoria and motivation of all the soldiers".[1142] The Ministry of Defense of the Republic of Croatia, Intelligence Administration, on 5 August 1995 reported that the State and military structure was completely deprived of its leadership by the liberation of Knin, which had a significant effect on the collapse of morale of the civilian population and military units.[1143]

3. Indiscriminate Shelling of Other Towns

1225. Witness Jovan Dopuđ testified before the ICTY that Obrovac was heavily shelled on 4 August 1995. The witness observed shells hitting a café/restaurant in the center of the town, a health clinic and a movie theater.[1144] He also confirmed that the targets of the Croatian shelling were villages of Kruševo, Žegar, Zelengrad, Zaton, Bilišane, Muškovići and Bogatnik.[1145]

1226. Another example is the shelling of Benkovac. This was, according to the report of 134th Home Guard Regiment belonging to the OG Zadar (Split MD), done indiscriminately and without any type of monitoring which is visible from the fact that the Regiment after opening fire did not know what they were shelling and asked whether anything is falling on Benkovac.[1146] All this confirms the role that the artillery had in operation *Storm* and the fact that Drvar, Knin, Benkovac, Obrovac and Gračac were viewed together as targets that would be indiscriminately attacked.

1227. The village of Polača was also shelled on 4 August, according to witness Sava Mirković. According to Mr. Mirković there were no military targets in Polača.[1147] The witness explained that he and his family left the village because they knew what had happened to the Serbs who stayed in the Medak pocket and Western Slavonia. That life

[1142] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 129.
[1143] *Ibid.*, p. 173.
[1144] ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Jovan Dopuđ, 8 July 2008, Transcript pp. 5980–5981.
[1145] *Ibid*., pp. 5981, 6000-6001.
[1146] ICTY, *Gotovina et al*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 188.
[1147] See ICTY, *Gotovina et al.,* IT -060-90, testimony of witness Sava Mirković, 25 August 2008, Transcript p. 7417.

for Serbs was no longer possible in Croatia was proved by the fact that his mother, Đurđija Mirković, born in 1925, who was adamant on staying, was subsequently shot and her body burnt by Croatian soldiers.[1148]

1228. Witness Vida Gaćeša, from Gračac, testified before the ICTY how on 4 August her house was damaged by a shell landing close to her house. Ms. Gaćeša confirmed that Gračac was ocassionaly subjected to artilery attacks since 1993, but on 4 August 1995 around 100 shells landed on the village, forcing her and her family to leave.[1149] Similarly, witness Herman Steenbergen, deputy team leader of UNMO Team Gračac, testified about the shelling of Gračac on 4 August, stating that he was forced to evacuate his team due to the shelling.[1150]

C. *The Exodus of Serbs*

1229. The indiscriminate shelling forced the Serb civilians to run away from the line of fire that was gradually moving forward, in order to save their lives.

1230. The Serbs from Sector South had already been forced to move from some areas when Grahovo and Glamoč were captured at the end of July 1995, since their security was seriously endangered.[1151] For example, witness Peter Marti testified about the shelling of Cetina prior to operation *Storm*, even though there were no military targets there and the only purpose was to intimidate the people and prompt them to leave.[1152]

1231. The Sector South came under attack first. Considering that the main towns of Knin, Obrovac and Benkovac fell as early as 5 August, Serbs from the Sector South were already in a column fleeing the Croatian forces on 6 August.[1153] According to the

[1148] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Sava Mirković, 25 August 2008, Transcript p. 7422.
[1149] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Vida Gaćeša, 15 May 2008, Transcript pp. 2886 and 2898–2899.
[1150] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Herman Steenbergen, 30 June 2008, Transcript p. 5416.
[1151] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 23: "The Citizens of Strmica were the first ones who went into exile, the so-called 'tactic withdrawal' on 27th, and 28th July 1995. There were 1300 inhabitants living in the village prior to the war. At least 8 of them were killed in the village, and 8 were reported missing."; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Aleksandar Tchernetsky, 19 May 2008, Transcript p. 3180 (witness was UN military observer in Sector South and testified that Strmica was heavily shelled at the end of July 1995); see also ICTY, *Gotovina et al.,* IT-060- 90, testimony of witness Mile Đurić, 12 June 2008, Transcript pp. 4841–4842.
[1152] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Peter Marti, 9 June 2008, Transcript p. 4592.
[1153] According to the Croatian Helsinki Committee for Human Rights report the Serb population left the UN Sector South almost entirely until the end of Saturday, 5 August, see Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 20.

Croatian Helsinki Committee for Human Rights, the exodus from Benkovačko Selo, Jagodnja Gornja, Kula Atlagić, Benkovac and other villages began on 4 August due to the fact that these villages were heavily shelled.[1154]

1232. According to UNPROFOR data up until 6 August 1991, 46,200 Serbs left Sector South, while in the period concluding with 11 August that number increased to 72,500.[1155]

1233. Inhabitants of the Sector North, started to leave the area between August 6 and 8.[1156] There were three main routes that the refugee columns took to leave Sector North. Their direction partially changed as a result of frequent air and tank attacks of the Croatian forces during which refugees hid in the woods, only later to return to follow the main paths. Refugees from Vojnić and Gvozd travelled in the direction of Topusko-Glina-Žirovac-Dvor. Another refugee column took the Topusko-Glina- Petrinja- Sisak route and followed the Lipovac highway, continuing into Serbia. The third route taken was Slunj- Cetingrad- Banja Luka.[1157]

1234. The precise number of the Serbs that were forced to leave Krajina during operation *Storm* is still undetermined. Estimates put that number between 180,000 and 220,000 people.[1158]

1235. However, it is known how many Serbs remained in the area of Sectors South and North – not more than 5,000. In other words, the Krajina region was completely emptied of Serbs by operation *Storm*. According to the Secretary-General,

> "The exodus of 200,000 Krajina Serbs fleeing the Croatian offensive in early August created a humanitarian crisis of major proportions. It is now estimated that only about 3,000 Krajina Serbs remain in the former Sector North and about 2,000 in the former Sector South…"[1159].

[1154] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 23.
[1155] ICTY, *Gotovina et al.*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para. 11.
[1156] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 5.
[1157] *Ibid.* p. 214.
[1158] *Ibid.* p. 20: "between 180.000 and 200.000"; see also NGO "Veritas", Bilten No. 114, August 2007, *Žrtve «Oluje» i postoluje*, pp. 5-13: " 220.000" (Annex 62).
[1159] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 27.

1236. The remaining Serbs were mostly elder persons who were not able to leave their homes. They were scattered in the area which became a virtual wasteland. According to one source:

> "The abandoned persons were found in 524 hamlets, villages and towns. A single person remained in 73 communities, 2-5 in 155, 6-10 in 104, and none in almost 100 settlements. The departure of the majority of inhabitants enormously increased the proportion of elderly among the abandoned people: 75.6 per cent were older than 60, creating a demographic cloud of suffering"[1160].

5. The Victims of Operation *Storm*

1237. Operation *Storm* was carried out by elite Croatian forces pursuant to a clear order of President Tudjman that Krajina Serbs should disappear. The crimes committed against Serbs were of such a nature and of such proportions that Tudjman's order was successfully accomplished. The exact number of persons killed is not known even today, and this is due to a large extent to the fact that Croatian organs subsequently restricted movement in the area by all, including representatives of the international community, in an effort to conceal the crimes.[1161] As stated by the UN Special Rapporteur:

> "On 4 August 1995, the Croatian army launched a military operation, operation 'Storm', throughout the former sectors North and South; it took control of Knin in former Sector South at midday on 5 August and most of the rest of the Sector by 7 August 1995. Severe restrictions on movement were imposed on the United Nations and other international personnel in Knin until 7 August, and in other parts of the Sector until as late as 13 August. Periodic restrictions of movement were imposed throughout August 1995. In former Sector North, where active fighting continued well into the second week of August, severe restrictions on

[1160] S. Lang, 'Abandoned elderly population, a new category of people suffering in war', *Journal of Public Health Medicine*, Vol. 19, No. 4 (1997), pp. 476–477.
[1161] See 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).

movement were imposed as well. As a consequence of these limitations, it is difficult to make an objective assessment of the extent of casualties and damage during the first days of operation."[1162]

1238. Already on 11 August, General Ante Gotovina gave an order that the battlefield should be cleaned up and that special priority should be given to the removal of human bodies.[1163] A strict restriction of movement was imposed on international observers[1164] at the time and the subsequent removal of corpses ensured that the exact number of victims could not ever be precisely established.

1239. According to the Croatian Helsinki Committee for Human Rights, during and 100 days after operation *Storm*, 677 Serbs civilians were murdered and went missing. Out of the 677 Serbs, 410 victims were from Sector South while 267 victims were from Sector North.[1165] The report also noted that Serbs were killed in over 60 villages during the first week of operation *Storm*.[1166] However, the Croatian Helsinki Committee for Human Rights has not dealt with military victims even though it had noted that indications existed that a number of those victims were killed after having surrendered to Croat forces.[1167]

1240. Information offered by the non-governmental organization Veritas are somewhat different. According to Veritas more than 1,900 Serbs were killed as a result of operation *Storm*, out of which around 1,200 civilians and 700 members of the armed forces.[1168] The main problem with establishing the real number of those killed, as already mentioned, lies in the purposeful obstruction by the Croatian Government and

[1162] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7, para. 17.
[1163] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 147.
[1164] International forces on the ground included: European Community Monitoring Mission ("ECMM"), United Nation Military Observers ("UNMO"), Human Rights Action Team ("HRAT"), United Nation Civilian Police ("UNCivPol") and UN military police ("UNMPOL).
[1165] 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 August – 11 September 1995 (Annex 55)
[1166] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, (Sector South list of 410 killed civilians, pp. 137-171; Sector North list of 76 civilians killed in columns pp. 223-230; Sector North list of 191 killed civilians pp. 236-260).
[1167] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 135.
[1168] NGO "Veritas", Bilten No. 114, August 2007, *Žrtve «Oluje» i postoluje*, pp. 5–13 (Annex 62).

also in a large number of unidentified victims. As it was noted by Amnesty International after visiting Krajina three years after operation *Storm*:

> "Driving through the Krajina three years later the countryside retains an abnormal air. The majority of houses have been completely destroyed by fire or looting, and fields are overgrown. Here and there sown fields and laundry on the clothesline indicate life; however, most commonly the clothes hanging on the line include military uniforms or the cars parked in the drive bear license plates from Bosnia-Herzegovina. Apart from the devastated property, evidence of the human rights violations is unseen. However, town cemeteries contain row after row of closely packed wooden crosses marked only with numbers and the initials 'NN' – unidentified."[1169]

1241. What is known is that the killing of Serbs was mainly carried out while Serbs were fleeing the area in columns, or while they were in their houses, for those Serbs who did not or could not escape fast enough.

A. *Killing of Serbs while They were Escaping in Columns*

1242. While escaping from their homes in columns Serbs fell victim to both Croatian military forces and Croatian civilians along the roads they took while trying to escape. While running for their life in a completely chaotic and unorganized manner, Serbs did not have any protection. Columns that were hastily fleeing were under attack by artillery shelling, bombing from the air, infantry fire and attacks by Croatian civilians. As it was noted later by the UN:

> "Fleeing civilians were subjected to various forms of harassment, including military assaults and attacks by Croatian civilians. On 8 August, a refugee column was shelled between Glina and Dvor, resulting in at least 4 dead and 10 wounded. A serious incident occurred in Sisak on 9 August, when a Croatian mob attacked a refugee column with

[1169] Amnesty International, *Croatia: Impunity for killing after Storm*, August 1998, p. 2, AI Index: EUR 64/04/98.

stones, resulting in the injury of many persons. One woman subsequently died of her wounds. Croatian police watched passively until United Nations civilian police monitors showed up and prompted them to intervene. The Special Rapporteur met some Krajina refugees in Belgrade. They informed her of the tragic circumstances of their flight, which was particularly traumatic for children, the elderly, the sick and wounded."[1170]

1. Sector North

1243. There were more killings while Serbs were trying to escape from Sector North probably due to the fact that evacuation in Sector North started two days after that in Sector South which gave Croatian forces more time to organize and direct the shelling at the columns of Serbs. The fact is also that the Croat forces at that time were able to concentrate their forces knowing that they did not have worthy opponents and that they could approach Serbian columns and direct fire at them without fear of military response. Croatian Helsinki Committee for Human Rights reported:

> "A great number of victims were recorded in the refugee column in the region of Banija, which was repeatedly cut off by shelling … From some parts of Kordun inhabitants started to leave between August 6 and 8. Thus, in this territory the greatest number of persons injured in a refugee column was recorded. Between August 6 and 9 1995 the column was the target of airplanes and tanks, as well as attacks from some individuals from the Croatian Army and the Fifth Corps of BH Army. These attacks killed and wounded great number of persons and individual executions of civilians moving in the columns were also carried out." [1171]

[1170] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7, para. 18; see also Report of the Secretary-General submitted pursuant to Security Council Resolution 1009 (1995), 23 August 1995, UN Doc. S/1995/730, para. 6; see also 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), p. 10, available at: http://www.hrw.org/legacy/reports/1996/Croatia.htm.

[1171] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 215-216; see also Humanitarian Crisis Cell Sitrep, Compilation of Human Rights Reporting, 7 August – 11 September 1995 (Annex 55).

1244. The report notes in more detail that Serb refugees from Sector North evacuated in the direction of Topusko-Glina-Žirovac-Dvor, from where the column entered BIH. This column suffered the greatest hardship in the Topusko-Dvor section of the route, especially in the town of Maja and Žirovac. On that part of the road, in the period between August 6 and 9 1995, a large number of refugees were indiscriminately targeted. The column, which was cut off several times, was caught in cross-fire and became the target of attacks from Croatian airplanes. The report further notes that from the evening of August 6 until August 9, the column was shelled several times by the Croatian army.[1172]

1245. The Croatian Helsinki Committee for Human Rights reported that another column also took the Topusko-Glina-Petrinja-Sisak route and followed the Lipovac highway, continuing into Serbia. The column was stoned in Sisak, at which time a great number of refugees sustained serious injuries.[1173]

1246. Finally the third route taken was Slunj- Cetingrad- Banja Luka. The refugees moving in this direction were also the targets of airplane attacks. Civilian victims were recorded, although fewer that at Žirovac.[1174]

1247. Even today there is no reliable information about the number of Serbs killed in the columns.[1175] The non-governmental organization from Belgrade, the Humanitarian Law Center, estimates that there were about 300 Serbs killed in the columns.[1176]

a) Glina

1248. According to the statement of A.G, interviewed by Croatian Helsinki Committee, a woman from the column whose name was Zora was shot by Croatian soldiers near the hospital in Glina.[1177] Other witnesses also confirmed seeing dead bodies near Glina. One of the statements from the Croatian Helsinki Committee for Human Rights report

[1172] For more details see *infra* under b) Žirovac, para. 1249 and c) Maja, para. 1250.
[1173] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 214.
[1174] *Ibid.* p. 214.
[1175] E.g., Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 223-230 (reports about 76 Serbs victims).
[1176] Humanitarian Law Centre, http://www.hlc-rdc.org/O_nama/FHP-u-medijima/1163.sr.html, last accessed 1 October 2009.
[1177] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 219.

notes: "We were mistreated from the time we left Glina until we crossed the border. We were hit by stones. We mostly saw dead bodies in Glina".[1178] According to the statement of A.N, from Vojnić, also interviewed by Croatian Helsinki Committee:

> "We took the road on August 6, 1995 at 2:00. We arrived in Topusko and then continued to Glina…In front of us, the column was assaulted from the right side. This was a Muslim area, they were firing at us. There was panic people dispersed and hid. Dead bodies were strewn all over the road and on the sides. I saw about 20 dead people"[1179]

b) Žirovac

1249. Many Serbs gave testimonies about the horrors they survived while they were trying to save their lives. Those testimonies can be found in the Croatian Helsinki Committee for Human Rights report and the Human Rights Watch report.[1180] However, the gravity of the crimes survived by Serbs deserves to be at least described by way of citing small parts of witness testimonies. In his statement given to the Croatian Helsinki Committee A.A, from Krnjak describes the shelling of a part of a column in which he was present:

> "I went across the bridge over the river Una for Bosanski Novi on Tuesday August 8, 1995. We were all moving somehow o.k. in the column until Glina. We were moving in two columns, one after the other. When we reached Žirovac, we were shelled. People were killed, there was crying, people were trying to run. Many were leaving their tractors, throwing their bundles away, and running. Women were dragging children. I saw in Dvor, a dead man in one red 'Yugo' car. We were actually cut off by the Croatian Army. I ran into bushes and continued on my own. I walked all the way from Dvor to Novi. There was heavy shelling. I crawled almost all the way. I crossed the bridge crawling on my stomach".[1181]

[1178] *Ibid*., p. 221.
[1179] *Ibid.,* p. 222.
[1180] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p.216-222; see also 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), p. 11 available at: http://www.hrw.org/legacy/reports/1996/Croatia.htm
[1181] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 216.

According to the statement given to the Croatian Helsinki Committee by A.E, who was also present near Žirovac when unarmed civilians were shelled:

> "I was in the column which was stopped at Žirovac, on the way to Dvor. Soldiers and tanks started to fire at the column. People started to run away, and those who did not succeed fleeing were killed. Tanks were driven over the dead bodies scattered on the road…."[1182]

Finally, the Croatian Helsinki Committee for Human Rights report cites statement of A.J. from Gvozd who testified that a column of refugees upon arriving in Žirovac found the dead lying on the road and that they were fired at from all sides. In his statement A.J. also stated that the column was bombed from planes and describes the attack "… people were leaving their cars behind and running. We were attacked by airplanes, there was firing. Shells were falling all around and onto us…."[1183]

c) Maja

1250. According to numerous statements compiled by Croatian Helsinki Committee the attack on the column by the Croatian airplanes at Žirovac, was not an isolated event but was obviously part of a plan. In his statement A.H, from Gvozd testified about the attack at Maja:

> "We took to the road on August 6, around 1:30 p.m. We were going in the direction of Gvozd-Glina-Maja-Dvoborn. On the same day, at sunset, the column had been cut off at Maja. Airplanes were making circles, people were falling and running to the woods. A grenade fell in front of us. We laid down, some 20 of us, and then we were hit by a grenade. This is when Miljka Radovanović was hit. When I rose to my feet, a fragment shell hit me in the throat and in the hand…"[1184]

1251. Some of the statements cited by the Croatian Helsinki Committee for Human Rights report provided further evidence about the shelling of refugees and the victims on the road between the Glina and Dvor. Witness of this particular attack saw four dead and 10 wounded.[1185]

[1182] *Ibid.* p. 217.
[1183] *Ibid.*, p. 220.
[1184] *Ibid.*
[1185] *Ibid.,* p. 219; see also 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. 13–14, available at: http://www.hrw.org/legacy/reports/1996/Croatia.htm.

d) Cetingrad

1252. The refugees that escaped from Slunj and headed in the direction of Cetingrad-Banja Luka on 5 August were also shelled according to the witness A.F. from Slunj. This witness stated that the column was shelled while they were near Cetingrad. He personally saw at that time that one woman was killed while other persons were injured, among which the mother of the witness's husband.[1186]

1253. Unfortunately, the Serbs were not spared even when they managed to cross the border and enter into the Republic of Srpska. The fact that the Croatian air force bombed Serb columns even in the territory of the Republic of Srpska demonstrates how persistent Croat forces were in the pursuit of their criminal intention.[1187]

2. Sector South

1254. It should be noted that even though the majority of Croatian attacks targeted columns of Serbs escaping from Sector North, columns from Sector South were in no way spared. Witnesses from Sector South described that in addition to being shelled, Serbs from the columns were also shot at by Croatian soldiers. According to the statement of Savka Hinić compiled by Croatian Helsinki Committee when she and her son Marinko and step-son Srđan arrived in Vrhovine two soldiers approached them and shot her son without any explanation.[1188]

1255. According to survivors statements cited in Human Rigths Watch (HRW) report Croatian air forces directly targeted the column of Serb civilians. Most of those accounts deal with the shelling close to Petrovac on the territory of Bosnia and Herzegovina. According to HRW report and survivors of the attack the column was hit with four bombs, one of them directly hitting a civilian vehicle that was moving within the column. Two trucks were also directly hit and were burning, according to the HRW report.[1189] Witness 56 testified before the ICTY about this shelling and confirmed that several civilian cars were hit in addition to two trucks that were burning.[1190]

[1186] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 218, witness A.F.

