INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

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

(CROATIA v. SERBIA)

REPLY

OF THE REPUBLIC OF CROATIA

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CHAPTER I

INTRODUCTION

Section I: Overview

1.1 The Applicant instituted these proceedings before the International Court of Justice ("the Court") on 2 July 1999. In accordance with an Order of the Court, the Applicant filed its Memorial on 1 March 2001. Following preliminary objections to jurisdiction filed by the Respondent in September 2002, on 18 November 2008 the Court gave a judgment rejecting the Respondent's preliminary objections, with the exception of the objection relating to jurisdiction *ratione temporis* that the Court found did not possess an exclusively preliminary character and should therefore be considered with the merits. By Order dated 20 January 2009 the Court fixed 20 March 2010 as the date for the Respondent to file its Counter-Memorial. On 4 January 2010 the Respondent filed its Counter-Memorial together with its Counter-Claim. By Order dated 4 February 2010, the Court authorised the submission of a Reply by the Applicant and a Rejoinder by the Respondent, and fixed 20 December 2010 as the time limit for the filing of the Reply. This Reply is submitted in accordance with that Order, together with accompanying Annexes.

1.2 The Applicant has followed the dispositions of the Court in using its Reply for the purposes of responding to factual claims and legal arguments made by the Respondent in its Counter-Memorial, as well as those raised for the first time in the Counter-Claim. For the avoidance of doubt, the Applicant maintains the factual claims and legal arguments, as set out in the Memorial.

1.3 The Applicant brought these proceedings before the Court in July 1999, and filed its Memorial on 1 March 2001. In the intervening period there have been a significant number of developments, including in particular the judgment of the Court in 2007 in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),*[1] a series of judgments and other decisions by the ICTY, and significant new evidence. Each of these elements requires a number of preliminary comments.

1.4 The background to the Genocide Convention, its rationale and the events leading to its adoption were set out in detail by the Applicant in the Memorial.[2] It comes as no surprise that the Respondent should place heavy reliance on the Court's 2007 judgment in the *Bosnia* case, noting that the judgment is of "paramount importance to the present case".[3] The Applicant

[1] Hereinafter referred to in this Reply as '*Bosnia*'.
[2] Memorial, paras. 7.05-12.
[3] Counter-Memorial, para. 32.

does not disagree. However, the Respondent has manifestly failed to recognise that the facts of these two cases are different, and that the evidence is distinguishable. The Applicant has taken full account of the Court's 2007 judgment in the *Bosnia* case, which as is shown in the Chapters that follow, clearly confirms the approach taken by Croatia in the Memorial. The Applicant has set out a catalogue of prohibited acts carried out against Croats, from which only one inference can be drawn: the Respondent has breached its obligations under the Genocide Convention.[4]

1.5 Since the filing of the Memorial, significant additional evidence has emerged, in particular confirming the high degree of control exercised by FRY/Serbian authorities over Serb paramilitaries that were active on Croatian territory. As confirmed by an expert report presented to the ICTY in 2003, Serbia went so far as to integrate paramilitary forces involved in the commission of acts of genocide into the JNA itself by means of an Order dated 10 December 1991.[5] A further independent report of 2007 confirmed that a number of Serb paramilitary groups including Arkan's Tigers and those operating under 'Captain Dragan' were "controlled by the Ministry of Interior (MUP) of the Republic of Serbia".[6]

1.6 Of particular significance are the findings of the ICTY in *Prosecutor v. Martić*[7] and *Prosecutor v. Babić*.[8] The ICTY case law puts it beyond doubt that there was a joint criminal enterprise ('JCE') orchestrated by the Serbian government to eradicate the Croat population from significant parts of Croatia, and that the participants in the JCE included: "at least Blagoje Adžić, Milan Babić, Radmilo Bogdanović, Veljko Kadijević, Radovan Karadžić, Slobodan Milošević, Ratko Mladić, Vojislav Šešelj, Franko "Frenki" Simatović, Jovica Stanišić, and Captain Dragan Vasiljković."[9] The ICTY concluded that there was a "generally similar pattern" of attacks against Croatian towns and villages by the TO, police and JNA acting in cooperation, which "involved the killing and the removal of the Croat population. … after these attacks, widespread crimes of violence and intimidation and crimes against private and public property were perpetrated against the Croat population, including detention

[4] See Chapters 4 and 5 of the Memorial and Chapters 5 and 6 of this Reply.

[5] See Expert Report of R. Theunens, 16 December 2003, submitted by the Prosecution in *Prosecutor v. Slobodan Milošević*, IT-02-54-T ('Theunens Report, 2003'), p. 20 of Part II (at para. 6). The order stated: "In all zones of combat operations all units of the JNA and TO, as well as volunteer units agreeing to be placed under that command and to wear JNA and TO insignia, are to be put under the control of the most senior JNA officer. All other armed groups are to be regarded as paramilitary and are to be disarmed and removed from zones of combat operations.", 1st Administration of the General Staff of the SFRY's Armed Forces, strictly confidential No. 2256-2, dated 10 December 1991, Directive.

[6] See Expert Report of R Theunens, 30 June 2007, submitted by the Prosecution in *Prosecutor v. Jovića Stanišić and Franko Simatović,* IT-03-69 ('Theunens Report, 2007'), pp. 6-7, paras. 9-10, and see Part 1: Section Three, Part 5 of the Report at pp. 89-104.

[7] IT-95-11, Trial Chamber Judgment, 12 June 2007 ('*Martić*').

[8] IT-03-72, Trial Chamber Sentencing Judgment, 29 June 2004 ('*Babić*').

[9] *Martić*, para. 446.

in facilities run by MUP forces or the SAO Krajina and the JNA. … the Trial Chamber has concluded that the displacement of the non-Serb population was not a mere side-effect but rather a primary objective of the attacks."[10]

1.7 The Applicant invites the Court to treat the Respondent's Counter-Memorial with care and attention, as a number of points must be made about the Respondent's treatment of evidence. *First*, as will be clear, the Respondent's Counter-Memorial is characterised by numerous misrepresentations of facts and of key events, including a manifest failure to take account of the context in which they occurred. This approach characterises the whole of the pleading but in particular the treatment of the Counter-Claim in Chapters XII and XIII of the Counter-Memorial. The political context of the events that are addressed, their interpretation, and the manner in which Operation *Storm* was conducted are materially different from those presented in the Counter-Memorial. These misrepresentations are addressed in detail in this Reply.

1.8 *Second*, having describing facts erroneously and in a manner that is not supported by the evidence, the Respondent proceeds to make sweeping deductions that are not established by primary evidence or inference. The most blatant example of this approach is reflected in the Respondent's description and treatment of the 'Brioni Minutes' and the conclusions it draws from that document with regard to the characterisation of *Operation Storm*.[11]

1.9 *Third,* it is noteworthy that the Respondent frequently fails to rely on its own official documentation or the "official records" of the 'RSK', to which it presumably has access. It seeks to overcome this shortcoming with references to allegedly neutral reports and foreign sources. Great reliance is placed on *inter alia*: UN reports, which in general are not annexed; an ICTY indictment from an ongoing case (the evidentiary value of which is addressed in Chapter 2); and accounts of non-governmental organisations like the Krajina Serbs Centre for Collecting Documents and Information ('*Veritas*') report and the Croatian Helsinki Committee for Human Rights ('CHC'). In contrast to the evidence on which the Applicant relies, these sources either lack authority or independence or contain serious methodological flaws that are addressed in subsequent chapters.

1.10 *Fourth*, as more fully explained in Chapters 5 and 6, the Respondent frequently fails to mention or respond to very significant aspects of the claims raised by the Applicant. Where there is a response, it is confined to insubstantial criticisms of specific evidence relied upon by the Applicant: at no stage does the Respondent advance a positive case on particular events or adduce any evidence in rebuttal. The Applicant invites the Court to treat these claims as not having been refuted and therefore established.

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[10] *Ibid.,* para. 443.

[11] See Chapters 11 and 12, *infra*.

1.11 *Fifth*, the Respondent frequently misrepresents the Applicant's actions and laws, often citing out of date reports and ignoring matters such as the return of Serb refugees to Croatia. Such omissions are particularly apparent with the erroneous title and contents of Chapter XIII, which fails to raise any allegations as to violations of the Genocide Convention. The Respondent ignores all developments relating to co-operation between the parties that refute its allegations and of which it was well aware when the Counter-Memorial was being drafted.

1.12 The Applicant also observes that the Respondent's Counter-Claim has been raised for the first time in 2010, notwithstanding the gravity of the allegations it makes, and the fact that it concerns conduct alleged to have occurred in 1995. This is of particular significance, given the criticisms made by the Respondent of the timing of the Application, in 1999 (Counter-Memorial, paragraph 14).

1.13 A final introductory matter concerns the request made by the Applicant – by communication to the Court – for the Respondent to produce certain documents emanating from, or implementing the decisions of, four entities: the SFRY Presidency; the Supreme Command Staff; the 'Meetings of the Six' and the Supreme Defence Council (these entities exercised *de jure* or *de facto* control and command over the JNA/JA armed forces in the period 1 April 1991 - 30 November 1995).[12] The Applicant believes that these documents contain significant information of crucial relevance to the issues in the case, and was reassured by the Respondent's positive response in observations dated 7 September 2010, following a meeting held between the Parties in Belgrade on 3 September 2010: significantly, the Respondent agreed in principle to disclose all the documents that were in its possession, whilst indicating that a number classified as 'Confidential' would require formal internal governmental approval process. The Respondent has since provided the Applicant with a number of documents but has withheld many others. As set out in Chapter 2, the Applicant reserves its right to make application to the Court for the full disclosure in the event that all the documents are not provided very shortly.[13] In the *Bosnia* case, the Court stated:

> "Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions."[14]

1.14 On the basis of the facts of that case, and in view of the fact that the request was made very late in the proceedings, the Court refused to request

[12] Pursuant to Article 49 of the Court's Statute and Article 62 of the Court's Rules of Procedure. See Request by Croatia for Serbia to Produce Certain Documents, 30 July 2010.

[13] Chapter 2, paras. 2.85 *et seq.*

[14] *Bosnia,* para. 206.

that the Respondent disclose the unredacted versions of the SDC documents.[15] In these proceedings, the Applicant's request for disclosure has been made promptly and in good time. The Respondent has accepted in principle that the documents fall to be disclosed, but has so far failed to comply fully with that principle in its actions. The Applicant hopes that it will not be necessary to make a formal application to the Court to order disclosure of the documents that have so far been withheld. In the Applicant's submission, should such an application be made, the Court should reaffirm the general principle that the party with access to evidence (potentially) relevant to the determination of a key issue in the case should produce that evidence, or face the prospect of adverse inferences being drawn by the Court.

Section II: Structure of Reply

1.15 This Reply is divided into three Parts. Part I addresses the facts relating to the Applicant's claims concerning the Respondent's violations of the Genocide Convention; Part II addresses the legal issues that arise, including issues in relation to the jurisdiction of the Court; and Part III addresses the Respondent's Counter-Claim.

1.16 Part I comprises five Chapters. *Chapter 2* responds to arguments raised by the Respondent in Chapter III of its Counter-Memorial relating to issues of proof and evidence, having regard to the approach set out by the Court in the *Bosnia* case. A first section addresses the burden of proof, in particular the duty of the Respondent to account for and explain matters that occurred whilst it had control over the territory on which acts of genocide occurred. A second section concerns the standard of proof, identifying those matters on which the Parties are in agreement, namely that (i) violations of Articles II and III of the Convention are to be proved by fully conclusive evidence, (ii) violations of Article I require a lesser standard of proof at 'a high level of certainty appropriate to the seriousness of the allegation', and (iii) the proof may be established by inferences of fact. The third section addresses methods of proof, responding to the Respondent's misconceived and erroneous criticisms of Croatia's evidence and addressing the implications to be drawn from ICTY cases.

1.17 *Chapter 3* addresses a number of matters of historical fact that are significant in establishing the context for the Respondent's responsibility for genocidal acts. Section I responds to the Respondent's arguments on the growth of extreme Serbian nationalism and addresses erroneous claims made regarding nationalism in Croatia. Section II revisits Belgrade's campaign of propaganda that gave rise to a rebellion by the Serb community in Croatia, leading to the creation of areas of Serb occupation within the territory of Croatia, as part of establishing a 'Greater Serbia', including the creation of 'Serb Autonomous Regions' and the so-called Republic of Srpska Krajina

[15] In his Dissenting Opinion, Vice-President Al-Khasawneh criticized this part of the Court's approach, see para. 35.

('RSK'). Section III describes the intensification of the conflict in Croatia from March 1991 onwards, including the role of the JNA; the dissolution of the SFRY and the takeover of its federal institutions by Serbia; and human rights abuses suffered by Croatia's Croat population at the hands of the JNA and the rebel Serbs. Section IV considers the role of the international community, including UN engagement.

1.18 *Chapter 4* responds to Chapter VI of the Counter-Memorial, in which the Respondent tries to break the link between the FRY/Serbian authorities and the activities of the JNA and the paramilitary forces that resulted in acts of genocide. It establishes that the JNA was a FRY/Serbian army for which it has responsibility. Relying *inter alia* on judgments of the ICTY and evidence that was not available in 2001, the Chapter revisits and supplements the evidence presented in its 2001 Memorial to describe the transformation of the JNA into a Serbian Army in the service of Serbian expansion and the creation of a 'Greater Serbia'. It proceeds to show Serb/JNA command and control over the Serbian TO; the JNA's role in the lead-up to the genocidal war; the SFRY Presidency's lack of control over the JNA; and the JNA's engagement in the genocidal conflict, including direct participation in acts of genocide in concert with paramilitaries. It also touches upon the establishment of the so-called army of the RSK ('SVK') by FRY/Serbia and its continuing command and control over this so-called army.

1.19 *Chapter 5* responds to those parts of Chapter VII of the Counter-Memorial that concern genocidal acts in Eastern Slavonia. It confirms that the evidence of genocidal acts for which the Respondent is responsible is clear, compelling and conclusive, and that the Respondent's evidence is misleading and incomplete and often it even fails to address many of the factual claims made by the Applicant in its Memorial. The Chapter draws on new evidence and on ICTY and Serbian case law that provides strong support for the Applicant's case.

1.20 *Chapter 6* responds to those parts of Chapter VII of the Counter-Memorial that concern genocidal acts in Western Slavonia, Banovina, Kordun and Lika, and Dalmatia. The Applicant's conclusions in Chapter 5 are equally applicable to the evidence of the Respondents responsibility for genocidal acts in these parts of Croatia.

1.21 Part II of the Reply comprises three chapters that address the legal issues. It begins with *Chapter 7*, which addresses the single issue relating to the jurisdiction of the Court that was joined to the merits in the Court's judgment of Jurisdiction of 18 November 2008. The Chapter responds to Chapter IV of the Counter-Memorial, where the Respondent argues that acts and omissions that took place before 27 April 1992 cannot entail its international responsibility because the FRY only came into existence on

that date and was not bound by the Genocide Convention prior to it, and the alternative argument that since Croatia only came into existence on 8 October 1991 it cannot raise claims based on facts preceding that date. In Section I the Applicant submits that there is no express limitation *ratione temporis* in the Genocide Convention. This has been confirmed by the Court in 1996 and reaffirmed in 2008. Section II explains why, for all material times, Croatia is entitled to invoke responsibility and Serbia may be held responsible under the Convention. In Section III the Applicant invokes the effect of FRY's 1992 declaration of continuation of SFRY's multilateral treaty rights and obligations in support of the Respondent's responsibility. The Applicant argues that the FRY is responsible as a State for acts prior to 27 April 1992 either by reason of the self-proclaimed/*de facto* continuity of Serbia or, alternatively, by reason of Article 10(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts, which reflects customary international law and was applicable to the facts of the present case. Section IV sets out conclusions as to the Court's jurisdiction *ratione temporis* to entertain the present dispute in accordance with Article IX of the Convention, on the grounds that the genocidal act are attributable to Serbia as a self-proclaimed continuator of the personality of its predecessor or in the alternative, pursuant to the customary rule codified in Article 10(2) of the ILC Articles.

1.22 *Chapter 8* responds to the Respondent's legal arguments on the Genocide Convention as set out in Chapter 2 of the Counter-Memorial, including the definition of the physical and mental elements which form the crime of genocide. Section I addresses the mental and physical elements of the crime of genocide, as set out in Article II of the Genocide Convention; Section II deals with the related crimes contained within Article III (b) to (e) of the Convention; Section III addresses the obligations of the Respondent to prevent and punish genocide pursuant to Article I of the Convention; and Section IV responds to the Respondent's arguments on the specific intent (*dolus specialis*) required to show that the crime of genocide has been committed, and that the Respondent's approach to specific intent is misguided and overly narrow and is inconsistent with international practice and jurisprudence.

1.23 *Chapter 9* sets out the legal basis for Applicant's submissions concerning the responsibility of the FRY for violations of the Genocide Convention, responding to arguments advanced in The Respondent's Counter-Memorial and taking into account the developments that have occurred since the Memorial was filed (in particular the Court's judgment in the *Bosnia* case, decisions of the ICTY, and the additional body of eyewitness testimony and documentary evidence corroborating the allegations made in the Memorial). Section I addresses the mental element of the crime of genocide; the issues arising under the *actus reus* requirement in light of the Court's decision in the *Bosnia* case; and the conclusions Croatia asks the Court to draw on these questions by reference to the whole of the evidence now available. Section II

shows why, if the Court finds Serbia responsible for acts of genocide under Article III(a), it is not necessary to consider other forms of responsibility under Article III(b) to (e). Section III addresses attribution, demonstrating that it is "clearly established"[16] that the entities that committed the genocide were organs of the Serbian state, or that they were acting on the instructions of an organ of the State or under the effective direction and control of such an organ. Finally, Section IV sets out the basis for the Applicant's conclusion that the Respondent is responsible for the failure to prevent and punish the violations of Articles II and III of the Convention.

1.24 Part III of this Reply addresses the Respondent's Counter-Claim alleging that the Applicant has violated the Genocide Convention. It demonstrates that these claims are entirely without foundation and appear to have been made to further delay these proceedings; it is notable that the Respondent's allegations are restricted to Operation *Storm*, that no allegation of genocidal act is made in respect of matters occurring prior to this date, and that Chapter XII contains no allegations regarding the breaches of obligations under the Genocide Convention.

1.25 *Chapter 10* sets out the true factual account of the events that transpired up to the commencement of Operation *Storm*, necessitated to correct the unsatisfactory, incomplete and misleading "factual background" provided by the Respondent. Section I addresses a number of preliminary matters in relation to the Respondent's Counter-Claims. Section II sets out the facts, describing the Vance Plan and the conditions of the Croats living in the UN Protected Areas. It describes the failure of the rebel Serbs to comply with the Vance Plan from its inception, a fact that the Respondent admits. Section III describes Croatia's continuing efforts to arrive at a peaceful settlement with the rebel Serb leadership. Section IV describes Operation *Flash* and the events that followed.

1.26 *Chapter 11* responds to the Respondent's allegations that the Applicant committed Genocide during Operation *Storm* and thereafter, by *inter alia* deliberately driving persons of Serb ethnicity out of their homes and killing the Serbs who remained in the 'Krajina'. Section II describes Croatia's planning and preparation for the liberation of the occupied territories of Croatia and refutes the Respondent's claim that Croatia formulated and finalized a "genocidal plan" at a meeting of the military establishment of Croatia on the island of Brioni. Section III describes the final planning and preparation for Operation *Storm*, the conduct of the Operation and the participants. Section IV responds to the Respondent's allegation that the Applicant committed genocide through Operation *Storm* and thereafter. It describes evacuation plans made and executed by the rebel Serbs and shows there was no unlawful shelling of civilians; no forcible mass expulsion of Serbs from the 'Krajina';

[16] *Bosnia,* para. 209.

no systematic or widespread destruction of Serb property; and no targeting of Serbs thereafter.

1.27 *Chapter 12* shows that no genocide occurred against the Serbs in Croatia. The Applicant refutes allegations that its *de jure* organs committed genocidal acts or acted with any requisite genocidal intent to destroy a substantial part of the Serbs in Croatia. The Chapter refutes the axiomatic allegation that a genocidal plan or policy was adopted by the Croatian political and military leadership during a meeting on the island of Brioni on 31 July 1995, and the allegation that any inference of genocidal intent can be drawn from the manner in which Operation *Storm* was conducted, from events that are alleged to have occurred in its aftermath, or from the legislative and executive policies of the Applicant in relation to the return of the Serb civilian population of the Krajina, and the protection of their civil and political rights.

1.28 The Reply includes 215 *Annexes*, divided into those related to the Claim and those related to the Counter-Claim. The Annexes related to the Claim are set out in Volumes 2-4 and are divided into the following categories: (i) Witness Statements; (ii) Detained, Missing and Exhumed Persons Data; (iii) Military Documents; (iv) Domestic Criminal Prosecutions Documents; (v) UN Documents; and (vi) Other Documents. Annexes related to the Counter-Claim are set out in Volume 5.

CHAPTER 2

ISSUES OF PROOF

INTRODUCTION

2.1 This Chapter responds to arguments raised by the Respondent in Chapter III of the Counter-Memorial, taking into account recent international jurisprudence, including the Court's judgment in the *Bosnia* case. The issues addressed in this Chapter are as follows**:**

1. In relation to burden of proof, the Parties agree that the litigant seeking to establish a fact bears the burden of proving it. The Applicant submits however that the Respondent is under a duty to explain certain matters which occurred whilst it had control over the territory on which acts of genocide occurred and to disclose documents in its possession which have been requested by the Applicant as having a direct bearing on these proceedings (**Section I**);

2. In relation to standard of proof (**Section II**), and in the light of the Court's judgment in the *Bosnia* case, the Parties agree that:

    a. Claims against a State involving acts contrary to Articles II and III of the Convention must be proved by fully conclusive evidence such that the Court is fully convinced that the allegations are clearly established;

    b. A lower standard of proof applies in relation to violations of the duties to prevent and punish acts of genocide under Article I of the Convention, namely 'proof at a high level of certainty appropriate to the seriousness of the allegation';

    c. The Court can draw proof of genocidal intent from inferences of fact.

3. As regards methods of proof (**Section III**):

    a. The Respondent has made a range of sweeping and unjustified criticisms of the evidential material on which the Applicant relies in order to seek to persuade the Court that the material in question is inadmissible. The Applicant does not accept these criticisms for the reasons set out below and, in any event, notes that if the criticisms had any merit (which is denied), they

would go to the weight to be placed on that evidence, and not its admissibility. The Applicant also notes that Respondent has, in many instances, relied on similar sources in its Counter-Claim;

b. There is an issue as to the implications to be drawn by the Court from a failure by the ICTY to indict or convict individuals for acts of genocide, in the light of the Court's judgment in the *Bosnia* case. The Applicant's position is that the lack of ICTY indictments or convictions for genocide in relation to the conflict in Croatia is of no evidential significance.

SECTION I: BURDEN OF PROOF

2.2 It is well established that, in general, the applicant must establish its case and that a party asserting a fact must establish it. As the Court stated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*:

> "it is the litigant seeking to establish a fact who bears the burden of proving it"[1]

This principle is often referred to as the principle *actori incumbit onus probandi*. The Respondent refers to this principle in the Counter-Memorial.[2] The Respondent does not discuss further the principles which apply to the allocation of the burden of proof between the parties. As is clear from the presentation of its case in the 2001 Memorial, the Applicant accepts that the burden of proving its claim under the Convention rests on the Applicant.[3] The extent to which the Respondent is under an obligation to provide an explanation in respect of certain matters is addressed at the end of this Chapter.

SECTION II: STANDARD OF PROOF

2.3 In the *Bosnia* case, the Court held that:

> "The Court has long recognised that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive, *Corfu Channel (United Kingdom v Albania), Judgment I.C.J Reports 1949*, p. 17. The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have

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

[2] Counter-Memorial, para. 131.

[3] Chapter 8 generally and in particular paras. 8.07-17.

> been committed, have been clearly established. The same standard applies to the proof of attribution for such acts."[4]

2.4 In the *Corfu Channel* case the Court recognized that the gravity of the charge against a state was relevant to the determination of the required standard of proof:

> "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here."[5]

The Respondent has stated that the same standard of proof should apply in this case.[6]

2.5 The Applicant agrees that the appropriate standard of proof for the crime of genocide and the other acts enumerated in Article III of the Convention is that the crimes must be clearly established and that the same standard applies to the proof of attribution for such acts. As set out in the Memorial and in this Reply, the evidence presented by the Applicant clearly establishes that FRY/Serbia committed the crime of genocide during the genocidal campaign it conducted in Croatia.

(1) The Duties to prevent and punish genocide – different standard of proof

2.6 The Respondent appears to accept that a different standard of proof applies in relation to violations of the duties to prevent and punish acts of genocide under Article I of the Convention. Referring to the Court's judgment in the *Bosnia* case, the Respondent describes this as 'a sensitive distinction'.[7] In that case, the Court laid down a distinction between the standard of proof for establishing violations of Articles II and III of the Convention and violations of the obligations to prevent and punish genocide under Article I of the Convention:

> "In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation."[8]

2.7 The Court's language stands in contrast to its reference to the requirement for 'fully conclusive evidence' in relation to acts contrary to Articles II and III of the Convention. The Applicant agrees with the Court that a lower standard of proof is indeed appropriate, for the reasons set out below.

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[4] *Bosnia,* para. 209.

[5] *Corfu Channel (United Kingdom v. Albania),* Merits, Judgment, I.C.J. Reports 1949 (hereinafter referred to in this Reply as '*Corfu Channel* case'), p. 17.

[6] Counter-Memorial, para. 134.

[7] Counter-Memorial, para. 133.

[8] *Bosnia,* para. 210.

2.8 As the Court made clear in the *Bosnia* case, the duty to prevent genocide is an obligation of conduct not result.[9] It entails the duty to employ all means reasonably available to that state 'so as to prevent genocide as far as possible'. A breach of the duty occurs if the state manifestly failed to take all measures to prevent genocide which were within its power, and 'which might have contributed to preventing the genocide'. The Court referred to the notion of due diligence as being of critical importance in this regard. The duty arises at the moment when the state learns of or should have learned of a 'serious risk' that genocide will be committed.[10]

2.9 A breach of the obligation to prevent genocide therefore results from the failure to adopt and implement suitable measures to prevent genocide in circumstances where the respondent was aware, or should have been aware, of a serious risk that acts of genocide would be committed. The justification for applying a lower standard of proof for responsibility under Article I of the Convention arises from the special difficulty of proving the causality of omissions. The facts of this case easily meet this threshold, as addressed in Chapters 5, 6 and 9 of this Reply.

2.10 In relation to the Respondent's breach of duty to punish acts of genocide, it should be noted, as discussed in Chapter 9,[11] that Goran Hadžić remains at large, six years after being indicted by the ICTY Prosecutor, because of the failure of the Serbian government to cooperate with the ICTY by surrendering Hadžić for trial. Ratko Mladić also remains at large, 15 years after a warrant was issued by the ICTY. The lower standard of proof for demonstrating breach of the duty to punish is relevant and appropriate in this context.

(2) Inference: Proof of Special Intent

2.11 The Parties also appear to be in agreement that the Court, as confirmed in the *Bosnia* case, can draw proof of genocidal intent from inferences of fact.

2.12 The Respondent acknowledges in the Counter-Memorial that it is sometimes difficult to show by direct evidence the intent to commit genocide as the mental element of the crime.[12] The Respondent goes on to refer to the possibility, as confirmed by the Court in *Corfu Channel,*[13] of reliance on indirect evidence and drawing proof from inferences of fact. The Respondent notes that the standard of such proof to be applied in such cases is that of 'no room for reasonable doubt' which is equivalent to the standard applied by the ICTY under Rule 87A of the ICTY Rules of Procedure and Evidence which

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[9] *Bosnia*, para. 430.

[10] *Bosnia,* para. 431.

[11] *Infra*, at paras. 9.90-94.

[12] Counter-Memorial, para. 135.

[13] Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p.18 ('Corfu Channel case').

addresses the basis for a finding of guilt.[14] The Respondent then argues that this leads to the conclusion that the standard of proof in this case should be the same as the standard of proof in criminal proceedings, namely beyond reasonable doubt, the highest standard of proof that could be required in international litigation.[15]

2.13 In its Memorial, the Applicant stated that:

> "By reason of the very nature of the act of genocide, it 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 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." (paragraph 7.33)

The Applicant set out the basis for its argument that special intent could inferred in this case on the basis of a consistent pattern of events amounting to genocide:

> "In summary, the Serbian leadership, the FRY and the Republic of Serbia embarked on a campaign of territorial acquisition with the objective, not merely of establishing 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'), but also of eliminating from those areas as far as possible all or almost all members of the Croatian population.[16] The process involved the systematic and repeated commission of unlawful acts prohibited by Article II, with the specific intent of achieving the physical destruction and elimination of the Croatian population of the areas in question. Indeed, these genocidal actions were a necessary part of the policy as it had been conceived…"[17]

The Applicant then drew together the related factors which collectively provide overwhelming evidence of the intent required by Article II.[18]

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[14] Counter-Memorial, para. 136.
[15] Counter-Memorial, para. 137.
[16] For a Map of "Greater Serbia", see Memorial, paras. 2.76-77.
[17] Memorial, para. 8.03.
[18] Memorial, para. 8.16.

2.14 In the *Bosnia* case, Bosnia had argued that the existence of a genocidal intent could be deduced by the Court from 'objective circumstances': proof of the destruction, torture and cleansing of a large number of persons of the same ethnic and religious group, especially when replicated on a national scale and over a protracted period.[19]

The Court held as follows:

> "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*."[20] (emphasis added)

In relation to the test laid down by the Court: that the pattern of conduct would have to be such that it could *only* point to the existence of special intent, the Applicant submits that the evidence of a consistent pattern of conduct on the part of FRY/Serbia presented in the 2001 Memorial, as supplemented in this Reply, can only point to a specific intent to destroy in part that part of the Croat population of Croatia living in areas claimed as Greater Serbia.[21] On the basis of this evidence, it is clear that special genocidal intent has been clearly established.

2.15 The extent to which inferences may be drawn is illustrated by the approach of the ICTY in *Martić*, the Tribunal held that discrepancies in relation to evidence concerning how certain killings had been carried out were not material and did not affect its finding that the killings in question were committed.[22] This shows that if evidence is of overall sufficient weight, the existence of a number of discrepancies relating to that evidence does not prevent the Tribunal from making a finding based on the evidence as a whole.

2.16 A similar approach was adopted by the ICTY in relation to what might be described as incomplete evidence of a particular event. In *Martić,* the ICTY Tribunal held that in relation to exhumations at a mass grave it was sufficient that there was direct evidence in relation to the killing of 8 of the 14 victims in order to conclude that they had all been killed at the site and on the date in question.[23]

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[19] *Bosnia,* para. 8.
[20] *Bosnia,* para. 373.
[21] See Chapter 9, paras. 9.20-22.
[22] *Martić,* para. 215.
[23] *Martić,* para. 234.

SECTION III: METHODS OF PROOF

2.17 The Applicant presented extensive evidential material in its 2001 Memorial. This material included witness statements; the reports of UN bodies; forensic material obtained by UN sources and by Croatian intelligence services, including photographic and documentary evidence recording the findings made during the excavation of mass graves; copies of military orders and other official documentation; the findings of ICTY proceedings, press material and a range of other materials.

2.18 As confirmed in the Court's judgment in the *Bosnia* case, the evidence is pertinent and the Court must make own determination of the relevant facts. In its judgment in that case, the Court made reference to its earlier judgment in *Congo v. Uganda* in this regard (see below). The Respondent accepts that the Court must determine the relevant facts and that the Court has a duty to determine which materials have probative value.[24] The Applicant agrees that the Court must perform these tasks in this case.

2.19 In the *Bosnia* case, the Court noted that the case had 'an unusual feature' in that: "Many of the allegations before this Court have already been the subject of processes and decisions of the ICTY."[25] The unusual feature in that case is of course also present in these proceedings and the approach taken by the Court in *Bosnia* to the relevance and weight of the findings of the ICTY clearly has a direct bearing on many of the issues to be determined in this case, albeit that, to a large extent, the factual findings put before the Court in that case relate to different facts and events.

2.20 The Applicant will first address a number of general issues relating to methods of proof; it will then address the specific issues raised by relevant findings of the ICTY.

(1) General approach

2.21 The Court's general approach to evidentiary material is set out at paragraph 61 of its judgment in *Congo v Uganda*, to which the Court referred in *Bosnia*,[26] and to which the Respondent also makes reference in the Counter-Memorial:[27]

> "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

[24] Counter-Memorial, para. 138.
[25] *Bosnia,* para. 212
[26] *Bosnia*, para. 213.
[27] Counter-Memorial, para. 139.

> by the person making them... 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. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties."[28]

2.22 In the *Bosnia* case, the Court considered the approach to be taken to material other than that emanating from the ICTY, in particular reports from official or independent bodies giving accounts of relevant events, and held that:

> "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)."[29]

2.23 Among the materials put before the Court in the *Bosnia* case was the United Nations Secretary General's Report 'The Fall of Srebrenica'.[30] The Court considered how the report had been prepared and concluded:

> "The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it… the Court gained substantial assistance from this report."[31]

2.24 In this case, the Applicant has presented the Court with a range of material emanating from independent and authoritative sources. Individual sources are discussed below, but in general terms these materials can be considered to fall within the *Congo v Uganda* criteria and to fulfill the requirements set out by the Court in *Bosnia*.

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[28] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) Merits,* Judgment of 19 December 2005, ICJ Reports 2005 p. 35 ('*Congo v Uganda* case'), para. 61; see also paras. 78-79, 114 and 237-242.

[29] *Bosnia,* para. 227.

[30] Published November 1999, submitted to GA: UN Doc A./54/549, para. 228.

[31] *Bosnia*, para. 230.

(2) Relevance of findings of the ICTY

2.25 Since the Memorial was filed, numerous individuals have been indicted, prosecuted and tried for crimes committed on the territory of Croatia. The relevance of ICTY proceedings was considered by the Court in *Bosnia*. Subject to one *caveat,* the approach taken in *Bosnia* is adopted by the Applicant. The Court held that:

1. the conviction by the ICTY of an individual for the crime of genocide cannot be a pre-requisite to a finding by the ICJ of State responsibility for violations of the Genocide Convention;[32]

2. findings of fact by the ICTY following a contested trial are likely to be "highly persuasive" and the resulting verdicts and evaluations (as to, for example, the existence of the required intent) are also to be accorded "due weight";[33]

3. agreed statements of fact following guilty pleas, and any resulting sentencing judgments, are to be given a "certain weight";[34] and

4. no evidential weight is, however, to be accorded to the mere inclusion of a charge in an Indictment of the ICTY, or to a decision to confirm an Indictment, to issue a warrant, or to accept or reject an accused's motion for acquittal at the end of the prosecution case since none of these steps involves any definitive finding of fact.[35]

2.26 The Applicant agrees with each of these propositions and adopts them. There is, however, one aspect of the Court's approach in the *Bosnia* case with which the Applicant takes issue. The Court held that decisions of the Office of the Prosecutor of the ICTY ("OTP") not to include a charge of genocide in an Indictment or to amend an Indictment so as to exclude such a charge "may" be significant.[36] The Applicant does not accept that a prosecutorial decision of this nature should be accorded any probative value.

2.27 In particular, the Applicant submits that:

1. the only tangible significance of a decision by the OTP not to include a charge of genocide in an Indictment is that the Trial Chamber in any such case will not have been called upon to reach a determination as to whether the crime of genocide did, or did not, occur;

[32] *Ibid.,* paras. 180-182.
[33] *Ibid.*, paras. 220-223.
[34] *Ibid.*, paras. 224.
[35] *Ibid.,* paras. 218-219.
[36] *Ibid.,* para. 217.

2. there is no obligation on the OTP to charge the most serious crimes available on the totality of the evidence. The width of prosecutorial charging discretion is militates heavily against any attaching evidential significance to a decision of the OTP not to indict for genocide;

3. a wide range of factors may influence the OTP's choice of charges, which cannot have any material significance for the determination of the issues before the ICJ (save that, as a result, there will be no judicial determination of genocidal intent by the ICTY). These include the cost, length and manageability of proceedings, the difficulties of proving genocide when other serious charges are available carrying adequate penalties, the difficulties of identifying and apprehending individual perpetrators or those bearing command responsibility, and the availability of witnesses. As the ICTY has itself explained:

> "In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments."[37]

4. a decision made for any one of these reasons would be wholly devoid of evidential significance in proceedings before the ICJ under the Genocide Convention because it would have nothing to do with the question of State responsibility for a violation of the Convention. Serbia is liable for the conduct of its organs, whether or not it is possible to identify and prosecute particular individuals, or to prove that an individual commander necessarily shared the genocidal intent of those who framed the campaign;

5. even where the OTP has reached a considered evaluation that a particular event (or combination of events) did not amount to the crime of genocide, the significance of such an evaluation to proceedings before the ICJ must be minimal at best. The decision not to indict for genocide is an evaluation made the OTP (an executive body), rather than the ICTY (a judicial body). It is difficult to see why a negative

[37] *Prosecutor v Mucić et al,* Case No. IT-96-21, Appeals Chamber Judgment, 20 February 2001, p. 602. The appellant had argued that in his case there had been selective prosecution by the Prosecutor; the Appeals Chamber found that no evidence of a discriminatory or improper motive on the part of the Prosecutor and dismissed the appeal on this ground.

prosecutorial decision (that is, a decision *not to include* a charge of genocide in an Indictment) should bear any greater significance than a positive prosecutorial decision (a decision *to include* such a charge in an Indictment). The Court has held the latter to be of no evidential weight in reaching its own determination. This is because the mere inclusion of a charge in an Indictment does not involve any definitive finding of fact following a proper evaluation of the evidence. The same is of course equally true of an OTP decision not to include a charge of genocide in an Indictment, and the same result should follow;

6. there is no obligation on the OTP even to explain the reasons for a decision to exclude a charge of genocide in an Indictment. There is accordingly no basis for determining whether or not the OTP's decision was made as the result of a considered evaluation that a particular crime (or series of crimes) could not be proved to amount to genocide, or was made, or influenced by, any of the factors identified in paragraph 2.27(3), *supra*;

7. in addition, the ICTY is concerned with individual responsibility for particular crimes, not State responsibility for an accumulation of crimes. When considering whether to include a charge of genocide in an Indictment, the OTP may conclude that a particular crime can be proved against an identifiable individual, but that the facts of that crime, when viewed in isolation, do not prove beyond reasonable doubt an intention on the part of that particular accused to destroy a protected group in whole or in part. Proceedings before the ICJ under the Genocide Convention have an altogether wider focus, which can take account of the cumulative impact on a protected group of a series of crimes, systematically perpetrated on a large section of the population, over a wide geographical area, by a large number of individual perpetrators, some or all of whom cannot be identified or brought to justice before the ICTY for their part in the events. The ICJ is also subject to its own rules and principles governing evidentiary matters, including the burden of proof;[38]

[38] This issue was commented on by Vice-President Al-Khasawneh in his Dissenting Opinion, where he noted: "That the ICTY has not found genocide based on patterns of conduct in the whole of Bosnia is of course not in the least surprising. The Tribunal only has jurisdiction to judge the individual criminal liability of particular persons accused before it, and the relevant evidence will therefore be limited to the sphere of operations of the accused. In addition, prosecutorial conduct is often based on expediency and therefore no conclusions can be drawn from the prosecution's acceptance of a plea bargain or failure to charge a particular person with genocide. While the Court is intent on adopting the burden of proof relevant to criminal trials, it is not willing to recognize that there is a fundamental distinction between a single person's criminal trial-and a case involving State responsibility for genocide. The Court can look at patterns of conduct throughout Bosnia because it is not constrained by the sphere of

8. in consequence, the Court has before it additional evidence that was not available to the ICTY at the time the Prosecutors exercised prosecutorial discretion (and the Applicant believes may have even more as and when the Respondent complies fully with the Applicant's document request). The factual matrix is entirely different, since the Court is able to view the totality of the evidence, including the factual findings already made by the ICTY, and is in a far better position than the OTP to assess whether the totality of the crimes contemplated and committed disclose genocidal intent.

2.28 The Applicant's approach is supported by an article published in 2008 by Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR, criticising the Court's approach to this issue in the *Bosnia* case:

> "The problem with the Court's reasoning is that the question before it at that stage was whether genocide had occurred in Bosnia and Herzegovina, not whether genocide was committed by the relative handful of individuals who have to date been prosecuted by the ICTY. The ICTY does not have the resources or the mandate to investigate every possible charge of genocide arising out of the horrific crimes committed in Bosnia and Herzegovina since 1991. Furthermore, the ICTY was never judging whether genocide occurred at a given location or time, but rather whether an individual before it was responsible for a particular act of genocide or not. It is therefore inappropriate to draw inferences about whether genocide did or did not take place based on what the ICTY chambers have not found to be substantiated beyond a reasonable doubt, in respect of any given individual."[39]

2.29 In conclusion on the issue of the implications to be drawn from a lack of convictions, Goldstone states:

> "the availability or not of judgments before one tribunal should not be determinative of the outcome of proceedings before another independent body, especially if other sources of evidence or avenues of inquiry remain open, and least of all on a matter of this gravity and importance."[40]

2.30 Similarly in relation to the drawing of inferences from the absence of ICTY charges, Goldstone concludes:

> "Giving evidentiary weight to the Prosecutor's decision not to include a genocide charge in any given indictment, or to negotiate

operations of any particular accused-and it should have done so." *Bosnia*, Dissenting Opinion of Vice-President Al-Khasawneh, para. 42.

[39] See "Bosnia v Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", (2008) 21 *Leiden Journal of International Law*, pp. 95-112.

[40] *Ibid.*

> a plea agreement that involves withdrawing a genocide charge, is troublesome. First, the Prosecutor's decision not to charge genocide in an indictment may have nothing at all to do with the absence of evidence that genocide was committed in any particular situation. The evidence might indeed be conclusive as to the *actus reus* but wanting with regard to the criminal liability of the particular individual accused person or persons before the Tribunal. Second, crucial evidence may have been obtained from a state intelligence source under the provisions of Rule 70B of the ICTY Rules of Procedure and Evidence. Reference to such evidence in an indictment would thus be precluded. And, with regard to a plea agreement, the acceptance by the Prosecutor of a confession of guilt to a less serious crime than genocide might well be driven by the advantages of avoiding a lengthy trial or the unavailability of essential evidence. There might, indeed, be other weaknesses in the prosecution case that are unrelated to whether or not genocide was actually committed."[41]

2.31 In addition to the reasons put forward by Goldstone against placing particular weight on ICTY decisions not to prosecute/convict individuals for genocide, it should also be remembered that in 2004 the UN Security Council imposed a 'Completion Strategy' (sometimes referred to as an 'exit strategy') on the ICTY, calling on the Tribunal to conclude all its work by 2010 (appeals).[42]

2.32 The Respondent argues[43] that it is for the Applicant to decide what use to make of ICTY findings as the defendants were of Croatian nationality. The Applicant does not understand this comment, the nationality of particular defendants being tried before the ICTY is not, of itself, determinative of whether a state has committed genocide. The relevance of various findings of fact made by the ICTY is addressed further in Chapters 4, 5, 6 and 9.

2.33 The Respondent has also relied upon the statements and testimony of witnesses who have given evidence before the ICTY in *Prosecutor v. Gotovina et al.*[44] At the time of writing, there has been no judgment of the ICTY recording definitive findings of fact based upon that evidence, and no assessment of the reliability or accuracy of the factual statements on which Serbia relies. Accordingly, that testimony is of no greater evidential value than any other statement or testimony on which either party relies. It forms part of the material for the Court to consider, but it does not enjoy any special status. It will be for the Court to determine what weight, if any, to attach to that evidence.

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[41] *Ibid.,* pp. 106-107.

[42] See UN Security Council Resolution 1534 (2004), referring to earlier SC Resolution 1503 (2003); see also UN Security Council Resolution 1931 (2010) calling on the Tribunal to conclude its work 'expeditiously'.

[43] Counter-Memorial, para. 175.

[44] ICTY Case No IT-06-90 (judgment pending) ('*Gotovina et al'*).

(3) Admissibility of documentary evidence presented by the applicant

2.34 The Respondent seeks to persuade the Court that the documentary materials presented by the Applicant in its 2001 Memorial, including witness statements, are inadmissible. In particular the Court is asked to dismiss the evidence of several hundred individuals who were present during the conflict. The Applicant objects to this claim. Many of these were victims of atrocities themselves, or lost family and friends as a result of such atrocities. Many have given evidence on condition of anonymity, on the basis that they remain fearful of being publicly identified because of possible retaliation by individuals suspected of participation in the atrocities to which they have attested. In 2010, the vulnerability of witnesses giving evidence in relation to the conflicts in the former SFRY, including in relation to Croatia, remains an issue as recent decisions by the ICTY testify.[45]

2.35 Notwithstanding the sensitive position of these witnesses whose evidence has been presented by the Applicant, and rather than confine itself to challenging those parts of such evidence which it disputes as a matter of fact, the Respondent seeks to exclude, in its entirety, the testimony of people directly and personally involved in the events which have given rise to this claim.

2.36 The Respondent's first legal basis for making such an argument is that the documents "are not relevant in this case" (sic).[46] The Respondent asserts that only a small number of the statements contain direct knowledge about offences which constitute the *actus reus* for genocide.[47] The Applicant does not accept this characterization of the evidence presented (see further Chapters 5 and 6 of the Reply); but, in any event, that more properly goes to the probative weight to be attached to that individual's evidence and not to the admissibility of the witness statements taken as a whole. Each witness statement must be considered individually and on its own merits if it is alleged that such a statement is so lacking in relevance as to be inadmissible. This Serbia has not done.

2.37 In its judgment in *Corfu Channel*, the Court held that statements attributed by the witness to third parties can be regarded only as allegations falling short of conclusive evidence, but proof may be drawn from inferences of fact provided they leave no room for doubt[48]. The issue of inference has already been discussed above, but this approach of the Court confirms that the issue is one of weight, not admissibility.

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45 See, for example, the recent decision in *Prosecutor v. Šešelj*, IT-03-67-R77.2, Appeals Chamber Judgment, 19 May 2010, confirming the conviction of Vojislav Šešelj for contempt in respect of the disclosure of information regarding three witnesses.

46 Counter-Memorial, paras. 144-149.

47 Counter-Memorial, para. 145.

48 *Corfu Channel* case, pp. 17-18.

2.38 A characteristically sweeping approach is also to be found at paragraph 147 of the Counter-Memorial, where the Respondent makes the broad claim that 'not one' of the other documents annexed to the Memorial, including military documents and statements of high-level Serbian and Yugoslav officials, 'contains facts that provide proof establishing the legal elements of the crime of genocide'. The Applicant notes that the Respondent does not attack these documents on the basis of any supposed inauthenticity. The authenticity of those materials is therefore presumably accepted. The Applicant cannot respond to criticisms of evidence which are so generalized as to constitute no more than a general denial of the Applicant's case. In those circumstances, the Applicant submits that the Court can only proceed to weigh the probative value of individual items by reference to the details of the claim. The Respondent simply has not presented any sound basis for dismissing this evidence in its entirety.

2.39 In sum, the Applicant invites the Court to reject Serbia's argument. The Respondent's criticisms of the Applicant's evidence as to the role of the JNA at the Croatian battlefront[49] are addressed in Chapter 4 of this Reply, which refers to relevant findings of the ICTY.

2.40 The Respondent's second basis for attacking the evidence presented by the Applicant is that the witnesses are not 'disinterested' in the outcome of this case.[50] By this the Respondent is apparently referring to the fact that the witnesses were directly involved in the conflict.[51]

2.41 The Applicant would note here that the Court's comment in its judgment in the *Nicaragua* case cited by the Respondent simply refers to the 'superior credibility' of evidence obtained from those who are 'disinterested' in the sense of not being party to the proceedings and who have nothing to gain or lose from its outcome.[52] Thus the citation does not support the proposition that evidence which does not come from such sources must be inadmissible, simply that it may be of less credibility. These witnesses are not parties to the case and there is no evidence that any of these individuals stand to gain materially from the outcome of the case as implied from the reference to possible reparations: it is misconceived and without foundation for the Respondent to assert that the witnesses have an individual financial interest in these proceedings. Moreover, the ICTY has specifically stated that: "It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused."[53]

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[49] Counter-Memorial, para. 148.
[50] Counter-Memorial, paras. 150-152.
[51] Counter-Memorial, para. 151.
[52] *Nicaragua* case, para. 69.
[53] *Prosecutor v. Tadić*, IT-94-1, Trial Chamber Judgment, 7 May 1997, para. 541.

2.42 The Respondent's third basis for arguing that the Applicant's evidence is inadmissible relates to the alleged lack of fulfillment of minimum evidentiary requirements.[54] The Respondent asks the Court to dismiss as inadmissible 'a large majority' of the witness statements on the basis that they were either not signed or were not taken by 'an authorized domestic organ' or by a procedure that would guarantee 'minimum procedural safeguards'. The Respondent is factually incorrect in its assertion: 72 of the original witness statements were taken in court proceedings, during the course of which the witness was warned (in the usual way, for both Croatian and Serbian courts) that he or she must tell the truth and that failure to do so would be an offence. The Respondent's assertion is also legally incorrect: as the ICTY has recently made clear,

> "There will be no blanket prohibition on the admission of evidence simply on the grounds that the purported author of that evidence has not been called to testify. Likewise, the fact that a document has neither a signature nor a stamp is not in itself a reason to find that the document is not authentic."[55]

2.43 In any event, the Applicant has now obtained confirmatory witness statements from 188 of the original witnesses which were the subject of criticism by the Respondent, verifying (in the presence of a police officer) that their original statements were truthful;[56] a further 106 are now deceased. In addition, the Applicant has obtained confirmatory witness statements in relation to many of the further statements relied upon in this Reply.[57] There is accordingly no merit in the Respondent's contention that the evidence relied upon by the Applicant in the Memorial is inadmissible.

2.44 The Respondent frequently asserts that evidence relied upon by the Applicant is hearsay and is accordingly not capable of supporting the Applicant's case.[58] The Respondent's argument is misconceived. The jurisprudence of the principal international criminal courts and tribunals makes it clear that hearsay evidence is relevant and admissible, and should be assessed in the light of its content and circumstances in which it was obtained.[59]

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[54] Counter-Memorial, paras. 153-158.

[55] *Prosecutor v. Karadžić*, IT-95-5, Decision on Guidelines for the Admission of Evidence Through Witnesses, 19 May 2010, para. 25; and see in similar terms the Decision Adopting Guidelines on the Standards Governing the Admission of Evidence in *Martić*, 19 January 2006, Annex A, para. 5. The *Martić* Decision also comments that: "Parties should always bear in mind the basic distinction that exists between the admissibility of documentary evidence and the weight that documentary evidence is given under the principle of free evaluation of evidence. The practice will be, therefore, in favour of admissibility."

[56] See Annex 30, in which the statements appear in the same order as in the original Annexes to the Memorial.

[57] The confirmatory witness statements appear immediately behind the original witness statement of each witness.

[58] See, for example, Counter-Memorial, paras. 730, 743 and 758.

[59] *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on

2.45 The Respondent also appears to be critical as a matter of principle about the fact that only one witness gives evidence in relation to certain incidents.[60] Any such criticism is unsustainable: Rule 63(4) of the Rules of Procedure and Evidence of the International Criminal Court specifically provides that "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court…."[61]

2.46 The Respondent also raises the issue of whether the Applicant will seek to present oral evidence at the hearing and argues that this would be impracticable.[62] The Applicant is currently reviewing whether or not to call non-expert witnesses at the oral hearing and, if it decides to do so, will provide notice to the Registrar in sufficient time, in accordance with Article 57 of the ICJ Rules of Court.

2.47 In relation to the Applicant's references to press reports and extracts from books, the Respondent argues[63] that these are secondary sources of evidence which do not support any other sources of primary evidence and which, in the light of the Court's judgment in the *Nicaragua* case must be treated with 'great caution'.[64] The Respondent also argues that the material does not offer any information on the required legal elements of the crime of genocide.

2.48 Once again, the Respondent resorts to sweeping unsubstantiated criticism in an attempt to dismiss an entire category of the Applicant's evidence. The Applicant would argue that the items must be considered individually on their own merits or, at the very least, much more narrowly and that in no case has the Respondent shown any convincing basis for excluding the material altogether, whatever view it takes of relevance or probative weight.

2.49 To take a few examples only, the Applicant has cited extensively from the official weekly newspaper of the JNA, *Narodna Armija* (People's Army). The articles published in the *Narodna Armija* were written in a tone that reflected the official policy of the JNA and its understanding of Yugoslav unity. The newspaper's main task was to inform the JNA about the current situa-

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Admissibility of Evidence, 16 February 1999, para. 15; *Prosecutor v. Blaškić,* IT-95-14, Trial Chamber Judgment, para. 36; and *Prosecutor v. Galić*, Case No. IT-98-29, 7. June 2002, para. 27.

[60] See, for example, para. 661

[61] The principle has also been consistently expressed in the case law of the ICTY: see, for example, *Prosecutor v. Tadić*, IT-94-1, Trial Chamber Opinion and Judgment, 7 May 1997, paras. 535-539, concluding that "there is no ground for concluding that this requirement of corroboration is any part of customary international law and should be required by this International Tribunal"; *Prosecutor v. Delalić et al*, IT-96-21, Trial Chamber Judgment, 16 November 1998, para. 594; *Prosecutor v. Kupreškić,* IT-95-16, Appeals Chamber Judgment, 23 October 2001, para. 33.

[62] Counter-Memorial, para. 158.

[63] Counter-Memorial, paras. 159-162.

[64] *Nicaragua* case, para. 62.

tion within the army and the state itself, as well as internationally. Moreover, the JNA used the *People's Army* to wage its propaganda war against Croatia and, in 1992, against Bosnia and Herzegovina too. The paper used to report regularly on the activities of the SFRY Presidency and the Federal Executive Council. It published information concerning defence issues that was made available by those bodies. This practice became increasingly common from mid-1990 and especially from 1991. The articles referred to by the Applicant deal with issues including: the deployment of the JNA during the conflict;[65] the aggressive stance of the JNA towards Croatian civilians;[66] the use of derogatory language to refer to Croats ("vampire Ustashas") by senior military figures in the JNA;[67] the relationship between the JNA and TO forces and the support offered to rebel Serbs by the JNA.[68] This publication was published by the state for the purposes of informing and influencing an official organ of the state, the JNA. As such, it is of significant probative value as to official policy during the conflict, the policies, attitudes and operational stance of the JNA during the conflict and provides a contemporaneous commentary on some of the events on which this claim is based.

2.50 A further example of the use of published material is the Applicant's references to the published memoirs of Boris Jović, former Chairman of the Presidency of the SFRY and close associate of Milošević.[69] So far as the Applicant is aware, Mr Jović has not retracted the statements made in his book, which provide very strong evidence, originating from a very senior source, in support of the Applicant's case.

2.51 In relation to these and all similar materials, the Applicant submits that relevance is a matter for individual determination by the Court in each case, having regard to the proposition in support of which the material is adduced. It should be noted that the Court in *Nicaragua* stated that this type of material (reports in press articles and extracts from books) could "contribute in some circumstances to corroborating the existence of a fact i.e. as illustrative material additional to other sources of evidence."[70] In the case of *Narodna Armija,* this material is more than merely illustrative being an official publication produced by the state for the purposes of informing the policies and actions of a state organ, the JNA. Furthermore, as also confirmed by the Court in *Nicaragua*, 'press information' can also be relied on as evidence of public knowledge of a fact.[71]

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[65] See, for example, Memorial, para. 3.76, footnote 176.

[66] Memorial, para. 3.78, footnote 178.

[67] See Memorial para. 3.39, footnote 94; see also para. 3.75 footnote 173 (sensationalist descriptions of 'Ustasha' plots to murder Serbs).

[68] Memorial, para. 3.82, footnote 193 (area held by JNA while rebel Serbs administrations being formed).

[69] Boris Jović was cited before the ICTY proceedings against Milošević as participating in a joint criminal enterprise with Slobodan Milošević and others in relation to the conflict in Croatia, but he has not yet been indicted by the ICTY: *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Second Amended Indictment, 27 July 2004 (*'Milošević'*).

[70] *Nicaragua* case*,* para. 62.

[71] *Ibid.,* para. 63.

2.52 In relation to the provenance of certain maps, photos, lists and graphics presented in the Memorial, the Respondent seeks to argue that these are inadmissible because they are presented without information on provenance.[72] These materials have been prepared by official Croatian agencies to assist in the comprehension of material presented by the Applicant. This has no impact upon their admissibility, which cannot be properly disputed.[73]

2.53 Further, in relation to the photograph displayed at Plate No 13 showing Slobodan Milošević and Arkan attending the funeral of Badža in April 1997, the Applicant notes that the Respondent does not seek to claim that the photograph is not authentic or has been doctored in any way. As to the conclusions to be drawn from the photo, this is a matter for determination by the Court and not an issue of admissibility (as is the position for all such material relied upon by the Applicant).

2.54 The material relating to camps has been confirmed by the International Committee of the Red Cross.[74] An updated list of missing persons is annexed at Annex 41.[75] An updated list of detained persons is annexed at Annex 42.[76] It is also of considerable importance that, on 27 and 28 July 2010, a meeting on missing persons was held in Belgrade between the Commission for Missing Persons of the Government of Republic of Serbia and the Commission for Detained and Missing Persons of the Government of Republic of Croatia, under the auspices of the International Committee of the Red Cross and the International Commission on Missing Persons. One of the issues addressed was the question of those detained on the territory of the Respondent. In respect of this issue**,** representatives of the Respondent gave to the Applicant' representatives a list of 2786 persons who were detained in Republic of Serbia in the period 1991-1992.[77] This is a critical and welcome admission by the Respondent that thousands of Croats were detained in several prison camps on Serbian territory. The names included on the list of detained persons received from Serbia accord with the names on the list of detained persons form Memorial. Documents concerning JNA orders to set up camps (and sub-orders) are annexed to this Reply.[78]

[72] Counter-Memorial, paras. 163-167.

[73] See further, footnote 56, *supra*, citing the Decision Adopting Guidelines on the Standards Governing the Admission of Evidence in *Martić*, 19 January 2006, Annex A, para. 5. As to material emanating from official Croatian agencies, see *infra*, para. 2.55 *et seq*..

[74] See for example copies of ICRC certificates recording information on detained persons at camps at Morinj, Knin and Manjača: International Committee of the Red Cross, Registration Certificate for D.Š., 3 January 1996, Annex 31; International Committee of the Red Cross, Registration Certificate for Z.T., 19 February 2009, Annex 40; and International Committee of the Red Cross, Registration Certificate for T.L., 3 April 1998, Annex 34.

[75] Updated List of Missing Persons, 1 September 2010, indicating a total of 1024 missing persons, Annex 41.

[76] Updated List of Persons Detained in Camps under Serbian Control on the Territory of the FRY, BH and Croatia, 1 September 2010, indicating a total of 7708 missing persons, of whom 2866 were registered by the ICRC, Annex 42.

[77] Serbian List of Persons Detained on the Territory of Serbia, Annex 47.

[78] JNA, 5th Corps., Order to set up Camp Manjača, 13 September 1991, Annex 52, and JNA,

2.55 As to the status of material provided by Croatian official bodies,[79] criticized by the Respondent for not being 'impartial', again this is a matter on which the Court must reach a view on an individual basis, but there is no possible basis for the exclusion as inadmissible of any material emanating from the official bodies of a party, nor does the Respondent cite such basis. Indeed the Respondent simply claims that these materials should be 'taken with great reserve'.

2.56 In relation to the alleged lack of impartiality it should be noted that, in relation to the Office for Detained and Missing Persons, that body works closely with independent international organizations, including the ICRC, which in 2006 decided to transfer responsibility for the processing and management of data relating to persons reported missing in connection with the armed conflicts on the territory of the Republic of Croatia between 1991 and 1995 to the Croatian Red Cross.[80] International organizations and agencies including the Office of the UN High Commissioner for Human Rights, the ICTY, the OSCE and the Observation Commission of the European Community were invited to send expert observers to observe the exhumation of mass graves in Croatia.[81] The high standing of the Office for Detained and Missing Persons is also confirmed in a letter from Carla del Ponte, Prosecutor of the ICTY dated July 2002 which expresses gratitude for the 'efficient, professional and co-operative manner' in which exhumations were conducted by the Office, under the direction of Colonel Grujić.[82] An indication of the degree of cooperation between the Croatian authorities, international bodies including the ICTY and the Serbian authorities is provided by a report of an exhumation dated 17 October 2006 attached at Annex 39.[83] This report indicates the presence of not only a number of representatives of relevant Croatian agencies, including the Office for Detailed and Missing Persons, but also a representative from the ICTY and from the International Commission for Missing Persons, together with Serbian governmental representatives.

2.57 It should also be noted that the Serbian authorities allowed only limited access to international humanitarian organisations, including the ICRC, and did not allow Croatian authorities to have access to the burial sites of bodies of Croatian nationals in areas under their control: see, for example,

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5th Corps., Order to set up Camp Stara Gradiška, 7 January 1992, Annex 75.

79 Counter-Memorial, para. 167.

80 Memorandum of Agreement Between the Government of the Republic of Croatia, and the International Committee of the Red Cross, to Define the Roles and Responsibilities of the Government of the Republic of Croatia and the International Committee of the Red Cross in view of the Transfer of the Competence for the Management of Data on Missing Persons in the Armed Conflicts on the Territory of the Republic of Croatia, 28 July 2006, Annex 38.

81 Letters from the Commission for Detained and Missing Persons inviting the ICTY Liaison Office, the UN High Commissioner for Human Rights, the OSCE Mission to the Republic of Croatia and the Observation Mission of the EC to Send Observers to the Exhumation of Mass Graves, 27 February 1997, 9 April 1998 and 7 July 2000: Annex 35. Also the Joint Serbian, Croatian and International Monitors Record for Marinovci Farm dated 26 March 1997, Annex 33.

82 Letter from the ICTY OTP to the Republic of Croatia, dated 25 July 2002, Annex 36.

83 Gospic County Court Exhumation Record Kir-113 04, dated 17 October 2006, Annex 39.

the Report on the Work of the Commission for Detained and Missing Persons dated 29 October 1996, concerning the Serbian failure to cooperate with exhumations of mass graves at Ovčara.[84] Even the international humanitarian organizations, including the ICRC, were allowed only limited access.[85] In relation to the report produced by the Ministry of Culture, it should similarly be noted that the Ministry could only investigate areas under Croatian control as it did not have access to other areas.[86]

2.58 Finally, it should be noted that it is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established and the Court may take into account any statements made by *either* party that bear upon the issue, and may accord them such legal effect as may be appropriate.[87]

(4) The Respondent's Approach to Proof

2.59 Having invited the Court to dismiss the Applicant's evidence in its entirety, the Respondent turns to the question of its own general approach to methods of proof, including in relation to the counterclaim.[88] The specific points it raises are considered under specific headings in this Reply, but in relation to the general approach, it is worth noting that the Respondent "states its willingness to discuss reaching an agreement on relevant facts" with the Applicant.[89] The Respondent goes on to state that any such agreement must be relevant not only to the suffering of Croats during the conflict but also to facts relevant for the suffering of Serbs in Croatia.

2.60 The Respondent argues that the Court should follow the same approach to methods of proof in these proceedings as it adopted in *Bosnia*.[90] The Applicant agrees, subject to the following observations: (1) the approach to be taken to the Applicant's request for the Respondent to produce documents should be considered in light of the Applicant's submissions at paragraph 2.85 *et seq.*, *infra*; (2) the approach to ICTY prosecutorial decisions should be considered in light of the Applicant's submissions at paragraphs 2.25-33, *supra*, and Chapter 9, paragraphs 2.25-33, *infra*.

2.61 The Respondent refers to the proceedings before the ICTY including *Gotovina et al* in which the trial is under way. The Respondent states that it intends to rely on transcripts from the case which contain witness testimony and states that these relate to 'first hand experiences of impartial persons who

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[84] Annex 32.

[85] *Ibid.*.

[86] Ministry of Culture, Damage to Cultural Property on Croatian Territory, Memorial Appendices, Vol 5, Appendix 7.

[87] *Bosnia*, para. 378, citing *Nuclear Tests (Australia* v. *France), Judgments, I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff. and *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 38-39.

[88] Counter-Memorial, paras. 169-173.

[89] Counter-Memorial, para. 171.

[90] Counter-Memorial, para. 174.

were in the direct position to get knowledge about the key events.'[91] The Respondent also intends to rely on documents admitted as evidence in that case and refers to the international monitoring missions, UNMO and ECMM.

2.62 The Applicant will address the substantive issues arising from this evidence later in the Reply (see Chapters 9 and 12). In any event, it is clear that each Party can rely only on evidence that is actually available to it. In 2001, there were no ICTY judgments relating to the conflict in Croatia on which the Applicant could rely in support of its case. To the extent that there were international monitoring missions, the Applicant has submitted evidence from these which relates to the events on which its claim is based.

2.63 The Respondent refers to other documents on which it seeks to rely.[92] These include statements from officials and press reports.[93] In relation to its own claim therefore, the Respondent is content to rely on types of evidence including press reports and official statements, which it has invited the Court to dismiss as inadmissible when relied on by the Applicant.

2.64 In the Counter-Claim, the Respondent lays great emphasis on the transcript of a meeting which took place on Brioni island and was attended by the senior-most Croatian military personnel, the so-called 'Brioni minutes'.[94] The Applicant will address the substantive arguments raised by the Respondent in respect of this material later in Chapter 11 of the Reply. In relation to the status of the transcript as a method of proof however, the Applicant's position is that the Respondent has made selective use of the minutes and asks the Court to make unjustified and improper inferences from them.

2.65 The Respondent also relies on the Report of the Croatian Helsinki Committee for Human Rights ('CHC Report')**.** A preliminary analysis of the data in the CHC Report was carried out by the Croatian Directorate for Detained and Missing Persons, with the aim of verifying its reliability and accuracy. An analysis of the lists from Report "Military Operation "Storm" and It's Aftermath" was carried out by comparing the data in the Report with official records and documentation.[95] This comparison broadly identified the following significant methodological flaws and mistakes:

1. The biographical details essential for identification are inaccurate or incomplete for a large number of those said to be killed. (e.g. wrong name, name of fathers, wrong dates of birth/death, wrong location). In a number of cases, only the victims' name is provided

[91] Counter-Memorial, para. 177.
[92] Counter-Memorial, paras. 178-183.
[93] Counter-Memorial, para. 181.
[94] Counter-Memorial, para. 179 and its Annex.
[95] Counter-Memorial, Annex 61, CHC Report was compared with the Applicant's official records and documentation.

further complicating the process of comparison with other data, and definite identification.

2. Mistakes in characterising members of the SVK and paramilitary formations as civilians.

3. Mistakes or disparities in relation to the details regarding the circumstances of deaths. The CHC lists all persons as "killed," whereas official records and documentation provide differently *e.g*. a number of individuals on the List appear to have died from natural causes, accidents, or were combatants who are missing and so on. [96]

2.66 So far as the *Krajina Serbs Centre for Collecting Documents and Information ('Veritas'*) list is concerned,[97] the Applicant does not consider this organization to be neutral and independent, particularly if account is taken of the duties and tasks of its head, Savo Štrbac. Mr Štrbac was Secretary in several 'Governments of the Republika Srpska Krajina', under which ethnic cleansing of the non-Serb population in that area was carried out. This fact alone calls into question his neutrality and objectivity in the presentation of facts about the events and victims of the war.[98]

2.67 The list of Serb casualties declared by *Veritas* in August 2005 to be victims killed by the Croatian armed forces is evidence of Mr Štrbac's lack of objectivity and his readiness to manipulate the presentation of events of and facts about the Homeland War. As will be elaborated on in the Chapters that follow, the *Veritas* List contains various discrepancies, mistakes and methodological flaws. By way of example only, it lists as dead or missing individuals who are either still alive or were alive when the list was published, individuals whose death was unconnected to the military operation, (including individuals who died in accidents or through natural causes): see further, Chapter 11, paragraph 11.68. While an analysis of the List is ongoing, the Croatian Memorial-Documentation Centre of the Homeland War has established that numerous claims in the list that are false.

2.68 Likewise, Mr Štrbac is morally discredited by statements during the trial of Nikola Gagić, a soldier of the 'Serb Army of Krajina' in which he acted as counsel for defendant. Nikola Gagić was tried for the murder of two elderly and unarmed civilians of Croatian nationality in their house in November 1991. Mr Štrbac asked that the defendant be acquitted because, among other things: "he committed the crime against persons whom he quite well-foundedly regarded as members of the other party to the conflict and a soldier can never be held accountable for murdering the enemy". "In this regard"

[96] Chapter 11, para. 11.92.
[97] Counter-Memorial, para. 180; Annex 66.
[98] See also Chapter 11, para. 11.81.

continued Mr Štrbac, "it is of no significance that the victims were civilians because this was a civil war and enemy territory". He goes on to conclude the following: "It is obvious that the first-instance court neglected those issues and based its conclusions, on peacetime instead of wartime circumstances which, when it comes to the crime of murder, essentially change the notion of wrongfulness."[99]

2.69 The Respondent also repeatedly criticises the Croatian criminal justice system.[100] That criticism is misplaced, as is apparent from a number of sources (the Applicant notes at this juncture that the Court ought to consider the full context of all material relied upon by the parties, including any explanation of that material arising from subsequent documents or information):

1. On 13 October 2006, an Agreement on cooperation in prosecuting of perpetrators of war crimes, crimes against humanity and genocide was signed between Chief State Attorney of the Republic of Croatia, Mladen Bajić and the War Crimes Prosecutor of the Republic of Serbia, Vladimir Vukčević (the agreement entered into force on signature). This Agreement provides:

   > "Provisions of this agreement shall be applied for the criminal proceedings for war crimes committed on the territory of the Republic of Croatia, against the citizens of the Republic of Croatia and the Republic of Serbia by perpetrators residing and/or possessing the citizenship of the Republic of Croatia or the Republic of Serbia.
   >
   > Cooperation in the exchange of evidence and other information in war crime cases is possible during the entire criminal proceeding up to the moment of rendering of the final verdict by the competent court of the participating country."

   The Agreement goes on to provide for the request and transfer of information relevant to war crimes proceedings, crimes against humanity and genocide.[101]

   At least from the date on which the Cooperation Agreement was signed and entered into force, it is difficult to see how the Respondent can maintain the position that criminal proceedings for war crimes, crimes against humanity and genocide in Croatia are inherently flawed or unfair given that government of Serbia has committed itself to cooperating in such proceedings.

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[99] HR-HMDCDR, Supreme Martial Court, II K No. 111/92, 7 May 1992, Decision, box 5011.

[100] Counter-Memorial, paras. 184-186.

[101] Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes Against Humanity and Genocide Between the Chief State Attorney of the Republic of Croatia and the War Crimes Prosecutor of the Republic of Serbia, 13 October 2006, Annex 81.

2. A recent OSCE Report on war crimes proceedings in Croatia, dated 27 October 2009, states that:

> "One should also consider the visible results achieved by Croatia in the last 10 years through the assistance and the active field monitoring of the OSCE. Significant improvements were attained in the field of war crimes prosecution. Croatia, like other States in the region, is conscious of its obligations under international law and continues working towards judicial addressing of war incidents as comprehensively as possible. Decisions and steps taken, including the prosecution of high-ranking generals and civilian authorities, were not easy. Out of six items on the agenda of the Plenaries with the Minister of Justice, two only remained as main issues at the beginning of 2009: *in absentia* convictions and serious unprosecuted war crimes. The issues of adequate defence, inter-State regional co-operation, integrity of witnesses and use of video-link were considered completed or referred to the technical level. The important process of systematic revision of *in absentia* verdicts from the early 1990s that took place during this year, made the discussion in the Plenaries almost completed with one only main remaining item: the need for re-invigorated efforts to pursue serious unprosecuted war crimes…"[102]

3. In May 2009, the English High Court refused to set aside an extradition decision concerning a Serb convicted in absentia of war crimes by a Croatian court, who then fled to the UK, *Milan Španović v Government of Croatia and Secretary of State for the Home Department.*[103] One of the grounds on which Mr Španović resisted extradition was that he would receive an unfair trial because he was an ethnic Serb (as the High Court confirmed, he was entitled to a retrial in Croatia, having been convicted in absentia). The High Court found that he would get a fair trial, notwithstanding that he was an ethnic Serb. The Court concluded that:

> "the criminal law and procedure of Croatia, if applied to the re-trial of the appellant is well able to provide him with a fair trial"[104]

> "On the material before us, we are satisfied that Croatia

[102] OSCE Status Report on Mandate-related Developments and Activities, 27 October 2009, p. 2.
[103] [2009] EWHC 723 (Admin), judgment of 15 May 2009.
[104] *Ibid.,* para. 66.

> will provide a fair trial to the appellant, even though he is a person of Serbian ethnicity accused of war crimes against Croatians."[105]
>
> The High Court also noted that from 1993 to 2006 the Croatian Supreme Court had dealt with 263 cases of war crimes, not one final judgment of which had been challenged before the European Court of Human Rights.[106]

2.70 The Respondent has stated that it will challenge the credibility of the findings of the Croatian courts on two grounds: first that Croatian courts apply a definition of genocide which is not fully in accordance with the 1948 Genocide Convention and second that procedurally, trials before Croatian courts have been characterized by 'a lack of impartiality and fairness'.

2.71 In relation to the definition of genocide applied by Croatian courts, the Respondent states that the definition 'largely reiterates' the definition contained in Article 2 of the Convention but expands that definition to include 'forcible population displacement.'[107] The Respondent argues that such a definition is inconsistent with the Convention and with recent case-law of the Court and the ICTY. It is correct that the Croatian Criminal Act includes within the definition of genocide "forcible population displacement". It should, however, be noted that this definition was inherited from the SFRY's penal legislation[108] and the same definition was, until 2006, included in the Respondent's legislation.[109] It should also be pointed out that a similar extension of the definition of genocide has been included in the legislation of numerous other countries.[110]

2.72 Furthermore, as the Court specifically held in the *Bosnia* case: ethnic cleansing can occur in parallel with acts of genocide "and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts." [111] The key mental element is the special intent of the perpetrator and, under Croatian law, it must be shown that the alleged perpetrator intended to destroy in whole or in part a national ethnical, racial, religious group.

2.73 Accordingly, in relation to *Koprivna* case which the Respondent re-

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[105] *Ibid.,* para. 69.

[106] *Ibid.*, para. 68.

[107] Counter-Memorial, para. 187.

[108] See Art. 119 of the OKZRH (Basic Criminal Act of the Republic of Croatia), Official Gazette, no. 53/91 and its amendments published in the Official Gazette, nos. 39/92 and 91/92. Except for minor lexical changes, the same definition was incorporated into the Criminal Act of the Republic of Croatia of 19 September 1997. See Extracts from Criminal Codes of the SFRY, Serbia and Croatia, Annex 91.

[109] *Ibid.*.

[110] Such as Bolivia, Estonia, Ethiopia, Italy, Costa Rica, Lithuania, Nicaragua, Ivory Coast, Paraguay, Russia, Salvador, Slovenia, Spain and to a certain extent Armenia, which treat forcible repopulation as a genocidal act.

[111] *Bosnia,* para. 190.

fers to[112] it is not correct to say that a conviction of this kind under Croatian law could not also constitute a violation of the Convention itself. It is correct that in the *Koprivna* case the defendants were convicted on the basis of "forcible population displacement", in accordance with Croatian legislation. This, however, does not mean that, in the case in question, there was no *actus reus* within the meaning of Article II of the Genocide Convention, as the Respondent claims in the Counter-Memorial.

2.74 In relation to the *Velimir* case of September 1996, the judgment in which is attached to the Counter-Memorial, the Respondent seeks to show that the court was not entitled to convict for genocide. The Applicant refutes the criticisms made by the Respondent and refers to a signed statement presented by Judge Melita Avedić in which the Judge notes that:

> "The main hearing was held in the presence of the defendant Jakov Velimir, who, during the main hearing, confessed to committing the crimes he was charged with.
>
> Besides the defendant's confession, the Court also inspected the substantive evidence in the form of a permit number 224, issued by " the Serb Army of Krajina - 39th Corps", clearly showing that the defendant was the member of so called " the Serb Army of Krajina" and from "revers - personal issue" it is clear that he was a First Sergeant issued with weapons and ammunition.
>
> Taking into consideration that the defendant confessed to the crime as well as mentioned substantive evidence, the Council of the County Court in Sisak found the defendant guilty and sentenced him to aforementioned prison sentence."[113]

2.75 In relation to the 2004 OSCE Mission Report on Croatian Domestic War Crimes Trials,[114] the Respondent includes a citation in which it is stated that the crimes prosecuted as genocide before the Croatian courts 'were not of the gravity usually associated with verdicts of international tribunals ascribing genocidal intent' and the report goes on to state that a qualification of the 'expulsion cases' as constituting war crimes appears more appropriate. As discussed above, later reports are very positive about the progress made in addressing issues identified as having arisen in the early 1990s.

2.76 In relation to the *Svetozar Karan* case, also referred to by Serbia,[115] it is important to point out that the President of Gospić County Court reported the judge in that case, Judge Branko Milanović, for disciplinary offenses of ju-

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[112] Counter-Memorial, para. 188.

[113] Sisak County Court, Statement by Judge Melita Avedić on the Criminal Case Against Jakov Velimir, 2 July 2010, Annex 87**.**

[114] Counter-Memorial, para. 191.

[115] Counter-Memorial, para. 195.

dicial misconduct, disturbing the work of the Court, significantly influencing the functioning of the judicial authority and damaging the reputation of the Court and the judicial office. The Judge was subsequently held responsible for those offences on 8 July 2009 and relieved of his duties.[116] In relation to the *Karan* case itself, the President of the Supreme Court of the Republic of Croatia ceded the case to the County Court in Karlovac being another court of general jurisdiction. The verdict was rendered on 30 June 2005 and the defendant was found guilty and sentenced to 7 years in prison. On 7 February 2006, the Supreme Court of the Republic of Croatia, upon deciding on the defendant's appeal, upheld the verdict of the County Court in Karlovac.[117]

2.77 The Applicant strongly denies that there has been an alleged 'lack of impartiality and fairness' in the prosecution and trials in genocide and war crime cases in Croatia.

2.78 In relation to the Respondent's allegations about the conduct of the *Lora* camp case,[118] the Applicant denies those allegations and refers to a summary of the case prepared by the Court President and to a statement signed by the Judge in the case, Spomenka Tonković, and dated 2 July 2010, both annexed to this Reply.[119] In his statement, the Judge notes for example that**:** **"**each of the summoned witnesses was guaranteed a free passage to and out of the Republic of Croatia even if there was an ongoing criminal procedure against them or an arrest warrant or a request to render them into custody, all of this in accordance with the legal protection provided for the witness by our laws (Article 25 of the International Legal Aid Act for Criminal Issues "Official Gazette"178/04) and bilateral agreement between the two countries". The other allegations are also denied. In a statement dated 5 July 2010, the Split County Court Judge, Slavko Lozina, also denies the various allegations made by the Respondent in relation the conduct of the *Lora* case and notes, in relation to the allegation that the President of the Court shook hands with the defendants that:

> "The stand where the judges and jurors are sited is quite far away from the place where the defendants are sitting - on one hand, and on the other hand there is clear substantial evidence showing that this is not true, as there are recordings of all the main hearings held in the aforementioned courtroom as HRT - National Television recorded all the hearings."[120]

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[116] Decision of the State Judicial Council of the Republic of Croatia, SP-23/07, dated 8 July 2009, Annex 83.

[117] Overview of the Karan Proceedings, compiled by the Office of the President of the Karlovac County Court, Karlovac, 13 July 2010, Case number: Class: 018-04/10-09/40, Entry no.: 514-09-02-10-7, Annex 89.

[118] Counter-Memorial, para. 196.

[119] Split County Court, Statement by Court President, Ante Perkušić, on the Progress of Proceedings in the *Lora* case, 2 July 2010, Annex 85; Split County Court, Statement by Judge Spomenka Tonković, on the Proceedings in the *Lora* case, 2 July 2010, Annex 86.

[120] Letter from Split County Court Judge, Slavko Lozina, to the President of the County Court

2.79 Furthermore, in relation to the Respondent's allegations concerning an alleged lack of impartiality in Croatia's courts, it should be noted that, in addition to the *Španović* decision referred to above, there have been several decisions to transfer cases to the Croatian criminal jurisdiction made by the ICTY and by the Australian High:

1. In the proceedings brought against Rahim Ademi and Mirko Norac for alleged crimes against humanity and war crimes, based on the Prosecutor's request, the ICTY transferred (referred) those two cases to the Croatian courts in accordance with Rule 11bis of the Tribunals Rules of Evidence and Procedure. For a case to be referred to the national authorities, the Referral Bench must be fully satisfied that the accused will be tried in accordance with international standards. In the proceedings against Ademi and Norac, the ICTY ordered referral on 14 September 2005. The defendants were subsequently tried before the Zagreb District Court. On 30 May 2008, Ademi was acquitted of all charges and Norac was sentenced to seven years imprisonment.[121]

2. The High Court of Australia[122] upheld the 2007 decision of the local court in New South Wales to order the extradition of Mr Vasiljković (also known as 'Captain Dragan') to Croatia to face trial for war crimes. In proceedings before a magistrate to determine his eligibility for surrender, the respondent contended, inter alia, that there were substantial grounds for believing that if surrendered to Croatia he might be punished by reason of his political opinions. The respondent failed to satisfy the magistrate that there were substantial grounds for believing that any extradition objection existed and the magistrate determined that he was eligible for extradition. However, on 2 September 2009 the Full Court of the Federal Court of Australia upheld the respondent's appeal on the basis that, in sentencing for offences of the kind alleged, prior service in the Croatian armed forces was treated by Croatian courts as a mitigating factor and was *ipso facto* not available to those who had fought on the Serbian side of the conflict. The Court held there were therefore substantial grounds for believing that the respondent might be punished, detained or restricted in his personal liberty by reason of his political opinions.

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in Split, 5 July 2010, Annex 88.

[121] *Prosecutor v Ademi & Norac,* IT-04-78, Case Information Sheet, available at www.icty.org/x/cases/ademi/cis . See also Chapter 10, *infra*.

[122] *Republic of Croatia v Sneddon* [2010] HCA 14 (19 May 2010).

3. However, in its judgment overturning that decision, the High Court observed that the application of the mitigating factor of service in the Croatian armed forces during the relevant conflict "does not evidence any advertence by the Croatian courts to the political opinions of those who are not able to invoke its benefit."[123] The Court also noted that the Attorney-General of Croatia had indicated to the Attorney-General of Australia that he would request the consent of the President of the Supreme Court of Croatia that the trial of the respondent be held before one of the four County Courts in Croatia specially designated to adjudicate alleged war crimes. The Court noted that significance of that assurance was twofold: those County Courts are located in Osijek, Split, Rijeka and Zagreb, which were not regions where alleged war crimes took place, and second, the County Courts were staffed by professional judges.[124]

2.80 The Respondent has commented adversely on the fairness of trials in absentia which have taken place in Croatia.[125] First, it should be noted that of the total of 464 persons convicted *in absentia*, in the case of 93 persons a request for the reopening of criminal proceedings was submitted, while in the case of 34 the proceedings were returned to the investigation phase, and in the case of 46 to the trial phase. Thus, the initial figure of 464 persons convicted *in absentia* fell to 367 as of 30 September 2010.[126] The English High Court recently confirmed in the *Španović* case that any defendant tried *in absentia* by Croatia was entitled to an automatic retrial: *supra*, paragraph 2.69(3).

(5) The Respondent's Duty to Provide an Explanation

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

2.82 It is clear from the jurisprudence of the Court that there are circumstances where the Court may require the party against whom an assertion is made to provide an explanation. For example in its judgment in *Corfu Channel*, the Court stated:

> "It is true, as international practice shows that a State on whose territory or in whose waters an act contrary to international law has

[123] *Ibid.,* para. 25.

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

[125] Counter-Memorial, para. 198

[126] Table showing the numbers of persons convicted for war crimes *in absentia* by a final judgment as of 30 September 2010 prepared by the Deputy State Attorney of the Republic of Croatia, Annex 90.

> occurred may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof."[127]

The Court then held:

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This 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."[128]

2.83 In the present case, the physical acts upon which the claim of genocide is based did not take place in the territory of the Respondent. However many of those acts took place in circumstances where the Respondent was exercising control over the territory in question, either because of the presence of the JNA, an army which, from at least July 1991, was pursuing the aims of Serbia,[129] or because rebel Serbs in Croatia, aided and supported by the FRY/Republic of Serbia, had taken over control of Croatian territory on the basis of purported 'autonomy' and eventually purported statehood,[130] in some cases both requirements were met. This element of FRY/Serbian territorial and/or military, as well as political, control is present to a degree that justifies the Court requiring Serbia to provide an explanation for the events on which the claim is based. Furthermore, the planning of the genocidal campaign on which this claim is based, did take place, to a large extent, on the territory of the FRY/Serbia, in Belgrade.[131]

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[127] *Corfu Channel* case, p. 17.

[128] *Ibid*., p. 18.

[129] See *infra,* Chapter 4, paras. 4.53 *et seq*., which discuss, *inter alia,* the ICTY's findings in this regard in *Prosecutor v. Mrkšić et al*, IT-95-13, Trial Chamber Judgment, 27 September 2007 ('*Mrkšić*').

[130] See *infra,* Chapter 3; see also, Memorial, Chapter 2, paras. 2.86-104.

[131] See, for example, Memorial, Chapter 2, paras. 2.210-212 and Chapter 3 of the Reply, *infra*.

2.84 The Applicant has produced evidence of a widespread and systematic campaign to eradicate the Croat population from parts of Croatia by the Serbian authorities. When the pattern of conduct is considered as a whole, the campaign can only be explained one based on genocidal intent.[132] It is for Respondent to produce evidence in rebuttal in relation to the intent of those directing and conducting that campaign.

(6) The Respondent's Refusal to Disclose Material Evidence

2.85 On 30 July 2010, the Applicant requested the Court to call upon the Respondent to produce certain documents.[133] The documents requested emanated from, or implementing the decisions of, four entities: the SFRY Presidency; the Supreme Command Staff; the 'Meetings of the Six' and the Supreme Defence Council. These entities exercised *de jure* or *de facto* control and command over the Serbian armed forces in the period 1 April 1991-30 November 1995. The Applicant has reason to believe that the documents contain significant information of crucial relevance to the issues in the case.

2.86 The Respondent responded to that request by observations dated 7 September 2010, following a meeting held between the Parties in Belgrade on 3 September 2010. Significantly, the Respondent has agreed in principle to disclose the documents sought, where they are in its possession. It has, however, said in relation to a number of documents that they are classified as 'Confidential' and can therefore only be disclosed following an internal governmental approval process; this indicates that the delay is due to procedural requirements and not any other objections.

2.87 The documents the Applicant has been provided with at the time of writing contain some relevant information. However, it is the Applicant's belief that the outstanding documents are those that contain the most relevant and incriminating information in relation to this case. It is now more than 4 months since the request was made, and 3 months since the Respondent agreed in principle to provide the documents. It is inconceivable that the Respondent could not have obtained the necessary internal approval for the release of the documents, if its purported intention to disclose them to the Applicant was genuine.

2.88 In the *Bosnia* case, the Court stated:

> "Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions."[134]

Similarly, many of the component elements of the Applicant's case that the Respondent is responsible for complicity in and failure to prevent genocide took place on the territory of the FRY/Serbia.

[132] See *infra,* Chapter 9.

[133] Pursuant to Article 49 of the Court's Statute and Article 62 of the Court's Rules of Procedure.

[134] *Bosnia,* para. 206.

On the basis of the facts of that case, and in view of the fact that the request was made very late in the proceedings, the Court refused to request that Serbia disclose the unredacted versions of the SDC documents.[135] In these proceedings, the Applicant's request for disclosure has been made promptly and in good time. The Respondent has accepted in principle that the documents fall to be disclosed, but has so far failed to comply fully with that principle in its actions. The Applicant hopes that it will not be necessary to make a formal application to the Court to order disclosure of the documents that have so far been withheld. In the Applicant's submission, should such an application be made, the Court should reaffirm the general principle that the party with access to evidence (potentially) relevant to the determination of a key issue in the case should produce that evidence, or face the prospect of adverse inferences being drawn by the Court.

2.89 In the *Parker* case an international tribunal stated that:

> "it is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The commission denies the right of the respondent to merely to wait in silence in cases where it is reasonable that it should speak."[136]

The tribunal also made the following observation:

> "In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the commission in reaching a decision."[137]

2.90 Similarly, in *Avena and other Mexican nationals* (*Mexico v United States of America),* the Court indicated that a party which claims that the other party has evidence necessary for the proof of the former's case (in that case relating to the nationality of certain individuals) must make an effort to secure that evidence from the latter by requesting it:

> "It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done and that the Mexican authorities declined or failed to respond to such specific requests. Without having made such a request, the former could not claim that the latter was not cooperating in the production of evidence which was in its possession."[138]

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[135] In his Dissenting Opinion, Vice-President Al-Khasawneh criticized this part of the Court's approach, see para. 35.

[136] USA v Mexico (1926) 4 *UNRIAA* p. 39.

[137] *Ibid*..

[138] *Avena and other Mexican Nationals (Mexico v United States of America)* 2004 ICJ Reports, para. 57.

2.91 The Applicant has requested, with 'sufficient specificity', information from the Respondent. The Respondent has agreed to produce only a part of that information and has provided no adequate or persuasive reason for its failure to provide the remainder.

CHAPTER 3

THE HISTORICAL AND POLITICAL BACKGROUND

INTRODUCTION

3.1 In its Memorial, the Applicant provided the Court with a historical and political background to assist in understanding the overall context of the conflict in Croatia and the history of the various entities concerned. It set out the backdrop against which the Respondent carried out genocidal acts against the Croat population in Croatia. The Respondent, however, contends that the historical and political background deals with events that are "largely irrelevant" to the dispute.[1] As stated in the Memorial, genocide is not a single act but a series of acts, a campaign that occurs in a given geographical and historical context, even though, legally and morally, the genocidal acts themselves can never be excused by reference to historical or any other factors.[2] Thus, unlike Serbia, Croatia believes the background which relates to the events and developments which occurred just before the period under consideration in the present case, is relevant and necessary for a proper appreciation of the facts.

3.2 Despite its claim that the background is "largely irrelevant" the Respondent has provided the Court with its own detailed historical and political account. In this chapter, the Applicant responds to the Respondent's version of events as set out in Chapter V of the Counter-Memorial and elaborates upon the background where necessary.

3.3 In its Memorial, the Applicant presented the historical and political background in three parts:

> **Part One** described the ethnic composition and the political and constitutional background of the SFRY. It set out the central importance of the constitutional structure and the territorial borders of the SFRY and each of its constituent Republics, including Croatia, as they existed from the adoption of the 1974 SFRY Constitution until the period when the process of dissolution of the SFRY entered its final stage.[3] By and large, Serbia has not challenged or contradicted this part of the Chapter, and for the sake of brevity this section stands admitted.[4]
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> **Part Two** described the events leading up to the genocidal acts that occurred in Croatia after its declaration of independence in June 1991,

[1] Counter-Memorial, para. 389.
[2] Memorial, para. 2.01.
[3] Memorial, paras. 2.05-35.
[4] The Counter-Memorial refers to the Memorial, para. 2.08, regarding the NDH (which is dealt with at 3.17 *et seq.)* and Memorial, para 2.11 (regarding the "Croatian Spring" a popular movement that was put down in 1971).

and which are the subject of Croatia's Application to the Court. It focused on the period following the death of President Tito in 1980 up until the actions of the Serbian controlled members of the SFRY Presidency in seeking to block the appointment of the Croatian representative, Stjepan Mesić, as President of the SFRY Presidency in May 1991.[5] This period witnessed the rise of extreme Serbian nationalism, which coincided with Slobodan Milošević's rise to power, leading to a situation in which Croatia was essentially presented with two options by Serbia: (i) it could remain within a federal Yugoslav state dominated by Serbian interests, or (ii) it could become an independent state with a sharply reduced territory, with Serbia taking control of large swathes of territory which had been within Croatia's borders since at least World War II. When Croatia's citizens opted overwhelmingly for independence in May 1991, Serbia embarked on a campaign of territorial acquisition with the object of establishing Serbian control over parts of the Republic of Croatia. This campaign was conducted by the Serbian leadership, which controlled the Yugoslav People's Army (JNA) and paramilitary groups which were either incorporated into the structure of the JNA or were under the effective control of Serbia. This campaign of "Serbianisation" of Croatian territories was accompanied by the commission of genocide against a significant part of the Croatian population of Eastern and Western Slavonia, Banovina, Kordun and Lika and Dalmatia. It is these acts of genocide which are the subject of Croatia's Application.[6]

Part Three described the events that occurred from the end of 1991, after the JNA, Serb paramilitaries and Serb rebels, occupied large parts of Croatian territory, through to the winding up of the United Nations Transitional Administration for Eastern Slavonia ('UNTAES') in January 1998. It described the efforts of the international community and the involvement of the United Nations in seeking to resolve the crisis in the former SFRY, including the deployment of peacekeeping missions and the establishment of United Nations Protected Areas ('UNPAs'). It also covered the proclamation of the FRY/Serbia, and the adoption of the Dayton Peace Agreement.[7]

3.4 The Respondent's account of the historical and political events is incomplete, inaccurate and in numerous places misleading. The purpose of the

[5] Memorial, paras. 2.36-116.

[6] The military campaign from May 1991 to December 1991 in the context of which several genocidal acts were carried out was dealt with in Chapter 3 of the Memorial. That also provided an overview of the role of the JNA and the paramilitaries, and described the direct control which Serbia had over these forces which perpetrated the genocide. The genocidal acts were described in detail in Chapters 4 (Eastern Slavonia) and 5 (other parts of Croatia) of the Memorial.

[7] Memorial, paras. 2.117-162.

present Chapter is to set the record straight. This Chapter is organized as follows:

Section I addresses the growth of extreme Serbian nationalism, responding to the Respondent's arguments on the subject. It also responds to Serbia's allegation regarding the growth of nationalism in Croatia and the allegedly discriminatory actions of the Croatian Government.

Section II sets out how influenced by the propaganda and hate campaign emanating from Belgrade, political representatives of the Serb community in Croatia refused to accept the authority of the Croatian Government and, under the direction, command, and control of the leaders of the Republic of Serbia rebelled against the Republic of Croatia. This involved establishing areas of Serb occupation within the territory of Croatia in order to extend Serbia's borders with a view to establishing a "Greater Serbia". During this period "Serb Autonomous Regions" were "proclaimed" and finally the so-called Republic of Srpska Krajina ('RSK') was "established."

Section III briefly describes the intensification of the conflict in Croatia (March 1991 onwards) where the JNA, purportedly acting as a "neutral peacekeeper"[8], first covertly and later openly sided with the rebel Serbs.[9] A planned and strategic programme of genocide was carried out against Croatia's Croat population.[10] It also describes the dissolution of the SFRY and the take over of its federal institutions by Serbia. Finally, it touches upon the human rights abuses suffered by Croatia's Croat population at the hands of the JNA and the rebel Serbs and briefly responds to Serbian allegations of human rights abuse against the Serbs in Croatia.

Section IV briefly deals with the role of the international community, more particularly the UN's engagement that resulted in the deployment of the United Nations Protection Force ('UNPROFOR') and the establishment of the UNPAs.

3.5 The Applicant invites the Court to read the Respondent's Counter-Memorial with the degree of care and attention to detail that it deserves. For example the Court should note the various admissions made by the Respondent (for e.g. para. 420 (Serbia admits that Serbian nationalists misused recollections of the past); para. 423 (admits that in Serbia's "undemocratic regime" prior to October 2000 Serbian nationalism was the "leading political idea"); para. 434 ("hate speech was abundant in the Serbian media" in the 1980's and

[8] Counter-Memorial, *inter alia* para. 501.
[9] On the role of the JNA, see Chapter 4, *infra*.
[10] See Chapters 5 and 6, *infra*.

1990s); para. 497 (Milošević manipulated the fears of the Serbs in Croatia and misused this for his own purposes); 507 (that the JNA fought in alliance with the rebel Serbs); para. 533 (the JNA leadership and the Serbian leadership were "political allies"); para. 562 (that the so-called RSK "enjoyed the "political and financial support of the FRY"). The Respondent's Counter-Memorial is equally noteworthy for the factual aspects which are not addressed, and for the material which is omitted (see the numerous examples identified in Chapters 5 and 6 of this Reply, *infra*). With regard to the material which is included, the Counter-Memorial is noteworthy for the significant number of contradictions and misrepresentations it contains. Both the content and the omissions underscore the fragility of the Respondent's arguments.

SECTION I: THE RISE OF NATIONALISM

3.6 The Memorial sets out in some detail the rise of nationalism in the SFRY, and more particularly the rise of Greater Serbian nationalism after the death of President Tito.[11] It sets out how some in the Republic of Serbia began to question the basic principles governing the structure of the SFRY, in particular the status of the two Autonomous Provinces of Kosovo and Vojvodina.[12]

3.7 The Respondent argues that the Memorial (1) presents a "distorted and *at times* inaccurate picture of Serbian nationalism" (emphasis added); and (2) fails to mention the rise of Croatian nationalism.[13] It is argued that Serbian and Croatian Nationalism went "hand in hand as the crisis in the former SFRY aggravated to the level of an armed conflict."[14] It is also argued that Croatian nationalism is "directly responsible for the outbreak of conflict in Croatia."[15] And finally it is argued that Serbian nationalism was "accompanied and mutually re-enforced by the nationalism that flared up in Croatia and other parts of the SFRY." [16] The Respondent's claim that "Serbian and Croatian nationalisms went hand in hand" misrepresents the facts and attempts to shift responsibility for the war. While extreme and aggressive Serbian nationalism and historic revisionism were rampant in Serbia and marked the second half of the 1980's, Croatian nationalism was subdued and defensive. The League of Communists of Croatia, the Croatian communist party, headed by a Serb, from 1986 to 1989, suppressed any form of nationalism in Croatia and it was only with the start of the campaign for the first multiparty elections of April 1990 that there was any real public manifestation of Croatian nationalism.[17]

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[11] Memorial, para. 2.36 *et seq.*

[12] Memorial, paras. 2.39-42.

[13] Counter-Memorial, para. 394, 422.

[14] Counter-Memorial, para. 420.

[15] Counter-Memorial, para. 422.

[16] Counter-Memorial, para. 423.

[17] The Croatian political leadership's alarm and fear caused by the outburst of Serb nationalism are described by B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], pp. 42-44.

By then the security situation in Croatia had been compromised as a result of outbursts of Serb nationalism.

3.8 In any event, the Respondent admits that prior to October 2000 "… Serbian nationalism was the leading political idea."[18] This is therefore not in dispute.

(1) The Rise of Serb Nationalism

3.9 While the Respondent states that the Memorial is "frequently misleading and inaccurate" in its account of Serbian nationalism, it only challenges two facts. *First*, Serbia claims that the Memorial fails to distinguish between the Serbian communists who were not nationalists and nationalists in the 1980s.[19] In fact, the Memorial did distinguish between them.[20] *Second,* the Respondent claims that the Applicant exaggerates the importance of the 1986 Memorandum prepared by the Serbian Academy of the Sciences and Arts (SANU, 1986 Memorandum).[21] In this regard, it is submitted that the importance of the 1986 Memorandum cannot be underlined enough.

3.10 In the Memorial the Applicant set out why the 1986 Memorandum prepared by SANU, the umbrella institution of the Serbian scientific and intellectual elite, was particularly important in fuelling the rise of Serbian nationalism.[22] Described as a 'catalytic event', the SANU Memorandum set forth a Serb nationalist re-interpretation of the recent history of the SFRY and carried considerable weight because of the authority of its authors.[23] It reflected the basic precepts of the growing Serbian nationalist movement, which was premised on the belief that Serbia and the Serbs in the Republics of the SFRY outside Serbia were in a uniquely unfavorable situation within the SFRY.[24] Serbia takes issue with Croatia's discussion about the SANU Memorandum and argues that its description is an "enormous exaggeration".[25]

3.11 That the Applicant's description is not exaggerated is borne out by a number of independent sources. Silber describes the Memorandum as a "political bombshell," stating that in it Serbian academics catalogued their na-

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[18] Counter-Memorial, para. 423.
[19] Counter-Memorial, para. 427.
[20] The Memorial distinguishes between Serbian communists and Serbian nationalists in Memorial para. 2.49.
[21] Counter-Memorial, para. 428.
[22] Memorial, paras. 2.43-50. The Memorandum was first published in the Belgrade daily newspaper *Večernje Novosti (Belgrade),* on 24 and 25 September 1986 and was subsequently published in a limited edition and then republished several times; SANU Memorandum, Memorial, Annexes, vol 4, annex 14.
[23] The authors included the President and Vice President of SANU. Serbian novelist and later first President of the FRY/Serbia, Dobrica Ćosić has been described as the driving force behind the Memorandum, see Memorial, para. 2.43.
[24] Memorial, paras. 2.43-50.
[25] Counter-Memorial, para. 428.

tional grievances, and when it was published the "country was convulsed."[26] Similarly, an expert report from the ICTY, on the use of propaganda in the conflict in the FRY/Serbia, found that it was the deliberate leaks of the SANU Memorandum that sparked things off and raised the issue of Serbian nationalism publicly.[27] The SANU Memorandum's key features include the authority and influence of the institution that prepared it and the fact that it was published and became publicly available.[28]

3.12 The Memorial described how the emergence of extreme Serbian nationalism was accompanied by the promotion of the theory that the Croats had always had – and now maintained – a genocidal intent against the Serbs.[29] This theory, articulated in 1986, by a History Professor at the University of Belgrade (and also a member of the Serbian Academy of Sciences and Arts), gained currency. Subsequently, other Serbian historians and journalists, influenced by these ideas and by the ideas set out in the SANU Memorandum, gave vent to the theory that the Croatian people were collectively to blame for the large number of Serbs who were killed by the Ustasha between 1941-45 and were accordingly, by their very nature, genocidal in character and adhered to a continuing genocidal intent against the Serbs.[30]

3.13 From the early 1980s, several Serbian newspapers ran inflammatory articles about the Ustasha concentration camp in Jasenovac, where terrible crimes had been committed against Serbs, Jews, Roma/Gypsies, Croats and others during the World War II.[31] It is also worth noting that in parallel to the adoption of SANU Memorandum, its authors along with Serbian political leaders and high-ranking military officials of the JNA were also instrumental in perpetrating the Jasenovac myth. As early as October 1985, a SANU

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[26] Laura Silber & Allan Little, *Death of Yugoslavia*, Penguin, 1996 ('Silber'), pp. 31-32. The SANU memorandum stated *inter alia:*

> "Except during the period of the NDH, Serbs in Croatia have never been a s endangered as they are today. The resolution of their national status must be a top priority political question. If a solution is not found, the consequences will be damaging on many levels, not only for relations within Croatia but also for all of Yugoslavia. "

[27] R de la Brosse, "Political Propaganda and the Plan to Create a State for all Serbs: Consequences of Using the Media for Ultra-Nationalist Ends", Report Compiled at the Request of the OTP of the ICTY, 4 February 2003, pp. 34 *et seq*, Annex 106.

[28] The role of Serbian intellectuals and media and the support which the memorandum received from the Serbian leadership is elaborated and analyzed in the Professor de la Brosse Report, ICTY, para. 38-40 and footnote 75.

[29] Memorial, paras. 2.51-53 on the "Demonization of the Croats". See also Hate Speech, Memorial, vol 5, appendix 3, in particular paras. 30-38.

[30] For the tendency to demonize Croats and to hide parts of Serbian history during World War II such as Serbian complicity in the holocaust, see P.J.Cohen, "Serbian Anti-Semitism and Exploitation of the Holocaust as Propaganda", (1992), Annex 100.

[31] Memorial, para. 2.53

delegation visited Jasenovac,[32] where Vladimir Dedijer, a Serb historian and SANU academic stated:

> "however, the circumstances are difficult and younger generations could be again called upon to defend their homeland. If they see the graves of their predecessors being neglected, that could negatively affect their fighting morale. And finally, it is only decent to thank general Ivan Gošnjak, who during the sixties, invested a lot of energy to advocate for Jasenovac to be marked visibly, because hundreds of thousands of Serbs, Muslims, Jews, Roma and members of other nations lost their lives here. *I think, if necessary, the Army will help us, as it has helped us before.*"[33] (emphasis added)

3.14 The same year a mobile exhibition "*The Dead Open the Eyes to the Living*" set up at the JNA quarters was also opened to the public. From the map showing the exhibition sites it is easy to see that these were the areas were genocidal acts were later perpetrated by the Respondent.[34] The Jasenovac museum mobile exhibition was shown to soldiers from the JNA from 1986 to 1991. The presentation and the exhibited material, including photographs, had a clear goal, to connect the crimes from World War II to the allegedly "separatist" tendencies in the Socialist Republic Croatia. Simultaneously, numerous articles in weekly journals intended for the JNA (e.g. Front, People's Army) contributed to this notion from 1986 to 1991.

3.15 The Respondent does not dispute this, admitting that "hate speech was abundant in Serbian media at the end of the 1980s and during the 1990s".[35] The Respondent attempts to justify this by saying that this phenomenon was not confined to Serbia alone, and in any event none of the evidence presented in the Memorial with regard to hate speech fall under the legal elements of the crime of genocide.[36]

3.16 As considered in Chapters 5, 6 and 9, *infra,* the ICTY proceedings have provided a wealth of new material that was unavailable to the Applicant when the Memorial was filed. One of these is the Expert Report on '*Political Propaganda and the Plan to Create a State for all Serbs: Consequences of using the media for ultra-nationalist ends*' prepared by Professor de la Brosse, submitted in *Milošević* and annexed to this Reply ('Professor de la Brosse

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[32] The delegation was made up of *inter alia* akad. Vladimir Dedijer, akad. Miloš Macura together with the Lt General Đuro Meštrović, Milan Bulajić and Lt. Col Antun Miletić. See the photograph of the team in the book A. Miletić, *Koncentracioni logor Jasenovac* [Jasenovac Concentration Camp], vol. III, 1987, Belgrade, p. 573, Annex 111.

[33] "Visit of the Working Group of the Committee of SANU to the Jasenovac Concentration Camp, The Biggest Execution Site in Yugoslavia", Excerpts from the Minutes of the Meeting of 11 and 12 October 1985.

[34] Exhibition sites of "*The Dead Open the Eyes to the Living*", Annex 113.

[35] Counter-Memorial, paras. 434-435.

[36] See Chapter 8, *infra* for the legal elements of the crime of genocide.

Report, ICTY').[37] It describes in detail how history was manipulated to serve the objectives of Serb nationalists in Serbia; how Milošević relied on the state controlled media to consolidate power; how the media was at the heart of the Yugoslav war and was used to justify the use of force, stigmatize the opponent and create conspiracy paranoia.[38] A number of conclusions are especially pertinent to this case, for example:

1. Milošević knowingly used and controlled the media in Serbia to impose the themes of nationalist propaganda to justify to the citizens the creation of a state which would be home to all the Serb people.[39]
2. The policy of establishing a "State for all Serbs" included ethnic policies that skilful propaganda justified in the eyes of Serbian public opinion.[40]
3. The media was used as a weapon of war sometimes to achieve political goals, for instance to launch and defend the theme of a state for all Serbs - and sometimes to accomplish strategic objectives such as the capture of territory by force and the practice of ethnic cleansing.[41]
4. Historical facts were imbued with mystical qualities to be used as nationalist objectives so that the Serbian people could feel and express a desire for revenge directed at the prescribed enemies, the Croats, the Muslims - who were presented as the Devil.[42]
5. Before Serbia triggered the war, Belgrade's audio-visual media broadcast many programs recalling historic events always likened to the persecutions allegedly suffered by the Bosnian and Croatian Serbs.[43]
6. The highest Serbian moral and intellectual authorities were involved in conditioning public opinion to justify the upcoming war with Croatia.[44]

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[37] Annex 106.

[38] Professor de la Brosse Report, ICTY, pp. 59-74.

[39] Professor de la Brosse Report, ICTY, pp. 5-6, where she describes how Milošević went about controlling the media; see also pp. 26-28; 48 *et seq*, 79-84.

[40] Professor de la Brosse Report, ICTY, p. 16 *et seq*. Professor de la Brosse goes on to set out the fundamental principles of propaganda (p. 18 *et seq*) that contain a wealth of examples of the hate speech and propaganda employed by Serbia both before and after the conflict.

[41] Professor de la Brosse Report, ICTY, p. 28 *et seq.* The example provided is that when war had broken out between the Serbs and Croats in Slavonia, the Belgrade regime's entire propaganda machine worked towards preparing public opinion for the need to protect the Serbs living outside Serbia and for the war with Croatia.

[42] Professor de la Brosse Report, ICTY, p. 31 *et seq;* pp. 43-48.

[43] Professor de la Brosse Report, ICTY, pp. 51-52. The Report states that this was particularly so after the HDZ came in to power in May 1990 after which the primary aim of television coverage was to pit the Serbian public against its designated enemies and to prepare the way for war.

[44] Professor de la Brosse Report, ICTY, p. 53.

(2) The Alleged Revival of Croatian Nationalism

3.17 The Respondent only half-heartedly attempts to refute the role of extreme nationalism in Serbia and the 'Greater Serbia' project in the perpetration of the Genocide that occurred against the Croats in Croatia. Instead it attempts to argue that it was Croatian nationalism that was "directly responsible" for the conflict in Croatia.[45] While stating that political and historical events (that occurred in the 1980s and 1990s) described in the Memorial are "largely irrelevant" to the present dispute, Serbia states that the Memorial fails to deal with facts that are "clearly relevant" such as the "genocide against the Serbs in Croatia committed by the Independent State of Croatia during World War II."[46] In fact the events of 1941-45 were referred to in the Memorial. [47]

3.18 The Respondent devotes 10 pages to the Independent State of Croatia (NDH) arguing that those events had a great influence on the events and actors in 1991-1995 and talks of the rehabilitation of the Ustasha movement in the 1990s.[48] However, the Respondent recognises that the NDH was a "puppet state that served the political interests of fascist Italy and Nazi Germany."[49]

3.19 Professor de la Brosse's Report stated that

> "[the] incessant reminders of the Independent Croatia state and atrocities committed by the Ustasha were an alibi for the political objectives of the [Serbian] regime and were at the root of the development and strengthening of inter-ethnic hatred… The parallel between the past and the present comparing Franjo Tuđman's regime to that of Ante Pavelić, was made to raise anti-Croatian hatred to fever pitch". [50]

3.20 In any event, this discussion merely serves to strengthen Croatia's argument that the rise of extreme nationalism in Serbia in the late 1980s and early 1990s was fuelled by historic revisionism and the demonization of the Croats. There was a deliberate evocation of atrocities; a consciously fostered paranoia fed at least as much by rumour and myth as by historical reality and the use of the past as a weapon of conflict, and later, war.[51] In any event once again Serbia admits this, stating that "It is not contested that Serbian nationalists misused the recollections of these past events…."[52]

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[45] Counter-Memorial, para. 422.

[46] Counter-Memorial, para. 391.

[47] Memorial, para. 2.08.

[48] Counter-Memorial, pp. 136-145. In addition to these pages, Chapter V of the Counter-Memorial alone includes at least 15 further references to the Ustasha regime or the "genocide committed by the NDH".

[49] Counter-Memorial, paras. 398-9. At para. 419 it again describes the controversy with regard to the numbers killed at the Jasenovac camp, a matter mentioned in the Memorial, before stating that this "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."

[50] Professor de la Brosse Report, ICTY, pp. 53-54, 62. The Report sets out several examples in this regard.

[51] Silber, p. 92.

[52] Counter-Memorial, para. 420.

3.21 The Counter-Memorial devotes considerable attention to the "revival" of Croatian nationalism with the creation of the Hrvatska Demokratska Zajednica ('HDZ')[53] in 1989, arguing *inter alia* that its rhetoric was inflammatory and led to ethnically motivated incidents against Serbs.[54] The Respondent does admit that the rise of the HDZ took place at a time when "inter-ethnic tensions were *already* running high in the SFRY"[55], thus admitting that some actions of the HDZ were reactions to extreme Serb nationalism.

3.22 It is also pertinent to note that the HDZ was only established in 1989 and that its inaugural meeting in Zagreb, scheduled for 15 June 1989 was banned under the influence of the ruling League of Communists Party. As a result, the inaugural meeting was held almost underground, far from the eyes of the public or the media.[56] The HDZ was only registered as a political party on 25 January 1990[57] and up until the election campaign in 1990 it had virtually no access to Croatian state TV or the main Croatian dailies and was constantly thwarted by the ruling League of Communists of Croatia.

3.23 The Respondent argues that the rise of the HDZ was the first sign of the rehabilitation of the NDH and, with it, the Ustasha Movement. The Counter-Memorial however, misquotes President Tuđman's regarding the NDH, setting out his statement out of context.[58] It is clear from President Tuđman's statement that he did not deny the criminal character of the NDH, on the contrary, he underlined it. He had made clear his views on the NDH in his book *Bespuća povijesne zbiljnosti* [The Horrors of War],[59] and had expressed

[53] The Croatian Democratic Union.

[54] Counter-Memorial, paras. 430-432.

[55] Counter-Memorial, para. 433.

[56] Marinko Čulić, Željko Luburović, *Bauk nacionalnih partija* [The Bugbear of National Parties], *Danas*, 27 June 1989, p. 16; *Što jest i što hoće HDZ* [What is the HDZ and what does it want?], pp. 40-41; I. Perić, *Godine koje će se pamtiti* [The Years to Remember], p. 20.

[57] Administrative Decision of the Secretariat of Justice and Public Administration of the Socialist Republic of Croatia, document class UP/I-007-02/89-01/20, Ref. No. 514-04-02/4-90-8, 25 January 1990.

[58] The Counter-Memorial (para. 431) claims that Dr. Tuđman made clear his view that the fascist Independent State of Croatia was "an expression of the historical aspirations of the Croatian people"; what he actually said was that "the NDH was not only a mere 'quisling' creation and a 'fascist crime' but also an expression of the historical aspirations of the Croatian people for its own independent state": see *Odluke I. općeg sabora HDZ, Programske zasade i ciljevi HDZ, Statut HDZ, Izborni proglas, Izabrana tijela HDZ* [Decisions of the First General Convention of the HDZ, Programmatic Tenets and Objectives of the HDZ, Election Manifesto, Elected Bodies of the HDZ], Hrvatska demokratska zajednica, Zagreb, 1990, p. 10.

[59] Franjo Tuđman *Bespuća*, Nakladni zavod Matice Hrvatske, Zagreb, 1989, p. 434, stating:

> "It cannot be disputed that the Croatian nation, taken as a whole, welcomed the fall of the Yugoslav hegemony as their extrication from 'prison', and that this was publicly visible. Nor is it disputed that the declaration of an independent and free Croatian state at first meant the realization of a 'centuries-old dream', dreamt by national, but also class revolutionaries. However, it is even less arguable – both from the standpoint of the participants as well as from the objective investigations of the historical events of that time – that the Croatian people not only did not identify themselves with the Ustasha regime of the NDH, but that they also increasingly and more resolutely distanced themselves from that regime, having become suddenly sobered by its pro-Fascist, pogrom methods of rule and the handing of Dalmatia over to Italy."

similar views earlier, when he headed the historical institute of the League of Communists of Croatia.[60]

3.24 Finally, Croatia made clear its views with regard to the NDH when it adopted its new Constitution in December 1990. The Preamble to the Constitution emphasised that the Croatian statehood during World War II found expression not in the NDH but only through the country's Anti-Fascist Council of National Liberation of Croatia.[61]

(3) The Alleged Hate Speech against the Serbs

3.25 The Respondent admits that "hate speech was abundant in Serbian media at the end of the 1980s and during the 1990s",[62] yet accuses Croatia of failing to mention the hate speech directed against Serbs. As a "particularly notorious example" of hate speech against Serbs, the Respondent selects a weekly tabloid - *Slobodni tjednik* [Free Weekly].[63] The Respondent only provides a reference to a 1998 article in Serbian. No other examples are provided.

3.26 In this regard, it must be noted that *Slobodni tjednik* was a private tabloid and the mainstream Croatian media distanced itself from it.[64] In early 1991, the Croatian Ministry of Information also distanced itself from the tabloid stating that its writing was an attempt at "introducing in the Croatian press a base, tasteless and uncivilised" type of journalism and stated that it would do everything in its power against it.[65] This was in sharp contrast with Serbian hate speech that was propagated and promoted by Serbian state media. And in any event the writings of a private tabloid cannot be considered typical

[60] Franjo Tuđman, *Okupacija i revolucija: dvije rasprave* [Occupation and Revolution: Two Treatises], Institute for the History of the Labour Movement, Zagreb, 1963, p. 190.

[61] The Preamble of the Constitution of the Republic of Croatia, 1990 states:

> "The millennial national identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience in various political forms and by the perpetuation and growth of state-building ideas based on the historical right to full sovereignty of the Croatian nation, manifested itself: […]
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> - in laying the foundations of state sovereignty during World War Two, through decisions of the Anti-Fascist Council of the National Liberation of Croatia (1943), to oppose the proclamation of the Independent State of Croatia (1941), and subsequently in the Constitution of the People's Republic of Croatia (1947), and several subsequent constitutions of the Socialist Republic of Croatia (1963-1990)."

[62] Counter-Memorial, para. 434.

[63] Counter-Memorial, para. 438.

[64] The weekly *Danas* described *Slobodni tjednik* as "a weekly of ugly appearance and unexplainable content that in a very brief time span managed to destroy those few sweet remaining illusions about writing newspapers and dominant readers' appetites in these areas". Its pens were said to be regularly proving themselves to be "ignorant of any journalistic styles with no intention whatsoever to burden themselves with any kind of written or unwritten journalistic canons": Đurđica Klancir, *Trg Republike kao Tennessee*, *Danas*, 28 August 1990, p. 75.

[65] Krešo Špeletić, *Žuto raspirivanje strasti* [Fuelling Passion by means of the Yellow Press], *Danas*, 23 April 1991, pp. 14-15.

of the writing of the entire Croatian press at that time. Moreover, in its attempt to show that Croatian nationalism and Serbian nationalism "went hand in hand" Serbia is somewhat lax with dates and timelines of events. It fails to mention that the inflammatory articles in *Slobodni tjednik* were not written in the period when the HDZ emerged, but later, when armed conflict had spread through Croatia and genocide was being committed against Croats.

3.27 With regard to the allegations that hate speeches were made by the highest Croatian officials, the Counter-Memorial refers to a comment allegedly made by the former President, Mr Mesić.[66] In addition to citing a document that is not annexed (and in any event is inadequate as an evidential source, and was published in 2008), the Respondent misquotes Mr Mesić. What Mr Mesić actually said is clear from an exchange at the Milošević Trial at the ICTY.[67] The Counter-Memorial also refers to a speech made by a Member of Parliament, Mr Jurić.[68] Though the Applicant is not justifying its content, the context and timing of the statement are relevant - the speech was made in early August 1991, on the very days when the JNA and Serb rebels captured the towns of Dalj, Erdut and Aljmaš, and massacred Croatian civilians and policemen, and the remaining Croatian population had to flee. In any event, this speech, once again, does not fall into the period when the HDZ came to power in 1990, but dates from 1991 when the war in Croatia was ongoing. Further, it

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[66] Counter-Memorial, para. 439.

[67] At his Trial at the ICTY, the exchange between Slobodan Milošević and Mesić was as follows:

> "*Milošević*: You know there was no such plan, but who actually contributed to the anxiety of the Serbs and to their concerns? I think that without doubt, you are one of those mostly responsible for that. For example, in the summer of 1990, on the occasion of your visit to Gospić, you said, I quote: "The Serbs from Croatia, while they are ploughing Croatian land, pray to God that rain might fall in Serbia. Let the Serbs go to Serbia but take with them only as much land as they brought when they arrived on the soles of their shoes." Is that what you said, Mr Mesić?
>
> *Mesić*: I'm not interested in what you think of me and what I do. That is completely immaterial to me. The quotation is incorrect. The accused put together two things that I said. What I said was, first, that Croats -- that Serbs in Croatian should not plough land in Croatia while praying to God that it might rain in Serbia. This was my response to those who wrote graffiti on walls in Croatia saying this was Serbia. It was not Serbia. It was Croatia, and that's what I wanted them to know. I wanted them to know that they could not engage in implementing such a policy. The second thing I said was that when Serbs arrived in Croatia, they were not carrying Serb land on their shoes to transform Croatian soil into Serbian soil. I wasn't saying anything about what they should take away with them. What I said was that they had not brought Serbia with them on their shoes. Just as the Croats who went to live in Austria, in Burgenland, did not take Croatia with them on the soles of their shoes. They took it with them in their hearts. But they are loyal citizens of the Republic of Austria, although they are aware of their ethnic origins, their Croatian origins. So my message to the Serbs was that Croatia was their homeland, that they can love their former country, but that they should be loyal citizens of the Republic of Croatia. In fact, my message to them was that we wanted them in Croatia, not that they should leave Croatia."

Prosecutor v. Milošević, IT-02-54, testimony of Mr Stjepan Mesić, 2 October 2002, Transcript pp. 10696-10697.

[68] Counter-Memorial, para. 440.

was not representative of the position of the Croatian Government.

3.28 The Respondent also argues that "hate speech manifested itself in the rehabilitation of the Independent state of Croatia."[69] It repeats its allegations regarding Mr Tuđman's speech and refers to a statement by Mr Mesić's that Croats won twice in World War II. Two points need to be made with regard to this statement. Firstly, this statement is undated. This appears deliberate, as Serbia tries to create a false impression that the statement was made in 1990, thereby fuelling its "hate speech" and the "rehabilitation of the NDH" argument. This is not so, as the statement was made in May/June 1992 in Sydney, and it was unknown to the public until its publication in an article in December 2006.[70] And secondly, Mr Mesić has in the meantime apologised for the statement. A fact that the Respondent admits.[71] These isolated examples do not compare with the systematic and planned propaganda of Serbia.

3.29 Finally, and once more, the Respondent argues:

> "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. 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". [72]

3.30 As stated above, this is symptomatic of the historical revisionism that was prevalent in Serbia in that period. As noted in the Memorial, historic revisionism escalated from the 1980s onwards, reaching absurd levels and its contribution to genocidal acts in Croatia was revealed only subsequently.[73] The demonization of the Croats as harbouring genocidal intentions against the Serbs, coupled with the promotion of the idea of Serbs as victims, played a significant role in preparing the ground for the genocide perpetrated against the Croats that followed. Throughout Serbian media, the desire for revenge focused in particular on the events of 1941, and was intentionally created by referring to the crimes "for which no one has ever been held to account." Belgrade television frequently broadcast films of Ustasha leader Pavelić, in

[69] Counter-Memorial, paras. 441-442.

[70] Jadranka Jureško-Kero, *Što je Mesić sve rekao u Sydneyu* [What did Mesić say in Sydney?], *Večernji list*, 10 December 2006.

[71] Counter-Memorial, p. 152, footnote 320.

[72] Counter-Memorial, para. 442.

[73] Memorial, paras. 2.56-58. This section also describes how hate speech was initially tolerated but then became even desirable as a form of public communication.

1941, woven with scenes of Tuđman and the newly elected HDZ.[74] This was confirmed by the Expert Report of Professor de la Brosse at the ICTY.[75]

3.31 From the late 1980's, writings on the Ustasha crimes against the Serbs in the NDH changed, as did the terminology. The older term "mass Ustasha crimes" was replaced by the word "genocide". This was further developed into the claim that all Croats are collectively guilty of Ustasha crimes.[76] These revisionist ideas were systematically spread by a significant part of the Serbian political, religious, cultural and scientific elite.[77] In 1989, Miloš Laban, an MP of the Serbian Assembly asked who the legal successor of the Ustasha state was, and to whom could the Serb victims of the Ustasha genocide turn for indemnification?[78] In late 1989 the Metropolitan Bishop of Zagreb Jovan Pavlović demanded that Croatia indemnify the Serbian Orthodox Church for crimes committed at the time of the NDH.[79] Apart from vividly demonstrating the kind of propaganda from Belgrade to which the Serbs in Croatia were exposed, this also reveals the extent to which the Serb community in Croatia was free to express themselves. As stated in the Memorial, this theory was articulated by the renowned Serbian historian, Vasilije Krestić[80] and gained considerable support with a number of papers being written on the subject.[81] It was also claimed that the Communists had banned research into the crimes committed against the Serbs for decades, because they did not want to jeopardise their platform of 'brotherhood and unity'.[82]

3.32 The Respondent's claims regarding the alleged hate speech emanating from Croatia is also clearly repudiated by the fact that in the 1990 elec-

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74 Silber, pp. 92, 133.

75 See also Professor de la Brosse Report, ICTY, pp. 53-54, 62.

76 LJ. Boban, *Kontroverze iz povijesti Jugoslavije*, Book 2, p. 324.

77 Radmila Radić, *Crkva i 'srpsko pitanje* [The Church and the 'Serb Issue'], *Srpska strana rata* [The Serbian side of the War], Republika, Belgrade, 1996, pp. 269-288; Olivera Milosavljević, *Zloupotreba autoriteta nauke* [The Abuse of the Scientific Authority], *Srpska strana rata*, Republika, Belgrade, 1996, pp. 305-322.

78 Jelena Lovrić, *Na redu je Hrvatska* [It's Croatia's Turn], *Danas*, 19 September 1989, pp. 7-9.

79 Marinko Čulić, *Zaruke zvijezde i krsta* [Betrothal of the Star and the Cross], *Danas*, 26 June 1990, pp. 28-29.

80 Memorial, paras. 2.51-53. Krestić claimed that genocidal ideas and genocide against Serbs were deep-rooted in the awareness of Croatian generations. See also Vasilije Đ. KRESTIĆ, *Srpsko-hrvatski odnosi i jugoslovenska ideja u drugoj polovini XIX veka* [The Serbian-Croatian Relations and the Yugoslav Idea in the Second Half of the 19th Century], Nova knjiga, Belgrade, 1988, pp. 367-368

81 Josip Jurčević, *Nastanak jasenovačkog mita* [How the Jasenovac Myth Came into Being], Hrvatski studiji, Zagreb, 1998, p. 147.

82 See Milan Bulajić, *Ustaški zločin genocida* [The Ustasha Crime of Genocide], Belgrade, 1989, III, p. 15. Compare also Svetozar Stanojević, *Propast komunizma i razbijanje Jugoslavije* [The Collapse of Communism and the Destruction of Yugoslavia], "Filip Višnjić"; *Institut za filozofiju i društvenu teoriju*, Belgrade, 1995, pp. 61-63; M. Hadžić, *Sudbina partijske vojske* [The Destiny of the Party's Army], pp. 136-137. Endru Baruh Vahtel, *Stvaranje nacije, razaranje nacije* [Creation of a Nation, Destruction of a Nation], Stubovi kulture, Belgrade, 2001, pp. 253-254.

tions a majority of the Serbs in Croatia voted for a party that had no exclusive nationalist orientation, the reformed communists, headed by a Croat and not for the Serb Democratic Party ('SDS').[83]

3.33 In any event, historical revisionism was created and inflamed by the Serbian intellectual elite in the late 1980s, then guided by the SDS amongst the Serbs in Croatia.[84]

(4) In Pursuit of Greater Serbia: Serbia's Efforts to Expand its Borders

3.34 In the Memorial, Croatia stated that as the disputes between the Republics intensified, significant differences emerged between them as to the inviolability (or otherwise) of the territorial borders of the Republics.[85] These borders had remained unchanged since 1945, save for minor adjustments, and their maintenance was expressly provided for by the 1974 Constitution.[86] Serbia started to question the internal borders of the Republics, and together with its bloc (Montenegro, Kosovo and Vojvodina) argued that it was for the peoples to decide on borders rather than the Republics, because the Serb people were spread over the territory of a number of Republics, particularly Croatia and Bosnia.[87] Serbia claimed that the people, and not the republics, were sovereign, drawing from this the conclusion that the borders were to be changed by the people (and by this it meant solely the Serb people). Thus, it is submitted that even before the HDZ came to power in Croatia, Serbia's leadership had started preparing its criminal plan of creating a Greater Serbia.[88] It only recognized the international borders of SFRY, arguing that the territorial borders of the individual Republics, were merely "administrative" in character and could be modified.[89] Later, the leadership of the 'Serb Autonomous Region' ('SAO') Krajina was another proponent of this view when through its unilateral actions, it declared that it had joined the Republic of Serbia and

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[83] Silber, p. 95.

[84] Silber, p. 98.

[85] Memorial, para. 2.72 *et seq.*

[86] Article 5 of the SFRY Constitution provided that the territory of the SFRY was a single unified whole and consisted of the territories of the Socialist Republics. It went on to provide that "the territory of a Republic may not be altered without the consent of that Republic" and that the territory of an Autonomous Province could not be altered without the consent of that Autonomous Province. Article 5 also provided that "boundaries between the Republics may only be altered on the basis of mutual agreement, and if the boundary of an Autonomous Province is involved, also on the basis of the latter's agreement."

[87] Memorial, paras. 2.72-74.

[88] This is borne out by Jović's diary, more precisely by the account for 26 March 1990 which makes it clear that the Serbian leadership was conscious that they would not be able to achieve the borders they wanted without a war. See B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], p. 131.

[89] See "Ethnic Composition of the Population of Serbia and Montenegro and the Serbs in SFR of Yugoslavia", University of Belgrade, Belgrade 1993 at p. 17, describing the Serbs as "internees of the administrative interior boundaries between the Yugoslav federal units" and criticising the European Community's aspirations to recognize "the administrative boundaries between Yugoslav federal states as the untouchable state borders. "

become a part of its state territory. The view of the other Republics – particularly Slovenia and Croatia – was that they were sovereign within their existing borders, which was based on the 1974 Constitution and on international law, was unacceptable to Serbia.[90]

3.35 The Respondent argues that the debate with regard to internal borders is irrelevant, and in any event it was only in January 1992 that the Badinter Commission held that the former internal borders of the Republics were frontiers protected by international law.[91] It fails to mention that almost 6 months earlier, the European Community had made it clear that

> "it will never accept a change of borders that was not brought about in a peaceful way or through agreement."[92]

The same principles were confirmed as one of the conditions for recognition of new states emerging out of the dissolution of SFRY by the EC in December 1991.[93]

3.36 The Respondent denies that its attempts at altering internal borders was motivated by the idea that different ethnicities could not live together and that certain areas within the republics were to be cleansed of non-Serb populations. This is unpersuasive. Moreover it argues that this is unsubstantiated.[94] By conflating two separate arguments of Croatia, Serbia first recasts the arguments made in the Memorial and then seeks to challenge them. The facts and situation on the ground show that this is exactly what happened, particularly in the later half of 1991. Pro-Milošević politicians and intellectuals in Serbia (and in fact Milošević himself) began to propose the revision of the borders of the Republics on grounds of ethnicity.[95] In early June 1991, on the eve of the outbreak of the fiercest fighting in Croatia, Vojislav Šešelj was asked under what conditions would he be ready to negotiate with Croatia, to which he replied:

> "The condition is that they accept the line Karlobag-Ogulin-Karlovac-Virovitica as Croatia's border. Only then can we agree on the exchange of the population. All the Serbs living in Zagreb, Rijeka, Istria and Slovenia to move to Serbia and Croats living in Serbia to move to

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[90] See Miodrag Zečević, Bogdan Lekić, *Državne granice i unutrašnja teritorijalna podela Jugoslavije* [International Borders and Internal Territorial Division of Yugoslavia] *Građevinska knjiga* Belgrade, 1991. The book's Introduction refers to an attempt by some Republics to declare their administrative-territorial borders to be international borders.

[91] Counter-Memorial, para. 443.

[92] Declaration on Yugoslavia issued by the Council of Ministers of the European Communities after the extraordinary meeting in Brussels on 27 August 1991.

[93] EC Declaration Concerning Conditions for Recognition of New States of 16 December 1991. (with the annexed Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union S/23293, Annex II).

[94] Counter-Memorial, para. 444.

[95] Memorial, paras. 2.72 onwards; see also Professor de la Brosse Report, ICTY, p. 16 *et seq.*

Croatia; thus, we would resolve the issue once and for all. "[96]

3.37 The Respondent states that Vojislav Šešelj, the leader of the Serbian Radical Party, was not a pro-Milošević politician at that time, but a member of the opposition, and that his party was refused registration in 1990. It also states that there is no evidence that Šešelj's statement or his ideas regarding the borders of "Greater Serbia", were supported by President Milošević.[97] In arguing as such, the Respondent looks at form rather than substance. Šešelj and Milošević may well have been opposed politically to start with, but they were both unanimous with respect to the idea of one Serbia for all Serbs.[98] Even though the Serbian authorities refused to register Šešelj's party in 1990, it was registered in February 1991, and soon thereafter Šešelj became an MP in the National Assembly of Serbia. The Serbian state media gave him extensive coverage, enabling him to popularise his war-mongering anti-Croatian slogans.[99] In any event the Respondent does admit that Šešelj become President Milošević's ally later, by November 1991.[100] Milošević's government skilfully used Šešelj for war-mongering and for publicly expressing what Milošević and the leadership of the JNA did covertly.[101] A Serbian sociologist later wrote that Milošević and his "statist elite" used and manipulated Šešelj in 1991, giving him access to the Serbian mass media to reach the common man, which he did.[102] Quite often Šešelj was the "lightning-conductor" for Milošević's strategy. Similarly, while in the spring of 1991, the JNA may have condemned Šešelj, they used him later that year for boosting morale on the Croatian battlefield.[103] It is noteworthy that in addition to be indicted for individual criminal responsibility,

[96] Joco Eremić, Interview with Vojislav Šešelj, *Neka se Hrvati ne igraju glavom* [Don't let Croats Play with their Heads], *Srpske novine, Novine Krajine*, Knin, No. 1, 8 June 1991, pp. 6-7. See also Memorial, vol. 3, Plate 2.6. This is also set out in his Indictment at the ICTY.

[97] Counter-Memorial, paras. 445-446.

[98] Šešelj did not really oppose Milošević, but the other opposition parties in Serbia. Erik D. Gordi, *Kultura vlasti u Srbiji, Nacionalizam i razaranje alternative* [The Culture of Power in Serbia: Nationalism and the Destruction of Alternatives], Belgrade, 2001, pp. 57-58.

[99] In almost daily rallies and election campaigns, he called for Serb unity and war against Serbia's "historic enemies", namely the ethnic Croat, Muslim and Albanian populations within the territories of the former Yugoslavia. See Third Amended Indictment, IT-03-67, para. 4.

[100] Counter-Memorial, para. 445. [See also Recording of V. Šešelj's Speech in Benkovac on 23 November 1991 with the Croatian Memorial-Documentation Centre of the Homeland War (HMDCDR); Inventory No. 436.

[101] For a detailed account Šešelj's activities see: *Proces Vojislavu Šešelju: Raskrinkavanje projekta Velika Srbija* [A Trial against Vojislav Šešelj: Exposing the Project of Greater Serbia], Biblioteka "*Svedočanstva*", No. 34, edited and prepared by Sonja Biserko, Helsinki Committee on Human Rights in Serbia, Belgrade 2009.

[102] Slobodan Antonić, *Zarobljena zemlja, Srbija za vlade Slobodana Miloševića* [Captured Country, Serbia under Slobodan Milošević's Rule], Belgrade 2002, p. 379 states:

> "Statist elite that was engrossed by important state-building affairs and tasks after 1988 somehow did not manage to reach the heart of 'the little man'. In 1991, the idea occured to someone from that elite to give Vojislav Šešelj - a gifted 'leader from the crowd' - more space in the media. This is how the national-populist elite came into being. Šešelj managed to fascinate the masses."

[103] D. Gajić-Glišić, *Srpska vojska – iz kabineta ministra vojnog* [Serbian Army – from the Personal Office of the Minister of the Military], pp. 16/17.

Šešelj has also been indicted for his role in a joint criminal enterprise (JCE), the purpose of which was the permanent forcible removal of a majority of the Croat and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia, in order to make these areas part of a new Serb-dominated state.[104] The other members of the JCE included Milošević, General Veljko Kadijević, Milan Martić, Milan Babić, and other political figures from the SFRY, the Republic of Serbia and the Croatian Serb leadership. So Serbia's attempt to distance itself from Šešelj is futile.

3.38 In any event Milošević himself articulated the goal of a single state for all Serbs. On 15 January 1991, he stated that "it would be unacceptable for Serbs to live in separate States" and added that the Serbian nation would, indeed, live in one State, in one single State,[105] thus echoing the message of the 1986 Memorandum. He explained his vision of the future Yugoslavia: the borders of the constituent Republics of the former Yugoslavia would not be defining for this future Yugoslavia; what would be defining would be borders which would ensure that the Serbian *nation*, not to be confused with the Serbian *State*, would be brought together in one single State.[106] On 16 March 1991, Milošević clearly expressed this goal at meeting with heads of municipalities in Serbia. He stated:

> "We have to ensure that we have unity in Serbia if we as a Republic that is the largest and most populous want to dictate the further course of events. These are the issues of borders, therefore essential state issues. And borders, as you know, are always dictated by the strong, they are never dictated by the weak. (...) We simply consider it a legitimate right and interest of the Serb people to live in one state. And that is the beginning and the end. (…) Besides, what do they need those Serbs for, who are such a nuisance to them. (…) They are a nuisance to them but they need the territory. The Serbs, however, are no subtenants on this territory. Since the time of the *Vojna Krajina* [Military Frontier], throughout history, they have been living there as their own men in their own country. And generally speaking, they have no intention of leaving the territory they live in. They formed and declared that they do not recognise the Croatian Republic. They established the Autonomous Region of Krajina. (…) And if we have to fight, then, by God, we will fight. And I hope they will not be so crazy as to fight against us. Because if we do not know how to work and do business well, at least we know

[104] According to the Indictment, the JCE came into existence before 1 August 1991 and continued at least until December 1995 and Šešelj participated in the JCE until September 1993. See Third Amended Indictment, IT-03-67, para.8.

[105] *Tanjug*, 1939 gmt, 15 January 1991, source: BBC Summary of World Broadcasts. See also the comments of the Vice-President of Milošević's Serbian Socialist Party Michaelo Marković, who is reported to have talked about the new State and said there would be at least three federal units: Serbia, Montenegro and a united Bosnia and Knin region. Tanjug, 1746 gmt, 9 October 1991, see Noel Malcolm, *Bosnia: A Short History*, 1996, pp. 228-229.

[106] *Tanjug*, 1939 gmt, 15 January 1991, source: BBC Summary of World Broadcasts.

how to fight well."[107]

While ostensibly fighting for "Yugoslavia", Milošević was clearly advocating for all Serbs to live in one state - a state under Serb domination – and in reality – "Greater Serbia".

3.39 To distance itself from Šešelj's statement for the revision of the Republics' borders on the grounds of ethnicity, the Respondent states that when on 1 April 1991 the 'SAO Krajina' adopted a decision to join the Republic of Serbia, the following day, on 2 April 1991, the National Assembly of Serbia adopted a Declaration on the Peaceful Settlement of the Yugoslav Crisis, "which basically rejected this idea."[108] The Declaration clearly did no such thing. Though the Respondent could have annexed the National Assembly's declaration it has not, choosing to rely on an oblique and vague reference.[109]

3.40 The Respondent states that President Tuđman was one of the most en-

[107] "Excerpts from shorthand notes from a meeting of the President of the Republic, Slobodan Milošević, and the deputy chairman of the National Assembly of the Republic of Serbia with presidents of municipal councils of the Republic of Serbia, held on 16 March 1991," prepared by M. M., *Vreme* (Belgrade), no. 25, 15 April 1991, pp. 62-66. See also Professor de la Brosse Report, ICTY, pp. 28-29.

[108] Counter-Memorial, para. 446.

[109] See Declaration on the Peaceful Settlement of the Yugoslav Crisis against Civil War and Violence, National Assembly of the Republic of Serbia, 03 No. 43, 2 April 1991, Annex 49**.** Claiming to advocate for a peaceful, democratic and speedy resolution of the Yugoslav crisis, the Declaration was an ultimatum of sorts and clearly sought to interfere in the internal affairs of Croatia. It called on the SFRY Presidency and the General Staff of the Supreme Command of the JNA to prevent inter-ethnic armed conflict or civil war in Yugoslavia and not to permit any one side to resort to violence in settling inter-ethnic and inter-state disputes (para. 3). Instead of calling into question the illegality of the establishment of the Serb regions in Croatia, the Declaration accused Croatia "of using violence...against the Serb people in the municipality of Titova Korenica." The Croatian leadership was warned that "the use of force against the interests of the Serb people in the Republic of Croatia makes it exclusively responsible...for future developments" (para. 4). Para. 5 justified the unlawful decisions of "the relevant bodies of the SAO Krajina, Slavonia, Baranja and Western Sirmium and the reactions of the Serb people as a whole" to decide on Yugoslavia's future through a referendum, even though this was in contravention of Croatian law. Thus, far from rejecting SAO Krajina's decision to join the Republic of Serbia, the Declaration accused Croatia of not permitting the [Serb] referendum, and it stated that the Serbian Assembly and all government bodies would provide all necessary assistance and support to the Serbs in Croatia (para. 6). Croatia was requested to withdraw its police from Plitvice (it was this intervention that prompted the rebel Serbs to declare their unification with Serbia). In the same vein, support was given to the JNA's actions, which was requested to deploy in the SAO Krajina, Slavonia, Baranja and Western Sirmium and "in all the places in which the Serb population resides until a political agreement on the solution to the existing situation be reached" (para. 9). This request was in fact a request for the occupation of a part of the Croatian territory which was precisely what General Kadijević promised the Serbian political leadership a few days later.

In the 5 April 1991 entry in his memoirs, B. Jović testifies that he and Milošević talked with Kadijević and Adžić and that the following question came up:

> "Will the army allow the Croatian police to occupy Knin and other Serb towns which are now under Serb control? The response is very clear: no … The army will not attack anyone but it will defend both itself and the Serb people in Krajina." B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], p. 317.

thusiastic proponents of a change of borders along ethnic lines. Notwithstanding that claim, the evidence shows that through the several months of negotiations between the leaders of the Yugoslav republics on the future of the SFRY, President Tuđman maintained a position with regard to the inviolability of the Republican borders. It is to be noted that Croatia and Slovenia, together with Bosnia and Macedonia were all strong advocates for the preservation of the republican borders, which were to be respected as international borders of the new states.

(5) The HDZ Government and its Allegedly Discriminatory Policies

3.41 The HDZ won Croatia's first multi-party elections in the spring of 1990 and formed the government. Dr. Tuđman became independent Croatia's first President.

3.42 The Respondent states that in January 1990, at its 14th Congress, the League of Communists of Yugoslavia (LCY) was torn along ethnic lines and effectively disappeared as a cohesive force of the federation, as a result of which the very survival of the SFRY was at stake. Serbia's claim that the dissolution of the LCY heightened the sense of "insecurity" felt by the Croatian Serbs is in keeping with the Greater Serbian world view according to which it was only the Serbs who had reasons to fear an uncertain future.[110] Unfortunately, the Respondent fails to mention that it was Milošević's attempt to take control of the LCY that led to its break-up and later to the to the break-up of the SFRY.[111]

3.43 In any event, the HDZ did not adopt discriminatory government policies aimed at Serbs, nor were Serbs fired en masse from the state administration and public services and nor were the rights held by the Serb community taken away or reduced.

(a) The Allegations of Mass Dismissals are Unsubstantiated

3.44 The Counter-Memorial alleges that once the HDZ came to power, its "threatening rhetoric was turned into government actions with the introduction of discriminatory policies clearly aimed at Serbs". This, the Respondent alleges, included mass dismissals from the state administration and public services and a reduction *or* taking away of the rights of the Serb community; once again, accompanied by acts aimed at rehabilitation of the NDH. These events are said to have "cemented the insecurity" of the Serbs in Croatia. [112]

3.45 Firstly, it is noteworthy that Serbia admits that the coming into power of the HDZ and the spectre of NDH were "manipulated by the propaganda of the state-controlled media in Serbia". [113]

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[110] Counter-Memorial, para. 451.
[111] B. Jović, *Poslednji dani SFRJ* [The Last Days of the SFRY], pp. 88, 92-93.
[112] Counter-Memorial, para. 452.
[113] *Ibid*.

3.46 Secondly, in support of its expansive claims of a campaign of massive dismissals of Serbs from government employment, the Respondent cites one book.[114] This book however provides no support for this allegation. It sets out the opinion of the author, but does not quote any specific source or any concrete data. It does not provide even a single specific piece of information as to who, when and what numbers were allegedly dismissed. Even with regard to the alleged dismissals of Serbs from the local police force, and the destruction of Serb property Serbia cites one book - J. Lampe's book *Yugoslavia as History: Twice There was a Country* - This book relies on unsubstantiated and uncorroborated secondary data.[115] Thirdly, the Respondent provides no authority in support of its claim that there existed discriminatory government policies aimed at Serbs. It cannot, as there were none.

3.47 In conclusion, the Respondent has not offered any evidence in support of these claims, which cannot, in any event, justify the genocidal acts for which Serbia is responsible.

(b) The Allegation that Constitutional Changes were Discriminatory is a Misrepresentation of the Facts

3.48 The series of constitutional changes adopted by the HDZ did not reduce the rights and affect the position of Serbs in Croatia, as alleged.[116] Serbia refers to two specific changes:

1. the Constitutional amendments in July 1990 that resulted in the introduction of a new flag and coat of arms by Croatia, that were allegedly similar to the flag and coat of arms of the NDH; and

2. the adoption of a new Constitution in December 1990, which allegedly "further reduced the rights of the Serb community in Croatia."[117]

3.49 The July 1990 Amendment removed the term "Socialist" and visual socialist signs from the flag and the coat of arms. The communist red five point star was replaced by the *šahovnica* (a white and red checker-board), which Serbia admits "was historically one of Croatia's symbols."[118] This was clearly distinguishable from the flag of the NDH, the symbol of which was the letter "U" with the stylised Croatian three-strand pattern. The Croatian flag underwent further changes on 21 December 1990 when a "crown" made up of the historical coats of arms of the Croatian regions was added to it. The Counter-Memorial fails to present a graphic of the historical coat of arms of Croatia because it is clear that the coat of arms of the Socialist Republic of

[114] Counter-Memorial, para. 453, citing O. Žunec, *Goli život* [Naked Life], Zagreb, 2007, p.572. Žunec's statement is not corroborated by any relevant sources but rather individual examples.

[115] Counter-Memorial, para. 454, citing J. Lampe, *Yugoslavia as History: Twice There was a Country*, Cambridge University Press, 2000 (2nd ed.), p. 360.

[116] Counter-Memorial, para. 456.

[117] Counter-Memorial, paras. 456-458.

[118] Counter-Memorial, para. 457.

Croatia also contained the historical Croatian coat of arms with the checkerboard. No further changes were introduced as is clear from the graphics set out below.

The Coat of Arms of the Socialist Republic of Croatia

The Coat of Arms of the Republic of Croatia from December 1990

Therefore the Respondent's allegations and graphics are obviously false.

3.50 The Respondent's second allegation refers to the adoption of Croatia's new Constitution, which it says "further" reduced the rights of the Serb community.[119] As the Counter-Memorial does not specify how the change in the flag and coat of arms resulted in a reduction of the rights of the Serb community it is difficult to see how the new Constitution resulted in a *further* reduction of their rights. While the text of the Constitution was amended, there was no corresponding loss to the rights of the Serb people. The 1990 Constitution defines Croatia as follows:

> "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 [United Nations] and the countries of the free world."

3.51 The new Constitution "guaranteed equality" to all Croatian citizens. Therefore Serbia's claim that with the adoption of the new Constitution the Serbs in Croatia lost their position as constituent elements of the state and their collective rights is simply wrong and unfounded in law. Admittedly, the new formulation states that Croatia is the national state of the Croatian people, but it is also the state of other peoples and minorities who are its citizens. The

[119] Counter-Memorial, paras. 458-462

1990 Constitution does not abolish any substantial rights of the Serbian community. The Counter-Memorial fails to specify the nature of the special rights enjoyed by the Serb community which were taken away by the adoption of the new Constitution. Although the Serbs were described as a "constituent people" in the earlier Constitution, this did not give them any special national rights, like any right to territorial and other autonomy.

3.52 Similarly, there was no particular guarantee of the explicit use of Serbian language as a separate and distinct language. The Respondent admits that the 1974 Constitution provided that the language[120] for public use in Croatia was the

> "Croatian literary language - the standard form of the people's language of the Croats and Serbs in Croatia, which is called Croatian or Serbian."[121]

3.53 The Respondent makes other allegations of discrimination and threats.[122] It alleges that Serb property was damaged and the pressure against Serbs was such that thousands changed their names to conceal their Serbian identity to avoid discrimination and persecution by Croatia. It alleges that this discrimination and persecution increased at the beginning of the armed conflict in 1991 and eventually resulted in an alleged genocide" in 1995, during the Operation Storm.[123] The Applicant vehemently denies that it committed genocide against the Serbs in Croatia in 1995. A detailed reply to the Respondent's Counter Claims is set out in Chapters 10 to 12. The other allegations regarding the destruction of property and the changing of names are based on three sources, none of which is probative or convincing.[124] In any event the allegations are denied.

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[120] The language (singular) - not "languages", as suggested in the Counter-Memorial - was the Croatian language. The footnote (note 463) contains the correct text, Croatian language in singular.

[121] Counter-Memorial, para. 463. Throughout the existence of the SFRY there was a trend to create a single language out of the Croatian and Serbian languages, which resulted in naming the two languages as one. The only difference was which language was named first. In practice, in Croatia the "Croatian literary language" was called "Croatian or Serbian language" (the Croatian language meant/implied the use of the Latin script). In Serbia the same language was called "Serbian and Croatian language" (this implied the Serbian language and both the Latin and Cyrillic script).

[122] Counter-Memorial, paras. 465-466.

[123] *Ibid*.

[124] The Counter-Memorial cites:

- O. Žunec, *Goli život* [Naked Life], Zagreb, 2007, p. 572 *et seq.* – This is the same source cited in support the allegation of ethnically motivated dismissals. However Žunec cites no concrete data for this allegation. In fact Serbia admits as much in the footnote when it states that though that 25,786 "persons" changed their names in Croatia during the period 1990-1992, it still remains to be determined how many persons were Serbs and how many Serbs changed their names to conceal their identity.
- Two other books are also referred to - S. Woodward, *Balkan Tragedy* (1995), p. 107 and John R. Lampe, *Yugoslavia as History: Twice There was a Country* (2nd ed., 2000), p. 354 - in support of these allegations. These books are based on secondary sources and in any event, the page cited from Lampe's book contains nothing that

(c) The Allegation of Illegal Arming is Misleading

3.54 The Counter-Memorial also contains a brief section entitled *Croatia's Preparation for War* where it is stated that the HDZ government in Croatia started to prepare for armed conflict in 1990, after it took office.[125] This is yet another misleading statement.

3.55 The Respondent fails to mention that the enlargement and arming of the Croatian police personnel was necessitated by the disarming of the Croatian Territorial Defence (TO) by the JNA. This was in May 1990. Additional personnel were also required to meet the shortfall in numbers created by the rebellion of the Serb officers in the police force in the areas of Croatia where the Serb community had proclaimed their autonomy in December 1990. The disarmament of the TO that preceded the Croatian defence activities is completely ignored in the Counter-Memorial.[126] As stated by General Svetozar Oro, a Serb general in the JNA:

> "as soon as the JNA took arms of the Territorial Defence of Slovenia and Croatia but not of other republics (disarmed them), it gave more than a clear message to those disarmed what the future held in store for them".[127]

3.56 Croatia received that "clear message" and therefore proceeded to enlarge and arm its police forces. The fact that this was a defensive action is clear from the dates. The 'Balkan Battlegrounds' Report cited in support by Serbia states that police personnel was expanded by January 1991, as was the special police, whereas the territorial defence was disarmed in May 1990.[128] In the face of the illegal disarming of the Croatian TO by the JNA, and the refusal of the federal authorities to equip the Croatian police force, there was nothing illegal about Croatia arming its police forces. It was a necessity, as the Croatian government had no armed force capable of acting independently of the JNA, except its police.[129]

SECTION II: INSTRUMENTALIZATION OF THE SERBS AND THE SERB REBELLION IN CROATIA

3.57 The Memorial explains in details how the Serb community in Croatia corroborates Serbia's allegation.

[125] Counter-Memorial, paras. 467-472.

[126] See Chapter 4, *infra*.

[127] See the forward by General Svetozar Oro in Vaso Predojević's book, *U procjepu* [In the Cleft Stick], Dan Graf, Belgrade, 1997, p. 6. (Predojević was a JNA colonel from the 5th Military District).

[128] 'Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995', Central Intelligence Agency, Office of Russian and European Analysis, Washington, DC 20505, May 2002. Counter-Memorial, paras. 468-471 refers to the Report; see further, Chapter 4 of this Reply, *infra*.

[129] See Memorial, para. 2.97. See also Chapter 4, *infra*.

reacted to the political changes and political climate in the SFRY from the mid 1980s.[130] Serbs living in the parts of Croatia where they were in a significant part of the populous were more influenced by the media onslaught from Belgrade, which raised the spectre of a repetition of the events of 1941. Some Serb communities began to "organize themselves" often with the assistance of public authorities in the Republic of Serbia and the JNA.[131] In 1989 and 1990 some Serb communities also began to arm themselves, and draw up "emergency plans".[132] The Counter-Memorial refers to this as a "manifestation of national sentiments" by the Serbs,[133] whereas for Serbia, any manifestations of national sentiments by the Croats were deemed as a "rehabilitation of the NDH" or a threat of genocide or creating insecurity in the Serb community. This Serbian national sentiment would soon prove to be a lethal weapon in the implementation of an aggressive and genocidal plan.

3.58 It is submitted that the entire section entitled "The Organising of Serbs in Croatia" abounds in inaccurate information.[134] The manner in which the entire section was written contradicts Serbia's claim that it would assist the Court in gaining a more balanced picture of the events.[135] As in other parts of the Counter-Memorial, the Respondent deliberately glosses over the truth by leaving out a whole string of important events without which the true state of affairs cannot be understood.

3.59 The Serb Democratic Party ('SDS') was formed by Serbs in Croatia on 17 February 1990, almost simultaneously with the HDZ. Initially, the SDS proposed a new administrative partition which later developed into a demand for complete autonomy or a later separation.[136] However, even before this, the idea of forming a so-called "Serb Autonomous Region" ('SAO') in Croatia was accepted at a Serb meeting in Vojnić, on 4 February 1990.[137] These developments occurred before the elections in April 1990 that brought the HDZ to power. Therefore the allegation that the SDS started to seek autonomy for the Serbs in Croatia after the allegedly discriminatory constitutional amendments of July 1990 is plainly incorrect.[138] By the time of the election campaign in the spring of 1990, radical Serb nationalism had manifested itself several times in Croatia. The Respondent's admission that the first manifestations of national sentiments of the Serbs in Croatia took place in 1989[139] is an understatement

130 Memorial, pp. 53-67.
131 See Memorial, Chapter 3, para. 3.27 *et seq*.
132 Memorial, para. 2.81 and the citations therein.
133 Counter-Memorial, para. 475. The Counter-Memorial fails to specify how the Serb "manifestation of national sentiments" at the Knin celebration of the battle on the Kosovo field, provoked anxiety and fear among Croats.
134 Counter-Memorial, paras. 473-498.
135 Counter-Memorial, para. 473.
136 Memorial, para. 2.82.
137 Memorial, para. 2.83.
138 Counter-Memorial, para. 478.
139 Counter-Memorial, para. 475.

for the outburst of Serb nationalism which threatened the security situation in Croatia.[140]

3.60 It is also unclear how such autonomy for the Serbs in Croatia was to be exercised. The Counter-Memorial provides no details. A clue to its meaning and the SDS agenda could be found in a statement made by the first President of the SDS, Jovan Rašković, who stated:

> "for every step which Tuđman takes distancing Croatia from [SFRY] we shall make a step towards distancing ourselves from Croatia".[141]

3.61 After the elections, President Tuđman and Mr Rašković, the leader of the SDS, held discussions in July 1990.[142] What the Counter-Memorial fails to state is that Mr Rašković was offered the post of Deputy Speaker of the Croatian Parliament, but he rejected it. In fact the Serbs obstructed and soon rejected all talks on their status. Rašković himself was criticized for meeting with Tuđman and thereafter the leading role in the development of the rebellion was taken over by Milan Babić.

3.62 As noted earlier, by 1991 Serbia had two alternative objectives: either to prevent Croatia from achieving independence from the SFRY and keeping it under Serbian control, exercised through Federal institutions, or, (if that policy failed) ensuring that an independent Croatia existed within significantly reduced borders than that of the Republic within the SFRY. The latter objective was premised on Serbia's desire to ensure that a large part of the territory of Croatia should remain subject to its control, even if that meant the use of force and, ultimately, the displacement or destruction of significant parts of the Croatian population.[143]

3.63 An important element of Serbian policy was the encouragement and logistical support of a Serb rebellion in the Republic of Croatia, though not all Serbs, nor all Serb-populated areas, joined the rebellion.[144] From the summer of 1990 until the summer of 1991, the period when Serbia's genocidal campaign began, mass protests and demonstrations were organized on the territory of the Republic of Croatia with a view to encouraging Serbs to mobilize.[145] The Belgrade media continued to prepare the Serb population for the impending Croatian "genocide" against them, in particular during the 1990 election campaign and subsequently. The leadership of the SDS consciously intensified the perception of threat to the Serbian community in Croatia.[146]

[140] See Republican Secretariat of Internal Affairs of the SRH, No. III/1-6/1-90 of 25 January 1990, Report on the Implementation of Conclusions of the DPV (Social and Political Council) of Parliament.

[141] Memorial, para. 2.87 (citations omitted).

[142] Counter-Memorial, para. 478.

[143] Memorial, para. 2.85.

[144] Memorial, para. 2.86 *et seq.*

[145] Memorial, para. 2.87.

[146] Memorial, para. 2.88.

3.64 Rather than take up their parliamentary seats in the Croatian Parliament, on 1 July 1990 the SDS MP's formed the "Union of municipalities of Lika and northern Dalmatia."[147] Soon other Serb dominated areas were also incited and encouraged to rebel. The Memorial sets out the details of the rebellion.[148] The Respondent claims that this establishment of municipalities was "completely lawful" and that it was largely "a symbolic expression of the Serb protest" and in any event the Municipalities were "voluntary associations without much power."[149] The union of municipalities was unlawful and was annulled by the Croatian Constitutional Court on 28 August 1990.[150] This description of the union of municipalities is at odds with a contemporaneous source, *viz* the published diary entries of Borisav Jović, (the then Serbian member of the Yugoslav Presidency). In late June 1990, the JNA and Serbian leaders had, according to a "reliable source", information that the newly elected authorities in Croatia advocated the reconstruction of Yugoslavia into a confederation, in other words a union of sovereign states, which would all be subjects of international law and have the option to leave this alliance. Borisav Jović records a conversation with General Kadijević on 27 June 1990 as follows:

> "I would like it most to expel them [Croatia] from Yugoslavia by force, by simply cutting borders and declaring that they themselves caused such a situation through their own decisions but I do not know what to do with the Serbs in Croatia. I am not in favour of the use of force but rather for bringing them to a fait accompli. Veljko [Kadijević] agrees to elaborate an action in that direction, with a version to hold a referendum [of the Serbs in Croatia] prior to the final expulsion [of Croatia] the results of which would be used as a basis for the decision where to draw the border line".[151]

3.65 The following day, on 28 June 1990, B. Jović discussed the same proposal with President Milošević:

> "He agrees with the idea of 'throwing out' Slovenia and Croatia, but he asks me whether the army will execute such a command. I am telling him that it must execute the order and I do not have any doubts about it but the problem is what to do with the Serbs in Croatia and how to ensure the majority vote in favour of such a decision in the Presidency of the SFRY. Sloba [Milošević] gave two ideas: first, to execute this "cutting off" of Croatia in the way that the municipalities from Lika-Banovina and Kordun, which formed the union, remain on our side,

147 Counter-Memorial, para. 479.
148 Memorial, paras. 2.89-92.
149 Counter-Memorial, para. 479.
150 Decision of the Croatian Constitutional Court, no. U/I-214/1990, dated 28 August 1990, *Official Gazette*, 3 September 1990.
151 B. Jović, *Poslednji dani SFRJ* [The Last Days of the SFRY], pp. 159-160.

> provided that the people later at a referendum say whether they want to stay or leave and second, to exclude members of the Presidency of the SFRY from Slovenia and Croatia from voting, since they do not represent the part of Yugoslavia that makes that decision. Should the Bosnians be in favour of it, we shall have a two-third majority. Sloba appeals that the decision be made in a week at the latest, if we wanted to rescue the state. Without Croatia and Slovenia, Yugoslavia will have the population of around 17 m and for European circumstances this is sufficient".[152]

These were thus the plans of the Serbian political and military leaders with respect to the Serbian "Union of municipalities" which was then established in Croatia.

3.66 On the day that amendments were made to the Croatian Constitution, on 25 July 1990, a mass rally was held in the village of Srb, on the border with Bosnia and Herzegovina, where Milan Babić of the SDS announced the establishment of a "Serb National Council." The Serb National Council was to take on the handling of business of Serbs in Croatia, but there was also a separate body called the Presidency of the Union of Municipalities of Lika and Northern Dalmatia. The Council rejected the Croatian Constitutional amendments and issued a Declaration on the sovereignty and autonomy of the Serbs in Croatia, and announced that there would be a "referendum" on the question of Serb autonomy in Croatia.[153] The Counter-Memorial states that the Declaration merely "set forth political aspirations of the Serbs in Croatia."[154] It fails to explain how "voluntary associations without much power" could reject the Constitutional amendments of a sovereign state and adopt a Declaration establishing its own Parliament and declaring politico-territorial autonomy, and how such actions could be considered "symbolic expressions" of protest.

(1) Escalation of the Crisis and the Serb Referendum

3.67 August 1990 saw an escalation of the conflict. On 17 August, SDS members broke in to police stations and seized weapons of the police reserve forces in the areas that they controlled. The Croatian police tried to take those weapons as prior to that armed sentries had been posted, among other things, in the Knin area. In September 1990 the Serbs raided police stations and held demonstrations in Banovina (for example, Petrinja). Milan Babić, the mayor of Knin and a key figure in the SDS who went on to become the 'President' of

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[152] B. Jović, *Poslednji dani SFRJ* [The Last Days of the SFRY], p. 161. See also Chapter 4, *infra*.

[153] BBC Summary of World Broadcasts, 27 July 1990, Memorial Annexes, vol 4, annex 29. The "referendum" was first announced by Rašković at the Srb rally. See also Counter-Memorial, paras. 480-481.

[154] Counter-Memorial, para. 482.

the 'SAO Krajina' described this as a "war situation."[155] The Counter-Memorial contradicts the Memorial, citing selectively from a "Croatian account"[156] (N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], 2005. It alleges that the Serb "demonstrations" on 17 August 1990 were provoked by actions of the Croatian police. It omits sections of Barić's book that state that prior to 17 August 1990 the Serbs had organised armed groups and guards in the area of Knin and that the local Serb police officers had renounced their loyalty to the Croatian government.[157] The facts set out in the Memorial are also confirmed by Milan Martić, Minister of Internal Affairs of the 'SAO Krajina' and the 'RSK', and later the 'President' of the 'RSK', who admitted in 1991, that there were no reasons for him:

> "not to say that the break in of the citizens into the police weapon depots a year ago was staged."[158]

He admitted that:

> "the Serb uprising in Croatia was organized and not spontaneous".

He also stated that the:

> "mood of the Serb people is such that they will no longer accept any kind of autonomy, not even the territorial autonomy offered by Zagreb".[159]

3.68 A "referendum" on Serb autonomy in Croatia took place on 19 August 1990. Supported by Serbia and the political authorities of Belgrade the referendum resulted overwhelmingly in favor of autonomy, and provided the basis for further action.[160] The "Serb National Council" pronounced all municipalities with substantial or majority Serb populations to be "autonomous."[161]

3.69 A day before the Republic of Croatia proclaimed its new Constitution which *inter alia* envisaged a multi-ethnic Croatia with "guaranteed equality" and safeguards for minority communities, on 21 December 1990, the Serb community in Knin adopted a resolution on the establishment of the 'SAO Krajina', with its own 'Constitution'.[162] In the following months the Serbs repeatedly blocked road and rail lines in Knin and Eastern Slavonia. Thereafter

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155 Memorial, paras. 290-292. See also Silber, pp. 100-103.

156 Counter-Memorial, paras. 484-485, citing N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), p. 78.

157 N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), pp. 68-70.

158 See "*Truce in Croatia on Edge of Collapse*", New York Times, 20 August 1991, Annex 112.

159 *Ibid*.

160 Memorial, para. 2.93. As stated in the Memorial, there were no proper voting lists and people in Belgrade also voted in the referendum.

161 *Ibid*.

162 Memorial, para. 2.94.

the Serbs in 'SAO Krajina' stopped paying taxes to the Croatian Government, and the police stations in 'SAO Krajina' separated themselves from the policing system of Croatia.[163] It is to be noted that the territorial limits of 'SAO Krajina' corresponded to the borders proposed by Šešelj.[164]

3.70 The Respondent attempts to justify the adoption of the resolution to establish an autonomous region by stating that in December 1990, the Serbs in Knin lived under the *permanent threat* of an attack by the Croatian Secretariat of Internal Affairs (MUP).[165] However, the source quoted states in fact that they lived in *permanent anticipation* of it. Once again the sections of Barić book that state that the Serbs in Knin were armed and that they obstructed road traffic in the region are omitted.[166] It argues that "the statute of the new region envisaged this regional autonomy as part of Croatia and as a part of the Croatian legal system" and the fact that the territory of 'SAO Krajina' corresponded with the "borders" of a "Greater Serbia" roughly corresponded to the actual territorial allocation of ethnic Serbs at the time.[167] It does admit however that the 'SAO Krajina' formed its own police force and that the authority of the Croatian MUP on the territory of the 'SAO Krajina' was revoked. [168]

3.71 The proclamation of the 'SAO Krajina' and its statute were never a part of the "Croatian legal system."[169] The so-called political leaders of 'SAO Krajina' acted illegally and unilaterally, disregarding decisions made by the authorities in Zagreb and presented the Croatian authorities with a *fait accompli*. The proclamation of autonomy was not the result of a dialogue between Knin and Zagreb. The fact that it was outside the Croatian legal system is clear from the fact that the 'SAO Krajina' authorities set up their own Secretariat of Internal Affairs and the authority of the Croatian MUP was revoked. These were also the reasons that compelled Croatia to enlarge and arm its own police forces, which it did by January 1991.[170]

3.72 The Counter-Memorial also fails to state that in the course of drafting its new Constitution, the Croatian government set up a working group to prepare proposals for Serb cultural autonomy in Croatia. The working group produced three proposals. However, their efforts were in vain because the leadership of the SDS and the "Serb National Council" found the group unacceptable and were not even willing to discuss the proposals.[171]

3.73 The Counter-Memorial sets out how additional municipalities

[163] Memorial, paras. 2.93-95.
[164] See Memorial, Plate 8 for the territorial extent of the "SAO Krajina"; and Memorial, Plate 7 *bis* which defines "Greater Serbia".
[165] Counter-Memorial, para. 486 (emphasis added), citing N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), p. 83.
[166] See N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), pp. 83-84.
[167] Counter-Memorial, para. 486.
[168] Counter-Memorial, para. 487.
[169] Counter-Memorial, para. 486.
[170] See para. 3.56, *supra*.
[171] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005).

with Serb majorities joined the Serb Rebellion in late 1990/early 1991.[172] These also set up Serbian National Councils and adopted similar declarations on autonomy and established their own governments, assemblies and judicial organs.[173] These too were illegal and not a part of the "Croatian legal system." This became obvious with the adoption by the 'SAO Krajina' of a resolution of disassociation with Croatia. On 28 February 1991, the "Serb National Council" of the 'SAO Krajina' adopted a "Resolution on Disassociation between the SAO Krajina and Croatia".[174] Jovan Rašković, the President of the SDS, publicly stated that the Republics' borders were merely those imposed by President Tito.

3.74 On 1 April 1991, 'SAO Krajina' passed a resolution to join the Republic of Serbia. The Respondent states that this decision was not accepted by Serbia's National Assembly, which instead, adopted a declaration on the peaceful resolution of the Yugoslav crisis.[175] This issue has been addressed at paragraph 3.39, *supra*. Nevertheless, on 12 May 1991 'SAO Krajina' held a referendum on "union with Serbia" and a common state with Serbia and Montenegro (Greater Serbia), which was supported by an overwhelming majority.[176] The Respondent states that President Milošević "publicly opposed the referendum".[177] As stated above, in making this argument Serbia looks at form rather than substance. Milošević had clearly stated his goal of "one state" for all Serbs on 16 March 1991, irrespective of what he may have said "publicly".[178]

3.75 The 'SAO Krajina' referendum seeking "union with Serbia" was held a week before the Croatian Government's referendum in which the electorate overwhelmingly voted for independence from the SFRY.[179] Shortly after Croatia's referendum, on 29 May 1991 'SAO Krajina' set up its "government", including its Ministry of Defense. Over the next few months it established its armed forces (this included the police, TO and special police units (*Milicija Krajine*)).[180]

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[172] The Serbs in Eastern Slavonia did not adhere to the SAO Krajina; they formed their own Serb region. The Serbs in Western Slavonia were for a time part of SAO Krajina and only later became a 'Special Autonomous Region'.

[173] Counter-Memorial, paras. 487-489.

[174] See "The Serbian Krajina, Historical Roots and its Birth" ISKRA 1994, Chronology of Important Events (A resolution on a purported secession was also adopted by the municipalities of the "SAO Krajina" on 19 March 1991). See also Counter-Memorial, paras. 490.

[175] Counter-Memorial, para. 492.

[176] The question posed on 12 May 1991 was: "Are you for the unification of (SAO) Krajina with the Republic of Serbia and are you for Krajina to stay within Yugoslavia with Serbia, Montenegro and others who want to preserve Yugoslavia?". See N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), p. 101.

[177] Counter-Memorial, para. 492.

[178] See para. 3.38, *supra*.

[179] Memorial, para. 2.113.

[180] Counter-Memorial, para. 494 and its Annexes 15, 16 & 17.

(2) The Illegal Proclamation of the RSK

3.76 A few months later, on 19 December 1991, the "Assembly" of SAO Krajina proclaimed the so-called 'Republic of Serbian Krajina' ('RSK').[181] This was joined by the 'SAO Western Slavonia' (formed on 13 August 1991) and 'SAO Slavonia, Baranja and Western Srem' on 26 February 1992. These were illegal and unconstitutional actions, irrespective of how Serbia seeks now to legitimize them. Serbia describes the "Constitution" of the 'RSK' which defined the 'RSK' as the "national state of the Serbian people and the state of all citizens living in it;" it states that "legislative and constitutional powers belonged to the RSK Assembly, while the government had executive powers", and that the 'RSK' was represented by its President, "who commanded its armed forces in peace and war."[182] Serbia also states that "[a]mendments to the RSK Constitution established the Serb Army of Krajina ('SVK') on 18 May 1992.[183] The Respondent reluctantly admits that the "RSK was never recognized as a State" though it had "*de facto* control over substantial territory and enjoyed loyalty of its population."[184]

3.77 The Respondent initially tries to portray these illegal actions as "manifestations of national sentiments of the Serbs"[185]; "completely lawful" and merely "symbolic expressions of Serb Protests."[186] Then the actions of 'SAO Krajina' (an unconstitutional entity) are said to be a "part of the Croatian legal system"[187] and "steps towards achieving greater autonomy."[188] Finally, the Respondent claims that by May 1991 'SAO Krajina' with its own so-called Parliament, Government and court system was "*de facto* an autonomous region existing on the territory of the Republic of Croatia."[189] In a bid to distance itself from the 'RSK' - an illegal entity - Serbia states that while the 'RSK' "enjoyed political and financial support of the FRY/Serbia, the RSK was neither a part of the FRY/Serbia nor an entity under its control, but a de facto State entity on the territory of Croatia".[190]

3.78 While stating that the nationalism of the Croatian government "significantly contributed" to the eruption of the conflict and its aggravation, the Respondent makes two important admissions. *Firstly*, it concedes that the regime of Mr Milošević manipulated the fears and anxieties of the Serbs in Croatia, and misused their troubles for its own purposes,[191] thereby admitting Milošević's role and involvement in the Serb rebellion. *Secondly*, it admits

[181] Counter-Memorial, paras. 494-496.
[182] Counter-Memorial, para. 562.
[183] *Ibid.*
[184] *Ibid.*
[185] Counter-Memorial, para. 475.
[186] Counter-Memorial, para. 479.
[187] Counter-Memorial, para. 486.
[188] Counter-Memorial, para. 498.
[189] Counter-Memorial, para. 498
[190] Counter-Memorial, para. 562.
[191] Counter-Memorial, para. 497.

that the creation of a Serb autonomous region within the territory of the Republic of Croatia was unconstitutional, as it was

> "not recognized as an autonomy or federal entity under the SFRY constitutional order."[192]

In making this admission the Respondent contradicts itself twice. This statement proves (a) that the internal borders of the Republics were not purely administrative as contended by Serbia; and (b) that the 'SAO Krajina' was not a "part of the Croatian legal system."[193]

3.79 Also, contrary to what is stated in the Counter-Memorial,[194] and as considered above, Zagreb *did* try to engage with the rebel Serbs, but the rebel Serbs rejected any solution that involved the peaceful establishment of an independent Croatian state within the existing borders of the Republic.

3.80 It is evident from the foregoing that the Serb rebellion in Croatia was lead by the Serbian leadership in Belgrade, relying on Serbian state-controlled media and with the full support and protection of the JNA.[195]

SECTION III: DISSOLUTION OF THE SFRY

3.81 The Counter-Memorial makes some passing references to the role of the JNA in Chapter V. A comprehensive response to the role of the JNA is set out in the following Chapter. However, some brief comments may be made here. This section also addresses the Respondent's claims that that the SFRY existed as a subject of international law in 1991 and early 1992 and that its organs continued to function as SFRY organs. As stated in the Memorial, and set out below this was not the case. From the spring of 1991, the Presidency of the SFRY was not the federal organ it once was. It became a tool used by Serbia to conduct its unconstitutional and illegal actions under the guise of Constitutional authority. This is equally true regarding the other federal organs of the SFRY.

(1) The Role of the JNA including its alleged "Buffer Zone" Policy

3.82 The Respondent claims that the JNA was not a "Serbian Army" but remained a *de jure* organ of the SFRY, acting under the political guidance of the Presidency of the SFRY;[196] that the JNA performed a "peacekeeping" role; and that the JNA's participation in the "armed conflict" in Croatia was effec-

[192] Counter-Memorial, para. 498
[193] Counter-Memorial, para. 486.
[194] Counter-Memorial, para. 497.
[195] See Chapter 4, *infra*.
[196] Counter-Memorial, inter alia paras. 507, 531-533.

tively over by the end of 1991.[197] While some preliminary remarks regarding these claims are set out here, these claims are refuted comprehensively in Chapter 4, *infra*.

3.83 Basing its claim on the 'Balkan Battlegrounds' Report, the Respondent claims that the JNA were "neutral peacekeepers" through the summer of 1991, until 14 September 1991, when Croatia attacked the JNA barracks and facilities in Croatia.[198] The inaccuracies and misrepresentations with regard to this so-called neutrality of the JNA are dealt with extensively in Chapter 4, *infra*. Chapter 4 also demonstrates that the authority cited by Serbia does not support its view. In any event Croatia was not alone in viewing the JNA as an instrumentality of Serbia and Serbian interests. European monitors also disputed the JNA's "peacemaking" role. The European Community, in its Declaration on Yugoslavia of 27 August 1991 emphasised that it cannot be denied any longer:

> "that elements of the Yugoslav People's Army are lending their active support to the Serbian side".[199]

3.84 As set out in the Memorial, in March 1991, rebel Serbs disarmed the Croatian police in the Western Slavonian town of Pakrac, and purported to declare the district a part of the 'SAO Krajina'. This lead to the intervention of the Croatian Police.[200] The SFRY Presidency (Jović) ordered the Croatian police to withdraw,[201] and the JNA purported to take on the role of mediator between the opposing sides. In fact it was protecting the Serbian side. This became a model for similar interventions by the JNA in the spring and summer of 1991. First at Plitvice which was occupied by the police of 'SAO Krajina'. Plitvice was subsequently occupied by JNA units purportedly to create a "buffer-zone". A similar "buffer-zone" was also established in Borovo Selo (near Vukovar) in April 1991. In reality the JNA assisted Serbia and the rebel Serb in their bid to establish new borders for the 'SAO Krajina' and in effect prevented the Croatian authorities from exercising control over their territory.[202] As stated in the Memorial, Slavonia was of particular interest to Serbia because it bordered Serbia and had a numerically significant Serb population.[203]

3.85 The Respondent also claims that the JNA's participation in the armed conflict in Croatia *was effectively* over by the end of 1991, after the ceasefire

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[197] Counter-Memorial, paras. 500-508.
[198] Counter-Memorial, paras. 500-503.
[199] Declaration on Yugoslavia: adopted at EPC Extraordinary Ministerial Meeting, Brussels, 27 August 1991, Trifunovska, p. 333.
[200] Memorial, para. 2.101
[201] See Financial Times, 4 March 1991, Memorial, Annexes, vol. 4, annex 33.
[202] Memorial, paras. 2.101-104. See also Chapter 4, *infra*.
[203] Memorial, paras. 2.103-104.

agreement concluded of 2 January 1992.[204] This claim is refuted comprehensively in Chapter 4.[205]

3.86 In addition to the continuing involvement of the JNA in the conflict; its role in directing, organising, arming and otherwise supporting the rebel Serbs which is dealt with in the following Chapter, Serbia and through it the JNA were also directly responsible for organising, mobilising, staffing and arming the rebel Serb TO into an army of the 'RSK'.[206]

(2) The Dissolution of the SFRY and the Collapse of the SFRY Presidency

3.87 The Respondent states that it "strongly opposes" Croatia's view which is designed to make 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/Serbia came into being on 27 April 1992. It claims that 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.

3.88 The Respondent asserts that:

- 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.[207]

3.89 These claims are dealt with comprehensively in Chapter 7, *infra*. The following brief response can nevertheless be made. Though the dissolution of the SFRY was an extended process, it was well advanced by the second half of 1991. The fact that the FRY/Serbia only formally proclaimed itself on 27 April 1992 does not mean that acts occurring prior to that date cannot be attributed to it.[208] In the period prior to the proclamation of the FRY/Serbia the conduct which is the subject of Croatia's Application was directed by the Serbian leadership, which controlled the relevant political apparatus and the military, in the form of the JNA and the Serb paramilitary groups.[209]

[204] Counter-Memorial, para. 508 (emphasis added).
[205] See also Memorial, para. 3.67 *et seq.*
[206] This is elaborated in Chapters 4, 10 and 11.
[207] Counter-Memorial, paras. 510- 537.
[208] See Memorial, para. 8.40 *et seq.* See also Chapter 7, *infra*.
[209] As described in the Memorial, in Chapters 2 and 3:

a. From mid-1991 the SFRY ceased to operate as a functioning State and was authoritatively recognised as in a "process of dissolution" (Memorial, Chapter 2, paras. 2.105-109, 2.120).

3.90 While the Badinter Commission stated that Yugoslavia was in the 'process of dissolution', in November 1991, that process had started earlier. And while the organs of the SFRY may have continued to function, the SFRY was a functional state in name only. It did not exercise public authority on behalf of the federation. In fact the Respondent admits that the "by the end of ... the 1991 SFRY federal authorities were facing substantial difficulties in their work" and that from 1991 members from different Republics had started to leave their posts. [210]

3.91 In order to demonstrate that the SFRY was a functioning state and a subject of International Law in 1991 and early 1992 Serbia states that the SFRY entered in to Treaties and took part in diplomatic conferences, and States continued to maintain diplomatic ties with the SFRY.[211] The Respondent *inter alia* refers to a number of letters from the Ambassadors of the former USSR, Indonesia and Mali written between November 1991 and the end of January 1992, each of which announce the appointment of an ambassador from the country concerned to the Presidency of the SFRY.[212] The Applicant notes that no letter by a Member State of the European Community is included, since none was sent. On 5 October 1991, after the four-member Serbian bloc in the Presidency declared the day before that it would work in the existing format (with four members), the member-states of the European Community declared that such a Presidency was unacceptable and that they would, as testified by B. Jović "ignore our decisions or consider them non-existent".[213]

3.92 The Respondent contends that the SFRY's federal organs continued to function after mid-1991, exercising public authority on behalf of the SFRY, and that they were headed by individuals from the different Republics. (In fact, it states, most important SFRY officials originated from Croatia, and most were ethnic Croats). [214] These claims are also refuted in the following Chapter.[215]

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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 and authorities of the emerging FRY/Serbia 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 Defence and Interior (Memorial, Chapter 2, paras. 2.110-112).

c. The JNA ceased to be the army of the SFRY and became, initially, a *de facto* organ of the emerging FRY/Serbia (comprised of the Republics of Serbia and Montenegro) taking instructions directly from, and acting in the service of, the Serbian leadership (Memorial, Chapter 3, paras. 3.02, 3.33-42).

[210] Counter-Memorial, para. 513.

[211] Counter-Memorial, paras. 516-518.

[212] Counter-Memorial, para. 517 and its Annex 24.

[213] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], pp. 392-393. Serbia admits this in para. 527

[214] Counter-Memorial, paras. 519-520.

[215] Further evidence of the process of "Serbianisation" of the SFRY's federal institutions and of the Serbian "strategy of war crimes" for achieving political goals, announced in Gazimestan in June 1989, is set out in James Gow, *The Serbian Project and its Adversaries: A Strategy of War Crimes*, McGill-Queen's University Press, 2003.

(a) The Takeover of the SFRY Presidency by Serbia

3.93 The Memorial describes how after the death of President Tito, Presidential authority vested in a collective Presidency which included representatives of all the Republics and Autonomous Provinces. Each member was elected for a term of five years and the Presidency was required to rotate the positions of President and Vice-President from among its members for a term of one year, according to a schedule lay down by the Presidency Rules of Procedure.[216] It also sets out how this constitutionally prescribed rotation of the Presidency was thwarted on 15 May 1991 when the Serbian representative (Borisav Jović) was to be replaced by the Croatian representative (Stjepan Mesić).[217] Serbia with the support of Serbian controlled members of the SFRY Presidency voted against the election of Mr Mesić. The vote against him was also supported by high-ranking JNA officers, acting in concert with the Serbian representatives/Serb controlled members in the Presidency. This constitutional crisis marked the beginning of the dissolution of the SFRY, and a crucial step in the Serbian takeover of the apparatus of the Federation. This was a matter of international concern, with the European Community calling for the rotation in the Presidency to be respected.[218] The Respondent weakly argues that the appointment of Mr Mesić as President was "delayed due to political conflicts,"[219] a classic Serbian understatement, misrepresentative of the facts.

3.94 On 25 June 1991, both Croatia and Slovenia proclaimed their dissociation from the SFRY. This was followed by a brief conflict in Slovenia. During this time however, the European Union secured agreement that Mr Mesić would be installed as President and that Croatia and Slovenia would "freeze" their independence declarations for three months. This occurred at a midnight

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[216] Memorial, para. 2.16. The Constitutional provisions in this regard included the following:

- The Presidency of the SFRY was a collective body that represented the SFRY in the country and abroad, it coordinated the common interests of the republics and the autonomous provinces, and was the supreme body in charge of the administration of the Armed Forces of the SFRY in war and peace (The Constitution of the Socialist Federal Republic of Yugoslavia 1974, Article 313.)
- The term of the President and the Vice-President began on 15th May and ended on the same day the following year. The Presidency of the SFRY worked on the basis of consensus and made decisions as determined by the Standing Orders of the SFRY Presidency (Article 330).
- Consensus was the primary Constitutional principle in the work of the Presidency, in other words agreement of representatives of all the republics and the provinces. In cases where such an agreement could not be reached, each member of the Presidency could put forward a motion to vote, where the principle of making decision on the basis of majority was respected. With regard to the management and command of the Armed Forces, five votes were necessary to make a decision.

[217] Memorial, para. 2.105.

[218] *Ibid.*

[219] Counter-Memorial, para. 522.

session of the SFRY Presidency on the night of 30 June/1 July 1991.[220]

3.95 It became increasingly clear during this period that the non-Serbian members of the federal authorities had no influence in the SFRY Presidency and other SFRY organs.[221] President Mesić's lack of authority is apparent from the way he was ignored by the JNA;[222] After the bombing of the building in Zagreb, on 7 October 1991, where President Marković of the Federal Executive Council was in a meeting, his demand for the resignation of Federal Defense Secretary, General Kadijević was also refused.[223] By October 1991, the SFRY payroll office had stopped paying the salary of President Mesić.[224] The Memorial also sets out other examples that demonstrate the loss of authority of the President of the Presidency of the SFRY and the increasing control exercised by the Serbian authorities.[225]

3.96 While the SFRY Presidency may have operated in full or near full composition until early October 1991, it became increasingly clear to the non-Serbian members of the SFRY Presidency that they could exercise no real authority/influence in this federal organ and that the Presidency had been taken over by Serbia and Serbian controlled members. The Respondent disregards and relativises one of the most important functions of the Presidency of the SFRY, namely to coordinate the common interests of the 6 republics and 2 autonomous provinces.[226] Initially through amendments to its Constitution (in March 1989) and then in September 1990, through the promulgation of the Constitution of the Republic of Serbia,[227] Serbia brought the provinces under its control, thereby irrevocably altering the concept of Yugoslav federalism. With the adoption of the Serbian Constitution of 1990, the autonomy of the two provinces became a mere formality. From then on Serbia had three votes in the Presidency (its own, and the votes of Kosovo and Vojvodina).[228] From then on Serbia (with only one additional vote) could control the work of the Presidency or prevent it from taking any decisions. This it did.

3.97 The Presidency limped along (in nothing but form) until 7 September 1991 but it members ceased to meet with the beginning of the Hague Confer-

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220 Memorial, paras. 2.106-2.107.

221 This tendency had been in evidence at earlier stages, for example Kadijević had refused to communicate with the non-Serbian members of the SFRY Presidency in March 1991 following the Presidency vote against the proclamation of emergency measures sought by the JNA, see Memorial, para. 2.107, note 174.

222 Memorial, paras. 2.106-107 and Chapter 4, *infra*.

223 See Memorial, footnote 175.

224 Memorial, para. 2.107. The Respondent claims that President Mesić claimed a salary until 1 January 1992 (Counter-Memorial, para. 528). This is irrelevant; no salary was in fact paid after October 1991.

225 Memorial, paras. 2.108-109.

226 *Constitution of the Socialist Federative Republic of Yugoslavia*, Official Gazette of the SFRY, Belgrade, 1974, Article 313.

227 Constitution of the Republic of Serbia, [*Službeni glasnik Republike Srbije*], Official Gazette of the Republic of Serbia, 28 September 1990, in particular Basic Provisions, also Articles 109 and 112.

228 Silber, p. 73.

ence on Yugoslavia in 1991.[229] In early October 1991 the Serbian-Montenegrin bloc completely took over the Presidency. From 3 October 1991, this rump Presidency of the SFRY made all decisions by a majority of votes of those present.[230]

3.98 Jović's memoirs contain sufficient material testifying to how the Presidency actually functioned and the scope of the Serbian conspiracy. General Kadijević also admitted that the JNA identified the politicians it trusted and those it did not trust. According to him the Presidency was made up of three types of politicians. In the first category were politicians

> "firmly committed to Yugoslavia and to its democratic transformation by peaceful means".[231]

A second group was made up of the

> "bitterest enemies of Yugoslavia's unity who did everything they could to destroy it; a part of them directly worked for foreign countries and on their orders".[232]

And a third group was made up of

> "waverers whose behaviour varied from situation to situation but who were mainly unreliable in all crucial situations."[233]

Even though the Presidency was constitutionally required to make decisions collectively, and the JNA was obliged to present all their proposals and actions to the entire Presidency. The JNA rejected this, and according to Kadijević, began "to act completely differently." In his Memoirs, he states:

> "So, for example, when it comes to planning, issuing written Directives, Decisions and Orders of the Supreme Command, we could not do what is normally done by more or less any army of the world since each such written document would end up in the hands of the enemy".[234]

3.99 Borisav Jović, the Serbian member of the Presidency of the SFRY, also testifies to these double standards and unconstitutional practices of the JNA as early as November 1989, before the multi-party elections in Slovenia and Croatia. According to Jović, from mid-November 1989 Kadijević "was a permanent guest" of the Serbian member of the SFRY Presidency, to whom

[229] Stjepan Mesić, *Kako je srušena Jugoslavija* [How Yugoslavia was Brought Down], Mislav Press Zagreb 1994, at p. XI, Memorial, Appendices, vol 5, appendix 4.2.
[230] *Neposredna ratna opasnost uslovljava rad* [Work is conditioned by immediate war threat], *Narodna armija*, 5 October 1991, p. 3.
[231] Veljko Kadijević, *Moje viđenje raspada* [My view of the Dissolution], Politika, Belgrade, 1993, p. 91.
[232] *Ibid*.
[233] *Ibid*.
[234] *Ibid*.

he presented detailed JNA analyses since he did not want to "present this to the entire Presidency for understandable reasons".[235]

The illegality of these actions appears to have been of no real concern to the JNA and the then Vice-President of the Presidency. When Jović took over as President for a one-year term these unconstitutional contacts were intensified. In fact an unconstitutional system of command and decision-making was set up by the JNA. Jović and Kadijević were joined by Milošević, who as the President of Serbia had no legal authority over the JNA.

3.100 From August 1991 an informal group consisting of the leaders of Serbia-Montenegro and the generals of the JNA functioned independently. The group assessed military and political situations and proposed decisions.[236] By the end of 1991 this group had met at least eleven times. All issues regarding military action, which were constitutionally within the jurisdiction of the Presidency and the Supreme Command of the SFRY, were discussed and decisions were made, at these meetings.[237]

3.101 It is clear from the preceding paragraphs that the Presidency of the SFRY was not the federal organ it once was. It became a tool used by Serbia to conduct its unconstitutional and illegal actions under the guise of constitutional authority. The Presidency's decision dated 18 July 1991 on the withdrawal of the JNA from Slovenia illustrates what the *de facto* Presidency of the SFRY became. This is also clear from the conversation between Kadijević, Jović and Milošević on 5 July 1991 when they agreed on the withdrawal of the JNA from Slovenia towards the planned Serbian borders and on "covering" the territory inhabited by the Serbs.[238]

3.102 The Respondent admits that there were "deep disagreements and conflicts in the Presidency",[239] but claims that from October it continued to function and take decisions despite the absence of some of its members. The members present and voting were Serbia, Montenegro, Kosovo and Vojvodina.[240] The Respondent admits that:

> "it is true that the members who remained active in the SFRY Presidency were political allies of the Serbian President." [241]

In these circumstances it is apparent that the Presidency did not function effectively nor was it in fact the Presidency of the SFRY. Serbia also admits that the Member States of the European Communities, refused to acknowledge the decisions of the SFRY Presidency, on 5 October 1991.[242]

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235 B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], .p 68.
236 *Ibid*., p 371.
237 *Ibid*., pp. 371, 382-383, 385-387, 391-392, 394, 402-403.
238 *Ibid*., pp. 349-350.
239 Counter-Memorial, para. 523.
240 Counter-Memorial, para. 526.
241 Counter-Memorial, para. 529.
242 Counter-Memorial, para. 527.

(b) The Takeover of Other Federal Institutions by Serbia

3.103 As stated above, the leadership of the Republic of Serbia had taken control of the federal institutions of the SFRY, including the Presidency, which was located in Belgrade, and was directing the activities of the JNA. These developments, culminated on 4 October 1991 with President Mesić being deposed by the members of the Presidency from Serbia, Montenegro, Vojvodina and Kosovo.[243] They had called a meeting in Belgrade which they knew Mr Mesić, who was in Zagreb, would be unable to attend because of the fighting in Croatia. Subsequently, after expelling Slovenia from the Presidency and in that way obtaining a 4:3 majority in the Presidency, Branko Kostić of Montenegro then chaired the Presidency in his capacity as vice-president.[244]

3.104 By the time President Mesić had been deposed widespread fighting had erupted in Croatia and Serbia's genocidal campaign was well underway. By that time the JNA was under the control of Serbia, Serbian paramilitary groups had been established to engage in armed activities in Croatia, and by an order of 13 September 1991, those paramilitary groups including units of the regular TD of Serbia and Montenegro, had been formally incorporated into the JNA. A genocidal campaign was underway in Banovina and Eastern Slavonia.[245]

3.105 Despite facts to the contrary, the Respondent continues to maintain that the JNA did not lose its Yugoslav character and was not "Serbianised",[246] even when there were direct clashes with the Croatian armed forces. These claims are refuted in the following Chapter.

3.106 With respect to the role of the JNA, the Respondent's approach is contradictory and even confused. This aspect will be fully addressed in Chapter 4. For the present purposes it is sufficient to note, by way of example, that while the Respondent states that the relationship between the leadership of the JNA and Serbia was "tense, precarious, even conflicting", it nevertheless admits that the

> "JNA leadership and the Serbian leadership were political allies during the armed conflict in Croatia."

3.107 The Respondent argues that the JNA was not a *de facto* organ of the Serbian leadership but was a *de jure* organ of the SFRY.[247] Firstly, these two

[243] Memorial, para. 2.110. On 4 October 1991 the Serbian controlled members of the SFRY Presidency had purported to declare a state of emergency or "war danger" in contravention of the procedures laid down in the Constitution, described in Stjepan Mesić, *Kako je srušena Jugoslavija* [How Yugoslavia was Brought Down], Mislav Press Zagreb 1994, at pp. 268-269.

[244] Memorial, para. 2.110. He was appointed to the post by his own vote and that of the three Serb members of the Presidency representing Serbia, Vojvodina and Kosovo.

[245] Memorial, para. 2.112. See also Chapter 4, paras. 4.108-110, *infra.*

[246] Counter-Memorial, paras. 531-532.

[247] Counter-Memorial, para. 533.

positions are not mutually exclusive. Secondly, even this argument is shown to be false in the light of Jović's diary entries. Thirdly, while the details of the relationship of the leadership of the JNA and Serbia has already been touched upon and will be further demonstrated in Chapter 4, one also needs to look at the rank and file membership of the JNA and its Serbian character. Jović's diary entries show that Serbia was careful not to rush into the open because of international factors. Instead it sought to implement its plans under the cloak of the JNA. Finally, from late June 1991 all the Republics except Serbia and Montenegro refused to send conscripts and money to the JNA and therefore the JNA was dependant on only those two Republics.

3.108 The Counter-Memorial also seeks to establish the "Yugoslav character" of the federal organs through the functioning and ethnic composition of the Constitutional Court of Yugoslavia.[248] While it is true that the Constitutional Court declared unconstitutional the legislative acts of all the Republics, this is completely irrelevant for the purposes of the facts of this case. It is noteworthy that the Constitutional Court failed to declare as unconstitutional the Decision of the Presidency of the SFRY dated 18 July 1991 on the withdrawal of the JNA from Slovenia. This decision violated the Constitution of the SFRY as well as three other laws. The Constitutional Court did not initiate proceedings to question its constitutionality and legality since the decision was not duly promulgated in the Official Gazette of the SFRY.[249]

(3) Human Rights Violations in Croatia

3.109 The Respondent's silence with respect to the United Nation's condemnation of human rights violations and ethnic cleansing in Croatia speaks volumes.[250] The UN monitored the situation of human rights in the former SFRY on a regular basis throughout the crisis,[251] and the Memorial referred to some of the key resolutions and reports adopted during this period. The Memorial referred to various reports of the UN Commission on Human Rights' Special Rapporteur to investigate the situation on human rights in the former Yugoslavia - the former Polish Prime Minister, Tadeusz Mazowiecki. In his report on 28 August 1992 he noted amongst other things that ethnic cleansing was "the cause of most such violations".[252] He continued to monitor the situ-

[248] Counter-Memorial, para. 535.

[249] All the relevant decisions, regulations and similar acts of the federal state were published in the *Official Gazette of the SFRY*. (*Constitution of the Socialist Federative Republic of Yugoslavia*, Official Gazette of the SFRY, Belgrade, 1974, Article 269.) This is yet another indication that the SFRY did not even function at a paper level. See also Milovan Buzadžić, *Secesija bivših jugoslovenskih republika u svetlosti odluka ustavnog suda Jugoslavije: Zbirka dokumenata s uvodnom raspravom* [Secession of the Former Yugoslav Republics in the Light of the Decisions by the Constitutional Court of Yugoslavia: A Collection of Documents with the Introductory Discussion], Official Gazette of the SFRY, Belgrade, 1994, pp. 236-237.

[250] Memorial, paras. 2.130 *et seq.*

[251] Reference was made to UN reports of specific incidents and human rights violations in Chapters 3, 4 and 5 of the Memorial.

[252] See Report on the situation of human rights in the territory of the former Yugoslavia, E CN.4/1992/S-1/9, at para. 6.

ation in the former SFRY and in particular investigated the situation in the United Nations Protected Areas (see *infra)* and the plight of ethnic Croats and other non-Serbs in these areas. In his 1994 report, for example, the Special Rapporteur noted continuing human rights violations against Croats and other non-Serbs in parts of Sectors South and East.[253]

3.110 As stated in the Memorial, both the UN Commission on Human Rights and the General Assembly, in condemning the practice of ethnic cleansing in the former SFRY, found that the Serbian leadership in the territories under their control, the JNA and the political leadership of the Republic of Serbia bore "primary responsibility for this reprehensible practice".[254]

3.111 Non-governmental organizations were also active in monitoring human rights violations throughout the conflict. The Memorial referred particularly to the August 1992 Helsinki Watch Report which noted that:

> "During the war in Croatia, Serbian forces engaged in practices which closely resemble those used to "cleanse" areas of non-Serbs in Bosnia and Herzegovina"[255]

It went on to state that:

> "In Croatia, Serbian civilian, paramilitary, police and military authorities have systematically expelled non-Serbs from their homes in Serbian-occupied areas of the country".[256]

The worsening situation of the Croats in the occupied areas is dealt with in Chapter 10, *infra.*

3.112 Significantly, since the filing of the Memorial, the ICTY has rendered a number of judgments that are relevant to these proceedings. The relevance of findings of the ICTY has been discussed in Chapter 2, at paragraphs 2.25-33, and the findings themselves are considered further in Chapters 5 and 6. Some of these findings are set out here, in brief, to demonstrate the nature of the abuse suffered by the Croats.

> 1. Milan Babić pleaded guilty to the crime against humanity of persecutions on political racial and religious grounds committed while he was President of the Municipal Assembly in Knin, and also President of the Serbian National Council and the Executive Council of the 'SAO

[253] See Report E/CN.4/1994/110, paras. 107-109. See also Chapter 10, paras. 10.34-38, *infra*.
[254] Memorial, para. 2.133. See also Commission on Human Rights, 2nd special session, Resolution "The situation of human rights in the territory of the former Yugoslavia" 1992/S-2/1 of 1 December 1992, para. 3, endorsed in UN General Assembly Resolution A/RES/47/147 of 26 April 1993, para. 16; and UNGA Resolution A/RES/47/147 of 26 April 1993, adopted on 18 December 1992 at para. 3 (Memorial, Annexes, vol. 4, annex 5.)
[255] Memorial, para. 2.135, (citing the Helsinki Watch Report on the former SFRY, August 1992, p. 52).
[256] *Ibid.*

Krajina'. The basis of the plea was that Serb forces had taken control of towns, villages and settlements in the 'SAO Krajina' and had

> "established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial or religious grounds, included the extermination of murder of hundreds of Croat and other non-Serb civilians... the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions … the deportation and forcible transfer of thousands of Croat and other non-Serb civilians…."[257]

The acts he was accused of started on or about 1 August 1991 and continued until June 1992.[258] He was sentenced to 13 years of imprisonment, affirmed on appeal.

2. Milan Martić was convicted of 16 counts of crimes against humanity (including persecutions, murder, imprisonment, torture, inhumane acts, deportation and forcible transfer) and war crimes (including murder and torture) and sentenced to 35 years' imprisonment. The Appeals Chamber upheld convictions on each of the 16 counts and added further convictions for crimes against humanity. It also upheld the sentence of 35 years' imprisonment.[259] During the relevant time, Martić was a senior figure in the leadership of the 'SAO Krajina', later the 'RSK', culminating in his election as 'President' of the 'RSK' in January 1994. He was

> ''considered one of the most important and influential figures in the SAO Krajina and the RSK governments.''[260]

3. Goran Hadžić, as President of the Government of the "SAO of Slavonia, Baranja and Western Sirmium" and, later, President of the RSK, was charged with the crimes against humanity of persecutions, exterminations, murder, imprisonment, torture, inhumane acts and deportation, as well as numerous counts of war crimes, mostly in the Eastern Slavonia. Hadžić is one of only two outstanding fugitives from the ICTY.[261]

3.113 In addition to setting out the nature of the genocidal acts perpetrated against the Croats, which are dealt with comprehensively in the Chapters that follow, the ICTY case law also establishes many of the facts on which the

[257] *Babić*, para. 15.
[258] *Ibid.,* para. 16; see also para. 34.
[259] *Martić*, Case IT-95-11, Appeals Chamber Judgment, 8 October 2008.
[260] *Martić,* para. 449.
[261] Press Release, 19 July 2004, JP/P.I.S./872-e, quoted in Chapter 9, para. 9.93, *infra*.

Applicant relies and that are pertinent to this case, including the existence of a joint criminal enterprise within the Serbian political and military infrastructure to eradicate ethnic Croats from the regions under consideration in the claim: this is addressed in more detail in Chapters 5, 6 and 9. ICTY case law also establishes "beyond reasonable doubt" that from at least August 1991 there was a common political objective to unite Serb areas in Croatia and in Bosnia and Herzegovina with Serbia in order to establish a unified Serb State, through the establishment of paramilitary forces, and by the use of a JNA, largely purged of its non-Serbian elements.[262]

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3.114 The Respondent alleges that with the outbreak of the war in 1991, Serbs suffered systematic violations of their human rights both in areas where the fighting took place, as well as violations that were not directly connected with the fighting.[263] While all these allegations will be dealt with subsequently, some preliminary points may be made here. Firstly, this Section of the Counter-Memorial is full of statements like the following:

> "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 killing*."[264] (emphasis added)

3.115 This very serious allegation is not supported by any evidence. There is no credible evidence presented of the alleged numerous executions and disappearances or the massive killing campaign against the Serbs. There is no evidence that any crimes that may have been committed were not investigated and prosecuted. There is no evidence that these alleged acts were carried out by local military and political officials. In addition, Serbia admits that the

> "relationship of the central Croatian government and these campaigns remains to be determined".

Finally there is no evidence presented to support the allegation that the government was aware of "what was going on but did nothing to stop the killing." These allegations, made without credible evidence, are a characteristic feature of several sections of the Counter-Memorial.

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[262] See *inter alia Martić*, paras. 122-129.
[263] Counter-Memorial, para. 538
[264] Counter-Memorial, para. 540.

3.116 Several of the allegations set out in this section claim their support from unofficial and dubious electronic and other sources.[265] By way of example, the Counter-Memorial quotes *Hrvatski vjesnik* as an example of hate speech and chauvinism directed against the Serbs.[266] This was a marginal publication with only had 47 issues. It is noteworthy that the Respondent challenges Croatia's evidence, including its witness statements, while it relies on obscure and non-probative evidence that lacks any credibility whatsoever.[267]

3.117 In any event, several of Serbia's allegations in this regard are repeated in its Counter Claim and are addressed in Chapters 10 and 11 *infra.*

SECTION IV: THE ROLE OF THE INTERNATIONAL COMMUNITY

3.118 The Memorial describes the role of the international community following the escalation of fighting in Croatia. This involvement continued until after 1995.[268] That account is essentially unchallenged in the Counter-Memorial.

3.119 The Respondent attempts to argue that the "major hostilities of the 1991 war in Croatia were effectively over by the beginning of December 1991". It states disingenuously that 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 to the conflict.[269] This is at odds with the facts on the ground and is contradicted by its later statements where it refers to continuing conflagrations between the different sides. These claims are also dealt with in the Chapters that follow.

3.120 As stated in the Memorial, the UN Secretary General appointed Cyrus Vance as his Special Representative for Yugoslavia. An agreement (the ''Vance Plan'') was adopted in Geneva on 23 November 1991 and a proposal for the deployment of a UN peacekeeping operation, pursuant to the ''Vance Plan'', was formally agreed in December 1991, and its role and functions were set out in a Report of the Secretary General.[270] The Report set out how and where this force was to function and stated categorically that this was ''an interim arrangement'' to create the conditions for peace required for the negotiation of an overall settlement to the conflict. From its inception, it was not intended to prejudice or otherwise affect the outcome of negotiations for a

[265] See e.g. Counter-Memorial, pp. 185-190.
[266] Counter-Memorial, p. 186, footnote 476.
[267] This is discussed generally in Chapter 2, paras. 2.42-45.
[268] Memorial, paras. 2.117-122 *et seq.*
[269] Counter-Memorial, para. 560.
[270] Memorial, para. 2.124. See Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23280, 11 December 1991, para. 9 *et seq* and Annex III; Annex 92. Further changes to the plan were set out in the Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23592, 15 February 1992, para. 9 *et seq*.

comprehensive settlement of the conflict.[271]

3.121 All sides involved in the conflict accepted this plan: the Governments of the Republic of Croatia and the Republic of Serbia, the JNA, and, after strong pressure from Belgrade, representatives of the Serb community in Croatia.[272] The Counter-Memorial admits that the "RSK leadership" was reluctant to accept the plan which envisaged demilitarization of the UNPAs. It states that Milan Babić was the main opponent of the plan and that the leadership of Serbia had to invest "enormous political capital" to procure the consent of the rebel Serbs to the plan.[273] This "enormous political capital" involved Milošević giving the rebel Serbs an ultimatum to remove Babić and elect new representatives. This was done. As stated in the Counter-Memorial, the "RSK Assembly removed Babić from the office of President, and accepted the Vance Plan".[274] This is yet another demonstration of the effective control exercised by the Serbian leadership over the rebel Serb authorities. Milošević was able to dictate to the rebel Serb leadership.[275]

(1) The Involvement of the United Nations: UNPROFOR

3.122 The UN Protection Force (UNPROFOR) was established on 21 February 1992. It deployed in those areas of Croatia where Serbs constituted the majority or a substantial minority of the population and where inter-communal tensions had led to armed conflict. 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.[276] The UNPAs were to be demilitarized, with all armed forces withdrawing completely, including the JNA. Police monitors were to control the activities of local police forces, and stop discrimination on the basis of ethnicity. Working with UN humanitarian agencies, UNPROFOR was also to secure the return of refugees and displaced persons to their homes. The creation of the UNPAs was not intended to prejudice or otherwise affect the outcome of any political settlement in the former SFRY.[277]

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[271] See annex 92, Annex III, para. 1

[272] As stated in the Memorial, multi-party elections were due to be held in Bosnia in December 1991. As the crisis in Bosnia deepened President Milošević, wishing to concentrate on that situation put pressure on the rebel Serbs in Knin to accept the ''Plan'' for this reason. Memorial, 2.125. Borisav Jović reports a ''difficult and dramatic'' meeting on 2 February 1992 attended by Milošević during which the leadership of the 'RSK' accepted the Vance Plan, B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY].

[273] Counter-Memorial, para. 564.

[274] Counter-Memorial, para. 564.

[275] For an extensive description of Milošević's ultimatum and removal of Babić see N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia] (2005), pp. 150-162.

[276] Memorial, para. 2.125 *et seq* and Counter-Memorial, para. 566.

[277] Memorial, para. 2.124 *et seq.*

3.123 The UNPAs were divided into four sectors:

1. **The South Sector** included the hinterland of northern Dalmatia and eastern Lika;
2. **The North Sector** included the area of Kordun and Banovina;
3. **The East Sector** included the area of Eastern Slavonia, Baranja and Western Sirmium. These three sectors were controlled by the rebel Serbs at that time.
4. **The West Sector** that included the western part of Slavonia, was mainly under the control of the Government of Croatia. A small area around Okučani was under the control of the rebel Serbs. [278]

Under the Vance Plan, the status of the UNPAs would not be changed until an "an overall political solution of the Yugoslav crisis" was found, an approach which Croatia was unhappy with.

3.124 In addition to the UNPAs, UNPROFOR's authority was extended to the so-called "pink zones", the term used to describe parts of Croatian territory outside the UNPAs which remained under rebel Serb control after the cessation of hostilities in January 1992. In order to avoid the outbreak of further hostilities, Croatia agreed to accept UNPROFOR assistance in reinstating Croatian authority over these areas even though these areas were to be handed back to Croatia unconditionally. In the end the "pink zones" effectively became an integral part of the UNPAs and stayed under the control of the rebel Serbs. [279]

3.125 While the UNPAs were supposed to be demilitarized, this did not happen.[280] Secure under the protection of the UNPROFOR, the rebel Serbs together with Serbia consolidated the gains of their genocidal campaign, cleansing occupied areas of non-Serbs and destroying non-Serb property (including cultural and religious monuments) in such a way as to make conditions of life impossible for the Croat and other populations.[281] Despite UNPROFOR's presence, the rebel Serbs continued to expel Croat citizens from the UNPAs.[282]

3.126 Serbia claims that despite considerable progress between the parties in 1994 in establishing a permanent cease-fire and cooperating in economic

[278] The UNPAs are set out in Memorial, Vol. 3, Plate 2.7.

[279] Memorial, para. 2.128. See Chapter 10, *infra*.

[280] As described in the Memorial and set out further in Chapter 4, *infra*, when the JNA withdrew from Croatia towards the end of May 1992, it left much of its weaponry with the Serb Territorial Defence and police: Memorial, paras. 2.127 and 3.96.

[281] See for example, in Security Council Resolution 757 of 30 May 1992 (which introduced wide-ranging sanctions against the FRY/Serbia) the Security Council expressed its deep concern at persistent ceasefire violations, at the continued expulsion of non-Serb civilians and at the obstruction of and lack of cooperation with UNPROFOR in parts of Croatia.

[282] See Report on the persecution faced by Croats and other non-Serbs in the occupied areas, July 1993, Annex 116.

matters, Croatia decided to resolve the problem of the 'RSK' by the use of force.[283] This is a distortion of the facts. It was Croatia, through inter alia the implementation of the Economic Agreement, that sought to peacefully re-integrate the areas under Serb control, but the rebel Serbs lead by their "President" Milan Martić, obstructed the implementation of the agreement. Knin advocated the unification of the 'RSK' with the Republika Srpska (RS) of Bosnia and rejected any solution that envisaged the future of the 'RSK' within Croatia. These issues are dealt with in Chapters 10 and 11 *infra*, as are Serbia's allegations of genocide allegedly committed by Croatia against the rebel Serbs during Operation Storm, in August 1995. These allegations are vehemently denied.

CONCLUSION

3.127 The Respondent's account of the historical and political events is incomplete, inaccurate and in numerous places misleading. The preceding paragraphs, taken together with Serbia's various admissions, set the record straight. They establish that in the "undemocratic regime" in Serbia, prior to October 2000, Serbian nationalism was the "leading political idea." The Serbian leadership manipulated the Serbs in Croatia by *inter alia* misusing recollections of the past and through abundant hate speech in the state-controlled media.

3.128 The Serbian leadership took control over the federal organs of the SFRY, including the Presidency of the SFRY and the JNA, resulting in the dissolution of the SFRY. The late 1980s and early 1990s witnessed the rise of extreme Serbian nationalism, which coincided with Slobodan Milošević's rise to power, leading to a situation in which Croatia was essentially presented with two options by Serbia: (i) it could remain within a federal Yugoslav state dominated by Serbian interests, or (ii) it could become an independent state with a sharply reduced territory, with Serbia taking control over large parts of its territory which had been within Croatia's borders since at least World War II. When Croatia's citizens opted overwhelmingly for independence in May 1991, Serbia embarked on a campaign of territorial acquisition with the object of establishing Serbian control over parts of the Republic of Croatia.

3.129 This campaign was conducted by the Serbian leadership, which controlled the JNA and paramilitary groups which were either incorporated into the structure of the JNA or were under the effective control of Serbia.[284] Through a process of Serbianisation, the JNA emerged as a Serb dominated army, with an ideological commitment to a Greater Serbia. Serbia admits that the JNA leadership and the Serbian leadership were "political allies" and that the JNA, together with paramilitaries co-opted by it, first covertly, and later openly fought in alliance with the rebel Serbs and pursued the goal of "Greater Serbia."

[283] Counter-Memorial, para. 570.
[284] See Chapter 4, *infra*.

3.130 This campaign of "Serbianisation" of Croatian territories was accompanied by the commission of genocide against a significant part of the Croatian population of Eastern and Western Slavonia, Banovina, Kordun and Lika and Dalmatia. It is these acts of genocide which are the subject of Croatia's Application.[285]

3.131 Influenced by extreme Serbian nationalistic propaganda and hate campaign emanating from Belgrade, political representatives of the Serb community in Croatia refused to accept the authority of the Croatian government and, under the direction, command, and control of the leaders of the Republic of Serbia rebelled against the Republic of Croatia by *inter alia* establishing areas of Serb occupation within the territory of Croatia in order to extend Serbia's borders with a view to establishing a "Greater Serbia". Initially this was through the proclamations of "Serb Autonomous Regions" and finally by the "establishment" of the 'RSK'. Serbia admits that the illegal entity, the 'RSK', enjoyed the "political and financial support of the FRY".