[1187] 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), p. 11, available at: http://www.hrw.org/legacy/reports/1996/Croatia.htm

[1188] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 51.

[1189] 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 at: http://www.hrw.org/legacy/reports/1996/Croatia.htm.

[1190] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness 56, 23 May 2008, Transcript p. 3546 (witness saw two civilian trucks and several cars that were hit by bombs on the road 15 kilometers from Petrovac in the direction to Bravsko).

1256. According to the HRW report based on the witness statements in this incident at least five persons were killed while 15 were wounded. [1191]

1257. An entry of the 4th Guards Brigade Operative Logbook for 7 August 1995 shows that a column near Petrovac was also shelled from the area of Sector South. The entry indicates that artillery fire was used against a SVK column in order to kill Serbs that were retreating. The Logbook notes "our artillery was hitting the column pulling from Petrovac to Grahovo, the score is excellent, the Chetniks have many dead and wounded…"[1192]

B. *Killing of Serbs that stayed in the UNPA sectors*

1258. As previously shown, a very small number of Serbs stayed in UNPA sectors. However, despite the fact that elderly and disabled made up approximately 75% of the remaining population[1193] they were still systematically targeted by Croatian forces. The killing of remaining Serbs was perpetrated immediately after Croatian forces entered Serb villages as well as after operation *Storm* was formally finished. Victims were both Serbian soldiers that surrendered to Croatian forces[1194] and Serb civilians. The fates of many Serbs remain unknown because Croatian forces obstructed any UN investigations. The Special Rapporteur Elisabeth Rehn reported:

> "Field staff of the Centre for Human Rights received numerous reports of killings taking place in former sectors South and North both while the military operation was ongoing, without any military justification, and after the Croatian army had assumed control of the region. More than 120 bodies have been discovered by the United Nations and reports of

[1191] 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 at: http://www.hrw.org/legacy/reports/1996/Croatia.htm.
[1192] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 189.
[1193] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7; see also ECMM, 100 Days after Operation "Storm" in the former "Serb Krajina", Comprehensive Survey Report on the First Hundred Days of Croatian Rule in UN Sector South, dated 21 November 1995 p. 8, (Annex 60).
[1194] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 135; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Vladimir Gojanović, 15 May 2008, Transcript p. 2944 (witness testified about killing of a SVK soldier who surrender, unidentified location).

> killings have been especially numerous in the Knin area. According to information received, a common murder method was shots in the back of the head."[1195]

Similarly Croatian Helsinki Committee for Human Rights reported:

> "Some hamlets in the surrounding area of Podinarje were impossible to reach. The residents of these hamlets left the area on time, only a few elderly people remained to live there. Two old women remained to live in one house there, and one man from Knin, who took part in military operation 'Storm', visited them several days in the row, brought them food and helped them. One morning he found them with their throats cut open."[1196]

1259. According to evidence gathered by the non-governmental organization "Veritas", the majority of killings were committed in August 1995 but the killings did not stop and continued throughout 1995.[1197]

1260. In light of the foregoing difficulties the Respondent will nevertheless try to provide a short overview of the killings committed in Sectors South and North. In doing so, unlike the Applicant in the Memorial, Respondent will use information and facts from official international bodies and sources originating from Croatian organizations.

1. Sector South

a) Knin

1261. The city of Knin, the center of Serbian life not only in Sector South but also in Krajina, and the Serb civilians living in it were not only targeted by indiscriminate shelling but were shot by Croatian forces upon entering the city. Again the real number of those killed is difficult to establish considering that the Serbs were buried under serial

[1195] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 9, para. 24.
[1196] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 46.
[1197] NGO "Veritas", Bilten No. 114, August 2007, *Žrtve «Oluje» i postoluje*, pp. 5–13 (Annex 62).

numbers. The report of the Croatian Helsinki Committee for Human Rights lists names of 13 persons killed but the report also gives information about other crimes perpetrated in Knin.[1198] Those crimes were committed on 5 August when the Croatian forces entered the town of Knin.

1262. As already noted, it is symptomatic that the UN was allowed entry into the city only after the streets were cleaned and bodies removed.[1199] However, witness statements are of assistance in reaching a conclusion about the magnitude of the killings perpetrated by Croatian forces which they were only successful in partially hiding from International observers. Witness Andrew Lesli testified before the ICTY Trial Chamber about his voyage from the UN barracks to the Knin hospital on 5 August. He described the damage inflicted on the city and how he saw dead bodies along the way, approximately 15 to 20 dead people.[1200] Witness Andreas Dreyer similarly testified that while driving through Knin he observed tens of dead civilians killed at close range. Witness described that he saw old men being shot at close range, a man who was shot through his head who was later found in a shallow grave, several bodies of victims stripped of their clothes and who were also shot at close range.[1201] Similar description of the destruction was given by the chief engineer of UN in Sector South, Joseph Bellarose, who described observing a great deal of devastation everywhere he looked, numerous dead civilians lying in the streets and buildings and cars on fire.[1202]

1263. According to the testimonies of Lesli and Hill, UN observers were prevented from leaving their camp from 5 until 9 August 1995.[1203] Witness John William Hill further added that he talked to some Croatian soldiers in front of the UN camp who told him that "they were going to kill all the Serbs".[1204]

[1198] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 152 (on 4th August UN registered 15 unidentified bodies of men, women and children on the main road in Knin; on the entry to Knin 5 unidentified dead bodies between 30 and 70 years old, were found; six men on tractor that were comming from Kosovo to Knin to surrendered were killed...; on Sunday, 6 August 1995, around 10,00 a truck was carrying a group of dead bodies...) .

[1199] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 37.

[1200] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andrew Lesli, 22 April 2008, Transcript p. 1967; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Roland Dangerfield, 24 July 2008, Transcript p. 7233 (witness testified that Canadian soldiers pick up dead bodies and took them to Knin mortuary).

[1201] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andreas Dreyer, 17 April 2008, Transcript pp. 1739-1740; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness John William Hill, 28 May 2008, Transcript pp. 3770–3771 (witness testified about two bodies found in the vicinity of Knin, "on the hill as you leave Knin" that were shot in the head).

[1202] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Joseph Bellarose, 7 July 2008, Transcript p. 5867.

[1203] See *ibid.*, testimony of witness Andrew Lesli, 22 April 2008, Transcript p. 1973; see also *ibid.*, testimony of witness John William Hill, 27 May 2008, Transcript p. 3750.

[1204] See *ibid.*, testimony of witness John William Hill, 27 May 2008, Transcript p. 3751.

1264. Protected witness "69" testified before the ICTY that once Croatian forces entered Knin one of the soldiers took his 81-year-old neighbor Dmitar behind the house, that shots were heard - his neighbor's body was found a week later along with some other bodies of killed Serbs.[1205] The Croatian Helsinki Committee for Human Rights report provides statements which describe the killings of Serbs who stayed behind, committed by Croatian soldiers or police. According to the statement of K.Š., interviewed by Croatian Helsinki Committee, he saw two executions and the police vehicle took part in the latter one: "A vehicle turned to my house. I did not see anything, but I heard. They shouted and screamed: Open up, Open up, the doors opened and the voice was heard. And what? And afterwards I hear 5-6 gun shots."[1206] K.Š. testified about other executions committed in Knin: "I saw a group of 5-6 persons in the masque uniform who stood on the upper side of the road. I saw two men standing, and a few persons kneeled before them. There was one woman among them. They were killed by shots into back of their head…"[1207]

1265. International observers discovered the bodies of Serbian civilians that were executed in their homes in Knin after Croatian forces had taken over the city. Witness Edward Flynn, leader of the UN HRAT human right action team in Sector South, testified that not far from the center of Knin on 12 August together with his UN colleagues he saw the bodies of two older men that had been shot in the head.[1208]

1266. In the village of Golubić, 10 Serbian villagers did not want to flee with the column and returned to their village. While returning they stopped in the village of Radljevac to buy some fuel. They were found by Croatian soldiers who opened fire without any explanation which killed 7 Serbs while only two managed to escape. The killed Serbs were Mara Marić (1930), Petar Marić (1930), Djuka Damjanović (1930), Dušan Damjanović (1930), Milica Vuković (1925), Tanasije Vuković (1927) and Boško Vuković (1938). On the same day Jovan Markelić (born in 1937) was also killed.[1209]

[1205] See *ibid.*, testimony of witness 69, 13 May 2008, Transcript pp. 2705–2706.
[1206] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 37.
[1207] *Ibid*.
[1208] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Edward Flynn, 11 April 2008, Transcript p. 1328; see also *ibid.*, testimony of witness Aleksandar Tchernetsky, 19 May 2008, Transcript p. 3188 (witness Tchernetsky testified about discovering of two bodies on 12 August 1995 that were later identified as Mila i Ilija Milivojević).
[1209] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 53.

1267. Other Serbs living in the same village of Golubić were killed on the same day when 14 Serb civilians were also systematically killed.[1210] In the village of Golubić there were at least 21 Serbian victims.[1211]

1268. The Croatian Helsinki Committee for Human Rights reports the postmortem desecration of Serb bodies:

> "Nikola Panić, born 1935, disabled, killed on August 6, 1995 in Golubić. His head was found 50 meters away from the murder spot. Allegedly soldiers played football with his head. A corpse of Marija Banjanin, 89 years old from Gračac, was found with a head cut off. The head was found without eyes. NN(f), around 74 years, was found tied with a fishing net. The automobile tyre was found around her neck, which seemed burned. In the vicinity of Golubić, UN registered a dead man and women. The man's nose and ears were cut off."[1212]

1269. In the village of Uzdolje only one day later, on 7 August, seven Serbs were killed (born between 1920 and 1931). The Croatian Helsinki Committee for Human Rights provided details of their death: "the residents were gathered on a small path, forced to sit down and killed from a distance. One potential victim survived but was wounded".[1213]

1270. In Strmica, the SVK left on 28 July 1995 but a number of older Serbs unfortunately stayed behind. The Croatian army killed 15 Serbs, among whom two sisters Andja and Draginja Dragaš were 65 years old, sick and immobile. They were burned in their house at the end of August 1991.[1214]

1271. In the village of Oton, at least 8 Serbs were killed out of whom a majority was older than 70 years.[1215]

[1210] *Ibid.*, p. 54, (people killed on 6th August Đuro Jerković, Jovan Jerković, Vaso Vasić, Nikola Panić, Branko Radinović, Maša Radujko, Vaso Radujko, Toda Marić; killed latter during August Glišo Čanak, Milka Grubić, Zorka Kablar, Milica Šljivar and Jelka Opačić).
[1211] *Ibid.*, pp. 148-149.
[1212] *Ibid.*, p. 47.
[1213] *Ibid.,* p. 54.
[1214] *Ibid.,* p. 38.
[1215] *Ibid.,* p. 40; also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Jovan Vujinovic, 9 June 2008, Transcript pp. 4558 and 4562 (witness testifies about finding a body of a civilian Stevo Vujnovic).

1272. The same fate awaited Serbs who dared to stay in the village of Vrbnik in which at least 9 Serbs were killed. One of those Serbs was Savo Vukmirović, 73 years old and immobile, who was burned in his house while Croatian forces were burning the rest of the houses in village. Vukmirović's children's later found the burned house and some burned bones.[1216]

1273. The Croatian army captured the village of Mokro Polje on 5 August. By September 28, the remaining 7 Serbs in the village were killed. One of the survivors stated:

> "I lied down very tired and exhausted. Suddenly I heard shots. I thought that the army was killing chicken. But I heard my mother screams. When I heard that a Croatian soldier scream: I killed one more, we have to burn him before the monitors arrive, and through the window I saw officers shouting: Do not shoot any more, or I kill you. I finally understood that something was happening, I went down the stairs and saw my brother killed and my mother choking from the wound on the throat. I raised her and she showed me to run away, and asked for water. Soon she passed away…"[1217]

1274. Croatian forces entered the village of Plavno on 6 August. The same day 13 Serbian villagers were killed. Croatian Helsinki Committee for Human Rights report gives an account of the event: "The group of soldiers spread all over the village. They shot, without any warning or discussion, everything that moved through the village. Thirteen elderly people were killed that day, mostly in their yards and gardens."[1218]

1275. Witness Mile Đurić testified before the ICTY how Croatian army entered the hamlet Đurići in the village of Plavno on the 6 August 1995. He observed how Croatian soldiers in camouflage uniforms burned houses and how they threw his father inside the burning workshop and locked the door.[1219]

[1216] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 40.
[1217] *Ibid.*, p. 41.
[1218] *Ibid.*, p. 43; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Aleksandar Tchernetsky, 20 May 2008, Transcript p. 3209 (witness testifies about finding a body of man who was shot together with several sheep and a dog during the mop-up action in Plavno).
[1219] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mile Đurić, 12 June 2008, Transcript p. 4841; see also *ibid.*, testimony of witness Milica Đurić, 29 October 2008, Transcript pp. 10775–10776.

1276. Serbs that stayed in the village of Žagrović were also systematically killed. Sixteen Serbs that stayed in the village were killed. Croatian Helsinki Committee for Human Rights provides details about the killing of a number of Serbs in Žagrović:

> "Two bodies were thrown in the ditch besides the road. Both were dressed in their underwear only, and one had his slipper on. A right fist of one of them was mutilated, and several fingers were cut off. Both men had bullet hole in their backs."[1220]

1277. Serb Ana Barišić, 90 years old, was killed while Sava Barišić, 68 years old, and Stana Kurbasa, 75 years old, disappeared from the village of Cetina.[1221]

1278. In the village of Ivoševci, according to Croatian Helsinki Committee for Human Rights report, 14 Serbs were killed and 10 were missing.[1222]

1279. Killings were committed in all other places were Serbs stayed behind. In the village of Polača at least 5 Serbs were killed[1223] and in the village of Orlić two Serbian inhabitants were killed.[1224] Serbs were killed in the villages of Biovičino Selo, Čučevo, Đurske, Ervenik, Kakanj, Kistanja, Kovačići, Očestovo, Padjane, Ridjane, Rudele, Smdrelji and Zečevo.[1225]

1280. In some of these villages Serbs who were captured were subsequently killed by Croatian forces. Witness Marija Večerina, from Obrovac, testified before the ICTY how Croatian forces shot the car she was in with seven other persons. The witness's son was wounded as well as several other passengers. The witness described how the masked soldiers cursed and insulted them, told them they would kill them and took their money from their pockets.[1226] Passengers from the car were taken to a basement in a house nearby, and the next morning three young men from the car and two others that were already in the basement were taken out.[1227] Several minutes later the witness heard a burst of gun

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[1220] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 45–47.
[1221] *Ibid*., p. 45.
[1222] *Ibid*., pp .45, 150-151.
[1223] *Ibid*., p. 46 & 156.
[1224] *Ibid*., p. 47.
[1225] *Ibid.*, pp. 136-165, list of killed in Sector South; in relation to village Kakanj see ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mirko Ognjenović, 16 October 2008, Transcript pp. 10710-10711.
[1226] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Marija Večerina, 17 July 2008, Transcript p. 6721.
[1227] See *ibid.*, p. 6717.

fire. Ms. Večerina identified five young boys including her son by name and all of them were later exhumed in the Knin cemetery while the cause of death of four of them was a gunshot injury to the head and for one a gunshot wound to the neck.[1228]

1281. As previously stated, the systematic killing of Serbs continued after operation *Storm* was over. On 25 August the following Serbs were killed in the village of Grubori: Jovan Grubor (73 years old), Jovo Grubor (65 years old), Marija Grubor (90 years old), Milica Grubor, Miloš Grubor (80 years old), Đuro Karanović (45 years old). By the end of the month Petar Vidović (55 years old) and Stevan Vidović (50 years old) were also killed in Grubori. Alan Roberts described what happened in the village:

> "When we returned to the village that night they showed us bodies of the people. One belonged to an older man (Miloš Grubor, born in 1915) in the room of the house, which was partly burned. He had pyjamas on and lay in the pool of blood near the bed. He was shot behind the ears, and the bullet passed through his throat. A little bit further away, there was another body in the room. We could not see the person (Jovo Grubor, born in 1930). The man told us that he brought the body that afternoon when we were away. When we turned the body over, the sight was horrible. His throat was cut in two pieces."[1229]

1282. Two days after the killings in the village Grubori, the village of Gošići was also a place of massacre of Serbs. Croatian forces killed 7 Serbs and destroyed their houses.[1230]

1283. On or about 28 September 1995, at least nine Serbs were executed in the village of Varivode (in former Sector South). The nine victims were between sixty-five and eighty-four years of age. The victims' bodies were apparently removed from the scene

[1228] See *ibid.*, p. 6723 (witness named her son Stevo, Mile Gnjatović, Stevo Baljak, Đuro Mačak and Momčilo Tišma).
[1229] Alun Roberts, the UN spookeperson, in *Voice of America*, 11 September 1995 (taken from Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 54); see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alun Roberts, 21 July 2008, Transcript 6861, 6920 ; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Edward Flynn, 9 April 2008, Transcript 1060 (witness testified that he and his team saw 10 bodies in Grubori); see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Roland Dangerfield, 25 July 2008, Transcript 7292 (witness testified that when they entered Grubori they discovered that Croats had come, burned the village and slaughtered the men and livestock).
[1230] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 54 & 149 people killed on 27 August: Dušan Borak, Grozdana Borak, Kosara Borak, Marija Borak, Milan Borak, Vasilj Borak and Savo Borak.

of the crime and buried in the Knin cemetery, where UN monitors found nine freshly dug graves. Bullet holes, blood stains and other physical evidence were also found in the homes of the victims by UN monitors.[1231]

b) Benkovac

1284. Serbs who stayed behind were also systematically killed in the villages belonging to Benkovac municipality. In the village of Kakma, which is close to the city of Benkovac, a 75 year old Serb was last seen in the afternoon of August 9 when he was arrested by Croatian police. Later that day he was killed while his body disappeared the next day.[1232]

1285. Two Serbian women were killed in the village of Brgud. They were 65 and 70 years old and were killed behind their house. One of them was buried while the body of the other disappeared.[1233] According to the same source, the Serbs were also killed in villages of Biljane Donje, Biljane Gornje, Dobropoljci, Jagodnja Gornja, Kula Atlagića, Ostrvica, Plastovo.[1234]

c) Donji Lapac

1286. According to information gathered by the Croatian Helsinki Committee for Human Rights, in the Donji Lapac municipality 38 Serbs were killed.[1235] One of the Serbs, Milutin Medić, 78 years old, was last seen on Croatian television giving an interview that he is safe. It is cruelly ironic that he was killed within the next few days and buried in the backyard of his house.[1236]

1287. Simo Bursać, born in 1911, was killed and buried in his backyard in the village of Lička Kaldrma, while his house was burned to the ground.[1237] Croatian forces killed two other persons in that village.[1238]

[1231] Human Rights Watch, *Croatia: Impunity For Abuses Committed During "Operation Storm" and the Denial of the Right of Refugees to Return to the Krajina*, 1996, Vol. 8, No. 13 (D), available at http://www.hrw.org/legacy/reports/1996/Croatia.htm#P332_81851; see also ICTY, *Gotovina et al.,* IT.060-90, testimony of witness Vladimir Gojanović, 15 May 2008, Transcript p. 2977.
[1232] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 35.
[1233] *Ibid*.
[1234] *Ibid.,* pp. 137–138.
[1235] *Ibid*., pp. 137–141.
[1236] *Ibid.,* pp. 138–141.
[1237] *Ibid*.

1288. Croatian forces entered the village of Oravac on 7 August. Upon entering the village they imprisoned 5 Serbs, among them Ruža and Rade Bibić, 75 and 76-years-old Serbs. During the afternoon, Serbs were taken to the execution site from which only one person managed to escape.[1239]

1289. In the village of Srb, seven Serbs were killed.[1240] There is however no precise information about the circumstances of the events. The killing of Serbs also occurred in other villages in the Donji Lapac municipality, specifically in the villages of Begluci, Birovača, Brezovac Dobroselski, Brotinja, Dobašnica, Dobroselo, Doljani, Donji Lapac, Gornji Lapac, Kunovac, Kupirovo, Lapačka Korita, Obljaj, Opačića Dolina, Mišljenovac and Toškovac Lički.[1241]

d) Gračac

1290. In the municipality of Gračac, Serbs were also systematicaly killed. In the village of Zrmanja 7 older Serbs were killed in August and September 1991 under unknown circumstances.[1242] In October, two Serbs, Milan Marčetić and Dušan Šujica were also killed.[1243] The account of the killing of Milan Marčetić was to a certain extent explained by UN official Peter Marti who testified before the ICTY that he was very surprised when he saw Milan Marčetić as a Serb still alive and that Marčetić explained him that he was never in the army. However, Mr. Marti's fears turned out to be justified when Marčetić was killed soon afterwards.[1244]

1291. During August, 13 Serbs were killed in the village of Kijani.[1245] Djuro Mandić, 81 years old, was killed in the village of Tomingaj, and his body was found by his daughter who was allowed to enter the village.[1246]

[1238] *Ibid*.
[1239] *Ibid*.
[1240] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 138–141.
[1241] *Ibid*.
[1242] *Ibid.,* pp. 146–147.
[1243] *Ibid.,* p. 37.
[1244] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Peter Marti, 9 June 2008, Transcript p. 4628.
[1245] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 144–146 (Dane Bolta, Sava Bolta, Branko Jelača, Marija Jelača, Milica Jelača, Ana Jelača, Smilja Jelača, Dušan Kesić, mileva Konudžić, Danica Sovilj, Mara Sovilj, Mira Sovilj, Rade Sovilj, Vlado Sovilj); see also

1292. The killing of Serbs was recorded in other villages of the Gračac municipality such as the villages of Bruvno, Deringaj, Gračac, Ivanići, Kik, Mazin, Nadvrelo, Otrić, Palanka, Prljevo, Rastičevo and Rudopolje.[1247]

g) Korenica

1293. According to the Croatian Helsinki Committee for Human Rights report, 31 Serbs were killed in the municipality of Korenica.[1248] One of the Serbs, Zdravko Sovilj, asked for UNCRO protection. According to the information of the Croatian Helsinki Committee for Human Rights, Croatian soldiers asked the UNCRO to: "give him up only for a short time – to ask for some information" which was the last time Zdravko Sovilj was ever seen.[1249]

1294. Other Serbs were also killed in the vicinity of the UNPROFOR base. According to one source:

> "The Officer of the Czech battalion of the UNPROFOR forces, situated in Korenica informed me that on Sunday, August 5, 1995, they had seen 21 Serb civilian running along the base of the Czech battalion from Croatian soldiers. Later on Czech soldiers heard awful screams and shots. Maybe it is only a coincidence but the numbers on the nearby graves are compatible to the numbers of 21 Serb civilian."[1250]

1295. Croatian forces entered the village of Komić on 12 August. In this village, like other Serb villages, only a few Serbs remained. Upon entering it, Croatian forces killed Marija Ugarković, Sava Lavrnić (93 years old) and his son Petar Lavrnić (60 years old), Stanka Čurčić (45 years old), Milka Pavlica (89 years old), Mika Sunajko (75 years old), Rada Sunajko (88 years old), Mara Mirković and Rade Mirković on 12 August 1995.[1251]

ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Mile Sovilj, 24 April 2008, Transcript p. 2221 (witness testified about disappearance of his father).
[1246] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 36.
[1247] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 144–147.
[1248] *Ibid.* p. 49.
[1249] *Ibid.* p. 57.
[1250] Robert Fisk, 'Independente' (taken from Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 57).
[1251] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 49.

1296. As in the case of other municipalities, Serbs that stayed behind were systematically killed also in other places of the Korenica municipality, such as Arapov Dol, Frkašić, Pećani,[1252] Jošani, Kapela Korenička, Ličko Petrovo Selo, Mutiliči, Novo Selo, Udbina, Visač and Vrelo.[1253]

h) Otočac

1297. During the operation *Storm* in Doljani, 12 older Serbs were killed, six men and six women.[1254] In the village of Zalužnice, eight Serbs were killed during August. Two of these eight were Marica and Žarko Popović, both of whom were elderly and ill.[1255]

1298. Croatian soldiers also killed Serbs in the villages of Dabar and Škare.[1256]

(a) Remaining municipalities in Sector South

1299. Serbs that stayed in their houses located in Sector South were also systematically killed in other places. Those places are: in the Drniš municipality, in the villages of Biočić, Bobodol, Cerovac, Drniš, Kadina Glavica, Miočić, Parčić, Trifunovići and Žitnić;[1257] in the Gospić municipality, in the villages of Barlete, Medak, Mogorić, Ostrvica, Papuća, Pavlovac Vrebački, Plača and Raduč;[1258] in the Obrovac municipality, in the villages Krupa, Golubić, Nadvođe, Zelengrad and Žega; in Sinj municipality, in village of Koljani; and in Šibenik municipality, in villages of Čista Mala, Jabuka and Lađevci.[1259]

1300. *Human Rights Watch* in their report discussed the responsibility of the high military and civilian officials, including President Tudjman for the killings of Serbs when Croatian forces were still in control of the territory:

> "President Tudjman, who despite his initial conciliatory rhetoric calling for Serbs to remain in the Krajina area allowed attacks against them to continue for months after the offensive, should also be held accountable for the conduct of Croatian troops. Local human rights monitors report

[1252] *Ibid.,* p. 50.
[1253] *Ibid.,* pp. 160-162.
[1254] *Ibid.,* p. 50.
[1255] *Ibid.,* p. 51.
[1256] *Ibid.,* pp. 163–164.
[1257] *Ibid.,* pp. 141–142.
[1258] *Ibid.,* pp. 142–143.
[1259] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 165.

that an estimated eighty elderly Serb civilians were executed in the months from November 1995 to April 1996, long after the Croatian government had asserted control over the region and promised it would guarantee the safety of the Serbs living in the Krajina area."[1260]

2. Sector North

1301. Croatian armed forces stormed Sector North in similar manner as was the case with Sector South. However, unlike Sector South, information about victims in the Sector North has not always been available in light of the fact that many Serb victims remained unidentified and buried in unknown locations in the days following operation *Storm*.[1261]

1302. The European Community Monitoring Mission in Croatia (ECMM) reported from the field about the crimes occurring in Sector North. As reported on 7 August 1995, in Dvor na Uni nine physically disabled civilians were killed by armed uniformed men. On 13 August, at the checkpoint controlled by the Ukraine unit, a RSK soldier was shot, doused with gasoline and burned; on 29 August in Radašnica, two bodies, of which one was decapitated was found; on 4 September in Plaški, two bodies were found in a freezer, one in uniform, one in civilian clothes. On 10 September in Svinjice the body of a Serb male, with bullet wounds to the head and in the back, was found. ECMM also noted that Croatian police did not allow their team to enter the house and to be present during its inspection.[1262]

1303. The Croatian Helsinki Committee for Human Rights report noted that Croatian forces entered the village of Donji Skrad, Duga Resa municipality, on 5 August 1991 and killed Kata Dmitrović, Nikola Dmitrović, Zorka Gazibara, Ljubomir Končalović, Smiljana Končalović, all of whom were older then 60 years. The next day, in the same village, Danica Dmitrović and Stanka Končalović were also killed while Andjelka Končalević went missing. Serbs were also killed in villages of Kestenjak and Veliki Kozinac.[1263]

[1260] Human Rights Watch Report, *Croatia: 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), p. 2; Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 166–169 (list of 24 Civilians killed in Sector South in period from 1996 to 1999).

[1261] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 261; see also Humanitarian Crisis Cell Sitrep, Compilation of Human Rights Reporting, 7 August – 11 September 1995 (Annex 55).

[1262] *Ibid.*

[1263] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 236–237, see also pp. 255-260.

1304. As was the case in the territory of Sector South, Serbs from Sector North also left their homes fleeing from Croatian forces. A small number of elderly Serbs who stayed behind were systematically killed. Once more the report of the Croatian Helsinki Committee for Human Rights, emphasized that 11 Serbs were killed or went missing in separated incidents in Karlovac,[1264] that in Plaški at least 5 Serbs were killed or went missing, while in Slunj the number of reported Serbs killed is 10, and in municipality of Vojnić - 14.[1265]

1305. In the municipality of Glina, as reported by the Croatian Helsinki Committee for Human Rights, the Serbs killed included Stana Lazić who was 87 years old, killed in the village of Gornje Selište on or after 7 August 1995; Milka Dmitrović, 72 years old, killed in the village of Bojna on or after 6 August 1995.

1306. In the village of Brubno, killed Serbian victims were Dušan Radovanović, 60 years old, and Stanko Vujesinović, 65 years old. According to Croatian Helsinki Committee for Human Rights report they went missing after Croatian forces entered the village. Serb Slavko Mišćević was killed in the village Buzeta. In the village of Mali Obljaj, Janja Dukić, 65 years old, Vasilija Vujaklija, around 78 years old, and an unidentified woman were killed. In the village Veliki Obljaj, Vuja Lončar, 80 years old, and Miloš Rakas, 65 years old, were killed. Slavko Macakanja went missing from the village of Šaševa and he was last seen on 6 August 1995.[1266]

1307. Overall, the number of killed Serbs in Glina, according to the Croatian Helsinki Committee for Human Rights report, is 35.[1267]

1308. In the municipality Dvor na Uni, elderly Serbs remained in local villages. The Croatian Helsinki Committee for Human Rights report listed some of the known individual victims.

1309. Stevo Brajnović, 71 years old, Stoja Čorić, 70 years old, Slavka Knežević, 70 years old, and Milan Miljković, 75 years old, were killed in the village of Šakanlije. According to

[1264] *Ibid*., pp. 237-242, see also pp. 255–260 and Annex 3 of the report .
[1265] *Ibid.,* pp. 241-242, see also pp. 255–260 and Annex 3 to the report.
[1266] *Ibid.*, Annex 3.
[1267] *Ibid.*, pp. 242–254; see also Annex 3 of the report.

witness statements contained in the Croatian Helsinki Committee for Human Rights report, the named persons were killed on 12 August 1995. In the village of Brdjani, Branko Roksandić was killed and his body was later found by his father.[1268]

1310. Danica Čanak, 75 years old, was killed in the village of Ćore and according to a witness statement she was killed by a soldier. Nikola Cvetojević disappeared from the village of Donji Javoranj. Adam Kepčija, 70 years old, was killed in the village of Kepčije on 7 August 1995. Dragica Benak, 64 years old, was killed in the village of Paukovac and her body, according to witnesses, was found in September or October of 1995.[1269]

1311. Overall, in Dvor at least 45 Serbs were killed, in Gvozd 20 Serbs were killed, in Petrinja 17 Serbs, in Kostajnica 7 Serbs, and in Sunja 5 Serbs were killed. [1270]

6. Destruction and Looting of Serbian Property

1312. The systematic killings of Serbs were also followed by other activities geared toward destroying every possibility that Serbs who were not killed could live on the territory of Krajina. Upon entering the Serb populated villages, Croatian forces killed Serbs that they managed to find, destroyed houses and other Serb property, killed livestock, polluted wells and waterways, and stole or removed fire-wood stored for the upcoming winter.[1271] Symbols of presence of the Serbian community in the area were also destroyed during and in the aftermath of the operation – houses, churches, monasteries and cultural monuments were devastated and burnt.[1272] The Respondent will provide a short overview of the facts showing the systematic destruction of Serbian property. The

[1268] *Ibid.*, pp. 242–254.
[1269] *Ibid.*
[1270] *Ibid.*
[1271] ICTY, *Gotovina et al*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para. 40; see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Ton Minkuielien, 15 April 2008, Transcript p. 1501; see also *ibid.*, testimony of witness Alain Robert Forand, 3 June 2008, Transcript p. 4126; see also *ibid.*, testimony of witness Alain Robert Forand, 3 June 2008, Transcript p. 4126; see also ECMM Team N2, The Consequences in former "RSK" of Operation "Storm", Special Report, dated 23 August 1995 (Author Soren Liborius), (Annex 54).
[1272] ICTY, *Gotovina et al*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, Notice of (alleged) serious crimes in the zone of responsibility of the Split MD during and after Operation Storm, pp. 317-352; see also Humanitarian Crisis Cell Sitrep, Compilation of Human Rights Reporting, 7 August – 11 September 1995 (Annex 55); see also UNMO HQ Sector South, Summary of Humanitarian Violations, DAILY SITREPS, 4 September – 4 October (Annex 57); see also: UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 October-4 November 1995, drafted by Major Peter Marti and Captain Kari Anttila (Annex 58);

UN observers noted the systematic character of the processes during the operation *Storm* and the Secretary General reported about this in the following manner:

> "Since the beginning of the Croatian offensive, there have been numerous reports of houses and other property being set on fire and/or looted. Although there were no sightings of houses actually being set alight, many of the reports indicated that Croatian troops were in the close vicinity of the burning houses and in many of the areas in question all the inhabitants had already fled. On 8 August, for instance, United Nations civilian police reported that houses in Zazvici, Djevrske and Kistanje, in Sector South, were on fire. A human rights action team reported on 10 August that 35 to 40 houses along a 15-kilometre stretch of road south of Knin towards Drnis were burning; crops had also been set ablaze. Members of a United Nations battalion reported that on 10 and 11 August houses recently set on fire were observed in nine different villages in Sector South. In addition, they reported evidence of looting. On 13 August, a United Nations military observer observed a burning house in Topusko in Sector North; Croatian soldiers were standing by. As late as 15 August 1995, a human rights action team reported houses as having been freshly set ablaze in Mircete in Sector South."[1273]

1313. Witness Dreyer, while describing to the ICTY Trial Chamber what he saw in Knin, particularly noted that, apart from dead humans, he and his colleagues also observed that almost all cattle, dogs, pigs, and other animals had also been shot.[1274]

1314. The village of Kistanje was described by International Observers as being totally destroyed, there were not even animals there, just a strong smell of bodies.[1275] John Hill testified that the village of Srb was destroyed and he also saw looting being perpetrated by HV soldiers.[1276] Witness Hill further described that, upon entering Otrić, they saw

[1273] Report of the Secretary-General submitted pursuant to Security Council resolution 1009 (1995), 23 August 1995, UN Doc. S/1995/730, para. 17.
[1274] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Andreas Dreyer, 16 April 2008, Transcript pp. 1739–1740; see also *ibid.*, testimony of witness Roland Dangerfield, 24 July 2008, Transcript pp. 7153–7154 (witness testified about systematic looting in Knin that have started after HV troops entered the city that lasted for 2 weeks).
[1275] See *ibid.,* IT-060-90, testimony of witness John William Hill, 28 May 2008, Transcript p. 3768; see also *ibid.*, testimony of witness Roland Dangerfield, 24 July 2008, Transcript p. 7160 (witness testified that vast majority of Kistanje was on fire); see also *ibid.*, testimony of witness Rajko Guša, 1 October 2008, Transcript pp. 9834–9835 (witness testified about burning and destruction of Kistanje, Ervenik and surrounding villages).
[1276] See *ibid.*, testimony of witness John William Hill, 28 May 2008, Transcript pp. 3777–3778.

homes burning, but also noted that "all of the animals, cows, pigs, sheep, whatever had been killed, shot."[1277] The village of Gračac was described by witness Hill as being fairly well destroyed. He saw that some houses were still burning while the looting was taking place and there was again a strong smell of bodies.[1278]

1315. Witness Edmond Vanderstyne also testified about the destruction he observed in the area between Gospić and Gračac. He testified that from a little hill he "saw the countryside as far as could you look and everywhere, everywhere every farm, every bam, every annex, every house in the countryside. I mean, not in the villages, but every single building in the countryside was on fire." The witness also testified that the looting was organized and on a major scale.[1279]

1316. Because of the massive scale of destruction, witness Herman Steenbergen, deputy team leader of UNMO Team Gračac, made a complaint to Croatian police about the burning of houses in Gračac. He was given a sarcastic answer that the cause of the fire was faulty wiring installed by the Serbs.[1280]

1317. Witness Edward Flynn confirmed before a Trial Chamber of the ICTY his report in which he stated that Kistanje, Đeverske, Otrić and other towns had become virtually unlivable because of actions that took place after the fighting.[1281] Looting of property was systematic as well as its destruction and Serbs' property had been specifically targeted while Croatian households were spared.[1282] The UN report noted that virtually every abandoned Serb property was looted.[1283] The looting of Serb property decreased only in October, but according to the UN report only because "there was nothing left to loot".[1284]

[1277] See *ibid.*, testimony of witness John William Hill, 28 May 2008, Trial Transcript p. 3776.
[1278] See *ibid.*, testimony of witness John William Hill, 28 May 2008, Transcript p. 3772; see also *ibid.*, testimony of witness Herman Steenbergen, 30 June 2008, Transcript pp. 5416 and 5429 (witness observed burning of houses and looting in Gračac and village Velika Popina).
[1279] See *ibid.*, testimony of witness Edmond Vanderstyne, 2 June 2008, Transcript 4047 (witness was a a Belgian journalist, De Standard newspaper).
[1280] See *ibid.*, testimony of witness Herman Steenbergen, 30 June 2008, Transcript p. 5431.
[1281] See *ibid.*, testimony of witness Edward Flynn, 9 April 2008, Transcript p. 1501.
[1282] *Ibid.*, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para. 41; see also *ibid.*, Trial Chamber *98 BIS* Decision, 3 April 2009, Transcript pp. 17611–17612.
[1283] Report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), 25 December 1995, UN Doc. S/1995/1051, p. 5.
[1284] UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 October-4 November 1995 (drafted by Major Peter Marti and Captain Kari Anttila) (Annex 58).