3.132 This situation continued until mid 1995. The existence of the 'RSK' in the heart of the sovereign Republic of Croatia was a critical obstacle to the political and economic development of the country. In the face of over 4 years of failed negotiations, the intransigence of the rebel Serbs and the inefficiency of the UN, the Republic of Croatia was compelled to resolve the problem directly through the use of military force and in 1995 Croatian forces, in two key Operations - *Flash* and *Storm* - regained control over the occupied territories.[286]

[285] See Chapters 5, 6 and 9, *infra.*
[286] See Chapters 10 and 11, *infra*.

CHAPTER 4

THE JNA AND THE PARAMILITARY GROUPS

(1) Introduction

4.1 This Chapter responds to Chapter VI of the Counter-Memorial, in which the Respondent seeks to sever the link between the FRY/Serbian authorities and the activities of the JNA and the paramilitary forces involved in acts of genocide. The object is to distance itself from acts of genocide in which those forces were involved. In relation to the JNA, the Respondent asserts that the JNA was an army of the SFRY for which it has no responsibility,[1] that it was a *de jure* organ of the SFRY and not of the FRY/Serbia. In relation to Serb and Serbian paramilitary forces, the Respondent asserts that it did not supervise or direct these paramilitary units.[2]

4.2 The evidence in the Memorial shows that the JNA was directed by the FRY/Serbian authorities and, acting in concert with Serbian TOs and Serb and Serbian paramilitary groups, played a decisive role in the military campaign in Croatia and in the commission of genocidal acts there committed.[3] The Applicant relied on a substantial body of evidence in support of that claim, including witness testimony, JNA and other military orders and regulations, extracts from memoirs of those directly involved within the FRY/Serbian political and military leadership, press articles from the official JNA newspaper *Narodna Armija* and elsewhere, and videotapes. The evidence clearly demonstrates the JNA's direct involvement in violations of the Convention.

4.3 In this Chapter of the Reply, the following specific issues are addressed:

1. The transformation of the JNA into a Serbian Army, by intentional Serbianisation: Serbia claims that structural changes were not intended to achieve Serbian dominance. The evidence in this Reply confirms that this claim has no foundation;

2. Serb/JNA command and control over the TO of the Republic of Serbia and over the armed forces of the 'Serb Autonomous Regions': The Respondent claims that the JNA and Serbian

[1] See Counter-Memorial, para. 604.

[2] Other issues raised in Chapter VI include the role of 'the Serb Army of Krajina' ('SVK') and the role of forces of the Government of Croatia, which are addressed in Chapters 11 and 12 of this Reply, *infra*.

[3] See, in particular, Memorial: Chapter 3, paras. 3.73-99; Chapters 4 and Chapter 5 generally; and the summary in Chapter 8, para. 8.16, and the footnotes therein, in particular footnotes 57-59.

leadership did not command or control the 'autonomous' forces of these regions in Croatia, yet the evidence clearly demonstrates that from at least July 1991 the JNA supported rebel Serbs and that the Serbian leadership and JNA controlled and directed the actions of the TO and forces of the Serb autonomous regions;

3. The JNA's role in the lead-up to the genocidal war: The Respondent argues that the JNA acted as a neutral buffer between Croatian forces and rebel Serbs until September 1991. This is contradicted by findings of the ICTY and other evidence, including a report relied on by Serbia, which clearly establishes that the JNA acted as 'Biased Peacekeeper' from July 1991, at least;

4. The SFRY Presidency's lack of control over the JNA: The Respondent argues that the JNA retained its federal, 'Yugoslav' character during the conflict with Croatia. However, the lack of control over the JNA by the non-functioning SFRY Presidency is confirmed by accounts of discussions within the SFRY Presidency in early 1991;

5. The JNA's engagement in the genocidal conflict: The Respondent presents the JNA's role as one that shifted from 'peacekeeper' to a defensive role in the face of attacks by Croatian military forces. In fact, by July 1991, as the Trial Chamber in *Mrkšić et al* found, the JNA became 'actively involved in conquering territory and not merely in interposing itself between rebelling Serbs and local Croat authorities'. The Applicant shows that this role included direct participation in acts of genocide in concert with paramilitaries and supporting military actions of rebel Serbs in Croatia.

4.4 The Applicant maintains the arguments put forward in the Memorial, and the absence of a specific rebuttal to particular points made by the Respondent should not be taken as a concession. In this Reply the Applicant relies on additional evidence, including : the 2003 Theunens Report;[4] the 2007 Theunens Report;[5] the 2002 'Balkan Battlegrounds' Report[6] and various military orders and other material produced by the military authorities. This

[4] See Expert Report of R. Theunens, 16 December 2003, submitted by the Prosecution in *Milošević* ('Theunens Report, 2003').

[5] See Expert Report of R Theunens, 30 June 2007, submitted by the Prosecution in *Prosecutor v. Jovica Stanišić and Franko Simatović,* IT-03-69 ('Theunens Report, 2007').

[6] 'Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995' Volume I, Central Intelligence Agency, Office of Russian and European Analysis, Washington, DC 20505, May 2002 ("Balkan Battleground' Report').

evidence shows there are no grounds to question the clear relationship of control exercised by FRY/Serbia over the JNA, the Serbian TO forces, the Serb and Serbian paramilitary forces or volunteers, and the rebel Serb forces in Croatia. Subsequent findings and analysis, in particular by the ICTY, have strengthened the evidence in support of that crucial relationship.

4.5 The evidence presented in the Memorial, supplemented by this new evidence,[7] confirms that the JNA directly participated in acts of killing and other acts of genocide that violated Article II of the Convention, for example in relation to the killings of Croats at Aljmaš, Ilok, Lovas, Petrova Gora and Vukovar. At other times, the JNA's involvement took the form of securing or blockading the area in which atrocities took place, for example at Orlovnjak, Joševica and Sotin. Furthermore, Serbia provided support to Serb paramilitary forces in the form of financing, training, logistical support and provision of equipment. Much of this support was provided through the JNA and some was directed through other organs of the FRY/Serbian state, including the Ministry of the Interior ('MUP'), the Secret Police and the intelligence services.

4.6 In Chapter VI of the Counter-Memorial, the Respondent places great reliance on a Report entitled 'Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995'.'[8] It does so to persuade the Court that the JNA played a neutral role in the conflict. Yet the Report states that personnel from the Serbian State Security Department and its Special Operations Unit "almost certainly helped plan" many of the military operations undertaken by break-away Croatian Serbs in 1991.[9]

4.7 The Respondent seeks to persuade the Court that Serb paramilitaries operated independently of the authorities of the Republic of FRY/Serbia. It argues that certain local Serb paramilitary forces operated under the command and control of local Serb authorities.[10] And it denies that Serb paramilitary groups, including those headed by Vojislav Šešelj and Arkan, acted under the control of the JNA.[11]

4.8 These claims are not supported by the evidence, which confirms the control exercised by FRY/Serbian authorities over Serb paramilitaries. For example, an expert report presented to the ICTY in 2003 indicates that Serbia integrated paramilitary forces involved in the commission of acts of genocide into the JNA itself: see the Order dated 10 December 1991.[12] A 2007 report

[7] See Chapters 5 and 6, *infra*.
[8] 'Balkan Battlegrounds' Report, Vol.I, p. 90.
[9] *Ibid*..
[10] See Counter-Memorial, paras. 610-615 and 622-636.
[11] See Counter-Memorial, paras. 641-652.
[12] Theunens Report, 2003, p. 20 of Part II, para. 6. The Order stated: "In all zones of combat operations all units of the JNA and TO, as well as volunteer units agreeing to be placed under that command and to wear JNA and TO insignia, are to be put under the control of the most senior JNA officer. All other armed groups are to be regarded as paramilitary and are

confirms that Serb paramilitary groups - including Arkan's Tigers and those operating under 'Captain Dragan' - were 'controlled' by the MUP of the Republic of Serbia.[13]

4.9 In *Mrkšić et al*, the ICTY Trial Chamber found that the JNA was commanded to establish 'full control' within its various zones and that at all levels, all armed units, whether JNA, TO or volunteers 'must act under the single command of the JNA.'[14] The position was confirmed in other JNA orders.[15] In *Mrkšić et al,* the Trial Chamber found that the typical system of attack employed by the JNA in Eastern Slavonia included the following stages: building up military presence around a Croatian village; shelling for several days; issuing ultimata to the villagers, followed by the entry of Serb paramilitaries.[16]

4.10 The pro-Serb role of the JNA as early as August 1991 is confirmed by the Trial Chamber in *Martić*:

> "166. On 26 August 1991, the Croat village of Kijevo, situated 15 kilometres east of Knin, was attacked because the MUP of Croatia had established an SJB in the village... The decision to attack Kijevo was taken by Milan Martić in coordination with the JNA and followed an ultimatum issued by him to the Croatian SJB [Police Station] …..
>
> 167. Units of the JNA 9th Corps in Knin, the *Milicija Krajine* and the local TO participated in the attack. The evidence establishes that there was coordination between the JNA and the MUP, and that the JNA was in command of the participating forces."

4.11 As regards the relationship with the Serb paramilitary forces, the Respondent alleges[17] that the Applicant has 'bundled together' the different Serb volunteer units into one group ("Serb paramilitary groups") without providing data on the individual groups. The Respondent argues that the

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to be disarmed and removed from zones of combat operations.", 1st Administration of the General Staff of the SFRY's Armed Forces, strictly confidential No. 2256-2, 10 December 1991, Directive.

[13] Theunens Report, 2007, pp. 6-7, paras. 9-10; and see Part 1: Section Three, Part 5 of the Report, pp. 89-104. See also the Except of Transcript from "The Unit", Serbian Television Documentary (B92 Network), Annex 114.

[14] *Mrkšić et al*, para. 101.

[15] Under a similar Order from Major-General Špire Niković, dated 19 October 1991, TO units that were part of the Zone Staff of TO (ZnŠTO) Banija and Kordun, i.e., of District Staffs of TO (OpŠTO) Dvor na Uni, Kostajnica, Petrinja, Sisak, Glina, Vrginmost and Vojnić, had also officially been re-subordinated to "JNA units – the 1st Operational Group Command" and in their subsequent operations were used "as organic constituents of the JNA units in combat zones where the JNA units are stationed."

[16] *Mrkšić et al*, para. 43.

[17] Counter-Memorial, paras. 572-573, 607-608.

Applicant tries in this way to link all the paramilitary groups with the JNA, without providing evidence.

4.12 This is wrong and distorts the Applicant's case. The Applicant acknowledges that there were a range of different paramilitary forces and 'volunteer' units operating in Croatia during the time of the genocidal campaign. At paragraphs 3.47-49 of the Memorial, for example, reference is made to the estimation by Croatian intelligence sources that there were 32 such groups operating in Croatia in the period 1990-97. The Memorial refers to the classification of paramilitary forces operating in Croatia used in the Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992),[18] identifying four categories of paramilitary forces: special forces (operating with substantial autonomy under the command of an identified leader), militias (members of former TO forces), paramilitary units (operating under the command of a local leader) and police augmented by armed civilians (operating under local leadership reportedly under the control of the Ministry of Interior or other political organisations).

4.13 Wherever possible, in the Memorial the Applicant identified the specific forces or groups involved in violations of the Convention*:* in Dalj, paramilitary Serb formations from Vojvodina (paragraph 4.32); in Ilok, detachment of the TO from Titovo Užice, Serbia (paragraph 4.71); in Tovarnik, the White Eagles (paragraphs 4.95 and 4.105); in Lovas, the Dušan Silni (paragraph 4.119), led by Ljuban Devetak (paragraph 4.123); in Vukovar, Arkan's tigers, the Šumadija Squad and the Dušan Silni as well as other volunteer units identified by town of origin in Serbia (paragraph 4.143), Donji Čaglić, local Serb paramilitaries (paragraph 5.49), Đulovac, White Eagles (paragraph 5.51), Petrinja, the police of the SAO Krajina (paragraph 5.95), Kordun and Lika, local Serb paramilitary police units (paragraph 5.128), Vaganac, Martić's paramilitaries (paragraph 5.175). Identification is sometimes difficult because the forces wore JNA uniforms given to them by the JNA.[19] The Applicant does not argue nor does it need to in order to establish its claim, that there was only one Serb paramilitary group operating in Croatia in 1991. It has shown that Serbian authorities, acting through the JNA and other state organs, and as part of an overall policy, supported, directed and controlled these various forces, even to the extent of integrating them into the JNA at certain points in order to effect its genocidal campaign in Croatia.

4.14 It is notable that in judgments of the ICTY, it has not always been possible to specifically identify precisely which paramilitary groups were involved in specific atrocities.[20] This has not prevented the Tribunal from

[18] See Chapter 3 of the Memorial, para. 3.49.

[19] See for example Memorial, para. 3.56. See also *Martić*, paras. 245-246.

[20] See for example *Mrkšić et al,* para. 608, in which the Trial Chamber concluded that: "The evidence demonstrates that the prisoners were murdered by TOs with some paramilitary support, although it is the case that one or more JNA soldiers may have been directly involved

reaching conclusions as to the individual criminal liability of the accused.

4.15 The use of the phrase 'Serb paramilitary force or group' in the Memorial in no way undermines the Applicant's case: where the identity of the group is known, it is stated in the evidence. Further, there is clear evidence of an overall policy of the FRY/Serbian authorities to use the paramilitary forces in the genocidal campaign. The Order of 13 September 1991 which deals with the acceptance of 'volunteers' into the JNA was the basis for the integration of paramilitaries into the army.[21]

(2) The Transformation of the JNA into a Serbian Army

4.16 In the Memorial, the Applicant showed that the JNA was deliberately transformed by the Serb leadership from a Yugoslav federal army, serving the interest of the SFRY, into a Serb dominated army.[22] The domination of Serbs and Montenegrins in the ranks of the JNA was one of the reasons why the JNA supported the 'Greater Serbia' policy promoted by the Serb Government. The Respondent seeks to rebut this evidence,[23] to present the JNA as an organ of the SFRY that acted at least until September 1991 as a neutral buffer between Croatia and rebel Serbs and was not engaged in pursuing the political goal of a Greater Serbia, which formed the political basis of the genocidal campaign.

4.17 In relation to the issue of the ethnic composition of the JNA, the Respondent asserts that this only started to change in 1991.[24] It presents data on the relative proportions of Serbs and Croats in the JNA from 1987 to 1990 that differs from the Applicant's data.[25] Even if the data presented in the Counter-Memorial was correct,[26] it nevertheless confirms that Serbs were disproportionately represented in the JNA and Croats under-represented. This is acknowledged by the Respondent,[27] noting that Serbs constituted 56% of the JNA Officer corps, but only 36% of the population of the SFRY. The data to which the Applicant had access in 2000, which gave an overview of the JNA officer corps from 1984 onwards, showed that there were 63% of Croats and 136% of Serbs in relation to the population.[28] The data confirms that the

on their own individual volition." The Trial Chamber subsequently refers to some specific paramilitary groups which were involved in the murder of prisoners: para. 613.

[21] See 3rd Administration of the General Staff of the Armed Forces of the SFRY, Confidential No. 2391-1, 13 September 1991, Instructions on the Admission of Volunteers into the JNA. See paras. 4.108-110, *infra*.

[22] Memorial, Chapter 3, paras. 3.02-42.

[23] Counter-Memorial, paras. 580-606.

[24] Counter-Memorial, para. 579 *et seq.*

[25] See Counter-Memorial, para. 580.

[26] In relation to which it should be noted that Serbia appears to have relied on archival records of the JNA which it holds and to which Croatia has had no access; further evidence in itself of the Serbian state's control over the JNA.

[27] Counter-Memorial, para. 581.

[28] Presidency of the SFRY, Strictly Confidential No. 418/7-4, 26 October 1984, Information of the Federal Secretariat for People's Defence on Personnel Issues in the JNA.

proportion of Serbs in the JNA officer corps was much greater than in the general population in the period before 1991.

4.18 The Respondent asserts that the ratio between Serb and Croat officers had not altered from that which existed in the period 1987 to 1990.[29] This is unsustainable. At the beginning of the transformation of the JNA, the number of Croats at the command level of the military district and the corresponding command posts of the Military-Naval District and the Air Force and Anti-Aircraft Defence was high – as many as four. By the end of 1990 only one Croat held a command post of that level (A. Tus). Moreover, at the lower, operative levels (corps, brigade – regiment) and higher tactical levels (brigades and regiments), there was no ethnic balance between Serbs and non-Serbs/ Croats.[30]

4.19 An example which supports the Applicant's contention that JNA officers who supported the idea of a 'Greater Serbia' were elevated through the ranks[31] is provided by the promotion of General Života Avramović, a Serb from southern Serbia, who was appointed commander of the 3rd Military District (south-eastern Serbia, Montenegro, Kosovo and Macedonia). In early July 1991 he took over the 5th military district. By contrast, the removal of Admiral B. Grubišić in the summer of 1990 from the post of Commander of the Military-Naval District can be viewed as the removal from an important post of an Admiral who was not trusted by the political and military leadership in Serbia. Reference can also be made to an admission by the former Minister of Defence of the SFRY, Admiral Branko Mamula, that Serbs from Serbia started to occupy the highest command posts in the 1980s.[32] In a 2010 interview, Admiral Mamula stated that participation in the 1941-1945 war was later rewarded and that the significant influence that the Serbs from Croatia had in the JNA was due to the fact that they used to be a key segment of partisan personnel during the 1941-1945 war.[33] In late 1990, not a single Croat commanded an Army corps in the territory westwards from the Drina River. The only A brigade commanded by a Croat until July 1991 was stationed in Ilirska Bistrica.[34]

4.20 Notwithstanding the Respondent's assertion that the ethnic structure of the JNA remained unchanged between the 1980s and 1991,[35] the ethnic composition of the JNA never corresponded to the ethnic composition of the

[29] Counter-Memorial, para. 580.

[30] See the Letter from the Council for Succession to Military Property to the Ministry of Justice, 23 November 2010, Annex 108.

[31] As set out in para. 3.21 of the Memorial and the references therein.

[32] B. Mamula, *Slučaj Jugoslavija* [Yugoslavia Case], p. 153.

[33] Denis Krnić, *Mamula: Dubrovnik je trebao biti prijestolnica Crne Gore* [Mamula: Dubrovnik was to be the capital of Montenegro], *Slobodna Dalmacija*, 10 April 2010, p. 13.

[34] See the Letter from the Council for Succession to Military Property to the Ministry of Justice, 23 November 2010, Annex 108.

[35] Counter-Memorial, para. 584.

population of the SFRY. This is admitted by the JNA.[36] The SFRY Constitution required the ethnic make-up of the commanding personnel to be coordinated with the representation of the republics and autonomous provinces.[37] This was not achieved.[38]

(a) The Restructuring of the JNA to secure Serbianisation and the pursuit of Serbian political goals

4.21 The Respondent treats the Applicant's assertions that the 1988 restructuring of the JNA was 'a further shift towards the promotion of Serbian interests' as mere 'conjecture'. It asserts that the restructuring was done pursuant to a decision taken by the SFRY Presidency.[39]

4.22 This misrepresents the facts. The 1988 restructuring of the JNA was achieved by avoiding the SFRY Constitution:[40] the changes approved by the Republics were not those implemented by the JNA. When seeking approval for the restructuring, the JNA argued that there would be no significant changes in the existing relations within the defence system.[41] However, a confidential study on the existing situation and future directions, drafted in 1989, shows that the JNA did not act in accordance with the proposals presented to the Republics: it centralised the constitutionally decentralised defence system to the detriment of the constitutional rights of the Republics.[42] The essence of the restructuring under the name *Jedinstvo* (*Unity*) was to subordinate the TO to the commands of the JNA. The second important implication of the restructuring was that, after twenty years, the JNA's 'republican' structure was terminated.

4.23 Although it is correct that the changes in the JNA were accepted without objection from any Republic other than Slovenia,[43] the proposal which the

[36] *Kadrovi i kadrovska politika* [Personnel and Personnel Policy], Internal document, edition *Razvoj oružanih snaga SFRJ 1945-1985* [The Development of the Armed Forces of the SFRY 1945-1985], Belgrade, 1989.

[37] Constitution of the Socialist Federal Republic of Yugoslavia, 1974, Article 242.

[38] *Kadrovi i kadrovska politika*, 338; Presidency of the SFRY, Strictly Confidential No. 418/7-4 dated 26 October 1984, *Informacija SSNO o kadrovskim pitanjima u* JNA [Information of the Federal Secretariat for People's Defence on the Personnel Issues in the JNA].

[39] See Counter-Memorial, paras. 585-587.

[40] As discussed in Chapter 3 of the Memorial, paras. 3.02-42.

[41] *Savjet za narodnu obranu Predsjedništva SFRJ* [People's Defence Council of the Presidency of the SFRY], *DT br. 274-2 od 21. listopada 1986* [State secret No. 274-2, 21 October 1986], *Informacija o predlogu modernizacije sistema rukovođenja i komandovanja oružanim snagama SFRJ* [Information on the Proposal to Modernise the System of Managing and Commanding the Armed Forces of the SFRY].

[42] *Komanda 5. VO* [Command of the 5th Military District], Strictly Confidential No. 29-2/1989; *I uprava GŠ OS SFRJ* [I. Directorate of the General Staff of the Armed Forces of the SFRY], Strictly confidential No. 532-1, 14 March 1989, *Dogradnja i razvoj rukovođenja i komandovanja u oružanim snagama* [Further Development of the Management and Command System in the Armed Forces]

[43] Counter-Memorial, para. 586. See *Predsjedništvo Socijalističke Republike Hrvatske*

Republics approved differed from the changes actually implemented within the JNA. The Slovenes had certain objections because they came to understand the JNA's true intentions in time. Even Montenegro had certain objections.[44] This is explained by the fact that the JNA guaranteed that the restructuring of the armed forces would not infringe the rights of the Republics to the TO, whereas in the final stages of the crisis it became evident that the opposite was the case so far as Croatia was concerned.

4.24 The JNA controlled the Croatian TO, as was evident during 1990-1991 when the General Commander of the TO, Lieutenant-General Zdravko Novoselić, faithfully executed the orders of Generals Kadijević and Adžić received from Belgrade.

4.25 The Respondent refers to the view presented in the 'Balkan Battlegrounds' Report, that the JNA acted as a force for integration in Yugoslavia.[45] The suggestion that the JNA was an integrative factor is true only with respect to the period *before* the JNA's adoption of the *Unity* structure. However, from that point onwards, the JNA sided with Serbia and served its interests. The Report is not an official document.

4.26 The true role played by the JNA is conceded to some extent in the report, which states that in the summer of 1991 the JNA was "acting in the name of Yugoslavia but irresistibly biased towards Serbia."[46] The report refers to the JNA as 'biased peacekeepers'. It notes that "even when the JNA was clearly hewing to its mandate of restoring peace and acting as a buffer, after Serb forces had captured an area from the Croatians, the JNA's intervention to halt the fighting usually left the Serb forces occupying their objectives… ."[47]

4.27 As discussed below, the Applicant does not accept the portrayal of the JNA's role as a 'peace-keeper', but it is significant that even this document, on which the Respondent places reliance, does not support the contention that the JNA played a non-partisan peace-keeping role. In this regard, Jović testifies extensively to the *rapprochement* between the JNA and Serbia.[48]

(b) The Senior Command of the JNA in the Build Up to Genocide

4.28 The Respondent contends that the Applicant's arguments about

[Presidency of the Socialist Republic of Croatia], No. DT [State Secret]-19/1-86, 21 November 1986.

[44] Admiral Mamula wrote about this in his memoirs: B. Mamula, *Slučaj Jugoslavija* [Yugoslavia Case], Podgorica, 2000, pp. 64-65.

[45] See Counter-Memorial, para. 587.

[46] 'Balkan Battlegrounds' Report, Vol.I, p. 90.

[47] *Ibid*., pp. 91- 92.

[48] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], see pp. 45, 68, 139-143, 176, and, in relation to meetings of the "Group of Six", see pp. 371, 382-383, 385-387, 391-392, 394 and 402-403.

the "Serbianisation" of the JNA's commanding personnel in June 1991 are unfounded, on the basis that some 'top positions' were held by non-Serbs in early 1991.[49] The Counter-Memorial cites the examples of Veljko Kadijević, Stane Brovet, Anton Tus, and Zvonko Jurjević. According to the Respondent, General Kadijević, for example, should not be referred to as a 'Serbian' general.

4.29 The Respondent's argument that the senior ranks of the JNA were ethnically balanced[50] is wholly unpersuasive. In 1989 the Croat commanders of the 1st and the 5th military districts retired, to be replaced by Aleksandar Spirkovski, a Macedonian, (the 1st military district) and Konrad Kolšek, a Slovene, (the 5th military district). Both are mentioned in Annex 30 of the Counter-Memorial. Kolšek was replaced in early July 1991 and Spirkovski in late September or early October 1991, purportedly on the basis of poor performance. Yet they faithfully executed everything that General Kadijević demanded of them.

(c) Further Evidence of Serbianisation of the JNA

4.30 In response to the Respondent's assertions about the Applicant's 'misleading interpretation' of events leading up the war,[51] it is necessary to highlight some instances where the JNA's orientation towards Greater Serbian political goals is plainly in evidence.

JNA Aquiescence to Changes to the Serbian Constitution

4.31 In contrast to the position it took in relation to changes to the constitutions of other republics, including Croatia, the JNA did not react to the changes to the Serb Constitution in September 1990. The Serbian Constitution usurped three basic competences of the federation: external relations, people's defence and state security and, most importantly, contained a provision that Serbia would respect federal laws only when that served its interests.[52] The Constitution provided for the President of the Republic to discharge the duty of Supreme Commander in peace and war.[53] This silence continued following the enactment of the Law on Defence of the Republic of Serbia in July 1991, which authorised the President of the Republic of Serbia to "manage the armed forces in war and peace", including the TO.[54] The JNA's bias towards

[49] Counter-Memorial, para. 582.
[50] *Ibid*..
[51] Counter-Memorial, paras. 588-605.
[52] S. Popović, "How we defended Yugoslavia, Milošević vs Yugoslavia", Helsinki Committee for Human Rights in Serbia, Belgrade, 2004, pp. 26-27.

S. Popović, *Kako smo branili Jugoslaviju* [How We Defended Yugoslavia], pp. 26-27.
[53] B. Mamula, *Slučaj Jugoslavija* [Yugoslavia Case], p 178; Slobodan Inić, *Predsjednička svemoć* [Presidential Omnipotence], *Borba*, 23 August 1990, p. 2.
[54] *Ukaz o proglašenju zakona o odbrani*, [Decree on Promulgation of the Law on Defence],

Serbia is also evident from its conduct towards its supreme commander, the Presidency of the SFRY, even before the elections in Slovenia and Croatia. From mid-November 1989, Kadijević was a permanent guest of the Serbian member of the SFRY Presidency, he presented him with detailed analyses of the JNA since he did not want, as testified by B. Jović, "to present them to the entire Presidency for understandable reasons".[55]

The JNA's Actions During 1990

4.32 In its attempt to present the JNA as a neutral force, at least until September 1991, the Respondent alleges[56] that the JNA's actions in 1990 were supported by the entire Yugoslav Presidency, including the decision to place all material of the TO under control of the JNA.

4.33 This assertion is directly contradicted by the diary of Borisav Jović, the Serbian member of the Yugoslav Presidency. On 17 May 1990 (13 days before the HDZ assumed power in Croatia), he wrote that measures were taken for the JNA to remove weapons from the TO in Slovenia and Croatia against the wishes of the two republics:

> "We are taking measures to take the weapons from the civilian depots of the TO in Slovenia and Croatia and to transfer them into the military depots. We shall not allow that they misuse the weapons of the TO in potential conflicts or for secession by force. We have virtually disarmed them. Formally, this has been done by the Chief of the General Staff but actually this has been done on our order. The Slovenians and Croats responded strongly but they have no alternative."[57]

4.34 In September 1990, Croatia sought material from the JNA to equip its police force. The JNA did not reject Croatia's request, but declared that the amount of material that Croatia sought could not be delivered before the end of 1991.[58] This was a puzzling response to a relatively moderate request given Yugoslavia's position as a major world arms exporter.[59] The JNA aimed to put off resolution of the issue of the supply of weapons until late 1991, because the JNA and Serbia hoped it would solve the "problem" of Croatia

Službeni glasnik Republike Srbije [Official Gazette of the Republic of Serbia], Belgrade, 27 July 1991, p. 1.

[55] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], Belgrade, 1996, p. 68.

[56] See Counter-Memorial, para. 589.

[57] B. Jović, *Poslednji dani SFRJ*, [Last Days of the SFRY], Belgrade, 1996, p. 146.

[58] *Ugovor možete odmah zaključiti* [You Can Conclude the Contract Right Away], *Narodna armija*, 26 January 1991, p. 14.

[59] Confirmation that the SFRY, i.e., the JNA was a major exporter of weapons and military equipment is provided in the book by Aleksandar Stamatović, *Vojna privreda druge Jugoslavije 1945-1991* [Military Economy of Second Yugoslavia 1945-1991], Belgrade, 2001, pp. 72, 120.

during 1990, or at least by May 1991, when B. Jović would be President of the Presidency of the SFRY. Jović wrote in August 1990 that while on holiday he had talked to Kadijević and Milošević and their estimate had been:

> "The Yugoslav political crisis needs to be resolved while I (B. Jović) am at the head of the Presidency of the SFRY. After this, we would be completely helpless. For this reason, we need to make moves in that direction".[60]

4.35 Anticipating the possibility of a communist electoral defeat in Croatia, the JNA took preparatory measures. This began in 1990 with the second stage of the *Unity* plan to be implemented from 1991. Based on the plan *Jedinstvo-2* (*Unity-2*) and the JNA intervention in the anticipated political crisis, a new plan *Jedinstvo-3* (*Unity-3*) was adopted on 26 February 1990.[61] This would phase out or degrade parts of the units.[62] According to the plans, obsolete arms and equipment should have been withdrawn by mid July 1991, so as to procure new equipment and armament.[63] In the second half of February 1990, the commands of the military districts were familiarised with the *Unity*-3 plan. At the time, it was claimed that the plan was being adopted because of the risk that Hungary, following the break-up of the Warsaw Pact, would link itself to NATO. This threat was used to justify the development of the armed forces.[64]

4.36 The credibility of this explanation was short-lived. In a speech delivered on 13 March 1990, before a group of the highest-ranking JNA officials, Kadijević admitted there was no possibility of external aggression against Yugoslavia.[65] A day later, on 14 March 1990, the Chief of the General Staff of the Armed Forces, General Adžić, signed an order stipulating that, in the course of implementing the *Unity-2* and *Unity-3* plans, priority should be given to restructuring units in "sensitive regions".[66] At a session of the Military Council of the Federal Secretariat for People's Defence held on 27 April 1990, it was decided that JNA units should be classified on the basis

[60] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], pp. 175-176.

[61] I. Directorate of the General Staff of the Armed Forces of the SFRY, State Secret NO. 1487-135/89, 26 February 1990, Order. In the well-known interview to the Zagreb weekly *Danas*, Kadijević said that the Army was trying to realise its plans for its five-year downsizing by the end of 1990. Miroslav Lazanski, *Jugoslavija neće biti Libanon* [Yugoslavia Will Not Be Lebanon], *Danas*, 4 December 1990, p. 12.

[62] I. Directorate of the General Staff of the Armed Forces of the SFRY, State Secret No. 11-1, 17 April 1990, Working Material.

[63] Command of the 5th Military District, Confidential No. 38/87-24, 26 April 1990, Order Confidential No. 392-1 of the Federal Secretary for People's Defence.

[64] I. Directorate of the General Staff of the Armed Forces of the SFRY, State Secret No. 1487-136/89, 26 February 1990, Starting Point For Further Development of the JNA.

[65] Speech by the Federal Secretary for People's Defence, General of the Army, Veljko Kadijević at a meeting with the most responsible commanding personnel of the JNA on 13 March 1990.

[66] I. Directorate of the General Staff of the Armed Forces of the SFRY, Strictly Confidential No. 527-, 14 March 1990, Order.

of the paramount need to be ready for combat in crisis situations within the country.[67]

4.37 This decision made the new policy official for the first time although the entire *Unity* plan was predicated on the need to deal with emergencies in the country: "sensitive regions" meant in fact the areas of Zagreb and Knin. The changes in the structure of the JNA in that period were crucial to the transformation of the JNA into a Serbian army, to pursue the aims of a Greater Serbia.[68] This is confirmed by the testimony of senior JNA officers.[69] Colonel Vaso Predojević, a high-ranking officer from the Command of the 5th Military District. Colonel Vaso Predojević is a Serb from Bosnia and Herzegovina who gives first-hand testimony about General Kolšek's absolute obedience to Kadijević and Adžić's orders.[70] As soon as Kolšek showed that he could not, or would not, work on Kadijević's orders, Kadijević illegally removed him.

4.38 The 'Balkans Battleground' Report on which the Respondent relies in order to demonstrate the supposedly impartial role played by the JNA in the conflict notes that:

> "The Army became increasingly Serbianized after the eruption of the Slovenian Ten-Day War as conscripts began deserting and the other republics refused to send their biannual intakes of conscripts to the JNA."[71]

(3) Serb/JNA Command and Control over the Armed Forces of the Serb Autonomous Regions

4.39 The Respondent seeks to sever the link of command and control between FRY/Serbia and the armed forces of the 'autonomous Serb regions' to avoid the attribution of responsibility of genocidal acts committed by those forces to FRY/Serbia. The Respondent alleges that 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..." and could only be

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67 Command of the 5th Military District, Personal Office of the Commander, Strictly Confidential No. 2/55-50 dated 18 May 1990, Conclusions and Tasks.

68 D. Marijan, *Slom Titove Armije* [The Collapse of Tito's Army], pp. 156-164.

69 Konrad Kolšek, *Spomini na začetek oboroženoga spopada v Jugoslaviji 1991*, Obzorja, Maribor, 2001. A supplemented Serbian edition of the book was published four years later under the title *Prvi pucnji u SFRJ: Sećanja na početak oružanih sukoba* [The First Shots in the SFRY: Reminiscences of the Beginning of the Armed Conflict], Dan Graf, Belgrade, 2005.

70 Vaso Predojević, *U procjepu [In the Cleft Stick]*, Dan Graf, Belgrade, 1997; Slobodan Maksimović, *Petrinjski dani teku* [Petrinja Days are Passing], Radnička štampa, Belgrade, 2000.

71 'Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995' Volume I, Central Intelligence Agency, Office of Russian and European Analysis, Washington, DC 20505, May 2002, p. 93.

subordinated to the JNA "on the basis of a decision of the local authorities".[72] The Respondent seeks to present the 'RSK' and other rebel Serb forces as legitimate armed forces established by legitimate autonomous authorities.[73] The illegal nature of the 'RSK' and its dependence on the government of FRY/ Serbia was addressed in Chapter 3.[74]

4.40 Since the drafting of the Memorial moreover, the ICTY Trial Chamber in *Martić* has held that:

> "142. The SFRY Federal Secretariat of National Defence of the JNA ("SSNO") made unit and personnel changes within the SAO Krajina armed forces…There is evidence that beginning after the summer of 1991, the SAO Krajina TO was subordinate to the JNA… There is also evidence of operational cooperation between the JNA and the armed forces of the SAO Krajina. Any resubordination of MUP units to the JNA for temporary assignment required prior approval of the Minister of Interior of the SAO Krajina… When resubordinated, the MUP unit would be under the command of the JNA unit commander. However, if the MUP unit was merely acting in cooperation or concert with the JNA unit, it would remain under the command of the MUP commander… After the completion of a mission where it had been resubordinated, the MUP unit would return into the structure of the MUP… For the purpose of combat operations, TO units could also be resubordinated to JNA units… When resubordinating, the largest unit of either the TO or the JNA would command, which would normally be the JNA unit in a given area. Such resubordination of TO units would be carried out by the JNA."

4.41 The ICTY in *Mrkšić et al* confirmed that, consistent with the SFRY constitutional arrangements, there was unity of command over the TO units and the JNA and that, during the conflict in 1991, the TO units from Serbia (and paramilitaries) were operating under the command and control of the JNA. The Trial Chamber noted in *Mrkšić et al* that: "Pursuant to the Law on All People's Defence, the [TO] was one of the two constituent elements of the armed forces of the former Yugoslavia, the other being the JNA".[75] The Trial Chamber noted that the Law on All Peoples' Defence allowed for the possibility in time of war or other emergencies for the armed forces to be reinforced by volunteers.[76] The Tribunal noted that volunteers were often

[72] Counter-Memorial, para. 615.
[73] Counter-Memorial, paras. 610-614 and 616.
[74] Chapter 3, paras. 3.76-80
[75] *Mrkšić et al,* para. 83.
[76] The relationship between the JNA and the TO was governed by the 1974 Constitution of the SFRY; the Law on All People's Defence from 1982 and two documents: the 1983 Strategy

referred to as 'paramilitaries' and states that it will use that term at times in the judgment.[77] Both the JNA and the TO were subordinated to the Supreme Defence Council.

4.42 As noted by the Tribunal in *Mrkšić et al*:

> "in situations when JNA and TO forces were engaged in joint combat operations, these units were subordinated to the officer in charge of carrying out the operation. This principle was reiterated at brigade level in rule 108 of the JNA Brigade Rules …issued by the Federal Secretariat for National Defence in 1984, which stated that integration of command is achieved "through joint efforts by the brigade command and commands of the brigade's subordinate and other units and staff of the TO operating in coordination [with] the brigade […]." Rule 108 continued by making it clear that this integration of command is achieved "on the basis of unity of command and subordination". The principle of unity or singleness of command, therefore, required that in a zone of operations, in combat action, one commander was responsible for commanding all military units in that area, including TO and volunteer units, and that all subjects in the area, i.e. all units and their individual members, were subordinated to the one Commander. This is further reflected at the battalion level in the rules of Battalion Manual… of 1988." [78]

4.43 In the light of this, the Tribunal was able to conclude that:

> "it is clear that, in practice, at least at the time relevant to the Indictment, the officers in command of all joint combat operations were JNA officers. An example of how the principle of singleness of command was implemented in practice is the general moral guidance circular of General Adžić, the Chief of the General Staff, of 12 October 1991, which in its last paragraph reiterated that at all levels all armed units, whether JNA, TO or volunteers, must act under the single command of the JNA. Further, on 15 October 1991 the command of 1st MD issued an order to all units subordinated to it, including OG South, to establish "full control" within their respective zones of responsibility. Pursuant to this order, paramilitary units which refused to submit themselves under the command of the JNA were to be removed from the territory.

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of the Armed Struggle (military strategy) and the 1987 Strategy of General People's Defence and Social Self-Protection (national security strategy).

[77] *Mrkšić et al,* para. 83.

[78] *Ibid.,* para. 84.

> The effect of this lawfully established structure was, in the Chamber's finding, that in respect of the joint combat operations for the liberation or capture of Vukovar, in the zone of responsibility of OG South, between 8 October 1991 and 24 November 1991 when Mrkšić and his command withdrew from Vukovar, Mrkšić as the commander of OG South, had the sole command of all JNA and all TO including volunteer or paramilitary units. *Accordingly, he had de jure authority to issue orders to all JNA, TO and paramilitary units in the zone of responsibility of OG South in combat operations*..."[79] (emphasis added).

4.44 The Trial Chamber stated that the Circular of 12 October 1991 and the Order of 15 October 1991 confirmed the *de facto* reality of complete command and full control by the JNA of all military operations. This reality was enforceable.[80] Thus, contrary to the claims of the Respondent,[81] the JNA had *de jure* and *de facto* control over all TO and volunteer or paramilitary units in the zone of responsibility of OG South. This control derived from the constitutional arrangements in place in the SFRY and which persisted into the conflict in Croatia in 1991. Under these arrangements, the JNA and the TO were two components of the unified armed forces of the SFRY, with equal rights. Their mutual relationship was elaborated in the 1983 Strategy of the Armed Struggle. In wartime, there was a potential for overlapping of authority of commanders of the JNA and TO, so there was a principled view that a JNA commander would command armed forces on the front, while a TO commander would command armed forces in the temporarily occupied territory.[82] This arrangement remained in place until the second half of the 1980s and the adoption of the *Unity* Plan.

(4) The JNA's Role in the Lead-up to Genocide

4.45 The Applicant's position is that the JNA played a direct role in the genocide in Croatia. The Respondent seeks to present the JNA as playing a neutral and (from September 1991) a defensive role, initially at least in defence of the idea of SFRY. The Respondent seeks to undermine the Applicant's case by highlighting alleged inconsistencies in the Memorial, as regards the Applicant's identification of the point at which the Serbian leadership took over full control of the JNA.[83] The Respondent argues that the Memorial does not prove that the JNA and the Yugoslav Presidency were *de facto* under Serbia's control.

4.46 On the basis of the evidence presented below, including factual

[79] *Ibid.,* paras. 85-86.
[80] *Ibid.,* para. 89.
[81] Counter-Memorial, para. 622.
[82] The 1983 Strategy of the Armed Struggle, [*Strategija oružane borbe*], pp. 149-150.
[83] See Counter-Memorial, paras. 591, 603 and 606.

findings made by the ICTY, it is beyond doubt, that by July 1991 the Republic of Serbia/emergent FRY *clearly* assumed control over the JNA, which became *de facto* its military force. Several months prior to that, a secret armament of the rebel Serbs by some Serb servicemen of the JNA had also taken place (discussed *infra*). This indicates that the process of disintegration within the JNA, its "porosity" and the definite domination of national standpoints over a federal 'Yugoslav' orientation among the military leadership took place in stages, culminating in Kadijević's agreement to act in Serbia's interests, from July 1991.

4.47 The difficulty of establishing the actual moment when control definitively passed from the federal level to Serbia can be explained by the inherent difficulty of identifying precisely decisions which were generally covert (in relation to Croatia) and by the fact that there was a period during which lip-service was paid to federal control by the Presidency. But the reality is that within the JNA decision-making structure had shifted from the SFRY Presidency to Serbia. As shown below, the JNA provided support to rebel Serbs in Croatia even before the clear agreement of the JNA leadership to follow the direction of the Serbian leadership. Jović's diary shows that the alliance between the JNA and the Republic of Serbia started in the summer of 1989. The JNA did not have this sort of alliance with the other republics (with the possible exception of Montenegro, which was part of the Serbian project). This distinction in relationship between the JNA and the various republics serves to undermine the portrayal of the JNA as inherently 'Yugoslav' from that period onwards.

4.48 Contrary to the assertion of the Respondent,[84] as early as August 1990 the JNA supported the rebel Serbs in Croatia.[85] In early April 1991, Milošević and Jović demanded from Kadijević, and eventually obtained, his promise that the JNA would protect the Krajina.[86] On 5 July 1991, Milošević and Jović demanded from Kadijević, and secured his promise, that the JNA would 'defend' the Serb population of Croatia.[87] From then until the end of 1991 and the end of Kadijević's command over the JNA, Serbia was demanding support from the JNA and getting what it demanded.

4.49 The Respondent fails to mention the detailed chronology of conspiratorial agreements between Serbia's political leadership and the JNA's leadership in the summer of 1989, outlined in Jović's diary.[88] Under the pretence of acting lawfully and fighting for a unified Yugoslavia, they sought to create a state for all the Serbs. When it was no longer possible for Serbia and the JNA to impose, through the SFRY Presidency, Serbian interests on the

[84] Counter-Memorial, paras. 589-597 *et seq.*
[85] Memorial, paras. 2.90-91.
[86] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], pp. 349-350.
[87] *Ibid*., pp. 349-350.
[88] Counter-Memorial, paras. 592-595.

other Republics, they set out to redraw the borders of Croatia and, in 1992, of Bosnia and Herzegovina. There is nothing contentious in describing 'Greater Serbia' as a state which provides for "the protection and defence of the Serb people outside of Serbia and the gathering of the JNA inside the borders of the future Yugoslavia", as Kadijević put it.[89]

4.50 Lawful use of the armed forces required the agreement of five members of the Presidency of the SFRY. However this was not always adhered to. In early May 1991, Kadijević arbitrarily gave combat missions to parts of the JNA in the form of the engagement of several armoured battalions that were brought (or were to be brought) to Croatia from Serbia and from Bosnia and Herzegovina. Kadijević raised the combat readiness of the JNA, ordered mobilisation of the JNA and TO, relieved commanders of military districts of their duty and gave combat missions to the JNA and TO. The four votes of Serbia and the Serbian influenced members in the Presidency of the SFRY were sufficient to protect him from any sanctions as demanded by members of the Presidency coming from other republics.

4.51 Since the drafting of the Memorial, a number of other sources have confirmed that the point at which it became clear that army was pursuing Serb aims and objectives was around July 1991.

4.52 In the Theunens Report, 2003, it is stated that:

> "From late summer 1991 onwards,.... orders and instructions from what remained of the SFRY Presidency, the Supreme Command and the Supreme Command Staff indicated that at least *de facto* the JNA moved towards ceasing to be the 'SFRY Army' and instead gradually developed into a mainly Serb force, serving Serbian goals..."[90]

4.53 In *Mrkšić et al* the Trial Chamber found that:

> "From July 1991, after the war in Slovenia, the JNA became actively involved in conquering territory and not merely in interposing itself between rebelling Serbs and local Croat authorities as it had been in the early stages of the conflict."[91]

4.54 Whilst the Applicant does not accept this characterisation of the JNA's role as an 'interposing' one in the earlier stage of the conflict, it is evident from this finding and the other evidence referred to above, that by July 1991 at least, the true role of the JNA was clear.

[89] V. Kadijević, "As I See the Disintegration – An Army without a State", p. 114: Memorial Annexes, Vol.5, Appendix 4.1.

[90] See Theunens Report, 2003, para. 8; Theunens Report, 2007, p. 19.

[91] *Mrkšić et al,* para. 31.

4.55 The Trial Chamber in *Martić* held that:

> "The evidence shows that beginning with the armed attack on the predominantly Croat village of Kijevo in August 1991, the SAO Krajina MUP and TO forces cooperated with the JNA. As of this point in time, the JNA was firmly involved on the side of the SAO Krajina authorities in the struggle to take control of territory in order to unite predominantly Serb areas…"[92]

4.56 The role of the JNA was also clear to the US Government. Before the start of the session of the SFRY Presidency on 12 July 1991, President Mesić was handed a letter from the US Ambassador in Belgrade, Warren Zimmermann:

> "My Administration has ordered me to convey to you the serious concern of the United States of America over the current mobilisation of the JNA. Certain aspects of this mobilization are especially disturbing and might help create the impression in Washington that a military action in Croatia is being planned. We are aware of the fact that the JNA has gathered large forces – two motorized divisions numbering around 20 thousand people – at the fringe of Eastern Slavonia, in western Vojvodina and northern Bosnia. There are reports that the JNA is coordinating operations in Vojvodina with units of the Serbian TO. An action of this kind, together with the formation of Serb reserve troops, the filling of vacancies left behind deserters of other nationalities and reports of replacement of non-Serb officers by Serbs in the 5th (Zagreb) Military District, point to an increasingly Serb orientation within the JNA… ."[93]

4.57 The 'Balkan Battlegrounds' Report, on which the Respondent places such reliance in relation to the JNA's purported peace-keeping role, notes that:

> "after the war in Slovenia began, the JNA dispatched large numbers of troops to the border with Easter Slavonia and elsewhere in Croatia to intimidate Zagreb into backing away from secession…"[94].

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[92] *Martić*, para. 443. See also 'Balkan Battlegrounds' Report, Vol. II, pp. 90-91.

[93] S. Mesić, *Kako smo srušili Jugoslaviju* [How we destroyed Yugoslavia], Zagreb, 1992, p. 99.

[94] 'Balkan Battlegrounds' Report, Vol. I, p. 92.

4.58 As discussed above,[95] the Respondent seeks to rely on the 'Balkan Battlegrounds' Report which, it claims, asserts that in the summer of 1991 the JNA acted as a "neutral peace-keeper" between Croats and Serbs.[96] According to the Respondent, the Report states that, although the Croats kept attacking the JNA during the summer of 1991, the JNA tried "conscientiously" to remain an unbiased federal force in Croatia. This reliance on the Report is misplaced for the reasons set out above.[97] The Report also states that the JNA was "irresistibly biased toward Serb interests" and that some commanders even provided weapons to Serb Croatian forces. It is difficult to see how the Respondent can maintain its position that the JNA played a genuinely neutral peace-keeping role when the very report it relies upon in support of this contention itself highlights the pro-Serb bias of JNA operations at this time.

4.59 The ICTY Trial Chamber in *Martić* found that:

> "330. … At the end of the summer 1991 and coinciding with the attack on Kijevo, *the JNA became an active participant in Croatia on the side of the SAO Krajina. According to the SFRY Federal Secretary for Defence, General Veljko Kadijević, the task of the JNA became one of protecting "the Serb people in Croatia in such a way that all regions with a majority Serb population would be completely freed from the presence of the Croatian army and the Croatian authorities"*. Veljko Kadijević also noted that among "the principal ideas" behind the deployment of the JNA during the second phase was "full co-ordination with Serb insurgents in the Serbian Krajina".
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> 331. On 3 October 1991, Veljko Kadijević stated that the objective of the JNA in the conflict was "to restore control in crisis areas, to protect the Serbian population from persecution and annihilation". On 12 October 1991, General Blagoje Adžić, Chief of the General Staff of the JNA, stated that the main task of the JNA was to prevent "the spread of interethnic conflicts and the recurrence of genocide against the Serbian people in Croatia." On 25 October 1991, at a meeting of, among others, Slobodan Milošević, Veljko Kadijević and Blagoje Adžić, Slobodan Milošević stated that "we have helped [the Serbs in Croatia] abundantly and [we] will continue to do so until the end." (emphasis added)

This finding by the ICTY confirms the non-neutral role of the JNA from the summer of 1991.

4.60 In the spring and summer of 1991 the JNA purportedly acted in

[95] See para. 4.6, *supra*.
[96] Counter-Memorial, para. 597.
[97] See paras. 4.6 and 4.25, *supra*.

conformity with the guidelines on the use of the armed forces in extraordinary circumstances.[98] According to secret internal documents, a state of emergency was understood as an armed or other activity immediately jeopardising the independence of the SFRY, its sovereignty and territorial integrity and the constitutionally defined social order.[99] The plan to be adopted in such a case was as follows: first, the police would act, followed by the TO and finally, should this not resolve the situation, the JNA would be engaged. The code for this type of action was "Radan" and one such plan of action adopted by the 9th Corps of the JNA from Knin in early April 1991 was included in the Memorial.[100] In Croatia however, the JNA did not act in line with the guidelines set out in the strictly confidential 1988 Manual for the Work of Commands, Headquarters and Units of the Armed Force of the SFRY in Extraordinary Circumstances. When the Serb rebellion in Croatia broke out, the JNA purported to separate "the warring sides". In conclusion on this point, the Applicant would argue that in the light of the evidence presented in the Memorial[101] and in this Reply, it is clear that from August 1990, the JNA in Croatia made impossible the restoration of peace and order in the regions.

4.61 The Respondent denies that the JNA withdrew from Slovenia in line with the idea of creating a Greater Serbia[102] and argues that the JNA was merely acting upon the Decision of the Presidency of the SFRY made on 18 July 1991, when the majority of its members were in favour of withdrawal. In fact, this decision violated the Constitution of the SFRY, the General People's Defence Law, the Conscription Law and the Law on the Service in the Armed Forces.[103] This decision was a result of actions of the political leadership of Serbia, as testified by Jović in his diary entry for 5 July 1991.[104] Compliance with this order indicates that (1) the Presidency of the SFRY was a tool of Serbian interests, and (2) that the JNA obeyed those orders that suited it.

4.62 The Respondent claims that the JNA's military preparations for the attack on Croatia, made in and around Croatia during the summer of 1991, were prudent because the JNA was "subjected to constant harassment and

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98 See *Strategija općenarodne obrane i društvene samozaštite SFRJ* [Strategy of General People's Defence and Social Self-Protection of the SFRY]; and *Priručnik za rad komandi, štabova i jedinica oružanih snaga SFRJ u vanrednim prilikama* [Manual for the Work of Commands, Headquarters and Units of the Armed Force of the SFRY in Extraordinary Circumstances], Strictly Confidential, General Staff of the Armed Forces of the SFRY, 1988, Annex 48.

99 *Strategija općenarodne obrane i društvene samozaštite SFRJ* [Strategy of General People's Defence and Social Self-Protection of the SFRY], p. 133.

100 Command of the 9th Corps, DT. 1-4, 5 April 1991, Order for Defence, Operations No. 1, Memorial, Annexes, Vol. 2(III), annex 401.

101 See Memorial, paras. 3.24-31, 3.38-39 and 3.54 *et seq.*

102 Counter-Memorial, para. 598.

103 Milovan Buzadžić, *Secesija bivših jugoslovenskih republika u svetlosti odluka ustavnog suda Jugoslavije: Zbirka dokumenata s uvodnom raspravom* [Secession of the Former Yugoslav Republics in the Light of the Decisions by the Constitutional Court of Yugoslavia: A Collection of Documents with the Introductory Discussion], Službeni list SFRJ; Belgrade, 1994, pp. 236-237.

104 B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], pp. 349-350.

attacks" in Croatia.[105] The Respondent claims that on 5 July 1991, Milošević and Jović demanded that Kadijević concentrate forces within 2-3 days along the line running from Karlovac to Plitvice in the west, from Baranja, Osijek and Vinkovci to the Sava in the east, and along the Neretva in the south, thus gaining control over all the territory where Serbs lived. Kadijević agreed to the request,[106] and ordered his subordinates to carry out the task. On 8 July 1991, the Command of the 1st Military District ordered the implementation of its part of the task. The plan provided for the emergence of several mechanised brigades onto the Virovitica – Pakrac – Kutina axis, which roughly coincided with the border implied by Serbia's territorial aspirations against Croatia.[107] In view of the fact that at that time parts of the TO in Serbia were being mobilised, there are grounds to assume that they too had their plan of action in the aggression against Croatia.[108] The Order of 8 July 1991 was not carried out, presumably out of fear that it would provoke international condemnation. At the end of July, the military leadership drew up a directive specifying the tasks of each military district in the future conflict.[109] According to this plan, a general offensive on Croatia was launched in the latter half of September.

4.63 From the beginning of July 1991 to the beginning of September 1991, the Command of the Croatian National Guard issued a number of orders to avoid fighting between its forces and the JNA. Fighting was tolerated only in cases when the JNA attacked first, which it regularly did.[110] The TO of Serbia and the part of Bosnia and Herzegovina with a majority Serb population was mobilised from the end of June 1991.

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105 Counter-Memorial, para. 599.

106 B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], p. 349.

107 Command of the 1st Military District, Order for the Engagement of Forces of the 1st Military District in Slavonia, 8 July 1991, Annex 50.

108 Petar Bošković, *Izdaja nam otvorila oči* [Treason Opened Our Eyes], *Narodna armija* [People's Army], 13 July 1991, pp. 20-21.

109 1st Administration of the General Staff of the Armed Forces of the SFRY, DT No. 53-1, 25 July 1991, Directive for the Enforcement of the SFRY Presidency's Decision on the JNA's Withdrawal From the Territory of the Republic of Slovenia. The text of the Directive demonstrates once again how ambiguous the JNA's jargon was and how questionable the interpretation of the SFRY Presidency's illegal decision on the JNA's withdrawal from Slovenia was. It cannot be concluded from the SFRY Presidency's decision itself and its appeal for peace that the JNA was given permission to withdraw with weapons from Slovenia, if necessary.

110 Command of the Croatian National Guard, Class: 8-01/91-01/01, Reg. No. 512-03-91-1 of 7 July 1991, Order (issued to the forces in Osijek); Command of the Croatian National Guard, Class: 8/91-01/01, Reg. No. 512-03-91-2 of 11 July 1991, Order (a circular to all the forces); Command of the Croatian National Guard, Class: 119-01/91-01, Reg. No. 512-03-91 of 24 July 1991, Order (for Dalmatia); Command of the Croatian National Guard, Class: 8/91-01/03, Reg. No. 512-91-03-1 of 5 August 1991, Order (issued to the forces in Dalmatia); Command of the Croatian National Guard, Class: 801-01/91-01/08, Reg. No. 5120-03-91-1 of 30 August 1991, Order (a circular to the majority of formations); Command of the Croatian National Guard, Class: 8/91-01/17, Reg. No. 512-03-91-1 of 3 September 1991, Order (a circular to all the formations).

4.64 It is clear that Slobodan Milošević in his role as supreme commander of Serbia's armed forces directed this mobilisation. The Applicant does not have access to his order for mobilization but his appointment as supreme commander was, by itself, in violation of the SFRY Constitution. From mid-May 1991 to 7–8 July 1991 the SFRY Presidency did not hold any meetings. Therefore, mobilization could be ordered only by someone who requested that the JNA be deployed along the borders to which Serbia laid claim and within which large parts of Croatia were included. This was what Jović and Milošević requested from Kadijević on 5 July 1991. At that meeting Kadijević asked them to assist with the mobilization and to mobilize the TO.[111]

(5) The SFRY Presidency's Lack of Control over the JNA

4.65 The Applicant's position is that the SFRY Presidency ceased to have control over the JNA in or around July 1991: from then the JNA was controlled by the Serbian leadership, implementing Serbia's genocidal plan to create a Greater Serbia.[112] The Respondent seeks to present the JNA in quite a different light, arguing that the JNA was a *de jure* organ of the SFRY and under the political control of the Presidency of the SFRY.[113] Both issues are addressed in the Memorial.[114]

4.66 The Respondent presents the JNA as retaining its Federal, 'Yugoslav' character during the conflict with Croatia.[115] However the lack of control over the JNA by the non-functioning SFRY Presidency is evidenced by accounts of discussions within the SFRY Presidency in early 1991. For example, after the release of a secretly made film on the arming of the Croatian police in the second half of January 1991, the Slovenian member of the Presidency, Janez Drnovšek, raised the issue of the relationship of the JNA and some members of the Presidency at the Presidency's session. Drnovšek became aware, on the basis of a note of a conversation between the President of the Presidency of the SFRY, Jović, and the US Ambassador Zimmermann on 17 January 1991, that Jović knew about the film, as did the Presidency. However, it turned out that at least three members of the Presidency (from Croatia, Slovenia and Bosnia and Herzegovina) did not know of the film before its release. This gave ground to the President of the Presidency of Slovenia, Milan Kučan, to ask the following question: "Who is the Yugoslav Presidency? Are there two sorts of members of the Yugoslav Presidency and what is the relationship between the Presidency and the JNA?"[116] A similar question at the same session was asked

111 B. Jović, *Posljednji dani SFRJ* [Last Days of the SFRY], pp. 349-350.

112 See Memorial, para. 3.33 *et seq.*

113 See Counter-Memorial, para. 604.

114 In relation to the former, see Memorial, Chapter 8, in particular paras. 8.47-8.55 and in relation to the latter see Memorial, Chapter 3, in particular, paras. 3.24-3.33, 3.39-3.41 and 3.77.

115 See Counter-Memorial, paras. 531-533.

116 Presidency of the SFRY, No. 03-10 dated 3 February 1991, Shorthand Notes of the 93rd Session of the Presidency of the SFRY held on 31 January 1991, pp. 10-12.

by President Tuđman. He asked the Presidency of the SFRY the following: "Whose policy is it that the Army is implementing, is it the Presidency's policy as its supreme commander? It is clear, if that was a decision of the Presidency as a collective organ, then a representative of Croatia could not take part in such an organ, since will is imposed on the Croatian people by force, by armed force."[117]

4.67 At the same session, commenting on Jović's mode of operation, Tuđman said: "Moreover, Mr Jović, President of the Presidency of the SFRY, you say "we told you hundreds of times". Who is we and whom did you tell? Here is the member of the Presidency from Croatia who does not agree with you".[118] Representatives of Serbia defended the JNA. Milošević asserted that the role of the JNA in the preceding period had been crucial for a peaceful and democratic way of settling the Yugoslav crisis. Jović also denied that the JNA had the task "of preparing a new constitutional order".[119]

4.68 The Applicant notes that the transcripts of some SFRY Presidency sessions and some personal diary entries demonstrate the extent to which Jović was operating in the interests of the Serbian leadership. At the session of the Presidency of the SFRY held on 21 March 1991, Tuđman told Jović that he had disregarded the view of the majority and was representing only his views.[120]

4.69 Making his diary entries public, Jović admitted the extent to which he abused his position as President of the Presidency of the SFRY. This is evident in this diary entry for 5 April 1991, noting his and Milošević's conversation with Kadijević and Adžić:

> "We are discussing the situation in which the Presidency of SFRY found itself now when it no longer has the necessary majority and is not capable of making decisions on the use of the army as an armed force. All decisions on the use of the army can from now on be made only if the Army is not commanded to operate. We can get [a] sufficient number of members of the Presidency SFRY solely for that. It is clear that respecting the view that the Army is not allowed to use arms would be a disaster for the Serb people in Croatia, who did not arm themselves since they counted on the protection of the JNA, while Croatia has been arming its pro-Ustasha secessionist units…. We are not asking any decisions from anybody, we are acting as necessary to protect the Serb people, we are informing the Presidency about the developments.

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117 *Ibid.,* pp. 14, 17.
118 *Ibid.,* p. 163.
119 *Ibid.,* pp. 18-19.
120 Presidency of the SFRY, Strictly Confidential No. 75, 22 March 1991, Shorthand Notes of the 108th Session of the Presidency of the SFRY held on 21 March 1991, pp. 28-29, 48.

> Whoever does not like it, let him go home. It is stupid for them too to sit on the Presidency of a state they started a war against. The Army will not attack anyone but it will defend itself and the Serb people in the Krajina."[121]

4.70 Jović noted also that Kadijević had promised that the army would execute orders "of a group of members of the Presidency, although they do not constitute a qualified majority", in the event that the Presidency was "not able to perform its functions and to make the decision on defending the country's integrity".[122]

4.71 The 'Balkan Battlegrounds' Report on which the Respondent relies notes that, by midsummer 1991, Milošević and Jović were the JNA's *de facto* political overseers in rump Yugoslavia. It goes on to state that Kadijević wavered as to whether or not the aim should be to preserve the Federation.[123] It is also significant that Kadijević, the then chief-of-staff of the Supreme Command of the SFRY's Armed Forces, commended the JNA commanders who led the attacks on Vukovar. Among those he praised was also the convicted war criminal Mile Mrkšić.[124]

4.72 The evidence discussed above confirms and reinforces the evidence presented in the Memorial: by early 1991 the SFRY Presidency had lost control over the JNA and the Serbian leadership had entered into a close relationship with the JNA command, by-passing SFRY constitutional requirements.

(6) The JNA's engagement in the genocidal conflict

4.73 The Respondent seeks to present the JNA's role in the war as one that shifted from 'peacekeeper' to a defensive role in the face of attacks by Croatian military forces.[125] This is not supported by the evidence before the Court. The Applicant will here outline, in general terms, the role played by the JNA and the Serbian TO (together with the TO's of Montenegro and of Serbian areas of Bosnia and Herzegovina) once the conflict was fully underway in July 1991.[126] It is clear from the evidence that the JNA took on an expansionist and aggressive role, and that the Serbian TO played an integral part in the operation under the direction of the Serb authorities and the JNA.

4.74 By July 1991, as the Trial Chamber in *Mrkšić et al* found, the JNA had

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[121] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], p 317.
[122] B. Jović, *Poslednji dani SFRJ* [Last Days of the SFRY], p 162.
[123] 'Balkan Battlegrounds Report, Vol. I, p.96.
[124] See Memorial, Annexes, Vol. 2(I), annex 104 (paragraph 3 of the Order).
[125] See for example Counter-Memorial, para. 597.
[126] Details of specific incidents and acts of genocide in which the JNA was involved, directly or indirectly are set out in Chapters 5 and 6 of this Reply and Chapters 3, 4 and 5 of the Memorial.

become 'actively involved in conquering territory and not merely in interposing itself between rebelling Serbs and local Croat authorities'.[127] Building on the evidence in the Memorial,[128] the Applicant will show that this role included direct participation in acts of genocide and supporting the military actions of rebel Serbs in Croatia, including through secondment of personnel, training, financial and logistical support and operational support. Details of the JNA's involvement in specific acts of genocide are contained in Chapters 5 and 6 of this Reply.

4.75 The military support given by the JNA to rebel Serbs in Krajina and in Western and Eastern Slavonia is to be seen alongside the ongoing support offered by Serbia through the State Security Service and other state organs.[129]

4.76 The JNA treated all military and paramilitary forces that fought for the interests of Serbia as 'TO', including not only the official TO's of Serbia, Montenegro and (Serb areas of) Bosnia and Herzegovina, but also the self-styled 'TO' forces of the rebel Serbs and paramilitary forces. Unlike the Croatian TO, the TO's of Serbia, Montenegro and (Serb areas of) Bosnia and Herzegovina were not disarmed by the Serb leadership/JNA; the participation of the former in Croatia confirms that their arms were restored by the JNA, see below.

4.77 These Serbian and Montenegrin TO forces were armed and directed against Croatia. For this to happen lawfully, a decision of the Presidency of the SFRY would have been required. A decision of the rump Presidency of the SFRY was taken in early October 1990 mobilising the TO forces in readiness for war. Theunens makes reference to the control exercised by the JNA over the Serbian TO forces in his Expert Report submitted to the ICTY during the trial of Slobodan Milošević:

> "Documentary evidence indicates that (local) Serb(ian) TO units and staff operated under single unified command and control with the JNA. The JNA established Operational (OG) and Tactical Groups (TG) to restore and/or maintain unified and single command and control during the operations, involving the JNA, local Serb TO, Serbian TO and volunteers/paramilitaries."[130]

(a) The role of the Serbian and Montenegrin TO

4.78 In writing its Memorial, Croatia was not fully aware of the role of the TO of Serbia and this issue was therefore not addressed in detail. Gradually, more information on the engagement in Eastern Slavonia of the Serbian

[127] *Mrkšić et al,* para. 101.
[128] See in particular Memorial, Chapters 3, 4 and 5.
[129] Theunens Report, 2007, paras. 9-10; and see pp. 89-104.
[130] Theunens Report, 2007, p. 7.

TO has emerged and findings of the ICTY have enhanced the Applicant's understanding of the events. It appears that at least two detachments of the TO of Serbia (Šumadija and Lepenica), that were engaged in a part of the front between Vukovar and Vinkovci, were wrongly described in the Memorial as 'Serbian volunteer units'.[131] In early July 1991, parts of the TO's of Serbia and of Bosnia and Herzegovina were mobilised. In Serbia, such a decision could not have been made without the agreement of President Milošević. Indicative in this respect, is a news item published on 3 July 1991 in the daily *Politika,* where Milošević was said to have met with commanders of the TO of Serbia and the headquarters of all zones: "It was stated that the TO of Serbia was well organised, trained and armed with modern equipment for successful and efficient completion of all tasks".[132] Following the publication of this article, JNA forces arrived at the border between Serbia and Croatia, but some units of the TO of Serbia were mobilised as well.[133]

4.79 The Directive of the Command of the 1st Military District of 19 September 1991 refers to several units of the TO that were to take part in the aggression against Croatia.[134] According to a Directive of the Command of the 1st Military District dating 19 September 1991, the TO of Serbia was sent, again without the approval of the SFRY Presidency as Supreme Commander of the Armed Forces of the SFRY, to take part in an operation in Slavonia. Daily reports of the General Staff of the SFRY Armed Forces reveal that some of these units were indeed deployed, including in the area of Vukovar.[135] The most important overview from this period dates from 16 November 1991.[136] The overview specified units, their deployment, manpower and subordination to the JNA commands. There were 9,289 people in 29 different units of the TO.[137]

4.80 Taken together, these documents provide clear evidence of Serbia's role, acting both through the JNA and the TO forces, in the genocidal campaign.

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131 Memorial, para. 3.82.

132 *Milošević sa komandnim sastavom Teritorijalne odbrane Srbije* [Milošević with Commanders of the TO Serbia], *Politika*, 3 July 1991, p. 1.

133 Petar Bošković, *Izdaja nam otvorila oči* [Treason Opened Our Eyes], *Narodna armija*, 13 July 1991, pp. 20-21.

134 Command of the 1st Military District, Strictly Confidential No. 5-89, 19 September 1991, Directive of the Commander of the 1st Military District for Operation in Slavonia.

135 For example: According to the Daily Report of 26 September 1991, "on 25 September, from 17:30 to 17:50 hours, a company (č) of the 1st Novi Sad partbr (Partisan Brigade in the area of the village of Bršadin was exposed to fierce fire", Operational Centre of the 1st Administration of the General Staff of the SFRY Armed Forces, SP no. 1-269, 26 September 1991, Daily Report. The Daily Report of 28 September 1991 also specifies that "on 26/27 September and throughout the day, the Panonnian part. br. (Partisan Brigade) of the TO in the area of Trpinje – Borovo Selo was exposed to enemy mortar and sniper fire", Operational Centre of the 1st Administration of the General Staff of the SFRY Armed Forces, SP no. 1-271, 28 September 1991, Daily Report.

136 Command of the 1st Military District, Strictly confidential, No. 1614-162, 16 November 1991, Overview of the Composition of Forces.

137 *Ibid*..

4.81 As interpreted by the Serbian lawyer, Srđa Popović, the Constitution of the Republic of Serbia usurped the competences of the Federation in international relations, people's defence and state security.[138] Under the Serbian Constitution, the President of the Republic of Serbia had the right to "manage armed forces in war and peace and people's resistance in war".[139] Under the Law on Defence of the Republic of Serbia, adopted in July 1991, the President of the Republic of Serbia was authorised to "manage armed forces in war and peace, including the authority to resolve organisational and personnel issues in the TO".[140] The term "armed forces" in the Serbian Constitution is not defined, nor are their functions specified, but the phrase clearly encompasses the TO. In the 1982 Law on All-People's Defence of the SFRY, there was a provision that all armed units and formations outside the JNA and *Milicija* were parts of the TO.[141] This is consistent with the Law on Defence of the Republic of Serbia passed in July 1991.[142]

4.82 The JNA did not appear to find anything objectionable in those provisions in Serbian legislation in the period between 1990 and 1991; it made no adverse public comment about the unconstitutionality of these provisions under the Constitution of the SFRY, in contrast to its stance on other matters.

4.83 Findings made by the Trial Chamber in *Mrkšić et al* illustrate the extent to which TO's were an integral part of the Serb armed forces during the conflict with Croatia. The ICTY Trial Chamber described the formation of Operation Group South as a "temporary formation, set up in order to carry out a specific task…to unify all military units acting in a geographic zone around and to the south of Vukovar under a single command".[143] The Trial Chamber also found that:

> "As of 1 October 1991 units subordinate to [Operation Group South] included the [Guards Motorised Brigade], the TO unit Petrova Gora and the armoured battalion of the 544th Motorised Brigade of the JNA…"[144]

4.84 The Trial Chamber in *Mrkšić et al* goes on to note that, pursuant to orders of the Federal Secretary for National Defence, the command of OG South was subordinated to, and reported one level up to, the command of the

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138 Srđa Popović, *Kako smo branili Jugoslaviju*, *Milošević vs Jugoslavija* , [How we defended Yugoslavia, Milošević vs Yugoslavia], Serbian Helsinki Committee for Human Rights, Belgrade, 2004, pp. 26-27.

139 Constitution of the Republic of Serbia, 1990, Article 83.

140 Serbia, Law on Defence, *Službenik glasnik Republike Srbije*, Article 5, Belgrade, 27 July 1991.

141 SFRY, Law on All- People's Defence, Article 102.

142 Serbia, Law on Defence, *Službeni glasnik Republike Serbije*, Article 25, Belgrade, 27 July 1991.

143 *Mrkšić et al*, para. 69.

144 *Ibid*..

1st Military District. The Commander of the 1st Military District was General Panić, who in return reported up to General Adžić, the Chief of General Staff, General Kadijević being, in 1991 the Federal Secretary of National Defence.[145]

(b) Relationship between the JNA and the armed forces in Rebel Serb Areas in Croatia

4.85 The Respondent criticises the Memorial for asserting that all Serb units fighting against Croatia were "paramilitary groups" and thus connected as a whole to the JNA and the FRY. The Counter-Memorial refers to the *Milicija* and the TO forces of the 'Serb autonomous regions' and strives to show that they stood under the control of the Serb authorities of those 'autonomous' regions.[146] According to the Respondent, when the JNA "started" to fight the Croatian side (having previously been a "peacekeeper"), it cooperated with the *Milicija* and the TO forces of the 'Serb autonomous regions'.[147] As discussed below, this representation of the rebel Serb forces as a distinct and independent armed force, subject only to the control and direction of the rebel Serb authorities, is wrong.

4.86 The emergence of Serb paramilitary groups in Croatia and the support given to such groups by the JNA and the Serbian leadership is described in Chapter 3 of the Memorial.[148] Having disarmed the Croatian TO in May 1990, the JNA went on to make seized weapons available to rebel Serbs. The purported 'buffer role' played by the JNA allowed the Serbs to organise themselves into paramilitary groups. This was a prelude to the JNA's direct support for and then reliance on paramilitary groups.[149] Some paramilitary groups evolved into the 'TO' of the RSK and subsequently into the 'army of the RSK'. After the formal proclamation of the FRY in April 1992, the VJ continued to provide support to the military forces of the rebel Serbs, even beyond the departure of the JNA/VJ from Croatia on 19 May 1992.[150] As noted by V. Kadijević: "The JNA represented the basis from which three armies were formed – the Army of the FRY, the Army of the Republika Srpska (VRS) and the Army of the Republika Srpska Krajina".[151] This Section of the Reply responds to the Respondent efforts to downplay or deny the support provided by the Republic of Serbia/emergent FRY to the rebel Serbs.[152] As explained in the Memorial, the rebel Serb TO units[153] were in fact largely drawn from,

[145] *Ibid.,* para. 71.
[146] Counter-Memorial, paras. 610-612.
[147] Counter-Memorial, para. 613.
[148] See Memorial, paras. 3.45-3.71.
[149] See Memorial, para. 3.54.
[150] See Memorial, para. 3.58
[151] V. Kadijević, "As I See the Disintegration – An Army without a State*",* p. 163.
[152] Counter-Memorial, paras. 624-634.
[153] The structure of the TO of rebel Serbs is outlined in Davor Marijan, *Slom Titove armije: JNA i raspad Jugoslavije 1987.-1992.* [Collapse of Tito's Army: the JNA and Break-up of

and inherited equipment taken from, former units of the TO of the Socialist Republic of Croatia.[154] The Respondent admits that on 10 October 1991 the All People's Assembly of Slavonia, Baranja and Western Srem made a decision that its TO forces would become a part of JNA, but then states that there is evidence that it was not before late October 1991 that the local TO units were subordinated to the JNA in the fighting in Vukovar.[155] The Respondent omits to refer to the ICTY Trial Chamber Judgment in *Mrkšić et al*.

4.87 As noted above and in the Memorial,[156] Serb paramilitary groups were formed as a result of Serbian intervention in the internal affairs of Croatia. In this way, the JNA gave the Serbs time and space to establish the 'Serb autonomous regions' in Croatia and to organise paramilitary groups and arm them. The breakaway *Milicija* was kept alive by the JNA through a system of buffer zones and, after the attack on Glina on 26 June 1991, a concerted action between the *Milicija* and the JNA started. By late July 1991, the JNA became the chief source of instability in Croatia. Paramilitary groups, later called 'the TO', mirrored the structure of the TO of the Croatia. However, their emergence ran in parallel with the launching of the JNA offensive against Croatia in September 1991. From that time on, the paramilitary TO was under the control of the JNA and incorporated into the JNA system. This can be seen in many documents of the JNA Knin Corps which effectively set it up and had command over it.[157]

4.88 In the Theunens Report, 2003, submitted to the ICTY by the Prosecution during the proceedings against Slobodan Milošević, reference is made to the support provided by the SFRY, the JNA and Serbia to local Serb forces in Croatia in 1991:

> "The organised nature of this support and its extent...indicate that the assistance provided by the JNA was authorised and endorsed by the supreme (political) command levels of the (S) FRY...There are examples of Slobodan Milošević being involved in the decision-making process to provide assistance to the local Serb forces in Croatia. The local Serb leadership in Croatia considered Milošević as a person to have influence and contacted him during the conflict in order to help implement their requests for assistance."[158]

Yugoslavia 1987-1992], pp. 286-288.

154 Memorial, para. 3.47.

155 Counter-Memorial, para. 614.

156 Memorial paras. 3.48-3.53.

157 *Komanda 9. korpusa, Str. pov. br. 19-1441 od 16. 9. 1991., Zapovest za napad op. br. 1.,* [Command of the 9th Corps, Strictly confidential, No. 19-1441, 16 September 1991, Command for Attack Op. No. 1], *IKM Komande VPO – Istureno komandno mesto Komande Vojnopomorske oblasti* [Command Outpost of the Command of the Military-Naval District], *Str. pov. br. 167-1/47-911 od 20. 9. 1991., Zapovest za upotrebu snaga* [Strictly confidential No. 167-1/47-911, 20 September 1991, Command for the Use of Forces].

158 Theunens Report, 2003, p. 7; Theunens Report, 2007, p. 8.

4.89 Further evidence that rebel Serbs were subordinated to the JNA in the battle for Vukovar is provided by the Croatian State Attorney's Office, which has collected JNA documents issued at the time of the battle for Vukovar, from the case *Mrkšić et al*. From the very first battle command issued by Mile Mrkšić on 1 October 1991, it is evident that the rebel Serbs were under the command of Operation Group South.[159] On 20 September 1991, the JNA strengthened Serb rebel forces with its own personnel. Many officers and junior officers of the JNA were appointed and sent to Croatia to lead Serb rebels there.[160] Based on a decision of the Federal Secretariat for People's Defence, the "Headquarters of the TO SAO Krajina was set up". That HQ became operational on 30 September 1991.[161] The 2nd Operation Zone was established for the area of Lika, while Kordun and Banovina were merged into the 3rd Operation Zone.[162] A new commander of the HQ of the TO SAO Western Slavonia was appointed.[163] HQ of the TO Zone Eastern Slavonia, Banovina and Western Srem was set up as late as December, following the merger of the rebel regions into one whole, the 'Republic of Serb Krajina'.[164] Prior to its existence, there was the HQ of TO of Slavonia, Banovina and Western Srem that had been commanded by Radovan Stojčić – Badža, a member of the security service of the Republic of Serbia.[165] This confirms Serbia's direct control over the armed forces of the rebel Serbs.

4.90 The 'Balkan Battlegrounds' Report on which the Respondent relies in the Counter-Memorial states that:

> "[In June–September 1991] The political and military leadership of the three SAO's almost certainly with strong support from the Serbian SDB and its Special Operations Unit had a clearer understanding of their war aims and the strategy they intended to use to achieve their objectives. In addition the SDB had thoroughly armed the TO forces of all three autonomous regions, ensuring that in general, Serb forces outmanned and outgunned

[159] Command of the Guards Motorised Brigade, No 15-1, 1 October 1991, Annex 62.

[160] See the 6 Orders from 20 September 1991 to send persons to Territorial Defence of the Serbian Autonomous District (SAO) Krajina (4 examples for persons sent to the 2nd Operational Zone, Lika; 1 example for persons sent to the 3rd Operational Zone, Banovina and Kordun; and 1 example for persons sent to the Headquarters of the TO of the Serbian Autonomous District Krajina), Annexes 53-58.

[161] Decision of 2nd and 3rd Operation Zone for Banija and Kordun, No 9, 3 October 1991, Annex 65.

[162] SAO Krajina, HQ of the TO II. Operation Zone Lika, Strictly Confidential No. 88/1, 26 January 1992, Presentation by the Commander of the Command HQ of TO Lika; SAO Krajina, Government, President, Confidential 1/1-91, 5 October 1991; Decision of 2nd and 3rd Operation Zone for Banija and Kordun, No 9, 3 October 1991, Annex 65; SAO Krajina, HQ of the TO, No 85/91, Order No 24-272, 26 November 1991, Annex 73.

[163] SAO Krajina, HQ of the TO, No 85/91, Order No 24-272, 26 November 1991, Annex 73.

[164] Introductory remarks by the Commander of the Main Headquarters of the TO RSK During Report to the Government of RSK on Combat Readiness of the TO, 27 July 1992.

[165] SAO SBWS, TO Order No. 3/91, 23 September 1991, Annex 59.

> their Croatian opponents….The deployment of the elite SDB-raised Special Police from Knin (most likely aided by the SDB's Special Operations Unit) in key situations was critical to bolstering the [quantitative] superiority of the TO forces against regular Croatian troops…"[166]

4.91 Volume II of the same Report describes how the SDB prepared Martić to be the Krajina Serb military leader and organised the Serbian Volunteer Guard under Arkan.[167] The Report notes that in May 1991, the SDB (now renamed the RDB) formed its Special Operations Unit at Golubić in the Krajina under Captain Dragan's command, overseen by Simatović, and states that "The unit operated jointly with the Kninjas".[168] The Report states that the Kninjas and the SDG were to serve as 'elite mobile units', and confirms the direct support given by Serbia to the military forces of the rebel Serbs, as well as the control exercised by Serbian state organs including the SDB**.**

4.92 The Respondent claims that the armed forces of the Serb Autonomous Region of Krajina, and later of the 'RSK', and of other 'Serb autonomous regions' were 'independent'.[169] The Counter-Memorial criticises the Applicant for trying to create the responsibility of the FRY for the actions of the SFRY organs and the JNA.[170]

4.93 As discussed in Section 2 of Chapter 3 of the Memorial, there is extensive evidence that Serbia supported the 'RSK' militarily in a range of ways: Serb and Serbian paramilitary groups were financed, armed, supported, organized and controlled by Serbia, and carried out their activities in close cooperation with the JNA and then the Yugoslav Army of the FRY. On occasion, they were formally integrated into the command structure of the JNA, including as volunteers.[171] Notwithstanding the Respondent's claims to the contrary, the Krajina Serbs had neither the strength nor the capability to act independently of Serbia militarily, and Serbia and the JNA armed the rebel Serbs in those areas. The JNA provided them with senior military personnel and commanded them, maintaining the position which had applied to the Armed Forces of the SFRY. Finally, the entire structure of the TO of the 'RSK' was set up by the JNA: including the organisational structure, armament, the placement of commanding officers and operational planning. There is extensive official documentation issued by the JNA and by rebel Serbs that evidences this relationship.[172]

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166 'Balkan Battlegrounds' Report, Vol. I, p. 94.
167 'Balkan Battlegrounds' Report, Vol. II, p. 26.
168 *Ibid*, pp. 26-27.
169 See Counter-Memorial, paras. 616, 618, 621 and 623.
170 Counter-Memorial, para. 636.
171 Memorial, para. 3.71 and the preceding section.
172 See for example Memorial, paras. 3.62-3.71.

4.94 The Respondent criticises[173] the Applicant's reliance on a Decision of the 'President of the Government of the Serb Autonomous Region of Krajina', Milan Babić, on the appointment of the Commandant of the TO of the 'Serbian Autonomous Region of Krajina'.[174] The Respondent contends that this Decision undermines the Applicant's position since it shows that the authorities of the 'Serb Autonomous Region of Krajina' appointed commanding officers in their TO themselves. As discussed below however, the Respondent's argument misrepresents the facts.

4.95 Milan Babić appointed General Ilija Đujić as Commander of the TO of the Serb Autonomous Region of Krajina on 30 September 1991.[175] A memorandum issued by the Headquarters of the Operation Zone 2 and 3 for Banovina and Kordun of 3 October 1991 states that "the Headquarters of the TO of the Serb Autonomous Region of Krajina" was formed by a decision of the Federal Secretariat of People's Defence and that retired Colonel-General Ilija Đujić was appointed Commander of the HQ of the TO of Krajina.[176] The memorandum repeats the wording used in a copy of an undated circular letter signed by Milan Babić. Further evidence of the Serbian state's leading role in the operation of the TO of the 'Serb Autonomous Region of Krajina' is provided by an Order of the Head of the Personnel Administration of the Federal Secretariat for People's Defence of 20 September 1991, under which many JNA officers and non-commissioned officers were sent to the Main Headquarters of the TO of the 'Serb Autonomous Region of Krajina' to staff the headquarters and take over the command of the TO of the rebel Serbs. That Order refers to the appointments in the Headquarters of the TO of the 'Serb Autonomous Region of Krajina' and the rest to Operation Zones 2 and 3, comprising Lika, Kordun and Banovina.[177] The position was the same in Western Slavonia where the TO commander was also appointed by the JNA.[178] The only exception was Eastern Slavonia, Baranja and Western Srem, where the military commander of the rebel Serbs was a high-ranking official of the Ministry of the Interior of Serbia (Radovan Stojičić Badža),[179] appointed by the Minister of the Interior of Serbia. These documents clearly refute the Respondent's claim.

4.96 The Respondent largely admits that the JNA supplied the Krajina forces with arms in late 1991 and in 1992.[180] However, it asserts that this must be viewed within the "context" of the JNA's withdrawal from the UNPAs

[173] Counter-Memorial, para. 624.
[174] Memorial, Annexes Vol. 4, Annex 101.
[175] Memorial, para. 3.81.
[176] Decision of 2nd and 3rd Operation Zone for Banija and Kordun, No 9, 3 October 1991, Annex 65.
[177] SAO Krajina, HQ of the TO, No 85/91, Order No 24-272, 26 November 1991, Annex 73.
[178] *Ibid*..
[179] SAO SBWS, TO Order No. 3/91, 23 September 1991, Annex 59; Confirmation Document, Supreme HQ of the SAO SBWS TO, 13 December 1991, Annex 74.
[180] See Counter-Memorial, paras. 628 and 630.

and the need to leave behind "obsolete military equipment". The Respondent argues that the provision of arms and military equipment does not amount to proof of control over the forces of Krajina Serbs. The Counter-Memorial claims that the SFRY "assisted" in the restructuring of the TO of the Krajina. According to the Respondent, the restructuring of the TO and the *Milicija* was eventually completed without the participation of the JNA.

4.97 In addition to the evidence presented in Chapter 3 of the Memorial, the Applicant has identified further evidence to confirm that the JNA played a decisive role in setting up and operating the TO of the rebel Serbs. In relation to the Respondent's claim that the JNA was forced to 'abandon' equipment when it withdrew from Croatia, the Applicant notes that the JNA did not leave obsolete arms and equipment in Macedonia. In Macedonia, the JNA left only some very ancient T-34 tanks.

4.98 The Respondent admits that the Army of Yugoslavia 'accepted' conscripts of the SVK before they were sent to the RSK.[181] However, according to the Counter-Memorial, this does not represent the deployment of conscripted soldiers from the FRY to the occupied territory of Croatia, as claimed by the Applicant.

4.99 The Respondent seeks to downplay the subordination of the 'RSK' armed forces and police force to the JNA and Serbia, and alleges that the 'Serb Autonomous Region of Krajina' and the subsequent "RSK" had exclusive command over their military and police forces. The Respondent admits that these forces cooperated with the JNA from the moment the JNA had abandoned the role of a "peacekeeper" and begun fighting the Croatian forces. There are many examples, however, showing that the approval of the 'RSK' authorities was neither sought nor considered necessary by Serbia. As the ICTY held in *Mrkšić et al*, the Respondent's contention that the cooperation between the JNA and rebel Serbs started only in mid-September 1991 is false. There is clear evidence of their "cooperation" as early as July 1991.[182]

(c) Volunteers and paramilitary formations

4.100 The Applicant's position is that the JNA integrated paramilitary forces or 'volunteers' into its forces during the war and the genocidal acts committed by these paramilitary forces were a full part of the JNA's campaign. The Respondent claims the information on volunteers and volunteer groups is "inadmissible, insufficient and inaccurate,"[183] and contends that allegations that these groups were part of the JNA must be established in each specific case.

[181] See Counter-Memorial, para. 632.

[182] Evidence of cooperation between rebel Serbs and the JNA is specified in *Slom Titove armije: JNA i raspad Jugoslavije 1987.-1992* [The Breakdown of Tito's Army: the JNA and Disintegration of Yugoslavia], Zagreb, 2008, by Davor Marijan, pp. 269-273.

[183] See Counter-Memorial, paras. 637, 638 and 641.

These objections have no foundation, as ICTY findings and other evidence confirms, as noted in Chapters 2, 5, 6 and 9 of this Reply.

4.101 The ICTY Trial Chamber in *Mrkšić et al* described the typical system of attack employed by the JNA as one which culminated in the entry into Croatian villages by Serb paramilitaries, once these villages had been surrounded and shelled by the JNA.[184] This confirms the evidence provided in the Memorial.

4.102 The Respondent notes that there are a number of missing paragraph references in Chapter 3 of the Memorial where it refers to the Final Report of the United Nations Commission of Experts established pursuant to Security Council resolution 780 (1992).[185] These missing references are set out below (all initial paragraph references are to Chapter 3 of the Memorial):

1. Paragraph 3.48, footnote 109, the missing paragraph reference is to Introduction (3rd paragraph) of Annex IIIA of the Report;

2. Paragraph 3.49, footnote 110, the reference is to Section III A of the Report, 'The military structure of the warring factions and the strategies and tactics they employ';

3. Paragraph 3.49, footnote 111, the reference is to Section III A, 12th paragraph;

4. Paragraph 3.49, footnote 112, the reference is to Section III A, 10th paragraph;

5. Paragraph 3.49 footnote 113, the reference is to Section III A, 13th paragraph;

6. Paragraph 3.49 footnote 114, the reference is to Section III A, 11th paragraph;

7. Paragraph 3.51 footnote 119, the reference is to Annex III A, Section II D.I, 2nd paragraph;

8. Paragraph 3.52, footnote 127, the reference is to Annex III A, Section II,D.2 (Section on Arkan);

9. Paragraph 3.56, footnote 133, the reference is to Annex III A, Section III.C (Section on White Eagles).

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[184] *Mrkšić et al,* para. 43.

[185] Final Report of the United Nations Commission of Experts established pursuant to Security Council resolution 780 (1992), S/1994/674/Add.2 (Vol. I), 28 December 1994.

4.103 The Applicant notes the role of the Ministry of the Interior of Serbia in Croatia, an example of which is evident from a statement given before the Military Court in Belgrade by General Aleksandar Vasiljević in 1999, confirming the links between the JNA and three key paramilitary groups, including Dušan Silni and Arkan's group. From 1991 to 1992 General Vasiljević was Head of the Security Service of the Armed Forces of the SFRY, and he confirms that Radovan Stojičić Badža was commander of a brigade of the Ministry of the Interior of the Republic of Serbia consisting of three detachments: (1) the "Dušan Silni" detachment [Dušan the Mighty] with mainly members of the Serbian People's Defence of Mirko Jović, (2) the "Crnogorac" detachment [Montenegrin] that was formed with the personnel from the area of Fruška Gora and (3) Željko Ražnatović (Arkan's) detachment.[186]

4.104 The Respondent also claims that the Memorial does not adduce reliable evidence that Vojislav Šešelj received official support from Belgrade to send volunteers to Croatia.[187] The Respondent argues that those claims are founded on the statements that Šešelj gave but then retracted.

4.105 The connection between Šešelj, his volunteers and the Serbian authorities was made through the JNA. The Belgrade weekly *Intervju* states that two battalions of Vojislav Šešelj's Serbian Radical Party took part in the fight for Vukovar.[188] Šešelj himself claimed that the first arms shipments arriving in Borovo Selo in Croatia derived from a depot of the TO of the Republic of Serbia and were transported by the Milicija of the Republic of Serbia.[189] The close relationship between the JNA and MUP and Šešelj and the Serbian Radical Party is also discussed in the 'Balkan Battlegrounds' Report, on which the Respondent relies.[190]

4.106 In the *Martić* case, the Trial Chamber found as a fact that Šešelj was party to the joint criminal enterprise alleged in that case. Šešelj has also been indicted by the ICTY Prosecutor as being involved in a joint criminal enterprise together with Slobodan Milošević and others, alongside members of the JNA, the Yugoslav Army ('VJ'), the Serb TO of Croatia and of Bosnia and Herzegovina, the army of the 'RSK' ('SVK') and the Army of the Republika Srpska ('VRS'), amongst others.

4.107 The Respondent contends that the Applicant has also failed to provide reliable evidence that Željko Ražnatović (Arkan), with his unit, was closely connected to the authorities of Serbia and the FRY.[191] It claims that a

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186 Witness Statement of Aleksandar Vasiljević, Annex 26.
187 Counter-Memorial, paras. 642-645.
188 *Dobrovoljci ne ratuju za stranke* [Volunteers are not Fighting for Political Parties], *Intervju*, 24 January 1992, pp. 6-8.
189 *Veći sam nego ikada* [I am Greater Than Ever], *Velika Srbija*, May 1994, p. 37.
190 'Balkan Battlegrounds' Report, Vol. II, p. 199.
191 Counter-Memorial, paras. 646-647.

photograph taken in 1997 at the funeral (of Radovan Stojičić Badža) showing Arkan and Milošević together cannot be used as evidence to substantiate the Applicant's claims. In fact, the close connection between Arkan and the FRY/ Serbia is evidenced by many sources:

1. The Security Service of the Headquarters of the TO of the Republic of Serbia stated that Arkan is "paid especial attention to by a larger number of ministers and other officials in the Government of Serbia and enjoy a specially privileged treatment";[192]

2. The Security Service of the Command of the 1st Military District dated 19 October 1991 found out from an informer who was in contact with Arkan on several occasions that "that they are receiving armaments, ammunition and MES (mines and other explosive devices) from the Ministry of the Interior and the Ministry of Defence of the Republic of Serbia and that he is distributing them to the Headquarters of the [TO] of Erdut, Sarvaš and Borovo Selo";[193]

3. The Security Service of the 12th Corps of the JNA dated 1 January 1992 stated that Arkan was openly "supported by the Ministry of the Interior, the TO and the Ministry of People's Defence of the Republic of Serbia, but it is claimed that this is so on direct orders of the highest leadership of the Republic of Serbia". It also reports that Arkan was "taking part in meetings of the Command of the 1st Military District together with the Corps Commanders";[194]

4. In his statement given in 1999 before the Military Court in Belgrade, General Aleksandar Vasiljević stated that Arkan was commander of a detachment that was part of a brigade of the Ministry of the Interior of the Republic of Serbia commanded by Radovan Stojičić Badža;[195]

5. The 2002 Balkan Battlegrounds Report on which the Respondent relies states:

"After Vukovar fell, General Panić moved his powerful

[192] Security Organ of the Republic's Headquarters of the TO of the Socialist Republic of Serbia, Strictly Confidential No. 254-1/9, 13 October 1991, Notification (ICTY Doc No. 0340-4870-0340-4871).

[193] The Security Organ of the Command of the 1st Military District, Strictly Confidential No. 68-443, 19 October 1991, Information (ICTY Doc No. 0340-4872-0340-4873).

[194] The Security Organ of the Command of the 12th Corps, 1 January 1992, Information (ICTY No. 0340-4884-0340-4887).

[195] Witness Statement of Aleksandar Vasiljević, Annex 26.

> forces into position to continue the strategic offensive which Vukovar had delayed for two months. JNA 12th Corps troops, *spearheaded by Arkan's Tigers*, began their effort to break through the key Osijek-Vinkovci defense line defended by the Croatian 1st Osijek…" (emphasis added)[196]

4.108 The Memorial makes clear that volunteer paramilitary groups were integrated into the JNA by an order of the Federal Secretariat of People's Defence dated 13 September 1991.[197] This order confirmed that Serbia had, through the JNA, effective control over Serbian paramilitary forces.[198] The Respondent claims that volunteers were integrated into the JNA on an 'individual' basis,[199] and contends that the Applicant has not identified specific instances in which volunteers who committed crimes had been integrated into the JNA or acted under JNA command.

4.109 This is clearly established by the evidence, including findings of fact of the ICTY on the status and action of volunteers or paramilitaries:[200]

> "Serb "volunteers" in Lovas had attacked specific homes on 10 October 1991 killing 22 Croats and one Serb."[201]

The Trial Chamber has confirmed that:

> "The principle of unity or singleness of command, therefore, required that in a zone of operations, in combat action, one commander was responsible for commanding all military units in that area, including TO and volunteer units, and that all subjects in the area, i.e. all units and their individual members, were subordinated to the one commander."[202]

And it has affirmed the degree of control over volunteers or paramilitaries by the JNA:

> "The circular of the Chief of the General Staff of 12 October 1991 and the order of the command of 1st MD of 15 October 1991 … go even further than has been discussed in these last paragraphs. They serve to confirm that what had been established as the *de facto* reality, not only in the zone of operations of OG South,

196 'Balkan Battlegrounds' Report, Vol.I, p. 101; Vol.II, p. 196.
197 Memorial, para. 3.80.
198 Theunens Report, 2003, para. 7: Theunens refers to the Serbian and SFRY 1991 Orders for the Registration and Acceptance of Volunteers into the Serbian TO and JNA.
199 Counter-Memorial, paras. 648-652.
200 *Mrkšić et al*, para. 83, cited at para. 4.41, *supra*.
201 *Mrkšić et al,* para. 47.
202 *Ibid.,* para. 84.

> but, generally, in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations. This, in the Chamber's finding, reflects the reality of what had been established. It was a reality, which the JNA had the military might to enforce, even though it may well have been reluctant to be too heavy handed in doing so, against TO and volunteer or paramilitary units fighting in the Serb cause..."[203]

4.110 Under the rules operating in the SFRY,[204] a 'volunteer' was a minor or a retiree. Kadijević's order of 13 September 1991 confirmed that the JNA had given up its former "code of conduct" in direct response to the decision of early July 1991 to call for volunteers. The great majority of these volunteers were Serbs, so it is not surprising that the JNA was perceived as a 'Serb' army. There is evidence that volunteer groups were fighting together with the JNA, even independently of this Order, as was the case with two battalions of Šešelj's Chetniks in Vukovar.[205] Other examples include:

1. A command of Colonel Mile Mrkšić of 21 November 1991 showing that the volunteer detachment of "Šešeljevci" [Šešelj's people] was under the command of the JNA Operation Group South;[206]

2. An order of the Command of the 1st Military District of 9 October 1991 informing the subordinates that new volunteer and other units were coming and should be readily accepted;[207]

3. An order of the Command of the 1st Military District of 15 October 1991 that the JNA units should remove from the territory all paramilitary detachments "which refuse to put themselves under the command of the JNA".[208]

4.111 In one of his analyses for the ICTY OTP, R. Theunens identifies links between paramilitary formations and the Ministry of Interior of the Republic of Serbia. These links were illegal under both the SFRY Constitution and the Constitution of Serbia, but continued to exist.[209]

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[203] *Ibid.,* para. 89.

[204] See the Expert Report of the ICTY Military Analysis Team in *Mrkšić et al*: Operational Group *South* of the SFRY Armed Forces and the Operations in SBWS. This Report was published in the book *Vukovarska tragedija 1991: U mreži propagandnih laži i oružane moći JNA* [Vukovar Tragedy of 1991: Entangled in Propaganda Lies and Military Power of the JNA], Helsinki Committee for Human Rights in Serbia, Belgrade, 2007, Vol. II, pp. 830-831.

[205] See Counter-Memorial, paras. 642.-645.

[206] Command of OG South, Strictly Confidential, No 464-1, 21 November 1991, Annex 72.

[207] Command of the 1st MD, No 160-15, 9 October 1991, Annex 66.

[208] Command of the 1st MD, Strictly Confidential No 1614-82 27, 15 October 1991, Annex 67.

[209] *Vukovarska tragedija 1991: u mreži propagandnih laži i oružane moći JNA* [Vukovar

4.112 In the 1982 Federal Law on All People's Defence, there was a provision that the TO comprised all armed units outside the JNA and *Milicija*.[210] This did not include Serb volunteer and paramilitary units. The issue of volunteers in the armed forces was also regulated by the 1982 Law on All People's Defence,[211] which defined 'volunteers' as individuals who did not have to serve in the army and who volunteered in the armed forces. It is, in any case, clear that volunteer units as such were not meant to exist, whatever the basis for their organisation.

4.113 Paramilitary units operate outside the law. There were references to them in 1990 when Croatia was accused of preparing a paramilitary army, and in January 1991, the Presidency of the SFRY ordered their disarmament. The order was never withdrawn and the JNA was obliged to execute it, regardless of who formed the units or the basis on which they were formed. During the siege of Dubrovnik, the JNA invoked this order and ordered the Croatian forces to surrender their arms. Yet the same was not required from Serb voluntary units fighting the JNA.

4.114 There is overwhelming evidence that Serbia permitted the organisation of paramilitary forces on its territory and also armed and trained these organisations. Reference can be made to an article in the Belgrade daily *Borba* on 16-17 November 1991 which stated that some hundred volunteers of the Serbian Radical Party came to help members of the paramilitary TO of Podravska Slatina. The volunteers "who call themselves Chetnicks [...] signed for their uniforms in the Belgrade "4. juli" barracks" on the basis of an agreement "between the leadership of the Serbian Radical Party and General Simović, Serbian War Minister".[212]

4.115 Further evidence of the integration of paramilitary forces into the JNA can be adduced from a report by the European Union monitors, published in 1991 in the Belgrade weekly *Intervju,* which stated that the overall activities of the JNA and volunteer units were "a part of the plan designed to gain control over the territory in the areas inhabited by the Serb population particularly following the line Virovitica – Hungarian border – Sisak – Karlovac to Zadar and the Dalmatian coast".[213]

Tragedy of 1991: Entangled in Propaganda Lies and Military Power of the JNA], Helsinki Committee for Human Rights in Serbia, Belgrade, 2007, Vol. II, p. 821.; see also Expert Report of R. Theunens, submitted by the Prosecution in *Mrkšić et al,* "SFRY Armed Forces OG South and the operations in Slavonia, Baranja and Western Srem (SBWS) (August – November 1991)", September 2005.

210 SFRY, Law on All People's Defence, Article 102.

211 SFRY, Law on All People's Defence, Article 119.

212 *Saveznici na slavonskom frontu* [Allies on the Slavonian Front], *Borba*, 16-17 November 1991.

213 *Izveštaj evropskih posmatrača* [Report of the European Monitors], *Intervju*, 25 October 1991.

4.116 The 'Balkans Battlegrounds' Report relied upon by the Respondent states that:

> "It was during this second battle [for Vukovar in September/ October 1991] that the JNA introduced a new force into the war-volunteer units. These were recruited to fill the gaps in the Army's ranks that should have been occupied by trained reservists who had failed to appear for mobilisation. The men for these company –and battalion sized detachments, recruited with the assistance of the Serbian MUP, came primarily from Serbian nationalist political parties and clubs…The untrained volunteers were often motivated by xenophobic zeal against the Croats…who suffered numerous atrocities at their hands…"[214]

4.117 In *Mrkšić et al* the ICTY Trial Chamber found that the command of OG South of the JNA exercised direct command authority over up to five assault detachments in respect of their combat operations and that these detachments included TO and volunteer or paramilitary units.[215] The Trial Chamber also noted that the paramilitary unit *Leva Supoderica* was included in the 1st Assault Detachment and that it was the strongest such detachment precisely because of the size of TO and volunteer units attached to it.[216] The Trial Chamber held that:

> "Other volunteer units present in the Vukovar area in the zone of operations of OG South included Novi Sad Volunteers Company, which was also part of 1 AD (*see* below), 2nd Volunteers Company, Smederevska Palanka, Sarajevo and Belgrade volunteers' platoons"[217].

(d) Illegal arming of Serb rebels by the JNA

4.118 The Applicant's position is that FRY/Serbia, acting through the JNA, armed the rebel Serb forces in Croatia. The Respondent seeks to play down the extent to which the JNA armed rebel Serbs in Croatia. The Memorial refers to a letter written by the Colonel of the Security Service of the army of rebel Serbs in Croatia, Dušan Smiljanić[218] and the Respondent tries to present it as an isolated example of action taken by an individual officer.[219] An analysis of Smiljanić's letter shows that the Applicant's position is correct. As Lieutenant-Colonel and Head of Security in the 10th Corps of the JNA, Smiljanić armed the rebel Serbs. He organised the distribution of some 15,000 arms, a quantity sufficient to arm an Army division or four brigades.

214 'Balkan Battlegrounds' Report, Vol. I, p. 100.
215 *Mrkšić et al,* para 98.
216 *Ibid.,* paras. 99 and 101-104.
217 *Ibid*., para. 94.
218 Memorial, para. 3.32, footnote 70.
219 Counter-Memorial, para. 596.

4.119 In his letter to General Mladić dated 15 October 1994[220], Smiljanić states:

> "At the beginning of August 1991, the Operations team PROBOJ-2 was formed requested by the Security Administration and under my commanding [sic]. It was composed of the Security Department of the various branches with the following task:
> - arming of the Serbian people,
> - the central task: the help and participation in the military organisation tasks,
> - resisting the Croatian service in the areas of Lika, Banija and Kordun.
> - this team worked until the end of 1991. I was a subordinate to the Security Administration (UB) and I used to submit a report to the Head of the 2nd Military Region, Air Force [(RV)] and the Anti-Aircraft Defence [(PVO)]. Besides that I was also connected with the Ministry of Defence [(MO)] of the Republic of Serbia, concerning the role of this Ministry in the war conducting [sic] at that time..."[221]

4.120 Having armed the Serbs in Lika, Kordun and Banovina– with the full knowledge of the head of security of the 5th Military District, Colonel Boško Kelečević – Smiljanić arranged a similar action in July 1991 in Banja Luka and Bosanski Novi. Over 20,000 arms and weapons were transported to Čelinac and Drvar.[222] B. Mamula refers to Smiljanić as one of the people who organised the 'People's Front', one of many participants in a larger undertaking.[223] This was not an isolated incident.

4.121 This illegal arming of rebel Serbs by the Republic of Serbia/emergent FRY continued during the conflict. The Trial Chamber in *Martić* held that:

> "140. As early as August 1990 and through the summer of 1991, officials of the MUP of Serbia, including the Chief of the SDB, Jovića Stanisic, and an official thereof, Franko "Frenki" Simatović, met with the SAO Krajina leadership, in particular with Milan Martić, concerning the provision of financial, logistical and military assistance. From January 1991, Milan Martić went on occasion to Belgrade to meet with these officials and with Radmilo Bogdanović, the Minister of the Interior of Serbia, concerning the provision of support to the SAO Krajina.

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220 Memorial, Annexes, Vol.4, annex 65.

221 *Ibid.,* pp. 162-163.

222 Pomoćnik K-za bezbed.-obaveštajne poslove GŠ SVK od 15.10.1994, Provera podataka i razgovor [Counter-Intelligence Agency: Assistant Commander for Security and Intelligence of the General Staff of the Serb Army of Krajina, 15 October 1994, Verification of data and conversation].