1318. Whilst these crimes were taking place, as a rule, the movement of UNCRO was forbidden by Croatian authorities. Brigadier Forand, protested to General Čermak even at the time of the events that the restriction of movement was intended to prevent UNCRO from monitoring the situation.[1285] Forand also protested to General Čermak about the torching of houses while General Čermak accused Forand of making baseless accusations.[1286] Mr. Forand simply concluded that methodical and continous destruction that was observed wherever they could travel suggested the real reason for the restrictions in movement imposed by Croatian forces.[1287] He also noted that Croats used these periods of restricted movement to clean up evidence of their military tactics like patching up shell holes on the Knin - Drniš road.[1288]

1319. In the words of witness Kari Antila, UN military observer in Sector South, even though Croats explained that such restrictions were required for mop-up operations, he and his colleagues thought that such restrictions were imposed just to provide an opportunity to burn houses and loot them without fear.[1289] Witness Forand testified in relation to the crimes committed in Donji Lapac during August 1995 that usually there was a connection between restriction of movement and mop up activities or subsequent crimes. He confirmed the UN situation report from 31 August, reporting atrocities against people and property, including murder, and wholesale destruction of livestock.[1290]

1320. Despite the words of General Čermak, it was clear to the UN that such destruction could not be done without the existence of a systematic and premeditated plan:

> "In the whole Krajina region houses were burning and even today, more than five weeks after the last battles, they are still burning. Destroying big complex of Non-Croat properties can lead to the conclusion that this

[1285] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alain Robert Forand, 3 June 2008, Transcript 4128–4129; also *ibid.*, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 232.
[1286] ICTY, *Gotovina et al*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 232.
[1287] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Alain Robert Forand, 3 June 2008, Transcript p. 4135.
[1288] *Ibid*., pp. 4126-4127; see also *ibid.*, testimony of witness Alun Roberts, 21 July 2008, Transcript p. 6895.
[1289] See *ibid.*, testimony of witness Kari Antila, 1 May 2008, Transcript p. 2637; see also *ibid.*, testimony of witness Jacques Morneau, 29 May 2008, Transcript p. 3941; see also *ibid.*, testimony of witness Joseph Bellarose, 7 July 2008, Transcript p. 5875.
[1290] See *ibid.*, testimony of witness Alain Robert Forand, 3 June 2008, Transcript p. 4157.

was not done only by mobs and that the whole affair was tolerated by the Croatian Government… Result will be an efficient impediment of the Serb return to their houses and it will also create more difficulties for people to settle down again in this region. It is impossible to identify the accurate range of destruction, but the largest portion of property in rural parts of former Sector South is, roughly speaking, partially or completely destroyed… General destruction happened more in the former Sector South, than in the Sector North. Some bigger town like Knin, Benkovac, Obrovac and Drniš were spared and serve as showcases for public"[1291].

1321. That destruction and looting of Serbian property was systematic was also confirmed by witness Jacques Morneau, whose UN unit was located near Benkovac. Witness Morneau explained that destruction and looting lasted day after day for three to four weeks and was deliberate in the sense that houses were targeted and selected.[1292] Reports from different police administrations like Šibenik and Zadar, confirm that the cooperation of civilian police and units of military police in providing security to "liberated areas" was inadequate and that joint patrols were in fact "non existent".[1293]

1322. UN reports suspected that the destruction was planned, and not just tolerated by the Croatian Government. This can be seen from the Croatian civilian police report of Čedo Romanić, the Chief of the Knin (civilian) Police Administration, dated 1 September 1995. In the report, burning of family houses was noted, and it was stated that in the majority of cases houses were set on fire by persons wearing HV uniforms and units that were mopping up the area from isolated paramilitary units.[1294] It is obvious thus that the destruction was not only tolerated but actually perpetrated by *de jure* organs of Croatia.

1323. It was noted that, while in Sector South arsons occurred during and immediately after the operation *Storm*, in Sector North only sporadic destruction of houses was reported during the operation *Storm*, while it began being fully implemented after the operation.[1295]

[1291] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, pp. 82–83.
[1292] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Jacques Morneau, 29 May 2008, Transcript p. 3940.
[1293] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 232.
[1294] *Ibid.*
[1295] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 211.

1324. However, the reason for lesser destruction in Sector North was that Croatian leadership found other ways to make sure that the Serbs would never live again in those areas. Namely, as noted by the Croatian Helsinki Committee for Human Rights:

> "In the region (former Sector North), which is a compliment to the Republic of Croatia, most of the houses were not burned down. They remained intact and they could be used. The newcomers from BIH [Bosnia and Herzegovina] and Vojvodina were resettled daily into that region. The empty houses that are inhabited are entirely looted."[1296]

1325. Finally, the UNMO report from 4 November 1995 on Sector South states that 17,270 houses were destroyed or damaged after the commencement of the operation *Storm*.[1297] Similarly in October 1995, the UN was also able to comment on the scale of the destruction:

> "As of the end of September, the European Community Monitoring Mission (ECMM) documented that 73 per cent of Serb houses were burned and looted in 243 villages investigated. In early October, accounts of armed robberies and personal threats were reported with increasing frequency, along with crimes against property."[1298]

7. After Effects

1326. In the following section a short overview will be given as to how the operation *Storm* affected Krajina Serbs that used to live in Sectors South and North. Furthermore, it will be shown what further steps the Croatian Government took in order to prevent Serbs from returning to their homes.

1327. The Croatian plan was successfully implemented and Krajina Serbs ceased to exist. Due to the operation *Storm*, the aforementioned killings, the serious bodily or mental harm that was caused to Serbs, and the intentional and organized destruction of Serb property

[1296] *Ibid.*, p. 265.
[1297] See also UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 October-4 November 1995 (drafted by Major Peter Marti and Captain Kari Anttila) (Annex 58).
[1298] The situation in the occupied territories of Croatia: Report of the Secretary-General, UN Doc. A/50/648, 18 October 1995, para. 33.

by Croatian forces that took place on the territory of former Sectors South and North, only approximately 5,000 Serbs remained living there. As stated by the Secretary General in his report:

> "The exodus of 200,000 Krajina Serbs fleeing the Croatian offensive in early August created a humanitarian crisis of major proportions. It is now estimated that only about 3,000 Krajina Serbs remain in the former Sector North and about 2,000 in the former Sector South.[1299]

1328. In an effort to ensure that Serbs would disappear from Krajina, the Croatian Government repopulated the region with Croats. The Croatian Helsinki Committee for Human Rights report notes that:

> "180.000 Croats from BIH, Vojvodina and Kosovo have resettled on the liberated territories in the following municipalities: Glina, Gvozd, Hrvatska Kostajnica, Krnjak, Plaški, Petrinja, Vojnić, Serb property was given to the Croat newcomers for them to keep initially for 10 years, and subsequently forever.[1300]

A. Croatia's actions targeting Krajina Serbs after the Operation Storm

1329. The level of persistency of the Croatian Government, headed by its President Tudjman, in implementing the plan to have Krajina Serbs disappear is demonstrated by the fact that they simply ignored directly applicable resolutions of the UN Security Council. Security Council resolution 1009 was adopted on 10 August 1995 and it urged Croatia to respect the rights of the Serb population to remain, stay or return safely and to create conditions for return for those who wished to do so.[1301] The Security Council resolution adopted on 9 November 1995 was even more direct in this respect:

> "...6. Reaffirms its demand that the Government of the Republic of Croatia take urgent measures to put an end to violations of international humanitarian law and of human rights, and investigate all reports of such violations so that those responsible in respect of such acts be judged and punished.

[1299] *Ibid.*, para. 27.
[1300] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 299.
[1301] Security Council resolution 1009 (1995) of 10 August 1995.

> 7. Reiterates its demand that the Government of the Republic of Croatia respect fully the rights of the local Serb population including their right to remain or return in safety and reiterates also its call upon the Government of the Republic of Croatia to lift any time-limits placed on the return of refugees to Croatia to reclaim their property."[1302]

1330. However, a number of documents testify about the actual plan of the Croatian Government. The importance for Croatia that Serbs were not to exist as a community on its territory is evident from the advice that Mr. Valentić gave in mid-August to President Tudjman. He stated that there was no need to conduct a census to determine a minority list because "there is no more than 2% of Serbs in Croatia, 2 to 3%."[1303]

1331. On 23 August 1995 President Tudjman held a meeting with the military leadership of the Croatian army in order to try to solve the demographic situation in the former protected areas - sectors South and North. From the transcripts of that meeting it can be seen that at the time when the Krajina Serb community disappeared according to the Brioni plan, the Croatian leadership had already a plan prepared on how to ensure that this community was never restored in Krajina. President Tudjman stated on that meeting:

> "...in view of the situation created by the liberation of occupied territories affecting the demographic picture, there is a need to make military units one of the most effective elements, which can happen if we properly solve *one of the most effective postulates of states' politics in dealing with our essential problem of today, namely, demographic situation in Croatia.* That was why I invited to this meeting the Vice Premier and the Minister responsible for reconstruction and development, Dr. Radić, to present, at the opening of this debate, the present demographic situation because of the deployment of military commands, military districts, brigade stationing, military-training institutions, etc. It may be effective and useful to resolve that situation where we have reinforced or at least

[1302] Security Council resolution 1009 (1995) of 10 August 1995.
[1303] Presidental transcript (17 August 1995), cited in the ICTY, *Gotovina et al.*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para. 23.

should reinforce Croatian dom, like in Istria, and in other places the more so because *it is not so much about changing the composition today as to populate some places and areas.*"[1304]

1332. Minister Radić explained how they should proceed:

> "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...."[1305]

1333. Several days later, on 26 August, President Tudjman gave a speech in the city of Knin, which used to be the center of the Serbian community in Krajina. President Tudjman publicly stated the likelihood of the idea that Serbs would never live again on the territory of Krajina:

> "Croatian women and men, dear Croatian youth, Croatian soldiers, dear citizens of Knin, you who have survived here and who have returned and all your guests who have gathered here on this day - and we can accept what Croatian Army Knin commander Gen Ivan Cermak said: that we can call this the day when the Croatian historical cross has been completed.
>
> And [applause] there can be no return to the past, to the times when they the Serbs were spreading cancer in the heart of Croatia, cancer which was destroying the Croatian national being and which did not allow the Croatian people to be the master in its own house and did not allow Croatia to lead an independent and sovereign life under this wide, blue sky and within the world community of sovereign nations."[1306]

[1304] Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 23 August 1995 in Zagreb, pp. 01325991, 01325993-01325997, pp. 4–7 (Annex 53), see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Škare Ožbolt, 4 June 2009, Transcript pp. 18157–18159.

[1305] Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 23 August 1995 in Zagreb, pp. 01325991, 01325993-01325997, pp. 4–7 (Annex 53).

[1306] BBC Summary of World Broadcasts, August 28, 1995, Monday, Part 2 Central Europe, the Balkans; Former Yugoslavia; Croatia; EE/D2393/C; see also HINA Article, *Franjo Tudjman: Hour of return has come both for East Slavonia and Baranja,* dated 28 August 1995: "And those from the international community who are accusing us even today that we are toching Serbian houses in the liberated territories of Croatia should remember that it is a tenet from the Old Testament: An eye for and eye and a tooth for a tooth!" (Annex 56)

1334. The effectiveness of President Tudjman's plan to have Serbs disappear from the territory, thereby preventing them from being a political factor in the Croatian parliament under the Constitutional Law on Minorities, can be seen from his own words uttered in December 1995: "… when we passed a decision to conduct a popular census, we wanted to determine the number of Serbs who would leave. Since we currently know that 98% of them left this area, it means that the census is not required at this point."[1307] From this statement one could only conclude that in President Tudjman's opinion the destruction of Krajina Serbs was successfully accomplished.

1335. Bearing in mind the attitude towards Serbs publicly expressed by President Tudjman, it is unsurprising that the killing of Serbs continued to take place long after the operation *Storm*. As noted in the Croatian Helsinki Committee for Human Rights report, at least 24 ethnically motivated killings of Serbs occurred between 1996 and 1999 in the area of the former Sector South. At least 8 people were killed in the former Sector North.[1308]

1336. According to the UN Special Rapporteur:

> "Unfortunately, one year after Operation Storm, it is evident that the Croatian authorities are still not providing adequate security to the residents of former Sectors North and South. During my mission I learned of numerous recent cases of looting, arson and harassment in the region, in which most of the victims have been Croatian Serbs. There is also an ominous new problem of bombing incidents, which have caused at least three deaths....
>
> "Mr. Chairman, the continuing state of insecurity in former Sectors North and South so long after last summer's military operations leads me to conclude that there apparently is an unwillingness on the part of the Croatian authorities to take strong preventive measures to ensure the safety of local residents. I am deeply concerned at this situation for many reasons, including its likely effect on the decisions of Croatian Serbs who are considering either remaining in - or returning to - the area ..."[1309]

[1307] ICTY, *Gotovina et al.*, IT-060-90, Prosecutor's Pre-trial brief, Public Version of Pre-Trial Brief, 23 March 2007, para. 23.
[1308] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, details about killings at pp. 104-106, number of killed pp. 137 & 166–169, description of events in Sector North pp. 281–283, list of killed pp. 285–286.
[1309] Periodic report submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 45 of Commission resolution 1996/71, 22 October 1996, UN Doc. E/CN.4/1997/9, para. 124.

1337. The Human Rights Watch noted the perpetrators of the crimes against Serbs:

> "Contrary to Croatian government assertions, "individual extremists" and individual Croats whom Serbs earlier had expelled from their homes appear not to have been responsible for the bulk of the killings. Rather, all available evidence indicates that Croatian Army soldiers and, in some cases, Croatian police were responsible. Many of those killed had been seen in or outside their homes in the presence of Croatian Army soldiers. The soldiers often were also seen looting homes or walking away from a burning house. "[1310]

B. *Legislative Measures Targeting Serbs*

1338. Serbs were not only targeted by bombs or killed in other ways, but the Croatian Government made additional efforts to make sure that their goal of ridding the territory of Serbs and destroying all vestiges of Serb life and culture was fulfilled. UN Special Rapporteur Elisabeth Rehn identified in her report constraints imposed by Croatia to prevent any chance that Serbs would ever again exist in Krajina. First she identified physical barriers to returning:

> "The official line in Croatia is that the Serbs are welcome to return to their ancestral homes. However, the reality is rather different. First, there are physical barriers to returning because of the widespread burning of houses and, secondly, there are more subtle legal and administrative impediments."[1311]

1339. Special procedures for reclaiming property was put in place by the Croatian Government to ensure that Serbs would not be able to reclaim the small number of houses that were not burned. The UN Special Rapporteur stated:

> "Furthermore, the Special Rapporteur notes the difficulties facing refugees in returning to Croatia within the deadline in order to reclaim their properties. The Croatian Office for Displaced Persons and Refugees

[1310] Human Rights Watch Report, *Croatia: 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), p. 22.
[1311] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, para. 36.

has established a procedure for return. After studying the regulations, the Special Rapporteur is convinced that the vast majority of refugees, regardless of their own intentions, will not be able to meet those requirements…"[1312]

1340. As noted by the Secretary-General, executive and legislative measures that the Croatian Government adopted clearly targeted Serbs. As stated in the Secretary-General's report:

> "The Croatian Government has consistently maintained that Serbs are free to live in Croatia and that those who fled are welcome to return. However, the United Nations High Commissioner for Human Rights, UNHCR and UNCRO, as well as a number of Member States and independent human rights organizations, have expressed their concerns over the fact that serious violations of human rights have taken place and have continued to occur after the military operations had been successfully concluded. These violations, together with a number of recently adopted executive and legislative measures, appear de facto to restrict the civil, political, economic and social rights of the Croatian Serb population and the refugees' right to return, in contravention of international conventions (see sect. C below). The High Commissioner for Human Rights raised these matters in two letters to President Tudjman on 18 August and 2 October 1995. In his letter of 2 October, he particularly urged that the Croatian Government should not deter the return of the local Serb population in safety and dignity."[1313]

1341. The Secretary-General even reported on concrete executive and legislative measures that were enacted by the Croatian Government. One of the executive orders was adopted on 31 August 1995 and stipulated the temporary expropriation and control by the Government of certain "abandoned" property in the former Sectors North, South and West. The law also applied to any property situated in Croatia owned by individuals who had left the country after 17 August 1990 or who resided in Sector East, the FRY or areas of Bosnia and Herzegovina under the control of Bosnian Serb forces.

[1312] *Ibid*., para. 40.
[1313] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 28.

1342. Naturally, such property was not abandoned by Serbs but was the property of the Serbs who were forcibly expelled by the Croatian Government. The Secretary-General noted that the deadline for claims of exemption was at first 30 days from 4 September 1995, and was subsequently extended to 90 days. Within that deadline the property owners were required to claim their property for possession and use.

1343. However, the Secretary-General noted that for the Croatian Serbs physical return within that time-limit, in order to claim their rights, was neither feasible nor advisable and that this law constituted a potentially insurmountable obstacle. It was also noted that the Security Council on 3 October called upon the Government of Croatia to lift any time-limit on the return of refugees to Croatia to reclaim their property.[1314]

1344. Mr. Galbraith, former US ambassador in Croatia, testified that Serbs were not allowed to come back within the 30 day period to reclaim their property. He further gave his account of the meeting with Mr. Šarinić in order to press upon this issue. The answer he was given by Mr. Šarinić was that "[w]e cannot accept them to come back. They are cancer in the stomach of Croatia",[1315] which clearly shows the intentions of Croatian Government when enacting this and other laws applicable to Serbs.

1345. Secretary General also noted that the Croatian Parliament adopted modifications to the electoral law that reduced the number of Croatian Serbs representatives from twelve to three.[1316]

1346. The enactment of executive and legislative measures was intended as a measure to prevent any possibility that Krajina Serbs would reclaim their property. As noted in the UN and ECMM reports, the Croatian Government physically prevented the return of Serbs and then enacted laws that would, in the unlikely event that some Serbs did return, ensure that the majority of Serbs would lose their property.[1317]

[1314] *Ibid*., para. 37; see also ECMM, 100 Days after Operation "Storm" in the former "Serb Krajina", Comprehensive Survey Report on the First Hundred Days of Croatian Rule in UN Sector South, dated 21 November 1995p. 4, (Annex 60).
[1315] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Peter Galbraith, 23 June 2008, Transcript p. 4939.
[1316] The situation in the occupied territories of Croatia: Report of the Secretary-General, UN Doc. A/50/648, 18 October 1995, para. 38.
[1317] See *supra* para. 174 *et seq*. , see also ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Vesna Skare Ožbolt, 4 June 2009, Transcript pp. 18524–18525.

C. *Criminal Impunity*

1347. While the Croatian Government was being very active in enacting laws against Serbs, the Croatian judiciary on the other hand did not use the criminal justice system in place to punish the perpetrators of crimes committed against Serbs. Such criminal impunity, at times publicly exhibited in courtrooms, as demonstrated in Chapter III, was a message to Serbs.[1318]

1348. Furthermore, the OSCE noted the discrepancy in the proceedings conducted against Croats, by stating:

> "A recent OSCE report on domestic war crimes trials in Croatia noted that 'the national origin of defendants and possibly even more importantly that of victims continued to affect war crimes proceedings in 2003'. According to statistical data compiled by the OSCE Mission to Croatia, in 2003 19 of 20 people arrested, 137 of 148 under investigation, three of three indicted, 83 of 102 on trial, and 10 of 12 people convicted were ethnic Serbs. The total number of ethnic Croats arrested, indicted and put on trial for war crimes and crimes against humanity decreased from 2002 to 2003."[1319]

1349. On the other hand, trials conducted against Serbs had a similar goal. A short overview of cases initiated against Serbs was given in Chapter IV of this Counter-Memorial. It was shown that such trials lacked impartiality and fairness. It should however also be stated that even though the Respondent is wholeheartedly in favour of the criminal conviction of anyone responsible for any crimes of the severity of war crimes and crimes against humanity, it is hard not to notice that criminal trials in Croatia were actually a message intended for Krajina Serbs.

1350. This was obvious to the OSCE Monitoring Mission to Croatia for many reasons including the significant disproportion between the number of Serbs and the number of

[1318] See *supra* Chapter III, paras. 184–199.
[1319] Amnesty International, *A shadow on Croatia's future: Continuing impunity for war crimes and crimes against humanity*, 2004, AI Index: EUR 64/005/204, p. 10.