223 B. Mamula, *Slučaj Jugoslavije* [Yugoslavia Case], p. 238.

> 141. The SAO Krajina budget was very small as a result of Croatia having ceased to provide budget allocations to Serb municipalities in May 1991. The SAO Krajina government, including Milan Martić, sent requests to the government of Serbia for military assistance and the evidence shows that these requests were frequently met. The police of the SAO Krajina were mainly financed with funds and material from the MUP and SDB of Serbia. Moreover, there is evidence that weapons were sent from Serbia by Radmilo Bogdanović via Bosanski Novi, BiH, to the SAO Krajina. Beginning at the end of April 1991, Dušan Smiljanić, Chief of Security of the JNA 10th Zagreb Corps, made contact with leading figures in the SDS in the SAO Krajina and provided large amounts of infantry and artillery weapons to Serbs in Krajina from JNA depots."

4.122 A further specific example of JNA distributing arms to rebel Serbs is provided by security officers of the II Detachment of the Counter-Intelligence Group of the Air Force and Anti-Aircraft Defence located in the building of the Command of the 5th Corps of the Air Force and Anti-Aircraft Defence in Zagreb. The operation had a cover name '*Proboj 1*' *(Breakthrough 1)* and its centre was at the Bihać airport. Local officials of the Serbian Democratic Party assisted in arms distribution.[224] In some territories along the Kupa River, arms were distributed on the basis of the membership in the League of Communists – the Movement for Yugoslavia. Some of the group opposed the distribution.[225] According to one source, the League of Communists – Movement for Yugoslavia, as a political emanation of the JNA, distributed some 13,000 'long arms' in Eastern Slavonia.[226] A further example is that of Lieutenant-Colonel Milan Škondrić from the 944th Logistic Base in Karlovac, who started to supply the rebel Serbs in the area of Plaški with arms in early July 1991.[227] A sizable quantity of JNA arms was transported to Gorski Kotar in late July and early August 1991.[228]

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[224] Witness Statement of M.Č., Memorial, Annexes, Vol.2(III), annex 339.

[225] MUP RH – Ministarstvo unutarnjih poslova RH [Ministry of the Interior RC], Služba za zaštitu ustavnog poretka [Service for Protection of the Constiturional Order], 3 May 1994, Statement by R.R..

[226] Dobrila GAJIĆ-GLIŠIĆ, *Srpska vojska – iz kabineta ministra vojnog*, [Serbian Army-From the Cabinet of the Defence Minister], Marica and Tomo Spasojević, Čačak, 1992, p 146.

[227] *Ratni put Plašćanske brigade* [The War Path of the Plaško Brigade], *Pod zastavom otadžbine* [Under the Homeland's Banner], Informativni list 70. pešadijske brigade, Plaški, 1/1995,1 [The Information Bulletin of the 70th Infantry Brigade].

[228] *Štab odbrane Gorskog kotara, Br. 9 od 18.05.1994., Kratak pregled najvažnijih događaja u radu predstavništva Srba i Štaba odbrane Gorskog kotara* [Defence Headquarters of Gorski kotar, No. 9 dated 18 May 1994, A brief overview of the most important events in the work of the representative body of Serbs and the Defence Headquarters of Gorski kotar] A portion of these arms was surrendered to the Croatian authorities in mid-1992], N. Barić, *Srpska pobuna u Hrvatskoj* 1990-1995. [The Serb Rebellion in Croatia, 1990-1995], pp. 325-326.

4.123 There were similar cases in Western Slavonia: Colonel Nikola Marić and other officers provided Serbs with arms and equipment from the Doljani depot in the vicinity of Daruvar on 3 July 1991. Also in July 1991, Lieutenant-Colonel Stevanović from the Požega barracks "transported in ten lorries arms and ammunition to Serbs in the mountains".[229] From 1 June to 17 August 1991, Stevo Prodanović (an Ensign of the JNA) organised the removal of some long arms from the JNA barracks in Daruvar and their transportation to rebel Serbs.[230]

4.124 A confidential document of November 1992 reveals that, at the start of July 1991 a JNA officer being recommended for promotion was arming the Serbs in Slavonia, and refers to the arming of Serbs by the JNA in the area of Okučani in early July 1991. This at a time when according to the Respondent, the JNA was still acting as a 'peacekeeper'. This was done with the approval of the head of the Security Service of the 5th Military District.[231] The Command of the Motorised JNA Brigade from the Logorište barracks near Karlovac distributed arms and equipment to rebel Serbs in the municipalities of Vrginmost and Vojnić and organised training for 346 rebel Serbs from those municipalities.[232]

4.125 The rebel Serbs in the area of Hrvatska Kostajnica were armed and equipped in July 1991 by the JNA Banja Luka Corps, whose commander, Lieutenant-Colonel-General Nikola Uzelac "showed full understanding for our problems and I can well say that he met all our demands in terms of the required matériel and equipment. Thus, we were reputed to be one of the best equipped Headquarters in Banovina and Kordun at the time".[233] A document from the ICTY archives sets out the equipment the Banja Luka Corps (later the 1st Krajina Corps of the VRS) distributed to Serbs in Croatia.[234]

4.126 The area of Northern Dalmatia also received arms from Serbia. In one case, a tanker transporting petroleum and arms arrived in Knin on 28 July 1991. From there, Lieutenant-Colonel Borislav Đukić, Commander of

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229 A. S. Jovanović, *Poraz – koreni poraza* [The Defeat – the Roots of Defeat], pp. 152-153, 176.

230 RSK, Recommendation for Extraordinary Promotion, Stevo Prodanović, 23 November 1992, Annex 76.

231 RSK, Recommendation for Extraordinary Promotion, Dušan Saratlić, 23 November 1992, Annex 77.

232 *Vojna pošta br. 5512 Karlovac, Pov. br. 1-3 od 14.11.1991.,* [Military Post Office No. 5512 Karlovac, Confidential No. 1-3, 14 November 1991], *Izvešće* [Report].

233 *Izvještaj o radu i aktivnostima predsjednika Skupštine opštine [Kostajnica] za protekli period*. [Report on the work and acitivities of the President of the Municipal Assembly of Kostajnica for the past period]. The Report is not dated and it covers the period from the democratic elections to early 1992 and probably also a speech by the Mayor of the Municipality Branko Dmitrović, which can be concluded from its content.

234 Command of the 1st Krajina Corps, Strictly Confidential No. 18-168/1, 31 August 1992, Review of Distributed Arms (ICTY Doc. No. 00959772-00959773).

the Motorised Knin Brigade ensured its safe passage to the Cetina River.[235] A conversation about arming the rebel Serbs in Obrovac by the Benkovac Garrison was recorded on 1 August and broadcast on 19 August 1991 on the Zadar Radio Station.[236]

4.127 A report submitted on 28 July 1991 by deputy head of the State Security Service of the Republic of Serbia, Franko Simatović, confirms the involvement of the JNA leadership and Serbia in the organisation of the Serb armed rebellion in Croatia:

> "On 28 July 1991 a road tanker that besides oil derivatives, was transporting weapons for the voluntary units of the SAO Krajina arrived in Knin. Upon arriving in Knin, transportation escort Musa Jovičić contacted lt. col. Đukić who provided for his unobstructed passage through the Cetina area…The quantity of weapons does not satisfy the needs of the Cetina area. A part of them was intended for the arming of the SAOK "Guard" that should be formed as the SDS's party militia. The weapons were sent following the agreement between Babić and General Špiro Niković. We estimate that an uncoordinated distribution like this one would lead to a rift in the, until now, tightly-knit Krajina defence and that the actions of the party militia would disturb the equilibrium that we already have trouble preserving. …The basic conception as well as the elements of compactness of Krajina's defence might be jeopardized if the troops formed by Babić, which are under the exclusive control of the SDS, were armed in such a manner. Should such a situation create disturbances in the defence, we shall react and stop such activities on time....[237]"

4.128 In a Recommendation dated 23 November 1992, by the Zone Staff of TO Western Slavonia for the promotion of major Dušan Saratlić, it is noted that Saratlić, commander District Staff TO Okučani:

> "organized with [Radoslav] Narančić and [Đorđe] Damjanović and with the approval of the Security Service of the 5th Military District, colonel Boško Kelečević, the supply and distribution of weapons to

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[235] Frenki Simatović's Report of 28 July 1991, published in "Republic of Croatia and Homeland War *1990.-1995: Documents: Armed Rebellion of Serbs in Croatia and Aggression of Armed Forces of SFRY and Serbian paramilitary to Republic of Croatia", Book 1,* Croatian Memorial-Documentation Center of the Homeland War, *Zagreb, pp. 208-209.*

[236] *Dnevnik Organa bezbednosti 9. korpusa* [Diary of the Security Organ of the 9th Corps], entry at 12.35 p.m., 19 August 1991; Jadranko Kaleb, *Zadar u Domovinskom ratu 1990. – 1991.*, [Zadar in the 1990-1991 Croatian Independence War], *Udruga hrvatskih veterana Domovinskog rata Zadarske županij*e [Association of Croatian Independence War Veterans of the Zadar County], Zadar, 1999, p 73.

[237] Book of Documents RSK 1, Doc. No. 98.

> the population of the Okučani territory. Until 8 August 1991 conducted training of conscripts from this territory on Psunj, distributed weapons and formed units. After having been notified that the Ministry of the Interior Nova Gradiška has information on activities of JNA officers relating to the arming of the population of Okučani, he returned to his home 513rd Engineer Brigade in Zagreb. .."[238]

4.129 By way of further confirmation of the JNA's role, the Applicant notes General Kolšek's admission that

> "the Serb population in Krajina and other areas, inhabited by the Serb population in Croatia, was armed in different ways, *inter alia*, from the depots of the 5th Military District. Some of the most senior officers from the Command of the 5th Military District participated in those actions. Arms were also transported by helicopters to secret locations."[239]

(7) Conclusion

4.130 This Chapter establishes that the Serbianisation of the JNA started in the late 1980's, and that it then emerged as a Serb-dominated army with an ideological commitment to a Greater Serbia. Additional evidence obtained since the Memorial confirms this. Such additional evidence also confirms the extent to which the Serb TO forces were subordinated to the JNA, including in the course of the conflict itself; in this regard the ICTY's judgment in *Mrkšić et al* is dispositive.

4.131 The relationship between the rebel Serb forces and the JNA has also become clearer. As confirmed by the ICTY's judgment in *Martić*, the rebel Serbs could not have operated as they did without the support of the Serbian state and the JNA, in terms of personnel, financing, logistical, materiel and operational support: see further, Chapter 9, at paragraphs 9.62-79.

4.132 Finally, it is evident that Serbia, through the JNA, had effective control of paramilitary forces in the run up to and during the genocidal conflict in Croatia, in particular in the autumn of 1991. These forces were integrated into the JNA by the Order dated 13 September 1991. Findings of the ICTY in *Mrkšić et al* and *Martić* confirm the extent to which paramilitaries and members of the JNA acted in concert in committing acts of genocide in Croatia.

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[238] RSK, Recommendation for Extraordinary Promotion, Dušan Saratlić, 23 November 1992, Annex 77. There are similar Recommendations in respect of, for example, Stevo Prodanović, Annex 76; and Marko Vujić, Annex 78.

[239] K. Kolšek, *Prvi pucnji u SFRJ*, p. 126.

4.133 In sum, there can be no doubt that the evidence confirms the central role played by the JNA in the genocidal conflict conducted in Croatia. This is conclusively established.

CHAPTER 5

GENOCIDAL ACTIVITIES IN EASTERN SLAVONIA

(1) Preliminary Observations

(a) Introduction

5.1 In this Chapter, the Applicant responds to paragraphs 654-748 of Chapter VII of the Counter-Memorial, concerning the genocidal activities which took place in Eastern Slavonia, primarily in 1991-1992. Chapter 6 addresses the remainder of Chapter VII of the Counter-Memorial and follows the same approach as this Chapter.

5.2 Chapter VII of the Respondent's Counter-Memorial follow a consistent pattern:

- It summarises the allegations and evidence in the Memorial in a misleading, inconsistent and incomplete manner, often to create an unfounded basis for subsequent criticism;
- It erroneously criticises the evidential sources relied upon by the Applicant as being inadequate;
- It ignores many of the methods by which the Applicant alleges the genocide was perpetrated, concentrating primarily (and incorrectly) on killings;
- It fails to respond to many of the principal allegations and evidential sources relied on by the Applicant, including by failing to contest many of the killings which the Applicant alleges.

5.3 Perhaps the most striking feature of the Respondent's approach is its abject failure to advance any positive case in relation to any of the allegations made by the Applicant. The Respondent provides none of its own evidence about the atrocities committed on the territory of Croatia, notwithstanding the abundance of material which it must have in its possession. Instead, it elects to criticise the Applicant's evidence, often by making insubstantial observations about details of particular witness statements.

5.4 The effect of the Respondent's approach is that the Court is left without a response to many of the factual allegations made by the Applicant. In those circumstances, it is submitted that the appropriate course is for the Court to accept those aspects of the Applicant's case as unchallenged.

5.5 The evidence relied upon by the Applicant in this Reply reaffirms the case advanced in the Memorial about the pattern of conduct which took

place throughout the geographical areas with which the Claim is concerned (see, in particular, paragraphs 4.08-11 and 8.11-15 of the Memorial). The pattern included: killing; rape and sexual violence; torture; ethnically derogatory language; conduct designed to debase and humiliate; subjection to a subsistence diet; systematic expulsions from homes; hindering of essential medical treatment and supplies; the identification of Croats by the use of white bands and crosses; denial of food, water, electricity and medical treatment; movement restrictions; looting and destruction of cultural monuments.

(b) The Structure of Chapters 5 and 6

5.6 This Chapter and the following Chapter focus on the specific factual issues arising in relation to geographical areas, addressed in the sequence that they appeared in the Memorial. Many of the Respondent's general criticisms about evidential sources are addressed in Chapter 2, as follows:

- Hearsay evidence, paragraph 2.44;
- Single witness evidence, paragraph 2.45;
- Unsigned witness statements, paragraphs 2.42-43;
- Documents emanating from Croatian official bodies, paragraphs 2.55-57.

(c) The ICTY Case Law

5.7 Since the preparation of the Memorial, the ICTY has indicted and tried numerous members of the Serbian political and military infrastructure for crimes committed against ethnic Croats between 1991 and 1995 in the territory of Croatia. It is beyond doubt as a consequence of that case law that there was a joint criminal enterprise orchestrated by the Serbian government to eradicate the Croat population from significant parts of Croatia. In this section, the Applicant sets out a summary of the relevant cases to illustrate the nature and extent of the actions committed pursuant to that policy. The details of the particular allegations in each relevant geographical location are considered at the appropriate points later in this Chapter and in Chapter 6.

(d) The Serbian Case Law

5.8 In addition to the findings of the ICTY, the Belgrade District Court War Crimes Chamber has prosecuted and continues to prosecute individuals for their involvement in the crimes committed against ethnic Croats in Croatia during the relevant period. The Belgrade Court has rendered verdicts in cases concerning the Vukovar massacre at Ovčara Farm and one concerning Slunj

in Kordun.[1] All resulted in convictions for war crimes, the details of which are considered in the relevant sections below. In addition, there is an ongoing prosecution of 14 individuals for war crimes in Lovas, Eastern Slavonia.[2] The indictment alleges that the "parties to the conflict were the JNA forces with other armed groups under their command and control".[3] Six of the accused were members of a volunteer armed group, "Dušan Silni", four were local civilian and military leaders, and four were members of the TO then subordinated to the 2nd Proletarian Guards Motorised Brigade of the JNA. All were said to have acted in concert in committing atrocities in Lovas, including killings and torture. The details of the allegations are again set out in the relevant section below.

(E) Additional JNA Documents

5.9 The Applicant notes that the Respondent does not comment on or specifically dispute the Applicant's assertions that the JNA was involved in the attacks on the villages and towns of Eastern Slavonia. The Respondent does, nonetheless, assert that there can be no attribution of genocidal intent to the Serbian state.

5.10 Since preparing the Memorial, the Applicant has obtained a number of significant documents originating from the JNA which reinforce the conclusion that the attacks in Eastern Slavonia were part of a coordinated plan to eradicate the Croat population from the region, emanating from the Serbian state and carried into effect by the JNA, in coordination with the TO and paramilitary forces.[4] The documents repeatedly refer to the capturing of areas, followed by a "mop up" of the terrain,[5] and the "cleansing" of villages.[6] The orders also refer to an objective of preventing "possible retreat of Ustasha forces" by blocking roads,[7] thus evidencing an intention to "create preconditions for total destruction of the Ustasha forces."[8] The terminology used is not only

[1] *Vujović et al*, KV 4/2006; *Sireta et al*, KV 9/2008; *Pašić*, KV 4/2007 (see also the Supreme Court of Serbia decision in the same case: Kz I r z 2/08).

[2] *Devetak et al*, Indictment, 28 November 2007.

[3] *Ibid*..

[4] Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 15 October 1991, Annex 68; Operational Group South Command, Decision of Colonel Mile Mrkšić, 18 October 1991, Annex 69; Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 29 October 1991, Annex 70; 1st Proletarian Motorised Guard Division Command, Order for Combat of the 1st PGMD Artillery Commander, 29 October 1991, Annex 71.

[5] See, for example, Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 15 October 1991**,** Annex 68; Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 29 October 1991, Annex 70.

[6] See, for example, 1st Proletarian Motorised Guard Division Command, Order for Combat of the 1st PGMD Artillery Commander, 29 October 1991, Annex 71.

[7] Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 15 October 1991, Annex 68.

[8] Operational Group South Command, Decision of Colonel Mile Mrkšić, 18 October 1991, Annex 69.

inconsistent with legitimate military targeting, but is also demonstrative of an intent to destroy the entirety of the local Croat population by whatever means necessary. That intent was manifested in coordinated action by JNA, TO and paramilitary groups: one order entitled "Decision to continue the attack operation Vukovar", issued on 29 October 1991 by Mile Mrkšić, refers to "Assignment for the units" before listing "JOd-1 formation: 1st mtb … Leva Sudoperica to Petrova Gora, Volunteers' Company Novi Sad, one tank M-84…, part of TO… continue the attack and in coordinated action with JOd-2 with the insertion of forces crush the Ustasha units in 'Cvetno naselje' and 'Pionirsko naselje' … use the auxiliary forces to crush the Ustasha forces in the area of the housing estate…".[9]

5.11 The intent in the documents is corroborated by the evidence of JNA soldiers serving in Vukovar. For example, J.Đ. served in the JNA in 1991. He recalls receiving a lecture on strategy and a short tactical training session on behaviour at the front line: "The officers told us again that Ustashas in Croatia committed horrible crimes, massacres and rapes and we had to fight them for this reason. Here, every squad obtained guide from the lines of the Serbs from Slavonia. My group was assigned a Serb from Bogdanovci. He told us how Ustashas had evicted him from his house and set it on fire, and that the 'pest should be killed off' by all means necessary."[10] Similarly, a "Plan of measures and activities in the units of the 134th light brigade on developing motivation and determination of units, soldiers and commanders for the execution of combat missions" approved by Lt Col Dražić referred to the need to "develop wish for revenge, hatred towards the enemy". The "methodology" identified included "When talking about the enemy use words such as: genocide, Ustashe, murderers of children, butchers, mercenaries, unorganised mob, traitors etc." The "executing authority" was identified as "company commanders, commanders of autonomous platoons and all other commanders during their contacts with soldiers and commanders", to be assisted by "commanding staff of brigade, assistant to the brigade commander for moral education".[11]

(f) Exhumation Data

5.12 In Annexes 164-167 to the Memorial the Applicant set out the information then available about bodies which had been exhumed from numerous mass graves. Since that data was prepared, nearly 10 years ago, many more bodies have been located and exhumed. Annex 43 to this Reply sets out a summary of all the bodies which have been exhumed from locations

[9] Operational Group South Command, Decision to Continue the Attack Operation Vukovar, 29 October 1991, Annex 70.

[10] Witness Statements of J.Đ., Annex 12.

[11] Plan of Measures and Activities in the Units of the 134th Light Brigade on Developing Motivation and Determination of Units, Soldiers and Commanders for the Execution of Combat Missions, Annex 80. See further, Chapter 3.

which were the subject of detailed analysis in the Memorial. In addition, bodies have been exhumed from many locations in Eastern Slavonia, Western Slavonia, Kordun and Lika, Banovina or Dalmatia which were not the subject of detailed analysis in the Memorial: see Annex 44. The Applicant relies upon these further sites as showing the context and breadth of the killings committed by the Serbian forces.

5.13 Annex 46 sets out the function of the various participants (Croatian, Serbian and international) in the exhumation process which has given rise to the data contained in Annexes 43 and 44. Each exhumation has been carried out pursuant to an Order of the competent County Court, following an investigation based on evidence collated by the Count State Attorney's Office: see Annex 46. Samples of the data collected during the exhumation process appear at Annex 45.

(2) Tenja

5.14 At the outset of its response on Tenja, the Respondent sets out an inaccurate and incomplete summary of the Applicant's case: Counter-Memorial, paragraph 659. It entirely ignores the serious bodily and mental harm caused to Croats through arbitrary arrests and torture (paragraph 4.27); the deliberate infliction on Croats of conditions of life designed to bring about their physical destruction, including withholding medication from Croat patients (paragraph 4.23), compelling Croats to undertake forced labour (paragraph 4.25), restriction of movement (paragraph 4.26), listing all Croatian residents, recording their sex, age, and other statistics in order to search their houses under the pretext of looking for weapons (paragraph 4.24) and forced exile of the Croat population (paragraph 4.30). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Tenja.[12] This data confirms that 4 bodies have been exhumed from various sites in the area (not including those bodies removed from Tenja and buried at other sites, *e.g.* Ćelije, Orlovnjak).

5.15 The Respondent asserts that the Applicant's witness statements "do not support the Applicant's claims", because only four witnesses have direct knowledge of murders and each of them only about one murder (Counter-Memorial, paragraph 661). That is a misleading summary of the Applicant's evidence: Z.M. refers not to one, but to six killings: Stevo Bačić, Mato Mikolaš, Ivo Prodanović, Joža Božičević, Matko Nađ and a man known as 'Herceg'.[13] The Applicant specifically referred to this at paragraph 4.28 and footnote 32 of the Memorial.

5.16 In addition, a number of witnesses describe numerous Croats being

[12] See List of Exhumed Bodies prepared by the Directorate for Detained and Missing Persons, Annex 43. See further, paras. 5.12-13, supra.
[13] Memorial, Annexes, vol 2(I), annex 15.

taken away and not being seen subsequently. L.R., a TO member in Tenja, gives an account of five Croats (A.H., the P. couple, 'M' the postman, and a 25 year old man) being beaten whilst being transported in a truck. He asked the man who was beating them where he was taking them and was told "to Borovo Selo where they would be exchanged". L. R. did not see the five Croats again.[14] Đ.B., who guarded a jail in the cinema hall in Tenja, corroborates R.'s account: he describes seeing H., the P. couple, 'M', the two V. brothers, M.C. and K.K. at the jail one day, but missing the next.[15] Đ.B. also refers to personally burying 5 or 6 killed persons at the Ćelije cemetery, after their bodies had been found dead in the canal near Topolik, wrapped in black nylon bags and transported by tractor. Equally, I.I. describes nine named people being taken and "probably killed": M.N., J.Š., J.M., a man whose surname was B., M.M., A.G. and Đ.K.[16] The Respondent is accordingly wrong to refer to his statement as containing only a "general allegation" in relation to people buried in the cemetery (Counter-Memorial, paragraph 661).

5.17 Since the Memorial was prepared, the Applicant has obtained further evidence corroborating the accounts of the witnesses relied upon in the Memorial. P.B. was the Assistant Pathologist in Tenja from July to 31 December 1991, as a result of which he examined the bodies of 59 deceased persons. He kept a diary noting the time and date of death of all bodies he examined and, for those who died a violent death, sketches. He gives the following evidence:[17]

- On 8 July 1991 he was called by Jovan Rebrača to go to the cinema courtyard to inspect two bodies, which he recognised to be Đuro Kiš and Antun (Ante) Golek. He concluded that they had died a violent death at a different location and had been moved subsequently. Đuro Kiš had 3 entry gunshot wounds on his back in parallel position from right to left with exit wounds in the abdomen. The wounds were probably caused by an automatic weapon. Antun Golek had a gunshot wound to the head and an amputation of the lower left leg, attached only by skin. P.B. submitted his record of the inspection to the Registrar's Office in Tenja and informed the duty investigative judge in Osijek by telephone of the event. He was then ordered by Jovo Rebrača to remove the bodies, which he did with the assistance of M.M. The bodies were taken in the first instance to the courtyard of the house of Đuro Kiš's mother in the Pušinci area of Tenja.

- On 16 July 1991 P.B. received a call from the Militia Station to

[14] Memorial, Annexes, vol 2(I), annex 17.
[15] Memorial, Annexes, vol 2(I), annex 18.
[16] Memorial, Annexes, vol 2(I), annex 11.
[17] Witness Statements of P.B., Annex 5.

come and examine a body in the cinema's courtyard. He identified the body as being Mato Nađ, whom he had known personally. The body was face down, with four gunshot wounds: one under the left arm; one on the right side at the level of the ninth rib; one on the right side at the level of the fifth rib; one to the back of the head. All but the head wound had exit wounds to the front side of the body, whilst the bead shot had an exit wound at the left side of the frontal bone. The first three wounds were probably caused by shots from an automatic weapon, probably a rifle, whilst the shot to the back of the head was most likely from a pistol.

- On 18 September 1991 at approximately 01:00 hours, Radoslav Podbarac came to wake P.B. to ask him to examine a body in the village centre which had been killed by 'a stray bullet.' The body was at the crossroads of Sveta Ana Street and Vlatko Maček Street. P.B. recognised it as the body of Stevo Bačić. The body was lying face down in the street and in the left hand there was a handkerchief drenched with clotted blood. On examination, the body had broken nose cartilage, and haematoma on the left side of the back, measuring approximately 4cm x 15cm, caused most likely by a hard, blunt object. There were two gunshot wounds to the head. One entered the right temple with an exit would to the left temple. The second was to the right side at the back of the head. The body was still warm, indicating that death had occurred during the past 2 hours. Two shells from a 7.65mm calibre gun, and one unfired bullet of the same calibre, were found in the vicinity. It was known that only the Serbian Police had guns of that calibre during that time in Tenja.

- On 25 September 1991 P.B. received a call from the Militia Station, which was at that time located behind an old school building. He was told to come there as there was a body behind the school, near the gym. He arrived at the Station and was told by the officer on duty, Slavko Babić, that the body was behind the gym. P.B. recognised the body as that of Josip Hodak., a.k.a. 'Ličanin'. On examination, the body had one gunshot wound to the head with an entry would by the right ear and an exit wound at the left ear. The injury was caused by a 9mm calibre gun, possibly a pistol.

- P.B. also examined the body of Mato Mikolaš, who was found in the attic of his (Mikolaš's) house. The body was hanging on a rope with multiple wounds, including explosive wounds caused by hand grenade fragments, gunshot wounds, stab and cutting wounds.

- P.B. examined a number of people killed at Orlovnjak village-farm (a short distance from Tenja), including Mato Šklebek and Emil Dujmović, both of whom had gunshot wounds to the back, probably from shots fired by a pistol. He conducted the examinations on 7 October 1991, after Orlovnjak had been captured.

5.18 P.B. created a list of the persons whose bodies he had examined whilst coroner and had tried to submit this to the Registrar's Office in January 1992 so that he could be paid. He was told that he should remove the names of persons of Croatian ethnicity from the list, but refused to do so and as a consequence never resubmitted the list, or received payment.

5.19 Having inaccurately summarised much of the Applicant's evidence, the Respondent then fails to mention, even less dispute, the Applicant's description of Serbian paramilitary and JNA activities in the region, or their role in the attack on the village, as set out in the Memorial, paragraphs 4.21, 4.22 and 4.29. This is a critical failure. Since the Memorial, the Applicant has obtained a statement taken in 1995 from M.M., who completed compulsory military service in the JNA between 15 June 1991 and 12 May 1992. He was stationed in Osijek and was aware that his units had participated in combat actions in Tenja, Ernestinovo, Laslovo and Tordinci.[18]

(3) Dalj

5.20 As before, the Respondent's summary of the Applicant's case, at paragraph 665 of the Counter-Memorial, is inaccurate and incomplete. It does not refer to the numerous ways in which the Serb forces deliberately inflicted on Croats conditions of life designed to bring about their physical destruction, through the means of forced labour, house arrests and random acts of violence (paragraph 4.35). The local Catholic Church was completely destroyed (paragraph 4.35). The Croat population was banished from the area and the people were forced to sign statements relinquishing all rights to their property (paragraph 4.37). Thereafter, the Respondent frequently misrepresents the evidence relied upon by the Applicant.

5.21 The Respondent asserts, at paragraph 667, that "From the Applicant's description of the events in Dalj on 1 August 1991, it is obvious that an armed conflict took place in this village, with the Croatian forces constituting one side in that conflict." The suggestion that the actions described in the Applicant's evidence are explicable as being part of a legitimate armed conflict is misleading and ill-conceived. The Applicant's evidence filed with the Memorial, and the further evidence obtained subsequently, makes it clear that the sequence of events in Dalj was as follows:

- On 1 August 1991 the JNA and paramilitary groups attacked the Police Station, with the paramilitary forces having occupied all the houses in the surrounding area. JNA members used a megaphone to call to the occupants of the Police Station saying "Come on Ustasha, surrender. You'll get a fair trial." A tank was then used by the JNA to fire on the Police Station. At least two police officers who had surrendered were nonetheless killed by the Serb forces.

[18] Witness Statements of M.M., Annex 16.

M.D. had been captured and was sent by the Serb forces to outside the Station to tell others to surrender. He was unarmed and in obvious distress. Having passed on the message, D. turned and walked back towards the Serb forces, whereupon he was shot by a bullet coming from the direction of the Serb forces.[19] M.L., whose full evidence is considered further, *infra*, recalls collecting D.'s body from outside the Police Station.[20] Subsequently, a second officer, believed to be J. G., left the Police Station with the intention of surrendering, holding a white cloth. The officer was shot several times and fell to the ground. J.Č. escaped the scene but was subsequently captured, before being taken to the prison at the Headquarters of the TO in Dalj, where he saw different paramilitary forces from Serbia from the village of Prigrevica, whose commander was called Nikola Puvača or Puača. Č. was then physically abused whilst detained. He also recalls S.P. being held captive at the same time as him, but being released with an obligation to report daily. Č. subsequently learned that P. had been taken by Vaso Glodić and Nikola Puača the day he was released, and shot in the head at the Orthodox cemetery before being burned. Č. was subsequently one of the prisoners exchanged on 15 August 1991, shortly prior to which Željko Ražnatović had come to the detention centre and told Č. and others that they would be exchanged.[21] The Respondent is further critical of the absence of any "credible support" for the claims that MUP and ZNG members were executed after they surrendered: paragraph 667. Again, the Applicant has obtained further evidence corroborating the evidence cited in the Memorial. J.Č.[22] was a reserve police officer in Dalj at the time of the attack on the village, and the only survivor of the attack on the Police Station. He recalls that prior to the attack on the Police Station, the local Serbian population was armed by the JNA, with Č. observing trucks coming into the village laden (evident from their tyres) and leaving un-laden.[23] The JNA had also established a checkpoint outside the village, between Dalj and Borovo Selo. Č. and a number of others were in the Police Station at the time the attack commenced. Serbian Militia Commander, Ž.Č.,

[19] Witness Statements of J.Č., Annex 7.

[20] Witness Statements of M.L., Annex 14.

[21] Witness Statements of J.Č., Annex 7.

[22] *Ibid.*.

[23] Ž.Č., Commander of the Dalj Militia Station, also gives a detailed account of occasions on which weapons were supplied to Serb forces in Dalj by Serbia, including from the Serbian village of Prigrevica. Jovo Ostojić was the principal organiser of the weapons acquisition in 1991, and was a member of the Serbian National Renewal. He also recalls weapons being obtained by boat from Kamarište and distributed to Serbs in Dalj during June and July 1991: Witness Statement of Ž.Č., Annex 8.

subsequently observed that the Police Station was "destroyed beyond use."[24]

- After the 1 August 1991 attack, Croat civilians tried to flee Dalj, but many were forced to return and assist with collecting and burying the bodies of those killed in the attack. D. P.[25] states that he had initially tried to flee with his family when the attack commenced on 1 August 1991, but was stopped from doing so by JNA members near the train station. They were then taken, with others, by bus to Bijelo Brdo on 2 August 1991, at which point Serb forces separated the young men from the older men, women and children. Some of the men were subsequently returned to Dalj in the bus, where approximately ten of them were separated out, including D.P., R. and Ž. L., D.P., D.P., A.A., M. L., T.K., and A.R.. Armed men were present at this time, including Zoran Čalošević, alias Fafrika, and Đorđe Čalošević, alias Briga or Đoko-Briga. The men were taken to the Police Station in Dalj, where A.A. had to drive a tractor and trailer. They were then required to collect bodies from various sites around Dalj in the trailer, before taking them to the Catholic cemetery. D.P. recalls the following bodies:

    - Đuro Butorac, lying in front of the Police Station in (what is now known as) Ivan Horvat-Bećar Street, and another body lying in the canal along the road;

    - Josip Glibušić;

    - Several corpses in the cellar of the Police Station;

    - Zdravko Kovčalija, along with 3-4 other persons, in the courtyard of a house;

    - Stjepan Lijić, known to be a carpenter, found dead in his house;

    - Goran Mihaljević, found in a coffin at the Orthodox cemetery (the body of Slavko Putnik was also found in a coffin at the Orthodox cemetery and was taken to the mortuary);

    - Andrija Ripić and other members of the Ripić family,

[24] Witness Statement of Ž.Č., Annex 8.
[25] Witness Statements of D.P., Annex 20.

found in the courtyard of their home;

- Several corpses in the Elementary school, "Božidar Maslarić", which had lots of open wounds. Four bodies found in the hallway were naked, and he also recognised the body of Josip Kemenji in the hallway, with his face disfigured;

- Two bodies at the bakery in BJ Jelačić Street, but these were taken by the funeral company, Ukop from Osijek, rather than being taken to the Catholic cemetery.

M.L.[26] corroborates D.P.'s account, having himself been one of the 10 men separated out in Dalj. He was also forced to assist with collecting the bodies, fearing for his life had he refused to do so. He recalls carrying corpses from the courtyard and the Police Station, together with D. P. and T.K.. The body of Josip Glibušić, a police officer, had a bloody gunshot to his head and injuries to the abdomen area which looked like gunshots. L. also recalls that he found the body of Stjepan Pavić lying face down with visible blood staining on the body and around it. As instructed by Đoko-Briga (Đorđe Čalošević), A.A. drove the trailer to the Catholic cemetery. On the way, they stopped at the Elementary school, where, as described by P., several naked male bodies were found. From the scene, L. assumed their throats had been slit. L. also corroborates P.'s account of finding Josip Kemenji severely disfigured, with the right side of his face crushed and his throat slit. Đoko-Briga made the others take the bodies to the Catholic cemetery, holding L. and M.I. hostage until they returned. L. was subsequently physically assaulted whilst in custody and, before being released with a reporting requirement, was told by Serb forces that he would be killed if he told anyone about what had happened. Upon reporting to the TO Headquarters the next day, L. was again beaten by a man known as Kalabić, and Savo Glodić. He was thereafter required to report twice a day, every day, for approximately 40 days. He was also required to carry out forced labour, along with others.

- On **3 August 1991** the SAO SBWS Militia Station was established in Dalj, at the former Culture Centre, next to the TO Headquarters.[27]

[26] Witness Statements of M.L., Annex 14.
[27] Witness Statement of Ž.Č., Annex 8.

- On **21 September 1991** Arkan visited the Militia Station for the first time: 2 detainees were released on his orders, and another 11 were taken. Their bodies were subsequently found at the cemetery in Ćelije.[28]

- On **4/5 October 1991** Arkan visited the Militia Station again. Ž.Č., the Militia Station Commander, records Arkan coming with a silenced Heckler-Koch handgun on the evening of 4 October 1991 with a large number of his troops and shooting most of the prisoners detained there. The 3 who were not killed were required to clean the room and load the bodies onto a truck. The bodies were subsequently taken to the Danube, along with the 3 survivors. Silenced gunshots were subsequently heard from the location. Č. wrote a report of the incident, listing the names of some of the detainees.[29]

5.22 The Applicant's evidence clearly documents that Croatian civilians were targeted and killed by the Serb armed forces during the assault on Dalj: see, for example, the account of H.S., who saw her husband, I. S. shot dead as he checked on damage to their house.[30] She also describes her (civilian) house being shot at and having an explosive device thrown at it. Those are not actions explicable by a legitimate armed conflict, but are evidence of the targeting of a civilian population, as alleged by the Applicant. The suggestion that the evidence relied upon by the Applicant can be explained by the occurrence of an armed conflict is not credible.

5.23 The Respondent also makes a number of assertions in paragraph 667 to the effect that the bodies seen by the witnesses relied on by the Applicant cannot be identified, and their cause of death is unknown. This overlooks the statement, referred to at paragraph 4.33 of the Memorial, made by Serb forces during negotiations on 13 August 1991 confirming that 56-57 Croats had

[28] On 21 September 1991, members of Arkan's units took 11 imprisoned soldiers/civilians from the Dalj Militia Station: Ivan Zelember, Zoran Anđal, Čedomir Predojević, Dražen Štimec, Željko Filipčić, Darko Kušić, Ivan Forjan, Pavao Zemljak, Vladimir Zemljak, Pavle Beck and Haso Brajić : see Official Note Concerning Hand-over of Prisoners from Dalj Police Station, 23 September 1991, Annex 60. Their remains were subsequently found at the cemetery in Ćelije: Annex 43 – List of Exhumed Bodies for Sites Referred to in the Memorial.

[29] Witness Statement of Ž.Č., Annex 8. Č. listed the following persons: Zvonko Mlinarević, Ivan Tomić, Josip Balog, Zlatko Rastika, Josip Mikić, Rudolf Jukić, Vinko Oroz, Pero Rašić, Janoš Sileš, Stanislav Stmerčki, Ivica Krkalo, Tibor Sileš, Danijel Tomičić, Martin Banković, Mile Grbeša. The Official Note Concerning Incidents at Dalj Police Station and Acknowledgment of Handover, 5 October 1991, Annex 64, list the following names: Zvonko Mlinarević, Ivan Tomičić, Josip Balog, Zlatko Rastija, Josip Mikec, Rudolf Jukić, Vinko Oroz, Pero Rašić, Janoš Šileš, Stanislav Strmečki, Ivica Krkalo, Tibor Šileš, Danijel Tomičić, Martin Banković and Mile Grbešić. Their bodies were subsequently thrown into the Danube. The names identified in the above documents correlate with the names listed by the ICTY in Annex 1 to the Milošević Indictment.

[30] Memorial, Annexes, vol 2(I), annex 22.

been killed in Dalj. The Applicant also notes that the Respondent is critical, at paragraph 667, of the absence of any detail about the identities of the bodies at the Catholic cemetery, referred to by the witness H.S. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Dalj.[31] This data confirms that 78 bodies have been exhumed from various sites in the area, providing details of names, father's names, places and dates of exhumation.

5.24 At Easter 1992, Zoran Čalošević was observed by the witness, Ž. Č., giving orders that the remaining non-Serb population of Dalj would be displaced and banished, in accordance with the allegations set out at paragraph 4.37 of the Memorial (the substance of which is not directly challenged by the Respondent). Goran Hadžic and Arkan were also involved in this process. The property of the displaced persons was seized and managed by a committee established within Dalj for that purpose.[32]

5.25 Having misrepresented the available evidence, the Respondent does not then deny that the JNA was involved in the attack on Dalj, and that in doing so, it was reinforced by paramilitary Serb formations from Vojvodina (Serbia), as asserted at paragraph 4.32 of the Memorial. Moreover, the evidence of Ž.Č., himself a militia member, makes it clear that Goran Hadžić, who was the de facto leader of the SAO SBWS in late August 1991, was visiting Belgrade regularly for meetings with Slobodan Milošević and the Serbian government, in order to consult them in relation to activities in the SAO SBWS area.[33]

5.26 The Respondent correctly observes that crimes in Dalj were included among the charges in the indictment against Milošević but asserts that the timing of the offences does not accord with the allegations made by the Applicant (Counter-Memorial, paragraph 670). The Applicant does not rely upon the Milošević Indictment for anything other than context,[34] but it considers that the Respondent's assertion is factually misleading and accordingly ought to be corrected. The Memorial deals with events in Dalj between 1 August 1991 and 18 April 1992. The ICTY proceedings concern alleged crimes in the same period. The allegations against Milošević included:[35]

> "34. From on or about 1 August 1991 until June 1992, Slobodan Milošević, acting alone or in concert with other known and unknown

[31] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra. See also the detail provided by Marcikić, Kraus and Marušić in "Civilian Massacre in Dalj", Croatian Medical Journal, 1992, Vol 33, War Supplement 1, 29-33, Annex 101.

[32] Witness Statement of Ž.Č., Annex 8.

[33] Ibid..

[34] See further, Chapter 2, paras. 2.25-33; Chapter 9, paras. 9.31-32.

[35] Prosecutor v. Slobodan Milošević, Case IT-02-54-T, Second Amended Indictment, 27 July 2004.

members of a joint criminal enterprise, planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of the persecutions of the Croat and other non-Serb civilian populations in the territories of the SAO SBWS...

35. Throughout this period, Serb forces, comprised of JNA units, local TO units from Serbia and Montenegro, local and Serbian MUP police units and paramilitary units, attacked and took control of towns, villages and settlements in these territories... After the take-over, the Serb forces in co-operation with the local Serb authorities established a regime of persecutions designed to drive the Croat and other non-Serb civilian population from these territories.

36. These persecutions were based on political, racial or religious grounds and included the following:

> (a) The extermination or murder of **hundreds** of Croat and other non-Serb civilians, including women and elderly persons, in Dalj, Erdut, Klisa, Lovas, Vukovar …"

50. In September and October 1991, the Serb TO forces and Militia of the SAO SBWS arrested Croat citizens and kept them in a detention facility in the police building in Dalj. On 21 September 1991, Goran Hadžić and Željko Ražnatović visited the detention facility and ordered the release of two of the detainees. Members of the TO of the SAO SBWS led by Željko Ražnatović shot **eleven** detainees and buried their bodies in a mass grave in the village of Ćelija.…[36]

51. On 4 October 1991, members of the TO of the SAO SBWS led by Željko Ražnatović entered the detention facility in the police building in Dalj and shot **twenty-eight** Croat civilian detainees. The bodies of the victims were then taken from the building and dumped into the nearby Danube River. …[37] [the incident described by the witness, Ž.Č.[38]]

53. On 9 November 1991, members of the TO of the SAO SBWS led by Željko Ražnatović and members of the Militia of the SAO SBWS

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[36] The names of the victims are set out in Annex 1 to the Indictment: Zoran Anđal, Pavle Beck, Haso Brajić, Željko Filipčić, Ivan, Forjan, Darko Kušić, Čedomir Predojević, Dražen Štimec, Ivan Zelember, Pavao Zemljak, and Vladimir Zemljak.

[37] The names of the victims are set out in Annex 1 to the Indictment: Josip Balog, Martin Banković, Mile Grbešić, Rudolf Jukić, Ivica Krkalo, Josip Mikec, Zvonko Mlinarević, Vinko Oroz, Pero Rašić, Zlatko Rastija, Tibor Sileš, Janos Sinaš, Stanislav Strmečko, Ivan Tomičić, Danijel Tomičić, Erne Baca, Elvis Hadić, Iles Lukač, Andrija Maksimović, Franjo Mesarić, Pero Milič, Đorđe Radaljević, Karlo Raić, Pavo Šarac, Mihajlo Šimun, Ranko Soldo, Marinko Somodvorac, and Mihaly Tollas.

[38] Witness Statement of Ž.Č., Annex 8.

arrested ethnic Hungarian and Croat civilians in Erdut, Dalj Planina, and Erdut Planina and took them to the training centre of the TO in Erdut where **twelve** of them were shot dead the following day. … The bodies of eight of the initial twelve victims were buried in the village of Ćelija and one victim was buried in Daljski Atar. …[39]

54. On 11 November 1991, members of the TO of SAO SBWS, under the command of Željko Ražnatović, arrested seven non-Serb civilians in the village of Klisa [a small village between Tenja and Dalj]. Two of the detainees who had Serb relatives were released. The remaining **five** civilians were taken to the TO training centre in Erdut. After their interrogation, the victims were killed and buried in a mass grave in the village of Ćelija. …[40]

…

64. Serb military forces, comprised of JNA, TO and volunteer units acting in co-operation with local and Serbian police staff and local Serb authorities, arrested and detained **thousands** of Croat and other non-Serb civilians from the territories specified in the following short- and long-term detention facilities: …

> (j) Police buildings and the hangar near the railway station in Dalj, SAO SBWS run by the JNA and TO, **hundreds** of detainees. …
>
> (l) Territorial Defence training centre in Erdut, also referred to as "Arkan's" military base, SAO SBWS, run by members of the TO and "Arkan's Tigers", approximately **fifty-two** detainees."

(4) Berak

5.27 The Respondent's summary, at paragraph 672, of the Applicant's case is factually inaccurate and incomplete. It is not correct that the Applicant alleged 4 cases of rape committed by the "White Eagles" paramilitary group. Three of the rapes were not alleged to have involved the "White Eagles" (although one was said to involved a Serbian police officer).[41] One victim, P.B.*,[42] described being subjected to a multiple and prolonged rape by numerous JNA reservists. In the Memorial, it was incorrectly stated that

[39] The names of the victims are set out in Annex 1 to the Indictment: Ivica Astaloš, Josip Bence, Pavao Bereš, Antun Kalozi, Nikola Kalozi, Nikola Kalozi, Ivan Mihajlev, Atika Palos, Franjo Pap, Mihajlo Pap, Josip Senaši, and Stjepan Senaši.

[40] The names of the victims are set out in Annex 1 to the Indictment: Jakov Barbarić, Tomo Curić, Josip Debić, Ivan Kučan, and Josip Vaniček.

[41] See the witness statement of M.H.*, Annexes, vol 2(I), annex 30.

[42] Memorial, Annexes, vol 2(I), annex 35.

the rapists were wearing "White Eagles" marks: the correct position is that they were JNA reservists. The summary then fails to include a number of references to torture, physical violence and abuse (regardless of age and gender) (Memorial, paragraphs 4.40, 4.41 and 4.42), forced labour (including requiring victims to dig their own graves) (paragraph 4.41) and forced exile of the Croat population involving the forced signing of statements declaring that they voluntarily gave up their property to the Serb authorities (paragraph 4.46). The killings the Respondent does refer to in its summary were often preceded by degradation and physical mutilation (paragraphs 4.42-43). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Berak.[43] This data confirms that 46 bodies have been exhumed from various sites in the area.

5.28 Again, at paragraph 674, the Respondent misrepresents the Applicant's case in an apparent attempt to find some basis to be critical of it. The Respondent asserts that "the Applicant's allegation that bodies of approximately 44 women, older men and children, who had been detained in the basement of D.P.'s 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. "The Applicant did not allege that all 44 people from the basement were subsequently found dead in the mass grave: the Memorial explicitly states that "Some of their bodies were eventually found in a mass grave…" (paragraph 4.41).

5.29 Similarly, the suggestion at paragraph 675 that "the Applicant failed to support its allegation about the 44 missing persons with any type of source" is misconceived where it is the Applicant's clear case that some of those missing persons were later discovered in the mass grave, evidenced by the (undisputed) exhumation record.[44] The Applicant has also subsequently obtained a contemporaneous, record from S.P., the Deputy Defence Commander of Berak (signed and stamped in his capacity as the head of Tompojevci municipality) of the 87 persons detained in Berak between 2 October and 13 December 1991, recording many of them as having been killed, raped, taken away or gone missing.[45] The document accords with the exhumation record for the mass grave, it also listing, for example, Janko Latković (a civilian) as having been killed (entry 7).[46] The document also lists 5 persons in a group taken away by Serb Forces and 9 others who were killed or hurt in Berak.

[43] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

[44] Memorial, Annexes, vol 2(I), annex 167.

[45] List of Persons from the Village of Berak Imprisoned in an Improvised Camp in Berak, Radićeva 6 in the Period Between 2 October 1991 and 13 December 1991, Annex 98. This document also corroborates the allegation that Kata Garvanović was killed: see Memorial, para. 4.40 and Counter-Memorial, para. 674.

[46] See also the entries in both documents for A./A.C. and M.M.

5.30 Equally, the Respondent asserts at paragraph 674 that the autopsy reports for many of the bodies lead to the reasonable inference that the deaths were "linked to combat activities." The Applicant does not understand the basis on which this assertion is made. Many of the victims are recorded as dying an "unnatural, violent death", with causes including explosive devices, gunshots and hard, blunt objects.[47] Some of the victims were females in their seventies. The suggestion that they died whilst participating in an armed conflict is untenable. Moreover, the Respondent has not advanced any positive evidence of there being an armed conflict or combat activities in Berak at the relevant time: it is the Applicant's (evidenced) case that there were no Croatian armed forces in the village when it was attacked and, despite JNA attempts to provoke an armed conflict, there was in fact no resistance (see paragraph 4.40 of the Memorial). Absent any evidence to the contrary, the Respondent's assertion is baseless and contrary to the obvious inference to be drawn from a mass grave containing the bodies of elderly females who had died unnatural and violent deaths.

5.31 It is of considerable significance that the Respondent does not challenge large parts of the Applicant's case in relation to Berak, including the 10 killings referred to at paragraphs 4.40-42 of the Memorial, and the assertion at paragraph 4.39 of the Memorial that the JNA was responsible for arming the local Serb forces or that the JNA was directly involved in the attack on Berak. The Respondent also does not challenge the specific record of exhumation for Berak (Annex 167).

(5) Bogdanovci

5.32 The Respondent's summary typically misrepresents the Applicant's case so as to create a basis for criticising it. The summary is factually incorrect and incomplete. The assertion that the killings the Respondent included in its summary occurred during the attacks on Bogdanovci is misconceived. Many of the victims were in fact civilians hiding in the basements of their houses during the attacks, only to be murdered by grenades which were thrown into the houses (Memorial, paragraphs 4.49, 4.52 4.54 and 4.55) or killed whilst trying to flee Bogdanovci (paragraphs 4.50 and 4.51). The Respondent then fails to refer to instances of torture and harassment (paragraph 4.53) and vast destruction of sacral objects and Croatian infrastructure (paragraph 4.48 and 4.55). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Bogdanovci.[48] This data confirms that 70 bodies have been exhumed from various sites in the area.

5.33 The Respondent also asserts at paragraph 680 that there is no evidence to support the assertion that 84 Croatian civilians were killed or disappeared.

[47] Memorial, Annexes, vol 2(I), annex 167.

[48] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

That overlooks the evidence from A.C. that her husband and 60 other men were taken and not seen again, and the exhumation of the mass graves in Bogdanovci, which now record 22 bodies, 21 of which were identified.[49]

5.34 Significantly, and notwithstanding its attempts to undermine the case presented by the Applicant, the Respondent does not dispute the presence or role of the JNA in the attack on Bogdanovci, as set out at paragraphs 4.48-55 of the Memorial.

(6) Šarengrad

5.35 The Respondent summarises the Applicant's case in an incomplete and inaccurate manner. At paragraph 683(a) it is suggested that there were 4 killings by mortar attack alleged by the Applicant. This overlooks the further killings of civilians who had been granted permission to exit Šarengrad during the mortar attack, only to be ambushed by Serb paramilitaries and killed (Memorial, paragraph 4.58). Similarly, civilians who were trying leave the area were captured by members of the Serb paramilitary groups and transported to the concentration camps in Serbia (paragraph 4.59). During the (undisputed) attack the JNA repeatedly fired at the local Catholic Church until it was completely destroyed (paragraph 4.57). The suggestion that the Applicant alleges only "one instance of rape and random beatings" is a gross understatement of the extent and nature of torture, physical and psychological maltreatment, humiliation and degradation visited on the remaining inhabitants of Šarengrad, including detention and forced labour (paragraph 4.60). The Croats that remained in the village had to wear white ribbons in order to distinguish themselves (paragraph 4.60). Croatian children were forced to attend Serbian school, where the education was based on the "Greater Serbian programme", write in Cyrillic letters and speak Serbian language (paragraph 4.60). The Respondent then omits to refer to the fact that on 26 March 1992 the remaining Croats were exiled after they were forced to sign statements that they were voluntarily leaving and were assigning all their property to the settled Serbs (paragraph 4.61). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Šarengrad.[50] This data confirms that 5 bodies have been exhumed from the Catholic Cemetery in Šarengrad.

5.36 Equally, the assertion of the Respondent at paragraph 685 is ill-conceived: "Even the Applicant's description of the events reveals that Croatian forces were engaged in the fighting in Šarengrad. According to the witness Ž.M., four out of six victims who were identified by the Applicant died as a result of a mortar attack." The fact that victims have died in mortar attacks is no indication whatsoever that they were engaged in fighting and it

[49] Memorial, Annexes, vol 2(I), annex 166.

[50] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

is not explained how this inference is drawn. As the Memorial makes clear, mortars were used to attack Šarengrad, killing civilians. Further evidence obtained by the Applicant confirms that Jule Saračević was killed by a mortar attack in Šarengrad on 4 October 1991.[51] The Applicant's (evidenced) case is, quite clearly, that the village was "seized … without resistance" (Memorial, paragraph 4.58). The Respondent has not adduced any evidence to counter that suggestion.

5.37 The Respondent correctly observes that conduct in Šarengrad was included in the Indictment of *Milošević*. The Applicant does not rely upon the fact of the Indictment in support of its case, but notes that the Respondent incorrectly states that Milošević was charged with destruction of homes and property: the actual charge was the crime against humanity of persecutions.[52]

5.38 Significantly, and notwithstanding its attempts to undermine the case presented by the Applicant, the Respondent does not dispute the presence or role of the JNA in the attack on Šarengrad, as set out at paragraph 4.58 of the Memorial.

(7) Ilok

5.39 The Respondent misrepresents the Applicant's case by suggesting, at paragraph 689(a), that there was a "voluntary exodus" of the Croat population from Ilok on 17 October 1991. It is very clear from the Memorial that it is the Applicant's case that the exodus was forced, and brought about by the conditions of life for Croat civilians in Ilok, caused by the Serb forces. The Memorial specifically asserts that "The local Croat leaders were concerned to avoid the degree of bloodshed that occurred in other areas" (paragraph 4.64) and that the exodus was "forced" (paragraph 4.66). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Ilok.[53] This data confirms that 38 bodies have been exhumed from various sites in the area.

5.40 Again, paragraph 689(b) of the Counter-Memorial is a gross minimisation of the extent of the ill-treatment inflicted on the Croat population of Ilok. The notion of "random beatings and maltreatment" does not encompass the random killings of Croats who would not leave their homes (Memorial, paragraph 4.66), the serious bodily and mental harm caused to Croats,[54] or the deliberate infliction of conditions of life intended to bring about the

[51] List of Civilians Fallen in the War of Independence before 17 October 1991, prepared by Mayor of the town of Ilok Stipan Kraljević, 7 November 1995, Annex 104.

[52] *Prosecutor v. Slobodan Milošević*, Case IT-02-54-T, Second Amended Indictment, 27 July 2004, para. 36(l).

[53] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

[54] See, for example, the Witness Statement of B.K., Memorial, Annexes, vol 2(I), annex 57.

destruction of the Croats that remained in the town, who were exposed to physical and psychological harassment, molestation, forced labour, constant robbery and groundless imprisonment (paragraph 4.66-4.70). Croats were compelled to undertake forced labour for days without any food or any compensation (paragraph 4.67) and their freedom of movement was severely curtailed (paragraph 4.70). The witness statement of J.B., dated 23 September 1993, sets out further details of the conditions of life in Ilok after the mass exodus.[55] J.B. describes being called an "Ustasha whore" on a daily basis. She also recalls the killing of Ms Lončar, a.k.a. Zika, who was burned alive in a field: her house was then inhabited by Serbs from Osijek. Furthermore, the record of Ilok Mayor Stipan Kraljević records a number of inhabitants of Ilok being killed in the period 1991-1995, several of whom died whilst carrying out forced labour.[56]

5.41 The Respondent notes that Slobodan Milošević was indicted for deportation or forcible transfer of at least 5000 inhabitants from Ilok, but again fails to recognise that the actual charge was one of crimes against humanity.[57]

5.42 Again, it is notable that the Respondent does not dispute the involvement of the JNA in the attack on Ilok, and in particular the involvement of the 1st Guard Proletariat Mechanised Division, as set out at paragraphs 4.64-66 and 4.71 of the Memorial.

(8) Tompojevci

5.43 The Respondent's summary (Counter-Memorial, paragraph 695) of the Applicant's case is again misleading. The Respondent refers to "random maltreatment" as a purported summary of the allegations of systemic, graphic and dehumanising ill-treatment of the Croat population of Tompojevci (Memorial, paragraphs 4.77 and 4.80), that included martial law being imposed, movement passes being introduced, and water supplies and electricity being cut off from the Croatian households, making daily life impossible. According to the witness I.B.: "We were living like prisoners in our own houses, as if we were not human. We were living in our village as prisoners in a camp without any rights at all." Serbian paramilitaries entered the houses to molest the inhabitants and threatened to kill them.[58] The local Catholic Church was completely devastated (paragraph 4.75). On 17 March 1992 the remaining population was expelled from the village while having to sign a statement that

[55] Witness Statements of J.B., Annex 2.

[56] List of Civilians Fallen in the War of Independence after 17 October 1991, prepared by Mayor of the town of Ilok, Stipan Kraljević, 7 November 1995, Annex 105.

[57] *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Second Amended Indictment, 27 July 2004, para. 36(k).

[58] Memorial, Annexes, vol 2(I), annex 64.

they were voluntarily leaving the village and leaving all of their property to the "SAO Krajina Government" (paragraph 4.80).

5.44 The Respondent also misrepresents the evidence of V.V., by asserting that his statement makes it "obvious that Croatian forces were engaged in fighting over Tompojevci." (paragraph 697). V.V.'s statement contains the following relevant passage: "during the whole period of occupation they were in Tompojevci, from the 3rd of September when the population was evacuated and the Croatian army stayed in Tompojevci until 10th of September when the Croatian army withdrew towards Ilok, Svinjarevci and Đeletovac because of the Chetnik impact. After that on the 10th of September the former JNA and the local Serbs with the Chetniks from Serbia entered the village. They state that those Chetniks from Serbia were from Mitrovica and Valjevo and from the inside of Serbia and the members of the former JNA were from the composition of the so-called Novi Sad Corpus."[59] There is no suggestion of actual armed conflict: on the contrary, the clear inference is that the attacks on Tompojevci commenced after the Croatian army had left on 10 September 1991.

5.45 The Respondent thereafter fails to engage with many of the substantive allegations made by the Applicant, including (significantly) the presence and role of the JNA in the activities at Tompojevci, as set out at paragraphs 4.74-76 of the Memorial. That conduct must, therefore, be taken to be admitted by the Respondent.

(9) Bapska

5.46 The Respondent characteristically minimises the allegations made by the Applicant, by simply omitting key parts of the conduct from its summary at paragraph 700. The Respondent fails to mention: the causing of serious bodily or mental harm to the Croatian population through the use of psychological, sexual and physical violence (Memorial, paragraphs 4.86-91) which on one occasion led to suicide (paragraph 4.88); deliberate infliction of conditions of life intended to bring about the physical destruction of the Croat population, including rapes (paragraph 4.90), and forced expulsion of the Croats accompanied with forced statements relinquishing their entire estates to "SAO Krajina" (paragraph 4.93); and destruction of sacral objects (paragraph 4.92). The Croat population was compelled to undertake forced labour, required to have special passes and their homes were marked with white ribbons (paragraph 4.87-88). Croatian family houses were systematically burnt and destroyed (paragraph 4.86). None of this conduct is adverted to, even less disputed, in the Respondent's Counter-Memorial. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Bapska.[60]

[59] Memorial, Annexes, vol 2(I), annex 62.

[60] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

This data confirms that 4 bodies have been exhumed from various sites in the area.

5.47 The Respondent asserts at paragraph 702 that the Applicant's statements "show that in the village of Bapska Croatian armed forces were engaged in heavy fighting with Serb forces and that both sides had losses." This is a significant distortion of the statement of F.K.,[61] which makes it very clear that the few Croatians who took up arms in defence of Bapska were vastly outnumbered and overcome by the weaponry used by the Serbian forces. J.K. states that "on 4 October 1991, the JNA started an artillery attack on the village. With short interruptions, the attack lasted until 14 October 1991, when tanks of the JNA came to the village. During the attacks, more than 1,000 missiles of different calibres hit targets in the village, whereby numerous houses, outbuildings and other buildings were damaged."[62] Moreover, the Applicant has recovered a copy of the ultimatum issued to the residents of Bapska by the JNA on 28 September 1991, which explicitly states: "Since inhabitants of your village were peaceful and did not cause any problems for JNA units so far, we believe there will be no problems in the future either. We are demanding the following from you...".[63] The Applicant has also obtained official records compiled by the Mayor of Ilok concerning civilians killed in the region during the relevant period.[64] Those records include entries for: Borislav Sabo, killed on 6 October 1991 by the JNA at the exit of Bapska towards Šid; Mato Josip Rumberger and Ivan Mijić, both killed on 14 October 1991 by Serb forces (JNA/army patrol) in Braće Radić Street; Zdravko Tustonjić, killed on 18 October 1991 by JNA forces at the entrance of Bapska, when returning from Šid.

5.48 The Respondent correctly observes that conduct in Bapska was included in the Indictment of Milošević. The Respondent incorrectly states, however, that Milošević was charged with destruction of homes and property: the actual charge was the crime against humanity of persecutions.[65] An application under Rule 98bis for judgment of acquittal was specifically refused in relation to this allegation.[66]

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[61] Memorial, Annexes, vol 2(I), annex 74.

[62] Memorial, Annexes, vol 2(I), annex 69.

[63] Ultimatum Issued to the People of Bapska, 28 September 1991, Annex 61.

[64] List of Civilians Fallen in the War of Independence before 17 October 1991, prepared by Mayor of the town of Ilok, Stipan Kraljević, 7 November 1995, Annex 104; List of Civilians Fallen in the War of Independence after 17 October 1991, prepared by Mayor Stipan Kraljević, 7 November 1995, Annex 105.

[65] *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Second Amended Indictment, 27 July 2004, para. 36(l).

[66] *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 116.

5.49 It is again notable that the Respondent fails to comment on or challenge the involvement of the JNA in the atrocities committed in Bapska, as set out at, for example, paragraph 4.84 of the Memorial.

(10) Tovarnik

5.50 The Respondent's summary at paragraph 705 of the Applicant's case overlooks several key aspects of the evidence. In particular, it makes no mention of causing of serious bodily or mental harm to the Croatian population through the use of psychological and physical violence: torture (Memorial, paragraphs 4.99, 4.101 and 4.106), castration preceding killings (paragraph 4.100); the deliberate infliction of conditions of life intended to bring about the destruction of the Croat population, including imprisonment (paragraphs 4.99 and 4.101), forced labour, "Serbianisation" of the culture, destruction of sacral objects and Croatian property (paragraph 4.98). The Croat population was subjected to restrictions on their movement and when they moved around the village they had to wear white rags around their arms (paragraph 4.106). It is also notable that the Serb authorities reached a decision that only 5% of the Croat population could stay in Tovarnik area and accordingly carried out mass expulsions (paragraph 4.105). After 95% of Croats were expelled from the village (December 1991) the newly settled Serbs continued to drive the remaining Croats out of the village by means of physical abuse and torture, until there were only 26 Croats left in the village by April 1992 (paragraph 4.106). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Tovarnik.[67] This data confirms that 56 bodies have been exhumed from various sites in the area.

5.51 The Respondent then selectively summarises the evidence of B.H.[68] (at paragraph 707), providing an entirely distorted account of his recollection. It is apparent from B.H.'s statement that the Croatians were significantly outnumbered by the Serb forces, whose artillery and weaponry they could not match. He describes the "second phase" of the occupation on 27-28 September 1991, during which there was "no organised resistance". The Respondent also asserts that the evidence does not support a general claim that 61 persons were killed in Tovarnik and that some witnesses do not comment on the manner in which the buried lost their lives (paragraph 708). M.P., a JNA soldier in 1991, states that "There were, in Tovarnik, corpses lying on a road and in yards. The burial of the dead wasn't allowed. I'll never forget the number of dead people – 48. I counted so many dead women, children and older men. I saw that killing with my own eyes."[69] It is very apparent from the context of the statements, in particular that of

[67] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.
[68] Memorial, Annexes, vol 2(I), annex 81.
[69] Memorial, Annexes, vol 2(I), annex 79.

M.D.,[70] that the people had been killed by Serb forces during the occupation. Any suggestion to the contrary is entirely un-evidenced by the Respondent.

5.52 The Respondent correctly observes that conduct in Tovarnik was included in the Indictment of *Milošević*. The Respondent incorrectly states, however, that Milošević was charged with destruction of homes and property: the actual charge was the crime against humanity of persecutions.[71] An application under Rule 98*bis* for judgment of acquittal was specifically refused in relation to this allegation.[72]

5.53 It is also highly significant that the Respondent does not directly challenge either the specific evidence of genocidal intent referred to by the Applicant (see for example, paragraph 4.95, in which it is noted that Milošević had told his soldiers that their task was to "kill and destroy everything Croatian", and paragraphs 4.97-98) or the involvement of the JNA in the attacks on Tovarnik (paragraphs 4.95, 4.97).

(11) Sotin

5.54 The Respondent omits, at paragraph 712, to properly summarise a number of the key allegations made by the Applicant: the suggestion that the beatings were random is not borne out by the evidence of a number of witnesses, who recall systemic and repeated abuse, beatings and torture (see, for example, Memorial, paragraphs 4.110-112); there were 3, not 2, rapes, one of which was a multiple rape (see paragraphs 4.110 and 4.113); Croats were required to carry out forced labour (paragraph 4.114); Croat houses were marked with white sheets and Croat civilians were required to wear white ribbons (paragraph 4.114);[73] and Croats were required to have passes in order to move around while curfew being imposed (paragraph 4.114). The JNA carried out targeted destruction of the local Catholic Church and Croatian property (paragraph 4.110). So extensive were the crimes committed in Sotin that at one point people were unable to go more than 500m from the area because of the smell of decaying bodies (paragraph 4.112). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Sotin.[74] This data confirms that 28 bodies have been exhumed from various sites in the area.

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[70] Memorial, Annexes, vol 2(I), annex 83.

[71] *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Second Amended Indictment, 27 July 2004, para. 36(l).

[72] *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 116.

[73] The witness, O.B., a Serbian national, corroborates the use of white sheets and ribbons to identify Croats: Witness Statements of O.B., Annex 3.

[74] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

5.55 The Respondent also grossly misstates the Applicant's evidence, asserting that Sotin was a village where heavy fighting took place on the basis that the "fighting lasted from 28 August to 14 October" (paragraph 714). The Memorial states: "The attack lasted from 29 August to the 14 October 1991 when Sotin was finally occupied. However, during that period no resistance was offered since the village was threatened with destruction if a shot was fired. The conduct of the JNA served little military purpose and can only be explained by a desire to inflict maximum damage on the local Croatian population." (paragraph 4.109). Further evidence from a Serbian witness confirms that there was no resistance by the Croat population of Sotin: M. O., a Serbian national, was enlisted in the JNA and formed part of the troops which attacked Sotin.[75] He recalls that "as they advanced along the said street they encountered no resistance and there was no fighting".

5.56 It is also highly significant that the Respondent does not directly challenge either the specific evidence of genocidal intent referred to by the Applicant (see for example, paragraphs 4.111) or the involvement of the JNA in the attacks on Sotin (paragraphs 4.108-110).

(12) Lovas

5.57 The Respondent's approach to the Applicant's case in relation to Lovas is highly surprising, in light of the fact that the Serbian authorities are currently prosecuting 14 individuals in the Belgrade District Court for numerous atrocities committed in Lovas during October 1991, including the mass killings of 68 civilians. The Respondent nonetheless elects to challenge details in the witness statements relied upon by the Applicant, without at any stage conceding that the preponderance of the allegations made therein are accurate. The Respondent goes so far as to say "The Applicant's allegation that, from 19 October until the New Year, 69 Croats were killed is not supported by any reliable evidence." The Respondent then immediately notes "However, fourteen accused are currently standing trial before the Belgrade District Court for the alleged killing of 68 Croat victims" (paragraph 720). The Respondent's approach to the Lovas allegations is typical of its stance on the factual issues more generally: even when faced with compelling evidence to the contrary, the Respondent maintains technical and insubstantial criticism of the case advanced by the Applicant. The weight of that criticism must be undermined by its repetition in relation to a location where the Serbian authorities themselves consider there to be a sufficient case to prosecute 14 individuals for war crimes, including the commission of 68 murders.

5.58 The allegations made in the Lovas Indictment concern essentially the same principal incidents referred to in the Memorial. In particular, the Indictment alleges that:[76]

[75] Witness Statement of M.O., Annex 18.

[76] Office of the War Crimes Prosecutor, District Court in Belgrade, War Crimes Chamber,

- The fourteen accused acted together in the commission of the crimes. Ljuban Devetak was the de facto leader of Lovas after it was occupied, and had almost unlimited power. Milan Devčić, Milan Radojčić and Željko Krnjajić all held significant posts in the local command structure. Miodrag Dimitrijević, Darko Perić, Radovan Vlajković and Radisav Josipović were members of the TO, subordinated to the 2nd Proletarian Guards Motorised Brigade of the JNA. Petronije Stevanović, Aleksandar Nikolaidis, Dragan Bačić, Zoran Kosijer, Jovan Dimitrijević and Saša Stojanović participated as members of "Dušan Silni", a volunteer armed group.

- The crimes were directed against the Croat civilian population of Lovas, which was unarmed, and carried out at a time when there were no Croat troops to protect them.

- On 10 October 1991, a group of volunteers organised by Devetak were armed by the TO and sent to attack Lovas. In an indiscriminate and unjustified attack, 21 civilians were killed and numerous civilian buildings were destroyed. The victims were: Mirko Grgić, Mato Adamović, Danijel Badanjak, Cecilija Badanjak Antun Jovanović, Anka Jovanović, Katarina Pavličević, Juraj Poljak, Josip Kraljević, Alojzije Polić, Mato Keser, Josip Poljak, Ivan Ostrun, Drago Pejić, Mijo Božić, Tomo Sabljak, Vido Krizmanić, Stipe Mađarević, Pava Đaković, Stipe Pejić, and Živan Antolović.

- After the village had been seized, a new local government was established and a number of informal orders were issued with the intention of discriminating against the non-Serb (predominantly Croat) population. As a result, humiliating and discriminatory measures were introduced, including marking houses with white towels, white cloths around the sleeves, forced labour under armed supervision and denial of freedom of movement.[77] Unlawful hauls, arrests and interrogations of civilians were conducted, resulting in the torturing and mutilating of the victims. Devetak also ordered numerous killings, including that of Snežana Krizmanić, in relation to whom he said to Aleksandar Nikolaidis to "take her away, fuck her and kill her". Twenty-seven victims were killed on the orders of Devetak and others. The victims were: Darko Pavlić, Željko Pavlić, Anton Luketić, Đuka Luketić, Petar Luketić, Alojz Krizmanić, Đuro Krizmanić, Andrija Devčić, Stipo Dolački, Marko Damjanović, Franjo Pandža, Ivan Vidić, Stjepan Luketić (all of whom had been held in detention), Slavica Pavošević, Jozefina Pavošević, Marija Pavošević, Ana Lemunović, Josip Rendulić, Božo Vidić, Marin Balić, Katarina Balić, Rudolf Jonak, Marija Fiser, Zoran Krizmanić, Josip Jovanović, Zvonimir Martinović, and Petar Rendulić.

Indictment against Ljuban Devetak et al., 28 November 2007, Annex 82

[77] See, for example, Lovas Community Council, Pass Permitting Movement for Đ. R., 19 October 1991, Annex 97.

- On 17 October 1991, the male civilians were gathered together and detained, before being tortured. It was then decided by the accused that the civilians should be used as human shields in exploring the local area, which was known to be mined. On 18 October 1991, approximately 50 civilians were taken to the village outskirts in a column. On the way, Boško Bođanac was killed because he had been so badly injured by previous beatings that he was unable to walk. The remaining civilians were forced to walk in a line, holding hands, shuffling through the clover field, dragging their feet to the left and right. One of the civilians, Ivica Kraljević, who had previously been heavily beaten, fell over a mine, triggering a number of explosions. A number of armed guards opened fire on the civilians. Twenty civilians were killed by the explosions and gunfire: Marijan Marković, Tomislav Sabljak, Darko Solaković, Ivan Palijan, Zlatko Panjik, Slavko Kuzmić, Ivan Sabljak, Mijo Šalaj, Ivan Kraljević, Petar Badanjak, Zlatko Božić, Antun Panjik, Marko Vidić, Luka Balić, Marko Sabljak, Mato Hodak, Nikola Badanjak, Ivan Conjar, Slavko Strangarević and Josip Turkalj.

5.59 The allegations in the Memorial and the Indictment are further supported by the television documentary, *"*Bloody Grape Harvest*",* produced by the Serbian Network, B92, which compiles a number of graphic and compelling interviews with witnesses and victims to the atrocities committed in Lovas.[78] One villager, Lovro Gerstner, gave the following description of the events of 18 October 1991:

> "They killed a man, I saw it myself. In front of me, some ten or so meters, a man fell to the ground, he had been stabbed and he fell to his knees and said that he cannot go on, one of the Chetniks kicked him, the men fell into a ditch and he then shot him. I saw it personally, when he was killed, there was a lot... I said we were not going to pick grapes, I saw that immediately. We entered the field, they positioned us diagonally and we had to rake the clover with our feet, we came there, there the mines were tied to little stakes, they asked us why we had stopped. We stopped because there were mines in front of us, and one of the Chetniks pushed Ivo Kraljević and he fell and the mines exploded. Now, I think not many, very few, even one is too much, were killed by the mines but those cowards were shooting us in the back with automatic rifles, I was shot in the leg."

Ivan Mujkić gives a similarly harrowing account:

> "We had to cover the whole width of the field, hold each other hand and walk down the entire field. Young clover covered the field and they ordered us to mimic the scythe with our legs while walking. They kept their distance, the distance from there, on this hill, little further down the road they had us in their gun sights and shouted that

[78] Excerpt of Transcript, "Bloody Grape Harvest", Serbian Television Documentary (B92 Network), July 2007, Annex 115.

> they would kill anyone who tries to run away. We reach the middle of the field where we stopped because we saw the mines. Out of the corner of my eye I saw a Chetnik approach the first man in the line and he fell down. As he was falling I threw myself backwards and then the explosions and shooting started, and we fell to the ground. When I fell I saw that I was wounded, I swiped with my hand under me and the hand came out bloody. Next to me was Zlatko Božić, he was having problems breathing, I asked him if he was all right -yes, are you -yes, and a few minutes later he was shouting to kill him and end his suffering a soldier approached him and killed him."

5.60 Aleksandar Vasiljević, the Serbian Chief of Security in the Federal Secretariat for National Defence from 1 June 1991 to 5 August 1992, gave detailed testimony in the Belgrade Military Court in 1999 in relation to allegations of war crimes in Eastern Slavonia, commenting in particular on Lovas:[79]

> "Colonel Petković and his team in Šid provided me with more extensive data, on 28 October 1991, regarding the acts of paramilitary squads of "Dušan Silni" and Arkan's units, the executions in the villages of Lovas and Tovarnik, which were mainly inhabited by Croatian population. "Dušan Silni" squad was at the time commanded by Ljubo Devetak in the village of Lovas. At the same time he was a commander of the village. I found out that he had sent some civilians to walk through the mine field. … According to the data I received, the civilians were forced to go through the mine fields by the members of "Dušan Silni" squad: Aleksandar Nikolaidis, Zoran Obrenović, Nikola Vuković, Zoran Kosijer, Dragan Bogić, Kosta Gvozdenov, Ljubodrag Jelić and Petronije Stevanović. … In addition, Petković informed me on that occasion that about 70 civilians were executed in the village of Lovas. … However, his checks established specifically for the area of Tovarnik that out of 35 people they sent to Tovarnik, only 5 of them were alive after a week and the rest of them were executed by the territorial units in Tovarnik, according to his information.
>
> In addition to Petković's check, he got confirmation of all these data from lieutenant on a battle ship, Somborac Marin, who was then serving in security organs of Kumbor and happened to be in the village of Lovas at the time, where his parents lived … . I learned about this from Petković; according to my records it happened on 28 October 1991 when I was in Šid and in the afternoon of the same day I returned to Belgrade to attend a meeting of the coordination team at the Serbian Ministry of Defense regarding the agreement on mutual exchange of information about on the situation in the field. Attendees present in the building of the Serbian Ministry of Defense

[79] Witness Statement of Aleksandar Vasiljević, Annex 26.

included general Simović Milan, Minister of Defense of the Republic of Serbia who chaired the meeting; general Đokić, commander of the Serbian territorial defense; Zoran Sokolović, Minister of Interior; Zoran Janaćković, who was at the time the Chief of National Security Service of the Serbian Ministry of Interior; general Kuzmanović from the Serbian Ministry of Defense and Deputy Minister of the National Defense of Serbia. … . I informed all the attendees of the actions and behaviour of paramilitary troops which I learned from colonel Petković in Šid … warning them that Arkan's troops also participate in these activities and that the Serbian Ministry of Interior should take measures to relegate all these troops from the combat zone of JNA units. Zoran Sokolović then said that he did not know who Arkan was and all my information and warning were turned a blind eye on.

I added that what they were doing in the villages of Lovas and Tovarnik was worse than what Germans did during World War II, when they retaliated on the civilian population, whereby they adhered to some rules of their own, including taking hostages, making lists of their names, issuing orders about their execution and shooting them. I pointed out that Germans killed civilians, but did not cut off the victims' fingers to take their rings. It was due to this fit of mine at that meeting that I later got a nickname of "a Swabian from Kragujevac" by some of them. I compiled a notice of all these findings and sent it to the top military commanders." (emphasis added)

5.61 Aleksandar Vasiljević's testimony leaves no doubt that the Serbian military and civilian command was fully aware of and endorsed the atrocities committed by the paramilitary forces, operating in coordination with the JNA, throughout Eastern Slavonia. It is of note, of course, that the Respondent does not directly dispute the involvement of the JNA in the atrocities committed in Lovas (see Memorial, paragraphs 4.116-132). Nor does the Respondent dispute the commission of the other sets of killings committed in Lovas, which they summarise at paragraphs 717(a)/(b) of the Counter-Memorial.

5.62 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Lovas.[80] This data confirms that 84 bodies have been exhumed from various sites in the area.

(13) Tordinci

5.63 The Respondent's summary of the Applicant's case is characteristically misleading. The Applicant's case is not that 11 civilians were killed on 25 October 1991, but that "During the occupation 11 Croatian inhabitants of Tordinci were killed." (Memorial, paragraph 4.135). The witness, T. R., describes in detail the ongoing attacks against Tordinci, and states

[80] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

"During these combat actions of various Serbian paramilitary formations and the so-called JNA at Tordinci, the following local people from Tordinci were killed… ". He then lists the names, dates of birth and addresses of 11 victims. The suggestion at paragraph 724 of the Counter-Memorial that he does not offer any information as to "how, under what circumstances or by whom they were killed" is misconceived. It is patently apparent from the witness's account that the victims were killed by Serb forces during the attacks on Tordinci. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Tordinci.[81] This data confirms that 40 bodies have been exhumed from various sites in the area.

5.64 It is again notable that the Respondent does not dispute the involvement of the JNA in the activities at Tordinci, as set out at paragraphs 4.134-135 of the Memorial. The Applicant has subsequently obtained a statement taken in 1995 from M.M., who completed compulsory military service in the JNA between 15 June 1991 and 12 May 1992. His unit was stationed in Osijek and participated in combat actions in Tenja, Ernestinovo, Laslovo and Tordinci.[82]

(14) Vukovar

5.65 Both the ICTY and the Belgrade War Crimes Chamber have rendered numerous convictions of Serbian defendants for the atrocities committed at Ovčara, Vukovar. Whilst those convictions do not, inevitably, encompass the full extent of the crimes committed in Vukovar, they do represent an illustration of the extent and gravity of the atrocities visited upon the Croat population by the Serb forces. The Respondent's attempts to minimise the significance of the findings of the ICTY in its Counter-Memorial cannot detract from the compelling evidence in support of the Applicant's case that those convictions provide. Notwithstanding this, the Respondent continues to dispute the severity of the attacks on Vukovar, and its responsibility for the same. It repeatedly seeks to rely on the failure of the ICTY Prosecutor to indict for particular crimes in relation to particular incidents in Vukovar as an evidentially probative point. That reliance is addressed in general terms by the Applicant in Chapter 2, paragraphs 2.25-33. For present purposes, it is prescient to note the ICTY Trial Chamber's own comments at the outset of its judgment in *Mrkšić et al* on the extent of the atrocities committed in Vukovar and the limited nature of the Indictment it was considering:

> "The Indictment is confined to the events mentioned above. It does not include the attack directed against the city of Vukovar and its civilian population by the JNA and other Serb forces in 1991. The devastation brought on Vukovar over the prolonged military engagement in 1991, the very many civilian casualties and the extensive damage to

[81] *Ibid*..

[82] Witness Statements of M.M., Annex 16.

> property resulting from the military operations are not the subject of the Indictment. As a result, the Chamber cannot enter a finding of guilt in respect of those events."[83]

5.66 Again, the Respondent provides a misrepresentative and incomplete summary of the Applicant's case at paragraph 727 of the Counter-Memorial. By way of example, it asserts that the Applicant's case is that there were 529 people killed in the fighting between Croatian and Serb forces in the battle for Vukovar and the suburb of Sajmište: paragraph 727. That is incorrect: the Memorial makes it quite clear that the killings happened during the "siege" (paragraph 4.152) and the "occupation" (paragraph 4.153). This deliberate mischaracterisation of the Applicant's case is then used to provide a false foundation for the assertion subsequently made 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 [sic] of Croat victims died as a result of the fighting." (Counter-Memorial, paragraph 744).

5.67 In accordance with the Respondent's attempts to portray the Applicant's case as consistent with legitimate military targeting, it also elects to ignore the repeated accounts of torture, beatings and dehumanising treatment set out in the evidence. Accordingly, the summary at paragraph 727 makes no mention of, for example, the various forms of torture referred to in relation to Borovo Naselje, at paragraph 4.162 of the Memorial. Considerable caution must be exercised when reading the Respondent's summaries of the Applicant's case.

5.68 Having summarised the case in this way, the Respondent elects to specifically challenge only very limited parts of the evidence relied upon by the Applicant: the Applicant's Memorial sets out the atrocities committed in Vukovar over 27 pages; the Respondent's Counter-Memorial contains just 6 pages in response. The Applicant does not reiterate in this Reply all the evidence relied upon in the Memorial, but addresses those particular points raised by the Respondent and sets out the new evidence obtained since 2001.

Sajmište

5.69 The Respondent notes that the Applicant claims that there are several accounts of Croats being crucified, when it is apparent that the witnesses are in fact referring to the same victim: Counter-Memorial, paragraph 730. The Applicant accepts that there was a mistranslation of its Memorial, resulting in an error at 4.157 of the English version. The original Croatian language Memorial correctly states that "several witness statements speak of a Croat being crucified".

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[83] *Mrkšić et al*, para. 8.

Mitnica

5.70 The Respondent again attempts to characterise the events in Mitnica as being part of the heavy fighting between Croatian and Serbian forces: Counter-Memorial, paragraph 731. It is very clear from the Applicant's witness statements that, whilst there was some limited defence mounted by the Croat population, the Serb forces quickly overcame the Croat defenders so that the area was essentially under occupation.[84] That this is correct is borne out by the findings of the ICTY in *Mrkšić et al*:

> "A large number of JNA, Territorial Defence Units ("TO") and paramilitary units, including Serb volunteers took part in the battle for Vukovar on the Serb side. … By the end of September 1991 the number of JNA troops had increased considerably. The evidence indicates there were then some 15,000 JNA soldiers in the larger Vukovar area. …
>
> On the Croatian side there were the locally based Territorial Defence and members of the Ministry of the Internal Affairs ("MUP"), the National Guard ("ZNG") and a small number of a newly created Croatian defence force. … Eventually, by the height of the siege, the number of Croat combatants may have reached 1,700-1,800. …
>
> There were dramatic differences between the military capacities of the opposing forces. The JNA was an extensively equipped and trained military force and was in far superior numbers. The Serb TO, paramilitary and other volunteer elements were all equipped and armed. Available to the Serb forces in large numbers was a full range of military weaponry, including automatic infantry rifles, other automatic weapons including machine-guns, rockets (including hand-held and multilaunchers), heavy and light mortars, artillery and land mines. They had armoured vehicles including armoured personnel carriers (nearly all mounted with heavy machine-guns), tanks both old (T-33) and new (M-84).88 They also had anti-aircraft batteries and an air force armed with a range of ground attack weapons including bombs up to 250 kg,89 all of which were used in the attack on Vukovar. Naval forces on the Danube were also used.
>
> By way of stark contrast, not only were the Croatian forces very significantly less numerically and mostly ill-equipped and untrained, but for the most part they had only light infantry weapons. Indeed many were only armed with personal hunting rifles. Some shared weapons, although gradually the Croatian forces gathered weapons. These were bought, sometimes from neighbouring countries, and

[84] Memorial, Annexes, vol 2(I), annexes 132 and 133.

> weapons were seized from JNA barracks in Croatia. While, during the siege, the Croatian forces had mostly infantry weapons, they did acquire some mortars and one or two anti-aircraft guns. They also used mines, most of which were made in improvised facilities. They captured two JNA tanks during the fighting. They had also two or three cannons."[85]

5.71 The suggestion at paragraph 731 that many of the victims were killed in shelling is no answer to the Applicant's case: shelling is equally capable of being a method of committing genocidal acts. Indeed, the ICTY specifically noted that many civilians were killed in the shelling of Vukovar.[86] Also at paragraph 731, the Respondent asserts that the statement of M.M. was taken by Croatian Police whilst M. was in custody and is therefore only of *"*limited evidentiary value*."* The Applicant does not understand the foundation for this criticism: if it is suggested that the statement was obtained under duress, then the Respondent must evidence that assertion. Moreover, the evidence given by M. is consistent with the other evidence relied upon by the Applicant. There is no basis for the Respondent's criticism. It is of considerable note that the Respondent does not elect to challenge the events which occurred after the fall of Mitnica, as set out in the Memorial at paragraph 4.158, including the genocidal activities of the Serb forces.

Borovo Naselje

5.72 The Respondent asserts that the witness statement of K.O. reveals that the 7-8 people killed in the attack on the Commerce building in fact died in fighting between Serbian and Croatian forces. That is demonstrably false. There is no mention of any fighting in the statement of K.O. On the contrary, he gives an account of elderly people and children taking shelter in the building, before it was attacked using tanks and tear gas: "On the night between the 18th and 19th they (I do not know who or from where) blasted the corner of the Komerc building that we were in and they let in tear-gas. Many people were killed there (I do not know whether they were female or male). I saw seven or eight bodies. They attacked Komerc with tanks. … I do not know how many tanks there were or from what side they were firing. I heard them shouting: 'Pass the hose!' Anyone who knew what was going on, he/she saved himself/herself from the tear-gas. The elderly women were crying. A young man threw out a cloth or towel as a sign of our surrender. …"[87]

Central Vukovar

5.73 The Respondent again overstates its criticisms of the Applicant's evidence. By way of example, it asserts that the statements produced by the

[85] *Mrkšić et al*, paras. 39-42.
[86] *Ibid.,* para. 36.
[87] Memorial, Annexes, vol 2(I), annex 139.

Applicant 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." (Counter-Memorial, paragraph 735). This is to be contrasted with, for example, the evidence of Vladimir Obleščuk, who sets out the precise circumstances of the killing of his elderly (civilian) mother in her house on 14 September 1991:

> "That day, in Petrovača Street, 67 persons were killed … They were all civilians. My mother was among them. She was born in 1926. She was cooking dinner for my father and herself. Three men entered the yard. One of them stayed with my father in front of the house. The other two entered the house and started shooting at objects. Simo Samaradžija, who used to work as janitor in the hospital, shot my mother in the temple. When she fell, the other one fired from a rifle at her. She was left there between the table and the stove."[88]

Velepromet

5.74 The ICTY in *Mrkšić et al* made it very clear that it was considering only a very limited part of the atrocities committed in Vukovar: see above, paragraph 5.65. It went on to specifically comment on the Velepromet crimes:

> "Also, acts of mistreatment and killings of detainees at the Velepromet facility on 19 November 1991, are not the subject of the Indictment, While the crimes alleged to have been committed there are referred to in the Indictment, this is only to demonstrate the Accuseds' knowledge of instances of abuse similar to those that are alleged to have occurred at the JNA barracks and the Ovčara farm. The Chamber cannot, therefore, enter a finding of guilt in respect of events at the Velepromet facility."[89]

5.75 It is accordingly wholly inappropriate for the Respondent to rely (at paragraph 738 of the Counter-Memorial) upon the ICTY's limited comments on Velepromet as evidencing the full extent of the criminal activity the ICTY considered to have occurred at that site. As the judgment makes clear, the consideration of Velepromet was undertaken for the sole reason of evidencing the accuseds' knowledge of abuse, not to establish the number of victims. The Trial Chamber judgment itself acknowledges that "Acts of mistreatment occurred at Velepromet on 19 November 1991. They will be described briefly because events at Velepromet are not charged as offences in the Indictment."[90]

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88 Memorial, Annexes, vol 2(I), annex 132. See also the accounts in annexes 117 and 155.
89 *Mrkšić et al*, para. 8.
90 *Mrkšić et al,* para. 163, emphasis added.

5.76 Moreover, it is highly misleading to suggest that the Trial Chamber found it established that only 15 people had been killed at Velepromet (Counter-Memorial, paragraph 738), and to rely upon this as demonstrating "how exaggerated the Applicant's claims that 350 people were killed at Velepromet actually are." The ICTY made no factual finding as to the precise number of people killed at Velepromet. It referred to accounts from witnesses of many people being taken off and not returning, or of being killed. It commented on the number of bodies found in one mass grave. But its conclusion specifically left open the number of people who were shot dead:

> "In the finding of the Chamber, on 19 November 1991 some hundreds of non-Serb people were taken from the Vukovar hospital and transferred to the facility of Velepromet by Serb forces. Others arrived at Velepromet from elsewhere. At Velepromet these people were separated according to their ethnicity and suspicion of involvement in the Croatian forces. The Chamber finds it established that interrogations of some of these people were conducted at Velepromet in the course of which the suspects were beaten, insulted or otherwise mistreated. A number of them were shot dead at Velepromet, some of them on 19 November 1991. The Chamber finds that many, if not all, of the persons responsible for the brutal interrogations and killings were members of the Serb TO or paramilitary units."[91]

5.77 The Respondent has also elected to approach the Applicant's evidence in a disjointed and artificial manner. The assertion that the witnesses do not support the Applicant's case that 350 people were killed at Velepromet is incorrect. The Applicant refers to a number of witnesses whose accounts corroborate the case that a high number of people were killed: see, for example, M.L., who witnessed 38 executions and stated that "the entre night people were taken out and executed."[92] The Applicant also relies on the witness statement of V.Š. who was detained at Velepromet and states that "At least 350 persons were killed in 'Velepromet', and they were buried, if one can say so, in the brick factory in Vukovar."[93]

Vukovar Hospital and Ovčara Farm

5.78 The Respondent does not address in any detail the findings of the ICTY in *Mrkšić et al* or the findings of the Belgrade War Crimes Chamber in the Ovčara case. Nor does the Respondent challenge any of the factual assertions made by the Applicant specifically in relation to the Vukovar Hospital/Ovčara Farm massacre. In those circumstances, the Respondent must be taken to accept the case as presented by the Applicant on these incidents.

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[91] *Mrkšić et al*, para. 167, emphasis added. The Applicant has also obtained further witness statements to the recording similar accounts of the ill-treatment at Velepromet: witness statements of S.S. and V.Š., Annexes 25 and 23.

[92] Memorial, Annexes, vol 2(I), annex 147. See also, annexes 121 and 123.

[93] Witness Statement of V.Š., Annex 23.

5.79 The ICTY Trial Chamber convicted Mrkšić of the war crimes of murder, torture and cruel treatment, sentencing him to 20 years imprisonment. The convictions and sentence were upheld on appeal. Šljivančanin was convicted of the war crime of torture and sentenced to 5 years imprisonment, increased on appeal to 17 years.[94]

5.80 The ICTY made detailed findings about the events at Vukovar Hospital and Ovčara Farm. Those findings are, in essence, the same as the case asserted by the Applicant. By way of example, the Applicant sets out below some of the key findings of the Trial Chamber concerning Ovčara Farm and the involvement of the JNA in the same:

> "The buses arrived at Ovčara on 20 November 1991 between 1330 and 1430 hours. They were emptied one by one. The prisoners of war were released from each of the buses in groups of five to six and every second or third prisoner of war was questioned by the soldiers about their activities in Vukovar. The prisoners of war were then stripped of their personal valuables; their money and jewellery was taken away while their IDs and other personal belongings were thrown in a ditch. Then they had to pass between two rows of soldiers, about 10 to 15 on each side, who were beating them severely as they passed through. The soldiers beat the prisoners of war using wooden sticks, rifle-butts, poles, chains and even crutches. They were also kicking and punching the prisoners of war. The gauntlet was about eight to 10 metres long. Everyone from the buses, except for four persons, had to go through the gauntlet and was heavily beaten. It took approximately 15 to 20 minutes to unload each bus. After passing through the gauntlet some prisoners of war were further individually interrogated and mistreated. Serb paramilitaries and TO members participated in the gauntlet. Individuals among them were recognised and have been identified in evidence. Witnesses saw Slavko Dokmanović the minister of agriculture in the "government," by this time wearing a JNA uniform. Some regular JNA soldiers in uniform may also have participated in the gauntlet. The JNA military police of the 2MP/gmtbr, who had provided the security on the buses, stayed on the buses while the men were made to run the gauntlet. At the hangar there were also 15-20 JNA soldiers who were securing the area. A witness described the soldiers around the hangar as JNA military policemen wearing olive-drab JNA uniforms with white belts. Other evidence, specifically considered elsewhere confirms that these were military police of the JNA 80 mtbr. No one tried to stop those who were hitting the prisoners of war ...
>
> Inside the hangar the beatings continued. The atmosphere was miserable. There were about 200 people from the buses and at least 40

[94] *Mrkšić et al*, Appeals Chamber Judgment, 5 May 2009.

> Serb soldiers including paramilitaries, TO members and JNA soldiers. … The prisoners of war had to lean against the wall with their arms up and their legs spread. Some were hit with iron rods and rifle-butts and kicked. The evidence was specific about a number of prisoners of war, including the following. Siniša Glavašević, a Radio Vukovar journalist, was severely beaten with rifle-butts, iron bars, rods, chains and police truncheons by several soldiers. Damjan Samardžić was punched, he fell to the ground and was beaten by five or six soldiers. He was beaten so badly that after two hours he still could not move. Kemal (Ćeman) Saiti was also beaten particularly badly. A paramilitary soldier grabbed him by the hair and banged his head several times against the concrete floor so severely that witnesses thought that he died there from the injuries caused during the beatings. …
>
> Witnesses testified that one man whose dress and general appearance indicated he was a TO member, despite the evidence of one witness that he was a JNA officer, blew a whistle at intervals at which sound the soldiers who were doing the beatings left and other soldiers came in to the hangar to continue the beatings. …
>
> In the Chamber's finding, in the evening and night hours of 20/21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 2100 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later."[95]

5.81 Subsequent to the findings of the ICTY, the Belgrade War Crimes Chamber has handed down convictions for war crimes for 13 defendants concerning the Ovčara Farm massacre, with sentences ranging between 6 and 20 years' imprisonment. The convictions have been upheld on appeal to the Supreme Court.

5.82 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Vukovar.[96] This data confirms that 1260 bodies have been exhumed from various sites in the area.

(15) Conclusions

[95] *Mrkšić et al.*, paras. 215-253.

[96] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, paras. 5.12-13, supra.

5.83 At the outset of this Chapter, the Applicant asserted that the Respondent's Counter Memorial followed a consistent pattern which was deficient in a number of material aspects (see paragraph 1, above). Those deficiencies have been repeatedly borne out in this Chapter by critical analysis of the Respondent's submissions on particular geographical areas. The Respondent:

- Provides selective and misleading summaries of the Memorial;
- Makes sweeping and legally unmeritorious criticisms of categories of evidence;
- Ignores many significant parts of the Applicant's case;
- Distorts the ICTY case law; and
- At no point advances any positive case on the allegations made by the Applicant nor adduces any of its own evidence.

5.84 By contrast, the Applicant has adduced detailed evidence for each geographical area, submitted with the Memorial and with this Reply, setting out the pattern of killing, rape, torture, detention, degrading and derogatory treatment, restriction of movement, food and medicine deprivation, looting, expulsion and that occurred in the region. That evidence conclusively establishes that the Serbian forces conducted a coordinated, systematic and widespread attack upon the Croat population of Eastern Slavonia, with the intent to destroy that part of the Croatian ethnic group. In the territory of Eastern Slavonia as a whole, the population ratio prior to the occupation was 70.24% Croat, 17.13% Serb and 12.6% other ethnic groups; by 1993, after the occupation, the Croat population had dropped to 2% and the Serb population increased to 97%.[97] Those statistics are themselves compelling evidence of the extent and impact of the Serbian attack.

[97] Memorial, paras. 4.3.-5.

CHAPTER 6

GENOCIDAL ACTIVITIES IN THE REST OF CROATIA

INTRODUCTORY REMARKS

6.1 In this Chapter, the Applicant responds to paragraphs 749-931 of Chapter VII of the Counter-Memorial, concerning the genocidal activities which took place in Western Slavonia, Banovina, Kordun and Lika, and Dalmatia. The Applicant's Preliminary Observations at paragraphs 5.1-13 of Chapter 5 apply equally to this Chapter. As the Applicant concluded in Chapter 5, the Respondent provides selective and misleading summaries of the Memorial, makes sweeping and legally unmeritorious criticisms of categories of evidence, and at no point advances any positive case to meet the allegations made by the Applicant. The Respondent's reliance upon the ICTY case law decided since the Memorial is distorted and the Respondent provides no evidence whatsoever to undermine the Applicant's case.

SECTION ONE: WESTERN SLAVONIA

(1) Municipality of Pakrac

6.2 The Respondent's summary, at paragraph 749, of the Applicant's case on the atrocities committed in Pakrac municipality omits to mention anything other than the murders detailed in the Memorial (paragraphs 5.17, 5.18, 5.19, 5.21, 5.22, 5.27). It does not, for example, mention the raping (paragraph 5.17), torturing and physical mutilation (including castration and injection of poisons) (paragraph 5.27). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Pakrac Municipality.[1] This data confirms that 31 bodies have been exhumed from various sites in the area.

6.3 The Respondent asserts that the Applicant's reliance on Annex 240, "Dead Civilians in the Former Municipality of Pakrac", is inadequate because it does not contain sufficient information about the circumstances in which the victims died: Counter-Memorial, paragraphs 751 and 753. The list itself contains short summaries of the relevant information for each entry and serves to corroborate the witness statements relied upon by the Applicant, which set out in some detail the circumstances in which a number of those on the list died. For example:

- The killings of Marijan Svjetličić ("Jumbo") and Ilija Turković (entries 85 and 86 in Annex 240) are set out in the following witness statements:

[1] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

i. I.B.: "… at the end of August 1991 Gaja Ratković captured Marijan Svjetličić from Pakrac and Ilija Turković from Pakrac in their houses and he took them in his personal car, "Zastava-750" brand, to Bučje where they were locked up in the police station. The other day he heard that both of them died of the consequences of constant beating. Jovo Vezmar from Pakrac was the police station commander in Bučje at that period and a certain Siniša from Ožegovac and Đuro were the guards known as bullies. He also saw that Vlado Pavlica from Pakrac worked in the police and that he had a catering establishment in the complex of his house in Pakrac before the incidents of war began. He heard that Marijan Svijetličić and Ilija Turković were buried in Bučje, near Cikoška Rijeka."[2]

ii. S.V.: "He doesn't know when, but he knows that, on one occasion, Ivo Rogulić and Gaja Ratković captured Ilija Turković and a person whose nickname is "Jumbo", both are from Kusonje, and that they drove them in the direction of Bučje."[3]

iii. V.S.: "ILIJA TURKOVIĆ – from Pakrac, was brought into Kusonje as well as V.M. and B., and GAJA RATKOVIĆ from Kusonje (… Street) brought him in and IVO ROGULIĆ from Rogolj, who had a house in Kusonje. …Ratković and Rogulić said that Turković had to go to the prison in Bučje, and that he should be mentioned for liquidation. S. claims that during that conversation Turković wasn't beaten, and in the event that he was molested that was probably in Bučje, but he doesn't know anything about it. The above mentioned Ratković and Rogulić said that he died during the process."[4]

- The killing of Lazo Grubinić (entry 69 in Annex 240):

i. H.H.: "On the 5th day of the massacre, he heard from his neighbours from Pakrački vinogradi, that Milan Kovačević and Nenad Bojić massacred Anton Pavić, Ivo Nađ, Ivo Šmit, his wife Zdravka and grandson Zoran and Lazo Grubinić the same way they massacred the above mentioned."[5]

ii. I.B.: "Bajić and Milan Kovačević called "Sikirica" killed Lazo Grubinić in his house in Pakrački Vinogradi. They shot him and hit him most probably with the blunt end of an axe on the head so he had a stab wound on the neck in the throat area. His

[2] Memorial, Annexes, vol 2(II), annex 177.
[3] Memorial, Annexes, vol 2(II), annex 184.
[4] Memorial, Annexes, vol 2(II), annex 185.
[5] Memorial, Annexes, vol 2(II), annex 175.

> wife M. saw the attack on her husband, Lazo, so she immediately went on the road and ran to his (I.B.) place where R. B. from Pakrac and B.v. from Pakrački Vinogradi were and she told them what had happened so they immediately went to Lazo's house. They found Lazo Grubinić on the threshold of his house, murdered."[6]

iii. J.P.: "He states that in October 1991 he got an order from Stevo Kojadinović to perform a checkup on Milan Kovačević called "Sikirica" connected with the massacre of the Croatian families that "Sikirica" did and the witness had to find out if "Sikirica" "cracked up" and if there was any danger of him killing another of the neighbors. The check up was performed after Milan Kovačević was released from the Bučje prison, that is after the executed massacre. He found Milan Kovačević in his house in Pakrački Vinogradi together with his wife and he asked him "How did you begin to kill" and he answered that Lazo Grubinić (the butcher) provoked him and that he kept on turning the tractor on and off and in that way he gave the signals to the other side (the Croatian police) and then the shelling would start. When he asked him how many people he killed he said that he killed about five people. He said that one of the reasons he killed Lazo was that Lazo was their connection so he had to liquidate him the same way as he liquidated the others – chopping them with an axe."[7]

6.4 The Respondent asserts at paragraph 752 that only four witnesses have direct knowledge in relation to the murders. The Respondent fails to note that the same witnesses (A. and S.P.) give considerable further evidence about the circumstances which seem very likely to have caused the death of Anton Pavić on the night of 3-4 November 1991:

> "At night on 3rd/4th November 1991, around midnight, they heard banging at B.D.'s doors and then Bojić and Kovačević broke into the house. In the house then slept A., S. and A.P., B.D. and L., and their daughter L.Š. with her two

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[6] Memorial, Annexes, vol 2(II), annex 177.

[7] Memorial, Annexes, vol 2(II), annex 178. Further examples of the list at annex 240 corroborating the accounts given in the Applicant's witness statements can be seen in relation to: List Entries 43, 45, 46 and 47 corroborating the Witness Statement of N. M., Annexes, Vol 2(II), annex 212; List Entries 41, 43, 44, and 47 corroborating the Witness Statement of V.G., Annexes, Vol 2(II), annex 214; List Entries 58 and 59, corroborating the Witness Statements of M.Z. and M.V., Annexes, Vol 2(II), annexes 179 and 180; List Entries 60, 64, 65, 66, 67, 68 and 70 are corroborated by the Witness Statements of A.P., S.P., H.H. and I.B., Annexes, Vol 2(II), annexes 173, 174, 175 and 177. See also, the further corroboration for List Entries 41, 43, 44, 45, 46, 47, 48, 49, 50 and 51 provided by "List of Killed Persons", Annexes, Vol 2(II), annex 241.

> children N. and I. … Wrestling and a fight began. Using the moment, S., A., L., S., I. and L. escaped from the house. A., B.D., Kovačević and Bojić stayed in the house. Those who escaped set off towards Pakrac, but they ran into a barricade of the terrorists. They asked the terrorists to let them pass to the territory under the command of the Croatian Army, but those did not let them. They asked the terrorists to stop torturing them and to kill them, because they could not endure any more of the above stated molestations. The terrorists sent them to the temporary terrorist HQ in 40th Divizija Street in Pakrac. There they spent eight days. … On their way to Bučje, S. and A. stopped by D.B.'s house … they noticed a big splash of blood in the room where the fight was. In the backyard they saw a freshly dug grave and they think that their husband, that is father A.P. was buried there. They asked the terrorists to tell them where A. was, and to dig the grave. They did not let them do that. …."[8]

The evidence of A. and S. P. is further corroborated by H. H.[9] and I.B.[10]

6.5 The Respondent asserts, at paragraph 752, that the statement of M.K. is so short that it lacks most of the basic information about the events it refers to. The Respondent's criticism is based on an artificial consideration of the K. statement in isolation from the other evidence available about the events in Pakrac. In particular, the statements of S. V.[11] and Ž.L.,[12] both Serbian paramilitaries, give detailed accounts of numerous Croats being tortured and killed in Kusonje.

6.6 Furthermore, the availability of statements from Serbian armed forces corroborating the incidents of torture and murder in Pakrac[13] undermines the Respondent's complaint that the list of 'Dead Civilians in the former municipality of Pakrac' (Annex 240) is not supported by evidence emanating from an independent (non-Croat) source (Counter-Memorial, paragraph 754). This general criticism is addressed in Chapter 2, at paragraphs 2.55-57. The Applicant does not understand the Respondent's assertion that the statements of the perpetrators were taken by Croatian police without the involvement of judicial organs and are therefore inadmissible (paragraph 752). If it is the Respondent's case that the statements were obtained under duress, then the Respondent must evidence that assertion. Moreover, the evidence given by the Serb witnesses is consistent with the other evidence relied upon by the Applicant. There is no basis for the Respondent's criticism.

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[8] Memorial, Annexes, vol 2(II), annex 173; see also annex 174.
[9] Memorial, Annexes, vol 2(II), annex 175.
[10] Memorial, Annexes, vol 2(II), annex 177.
[11] Memorial, Annexes, vol 2(II), annex 184.
[12] Memorial, Annexes, vol 2(II), annex 183.
[13] In addition to annexes 183 and 184, see also annexes 172, 177, 178 and 182.

6.7 It is also notable that the Respondent fails to comment on or challenge the involvement of the JNA in the atrocities committed in Pakrac municipality, as set out at, for example, paragraphs 5.15, 5.17 and 5.26 of the Memorial.[14]

(2) Municipality of Podravska Slatina

6.8 The Respondent's summary of the Applicant's case fails to mention, even less dispute, key aspects of the allegations in relation to the Podravska Slatina municipality, including: rape, torture and physical abuse (Memorial, paragraphs 5.30, 5.33, 5.34, 5.39, 5.43); deliberate infliction of conditions of life intended to destroy the Croat population, such as food rationing (paragraph 5.30), denial of medicines (paragraph 5.30) and forced labour (paragraph 5.31); restrictions on religious practice and the use of the churchyard to bury ethnic Croats (paragraph 5.32) and destruction of sacral objects (paragraphs 5.35 and 5.43). Indeed, in relation to the crimes committed in Donji Čaglić, including the killing of 10 Croat civilians, the Respondent makes no direct comment at all (Memorial, paragraphs 5.47-49). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Podravska Slatina municipality.[15] This data confirms that 9 bodies have been exhumed from various sites in the area.

6.9 Many of the Respondent's comments on the allegations which it does address do not amount to a denial of the events as described by the Applicant. For example, in relation to Voćin, it is said "six witnesses provided direct testimonies regarding some of the alleged events in the village. All the other witnesses had only second-hand knowledge of the events." (paragraph 759: the general criticisms are addressed in Chapter 2, paragraph 2.44) The Respondent does not seek to directly challenge the specific content of any of the witness statements referred to.[16]

6.10 The Respondent's assertion, at paragraph 761, that the Applicant concedes that there are "no witness statements in support of the alleged massacre of persons" fails to note that there is, however, a video recording of the events (Memorial, paragraph 5.44, footnote 85).

6.11 The Respondent's criticism of the Applicant's evidence concerning Balinci (Counter-Memorial, paragraph 762) as being lacking in detail is unmerited. When taken together, the Applicant's evidence presents a clear and cogent account of the atrocities committed in Balinci:

- M.K., a Serb paramilitary, gives a detailed account of the

[14] See further, the statements of the Serb armed forces referred to above, including B. who was a JNA soldier, detailing some of the atrocities committed: Memorial, Annexes, vol 2(II), annex 172.

[15] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[16] This is true also in relation to the Respondent's comments at para. 760 (Hum) and para. 761 (Četekovac).

individuals sent to "clean" Balinci at the "beginning of September 1991":

"In a group whose commander was Mile Crnobrnja, who was armed with an automatic gun and a sniper, were:

- Rajko Ivković, armed with an automatic gun and a sniper;

- Zoran Jovakarić, armed with an automatic gun;

- Goran Bjelovuk, called "Goš", armed with a sniper;

- Stevo Šimić, armed with an automatic gun;

- Željko Bosanac, armed with an automatic gun;

- Branko Radmilović, called "Kopiter", armed with an automatic gun;

- Dragoslav Dokmanac, armed with an automatic gun;

- Jovan Vuković, called "Ogi", armed with an automatic gun;

- Jovan Cvijetić, called "Cvajo", armed with an automatic gun and a sniper;

- Rajko Vučković, armed with an automatic gun;

- Zoran Jovanović, armed with an automatic gun;

(...) A task of Mile Crnobrnja's group was to clean the upper part of Balinci, and our group was cleaning the houses by the road leading to Četekovci, and we joined each other at the crossroads in Balinci. In a backyard, Goran Bjelovuk ran into an old man wearing a blue working coat and told him to run, and then he shot him by sniping at his back. After we joined, we went towards Četekovac, and Zoran Miščević fired a grenade from the mortar into a trench that was empty and jumped into a ditch under a bridge that is between Četekovac and Balinci from where he chased out a few older women and men that he chased in front of himself as a human barrier all the way to the café in Četekovac, where we stopped, and Miščević made the civilians lie on the ground face down. After that we went to the café where we started drinking. When he entered the café, Goran Bjelovuk climbed upstairs from where somebody shot at him, and he threw a bomb and got down and told us that there was someone upstairs. After that Rajko Ivaković went out on the road and fired two grenade launchers at the rooms above the café, and Goran Bjelovuk went upstairs from where he took out a man in a ranger's uniform and one in a working coat. Since he chased them out into the backyard, Bjelovuk shot a full charge at this man in ranger's uniform from close range, and Rajko Vučković also shot at him from the automatic gun. The other one was beaten and cursed by Bjelovuk, he beat him and kicked him and fired at him several shots from a sniper gun and from a gun of TT

make. Immediately after that Dragan Starijaš, called "Gagi", brought a policeman from a house at whom, after they beat him, Rajko Ivković and Goran Bjelovuk fired a few shots, and Miladin Milnović, called "Drdan", sat on that man's stomach and took out a knife from his belt, and when he got up, I saw that Milnović's knife was all covered with blood."[17]

- M.B. provides the names of a number of persons killed in Balinci on 4 September 1991. It is incorrect to say that she has no firsthand knowledge of the circumstances in which they lost their lives: she makes it clear that the village was under attack (quite obviously from Serb forces), using both mortars and guns. It is apparent that she is referring to the same attack as M.K. describes as taking place at the "beginning of September". She describes her husband being killed by Relja Dragičević, along with Ivan Biskupović and Miško Lovrenc. She states that Rozika Vlatković, who was 93 years old, was also killed along with Ika Biskupović in the cellar, and that Nikola Mandić was killed in his house at the table. Jure Borovac was killed in his back yard and Ivan Rukavina was killed in front of the house of Jure Borovac. She also knows that Duško Košarek, Josip Potočnik and Milan Tone were killed.[18]

- A.M. gives a similar account of the attack on 4 September 1991, and identifies a number of those killed, including Ivan Biskupović, Nikola Magdić, Marko and Manda Rukavina, Rozika Vlatković, Ivka Biskupović, Miško Lovrenc, Jure Borovac, and Ivan Rukavina. She states that they were all wearing civilian clothes. She was not present at the time of their murders, but it is very clear from the evidence of M.K. that the Croat civilian population of Balinci was 'cleaned' by the Serb forces.[19]

6.12 The events in Podravska Slatina municipality are also corroborated by the Helsinki Watch Report sent to President Milošević and General Adžić on 21 January 1992.[20] That Report found that 21 civilians were killed in Četekovac, Čojlug and Balinci, ranging in age from 18-91 years, 15 of whom had been killed by gunshot wounds. The Report contains detailed accounts of some of the killings. The Report also details attacks on Hum and Voćin, resulting in numerous civilian deaths, many of which were preceded by brutal torture.

6.13 The Respondent has not provided any evidence contradicting the substance of any of the statements relied upon by the Applicant. It is also particularly striking that the Respondent does not specifically challenge the

[17] Memorial, Annexes, vol 2(II), annex 202.
[18] Memorial, Annexes, vol 2(II), annex 210.
[19] Memorial, Annexes, vol 2(II), annex 211.
[20] Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99. The Report has been treated by the ICTY as a reliable source of evidence in *Martić,* para. 324, footnote 1002.

substance of any of the evidence that the JNA acted in conjunction with the TO and Serb paramilitaries in committing the atrocities in Podravska Slatina, as set out in the Memorial and, in particular, the witness statements of J.M.,[21] M.P.,[22] R.M.,[23] A.Š.,[24] M.
K.*,[25] and N.M.[26] It is of particular significant that M.
and K.* are Serbian and that M. was a member of the 51st Brigade
of the 4th Battalion of the Army of the RSK.

(3) Municipality of Daruvar

6.14 In so far as the Respondent comments on the Applicant's evidence in relation to Daruvar, its observations are mostly generalised and do not directly challenge the veracity of the accounts given by the Applicant's witnesses. The generalised criticisms concerning, for example, hearsay evidence are addressed in Chapter 2. Apart from the murders detailed in the Memorial (paragraphs 5.55, 5.56, 5.58, 5.61, 5.64) the Respondent fails to refer in its summary (Counter-Memorial, paragraph 767) to physical and psychological violence (Memorial, paragraph 5.52) and torture (paragraphs 5.53, 5.54) including physical mutilation (5.64).

6.15 The observation that some of the witnesses in relation to Đulovac also refer to Serbs being detained and tortured (Counter-Memorial, paragraph 770) is not inconsistent with the Applicant's case. The general evidence given by those witnesses is that the 'Chetniks' targeted the Croat population. The fact that some victims may have been Serbs has not deterred the ICTY from making findings that the crime against humanity of persecutions was carried out against the Croat civilian population.[27]

6.16 Since the Memorial was prepared, the Applicant has obtained a further witness statement from I.H. who was the Đulovac parish
priest.[28] He gives a detailed account of the events in Đulovac from 1990-1992, corroborating the Applicant's case set out at paragraphs 5.51-56 of the Memorial. He recalls the barricades around Đulovac being manned by Serbs with 'Serbian Autonomous Region of Western Slavonia' insignia on their sleeves. All communication ceased on 18 August 1991, with trains stopping running and, a day or two later, the phone lines ceasing to work. He also confirms that the Veterinary Station was converted into a Police Station and, in September 1991, Franjo Zmegač was killed and his house set on fire. Like all the others left in the village at this time, Franjo Zmegač was elderly. I.

[21] Memorial, Annexes, vol 2(II), annex 189.
[22] Memorial, Annexes, vol 2(II), annex 192.
[23] Memorial, Annexes, vol 2(II), annex 198.
[24] Memorial, Annexes, vol 2(II), annex 200.
[25] Memorial, Annexes, vol 2(II), annex 202.
[26] Memorial, Annexes, vol 2(II), annex 212.
[27] *Martić*, para. 383.
[28] Witness Statements of I.H., Annex 13.

H. also remembers a number of arrests occurring in August 1991 and names B.B., I.B., F.B., I.G, a man called G. from Koreničani, and 4 men called Paljević from Koreničani. He was also arrested himself and taken to the Veterinary Station, where he was received by Vlado Kezele and another man wearing a JNA uniform (approximately 30 years old and 180cm tall). The other Croats he was detained with were frequently maltreated and did not receive any food. He recalls that other Croat prisoners were also kept in a wooden shed next to the Veterinary Station. The Church was subsequently attacked by the Serbs and abuse of the Croat population became an everyday occurrence. In November 1991, reservists from Novi Sad Corps had come to the village, lead by a JNA Captain, whose last name was Kulić or Kuliš. In early December 1991, he recalls 8-10 Croats being killed, including Franjo Blažan, his wife and his son, all of whom were shot in their own courtyard. Close to the Forestry Motel, one woman and her son were killed. He also remembers that the wine-grower, Sautner, and his mother were shot and killed.

6.17 The Respondent's criticism that, in relation to Doljani, the witnesses provide "no information on the perpetrators of the crimes they witnessed" is incorrect (Counter-Memorial, paragraph 771). I.M. begins his statement with the words "On the 16th of September 1991 the Serbs performed the attack on the village of Doljani." He goes on to state that "I do not know who those people were, but I am sure they were the local Serbs from the village of Doljani and the surrounding villages...".[29] Similarly, A.K. states of events on the same date that "We were listening to Radio Zagreb in the house and we heard on the news that in a moment there should be a surrender of the barracks in Doljani. When we went out of the cellar, we saw a tank at the barracks through the blinds, but without our Croatian flag and I knew that the barracks had not fallen yet. There was a Yugoslav flag on the tank." She goes on to identify one of the perpetrators as Goran Zabrdac from Daruvar.[30]

6.18 The Respondent states in relation to Vukovije that the witnesses give "no information as to how those people were killed." (Counter-Memorial, paragraph 772). That is, again, demonstrably false. M.H. states: "Mijo Novaković, Ivka Novaković and Štefica Kopriva were killed in Vukovije and the Chetniks killed them and we found the dead bodies on the steps in front of the house. They were killed with shots from a gun in the back of their heads. … Those three persons that were killed were found at S.K.'s place. That is to say, all of them slept in the house of M.N. and in the morning S.K. found them on the steps of the house. In the course of October 1991 the Chetniks from Batinjani were stationed for about two weeks in one building of the forester's house. Some time, during the period while they were in that building, these murders of these three people happened.

[29] Memorial, Annexes, vol 2(II), annex 224.
[30] Memorial, Annexes, vol 2(II), annex 226.

I do not know who could have done that. The house where these three people were, was about 200 meters away from the building where those Chetniks were stationed. My son buried those people. P.P. made the coffins and S.B. dug out the grave. M.O. was also present on their burial."[31]

6.19 The Respondent makes no direct observations on the Applicant's case or evidence in relation to Veliki Miletinac. The Respondent also does not comment on the evidence of the involvement of the JNA in the atrocities committed in Daruvar municipality, as set out, for example, at paragraphs 5.51 and 5.58 of the Memorial. The Applicant has subsequently obtained a "Proposal for special promotion" from the 'RSK' TO for Western Slavonia, concerning Warrant Officer Stevo Prodanović and his involvement in the "war" in Western Slavonia. He was particularly commended for his "determination and perseverance" in ensuring that "4000-4500 long barrel weapons were moved from Daruvar Barracks to the territory of Western Slavonia" between June and August 1991.[32] The document corroborates the extent of premeditation and organisation of the attacks in Western Slavonia by the Serbian infrastructure.

SECTION TWO: BANOVINA

(4) Municipality of Glina

6.20 In so far as the Respondent comments on the Applicant's evidence in relation to Glina municipality, its observations are mostly generalised and do not directly challenge the veracity of the accounts given by the Applicant's witnesses. The generalised criticisms concerning, for example, hearsay evidence are addressed in Chapter 2. In its summary (Counter-Memorial, paragraph 767) the Respondent fails to refer to the physical and psychological violence (Memorial, paragraph 5.52) and torture (paragraphs 5.53-54) including mutilation (paragraph 5.55) that was visited upon the Croat population of Glina Municipality. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Glina Municipality.[33] This data confirms that 91 bodies have been exhumed from various sites in the area.

6.21 At paragraph 781 the Respondent asserts that the Applicant has not identified the 18 Croats[34] who were killed in Glina and that the witness statement of A.B. in relation to the village of Maja lacks detail. It

[31] Memorial, Annexes, vol 2(II), annex 229. See also annex 228.

[32] RSK, Recommendation for Extraordinary Promotion, Stevo Prodanović, 23 November 1992, Annex 76.

[33] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[34] Para. 781 refers to 17 Croats being killed, whereas the Memorial and the Respondent's summary at para. 777(a)(ii) refer to 18 Croats being killed. It is assumed that para. 781 contains a typographical error.

cannot, however, be disputed that Serbian armed forces were carrying out attacks on and "mopping up" in Glina. The Applicant has obtained an Order from the War Presidency of the Municipal Assembly of Glina, dated 22 August 1991, which ordered the Glina Territorial Defence to "submit a written report on war operations as of 26 June 1991 to date. A special emphasis is required for the events in Maja on the occasion of mopping up of Maja, Svračica, Dolnjak, Joševica and Prijeka."[35] The date of the Order corresponds with A. B.'s account of the attack on Maja in August 1991. It is also notable that the Respondent makes no specific criticism of the statements of either I. M.[36] or P.T.,[37] both of whom provide further details of the attacks on Glina. The Applicant has also obtained a witness statement from M.Č., who gives evidence that Dr Dušan Jović was the head of the Glina Hospital and President of the Glina Serbian Democractic Party was the initiator and organiser of Serb acitivities in Glina and its surroundings. He ordered Serb units to *"*kill and slay every living creature of Croatian origin, even if it was a cat. He used to say that Croats should be exterminated while they were still in the womb. His idol was Boro Mikelić who transferred him to Belgrade after the first wartime year in Glina..."[38]

6.22 The Respondent asserts in relation to Novo Selo Glinsko that the Applicant has offered little detail regarding the killing of 32 Croats (paragraph 782). The facts of the killings and the identities of the victims are set out in the Criminal Charge dated 24 April 1995, namely that the 32 Croats were taken from their houses and were killed in a valley near the village, before being buried.[39] The perpetrators then returned to the village and set the houses on fire. The statement of M.P., a Commanders Assistant in the TO, sets out a cogent account of the attack on the village, the gathering of the Croat population, including women and children, and, shortly thereafter, gunshots and explosions.[40] The Respondent provides no evidence to undermine the obvious inferences to be drawn from the statements and documents relied upon by the Applicant.

6.23 Of the attacks on Joševica, the Respondent has elected to focus its comments on the killing of the K. family (paragraph 783). It entirely fails to respond to, or in any way challenge, the evidence that 21 Croats were killed on 16 December 1991, as set out in numerous witness statements relied upon by the Applicant at paragraph 5.86 of the Memorial. As VJ General Stevan Mirković subsequently described it, "Go about Banija, all Croatian villages are burned down to the ground... And that isn't a war. Where did

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35 SAO Krajina, Order on the Submission of a Written Report on War Operations as of 26 June 1991, 22 August 1991, Annex 51.

36 Memorial, Annexes, vol 2(II), annex 249.

37 Memorial, Annexes, vol 2(II), annex 251.

38 Witness Statement of M.Č., Annex 6.

39 Memorial, Annexes, vol 2(II), annex 323.

40 Memorial, Annexes, vol 2(II), annex 253. See also annexes 254 and 255.

you have a collision of two armies? A knife, a sniper rifle and the artillery are mainly operating and then civilians are the ones who die the most… When I saw Jošanica where Serbs had also slaughtered 19 Croatian women and Croatian children, since then I won't go there anymore."[41] The Applicant has also obtained further evidence in relation to the atrocities committed in Joševica. N.Š.[42] gives a detailed account of the killings of the K. family at the beginning of November 1991, which corroborates the other witnesses relied upon by the Applicant. He then gives a short account of the massacre in December 1991 and explains that, when he left Glina subsequently, he was required to sign a statement saying that he was leaving voluntarily. The events in Joševica are also corroborated by the Helsinki Watch Report sent to President Milošević and General Adžić on 21 January 1992.[43] The Report refers to the killings of 20 Croats (aged 5-65), carried out by the JNA and Serbian paramilitary units.

6.24 The Respondent does not dispute the facts asserted by the Applicant in relation to Gornje and Donje Jame, and only comments on the identity of the perpetrators of the attacks (Counter-Memorial, paragraph 784). It is the Applicant's case that the atrocities committed in Gornje and Donje Jame were carried out principally by Serb paramilitaries, but that they were acting in concert with the JNA. J.F. gives a detailed account of the attacks, and describes Đuro Pavlović, who was wearing a JNA uniform, as being involved.[44]

(5) Municipality of Petrinja

6.25 Again, the Respondent only comments on a limited number of the allegations made in the Applicant's Memorial in relation to Petrinja Municipality. The summary at paragraph 788 of the Counter-Memorial is characteristically incomplete, referring only to murders, but not including physical and psychological abuse (Memorial, paragraphs 5.100, 5.101), denial of medical care (paragraph 5.97), physical mutilation (paragraph 5.97), movement restrictions and the use of Croatians as a human shield (paragraph 5.100), nor the destruction of sacral objects (paragraph 5.94).Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Petrinja Municipality.[45] This data confirms that 151 bodies have been exhumed from various sites in the area. The Respondent asserts that the Applicant's claims concerning Petrinja town are imprecise as to the circumstances of the alleged killings (Counter-Memorial, paragraph 791).

[41] Witness statement of I.M., Memorial, Annexes, vol 2(II), annex 261.

[42] Witness Statement of N.Š., Annex 24.

[43] Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99. The Report has been treated by the ICTY as a reliable source of evidence in *Martić,* para. 324, footnote 1002.

[44] Memorial, Annexes, vol 2(II), annex 265.

[45] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

The Applicant has provided witness statements which provide details of the killings, including, for example, D.C., who gives an account of a group of Croats being made to run away in groups of 3, before being shot in the back by Serbs.[46] The suggestion by the Respondent that the evidence of this witness, and that of P.M.,[47] demonstrates that "heavy fighting occurred between Serb and Croatian forces over the town of Petrinja" is inaccurate. Neither witness makes any reference to there being any fighting whatsoever: on the contrary, they confirm the city was extensively shelled by Serb forces.

6.26 Since the Memorial was prepared, the Applicant has obtained a witness statement from M.Ž., who was a member of "Martić's Police", operative in the Petrinja area in 1991.[48] Ž. gives evidence that the JNA were supplying the TO in Joševica with uniforms, automatic rifles, mortars and ammunition in July 1991. He details the killing of an active police man, Ivica Mrazovac from Budičina in August 1991, by "Martić's Police" in a pre-organised ambush. Ž. gives a thorough account of the organisation of "Martić's Police" and their relationship with the local TO. He explains that armed actions were planned by Dragan Sanader, a platoon commander of "Martić's Police", "together with the TO Staff for Petrinja then located in the village of Joševica and that he planned those actions most often with Veljko Jasić from Moštanica who was in the Joševica TO." Ž. also provides an account of the attack on Petrinja on 16 September 1991, stating that 15 members of his platoon wen to Hrastovica where they met TO units from Gornja Mlinoga, Donja Mlinoga, Jabukovac and Klinac. They set off through the woods and met with a TO Cepeliš unit en route. They reached Petrinja on the morning of 16 September and were divided into 4 groups. Ž. left the area and when he returned later that day the 20 MUP and ZNG members, referred to in the Memorial, had already been executed. He spoke to Miroslav Kljaić, who had "commanded and organised the execution". Kljaić had ordered the men to lie on the ground and take off their uniforms. Four members of the group failed to do so right away, so Kljaić shot them. Members of "Martić's Police" (Pero Miočinović, Dragan Drobnjak and Milan Drobnjak ("Prelac")) joined in with the executions, with Kljaić requiring the men to run away in groups of 3 before being shot in the back. Two more of "Martić's Police" joined in towards the end of the execution. Ž. goes on to detail a number of further ZNG and MUP personnel who were killed and other atrocities that were committed in the area.

6.27 The Respondent's observations in relation to Kraljevčani are limited

[46] Memorial, Annexes, vol 2(II), annex 268. See also the findings of the Helsinki Watch Report sent to Slobodan Milošević on 21 January 1992, to the effect that 4 Croat men were killed in Pecki when they came to tend their cattle, 3 of whom appeared to have been tortured first: Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99.

[47] Memorial, Annexes, vol (2(II), annex 267.

[48] Witness Statement of M.Ž., Annex 28.

to noting that the Applicant's witnesses do not contain precise information as to the circumstances of the deaths on 15 August 1991 or the perpetrators (Counter-Memorial, paragraph 792). The Respondent does not dispute the fact of the deaths, nor the other atrocities committed in Kraljevčani, as set out in the Memorial at paragraphs 5.97-98. Moreover, it is apparent from the statement of N.T. that the killings in Kraljevčani were carried out by Serb armed forces, "mostly Martić's policemen".[49] The witness M.Ž., himself a member of "Martić's Police", recalls Zlatko Milanković "boasting at Čavić Brdo that together with several other persons from Mali Gradac he slaughtered four civilians in Dragotinci or in Kraljevčani, and he brutally killed three old women and a man."[50]

6.28 Of Glinska Poljana, the Respondent makes only generalised comments about the evidence being indirect and hearsay (as to which, see Chapter 2, paragraph 2.44), and observes that the perpetrators of the killings were said to be the "Siltovi" paramilitary group (Counter-Memorial, paragraph 793; see also, paragraph 821). The Respondent overlooks the evidence of I.D., who states that a JNA column had marched into the village on 4 October 1991, after which the witness concluded that the JNA was cooperating with local Chetniks.[51] It is readily apparent that the Serb paramilitary groups were acting in conjunction with the JNA.

(6) Municipality of Dvor na Uni

6.29 The Respondent does not summarise significant parts of the Applicant's case on Dvor na Uni municipality, including the use of Croat civilians as a human shield (Memorial, paragraph 5.103) and the subsequent murders by Serb paramilitaries of Croat patients in hospital being treated for injuries sustained as members of the human shield (paragraph 5.104), and the destruction of sacral objects (paragraph 5.108). Thereafter, the Respondent comments only on selective parts of the Applicant's case on Dvor na Uni municipality, and does not dispute many of the allegations, including, for example, the removal from hospital and subsequent murder of wounded civilians (Memorial, paragraph 5.104). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Dvor na Uni Municipality.[52] This data confirms that 21 bodies have been exhumed from various sites in the area.

6.30 In relation to Dvor na Uni itself, the Respondent asserts that the evidence offered by the Applicant is unclear as to the identity of the three Croatian policeman who were killed and the perpetrators of those killings. That is a misrepresentation of the evidence: T.B. sets out a detailed

[49] Memorial, Annexes, vol 2(II), annex 271.
[50] Witness Statement of M.Ž., Annex 28.
[51] Memorial, Annexes, vol 2(II), annex 272.
[52] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

account of the attack and identifies the perpetrator as wearing a masked uniform with the sign "Police of the Serbian Autonomous (SAO) Krajina".[53] The Respondent also misstates the evidence by asserting that the descriptions of the events shows that fighting between Croatian and Serb forces took place in Dvor na Uni (Counter-Memorial, paragraph 799). It is very clear from the Applicant's evidence that the attack on Dvor na Uni was a coordinated assault, and part of the broader attack in Banovina known as "Žaoka", including shelling of the civilian population and the creation of a human shield.[54] The implicit suggestion that any of the deaths the Applicant relies upon were the result of legitimate military targeting during an armed conflict is not supported by any evidence.

6.31 In relation to the remainder of the Applicant's case on Dvor na Uni municipality, the Respondent makes only generalised criticisms and does not dispute the accuracy of many aspects of the Memorial.

(7) Municipality of Hrvatska Kostajnica

6.32 The Respondent continues to dispute some of the details of the Applicant's case in relation to Hrvatska Kostajnica municipality, notwithstanding the findings of the ICTY in *Martić* that 83 Croat civilians were massacred in the area during October 1991.[55] The ICTY found that the killings and other persecutory conduct amounted to crimes against humanity, having been carried out as part of a joint criminal enterprise to conduct a systematic attack on the civilian population and with the intent to discriminate on the basis of Croat ethnicity.

6.33 In addition to the *Martić* judgment, Milan Babić pleaded guilty to his involvement in the joint criminal enterprise, including in relation to Hrvatska Kostajnica. The basis of plea recorded in the sentencing judgment provides a useful summary of the relevant conduct:

> "14. In the period of the Indictment, from about 1 August 1991 to 15 February 1992, Serb forces comprised of JNA units, local Serb TO units, TO units from Serbia and Montenegro, local MUP police units, MUP police units from Serbia, and paramilitary units attacked and took control of towns, villages, and settlements in the SAO Krajina.
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> 15. After the take-over, in cooperation with the local Serb authorities,

[53] Memorial, Annexes, vol 2(II), annex 275. See also annex 280.

[54] See, for example, Memorial, Annexes, vol 2(II), annexes 244, 273, 274, 275, 280 and 281, as referred to in the Memorial at paras. 5.103-106.

[55] Similar allegations as were established in *Martić* were also included in the Indictment in *Milošević,* para. 40. The Applicant has also obtained a statement from O.R., a Serb who lived in Hrvatska Dubica in 1991: Witness Statements of O.R., Annex 22. R. provides further details of particular individuals responsible for the killings considered by the ICTY in *Martić* in Hrvatska Dubica and Baćin.

> the Serb forces established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial, or religious grounds, included the extermination or murder of hundreds of Croat and other non- Serb civilians in Dubica, Cerovljani, Baćin, Saborsko, Poljanak, Lipovača, and the neighbouring hamlets of Škabrnja, Nadin, and Bruška in Croatia; the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA barracks in Knin, which were used as detention facilities; the deportation or forcible transfer of thousands of Croat and other non-Serb civilians from the SAO Krajina; and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations in Dubica, Cerovljani, Baćin, Saborsko, Poljanak, Lipovača, and the neighbouring hamlets of Vaganac, Škabrnja, Nadin, and Bruška.
>
> 16. These acts were intended to permanently and forcibly remove the majority of the Croat and other non-Serb populations from approximately one-third of Croatia in order to transform that territory into a Serb-dominated state. The acts started on or about 1 August 1991 and continued until June 1992, at least, that is until after the indictment period, which runs only until 15 February 1992."

6.34 The basis of Babić's plea also sets out in some detail the extent of the involvement of the Serbian political and military infrastructure in the commission of the crimes carried out pursuant to the JCE. Babić accepted that he had participated in the JCE in 8 ways:

- As President of the SNC, and later, President of the SAO Krajina and RSK, he formulated, promoted and encouraged the development and implementation of policies designed to bring about the objective of the JCE;

- He was instrumental in the establishment, support and maintenance of the government bodies that ruled the SAO Krajina which, in cooperation with the JNA, implemented the objectives of the JCE;

- He assisted in the reorganisation and recruitment of the TO forces of the SAO Krajina and subsequently the RSK, which participated in the crimes committed, and he was (from 1 June 1991) *de jure* commander-in-chief of the armed forces of the SAO Krajina;

- He cooperated with the commander of the "Martić Police", who were involved in the commission of crimes;

- He participated in the provision of financial, material, logistical and police support for the military take-over of the territories in the SAO Krajina, conducted by the TO, JNA and "Martić's Police";

- He requested the assistance of or facilitated the participation of JNA forces in establishing and maintaining the SAO Krajina;

- He made ethnically based inflammatory speeches directed at adding to the atmosphere of fear and hatred amongst Serbs living Croatia.[56]

6.35 Beyond the ICTY case law, the Respondent asserts in relation to Cerovljani that "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" (Counter-Memorial, paragraph 809). The Respondent maintains this position, notwithstanding the clear findings to the contrary of the ICTY in *Martić*:

> "359. The Trial Chamber finds that the following persons from Cerovljani were intentionally killed: Marija Antolović, Ana Blinja, Josip Blinja, Katarina Blinja, Nikola Blinja, Andrija Likić, Ana Lončar, Antun Lončar, and Kata Lončar (born 1906). The Trial Chamber recalls the manner in which the victims from Hrvatska Dubica were rounded up and detained in the fire station on 20 October 1991 and that they were subsequently killed on 21 October 1991 at Krečane near Baćin and buried in the mass grave at that location. Furthermore, the Trial Chamber recalls its finding that the Milicija Krajine was responsible for the killing of the victims detained in the fire station. The Trial Chamber considers that the rounding up, detention and killing of the above-named victims from Cerovljani is almost identical to the events in Hrvatska Dubica, including that most of the victims were buried at the mass grave in Krečane. It is therefore established beyond reasonable doubt that the above-mentioned victims from Cerovljani were killed on or around 20 or 21 October 1991 either by the Milicija Krajine, or units of the JNA or the TO, or a combination of some of them that the Trial Chamber has found were present in the area at this time. The Trial Chamber considers it proven beyond reasonable doubt that these victims were civilians and that they were not taking an active part in the hostilities at the time of their deaths. The Trial Chamber therefore concludes that all the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established.
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> 360. The Trial Chamber finds that on 13, 21 and 24 September 1991, armed Serbs from Živaja under the command of Nikola Begović burnt 10 houses in Cerovljani. The Trial Chamber finds that in a small village

[56] *Babić*, para. 24.

of some 500 people, the destruction of 10 houses must be regarded as destruction on a large scale. The Trial Chamber finds that there is evidence that this destruction was not carried out for reasons of military necessity. In this regard, the Trial Chamber notes in particular the evidence that only elderly persons remained in Cerovljani and that the armed Serbs came on three separate occasions. Finally, the intent of the perpetrators may be inferred from the repeated and deliberate nature of the attacks, as well as from the absence of any military necessity. The Trial Chamber therefore finds that the elements of wanton destruction of villages or devastation not justified by military necessity (Count 12) have been met.

361. The Trial Chamber finds that on 24 September 1991 the same armed Serbs damaged the Catholic Church in Cerovljani. The Trial Chamber finds that it has been proven that the church was not used for military purposes at the time it was damaged. The intent of the perpetrators to cause damage may be inferred from the fact that it occurred without any military necessity and as part of a series of repeated attacks targeting property in Cerovljani. The Trial Chamber therefore concludes that the elements of the crime of destruction or wilful damage done to institutions dedicated to education or religion (Count 13) have been met.

…

363. The Trial Chamber considers the totality of the evidence in relation to the events in Cerovljani in September and October 1991 to establish that the Croat civilian population and Croat property, including the Catholic Church, were the objects of attack. In this respect, the Trial Chamber recalls the systematic and repeated incursions into the village by armed Serbs with resulting killings and destruction. Moreover, the Trial Chamber recalls that a Croat civilian, Kata Lončar, survived the occupation because she had connections with the Serbs. The Trial Chamber therefore finds it established beyond reasonable doubt that the killings of the ten victims referred to above were carried out with intent to discriminate on the basis of Croat ethnicity. Moreover, the Trial Chamber considers the evidence to establish beyond reasonable doubt that the destruction of private houses and of the Catholic Church was carried out with the same discriminatory intent. The elements of the crime of persecutions (Count 1) have therefore been met in relation to the killings and the destruction in Cerovljani."

6.36 Similarly, in relation to Hrvatska Dubica, the Respondent asserts that the "witnesses referred to by the Applicant … did not have direct knowledge on the killings … and they only heard that the perpetrators were

local Serbs." (Counter-Memorial, paragraph 810). This stance is maintained, notwithstanding the following findings of the ICTY in *Martić*:

> "354. The Trial Chamber finds that the following 41 persons were detained in the fire station in Hrvatska Dubica on 20 October 1991 and intentionally killed the following day at Krečane near Baćin: Katarina Alavančić, Terezija Alavančić, Josip Antolović, Marija Batinović, Mara Čorić, Mijo Čović, Marija Delić, Ana Dikulić, Ruža Dikulić, Sofija Dikulić, Stjepan Dikulić, Antun Đukić, Marija Đukić, Antun Đurinović, Ana Ferić, Juraj Ferić, Kata Ferić, Filip Jukić, Marija Jukić, Jozo Karanović, Antun Krivajić, Reza Krivajić, Barbara Kropf, Pavao Kropf, Ivan Kulišić, Nikola Lončarić, Antun Mucavac, Ivo Pezo, Sofija Pezo, Anka Piktaja, Stjepan Sabljar, Veronika Stanković, Antun Svračić, Marija Svračić, Ana Tepić, Dusan Tepić, Ivan Trninić, Ivo Trninić, Kata Trninić, Terezija Trninić, and Katarina Vladić. The Trial Chamber finds that it has been proven beyond reasonable doubt that all victims were civilians and that they were taking no active part in the hostilities at the time of their deaths. Based on the evidence concerning the organised rounding up, detention and guarding of the civilians at the fire station by the Milicija Krajine, and the evidence that the victims were killed only one day subsequent to their detention, the Trial Chamber considers it established beyond reasonable doubt that the Milicija Krajine was responsible for these killings. The Trial Chamber finds that all the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established.
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> 355. The Trial Chamber heard evidence that between mid-September 1991 and mid-October 1991, approximately ten Croat or mixed ethnicity houses were destroyed in Hrvatska Dubica. There is evidence that "reservists" were involved in these acts. The Trial Chamber notes in particular that by mid-September 1991 there were only some 60 mainly elderly people remaining in the village and considers that this destruction was not justified by military necessity. However, the Trial Chamber considers that the destruction of 10 houses in a village of some 400 to 500 households gives rise to doubt as to whether this destruction can be considered as destruction on a large scale. The Trial Chamber therefore finds that the elements of wanton destruction of villages or devastation not justified by military necessity (Count 12) have not been met.
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> …
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> 357. The Trial Chamber heard evidence that the JNA, TO and Milicija Krajine took part in looting of Croat houses in Hrvatska Dubica

from mid-September 1991 and stole cars, tractors, tools, machinery, furniture and cattle.1100 The Trial Chamber finds that this intentional appropriation of property was carried out without lawful basis or legal justification. Furthermore, given the scale of the looting, the Trial Chamber finds that it resulted in grave consequences for the victims, having regard to the overall effect on the civilian population and the multitude of offences committed. The Trial Chamber finds that all the elements of the crime of plunder of public or private property (Count 14) have been established.

358. The Trial Chamber recalls that among the persons rounded up in the fire station in Hrvatska Dubica, the clear majority were Croats. The Trial Chamber notes that there were also Serbs among those rounded up. However, the evidence shows that three Serbs managed to leave the fire station and that seven Croats managed to leave the fire station after their Serb neighbours or friends had contacted the guards. The Trial Chamber finds that the killings of the above-mentioned 41 victims were carried out with intent to discriminate on the basis of Croat ethnicity. The elements of the crime of persecutions (Count 1) have therefore been met in relation to these killings."

6.37 It is of note that the Respondent does not, however, dispute the Applicant's case in relation the atrocities committed in Baćin. The ICTY in *Martić* recorded the following findings:

"364. The Trial Chamber recalls that Vera Jukić, Terezija Kramarić, Mijo Krnić, Marija Milasinović, Marija Šestić and Soka Volarević were exhumed from the mass grave at Krečane near Baćin, and that Nikola Barunović was exhumed from the mass grave at Višnjevački Bok, where Ivo Pezo, who had previously been detained at the fire station in Hrvatska Dubica, was also exhumed. On the basis of this evidence, the Trial Chamber considers it established beyond reasonable doubt that these seven victims were killed at or around the same time as the victims from Hrvatska Dubica and Cerovljani were killed. Moreover, the Trial Chamber considers it established beyond reasonable doubt that these victims were intentionally killed either by the Milicija Krajine, or units of the JNA or the TO, or a combination of some of them which the Trial Chamber has found were present in the area from mid-October 1991. The Trial Chamber finds it established beyond reasonable doubt that the victims were civilians and that they were taking no active part in the hostilities at the time of their deaths. The Trial Chamber concludes that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established.

365. The Trial Chamber finds that the following 21 persons from Baćin were intentionally killed around October 1991: Matija Barunović, Antun Bunjevac, Tomo Bunjevac, Antun Čorić, Barica Čorić, Josip Čorić, Josip Čorić, Vera Čorić, Nikola Felbabić, Grga Glavinić, Anka Josipović, Ankica Josipović, Ivan Josipović, Josip Karagić, Kata Lončar (born 1931), Stjepan Lončar, Antun Ordanić, Luka Ordanić, Antun Pavić, Matija Pavić and Nikola Vrpoljac. The Trial Chamber finds it established beyond reasonable doubt that the victims were civilians and that they were taking no active part in the hostilities at the time of their deaths. Based on the totality of the evidence, the Trial Chamber finds it established beyond reasonable doubt that the above-mentioned victims from Baćin were killed around October 1991 either by the Milicija Krajine, or units of the JNA or the TO, or a combination of some of them which the Trial Chamber has found were present in the area at this time. The Trial Chamber finds that the elements of crimes of murder as a crime against humanity (Count 3) and of murder as a violation of the laws or customs of war (Count 4) have been established.

…

367. The Trial Chamber recalls that in 1991 the population in Baćin was 95% Croat and 1.5% Serb. Even making allowance for the possibility that there may have been a few Serbs among the 21 victims referred to above, this does not affect the Trial Chamber's assessment that these killings were carried out with intent to discriminate on the basis of Croat ethnicity. With regard to the six victims exhumed from the mass graves in Krečane near Baćin and in Višnjevački Bok, the Trial Chamber recalls its findings regarding the killing of persons from Cerovljani and Hrvatska Dubica and finds that also these six killings were carried out with intent to discriminate on the basis of Croat ethnicity. The Trial Chamber therefore finds that all the elements of the crime of persecution (Count 1) have been met."

6.38 The Respondent's remaining specific observations in relation to Hrvatska Kostajnica municipality concern the allegedly indirect and inadequate evidence relied upon by the Applicant as to events in Kostrići and Kostajnički Majur (Counter-Memorial, paragraphs 806-807). The Respondent also comments (at paragraph 821) that the JNA involvement is mentioned by the Applicant in relation to Hrvatska Kostajnica only in relation to the fighting at Kostajnički Majur, and not the alleged killings. The Respondent's comments must, however, be viewed against the background of the general observations made in Chapter 2, in particular at paragraph 2.44, and against the overwhelming and clear findings of the ICTY in relation to the conduct of the Serb armed forces in Hrvatska Kostajnica municipality.

6.39 It is notable that the Respondent does not specifically challenge the Applicant's case or evidence in relation to the killing of two Croats in Hrvatska Kostajnica on 13 September 1991 (Memorial, paragraph 5.111), nor the allegations in relation to Graboštani, Panjani or Predore (Memorial, paragraph 5.122). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Hrvatska Kostajnica Municipality.[57] This data confirms that 127 bodies have been exhumed from various sites in the area.

(8) Respondent's General Comments on Banovina

6.40 The Respondent concludes its comments in relation to Banovina by stating that "it is obvious that the alleged killings in Banovina 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 attributable to the Respondent." (Counter-Memorial, paragraph 815) That observation is irreconcilable with the findings of the ICTY, set out above, that the conduct in Banovina was systematic and amounted to crimes against humanity. The ICTY found that the killings had been part of a "regime of persecutions", established pursuant to a joint criminal enterprise within the Serbian political and military infrastructure to systematically attack the civilian Croat population. The ICTY makes numerous references to incidents being "systematic" and "organised".[58] It is untenable for the Respondent to assert that the attacks were "random".

6.41 The Respondent also asserts that the fact that the ICTY did not find the conduct in Banovina to amount to exterminations is probative of the issues in this case (Counter-Memorial, paragraphs 817-818). Again, that is misconceived, in circumstances where the ICTY repeatedly found the conduct, including the killings, to have amounted to the crime against humanity of persecutions, which is entirely consistent with the Applicant's case: see further, Chapter 9 at paragraph 9.15. It has always been the Applicant's case that the genocidal plan executed against the Croat population was not confined only to killings, but extended to numerous physical and psychological methods which have been largely ignored by the Respondent.

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[57] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[58] See, for example, *Martić* para. 405.

SECTION THREE: KORDUN AND LIKA

(9) Municipality of Vrginmost

6.42 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Vrginmost Municipality.[59] This data confirms that 8 bodies have been exhumed from various sites in the area.

6.43 The Respondent asserts that the evidence in relation to the killing of the Britvec family in Crna Drga is inadequate (Counter-Memorial, paragraph 824). The Applicant has relied upon the statements of two witnesses, I. B. and S.C., the latter of whom was a security officer of the 2nd Battalion of the Serbian Brigade Command. The evidence of the witnesses when read together gives a clear account of the B. family being shot by Serbs and attempts being made to thwart any subsequent investigation into the murders.[60] It is notable that the Respondent does not dispute other aspects of the evidence given by I.B..

6.44 The Respondent's comments on the evidence in relation the JNA's involvement in the forced expulsion of civilians from Novo Selo Lasinjsko and Lasinja are misconceived (Counter-Memorial, paragraph 825). R. M. is clear that his JNA unit had been in the area "for some time" before 20 March 1992.[61] He is absolutely clear that there was no fighting: "We had known that the villages were abandoned as well as Lasinja itself, so we knew there were going to be no resistance. The inhabitants left the villages after constant artillery and mortar fire that was directed to these villages for a long time before this final attack."

(10) Municipality of Slunj

6.45 The Respondent's summary and subsequent criticisms of the Applicant's case in relation to Slunj municipality are, on many occasions, inaccurate. The Respondent fails to mention in its summary the occupation and subsequent destruction of numerous villages, including Cvitovići, Vukovići, Gnojnice, Lađevac and Grabovac (Memorial, paragraph 5.141). This is confirmed by the findings of the ICTY in *Martić*, which records Milan Babić as testifying as follows:

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[59] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[60] Witness statements of I.B. and S.C., Memorial, Annexes, vol 2(III), annexes 341 and 342. It is also of note that the ICTY has found that on "16 August 1991 four Croatian men were reported to have been killed when they returned to the village of Pecki (Vrginmost) to feed their livestock; the village had been occupied by 'Serbian forces'." (*Martić,* para. 324, footnote 1002, in reliance on the Helsinki Watch Report sent to Slobodan Milošević on 21 January 1992: Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99.

[61] Memorial, Annexes, vol 2(III), annex 343.

> "Milan Babić travelled to Lipovača and villages in the surrounding area in 1993 and testified that he saw "villages which used to be populated by Croats and Croat houses were devastated and there were no Croat residents any more." Upon returning to Lipovača in 1995, Witness MM-036 found Lipovača and other villages in the municipality looted and burnt."[62]

6.46 Thereafter, the Respondent raises general criticisms that the evidence relied upon by the Applicant is second-hand, as addressed by the Applicant in Chapter 2 of this Reply, at paragraph 2.44. Moreover, that criticism is on many occasions clearly misconceived:

- The witness statement of M.P. gives firsthand and not hearsay evidence of the killings.[63] Moreover, he gives a graphic and compelling account of the torture meted out to the inhabitants of Lađevac, which remains unchallenged by the Respondent.

- Similarly, M.S. gives a detailed account of finding three women naked and butchered in a house, being eaten by pigs, shortly after the JNA and Territorial Defence had been in the village, interrogating the local population.[64] The Respondent does not challenge the veracity of the evidence given by the witness of the other maltreatment, looting and intimidation carried out in the area.

- Likewise, the assertion that M.M. had only 'heard about' a murder is misleading: the witness gives a full account of the killing of Valentić Jure, which he watched from his house. He saw the victim being shot by one of three Serb armed forces, then being doused in petrol, dragged to a barn and everything being set on fire. The assertion that he has no direct knowledge is plainly wrong.[65]

- The statement of J.T. again provides direct knowledge of the murder of Dane Bogović, contrary to the assertion of the Respondent.[66] The Respondent then does not dispute either the remainder of the allegations made in that statement, or the others provided in relation to Lađevac, including the account of M.G.*, which contains direct evidence about the torture and murder of Mile Radočaj and further evidence about other killings.[67]

6.47 The Respondent makes no mention of the conviction by its own Belgrade War Crimes Chamber of Zdravko Pašić for the war crime of murder

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62 *Martić,* para. 209.
63 Memorial, Annexes, vol 2(III), annex 346.
64 Memorial, Annexes, vol 2(III), annex 350.
65 Memorial, Annexes, vol 2(III), annex 351.
66 Memorial, Annexes, vol 2(III), annex 354.
67 Memorial, Annexes, vol 2(III), annex 353.

in relation to the Croat civilian, Dragutin Kusić, in Slunj on 22/23 December 1991. The Chamber specifically noted that the motivation for the killing was the Croat ethnicity of the victim.[68]

6.48 The Respondent is compelled to concede that the ICTY has made relevant findings in relation to Slunj municipality in its judgment in *Martić* (Counter-Memorial, paragraphs 833-834), although it seeks to minimise the significance of those findings. The salient parts of the ICTY's findings in relation to Lipovača, and the murder of civilians, is as follows:

> "202. At the end of September or in early October 1991, the JNA entered Lipovača and almost all civilian inhabitants fled, with the exception of about 20-50 people. The JNA stayed for seven to eight days and fired from tanks at the Croatian police in Drežnik Grad and Rakovica and a Catholic church in Drežnik Grad. During this stay, some JNA soldiers warned a witness that "when we leave, beware of the reserve forces of those paramilitary units "who would" beat the people, set houses on fire, loot 'and who would kill' regardless of age." When the JNA troops left, several of the people who remained in the village fled to the forest and spent the night there.
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> 203. Sometime in October 1991, after the JNA had left, armed units including 'Serb paramilitary units' from the region and outside of the region arrived in Lipovaca. These forces were called 'reserve forces, Martić's troops or Martić's army', and that they wore uniforms 'like the ones that the army had'.
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> 204. On 27 October 1991, a JNA Miltary Police unit led by Milan Popović, together with members of the TO and uniformed local Serbs, arrived in the village of Nova Kršlja adjacent to Lipovača. The JNA soldiers wore JNA uniforms whereas the TO soldiers wore black uniforms. They arrested all of the young Croat men, including Ivan Marjanović's son Marijan, and searched Ivan Marjanović's house for weapons. On the next day, the soldiers returned to Ivan Marjanović's house and demanded that he surrender his rifle to them, even though he did not have one. The soldiers then beat him severely, kicked him in the groin and broke his wrist. They again returned the next day and told him he was not allowed to leave his house or its immediate surroundings.
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> 205. At the end of October 1991, some time after the arrival of the paramilitary units, the bodies of Franjo Brozinčević, Marija Brozinčević, Mira Brozinčević, and Katarina Cindrić were found in Franjo Brozinčević's house in Lipovača. All four victims were dressed

[68] District Court of Belgrade, War Crimes Council (K.V. 4/2007); Supreme Court of Serbia (Kž. I r.z.2/08).

in civilian clothes and had been killed by gunshots.

206. Between 29 and 31 October 1991, Nelo Kotur, a local Serb commander, came to the house of Ivan Marjanović and told him that "the Serbs" had killed some Croats and told Ivan Marjanović to go with him to Lipovača to bury the victims. Nelo Kotur, Ivan Marjanović, and three other Croat villagers, drove to Lipovača and passed a checkpoint manned by "Martić's men".

207. The group of men arrived in Lipovaca at 0900 hours and went to the house of Mate Brozinčević, where they found his body in the kitchen with several bullet holes in the stomach. Mate's wife, Roza, had also been shot, and the body of their son Mirko was lying at the entrance to the bedroom with a bullet hole in the neck. All victims wore civilian clothing.

208. In June 1996, the above-mentioned seven individuals, who are listed in the Indictment, were exhumed from mass graves in Lipovača Drežnička."[69]

6.49 The Respondent fails to note, however, the highly significant findings of the ICTY in *Martić* in relation to the killings in Vukovići, and in particular the execution of 8 Croat civilians by JNA soldiers in on 7 November 1991:[70]

"212. … Vukovići was shelled at around noon on 8 October 1991, after which there was shooting in the village by unidentified armed Serbs. The next morning, Tomo Vuković was found dead in front of his burnt down house and at least two more houses had burnt down. Around 14 October 1991, Mile Lončar, an invalid man, and his father, Ivan Lončar, were found hanged in their house. …

214. On 7 November 1991, there was a large group of soldiers present in Vukovići. The soldiers were dressed in green camouflage uniforms and their commanders wore JNA caps with a red star. There were local people among these troops and there was also a JNA special unit present from Niš, Serbia, who wore darker camouflage uniforms. The soldiers came to Nikola "Šojka" Vuković's house in Vukovići and lined up and killed Dane Vuković (son of Poldin), Dane Vuković (son of Mate), Lucija Vuković, Milka Vuković, Vjekoslav Vuković, Joso Matovina and Nikola Matovina. Nikola "Šojka" Vuković (born 1926) was too sick to leave the house and was shot from the window

[69] The attacks on Lipovača and surrounding areas were also the subject of Milan Babić's guilty plea see *Babić*, para. 15. See also footnote 1012 to the *Martić* judgment, recording "that in Slunj a Croat was beaten to death and his father beaten into a coma by three persons in local "Milicija" uniforms".

[70] The destruction of Vukovići is dealt with at para. 5.141 of the Applicant's Memorial. Passing reference is made to the killings in "Vuković" para. 861 of the Counter-Memorial.

> while lying in his bed. All killed individuals were Croat civilians. The evidence shows that one or two houses were burnt in Vukovići on 7 November 1991 by members of these units.
>
> 215. The Defence pointed out certain discrepancies in the evidence concerning how the killings in Vukovići on 7 November 1991 were carried out. However, the Trial Chamber considers that these discrepancies are not material and therefore do not affect its finding that these killings were committed."[71]

6.50 The findings in relation to Vukovići confirm the Applicant's arguments and significantly undermine the Respondent's attempts to dissociate the JNA from the killings in Slunj municipality with the assertion that the JNA had only been present in Lipovača from 7-8 days (Counter-Memorial, paragraph 834). In relation to Vukovići, the ICTY in *Martić* stated:

> "371. The Trial Chamber finds that Tomo Vuković was intentionally killed by unidentified armed Serbs in Vukovići on 8 October 1991. The Trial Chamber considers it proven beyond reasonable doubt that Tomo Vuković was a civilian and that he was not taking an active part in the hostilities at the time of his death. Moreover, the Trial Chamber finds that Joso Matovina, Nikola Matovina, Dane Vuković (son of Poldin), Dane Vuković (son of Mate), Lucija Vuković, Milka Vuković, Nikola "Šojka" Vuković (born 1926) and Vjekoslav Vuković were intentionally killed on 7 November 1991. The Trial Chamber finds that all victims were civilians and that none of them were taking an active part in the hostilities at the time of their deaths. The Trial Chamber finds that on 7 November 1991 there was a mixture of JNA soldiers, including members of a JNA special unit from Niš, as well as local armed men present in Vukovići. The Trial Chamber finds it proven beyond reasonable doubt that these groups of soldiers were responsible for the killings of these victims."

6.51 Most significantly, perhaps, the Respondent entirely fails to address the finding of the ICTY in *Martić* that the JNA acted in coordination with the TO and militia groups in committing the atrocities in this region:

> "344. … During the summer and autumn of 1991, numerous attacks were carried out on Croat majority villages by the JNA acting in coordination with the TO and the Milicija Krajine. … Furthermore, evidence shows that the leadership established the armed forces of the SAO Krajina, made up of the TO and the Milicija Krajine, and cooperated with the JNA in organising operations on the ground."

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[71] The 7 November 1991 attack on Vukovići was also the subject of the *Milošević* Indictment at para. 43.

The Respondent's attempts to dissociate the JNA are misconceived, not substantiated with any evidence and are contrary to the findings of the ICTY.

6.52 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Slunj Municipality.[72] This data confirms that 48 bodies have been exhumed from various sites in the area.

(11) Municipality of Ogulin

6.53 The Respondent concedes that "most of the acts alleged to have taken place in Saborsko have been confirmed by the judgment of the ICTY." (Counter-Memorial, paragraph 841). The ICTY in *Martić* gave detailed consideration to the events in Saborsko, and in particular the attack on 12 November 1991, conducted by the JNA, TO and paramilitaries, resulting in the killing of at least 20 civilians on 12 November 1991 and a further 14 civilians thereafter. The ICTY concluded that crimes against humanity of murder and persecution had been committed, as well as the war crimes of murder, wanton destruction and plunder. The ICTY first gave an overview of the attack on Saborsko on 12 November 1991:

> "225. Saborsko was attacked mid-morning on 12 November 1991 by Tactical Group 2 ("TG-2"), under the command of Colonel Čedomir Bulat, and the 5th Partisan Brigade, both of which were within the structure of the JNA 13th Corps. A unit of the Plaški SDB, the Plaški TO Brigade and Milicija Krajine units participated in the attack. Within the Plaški TO Brigade, a battalion consisting of three companies under the command of Bogdan Grba participated.
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> 226. The attack commenced with aerial bombing followed by an artillery attack. Afterwards, ground units, including tanks, moved in on Saborsko from three axes. During the attack, the church of St. John was hit by a tank shell but the tower remained standing. The church of the Mother of God was also shelled and damaged during the attack. That church was used as an observation post because there was a clear view of the Lička Jasenica barracks from it. The fighting went on until some point between 1400 hours and 1700 hours; the tanks withdrew around 1800 hours. There were no casualties on the Serb side whereas "on the Croatian [MUP] side" there were 50 dead.
>
> 227. After the attack, there were many Serb soldiers and policemen in the centre of Saborsko. The evidence shows that a shop was looted by Zdravko Pejić and individuals with the last names Cekić or Cvekić, and Momčilović, both of whom were members of Đuro "Snjaka" Ogrizović's company. An individual identified as "Peić" together

[72] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

with Željko "Buba" Mudrić and Nedeljko "Kiča" Trbojević, as well as "other Martić's men" drove away in private cars they found in Saborsko. Moreover, all the tractors in Saborsko were driven away, subsequently to be put up for auction, and household goods were stolen by plunderers. There is also evidence that more than 50 cattle from Saborsko were brought to Plaski and that 17 sheep were taken to Kunić. Many houses in Saborsko were set alight and burnt after the attack. The evidence shows that the perpetrators, who were engaged in the burning of the houses included Nedeljko "Kiča" Trbojević, "Peić", Željko "Buba" Mudrić, as well as "other Martić's men". Houses in the hamlets of Tuk and Dumenčići, and in the Serb hamlet of Solaje, were also set alight. In Borik, both Croat and Serb houses were burned. By mid-December 1991, both the church of St. John and the church of the Mother of God had been destroyed. By 1995, the whole of Saborsko, including the school, had been destroyed. The only houses left standing were two Serb houses, which had been very badly damaged.

228. Following the attack, most of the inhabitants of Saborsko fled to Karlovac, Zagreb, and Ogulin. However, about 30 to 60 elderly villagers remained in the village and were brought to the Lička Jasenica barracks by the Plaški TO. After spending the night at the barracks, they were taken by bus towards Ogulin and released in territory controlled by the Croatian side.

6.54 Thereafter, the *Martić* Trial Chamber considered in detail the evidence of killings in Saborsko during the attack:

"233. Beginning in October 1995, several grave sites were exhumed in Saborsko. The biggest site was at Popov Šanac, located close to the church of St. John, where the following 14 victims were found: Ana Bičanić, Milan Bičanić, Nikola Bičanić, Petar Bičanić, Kata Dumenčić, Nikola Dumenčić, Mate Matovina (born 1895), Milan Matovina, Mate Špehar, Ivan Vuković, Jeka Vuković, Jure Vuković (born 1929), Jure Vuković (born 1930), and Petar Vuković. In the grave site at Borik, the following three victims were found: Darko Dumenčić, Ivica Dumenčić, and Josip Štrk. The following ten victims were found in individual graves in Saborsko: Leopold Conjar, Ante Dumenčić, Ivan Matovina, Kata Matovina (born 1920), Kata Matovina (born 1918), Lucija Matovina, Marija Matovina, Marta Matovina, Slavica Matovina, and Slavko Sertić.

234. Considering in particular that there is direct evidence regarding the killing of eight of the victims exhumed from the mass grave in Popov Šanac, the Trial Chamber finds that all 14 victims exhumed from that mass grave were killed in Saborsko on 12 November 1991.

Moreover, based on evidence indicating their causes of death, the Trial Chamber considers it established beyond reasonable doubt that also Ivica Dumenčić, Kata Matovina (born 1920) and Slavko Sertić were killed in Saborsko on 12 November 1991. Furthermore, considering that Darko Dumenčić and Josip Štrk were found in the same mass grave as Ivica Dumenčić, who was killed on 12 November 1991, the Trial Chamber considers it established beyond reasonable doubt that these two persons were killed on the same date. Lastly, while the body of Jure/Juraj Štrk has not been recovered, the direct evidence establishes that he was killed on 12 November 1991. The Trial Chamber therefore finds beyond reasonable doubt that 20 persons were killed on 12 November 1991. …

…

379. … With regard to the killings at Petar Bičanić's house, the evidence establishes that the two perpetrators wore Serbian dark grey uniforms and helmets with a five pointed red star. The Trial Chamber finds that they were members of units present in Saborsko after the attack on 12 November 1991. With regard to the other twelve victims, the Trial Chamber finds it established beyond reasonable doubt that they were killed by members of units present in Saborsko after the attack on 12 November 1991. The evidence proves that the eight persons killed at Petar "Krtan" Bičanić's house were civilians and that they were not taking an active part in the hostilities at the time of their deaths. Furthermore, the Trial Chamber concludes, based on the totality of the evidence, that Ana Bičanić, Kata Dumenčić, Nikola Dumenčić, Kata Matovina, and Mate Matovina were civilians and that they were not taking an active part in the hostilities at the time of their deaths. … In conclusion, the Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established for the killings of the following 13 victims: …

381. The Trial Chamber finds that after the attack on Saborsko, civilian houses and property were burnt on a large scale by the Serb forces which entered the village. The Trial Chamber finds that this burning was carried out deliberately and was not justified by military necessity, noting in particular the evidence that the attack had ceased at the time this destruction took place. Consequently, the elements of the crime of wanton destruction of villages or devastation not justified by military necessity (Count 12) have been met. The Trial Chamber heard evidence that Serb soldiers and policemen who participated in the attack looted shops and businesses and took tractors, cars and livestock. The Trial Chamber finds that this looting was done

> on a large scale, noting in particular the evidence that nearly every household in Saborsko had a tractor stolen. The Trial Chamber finds that this appropriation resulted in grave consequences for the victims, taking into account the overall effect on the civilian population and the multitude of offences committed. Furthermore, the evidence establishes that this appropriation was done intentionally and without lawful basis or legal justification. The elements of the crime of plunder of public or private property under Article 3 (Count 14) have therefore been met.
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> 383. The Trial Chamber recalls that some of the soldiers present in Saborsko abused the inhabitants with profanities such as "Fuck your Ustasha mother" and that all Croat villagers should be slaughtered. The Trial Chamber further recalls that Saborsko was 93.9% Croat and 3.3% Serb. Even making allowance for the possibility that there may have been a few Serbs among the 13 victims referred to above, this does not affect the Trial Chamber's overall assessment that these killings were carried out with intent to discriminate on the basis of Croat ethnicity. The Trial Chamber therefore concludes that all the elements of the crime of persecution (Count 1) have been met."[73]

6.55 Notwithstanding the ICTY's findings and the Respondent's concession in relation to the same, a number of criticisms of the Applicant's evidence are still made. The Respondent's comments at paragraphs 838 and 840 of the Counter-Memorial focus on the evidence in relation to killings and imprisonment of the local population in Saborsko, and the suggestion that there is no evidence to support an objective of exterminating the Croat population of the village. Those criticisms are wholly undermined by the ICTY's findings, set out above, and by the evidence relied upon by the Applicant. By way of example, M. M., a member of the TO who participated in the attack on Saborsko and whose evidence is not specifically disputed by the Respondent, states:[74]

> "In the past month it was decided in the command that Saborsko should be called 'Ravna Gora' because it was planned that this village should be cleaned so that name would suit it. They even brought the panels with the name of the village written in Cyrillic script. Milan Čikara from Lička Jasenica, the private transporter and Bogdan Jančić called 'Janjac' (lamb) from Plaški transported the ammunition, the bodies and other necessities. … Nikola Medaković and the other commanders of the units, while they were issuing the orders to kill the civilians in Saborsko, used to say that they are all Ustashas and that they should all be killed and completely destroyed. That is the

[73] The atrocities committed in Saborsko were also the subject of Milan Babić's guilty plea (see *Babić*, para. 15). They were also included in the *Milošević* Indictment paras. 36(a), 41, and 44.

[74] Memorial, Annexes, vol 2(III), annex 365.

reason why all the houses were pulled down and all the people who could have testified about those brutalities were killed."

6.56 It is particularly surprising that the Respondent elects to use Saborsko as an example in its closing remarks on Kordun and Lika of a location where there was heavy fighting, such that "it is more than likely that all war related casualties are included as victims in the Memorial." (Counter-Memorial, paragraph 870) That suggestion is unsustainable in the face of the ICTY's findings in relation to Sabrosko, from which it is apparent that the killings were a methodical and cruel attack on an unarmed civilian population, driven by ethnicity of the victims.

6.57 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Ogulin Municipality.[75] This data confirms that 18 bodies have been exhumed from various sites in the area.

(12) Municipality of Karlovac

6.58 The Respondent's summary, at paragraph 842, omits any reference to the systematic destruction of Karlovac town and the surrounding villages and the deliberate shelling of cultural monuments and sacral objects (see Memorial, paragraph 5.155). Thereafter, the Respondent criticises the absence of direct evidence to support the Applicant's case in relation to Karlovac. In doing so, the Respondent ignores certain parts of the evidence of M.L. and D.P., which detail the role of the JNA in the attacks on Karlovac, and in particular the threats made and carried out by Colonel Marjanović to shell the town extensively.[76]

6.59 The Respondent does not deny the killing of 6 Croat civilians in Banski Kovačevac, as set out in the Memorial at paragraph 5.157, and nor could it in light of the fact that the Belgrade District Court's War Crimes Chamber is currently prosecuting 2 defendants, both members of the VRSK 19th Brigade, for the murders.[77] The Indictment alleges that Pane Bulat ordered his troops to bring the 6 remaining Serbs in the area to him, whereupon he executed them using an automatic rifle, with the assistance of Rade Vranešević.

6.60 Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Karlovac Municipality. This data confirms that 2 bodies have been exhumed from sites in the area.

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[75] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[76] Memorial, Annexes, vol 2(III), annexes 366 and 367.

[77] *Prosecutor v Pane Bulat and Rade Vranešević*, Indictment No KTRZ-13/07 of 16 April 2008. Pane Bulat is specifically identified by the Applicant's witnesses as being a perpetrator of the murders: see R.M., Memorial, Annexes, vol 2(III), annex 343.

(13) Municipality of Otočac

6.61 The Respondent's summary (paragraph 846) is, again, misleading, in that it does not mention the disappearance of Grga Bičanić (Memorial, paragraph 5.160). The Respondent's criticisms in relation to the Applicant's evidence are primarily generalised, focusing on the relative weight of hearsay evidence, as to which, see Chapter 2, paragraph 2.44. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Otočac Municipality.[78] This data confirms that 4 bodies have been exhumed from various sites in the area.

6.62 The Respondent is wrong to assert that the only evidence in relation to the 5 Croats from Vrhovine is in Memorial Annexes 374 and 375 (Counter-Memorial, paragraph 848). Since the Memorial was prepared, the bodies of the 5 victims have been located and identified.[79] The 5 Croats are recorded in an official Serbian document as having been brought into the police station and subsequently being taken away by Serbs with guns for "interrogation".[80] This is corroborated by the evidence of the two witnesses, I. and K. Č., about the arrest of the missing Croats.[81] In addition, the Applicant has obtained an Operational Report from the Internal Affairs Secretariat in Knin, which confirms that the 5 Croats were arrested, then taken the next day for "further investigation" by Predrag Baklajić, Nedeljko Brakus and Predrag Baklajić in a police van. They were then killed somewhere on the road between Homoljac and Babin Potok, and their bodies were thrown into a well. After UNPROFOR established a checkpoint near the well, the bodies were removed by the perpetrators of the crime, taken to a remote location and doused in oil before being set on fire and then covered with branches.[82]

6.63 The Respondent asserts, incorrectly, that the ICTY has "dealt with the 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." (Counter-Memorial, paragraph 849). The Indictment in *Martić* did not include any specific allegations in relation to Otočac, so any consideration of the evidence in relation to atrocities committed there was peripheral to the principal issues in that case, as the Trial Chamber made clear at paragraphs 323 and 326 (where the killing of Stipe Brajković is referred to). The implicit suggestion by the Respondent that the ICTY has

[78] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[79] Republic of Croatia, Office for Detained and Missing Persons, Identification Performed at the Institute of Forensic Medicine and Criminology, 15 November 2002, Annex 37.

[80] Memorial, Annexes, vol 2(III), annex 417.

[81] Memorial, Annexes, vol 2(III), annexes 374 and 375.

[82] Internal Affairs Secretariat Knin, Operational Report, 14 July 1993, Annex 79. The Report also details a number of further killings, lootings and mistreatment in the area. See also, the further statement of B.B. concerning the killings of the Čorak family and other attacks in Otočac municipality: Witness Statement of B.B., Annex 4.

conducted a full review of the available evidence for Otočac and rejected it in relation to all but one killing is highly misleading.

(14) Municipality of Gospić

6.64 The Respondent's only direct criticisms of the evidence in relation to Gospić municipality are generalised and are, accordingly, dealt with in Chapter 2. The Respondent does not dispute any of the specific allegations made in the Applicant's Memorial (Counter-Memorial, paragraphs 851-856). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Gospić Municipality.[83] This data confirms that 6 bodies have been exhumed from various sites in the area.

6.65 The Respondent refers to the findings of the Trial Chamber in *Martić* in relation to Široka Kula. As the Respondent correctly identifies, the Indictment did not include allegations in relation to Gospić municipality, but the ICTY commented on the evidence that 13 people had been killed by the Serbian police, and took it into account when convicting Martić of the crime against humanity of persecution.[84] Whilst the ICTY was not tasked with a full review of the evidence in relation to Gospić municipality, its findings in so far as it has made some are supportive of the Applicant's case.[85]

(15) Municipality of Titova Korenica

6.66 The Respondent's summary, at paragraph 857, of the Applicant's case is inaccurate and incomplete in that it: does not include the allegations of setting Poljanak on fire on 8/9 October 1991 or the torture of M.L.
by men in JNA uniforms (Memorial, 5.177); and it wrongly lists 2 people being killed in Smoljanac on 2 December 1991 when it is the Applicant's case that 8 people were killed on 4 December 1991 (Memorial, paragraph 5.181). The Respondent also fails to make reference to the restrictions on freedom of movement and the effective forced exile of the Croat population from Smoljanac (Memorial, paragraph 181). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Korenica Municipality.[86] This data confirms that 27 bodies have been exhumed from various sites in the area.

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[83] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[84] See *Martić* para. 324, footnote 1002, in reliance on the Helsinki Watch Report sent to Slobodan Milošević on 21 January 1992: Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99.

[85] The Applicant has also obtained a further witness statement from S.Đ. confirming the circumstances of the killings in Široka Kula: Witness Statement of S.Đ., Annex 11.

[86] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*. The Municipality of Titova Korenica is now known as the Municipality of Korenica.

6.67 The Respondent does not specifically dispute a number of the Applicant's allegations in relation to Titova Korenica. In particular, the Respondent does not directly challenge the evidence that detained Croats were tortured in Korenica, that 8 people were killed in Smoljanac on 4 December 1991, nor any of the killings in Poljanak. In relation to Poljanak, the Respondent concedes that the ICTY in *Martić* "confirmed the killings in Poljanak and its hamlet Vuković."[87] This concession is well-made, in light of the following findings of the ICTY, which founded a conviction for the crime against humanity of persecution:

> "211. Poljanak was shelled for the first time on 28 August 1991 and was shelled daily after that. A few families initially left but returned two to three days later.
>
> 212. On 5 September 1991, women with small children and minors in Poljanak and the surrounding villages left for Kraljevica, south-east of the city of Rijeka on the Adriatic coast. Vukovići was shelled at around noon on 8 October 1991, after which there was shooting in the village by unidentified armed Serbs. The next morning, Tomo Vuković was found dead in front of his burnt down house and at least two more houses had burnt down. Around 14 October 1991, Mile Lončar, an invalid man, and his father, Ivan Lončar, were found hanged in their house.
>
> 213. There were no Croatian military units in Poljanak in the summer and autumn of 1991. However, there was a civilian protection force that would keep watch, but the members were either unarmed or had two to three hunting rifles at their disposal.
>
> …
>
> 216. Also on 7 November 1991, 20 armed soldiers dressed in camouflage and olive-drab uniforms surrounded the house of Marica Vuković, a Croat, in Poljanak. Marica Vuković did not know where the soldiers were from but concluded that some must be locals because they appeared well informed about Marica Vuković and her family. As soon as they arrived, the soldiers "captured" Marica Vuković and the others present in the house. The soldiers tied the arms of Marica Vuković's husband Nikola Vuković (born 1938) and her father Ivan Vuković. Marica Vuković, her daughter Mira Vuković, her mother-in-law Jelena Vuković and her neighbour Marija Vuković were put under a plum tree where they were slapped, insulted and interrogated. One of the soldiers threatened Marica Vuković and also put a knife at her throat. The soldier wore a glove and said that it was "so that I won't get my hand bloody when I slit the throats of Ustashas."

[87] The Applicant's case on Vukovići is set out under Slunj Municipality, above, at para. 6.45.

> 217. The women were separated from Ivan Vuković and Nikola Vuković (born 1938) and taken to a nearby maize field whereupon two or three other soldiers came from the direction of Vukovići, together with a boy. The boy was put with the women. Subsequently, shooting was heard from the house where Ivan Vuković and Nikola Vuković had been left.
>
> 218. Soon thereafter, a soldier came to the women and told them to flee. The women and the boy hid in the woods for a few hours. After having seen some cars move away from the village, Marica Vuković returned to her house and then came across the bodies of her father and husband in the maize field. She saw that her husband's "brains were shattered" and that her father's "skull wasn't in place any more". On that day, neither her husband nor her father was armed or wearing a uniform, nor were they members of a military force or the police.
>
> 219. The evidence shows that several houses, sheds and cars were burnt in Poljanak on 7 November 1991, by the soldiers present in the village. The evidence also shows that before the houses were burnt private property was looted or destroyed. When torching the houses, some soldiers made comments, such as "Milošević built the house and Milošević is going to destroy it" and "what's Tuđman done for you? All you are going to get from him is a bullet in your head"."[88]

6.68 The Respondent directs specific criticism at the evidence in relation to the killing of two Croats in Smoljanac on 8 October 1991 (Counter-Memorial, paragraph 860). It is said that the witnesses do "not offer information on the specific circumstances under which the killings took place." That is a misrepresentation of the Applicant's evidence:

> "On 8th October 1991 the enemy army fiercely attacked the villages of Vaganac and Drezničko Selište, while I was in the defence of the village of Smoljanac, municipality of Titova Korenica, and together with me were: A.R., Z.B., D.B., I.
> B., N.R., M.R., M.M., I.M.,
> M.H., M.H., A.H., S.H., N.H.,
> M.H., J.Š., M.Š., R.R. and M.
> M. On that day at dusk, from the direction of Višnjevača hill
> a group of about 10 enemy soldiers came on foot to J.M.'s
> house (Smoljanac 7), from where a few minutes later we heard gunshots. After that the enemy soldiers went back towards Visnjevaca hill. Since we were not certain whether anyone of the enemy soldiers stayed at J.M.'s house, we did not come near his house all
> until 10th October 1991 in the morning when I saw J.M.

[88] The attacks on Poljanak were also the subject of Milan Babić's guilty plea in *Babić*, para. 15, set out above at para. 6.33.

> (son of Petar, born on 21st August 1930 in Saborsko, municipality of Ogulin, address:…) and A.B. (maiden name S., born in 1919 in Lipovača, minicipality of Slunj, address: …) lying dead in front of J.'s house. ... We put them onto a horse-wagon and drove them further in the village, where two caskets were brought later from Slunj in which we put J. and A. and drove them by a van to the local cemetery in Drežnik Grad, where they were buried in the same grave."[89]

6.69 The Applicant has subsequently obtained a statement from one of the TO officers present at the killings on 8 October 1991, which corroborates the other available evidence. N.C. states:

> "I remember that at the end of September or beginning of October 1991 we went to the Korana Bridge to cleanse the field, and in the evening, before we set out, the messengers reported to us to gather at the meeting point in the sports ground of the primary school in Udbina, at a late hour, before morning. On that occasion, I think that the entire troop gathered in the sports ground, it was lined up, the commander of the troop at the time was J.K., I was in the V squad, and S.U. called M. still wasn't commander of the squad. … M. pointed out that that we were making a move, and that we would get definitive instructions in Korenica or Plitivce. After this, grenade launchers, rocket launchers ("Zolja"), bombs and ammunition were distributed from a truck, and I remember that I carried a backup battery for RUP 12 (portable radio device set), and I had commissioned an automatic gun M-58, calibre 7.62 mm. …
>
> When we reached the first houses [in Smoljanac] where someone allegedly fired shots, I was told personally by U.S. called M. to remain with M.M., and when the rest of the squad went ahead, we approached a house where an older man was standing, and M. asked him: Where are your sons, to which the man replied In hell, together with you. At that moment, an old woman came from the garden and asked the old man "What's the matter", to which he replied "Nothing", and the old woman came to him, stopped in front of the house and started to cry. At that point, M.M. called M. said he would revenge his brother who was then imprisoned in the barracks in Gospić. The woman then said "I have nothing to do with this", and the man turned heading towards the door, to which M. said I fuck your mother and that he'd riddle him with 30 bullets. After this, the man turned to face us and I saw when M.M.

[89] Witness Statement of P.B., Memorial, Annexes, vol 2(III), annex 392.

> trained his short automatic gun killing the two of them with two bursts. I remember that he older man was skinny, a bit taller, and the woman short, he, as far as I remember, was wearing darker trousers and a "visor cap", and the woman was wearing a dress, their house was located just at the foot of the hill, but I don't know their identity. "[90]

6.70 The statement of N.C. undermines the Respondent's assertion (paragraph 860) that the Applicant's other evidence revealed that heavy fighting was going on at the time of the 8 October 1991 killings. It is apparent that the two civilian victims were unarmed at the time they were shot.

(16) Municipality of Gračac

6.71 The Respondent does not summarise or dispute several parts of the Applicant's case in relation to Gracac municipality: in particular, the allegations that Croat properties were burned down, churches were damaged or destroyed and the graveyard in Lovinac was desecrated (Memorial, paragraph 5.186). These are significant omissions. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Gračac Municipality.[91] This data confirms that 5 bodies have been exhumed from various sites in the area.

6.72 Thereafter, the Respondent is critical of the absence of evidence as to the circumstances under which several of the killings occurred. However, the Respondent's assertions are undermined by the findings of the ICTY in *Martić* that five Croats were killed in Lovinac between 5 and 14 August 1991 by Serbian paramilitary groups.[92] As the Respondent recognises, these crimes did not form part of the Indictment, and accordingly no formal conviction was entered in relation to them. Moreover, the fact that the crimes in Lovinac were not part of the Indictment means that the findings of the ICTY cannot be held out by the Respondent as a complete account of the atrocities committed in Lovinac. The findings that are made, however, strongly support the Applicant's case.

SECTION FOUR: DALMATIA

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[90] Witness Statements of N.C., Annex 9.

[91] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[92] *Martić,* para. 324, footnote 1002, in reliance on the Helsinki Watch Report sent to Slobodan Milošević on 21 January 1992: Report from Helsinki Watch to President Slobodan Milošević and General Blagoje Adžić, 21 January 1992, Annex 99.

(17) Municipality of Šibenik

6.73 The Respondent's summary of the Applicant's case (Counter-Memorial, paragraph 874) omits any reference to the expulsion of hundreds of Croats from Šibenik municipality, as detailed in the Memorial, paragraphs 5.203-205. Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Šibenik Municipality.[93] This data confirms that 16 bodies have been exhumed from various sites in the area.

6.74 Thereafter, the Respondent raises only generalised criticisms of the Applicant's evidence, which are principally addressed in Chapter 2, in particular at paragraphs 2.42-45 and 2.55-57. However, the Respondent's assertion that "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" is factually incorrect. The witness J.B. gives direct evidence of the beatings that the victim, M.P., had suffered at the hands of Serbs prior to finding his body in a cistern, badly beaten and bruised, particularly in his groin area, on 12 March 1992.[94] Similarly, the witness B.C. gives evidence as to the method by which M. C. was killed (9 stab wounds made by a knife) on 7 January 1992, and identifies the 4 men she believes to be responsible for the murder.[95] B. C. also gives evidence as to the beating, approximately 20 days later, of M.K. by 3 named Serbs, 8 days after which he was found dead, "with the veins on his arms and on his legs torn to pieces."

(18) Municipality of Drniš

6.75 The Respondent's summary of the Applicant's case is incomplete and inaccurate (Counter-Memorial, paragraph 878). At paragraph 878(a) the Respondent incorrectly states that the 10 killings in Puljane occurred on 2 August 1993, when in fact they occurred on 2 February 1993. The Respondent also omits to mention: the repeated evidence of serious physical abuse and torture, set out in the Memorial at paragraphs 5.210-212; the detention of Croats in prison camps, set out in the Memorial at paragraphs 5.207 and 5.212; the systematic harassment of the remaining Croat population, set out in the Memorial at paragraphs 5.207, 5.209-211 including a number of rapes (paragraph 5.112) ; forced labour (paragraph 5.210); forced exile (paragraphs 5.207-212); and the destruction of Croatian sacral and cultural objects (paragraphs 5.209-212). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Drniš Municipality.[96] This data

[93] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.
[94] Memorial, Annexes, vol 2(III), annex 432.
[95] Memorial, Annexes, vol 2(III), annex 433.
[96] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

confirms that 31 bodies have been exhumed from various sites in the area. The Respondent's specific criticisms are directed principally at Drniš and Miljevci. In relation to Drniš, the Respondent asserts that the witness M.P. gives no information about the circumstances surrounding the 3 killings in 1993 (Counter-Memorial, paragraph 882). It is clear from M.P.'s statement that she had herself been subjected to detention and threats from Serb policemen and it was subsequent to that that the killings occurred.[97] It is apparent from the state of the bodies that the killings were violent. The Respondent does not dispute the repeated evidence of beatings, torture and rape in Drniš.[98]

6.76 In relation to Miljevci, the Respondent asserts that the witness statements do not reveal the circumstances of the killings or the perpetrators. That is an exaggeration of the evidential position: for example, M.M. gives an account of P.K. arguing with Serbs and thereafter hearing 2 gunshots, before finding him lying dead the following morning in front of his house.[99] Since the Memorial was prepared, the Applicant has obtained further evidence corroborating that previously submitted. K.V., the widow of I.V., gives a detailed account of her husband being shot during a raid on Kaočine by Serb paramilitaries and JNA forces on 6 December 1991.[100]

6.77 The Respondent thereafter makes a general assertion that all other events are predicated on hearsay evidence. The Applicant responds to this general assertion in Chapter 2. However, the assertion is factually incorrect in relation to Kričke, when it is apparent from the statement of M.V. that she gives a firsthand account of the events.[101] Similarly, the assertion that I.G.'s statement *"s*eems to be based on hearsay" is incorrect: there is no indication that the evidence is anything other than firsthand.[102]

6.78 The Applicant has also obtained further evidence in relation to the killings in Drniš municipality:

- M.D. gives a detailed account of the killings of 25 Croats between 1992 and 1995, some of which are already referred to in the Memorial;[103]

- A crime scene report in relation to the killings of several Croats in Puljane on 2 February 1993 (see Memorial, paragraph 5.207), detailing the gunshot wounds found on all the victims, who were sitting in the kitchen of I. B.'s house. The report also deals with the killings of Kata Parać and

97 Memorial, Annexes, vol 2(III), annex 442.
98 See, for example, the witness statement of M.M., Memorial, Annexes, vol 2(III), annex 521.
99 Memorial, Annexes, vol 2(III), annex 445.
100 Witness Statements of K.V., Annex 27.
101 Memorial, Annexes, vol 2(III), annex 450.
102 Memorial, Annexes, vol 2(III), annex 460.
103 Witness Statement of M.D., Annex 10.

Krste Bračić in the village of Oklaj;[104]

- An interview record with M.B. concerning the same killings in Puljane on 2 February 1993.[105] M.B. states that she saw the dead bodies of the following Croats in their houses, after they had been killed by Serbs: Ivan and Ana Bračić, Pavao and Ana Parać, Marija Bračić, Kaja Parać, Krste Bračić and Mile Parać.

6.79 The Respondent asserts that the ICTY has not indicted or sentenced anyone in relation to Drnis municipality. That is factually correct, but overlooks the relevant findings made by the ICTY in *Martić*:

> "171. On 16 September 1991, Drniš, which is located near Knin and at the time was 75% Croat, was attacked by forces and artillery of TG-1 of the JNA 9th Corps. During the attack, and the following days, the centre of Drniš was almost completely destroyed. Widespread looting was committed by members of the JNA and the MUP and by local citizens. Approximately 10-15 days after the attack, an SJB of the SAO Krajina MUP was set up in Drniš.
>
> …
>
> 299. There is considerable evidence that similar displacement of the Croat population as a result of harassment and intimidation occurred elsewhere in the SAO Krajina, and subsequently RSK, territory and continued until the end of 1994. [The footnote includes reference to the fact that "around 50 Croats had filed requests with the civil police in Drniš to leave"] The evidence shows that harassment and intimidation of the Croat population was carried out on a large scale by the police and by local Serbs in the territory."

The findings of the ICTY corroborate the allegations made by the Applicant, and are not addressed by the Respondent in its Counter-Memorial.

(19) Municipality of Knin

6.80 In its summary (Counter-Memorial, paragraph 881) the Respondent fails to refer to several instances of torture and abuse, as well as forced labour, set out in the Memorial (paragraph 5.214), denial of food and destruction of sacral objects (paragraph 5.215) and forced exile (paragraph 5.216). The Respondent then wrongly asserts that it is the Applicant's case that 5 Croats were killed in Ervenik on 18 January 1992 (Counter-Memorial, paragraph 887(c)). It is the Applicant's case that 6 Croats were killed (Memorial, paragraph 5.215).

[104] Knin District Court, Crime Scene Report on the Occasion of the Death of Pavao Parać, 5 February 1993, Annex 102.
[105] Witness Statement of M.P. and M.B., Annex 19.

The ICTY relied upon the evidence of these killings in commenting on the wider pattern of persecutions of Croats in the Knin region, as the Respondent acknowledges.[106] The Respondent asserts that Martić was not directly charged in relation to these killings and was accordingly not convicted of them. That is factually correct, but the significance lies in the ICTY's reliance upon the fact that the killings had occurred, and that they formed part of the overall pattern of persecution of the Croat population. The fact that Martić was not charged with these crimes, but that they were nonetheless found by the ICTY to have been committed as part of the persecutory plan evidences the necessarily limited nature of the ICTY Prosecutor's Indictments (see further, Chapter 2, paragraphs 2.25-33). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Knin Municipality.[107] This data confirms that 20 bodies have been exhumed from various sites in the area.

6.81 Other than generalised criticisms, addressed in Chapter 2, the Respondent makes very little specific comment on the Applicant's case in relation to Knin municipality: it does, for example, make any comment or or dispute the Applicant's allegations in relation to Vrpolje (Memorial, paragraph 5.216). The assertion that the Applicant's witness statements do not support the Applicant's case is not supported by any analysis, save for the comment that the statements in relation to Kijevo are mostly hearsay and do not have accurate descriptions of how killings occurred or by whom they were committed (Counter-Memorial paragraphs 889-890). That is again an exaggeration of the evidential position. For example, the witness B.V. states that the most terrible crimes were committed by "Šešelj" and "Martić's Men", as well as local Serbs, and gives an account of how Ivan and Jaka Ercegovac were killed in their house and then thrown into the cistern in their yard.[108] B.V. also names several men responsible for physically and psychologically abusing her.

6.82 The Respondent does not, apparently, directly challenge the evidence of abuse given by the Applicant's witnesses. The Respondent notes that the ICTY dealt with the attack on Kijevo in *Martić*, but that it did not address the killing there. The Respondent does not overtly suggest that this demonstrates the ICTY found there to have been no such killings: such a suggestion would be unsustainable in circumstances where those killings did not form part of the Indictment. The ICTY's findings in relation to Kijevo are set out in relevant part below, and highlight the coordinated and systematic attacks that were perpetrated on the Croat population:

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[106] Martić para. 327, footnote 1012, which states in relevant part: "On 18 January 1992, the Čengić family were killed in their house in Ervenik Village, Knin municipality by three members of the TO. The same three perpetrators also set fire to houses, sheds and barns in the village."

[107] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

[108] Memorial, Annexes, vol 2(III), annex 463.

"166. On 26 August 1991, the Croat village of Kijevo, situated 15 kilometres east of Knin, was attacked because the MUP of Croatia had established an SJB in the village. The decision to attack Kijevo was taken by Milan Martić in coordination with the JNA and followed an ultimatum issued by him to the Croatian SJB, in which he stated that "you and your leadership have brought relations between the Serbian and Croatian populations to such a state that further co-existence in our Serbian territories of the SAO Krajina is impossible". In relation to the civilian population in Kijevo, the ultimatum provided that: "We also want to advise the population of Kijevo to find safe shelters on time so that there should be no casualties among them. We would like to stress that we want co-existence and understanding between the residents of the Serbian villages and the Croatian population in Kijevo, and we guarantee civil and human rights to everyone."

167. Units of the JNA 9th Corps in Knin, the Milicija Krajine and the local TO participated in the attack. The evidence establishes that there was coordination between the JNA and the MUP, and that the JNA was in command of the participating forces. The evidence is inconsistent as to the strength of the Croatian forces present in Kijevo. Prior to the attack, between 23 and 25 August 1991, the commander of the Croatian SJB evacuated almost the entire civilian population of Kijevo.

168. The attack on Kijevo on 26 August 1991 only lasted a few hours. There is differing evidence as to the purpose of the attack. Witnesses testified that the purpose was "to cleanse Kijevo of its Croatian population", to link up the two Serb villages of Polača and Civljane on either side of Kijevo, to "liberate the area", and to provide for further advancement of the JNA. Borislav Đukić, who at the time was commander of Tactical Group 1 ("TG-1") of the JNA 9th Corps in Knin, testified that the attack had not been planned beforehand but was provoked by a Croatian attack on 25 August 1991 on buffer zones previously established by TG-1. According to Borislav Đukić, the purpose of the attack was to lift the blockade along the Kijevo road, set up by the Croatian SJB in Kijevo.

169. The Catholic Church in Kijevo was damaged during the attack, and was later destroyed. The evidence also shows that private houses were looted and torched."

6.83 The Respondent makes no mention of the extensive findings of the ICTY in *Martić* in relation Knin, which serve to underscore the systematic, intentional and targetted persecution of Croats in the region:

"296. Beginning in 1990, Croat businesses and properties were blown up in Knin and there was constant pressure on the local Croat population. From around April 1991, discriminatory policies were applied against Croats, and Croat houses in the Knin area were searched for weapons. Following the fighting in the Hrvatska Kostajnica, Knin and Glina areas in August 1991, Croat civilians began to leave their homes to go to Zagreb, Sisak and other places.

297. Due to the situation prevailing in the Knin area, the Croat population began to fear for their safety and began requesting authorisation from the RSK authorities to leave the RSK territory. The insecurity of the Croats was also aggravated by speeches of Milan Martić on the radio that he could not guarantee their safety, particularly in the area of Knin. As a result, in the period between 1992 and 1993 the RSK police directed the Croat population towards Croat settlements near Knin, such as Vrpolje and Kninsko Polje. In Vrpolje, which was five kilometres north of Knin, a cultural centre was used as a gathering point for Croats, who had requested authorisation to leave the RSK. The Knin police secured the area at the cultural centre. The conditions there were poor and the Croats were not free to leave but had to wait for an agreement to be reached between the RSK Government, international organisations and the Croatian authorities before they could be transferred. The police from Knin organised and escorted bus convoys from Vrpolje to Šibenik and across Lika to Karlobag.

298. A decision on the conditions upon which Croats and other nationalities could return to the RSK was adopted by the RSK government on 21 April 1992. However, in September 1992, UNPROFOR reported that "it might be unrealistic to carry out any return [of displaced persons] in the forthcoming future" due to the likelihood of hostile acts being carried out against returning Croats.

299. There is considerable evidence that similar displacement of the Croat population as a result of harassment and intimidation occurred elsewhere in the SAO Krajina, and subsequently RSK, territory and continued until the end of 1994. The evidence shows that harassment and intimidation of the Croat population was carried out on a large scale by the police and by local Serbs in the territory. [footnote 931 then refers to a number of exhibits and witnesses, evidencing the following] … testifying that "[s]everal people said that Martić's policemen went door-to door telling people to leave Knin, that is the SAO Krajina"… providing also that in the month of October 1992 five Croats were murdered and that houses vacated by Croats have been burned down …reporting that "the Serb side" is building up a

climate of threat and fear of aggression out of ongoing incidents, that the "[Militia] is expanding ethnic cleansing systematically", and that the "Serb side" warned against returning Croats without RSK consent because "the recent acts against Croatians here can be considered as indication of what would happen on larger scale" … listing incidents of murder, destruction and intimidation of Croats in the Benkovac, Borovac, and Knin areas by the local police … letter reporting on beating and robbing of elderly and helpless people in the Vrlika area by members of the "Militia" … listing a number of incidents of violence, including murders, theft and destruction, aimed at Croats in Korenica, Zalužnica, Knin, Vrlika, Benkovac … providing that many Croats wanted to leave the UNPA due to not feeling safe …providing that in Sector North by July 1992 about 22,000 Croats were listed as Missing/Displaced."

6.84 It is plain from this finding that the ICTY treated the actions as part of a systematic policy; that is entirely consistent with intent. Similarly, the ICTY made extensive findings in relation to detention facilities in Knin and the extensive torture conducted there:

"279. There were two detention facilities in Knin, one at the barracks of the JNA 9th Corps and one at the old hospital. The evidence shows that between 1991 and 1995, between 650 and 700 were detained in Knin.

(a) Detention at the JNA 9th Corps barracks

… 281. On 19 November 1991, Luka Brkić, Ante "Neno" Gurlica and Marin Gurlica were brought by truck to the JNA barracks in Knin by men wearing JNA uniforms. While they were taken to the barracks, they were beaten and verbally abused.

282. Luka Brkić was detained at various locations at the JNA barracks with between 8 and 17 people, ranging from 30 to 80 years old. The detainees were severely beaten for at least twenty days. 3 The detainees did not receive medical treatment, there was insufficient food and water, and there were no sanitary facilities.

283. Luka Brkić was also detained at the sports hall of the barracks with between 75 and 200 people, mostly Croats. The detainees were occasionally severely beaten. There were limited sanitary facilities and a 200-litre barrel next to the door that was used to urinate in. Ratko Mladić, the then-Commander of the 9th Corps, twice visited the detainees at the sports hall. Ratko Mladić taunted them, saying "if you don't do what you are told […] your fate will be the same as the fate of the inhabitants from Škabrnja." The detainees were "displayed as

Ustashas" and made to "take an oath for the King and the fatherland, the Serbian fatherland".

284. While being detained in the JNA barracks, in addition to JNA soldiers, Luka Brkić saw soldiers wearing SAO Krajina insignia and the White Eagles ("Beli Orlovi") insignia.

(b) Detention facility at the old hospital in Knin.

285. In early 1991, a detention facility was established on the premises of the old hospital in the centre of Knin. This facility was sometimes referred to as "Martić's prison" and the "District Prison". … From the summer of 1991, the Ministry of Justice of the SAO Krajina took over control of the old hospital from the TO and hired professional guards. On 28 September 1992, the Assembly of the RSK formally established the District Prison in Knin.

286. On 2 October 1991, Stanko Erstić was arrested in Medviđa near Bruška by the Milicija Krajine and brought to the old hospital in Knin. He was detained with another 120 prisoners, all non-Serbs from Croat or mixed villages in the Krajina region. Except for 20 members of the ZNG who had been captured during the fighting in Kijevo, all detainees were Croat civilians. … In his view, "all the guards were paramilitary and part of 'Martić's militia'". He testified to having seen Ratko Mladić at the old hospital. …

287. Luka Brkić was brought to the old hospital from the JNA barracks in Knin. In his opinion, "it was the police or the army who operated there." …

288. The detainees were threatened and beaten every day for long periods, often by several guards at a time using rifle butts, truncheons, and wooden staves. The detainees were interrogated and also beaten by shift commanders. The detainees also had cocked revolvers pressed against their temples, were beaten on their kidneys until they were swollen, and were denied the use of toilet facilities. They were forced to drink urine and to clean toilets with their bare hands. They had their heads forced into toilets. They also had their personal belongings stolen. There is evidence of sexual abuse of some detainees and that detainees were subjected to sleep deprivation. There was insufficient food. The detainees were verbally abused by the guards, who said things like "the Croatian nation has to be destroyed", "all Croats have to be killed; Split and Zadar are burning, Šibenik will burn as well". On one occasion, Vojislav Šešelj visited the old hospital and insulted the detainees, asking them "how many Serbian children they slaughtered, how many mothers".

289. "Martić's police", wearing blue uniforms, carried out beatings together with people in camouflage uniforms. Ivan Atelj, who was also detained and beaten at the old hospital, stated that while Stevo Plejo and Jovica Novaković were in charge of the old hospital prison, they "allowed beatings of prisoners by civilians, Serbian prisoners, 'Martić's Special Forces members' and all others who wanted to beat them."

290. From his mistreatment in detention, Luka Brkic sustained permanent injuries to his stomach and contracted Hepatitis B. He is still receiving medical treatment. Stanko Erstić sustained two broken ribs and one cracked rib, while Ivan Atelj sustained three broken ribs and injuries to his spine.

…

294. In October 1991, Milan Martić was seen in the prison wearing a camouflage uniform with the insignia of the Milicija Krajine."[109]

6.85 The ICTY found that the detentions in Knin amounted to the crime against humanity of persecution, as well as the crimes of imprisonment, torture, cruel treatment and other inhumane acts.[110]

(20) Municipality of Obrovac

6.86 The Respondent makes only very limited comments in relation to the Applicant's case and evidence on Obrovac municipality, most of which are generalised and addressed by the Applicant in Chapter 2 (Counter-Memorial, paragraphs 893-898). The Respondent's summary of the Applicant's case refers only the killings described in the Memorial, and omits to mention the restriction of movement (paragraph 5.219) and fleeing of 1703 Croats (paragraph 5.221). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Obrovac Municipality.[111] This data confirms that 37 bodies have been exhumed from various sites in the area.

6.87 The only specific observation made is that "the exhumation records offered by the Applicant confirm the killing of six elderly Croats in the village of Jasenice, but they cannot provide any information under what circumstances and by whom they were killed." (paragraph 897) The Respondent is correct that the exhumation records cannot themselves provide evidence of the circumstances or perpetrators of the killings, but such evidence is available in the Applicant's witness statements. For example, the Applicant sets out at

[109] The allegations in relation to the Old Hospital in Knin also formed part of the *Milošević* Indictment para. 64(i).

[110] *Martić*, paras. 407-416.

[111] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, *supra*.

paragraph 5.217 of the Memorial the evidence of L.M. in relation to the shooting of L.M.[112]

6.88 The ICTY made two relevant findings in relation to Obrovac municipality in *Martić:*

- It relied on evidence that "over 100 Croats had left their homes in the Medviđa area and were living in caves, fields and forests" in concluding that "There is considerable evidence that similar displacement of the Croat population as a result of harassment and intimidation occurred elsewhere in the SAO Krajina, and subsequently RSK, territory and continued until the end of 1994."[113]

- It relied upon the Helsinki Watch Report sent to Slobodan Milošević on 21 January 1992, noting that it recorded that on "17 December 1991, five civilians were reportedly killed in the village of Jasenice (Obrovac)".[114]

6.89 In addition, the Applicant has also obtained further evidence corroborating its case in relation to Obrovac municipality:

- S.M. provides evidence of the murder of his brother, M. M., in Zaton Obrovački on 2 July 1992. The witness was present at the time of the shooting, which was a targeted execution of M.M.. The witness subsequently heard that the perpetrator was M.G. 'G' and a man called P. 'Ć'.[115]

- L.M. has provided a second witness statement, dealing with the killings in Zaton Obrovački on 26 January 1993, to which he was an eye-witness. The victims were rounded up by two soldiers on the pretence of being evicted, before being shot whilst unarmed. One of the soldiers was called M.G. 'G' and the other was unknown to the witness.[116]

- M.Ž. gives evidence of the killing of M., S. and M. Ž. in Kruševo on 31 December 1991. Upon reporting the crime, the witness was told that the police could not help her and that she should leave for Zadar otherwise she would end up like her neighbours. The witness had heard S.P. 'Ž' and B.P. 'B' talking about killing the Ž.'s 10 days prior to the shootings.[117]

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112 Memorial, Annexes, vol 2(III), annex 469.
113 *Martić,* para. 299, footnote 930.
114 *Martić,* para. 324, footnote 1002. The Helsinki Watch Report appears at Annex 99.
115 Witness Statements of S.M., Annex 17.
116 Witness Statement of L.M., Annex 15.
117 Witness Statements of M.Ž., Annex 29.

(21) Municipality of Benkovac

6.90 The Respondent's summary (Counter-Memorial, paragraph 899) of the Applicant's case omits to mention numerous incidents relied upon in the Memorial, including: the fleeing of 389 Croats from Korlat, all Croats from Smilčić and 659 Croats from Benkovac (Memorial, paragraphs 5.223 and 5.225); the forcible expulsion of 825 Croats from the village of Lišane Ostovičke, 139 Croats from Rodaljice, 360 Croats from Lisičić (while the "RSK" authorities settled Serbs in their houses), and 353 Croats from Perušić Benkovački (paragraph 5.225); compelling Croats to undertake forced labour in Šopot (paragraph 5.225); and destroying the Catholic church in Lisičić as well as Croatian property in Benkovac (paragraph 5.225). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Benkovac Municipality.[118] This data confirms that 48 bodies have been exhumed from various sites in the area.

6.91 Thereafter, the Respondent disputes very little of the Applicant's case in relation to Benkovac municipality in specific terms, but asserts in general terms that the Applicant's evidence does not support its case (Counter-Memorial, paragraph 902). The Respondent is compelled to concede, however, that the Applicant's evidence must be correct in relation to the killings of 9 Croats on 21 December 1991 in Bruška, because the ICTY convicted Milan Martić of murder and persecution in relation to those deaths. The relevant part of the ICTY's decision is set out below:

> "400. The Trial Chamber finds that Sveto Drača, Dragan Marinović, Draginja Marinović, Dušan Marinović, Ika Marinović, Krsto Marinović, Manda Marinović, Petar Marinović, Roko Marinović and Stana Marinović were intentionally killed in Bruška on 21 December 1991 by the Milicija Krajine. The Trial Chamber considers that the JNA reports which indicate that these killings were carried out in revenge do not disturb this finding. With the exception of Sveto Drača, all victims were civilians and were not taking an active part in the hostilities at the time of their deaths. The Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established for these victims.
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> …
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> 403. The Trial Chamber recalls that prior to the above-mentioned killings in Bruška, armed men identifying themselves as "Martić's men" or "Martić's Militia" would come to Bruška daily to intimidate the inhabitants, calling them "Ustasas", and telling them that Bruska

[118] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, supra.

> would be a part of a Greater Serbia and that they should leave. The Trial Chamber further recalls that the victims, with the exception of Sveto Drača, were Croats. The Trial Chamber therefore finds it established beyond reasonable doubt that these killings were carried out with intent to discriminate on the basis of Croat ethnicity. Trial Chamber therefore concludes that the elements of the crime of persecution (Count 1) have been met for all victims except Sveto Drača."[119]

6.92 The Respondent makes only very limited criticisms of the Applicant's evidence, some of which concern hearsay and are addressed in Chapter 2. In relation to the killings of 6 Croats in Smilčić, the Respondent asserts that there is insufficient evidence in relation to the circumstances of their deaths (Counter-Memorial, paragraph 902). Whilst B.A. is not able to provide an eyewitness account in relation to the murders of M. and L.A., he is able to give evidence as to which particular Serbs had been harassing and intimidating the victims prior to their deaths.[120] B. A. had in fact also given an earlier statement, detailing seeing the bodies of his cousin and his wife after they were murdered on 21 January 1992. He saw 5-6 empty military rifle casings on the floor in front of their bodies.[121] The Applicant has also obtained a statement from D.P., who was held in detention by "Martić's Militia" in Benkovac, where he overheard one of the militia, S.C., bragging that he had killed I.K. on 22 July 1991.[122]

(22) Municipality of Zadar

6.93 The Respondent asserts that the Applicant's witness statements do not support its case (Counter-Memorial, paragraph 908). It is not clear, however, what parts of the Applicant's case the Respondent in fact disputes, in light of the findings of the ICTY in *Martić,* summarised by the Respondent at paragraph 910. It is notable that the Respondent fails even to summarise the allegations made by the Applicant of torture and physical mutilation (Memorial, paragraph 5.229) and the fleeing of 433 Croats from the village of Zemunik Donji (paragraph 5.231). Since the Memorial was prepared, the Applicant has obtained updated exhumation data for Zadar Municipality.[123] This data confirms that 41 bodies have been exhumed from various sites in the area.

6.94 The Trial Chamber in *Martić* found that Zadar municipality was subjected to extensive attacks resulting in the killings of 75 Croats, considered by the ICTY to amount to the crimes against humanity of murder and persecution

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[119] The allegations were also included in the Milošević Indictment paras. 36(a) and 48.
[120] Memorial, Annexes, vol 2(III), annex 495.
[121] Witness Statement of B.A., Annex 1.
[122] Witness Statements of D.P., Annex 21.
[123] See List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43. See further, Chapter 5, paras. 5.12-13, supra.

and the war crimes of murder and wilful destruction. The findings also wholly undermine the implicit suggestion by the Respondent, at paragraph 909, that the killings were legitimate military targeting of civilians who had taken up arms:

> "386. The Trial Chamber recalls that Josip Miljanić, Krsto Šegarić, Lucia Šegarić and Stana Vicković were killed at Slavko Šegarić's house in Ambar on 18 November 1991. The Trial Chamber finds that Krsto Šegarić was intentionally killed by Đuro Kosović, a local paramilitary soldier wearing a camouflage uniform with an SAO Krajina patch and who participated together with other SAO Krajina forces in the attack on Škabrnja. The Trial Chamber further finds that the evidence establishes beyond reasonable doubt that Josip Miljanić, Stana Vicković, and Lucia Šegarić were intentionally killed by other members of such paramilitary soldiers. The Trial Chamber finds that all four victims were civilians and that none of them were taking an active part in the hostilities at the time of their deaths. The Trial Chamber concludes that all of the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established for the above-mentioned killings.
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> 387. The Trial Chamber finds that Jozo Brkić, Jozo Miljanić, Slavka Miljanić, Petar Pavičić, Mile Pavičić, Ilija Ražov, Kata "Soka" Rogić, Ivica Šegarić, Rade Šegarić and Vice Šegarić were intentionally killed outside Petar Pavičić's house in Škabrnja on 18 November 1991. The perpetrators of these killings were members of local paramilitary units, who participated, together with other SAO Krajina forces, in the attack on Škabrnja and who wore camouflage uniforms and different sorts of headgear. … The Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established for the killings of Jozo Brkić, Jozo Miljanić, Slavka Miljanić, Petar Pavičić, Ilija Ražov, Kata "Soka" Rogić, Rade Šegarić, and Vice Šegarić. With regard to Mile Pavičić and Ivica Šegarić, the Trial Chamber finds that the elements of murder, as a violation of the laws or customs of war (Count 4), have been established.
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> 388. The Trial Chamber finds that Novica Atelj, Stoja Brkić, Danka Brzoja, Ika Čirjak, Maša Čirjak, Marija Šestan and Jakov Šestan were intentionally killed at Pere Sopić's house in Nadin on 19 November 1991 by soldiers wearing JNA uniforms. The Trial Chamber finds that these victims were civilians and were not taking an active part in the hostilities at the time of their deaths. The Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and

as a violation of the laws or customs of war (Count 4) have been established for these killings.

389. The Trial Chamber finds that the following civilians were killed in Škabrnja, Nadin or Benkovac on 18 and 19 November 1991: Ivan Babić, Luka Bilaver, Marija Brkic (born 1943), Marko Brkić, Željko Ćurković, Marija Dražina, Ana Jurić, Grgo Jurić, Petar Jurić, Niko Pavičići, Josip Perica, Ljubo Perica, Ivan Ražov, Jela Ražov, Branko Rogić, Nikola Rogić, Petar Rogić, Kljajo Šegarić, Lucka/Luca Šegarić, Grgica "Maja" Šegarić, Mara Žilić, Milka Žilić, Pavića Žilić, Roko Žilić, Tadija Žilić and Marko Župan. The Trial Chamber further finds that these victims were taking no active part in the hostilities at the time of their deaths. The Trial Chamber finds that it has been proven beyond reasonable doubt that these victims, with the exception of Petar Rogić, were intentionally killed by members of the units, including JNA and TO units, which took part in the attack on Škabrnja and Nadin on 18 and 19 November 1991. …The Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established for these killings, except for the killing of Petar Rogić.