Croats charged with war crimes, and the findings of trial courts that appeared contrary to the evidence presented. This was all indicative of the lack of impartiality and the conduct of trials against Serbs in an unfair manner.

1351. It was obvious shortly after the operation *Storm* that all military able Serbs that stayed in Krajina were arrested under charges for armed rebellion. *Human Rights Watch* noted:

> "…Reportedly 1,043 or 1,047 persons -- almost all men -- were detained during and after the Krajina offensive; as of mid-December, 820 remained in prison. Most of those released were freed due to lack of evidence of criminal behavior but some may have been charged, released on bail and ordered to stand trial at a future date. These men are not permitted to leave the country until after their trial. According to representatives of the U.N. humanitarian crisis cells, over one hundred persons had been sentenced by mid-December 1995….Indeed, while some of the detained appear to have been charged with 'war crimes', the majority of those captured as a result of the Krajina offensive are charged with 'armed rebellion against Croatia' simply by virtue of their affiliation with the RSK military, which drafted all eligible men. Some of those charged with 'war crimes' were accused of having participated in massacres, murder or mistreatment of Croats in 1991, and/or ordering, commanding, or participating in the shelling of Croatian government-controlled territory during the war. The evidentiary bases on which some of the defendants are charged and tried is often weak. In some cases, the court failed to convict defendants due to lack of evidence, while in other instances, persons were convicted despite the paucity of evidence."[1320]

1352. Under pressure from the international community, the Croatian Government had to enact a Law on Amnesty, passed by the Parliament on 25 September 1996.[1321] However, as was noted in January 1997 by the Special Rapporteur, in practice this law did not produce results.

[1320] Human Rights Watch Report, *Impunity for abuses committed during Operation Storm, and the denial of the right of refugees to return to the Krajina*, pp. 29-31, August 1996, Vol. 8, No. 13 (D).

[1321] Periodic report submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 45 of Commission resolution 1996/71, 22 October 1996, UN Doc. E/CN.4/1997/9, paras. 54–57.

> "...78. The Special Rapporteur has previously noted her view that the adoption of the Amnesty Law on 25 September 1996 was a positive step for both the return of Croatian Serb refugees and the peaceful reintegration of the Eastern Slavonia region into the rest of Croatia. However, the Law's implementation, and specifically the re-arrests of numerous persons following its adoption, have cast doubt on its effectiveness for these purposes. ...
> 80. … The Minister informed the Special Rapporteur that the law resulted in the release of 96 persons, but that some 27 had evidently been re-arrested, accused of war crimes or criminal offences not covered by the Amnesty Law."[1322]

8. Conclusion

1353. The Croatian Government made a plan to destroy Krajina Serbs by conducting the military operation *Storm*. This plan was finalized during the Brioni meeting and devised by top civilian and military leadership aimed at making Serbs disappear from Croatia. Croatian forces on the ground started the attack with the heavy and indiscriminate shelling of Serb cities that killed and wounded many Serb civilians.

1354. These shelling and killings perpetrated by Croatian forces upon entering Serb towns and villages forced Serb civilians to flee from Croatian forces. Members of the Serbian Krajina community were subsequently killed by direct shelling from land and air, even after they had managed to cross the Croatian border. More than 200,000 Serbs ran from their homes in panic, leaving everything they had behind, while only several thousands of elderly Serbs who were not physically able to flee remained as the Croatian forces took Krajina. Croatian military and police forces then systematically killed every Serb they managed to find, burned every Serb household, looted Serb property, killed Serb animals and polluted wells in Serb villages.

1355. The Croatian Government repopulated Serbian homes with Croats, enacted laws that targeted Serbs, thereby preventing their return. The perpetrators of the crimes against

[1322] Periodic report submitted by Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 45 of Commission resolution 1996/71, 29 January 1997, UN Doc. E/CN.4/1997/56, paras. 77–81.

Serbs were not prosecuted, while the majority of Serbs were charged with armed rebellion and other war crimes, and were convicted in proceedings that according to international observers were conducted in an unfair manner and in a great majority of cases *in absentia*.

1356. By the operation *Storm* and the events that followed it, the Republic of Croatia succeeded in its criminal plan to destroy Krajina Serbs.

CHAPTER XIV

THE CRIME OF GENOCIDE HAS BEEN COMMITTED AGAINST SERBS IN CROATIA BY THE CROATIAN *DE JURE* ORGANS

1. Introduction

1357. In the following section of Chapter XIV the Respondent will demonstrate to the Court why the previously described operation *Storm* and the crimes committed during the course of the operation and in its aftermath amount to genocide committed against part of the group of Serbs in Croatia.

1358. The arguments will be presented as follows: firstly it will be briefly explained that Serbs in Croatia represented a national and ethnical group, protected by the Genocide Convention. Secondly, the Respondent will elaborate against which part of the protected group of Serbs in Croatia the genocide was perpetrated.

1359. Thirdly, it will be shown that crimes committed against the Krajina Serbs, as described, meet the requirements of the particular *actus reus* elements of genocide.

1360. Finally, the fourth part will demonstrate the existence of the special intent to destroy in part the protected group.

2. Serbs in Croatia were Targeted as Members of a National and Ethnical Group

1361. The Respondent stresses at this point that Serbs in Croatia undoubtedly satisfied the requirement under Article 2 of the Convention – they were clearly an identifiable national and ethnical group. As already mentioned in Chapter II pertaining to the applicable law, the groups protected by the Genocide Convention are national, ethnical, racial or religious groups.

1362. The criteria for determining groups that may fall under these categories have been elaborated in international practice. The ICTR in *Akayesu* defined a *national group* as "a collection of people who are perceived to share a legal bond based on common

citizenship, coupled with reciprocity of rights and duties".[1323] The definition provided by the Council of Europe Venice Commission might be of even more assistance in addressing this issue as it provides more elements based on which a national group may be identified. According to Venice Comission, a "national minority" group is one that "is smaller in numbers than the rest of the population of the State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion, or language".[1324] Membership in a *racial group* is considered as perhaps easier to determine since its members have "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors".[1325] *Ethnical groups* have been in practice defined as those whose members "share a common language or culture".[1326] Its members share common heritage that is either real or presumed and, in addition to language and culture, can also share certain religion and behavioral traits. The concept of a *religious group* does not raise as many issues in relation to its definition as other groups since it takes as a common denominator religion or denomination or mode of worship.[1327] Whether a concrete group is to be considered as falling within one of the four categories is to be determined on a case-by-case basis and with reliance both on subjective and objective criteria.[1328]

1363. Throughout these counter-claims particular evidence has been cited showing that tradition, history, and the specific way of life made Serbs in Croatia a stable and permanent group that was identified as such by all. Serbs in Croatia were distinguishable from the majority of the population by their descent, religion, tradition, and culture. According to the Encyclopedia Britannica "the primary distinguishing characteristics for ethnic identification among the Slavs in Croatia are religion and cultural tradition"[1329]. Serbs represented both an ethnic group and a national minority in Croatia. Serbs considered themselves based on such tradition, cultural and religious characteristics as a distinct ethnic and national group.

[1323] ICTR, *Akayesu,* ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 512.
[1324] European Commission for Democracy through Law, *The Protection of Minorities,* Strasbourg, Council of Europe Press, 1994, p. 12.
[1325] ICTR, *Akayesu,* ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 514.
[1326] *Ibid*., para. 513.
[1327] *Ibid.*, para. 515.
[1328] See, for example, ICTY, *Blagojević et al.,* IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 667.
[1329] Encyclopedia Britannica*, Facts about Serb: Croatia*, available at http://www.britannica.com/facts/5/476617/Facts-about-Serb-Croatia-as-discussed-in-Croatia-Ethnic-groups-and-religions.

1364. On the other side, Serbs have also been recognized by the Applicant as a national minority group, and prior to 1990 were recognized as a people and a constituent element of the Croatian State.[1330] At the time relevant for the current counter-claims, the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia provided various rights to Croatian Serbs as a national and ethnic group residing in Croatia, including cultural autonomy and proportional representation in governmental bodies (which were subsequently abolished, as noted in Chapter XIII).

1365. Similarly, Serbs in Croatia have been recognized as an ethnic minority group or a people in censuses conducted during the time of the SFRY, at the beginning of the 1990s, as well as in those subsequently conducted by an independent Republic of Croatia.[1331] They are also recognized as an ethnic and national minority group by an independent non-governmental source - the Minority Rights Group International World Directory of Minorities and Indigenous Peoples.[1332]

1366. It is thus respectfully submitted that Serbs in Croatia are a protected group for the purpose of the Genocide Convention.

3. The Victims of the Operation *Storm* were a Part of the Protected Group

1367. The present counter-claim concerns the genocide that was conducted by the Croatian Government against a part of Serbs in Croatia, which are a protected group under the Genocide Convention. Specifically, it is submitted that the Croatian Government targeted the Serbs living in the area of Krajina, which is geographically distinct area. Krajina covers areas which were at the relevant time UN Sectors North and South (Northern Dalmatia, Kordun, Lika and Banija).

1368. In Chapter II, on the applicable law pertaining to genocide,[1333] the Respondent outlined three interpretations of the concept "part of a group", stipulated by the Genocide

[1330] See *supra* Chapter V, paras. 459–464.
[1331] Republic of Croatia – Central Bureau of Statistics, *2001 Census, Population by Ethnicity by towns/municipalities*, available at http://www.dzs.hr/default_e.htm.
[1332] UNHCR, Refweb, *Minority Rights Group International World Directory of Minorities and Indigenous Peoples*, available at http://www.unhcr.org/refworld/country,,MRGI,,HRV,4562d8b62,49749d355,0.html.
[1333] See *supra* Chapter II, paras. 63-69.

Convention, that have been elaborated through the case-law to date: a) substantial part of the group, i.e. a significant percentage of its members whose annihilation would have an impact on the group as a whole;[1334] b) significant part of the group, i.e. its prominent representatives;[1335] and c) part of a group residing in a geographically limited area.[1336] The Respondent respectfully submits that the Krajina Serbs satisfied all three requirements for being considered a part of a protected group located in the geographically limited area.

A. *Substantial Part of the Group*

1369. As noted in Chapter II, in addition to *Krstić*, and other cases where the interpretation of the wording "in part" was discussed, the Court also had the opportunity to stress the significance of meeting the substantiality criterion in a given case.[1337] This is the only logical conclusion that stems from the aim of the Genocide Convention.[1338] As the Court stated:

> "In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. *That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole.* That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11

[1334] See, for example, ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91 para. 198; ICTY, *Brđanin*, IT-99-36, Trial Chamber Judgment, 1 September 2004, paras. 964 & 967; and ICTY, *Jelisić*, IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 93.
[1335] ICTY, *Jelisić,* IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 82 and ICTY, *Nikolić*, IT-94-2-R61,Decision on Review of the indictment pursuant to Rule 61, 20 September 1995, para. 2.
[1336] See, foe example, ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 590.
[1337] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 198.
[1338] *Ibid*.

> and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17)". (emphasis added)[1339]

1370. As pointed out by Nehemiah Robinson, "the aim of the Convention is to deal with action against large numbers, not individuals even if they happen to possess the same characteristics".[1340] In other words, the destruction of a part of the group **"**must be of such a kind as to affect the entirety."[1341] According to Special Rapporteur Benjamin Whitaker, this threshold would be met in case of a "reasonably significant number, relative to the total of the group as a whole".[1342]

1371. This position is well depicted by the assessments conducted by the ICTY chambers in *Brđanin*. The Trial Chamber in this case dealt with this issue on a somewhat larger scale, by looking at crimes committed against members of two protected groups, that of Bosnian Muslims and Bosnian Croats, within a number of municipalities. Prior to addressing whether genocidal intent could have been inferred from the scope of the actual destruction of members of two protected groups, the Chamber first assessed whether the total number of residents of the targeted communities belonging to the Bosnian Muslim and Bosnian Croat group represented substantial parts of their entire population residing in the territory of Bosnia and Herzegovina:

> "The Trial Chamber finds that there is sufficient evidence that the targeted parts of the groups were the Bosnian Muslims and Bosnian Croats of the ARK. For the purposes of analyzing whether the requirement of substantiality is satisfied, since it is difficult to precisely determine which municipalities belonged to the ARK at any given time,

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[1339] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, paras. 198 & 200.
[1340] N. Robinson, *The Genocide Convention – Its Origins and Interpretation*, Institute of Jewish Affairs, New York, 1949, pp. 17–18.
[1341] Letter from Raphael Lemkin to Dr. Kalijarvi, Senate Foreign Relations Committee, in 2 Executive Sessions of the Foreign Relations Committee 370 (1976).
[1342] Whitaker Report: Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, 29-30 (1985), para. 29; see also, for example, ICTY, *Brđanin*, IT-99-36, Trial Chamber Judgment, 1 September 2004, paras. 964 & 967.

> it suffices that the Trial Chamber is satisfied that all thirteen municipalities addressed in the Indictment and referred to as the relevant ARK municipalities belonged to the ARK at any given time. *According to the 1991 census, there were 2,162,426 Bosnian Muslims and 795,745 Bosnian Croats in BiH. Of these, 233,128 Bosnian Muslims and 63,314 Bosnian Croats lived in the relevant ARK municipalities. Numerically speaking, the Bosnian Muslims and Bosnian Croats of the relevant ARK municipalities, on their own, constituted a substantial part, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in BiH*. The requirement of substantiality is satisfied, at a minimum, by the relevant ARK municipalities, and it is therefore unnecessary to inquire further into other relevant factors such as the prominence of the targeted parts within the groups. The Trial Chamber is satisfied that, in targeting the Bosnian Muslims and Bosnian Croats of the ARK, the perpetrators intended to target at least substantial parts of the protected groups."[1343]

1372. As already noted at the beginning of Chapter XIII, according to the 1991 census there were around 580,000 Serbs in Croatia who had constituted approximately 12% of the total population of the Republic of Croatia.[1344] There are no precise figures as to the total numbers of Serbs in Croatia or about the total number of Serbs living in Krajina in 1995 at the time of operation *Storm*. This is due to the fact that Croatian army attacks, including operation *Flash* in Western Slavonia in May 1995,[1345] forced a large number of Serbs to leave the territory of Croatia which consequentially had an impact on the validity of previously existing figures pertaining to Serbian population presence in the area. However, in Chapter XIII it was noted that UN Reports at the time stated that approximately 200,000 Krajina Serbs were forced to flee during operation *Storm* and that only 5,000 remained in Sectors South and North.[1346] This figure alone represents roughly 30% of above stated 580,000 Serbs in Croatia reported in the 1991 census. However, if one takes into consideration the previously stated fact, i.e. that by summer

[1343] ICTY, *Brđanin*, IT-99-36, Trial Chamber Judgment, 1 September 2004, paras. 964 & 967.
[1344] R. Petrović, 'The national composition of Yugoslavia's population, 1991', *Yugoslav survey*, no. 1 (1992), p. 12.
[1345] See *supra* Chapter XII.
[1346] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 27.

of 1995 a large number of Serbs living in the territory of Croatia have already been forced to leave that territory, it is only logical to conclude that Krajina Serbs likely made up significantly more than 30% of the total number of Serbs in Croatia in 1995. All of this is clear evidence of the fact that Krajina Serbs represented a substantial part of the protected group - Serbs in Croatia.

1373. However, numbers are not the sole factor that should be taken into account in determining whether part of a group could be deemed as substantial. The case-law of the ICTY provided factors whose weight varies depending on the circumstances of a particular case. The Krstić case, as some of the factors, discusses geographic distinctiveness, size of the group, its strategic position, its significance in the eyes of population as a "safe area", as well as the fact that only that particular group was in the area of control of the perpetrators.[1347]

1374. As will be shown below Krajina was geographically distinct area with very important strategic position for both Croatia and the Krajina Serbs living in that area.

B. *Geographically Located Part of a Group*

1375. The possibility of a geographically limited scope of genocide was noted in the number of the ICTY judgments[1348] and the Trial Chamber in *Krstić* found that:

> "…the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue."[1349]

[1347] ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 590 & 597 and Appeals Chamber Judgment (2004), paras. 15–17.
[1348] See, for example, ICTY, *Jelisić,* IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 83.
[1349] ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 590.

1376. The position taken by the Trial Chamber of the ICTY was recognized as being a valid interpretation from the very outset of the existence of the Genocide Convention.[1350]

1377. The view that genocide may be committed by destroying a group within a geographically limited area was also endorsed by the Court in its *Bosnia* judgment.[1351]

1378. A number of ICTY judgments that both preceded and followed *Krstić* have dealt with events which took place in specific geographical regions following the same rationale – the impact of action taken against a specific geographically located community.[1352]

1379. The ICTY in *Krstić* also spelled out specifically that the group or part thereof being targeted could not represent an "accumulation of isolated individuals" but would rather have to present a "distinct entity".[1353]

1380. In conclusion, the jurisprudence of the Court and of the ICTY clearly shows that the existence of certain ties among members of the geographically located group, or part thereof, providing it with the character of a distinct entity, as well as a certain degree of permanency of the group's presence in a given location, would warrant it being considered part of a group protected under the Genocide Convention.

1381. Territory of Krajina was predominantly populated by Serbs. The Serb presence in these areas is most commonly associated with the forming of the former Military Krajina, a district border dividing the Ottoman and the Habsburg Empire, which was established in the first half of the 16th century and inhabited by Serbs escaping from the Turks.[1354] The major development for Military Krajina was the building of a garrison town of Karlovac in the late

[1350] In his Commentary of the Genocide Convention Nehemiah Robinson stated that a part of a group could be interpreted as meaning part of a group residing in a given country, within a region or within a single community "provided the number is substantial enough". N. Robinson, *The Genocide Convention – Its Origins and Interpretation*, Institute of Jewish Affairs, New York, 1949, pp. 17–18.
[1351] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 199.
[1352] See ICTY, *Nikolić*, IT-94-2-R61, Decision on Review of the indictment pursuant to Rule 61, 20 September 1995, para. 27, and Trial Chamber Judgment, 18 December 2003, paras. 50-67; see also ICTY, *Jelisić*, IT-95-10-T, Trial Chamber Judgment, 14 December 1999, para. 88 (The Trial Chamber found: "It is not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko *to the point of threatening the survival of that community*" (emphasis added)); also ICTY, *Sikirica et al.*, IT-95-8-T, Trial Chamber Judgment, 13 November 2001, para. 33.
[1353] ICTY, *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 590.
[1354] P.H. Liotta, *The Wreckage Reconsidered: Five Oxymorons from Balkan Deconstruction,* Lanham, Maryland: Lexington Books, 1999, p. 38.

sixteen century. Around Karlovac, a region was set up in which peasant soldiers were not only granted privileges but were also exempted from Croatian authority.[1355] Military Krajina reached its peak by late eighteen century when its territory extended to Lika, areas around the Bosnian border eastward along the Sava and Danube rivers bordering Serbia and across the Transylvanian border with the Romanian principalities.[1356]

1382. Even though the Serbs presence is associated with Military Krajina, the first evidence of the Serbian population settling in the region could be traced back to the 14th century, at which time the monasteries Krka and Krupa were built.[1357] Settlement of the Serbian population, which began in the 16th century, continued throughout the 17th century.[1358] All Serbs on these territories had a common denomination, being Orthodox Christians.[1359] The terms of Habsburg military service in Military Krajina attracted Serbs as providing freedom for the Serbs to build Orthodox churches and to practice their religion.[1360] In addition to religion, the church at the time was also the first institution to provide the local Serb population with education. In addition to being a religious and cultural center, Krajina was also known as the focus point of Serbian political life in Croatia. Despite various changes in its status and territory, Krajina continued to be the center of the Serbian population in Croatia.[1361]

1383. In 1991, Serbs constituted approximately 12% of the population of the Republic of Croatia.[1362] In UNPA Sectors South and North alone Serbs made up over 70% of the entire population in 1991.[1363]

1384. In light of the foregoing, Krajina Serbs did represent a distinct geographically located community at the time of the events covered by the Counter-Memorial.