390. The Trial Chamber finds that the following members of the Croatian defence forces present in Škabrnja and Nadin were killed on 18 and 19 November 1991: Vladimir Horvat, Nediljko Jurić, Slavko Miljanić, Gašpar Perica, Ante Razov, Marko Rogić, Bude Šegarić, Miljenko Šegarić, Šime Šegarić, Nediljko Škara and Stanko Vicković. … The Trial Chamber finds that it has been proven beyond reasonable doubt that these victims, with the exception of Šime Šegarić and Miljenko Šegarić, were intentionally killed by members of the units, including JNA and TO units, which took part in the attack on Škabrnja and Nadin on 18 and 19 November 1991. …

391. The Trial Chamber finds that the elements of murder as a violation of the laws or customs of war (Count 4) have been established for Ante Ražov, Vladimir Horvat, Gašpar Perica, Marko Rogić and Šime Šegarić, but not for Miljenko Šegarić.

392. The Trial Chamber finds that Marija Bilaver, Josipa Brkić, Mate Brkić and Kata Perica were killed in Škabrnja on 11 March 1992. Moreover, the Trial Chamber finds that the following persons were killed between 18 November 1991 and 11 March 1992: Grgo Bilaver, Peka Bilaver, Ana Brkić, Mijat Brkić, Jure Erlić, Dumica Gospić, Ljubomir Ivković, Neđelko Ivković, Tereza Ivković, Simica Jurjević, Mirko Kardum, Simo Ražov, Grgica Ražov, Marko Ražov, and Pera Škara. The Trial Chamber finds all of these victims, except Neđelko

Ivković, were civilians and were taking no active part in the hostilities at the time of their deaths. The Trial Chamber finds that it has been proven beyond reasonable doubt that these victims were intentionally killed by members of the units that took part in the attack on Škabrnja and Nadin on 18 and 19 November 1991, or which were subsequently present in the area of Škabrnja following the attack and until March 1992. These units included JNA units, units from a TO brigade under JNA command, and paramilitary units. The Trial Chamber finds that the elements of murder as a crime against humanity (Count 3) and as a violation of the laws or customs of war (Count 4) have been established, except with regard to Neđelko Ivković, who the evidence establishes was a "Croat defender". …

…

395. There is evidence that during the attack, the church of the Assumption of the Virgin in the centre of Škabrnja was shot at by a JNA tank. Furthermore, several soldiers entered the church and fired their weapons. The Trial Chamber finds that the church of the Assumption of the Virgin was not used for military purposes at the time of this damage and furthermore that the circumstances surrounding this damage establishes the intent of the perpetrators to cause such damage. The Trial Chamber notes the evidence that on 18 November 1991 a JNA tank opened fire in the direction of the school in Škabrnja and that by 19 November 1991 the school had been destroyed. However, the Trial Chamber considers the evidence to be insufficient to show that the school was not being used for military purposes at the time it was damaged. The Trial Chamber finds that the elements of the crime of destruction or wilful damage done to institutions dedicated to education or religion (Count 13) have been met in relation to the church of the Assumption of the Virgin.

…

398. The Trial Chamber recalls that the majority of the victims in Škabrnja and Nadin, referred to above, were of Croat ethnicity. The evidence shows that soldiers present in Škabrnja threatened villagers hiding in the basements, saying "Come out you Ustase, we are going to slaughter you all" and that even women and children were being called "Ustashas" and were insulted by soldiers. The Trial Chamber further recalls that Škabrnja and Nadin were almost exclusively Croat villages. Even making allowance for the possibility that there may have been a few Serbs among the victims referred to above, this does not affect the Trial Chamber's overall assessment that these killings were carried out with intent to discriminate on the basis of Croat

ethnicity. The Trial Chamber therefore concludes that all the elements of the crime of persecution (Count 1) have been met.

399. The Trial Chamber recalls that the church of the Assumption of the Virgin was destroyed and that it was not used for military purposes at the time of the destruction. The Trial Chamber recalls the manner in which the church was destroyed and concludes that this destruction was carried out with the same discriminatory intent as referred to above. The Trial Chamber therefore concludes that the elements of the crime of persecution (Count 1) have been met."[124]

(23) Municipality of Sinj

6.95 The Applicant's case in relation to Sinj municipality concerns the repeated attempts to destroy the Peruča Dam in order to exterminate a large part of the local Croat population (Memorial, paragraphs 5.232-234). The Respondent's criticism is essentially that the materials relied upon by the Applicant are not independent. That general criticism is dealt with in Chapter 2, paragraphs 2.55-57. Morever, the Applicant has subsequently obtained a number of independent documents, from UNPROFOR, which corroborate the evidence already provided. In particular:

- An UNPROFOR memorandum dated 14 September 1992, sent from UNPROFOR's Head of Mission, Satish Nambiar, in Zagreb to UN Head of Peacekeeping, Marrack Goulding, in New York, marked "Most Immediate", concerning Peruča Dam.[125] It begins: "As you know, two experts, O'Flaherty and Long, came last week to inspect Peruča. For our meetings with Secretary Vance and Lord Owen at the weekend, we obtained their interim report. It is somewhat alarming. … We asked Gen Panić for full JA cooperation on the matter of the dam's preparation for demolition, as suspected by the experts on their inspection … it was agreed that UNPROFOR would assume full responsibility for this installation..." The memorandum went on to note that "The experts found that there was circumstantial evidence of explosive charges having been placed in this [bottom] channel." It proposed a series of steps be taken by UNPROFOR to exercise control over the dam and to ensure that the top and bottom channels were opened, for the "avoidance of a major environmental disaster."

- A subsequent UNPROFOR memorandum dated 19 September 1992, again from Nambiar to Goulding, and copied to Vance, concering a meeting with the (Serbian) Knin authorities on Thursday evening (17 September).[126]

[124] The allegations were also included in the *Milošević* Indictment paras. 36(a), 45-47.

[125] UNPROFOR, Coded Cable from General Statish Nambiar to Marrack Goulding, 14 September 1992, Annex 93.

[126] UNPROFOR, Coded Cable from General Statish Nambiar to Marrack Goulding, 19

At the meeting, the Serb contingent admitted to mining the Dam. The memorandum records "The dam was, indeed, mined (it transpires that Španović's former military command when a JNA colonel included the dam) but they were ready to demine it." UNPROFOR reiterated the requests that had been made to Serbian Prime Minister Panić and General Panić "last weekend, for their immediate assistance in having the explosive charges removed."

- A letter from Cedric Thornberry, Deputy Head of UNPROFOR, to Serbian Prime Minister Panić, dated 21 October 1992, marked "Extremely Urgent" and titled, "Demining of the Peruča Dam."[127] The letter stated "At your and General Panić's meeting on 12 September in Belgrade with Mr Secretary Vance, General Nambiar and myself, we discussed the very dangerous situation of the Peruča Dam. On 23 September, in response to my letter of 14 September, Colonel Čađo, on behalf of the General Staff of the Yugoslav Army, offered to provide specialist assistance to UNPROFOR to demine the dam with UNPROFOR protection, a request to which I agreed on 26 September. Since this time, several written messages have been sent to your military authorities requesting, with increasing urgency, such assistance, and the matter has also been taken up with President Čosić. We are becoming increasingly concerned by the situation at the dam. The water level, already above flood level, is rising daily. If the dam is not demined in the very near future, thus enabling a further channel to be opened, we face the prospect of a major economic, ecological and possibly humanitarian disaster. … I have to reiterate, dear Prime Minister, that the situation cannot be allowed to continue for more than another 72 hours before UNPROFOR institutes emergency action."

6.96 It is apparent from the UNPROFOR documents, and from the admission made by the Serb contingent at the meeting on 17 September 1991, that the Applicant's Memorial correctly asserts that the Serbs repeatedly attempted to destroy the Dam, and to deflect UNPROFOR's intervention to prevent the same. The documents referred to in the Memorial and provided in the Annexes to this Reply confirm the gravity of the consequences explained in the Memorial, had the Dam been breached in the manner intended.[128]

September 1992, Annex 94.

[127] UNPROFOR, Letter from Cedric Thornberry to Prime Minister Milan Panić, 21 October 1992, Annex 95.

[128] Marin Vilović et al., "Facts and Estimates of the Consequences Resulting from Mining of the Peruča Dam by Serbian Forces on 28 January 1993", Croatian Medical Journal, vol 34(4), 1993, pp.280-4, Annex 103; Josip Macan, "A chronological narrative on the events at the dam until the occupation until the mining", Croatian National Electricity, Annex 96; "Consequences if the Peruča Dam was destroyed", Zvonimir Sever, Elektroprojekt, Annex 110.

(24) Dubrovnik

6.97 The Respondent does not summarise much of the Applicant's case in relation to Dubrovnik (see especially the allegations at paragraphs 5.236-237, 5.239 and 5.241 of the Memorial, including the removal of civilians to camps in Bosnia and Herzegovina and Montenegro) and does not specifically dispute anything other than the number of victims killed in the attacks on the city (Counter-Memorial, paragraphs 918-925). The dispute as to the number of victims is predicated on the judgments of the ICTY in *Prosecutor v. Jokić*[129] and *Prosecutor v. Strugar.*[130] However, the charges in those cases only concerned the attacks on Dubrovnik in December 1991 (commencing with the shelling on 6 December): they did not give detailed consideration to the crimes committed in the period between 1 October 1991 and 5 December 1991, other than by way of background context. It is not correct, therefore, for the Respondent to assert that the judgments are a complete consideration of all crimes committed in Dubrovnik in the relevant period. It is the Applicant's case that the deaths in Dubrovnik occurred over a much longer period, and not solely as a result of the December attacks. It should be noted that the Applicant asserted in the Memorial that 161 civilians were killed, according to the records of the Dubrovnik-Neretva County Police Station: it has since been established that the 161 deaths included a number of military and emergency services personnel. The total number of civilian deaths was 123.[131]

6.98 The ICTY case law does, however, set out a helpful background, entirely supportive of the Applicant's case. Miodrag Jokić, a commander in the Yugoslav Navy, pleaded guilty to war crimes in relation to the shelling of Dubrovnik on 6 December 1991. The summary of facts in the Sentencing Judgment provides a useful overview:

> "21. … from 8 October 1991 through 31 December 1991, Miodrag Jokić, acting individually or in concert with others, conducted a military campaign, launched on 1 October 1991 and directed at the territory of the then Municipality of Dubrovnik ("Dubrovnik").
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> 22. In the same period, during military operations directed at Srd Hill and the wider Dubrovnik Region, Yugoslav forces (JNA) under the command of Miodrag Jokić fired hundreds of shells which struck the Old Town of Dubrovnik (the "Old Town").

[129] *Prosecutor v. Miodrag Jokić*, IT-01-42, Trial Chamber Sentencing Judgment, 18 March 2004 ('*Jokić'*). Vladimir Kovačević was also indicted with Jokić and Strugar, but his case was subsequently transferred to Serbia for prosecution, pursuant to Rule 11*bis* of the ICTY Rules. At the present time, the Applicant understands that Kovačević has not stood trial because of psychiatric problems.

[130] *Prosecutor v. Pavle Strugar,* IT-01-42, Trial Chamber Judgment, 31 January 2005 ('*Strugar'*).

[131] Letter from Head of Administration of Dubrovnik-Neretva Police, dated 1 April 2010, Annex 107**;** and Letter from Head of the Crime Police Directorate, dated 1 December 2010, Annex 109**.**

23. Miodrag Jokić was aware of the Old Town's status, in its entirety, as a United Nations Educational, Scientific and Cultural Organization ("UNESCO") World Cultural Heritage site pursuant to the 1972 Convention for the Protection of the World Cultural and Natural Heritage ("UNESCO World Heritage Convention"). He was further aware that a number of buildings in the Old Town and the towers of the Old Town's Walls were marked with the symbols mandated by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention"). He was also aware of the presence of a substantial number of civilians in the Old Town on 6 December 1991.

24. The shelling of 6 December 1991 was preceded by military operations around the Old Town of Dubrovnik which had led to approximately three months of occupation of the areas surrounding the city. There was no investigation initiated by the JNA following the shelling of the Old Town in October and November 1991, nor were any disciplinary measures taken, to punish the violation of the standing JNA order to protect the Old Town of Dubrovnik.

25. At the beginning of December, the JNA and the Croatian forces were about to reach a comprehensive ceasefire agreement which included the restoration of basic supplies to the population of Dubrovnik. The negotiators were Miodrag Jokić, on the one side, and three high-level Croatian cabinet ministers, on the other, including Davorin Rudolf, who was the Croatian Minister for Maritime Affairs and, for a while, acting Croatia's Minister of Foreign Affairs. On 5 December 1991, after a high-level meeting between the two sides in Cavtat, the only remaining detail of the ceasefire agreement was the signing of the part related to the inspection of vessels blockading Dubrovnik's port.

26. On 6 December 1991, JNA forces under the command of, among others, Miodrag Jokić unlawfully shelled the Old Town. Notwithstanding the fact that the forces shelling the Old Town were under the de jure control of Miodrag Jokić, the Prosecution's expressed position is that the unlawful attack was "not ordered by Admiral Jokić". Miodrag Jokić told the Trial Chamber: "I was aware of my command responsibility for the acts of my subordinates in combat and for the failings and mistakes in the exercise of command over troops."

27. As a result of the shelling, two civilians were killed (Tonči Skočko, aged 18, and Pavo Urban, aged 23) and three civilians were wounded (Nikola Jović, Mato Valjalo, and Ivo Vlašica) within the Old Town. Six buildings in the Old Town were destroyed in their entirety

and many more buildings suffered damage. Institutions dedicated to religion, charity, education, and the arts and sciences, and historic monuments and works of art and science were damaged or destroyed. The shelling continued "until late in the day of 6 December 1991." The witness statements provided by the parties show that the Old Town was in chaos, that there was debris from the damaged buildings and that people were crying and in shock.

28. At 2 pm on 6 December 1991, Miodrag Jokić sent a radiogram to the Crisis Committee of Dubrovnik, and specifically to Minister Davorin Rudolf, expressing his regret "for the difficult and unfortunate situation" and stating that he had not ordered the shelling. However, notwithstanding the fact that the shelling of the city was so intense, there was, according to the submissions heard by the Trial Chamber, "no introduction of any immediate order to protect, to preserve the Old Town." The parties agree that "Miodrag Jokić had knowledge of the unlawful shelling from the early hours of the morning of 6 December 1991 and failed to take the necessary and reasonable measures to prevent, mitigate, stop or punish those under his command directly responsible for the shelling." Miodrag Jokić stated, in his message to the Croat side in the afternoon of 6 December 1991, that he would undertake an "energetic investigation on our responsibility and the guilty ones for this event," at the same time expecting "to find the responsibilities on your side." Nonetheless, no-one on the JNA side was punished or disciplined for the shelling; insufficient efforts, if any, were put into investigations.

29. On 7 December 1991, Miodrag Jokić met again with Minister Davorin Rudolf in Cavtat. After further negotiations, a comprehensive ceasefire agreement was concluded. During this meeting, Miodrag Jokić apologized for the events of the day before."

6.99 Pavle Strugar, who had been indicted with Miodrag Jokić, was subsequently convicted for his part in the crimes committed in Dubrovnik in December 1991. The ICTY made reference in its judgment to the shelling of Dubrovnik in both October and November 1991, following the JNA's blockading of the city pursuant to the following order:

"31. On 30 September 1991, pursuant to an order of the General Staff of the SFRY, the Commander of the 2 OG at the time, Lieutenant-General Jevrem Cokić, issued to subordinate units a directive to blockade Dubrovnik. The directive provided for the following deployment of forces:

'[…] Using most of the forces, to go on the attack from the current

sectors, deploying main forces on these axes: Ljubinje – Zavala – Slano; Ljubovo village – Ivanica - Čibača and Grab – Dubravka – Molunat; while auxiliary forces will secure features and the Mostar airport and in the Neretva valley with the following objective: with air, artillery and naval support, operating simultaneously and forcefully to defeat forces along the attack axes and reaching the coastline, to cut off the Adriatic highway at several points along the Slano – Prevlaka section, to seal off Dubrovnik, Ćilipi Airport and Prevlaka from the land and sea, and to prevent enemy forces from manoeuvring; then, providing support from the direction of Ploče, to engage in destroying and disarming the surrounded enemy forces, and to be in a state of readiness for further offensive operations in western Herzegovina.'"

6.100 The ICTY judgment in *Strugar* sets out the attacks on Dubrovnik in October and November 1991 over a number of pages. It concluded, by way of example, in relation to the 11/12 November shelling as follows:

"63. On 11 November 1991 the attack on Dubrovnik intensified. In the context of a much broader attack on Dubrovnik, a lot of shells were falling very close to the Old Town, as well as within the Old Town itself. Paul Davies and his team were filming the shelling on 11 November 1991. On his evidence, the shelling was so heavy that day that he and his team were able to recognise a pattern of noise, followed by the trajectory of the shell and the point of impact. An ECMM monitor stated in his report on 11 November that on that evening he could see the old port on fire, as well as part of the city beyond the walls.

64. The shelling continued on 12 November. The ECMM monitors reported sporadic shelling in the morning, which escalated in the afternoon. They also recorded a "continuation of the burning fire in the city", although it is not clear if this refers to the Old Town. It was the evidence of Paul Davies that the attack that day, unlike the previous days of shelling, was concentrated on the Old Town. He characterised the attack on the Old Town that day as "deliberate" and "sustained". He and his team filmed between 15 and 17 impacts of wire-guided missiles, although he testified that the total number of such missiles used on 12 November 1991 against the Old Town was probably somewhere between 30 and 100. The wire-guided missiles hit the walls of the Old Town, the boats moored in the sheltered area in the port of the Old Town, as well as hitting locations within the Old Town. The evidence establishes that the shelling of the Old Town on 12 November was intense."

6.101 It was the not the role of the ICTY in the *Jokić* and *Strugar* cases to set out the number of victims killed by the attacks on Dubrovnik in October and November 1991. It is apparent from its Judgment in *Strugar*, however, that civilians were killed, in addition to those whose deaths formed the subject of the Indictment:

> "49. On 5 October 1991, the city of Dubrovnik was shelled again. The shelling commenced around 0300 or 0400 hrs. According to Lars Brolund the shelling seemed to come from the sea. However, at least one person, Milan Milišić, was killed in the course of the attacks by a 120mm mortar shell, a land warfare weapon."

6.102 The principal focus on the ICTY's Judgment was on the events of 6 December 1991. The Trial Chamber found that Dubrovnik was subject to extensive and prolonged shelling on that date by the JNA, notwithstanding the repeated protests of ECMM monitors. In relation to civilian casualities, the ICTY specifically noted:

> "112. The attack on Dubrovnik, including the Old Town, on 6 December 1991 inevitably gave rise to civilian casualties. While the Chamber heard evidence of many more victims of the shelling that day, the Third Amended Indictment charges the Accused only in relation to two deaths and two victims of serious injuries, both alleged to have occurred in the Old Town."

6.103 The ICTY concluded that:

> "288. … the Old Town was extensively targeted by JNA artillery and other weapons on 6 December 1991 and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA. Hence, in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town."

6.104 The ICTY found as a fact that the JNA had deliberately provided false reports to create the impression that the 6 December 1991 attack had been a spontaneous action, when it was in fact a carefully planned and premeditated operation:

> "97. Questions arise whether the false reports and records were contrived after the event, or were part of a deliberate plan put in place to provide the JNA with a ready justification for its conduct. Some reports were made after the events, other records appear contemporaneous, though contrived. … the circumstances reveal that the JNA deliberately put in place false records to indicate that the attack was undertaken spontaneously by Captain Kovačević by virtue

> of Croatian "provocations" during the night of 5-6 December 1991. This required planning and coordination of some sophistication. Contrary to what is suggested by the false records, the Chamber finds that Captain Kovačević was carrying out orders, given the previous day, in making the attack. It was not his own spontaneous and ill-considered action on the morning of 6 December 1991."

6.105 Miodrag Jokić and Pavle Strugar were each sentenced to 7 years' imprisonment for their part in the attacks on Dubrovnik in December 1991. Both Jokić and Strugar are also the subject of an Indictment before the Dubrovnik County Court, along with 8 others, concerning the atrocities committed in the Dubrovnik region in October and November 1991, including the killing, inhumane treatment and displacement of civilians and the destruction and looting of villages.[132]

CONCLUSIONS

6.106 The analysis conducted by the Applicant in this Chapter of its Reply reinforces the conclusions set out at the end of Chapter 5. The deficiencies in the Respondent's Counter-Memorial identified at the outset of Chapter 5 are again borne out by the Applicant's analysis set out in Chapter 6. Again, the Respondent:

- Provides selective and misleading summaries of the Memorial;
- Makes sweeping and legally unmeritorious criticisms of categories of evidence;
- Ignores many significant parts of the Applicant's case;
- Distorts the ICTY case law; and
- At no point advances any positive case on the allegations made by the Applicant nor adduces any of its own evidence.

6.107 By way of contrast, many of the incidents relied upon by the Applicant in the Memorial have since been the subject of findings by the ICTY in *Martić, Babić, Strugar* and *Jokić* cases, which confirm in substantial part the evidence relied upon by the Applicant, both in the Memorial and in this Reply.

6.108 As the ICTY summarised in *Babić*, between August 1991 and February 1991:

> "Serb forces comprised of JNA units, local Serb TO units, TO units

[132] Dubrovnik County State Attorney's Office, Indictment against Jevrem Cokić et al., 10 November 2009, Annex 84.

from Serbia and Montenegro, local MUP police units, MUP police units from Serbia, and paramilitary units attacked and took control of towns, villages, and settlements in the SAO Krajina. After the take-over, in cooperation with the local Serb authorities, the Serb forces established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial, or religious grounds, included the extermination or murder of hundreds of Croat and other non- Serb civilians …; the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions …; the deportation or forcible transfer of thousands of Croat and other non- Serb civilians from the SAO Krajina; and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations …"[133]

[133] *Babić*, paras. 14-15.

CHAPTER 7

JURISDICTION OVER EVENTS PRIOR TO 27 APRIL 1992

INTRODUCTION

7.1 In Chapter IV of its Counter-Memorial the Respondent argues that acts and omissions that took place before 27 April 1992 cannot entail its international responsibility because the State only came into existence on that date and was not bound by the Genocide Convention prior to it. Alternatively it argues that Croatia only came into existence on 8 October 1991 and cannot raise claims based on facts preceding its coming into existence.[1] According to the Respondent, either situation would require the Court to apply the Genocide Convention retroactively, contrary to the principle of non-retroactivity reflected in Article 28 of the Vienna Convention on the Law of Treaties.[2] Furthermore, the Respondent argues that the principle of attribution reflected in Article 10(2) of the ILC Articles on State Responsibility, attributing to a new State 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", does not assist Croatia for several reasons: (a) Article 10(2) does not represent customary international law, (b) it does not apply to the case of Serbia, (c) it is merely a rule of attribution, not one concerning breach; and the issue of the lawfulness under the Convention of the conduct of persons acting as Serbian officials could only arise after the Convention entered into force for Serbia on 27 April 1992, and (d) Article 10(2) does not apply in cases where the predecessor State is responsible.[3]

7.2 In reply to these contentions, it is submitted that there is no indication in the wording of the Genocide Convention, nor any hint in the *travaux préparatoires*, to suggest it is subject to temporal limitations of such a kind as relied on by the Respondent. As the Court's jurisprudence makes clear, the Convention was specifically constructed to be as broad and as universal as possible, both in its substantive coverage and its provision for settlement of disputes: the Court observed in 1996 and reaffirmed in 2008 that there is no express limitation *ratione temporis* in the Genocide Convention[4] (see **Section I**). **Section II** deals with the existence and capacity of the Applicant to invoke responsibility under the Convention on the one hand and of the Respondent to be held responsible on the other hand. As to the Applicant, although it only came into existence as a legal person on 8 October 1991, that fact is irrelevant to the subsequent invocation of responsibility in respect of the Convention.

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1 Counter-Memorial, paras. 206, 357-387.

2 Counter-Memorial, paras. 226-230.

3 Counter-Memorial, paras. 280, 284.

4 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, Judgment of 18 November 2008, ICJ Reports 2008 p.412, 428, para. 123.

As to Serbia, the question is resolved either by the self-proclaimed/*de facto* continuity of Serbia or, alternatively, by Article 10(2) of the ILC Articles on State Responsibility, which reflects customary international law and was applicable to the facts of the present case. Finally, the Applicant invokes the effect of FRY's 1992 declaration of continuation of SFRY's multilateral treaty rights and obligations, which amounts to an assumption of responsibility (see **Section III**). **Section IV** sets out the conclusions.[5]

SECTION I: TEMPORAL SCOPE OF THE GENOCIDE CONVENTION: SUBSTANTIVE PROVISIONS AND COMPROMISSORY CLAUSE

7.3 Implicit in the Respondent's treatment of the Convention in the Counter-Memorial, as in earlier pleadings, is a vision of the Convention as a synallagmatic bargain between the States parties to it, giving rise to a "bundle of bilateral obligations", just as if it were a framework for bilateral consular relations or the provision of air services. But this is not how the Court has approached the Convention.

(1) The Genocide Convention regulates an existing crime

7.4 The precursor to the Genocide Convention was GA resolution 96(I), adopted unanimously on 11 December 1946. The resolution declared that genocide was "contrary to moral law" and that its punishment "is a matter of international concern". Its first operative paragraph read:

> "Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable."[6]

7.5 Thus the Convention, adopted just two years later on 9 December 1948, is in declaratory mode: it is a Convention on the Prevention and Punishment of a crime conceived of as already existing. The first preambular paragraph refers back to GA resolution 96(I):

> "Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;".

Article 1 correspondingly provides:

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[5] For the Applicant's arguments at the preliminary objections stage see Memorial, paras. 6.13-15, 8.32-36; Croatia Written Statement, Chapter 3, pp. 11-32, the substance of which, as it pertains to these issues, is fully incorporated by reference here.

[6] GA Res. 96(I) of 11 December 1946.

> "The Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."(emphasis added)

7.6 The object and purpose of the Convention is to make provision for the effective prevention and punishment of the prohibition of genocide, not to institute that crime as a new crime under international law as such. It is true that national jurisdiction is limited to crimes occurring on the territory of the State (Article VI), but international jurisdiction, whether of the international criminal tribunal to be established or of this Court, was not so limited. Genocide was to be considered a crime wherever it occurred.

7.7 The Respondent describes the Convention as future-oriented, enacted "to secure that no *future* instances of genocide will take place".[7] But the word "future" is supplied by the Respondent, who fails to reflect the declaratory character of the Convention, and the fact that it is concerned not only with prevention but also the punishment of genocide.

7.8 The special character of obligations under the Convention was emphasised by this Court in its advisory opinion of 28 May 1951. There the Court said:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation* … The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be *definitely universal in scope*. …
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention *the contracting States do not have any interests of their own*; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes

[7] Counter-Memorial, para. 237 (emphasis in original).

> which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[8] (emphasis added)

7.9 The obligation to prevent and punish genocide is an early example of what would come to be called an obligation *erga omnes*, an obligation owed to the international community as a whole.[9]

7.10 The Respondent acknowledges some of this.[10] But it persists in seeing in the Convention the source of a concept of genocide, and of obligations in regard to genocide, which are dissociated from the customary international law prohibition. There is, for the Respondent, "treaty genocide" and "customary international law genocide", and the two are supposedly distinct and destined never to meet. Thus, it says, "this is not a case about compliance with customary obligations governing questions of genocide, even where the treaty-based prohibition and the customary international law prohibition of genocide are identical insofar as their content is concerned".[11] But this is inconsistent with the recognition by the parties, in the preamble (with its reference to GA resolution 96(I)) and in Article 1, that there is complete identity between the concept of genocide under customary international law and under the Convention. There was (and is) a single crime, which as a result of recent dreadful events had been recognised not only as "contrary to moral law" but as a "crime under international law" and for whose prevention and punishment the Convention was a necessary instrument. What the Convention provided that was new was (a) an authoritative definition, and (b) a framework for "international cooperation" in relation to the application and enforcement of an underlying customary international law prohibition.

7.11 The point may be tested by postulating a World War II *genocidaire*, E, who is hiding in a State party to the Convention (State A). Can it be suggested that that State is not obliged to extradite the person concerned to State B, also a State party, on whose territory the crime was committed and which has an extradition treaty with State A? Can it be imagined that State A could prevail in its argument that E was not amenable under the Convention because (the Convention not being retrospective) he could not have committed genocide contrary to its terms? Or that the genocide was a "political crime" because Article 7 of the Convention could have no application to it? Far from being

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[8] *Reservations to the Genocide Convention*, *I.C.J. Reports 1951* p. 15, 23.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, 616, para. 31.

[10] Counter-Memorial, para. 211.

[11] *Ibid*., and see also Counter-Memorial, paras. 247, 334.

a reaction to the genocide committed during the War, the Convention on this analysis – which the Respondent persists in calling "lock-step"[12] – would actually privilege and protect World War II *genocidaires*. There is no trace of any such intention in the text of the Convention, or in its *travaux*, or that may be discerned anywhere in its underlying object and purpose.

7.12 In short, there is no such thing as "genocide relative to State A", or "genocide as between State A and State B". "[I]n a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."[13] It may be accepted that the obligations of international cooperation set out in the Convention might be variable and contingent (e.g. depending on reservations in place and the legal regimes of the two States). But in law, the basic concept of genocide is neither of these things.

7.13 The Respondent suggests that "even if the content of the prohibition of genocide under customary international law and in the Convention is identical, it is the Convention that brought fundamental changes as to the enforcement of the prohibition", in particular by Article IX.[14] But this is to confuse substantive obligations and jurisdictional provisions, which the Court has always been careful not to do. Obviously if the Convention has never applied to a State then the State's responsibility cannot be invoked under the Convention. But the question here is a quite different one: whether the Convention applies to the enforcement of responsibility in relation to genocide whenever occurring, or only in relation to genocide occurring after the entry into force of the Convention for the State concerned. The choice between the two cannot be made by reference to the presumption against retroactivity of treaties, since neither interpretation involves retroactivity properly so-called: the State is still only responsible for breach of an obligation in force for it at the time, and only for conduct attributable to it under international law.[15]

7.14 As noted above, the Court observed in 1996 and again in 2008 that there is no express limitation *ratione temporis* in the Genocide Convention.[16] To the contrary: Articles I and XIV reflect the intention of the Parties to extend its temporal scope of application. Any positive acknowledgment of the gap as proposed by the Respondent would defeat the spirit of the Convention, creating a dangerous precedent for impunity of any State undergoing a process of dissolution or claiming to be in *statu nascendi,* which is – not coincidentally – the period when atrocities are most likely to occur.[17]

[12] *Cf.* Counter-Memorial, para. 350, citing CR 2008/11, p. 14, para. 23 (Crawford).
[13] *Reservations to the Genocide Convention*, *I.C.J. Reports 1951* p. 15, 23.
[14] Counter-Memorial, para. 247.
[15] *Cf.* ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Arts. 2, 13.
[16] *Croatia Preliminary Objections*, p. 412, 428, para. 123.
[17] The Respondent cites the *Ambatielos* case in support of its non-retrospectivity argument: *Ambatielos case (merits: obligation to arbitrate), Judgment of May 19th, 1953: I.C.J. Reports*

7.15 The Badinter Commission dealt extensively with the legal issues arising out of the dissolution of the SFRY. In its very first opinion the Commission underlined the need for all human rights conventions to which SFRY had been a party to remain in force with respect to all territories of SFRY.[18] This proposition was never challenged by the FRY. Indeed, it was duly implemented in its reformed Constitution, as will be seen.[19]

7.16 Such an approach is also reflected in the Human Rights Committee's Comment 26 reaffirming that:

> "[universal human rights] belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession or any other subsequent action of the State party designed to divest them of the rights guaranteed…"[20]

(2) Temporal scope of jurisdiction pursuant to Article IX

7.17 The second point in response to the Respondent's objection *ratione temporis* concerns the interpretation of the compromissory clause, Article IX of the Genocide Convention, in order to determine its scope of application.[21] This issue should be approached from the perspective of general international law on treaty interpretation, bearing in mind the special characteristics of the Convention,[22] as well as the distinction consistently drawn by the Court between the scope of the substantive obligations forming the subject matter of the dispute on the one hand and the temporal scope of its jurisdiction on the other.[23]

1953, p. 10, cited Counter-Memorial, para. 23; but that was a totally different case: a dispute concerning an obligation to arbitrate a commercial claim arising under a bilateral treaty.

[18] Arbitration Commission, EC Conference on Yugoslavia: Badinter, Chairman, *Opinion No. 1*, 29 November 1991, 92 ILR 162.

[19] See below, Section D.

[20] Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1631st meeting, paras 3-4.

[21] See *Croatia Preliminary Objections,* p. 412 p. 4, 519-520, Separate Opinion of Judge Tomka, paras 11-12.

[22] *Reservations to the Convention* on *Genocide, I.C.J. Reports 1951*, p. 15, 23. See also *Bosnia* case, p. 595, 634 (Separate Opinion of Judge Shahabuddeen).

[23] *Armed Activities on the Territory of Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp 50-51, para. 123.

7.18 It is useful to recall the precise wording of Article IX:

> "Article IX
>
> Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those 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."[24]

7.19 This issue is distinct from that concerning the temporal scope of application of the substantive provisions of the Genocide Convention, discussed above. As the Court noted in the *South West Africa* case*s (Second Phase)*

> "The faculty of invoking a jurisdictional clause [of a treaty] depends upon what tests or conditions of the right to do so are laid down by the clause itself."[25]

Commentators rightly observe in this respect that Article IX is "a model of clarity and simplicity, opening the seizing of the Court as largely as possible."[26] In principle, Article IX applies to every dispute concerning responsibility for or in relation to genocide to which the Convention itself applies. There is no separate or distinct *ratione temporis* limitation to the application of Article IX.

7.20 It is true that on 12 March 2001, Serbia and Montenegro purported to "accede" to the Genocide Convention, with a reservation as to Article IX. Assuming, for the sake of argument, that the reservation then made was effective for the future, it is clear that it can have had no effect on the jurisdiction already invoked by the Applicant in its Application of 2 July 1999 and confirmed by its Memorial of 1 March 2001. In accordance with the Court's decision of 18 November 2008,[27] the Court's jurisdiction had by then been perfected, and subsequent developments cannot be considered relevant.[28]

7.21 Turning to the interpretation of Article IX, it should be noted that compromissory clauses are subject to autonomous interpretation due to their

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[24] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 1 January 1948, Article IX.

[25] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1996, I.C.J. Reports 1966,* p. 37, para. 60.

[26] Robert Kolb, "The Compromissory Clause of the Convention" in Paola Gaeta (ed), *The UN Genocide Convention, A Commentary* (OUP, 2009), p. 420.

[27] *Croatia*, Preliminary Objections*,* p. 412.

[28] See Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (4th ed., Leiden: Martinus Nijohoff, 2006) (hereinafter "Rosenne"), Vol. III, 1153.

special status within treaties. The separate consideration due to procedural as compared with substantive provisions was already underlined by this Court in the context of the Genocide Convention.[29]

7.22 In its previous jurisprudence relating to interpretation of compromissory clauses, this Court and its predecessor have consistently taken the position that they encompass disputes and situations arising prior to their ratification, unless explicitly stated otherwise in the instrument or by the State when giving its consent to the clause *e.g.* through entering a reservation to that effect. For example, in *Mavrommatis Palestine Concessions* the Permanent Court of International Justice stated that:

> "in case of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment … The reservations made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation and, consequently the correctness of the rule of interpretation enunciated above."[30]

7.23 The Court observed in *Nicaragua* with respect to declarations accepting the compulsory jurisdiction of the Court that they can be made "unconditionally and without limit of time … or may limit its effects to disputes arising after a certain date".[31] In *Certain Property,* the Court applied to the compromissory clause of a multilateral convention its previous jurisprudence on temporal limitations of unilateral declarations accepting its jurisdiction, finding no reason to interpret them differently.[32]

7.24 Thus Shabtai Rosenne draws a distinction between retroactive application of substantive and of dispute settlement provisions of treaties, stating that there is a presumption in favour of the retroactive effect of titles of jurisdiction, based on the major premise that "the purpose of a clause of jurisdiction is always to confer jurisdiction upon the Court and not to deprive it of jurisdiction"; it follows that "any instrument conferring jurisdiction on the Court must be presumed to have been drawn with regard to it."[33]

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[29] *Armed Activities on the Territory of Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, para. 67.

[30] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* p. 6, at 35. See also *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of 22 July 1952, I.C.J. Reports 1952,* p. 93, 104-107. See also *Phosphates in Morocco*, Ser A/B No 74 (1938), p. 24.

[31] *Military and Paramilitary Activities in and against Nicaragua, Preliminary Objections, I.C.J. Reports 1984,* p.392, 418, para. 59.

[32] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, para. 43.

[33] Rosenne, *Volume II; Jurisdiction* (Brill 2006), p. 915 *et seq.*

7.25 This is further reinforced by a contextual interpretation of the compromissory clause. Given the close interrelationship between the provisions of the Convention, when read in conjunction with Articles I and XIV, there is every reason to construe Article IX as covering all cases to which the Convention itself applies.

7.26 This conclusion is not incompatible with GA Resolution 47/1 of 22 September 1992 adopted upon recommendation by the Security Council Resolution 777 (1992): both instruments were limited to addressing only the issue of automatic continuation of SFRY's membership in the UN, with no reference to the status of SFRY or Yugoslavia as a party to multilateral treaties. Indeed, the Legal Counsel took the view that the Secretary General was not in a position as depository to reject or disregard Yugoslavia's claim that it continued the legal personality of the SFRY in the absence of any decision to the contrary by a competent UN or other treaty organ.

7.27 As observed by Judge Shahabuddeen in his Separate Opinion in 1996:

> "It is difficult to appreciate how the inevitability of such a break in protection could be consistent with a Convention the object of which was 'on the one hand…to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality'…the object and purpose of the Genocide Convention required parties to observe it in such a way as to avoid the creation of such a break in the protection it afforded." [34]

7.28 The particular wording of the compromissory clause of the Convention is relevant here. In addition to the standard phrase "interpretation and application", Article IX adds the category of "fulfillment". Fulfillment implies a non-synallagmatic obligation of result, referred to the Court for a determination of responsibility by any State entitled to invoke that responsibility. In this context it must be stressed again that the purpose of the Convention is to prevent and punish the crime of genocide, not to regulate the relations of States as such.

7.29 This broad interpretation of the temporal scope of Article IX is strongly supported by the preparatory work of the Convention.[35] In the Sixth Committee the debate of the compromissory clause only extended from the 103rd to the 105th meeting,[36] during which the Greek proposal to delete the word "fulfillment" as being superfluous repetition of "application" was rejected by

[34] *Bosnia,* pp. 595, 635 (Separate Opinion of Judge Shahabuddeen).

[35] Counter-Memorial, para. 242 fails to discuss the *travaux*, confining itself to a four line assertion that they "do not contain any indication" of a retroactive intent.

[36] Doc. A/C.6, SR.103-105, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September - 10 December 1948, at 428 *et seq.*

27 votes to 10 with 8 abstentions due to the consideration that the former went somewhat beyond simple application.[37] According to India, which voted against the retention of "fulfillment" in the draft:

> "the word 'application' included the study of circumstances in which the convention should or should not apply, while the word 'fulfillment' referred to the compliance or non-compliance of a party with the provisions of the convention. The word 'fulfillment' therefore had a much wider meaning."[38]

7.30 In the discussions of the draft compromissory clause that followed, the United Kingdom also underlined that acts of genocide did not occur suddenly as:

> "genocide was a process in which racial, religious or political groups were gradually destroyed. When it became clear that genocide was being committed, *any party* to the convention could refer the matter to the International Court of Justice."[39]

It was further observed by Greece in this context that "As a general rule, the State was responsible for acts of genocide committed in its territory… [g]enocide could be committed against the nationals of the State itself, or against aliens."[40] India explained its vote against the provision because in its view, it was:

> "capable of being interpreted in a much wider sense than the authors of the amendment had themselves intended. By virtue of that article, States parties to the convention could be called before the International Court of Justice on the basis of vague accusations, for instance, that they had not carried out the provisions of the convention or that they were implicated in the acts…"[41]

This concern was clearly not shared by the majority of States which voted in favour of Article IX. These discussions and understandings of the scope of the Genocide Convention are pertinent to the present case: they show that the participants were well aware of the potential scope of the term "fulfilment", but nevertheless confirmed its inclusion.

7.31 On the basis of these considerations the Court should uphold its temporal jurisdiction with respect to the entirety of the present dispute.

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[37] Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September - 10 December 1948, p. 447.

[38] Doc. A/C.6, SR.103, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of the 103rd Meeting on 12 November 1948.

[39] Doc. A/C.6, SR.104, Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of the 104th Meeting on 13 November 1948.

[40] *Ibid*..

[41] *Ibid*..

SECTION II: INVOCATION AND ATTRIBUTION OF CONDUCT[42]

7.32 Assuming that the Convention was applicable at all relevant times, there is still a question as to its application *ratione personae*. According to the Respondent, this affects both parties to the present case: the Applicant cannot invoke responsibility prior to its own emergence as a State since the Convention cannot have applied to it *intuitu personae* prior to that date; nor can it apply to Serbia, whose separate existence as a State dates from 27 April 1992. The Respondent claims that any conduct of Serbian authorities prior to that date cannot be attributed to a State which did not then exist: even if genocide was committed in the cause of Greater Serbia, by Serbian officials acting as such under a Constitution which treated Serbia as "independent" and Serbian interests as paramount, the State responsibility for their conduct was exclusively the SFRY. Serbia, by contrast, was born free on 27 April 1992, *after* each of Slovenia, Croatia, Macedonia and even *after* Bosnia and Herzegovina. Relative to those new States it is a newcomer.

7.33 Before going into further detail, the Respondent's account of the matter calls for three preliminary comments.

1. The first is that it bears no relationship to reality. The reality of the matter is that – as described in the opinions of the Badinter Commission and further in Chapter 3 above – the Serbian leadership in Belgrade had long before been acting on its own agenda which had nothing to do with the constitutional integrity of the SFRY.

2. The second comment is that the disintegration of the SFRY was a process which was already well advanced by the second half of 1991. The adoption of the 1992 Constitution by Serbia was the last formal step in that process. In the circumstances, the adoption by Serbia of the 1992 Constitution was recognition of an existing reality, not more or less. Given that no existing State claimed Serbian territory or contested Serbian independence (as distinct from its entitlement to represent the former SFRY), the unilateral declaration of independence was purely declaratory of an existing situation: there was a State in existence on the territory in question; that State was not the SFRY. That it took another seven years for the Serbian leadership finally to accept the latter proposition casts no doubt on the former.

3. Thirdly, as a general matter State responsibility depends on

[42] Counter-Memorial, Chapter V, pp. 85-133. For the Applicant's arguments at the preliminary objections stage see Memorial, paras. 6.13-6.15, 8.32-8.36; Croatia, Written Statement on Preliminary Objections, Chapter 3, pp. 11-32, the substance of which, as it pertains to these issues, is incorporated by reference here.

effective control, not on considerations of *which* sovereign is involved. The position with bilateral treaties is obviously different, but that is not this case. Genocide and related acts such as complicity can be committed by *any* State: the identity of the State matters not at all. As the ILC noted in its commentary to Draft Article 10, "it is unnecessary and undesirable to exonerate … a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin",[43] and *a fortiori* to the claims that State makes to its identity or otherwise with another legal person. Thus the idea that unlawful conduct of Serbian officials, taken in the perceived Serbian interest on say 15 April 1992, cannot be attributed to Serbia ("born" two weeks later) but only to the unresponding ghost of the SFRY strains credulity. To adopt the words of Judge Hudson (dissenting) in *Lighthouses in Crete and Samos*:

> "A juristic conception must not be stretched to the breaking-point, and a ghost of a hollow sovereignty cannot be permitted to obscure the realities of this situation."[44]

7.34 In terms of State responsibility, it is necessary to deal with the position of Croatia and Serbia separately.

(1) Croatia's date of independence is irrelevant to its invocation of responsibility under the Convention

7.35 On 12 October 1992 Croatia succeeded to the */Genocide Convention. Pursuant to Croatia's notification to the Secretary-General of the United Nations dated 27 July 1992, and in accordance with the Vienna Convention on Succession of States with respect to Treaties (to which both Croatia and Serbia are parties),[45] the effect of this succession is that Croatia stepped into the existing multilateral treaty rights and obligations of the SFRY as opposed to acquiring them anew. Thus succession had retroactive effect back to the date of independence of Croatia, viz., 8 October 1991.

7.36 The Respondent argues that Croatia cannot invoke responsibility under a treaty at a time when, not being a State, it could not have been a

[43] ILC, Commentary to Article 10, para. (11), citing the Court's dictum in the *Namibia (South West Africa)* advisory opinion: "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States". See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, 54, para. 118.

[44] PCIJ Ser. A/B No. 71 (1937), p. 127.

[45] Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 1946 UNTS 3.

party to that treaty, or to an international relation of responsibility arising from it.[46] But even if this argument might be relevant to bilateral or synallagmatic responsibility relations (*quod non*),[47] it has no bearing when it comes to responsibility under a treaty such as the Genocide Convention.

7.37 The rights and obligations under the Genocide Convention are not only declaratory of custom (as evidenced by the wording of Articles 1 and 2); they are also non-reciprocal in character,[48] as consistently reaffirmed by this Court. There is no need for both Parties to the dispute to have been Parties to the Convention when the facts giving rise to it took place. Neither the Court's jurisdiction, nor the Respondent's responsibility under the Genocide Convention, are conditioned upon the date of Croatia's independence as the obligations under the Genocide Convention are owed to the international community as a whole (*erga omnes*), and any State may invoke responsibility for their breach.

7.38 Once more, attention must be drawn to the addition of the word "fulfilment" in Article IX of the Convention (see paragraph 7.27 above). Whether the Respondent fulfilled its obligations under the Convention has nothing whatever to do with the date on which Croatia achieved its independence. This question is precisely what the Court is requested to adjudicate upon at present.

7.39 This conclusion accords with the rule expressed in Article 48 of the ILC Articles on State Responsibility, which in turn is based on the Court's famous dictum in the *Barcelona Traction* case.[49] Article 48 states:

> "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) The obligation breached is owed to the international community as a whole.
>
> 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

[46] Counter-Memorial, paras. 367-387.

[47] *Cf. Certain Phosphate Lands in Nauru (Nauru v Australia), I.C.J. Reports 1992*, p.240. More generally see J Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2006), Ch. 15.

[48] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 15, 23, quoted in paragraph 7.8 above.

[49] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, 32, para. 33.

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached."

As the commentary to Article 48 notes:

> "Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed in respect of obligations to the international community as a whole, the International Court specifically said as much in its judgment in the *Barcelona Traction* case."[50]

7.40 There has been some controversy about the term "international community as a whole", and a contrast has been drawn with the term "international community *of States* as a whole" as used in Article 53 of the Vienna Convention on the Law of Treaties.[51] But what cannot be disputed is that all States are *ipso jure* members of that community, irrespective of when they came into existence: this prerogative belongs equally to all States, old and new. No distinction is drawn in this context between States on the ground of their dates of independence: the "international community *as a whole*" is a dynamic, not a static concept, and it necessarily expands to include new States recognized as such.

7.41 Moreover in the present case, the Applicant has standing to invoke the Respondent's responsibility not only as a member of the international community, but also as a specially affected State within the meaning of Article 42(b)(i) of the ILC Articles. Article 42 ("Invocation of responsibility by an injured State"), in so far as relevant, provides:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
>
> (a) That State individually; or
>
> (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

[50] ILC Commentary to Article 48, para. 2.
[51] *Ibid*., Commentary to Article 26, para. 5.

(i) Specially affects that State; or

(ii) ..."

Obligations under the Genocide Convention are owed to the international community as a whole, and it cannot be denied that Croatia was specially affected by the conduct described in the Application, the Memorial and this Reply, insofar as it was contrary to that Convention. The Respondent's Counter-Memorial does not make such a claim, and obviously cannot do so.

7.42 For all these reasons, the Applicant is entitled to invoke the responsibility of the Respondent under the Genocide Convention, including in respect of breaches of the Convention occurring prior to its own independence on 8 October 1991.

(2) As a self-proclaimed continuator of SFRY at the relevant time (for this case), and as a State *in statu nascendi*, Serbia bears responsibility under conventions for conduct attributable to it under international law

7.43 But is the Respondent responsible for breaches of the Convention occurring prior to 27 April 1992, the date formally accepted as the date of the "independence" of the FRY (Serbia and Montenegro)? In its Preliminary Objections judgment the Court joined this issue to the merits on the ground that "the questions of jurisdiction and admissibility raised by the Respondent's preliminary objection *ratione temporis* constitute two inseparable issues in the present case".[52]

7.44 It is respectfully submitted that the Respondent's combined arguments on jurisdiction/admissibility must fail, and this for several reasons.

- First, because in its 1992 Constitution Serbia unequivocally and unconditionally affirmed that it would continue to perform the obligations of the SFRY.

- Secondly, because even if Serbia had not agreed to continue to perform the obligations of the SFRY, the conduct of the Serbian authorities in 1991-1992 would still be attributed to Serbia under Article 10(2) of the ILC Articles on State Responsibility.

(a) Serbia's self-proclaimed continuity with regard to the SFRY

7.45 Turning to the first argument of self-proclaimed/*de facto* continuity, in its Preliminary Objections judgment, the Court stressed the need to

[52] *I.C.J. Reports 2008*, p. 412, 460, para. 129.

examine the factual issues surrounding the dissolution of the SFRY and the establishment of the FRY.[53] This has been done in detail in earlier pleadings,[54] and also in Chapter 3. The position may be summarized as follows. By its 1990 Constitution Serbia located itself as an independent State – separate and distinct from the SFRY. Then, having established itself as a separate entity, the Serbian leadership in the course of 1991 gradually assumed control over the institutions of the SFRY, including its Presidency and the JNA. But the constitutional, demographic and territorial basis for that takeover of institutions was and remained Serbian.

7.46 Serbia's Constitution of 28 September 1990 was effectively an independence constitution, in that it stood entirely on its own feet, owing nothing to the federal Constitution. For example, Article 72 provided:

> "The following shall be regulated and provided by the Republic of Serbia:
>
> 1) sovereignty, independence and territorial integrity of the Republic of Serbia and its international position and relations with other states and international organisations;
>
> ...
>
> 3) defence and security of the Republic of Serbia and of its citizens; measures to cope with emergencies;
>
> ...
>
> 12) other relations of interest for the Republic of Serbia in accordance with the Constitution."

7.47 Article 135 of the 1990 Constitution defined the relationship between Serbia and the still-extant federal Constitution of the SFRY. It provided:

> "(1) Rights and duties which the Republic of Serbia, which is part of the Socialist Federal Republic of Yugoslavia, has according to this Constitution, and which are realised in the federation according to federal Constitution, will be realised in accordance with federal Constitution.
>
> (2) When legislation of federal authorities or authorities of the other republics conflict with the rights and duties that the Republic of Serbia has under the SFRY Constitution, jeopardizes the independence

[53] *I.C.J. Reports 2008*, p. 412, 459, para. 127.

[54] Croatia, Written Statement on Preliminary Objections, paras. 3.26-3.28, 3.32.3.34, 3.39-3.40, 3.43-3.50.

> of the Republic of Serbia or in some other way jeopardizes its interests without providing compensation, the authorities of the Republic will enact pass legislative documents for protection of the Republic of Serbia's interests."[55]

Article 135 was the only Article in Part VIII of the 1990 Constitution, entitled "Relationship to the Constitution of the Socialist Federal Republic of Yugoslavia". It is the only mention of the SFRY in the 1990 Constitution, which in all other respects is indistinguishable from the constitution of an independent State. And Article 135 betrays no sign of Serbian subordination: on the contrary, sub-paragraph (1) subordinates the federal Constitution to the Constitution of Serbia, and sub-paragraph (2) provides for "defensive" action in the event of conduct by other Yugoslav entities that, *inter alia*, "jeopardizes the independence of the Republic of Serbia".[56] Thus it was entirely a matter for Serbia to decide whether to continue to perform its obligations under the Constitution of the SFRY.

7.48 The new Constitution of the Federal Republic of Yugoslavia, promulgated on 27 April 1992 set out in clear terms the direction to be taken, in claiming continuity with the SFRY, by now a phantom. Thus, the Preamble of 1992 asserted the "unbroken continuity of Yugoslavia" before and after 1992. Article 16 of the Constitution of the Federal Republic of Yugoslavia stated that:

> *"Article 16*
>
> (1) The Federal Republic of Yugoslavia shall fulfill in good faith the obligations contained in international treaties to which it is a contracting party.
>
> (2) International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order."

Correspondingly, the FRY (Serbia and Montenegro) treated itself throughout as a party to and as bound by the full range of treaties to which the SFRY was a party. From the standpoint of Serbia itself there were no legal or time or other gaps: the constitutions reflected an approach premised on nothing less than complete continuity of the rights and obligations, initially in force for the former Yugoslavia, throughout the period in question.

7.49 The Badinter Commission examined extensive factual evidence and noted that by 1991 "the essential organs of the Federation … no longer meet

[55] Translation by the Applicant.
[56] Constitution of the Republic of Serbia, Belgrade, 28 September 1990, Preface, p.6.

the criteria of participation and representativeness inherent in a Federal State". It noted further that during the process of the dissolution "the recourse to force has led to armed conflict between the different elements of the Federation."[57]

7.50 During this period, Serbia's message to the international community was one of continuation of the legal obligations of the SFRY. It is true that the international community did not accept the FRY's underlying claim to identity with the SFRY. This is clear from GA Resolution 47/1 of 22 September 1992. The situation has been repeatedly described by the Court, most recently in its 2008 judgment in the present case.[58] But the FRY (as Serbia was during this period) did not condition its acceptance of multilateral treaties on the recognition by individual third States of its clam to identity with the SFRY. It took advantage of the resulting ambiguous situation. Other constituent republics of the former Yugoslavia notified their succession to the SFRY's multilateral treaties, but the FRY did no such thing: in effect it was hiding behind the name "Yugoslavia" which continued to be listed as a party to the treaties. In the result, its assurance of willingness to be bound by the SFRY's international obligations (on whatever basis) was accepted, but its underlying claim of continuity was not. And the subsequent clarification of the position, with the admission of the FRY as a new member of the United Nations in November 2000, did not have (and cannot have had) the effect of retrospectively freeing that State from the treaty obligations it had willingly accepted and the treaty rights it had relied on during the intervening period. As the Court held in 2003:

> "General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000, cannot have affected the FRY's position in relation to treaties."[59]

7.51 As already noted, in the matter of responsibility, international law looks to the fact of actual (*de facto*) control over those concerned, and not to questions of title.[60] In fact, 27 April 1992 made no difference to the extent or character of the control exercised by the FRY/Serbian authorities, including over the units of the former JNA. To limit the international responsibility of

[57] Opinion No. 1, 29 November 1991, pp. 1496-7.

[58] *I.C.J. Reports 2008*, p. 412, 426-428, paras. 43-51.

[59] *Application for Revision of the Judgment of 11 July 1996 In The Case Concerning Bosnia Preliminary Objections*, p. 31, para. 71.

[60] As the Court said in the *Namibia (South West Africa), Advisory Opinion*, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, 54, para. 118.

the FRY/Serbia to events occurring only after that date would be the merest formalism.

(b) Attribution of pre-April 1992 conduct to the FRY, now Serbia

7.52 Turning to the question of attribution,[61] to the extent that the responsibility of Serbia is not established on other grounds, it arises for Serbia by reason of the principle stated in Article 10(2) of the ILC Articles. It will be recalled that Article 10 reads as follows:

> "Conduct of an insurrectional or other movement
>
> 1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
>
> 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.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9."

7.53 The Respondent gives four reasons for rejecting this argument (see paragraph 7.1 above).

7.54 First, it is said that – by contrast with the rule stated in Article 10(1) (new governments of existing States) – Article 10(2) does not represent customary international law.[62] It is true that much of the practice relates to insurrectional governments rather than movements to create a new State, but the ILC (following Special Rapporteur Ago on first reading) was clear that were good reasons to cover both situations. According to the Special Rapporteur on second reading:

> "the two positive attribution rules in article [10] seem to be accepted, and to strike a fair balance *at the level of attribution* in terms of the conflicting interests involved. It is true that there are continuing difficulties of rationalisation, but there has so far been no suggestion in government comments or in the literature that the substantive rules

[61] For the Applicant's arguments at the preliminary objections stage see Memorial, paras. 6.13-6.15, 8.32-8.36; Croatia, Written Statement on Preliminary Objections, Chapter 3, pp. 11-32, the substance of which, as it pertains to these issues, is incorporated by reference here.
[62] Counter-Memorial, paras. 285-293.

should be deleted: if anything the proposals are for reinforcement. It should be stressed however that the rules of attribution in the law of state responsibility have a limited function, and are without prejudice to questions of the validity and novation of contracts under their proper law, or to any question of State succession."[63]

7.55 Government comments, notably on Chapter II of Part One (attribution) were generally favourable as well, and in the end Article 10 proved uncontroversial.[64]

7.56 The commentary justifies Article 10 as follows:

> "where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. 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."[65]

7.57 The Respondent relies on a single academic article, focusing on 19th century authority, to counteract this substantial and consistent record.[66] It is submitted that the ILC's conclusions on Article 10, supported by contemporary and subsequent responses of States and by the preponderance of modern practice[67] and doctrine,[68] should stand.

7.58 Secondly, it is said that even if Article 10(2) reflects customary international law, it is inapplicable to the case of Serbia, where there was no "movement" aimed at the creation of a new State of the kind envisaged by

[63] James Crawford, First Report on State Responsibility, *ILC Ybk.* 1998 Vol. II (Pt. 1), para. 279.

[64] James Crawford, Fourth Report on State Responsibility (A/CN.4/517 & Add. 1, 2001), Appendix; and see the remarks of the Chairman of the Drafting Committee (Mr. Peter Tomka), summarizing the Committee's conclusions: *ILC Ybk*. 2001 Vol. I, 94 (paras. 32-35). For the initial comments of the Drafting Committee on what became Article 10, see the Report of the Chairman of the Drafting Committee (Mr. Bruno Simma): *ILC Ybk*. 1998 Vol. I, 290-291 (paras. 86-91).

[65] Commentary to Article 10, para. 5.

[66] Counter-Memorial, paras. 292-293.

[67] Summarised in Crawford, First Report, paras. 267-280. See also Eritrea-Ethiopia Claims Commission, Partial Award, *Civilian Claims (Eritrea's Claims 15, 16, 23 & 27-32)*, 17 December 2004, 44 ILM 601, 610-11 (paras. 48-49, 51).

[68] See James Crawford, *Creation of States* (2006) 656, referring to "the well established rule that a seceding State will be held internationally responsible for acts performed by it in the process of its formation", and citing TC Chen, *The International Law of Recognition* (London, Stevens, 1951) 179-81.

Article 10(2), but rather the actions of officials of the SFRY (some of them non-Serbs) aimed at preserving the federation.[69] This novel and remarkable suggestion raises issues both of law and fact.

7.59 As to the law, the ILC intended the reference to a "movement, insurrectional or other" in Article 10(2) to be broadly construed to cover all unconstitutional or irregular activity aimed at separation or the dissolution of the State. After referring, in the context of Article 10(1), to "the wide variety of forms which insurrectional movements may take in practice",[70] the Commentary to Article 10(2) goes on to say:

> "(10) 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 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. Nor does it 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, whereas article 10 focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be."[71]

7.60 As to the requirement that the movement take place outside "the framework of the predecessor State",[72] this was intended to exclude from the scope of Article 10 instances of constitutional advocacy for change. Beyond that obvious point, the question is essentially one of fact and appreciation.

7.61 As to the facts, those responsible for the conduct of Serbia's affairs proclaimed their continuity with SFRY. The reality, however, as the evidence shows, is that they were acting against the principle of Yugoslavia as a whole and not at all "within the framework of the predecessor State".

7.62 Reference may be made to the factual findings of the ICTY trial and appeals chambers in cases related to these events, which support the Applicant's approach. For example, in *Martić* the evidence showed "beyond reasonable doubt" that from at least August 1991 there was a common political objective to unite Serb areas in Croatia and in Bosnia and Herzegovina with Serbia in order to establish a unified Serb State, intended by President of Serbia Slobodan Milošević through the establishment of paramilitary forces, and by

[69] Counter-Memorial, paras. 284-316.
[70] Commentary to Article 10, para. 9.
[71] *Ibid*., para. 10.
[72] Counter-Memorial, para. 305.

the use of a JNA largely purged of its non-Serbian elements. This political objective was implemented through widespread and systematic armed attacks on predominantly Croat areas. Milan Martić was found to have actively worked with the other participants to achieve the objective of a united Serb state, which he also expressed publicly on more than one occasions.[73] Other examples of similar findings are summarised in Chapters 3 and 4 above.

7.63 It should be concluded that for some considerable time prior to April 1992 the FRY was indeed a State *in statu nascendi* and that the perpetrators in question acted with the aim of creating a Serbian State. Rosenne observes that the underlying connection between "the former 'movement' (whether labeled 'insurgent', or 'liberation', or 'nationalist')"[74] and the new State are the men and women who remain the same and the strongly marked element of continuity in policy.[75] As he concludes, there is no reason why a situation which arose prior to the formation of the new State should not come before the Court after its independence and that new States should seek to ensure against a retroactivity stretching beyond "time as an 'element' of the State".[76]

7.64 Thirdly, the Respondent emphasises that Article 10(2) is a rule of attribution only, not one concerning the lawfulness of conduct. According to the Respondent, this raises insuperable difficulties in that the lawfulness of the conduct of persons *qua* Serbian officials cannot be judged under the Convention prior to its entry into force for Serbia on 27 April 1992.[77]

7.65 This argument is a further manifestation of the Respondent's attempt to divorce the Genocide Convention from its customary international law moorings, and to treat it as a mere contract between States concerning their mutual relations (see paragraphs 7.4-7.13 above). For the reasons already given, the conduct of Serbian officials was already governed by international law (as declared in the Convention): the only question is whether their conduct is attributable to Serbia. This, under Article 10(2), it is.

7.66 Fourthly, it is said that even if Article 10(2) reflects customary international law and is potentially applicable, it does not apply in cases where the predecessor State is responsible.[78] According to the Respondent, the SFRY is (or rather was) responsible for all the conduct in question, and there is no scope for the application of ILC Article 10(2).[79]

7.67 An initial comment is that it is by no means clear that – if the issue

[73] *Martić*, at para. 122-129.
[74] Rosenne, *Volume II: Jurisdiction* (Brill 2006), p. 919.
[75] *Ibid*..
[76] *Ibid*., quoting Hans Kelsen, *Principles of International Law* (2nd ed., ed. R W Tucker, 1966), p. 381.
[77] Counter-Memorial, paras. 330-350.
[78] Counter-Memorial, paras. 320-350.
[79] Counter-Memorial, paras. 351-364.

could have been judicially tested (an entirely hypothetical possibility) – the SFRY in a state of dissolution would have been legally responsible for the conduct of the constituent republics, still less for the conduct of others outside the immediate sphere of influence and control. In fact the constituent republics were operating at all relevant times virtually entirely as separate units and in the (perceived) interest of their own people. The international law of responsibility can, should and – it is submitted – does reflect that reality.

7.68 As the ILC's Commentary notes, it is true that in cases involving Article 10(2), the predecessor State will normally not be responsible for the conduct in question.[80] The case for the special rules contained in Article 10 is to sheet home responsibility to a State for what would ordinarily be non-State action, subject to the very limited mechanisms for applying and enforcing international law against non-States.

7.69 But as the Commentary also points out, Article 10 covers a wide variety of situations. In some, the predecessor State will continue to exist, in others it will not. The possibility that the predecessor State may also be responsible for the conduct on some basis is expressly preserved by Article 10(3), which the ILC decided to retain even though questions had been raised as to its utility. The point is made in the commentary:

> "(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in Chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3."

Thus, even if (*quod non*) the conduct of Serb officials in the present case were to be considered as notionally attributable to the SFRY under Article 4, as the Respondent claims, that would not preclude the same conduct from being attributable to Serbia under Article 10(2).

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[80] Commentary to Article 10, para. 6.

(c) Application of ILC Article 10(2) and the jurisdiction of the Court under Article IX of the Convention

7.70 It remains to deal with a point raised by Judge Tomka in his separate opinion in the Preliminary Objections phase and relied on by the Respondent.[81] He said:

> "13. Under the rule of customary international law codified in Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of an organ of a territorial unit of the State (and both Croatia and Serbia were territorial or constituent units of the SFRY) is considered as an act of the State, attributed to this State and thus engaging the international responsibility of that State, if it is not in conformity with what is required by an international obligation resting upon that State. When that State ceases to exist, as was the case of the SFRY which disintegrated in the process of dissolution which was completed before summer 1992 ... the issue of succession to responsibility may arise. Similarly, when a territorial unit of a predecessor State succeeds in its effort to secede and establishes itself as a separate State, the issue of the responsibility of the separate State for acts which were committed by the organs of that entity before it established itself as a State with international legal personality may arise. But clearly, regarding these two issues, neither that of succession into responsibility of the predecessor State nor that of 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 within the jurisdiction of the Court under Article IX of the Genocide Convention. That jurisdiction covers "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the . . . Convention" by its Contracting Parties. The FRY, now continuing as Serbia, became a Contracting Party on 27 April 1992."[82]

7.71 But with great respect, Article IX does not exclude disputes concerning succession to or assumption of responsibility or disputes concerning the application of principles of attribution such as that embodied in Article 10(2) of the ILC's Articles on State Responsibility. Article IX is formulated in broad terms: it covers "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, *including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III*". Of course, the dispute must be one between two Contracting Parties, and it must concern the obligations of those Parties under the Convention. But such a dispute could arise between two States in a case where the initial responsibility for genocide was that of a third State, or in

[81] Counter-Memorial, para. 280.
[82] ICJ Reports 2008, p. 412, 520, para. 13.

a case where (as in the example given in paragraph 7.10 above) the genocide was committed prior to the entry into force of the Convention for that State. Article IX does not say "including those relating to the responsibility of one of those Contracting Parties for genocide": the contrast between the phrases "disputes between the Contracting Parties" and "the responsibility of a State for genocide" is clear and must be taken to have been deliberate. Still less does it specify that the genocidal acts should all have occurred after the entry into force of the State in question.

7.72 It follows that a dispute over State A's succession to or assumption of responsibility for genocide allegedly committed by its personnel while it was *in statu nascendi* would fall within Article IX of the Convention.

SECTION III: SERBIA'S 1992 DECLARATION AS AN ASSUMPTION OF RESPONSIBILITY FOR ACTS PRIOR TO 27 APRIL 1992

7.73 In the alternative, it is submitted that Serbia's 1992 declaration was a unilateral declaration binding it internationally. By virtue of that declaration Serbia publicly manifested its will to assume the international rights and obligations of the SFRY, as well as to continue its international personality.[83] It is useful to recall the clear and specific terms[84] used by the FRY in its 1992 Declaration

> "1. The Federal Republic of Yugoslavia, *continuing* the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, *shall strictly abide* by all the commitments that the SFR of Yugoslavia assumed internationally."[85]

7.74 The official Note of the Permanent Mission of Yugoslavia to the United Nations also affirmed that:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfill *all* the rights conferred to and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations…"[86]

The Court noted with regard to this declaration that,

> "This intention thus expressed by Yugoslavia to remain bound

[83] ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Binding Obligations, Fifty eighth session of the International Law Commission, *Yearbook of the International Law Commission* 2006, vol. II, Part Two, Principle 1.

[84] *Ibid*., Principle 7 setting out that, "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms."

[85] Joint Declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro adopted on 27 April 1992, in UN Doc. A/46/915, Ann. II (emphasis added).

[86] UN Doc. A/46/915, Annex. I (emphasis added).

> by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention."[87]

7.75 The Court has already upheld the "*sui generis* position which the FRY found itself in" in the period until 2000.[88] In 1996, in *Bosnia and Herzegovina v. Yugoslavia,* the Court found that "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely on 20 March 1993"[89] on the basis of SFRY's ratification without reservation of the Convention on 29 August 1950 and that the "intention expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General."[90]

7.76 This *sui generis* situation, created by Yugoslavia's 1992 declaration remained unchanged at the time of the initiation of the proceedings at hand, until the new declaration of "accession" it made in 2001. However the latter can have no bearing upon the jurisdiction of the Court, in accordance with its established jurisprudence, jurisdiction cannot be modified retroactively by the occurrence of new facts.[91] Indeed, in the *Bosnian Genocide Case*, the Court found it unnecessary to assess the legal effects of Serbia's notification of accession to the Genocide Convention of 6 March 2001, as just like at present, the institution of the proceedings pre-dated it.[92] Moreover a withdrawal from the Genocide Convention cannot have any retroactive effect.[93]

7.77 It was not until GA Resolution 55/12 of 1 November 2000 when

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[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, 610, para. 17

[88] *Ibid*., citing *I.C.J. Reports 2003,* p. 31, para. 71.

[89] *Ibid*., p. 610, para. 17.

[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosna and Herzegovina v. Yugoslavia)*, Judgment of 26 February 2007, para. 121.

[91] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 32, para. 95 quoting the *Nottebohm Case (Liechtenstein v. Guatemala) Preliminary Objection, Judgment, I.C.J. Reports 1953,* p. 12 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 12, 28, para. 36; see also to this effect *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004* p. 314, para. 89.

[92] *Ibid*., p. 612, para. 23.

[93] J M Ruda, "Terminación y Suspensión de los Tratados", in E G Bello and P Bola Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (Nijhoff 1992), p. 112.

Yugoslavia renounced its claim of succession in favour of accession anew. Treaty actions after this moment were listed with the Secretary-General as depository under the designation "Serbia and Montenegro". The uncertainties surrounding the legal effect of this new declaration are reflected in the objections raised by other members of the United Nations, *e.g.* by Sweden on 2 April 2002, noting that:

> "The Government of Sweden regards the Federal Republic of Yugoslavia as one successor state to the Socialist Federal Republic of Yugoslavia and, as such, a Party to the Convention from the date of the entering into force of the Convention for the Socialist Federal Republic of Yugoslavia."

7.78 Furthermore, Serbia's breach is of a continuing character within the meaning of Article 14 of the ILC Articles on State Responsibility as it first failed to prevent and then to prosecute and punish the perpetrators of the genocide, which took place on its territory as required by Article I of the Genocide Convention, but also to co-operate with the competent international tribunal having jurisdiction over them pursuant to Article VI. These arguments apply whatever the outcome on the other issues discussed in this Chapter.

SECTION IV: CONCLUSION

7.79 Just because a State is in a process of dissolution, this does not mean that the situation is unregulated (*legibus solutus*) or that relevant actors are unaccountable for egregious violations of international law, particularly of *jus cogens* norms.[94] That principle applies with at least equal force to issues of responsibility for acts committed during the process in the period prior to 27 April 1992 – in which there emerged a *de facto* administration of Serbia - as it does for applicable law issues. An interpretation that leaves a gap in accountability for serious breaches of international law is one that is to be avoided, for obvious reasons. This is all the more so in relation to the crime of genocide, and also for the cooperative mechanisms reflected in the Genocide Convention.

7.80 In conclusion, the International Court of Justice has jurisdiction *ratione temporis* in respect of acts occurring prior to 27 April 1992 to entertain the present dispute in accordance with Article IX of the Genocide Convention and the acts in question are attributable to Serbia as a self-proclaimed continuator of the personality of its predecessor or in the alternative, pursuant to the customary rule codified in Article 10(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts.

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[94] See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 81.

CHAPTER 8

THE GENOCIDE CONVENTION

INTRODUCTION

8.1 This Chapter responds to the Respondent's arguments on the legal regime of the Genocide Convention as set out in Chapter 2 of the Counter-Memorial, including the definition of the physical and mental elements which form the crime of genocide. Since Croatia filed its Memorial the Court has given judgment on the merits in the *Bosnia* case.

8.2 **Section I** addresses the mental and physical elements of the crime of genocide, as set out in Article II of the Genocide Convention. **Section II** deals with the related crimes contained within Article III (b) to (e) of the Convention. **Section III** addresses the obligations of the Respondent to prevent and punish genocide pursuant to Article I of the Convention. **Section IV** responds to the Respondent's arguments on the nature of the specific intent (*dolus specialis*) required to show that the crime of genocide has been committed: it shows that the Respondent's approach to proving specific intent is misguided and overly narrow and is inconsistent with international practice and jurisprudence.

8.3 The Applicant recognises that this case is exclusively concerned with the crime of genocide and with the breach of the Respondent's obligations under the Genocide Convention. It accepts that the Court can only make findings in relation to the obligations under the Convention and not any other violations of international law that were committed by Serbia in the course of its military campaign.[1] This is not in issue between the parties.

8.4 The background to the Genocide Convention, its rationale and the events leading to its adoption were set out in detail by the Applicant in the Memorial.[2] It comes as no surprise that the Respondent should have placed heavy reliance on the Court's 2007 judgment in the *Bosnia* case, noting that the judgment is of "paramount importance to the present case".[3] Croatia agrees that the Court's 2007 judgment is central to the present proceedings. However, the Respondent has manifestly failed to recognize that the facts of the two cases are different, and that the evidence in the two cases is distinguishable. The Republic of Croatia has set out a catalogue of prohibited acts carried out against Croats, from which only one conclusion can be drawn: the Respondent has plainly breached its obligations under the Genocide Convention.[4]

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[1] Memorial, para. 7.04.

[2] Memorial, paras. 7.05-7.12.

[3] Counter-Memorial, para. 32.

[4] See Chapters 4 and 5 of the Memorial, and Chapters 5 and 6 of this Reply.

8.5 In this chapter, Croatia reaffirms its interpretation of the obligations under the Genocide Convention. The Applicant is mindful of the Court's 2007 judgment in the *Bosnia* case, which as will be shown below, clearly confirms the approach taken by Croatia in the Memorial.

SECTION I: MENTAL AND PHYSICAL ELEMENTS OF THE CRIME

(1) Mental Element: Mens Rea (*Dolus Specialis*)

8.6 As set out in the Memorial, the crime of genocide comprises two connected but distinct elements: the mental element (*mens rea*) and the physical element (*actus reus*).[5] In order to establish genocide has occurred it is necessary to show that one of the five sets of acts enumerated in Article II (a)-(e) was committed and that it was accompanied by "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This 'genocidal intent' has been referred to by the Court in the *Bosnia* case as specific intent (*dolus specialis*).[6]

8.7 It is established that genocidal intent may be ascertained by inference, including by reference to evidence showing a relatively consistent pattern of behaviour involving prohibited acts targeted at group protected under the Convention. A close examination of the *travaux préparatoires* of the Convention reveals that the drafters were conscious that it was unlikely that a State would formally and publicly declare a plan from which it would be possible to obtain documentary evidence proving "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[7] The Respondent accepts this point.[8] The difference between the parties is on the appreciation of the evidence and the facts, and the question of whether intent can be inferred; this is addressed below in Section IV(2).

8.8 In addition to the general requirement of specific intent, which can be inferred from a consistent and systematic pattern of behaviour, the Genocide Convention requires a number of elements to be met, as reflected in the *chapeau* to Article II. The Convention requires that the perpetrator of genocide must be shown to harbour an intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such". In its Memorial, the Applicant outlined its approach to the four elements to show that each of these has been satisfied in relation to the acts committed by the Respondent.[9]

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[5] Memorial, para. 7.25.

[6] *Bosnia*, para. 187.

[7] Memorial, para. 7.34. See also the Declaration of Judge Bennouna attached to the Court's Judgment in *Bosnia*, p. 362: "Indeed, it is rare for a State bluntly to proclaim its intent to destroy, in whole or in part, an ethnical, cultural or religious group or to disclose knowledge that such a crime was going to occur or to admit to having committed it."

[8] Counter-Memorial, para. 48.

[9] Memorial, paras. 7.42-7.57.

8.9 In relation to the establishment of an intent "to destroy", Croatia has argued that Article II is to be read as a whole. Subparagraphs (b) to (e) make it clear that the requirements of the destruction of a group cannot be equated simply with the physical destruction of members of the group, but rather the group as an entity. This interpretation has not been contested by the Respondent. It is clear from the evidence put forward in Chapters 5 and 6 of this Reply that the actions of the Respondent were committed with the intent to destroy Croats as an entity. This is addressed in more detail in Chapter 9.

8.10 The second necessary element - establishing "in whole or in part" - is also met in this case. Whereas the destruction of a group "in whole" is relatively straightforward, the Court in the 2007 *Bosnia* judgment made important findings with respect to the destruction of a group "in part",[10] as outlined by the Respondent in the Counter-Memorial.[11] The Court held that three factors are relevant to the determination with respect to a "part" of the "group" for the purposes of Article II of the Convention. The first of these is that there must be an intent to destroy at least "a *substantial* part of the particular group" (emphasis added).[12] Secondly, the Court accepted that a genocide will have occurred "where the intent is to destroy the group within a geographically limited area."[13] The third factor relied upon by the Court is "qualitative rather than quantative", and it requires an evaluation of the prominence of the targeted portion in relation to the entire group.[14] With respect to these three factors, the Court emphasised that the first of these - the substantiality requirement - "is an essential starting point."[15]

8.11 The Applicant submits that the evidence set out in Chapters 4 and 5 of the Memorial and Chapters 5 and 6 of this Reply clearly establish an intent, on the behalf of the Respondent, to destroy the whole of the Croat population in the areas referred to in those chapters: in Eastern Slavonia, Western Slavonia, Banovina, Kordun and Lika and Dalmatia. The great number of examples of prohibited acts carried out in these areas clearly and irrefutably demonstrate the existence of an intent to destroy the Croat population as a whole in those areas. This is addressed in further detail in Chapter 9.

8.12 In relation to the third element – "a national, ethnical, racial or religious group" – the Court in *Bosnia* was critical of the negative approach in the definition of a "national, ethnical, racial or religious group"; it adopted the use of a positive definition based on the presence of relevant characteristics. As pointed out by the Respondent in the Counter-Memorial, Croatia defines the protected group in the present case in positive terms (Croats as a national and ethnical group): as regards membership of that group, Croatia has satisfied

[10] *Bosnia*, paras. 198-200.
[11] Counter-Memorial, paras. 64-66.
[12] *Bosnia*, para. 198.
[13] *Ibid*., para. 199.
[14] *Ibid*., para. 200.
[15] *Ibid.;* see also para. 201.

both the subjective and objective criteria (as well as a combination of the two). Accordingly there is no dispute between the parties on this issue: it is not disputed that the Croats against whom genocidal acts were committed by or on behalf of the Respondent formed a separate and clearly identifiable national and ethnical group, in law and in fact.

8.13 Finally, as to the final element – the words "as such" – these were recognised by the Court in *Bosnia* to emphasise an "intent to destroy the protected group."[16] This is understood to mean that the specific intent in Article II requires that the acts in question were directed against members of the protected group *as such*: they were attacked because of their nationality, ethnicity, race or religion. The words "as such" are there located with the intent to highlight the discriminatory and targeted nature that is inherent in the crime of genocide. The Respondent has not advanced any arguments in the Counter-Memorial to counter Croatia's arguments and the evidence that the genocidal acts that were perpetrated against Croats were carried out on the basis of their identification as members of a distinct ethnical and national group *as such*.

(2) Physical Element: Actus Reus

8.14 In addition to the mental element, the crime of genocide also encompasses a physical element. Article II of the Genocide Convention lists five sets of acts, the commission of any one of which will amount to genocide where it has been accompanied by the requisite mental element. In its Memorial, Croatia set out its understanding of each of these sets of acts, and its approach is entirely consistent with the findings of the Court in the 2007 *Bosnia* judgment.

(a) "Killing Members of the Group": Article II(a)

8.15 'Killing members of the group' as set out in Article II(a) has been defined in the case-law of the ICTY and ICTR.[17] In *Akayesu*, the Trial Chamber of the ICTR found that killing in the context of Article II(a) could be broken down into two elements: the victim must have been killed, and the death must have resulted from an unlawful act or omission of the accused or a subordinate.[18] The Respondent adds to these elements the finding in *Krstić* to the effect that the killing needs to be accompanied by an "intention to kill or cause serious bodily harm which he/she should reasonably have known might lead to death".[19]

8.16 The Respondent's definition of the physical elements in relation to

[16] *Ibid.*, para. 187.

[17] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 588; *Krstić,* ICTY, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 485.

[18] Memorial, para. 7.59.

[19] *Prosecutor v. Krstić,* ICTY, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 485.

Article II(a), (b) and (c) also makes reference to the ICC Elements of Crimes.[20] For example, in relation to "killing members of the group" the Respondent argues that "four further requirements" need to be met:[21]

> "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."[22]

8.17 Croatia does not dispute that these four elements need to be met in order for a finding of genocide to be made. However, the reference to "four further requirements" by the Respondent intentionally confuses the issue of the *actus reus* and blurs the distinction between the physical and mental elements. It is clear, for example, that for Article II(a) of the Genocide Convention to be met (the physical element), only the first and second of the four requirements quoted above from the ICC Elements needs to be satisfied. The other two requirements - namely that the perpetrator intended to destroy the group in whole or in part and that the conduct took place in the context of a pattern of similar conduct or was conduct which itself affected the destruction – are more accurately to be treated as forming the mental element (*mens rea*) of the crime of genocide. Although there is a close relationship between the mental and physical elements, in order to meet the requirements of Article II(a) it need only be established that one or more members of the protected group was killed intentionally. The same point may be made in relation to the Respondent's reliance on the ICC Elements of Crimes in its definition of Article II(b) and (c).[23]

8.18 On this point, as has been addressed in Chapters 5 and 6, the Respondent has not disputed the fact that Croats were intentionally killed during the relevant period.

(b) "Causing serious bodily or mental harm to members of group": Article II(b)

8.19 Croatia's Memorial set out the general finding that "mental harm means more than minor and temporary impairment, but does not need to be

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[20] Counter-Memorial, paras. 77, 80 and 83.
[21] Counter-Memorial, para. 77
[22] ICC, Elements of Crimes, ICC-ASP/1/3, p. 2.
[23] Counter-Memorial, paras. 80 and 83.

permanent and irremediable".[24] This is consistent with the findings of the ICTY Trial Chamber in *Krstić*, as set out by the Respondent in the Counter-Memorial.[25]

8.20 The Court in the *Bosnia* case endorsed the views of the ICTR Trial Chamber in *Akayesu* to the effect that:

> "[i[ndeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm".[26]

The Court also cited the views of the ICTY Trial Chamber in *Stakić*:

> "[c]ausing 'serious bodily and mental harm' in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable."[27]

8.21 The endorsement by the Court of this broad interpretation of Article II(b) brings within the ambit of the Convention a significant number of the prohibited acts committed by Serbia against Croats. The Respondent has not disputed the fact that Croats were subjected to serious bodily and mental harm within the mean of Article II(b) during the relevant period.

(c) "Deliberately inflicting on the group conditions of life designed to bring about its physical destruction in whole or in part": Article II(c)

8.22 In its 2007 judgment the Court addressed this third group of prohibited acts under the Convention. There is no disagreement between the parties that acts falling under Article II(c) need to be accompanied by the necessary specific intent (*dolus specialis*). However, the Applicant reiterates the point that the actual physical destruction of the group does not need to have occurred, rather the conditions inflicted need to be calculated to bring about the destruction.[28] The Respondent has acknowledged that "systematic expulsion from homes" can, according to the Court in its 2007 judgment, also fall under Article II(c).[29]

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[24] Memorial, para. 7.62.
[25] Counter-Memorial, para. 79.
[26] *Bosnia*, para. 300, (citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 731).
[27] *Ibid*., (citing *Prosecutor v. Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516).
[28] Memorial, para. 7.67.
[29] Counter-Memorial, para. 84.

8.23 The Applicant has provided extensive evidence of the many instances of direct and targeted shelling and the intentional destruction of objects of cultural and religious importance in Croatia for which the Respondent bears responsibility.[30] The Respondent does not dispute that "some of the Croatian cultural and religious monuments were looted, damaged and, in some cases, destroyed during the war."[31] However, the Respondent's response to these specific allegations is wholly inadequate, simply stating that the "destruction of historical, cultural or religious property can never be considered as one of the genocidal acts within the meaning of the Genocide Convention."[32] To support this contention, the Respondent invokes paragraph 344 of the Court's 2007 judgment: it manifestly fails to appreciate what the Court said and the implications of its approach on this point.[33] The Court ruled:

> "However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention."[34]

The Court also endorsed the finding of the ICTY in *Krstić*, namely that "where there is a physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group".[35] The Court was clearly mindful of the fact that the destruction of cultural and religious heritage, as occurred in the case of Croatia, can be of significance when viewed in the context of the wider prohibited acts taking place.

8.24 The Respondent has not disputed the fact that it deliberately inflicted conditions of life designed to bring about the physical destruction of Croats as a group in whole or in part within the meaning of Article II(c).

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[30] Memorial, paras. 4.63, 4.92, 4.104, 4.150, 5.12, 5.76, 5.135, 5.155, 5.195, 5.201, 5.235-237, 5.241; see also Chapters 5 and 6, of this Reply, especially the findings of the ICTY referred to at paras. 6.33, 6.83 and 6.108.

[31] Counter-Memorial, para. 978

[32] *Ibid*..

[33] Counter-Memorial, p. 309, footnote 840.

[34] *Bosnia*, para. 344.

[35] *Prosecutor v. Krstić,* ICTY, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580 (cited in the Court's 2007 judgment at para. 344).

(d) "Imposing measures intended to prevent births within the group": Article II(d)

8.25 The Respondent does not dispute the Applicant's understanding of measures falling under Article II(d) of the Convention. Rather, the Respondent challenges the Applicant's assertion that there was a 'systematic perpetration against Croats of rape and other sex crimes', and that these acts fall clearly within Article II(d) of the Convention'.[36] The Respondent disputes that many of the alleged acts actually took place, and it asserts 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."

(e) "Forcibly Transferring Children of the Group to Another Group: Article II(e)

8.26 This category of acts is not relevant to the facts of the present case and the parties are not in dispute as to its non-application.

SECTION II: CONSPIRACY, INCITEMENT, ATTEMPT AND COMPLICITY

8.27 Article II of the Genocide Convention is supplemented by Article III, providing for the punishment of four other categories of acts that may not in themselves amount to genocide. These acts are also relevant to the present case. The Respondent has pointed to the findings of Court in *Bosnia* on the relationship between the acts enumerated in Article III (b) – (e) and the direct act genocide itself under Article III(a).[37] The reasoning employed by the Court is that it is "unnecessary" to consider the acts listed in Article III (b) to (e) if it has already made a finding attributing state responsibility for genocide under Article III (a). Croatia recognises that this may be a logical argument – there would indeed be little point in assessing whether a State is in violation of its obligations under Article III, subparagraphs (b), (c), (d) and (e) (conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide and complicity in genocide) were that state held to be directly responsible for acts of genocide under Article III(a). However, if the Court rules – as Croatia says its must – that the Respondent is responsible for acts of genocide under Article III(a), then it follows that the Respondent may also be responsible for acts of individuals under its command or control who committed one or more of the offences enumerated in Article III (b) to (e).

8.28 In *Bosnia* the Court recognised that the concepts enumerated in Article III(b) to (e) of the Genocide Convention make reference to criminal

[36] Counter-Memorial, para. 86.
[37] Counter-Memorial, para. 90; and *Bosnia*, para. 380.

law (complicity in particular) but that in light of the object and purpose of the Convention these obligations are also applicable to the State Parties to the Convention and may give rise to their responsibility.[38]

(1) Conspiracy to commit genocide: Article III(b)

8.29 In the *Bosnia* judgment, the Court did not specifically define conspiracy to commit genocide. As set out in the Memorial, Croatia submits that a conspiracy under Article III(b) of the Convention will exist where two or more persons have agreed upon a common plan to commit genocide, with the same specific intent as required for genocide itself.[39] The Respondent does not disagree, relying on the findings of the ICTR in *Musema* to the effect that the *mens rea* requirement for conspiracy is the same as that required for the crime of genocide.[40]

8.30 The distinction that existed at the time of drafting the Convention between the common law and Romano-Germanic legal systems as to the nature of complicity are also highlighted in the Memorial and Counter-Memorial. The Applicant has shown that it would appear from the *travaux preparatoires* of the Genocide Convention and the judgment in *Musema* that the common law approach to the crime of conspiracy as an inchoate offence has prevailed (so that conspiracy to commit genocide may be committed regardless of whether a genocide in fact occurred).[41] Croatia considers that a conspiracy to commit genocide will only be relevant in respect of those circumstances where, at a particular location or in respect of particular acts, a genocide has not been committed.[42] This is the case also with respect to a finding of State responsibility. In the event that the Court was to rule that the Respondent was in breach of its obligations not to commit genocide under Article III(a) of the Convention – as the Applicant has invited the Court to do – it would be unnecessary for the Court to go on to consider the question of state responsibility on the basis that individual Serbian leaders (for whom the FRY bears international responsibility) were party to a conspiracy to commit genocide.

8.31 In the present case, as shown by the facts set out in Chapters 5 and 6, genocide was committed against the Croatian populations concerned. In such a case, it would be of little logical and practical effect to also find the Respondent responsible of conspiracy to commit genocide under Article III(b). Moreover, if the Court reaches a finding of direct State responsibility for the perpetration of genocide, it is not necessary to consider the alternative basis

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[38] *Ibid.,* para. 167.

[39] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 559. See also Memorial, para. 7.76.

[40] *Prosecutor v. Musema*, ICTR-960130A, Judgment and Sentence, 27 January 2000, para. 191; see also Counter-Memorial para. 92.

[41] Memorial, para. 7.77.

[42] Counter-Memorial, para. 95.

for establishing State responsibility, namely that individual Serbian leaders were responsible for conspiracy to commit genocide and that the Respondent is internationally responsible for these acts.

(2) Direct and public incitement To Commit Genocide: Article III(c)

8.32 Incitement is also an inchoate offence, and no actual genocide needs to have occurred for a finding of direct and public incitement to be made. The parties agree as to the definition of the *mens rea* and *actus reus* elements of this offence. Simply put, it requires "directly provoking the perpetrator(s) to commit genocide…", whilst sharing the same specific intent to destroy the protected group, in whole or in part, as the principal perpetrator.[43]

(3) Attempt to commit genocide: Article III(d)

8.33 There is no disagreement between the parties as to the definitional aspects of this provision. Unlike Croatia, Bosnia did not make a claim in relation to attempt to commit genocide in its case before the Court against the FRY.

(4) Complicity in genocide: Article III(e)

8.34 Complicity in genocide involves the planning, ordering or otherwise aiding and abetting in the planning, preparation or execution of the crime. The Respondent has pointed to the fact that unlike the other three inchoate offences under Article III (b), (c) and (d), complicity in genocide requires that genocide actually be committed (as was the case here).

8.35 In the *Bosnia* judgment, the Court held that complicity includes the "provision of means to enable or facilitate the commission of the crime".[44] The Court also made reference to Article 16 of the International Law Commission's (ILC) Articles on State Responsibility, concerning "[a]id or assistance in the commission of an internationally wrongful act". Although recognizing that it was not directly applicable "because it concerns a situation characterized by a relationship between two States",[45] the Court saw no reason to make any distinction of substance between Article III(e) of the Convention and "aid and assistance" in the context of Article 16 of ILC Articles. Article 16 of the ILC Articles on State Responsibility provides:

> "*Aid or assistance in the commission of an internationally wrongful act*
>
> 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:

[43] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 557; see Counter-Memorial, para. 98.
[44] *Bosnia*, para. 419.
[45] *Ibid*., para. 420.

> That State does so with the knowledge of the circumstances of the internationally wrongful act; and
>
> The act would be internationally wrongful if committed by that State."

8.36 In relation to the mental element required to establish complicity, Croatia has referred to a number of authorities that support the contention that a person who aids and abets genocide does not need to meet the same *mens rea* requirement as the principal offender.[46] The Memorial notes that the real test "is whether the accused had knowledge of the principal offender's intent".[47] In *Bosnia*, the Court did not explicitly rule on this issue, finding only that:

> "the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there 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 complicit in genocide unless at 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."[48]

Judges Keith and Bennouna both addressed this issue in Separate Declarations appended to the 2007 judgment. Judge Keith took the view that an accomplice must have knowledge of the genocidal intent of the principle perpetrator, but does not need to share that intent. Judge Bennouna shared this view, but added that that the Court "[left] open the question whether an accomplice must share the specific intent (*dolus specialis*) of the principal perpetrator"[49]

8.37 The Applicant submits that its approach to complicity as set out in the Memorial therefore remains correct: the person who aids and abets must have provided the principal offender with aid and assistance in full knowledge of the genocidal intent of the principal. This approach is not disputed by the Respondent.[50]

SECTION III: THE OBLIGATION TO PREVENT AND PUNISH

8.38 The obligation of State Parties to prevent and punish the crime of genocide is set out in Article I of the Convention and elaborated on in most of the substantive articles of the Convention (Articles IV, V, VI, VII and VIII). The Court ruled in *Bosnia* that despite clear links between the duty to

[46] Memorial, paras. 7.93-7.95.
[47] Memorial, para. 7.94.
[48] *Bosnia*, para. 421.
[49] See p. 362 of the Declaration of Judge Bennouna in *Bosnia*.
[50] Counter-Memorial, para. 113.

prevent genocide and the duty to punish, these are two distinct but connected obligations.[51]

(1) The obligation to prevent genocide

8.39 The Obligation to prevent genocide lies at the heart of the Convention and is set out in Articles I and VIII. The obligation requires that a State take positive steps to ensure that those within its jurisdiction and control do not commit genocide.

8.40 In the *Bosnia* judgment the Court affirmed that the obligation to prevent has its own separate legal existence. According to the Court, the obligation:

> "is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely the reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organ have been called upon, this does not mean that the States parties to the Convention are relieved of 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"[52]

8.41 Regardless of how Serbia's military campaign may be characterised, its obligation to prevent genocide existed as a separate and distinct legal obligation. As described in Chapter 7, the Genocide Convention applied at all material times to the geographic areas where genocidal acts occurred and in respect of all persons who were the target of such acts. As the Court observed in 1996 and again in 2008, there is no express limitation *ratione temporis* in the Genocide Convention.[53] For the reasons set out in Chapter 7, the Applicant is internationally responsible for violations of the Genocide Convention throughout the period in question.

8.42 Moreover, in its 2007 judgment the Court made clear that the obligation is one of conduct rather than result. The obligation cannot be taken to mean that the State in question *must* succeed in preventing genocide; rather, it must have taken all reasonable means at its disposal to prevent genocide as far a possible.[54] The responsibility of the State is incurred

> "if the State manifestly failed to take all measures to prevent genocide

[51] *Bosnia*, para. 425.
[52] *Ibid.*, para. 427.
[53] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, Judgment of 18 November 2008, ICJ Reports 2008 pp. 412, 428, para. 123.
[54] *Ibid.*, para 430.

> which were within its power, and which might have contributed to preventing genocide."[55]

8.43 As described in Chapters 5, 6 and 9 of this Reply, Croatia submits that this standard is plainly met in the present case. The Court identified four factors that are relevant to setting the parameters for discharging the obligation to prevent genocide. The first is the capacity of the state to influence effectively the actions of persons likely to commit genocide, including by reference to factors of geographical proximity and the strength of political and other links. This capacity of influence is to be assessed by legal criteria in light of the fact that a State can only act within the limits of international law.[56] Second, it is irrelevant for a State to show that, even if it had employed all the means at its disposal, it would not have succeeded in preventing genocide. Third, the obligation to prevent genocide requires as a prerequisite that genocide was in fact committed. This does not mean however that the obligation only arises at the time when the genocide commences: as noted by the Court, "that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act."[57] Finally, the Court drew a distinction between the obligation to prevent and complicity in genocide: the latter requiring positive action (it results from commission) whereas the former results from a mere failure to act in order to prevent genocide (it results from an omission).[58] Croatia submits, as set out in Chapter 9, that these conditions are met in the present case.

8.44 As to the mental element required, the Court held that a State can be responsible for a failure to prevent genocide even where it had no certain knowledge that genocide was about to be committed or was under way:

> "it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed."[59]

On the facts of that case, the Court concluded that the FRY had breached its obligation under the Genocide Convention to prevent genocide with respect to the events in Srebenica:

> "In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and Muslims in the Srebenica

[55] *Ibid.*.
[56] *Ibid.*.
[57] *Ibid.*, para. 431.
[58] *Ibid.*, para. 432.
[59] *Ibid.*.

region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult population of the Muslin community of Srebenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proved that the State concerned definitely had the power to prevent genocide; it is sufficient that it has the means to do so and that it manifestly refrained from using them."[60]

(2) The obligation to punish genocide

8.45 The Genocide Convention also requires States to punish persons committing genocide, as set out in Article I, IV, V and VI. This obligation extends both to private individuals and public individuals.[61]

8.46 In its Memorial the Republic of Croatia set out its claim that:

> "Although the Convention does not provide for universal jurisdiction in the modern sense, it is apparent that States are not barred from trying their own nationals for acts committed outside the territorial State, and that in light of the provisions of Article IV of the Convention, they must do so."[62]

In the *Bosnia* judgment the Court ruled that "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction … ."[63] However, the Court proceeded to point out that Article VI obliges Contracting Parties to co-operate with the "international penal tribunal" referred to in that provision. The Court held that the ICTY constitutes an "international penal tribunal" within the meaning of Article VI.[64] On the facts in the *Bosnia* case, the Court held that there was evidence that the FRY's intelligence services knew of the whereabouts of Mladić, "but refrained from informing the authorities

[60] *Ibid*., para. 438.

[61] Article IV of the Genocide Convention reads: "Persons 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."

[62] Memorial, para. 7.101.

[63] *Bosnia*, para. 442.

[64] *Ibid*., para. 445.

competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive."[65] As described in Chapter 9 at paragraphs 9.90-94 there has plainly been a failure to punish acts amounting to genocide for which the Respondent is responsible.

SECTION IV: THE RESPONDENT'S APPROACH UNDER THE GENOCIDE CONVENTION

(1) The Respondent's understanding of the nature of specific intent

8.47 The Respondent has sought to characterise the nature of the specific intent (*dolus specialis*) partly on the basis of a comparison of the crime of genocide with other international crimes, such as that of extermination: In so doing it has relied on the ILC to the effect that:

> "[e]xtermination 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 characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared."[66] (emphasis added).

The Respondent also quoted from *Vasiljević*:

> "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." (emphasis added)[67]

8.48 References to the crime of extermination as set out above are misleading. The Respondent appears to be alluding to the fact that both extermination and genocide require "mass destruction" and "a large number

[65] *Ibid*., para. 448.

[66] Counter-Memorial, para. 44.

[67] Counter-Memorial, para. 44 (citing *Prosecutor v. Vasiljević,* IT-98-32-T, Trial Chamber Judgment, 29 November 2002, para. 227).

of killings". Although both these often occur as a direct result of a military campaign in which genocide has been committed, nowhere in the definition of genocide as set out in the Convention are these requirements stated. The nature of specific intent required is clearly set out in the Memorial: simply that the "perpetrator clearly seeks to produce the acts charged".[68] The Perpetrator must intend, in the words of Article II, "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Court in *Bosnia* was equally clear: "[t]he additional intent must also be established and is defined very precisely."[69] This confirms the approach adopted by Croatia in its Memorial.

(2) The Respondent's approach to proving specific intent

8.49 The Genocide Convention is silent as to the manner in which the specific intent required to establish the crime of genocide is to be proved. The practice of international courts and tribunals has addressed these issues and affirmed that genocidal intent may be inferred from the existence of a set of facts, including a pattern of consistent behaviour. The Respondent agrees with Croatia that "the existence of a plan or policy to commit genocide is not a formal requirement of the crime of genocide".[70] The practice of adducing "intent" is set out in detail in Croatia's Memorial at paragraphs 7.33 to 7.41. The Applicant's assertion in the Memorial is based on authoritative statements both at the ICTY (*Karadžić and Mladić*)[71] and ICTR (*Akayesu*, *Kayeshima and Ruzindana*),[72] this approach has also been supported in *Jelisić* (although the defendant was acquitted of genocide, the Chamber was willing to accept an inferential approach to proving "intent").[73]

8.50 More recently in *Gacumbitsi,*[74] the ICTR Appeal Chamber held:

> "By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must be inferred."[75]

In *Rutaganda*, the ICTR Appeal Chamber considered that:

> "The Appellant contends that the standard applied by the Trial Chamber implies that it was not necessary to prove *dolus specialis*. This

[68] Memorial, para. 7.31 (citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 497.

[69] *Bosnia*, para. 187.

[70] Counter-Memorial, para. 48.

[71] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998; *Prosecutor v. Karadžić; Prosecutor v. Mladić,* Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence.

[72] *Prosecutor v. Kayishema and Ruzindana,* ICTR-95-1, Trial Chamber Judgment, May 21, 1999.

[73] *Prosecutor v. Jelisić*, ICTY, Trial Chamber Judgment, 14 December, 1999.

[74] *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgment, 7 July 2006.

[75] *Ibid*., para. 40.

> contention is entirely unfounded. According to the principles recalled earlier, the standard applied in paragraph 398 of the Trial Judgment is in keeping with the generally accepted practice of the *ad hoc* Tribunals. The Appeals Chambers of the International Tribunal and the ICTY also confirmed that in the absence of explicit, direct evidence, specific intent may be inferred from other facts, such as the general context and the perpetration of other acts systematically directed against a given group. Such an approach does not imply that the guilt of an accused may be inferred only from his affiliation with a 'guilty organisation'"[76]

8.51 The Respondent accepts the implausibility of a State formally and publicly putting into place a plan with the stated intention to 'destroy' in whole or in part a group which falls to be protected under the terms of the Convention.[77] Yet, at the same time, and in face of overwhelming international practice to the contrary, the Respondent now argues that genocidal intent cannot be inferred from "a relatively consistent pattern of behaviour involving the prohibited acts and targeted at a protected group".[78] This contention is based on a flawed and selective reading of authorities. The first of these is *Stakić*:

> "The Trial Chamber has reviewed its factual findings in Part II of this Judgment 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 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."[79]

8.52 The Respondent points out that Dr. Stakić was acquitted of genocide. However, the Trial Chamber continued:

> "In its Decision on 98 *bis* Motion to Acquit, the Trial Chamber concluded that on the basis of the evidence presented by the prosecution, a reasonable Trial Chamber "*could* conclude that Dr. Stakić shared the plans to create a unified Serbian state by destroying other ethnic groups". Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakić to enable it to draw inference that those perpetrators had

[76] *Prosecutor v. Georges Rutaganda* , ICTR-96-3, Appeal Chamber Judgment 26 May, 2003, para. 528.
[77] Counter-Memorial, para. 48.
[78] Memorial, para. 7.33.
[79] *Prosecutor v. Stakić,* IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 546 (cited in Counter-Memorial, para. 51).

> the specific genocidal intent. As a consequence, the Trial Chamber is unable to draw any inference from the vertical structure that Dr. Stakić shared the intent." (emphasis in the original)[80]

8.53 It is clear, therefore, that that the Trial Chamber did not conclude that genocidal "intent" cannot, in principle, be inferred from the facts. The judgment stands only for the proposition that in that case it had not been provided with the necessary evidence in order to allow it to take an inferential approach. The Respondent also relies on this finding in *Brđanin*:

> "While the general a widespread nature of the 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 for the crime of genocide in satisfied."[81]

8.54 Again, the Respondent points out that Radoslav Brđanin was acquitted of genocide. But once again it has mischaracterized the Trial Chamber's reasoning. The Tribunal continued:

> "Although the factors raised by the Prosecution have been examined on an individual basis, the Trial Chamber finds that, even if they were taken together, they do not allow the Trial Chamber to legitimately draw the inference that the underlying offences were committed with the specific intent required for the crime of genocide. On the basis of the evidence presented in this case, the Trial Chamber has not found beyond reasonable doubt that genocide was committed in the relevant ARK municipalities, in April to December 1992."[82]

8.55 The same argument is applicable: the Trial Chamber is not stating that genocidal "intent" cannot legitimately be inferred from the facts, but rather that it was not possible to do so in that case based on the factual evidence which was presented. A second point (more fully argued in Chapter 2 above) is that the ICTY (as is also the case with the ICTR) is an *ad hoc* criminal tribunal established pursuant to a Security Council Resolution with a specific mandate relating to the criminal responsibility of individuals. Vice-President Al-Khasawneh, in his dissent on the merits of the *Bosnia* judgment, shed some light on the distinction between proving "intent" in cases of individual criminal liability and that in the case of State responsibility.[83] The factual evidence required to prove genocidal "intent" in the case of an individual is "limited to the sphere of operations of the accused".[84] However, in relation to cases of State responsibility under the Genocide Convention, Vice-President Al-Khasawneh concluded that

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[80] *Ibid.,* at para. 547.

[81] *Prosecutor v. Brđanin,* IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 984.

[82] *Ibid*., para. 989.

[83] Dissenting Opinion of Vice-President Al-Khasawneh in the *Bosnia* case.

[84] *Ibid*., para. 42.

> "[t]he Court can look at pattern of conduct throughout Bosnia because it is not constrained by the sphere of operations of any particular accused."[85]

The conclusion applies with equal force to the situation in Croatia and in relation to Croats.

8.56 In a final attempt to show that "intent" can never be inferred from the facts, the Respondent relies on the Court's judgment in *Bosnia*:

> "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 referent 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."[86]

8.57 Contrary to the Respondent's contention, this finding in no way refutes the approach taken by Croatia in the Memorial.[87] In the *Bosnia* judgment the Court did not reject, in principle, an inferential approach to the establishment of facts showing a genocidal intent; rather, it held that for a "pattern of conduct to be accepted as evidence" of the specific intent to destroy the group in whole or in part, "it would have to be such that it could only point to the existence of such intent".[88] It follows that this finding by the Court is consistent with the case-law of the ICTY and ICTR relied upon by the Applicant in the Memorial and in this Reply. There is no doubt that the Court recognises that a relatively consistent and widespread pattern of prohibited acts targeted at a protected group, taken as a whole, may provide evidence of specific intent to destroy that group as such, in whole or in part. The evidence of widespread genocidal activities set out in Chapters 4 and 5 of the Memorial and reinforced by Chapters 5 and 6 of this Reply, taken as a whole, point to the one inevitable conclusion that the Court had in mind: namely, that the Respondent possessed the specific intent required to establish the crime of genocide under the Genocide Convention. Further evidence of this is seen at paragraph 242 of the *Bosnia* judgment, where the Court sets out its approach to an examination of the factual evidence:

> "The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of

[85] *Ibid*..
[86] *Bosnia*, para. 373.
[87] Counter-Memorial, para. 941.
[88] *Bosnia*, para. 373.

> atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (*dolus specialis*)."[89]

It is plain from this passage that the Court in *Bosnia* was receptive to the Applicant's approach of inferring genocidal intent through a pattern of acts committed against members of a protected group. The fact that such an inference could not be drawn from the evidence in the *Bosnia* case does not have a dispositive bearing on the present case. The evidence of a widespread and consistent pattern of prohibited acts carried out against Croats does meet the threshold set by the Court in its 2007 judgment: the only possible conclusion to be drawn from this evidence, taken as a whole, is that the Respondent must have carried out these acts with an intention to destroy Croats as a group.

SECTION FIVE: CONCLUSIONS

8.58 As has been made clear above, the Court's judgment in *Bosnia* is entirely consistent with the Applicant's approach in these present proceedings. The dispute between the parties is not so much related to interpretation of obligations under the Genocide Convention, but rather whether the evidence presented by Croatia in this case conclusively establishes the responsibility of the Respondent under the Convention: the Applicant submits that the standard is plainly met.

8.59 Chapter 9, immediately following this chapter, applies the evidence and facts presented by the Applicant to the legal regime set out in the Genocide Convention. It sets out the Respondent's responsibility under the Convention, reflecting on the relevant findings of the ICTY and applying the test set out by the Court in the *Bosnia* case.

8.60 A close examination of the factual matrix in this case reveals that the Serbian leadership unquestionably intended to destroy ethnic Croats "as such" through their crimes; the threshold of *dolus specialis* is clearly satisfied. As will be seen in following chapter, the test of attribution is satisfied to the extent that the Respondent is responsible for acts genocide, even where these acts occurred beyond national boundaries and/or in excess of authority. All relevant military operations which resulted in breaches of obligations in the Genocide Convention were carried out under the command and control of

[89] *Ibid.*, para. 242.

the JNA, which in light of the evidence presented, must be regarded as an organ of the FRY, or at least as having been under the direction, command and control of the FRY leadership (for whose acts the FRY is internationally accountable).

8.61 The Applicant fully accepts and indeed applies the findings of the Court in the *Bosnia* case. These findings, when applied to the extensive and compelling evidence presented by the Applicant in these proceedings, demonstrate that only one possible conclusion can be drawn: the Respondent is responsible for acts of genocide on the territory of Croatia.

CHAPTER 9

THE RESPONSIBILITY OF THE FRY FOR VIOLATIONS OF THE GENOCIDE CONVENTION, INCLUDING ATTRIBUTION

INTRODUCTION

9.1 This Chapter sets out the Applicant's submissions concerning the responsibility of the FRY for violations of the Genocide Convention. It responds directly to arguments advanced in the Respondent's Counter-Memorial, and summarises the Applicant's submissions on the legal and factual developments that have occurred since the Memorial was filed.[1] Since then, there have been a number of developments: the Court has delivered judgment in the *Bosnia* case, clarifying important issues concerning the interpretation and application of the Convention; the ICTY has concluded a number of trials of individuals charged with war crimes relevant to these proceedings; and the Applicant has assembled a further body of eyewitness testimony and documentary evidence corroborating the allegations made in the Memorial.

9.2 At the outset the Applicant wishes to emphasise the following: the ICTY has found as a fact that at all relevant times there was in existence a joint criminal enterprise among the Serb political and military leadership, the purpose of which was to eradicate (by killing and removing) the Croat civilian population from approximately one third of the territory of Croatia in order to transform that territory into an ethnically homogenous Serb-dominated state. The ICTY found as a fact that this was to be achieved through the commission of widespread and systematic crimes against the majority Croat civilian population of the territory including extermination, systematic murder, torture, cruel treatment, sexual violence, detention in inhumane conditions, forced expulsion, the destruction of Croat public and private property, the targeting of monuments of cultural and religious significance to the Croat population, and the establishment of a discriminatory regime of persecution of those ethnic Croats who remained in the occupied territory.[2] The ICTY has returned convictions in respect of a number of the specific crimes alleged by the Applicant in the present proceedings, and has found as a fact that those crimes were committed as part of the joint criminal enterprise.[3]

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[1] The Applicant comments in detail on these developments in the preceding chapters in Parts 1 and 2 of this Reply. The present Chapter should also be read in conjunction with, in particular, Chapter 8 of the Applicant's Memorial which is adopted without repetition.

[2] See *infra*. paras. 9.29 *et seq*..

[3] *Ibid.,* especially paras. 9.32 *et seq*..

9.3 The ICTY has also found as a fact that all of the forces participating in the military operations in Croatia which are the subject of the present application (including the forces of the rebel Serb authorities, and all volunteer and paramilitary formations) operated under the effective command and control of the JNA; and that the JNA (and all of the combined forces fighting in the Serb cause) operated at all times under the command and control of the members of the joint criminal enterprise. The ICTY has held that these combined forces were the instrument through which the members of the joint criminal enterprise committed widespread and systematic crimes against the Croat civilian population on the basis of their ethnicity.

9.4 These findings are plainly sufficient to establish the existence of a criminal agreement among the members of the Serb political and military leadership to commit crimes against humanity in Croatia. For the reasons set out in Chapter 7, the Applicant submits that the FRY is internationally responsible for the acts of the Serbian leadership, which was to become the leadership of the FRY. There can be no dispute that crimes amounting to the *actus reus* of the crime of genocide were committed by the combined Serb forces on the territory of Croatia pursuant to that joint criminal enterprise. The remaining (and central) question for the Court to determine is whether the systematic nature and scale of the crimes committed pursuant to that joint criminal enterprise is such that it leads to the inevitable inference that the members of that criminal agreement intended to achieve their objective (of a racially homogenous Serb state encompassing one third of Croatia) not only by means of widespread and systematic crimes against humanity directed at the Croat civilian population on grounds of its ethnicity (which is now firmly established) but also by means of the eradication (through physical destruction, persecution and deportation) of the majority Croat civilian population of those territories.

SECTION I: THE CRIME OF GENOCIDE (ARTICLE II)

9.5 In this section the Applicant addresses in further detail the issues arising between the parties relevant to the mental element of the crime of genocide (including the elements of specific intent, and the resulting issues of proof); the issues arising under the *actus reus* requirement in light of the Court's decision in the *Bosnia* case; and the conclusions the Applicant asks the Court to draw on these questions by reference to the whole of the evidence now available.

(1) The mental element: Genocidal intent

9.6 The Applicant relies on a range of elements to prove genocidal intent, namely: (a) the political doctrine of Serbian expansionism which created the

climate for genocidal policies aimed at destroying the Croatian population living in the areas earmarked to become part of Greater Serbia; (b) the statements of public officials, including systematic incitement on the part of State-controlled media; (c) the fact that the pattern of attacks on the Croatian civilian population far exceeded any legitimate military objectives necessary to secure control of the regions concerned; (d) contemporaneous video-taped evidence of the genocidal intent of those carrying out the attacks; (e) 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; (f) the systematic nature and sheer scale of the attacks on Croatian civilians; (g) the fact that ethnic Croats were consistently singled out for attack whilst local Serbs were excluded; (h) 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 homes; (i) the number of Croats killed and missing as a proportion of the local population; (j) the degree and extent of the injuries inflicted (through physical attacks, acts of torture, inhuman and degrading treatment, rape and sexual violence) including injuries with recognisably ethnic characteristics; (k) the use of ethnically derogatory language in the course of acts of killing, torture and rape; (l) the forced displacement of the Croat population and the organised means adopted to this end; (m) the systematic looting and destruction of Croatian cultural and religious monuments; (n) the suppression of Croatian culture and religious practices among the remaining population; (o) the consequent permanent and evidently intended demographic changes to the regions concerned; and (p) the failure to punish the crimes which the Applicant alleges to amount to genocide.[4]

9.7 All but the last of these elements has been substantially confirmed by judicial findings of the ICTY in proceedings brought against senior Serb officials. The Indictments brought against named individuals have been necessarily selective, however, with the consequence that the decisions of the ICTY in the limited number of cases that have so far been concluded do not reflect the full scale of the attack on the Croat civilian population.[5] More than 12,211 people were killed in the Serb military campaign and 1,030 persons are still missing and unaccounted for.[6] The demographic evidence shows that many of the towns and villages which had a predominantly Croat population prior to their occupation had become almost exclusively Serb by 1993.[7] In the territory of Eastern Slavonia as a whole, the population ratio prior to the occupation was 70.24% Croat, 17.13% Serb and 12.6% other ethnic groups;

[4] Memorial, para. 8.16.

[5] See e.g. para. 9.40, *infra*.

[6] Updated List of Missing Persons, 1 September 2010, Annex 41; Updated List of Persons Detained in Camps under Serbian Control on the Territory of the FRY, BH and Croatia, 1 September 2010, Annex 42; List of Exhumed Bodies for Sites Referred to in the Memorial, Annex 43; List of Exhumed Bodies for Additional Sites, Annex 44.

[7] Memorial, para. 8.08, footnote 24.

by 1993, after the occupation, the Croat population had dropped to 2% and the Serb population increased to 97%.[8] It is against this evidential background that the issue of genocidal intent now falls to be considered.

(a) The elements necessary to establish genocidal intent

9.8 It is essential, at the outset, to draw a distinction between motive and intent. The primary motive of the Serbian leadership, in pursuing the joint criminal enterprise which the ICTY has found to have existed, was to secure control of approximately one third of the territory of Croatia, and to eradicate the majority Croat civilian from that territory, in order to transform it into an ethnically homogenous, Serb-dominated State. It can thus be said that the "motive" for the commission of these crimes was territorial acquisition coupled with "ethnic cleansing". However, as the ICTY has also confirmed, the military and political campaign by which the object of the joint criminal enterprise was to be achieved included the intentional and organised commission of widespread and systematic crimes against the Croat civilian population on account of their ethnicity. It is the Applicant's case that the scale of the crimes committed, including murder, torture, detention, crimes of sexual violence, and forced deportation, taken together, evince a clear intention to bring about the physical destruction of the Croat civilian population of the identified regions.

9.9 In its judgment in the *Bosnia* case, the Court confirmed that the *dolus specialis* for the crime of genocide under Article II of the Genocide Convention requires proof of an intent to destroy, in whole or in part, a national, ethnic, racial or religious group "as such".[9] It is not sufficient simply to prove that individuals were targeted because of their identification as members of a distinct national or ethnic group (which is undeniable in light of the decisions of the ICTY), or that acts of murder and persecution were committed with discriminatory intent (also undeniable in light of those decisions). It is necessary for the Applicant to go further, and to prove in addition that the protected group itself was targeted "as such", that is to say that the targeting occurred with intent to destroy the group itself, in whole or in part.[10] This will depend not only on the *scale* of the crimes committed, but also on their intended or likely *impact* on a national or ethnic group as a whole.[11] It is for this reason that the Applicant relies on the cumulative effect of the matters identified in paragraph 9.3 above.

9.10 In its *Bosnia* judgment the Court established three key criteria for identifying genocidal intent:

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[8] Memorial paras. 4.3 to 4.5.
[9] *Bosnia*, para. 187.
[10] *Ibid*., para. 187.
[11] See further, para. 9.47 *infra*.

1. The first (the "essential starting point") is whether there was an intent to destroy at least "a substantial part" of the identified group.[12] As the disposition in the *Bosnia* judgment makes clear, the question whether the "part" can be considered "substantial" does not necessarily depend upon purely numerical considerations. It will take account of broader issues relating to the "significance" of the targeted group to the national or ethnic group as a whole.

2. Second, the *dolus specialis* can be established "where the *intent* is to destroy the group within a geographically limited area".[13] It is not necessary to prove an intent to eradicate the group wherever it is to be found. The opportunity available to the perpetrator is significant.[14] It may be that the perpetrator has the opportunity to eradicate only those members of an ethnic group living within a confined geographical area. That is sufficient to constitute genocidal intent, providing the targeted group is a substantial part the whole. Thus, in the *Bosnia* case, the targeting of Bosnian Muslims living in the geographically confined area of Srebrenica was sufficient for the purposes of Article II.[15]

3. Third, having identified the targeted group (or part) the Court must go on to consider its prominence in relation to the national or ethnic group as a whole.[16] Put another way, the Court will take account of the relative significance of the part of the group against which the acts were directed. Thus, although the Bosnian Muslim population of Srebrenica accounted for only a small percentage of the Bosnian Muslim population as a whole, they were a more significant part of the whole than a purely quantitative analysis would have suggested.[17] That said, the Court emphasised that a "qualitative" approach alone, which takes no account of scale, would not suffice. It will always be necessary to determine whether the acts in question were committed with the intention of destroying a "substantial" part of the group.[18]

9.11 The Applicant infers from the Court's approach that there is no fixed minimum threshold in terms of scale, before a crime, or combination of crimes, falling within Article II (a) to (e) can be considered to amount to genocide. It is not a numbers game: the decisive question is the intent with which the crime was committed. There must, as a minimum, have been an intention to

[12] *Bosnia*, paras. 198-201.
[13] *Ibid.,* paras. 198-201.
[14] *Ibid.,* para. 199.
[15] *Ibid*., paras. 296-297.
[16] *Ibid*., paras. 198-201.
[17] *Ibid*., paras. 296-297.
[18] *Ibid*., para. 200.

bring about the destruction, as a separate entity, of a significant or substantial part of a national or ethnic group. Once the target group has been identified (that is the group of individuals against whom the crimes were directed) it is then necessary to determine whether that group represented a significant or substantial part of the whole.

9.12 The Court in the *Bosnia* case held that the idea of a "group", as it is contemplated by the Genocide Convention requires a positive identification of individuals through common national or ethnic characteristics.[19] In the present case, the target group identified by the Applicant is the Croat population that was, at the relevant time, living in Eastern Slavonia, Western Slavonia, Banovina, Kordun and Lika, and Dalmatia. There can be no dispute that this group constituted a substantial "part" of the Croat population as a whole (such that the *dolus specialis* is to bring about the partial destruction of a national group, namely Croats).

9.13 In light of the decisions of the ICTY, there can be no doubt that the eradication of the Croat civilian population from the identified regions, through the commission of widespread and systematic crimes, amounting to crimes against humanity, was the primary purpose of the joint criminal enterprise between Slobodan Milošević and other members of the Serb political and military leadership. It is undeniable that members of the group were targeted as such, and that the numbers killed or otherwise affected was on any view "substantial".[20] There remains, however, an issue between the parties as to the scale and significance of the physical attack on the Croat population of the identified regions, and whether it evinces genocidal intent. The question for the Court is whether that amounted to an intention to "destroy" part of a protected group.

9.14 It is clear from the *Bosnia* judgment, and indeed from the terms of Article II, that the term "destruction" does not necessarily imply an intention to bring about the complete physical annihilation of every member of a national or ethnic group.[21] Nor does it necessarily involve an intention to bring about the complete physical annihilation of every individual comprising an identified "part" of a protected group.[22] The *dolus specialis* requires an intention to bring about the destruction of the group (or part) "as such", that is as a distinct and separate entity sharing common national or ethnic characteristics. Thus, the *actus reus* of the crime of genocide can, in principle, be committed through a relatively small number of discriminatory crimes or other persecutory acts

[19] The Court drew a distinction between a positive identification, through shared national or ethnic characteristics on the one hand, and a purely negative formulation, such as the "non-Serb" population of a region, on the other. The "group" contemplated by the Genocide Convention connoted the former rather than the latter: *Bosnia*, paras. 191-196.

[20] Memorial, para. 8.17.

[21] As the International Law Commission has pointed out, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe": *Ybk ILC*, 1996, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17 of the Articles on State Responsibility.

[22] See e.g. para. 9.47(c) *infra*.

(falling within Article II(a) to (e)) perpetrated against individual members of a protected group. Such acts will constitute the crime of genocide provided the perpetrators' intention was to bring about the destruction of the whole, or a substantial part, of the protected group. In the present case, however, the number of discriminatory crimes and other persecutory acts was extensive.

9.15 The Respondent is wrong to imply, as it does in its Counter-Memorial, that the *dolus specialis* for the crime of genocide can be equated with the international crime of extermination, and that both crimes necessarily require killing on a scale amounting to "mass destruction" or a "large number of deaths".[23] Where (as here) the acts alleged involved massacre or mass destruction it will no doubt be easier to infer genocidal intent. This is not, however, a necessary pre-requisite. The Applicant however accepts and submits that the scale of deaths, and the extent of persecution, contemplated or inflicted on members of a protected group is an important factor in determining whether the acts complained were (or must have been) committed with an intent to destroy the protected group (or part) as such. Plainly, in a case where proof of genocidal intent depends upon inferences from a consistent pattern of crimes committed on a targeted population over a period of time, the greater the scale of the crimes committed or contemplated, the more readily the Court will infer the necessary genocidal intent. The Court, in its *Bosnia* judgment,[24] cited with approval the ICTY's observation in *Kupreškić* that;

> "when persecution *escalates* to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide"[25]

9.16 However, the Applicant would point out that certain crimes, even if committed on a relatively smaller scale, can have such significance, or be committed in such a way, as to demonstrate clearly that the crime was committed with intent to destroy the group "as such". This will, for example, be the position where the killing of all (or a large number) of males from a particular national or ethnic group, living in a relatively confined geographical area, has a disproportionate impact on the group as a whole (as the Court found to have occurred in the Srebrenica massacre). It could also be the position where the evidence discloses a large number of killings systematically committed against individuals from a targeted group, spread across a relatively wide geographical area. This is all the more so when combined with other evidence of a military and/or political strategy which clearly demonstrates that the crimes were committed with an intent to destroy the existence of a protected group as a distinct and separate entity, including forced deportation and the infliction of persecutory conditions of life for those who remain. Each

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[23] Counter-Memorial, para. 44.

[24] *Bosnia*, para. 188.

[25] *Prosector v. Kupreškić et al*, IT-95-16, Trial Chamber Judgment, 14 January 2000, para. 636.

of these features has been established in the present case by the decisions of the ICTY.

9.17 In light of the findings of the ICTY there can be no real dispute that acts amounting to the *actus reus* of the crime genocide were committed against the targeted group. The decisive question for the Court is whether the *mens rea* requirements of the Genocide Convention (which are "defined very precisely")[26] have been made out. This does not depend simply on establishing a minimum threshold in terms of the number of deaths caused (or contemplated) by a military campaign, or particular military operations. The analysis required is both quantitative *and qualitative*, necessitating an examination of all relevant circumstances in order to determine the intention with which the relevant acts were (or must have been) committed.

9.18 The Applicant's Memorial (as supplemented in the present Reply) evidences a very large number of separate genocidal acts (that is, acts which can constitute the *actus reus* of the crime of genocide) committed across the identified regions during the period from 1991 onwards. As the Applicant submits below, a consistent pattern of conduct of this kind is relevant to inferring genocidal intent in relation to the entire campaign, and therefore, by inference, in relation to each separate criminal act which formed part of that campaign. It is sufficient for the purposes of Article II for the Applicant to prove genocidal intent in relation to any one (or more) of the acts cited in the Memorial. This requires a close examination of each of the crimes and persecutory acts alleged, and a determination of whether the Applicant has established that any act (or combination of acts) was committed on such a scale, or was otherwise of such significance, as to prove that the perpetrators must have intended to destroy a "substantial" part of the targeted group.

9.19 Applying the Court's approach in the *Bosnia* case to the facts of the present case, the Applicant submits that the evidence proves conclusively that the Serbian leadership harboured an intention to eradicate ethnic Croats from the identified regions, through a combination of crimes including murder on a wide scale, and the infliction of persecution and destruction of property, thus bringing about the destruction of the Croat population living at the relevant time in those regions. The Applicant submits that this is sufficient to constitute the *dolus specialis* for the crime of Genocide.

(b) Proof of genocidal intent: inference from a consistent pattern of crimes

9.20 The *Bosnia* judgment confirms that the Applicant bears the burden of clearly establishing the *dolus specialis* for genocide, such that the Court is "fully convinced" of it. The specific intent for genocide is to be distinguished from other (discriminatory and persecutory) reasons or motives, and the

26 *Bosnia*, para. 187.

Applicant recognises that the Court will exercise considerable care before finding a sufficiently clear indication of genocidal intent.[27]

9.21 That said, however, it is common ground that a formal plan or policy establishing an intention to destroy a protected group is neither a legal requirement for the crime of genocide, nor a necessary element of proof.[28] As the Applicant emphasised in its Memorial, it is most unlikely that a state would ever formulate a political or military strategy in terms that disclosed a clear genocidal intent. It is equally unlikely that a perpetrator would leave behind a paper trail evidencing such a strategy. If it were necessary to prove a formal plan or policy to destroy a protected group, the Genocide Convention would become effectively unenforceable. As the Respondent recognises in its Counter-Memorial, in the absence of a formal policy, *direct* proof of genocidal intent is likely to be difficult if not impossible.[29] It follows that if the Convention's provisions are to be effectively implemented, indirect forms of proof (circumstantial and inferential evidence) must be admissible before international courts and tribunals called upon to decide whether genocide has occurred. It has therefore been held that the genocidal intent inherent in a particular act or series of acts can be deduced from the general context of the perpetration of other culpable acts systematically directed against the same group.[30] That much is no more than common sense. The scale of the crimes committed, their general nature, their geographical context, and the deliberate targeting of individuals on account of their membership of a particular group (whilst members of other groups are spared) can all contribute to an inference of genocidal intent in relation to any particular act alleged.[31]

9.22 A distinction must however be drawn between permissible methods of proof on the one hand, and the standard of proof required before a finding of genocide can be reached on the other. The fact that it is permissible to draw reasonable inferences from circumstantial evidence has to be reconciled with the principle that "cogent evidence" is required to prove the *dolus specialis* for genocide. Genocide is the most serious of all international crimes, and the standard of proof must be commensurate with the gravity of the allegation.[32] The Applicant accordingly acknowledges (as it did in its Memorial)[33] that it bears the burden of proving the allegations it makes,[34] and that in order to do so, it must adduce evidence that is, according to the standard adopted by the

27 *Bosnia*, para. 189.
28 Memorial, paras. 7.33 - 7.41; *Prosecutor v. Jelisić*, IT-95-10, Appeals Chamber Judgment, 5 July 2001, para. 48; Counter-Memorial, para. 48.
29 The Respondent expressly acknowledges this: Counter-Memorial, para. 135.
30 *Prosecutor v. Rutaganda,* ICTR-96-3, Appeal Chamber Judgment, 26 May 2003 (*'Rutaganda'*), para. 525.
31 *Rutaganda,* para. 525.
32 *Bosnia*, para. 209
33 Memorial, paras. 7.33 *et seq.* and 8.16.
34 *Bosnia*, para. 204.

Court, "fully conclusive".[35] Insofar as it is necessary to rely on inferences from the scale and the systematic nature of the crimes committed, taken in conjunction with the surrounding political and military circumstances, such an inference can only be drawn where it is an *inevitable* inference from all of the available evidence.[36]

9.23 In the *Bosnia* case the Court expressly adopted this approach, holding that in the absence of a "general plan" to destroy a protected group in whole or in part, genocidal intent could nonetheless be inferred from the existence of a set of facts, including a pattern of consistent atrocities committed against the targeted community over a period of time, providing that pattern is such that that it "could only point to the existence of such intent".[37] Whilst the *dolus specialis* must be "convincingly established" by evidence that is "fully conclusive", it can nonetheless be established by reasonable inferences from proven facts. In order to meet the necessary threshold, the inference of genocidal intent must be the *only* reasonable inference to be drawn from the facts found proved. The Applicant submits that this test is amply met on the evidence against Serbia adduced in the Memorial and in this Reply. The Applicant argued in its Memorial that the 16 factors identified at paragraph 9.6 above "point to the *inevitable* conclusion that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned" and that this is sufficient to prove genocidal intent. Proof of those 16 factors has now been substantially corroborated in the judgments of the ICTY summarised below. The central question to be determined in the merits phase of the present case is therefore an inferential one, namely whether the Applicant is right to assert that the pattern of consistent attacks on, and persecution of, the Croat population of the identified regions during 1991 and 1992, taken in its political and military context, leads inevitably to an inference of genocidal intent.

9.24 The Respondent criticises the Applicant for relying on a plurality of "common crimes" as being sufficient to establish genocidal intent. That is not and has never been the Applicant's position. The Applicant's argument throughout these proceedings has been that the proven pattern of crimes and acts of persecution evidenced in the Memorial, and in this Reply, can (and do) lead to an *inevitable inference* of specific intent. In the end, the point is a simple one. Genocidal intent must be "convincingly shown", if necessary by inference from all of the available evidence.

(c) Genocide and "ethnic cleansing"

9.25 One of the factors on which the Applicant relies to prove specific

[35] *Ibid*., para. 209.
[36] Memorial, paras. 7.33 *et seq.* and 8.16; *Bosnia*, para. 373.
[37] *Bosnia*, para. 373.

intent is the forced and large-scale displacement of the Croat population. The Applicant accepts, as it has done throughout these proceedings, that a policy of "ethnic cleansing" cannot directly be equated with proof of genocidal intent since the displacement of a protected group does not inevitably lead to its destruction.[38] However, as the Court recognised in the *Bosnia* case, the forcible deportation or displacement of a national or ethnic group can constitute a genocidal act contrary to Article II(c) ("deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part") if committed with the necessary intent.[39] In its Memorial the Applicant recognised that the term "ethnic cleansing" could encompass a wide spectrum of conduct, not all of which would necessarily amount to genocide. However where "ethnic cleansing" takes the form not merely of displacement, but of systematic killing (including a significant number of mass executions) and the infliction of wide-scale physical brutality on the protected group (as well as destruction of property, and the infliction of persecutory conditions of life) with the intention of bringing about the destruction of the protected group, then this will constitute the crime of genocide.[40] The question to be determined is whether, in the present case, the policy of "ethnic cleansing" through the commission of crimes against humanity and war crimes (a policy that is now firmly established by the ICTY) was pursued with the intention of bringing about the physical destruction of the group, or merely its dissolution or the displacement of its members.[41] The Applicant submits that when the evidence is viewed as a whole, the former inference is inevitable.

(d) The Respondent's admissibility objections

9.26 The Respondent makes a number of general objections to the admissibility of the documentary evidence adduced by the Applicant. In particular, the Respondent argues that each item of documentary evidence relied upon should be excluded as inadmissible on one or more of the following grounds: that it is not relevant since it does not prove genocidal acts or intent;[42] or that it emanates from a witness who is not disinterested;[43] or that it fails to meet formal evidentiary requirements for admissibility;[44] or that it includes press reports and books that cannot provide primary evidence;[45] or that it includes maps and graphics the providence of which is unknown.[46]

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38 *Bosnia*, para. 190.
39 *bid*., para. 190.
40 Memorial, para. 8.09.
41 *Bosnia*, para. 190.
42 Counter-Memorial, at para. 144 *et seq.* This submission is addressed in Chapter 2, para. 2.36.
43 *Ibid.,* para. 150 *et seq.* This submission is addressed in Chapter 2, paras. 2.40-41.
44 *Ibid.,* para. 153 *et seq.* This submission is addressed in Chapter 2, paras. 2.42-43.
45 *Ibid*., para. 159 *et seq.* This submission is addressed in Chapter 2, paras. 2.47-51.
46 *Ibid*., para. 163 *et seq.* This submission is addressed in Chapter 2, paras. 2.52-54.

9.27 These criticisms are manifestly without substance: they are either unfounded, unspecific, or have been addressed since the filing of the Memorial, as more fully explained in Chapters 2, 5 and 6 of this Reply. Having regard to established principles governing the presentation of evidence and matters of proof in proceedings before the Court, each of the objections goes to the weight of the evidence and not to its admissibility. The Court is entitled to have regard to all of the available evidence and to make its own evaluation of it. That is particularly so in light of the judicial findings of the ICTY, on the criminal standard of proof, corroborating a number of the key allegations made by the Applicant. It is the cumulative impact of all of the evidence, taken in conjunction with the judgments of the ICTY that forms the evidential matrix in this case.

(e) The Respondent's substantive response to the allegations made and evidence adduced by the Applicant

9.28 In Chapter VII of its Counter-Memorial the Respondent seeks to mount a critique of the evidence adduced by the Applicant, through a combination of selective criticism and assertion. The points made in the Counter-Memorial are addressed in detail in Chapters 5 and 6 of this Reply. The Applicant has answered each of the criticisms made by the Respondent and has summarised the further evidence that has been obtained since the initial Memorial was filed corroborating the allegations it makes. Significant parts of the Applicant's factual case remain unchallenged, and even where the Respondent has challenged the allegations, it has failed to adduce any affirmative evidence in support of its case (instead confining itself to a critique of the evidence adduced in the Applicant's Memorial). It is unnecessary to repeat or summarise the submissions made in response in the present Chapter. The Applicant relies not only on the evidence initially submitted with the Memorial, but on the additional corroborative evidence submitted with this Reply, and on the judgments and findings of the ICTY. In the light of all the evidence now available the Court is invited to reject the Respondent's evidential criticisms as failing to afford a substantive answer to the allegations made in the Memorial.

(f) ICTY judgments and prosecutorial decisions

9.29 The Applicant has set out its submissions on the relevance of the ICTY proceedings in detail in Chapter 2, paragraphs 2.25-33. It is common ground that the Office of the Prosecutor of the ICTY has not indicted any Serbian official for the crime of genocide in connection with the military operations conducted in Eastern Slavonia, Western Slavonia, Banovina, Kordun and Lika, and Dalmatia, or the subsequent persecution of the Croatian population living in those regions. In the Applicant's submission, this is significant only

in the sense that, as a consequence, there has been no judicial determination by the ICTY, one way or another, as to whether the crimes committed, taken in their totality, escalated beyond the systematic and widespread commission of crimes against humanity, and amounted to genocide. That is an evaluation that the ICJ is better placed to make since it is concerned not with individual responsibility for particular crimes, but with State responsibility for the totality of the crimes committed during the totality of the military and related operations that made up the military campaign against Croatia.

9.30 Nonetheless, the findings of the ICTY provide strong support for key elements of the Applicant's case in accordance with the principles laid down by the ICJ in the *Bosnia* case. So far, the ICTY has concluded criminal prosecutions against seven individuals, the results of which are of direct probative relevance to the present proceedings: *Martić; Babić; Mrkšić et al; Strugar*, and *Jokić*. Indictments relevant to the present proceedings have also been issued against four further individuals: Franko Simatović,[47] Jovica Stanišić,[48] Vojislav Šešelj,[49] and Goran Hadžić.[50]

9.31 To put the concluded proceedings in context, it is necessary first to summarise the joint criminal enterprise ('JCE') alleged against Slobodan Milošević and others.[51] Although Milošević died during his trial, such that the ICTY made no findings of fact in his case, the scope of the Indictment against him is nevertheless relevant. This is because two of the cases that have so far been brought to a final conclusion (and therefore involve judicial determinations of fact) involved the prosecution of individuals who were alleged to have been party to the same JCE as Milošević himself.

9.32 The *Milošević* Indictment alleged *inter alia* a JCE to bring about "the forcible removal of the majority of the Croat and other non-Serb population from approximately one third of the territory of the Republic of Croatia that [Milošević] planned to become part of a new Serb-dominated state through the commission of war crimes and crimes against humanity".[52] It alleged that Milošević, along with and through the other participants of the JCE "directed, commanded, controlled or otherwise provided substantial assistance or support to the JNA, the Serb-run TO staff, and volunteer forces".[53] Those named as parties to the JCE included Milan Martić, Milan Babić, Franko Simatović, Jovica Stanišić, Vojislav Šešelj, Goran Hadžić and Ratko Mladić. The

[47] *Prosecutor v. Jovica Stanišić and Franko Simatović,* IT-03-69, Third Amended Indictment, 9 July 2008.
[48] *Ibid.*.
[49] *Prosecutor v. Vojislav Šešelj,* IT-03-67, Third Amended Indictment, 7 December 2007.
[50] *Prosecutor v. Goran Hadžić,* IT-04-75-I, Indictment, 21 May 2004.
[51] *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Second Amended Indictment, 27 July 2004.
[52] *Ibid.,* paras. 6-7.
[53] *Ibid.,* para. 26(j).

Indictment contained specific allegations of war crimes and crimes against humanity in Eastern Slavonia and in Western Slavonia, Banovina, Kordun and Lika, and Dalmatia. In particular;

1. The Indictment alleged the crime of persecution through the murder (between 1 August 1991 and June 1992) of hundreds of Croat and other non-Serb civilians in Dalj, Erdut, Klisa, Lovas and Vukovar; the prolonged imprisonment of thousands of Croat and other non-Serb civilians, and the repeated torture and killing of such civilians; the forcible transfer or deportation of at least 170,000 Croat and other non-Serb civilians (including the deportation or forcible transfer of at least 5000 inhabitants of Ilok, 20,000 inhabitants of Vukovar and at least 2,500 inhabitants of Erdut).

2. It alleged murder (as a crime against humanity and as a war crime) and extermination (as a crime against humanity) between October 1991 and May 1992 of 264 Croats and other non-Serb civilians from Dalj, Lovas, Erdut, Erdut Planina and Dalj Planina through their removal, torture and execution.[54] These crimes were alleged to have been committed "as part of the overall persecution campaign" conducted by "Serb military forces under the command, control, or influence of the JNA, the TO SBWS and other participants of the JCE".

3. It alleged deportation and inhumane acts (as crimes against humanity) and unlawful deportation or forcible transfer (as war crimes) between 1 August 1991 and May 1992. The allegations were made against "Serb forces comprised of the the JNA, TO and volunteer units including the 'White Eagles', 'Šešelj's Men', 'Dušan Silni' and 'Arkan's Tigers', in co-operation with police units including 'Martić's Police', SNB and Serbian MUO, and others under the effective control of Slobodan Milošević or other participants in the joint criminal enterprise."[55] The *modus operandi* alleged was that set out in the Applicant's Memorial in the present proceedings, namely that Croat towns and villages would be surrounded, and the inhabitants told to surrender all weapons; the town or village would then be attacked, and civilians (including those who had surrendered their weapons) would be targeted with a view to compelling the population to flee; thereafter, once Serb forces had gained control, the remaining civilians would be rounded up and forcibly transferred outside Croatia (particularly to Serbia and Montenegro), or to locations in those parts of Croatia which remained under the effective control of the Government of Croatia.

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[54] *Ibid*., paras. 49-58 and 60-62.
[55] *Ibid.,* para. 68.

9.33 For the reasons set out above, the Applicant does not rely directly upon the inclusion of these charges in the Indictment against Milošević, or upon the fact that applications to dismiss certain of the charges at the end of the Prosecution case were rejected. However, in June 2007, following a contested trial, the ICTY found *Milan Martić* guilty of participation in a JCE which was in all material respects the same as the JCE alleged in *Milošević* Indictment.[56] Martić held a number of senior posts in the 'SAO Krajina' (later the 'RSK') including (from January 1994) its Presidency. He was convicted by the ICTY on 16 counts alleging crimes against humanity (including persecution, murder, imprisonment, torture, inhumane acts, deportation and forcible transfer) and war crimes (including murder and torture) and sentenced to 35 years imprisonment. The majority of these convictions related to his involvement in a JCE in the 'SAO Krajina' and the RSK between 1991 and 1995.

9.34 The Trial Chamber found as a fact that Martić had participated in a JCE jointly with *inter alia* Slobodan Milošević, Milan Babić, Franko Simatović, Jovica Stanišić, Vojislav Šešelj, Veljko Kadijević, and Ratko Mladić.[57] The JCE "involved the killing and the removal of the Croat population" by the TO, the police and the JNA acting in co-operation".[58] The aim was to eradicate the Croat civilian population from the territory. The ICTY found that the JCE had been implemented through a "generally similar pattern" of military attacks namely the encirclement of Croat towns and villages, attacks on the population, widespread crimes of violence and intimidation and crimes against public and private property, detention, and then forced displacement.[59] The Trial Chamber in *Martić* held that the displacement of the Croat population was not a mere side-effect of this pattern of attacks, but was its primary objective.[60]

9.35 As to the specific crimes alleged by the Applicant in its Memorial, the ICTY held as follows:

1. *Hrvatska Kostajnica:* The ICTY found as a fact in the *Martić* case that 83 Croat civilians were killed in this municipality in October 1991.[61] The Trial Chamber found that the killings and other persecutory conduct amounted to crimes against humanity, committed pursuant to a joint criminal enterprise to conduct a systematic attack on the Croat civilian population (a finding that is fully consistent with the agreed factual basis of plea in the

[56] *Martić*, para. 446.
[57] *Ibid*., para. 446.
[58] *Ibid*., para. 443.
[59] *Ibid*..
[60] *Ibid*..
[61] *Ibid*..

Babić case).[62] The killings were systematic and organised. In particular, the ICTY held that:

a. On various dates in September and October 1991 Serb forces destroyed 10 houses belonging to Croats or families of mixed ethnicity in the village Hrvatska Dubica, that during the same period the JNA, TO and *Milicija Krajine* looted Croatian property in the village, and that on 20 October 1991 the *Milicija Krajine* detained 41 civilians from the village in the local fire station and murdered them the following day at Krečane near Baćin.[63]

b. On various dates in September 1991 Serb forces burnt 10 houses and a Catholic church in the village of Cerovljani, and that on or about 20 or 21 October 1991 10 civilians from the village were murdered by the *Milicija Krajine*, units of the JNO or TO, or a combination of them, and the victims were buried in a mass grave in Krečane.[64]

c. During October, 28 civilians from the village of Baćin were murdered by the *Milicija Krajine*, units of the JNO or TO, or a combination of them, and that 7 of the victims were buried in mass graves in Krečane and Višnjevački Bok.[65]

d. The Trial Chamber held that it had been established beyond reasonable doubt that all of these crimes were committed on the basis of the victims' ethnicity.[66]

2. *Slunj:* The Chamber found as a fact that at the end of September or October seven Croat civilians from Lipovača were murdered and their bodies buried in a mass grave in Lipovača Drežnička;[67] and that on 7 November 1991 JNA soldiers murdered 8 Croat civilians in the village of Vukovići.[68]

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62 Chapter 6, para. 6.33.
63 *Babić*, paras. 354-358.
64 *Ibid*., paras. 359-363.
65 *Ibid*., paras. 365-367.
66 *Martić*, paras. 354-367.
67 *Ibid*., paras. 202-208.
68 *Ibid*., paras. 212-214.

3. *Saborsko:* The Chamber found as a fact that the JNA, TO and paramilitaries, in combination were responsible for the killing of a total of 34 Croat civilians in Saborsko in November 1991.[69] On 12 November 1991 JNA forces, acting with forces of the TO and the *Milicija Krajine* attacked Saborsko with aerial bombardment and shelling. Ground units, including tanks, moved in on three axes. In total the Chamber found that 30 Croat civilians had been murdered during this operation and that four were murdered subsequently. After the attack, Serb forces looted the village and during the ensuing months Croat properties were systematically destroyed. The only two houses left standing were Serb properties. The Chamber found that all these crimes had been committed on the ground of the victim's ethnicity. The ICTY's findings in the *Martić* case concerning attack on Saborsko are fully consistent with the agreed factual basis of plea in the *Babić* case summarised below.[70]

4. *Titova Korenica:* The Chamber found as a fact that the attack on the villages of Poljanak and Vuković constituted the crime of persecution (as a crime against humanity).[71]

5. *Gračac:* The Chamber found as a fact that between 5 and 14 August 1991, 5 Croat civilians were killed in Lovinac by Serbian paramilitaries.[72]

6. *Knin*: The Chamber found as a fact that on 18 January 1992, 6 Croat civilians were killed in Ervenik as part of a wider pattern of killings in the Knin region;[73] that the attacks on Kijevo and Knin were co-ordinated and systematic;[74] and that civilians detained in detention facilities including the old hospital at Knin were ill-treated and beaten, and that the detentions amounted to persecution (as a crime against humanity) as well as imprisonment, torture, cruel treatment and other inhumane acts (as crimes against humanity).[75]

7. *Obrovac*: The Chamber found as a fact that five civilians from Jasenice were killed, and over 100 Croat civilians displaced.[76]

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69 *Ibid*., paras. 225-234 and 379-383.
70 Chapter 6, paras. 6.33 and 6.53 *et seq*.
71 *Martić*, paras. 211 *et seq.*
72 *Ibid*., para. 324, footnote 1002.
73 *Ibid*., para. 327, footnote 1012.
74 *Ibid*., paras. 166 to 169.
75 *Ibid*., paras. 279 to 294.
76 *Ibid*., para. 299, footnote 930; and para. 324, footnote 1002.

8. *Benkovac:* The Chamber found as a fact that on 21 December 1991, forces of the *Milicija Krajine* killed 9 Croat civilians in Bruška, and that these killings amounted to the crimes of persecution (as a crime against humanity) and murder (as crime against humanity and as a war crime).

9. *Zadar*: The Chamber found as a fact that on 18 and 19 November 1991 Serb forces killed 75 Croat civilians and that these killings amounted to persecution (as a crime against humanity), murder (as crime against humanity and as a war crime), and further that the physical destruction in the municipality amounted to wilful destruction (as a war crime).[77]

9.36 Milan Babić was also indicted as a member of the same JCE. Babić held a number of senior posts in the 'SAO Krajina' and the 'RSK', including its 'Presidency'. He pleaded guilty and accordingly it is necessary (and permissible) for the ICJ to have regard to the agreed factual basis for his plea, and the sentencing judgment. By his plea, Babić accepted that he was guilty of the crime of persecution (as a crime against humanity) committed as part of a JCE jointly with Milošević, Martić, Hadžić, Stanišić, Simatović, Šešelj, Mladić and others between August 1991 and February 1992.

9.37 The purpose of the JCE to which Babić pleaded guilty was to "permanently and forcibly remove the majority of the Croat and other non-Serb populations from approximately one third of Croatia in order to transform the territory into a Serb-dominated state".[78] The area concerned was the 'SAO Krajina', the 'SAO Western Slavonia', the 'SAO SBWS' and the Dubrovnik Republic.[79] The JCE was accomplished by Serb forces (comprising the JNA, TO, MUP police and paramilitary units acting together) attacking and taking control of towns, villages and settlements in the 'SAO Krajina', and thereafter establishing a "regime of persecution" designed to force the Croat and other non-Serb civilian populations from those territories. On the agreed facts, this persecutory regime included the extermination or murder of hundreds of Croat and other non-Serb civilians in Dubica, Cerovljani, Baćin, Saborsko, Poljanak, Lipovača, and the neighbouring hamlets of Škabrnja, Nadin and Bruška; the prolonged and routine imprisonment of several hundred Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA barracks in Knin; the deportations of thousands of such civilians from the 'SAO Krajina': and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations in Dubica, Cerovljani, Baćin,

[77] *Ibid*., paras. 386-399.
[78] *Babić,* para. 16.
[79] *Ibid*., para. 34.

Saborsko, Poljanak, Lipovača and the neighbouring hamlets of Vaganac, Škabrnja, Nadin and Bruška.[80]

9.38 According to his agreed basis of plea, Babić participated in the JCE in his role as President of 'SAO Krajina' though the formulation, promotion and implementation of the JCE; through the establishment and maintenance of government bodies that, in co-operation with the JNA, implemented the JCE; by giving assistance in the recruitment and re-organisation of TO volunteer forces of the 'SAO Krajina', and by acting as their commander in chief; through his co-operation with the head of the 'Martić Police' who were involved in the commission of crimes; through the provision of financial, material and logistical support to the forces carrying out the military campaign through which the JCE was implemented; through facilitating the participation of the JNA in the maintenance of the 'SAO Krajina'; and by making ethnically inflammatory speeches aimed at fomenting an atmosphere of fear and hatred amongst the Serb population of the region.[81]

9.39 In the *Mrkšić et al* case the ICTY convicted Mile Mrkšić of murder, torture and cruel treatment (as war crimes) and convicted Veslin Šljivančanin of torture (as a war crime) in relation to their part in the Ovčara farm massacre, thereby confirming the factual allegations about this massacre set out in the Applicant's Memorial. They were sentenced to 20 years and 5 years imprisonment respectively, although the sentence imposed on Šljivančanin was subsequently increased on appeal to 17 years.[82] In its judgment, the ICTY found that prisoners held at the Ovčara farm on 20 October 1991 were systematically beaten by TO members, Serb paramilitaries and regular JNA soldiers, acting in concert, and that at least 194 prisoners were then taken to a separate site nearby where they were summarily executed and buried in a mass grave[83]. The facts of that massacre are thus beyond dispute. Subsequent to the judgment of the ICTY in the *Mrkšić et al* case, the Belgrade War Crimes Chamber has returned convictions against 13 individuals charged for their part in the Ovčara farm massacre.[84]

9.40 In its Counter-Memorial, the Respondent makes a number of observations concerning the *Mrkšić et al* case which are inaccurate and fail properly to reflect the scope of the Indictment or the significance of the findings made (or not made) in the judgment. These issues are addressed in Chapter 6 *supra*. In summary, the Applicant points out that the Indictment in *Mrkšić et al* was limited in scope, and did not encompass any charges relating to the prolonged attack by JNA and other Serb forces directed against the

[80] *Ibid*., para. 15.
[81] *Ibid*., para. 24.
[82] *Prosecutor v Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin,* (IT-95-13), Appeals Chamber Judgment, 5 May 2009.
[83] *Mrkšić et al.,* paras. 215 to 253.
[84] Chapter 6, paras. 5.65 and 5.81.

civilian population of Vukovar in 1991.[85] As a result, the Chamber was unable to return verdicts in relation to these events. Notwithstanding this, the ICTY found as a fact that JNA troops, acting in concert with territorial defence units ('TO') and paramilitary units took part in the attack on Vukovar; that there were dramatic differences in the military capabilities of the Serb forces and the Croatian defence forces; and that Serb forces had brought "devastation" on Vukovar during the prolonged military engagement in 1991, which involved "very many civilian casualties, and extensive damage to property".[86] To that extent the judgment is consistent with, and confirms, the allegations made by the Applicant in its Memorial.

9.41 In addition to these cases, the ICTY has concluded proceedings against Pavle Strugar and Miodrag Jokić in respect of a sample incident of shelling directed against civilian targets in the old town of Dubrovnik on 6 December 1991. The ICTY found as a fact that this attack (which was the culmination of three months of similar attacks) was directed against civilians and civilian sites of cultural and religious importance for the Croat population. In the *Bosnia* case the Court held that attacks on sites of religious and cultural significance cannot, taken alone, constitute prohibited acts within the meaning of Article II(c) (deliberately inflicting on the group conditions of life designed to bring about its destruction in whole or in part).[87] The Court went on to hold, however, that such acts may nonetheless be highly significant inasmuch as they are directed to the elimination of all traces of the cultural or religious presence of a group and are contrary to other legal norms. The relevance is to show genocidal intent. The Court specifically referred to the observations of the ICTY in *Krstić*[88] to the effect that

> "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group".[89]

9.42 The Indictment against Miodrag Jokić (an Admiral in the Yugoslav Navy) and Pavle Strugar (a JNA commander) did not directly concern the crimes committed in the period between 1 October 1991 and 5 December 1991, which form a key part of the allegations set out in the Applicant's Memorial. Jokić pleaded guilty to a charge alleging war crimes in relation to

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[85] *Mrkšić et al.,*para. 8. Nor did the Indictment include the acts of mistreatment and killing that occurred at the Velepromet facility on 19 November 1991 (as to which see Chapter 5, paras. 5.74-77).

[86] *Mrkšić et al.,*para. 8.

[87] *Bosnia*, para. 344.

[88] *Prosecutor v Krstić*, IT-98-33, Trial Chamber Judgment, 2 August 2001.

[89] *Bosnia*, para. 344.

the shelling of the old town of Dubrovnik on 6 December 1991. Accordingly it is necessary (and permissible) for the ICJ to have regard to the agreed factual basis for his plea, and the sentencing judgment. This records that Jokić took part in a military campaign directed at Dubrovnik which began on 1 October 1991; that during this campaign JNA forces under his command fired "hundreds of shells" which struck the old town of Dubrovnik which, to his knowledge, was a UNESCO World Cultural Heritage site, under the UNESCO World Heritage Convention, and included sites which were protected under the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict; that he was also aware that a substantial number of civilians lived in the old town; that no steps were taken to investigate the shelling of the old town during October and November, or to bring the perpetrators to justice; that on 6 December 1991 JNA forces under his command (and for whom he bore command responsibility) unlawfully shelled the old town; and that as a result two civilians were killed, three were wounded, six buildings were completely destroyed and many more suffered substantial damage, and institutions dedicated to religion, charity, education, and the arts and sciences, and historic monuments and works of art were damaged or destroyed.[90]

9.43 Pavle Strugar was subsequently convicted for his part in the attack on 6 December 1991. The Trial Chamber found as a fact that the old town of Dubrovnik was subjected to extensive and prolonged artillery shelling on that date by the JNA, notwithstanding repeated protests from the ECMM monitors on the ground, and that there was evidence of a significant number of civilian deaths and casualties. The Chamber held that in shelling the old town the JNA was not targeting Croatian firing points, or legitimate military targets, and that the intent of the perpetrators was to target civilians and civilian objects.

9.44 Indictments relevant to the same JCE have also been issued against Franko Simatović,[91] Jovica Stanišić,[92] Vojislav Šešelj,[93] and Goran Hadžić.[94] The prosecutions of Simatović, Stanišić and Šešelj are extant, and Hadžić remains at large. At the time of writing there have therefore been no definitive findings of fact by the ICTY in relation to any of these Indictments. Applying the principles laid down by the Court in the *Bosnia* case,[95] the Applicant places no reliance on the proceedings in those cases, other than to note that

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[90] *Jokić,* paras. 21-29.

[91] *Prosecutor v. Jovica Stanišić and Franko Simatović,* IT-03-69, Third Amended Indictment, 9 July 2008.

[92] *Ibid.*.

[93] *Prosecutor v. Vojislav Šešelj,* IT-03-67, Third Amended Indictment, 7 December 2007.

[94] *Prosecutor v. Goran Hadžić,* IT-04-75, Indictment, 21 May 2004.

[95] *Supra*., paras. 9.9 *et seq*..

Indictments have been issued, and that further ICTY judgments are expected in due course in relation to three of the accused members of the JCE. The Applicant would, however, point out that in the *Martić* case, the ICTY has already found as a fact that Simatović, Stanišić and Šešelj were parties to the same JCE.[96]

9.45 Finally, in the context of extant judicial proceedings, the Applicant would point out that the crimes alleged to have occurred at Lovas are currently the subject of a war crimes prosecution before the Belgrade District Court.[97] Applying *mutatis mutandis* the Court's approach in the *Bosnia* case, the Applicant does not place direct reliance on the Indictment or the institution of proceedings in that case since there have, at the time of writing, been no definitive findings of fact in the proceedings. Exceptionally however, the terms of the Indictment issued by the FRY in its own courts are themselves relevant to the present proceedings since they are inconsistent with the position taken by the State in its Counter-Memorial.[98]

(2) THE PHYSICAL ELEMENTS: GENOCIDAL ACTS

9.46 As regards the physical element of the crime of genocide (proof that genocidal acts occurred) the Applicant makes two points by way of introduction:

> First, the Applicant's case on genocidal intent depends in large part upon the inferences of intent which it invites the Court to draw from the widespread and systematic pattern of attacks that were perpetrated on the Croat civilian population of the identified regions. To that extent, there is a significant overlap between the evidence relevant to proving the *dolus specialis* for the crime of genocide and the evidence relevant to proving that genocidal acts occurred.
>
> Second, in light of the evidence adduced in the Memorial and in this Reply, taken in conjunction with the factual findings of the ICTY outlined above, there can be no doubt that genocidal acts (that is, acts which are capable of constituting the *actus reus* of the crime of genocide) occurred. The question for the Court is whether those acts were (or must have been) perpetrated with genocidal intent.

9.47 The Applicant submits that the factual evidence, taken in conjunction with the judicial findings of the ICTY, establishes beyond doubt that Serb forces (comprising the JNA, the MUP, the TO, the Milicija Krajine, the 'Martić Police' and various paramilitary groupings) acting on the authority

[96] *Supra*., para. 9.47(c)(i).
[97] Chapter 5, paras. 5.57-62.
[98] *Ibid.*.

of the leadership of the FRY, and the 'SAO Krajina' ('RSK'), committed the following prohibited acts:

1. *Killing members of the group* (Article II(a)): This requires proof of (a) the death of a person forming part of the protected group; (b) which resulted from unlawful acts of accused or his subordinates; (c) committed with either an intention to kill or cause serious bodily harm, or in circumstances which the perpetrator should reasonably have known might lead to death. Standing alone, the judgments of the ICTY leave no room for doubting that large numbers of ethnic Croats were intentionally and unlawfully killed as part of a widespread and systematic attack on the civilian population. However, the scale of the attack on the Croat civilian population only becomes fully apparent when those findings are taken in conjunction with the evidence set out in the Memorial, and in Chapters 5 and 6 of this Reply. More than 12,000 people were killed in the Serb military campaign and the demographic composition of the territory was changed in accordance with the objective of the joint criminal enterprise.

2. *Causing serious bodily or mental harm to members of the group* (Article II(b)): Again, on the findings of the ICTY alone, there can be no doubt that acts falling within Article II(b) were systematically committed against the Croat civilian population on a wide scale, and on account of their ethnicity. The Court has held that "serious bodily or mental harm" includes significant psychological harm resulting from acts of torture, inhumane and degrading treatment, the use or threat of violence, and in particular rape and other forms of sexual violence.[99] The evidence discloses numerous instances of such harm being inflicted on Croat civilians on grounds of their ethnicity, and demonstrates conclusively that such acts were carried out systematically, and on a wide scale.

3. *Deliberately inflicting on the group conditions of life designed to bring about its destruction in whole or in part* (Article II(c)): For the purposes of Article II(c) it is not necessary to prove that the conditions of life inflicted on the protected group in fact brought about its actual physical destruction in whole or in part. It is, however, necessary to prove that the conditions were calculated (that is, intended) to bring this about. The Applicant makes four submissions on the application of Article II(c):

    i. In the *Bosnia* judgment the Court left open the question whether the encirclement of Croat towns and villages by

[99] *Bosnia*, paras. 298-304.

military forces, accompanied by shelling and a period of enforced starvation could constitute a prohibited act falling within the meaning of Article II(c) if accompanied by the necessary genocidal intent.[100] The issue did not arise for final determination in the *Bosnia* case because (with the exception of the mass killings at Srebrenica) the Court was unable to find the necessary genocidal intent. The Applicant submits that in the present case, by contrast, the issue arises directly since the inference of genocidal intent is established and inevitably so. In this context the Applicant recalls the findings of the ICTY in the *Martić* case that the JCE proved in that case was carried out through a "generally similar pattern" of military attacks involving the encirclement of Croat towns and villages, attacks on the population, widespread crimes of violence and intimidation and crimes against public and private property, followed by detention, and then forced displacement.[101]

ii. The Applicant also recalls the basis of plea in the *Babić* case, whereby the accused admitted that through his role as a senior official in the 'SAO Krajina', he had been party to establishing a "regime of persecution" designed to force the Croat and other non-Serb civilian populations from those territories. On the agreed facts, that regime included the extermination or murder of hundreds of Croat and other non-Serb civilians; the prolonged and routine imprisonment of several hundred Croat and other non-Serb civilians in inhumane living conditions; the deportation of thousands of such civilians from the 'SAO Krajina': and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites. The Applicant submits that these findings, taken together, are plainly sufficient to bring the conduct concerned within Article II(c).

iii. As the Court recognised in the *Bosnia* case, the forcible deportation or displacement of a national or ethnic group ("ethnic cleansing") can constitute a genocidal act contrary to Article II(c) ("deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part") if committed with the necessary intent.[102] The Respondent does not dispute this.[103] For the reasons set out above, the Applicant submits that the evidence, taken as a whole, establishes beyond doubt that acts of forcible expulsion and deportation occurred on a wide scale; that this

[100] *Ibid*., paras. 328.
[101] *Martić*, para. 443.
[102] *Bosnia*, paras. 190-334.
[103] Counter-Memorial, para. 84.

policy was combined with systematic and targeted acts of physical destruction (of both people and of property) on ethnic grounds; that it was also accompanied by the imposition of a "persecutory regime" (see *Babić* above); and further that the only reasonable inference from the whole of the evidence is that the forced displacement of the remaining Croat civilian population was carried out for the purpose of destroying the group in whole or in part, and not merely for the purpose of displacing it.

iv. There is overwhelming evidence that Serb forces perpetrated attacks on (including direct shelling and destruction of) targets of cultural and religious importance for the Croat civilian population. A particularly notorious example (the shelling of civilian targets in the old town of Dubrovnik) was the subject of two convictions before the ICTY. There are, in addition, numerous instances in the *Martić* case in which the ICTY found as a fact that sites of religious and cultural significance to the Croat civilian population were targeted for destruction on ethnic grounds. This was confirmed by the *Babić* case where, according to the agreed facts, the parties to the JCE caused deliberate destruction of public and private property, cultural institutions, historic monuments, and sacred sites, perpetrated on ethnic grounds. The Applicant accepts that, taken alone, the destruction of property (including sites of cultural and religious significance) does not constitute a genocidal act within Article II(c) since it does necessarily connote an intention to bring about the physical destruction of the persons making up the group.[104] As the Applicant points out above,[105] however, such acts, taken in conjunction with acts of physical destruction of members of the group, and the infliction of physical and psychological injury, may be highly significant evidence of genocidal intent.

SECTION II: CRIMES OF CONSPIRACY, INCITEMENT, ATTEMPT AND COMPLICITY (ARTICLE III)

9.48 The Applicant accepts that if the Court finds the FRY responsible for acts of genocide under Article III(a) of the Convention it is not necessary to go on to consider the other forms of responsibility under Article III(b) to (e). The Court is concerned with the responsibility of States for internationally wrongful acts. If, and to the extent that, substantive acts of genocide under Article III(a) are held to be attributable to a State directly, it is unnecessary to

[104] *Bosnia*, para. 344.
[105] Paras. 9.41-43.

go on to consider, in relation to that particular act, whether persons or entities for whom the State is responsible were also guilty of the inchoate offences in Articles III(b) to (e), and thereby to impute State responsibility through an additional and alternative route. Thus Articles III(b) to (e) would only arise for determination if the Court were to hold against the Applicant in relation to its primary case under Article III(a) as regards all or any of the acts alleged.

(1) Conspiracy

9.49 As noted in Chapter 8, in order to prove conspiracy to commit genocide contrary to Article III(b), the Applicant bears the burden of establishing that individuals or entities for whom the FRY bears international responsibility agreed on a common plan to commit genocide, and shared the same specific intent as is required for proof of the crime of genocide itself. Proof of the existence of a conspiracy does not require proof that genocide was actually carried out.

9.50 Taken together the findings of the ICTY in the *Martić* and *Babić* cases establish that there was a conspiracy between Serb leaders, including Slobodan Milošević, Milan Martić, Milan Babić, Franko Simatović, Jovica Stanišić, Vojislav Šešelj, Goran Hadžić, and Ratko Mladić to commit crimes against humanity involving a widespread and systematic attack on the Croat civilian population through the perpetration of acts prohibited by Article II of the Genocide Convention. The sole issue for the Court to determine therefore is whether the criminal agreement proved in *Martić,* and admitted in *Babić,* taken in conjunction with the wider pattern of crimes disclosed by the evidence in the Memorial and this reply, must have contemplated crimes on a scale, or of such significance, as to demonstrate an intention to destroy a protected group in whole or in part.

9.51 The OTP of the ICTY has not alleged that genocide was encompassed within the objects of the criminal conspiracy which undoubtedly existed between the members of the Serb leadership responsible for the military campaign. That cannot however be dispositive. The ICTY has never been called upon to reach a finding of fact, one way or the other, as to the existence of an agreement to commit genocide in Croatia. That now falls to the ICJ. In light of the findings of the ICTY, however, there can be no reasonable doubt that a criminal agreement or conspiracy existed among the Serb leadership; that the agreement envisaged the commission of widespread and systematic crimes (including murder, infliction of serious bodily and psychological harm, torture, unlawful detention in inhumane conditions, persecution and forcible deportation) against the Croat civilian population of the identified regions; and that its objectives included the wholesale eradication of the Croat civilian population of those areas, in order to establish an "ethnically pure" Serb-dominated state. The remaining question is one of legal categorisation. The Court must determine whether, having regard to the factual findings of the

ICTY, taken in conjunction with the totality of the evidence now available to the ICJ, the scale or significance of the crimes envisaged by this agreement was sufficient to amount to genocide.

(2) Direct and public incitement

9.52 The parties are agreed that the crime of direct and public incitement contrary to Article III(c) requires proof that an individual or entity for whose acts the State is responsible has directly provoked the perpetrators to commit genocide whilst sharing the same specific intent to destroy the protected group, in whole or in part. In its Memorial the Applicant set out a series of public statements which it alleges amount to a crime contrary to Article III(c).[106] This evidence has been supplemented by the evidence summarised in Chapter 3 of this Reply, and in particular the report by Professor de la Brosse, submitted by the OTP as evidence in the *Milošević* trial which demonstrates the manipulation of the media by the members of the Serbian joint criminal enterprise in order to justify ethnic cleansing (a single state for "all Serbs") and prepare the Serb population for the perpetration of genocide.[107] In addition, the Applicant recalls that in the *Babić* case, it was agreed that the accused, in his capacity as a senior official (and President) of the SAO Krajina, had participated in the JCE with Milošević, and other members of the Serb leadership, by *inter alia,* making ethnically inflammatory speeches aimed at fomenting an atmosphere of fear and hatred amongst the Serb population of the region.[108] In the context of the other evidence in the case, this must be considered as further evidence of direct and public incitement to genocide.

(3) Attempt

9.53 The Applicant has nothing to add to the submissions made in its Memorial concerning the crime of attempt contrary to Article II(d), save that it agrees with the Court in its *Bosnia* judgment that the issue of attempt will arise only in a case where the Court has concluded that genocide did not in fact occur in respect of certain areas and acts.

(4) Complicity

9.54 In its *Bosnia* judgment the Court held that the crime of complicity in genocide contrary to Article III(e) requires proof that a person or entity for whom the State bears international responsibility was guilty of planning, ordering or otherwise aiding and abetting in the planning, preparation or execution of the crime. This would include the provision of means to enable or facilitate the commission of the crime.[109] Unlike other inchoate offences, the

[106] Memorial, paras. 8.23 - 26.
[107] Annex 106.
[108] *Babić,* para. 24.
[109] *Bosnia*, para. 419.

crime of complicity requires proof that genocide has actually occurred. The Court summarised the elements of the crime of conspiracy in the *Bosnia* case, holding that "there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts."[110]

9.55 In its Memorial the Applicant identified a number of acts alleged to amount to complicity in genocide,[111] submitting that the crime of complicity does not require proof that the secondary (complicit) party had the same specific intent as the principal perpetrator.[112] The Court left this latter question open in its *Bosnia* judgment, holding 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 complicit in genocide unless at 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."[113] The Applicant maintains the position taken in its Memorial: A person is guilty of complicity in genocide if they plan, order, aid or abet, or provide the means to enable or facilitate the commission of crime of genocide, knowing that it was the principal perpetrator's intention to destroy a protected group in whole or in part.

9.56 It is clear that the *actus reus* of the crime of complicity (the provision of aid and assistance to facilitate the commission of crimes against a civilian population) has been established. The ICTY has found as a fact that forces under the direct control of Slobodan Milošević, Milan Martić and Milan Babić acted in co-operation with paramilitary groups to achieve the objectives of the JCE:

1. The *Milošević* Indictment alleged that, along with and through the other participants of the JCE Slobodan Milošević had "directed, commanded, controlled or otherwise provided substantial assistance or support to the JNA, *the Serb-run TO staff, and volunteer forces*" in the commission of crimes against humanity and war crimes targeting the Croat civilian population.[114] It was alleged that these crimes were committed by "Serb forces comprised of the JNA, TO and volunteer units including the 'White Eagles', 'Šešelj's Men', 'Dušan Silni' and 'Arkan's Tigers', in co-operation with police units including 'Martić's

[110] *Ibid*., para. 431.
[111] Memorial, para. 8.30.
[112] Memorial, para. 8.31.
[113] *Bosnia,* para. 421.
[114] *Milošević*, Indictment, para. 26(j).

Police', SNB and Serbian MUP, and others under the effective control of Slobodan Milošević or other participants in the joint criminal enterprise".[115] The ICTY's judgment in the *Martić* case confirms the existence of this joint criminal enterprise as a finding of fact.

2. Similarly, in the *Babić* case, it was part of the agreed factual basis of plea that in carrying out the JCE with Milošević, and through his senior position within the SAO Krajina, Babić had been personally responsible for the provision of financial, material and logistical support to the forces carrying out the military campaign through which the JCE was implemented.[116]

9.57 These judicial findings are sufficient to establish the *actus reus* of the crime of complicity since in each case individuals for whom the FRY bears international responsibility have been convicted of an agreement to put substantial military and other resources at the disposal of the perpetrators of crimes against humanity. The questions which remain are (a) whether the totality of these crimes in fact amounted to genocide, and (b) whether individuals for whom the FRY bears international responsibility provided assistance in the knowledge of the genocidal intent of the principal perpetrators. As to the former, the Applicant adopts the submissions outlined above concerning the scale and significance of the attack on the civilian population. As to the latter, the judicial decisions of the ICTY in *Martić* and *Babić* establish beyond doubt that individuals for whom the FRY bears international responsibility were not only aware of, but were party to, a criminal agreement to commit the crimes alleged.

SECTION III: ATTRIBUTION

(1) General principles of attribution

9.58 In its *Bosnia* judgment the Court held that in order to prove State responsibility, it is necessary for the party alleging genocide to "clearly establish"[117] either (a) that the entities that committed the genocide were organs of the Serbian state or (b) that they were acting on the instructions of an organ of the State or under the effective direction and control of such an organ.[118] If attribution is established according to any one of these principles, the State will be responsible for the conduct even if it occurs beyond its national boundaries,[119] and it is irrelevant that the conduct may have been performed in excess of authority.

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115 *Ibid*., para. 68.
116 *Babić,* para. 24.
117 *Bosnia,* para. 209.
118 *Ibid*., paras. 385-415.
119 *Namibia*, para. 118

9.59 The question whether an entity is an organ of the state is primarily to be determined according to the internal law of the state concerned.[120] However, the Court held that it would, in certain limited circumstances, be permissible to go behind the characterisation of a particular organ in internal law, and to attribute international responsibility to a State for acts committed by persons or groups who, while they do not have the legal status of State organs, in fact act "under such strict control by the State that they must be treated as its organs for the purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act".[121] The Court endorsed the test laid down in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits, Judgment, ICJ Reports 1986 pp 62-64),* ("the *Nicaragua* case") namely that in order to attribute responsibility to a State for the acts of entities that did not constitute organs of the State under internal law, it would be necessary to show that the relationship of the perpetrator to the State was "so much one of dependence on the one side and control on the other that it would be right to equate [the perpetrator], for legal purposes, with an organ of [the State], or as acting on behalf of [the State]".

9.60 Adopting this formulation, the Court in its *Bosnia* judgment held that "persons, groups or entities may, for the purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instruments".[122] This requires the Court to look beyond legal formality, and to "grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent".[123] The purpose of this approach is to prevent States from evading international responsibility by taking action through entities whose independence is purely fictitious.[124] The attribution of State responsibility under this doctrine would be exceptional since it requires proof of a "particularly great degree" of State control over a perpetrator amounting to "complete dependence",[125] and carries the implication that the State is responsible for all actions committed by the person or entity concerned (and not merely the particular acts relied upon as amounting to genocide).[126]

9.61 If the perpetrator was neither an organ of the State according to its own internal law, nor a person or entity in a relationship of "complete

120 Article 4 of the ILC Articles on State Responsibility; *Bosnia,* para. 386.
121 *Bosnia*, paras. 391 - 393.
122 *Ibid*., para. 392.
123 *Ibid*..
124 *Ibid*..
125 *Ibid*., para. 393.
126 *Ibid*., para. 397.

dependence", so as to amount to a *de facto* organ of the State, responsibility for the perpetrator's actions may nevertheless be attributable to a State if the acts alleged were committed on the instructions of, or under the direction and control of, a person or entity that was an organ of the State in the sense described above.[127] This requires the Court to look at the specific circumstances of each alleged act of genocide rather than at the general relationship between the perpetrator and the State. Under this doctrine, international responsibility is attributed to a State "owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations".[128] The question to be determined in the present case therefore is whether organs of the Serbian State "originated" the genocide by issuing instructions to the perpetrators, or exercising direction and control.[129] In the *Nicaragua* case, the Court held that under this test, it would be necessary to prove that the State "had effective control of the military or paramilitary *operations* in the course of which the alleged violations were committed."[130] It is not sufficient to show that the perpetrators were under the control of the State "generally in respect of [their] overall actions".[131] On the other hand, it is not necessary to prove that the perpetrator was in a general relationship of "dependence" on the State.[132] Rather, it must be shown, in relation to each incident under examination (considered separately) that in committing an act amounting to genocide the perpetrator was acting on the instructions, or under the direction and control, of the State concerned.[133]

(2) Application to the facts

9.62 In the Applicant's submission, the judgments of the ICTY leave no room for doubt that the Serb leadership had effective control over all of the military operations which are the subject of the Applicant's complaint under the Genocide Convention, and over the acts and conduct of all of the perpetrators. The ICTY has found as a fact that the participation of the TO (volunteer groups), the *Milicija Krajine*, the MUP, and paramilitary groups in the commission of the crimes in Croatia invariably occurred under the direction and control of the JNA. The ICTY has also found that the JNA, in its turn, was operating under the direction and control of Milošević and the other members of the Serb political and military leadership who were party to the joint criminal enterprise. For the reasons set out in Chapter 7 and summarised below, the FRY is internationally responsible for the acts of Milošević and the other members of the Serb leadership during the entire period to which the present claim relates.

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127 Article 8 of the ILC Articles on State Responsibility; *Bosnia*, para. 397.
128 *Bosnia*, para. 397.
129 *Ibid*., para. 397.
130 *Nicaragua*, para. 115 (emphasis added).
131 *Bosnia*, para. 400.
132 *Ibid*., para. 400.
133 *Ibid*., para. 400.

9.63 The joint criminal enterprise the "JCE" alleged in the *Milošević* Indictment was found proved in the *Martić* case. The allegation against Milošević was that he had been party to a criminal agreement with Milan Martić, Milan Babić, Veljko Kadijević and others, which involved the commission of crimes against humanity were committed by Serb forces comprised of the JNA, the TO and volunteer units including the 'White Eagles', 'Šešelj's Men', 'Dušan Silni' and 'Arkan's Tigers', in co-operation with police units including 'Martić's Police', SNB and Serbian MUP. The *Milošević* Indictment alleged that all of these groups operated under the "*effective control of Slobodan Milošević or other participants in the joint criminal enterprise.*"[134] It alleged that Milošević, along with and through the other participants of the JCE "*directed, commanded, controlled* or otherwise provided substantial assistance or support to the JNA, the Serb-run TO staff, and volunteer forces."[135]

9.64 If the Applicant is correct that the crimes committed in Croatia, viewed cumulatively, prove genocidal intent, then the question of attribution is straightforward. The JCE alleged and found proved in the ICTY proceedings is sufficient to establish that the Serb leadership is responsible under the Genocide Convention for all of the combined military operations in Croatia by which the members of the JCE inflicted widespread and systematic crimes on the Croat civilian population. The ICTY had found that these crimes were committed under the direction and control of the JNA, and that all perpetrators participated in military operations on the instructions of, or under the effective direction and control of, Milošević and the other members of the Serb leadership for whose criminal acts the FRY is internationally responsible. Applying the criteria adopted by the Court in the *Bosnia* case, this is sufficient to establish attribution.

9.65 In *Martić* the ICTY held that during the summer and autumn of 1991, numerous attacks were carried out on Croat majority villages by the JNA "acting in coordination with the TO and the *Milicija Krajine*". The Chamber found as a fact that the Serbian leadership armed and financed the armed forces of the 'SAO Krajina', made up of the TO and the *Milicija Krajine*, and co-operated with the JNA in organising operations on the ground.[136] Similarly, the agreed basis of plea in the *Babić* case acknowledged that the combined Serb forces responsible for the commission of crimes in the 'SAO Krajina', pursuant to the JCE, comprised the JNA, TO, MUP police and paramilitary units, acting in concert.

9.66 Subject to the temporal issue addressed in Chapter 7 (and summarised below) the Applicant accordingly submits that attribution is clearly established.

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134 *Milošević*, Indictment, para. 68.
135 *Ibid.,* para. 26(j).
136 *Martić,* para. 344.

According to the findings of the ICTY all relevant military operations were conducted under the command and control of the JNA; and the forces of the JNA are to be regarded as organs of the FRY (or at the very least as being under the direction, command and control of the Serb leadership for whose acts the FRY is internationally responsible) applying the test laid down by the Court in the *Bosnia* case.

(3) State responsibility for the acts of the JNA

9.67 In Chapter VI of its Counter-Memorial the Respondent argues that according to its own internal law the JNA was an organ of the SFRY for which the FRY bears no international responsibility.[137] This stance cannot, however, be maintained in the face of the findings of the ICTY. The Trial Chamber in the *Martić* case found as a fact that that the SFRY Federal Secretary for Defence, General Veljko Kadijević (who bore overall responsibility for JNA deployment in Croatia) was himself a party to a joint criminal enterprise with the leadership of 'SAO Krajina' (Martić and Babić) and with the Serbian leadership under Slobodan Milošević. This important finding is sufficient to establish that the JNA was at the relevant time, operating under the command and control of the FRY leadership. The Chamber also found that by August 1991 the JNA was operating as a Serbian army, rather than a Yugoslav army. On the findings of the ICTY the JNA was subordinated to the command of Milošević and the leadership of what was to become the FRY. Accordingly, if the JNA is not to be regarded as a *de jure* organ of the FRY, it is to be regarded as a *de facto* organ of the FRY, or at the very least as having operated at all relevant times, and in respect of all military operations, under the direction and control of the Serbian leadership under Milošević, for whose acts the FRY is internationally responsible.

9.68 The Trial Chamber in the *Martić* case found as a fact that from the date of the Serb attack on the predominantly Croat village of Kijevo in August 1991, the 'SAO Krajina' MUP and TO forces were operating in open co-operation with the JNA.[138] The Chamber held that the decision to attack Kijevo was taken by Milan Martić in coordination with the JNA. The attack was carried out by units of the JNA 9th Corps in Knin, the *Milicija Krajine* and the local TO. The Trial Chamber found it established that there was co-ordination between the JNA and the SAO Krajina MUP ('Martić's Police'), and that the JNA was in command of the participating forces."[139]

9.69 The Chamber in the *Martić* case concluded that "as of this point in time, the JNA was firmly involved on the side of the SAO Krajina authorities

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137 Counter-Memorial, para. 604.

138 *Martić*, para. 443. See also 'Balkan Battlegrounds' Report, Vol. II, pp. 90-91.

139 *Ibid*., paras. 166-167.

in the struggle to take control of territory in order to unite predominantly Serb areas."[140] The Chamber noted that General Kadijević had described the principal purpose of JNA deployment in Croatia as being "full co-ordination with Serb insurgents in the Serbian Krajina."[141] It went on to find as a fact that by the "end of the summer 1991 and coinciding with the attack on Kijevo, the JNA became an active participant in Croatia on the side of the SAO Krajina."[142] Perhaps most significantly in this context the Chamber found, as noted above, that Kadijević was himself party to a joint criminal enterprise with Martić, Babić and Milošević. In light of these findings, the stance of FRY (that the JNA was an organ of the SFRY, the actions of which cannot be attributed to the FRY leadership) is unsustainable.

9.70 In addition to the judgments of the ICTY, the Applicant has produced a substantial body of evidence, including testimony from witnesses, copies of JNA and other military orders and regulations, extracts from memoirs of those directly involved within the Serbian/FRY political and military leadership, press articles (including numerous articles from the official JNA newspaper *Narodna Armija*) and videotape evidence, which together demonstrate conclusively that the JNA was implicated in numerous military operations identified in these proceedings which, in the Applicant's submission, amounted to violations of the Genocide Convention.[143] The Applicant has adduced clear evidence (which has not been rebutted by the Respondent) establishing that JNA forces took a direct part in the attacks on, *inter alia*: Tenja; Dalj; Berak; Šarengrad; Ilok; Tompojevci; Bapska; Tovarnik; Sotin; Lovas; Tordinici; Vukovar; Pakrac; Podravska Slatina; Daruvar; Glina; Petrinja; Hrvatska Kostajnica; Vrginmost; Slunj; Ogulin (Saborsko); Poljanak; and Drniš.[144]

(4) JNA COMMAND AND CONTROL OVER THE TO, THE *MILICIJA KRAJINE*, AND THE MUP

9.71 The Trial Chamber in the *Martić* and *Mrkšić et al* cases found as a fact that the doctrine of "unified command and subordination" under which the JNA operated, meant in practice that the JNA had effective command and control of all joint military operations with the forces of the 'SAO Krajina' (*Milicija Krajina*, the TO, the "Martić Police" or paramilitary forces). The ICTY, applying a criminal standard of proof, has thus held that each of the military operations which form the basis of the Applicant's case were conducted under the command and control of the JNA (which was itself under the direct command and control of what was to become the leadership of the FRY).

[140] *Ibid*., para 443.
[141] *Ibid*., para. 330.
[142] *Ibid*., para. 330.
[143] Chapter 3, 4, 5 and 6, *supra*.
[144] Chapters 5 and 6, *supra*.

9.72 The JNA's involvement often took the form of securing or blockading a town or village in which atrocities then took place with the deliberate aim of enabling the *Milicija Krajina*, the TO, the "Martić Police" or paramilitary forces to carry out the acts in question. The Trial Chamber in the *Mrkšić et al* case described the typical pattern of attacks on Croat towns and villages as involving encirclement and shelling by the JNA, followed by entry into the area by Serb paramilitaries. The Applicant has adduced clear evidence (which has not been rebutted by the Respondent) establishing that the *Milicija Krajina*, the TO, the "Martić Police" or paramilitary forces acting in conjunction with, or under the command and control of the JNA, took part in the attacks on, *inter alia*: Tenja; Dalj; Lovas; Vukovar; Podravska Slatina; Glina; Petrinja; Hrvatska Kostajnica; Slunj; Ogulin (Saborsko); Poljanak; and Drniš.[145]

9.73 In the *Martić* case the ICTY found that, under the "Law on All People's Defence," the JNA and the TO were the two constituent elements of the armed forces of the former Yugoslavia. The Chamber held that from the end of the Summer of 1991 the armed forces of the SAO Krajina TO were subordinated to the JNA,[146] and that the TO was reinforced by volunteer units, often formed under the auspices of political organisations. The Chamber noted that such volunteer groups were often referred to as "paramilitaries" and it used that term in the judgment.

9.74 The Chamber in the *Mrkšić et al* case found that that under the constitutional arrangements which had operated in the SFRY, there was to be "unity of command" over the JNA and TO units; that in situations where JNA and TO forces were engaged in joint combat operations, they were routinely integrated and subordinated to one commanding officer responsible for commanding all military units in that area.[147] The Chamber confirmed that, during the conflict in 1991 the Serb TO units (and "volunteer" paramilitaries) in Croatia were operating under the command and control of the JNA such that, in practice, JNA officers were in command of all joint combat operations. The Chamber's overall conclusion was that all Serb forces operating in Croatia, including irregular and paramilitary groups, did so under the command control of the JNA, and were permitted to operate only to the extent that they were subordinated to JNA command. In relation to a range of military orders confirming this analysis, the Chamber observed that:

> "They serve to confirm that what had been established as the *de facto* reality, not only in the zone of operations of OG South, but, generally, in the Serb military operations in Croatia, was the complete command and full control by the JNA of all military operations. This, in the

145 Chapters 5 and 6, *supra*.
146 *Martić*, para. 142.
147 *Mrkšić et al.,* para. 84.

> Chamber's finding, reflects the reality of what had been established. It was a reality, which the JNA had the military might to enforce, even though it may well have been reluctant to be too heavy handed in doing so, against TO and volunteer or paramilitary units fighting in the Serb cause. As the order of 1 MD made clear, paramilitary units refusing to submit themselves under the command of the JNA were to be removed from the territory *i.e.* from the respective zone of responsibility of the JNA command."[148]

9.75 The Counter-Memorial seeks to present the *Milicija Krajina* and the TO forces of the Serb "autonomous regions" as independent of the FRY leadership, operating under the control of independent regional authorities.[149] It suggests that these forces could only be subordinated to the JNA with the prior approval of the regional authorities.[150] Again, this stance cannot be reconciled with the findings of the ICTY. Not only were Milan Martić and Milan Babić (both high ranking officials of the 'SAO Krajina') convicted of being party to a joint criminal enterprise with Slobodan Milošević and other members of the FRY leadership (including the SFRY Federal Secretary for Defence, General Veljko Kadijević who had overall responsibility for JNA deployment in Croatia), but the ICTY has also found as a fact that all of the forces of the "autonomous regions" (including the *Milicija Krajina* and the TO) were effectively subordinated to the JNA in all joint military operations, and that the JNA was itself under the direct command and control of the FRY leadership. The ICTY Trial Chamber in the *Martić* case also found as a fact that the MUP operating in the Serb autonomous regions were financed and equipped by the MUP and RDB of Serbia;[151] that its units were subordinated to the JNA for specific assignments; and that when this occurred they would be under JNA command.[152] On the basis of these findings (and subject to the temporal issue addressed below) the FRY is responsible for the acts of each component element of the armed forces engaged on the Serbian side in the armed conflict in Croatia in 1991 and 1992.

(5) JNA COMMAND AND CONTROL OF NON-ENLISTED PARAMILITARY GROUPS

9.76 The ICTY in the *Martić* case found as a fact that the JNA exercised effective command and control not only over the official (enlisted) forces of the regional authorities (*Milicija Krajina*, the TO and the MUP) but also over the irregular paramilitary groups that were not formally integrated into the TO. It is estimated that there were 32 different "volunteer" (or paramilitary) groups operating in Croatia in the period 1990-97.[153] The Final Report of the United

148 *Ibid*., para 89.
149 Counter-Memorial, paras. 610-612.
150 Counter-Memorial, para. 613.
151 *Martić*, paras. 140-141.
152 *Ibid*., para. 142.
153 Memorial, paras. 3.47-49.

Nations Commission of Experts established pursuant to Security Council Resolution 780(1992) identified four categories of paramilitary forces:[154] special forces (operating with substantial autonomy under the command of an identified leader), militias (members of former TO forces), paramilitary units (operating under the command of a local leader) and police augmented by armed civilians (operating under local leadership reportedly under the control of the Ministry of Interior or other political organisations).

9.77 The Respondent alleges that the Applicant has failed to distinguish between the various "volunteer" and paramilitary groups, and has accordingly failed to prove that all or any of them was operating under the effective direction and control of the Serbian leadership and the JNA.[155] Again, this stance cannot be maintained in the face of the judgments of the ICTY. The Trial Chamber in the *Martić* and *Mrkšić et al* cases has found the JNA exercised effective command and control of all joint military operations with the all forces fighting on the side of the 'SAO Krajina' including the non-enlisted paramilitary groups such as those listed in the *Milošević* Indictment. In the light of this finding it is unnecessary (and indeed impossible) to identify each group individually and attribute particular crimes to them. It is sufficient that all such groups were only permitted to operate, and to take part in military operations if, and to the extent that, they operated under the command and control of the JNA. That factual finding of the ICTY is entitled to very great weight (reached as it was by a tribunal charged with determining the facts, following an adversarial hearing, and on a criminal standard of proof) and is sufficient to establish attribution in respect of all the perpetrators that took part in each of the military operations at issue in these proceedings.

9.78 Nonetheless, the Applicant would draw the Court's attention to the following matters in relation to FRY responsibility for the acts of paramilitary groups operating in Croatia:

1. There is clear evidence that a number of Serb paramilitary groups including Arkan's Tigers and those operating under 'Captain Dragan', were 'controlled by the Ministry of Interior (MUP) of the Republic of Serbia'.[156]

2. The evidence discloses a particularly close connection between Željko Ražnatović ('Arkan'), and the FRY leadership.[157]

3. The Applicant has shown in its Memorial[158] that volunteer paramilitary

[154] Memorial, para. 3.49.
[155] Counter-Memorial, paras. 572-573, and 607-608.
[156] Theunens Report, 2007, pp. 6-7 paras. 9-10 and see Part 1: Section Three, Part 5 of the Report, pp. 89-104.
[157] Chapter 4, *supra*.
[158] Memorial, para. 3.80.

groups were integrated into the JNA by an order of the Federal Secretariat of People's Defence dated 13 September 1991. This order confirms that Serbia had, through the JNA, effective control over Serbian paramilitary forces.[159]

9.79 Finally, in this context, the Applicant notes that the Respondent itself has alleged in its own domestic courts that paramilitary groups operated in Croatia under the direction and control of the JNA. The Indictment in the ongoing prosecution of 14 individuals for war crimes in Lovas, Eastern Slavonia[160] alleges that the "parties to the conflict were the JNA forces with *other armed groups under their command and control"*.[161] Six of the accused were members of a volunteer armed group ("Dušan Silni"), four were local civilian and military leaders, and four were members of the TO then subordinated to the 2nd Proletarian Guards Motorised Brigade of the JNA. All were said to have acted in concert in committing atrocities in Lovas, including killings and torture.

(6) The temporal issue

9.80 In Chapter IV of its Counter-Memorial the Respondent argues that any acts or omissions that took place before 27 April 1992 cannot entail its international responsibility because the State only came into existence on that date and was not bound by the Genocide Convention prior to it. The Applicant comprehensively responds to this argument in Chapter 7 of this Reply.

9.81 For the purposes of this Chapter, it is sufficient to note that there is nothing either in the wording of the Convention itself, nor in the *travaux préparatoires,* which supports any temporal limitation of the type relied upon by the Respondent. Any such restriction would be contrary to the Court's approach to interpreting the Convention, which it has made clear, was intended to be as broad and universal as possible. The Court has previously ruled, and recently affirmed, that there is no express limitation *ratione temporis* in the Convention.[162] The fact that a State is in the process of dissolution does not absolve the relevant actors of accountability for egregious violations of international law, particularly where those violations concern *jus cogens* norms.[163] The acts in question were perpetrated by the FRY or alternatively, are attributable to Serbia as a self-proclaimed continuator of the personality

[159] Theunens Report, 2003, p. 6, para. 7. Theunens refers to the Serbian and SFRY 1991 orders for the registration and acceptance of volunteers into the Serbian TO and JNA.

[160] *Vujović et al*, KV 4/2006; *Sireta et al*, KV 9/2008; *Pašić*, KV 4/2007 (see also the Supreme Court of Serbia decision in the same case: Kz I r z 2/08).

[161] *Ibid*..

[162] *Bosnia*, para. 123.

[163] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 81.

of its predecessor or in the alternative, pursuant to the customary rule codified in Article 10(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts.

SECTION IV: THE FRY IS RESPONSIBLE FOR THE FAILURE TO PREVENT AND PUNISH THE VIOLATIONS OF ARTICLES II AND III OF THE CONVENTION

9.82 Article I of the Genocide Convention imposes two "distinct yet connected" positive obligations to prevent and punish genocide.[164] The first obligation requires the State is to take all steps within its power to ensure that those within its jurisdiction or subject to its control (whether public officials, members of the armed forces, or private individuals) do not commit the crime of genocide. The second is the obligation to ensure that the perpetrators of genocide and related acts (whether they are constitutionally responsible rulers, public officials or private citizens) are punished. The Applicant alleges that the Respondent has breached both of these obligations, and bears the burden of proving these allegations to a "high level of certainty."[165]

(1) Failure to prevent acts of genocide

9.83 The obligation to prevent genocide depends upon proof that acts of genocide have in fact occurred, and focuses on a State's responsibility for failure to intervene. If the Court finds that the Applicant has proved its primary case (that the Respondent is directly responsible for the commission of, or complicity in, acts of genocide) then it is unnecessary to go on to consider the alleged breach of the duty to prevent acts of genocide (although it will still be necessary to consider the allegation of failure to punish).

9.84 The obligation to prevent genocide is an obligation of conduct rather than result.[166] The duty of intervention does not require the State to succeed in preventing genocide, but there will be a breach of the obligation if the State has failed to take all reasonable means at its disposal to prevent genocide as far as possible. The obligation arises as soon as the State was, or should have been aware, of a serious risk that acts of genocide are likely to be committed.[167] If this condition is met, State responsibility will be incurred "if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide".[168]

9.85 The Court, in its *Bosnia* judgment held that four factors were relevant in determining whether a State was responsible for a culpable failure to prevent genocide:

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[164] *Bosnia*, paras. 425 and 427.
[165] *Ibid*., para. 210.
[166] *Ibid*., para. 430.
[167] *Ibid*., paras. 431 and 432.
[168] *Ibid*., para. 430.

1. The first is the capacity of the state to influence effectively the actions of persons likely to commit genocide. This will include questions of geographical proximity and the strength of political and other links between the State and the perpetrator. The question of a State's capacity to prevent genocide is to be assessed in the light of the fact that a state can only act within the limits of international law.[169]

2. Secondly, where there has been a culpable failure to prevent genocide, it is no answer for the State to claim or prove that even if it had employed all the means at its disposal it would not have succeeded in preventing genocide. This is irrelevant to a breach of an obligation of conduct rather than result.[170]

3. Thirdly, a State can only be held responsible for failure to prevent genocide if genocide was in fact committed. A breach of the obligation of prevention obviously crystallises when the commission of the genocide begins. However, the duty to take preventative measures arises at the instant the State becomes aware (or should have become aware) of a serious risk that genocide will be committed.[171]

4. Fourthly, and finally, there is a significant difference between complicity in genocide and the obligation to prevent it.[172] The former requires a positive act of aid or assistance, whereas the latter results from a mere failure to adopt or implement suitable measures to prevent it. Complicity results from commission (in breach of the negative obligation in Article I to refrain from perpetrating acts of genocide), whilst a failure to prevent results from pure omission to act (in breach of the positive obligation imposed by Article I). Moreover, complicity requires the provision of aid or assistance in the perpetration of genocide, with full knowledge of the facts, whereas the obligation to prevent arises even if the State does not know for certain that genocide is about to be committed or is underway, but was or should have been aware of a serious danger that acts genocide would be committed.[173]

9.86 Given the close co-operation between the JNA and the forces (including volunteer paramilitary forces) of the autonomous Serb authorities, and in particular given the findings of the ICTY set out above that all military operations were conducted under the effective command of the JNA, the Applicant submits that if the Court were to hold that the FRY was not responsible for the commission of, or complicity in, acts of genocide, it is nevertheless responsible for a failure to prevent genocide. There can be no

[169] *Ibid*., para. 430.
[170] *Ibid*., para. 430.
[171] *Ibid*., para. 431.
[172] *Ibid*., para. 432.
[173] *Ibid*., para. 432.

doubt that the JNA military hierarchy, and the Serb political leadership, were fully aware of a serious risk that acts of genocide were being, or were about to be, committed. By way of illustration, the Serbian leadership and the JNA were fully aware that paramilitary groups, including the "Serbian Guard" under the command of Željko Ražnjatović (known as Arkan, and "Arkan's Tigers") were operating in Eastern Slavonia, and were engaged in what JNA intelligence described as the perpetration of acts of genocide. By way of example, annexed to this Reply are: [174]

1. A JNA military intelligence report dated 13 October 1991 which records information provided by the Government of the Republic of Serbia regarding the establishment of a "Non-Ideological Serbian Army". The report confirms that a paramilitary formation called the "Serbian Guard", operating under Arkan's command, is taking part in combat operations against "Ushtasa Soldiery" in Slavonia, Baranja and West Srem. The report notes that Arkan receives "special attention and privileged treatment by numerous Ministers and other officials of the Serbian Government every day". It goes on to state that in "the greater area of Vukovar, volunteer troops under the command of Arkan...are committing uncontrolled genocide and various acts of terrorism". It notes that the Commander of the Serbian TO, the Assistant Minister of Defence has been informed of this.

2. A JNA military intelligence report dated 25 October 1991 which refers to Arkan as "the Commander of the special forces of Slavonia, Baranja and Western Srem" and which details his operations at a Centre for Training of Volunteers in Erdut. The report records that volunteers are being taught that upon entering a Croat house, they should "kill everything and everyone in the house, including children, elders, disabled persons, [and] women"; that "most of the volunteers are criminals"; and that Arkan routinely killed prisoners brought in by the local territorial units, by beating them to death with baseball bats, or shooting them in the back of the head.

3. An undated JNA intelligence report detailing knowledge of the presence and activities of Arkan's paramilitary unit in Eastern Slavonia. The report describes Arkan as a professional criminal who is engaged in crime and controls the criminal "underworld of Belgrade". The report details the weaponry, and military vehicles (including tanks) at his disposal in Croatia, and states that these were "acquired from the TO, the MUP and the RS (Reserve Force) of the JNA". It goes on to note that Arkan is openly supported by the MUP, the TO and the MNO of the RSK, that he is accepted by certain JNA leaders, that he attends meetings of the 1st VO Command, and that

[174] Documents concerning Conduct of Arkan in Eastern Slavonia, Annex 63.

he is officially subordinated to the 12th Corps. It also refers to his "activities in *liquidating* the Croatian population" (emphasis added).

9.87 It is undeniable therefore, that at least from 13 October 1991, the JNA leadership, and the political leadership of Serbia was (as an absolute minimum) aware of the activities of Arkan's paramilitaries, and was aware that they were committing acts amounting to genocide. The documents cited above are more than sufficient to establish that, with effect from 13 October 1991 at the latest, the JNA leadership was aware of a serious risk that this group in particular would commit genocidal acts. In the light of the findings of the ICTY in the *Mrkšić et al* case, there can be no doubt that the JNA had the capacity to prevent this. As the Applicant pointed out in its Memorial,[175] the military capabilities of the JNA far outweighed those of the paramilitary formations. The JNA had the capacity to protect the Croat civilian population from genocide. Without JNA collaboration or consent the paramilitary groups, including Arkan, would have been unable to mount sustained attacks on the Croat civilian population. The Trial Chamber in the *Mrkšić et al* case expressly found as a fact that the JNA had the "military might to enforce" its effective command and control of "volunteer or paramilitary units fighting in the Serb cause" even though it "may well have been reluctant to be too heavy handed in doing so."[176] Given the military capabilities of the JNA, its failure to intervene to prevent genocide amounts to breach of Article I which is attributable to the FRY.

9.88 The significance of the documents referred to in paragraphs 9.86 and 9.87 above is that they establish JNA knowledge of a serious risk that genocide was being, or would be, perpetrated by paramilitaries, in Croatia generally, but in the Vukovar area in particular. As the Applicant noted in its Memorial, Arkan publicly boasted that his paramilitary group would "mop up" after the JNA had shelled "the first line of houses."[177] There can be no doubt that the JNA (at the very least) failed to prevent the genocidal "mop up" in Vukovar. The Applicant has previously submitted,[178] that the extent of the genocide committed in Vukovar in November 1991 exceeded any other area during the hostilities. During the three month siege leading up to the November occupation approximately 1700 people were killed, of whom 70% were civilians. In convicting Mile Mrkšić of war crimes, the ICTY found as a fact that 194 civilians, including civilians who had been taken from the Vukovar hospital, were executed in the grounds of the Ovčara farm on 20 November 1991 and buried in a mass grave. As many as 200 other people were killed after the occupation of the city.

9.89 Given the evidence of JNA knowledge, at a senior level, of the risk of

[175] Memorial, para. 8.63.
[176] *Supra*., para. 9.74.
[177] Memorial, para. 8.61
[178] *Ibid.,* para. 4.139

genocide by Arkan's Tigers, and given the findings of the ICTY in the *Mrkšić et al* case that the JNA had not only the capacity to enforce its command and control over paramilitaries, but that all paramilitary participation in military operations in Croatia occurred under the effective command and control of the JNA, it is clear, as a minimum, that the FRY is guilty of a failure to prevent acts of genocide within the meaning of Article I.

(2) Failure to punish acts of genocide

9.90 The importance of the obligation in Article I to punish acts of genocide is reflected throughout the Convention's provisions. Article IV requires expressly that persons committing acts of genocide or any of the other acts enumerated under Article III shall be punished, "whether they are constitutionally responsible rulers, public officials or private citizens". Article VI requires that persons charged with genocide 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". In its *Bosnia* judgment, the Court held that the ICTY is an international penal tribunal within the meaning of Article VI, in relation to which the Respondent was under an international duty of co-operation.[179] Accordingly, compliance with the obligation under Article VI required the Respondent to co-operate with the ICTY by handing Indictees over for trial.[180] On the evidence, the Court found that the Serbian security services had known of the whereabouts of Ratko Mladić, but had refrained from procuring his arrest because they remained loyal to him. The Court held that this failure to co-operate with the ICTY amounted to a violation of the obligation to punish genocide in breach of Articles I and VI of the Convention.[181]

9.91 When the Applicant submitted its Memorial the FRY had failed to surrender a number of high profile suspects including Slobodan Milošević, Veslin Šljivančanin, Vojislav Šešelj, and Željko Ražnjatović (Arkan). Since that time the first three named individuals have been put on trial by the ICTY and the last has died. However, the Applicant would submit that the Respondent's continuing failure to procure the arrest Goran Hadžić, and the circumstances surrounding the OTP's failed attempt to secure his surrender disclose a clear breach of Article VI, and bear a strong resemblance to the failure of the FRY authorities to procure the arrest and surrender of Ratko Mladić.

9.92 Goran Hadžić was indicted in 2004 as part of the same JCE as Milošević. The Indictment alleged that Hadžić, as President of the Government of the self-declared Serbian Autonomous District of Slavonia, Baranja and Western Srem ("SAO SBWS") and, later, 'President' of the 'RSK', was

[179] *Bosnia*, para. 445.
[180] *Ibid*., para. 443.
[181] *Ibid*., paras. 449-450.

guilty of crimes against humanity of persecutions, exterminations, murder, imprisonment, torture, inhumane acts and deportation, as well as numerous counts of war crimes. As with Milošević, many of the offences alleged against Hadžić concerned the Eastern Slavonia region. The Indictment alleges that Hadžić was party to a JCE that included the Serbian Volunteer Guard ('Arkan's Tigers') and volunteers related to the Serbian Chetnik Movement, and/or the Serbian Radical party of Vojislav Šešelj commonly known as 'Chetniks'. It alleges that during military operations these groups were integrated in or related otherwise to the TO of the 'SAO SBWS' "all operating under the command of the JNA". Hadžić is one of only two outstanding fugitives from the ICTY (the other being Ratko Mladić).

9.93 The then Prosecutor, Carla del Ponte, gave the following statement to the press at the time the indictment against Hadžić was made public, setting out the circumstances in which he evaded arrest on 18 July 2004:[182]

> "As you know, Goran Hadžić, former president of the so-called Republika Srpska Krajina, was indicted last week, his indictment being confirmed by a judge on 4 June 2004.
>
> On Tuesday 13 July at 9h30, we handed over to the Ministry of Foreign Affairs in Belgrade the indictment against Goran Hadžić, accompanied by an arrest warrant, both documents being under seal. We asked the authorities to act with all due diligence and within 72 hours. Indeed, Goran Hadžić had been located in his villa in Novi Sad. All information pertaining to his location were given to the authorities.
>
> The same day, at 11h30, a copy of this indictment was also transmitted to the Embassy of Serbia and Montenegro in The Hague, according to our usual practice.
>
> At 12.38 that same day, Mr. Hadžić left his house in Novi Sad. He came back 45 minutes later, at 13h18, and spent the rest of the afternoon with his family at his home. At 16h29, he left by car, having taken a bag with him. At 18h50, a driver brought back the car to the house. He has not returned to this house since that day. My office has evidence and photographs of those events that could be produced to the relevant authorities.
>
> That same day, at 15h30, the Ministry of Foreign Affairs transmitted to the Belgrade District Court the indictment and the arrest warrant, which was received by that court after working hours.
>
> The following day, Wednesday 14 July, at 9 hour the President of the

[182] Press Release, 19 July 2004, JP/P.I.S./872-e.

Belgrade District Court assigned an investigative judge to validate the arrest warrant that was then transmitted to the Serbian MUP. As I indicated, by then, the indictee had left his house. In fact, Goran Hadžić had fled 17 hours before the police was officially required by the judiciary to arrest him.

On Thursday 15 July, the police reported to the judge that the accused could not be found at his current address and that his whereabouts were unknown. That day, information was leaked to the press and information pertaining to the sealed indictment against Goran Hadžić appeared in the Belgrade newspaper InterNacional.

On Friday 16 July, at 9h30, in response to our request, the Belgrade judge informed us that no information on the current whereabouts of the accused was available.

At 10 hour, we submitted to the Chambers a motion to lift the Order for Non-disclosure on the indictment and the arrest warrant. That day, the Minister of Foreign Affairs of Serbia and Montenegro informed me by a letter that he had received no advice of any action taken by the competent authorities.

That afternoon, in conformity with the Chamber's Order, the indictment was made public. Indeed, it had become obvious by then that there was no more ground to keep it sealed in order to facilitate an arrest, since the accused was aware of its existence and had gone hiding.

The events of last week constitute the second time since the beginning of the year, when we actually can see for ourselves indictees, located by my Office, fleeing in a hurry just hours after the Belgrade authorities had been requested to act upon arrest warrants.

To date, I am sorry to have to report that there is one more ICTY fugitive, bringing the total number of accused at large to 22. Most of them are within the territory of Serbia and Montenegro.

This new failure by the Belgrade Authorities to actually cooperate with us surprised me particularly, as not even 10 days ago, Serbian President Boris Tadić in his first presidential speech, said "the cooperation with The Hague Tribunal is a priority of our foreign and domestic policy, since it proves our commitment to European values and represents a basic prerequisite of all European and Euro-Atlantic integrations".

The same day, Serbia-Montenegro President Svetozar Marović

indicated that "every postponement in cooperation with the ICTY will move away Serbia and Montenegro from Europe".

Foreign minister Vuk Drašković added "Our obligations toward The Hague court are something that must not be bargained with, they must be followed through. We don't want to be an isolated island in the sea of European democracies. All the excuses have been long spent".

Ten days ago Serbian Deputy Prime Minister Miroljub Labus also emphasized that "there would be soon strong evidence of Serbian co-operation with the Hague Tribunal ". "We are aware that the Tribunal is not satisfied with our co-operation. We are prepared to undertake serious steps and measures in order to improve this co-operation…. It is true that the next two months are decisive and that we will have to provide reliable information on the location of ICTY indictees and begin implementing the law."

Yesterday 18 July, Serbian Prime Minister Vojislav Koštunica said that the cooperation with the Hague Tribunal was "the issue of all issues' and that no major issue concerning the state's status can be resolved until this issue is resolved.

Those statements renewed our hopes that Serbia-Montenegro would immediately take concrete actions to cooperate with our requests.

Belgrade is now facing a choice:

> either, it puts its actions where its mouth is, and proceeds immediately with the arrest of Mr Hadžić and his transfer to The Hague.
>
> or, Belgrade's promises remain empty. I would then have no choice but to apply again under Rule 7 bis of the Rules of procedure and evidence of the Tribunal, that is to say to request the ICTY President to notify the UN Security Council of Serbia and Montenegro's failure to comply with its obligation under Article 29 of the Statute. Nevertheless, I sincerely hope that such a situation will be avoided and that, very soon, in the next hours, the authorities of Serbia and Montenegro will give us sincere signs of their good will, and put concrete actions behind their recent encouraging oral commitments."

9.94 Goran Hadžić remains at large at the time of writing. The plain inference from the facts outlined by the Prosecutor is that Hadžić (whose whereabouts were known to the FRY authorities and the OTP) was directly or

indirectly tipped off by at least one public official of the FRY who knew of the sealed Indictment and the imminent plan to arrest him (whether the official(s) who supplied this information was/were in the Ministry of Foreign Affairs in Belgrade, or the Serbian Embassy in The Hague). Within three hours of the first communication of the sealed Indictment to the FRY Hadžić had been made aware that he had to flee to evade capture and immediately did so. As the Prosecutor pointed out, this amounts to a clear "failure by the Belgrade Authorities to actually cooperate with us". She called on the FRY to proceed immediately with the arrest of Mr. Hadžić and his transfer to the ICTY. That demand was not complied with. In the Applicant's submission, the failure of the FRY to co-operate, involving (as it must have done) the deliberate tipping off of a fugitive by a public official in order to frustrate the execution of an arrest warrant issued by the ICTY amounts to a clear breach of Article VI, and accordingly of Article I as well.

CHAPTER 10

FACTUAL BACKGROUND: CROATIA AND THE RSK/SERBIA 1991- 1995

INTRODUCTION

10.1 In Part III of its Counter-Memorial the Respondent has filed a Counter-Claim to the effect that the Applicant has violated the Genocide Convention. These counter-claims are entirely without foundation and appear to be intended to further delay these proceedings.

10.2 The Respondent's allegations that the Applicant committed genocide against the Serbs in Krajina are restricted to Operation *Storm*, that commenced on 4 August 1995. The Respondent makes no allegations of genocidal acts prior to this date. The Applicant responds to Chapter XII of the Counter-Memorial for the sake of completeness, even though it contains no allegations regarding the breaches of obligations under the Genocide Convention.[1] The Respondent's various allegations of human rights violations in Chapter XII are denied. In any event, as the Respondent recognises, since the Court only has jurisdiction under the Genocide Convention such allegations fall outside the jurisdiction of the Court.[2]

10.3 As regards Operation *Storm*, the Respondent has not made out a basic case in support of its allegations. Indeed, the Respondent's approach is contradictory, alleging that Operation *Storm* was genocidal in character notwithstanding the fact that it was planned and executed in the same manner as Operation *Flash*, which the Respondent admits was not genocide. In any event, no genocide occurred and the Applicant accordingly is not responsible for any violations under the Convention. This is clear in the present and following Chapters. The Applicant's response to the Counter-Claim is as follows:

A. This Chapter provides a factual account of the events that transpired up to the commencement of Operation *Storm*. This is necessary to correct the unsatisfactory, incomplete and misleading "factual background" provided by the

[1] In fact there is only one reference to Genocide in the whole of Chapter XII, where the Respondent admits that non-Serbs in the 'RSK' faced a "very difficult human rights situation…which was characterised by discrimination, abuse and numerous crimes … (but not genocide)." Counter-Memorial, para. 1123.

[2] Counter-Memorial, para. 211. The same holds true for other allegations of human rights violations said to have been committed by Croatia against the Serbs in Croatia in Counter-Memorial, Chapter V, paras 538-559.

Respondent. As stated above, Chapter XII does not contain a single allegation regarding the commission of genocide until Operation *Storm* in August 1995.

B. Chapter 11 responds to the Respondent's allegations that the Applicant committed genocide during Operation *Storm* and thereafter, by *inter alia* deliberately driving persons of Serb ethnicity out of their homes and expelling them from the area, looting and burning thier property and killing the Serbs who remained in the "Krajina", with intent to destroy a substantial and significant part of the Serb national group in Croatia.[3]

C. Chapter 12 refutes the allegation, which is axiomatic to the Respondent's Counter-Claim, that a genocidal plan or policy was adopted by the Croatian political and military leadership during a meeting on the island of Brioni on 31 July 1995. It also refutes the allegation that any inference of genocidal intent can be drawn from the manner in which Operation Storm was conducted, from events that are alleged to have occurred in its aftermath, or from the legislative and executive policies of the Applicant in relation to the return of the Serb civilian population of "Krajina", and the protection of their civil and political rights.