[1355] T. Judah, *The Serbs: History, Myth and the Destruction of Yugoslavia*, New Haven: Yale University Press, 1997, p. 14.
[1356] See J. Lampe, *Yugoslavia as History: Twice There was a Country*, Cambridge: Cambridge University Press, 2000, 2nd ed., p. 30; see also Map no.1.
[1357] Serbian Orthodox Church, Diocese of Dalmatia, Monasteries, available at http://www.eparhija-dalmatinska.hr/Frames-e.htm.
[1358] S. Stanojević, *History of Serbs, Croats and Slovenians (Istorija Srba, Hrvata i Slovenaca),* Napredak, Beograd, 1920, pp. 55–57.
[1359] T. Judah, *The Serbs: History, Myth and the Destruction of Yugoslavia*, New Haven: Yale University Press, 1997, pp. 14–15.
[1360] J. Lampe, *Yugoslavia as History: Twice There was a Country*, Cambridge: Cambridge University Press, 2000, 2nd ed., p. 30.
[1361] M. Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, American Journal of International Law, Vol. 86, No. 3 (1992), pp. 569–607.
[1362] R. Petrović, 'The national composition of Yugoslavia's population, 1991', *Yugoslav survey*, no. 1 (1992), p. 12; see also http://en.allexperts.com/e/r/re/republic_of_serb_krajina.htm.
[1363] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 6.

C. *The Importance of Krajina for Croatian Serbs and Its Status as a UN Protected Area*

1385. In addition to presenting a distinct geographical location populated by Croatian Serbs, Krajina as such was of immense importance to Croatian Serbs. Serbs began their settlements in Croatia in that territory, established their first churches and schools there, and had developed themselves socially and politically on that particular territory. Krajina was perceived as the roots of everything Serbian in Croatia.

1386. As already described in Chapters V and XII, Krajina was also a United Nations protected area, consisting of Sectors North and South. In addition to UNPAs, the UN protection was extended to so-called "pink zones", areas which were outside UNPAs but were under Serb control.[1364] Living in the territory that was under the UN protection, Krajina Serbs did not expect that Croatia would develop a genocidal plan to take that territory and destroy them as a group. While Krajina Serbs waited for a peaceful solution, the Croatian side was not at all interested in peaceful negotiations in Geneva but was rather getting ready to act upon a genocidal order of President Tudjman that Serbs should for "all practical purposes disappear".[1365] If one looks at and compares the strength and the composition of Croatian armed forces and the forces of Krajina Serbs, it is obvious that Krajina Serbs never stood a chance in protecting themselves. However, the special status of Krajina as a UN Protected area made Krajina Serbs even an easier target of the subsequent genocide, as they were let to believe that such status afforded them at least some degree of safety from the Croatian forces.

D. *Krajina Was Perceived as a Distinct Entity that Should Be Eliminated as Such*

1387. The Respondent presented in previous paragraphs a number of reasons why Krajina and Krajina Serbs were seen as a distinct entity that needed to be eliminated as such. An additional factor that would have weighted in favor of eliminating the Serbian community in Krajina was the impact that its potential destruction would have had on the Serb group in Croatia as a whole since Krajina was populated by a significant percentage of its members. Primarily, Krajina was the historical center of Serbian life in Croatia for centuries. For Serbs in Croatia, its destruction would mean the loss of a large part of their historical and cultural roots in Croatia.

[1364] For more, see Chapter XII.
[1365] See *supra* Chapter XIII, para. 1197.

1388. Furthermore, Krajina was the first to resist the decision of the Croatian authorities to separate from the SFRY. In the words of General Gotovina, Knin was the "centre of greater-Serbian rebellion, psychologically and politically vital for rebel Serbs".[1366] For President Tudjman, destruction of Knin was one of the priorities,[1367] and one that was ultimately accomplished since the Croatian police units cleaning the Knin area in 1995 reported that there was not "any lagging Serb population".[1368]

1389. Subsequent actions taken by Croatian authorities, including the planned repopulation of the area with Croats,[1369] the revocation of human rights guaranteed to ethnic groups living in Croatia,[1370] and the expropriation of property and termination of tenancy rights of local Serbs who fled,[1371] hampered and continue to hamper the return of refugees from the region and reestablishment of the Serbian community that existed in Krajina. These subsequent actions also reinforce the conclusion that all previous actions against the Krajina Serb community were taken with a view to destroying a distinct community whose elimination would have a lasting impact on the group as a whole.

F. *Conclusion*

1390. Krajina was a specific geographical region within Croatia inhabited mostly by Serbs for whom this region was their historical, religious and cultural center. Due to its position and size, Krajina had a significant strategic importance both for the Republic of Croatia and Serbs living in Krajina, and as such was given the status of a UN protected area. It was shown that the Republic of Croatia perceived Krajina as an entity that should be

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[1366] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 67.
[1367] 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 p. 10 (Annex 52).
[1368] ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 295.
[1369] See Feral Tribune, *Croatian President Franjo Tudjman*: Demographic *Problem Should Be Solved Militarily*, Split, Croatia, July 4, 2003, available at http://www.ex-yupress.com/feral/feral214.html.
[1370] Human Rights Watch Report, *Croatia: Impunity for abuses committed during Operation Storm and the denial of the right of refugees to return to the Krajina*.
[1371] "The law adopted in September 1995 relating to formerly occupied territory stipulated that tenancy rights would be terminated if the tenants did not return to the apartment within ninety days after the law became effective. Only a month earlier, hundreds of thousands of Serbs previously resident in these areas had fled from Croatia after Croatian forces regained control. Many elderly Serbs who remained were killed. At the time of the law's adoption, it was obvious that genuine fear would prevent Serb refugees from returning within ninety days to repossess their apartments." (Human Rights Watch, *Croatia: A Decade of Disappointment,* 4 September 2006, available at http://www.hrw.org/en/node/11222/section/3).

eliminated and specifically targeted Krajina Serbs as such. In conclusion, the Respondent submits that based on a number of factors, such as the size of a part of the group, its geographical position, and its prominence, the Krajina Serb represented a substantial part of the protected group of Serbs in Croatia whose destruction would have had a lasting impact on the group of Serbs in Croatia as a whole.

4. Physical Elements of Genocide (*Actus Reus*)

1391. During the operation *Storm*, official organs of the Croatian Army committed genocide against the Serbs in Krajina, as a part of the protected group of Serbs in Croatia, by committing acts listed in Article II of the Genocide Convention. As shown previously, during the operation *Storm* Croatian forces: a) killed members of the group, b) caused serious bodily or mental harm to members of the group, and c) deliberately inflicted on the group conditions of life calculated to bring about its physical destruction.

1392. The crimes committed thus satisfy the requirements of the *actus reus* of the crime of genocide.

A. *Killing Members of the Group*

1393. It has already been pointed out in Chapter II that the determination of whether acts covered under Article 2(a) have been committed usually does not pose difficulties in practice. In sum, what is being required is to show: a) dead victims; b) that their death was a result of unlawful acts or omissions of a perpetrator or his/her subordinates; c) that the killing was intentional; and d) perpetrated with the required *dolus specialis.*[1372] Recovery of actual bodies is not a requirement, but proof of the killing is however necessary.

1394. It is evident from facts previously presented that the killing of Serbs in Krajina, as members of a protected group, was intentional and was committed by official Croatian forces comprising the Croatian military and police. Artillery attacks were, as testified by a number of witnesses (mainly UN peacekeepers), indiscriminate in targeting Serbian

[1372] ICTR, *Akayesu,* ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 589–590.

towns and villages and the civilian population living in them. As a result of this artillery fire many Serb civilians lost their lives. At the same time, killings were also perpetrated against those Serbs who were fleeing from the artillery fire. The Serbian columns were shelled and shot at from infantry weapons.

1395. Croatian Helsinki Committee for Human Rights report cites statements of witnesses who testified to the fact that the Croatian air force dropped bombs directly on columns of Serbs who were fleeing.[1373] Evidence was adduced to show that Serb vehicles were directly hit even once they had crossed the Croatian border with Bosnia and Herzegovina. Deaths that occurred in the process were a direct consequence of those air attacks.

1396. Serbs who were fleeing as well as those who were unable to or did not wish to flee were also killed by members of the Croatian forces as they progressed with the takeover of Krajina. Evidence presented in Chapter XIII shows that no reasonable explanation can be found to justify such killings – victims were in almost all cases civilians posing no threat to the Croatian forces. Moreover, such summary killings did not stop once combat activity ceased, but continued in the months that followed and, in some instances, in the years that followed. It is therefore obvious that all of the killings that took place were not only intentional but also carried out with specific genocidal intent, as will be shown below.

1397. Finally, all the killings were perpetrated by *de jure* organs of Croatia, either its Army or police. The extent of organization and readiness of these forces was discussed above. Evidence was also presented that shows that they even obstructed the work of the UN forces and observers while the crimes were committed.[1374] All the preparations for the operation *Storm*, as shown previously, enabled Croatian forces to have full control over the territory of Sectors South and North. Being in full control, the Croatian forces specifically targeted and killed the Serbs, in line with the order issued by President Tudjman that the Serbs must "to all practical purposes disappear."

[1373] See *supra* Chapter XIII, paras. 1242–1257.
[1374] See *supra* Chapter XIII, paras. 1237, 1263, & 1318–1319.

B. *Causing Serious Bodily or Mental Harm to Members of the Group*

1398. Genocide against Krajina Serbs was also committed by causing serious bodily or mental harm to members of the group. The following acts have been, among others, understood by the case law to lead to serious bodily and mental harm: a) enslavement, starvation, deportation and persecution … detention in ghettos, transit camps and concentration camps in conditions which were designed to cause … degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture;[1375] b) torture and persecution;[1376] c) harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses;[1377] and d) sexual violence including rape, interrogations combined with beatings, threats of death.[1378] Furthermore, as the Trial Chamber in the *Blagojević* case noted:

> "…the trauma and wounds suffered by those individuals who managed to survive the mass executions… The fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends' safety as well as for their own safety, is a traumatic experience from which one will not quickly – if ever – recover."[1379]

1399. In August 1995, the Krajina Serbs were subject to many of the above-mentioned acts that caused serious bodily and mental harm to them. Serbs from Knin were systematically shelled on 5 and 6 August 1995.[1380] Those that afterwards remained in Sectors South and North were killed outright by the Croatian Army and police, while those that found themselves in convoys were shelled by Croatian forces both from land and air.[1381] A number of people were seriously injured while being bombed by the Croatian forces. Almost the entire Krajina Serb population was forcibly and systematically expelled from their homes. They were beaten while escaping, and were subjected to inhumane treatment and threats of death. Evidence was also adduced that shows that a number of Serbs who survived the executions organized and performed by Croatian forces were seriously wounded.

[1375] *A-G Israel* v. *Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), p. 340.
[1376] ICTR, *Akayesu,* ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 503.
[1377] ICTR, *Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 109; and ICTR, *Semanza,* ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para. 320.
[1378] ICTY, *Stakić,* IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.
[1379] ICTY, *Blagojević et al.,* IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 647.
[1380] See *supra* Chapter XIII, paras. 1217–1228.
[1381] See *supra* Chapter XIII (killings in columns paras 1242-1257; killings in Sector South paras. 1261–1300, killings in Sector North paras. 1301–1311).

1400. Serbs who found themselves in columns were targeted by both official forces and Croatian civilians who were throwing stones at them along the way.[1382] Serbs were forced to watch their friends and family members being killed while at the same time being torn with guilt for being completely powerless to prevent their deaths.[1383] They were faced with death on every route that they took. The behavior of Croat forces induced among Krajina Serbs the sense of utter helplessness and extreme fear for the lives of their family members and their own lives.

1401. Moreover, a number of Serbs who stayed behind were summarily executed before their neighbors. Others were wounded but managed to survive. Remaining Serbs lived in constant fear that their time might be up within the next hour or the next day. Those forced to leave their homes had to watch their villages burn, to accept that neither they nor their children would ever be able to return, and to accept uncertainty of their survival and the survival of their families. Each of these acts alone, and taken together, caused serious bodily and mental harm to Krajina Serbs.

1402. It is therefore respectfully submitted that the crimes inflicted upon Krajina Serbs fulfill legal requirements posed by Article II(b) of the Genocide Convention.

C. *Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

1403. An act of deliberately inflicting conditions of life calculated to bring about the group's physical destruction is the act which does not immediately lead to physical destruction of a group's members but which "ultimately seek[s] their physical destruction".[1384] Point (c) of Article 2 of the Genocide Convention accordingly does not require proof that the actual destruction was achieved as it deals with acts that produce their ultimate effects at a later point in time. As found by the District Court of Jerusalem in the Eichmann case:

> "We do not think that conviction on the second Count [i.e., imposing living conditions calculated to bring about the destruction] should also include those Jews who were not saved, as if in the case there were two

[1382] See *supra* Chapter XIII, para. 1242.
[1383] See *supra* Chapter XIII, paras. 1217-1228 & 1261–1311.
[1384] ICTR, *Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 505.

separate acts – first, subjection to living conditions calculated to bring about their physical destruction, and later the physical destruction itself."[1385]

1404. According to the practice of the *ad hoc* international tribunals, infliction of conditions of life calculated to bring about destruction implies, among other things: a) subjecting a group of people to a subsistence diet; b) systematic expulsion from homes; c) reduction of essential medical services below minimum requirement or their denial; d) rape; and e) creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.[1386]

1405. As with other acts of genocide, such acts would have to be committed with genocidal intent and deliberately or, according to Nehemiah Robinson,[1387] with premeditation related to creation of conditions of life. The expression "calculated" signifies that such conditions are, to the perpetrator, "the principal mechanism used to destroy the group, rather than some form of ill-treatment that accompanies or is incidental to the crime".[1388]

1406. As shown in Chapter XIII, killings and inflicting serious bodily and mental harm to Serbs in Krajina were accompanied by subjecting the Serbs to conditions of life calculated to bring about the group's destruction. While on the one hand, killings were perpetrated by indiscriminate artillery attacks, the same artillery attacks, on the other hand, created such conditions of life to the Krajina Serbs that they have to leave their homes and other property that were later looted and destroyed.[1389] The systematic expulsion of almost all Serbs from their homes was also achieved by moving lines of artillery attack in such a way that it was impossible for the Serbs to remain.

[1385] *A-G Israel v. Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem), para. 196.
[1386] See ICTR, *Akayesu,* ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 506; see also ICTR, *Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 116; and ICTY, *Brđanin*, IT-99-36, Trial Chamber Judgment, 1 September 2004, para. 619.
[1387] N. Robinson, *The Genocide Convention: A Commentary*, New York, Institute for Jewish Affairs, 1960, pp. 60 & 63-64 cited in Schabas, W. *Genocide in International Law: The Crimes of Crimes*, 2nd ed, Cambridge University Press, Cambridge, 2009, p. 291.
[1388] Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide, UN Doc. PCNICC/1999/WGEC/RT.1, in W. Schabas, *Genocide in International Law: The Crimes of Crimes*, 2nd ed, Cambridge University Press, Cambridge, 2009, p. 291.
[1389] See *supra* Chapter XIII, paras. 1217–1228.

1407. Furthermore, evidence was presented that Croatian forces systematically killed and burned Serb livestock, poisoned Serbian wells and looted everything that could be used for survival of the Serbs. International observers noted that Croatian forces even took wood that was prepared by the Serbs for the upcoming winter. A witness from the UN who was on the ground at the time testified that Serb towns and villages became virtually unlivable by the actions that took place after the fighting.[1390] Thus, knowing that winter laid ahead, the Croatian forces destroyed Serb houses so that the Serbs would have no place to shelter if they ever try to return. They killed and burned the livestock of the fleeing Serbs so they would not have anything to eat, polluted their wells so they would have nothing to drink, and took away the stored wood so they would freeze.

1408. The international observers noted that such destruction of Serbian households was so systematic that it had to have been planned and methodically implemented. As already noted, the ECMM report from November 1995 noted that more than 17,000 Serbian houses were destroyed and looted.[1391] This indicates that the destruction and looting of Serb houses was one of the methods used for achieving the desired goal rather than being a side effect of ongoing combat activity.

1409. The immensity of acts conducted in the overall context of the operation *Storm* suggest that the perpetrator's intent when conducting them was not only the expulsion or mere dissolution of the Krajina Serbs but the physical destruction of part of the group of Croatian Serbs by way of inflicting on that part conditions of life calculated to bring about its physical destruction. A simple fact that a very small number of Serbs were left in the territory of Krajina after the indiscriminate shelling, killings and expulsion shows that the community of Krajina Serbs was destroyed already at that time, namely even before the Croatian forces started killing the few remaining elderly Serbs who stayed in Sectors South and North.

1410. It is respectfully submitted that the above described acts perpetrated against Serbs during operation *Storm* amounted to the deliberate infliction on the group of the conditions of life calculated to bring about its physical destruction, as envisaged by the Article II(c) of the Genocide Convention.

[1390] See *supra* Chapter XIII, para. 1317.
[1391] See *supra* Chapter XIII, para. 1325.

1411. In addition, the systematic expulsion of practically all Krajina Serbs from Sectors South and North, performed concurrently with killings and infliction of serious bodily and mental harm, shows without a doubt that the killing and the infliction of bodily and mental harm was done with a genocidal intent.

5. Existence of Genocidal Intent to Destroy a Substantial Part of the Group

1412. The Respondent will now deal with the most important question that will put together all previously stated arguments, namely that acts (*actus reus*) already analyzed were actually carried out with specific, genocidal intent to destroy the part of the group of Serbs in Croatia as such.

1413. The evidence available in relation to the operation *Storm* speaks to the fact that the said operation and the subsequent actions of the Croatian authorities were conducted with intent on the part of the Croatian leadership to destroy a substantial part of the protected group of Serbs in Croatia as such. This is visible first and foremost from the Brioni transcripts which testify directly to the existence of a genocidal intent, explicitly expressed by the President of Croatia Franjo Tudjman, who was by law the Supreme Commander of all Croatian armed forces. At the same time, the Brioni Transcripts testify to the existence of a plan to implement that genocidal intent.

A. *Brioni Transcripts*

1414. In Chapter XIII, pertaining to the facts related to the operation *Storm*, relevant parts of the Brioni transcripts were already cited.[1392] From the transcript it can be seen that at the meeting at the Brioni top civilian and military leadership envisaged a plan to destroy Krajina Serbs. The course of the entire meeting and the ideas exchanged and accepted by participants show that genocidal intent existed with the President Tudjman and was either shared or, at least, not contested by the rest of the Croatian leadership.

1415. During the meeting at Brioni, President Tudjman instructed his subordinates to pretend to guaranty to Serbs their civil rights[1393] and reminded military leaders that Knin did not suffer as other Croatian cities did and that this was the opportunity to rectify this.[1394]

[1392] See *supra* Chapter XIII, paras. 1195–1204.
[1393] See *supra* Chapter XIII, para. 1203.

1416. Most significantly, the following words uttered by President Tudjman at the Brioni meeting demonstrate a clear expression of the genocidal intent: "[w]e have to 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."[1395]

1417. This specific genocidal intent, as expressed by President Tudjman, was aimed at the above defined part of the protected group of Serbs in Croatia, the Krajina Serbs, which is obvious from the following words of Mr. Tudjman: "let us discuss whether *we will undertake an operation tomorrow or in the next few days to liberate the area from Banija to Kordun to Lika and from Dalmatia to Knin*."[1396]

1418. Participants of the meeting at Brioni were members of the top political, military and police leadership of Croatia. Only at such level could the genocidal plan be developed and implemented. President Tudjman clearly stated that plan for the operation existed and that the final decision will be adopted when all the assessment and proposals are presented.[1397]

1419. Presence of President Tudjman at the meeting was of particular importance as he was the unquestionable leader of Croatia and its ruling party, the HDZ, and the Supreme Commander of Croatian forces at the time. Equally important was the presence of the people who later implemented the genocidal orders of Mr. Tudjman, such as Ante Gotovina, Commander of the Split Military District and the overall operational commander of the operation *Storm* in the southern portion of the Krajina Region,[1398] and Mladen Markač, Commander of Croatia's Special Police.[1399]

1420. Participants of the meeting were aware of the criminal nature of the action they were planning and had thus devised in advance ways how to hide the action from the international community,[1400] as they were certain the UNCRO will try to stop the operation that implied the killings of Krajina Serbs.[1401]

[1394] See *supra* Chapter XIII, para. 1217.
[1395] 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 p. 2 (Annex 52).
[1396] *Ibid*. (emphasis added).
[1397] *Ibid*.
[1398] See ICTY, *Gotovina et al*, IT-06-90-T, Amended Joinder Indictment, 17 May 2007, para. 4.
[1399] *Ibid*., para. 10.
[1400] See *supra* Chapter XIII, para. 1195.
[1401] 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 p. 32 (Annex 52).

1421. The words of President Tudjman, that is, the "Infliction of such blows that the Krajina Serbs would disappear", is a direct order given to subordinates that the Serbs should be physically destroyed. These words were uttered among other members of the criminal enterprise on what they thought was a secret meeting. President Tudjman wanted his subordinates to understand his orders and the use of the word "disappear" is in such context very clear. The subsequent acts of the Croatian forces, such as air attacks targeting unprotected women and children that were running for their lives, demonstrate that the Croatian commanders down the hierarchy understood very clearly the words of President Tudjman as an order to physically destroy the Krajina Serbs and implemented those words through their orders to the troops under their command.

1422. It is therefore submitted that the Court should read and understand the words "disappear", uttered by President Tudjman, in their plain meaning, i.e. as they were spoken. These words are, thus, a clear expression of the genocidal intent to destroy the Krajina Serbs and a clear order to Mr. Tudjman's subordinates to carry out the task given to them by their president. Accordingly, all the actions subsequently taken were carried out in the execution of the said order, which was genocidal in its substance.

B. *The Magnitude of the Operation* Storm

1423. The existence of the genocidal plan is further confirmed by the magnitude of the operation *Storm*, carried out in order to implement the genocidal intent devised by President Tudjman, as well as by the attitude that Croatia simultaneously expressed with regard to the possible peaceful solution of the conflict.

1424. The operation *Storm* was characterized by massiveness, complexity of operations, involvement of various Croatian structures, considerable preparations and planning over a long period of time, all under the direction of the top governing bodies of the Republic of Croatia. Its goal was to deal with the "Serbian problem" in Croatia and this goal was to be implemented by attacking and destroying the most prominent part of the group of Serbs in Croatia – Krajina Serbs, by intentionally targeting and taking over Knin – the symbol of the Serb presence in Krajina – and by making sure that neither Knin nor the rest of the Krajina restore itself ever again as a predominately Serb areas.

1425. The operation *Storm* was prepared long in advance, which the Respondent explained in Chapters XII and XIII of this Counter-Memorial. However, while these preparations, and even the decision to attack the Krajina region, cannot, by themselves, be viewed as evidence of the genocidal intent, it is clear that at the Brioni Meeting that intent crystallized in the words spoken by President Tudjman that Serbs should "to all practical purposes disappear".

1426. Here, a parallel can be made with the takeover of the Srebrenica Enclave, where both the ICTY and the Court concluded that the attack of the Bosnian Serb Army on the Srebrenica Enclave was not genocidal in its beginning, but that the necessary intent was established after the change in the military objective, on about 12 or 13 July.[1402] In the present case, the existence of the genocidal intent is even more obvious that in the case of Srebrenica, since the words of President Tudjman uttered at the Brioni Meeting undoubtedly confirm that intent.

1427. Once the plan was devised and the intent was established, Croatia made sure that it was effectively put into practice. As has been pointed out in Chapter XIII, over 150,000 members of the well-trained and well-equipped Applicant's armed forces attacked approximately 30,000 members of the SVK forces.[1403] The attacking forces included regular forces of the Croatian army, Military Police and Croatian Special Police Force, as well as parts of the Army of Bosnia and Herzegovina which provided support. A combination of various military units was engaged in order to make sure the operation was a success – infantry, artillery, rocket launchers, anti-aircraft defense force, air force (planes and helicopters), and engineers.[1404] In addition, Croatia used various means of psychological warfare intended to create fear with the Serbs from Krajina.[1405] It is thus no surprise that the entire operation *Storm* lasted only 4 days and that the main goal, the takeover of Knin, was fulfilled within 30 hours from the onset of the operation.[1406]

[1402] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 295.
[1403] See *supra* Chapter XIII, para. 1213.
[1404] See, for example, A.Gotovina, *Offence Battles and Operations of HV and HVO (Napadni bojevi i operacije HV i HVO)*, Zapovijedništvo zbornog područja Split, Knin, 1996, pp. 71–72.
[1405] See *supra* Chapter XIII, paras. 1202–1203.
[1406] See *supra* Chapter XIII, para. 1213.

1428. In addition, once the plan to destroy the Serbs from Krajina was made, the Applicant directed its foreign policy activities in such a way as to ensure that the genocidal plan was implemented, while at the same time some formal justification for the Applicant's actions is created. Thus, the Applicant rejected every opportunity for a peaceful solution for Krajina and sent its representatives to the peace talks in Geneva to only pretend to negotiate.[1407]

C. *Facts which Further Confirm the Existence of the Genocidal Intent*

1429. In the preceding paragraphs, the Respondent has showed that the acts committed against Serbs in the operation *Storm* and the following months were committed with the genocidal intent, clearly expressed by President Tudjman at the Brioni Meeting, and as part of the genocidal plan adopted at that meeting. The Respondent will now show that the existence of the genocidal intent is further confirmed by: a) the nature of the committed acts; b) deportation of practically all Krajina Serbs and c) the scale of the destruction of Serbian homes and other property.

1430. It should be stressed, however, that, in accordance with the practice of the Court,[1408] none of these elements could prove the genocidal intent by itself, either viewed individually or collectively, since all these elements could equally, without other evidence, indicate the existence of a discriminatory intent, instead of a genocidal intent.

1431. Nevertheless, in the present case, the Respondent has already proven the existence of both the genocidal plan and the genocidal intent and, thus, all the additional elements that will be discussed *infra* merely emphasize that intent. Accordingly, although these elements are not sufficient to prove the genocidal intent by themselves, when they are viewed in conjunction with the order of President Tudjman that Serbs should "to all practical purposes disappear", they undoubtedly confirm that genocide has been committed against the Serbs from the Krajina region.

[1407] See *supra* Chapter XIII, paras. 1195–1196.

[1408] "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent", ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 373; see also Chapter II, paras. 46–58.

1. Nature of the Committed Acts, in Particular Killings

1432. Chapter XIII of this Counter-claim shows that the killings of Serbs where systematically done both during and after the operation *Storm*. In the Report on the situation of human rights in the territory of the former Yugoslavia, submitted by Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, killings of civilians have been listed as number one human rights violation committed during and after the operation *Storm*.[1409] According to the information gathered by the Special Rapporteur, the "common murder method was shots in the back of the head".[1410]

1433. The existence of the intent to physically destroy Serbs is further confirmed by the fact that Croatian planes bombed columns of Serb civilians fleeing Croatia.[1411] Furthermore, not only that the Croatian planes bombed the refugee columns in the Croatian territory, they even pursued them after they crossed into Bosnia and Herzegovina.[1412] There is no other explanation for these actions than that they were committed in the execution of the genocidal plan to destroy the Serbs.

1434. Killings of Serbs that continued long after the operation *Storm* was over also suggest that the true goal of the Croatian actions in Krajina was to eradicate all of the Krajina Serbs. Summary executions and disappearances of elderly and infirm were frequently reported in this period.[1413] In December 1995, the UN Secretary General reported deaths of more than 230 persons in Sectors South and North.[1414]

1435. As noted by the *Human Rights Watch*:

> "Despite the lack of conclusive evidence of the exact number of executions and deaths, it is clear that many execution-style killings took place during and after the Krajina offensive. Numerous bodies of Serbs -- many of whom were elderly or handicapped -- were found with bullet holes in the back of

[1409] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89 and Economic and Social Council decision 1995/290, UN Doc. S/1995/933, 7 November 1995, p. 8.
[1410] *Ibid*., p. 9.
[1411] See *supra* Chapter XIII, paras. 1217–1228.
[1412] See *supra* Chapter XIII, paras. 1254–1257.
[1413] See Chapter XIII, para. 1281 *et seq* ; See also NGO "Veritas", Bilten No. 114, August 2007, *Žrtve «Oluje» i postoluje*, pp. 5-13 (Annex 62).
[1414] Report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), 21 December 1995, UN Doc. S/1995/1051, p. 3.

> their heads after the Krajina area was placed under Croatian government control. Some bodies were also burned, particularly those who remained in houses that were set alight during or after the offensive; some of the victims may have been burned alive while others may have been shot before their houses were burned. A handful of bodies found by U.N. observers were reportedly mutilated. For example, a body found in one village reportedly had been decapitated and the head was later found in a pigsty. The cause of death in these cases, in addition to the fact that most deaths occurred long after the region was firmly under the control of the Croatian Army, indicate that these were executions and not civilian deaths that were incidental to the pursuit of a legitimate military goal."[1415]

1436. It is hard to contemplate any alternative reason for the killings of old Serb civilians who could not leave their homes in Krajina other than the intent to destroy the group of Krajina Serbs for all times. As a matter of fact, even though the Serbs from Krajina were already destroyed as a group when the great majority of Serbs was earlier forced out of Croatia, and although those who remained were neither a threat to Croatia in any sense, nor in any way capable of restoring the Serbian community in Krajina, Croatian forces continued to kill Serbs who remained as a message to those Serbs who fled Croatia that they should never return or they would meet the same fate.

1437. It is thus submitted that the very nature of the described killings committed both during and after the operation *Storm*, in particular those of civilians, including women and children in the refugee columns, and those of old and unprotected Serbs who remained behind, confirms that the crimes against the Krajina Serbs were committed with the intent to destroy them as such.

2. Deportation

1438. In its Judgment in the *Bosnia* case, the Court found that the "ethnic cleansing", understood to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area", may constitute genocide

[1415] Human Rights Watch Report, *Impunity For Abuses Committed During Operation Storm and the Denial of the Right of Refugees to Return to the Krajina*, 1996, available at http://www.hrw.org/legacy/reports/1996/Croatia.htm#P332_81851.

if it can be characterized as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" and only if such action is carried out with the necessary specific intent, that is to say with a view to the destruction of the group, as distinct from its removal from the region.[1416]

1439. In the present case, in addition to being killed and physically and mentally harmed, Krajina Serbs were placed in such conditions of life that forced them to flee Croatia, which resulted in their destruction as the group which had lived in Croatia since XVI Century.

1440. According to the practice of the ICTY, the forced character of the acts could be deduced from the absence of a "genuine choice".[1417] Genuine choice would not be possible in the presence of direct physical force, "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against … persons… or by taking advantage of a coercive environment"[1418] such as shelling of civilian objects, burning of civilian property, and commission of or the threat to commit other crimes "calculated to terrify the population and make them flee the area with no hope of return"[1419].

1441. According to the UN reports, approximately 200,000 persons fled from Krajina to Serbia and the Republic of Srpska (in Bosnia and Herzegovina).[1420] This population was first subjected to a well developed psychological campaign which included spread of information on the advancement of Croatian forces, disinformation on decrease in ability of RSK forces to provide them with protection, fabricated calls of RSK authorities to leave Krajina in order to create a negative psychological climate.[1421] This alone induced sufficient level of fear in some members of Krajina community that made

[1416]ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 190.
[1417] ICTY, *Krnojelac,* IT-97-25, Appeals Chamber Judgement, 17 Septembar 2003, para. 229; see also ICTY, *Blagojević et al.,* IT-02-60, Trial Chamber Judgement, 17 January 2005, para. 596; see also ICTY, *Brđanin*, IT-99-36, Trial Chamber Judgment, 1 September 2004, para. 543; see also ICTY, *Stakić*, IT-97-24, Appeals Chamber Judgment, 22 March 2006, para. 279.
[1418] ICTY, *Stakić*, IT-97-24, Appeals Chamber Judgment, 22 March 2006, para. 281.
[1419] ICTY, *Simić et al.*, IT-95-9/2, Trial Chamber Judgement, 17 October 2002, para. 126.
[1420] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7.
[1421] As cited in ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, Use of Psychological Operations (PsyOps) by the Split MD during and after Operation OLUJA (Storm), pp. 194–206.

them leave even before the beginning of the operation *Storm*. The largest wave of refugees, however, took place between the first and the second day of the full blown operation *Storm* [1422], when the Croatian artillery indiscriminately shelled Knin and other bigger towns in Krajina.

1442. According to the estimates, in the aftermath of the operation *Storm* no more than 5,000 Serbs remained in Sector North and South[1423], while elderly and disabled made up for approximately 75% of the remaining population.[1424]

1443. As it was explained in Chapter XII, Krajina Serbs knew quite well what would happen to them if they were caught by the Croatian army. Tactical operations that were conducted in preparation of the operation *Storm* completely eradicated Serbs from the territories under attack. The Croatian forces found it necessary even to slaughter animals belonging to Serb households. These actions of the Croatian forces, most vicious being the attacks on Maslenica, Medak Pocket and the operation *Flash*[1425], clearly demonstrate that it would be nothing but cynical to claim that Serbs should have stayed and waited for Croatian forces during the operation *Storm*.

1444. That the decision of most of the Serbs to flee before the Croatian forces was justified is confirmed by the UN Secretary General report, describing the fate of some Serbs who could not leave Knin on time:

> "19. Nearly 1,000 persons, including those without the means to depart, sought and were provided refuge in the UNCRO Sector South headquarters compound at Knin, commencing on the evening of 4 August. Following their arrival, the United Nations attempted to negotiate their safe passage to the Federal Republic of Yugoslavia, in accordance with their wishes, with the Government of Croatia. The

[1422] As cited in ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 196.
[1423] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7.
[1424] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, p. 7.
[1425] See *supra* Chapter XII, paras. 1123–1134 & 1142–1153.

> evacuation was stalled by the demand of the Croatian authorities that all military-age men be surrendered for investigation of possible complicity in war crimes."[1426]

1445. The UN report further described how realistic was the possibility that the Serbs would be left alive by Croatian forces if they chose to stay behind:

> "… the majority of persons who received passes to leave the camp, came running back to save their own necks just a few days later. They were beaten and maltreated before their return back to the camp. In spite of the fact that these people wished to remain at their houses in the beginning, they changed their minds later on. They saw how their houses were burnt and property taken away. Most of them where even physically abused…,. Most of them left the Croatia in September… Around 800 persons left UNCRO camp for the FRY on September 16, 1995. Before leaving they had to sign the following statement: 'I declare that I leave the territory of Croatia on my own will and enter the territory of Republic of Serbia. By this statement I also declared that I was properly taken care of and in a humane way brought to the border crossing.' Many persons seriously opposed the signing of the statement adding that they did not wish to leave Croatia on their own will…"[1427]

1446. That the decision of the majority of the Serbs to flee Krajina was justified was later confirmed also by the fate that bestowed those who did stay behind, even if they were mostly old and infirm people.[1428]

1447. It is therefore submitted that the deportation of Krajina Serbs on such a massive scale, committed together with the killings and the infliction of bodily and mental harm, further confirms the existence of the genocidal intent. The order of President Tudjman was that Serbs should disappear and the Croatian leadership knew that the combination

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[1426] Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. 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 November 1995, UN Doc. S/1995/933, para. 19.
[1427] Croatian Helsinki Committee for Human Rights, *Military Operation Storm and it's Aftermath*, Zagreb, 2001, p. 22.
[1428] See *supra* Chapter XIII, paras. 1261–1311.

of killings with the systematic expulsion of practically all of the Serbian population that was not killed would inevitably result in the physical disappearance of the Krajina Serbs as a group.

3. Scale of the Destruction of Serbian Homes and Other Property

1448. In Chapter XIII, the Respondent provided evidence on the massiveness, organized character and systematic nature of the destruction of property that belonged to Serbs. Evidence was provided that destruction included not only houses but also, in the words of witnesses observing such devastation: "every farm, every barn, and every annex". [1429]

1449. The destruction and looting lasted continuously for three to four weeks, but some reports indicated that houses in Krajina were burning even more than five weeks after the last combat activity had ended.[1430] Hundreds of Serbian villages were set to fire and the estimates show that as much as 73 per cent of Serbian households (which means thousands houses and other properties) were destroyed.[1431] Witnesses also testified to large scale killing and burning of livestock and other animals, as well as of poisoning wells in Serbian villages.[1432]

1450. Looting of Serbian property was committed on almost the same scale. The UN Special Rappourteur reported that virtually every abandoned Serb property was looted.[1433] International observers knew, even at the time of the events, that the real motivation of Croatian forces to restrict their movement was to commit more crimes and to continue with killings, burning and looting. The Croatian forces also restricted access to the international observers in order to conceal the evidence of their criminal actions. [1434]

1451. The destruction and looting of Serbian property was perpetrated by *de jure* Croatian forces. The evidence on this was presented in Chapter XIII.[1435]

[1429] See ICTY, *Gotovina et al.,* IT-060-90, testimony of witness Herman Steenbergen, 30 June 2008, Transcript p. 5431.
[1430] See *supra* Chapter XIII, para. 1320.
[1431] See *supra* Chapter XIII, para. 1325.
[1432] See *supra* Chapter XIII, paras. 1312–1317.
[1433] See *supra* Chapter XIII, para. 1317.
[1434] See *supra* Chapter XIII, paras. 1318–1319.
[1435] See *supra* Chapter XIII, paras. 1322, 1318–1319 & 1337.

1452. It is submitted, thus, that the destruction and looting of Serbian property during and, in particular, after the operation *Storm*, was a part of the plan of the Applicant to destroy the group of Krajina Serbs. As argued before, what is necessary for genocide to be established is that the said destruction is carried out with the necessary genocidal intent. In the present case, the intent was expressed by President Tudjman in the Brioni Meeting and the subsequent destruction of Serbian property only confirms the existence of that intent, since the destruction was effected in order to prevent that Serbs ever return to Krajina and reestablish themselves as a group on the Croatian territory.

C. *Applicant's Admission that the Events Connected with the Operation* Storm *Constituted Violations of the Genocide Convention*

1453. In its Application, submitted on 2 June 1999, the Applicant stated that the evacuation of "Croatian citizens of Serb ethnicity in the Knin region" [Republika Srpska Krajina] amounted to "a second round of 'ethnic cleansing', in violation of the Genocide Convention".[1436]

1454. Although this part of the Applicant's claims was later withdrawn,[1437] and although the Applicant cynically accused the FRY for this violation of the Genocide Convention, it is submitted that paragraphs 2 and 33 of the Applicant's Application instituting proceedings represent an admission that genocide has been committed against the Serbs from Krajina. It is further submitted that the Court should understand paragraphs 2 and 33 of the Application as the Applicant's admission against its own interest and give it due weight in the deliberations in the present case.

6. Republic of Croatia is Responsible for the Genocide Committed against Serbs in Croatia

1455. It was shown throughout Chapter XIII that genocide against Krajina Serbs, as a part of the group of Serbs in Croatia, was perpetrated by State organs of the Republic of Croatia in terms of Article 4 of the ILC Articles on State Responsibility, which was

[1436] See Application instituting proceedings, paras. 2 & 33.
[1437] See Memorial, para. 1.06.

found by this Court to reflect customary international law.[1438] The Brioni Transcripts are the evidence that the genocidal intent existed on the part of President Tudjman, as the person who held the highest position in Croatia at the time and was also the supreme commander of the Croatian armed forces. Furthermore, the Brioni Transcripts show that the intent was either shared, or at least not contested by other participants at the meeting – persons who held some of the highest position in the governmental structures of Croatia at the time.

1456. The transcript from the Brioni meeting is also a clear proof that the operation *Storm* was devised and subsequently implemented in the field by top civilian and military leadership of Croatia.

1457. The evidence was also presented that Croatian armed forces from four different Military Districts were involved in the operation *Storm* and its aftermath.[1439] Testimonies of UN observers confirmed that members of the Croatian army were directly involved in killings, maltreatment, destruction and looting that specifically targeted Krajina Serbs and their property.[1440] Croatian armed forces established strong control over the territory inhabited by Serbs soon after the operation *Storm* commenced and kept it throughout the whole period in which the crimes were committed. All units involved in the operation *Storm* were under the control and command of the Croatian army and under the overall control of the mastermind of the genocidal plan – Croatian President Franjo Tudjman.

1458. Finally, after the operation *Storm* was completed, the State organs of the Applicant enacted laws whose only goal was to make sure that Krajina Serbs, as part of the group of Serbs in Croatia, would never reestablish themselves as a group on the Croatian territory.[1441]

1459. It is thus submitted that genocide against the organs Krajina Serbs, as part of the group of Serbs in Croatia, was committed by State of the Republic of Croatia, which makes the Republic of Croatia responsible for the commission of genocide under the Genocide Convention.

[1438] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, paras. 385 & 398.
[1439] See *supra* Chapter XIII, para.1207.
[1440] See *supra* Chapter XIII, paras. 1316–1322.
[1441] See *supra* Chapter XIII, para. 1338–1346.

7. Conclusion: the Croatian Armed Forces Committed Genocide against Krajina Serbs

1460. Genocide was committed against Krajina Serbs. This part of the group of Serbs in Croatia was destroyed by a number of actions concurrently taken by the Republic of Croatia. Serbs were subjected to killings perpetrated by members of Croatian armed forces, both during and after the operation *Storm*. The victims of killings included hundreds of old and infirm Serbs who were unwilling or unable to escape in the aftermath of the combat operations. These people were not and could not have been a security risk to Croatia. The only factor that was decisive for their elimination was that they were ethnic Serbs.

1461. In the same vain, serious bodily and mental harm was inflicted on the Krajina Serb civilians during takeovers of various locations in Krajina and even while they were attempting to escape in order to save their lives. Helpless in the face of a great force, Serbs were physically and psychologically maltreated by both members of Croatian armed forces and Croatian civilians, attacked with significant force even after they had left the Croatian territory and forced to watch their loved ones getting killed. This amounted to one of the largest deportations of population during the wars of the 1990s, which left over 200.000 persons without a roof over their head and a community to belong to. And again, solely because they were Serbs from Krajina.

1462. These actions could not logically be explained in any other way than as mirroring the genocidal intent with which the entire operation *Storm* was planned and executed. The Meeting at Brioni and the agreement that was made between top civilian and military leadership of the Applicant, to inflict such blows to Krajina Serbs so they would disappear, represent direct evidence of this genocidal intent. The nature of the killings that took place, coupled with the infliction of serious bodily and mental harm and the systematic expulsion of almost all Krajina Serbs, confirm that the previously agreed genocidal plan was methodically and thoroughly executed in the field. The existence of this plan is visible from the extent of preparations that preceded the August 1995 operation, the extent of attention that was paid to all aspects of the operation, the extent of forces that were used, and the use of psychological warfare, among other things. The plan was, in fact, so well prepared that once it was executed, it left no chance for Krajina Serbs to survive as part of Serbs in Croatia.

1463. The sustainability of the result which the Applicant achieved with the operation *Storm* was ensured by the subsequent actions of the Croatian government, which deprived Krajina Serbs of their rights to immovable property, created legal, administrative and factual obstacles for their return to Croatia and their possible reestablishment as a group, and repopulated Krajina with Croats who were granted rights over confiscated Serbian property. The perpetrators of genocide not only enjoyed complete immunity from criminal prosecution but were (and still are) celebrated as heroes, which only reaffirmed the message that was sent to Krajina Serbs – that they were not wanted at the Croatian soil and that their life would be threatened if they ever thought of reestablishing their community in Krajina.

1464. In accordance with the evidence presented above, it is submitted that:

a) Acts listed in Article II, points (a), (b), and (c) of the Genocide Convention were committed against Krajina Serbs, as a substantial part of the national and ethnic group of Serbs in Croatia;
b) These acts were committed during and after the operation *Storm*, which was designed, planned and executed by the State organs of the Republic of Croatia;
c) These acts were committed with the intent to destroy the said group, according to the plan devised by the highest leadership of the Republic of Croatia;
d) The Republic of Croatia is accordingly responsible for genocide committed against Krajina Serbs as a substantial part of the national and ethnic group of Serbs in Croatia;

8. The Applicant's Responsibility for Conspiracy and Failure to Punish Genocide

A. *Conspiracy to Commit Genocide*

1465. In the previous paragraphs, the Respondent has proved that the Applicant has committed genocide against the Krajina Serbs. In addition, or in the alternative, the Respondent submits that the Applicant is also responsible for having conspired to commit genocide.

1466. Conspiracy connotes an agreement between two or more persons to commit a certain offence. The offence is considered to have been committed as soon as an agreement between the parties had been reached, irrespective of whether the crime whose commission was contemplated was actually carried out. One action taken in furtherance of the agreed plan would do. Conspiracy does not require existence of a formal agreement, but a mutual understanding between the parties. Persons involved had to have entered into it willfully and with intent to agree and to carry out acts planned.[1442]

1467. The analysis of the transcripts from the meeting at Brioni, attended by Croatian President Tudjman and the highest Croatian leadership, clearly shows that such an agreement was reached between the participants at the meeting. This is evidenced by the fact that none of the participants at the meeting contested President Tudjman's request that Krajina Serbs should disappear and that the participants proceeded to discuss practical methods to achieve this goal. It is thus submitted that all of those present willingly and knowingly entered into this agreement, even if some of them possibly did not share the genocidal intent of their President. Moreover, the overview of the conduct of the operation *Storm* and its aftermath shows that action had been taken by the official organs of the Applicant, including those present at the Brioni Meeting, in furtherance of the agreement that was reached at the meeting.

1468. Taking into consideration the position of the Court from the *Bosnia* case that conspiracy to commit genocide is absorbed if genocide has indeed been committed,[1443] it is submitted that the Court should, at least, declare that the Meeting in Brioni, and the agreement reached at that meeting, represented conspiracy to commit genocide.

1469. If, however, the Court finds that genocide has not been completed (*quod* non) because, for example, the group of Krajina Serbs has not been destroyed, the Respondent submits that the Court should find the Applicant responsible for conspiracy to commit genocide in accordance with Article III of the Genocide Convention.

[1442] C. M. Othman, *Accountability for International Law Violations: the case of Rwanda and East Timor*, Springer Berlin – Heidelberg, 2005, pp. 192-238.
[1443] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 380.

B. *Failure to Punish Genocide*

1470. In addition, the Respondent submits that the Applicant is also responsible for the violation of its obligation to punish the crime of genocide. The Court found this violation to be a distinct internationally wrongful act from the acts enumerated in Article III of the Genocide Convention and further found that State can incur responsibility for both an act of genocide and for the breach by that State of its obligation to punish the perpetrator of the act.[1444]

1471. The Applicant has never charged either its former president Franjo Tudjman (while he was alive) or any other person for genocide, although genocide was committed against Serbs from Krajina and was committed by the official organs of the Applicant. Moreover, as was shown in Chapter XIII, the Croatian judiciary has never initiated proper criminal proceedings against the perpetrators of crimes committed during and after the operation *Storm* even for war crimes or crimes against humanity. A small number of the criminal proceedings that were initiated against the perpetrators of Croatian nationality were evaluated by international observers as lacking impartiality and being unfair, and often contrary to the presented evidence.[1445]

1472. It is thus submitted that the Applicant has breached its obligation to punish the crime of genocide, as provided by Article I of the Convention, and the Court should accordingly find the Applicant responsible for this violation.

9. Applicant's Celebration of Genocide

1473. While the Genocide Convention does not specifically provide that States should not celebrate genocide or the persons who committed it, it is submitted that this obligation is self-implied in the Convention, since it is impossible to imagine that a State which undertook a solemn obligation to prevent and to punish genocide would, at the same time, celebrate genocide.

[1444] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 383.
[1445] See *supra* Chapter III, paras. 192-199, also see Chapter XIII, para. 1347-1350.

1474. Nevertheless, this is exactly what the Applicant did and still does. Namely, according to the Croatian Law on Public Holidays, Remembrance Days and Non-Working Days[1446], the 5th of August, the day when Knin and other major towns in Krajina were captured during the operation *Storm*,[1447] is celebrated as a public holiday – the "Day of Victory and Homeland Gratitude" (Dan pobjede i domovinske zahvalnosti) and the "Day of the Croatian Defenders" (Dan hrvatskih branitelja)[1448].

1475. This is a unique case in history that a State is celebrating the day on which its forces committed genocide against a significant part of the population of that same State. Furthermore, the celebration of the "Day of Victory and Homeland Gratitude" and the "Day of Croatian Defenders" is even today a clear message to Serbs in Croatia that they will never be considered in that country as citizens equal to the Croatian majority.

1476. For these reasons, the Respondent submits that, as a way of reparation for the commission of the crime of genocide, the Court should order the Applicant to 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" from its list of public holidays.

[1446] Law on Public Holidays, Remembrance Days and Non-Working Days, (Zakon o blagdanima, spomendanima i neradnim danima u Republici Hrvatskoj), *Narodne novine* [Official Gazette], no. 33/1996, adopted on 19 April 1996, entered into force 8 May 1996, amended 5 times (*Narodne novine* [Official Gazette], nos. 96/2001, 13/2002, 136/2002, 59/2006, 55/2008), Article 1.
[1447] See *supra* Chapter XIII, para.1205.
[1448] The celebration of the "Day of the Croatian Defenders" was added by the last amendments to the Law, adopted on 13 May 2008, published in *Narodne novine* [Official Gazette], no. 55/2008, entered into force on 16 May 2008.

SUBMISSIONS

On the basis of the facts and legal arguments presented in this Counter-Memorial, the Republic of Serbia respectfully requests the International Court of Justice to adjudge and declare:

I

1. That the requests in paragraphs 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 2(c) and 2(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, or alternatively, before 8 October 1991, when neither the Republic of Croatia nor the Republic of Serbia existed as independent States, are inadmissible.

2. That the requests in paragraphs 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 2(c) and 2(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 (alternatively, 8 October 1991) be rejected as lacking any basis either in law or in fact.

3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 (alternatively, 8 October 1991) are admissible, that the requests in paragraphs 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 2(c) and 2(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

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after the operation *Storm* in August 1995, the following acts with intent to destroy as such the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia:
   - 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 partial physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.

6. 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 part of the the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.

7. That the violations of international law set out in paragraphs 4, 5 and 6 above 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 proscribed by Article III of the Convention committed on its territory before, during and after operation *Storm*; and
    2) 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 ethnic group from the Republic of Croatia for all damages and losses caused by the acts of genocide;
        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;
        c) 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 the 5th of August, as a day of the triumph in the genocidal operation *Storm*, from its list of public holidays.

The Republic of Serbia reserves its right to supplement or amend these submissions in the light of further pleadings.

Belgrade, 21 December 2009

Dušan T. Bataković,
Agent of the Republic of Serbia

LIST OF ANNEXES

Volume II

Volume III

Annex 25: Minute of the 127th Meeting of Members of the Presidency of the Socialist Federal Republic of Yugoslavia held on 18 July 1991

Annex 26: Letter of Mr. Stjepan Mesić to the SFRY Presidency dated 9 January 1992

Annex 27: Excerpt from the Transcript of the 31st session of the Sobranije of the Republic of Macedonia held on 10 January 1992

Annex 28: Decision of the Federal Secretariat for Foreign Affairs concerning the Retirement of Mr. Budislav Lončar, Federal Secretary for Foreign Affairs dated 7 February 1992

Annex 29: Borisav Jović, *Last Days of the SFRY: Excerpts from a Diary (Poslednji dani SFRY, izvodi iz dnevnika)*, Belgrade, 1989, pp. 402, 411 & 420.

Annex 30: Letter of the Ministry of Defence addressed to the Ministry of Foreign Affairs of the Republic of Serbia dated 18 November 2009

Annex 31: JNA, Operation Group South Command, Decision for Continuation of Assault Operation *Vukovar,* Strictly Confidential no. 235-1 dated 29 October 1991

SECTION VI: **War Crime Trials in Croatia**

Annex 32: OSCE Mission to Croatia, Background report: domestic war crime trials 2005, dated 13 September 2006, p. 29

Annex 33: District Court of Sisak, Velemir case, Judgment of 26 September 1996

Annex 34: Federal Court of Australia, Snedden case, Appeal Judgment of 2 September 2009

SECTION VII: **Documents related to the Activities of the Commission for Missing Persons of the Government of the Republic of Serbia**

Annex 35: Minutes of the Meeting between the Office of the Commissioner for Detained and Missing Persons of the Government of the Republic of Croatia and the Commission for Missing Persons of the Government of the Republic of Serbia held in Zagreb on 30 June 2009

SECTION VIII: **Documents related to the Crimes committed against the Serbs in Croatia 1991–1995**

Annex 36: Martin Špegelj, Minister of Defence of the Republic of Croatia, *Soldier's Memory (Sjećanja vojnika),* Zagreb, 2001, p. 288, table IV: Weapons purchased in the organization of the Ministry of Defence of the Republic of Croatia between 5 October 1990 and 15 January 1991

Annex 37: Examples of Attacks on the Serbs in Croatian Towns 1990-1991 according to the Croatian Press

Annex 38: Centre for Peace, Non-Violance and Human Rights Osijek, Croatia, Monitoring war crime trials: War crime in Osijek

Annex 39: Centre for Peace, Non-Violance and Human Rights Osijek, Croatia, Monitoring war crime trials: Crime in Paulin Dvor

Annex 40: Centre for Peace, Non-Violance and Human Rights Osijek, Croatia, Monitoring war crime trials: The war crime in Marino Selo

Annex 41: District Court of Rijeka, Orešković et al. case, Judgment of 24 March 2003 (Excerpt)

Annex 42: Amnesty International, *A shadow on Croatia's future: Continuing impunity for war crimes and crimes against humanity*

Annex 43: Nebojša Taraba, *Most of them floated down the Sava*, Split, 1993

Annex 44: First Municipal court in Belgrade, Minutes of Witness Hearing of Milanče Tošić dated 19 February 2002 (*Lora* case)

Annex 45: First Municipal court in Belgrade, Minutes of Witness Hearing of Vojkan Živković dated 21 February 2002 (*Lora* case)

Annex 46: NGO "Veritas", List of the Killed or Missing Members of the RSK Territorial Defense at the Miljevci Plateau

Annex 47: Statement of Nikola Nadoveza, given to the Serbian Army of Krajina on 21 November 1993, reprinted in "Veritas", *Miljevci,* available from http://www.veritas.org.rs/publikacije/Miljevci/Tekstovi/Srpski/sesta.htm

Annex 48: Basic Court in Gradiska, Bosnia and Herzegovina, Minutes of Witness Hearing of Petar Božič dated 7 May 1995 (*Novi Varoš* case)

Annex 49: Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of Witness Hearing of Savo Počuča dated 10 May 1995 (Operation *Flash*)

Map no. 7: Croatia: Western Slavonia, May 1995 (Operation *Flash*), DI Cartography Center, reprinted in Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995*

Annex 50: General J. Bobetko, *All My Battles (Sve moje bitke)*, Zagreb, 1996, pp. 400 & 407

Annex 51: Public Statements which Directly Provoked Perpetrators to Commit Genocide against the Serb National Group in Croatia

Volume IV

SECTION IX: **Operation *Storm*** /Evidence/

Annex 52: 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

Map no. 8: Bosnia & Croatia: Livno Valley, 25–30 July 1995, Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995*

Map. No. 9: Operation *Oluja,* 4–8 August 1995, Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995*

Annex 53: Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 23 August 1995 in Zagreb, pp. 01325991, 01325993-01325997

Annex 54: ECMM Team N2, The Consequences in former "RSK" of Operation "Storm", Special Report, dated 23 August 1995 (Author Soren Liborius)

Annex 55: Humanitarian Crisis Cell Sitrep, Compilation of Human Rights Reporting, 7 August – 11 September 1995

Annex 56: Public Statement of President Tudjman, according to HINA Article, *Franjo Tudjman: Hour of return has come both for East Slavonia and Baranja,* dated 28 August 1995, reprinted in Jovan Bošković, *NDH drugi put – LUX Croatiae,* Belgrade, 1999, pp. 378–379.

Annex 57: UNMO HQ Sector South, Summary of Humanitarian Violations, DAILY SITREPS, 4 September – 4 October 1995

Annex 58: UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 October – 4 November 1995 (drafted by Major Peter Marti and Captain Kari Anttila)

Annex 59: UN A/50/727, S/1995/933, Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89 and Economic and Social Council decision 1995/290, dated 7 November 1995, Part II. Croatia, paras. 9-50.

Annex 60: ECMM, 100 Days after Operation "Storm" in the former "Serb Krajina", Comprehensive Survey Report on the First Hundred Days of Croatian Rule in UN Sector South, dated 21 November 1995

Annex 61: Croatian Helsinki Committee for Human Rights, *Militry Operation "Storm" and It's Aftermath,* Report, Zagreb, 2001

Tab. 1: Civilians Killed During and After Military Operation "Storm" (former UN Sector South), pp. 137-169

Tab. 2: List of Killed and Missing Persons from the Refugee Columns, pp. 223–230

Tab. 3: List of murdered and missing civilians in the area of the former Sector North with descriptions of executions, pp. 236–260

Annex 62: NGO "Veritas", Bilten No. 114, August 2007, *Žrtve «Oluje» i postoluje*, pp. 5–13

Annex 63: Recommendations for the Non-Governmental Organization "Veritas" by the UN Liason Office Belgrade, the International Committee f the Red Cross and the ICTY Deputy Prosecutor

Annex 64: ICTY, Gotovina et al. Case, IT-060-90, Reynaud Theunens, Expert Report "Croatian Armed Forces and Operation Storm" dated 18 December 2007, Excerpts

Annex 65: Commission of the European Communities, Croatia 2009 Progress Report, SEC(2009) 1333 dated 14 October 2009, pp. 15–16

Volume V

SECTION X: **List of Serb Victims on the Territory of Croatia 1990–1998**

Annex 66: Report of the Non Governmental Organization "Veritas", Serb Victims of War and Post-War in the Territories of Croatia and the former Republic of Serbian Krajina 1990–1998 dated 31 October 2009