10.4 Before describing the factual background and the events that led up to Operation *Storm*, certain points need to be made about the Respondent's use of evidence. *First*, as stated earlier, the Respondent's Counter-Memorial is characterised by numerous misrepresentation of facts and events or they are described out of context. This approach characterises the entirety of Chapters XII and XIII of the Counter-Memorial. The political context of the events in question, their interpretation, the context in which Operation *Storm* was launched and the manner in which it was conducted are materially different from those presented in the Counter-Memorial. These misrepresentations are identified below.

10.5 *Second*, after describing facts and events out of context, the Respondent proceeds to make sweeping deductions and draw erroneous conclusions. The most blatant example of this is in its description of the Brioni Minutes and the conclusions it draws therefrom that Operation *Storm* was genocidal.[4] *Third,* it is noteworthy that the Respondent scarcely relies on its official documentation or the "official records" of the 'RSK' to which it no doubt has access. It seeks to overcome this shortcoming with references to allegedly neutral reports and foreign sources. Great reliance is placed on *inter alia* UN reports (that

[3] Counter-Memorial, para. 1098.
[4] See Chapters 11 and 12 *infra.*

are not annexed); an ICTY indictment from an ongoing case (the evidentiary value of which is addressed in Chapter 2); and accounts of non-governmental organisations like the Serb Documentation and Information Centre ("*Veritas*") and the Croatian Helsinki Committee for Human Rights ("CHC"). The authority and neutrality of these sources, as well as of the CIA publication, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* to which the Counter-Claim makes repeated reference, is dealt with in Chapter 2,[5] and is also touched upon below. The Respondent's lack of reliance on its own internal documents is noteworthy and raises numerous questions. As the catalyst for and primary participant in all the events relating to the present case, the Respondent has access to its own archives and official documents (e.g. official and military documents) relating to all the events and these documents are the subject of the Applicant's document request that has only been partially fulfilled.[6] However, the Respondent has chosen not to make reference to any of these materials. It is submitted that through this reticence the Respondent seeks to achieve three goals: (a) to create an illusion of "objectivity" in its presentation; (b) to demonstrate its role as a "victim" against whom unjust and unfounded accusations have been made and (c) to prevent access to all official documentation that would contribute to the establishment of its responsibility for genocide in Croatia, by demonstrating that it directed, commanded and controlled the events that transpired. An example of the documents that the Respondent fails to annex is the Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995.[7] Its importance cannot be underestimated, as is set out below.

10.6 In any event, the Respondent admits that the overview contained in its Chapter XII "is by no means exhaustive and does not attempt to discuss all the details of almost 4 years of tensions, armed clashes, and negotiations between the parties."[8] The Respondent is correct: it fails to address matters that are highly relevant. By choosing this path it undermines its own case.

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10.7 This Chapter is organized as follows:

Section I addresses a number of preliminary matters in relation to the Respondent's Counter-Claims.

Section II describes the details of the Vance Plan and the conditions of the Croats living in the United Nations Protected Areas (UNPAs). Developing on the facts set out in Chapter 3, it reflects upon the

[5] See Chapter 2, para. 2.65 *et seq.*

[6] See Chapter 2, para. 2.85 *et seq.*

[7] RSK, State Fact-Finding Commission, Report on the Causes and Manner of the Fall of Western Slavonia, 11 July 1995, Annex 140. See para. 10.88 *et seq.*

[8] Counter-Memorial, para. 1160.

Respondent's continuing support to the rebel Serbs and explains how the rebel Serbs failed to comply with the Vance Plan from its very inception, a fact that the Respondent admits. It also touches upon the events in Maslenica and Medak.

Section III describes Croatia's continuing efforts to arrive at a peaceful settlement with the rebel Serb leadership, and sets out the difficulties Croatia experienced as the rebel Serb leadership pursued unification with FRY/Serbia and the Republika Srpska in Bosnia-Hercegovina (BH).

Section V describes Operation *Flash* and the events that followed.

SECTION I: PRELIMINARY ISSUES

10.8 The Respondent's argues that the Applicant's claim and the Respondent's Counter-Claim are based on the same "factual complex" and on facts that have a "common territorial and temporal setting". This is strongly rejected.[9]

10.9 The Applicant's claim does not arise out of a conflict between the "Croatian armed forces and the armed forces of the Republika Srpska Krajina", as suggested by the Respondent. Rather, it arises out of the conflict between the FRY/Serbia and Croatia, which was a part of the political process triggered by the breakdown of former Yugoslavia. This did not start in mid-1991, as the Responden claims, but earlier. The Respondent, together with the JNA, supported the Serb rebellion in Croatia from 1990 onwards. After the proclamation of the FRY (Serbia and Montenegro) in 1992, this entity and its army continued to control and support the rebellion and the 'RSK', until 1995. In legal terms, the entire process was set off by the adoption of the Constitution of Serbia in September 1990, a year before Croatia's proclamation of independence. Through this new Constitution the Respondent in effect declared its independence.[10] It took responsibility over its territorial integrity and international relations, defence and security, and declared that its President would command the Armed Forces in peacetime and in war.[11] Serbian jurist Srđa Popović understood this act, amongst others, as referring to the "fact of the existence of an independent and sovereign Serbia."[12]

[9] Counter-Memorial, paras. 1108-1109.

[10] See Chapter 7, para. 7.45 *et seq.*

[11] Constitution of the the Republic of Serbia, adopted in 1990. Article 72 provided that the Republic of Serbia would regulate and provide for the the following:

1) sovereignty, independence and territorial integrity of the Republic of Serbia and its international position and relations with other states and international organisations; ...

2) defence and security of the Republic of Serbia.

See also Article 83(5).

[12] Quoted by: M. Antić, *Teorija nadmoći i rat na teritoriju bivše Jugoslavije* [The theory of predominance and the war on the territory of the former Yugoslavia], *Politička misao*, Vol.

Together with the removal of the autonomy of the provinces of Kosovo and Vojvodina, this marked the prelude to the Respondent's total takeover of the federal institutions of the SFRY and their subsequent transformation and use to achieve the goal of a Greater Serbia for all Serbs.[13]

10.10 The Respondent also argues that the Claim and Counter-Claim both relate to the same geographical area - commonly referred to as the "Krajina" region of Croatia[14] - that the Respondent equates with the Serb occupied territories of Croatia,[15] and that it projects as the "roots of everything Serbian" in Croatia.[16] The Respondent seeks to project this area as historically, geographically and ethnically distinct from the rest of Croatia. This is wrong. No region called the "Krajina" ever existed in the territory of Croatia. From a historical and geographical perspective, the *Vojna Krajina* (Military Krajina) was the border separating the Hapsburg and Ottomon Empires and was spread over a considerably larger area than the rebel Serb occupied territories and the inhabitants of the region were both Serbs and Croats.[17] A map of the *Vojna Krajina* is set out in Annex 147. Similarly, throughout history and more recently, Serbs lived and worked in other areas in Croatia,[18] and numerous Croatian citizens, representing different ethnicities, lived in Krajina. According to the last census conducted in Yugoslavia in 1991, the areas that later came to be occupied and held by the rebel Serbs and the JNA (the area of the 'RSK') were inhabited by 287,830 Serbs (52.4% of the population). The rest of the population was made up of Croats and people of other ethnicities.[19] Later, as a result of the Serb aggression in 1991 a majority of the Croats fled from these areas and the population demographic changed.

10.11 Furthermore, contrary to the Respondent's suggestion that the 'RSK' was a legally established entity, distinct from both Serbia and Croatia, the 'RSK' was in fact an illegal entity that for four years occupied territory that

41, No. 2, 2004, p. 123.

13 See Chapters 3 and 7 *supra*.

14 Counter-Memorial, para. 1109.

15 For e.g. see Counter-Memorial, paras. 1381-1390, 1167.

16 Counter-Memorial, para. 1385.

17 *Military Encyclopaedia*, vol. 10, 2nd ed., Belgrade 1975, pp. 556-562.

18 For example, in 1981 Serbs living in the area of the Dalmatian hinterland made up 14.3% of the total Serb population, while in Kordun and Banija this percentage amounted to 8.3%. At the same time, in Zagreb, Osijek, Vukovar, Karlovac and Rijeka, Serbs accounted for respectively, 7.15%, 5.37%, 4.73%, 3.42% and 3.06% of the total Serb population. Thus, as a result of various social and economic developments and migrations after World War II more ethnic Serbs (in total number) lived in some large Croatian cities than in some municipalities where they traditionally made up a majority of population. Further, though in 1982 Serbs accounted for only 11.5% of the total population of Croatia, 17.7% of political leaders and 21.6% of members of the Central Committee of the League of Communists of Croatia came from their ranks. D. Roksandić (1991), *Srbi u Hrvatskoj: od 15. stoljeća do naših dana* [Serbs in Croatia: from the 15th century until today], Zagreb: Vjesnik, pp. 124-157.

19 N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, p. 172.

was an integral part of Croatia. This fact was recognised and supported by the international community. The 'RSK' consisted of three territorial units: the first in Eastern Slavonia, Baranja and Simirium; the second in Western Slavonia; and the third, the largest, situated in central Croatia, along Croatia's border with Bosnia - the so-called Krajina. In fact all the areas over which the self-proclaimed 'RSK' exercised control were sometimes referred to as the 'Krajina'. The last two units accounted for 85% of the area of the 'RSK'. For four years the rebel Serbs controlled 17,028 km, with a border of 923 km that separated it from the rest of Croatia, under the control of the lawfully elected Croatian authorities.[20] Chapter 3 describes how the 'RSK' emerged and how its very existence was only made possible through the continuing direction, command, control, support and backing of the FRY/Serbia.

SECTION II: FACTUAL BACKGROUND

(1) Introduction

10.12 In order to establish jurisdiction with respect to the Counter-Claim, the Respondent argues expansively that the facts giving rise to both claims have a common temporal setting.[21] However, on the very next page it seeks to restrict that temporal setting to the "period from the deployment of UNPROFOR in the spring and summer of 1992 to Operation *Storm* in August 1995". This is despite the fact that it admits that the conflict began earlier.[22] By excluding the crucial period before the summer of 1992 the Respondent seeks to ignore the acts of genocide for which it is responsible, committed by and through the JNA, paramilitaries and the 'RSK' against the Croat population.

10.13 The Respondent also fails to describe the attitudes and actions of the FRY/Serbia and the 'RSK' authorities towards the Croats living in the UNPAs. It fails to address the conditions of Croats living in the rebel Serb occupied territories and how these areas came to be almost exclusively inhabited by Serbs. The Respondent fails to address its own role and activities, that of the Yugoslav Army (VJ), the 'RSK' authorities and their armed forces - the Serb Army of Krajina (SVK). It also fails to address the 'RSK's' continuing efforts for unification with the FRY/Serbia and the Republika Srpska (BH). By excluding all of these facts from its account, the Respondent provides a wholly incomplete and misleading account of the factual background that resulted in Operation *Storm*. This Chapter sets the record straight.

10.14 In its Chapter XII, the Respondent once again alleges general discrimination and an intolerant attitude against the Serbs by the government of President Tuđman, "accompanied with the rehabilitation of the Independent

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[20] Davor Marijan, Storm, Zagreb, August 2010, p. 42.

[21] Counter-Memorial, Chapter XI.

[22] Counter-Memorial, para. 1115.

State of Croatia" which lead to a massive exodus of Serbs from Croatia.[23] Chapter 3 deals with the allegations of discrimination against the Serbs, which are strongly denied.[24] That Chapter also sets out details of the hate speech propagated and promoted by the Serbian state controlled media and the Serbian leadership with regard to the alleged rehabilitation of the Independent State of Croatia, and the impact it had on the Serbs in the region.[25]

10.15 It is recognised that there was an ongoing departure of Serbs from Croatia between 1991 to 1995. This resulted from a number of complex factors that are addressed below. This "exodus" was also the result of actions taken by the rebel Serb leadership after Operations *Flash* and *Storm*, in an attempt to create the impression that the Croatian Government was undemocratic and genocidal, that Croats were 'Ustashe' and that it was impossible for the Serbs to live in Croatia, under Croatian authority. Detailed evacuation plans were put in to operation, with some Serbs being compelled to leave. Mr. Akashi, the Special Representative of the UN Secretary General, stressed that the UN Agencies had been under enormous pressure from the Knin authorities, who threatened further attacks on Zagreb, to assist the Serb population in leaving the area after Operation *Flash*.[26]

10.16 It is noteworthy, however, that the Respondent admits that several thousand Croats fled the Serb-held areas of the country.[27] In other words, the Respondent admits that the conditions in the Serb-occupied areas of Croatia were such that they resulted in a massive exodus of Croats from these areas. These conditions are dealt also dealt with below.

(2) The Deployment of the UNPROFOR and the Creation of the UNPAs and Pink Zones

10.17 Chapter 3 briefly describes the Vance Plan, the deployment of the United Nations Protection Force (UNPROFOR) and the creation of the United Nations Protected Areas (UNPAs). Pursuant to the Vance Plan a proposal for the deployment of a UN peacekeeping force was formally agreed in December 1991. Its role and functions were set out in a Report of the UN Secretary General,[28] that stated categorically that this was "an interim arrangement"

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[23] Counter-Memorial, para. 1116.

[24] See Chapter 3, para.3.41 *et seq.*

[25] See Chapter 3, paras 3.12-3.33.

[26] Council of Europe, Political Affairs Committee, Memorandum on the Visit to Zagreb and Western Slavonia, 23 June 1995, Annex 144, p. 3. The Report also sets out details of the destruction of Croat villages in the rebel Serb occupied areas.

[27] Counter-Memorial, para. 1116.

[28] See Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23280, 11 December 1991, para. 9 *et seq.* and Annex III (*Concept for a United Nations peace-keeping operation in Yugoslavia, as discussed with Yugoslav leaders by the Honourable Cyrus R. Vance, Personal Envoy of the Secretary-General and Marrack Goulding, Under-Secretary-General for Special Political Affairs*), Annex 92.

to create the conditions for peace required for the negotiation of an overall settlement to the conflict. From its inception, it was not intended to prejudice or otherwise affect the outcome of negotiations for a comprehensive settlement of the conflict.[29]

10.18 The Report provided that UN troops and monitors would be deployed in those areas of Croatia where Serbs constituted the majority - or a substantial minority - of the population and where so-called "inter-communal tensions" had led to armed conflict.[30] These areas, designated as UNPAs, were to be demilitarized, with all armed forces (including the JNA) being withdrawn or disbanded. UN troops were to ensure that the areas remained demilitarized and its residents, including Croats and non-Serbs, protected from fear of armed attack. UN Police monitors were to ensure that local police carried out their duties without discriminating on the basis of ethnicity and abusing human rights. Working with UN humanitarian agencies, the UN force was also to secure the return of displaced persons to their homes in the UNPAs.[31] Three UNPAs were identified: Eastern Slavonia, Western Slavonia and Krajina. However, their exact boundaries were not defined. Once again the "interim nature" of these arrangements was reiterated.[32]

10.19 The Respondent states that all the parties generally accepted the ceasefire and the Vance Plan.[33] This contradicts its earlier admission that the "RSK leadership" was reluctant to accept the plan, allegedly because it was of the view that the UN forces would be unable to protect the Serb population from a Croatian attack.[34] It was only after the direct intervention of Milošević that the rebel Serbs in Knin agreed to accept the Vance Plan.[35] Borisav Jović reports a "difficult and dramatic" meeting on 2 February 1992 whereby, pursuant to Milošević's direction, the leadership of the 'RSK' accepted the Plan.[36]

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[29] *Ibid*., para. 1.

[30] See *Ibid*., para. 8. The Secretary General judged that "special arrangments" were required in these areas for "an interim period to ensure that a lasting ceasefire was maintained".

[31] *Ibid*., Annex III, para. 7.

[32] *Ibid*., Annex III, paras. 8, 9. The UNPAs are set out in the Memorial, Volume 3, Plate 2.7.

[33] Counter-Memorial, para. 1117.

[34] Counter-Memorial, para. 564. See Chapter 3, paras. 3.120-3.121.

[35] Milan Babić, the 'President' of the 'RSK' was opposed to the Plan and stated that the Serbs would refuse to co-operate, to surrender their weapons or permit the JNA to withdraw. See Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23513, 4 February 1992, para. 12. See also *Martić,* para. 149.

36 See Memorial, paras. 2.125 and 2.126; Boris Jović: "Last Days of the SFRY (Excerpts from a Diary)", Memorial, Volume 5, Appendix 4.3. See also Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23592, 15 February 1992, paras. 7-8 wherein Jović informed the Secretary General of the unconditional acceptance of the Krajina to the Vance Plan. Jović stated that "no undue significance" should be attached to Babić's resistance. Babić was "officially" replaced on 27 February 1992 by Goran Hadžić, the Serb leader in Eastern Slavonia. (Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Central Intelligence Agency (CIA), Vol. I, p. 106). See also *Martić,* para. 149.

10.20 In any event, UNPROFOR was established on 21 February 1992, and assumed responsibilities over four sectors in the three UNPAs between 15 May and 2 July 1992.[37] UNPROFOR's authority was extended to "pink zones", the term used to describe those parts of Croatian territory outside the UNPAs, that remained under rebel Serb control after the cessation of hostilities in January 1992. The Respondent once again distorts the facts and changes the order of events when it claims that the "pink zones" were largely populated by Serbs, and that Croatia sought to re-establish its authority over these areas.[38] Once it became known which areas would constitute the UNPAs, rebel Serbs occupied areas beyond and outside the designated, but as yet undemarcated, UNPAs. At that point these areas were not "largely populated by Serbs." In fact, Serbs accounted for less than half the population of the overall territory within the "pink zones".[39] After the conflict began the Croat inhabitants of these areas were driven out by the rebel Serb forces in conjunction with the JNA. This resulted in the area being largely populated by Serbs.[40]

10.21 In order to avoid the outbreak of further hostilities, Croatia agreed to accept UNPROFOR assistance in reinstating Croatian authority in these areas even though the Vance Plan required that these areas be handed back to Croatia following the JNA's withdrawal.[41] The Respondent accepts that the rebel Serb authorities resisted the re-establishment of Croatian authority in this area.[42] In so doing it admits that the 'RSK' began violating the Vance Plan from its very inception.

Liberation of Miljevci Plateau

10.22 The Miljevci Plateau (comprised of seven villages and some ten hamlets) was not "largely populated by the Serbs," as the Respondent claims. Before the Serb rebellion, there were some 2,500 Croats and only about 50 Serbs living in the area.[43] The attack on the positions of rebel Serbs in the Miljevac Plateau, that occurred on 21 June 1992, was not organised by the

[37] Report of the Secretary-General pursuant to Security Council resolution 762 (1992), UN doc. S/24353, 27 July 1992, para. 2.

[38] Counter-Memorial, para. 1118.

[39] O. Žunec, *Goli život: socijetalne dimenzije pobune Srba u Hrvatskoj* [Naked life: social dimensions of the Serb rebellion in Croatia], Zagreb, 2007; N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp. 178-182.

[40] See: Report on the Shelling of Civilian Targets and the Victims of those Shellings, April 1992 – July 1993 Annex 116.

[41] Memorial, para. 2.128. See Further Report of the Secretary-General pursuant to Security Council Resolution 752 (1992), 26 June 1992, UN Doc. S/24188, para. 16. Also Report of the Secretary-General pursuant to Security Council Resolution 762 (1992), 27 July 1992, para. 10.

[42] Counter-Memorial, para. 1118.

[43] Serbs were only resident in the village of Nos Kalik which was liberated by the Croatian Army as early as 2 March 1992. At the time of the liberation of Miljevci, on 21 June 1992, there were no Serb civilians in the area, only active and reserve forces of the former JNA, i.e., the Territorial Defence. Only some Croatian civilians remained, the majority having fled or been forced to leave earlier.

senior command of the Croatian Army. This is evident from a communication of the Chief-of-Staff of the Croatian Army to the Commander of the Croatian Navy, on 24 July 1992 which states *inter alia* that action was carried out without the knowledge or approval of the higher commands.[44] The operation lasted one day.

10.23 Claims about the killing of imprisoned Serb soldiers are not established by the evidence, and the Respondent is able to rely only on a report from the Serb NGO *Veritas*,[45] which is neither impartial nor convincing as an authority.[46]

10.24 *Finally*, the Respondent refers to UN Security Council Resolution 762, adopted after events at Miljevci, that urged Croatia to withdraw its army to the positions held before the offensive of 21 June 1992.[47] Yet the Respondent fails to mention that the same Resolution also ordered the local Serb authorities to demilitarize the "pink zones" and bring them back under the control of the Government of Croatia.[48]

(3) The Continuing Support of the FRY/Serbia for the 'RSK'

10.25 But for the active political, financial, military and logistic support and backing of the FRY/Serbia, the 'RSK', proclaimed in December 1991, would never have come into being or existed for the four years that it did. Chapter 4 sets out details of the extensive military and logistical support provided by the FRY/Serbia to the 'RSK', and its army- the SVK. Security Council and General Assembly Resolutions confirm this support.[49]

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[44] The communication states:

> "The latest incursions of parts of HV [Croatian Army] in the area of Unešić on 22 July and previous incidents near Nos Kalik and Miljevci Plateau prove that actions are conducted without the knowledge of and authorization from higher-ranking commands – OZ and HRM [Croatian Navy]. Set up a commission to investigate this matter and find out which forces or persons did this and whether this was done deliberately in order to jeopardize the implementation of the plan of the UN peacekeeping operation and inform me thereof by 8:00 hours on 26 July 1992. ... Having learned a lesson from this event, establish a command system so that these incidents do not happen again. The HV cannot enter, after having assumed commitments, into the territories of UNPAs, or territories outside of the UNPAs in which the HV units are not allowed to be present."

Letter from Lieutenant General Anton Tus to Admiral Sveto Letica, 24 July 1992, Annex 117.

[45] Counter-Memorial, para. 1120 and its Annex 46.

[46] Chapter 2, paras. 2.66-2.68. The Respondent fails to mention that 13 of the 14 prisoners of war (POWs) were exchanged for Croatian soldiers in Nemetin near Osijek on 11 August 1992 and an investigation is on at the Šibenik County State Attorney's Office/County Police Department regarding one death.

[47] Counter Memorial, para.1119

[48] UN Security Council Resolution 762, dated 30 June 1992, para. 4.

[49] See *inter alia* General Assembly Resolution A/RES/49/43 of 9 December 1994, Memorial, Vol.4, Annex 4, p. 25; Security Council Resolution 871 of 1993, which when calling for the demiliterization of the UNPAs called upon the FRY "in particular....to co-operate in [the] full

10.26 The Respondent's continuing direction, command and control is also clear from numerous other examples. For example, in early 1994, the FRY, through its National Bank, introduced a united monetary system into the 'RSK' and the Republika Srpska in BH. This led the two so-called Serb 'republics' replacing their own 'state' currencies with the dinar of the FRY.[50]

10.27 Further, the rebel Serb authorities in the UNPAs, (in the 'RSK'), were issuing documents, including personal identification cards, as if the UNPAs were a part of the FRY/Serbia. These documents show that the 'RSK' authorities (and Serbia) considered the UNPAs a part of the territory of the FRY.[51]

10.28 As regards military control and direction, the Respondent admits that the sources adduced by the Applicant confirm the links between Knin and Belgrade and their communication.[52] It claims, however, that this does not prove Belgrade's "control" over Knin. In fact, the 'RSK' and the SVK could not have survived without the support of the financial and material resources of the FRY/Serbia. This is clear from UN General Assembly Resolution on "The Situation in the Occupied Territories of Croatia", that noted the relationship between [Yugoslavia] and Knin.[53] By this Resolution, the General Assembly reaffirmed the principles of inadmissibility of the acquisition of territory through the use of force, and urged the restoration of the authority of the Republic of Croatia in its entire territory.[54] Stressing the importance of preserving Croatia's territorial integrity, the General Assembly stated that the the UNPAs were integral parts of the Republic of Croatia and called for the peaceful reintegration of "the Serbian-controlled territories" into the rest of Croatia.[55] Expressing alarm and concern that "the ongoing situation in the Serbian-controlled parts of Croatia [was] *de facto* allowing and promoting a state of occupation of parts of sovereign Croatian territory", thereby "seriously jeopardizing the sovereignty and territorial integrity of the Republic of Croatia," it called upon the FRY to fully comply with all Security Council resolutions regarding Croatia, and respect its territorial integrity.[56] It found that FRY's "activities aimed at achieving the integration of the occupied territories of Croatia into the administrative, military, educational, transportation and communication systems of the Federal Republic of Yugoslavia (Serbia and

implementation of the [Peacekeeping] plan." Annex 118, para. 4.

[50] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp 406-407.

[51] See one such example of a Identity Card, issued by the 'RSK' authorities, dated 26 November 1992, Annex 119.

[52] Counter-Memorial, para. 626.

[53] General Assembly Resolution A/RES/49/43 of 9 December 1994, Memorial, Vol.4, Annex 4, p. 25.

[54] *Ibid*.

[55] *Ibid*.

[56] *Ibid*., para. 2.

Montenegro) [were] illegal, null and void, and must cease immediately."[57] The General Assembly requested the FRY to immediately cease military and logistic support to the self-proclaimed Serb authorities.[58]

10.29 The Respondent seeks to underplay its own role. The evidence discloses the close connections between the Army of Yugoslavia (VJ) and the SVK and demonstrates the control that Serbia exercised over the SVK. The SVK came into being because the JNA had to "withdraw" from Croatia due to pressure imposed by the international community. The links between the SVK and the VJ included the political and ideological goal of securing a Greater Serbia. This was the basis on which the SVK was formed and which continued to link them until the end of the conflict. A further link was organisational, in the form of personnel: from November 1993 this operated through the 40th Personnel Centre for transmission of commanding officers from the VJ to the SVK, without whom the SVK could not have functioned. The Respondent provided the entire commanding personnel (brigades, corps, General Staff) of the 'RSKs' army. A third connection was logistical: without operational support from Serbia, the SVK could not have functioned or been armed.

10.30 The Respondent seeks to create the impression that there were only a few commanding officers of the VJ in the SVK, and seeks to minimise their role. However, the minutes of a session of the "Government" of the 'RSK', of early July 1994, confirms that the situation was as indicated by the Applicant in the Memorial: large numbers of JNA officers were active in the SVK.[59] Officers and non-commissioned officers of the VJ volunteered for the SVK, and many did so. The majority, however, went there by force of law, which can be seen from their personnel documents.[60]

10.31 The 40th Personnel Centre was established on 10 November 1993 as Military Post 4000 – Belgrade and was part of the Belgrade garrison. The professional officers, non-commissioned officers of Serb nationality who were born on the territory of the Republic of Croatia, i.e., who were sent to Military Schools from the municipalities of the Socialist Republic of Croatia, before

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[57] *Ibid.*

[58] *Ibid.*, para. 3.

[59] See Memorial, Chapter 3, Section 2, especially para 3.68 et seq. See RSK, Minutes from the Thematic Session held on 6 July 1994, Knin. The Minutes state:

> "We in SVK have 1,227 professional officers and non-commissioned officers sent from the Army of Yugoslavia and born in the former territories of the Republic of Croatia. This is around 50% of the total number of officers and non-commissioned officers born in the former areas of Croatia. Around 50% of them are still in the Army of Yugoslavia."

RSK, Minutes on the Thematic Session of the Government of the RSK, 6 July 1994, Annex 120.

[60] There are thousands of such personnel documents. For example under an order of the head of Personnel Administration dated 22 April 1992, 72 commanding officers of the JNA were sent for a year to the SVK. See SFRY, Chief of Personnel Administration of the Federal Secretariat for National Defence, Order No. 2-77, 22 April 1992, Annex 121.

the war, were to be transferred (with certain exceptions), to the 40th Personnel Centre from other units of the VJ. The establishment of the 40th Personnel Centre was intended to conceal the sending of VJ officers to paramilitary units on the territory of Croatia so that they could be assigned to the SVK as active members of the VJ.[61]

10.32 Also significant are the provisions on the joint authority of the commands, on the one hand, and the VJ and the SVK as a whole, on the other, with respect to transfers to the units of the so-called Army of the Republika Srpska (VRS), on the territory of Bosnia and Herzegovina. These were within the competence of the Personnel Directorate within the General Staff of the VJ (i.e., in the case of transfers within and between the SVK corps, within the competence of, respectively, the General Staff of the SVK and the corps commands).

10.33 It follows from this that the SVK and the VRS were *de facto* constituent parts of the VJ. Although they each had their own command structures, they were not, in practice, independent of the VJ. Furthermore, the Personnel Directorate of the General Staff of the Yugoslav Army was in charge of the transfers of VJ members who had been assigned ("*raspoređeni*") to the SVK, i.e., to the units of the VRS. The evidence shows that the functioning of the 40th Personnel Centre confirms the leading role of the FRY/Serbia and the VJ within the 'RSK' on the territory of Croatia.

(4) Continuing Human Rights violations faced by Croats in the rebel Serb Occupied Territories

10.34 Although the UN called for the demilitarization of the UNPAs, they were not demilitarized. Secure under the protection of the UNPROFOR, the rebel Serbs consolidated the gains of their genocidal campaign, cleansing occupied territories of non-Serbs and destroying non-Serb property (including cultural and religious monuments) in such a way as to make conditions of life impossible for Croat and other non-Serb populations.[62] The actions of the

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[61] See RSK, 18th Corps., Command no. 7-214/1, 16 April 1994, Annex 122 which describes the work of the 40th Personnel Centre. Para 4 states:

> "All persons who have been transferred cannot request the return ["povrat"] to the VJ, only the transfer ["premještaj"], while the persons who have been sent ["upućen"] may get the return. The position of the Collegiate Body is to approve the return only to the persons who were not born in Krajina and those who really have justifiable reasons (serious disease). The PU /Personnel Administration/ is responsible for the transfer into the VRS /Army of Republika Srpska/, the GŠ of the SVK is responsible for the transfer from one corps into another within the 40th KC, and within the Corps it is the Corps Command, which can be achieved through a Proposal for deployment into another unit."

[62] In Security Council Resolution 757, 30 May 1992 (which introduced wide-ranging sanctions against the FRY) the Security Council expressed its deep concern at persistent ceasefire violations, at the continued expulsion of non-Serb civilians and at the obstruction

Respondent and the rebel Serbs, described in detail in the Memorial and in earlier Chapters of this Reply,[63] were condemned by the UN and the international community, including by the UN Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia in February 1993.[64] The UN Special Rapporteur visited the UNPAs and found that "the *de facto* authorities of the self-proclaimed Serbian region of Krajina (RSK) are vigorously pursuing a policy of ethnic cleansing."[65] In another report, the UN Special Rapporteur referred to the deliberate and systematic shelling of civilian objects in Croatian towns and villages and to the resulting deaths and injuries among the civilian population.[66] The intention to prevent the return of displaced populations and refugees on a permanent basis was also noted by the General Assembly.[67] This situation continued through the years of Serb occupation.

10.35 Other members of the international community also condemned the acts of the FRY and the 'RSK'. The US State Department stated that in

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of and lack of cooperation with UNPROFOR in parts of Croatia. See also the Report of the Secretary-General pursuant to Security Council 762 (1992), 27 July 1992, paras. 14-15 which refers to expulsion, coercion and intimidation of the non-Serb populations in the UNPAs who were being compelled to leave their homes.

[63] See generally Memorial, Chapters 4 and 5 and Reply, Chapters 3 to 6.

[64] The Report submitted by Tadeus Mazowiecki, Special Rapporteur of the Commission on Human Rights, (UN doc. E/CN.4/1993/50, 10 February 1993), appointed to investigate first hand the human rights situation in the territory of the former Yugoslavia pursuant to UN Human Rights Commission Resolution 1992/S-1/1, UN doc. E/1992/22/Add.1, 14 August 1992. See also General Assembly Resolution A/RES/49/196 of 9 March 1995 in which the Assembly expressed its serious concern at the prevalence of lawlessness in the Serbian-controlled territories of Croatia and the lack of adequate protection for Croatian and non-Serb populations remaining in Serb controlled municipalities. See also the Report on the Shelling of Civilian Targets and the Victims of those Shellings, Annex 116, that sets out details of the expulsion of Croats from the UNPAs.

[65] Report submitted by Tadeus Mazowiecki, 10 February 1993, para. 143. Before the war Croats accounted for 37.1% of the total population living in the occupied territories of Croatia, while in 1993 this percentage fell to just 7%. See O. Žunec (2007), *Goli život: socijetalne dimenzije pobune Srba u Hrvatskoj* [Naked life: social dimensions of the Serb rebellion in Croatia], Zagreb, pp. 720-721.

[66] Fifth Periodic Report on the situation of human rights in the territory of the former Yugoslavia, UN doc. E/CN.4/1994/47, 17 November 1993 at para. 161. Similar findings were made in a Report of 4 November 1994, UN doc. A/49/641, UN doc. S/1994/1252.

[67] General Assembly Resolution A/RES/48/153 of 20 December 1993 urged an immediate end to the practice of ethnic cleansing and in particular that the authorities of the FRY use their influence with the self-proclaimed Serbian authorities in Croatia to bring the practice to an immediate end and reverse the effects of that practice. During the Serb occupation several hundreds of Croats who had remained in the UNPAs were killed, abandoned Croatian property was destroyed and plundered and Roman Catholic churches were destroyed. Specifically, of some 16,000 Croats who had remained in the occupied territories after the formation of UNPAs in 1992, approximately 8,000 people (mostly Croats) were systematically expelled, while around 600 were killed. See A. Bing (2007), *Put Do Erduta: Položaj Hrvatske u međunarodnoj zajednici 1994.-1995. i reintegracija hrvatskog Podunavlja,* [Path to erdut: Croatia's position in the international community 1994-1995 and the reintegration of Croatian Danube basin], *Scrinia Slavonica*, Vol. 7, No. 1, 2007:379; N. Barić, *Srpska pobuna u Hrvatskoj* [Serb Rebellion in Croatia 1990-1995], Zagreb, pp. 373-398.

1993, in the Serb-controlled portions of the UNPA's, there was no evident commitment to ending human rights abuses against the Croat population and that the Krajina Serb "authorities" continued to be among the most egregious perpetrators of human rights abuses that included killings, disappearances, beatings, harassment, forced resettlement, or exile.[68] In 1994 the US State Department found that the well-armed police and military forces of the self-proclaimed RSK continued their pattern of egregious human rights abuses including physical violence and "ethnic cleansing." It also found that of the 44,000 Croats who originally lived in Sector South, only 800 to 900 remained. In Sector North it found that only 1,000 Croats of an original population of 112,000 remained.[69]

10.36 International human rights organizations made similar findings. In its 1993 Report, Human Rights Watch stated *inter alia* that the

> "Serbian policy of "ethnic cleansing" involves the summary execution, disappearance, arbitrary detention, deportation and forcible displacement of hundreds of thousands of people on the basis of their religion or nationality. The goal is to rid all Serbian-controlled areas of non-Serbs, or at least to diminish their numbers significantly."[70]

10.37 As stated earlier, in December 1994, in a Resolution on the "situation in the occupied territories of Croatia", the UN General Assembly reaffirmed the principle of the inadmissibility of the acquisition of territory through the use of force, and urged the restoration of the authority of the Republic of Croatia in its entire territory.[71] In addition to calling upon "the Federal Republic of Yugoslavia (Serbia and Montenegro)" to fully comply with all

[68] See Croatia Human Rights Practices, 1993, U.S. Department of State, 31 January 1994. The report states inter alia:

> "Killings continued to occur in the UNPA's as part of the Belgrade-backed Serbs' program of "ethnic cleansing." [...]. Conditions in prisons within the Serb-controlled UNPA's are reliably reported to be abysmal. ... There were reports of torture and abuse in Serb-run prisons in the UNPA's. [...] In the Serb-controlled areas of the UNPA's, virtually no safegurds exist against arbitrary detention. The use of detentions to intimidate non-Serbs continued in 1993. [...]In Sector South, UNPROFOR had to provide 24-hour protection for a small Croatian village after local Serbian "authorities" announced they could no longer "protect" the inhabitants from the depredations of armed bands. [...] In Sector South and the Pink Zones, home to 44,000 ethnic Croats in 1991, there were reportedly only 1,161 ethnic Croats by year's end. In UNPA Sector East, most of the Croats have been driven out [...] The Croatian population has dropped from 46 % of the total in 1991 to approximately 6 %, whereas the Serbian population increased from 34 % to approximately 73 %. [...] There were reports of murder, rape and pillage, as well as brutal beatings against the remaining non-Serbs.

[69] See Croatia Human Rights Practices, 1994, U.S. Department of State, February 1995.

[70] Human Rights Watch World Report 1993, Situation in the Former Yugoslavia, available at http://www.hrw.org/reports/1993/WR93/.

[71] General Assembly Resolution A/RES/49/43 of 9 December 1994, Memorial, Vol.4, Annex 4, p. 25.

Security Council resolutions regarding Croatia, the UN General Assembly requested the FRY to immediately cease military and logistic support to the so self-proclaimed Serb authorities. The General Assembly also condemned the "Serbian self-proclaimed authorities in the Serbian-controlled territories of Croatia" for their militant actions that had resulted in ethnic cleansing of the UNPAs and for their constant refusal to comply with Security Council resolutions.[72] And it urged the restoration of the authority of the Republic of Croatia in the entire territory, calling for the utmost respect for human and minority rights in the territory of Croatia, including the right to autonomy in accordance with the Constitution of the Republic of Croatia and established international standards, and for efforts to achieve a political solution within the framework of the International Conference on the Former Yugoslavia (ICFY).[73]

10.38 In a 1995 Resolution, the UN General Assembly strongly condemned all violations of human rights and international humanitarian law in the Republic of Croatia and recognized, once again, that the "leadership in territories under the control of Serbs in ... Croatia, and the commanders of Serb paramilitary forces and political and military leaders in the [FRY bore] primary responsibility" for the violations.[74] It expressed serious concern at the lawlessness in the Serbian-controlled territories of Croatia and the physical violence and insecurity faced by non-Serb populations in those territories.[75]

(5) Serbian Non-Compliance with the Vance Plan Continues

10.39 As stated earlier, the FRY/Serbia and the leadership of the 'RSK' failed to comply with the Vance Plan from its very inception.[76] *First*, as noted in the Memorial, when the JNA finally withdrew from Croatia towards the end of May 1992, it left behind much of its weaponry with the Serb TO and police, in plain violation of the Vance Plan's provisions for demilitarisation.[77] *Second*, (as also admitted by the Respondent) the TO units that were to be disbanded and demobilized were transferred to "special police" and border units.[78] Thus, while

[72] *Ibid*. The Resolution reaffirmed the right of all refugees and displaced persons to return voluntarily to their homes safely and noted that the 1991 census was the basis for defining the population structure of the Republic of Croatia.

[73] *Ibid*. para. 7.

[74] General Assembly Resolution A/RES/49/196 of 10 March 1995, para. 4.

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

[76] Chapter 3, para. 3.125. The Respondent admits this in Counter Memorial, see *inter alia* para. 1118.

[77] Memorial, para. 3.47 and Reply, para. 4.86 *et seq.* See also Report of the Secretary-General pursuant to Security Council resolution 762 (1992), UN doc. S/24353, 27 July 1992, para. 5 which states that the JNA transferred its heavy weapons to Serb TOs and paramilitary units.

[78] Counter Memorial, para. 1121. See also Report of the Secretary-General pursuant to Security Council resolution 762 (1992), UN doc. S/24353, 27 July 1992, para. 7; Further Report of the Secretary-General pursuant to Security Council resolution 743 (1992), UN doc. S/24848, 24

the TOs were disbanded, and technically demobilized, their structure remained intact and available for fresh mobilization. The demobilized personnel were incorporated into eight brigades of militia (*Milicija*), and the *de facto* army and police brigades were subordinated through the Special forces units under the 'Ministry of Defence' of the 'RSK'. *Third*, these groups were equipped with automatic rifles and machine guns[79] and armoured vehicles. Recognising the failure to demilitarise and demobilize, the UN Security Council expressed concern at the creation of Serb paramilitary forces in the UNPAs and urged all parties and others concerned to comply with their obligations to withdraw and disarm under the Vance Plan.[80]

10.40 Notwithstanding these incontrovertible facts, the Respondent seeks to create the impression that it sought to demilitarize the UNPAs by referring to the withdrawal of the JNA in the spring of 1992 and the transfer of a number of the 'RSK' TOs to the RSK Police units. The Respondent admits that this was in violation of the Vance Plan,[81] but justifies this on the grounds of an alleged fear of a Croatian attack, based on events at the Miljevci Plateau to argue that their fears were justified. Subsequently, the Respondent contradicts itself: in its attempt to make its case that the Applicant committed genocide against the Serbs during Operation *Storm*, the Respondent states that Krajina was an UNPA and in it the "Krajina Serbs" were made even easier targets for the subsequent 'genocide' as they were led to believe that the UNPA status afforded them "at least some degree of safety from the Croatian forces".[82] The Respondent argues, on the one hand, that the rebel Serbs refused to disarm as they did not trust the UN forces to justify the failure to de-militarise; and, on the other hand, that these same rebel Serbs believed that the UN forces would protect them when attempting to claim that Croation forces committed genocide. Recent factual findings of the ICTY clearly contradict the Respondent's assertions. In the case of *Milan Martić*, for example, the Trial Chamber found that "[t]he evidence shows that the RSK was not demilitarised in its entirety in accordance with the Vance Plan."[83] It also found as fact that "[t]he RSK leadership was against the demilitarisation of the RSK, asserting that it would be unable to defend itself in the event of Croatian attacks."[84] The

November 1992, paras 11-12 which states *inter alia* that the "Knin Authorities" continued to obstruct demilitirization and despite "interventions at the highest levels in Belgrade....no progress has been achieved towards demobilization..." The Report also stated:

"It seemed evident that the Belgrade authorities could, if they chose, take measures which would have a strongly persuasive effect upon the Serb local authorities, especially in view of the considerable economic dependence of much of the UNPAs upon the FRY."

79 Report of the Secretary-General pursuant to Security Council resolution 762 (1992), UN doc. S/24353, 27 July 1992, para. 7.

80 Security Council Resolution 779 (1992), 6 October 1992, preamble and para. 4.

81 Counter-Memorial, para. 1121.

82 Counter-Memorial, para. 1386.

83 *Martić,* para. 152.

84 *Ibid*., para. 153.

Chamber noted "the evidence concerning the return of Croat refugees, which was a condition of the Vance Plan and which Milan Martić was clearly against and in fact obstructed."[85]

10.41 The Respondent also makes unsubstantiated allegations about Croatia's threats to resort to force, and various ceasefire violations, and claims that 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."[86] Yet it provides not a shred of evidence in support for such claims. In fact, there was no real progress between the parties. Following an initial ceasefire, the FRY/Serbia and the rebel Serbs failed to comply with the Vance Plan, and failed to discuss any international or Croatian initiatives to resolve the situation by arriving at a peaceful settlement.

10.42 The Respondent also violated other obligations under the Vance Plan, namely the return of Croat and other non-Serb refugees and displaced people to the UNPAs, and ensuring that the composition of the police forces in the UNPAs reflected the pre-conflict ethnic composition of the population. This was a central element of the Plan, and the failure to respect it undermined efforts to end the conflict.[87] In order to prevent the return of Croatian refugees and displaced persons to the UNPAs, the authorities of the 'RSK' charged Croatian refugees who fought in the Croatian forces with various criminal offences arising out of their (lawful) participation in "the armed forces of the enemy". The intention was to prevent their return. This was also clearly demonstrated by the statement by the 'RSK's' "Minister of Justice and Administration" Risto Matković, to the effect that it would be necessary to create "in the public" a climate of "persecution" of persons who "committed the crime of participating in the enemy forces."[88]

10.43 The fact that the rebel Serbs had no intention of complying with the Vance Plan is also apparent from their continuing pursuit of unification with Serbia and the Republika Srpska.

(6) The Continuation of Hostilities – 1993

10.44 There was no stablization or improvement in the UNPAs in the second half of 1992. In fact, no real progress was made towards resolving the

[85] *Ibid*., para. 341.
[86] Counter-Memorial, para. 1122.
[87] See the Further Report of the Secretary-General pursuant to Security Council resolution 721 (1991), UN doc. S/23592, 15 February 1992, paras. 16-17.
[88] Minutes of the 19th Session of the Government of the RSK, 31 December 1991, Annex 123. See also N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, p 391-393.

situation in the Serb occupied territories until early 1994.[89] In October 1992, the Security Council expressed alarm over continued ethnic cleansing and the forcible expulsion of civilians from the UNPAs, as well as over the creation of paramilitary forces in violation of the Vance Plan. It also made repeated demands for their disarmament.[90] Similarly, the Foreign Affairs Council of the European Community found increasing evidence of atrocities including mass killings and ethnic cleansing carried out principally by rebel Serb groups.[91] The ICTY Trial Chamber in *Martić* found as fact "a continuation of incidents of killings, harassement, robbery, beatings, burning or houses, theft, and destruction of churches carried out against the non-Serb population" on the territory of the 'RSK' during 1992.[92] The Trial Chamber also held that further reports of killings, intimidation and theft continued throughout 1993.[93]

10.45 By the end of 1992, the UN had come to the conclusion that it was the "authorities" of the 'RSK' that bore the greatest responsibility for the situation in the UNPAs.[94] This is confirmed by a communiqué of 3 December 1992, issued by the 'RSK's' "State Committee for Cooperation with UNPROFOR":

> "The latest report of the Secretary-General of the UN, Mr. Boutros Boutros-Ghali was expected, but not in the form and with the contents as it has been presented in the mass media. We [had] expected that in the Report the responsibility for the blockade of the peace operation will be shared between our side and the Croatian side - according to the criteria not known to us, though - but we [had] not expected that the Government of the RSK /Republic of Serbian Krajina/ would openly be called "the root cause for the impossibility of UNPROFOR's further operation". We cannot accept such qualification of the situation in the protected area, let alone the explanation which Mr. Boutros-Ghali provided in his Report." [95]

10.46 The Respondent's reliance on the February 1993 Report of the UN Secretary-General to claim that the situation in the UNPAs had stabilized by the second half of 1992 is misleading: the Report expressly singled out the non-cooperation of the rebel Serb authorities that "prevented the UNPROFOR

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[89] The fact that there was no improvement is set out the Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), UN Doc. S/25264, 10 February 1993, paras. 12-13. It states that the non-cooperation by the rebel authorities prevented UNPROFOR from establishing conditions of peace and security.

[90] Security Council 779 (1992), UN doc. S/RES/779, 6 October 1992.

[91] Declaration on Former Yugoslavia made by the Foreign Affairs Council of the European Community, Luxembourg, 5 October 1992, (UN doc. A/47/514 and S/24638).

[92] *Martić,* para. 327.

[93] *Ibid*., para. 328.

[94] See e.g. Security Council Resolution 779 (1992), UN doc. S/RES/779, 6 October 1992.

[95] RSK, State Committee for Cooperation with UNPROFOR, Public Announcement, 3 December 1992, Annex 124.

from achieving the demilitarizing of the UNPAs and the disarming of the Serb Territorial Defences and irregular forces."[96]

(a) Operation Maslenica

10.47 According to the Respondent, the Croatian "attack" against Maslenica and other locations in January 1993, halted the so-called 'improvement' of the situation and resulted in the destruction of 3 villages and the displacement of 11,000 Serbs to other parts of the 'RSK'.[97]

10.48 Yet again the Respondent presents an incomplete and misleading account of the facts. As stated above, there was no improvement in the situation, and the UN found that the Serbs were primarily responsible for the difficulties faced by UNPROFOR in fulfilling its mandate. The Respondent is also silent regarding the reason for the Operation in Maslenica that was undertaken between 22 January and 10 February 1993. That Operation aimed at re-establishing transport and communication links between the north and south of Croatia that had been severed by the 1991 occupation of this territory by the JNA and the rebel-Serbs.[98] This was the only traffic route for the supply of humanitarian and other aid to parts of Bosnia and Herzegovina under Muslim and Croat control. The Respondent also fails to mention that shortly before the Operation, the Serb authorities in Knin had rejected any negotiations on the re-establishment of transport links in the area.[99] Through this Operation, Croatia achieved a legitimate humanitarian and military objective.

10.49 On 27 January 1993, Croatian forces liberated the Peruča dam that had been held by the rebel Serb forces since late 1991, and that they had threatened to destroy. The destruction of the dam would have flooded the entire Cetina valley, leaving Dalmatia without power. As a result of the Serb control of the dam, the electrical supply system of southern Croatia (Dalmatia) was in a terrible situation throughout 1992. Prior to the liberation of the dam, the 'RSK' forces detonated explosives leaving it damaged and although it held long enough to prevent massive flooding, it resulted in a major loss of hydroelectric power for several months. It was for this reason that the Security Council approved UNPROFOR's takeover of the dam.[100]

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[96] See Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), UN doc. S/25264, 10 February 1993, paras. 12-13.

[97] Counter-Memorial, paras. 1124-1125.

[98] The destruction of the Maslenica bridge northeast of the city of Zadar, which was the main land route between northern and southern Croatia had left the Dalmatian coast accesible only by ferry (Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Central Intelligence Agency (CIA), Vol. I, p. 267).

[99] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], Zagreb, 2005, pp 184-185.

[100] Security Council 779 (1992), S/RES/779, 6 October 1992, para. 1. See also the Report of the Secretary-General pursuant to Security Council Resolution 871 (1993), UN Doc. S/1994/300, 16 March 1994, para. 15. Annex 125.

10.50 In its description of the Operation, the Respondent again selectively quotes from the CIA report. Even this publication details the direct assistance provided by Belgrade to the 'RSK' and notes that both the Bosnian Serb Army and Belgrade dispatched re-inforcements to strengthen the SVK and help launch counter-attacks to regain some of the lost ground. It mentions the Serbian Volunteer Guard (personally led by Željko Ražnatović Arkan) fought against Croatian forces.[101]

10.51 The Respondent claims that after Operation *Maslenica* the 'RSK' lost confidence in UNPROFOR's ability to protect the Serb population and Croatian forces never retreated to the positions they held before it, despite having been called upon to do so by the Security Council.[102] It fails to state that in the same Resolution the UN Security Council also expressed deep concern about the "lack of cooperation in recent months by the Serb local authorities" and their "threats to widen the conflict. "[103] The Respondent admits that after these events there was a remobilization of rebel Serb forces throughout the 'RSK', and that rebel Serbs removed their stored weapons, including heavy weapons from UN controlled storage areas.[104] The same Security Council Resolution demanded the immediate return of the weapons.[105]

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10.52 In the following months, the position of the remaining Croats in the UNPAs worsened. They were "relentlessly persecuted, suffering murder, assaults, threats, armed theft and arson," and UNPROFOR had to establish protected villages and also help relocate "several hundred vulnerable civilians to security in Croatia"[106] Rebel Serb authorities imposed restrictions on the freedom of movement of the UN Military Observers and the UN Civilian police restricting their ability to report on ceasefire matters or humanitarian situations.[107] Serb attitudes towards the UNPROFOR "gravely deteriorated"; several incidents were reported including the killing of at least three UNPROFOR personnel (of which two were murdered) and threats to take hostages or exact revenge on UNPROFOR personnel.[108]

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[101] See Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Central Intelligence Agency (CIA), Vol. I, p. 268

[102] Counter-Memorial, para. 1126.

[103] Security Council Resolution 802 (1993), UN doc. S/RES/802, 25 January 1993, fifth preambular paragraph.

[104] Counter-Memorial, paras. 1124, 1127.

[105] Security Council Resolution 802 (1993), UN doc. S/RES/802, 25 January 1993, paras. 3, 8.

[106] Report of the Secretary-General pursuant to Security Council Resolution 815 (1993), UN Doc. S/25777, 15 May 1993, para. 9.

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

[108] *Ibid*., para. 15.

10.53 The UN Secretary General once again found that the non-cooperation of the rebel Serbs was preventing the successful implemention of UNPROFOR's mandate. He stated that the local Serb leadership was "repeatedly" told that the "only basis for settlement was their acceptance of Croatian sovereignty in return for guarantees of their minority rights. They never accepted this position…"[109] Serb leaders in the UNPAs continued to reject the idea of being a part of Croatia, asserting that "minority status" within the Republic of Croatia was unacceptable to them.[110]

10.54 Despite the rebel Serbs' disregard for the Vance Plan and the worsening situation of the Croats in the UNPAs, Croatia continued to hope for a peaceful solution while recognising that it had the right to establish control over its entire territory. Contrary to the Respondent's allegation, President Tuđman did not publicly threaten that Croatia would attack the UNPAs if it considered that UNPROFOR was unable to fulfil the terms of its mandate.[111] He stated that in the event of a failure of the peacekeeping forces to fulfil their mandate, Croatia had the right to establish its territorial integrity *inter alia* by military means. However, the use of armed force was not Croatia's first option. The Republic of Croatia considered that UNPROFOR should be given enforcement powers to oblige the Serbs to comply with Security Council Resolutions, and to do so with specific objectives against a set timetable, failing which it would not agree to further extensions of UNPROFOR's mandate.[112]

(b) The Medak Pocket

10.55 In 1991, much of the interior of the Lika region of southern Croatia was captured by the rebel Serb forces together with the JNA. They then established the 'RSK'. Almost all the Croat population in the area was killed, expelled, or forced to seek refuge in other parts of Croatia. From April 1991, the rebel Serbs continued shelling major Croatian cities like Zadar, Šibenik and Gospić.[113] Gospić was one of the main targets with much of the shelling coming from the rebel Serb-controlled Medak Pocket, about 10 kilometres away.

10.56 The rebel Serbs continued to target civilians, facilities and infrastructure, and conducted frequent incursions to carry out raids, abductions and murders against Croatian civilians. During 1993, artillery attacks on Gospić intensified, their severity and frequency being such that it became practically impossible to organise everyday life and the functioning of civilian

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[109] This was made explicit in Resolution 815, where the Security Council stated that it supported efforts to help define the future status of the territories comprising the UNPAs, which were integral parts of the territory of Croatia. Security Council Resolution 815, UN doc. S/RES/815, 30 March 1993, paras. 4-5.

[110] *Ibid*., para. 12.

[111] Counter Memorial, para. 1126.

[112] Security Council Resolution 815, UN doc. S/RES/815, 30 March 1993, para. 19.

[113] See *Martić,* paras. 317-320.

authorities.[114] It was This state of affairs in Gospić and its surroundings, as

[114] With a view to providing a comprehensive overview of the extreme difficulties faced in the town of Gospić find below a chronological list of the incidents that preceded the Operation Medak Pocket in 1993 alone.

- January 28 – Two mortar projectiles fired from Medak at Croatian Army positions in Oranice and ten more at Bilaj and Ribnik;
- February 3 – Over 70 mortar projectiles, 15 tank projectiles and 20 shells from recoilless guns fired from the Medak Pocket area at Gospić and its surroundings. Enormous material damage inflicted on civilian facilities;
- February 5 – An attack by the combat helicopter S.A. 314 from the direction of Medak, 8 Maljutka missiles were fired;
- February 10 – An attempted infantry attack at night towards Klis, i.e. Bilaj, from the direction of Divoselo and Barlete;
- February 25 – An artillery attack from positions in Barlete and Njegovani on the Croatian Army positions in Bilaj and Ribnik and the town itself. 11 wounded soldiers and civilians admitted to the Gospić general hospital; three ambulances were destroyed and significant material damage caused;
- March 2 – 3 Large-calibre shells fell on the town at about 11:30 p.m.;
- March 16 – Artillery strikes from Medak against defenders' positions and the town itself, wounding two civilians and one child in Gospić;
- March 21 – More than 30 mortar shells fired at the town from positions in Divoselo;
- March 22 – Another attack of greater intensity. Around 80 various calibre shells fired;
- March 23 – The intensity of artillery attacks on the frontlines and Gospić increased. Also indiscriminate strikes from multiple rocket launchers, mortar, tanks and howitzers so that 180 missiles fell on the city alone. A general alert was sounded in Gospić, citizens went to shelters, the material damage inflicted was incalculable. One civilian was killed and another wounded;
- April 22 – An artillery attack against Gospić, started at 6:45 a.m. More than 500 various calibre shells fell on the city by the end of the day. Two civilians were killed and five wounded. This was one of the fiercest attacks since the war started.
- April 28 – Seven artillery projectiles fell on Gospić. Provocations continue into the next day when 2 defenders are killed by sniper and artillery fire at Croatian Army positions in Medovača;
- May 30 – Around 150 shells were fired from the Medak Pocket area at Gospić and its surroundings. One civilian was killed and six were wounded. Attacks were directed exclusively at civilian targets. Enormous material damage.
- June 17 – Indiscriminate shelling of the wider area of Gospić. Rebel serbs used an Orkan missile system to fire 20 projectiles into the town;
- June 22 – around ten various calibre shells fired into the town;
- June 30 – Four heavy-weight projectiles fired from SVK artillery positions in Vrebac into the town.
- 5 July - More heavy-weight projectiles fired;
- July 6 – 12 mortar shells fired from Serb positions in Divoselo and Vrebac fell on the town;
- July 15 – In one of the fiercest artillery attacks on Gospić during the previous three months, around 500 projectiles were fired at Gospić causing significant material damage to civilian locations. One civilian killed and several wounded.;

well as its importance in securing lines of communication between Dalmatia and the rest of Croatia, that necessitated Operation *Medak Pocket*.[115]

10.57 As a result of the Operation, the rebel Serbs were pushed back some 10 km from Gospić into the occupied territory towards Medak, liberating the rebel Serb-occupied strongholds of Divoselo, Čitluk and Počitelj from where Gospić and its surroundings had been shelled every day. Although Gospić remained within the range of the SVK heavy artillery, the operation eliminated a direct threat to the civilian population and ensured the basic preconditions for the normalization of life and the functioning of the economy and transport links within a wider area.

10.58 The Respondent makes various allegations regarding the limited Croatian operations in the Medak Pocket that sought to eliminate the threat posed to Gospić by Serb shelling, It alleges *inter alia* that the Croatian attack was accompanied by ethnic cleansing and arbitrary executions and the destruction and damage of certain hamlets in the area.[116] The allegations of ethnic cleansing and arbitrary executions are unsupported by any evidence.

10.59 The Respondent's selective use of evidence is clear: it cites a November 1993 Report of the Special Rapporteur of the Commission on Human Rights with regard to the events in the Medak Pocket, but not the Final Report of the UN Commission of Experts, on the Medak Investigation, of 28 December 1994.[117] After a detailed investigation, the UN team found "no evidence implicating any specific identifiable individual in the direct planning, instigation, ordering, commission, aiding or abetting of any of these crimes."[118]

- July 16 – Fierce artillery attacks continue;
- August – Throughout August there was indiscriminate and occasional artillery strikes on Gospić. Several civilians were wounded and there were continual armed provocations.
- August 5 – Several artillery projectiles fired and sporadic fire from infantry weapons.
- September – Throughout September there was sporadic shelling. A state of general alert was declared in Gospić for 30 days; there were frequent armed provocations by the SVK. Two members of the Croatian Special Police were ambushed and brutally murdered in the Velebit area, and their bodies were found later, completely naked and mutilated.
- September 9 – The military and police Operation Medak Pocket was launched on the 36th day of the state of general alert. On that date the rebel Serbs sporadically shelled the town and its surroundings in retaliation for the setbacks they had suffered at the battlefront, killing 4 civilians and wounding 11.

[115] Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Central Intelligence Agency (CIA), Vol. I, p. 269.

[116] Counter-Memorial, paras. 1130-1132.

[117] Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN doc. S/1994/674/Add.2 (Vol. I) Annex VII, Medak Investigation, 28 December 1994, Annex 126.

[118] *Ibid*., para. 72

It therefore, concentrated on indirect, *i.e*. command responsibility. With respect to the one example of first hand evidence of murder – that of an 83-year-old blind woman - it found "serious discrepancies" between two witnesses.[119] The investigation found "no convincing general pattern of the deaths occurring in the pocket" and found that the majority (71%) of the located dead were military personnel.[120] As regards the allegation that the presence of latex surgical gloves indicated that the Croats were moving bodies to hide evidence,[121] the Report found their presence "ambiguous" and noted that these "may have simply been ordinary precautions by the Croats to deal with the legitimate dead and wounded anticipated in any attack. The photographs of Canbat I personnel show them also using surgical gloves."[122] The investigation found that initial postmortem examinations and examinations conducted by the Serb authorities were "unsatisfactory" and the conclusions reached were "unreliable."[123] It also found local witnesses "unreliable" or "contradictory."[124]

10.60 Admittedly, the Report concluded there was wanton destruction and recomended that two Croatian officers be charged with war crimes.[125] The ICTY indicted Croatian Generals Ademi and Norac in relation to the events in the Medak Pocket.[126] In 2005, at the request of the Prosecutor, the cases were transferred to Croatian Courts.[127] On 30 May 2008, the Zagreb District Court sentenced General Norac to 7 years imprisonment for war crimes, while General Ademi was acquitted of all charges. It is noteworthy that the Applicant, unlike the Respondent, has tried and convicted senior military officials for violations of international humanitarian law, irrespective of the ethnicity of the victims.

10.61 The Respondent admits that immediately after the Croatian forces launched the operation in the Medak Pocket rebel Serb forces retaliated by shelling the Croat frontline and urban targets.[128] The rebel Serb forces mounted artillery attacks against Karlovac and targets near Zagreb were hit by *Orkan* rockets. They also threatened to hit 20-30 other targets in Croatia.[129] This was in keeping with their well-established "real threat strategy" that was introduced by the 'RSK' in the summer of 1993. It was based on the

[119] *Ibid*., para. 74
[120] *Ibid*., para. 76
[121] Counter-Memorial, para. 1131.
[122] Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, Annex VII, Medak Investigation, 28 December 1994, Annex 126, para. 77.
[123] *Ibid*., paras. 78, 80.
[124] *Ibid*., paras. 81, 86.
[125] *Ibid*., para. 107
[126] Counter-Memorial, paras. 1133-1134. See ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Consolidated Indictment.
[127] See further Chapter 2, para. 2.79.
[128] Counter-Memorial, para. 1130.
[129] Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Central Intelligence Agency (CIA), Vol. I, p. 269.

assumption that a Croatian offensive "against the RSK would set off....large scale counter-actions targeting vital facilities and objectives in Croatia and resulting in demolition, destruction and manpower losses, which the Croatian side would find unacceptable." It was believed that this was the only way by which the rebel Serb's "could force Croatia to accept the Krajina and its armed forces as a serious opponent and negotiating partner."[130]

SECTION III: CONTINUING EFFORTS TO ARRIVE AT A PEACEFUL SOLUTION

(1) The Daruvar Agreement of February 1993

10.62 The Respondent repeatedly alleges that Croatia sought to act militarily and accordingly makes little mention of the various initiatives to arrive at a peaceful settlement. For example no mention is made of the Daruvar Agreement that came about as a result of negotiations between the Croatian authorities and some members of the rebel Serb "government" who favoured a peaceful solution and a normalisation of relations between Croats and Serbs. The Daruvar Agreement was signed on 18 February 1993. It envisaged the re-opening of roads, the return of all refugees and normal functioning of government in Daruvar, Grubišno Polje, Nova Gradiška, Novska and Pakrac Municipality.[131] The Agreement recognised Croatian sovereignty over the former municipalities of Daruvar, Grubišno Polje, Nova Gradiška and Pakrac. The "Agreement" was signed by Ivan Milas (Vice President of Croatia), and Veljko Džakula (Deputy Prime Minister of the 'RSK' government and president of the "Municipal District of Western Slavonia") and his associates on behalf of the rebel Serbs, [132] and was witnessed by Gerard Fischer on behalf of UNPROFOR and two other members of the international forces.

10.63 Shortly thereafter, on 20 April 1993, the majority of the representatives at the first session of the first regular sitting of the "RSK Assembly" in Okučani, expressed disapproval of the "Agreement."[133] Soon after its signing, Džakula and his associates were removed from all political functions. Džakula was then arrested, maltreated and imprisoned in Knin and Glina, accused of treason.[134] A former JNA General Aleksandar Vasiljević testified at the ICTY

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130 R. Radinović, *Realna pretnja na delu* [Real threat at work] cited in Davor Marijan, *Storm*, Zagreb, August 2010, p. 45.

131 See the Daruvar Agreement, 18 February 1993, Annex 127.

132 *Ibid*. The associates included Dušan Ećimović (minister of information in the 'RSK' Government of the prime minister Zdravko Zečević), Milan Vlaisavljević, Mladen Kulić (president of the Regional Committee of the Serb Democratic Party for Western Slavonia), Đorđe Lovrić and Milan Radaković.

133 For eg., a representative in the 'RSK' Assembly from Daruvar Milan Trešnjić stated at the session in Okučani that he did not want autonomy and local self-government, that he could have had this before the war as well but had not wanted this. Referring to the Daruvar Agreement he stated: "This territory is now held by the Ustashas, people want to return but not under the Ustasha rule – never!"

134 See Igor Palija, *Peacemaker*, *Identitet*, March 2008, Annex 128.

regarding the assault of Džakula in Knin by members of the Red Berets.[135]

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10.64 In October 1993, the UN Security Council reaffirmed the importance of the full and prompt implementation of the peacekeeping plan, including the provisions for demilitarization of the UNPAs. It called upon the signatories of the plan, in particular the FRY (Serbia and Montenegro), to cooperate in the full implementation, stressing that the first step was restoring the authority of Croatia over the pink zones.[136] The UN Security Council called for an immediate ceasefire and its unconditional implementation, and for an agreement on confidence-building measures including the restoration of electricity, water, and communications in all regions of Croatia, including the UNPAs. It also called for uninterrupted traffic across the Maslenica strait and stressed in this context the importance of opening the railroad between Zagreb and Split, the highway between Zagreb and Županja, and the Adriatic oil pipeline.[137]

10.65 In November 1993, the parties held talks on a ceasefire agreement, agreeing to establish a military joint commission to take on practical work on details of a ceasefire, and on economic matters, in particular issues related to infrastructure and communications, energy and water supply.[138] On 29 March 1994, Croatia and representatives of the 'RSK' signed a general ceasefire agreement aimed at achieving and ensuring a lasting cessation of hostilities.[139] The Ceasefire Agreement generally held till May 1995.

10.66 The Respondent attempts to portray a picture of continuing progress. This was not the case. Any expectations for agreement on issues of mutual economic benefit, followed by talks on a final political settlement, were brought to an end in April and May 1994, when the rebel Serb authorities in Knin issued statements closing the door on political reconciliation, including announcements of their intention to pursue full integration with other Serb areas. Talks scheduled for 16 and 17 June 1994 were cancelled and opening negotiations through the summer of 1994 proved impossible.[140] Ambassador

[135] At the ICTY, General Aleksandar Vasiljević's stated as follows:

> "The Red Berets and their 'operations'
>
> The second such operation was the placing of a plastic bag over the head of Veljko Džakula who was also a political leader of Western Slavonia. I think his name is Veljko Džakula. After they had beaten him up, they were taking him around Knin where they accused him of high treason because he wanted to cooperate with the Croats and had forced the Serbs to stay in Croatia, and later he was released."

[136] Security Council Resolution 871 (1993), UN doc. S/RES/871, 3 October 1993, paras. 4 and 7.

[137] *Ibid*., paras. 6 and 8.

[138] See Report of the Secretary-General pursuant to Security Council Resolution 871 (1993), 1 December 1993, UN Doc. S/26828, paras. 4-8. See Counter-Memorial, para. 1135.

[139] Counter-Memorial, para. 1136.

[140] Report of the Secretary-General pursuant to Security Council Resolution 908 (1994), 17 September 1994,

Galbraith, the US Ambassador in Zagreb, testified to this at Milošević's trial.[141]

10.67 The negotiations then focused on an economic cooperation agreement that envisaged co-operation with respect to the supply of water and electricity, the opening of the Adriatic oil pipeline and the highway. An Economic Agreement was signed on 2 December 1994. On 21 December 1994, the Zagreb-Belgrade highway was opened in Sectors East and West.[142] Despite the Respondent's claims of progress in the relationship between Zagreb and the rebel Serbs, the rebel Serbs, particularly Martić, did not demonstrate any desire to fully implement the agreement. Instead, they sought closer ties with Serbia and the Republika Srpska.

(2) Rebel Serbs strive for Unification with Serbia and the RS

10.68 As political and economic negotiations were underway, the rebel Serbs continued with an agenda supportive of 'Greater Serbia' and 'one state for all Serbs'. After the imprisonment of the supporters of the "Daruvar Agreement", the rebel Serb leadership headed by the president of the 'RSK', Goran Hadžić, with the support of Serbia and Republika Srpska, continued to call for the unification of all Serb-populated areas of the former SFRY (the 'RSK' in Croatia and and Republika Srpska in Bosnia and Herzegovina, respectively) with Serbia and Montenegro, i.e., then FRY. An important step towards unification took place at a joint session of the "Assemblies" of the 'RSK' and Republika Srpska held in Bosanski on 24 April 1993. During this session a joint Assembly of the two entities was established with its seat in Banja Luka, together with a Council of Ministers which would act as an executive "government" of the two entities, and a co-ordination Board of senior "officials" from the two entities with particular responsibility for issues of mutual interest.[143] On 5 June 1993 the joint "Assembly" ordered a referendum to determine the issue of unification. This referendum took place on 19 and 20 June 1993, the question being: "Are you in favour of a sovereign republic of Serbian Krajina, and its unification in a single state with Republika

UN Doc. S/1994/1067, para. 4.

[141] See testimony of Ambassador Galbraith at the *Milošević*, Transcript, 26 June 2003, p. 23149. He stated:

> "The difficulty was that the Krajina Serbs refused to engage seriously for a very long period of time on the economic and confidence-building measures. They played ridiculous games, canceling meetings because the Croatians wanted to bring five journalists instead of two and all sorts of insane and bizarre behaviours which indicated to us, the mediators, and, I have to say, to the Croatian Government that they weren't serious. And when the time came following the signing of an economic and confidence-building measures to present a political plan, they refused to even receive this plan. And you, when you had an opportunity to help, provided no help."

[142] Counter-Memorial, para. 1137.

[143] Nikica Barić, *Srpska pobuna u Hrvatskoj*, p. 198. See the Decision of the Joint session of the "Assemblies" of the 'RSK' and Republika Srpska, 24 April 1993, Annex 129. See also the Proposal of the "Assemblies" of the 'RSK' and Republika Srpska, 18 August 1994, Annex 130.

Srpska and other Serb states?" The referendum result was overwhelming in favour of unification (98.6 % of the registered voters answered "Yes").[144]

10.69 On 10 November 1994, the "Assembly" of the 'RSK' adopted a Resolution entitled "Position of the RSK and Options of All-Serbian Unification" that provided for the integration of the 'RSK', the FRY and Republika Srpska (in Bosnia).[145] On 29 May 1995, a "Decision of the RSK Assembly on the Giving of Consent for the Constitutional Act on the Provisional Constitutional Order of the Unified Republika Srpska" was adopted in Knin.[146] These decisions had been preceeded by numerous earlier resolutions on Serb unification adopted since 1991.[147] The Respondent is silent about all these developments.

10.70 In an interview published in July 1995 Mile Mrkšić, a Lieutenant General in the SVK (since convicted by the ICTY for crimes committed in Vukovar) stated that the SVK must be properly organised, whether the 'RSK' was to be incorporated in a single state with the Republika Srpska, or annexed to the FRY. On the occasion of St. Vitus' day, he issued congratulations to the forces under his command, expressing the hope that by the following St. Vitus' Day the Serbs will be "united in the one Serb state."[148]

(3) End of the UNPROFOR Mandate

10.71 Ignoring the events described above, the Respondent contends that in the midst of this phase of "cautious optimism"[149], on 12 January 1995, President Tuđman and the Croatian Government declared that Croatia would not agree to a further extension of UNPROFOR's mandate and that this

[144] Nikica Barić, *Srpska pobuna u Hrvatskoj*, p. 199.

[145] S. Radulović (1996) *Sudbina Krajine* [Krajina's Destiny], S.1: graph, p. 164., quoted in Žunec, 2007:746.

[146] See Minutes of the Session of the Assembly of the Republic of Serbian Krajina which Approved the Decision on State Unification with Republika Srpska, 29 May 1995, Annex 131.

[147] See for example:

- *Decision on the Annexation of SAO Krajina to the Republic of Serbia* adopted by the SAO Krajina's Executive Council on 1 April 1991 in Knin;
- *Declaration on the Unification of the Association of the Municipalities of Bosnia Krajina and the SAO Krajina* adopted in Knin on 27 June 1991;
- *Declaration on the Unification of RSK and RS,* 31 October 1992, in Prijedor

See Davor Marijan, Storm, Zagreb, 2010, p. 178.

[148] See excerpt from the Interview with the SVK Lieutenant General Mile Mrkšić, Vojska Krajine, 11 June 1995, Annex 132.

[149] Counter-Memorial, para. 1137.

caused great concern to the UN Secretary General.[150] The Respondent alleges that "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."[151] This is not correct, and the Respondent's claim is not supported by the evidence before the Court.

10.72 As noted, Croatia recognised that it might have to take steps by military means to restore its authority over the areas illegally occupied by the rebel Serbs. However Croatia did not give up hope for a peaceful solution. Through 1993 and 1994 this sentiment was expressed several times by President Tuđman.[152] In late August 1994, in an interview on Croatian Television, he demanded that the problem of the UNPAs be resolved in a peaceful way with international assistance, failing which Croatia would resort to other means for achieving its territorial integrity. President Tuđman stated that a final peaceful solution could not mean a federalisation of Croatia into a "Croatian" part and a "Serbian" part; however, in line with its Constitutional Law, Croatia was ready to guarantee Serbs autonomy in the districts of Glina and Knin, where they constituted a majority prior to the outbreak of the conflict.[153] Responding to a question about whether Croatia was ready to resolve the problem of the UNPAs militarily, President Tuđman stated:

> "… the Croatian army has to hold back and we even have to convince our citizens, not just the Croatian people but all citizens of Croatia,

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[150] Counter-Memorial, para. 1138.

[151] *Ibid*. A similar allegation is repeated in para. 1143. No authoratative evidence is cited in support of this. The Respondent refers to the memoirs of General Bobetko which are clearly not authoritative in this regard. See J. Bobetko, *Sve moje bitke* [All My Battles], Zagreb, 1996, pp. 400 & 407, Counter-Memorial, Annex 50.

[152] For example, on 30 June 1993, in a speech to officers of the Croatian Army, President Tuđman expressed his understanding of the frustrations of Croatian citizens and the Army, who wished to restore Croatian authority over the areas under Serb control since 1991. He stated that the Croatian leadership was aspiring to integrate these areas in a peaceful way and that, as a last resort, this would be done militarily. In the same speech, Tuđman voiced the hope that the war would be brought to an end without further conflicts and with more efficient action by the UN peacekeeping forces. See excerpt from Franjo Tuđman, Zna se, HDZ u borbi za samostalnost Hrvatske [It is known: HDZ in the Struggle for the Independence of Croatia], Zagreb, 1993, pp. 190-195, Annex 133. In December 1993, with respect to the Serb rebellion and Croatia's right to exercise its sovereignty over the occupied territories, the President stated:

> > "We are trying to achieve this by peaceful political means, in co-operation with the international community, but it is also our obligation to have the Croatian Armed forces trained so that any given moment, if need be, they are able to liberate on their own every centimetre of Croatian territory"

See "We rely on the road of peace, but also on the Croatian army", *Vjesnik*, 28 December 1993, p. 1, Annex 134.

[153] *Strpljivošću do rješenja*, [Patiently to the Solution], *Večernji list* (Zagreb), 28 August 1994, p 3, Annex 135.

> that we must be patient so that our policy can contribute to the efforts of democratic European and international forces to resolve this conflict without further escalation of hostilities, and in order to create the preconditions for establishing a new international order on the territory of the former Yugoslavia, in South-eastern Europe, to which Croatia belongs as a Mediterranean and Central European state, as well as on the territory of Balkans that is constantly in turmoil. "[154]

10.73 These statements by the Croatian President, as head of state and commander-in-chief of the armed forces, were reasonable and justified. In the event that UN peacekeeping forces failed to fulfill the terms of their mandate, Croatia was entitled to realize its full sovereignty and territorial integrity by military means, if necessary.[155] That said, Croatia was fully committed, initially, to finding a political solution to the "Yugoslav crisis" and later to the problem of the occupied territories of the Republic of Croatia. It was as a result of this commitment, in the face of the persistent violations of the Vance Plan by the FRY/Serbia and the rebel Serbs that Croatia sought to achieve the objectives of the Economic Agreement in which it continued to be thwarted by rebel Serbs.[156]

10.74 Croatia's wish not to extend UNPROFOR's mandate after 31 March 1995, resulted from the failure of the peacekeeping forces to perform the functions it was tasked with. The Secretary General recognised this in a number of reports[157] and noted that its only success was the withdrawal of the JNA from the territory of Croatia.[158] However even this was incomplete, since the JNA continued to occupy the Prevlaka peninsula until late 1992, and had left its weapons behind.

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[154] *Ibid*.

[155] The views of the President were echoed by Croatia's top military and political leaders. Jure Radić, at that time the head of the Office of the President of the Republic, stated: "Croatia's top leadership opted for the path of negotiations ... but if this path does not lead to success, the Croatian Army will through muscle power reach the boundaries of the Republic of Croatia." See *Vjesnik*, 2 May 1994. Similarly General Đuro Dečak, commander of the Osijek Military District of the HV, stated: "If...peaceful means do not prove successful, we will also use military power." See *Večernji list*, 3 May 1994.

[156] The success of peaceful integration and the implementation of the Economic Agreement were not dependent on Zagreb, but rather on the readiness of Knin to fully implement the Economic Agreement. Knin, however, did not demonstrate the required readiness; in fact the resistance to the implementation of the Agreement grew greater among the Krajina Serbs. N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp 259-271, 488-492.

[157] The Secretary General recognised the failure of UNPROFOR to demilitarize the UNPAs; protect all persons there from fear of armed attack; ensure that the local police carried out their duties without discrimination and facilitate the return of displaced persons to their homes in the UNPAs. See also Security Council Resolution 981 of 31 March 1995 that stated that maor provisions of the peace-keeping plan remained to be implemented.

[158] See *inter alia* Report of the Secretary-General pursuant to Security Council Resolution 871 (1993), UN Doc. S/1994/300, 16 March 1994, para. 8. Annex 125.

10.75 Between June 1992 (when its mandate was extended by the Security Council[159]) and early 1995, UNPROFOR was unable to perform it principle task "to monitor the re-introduction of Croatian government authority in the areas controlled by Serb forces […] (the so called pink zones)." In a statement, the President of the Security Council stated that:

> "The Security Council reiterates its commitment to the sovereignty and territorial integrity of the Republic of Croatia within its internationally recognized borders. It understands the concerns of the Croatian Government about the lack of implementation of major provisions of the United Nations Peace-keeping Plan for Croatia. It will not accept the status quo becoming an indefinite situation." [160]

10.76 The Secretary General also stated that the Serb side had 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'.[161] He stated that the prevailing situation had "left UNPROFOR in the invidious position of, in effect, administering a stalemate in the UNPAs."[162] In these circumstances, Croatia's decision was justified.

10.77 On 12 March 1995, Croatia announced its readiness to negotiate a new mandate for a peacekeeping force with the Security Council.[163] A statement made by President Tuđman in a private meeting in late March 1995 demonstrates that he viewed the new UN mandate and the successful implementation of the Economic Agreement as opportunities for peaceful reintegration of the areas under Serb control. He concluded that Croatia had achieved success by accepting the UN Confidence Restoration Operation in Croatia (UNCRO), since this force would acquire control over the internationally recognised Croatian borders and hoped that the new UN mandate would enable the establishment of Croatia's territorial integrity, without intervention by the Croatian Army.[164] He recognised that the restoration of Croatian control over

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[159] Security Council Resolution 762 of 30 June 1992.

[160] Statement by the President of the Security Council, (S/PRST/1995/2), 17 January 1995.

[161] See Report of the Secretary-General pursuant to Security Council Resolution 871 (1993), UN Doc. S/1994/300, 16 March 1994, para. 8. Annex 125.

[162] *Ibid*., para. 10. The Secretary-General expressed similar views in his Report dated the 17 September 1994.

[163] In his letter to the Secretary General, President Tudman stressed that the cancellation of the UNPROFOR mandate did not imply that Croatia was desisting from a peaceful settlement of the conflict with the rebel Serbs and that it was instead an endeavour to reach an agreement through direct negotiations between Zagreb and Knin.

[164] The minutes from a meeting between President Tuđman with a delegation of the high-ranking officials of Herceg-Bosnia and the HDZ of Bosnia and Herzegovina, held on 27 March 1995 in the Office of the President. An excerpt was published in Predrag Lucić (ed.), Stenogrami o podjeli Bosne (Shorthand Notes on the Division of Bosnia), Split, Sarajevo, 2005, Book II, pp 399-448, Annex 136, wherein the President stated:

the occupied areas by military means would lead to further losses and would also be unacceptable to the international community. While not excluding the possibility of a Croatian military intervention, he hoped that the new UN mandate and the implementation of the Economic Agreement would lead to the "erosion" of the 'RSK' and ultimately to the peaceful reintegration of these areas into Croatia.

10.78 The Respondent claims that the Croatian refusal to extend the UNPROFOR's mandate was the cause of the postponement of the implementation of the Economic Agreement by the 'RSK', as well as their rejection of the draft Zagreb-4 Plan (Z-4 Plan), and that led to "a significant escalation in military activity and tension between the two sides."[165] This is wrong and not supported by the evidence before the Court: this is clear from the fact that even after Croatia agreed to the new UN mandate the rebel Serbs failed to comply with the Economic Agreement or agree to the Z-4 Plan. In fact they continued to pursue unification with the Republika Srpska. Croatia's decision not to renew UNPROFOR's mandate merely served as an excuse to stall progress on a political solution.

10.79 The Z-4 Plan[166] envisaged a high degree of autonomy within Croatia for the Krajina region and provided that Eastern Slavonia, Baranja, and Western Sirmium, and Western Slavonia would be reincorporated into Croatia with lesser forms of autonomy. The Z-4 Plan provided for a five-year transition period for the restoration of full sovereignty for Croatia.[167] The Plan was presented to Croatia and the rebel Serb leadership on 30 January 1995. Croatia, with some reservations, accepted the Plan, while the Respondent claims that the rebel Serbs declined to negotiate because of Croatia's decision not to extend UNPROFOR's mandate. The evidence before the Court tells a different story. The 'RSK's' rejection of the Z-4 Plan was not prompted by Croatia's decision not to extend UNPROFOR's mandate: it was part of a policy to negotiate with Croatia as representatives of a sovereign state whereas the international community recognised that the UNPAs were integral parts of the territory of Croatia and that it had a right to preserve its territorial integrity.[168]

(...) to resolve this Serb issue in Croatia providing guarantees of these national minority rights. And this process is running, the motorway is in operation, the oil pipeline works, the railway line through Okučani will be opened for traffic, most probably by the end of this week, and by the middle of the month the line to Belgrade as well; thus a link between Zagreb – Europe – Belgrade – Thessalonike will be established and we are getting ready for opening for traffic the railway line Zagreb-Knin-Split. This means, if we manage to achieve this in this way, when we once drive through Knin 90% of the problem will be resolved.

165 Counter-Memorial, para. 1139.

166 The Z-4 Plan or the Zagreb 4 peace proposal was made by the Zagreb 4 group (also known as the Mini Contact Group).

167 See *Martić*, para. 157.

168 N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp. 474-480.

10.80 On 8 February 1995, the Assembly of the 'RSK' decided to postpone the implementation of the economic agreement.[169] This affected further negotiations on the political agreement and the officials of the 'RSK' refused to accept the draft 'Z-4 Plan' until the extension of UNPROFOR's mandate had been assured.

10.81 The Respondent claims that it was Croatia's decision not to extend the UNPROFOR mandate that resulted in the Serb refusal to discuss the Z-4 Plan. In fact, as shown above, Croatia's decision was taken only after the "Assembly" of the 'RSK' had adopted a series of resolutions aimed at unification with the Republika Srpska and with Serbia. The real reasons for the Serb refusal to implement the Z-4 Plan are clear from the 30 January 1995 communication to the units of the Serb Army of Krajina:

> "A mini contact group headed by U.S. Ambassador Peter Galbraith will try to impose the Z-4 Plan as the basis for political negotiations between the Republic of Croatia and the RSK. The Plan has been drawn up with the Republic of Croatia and at the expense of the RSK. The Plan provides for the annulment of the Vance Plan and the RSK's relinquishment of its political and economic sovereignty by accepting the status of autonomy. It is the opinion of the RSK that the Plan should be rejected, because it has not been prepared in such a manner that would favour the interests of the RSK. It is expected that the "mini contact group" will release the contents of the Plan for the political solution between the Republic of Croatia and the RSK in the course of 30 or 31 January 1995."[170]

10.82 As stated above, the non-renewal of UNPROFOR's mandate was merely a pretext to avoid implementing the Economic Agreement and negotiating for a peaceful settlement. This was confirmed when Croatia agreed to the UNCRO but the rebel Serbs failed to initiate negotiations on the Z-4 Plan instead expressing dissatisfaction with the new mandate.[171] This was also recognised by the ICTY Trial Chamber in *Martić*.[172]

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[169] See Chapter 11, para. 11.18.

[170] Military Post 9138, No. 32-14, Glina, 30 January 1995, Annex 137.

[171] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], Zagreb, 2005, pp. 489-490.

[172] *Martić,* para. 157, which states:

> "On 30 January 1995, Milan Martić, as President of the RSK, refused to accept the Z-4 Plan, as Croatia had announced that it would not accept an extension of UNPROFOR's mandate. The mandate was eventually extended in March 1995 and focused on reconstruction and cooperation, however Milan Martić continued to refuse to negociate the Z-4 Plan because the reshaped UNPROFOR, now called UNCRO, was not a protection force. *There is evidence that Milan Martić acted under the instruction of Slobodan Milošević to reject the Z-4 Plan*." (emphasis added)

10.83 NCRO was established on 31 March 1995.[173] Its mandate included performing the functions envisaged in the ceasefire agreement of 29 March 1994, facilitating the implementation of the Economic Agreement of 2 December 1994, and relevant Security Council Resolutions, as well as assisting in controlling Croatia's international borders with Bosnia and the FRY.[174] It is noteworthy that this Security Council Resolution recognised that:

> "... major provisions of the [UN] peace-keeping plan for the Republic of Croatia (S/23280, annex III) remain to be implemented, [...].... also that major provisions of relevant Security Council resolutions, in particular resolutions 871 (1993) and 947 (1994), still remain to be implemented."

10.84 At a meeting of their "Assembly", at Borovo Selo on 20 May 1995, the Krajina Serbs rejected the name of UNCRO on the grounds that it prejudged a political solution, and rejected the operative provisions of Security Council Resolution 981 (1995) (which treated the rebel Serb-held territories as part of Croatia and established UNCRO's mandate). The "Assembly" expressed its readiness for further cooperation with the UN in the search for a peaceful and just solution to the conflict "based on principles of impartiality and equal honouring of the sovereign rights of the Serb nation in the Republic of Serb Krajina."[175]

SECTION IV: OPERATION *FLASH*, MAY 1995

10.85 It is against this background that Operation *Flash* occurred. The Respondent claims that soon after the establishment of UNCRO, Croatia grossly violated its international obligations by conducting an all-out armed attack against the Serb-held part of the Western Slavonia.[176] The Respondent refers to Operation *Flash,* claiming that there is "evidence" that it was planned long before the incidents that served as a pretext for its launch.[177] The Respondent's interpretation is unsupported by evidence, and is self-serving. A reading of the limited evidence cited by the Respondent – for example, excerpts of a book by General Bobetko - shows that even when Operation

[173] Security Council Resolution 981 of 31 March 1995. It was deployed pursuant to Security Council Resolution 990 of 28 April 1995.

[174] Security Council Resolution 981 (1995), UN doc. S/RES/981, 31 March 1995, para. 3. See also para 5 which provided that UNCRO shall be an interim arrangement to create the conditions that will facilitate a negotiated settlement consistent with the territorial integrity of the Republic of Croatia and which guarantees the security and rights of all communities living in a particular area of the Republic of Croatia, irrespective of whether they constitute in this area a majority or minority.

[175] Report of the Secretary-General Submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995. UN Doc. S/1995/467, para. 18.

[176] Counter-Memorial, paras. 1141-1142.

[177] Counter-Memorial, para. 1143.

Flash was being planned, Croatia hoped that the matter would be resolved peaceably. At this time, the 'RSK' was making its own plans including issuing orders for combat readiness and reinforcement.[178] By mid-March 1995, in addition to its own mobilisation, 2,000 new rebel Serb soldiers were stationed near Okučani, the construction of fortification facilities was intensified, a large quantity of heavy artillery was dug in and helicopter landing pads and other fortification facilities were constructed.[179]

10.86 Once again, the Respondent misrepresents the facts in order to support its case. It fails to set out the reasons for the launch of Operation *Flash* and its objectives, and misrepresents the manner in which it was conducted and its consequences. The Respondent also quotes selectively from various Reports of the UN Secretary General and statements of the President of the Security Council. For example, it does not refer to those portions of the Report of the Secretary General (submitted on 9 June 1995) which set out the reasons for Operation *Flash* and the events that preceeded it. The Report states:

> "Tension in Sector West increased dramatically when, on 24 April, the Serb authorities closed the motorway through the Sector for a 24-hour period in protest over the number of trucks denied passage along the motorway by the European Union (EU)/ Organization for Security and Cooperation in Europe (OSCE) Sanctions Assistance Mission in Croatia (SAM Croatia) at the Lipovac crossing in Sector East because their passage would have violated the sanctions regime on the Federal Republic of Yugoslavia (Serbia and Montenegro). Potential escalation was averted at the time through negotiations by UNCRO personnel."[180]

The shutting down of the motorway through Western Slavonia was in clear violation of the Economic Agreement.

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[178] In February 1995, the rebel Serbs adopted the *Gvozd* Plan through their *Directive for the Use of the Serbian Army of Krajina*. Pursuant to this the Command of the "18th Corps of the SVK" issued an order for increased combat readiness and reinforcement of its units. It was tasked with *inter alia* with using decisive defence, prevent an incursion of Ustasha forces into the Corps' defence zone. See: RSK, Directive for the Use of the Serbian Army of Krajina, February 1995, Annex 138.

[179] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], Zagreb, 2005, pp 490-491.

[180] Report of the Secretary-General Submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995,

UN Doc. S/1995/467, para 4. By closing the motorway for 24-hours the rebel Serbs wanted to draw attention to their dissatisfaction with the behaviour of members of UNCRO who, while controlling traffic in April 1995, had stopped a considerable number of trucks with goods and fuel intended for the rebel Serbs.

10.87 The Respondent also fails to mention Martić's visit to the area where he stated that Western Slavonia would forever remain a part of the 'RSK', and that the Serbs would restore their control over the adjacent areas from which they had been ousted by the Croatian forces in 1991.[181] In addition, the Serbs in Western Slavonia interrupted the repair works on a part of the railway track between Zagreb and Belgrade that should have opened for traffic as a part of the implementation of the Economic Agreement. [182] UNCRO had attempted to resolve the situation regarding the opening of the motorway through negotiations but this ultimately failed.

10.88 The extent to which the Respondent's depiction of Operation *Flash* and its consequences is contradicted by the evidence may be seen from the Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995.[183] It provides a chronological outline of attempts by both Croatia and UNCRO to open the highway through Western Slavonia through peaceful means.[184] This did not happen as some of the most senior civilian and military officials of the 'RSK', including President Martić and General Čeleketić, obstructed negotiations, exceeded their respective authority and provoked a conflict in which Croatia liberated the occupied territory.[185]

10.89 Moreover, the rebel Serbs in Western Slavonia committed several criminal acts in the period preceeding Operation *Flash*. These included acts of terrorism, abduction, robbery and theft resulting in at least twelve deaths. The final straw was the wounding of one person and the abduction of another near Ožegovci on 1 May 1995. The rebel Serbs had been given several warnings of the possible consequences of their provocative behaviour. After the 'RSK' "authorities" closed the higway for one day in late April 1995, and after "Supreme Council of Defence" of 'RSK' declared on 24 April that Serb side would probably suspend the further implementation of the Economic Agreement, the Croatian authorities made it known that Croatian police would secure the traffic on the highway if it was not reopened by the 'RSK'[186].

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[181] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], Zagreb, 2005, p 491.

[182] *Ibid*., pp 490-491.

[183] Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995, Annex 140.

[184] *Ibid*., pp. 4, 5 and 12.

[185] *Ibid*., p. 21. The Report also states that instead of reopening the motorway as instructed by the MUP, the SVK Main Staff ordered that combat readiness be raised to a level allowing quick mobilisation and the transfer of units of the 18th Corps into the area of engagement and on 28/29 April the commander of the 18th Corps ordered a total mobilisation in the territory of Western Slavonia. The mobilisation was conducted between 28 and 30 April, with 95-100% success. *Ibid*., p. 5.

[186] N. Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia], Zagreb, 2005, p 491.

10.90 Operation *Flash* began on 1 May 1995 and was effectively over in 30 hours. Both U.S. Envoy Richard Holbrooke and Ambassador Galbraith supported Operation *Flash* because they realised the strategic importance of that operation and the pressure it imposed on the Serbs.[187] The operation, launched with the aim of ensuring the free flow of traffic and preventing further terror attacks on people travelling along a section of the motorway was carefully planned and successfully executed.[188] Thereafter, negotiations were conducted with the Serb forces, and the operation was formally concluded at 17:00 on 4 May 1995, with the surrender of around 1,400 members of the SVK.

10.91 The UN Secretary General reported positively about the actions of the Croatian Government after Operation Flash, referring to the "evident efforts of the Croatian Government to achieve high standards of respect for the Serbs' human rights." He also stated that the "Croatian police have reportedly conducted themselves properly and with concern for the remaining…"[189] Similarly, the EC observer in Pakrac at that time, Günter Baron, stated that the "Croatian operation was conducted excellently, professionally and properly."[190] Other observors also came to similar conclusions and found *inter alia* that:

> "The Croatian Army demonstrated a high-degree of professionalism and did not deliberately attack civilians. As regards prisoners, it treated them properly and in accordance with the law of armed conflict; the initial reports by UNCRO on plundering and mistreatment turned out to be the product of bureaucratic inertia and were soon denied in their entirety."[191]

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[187] See Minutes of the Meeting between President Franjo Truđman, Richard Holbrooke, General Wesley Clark and Peter Galbraith, 18 August 1995 , Annex 145, p. 17.

[188] According to General Zvonko Peternel, the commander of the 2nd Guards Brigade "Gromovi" (The Thunderbolts) the Croatian forces were 16,360 strong and comprised of the elite guards brigades, home guard regiments, reserve brigades, support brigades, Croatian Guards Brigade, sabotage detachment of the Main Staff and the Croatian Ministry of Interior with its special units whereas there were about 4,470 Serbs. The Serbs forces consisted of units of the "18th Corps of the SVK" – three light brigades, two detachments, a rocket artillery regiment – and also disposed of a tactical group from the "1st Krajina Corps of the VRS". See *Veterani mira* [Veterans of Peace], HTV1 (Croatian Television), 1 May 2010. In their reports the Serbs also refer to around 4,470 members of Serb forces.

[189] Report of the Secretary-General, dated 9 June 1995 (S/1995/467), para. 15.

[190] Ćosić, *Sjevernoatlantski savez bi kvalitetnije funkcionirao da je Hrvatska u Partnerstvu za mir* [NATO would function better if Croatia were a member of the Partnership for Peace], *Vjesnik*, 30 April 1999.

[191] O. Žunec, (1995) *Okučanski zaključci* [Conclusions of Okučani], *Erasmus*, No. 12, July 1995, p. 7. The Human Rights Watch Report, July 1995 - *The Croatian Army Offensive in Western Slavonia and its Aftermath* - confirmed that Mr. Akashi, the Special Representative of the UN Secretary General, had exaggerated claims of massive human rights violations. The Report states:

> In an unfortunate and premature assessment, U.N. officials - most notably Yasushi

Once again the Respondent fails to mention this and other evidence that is supportive of Croatia's account and undermines the Respondent's narrative.

10.92 By contrast, the actions of the rebel Serbs were not professional nor did they comply with the provisons of international humanitarian law, as confirmed by the Serb Report on the Causes and Manner of the Fall of Western Slavonia, which concluded that:

- As a state, the 'RSK' did not function on the territory of Western Slavonia from the day on which the motorway was opened, to its fall.[192]

- In the period before the aggression, the Serb police failed to ensure the functioning of the rule of law in the territory of Western Slavonia.[193]

- The activities within the area of competence of organs of the Secretariat of Internal Affairs (SUP) did not succeed in preventing uncontrolled departure of citizens for the Republic of Croatia, nor the constant rise in crime.[194]

- Instead of carrying out their professional tasks - relating to the defence of the country and internal stability - the army and police leadership were to a large degree engaged in politics and politicking.[195]

- The local political leadership of the Municipality of Okučani was actively involved in provoking conflicts in the territory of Western Slavonia.[196]

Akashi, the secretary-general's special representative to the former Yugoslavia - alleged that "massive" human rights abuses by Croatian authorities had taken place during the offensive. Evidence of widespread abuse has not emerged, however; the information available at the time was flawed or incomplete and required further investigation and corroboration. While Human Rights Watch/Helsinki encourages the U.N. to condemn publicly human rights abuses by all parties to a conflict, we believe that criticism of a government's human rights record should be commensurate with the level of abuse and that criticisms should be as specific as possible. Because hasty statements can remove the incentive of a government or military to abide by international humanitarian law during subsequent military campaigns and because unwarranted exaggeration of abuses tends to increase inter-ethnic fear and tension, U.N. officials should take care to explain their human rights concerns clearly.

See http://www.hrw.org/legacy/reports/1995/Croatia1.htm

[192] Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995, Annex 140, p 21.

[193] *Ibid*., pp. 20, 18.

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

[195] *Ibid*., pp. 20-21.

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

10.93 The Respondent admits that the 'RSK' responded to Operation *Flash* by firing missiles at Zagreb and the Pleso airfield, and shelling Karlovac and Sisak on 2 and 3 May[197] Seven persons were killed in the shelling of Zagreb and about 214 people were injured.[198] These attacks were condemned by the UN Security Council.[199] Milan Martić was directly responsibility for rocket attacks on Croatian cities and all the civilian casualties incurred as a result of these rocket attacks.[200] The Respondent also fails to mention that during this time, rebel Serbs removed heavy weapons from storage sites in Sector East and obstructed the peacekeepers freedom of movement, which is also referred to in the Secretary General's Report of 9 June 1995.[201]

10.94 The Respondent alleges that following this military action over 10,000 Serbs left Western Slavonia; that as they fled into BH they were targeted by Croatian forces; that on 2 August 1995 UN troops reported seeing numerous bodies of civilians on the road and that witnesses provide accounts of the Croatian forces attacking refugee columns consisting mainly of passenger vehicles and tractors, as well as other killings.[202] (The Respondent mistakenly sets out the date 2 August 1995 as a result it is unclear if the allegations relate

[197] Counter-Memorial, para. 1142. In a newspaper article published in Serbia on 24 March 1995, Milan Čeleketić is reported as stating:

> "In the case of the Ustasha aggression, we will certainly not miss the opportunity to hit them where it hurts the most. We know their weak spots and where it hurts the most. Weak points are the city squares and know who goes there – civilians. I have already said this and was criticised a little. Well now, they may ask which squares and in which cities. I shall reply that that's a military secret. We shall make a decision about it and I think we will be precise. It is hard to say these words because there are, as I said, civilians in the squares, innocent people. However, if we are in was (and we are waging a filthy war for which thet are first and foremost to blame), then there will be no mercy. Not only will we be merciless but, as commander, I shall decided [*sic*] where we shall direct our attacks, when and where it hurts the most."

See *Martić,* para. 318.

[198] See *Martić,* paras. 303-322. At para 314, the Trial Chamber found there was evidence that Martić had considered shelling Zagreb prior to 2 May 1995: as far back as 1992. In 1993 he had moved LUNA rockets to the area of Banija and Kordun in order to prevent aggression or to carry out possible attacks on Zagreb, should RSK towns come under attack. See also paras 456-468.

[199] Statement by the President of the Security Council, UN Doc. S/PRST/1995/26, 4 May 1995, para. 5.

[200] On 3 May 1995, Milan Martić stated:

> "As a counter measure to what Tuđman did to you here, we have shelled their cities: Sisak several times, Zagreb yesterday and today. This was done for you. […] Today, an ultimatum followed if they continue to attack our besieged forces, we will continue to attack Zagreb and destroy their cities."

See *Martić,* para. 319. See also para 320, which states that Martić gave the order to shell, that he admitted to it on television and that he spoke of "massive rocket attacks on Zagreb which would leave 100,000 people dead."

[201] Report of the Secretary-General pursuant to Security Council Resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, paragraph 7.

[202] Counter-Memorial, paras. 1146- 1150 and Annexes 48 & 49.

to Operation *Storm* or Operation *Flash*.) The Respondent also refers to UN Security Council statements that called on Croatia "to put an end immediately to the military offensive […] in violation of the cease-fire agreement of 29 March 1994", and expressed deep concern at the reports regarding the human rights violations of the Serb population of Western Slavonia.[203] As stated above, observers found the reports of human rights violations were grossly exaggerated.[204] And yet again, the Respondent fails to recognise that the same UN Security Council Statement also called on the signatories of the Economic Agreement, signed on 2 December 1994, to respect it, in particular, take all necessary steps to ensure the safety and security of the Zagreb-Belgrade motorway and its immediate environs.[205] In any event, Croatia complied with the Security Council's directions, as confirmed by a press release from the Office of the President of Croatia, published on 2 May 1995. [206]

10.95 Once again, the Respondent makes allegations and claims that are not supported by the evidence before the Court. Notably, the Respondent does not allege any act of genocide.

10.96 Moreover, there is conflicting information about the numbers killed during Operation *Flash*.[207] The Respondent's claims are based on the list compiled by the non-governmental organisation *Veritas*. Chapter 2 has described the antecedents of *Veritas,* which significantly undermines the weight that can be given to its work.[208] More will be said about the *Veritas* list in Chapter 11 *infra.*

10.97 *Third*, with response to the Respondent's allegation that the there

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[203] Counter-Memorial, paras. 1144-1145 citing the Statement by the President of the Security Council, UN Doc. S/PRST/1995/23, 1 May 1995, para. 2 and Statement by the President of the Security Council, UN Doc. S/PRST/1995/26, 4 May 1995, paras. 2, 4 & 6.

[204] See para. 10.91 *supra*.

[205] Statement by the President of the Security Council, 1 May 1995, UN Doc. S/PRST/1995/23, para. 3.

[206] The press release from the Office of the President of Croatia, published on 2 May 1995 stated:

> The operation conducted by the Croatian police forces and units of the Croatian Army with the aim of opening the motorway and railway across the territory of Western Slavonia that until today was occupied has been completed. Armed Serbs ceased putting up organised resistance and the authority of the Republic of Croatia was established in Okučani. At 14:00 hours started negotiations on the surrender of the last big group of armed Serbs located in the area of Pakrac. The Deputy Prime Minister visited in person the said areas and on behalf of the President of the Republic, Dr. Franjo Tuđman, and the Government of the Republic of Croatia gave citizens of Serb nationality assurances that civil rights would be respected, and that those who were armed, apart from those who had committed war crimes, would be guaranteed amnesty

[207] Counter-Memorial, para. 1152.

[208] The *Veritas* list in question dates from 2002 and was posted on *Veritas*' internet site in the form of an Excel worksheet; it is all but impossible to determine the extent to which the data from the list differs from that of today.

was an "exodus" of the Serb population,[209] a number of points may be made in response. Most significantly that the Serb population did not leave because they were driven out by the Croatian forces, but their "exodus" was planned by rebel Serb leadership. This fact is confirmed by the rebel Serb commission charged with establishing responsibility for the fall of Western Slavonia[210] that states *inter alia* how some civilians and soldiers began withdrawing even before the launch of the offensive. It specifically mentions "evacuation orders" made by the SVK commanders; the disruptive nature of the evacuation process and the fact that soldiers and civilians were evacuating together.

10.98 In his Report of 9 June 1995, the UN Secretary-General noted that the Croatian Government sought to encourage Serbs to remain in the Sector and issued personal documents, including citizenship papers and passports, to those who applied for them.[211] In other words, while Croatia was encouraging the Serbs to stay, the rebel Serbs were encouraging them to leave. Milan Babić (then "Foreign Minister" of the 'RSK') told a UN official that Croatia was engaged in a "propaganda campaign to show everybody that they are humane."[212] In a meeting with Mr. Akashi, Special Representative of the UN Secretary General, Milan Martić (then "President" of the 'RSK') insisted that the UN facilitate the departure of the Serbs from Western Slavonia.[213] The UN agreed to this and organized Operation Safe Passage, and to ensure that the departures were voluntary, it had the departing Serbs sign a document indicating the voluntary nature of their departure.[214] The UN was criticised in a number of quarters for having acted too soon and for having contributed to the ethnic cleansing of Western Slavonia. As stated earlier, Mr. Akashi

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[209] Counter-Memorial, para. 1146-1147.

[210] See RSK, Report of the Commission Charged with Establishing Responsibility of the Military Organisation for the Fall of Western Slavonia, 13 July 1995, Annex 141. See also the Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995, Annex 140, p. 15 *et seq.*

[211] Report of the Secretary-General of 9 June 1995, para. 14. The 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, 29 also states that Serbs still living in Sector West were advised of their right to remain and were given public assurances by the Government of the Republic of Croatia that their rights, including the right to citizenship of the Republic of Croatia, would be fully respected. The report also indicates that the Government of Croatia stated that persons who had fled Western Slavonia, either during Operation *Flash* or afterwards, would be permitted to return subject to certain conditions.

[212] See UNPROFOR Coded Cable, Meeting with Babić , 10 May 1995, Annex 143.

[213] The July 1995, Mazowiecki reported that the Serb leadership had insisted on the evacuation of 3000-4000 people from Western Slavonia. See 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, p. 8, para. 28.

[214] Report of the Secretary-General submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, para. 16 that states *inter alia* that some 2,170 Serbs voluntarily left Sector West under Operation *Safe Passage* during the period from 9 to 30 May 1995.

stressed that the UN Agencies had been under enormous pressure from the Knin authorities, who threatened further attacks on Zagreb, to assist the Serb population in leaving the area after Operation *Flash*.[215]

10.99 Another factor for the departure of the Serbs from the former UNPA was the fact that many rebel Serbs did not wish to live in Croatia. This can be illustrated by a statement of Milan Martić who, speaking about the Z-4 Plan at the session of the RSK Assembly in February 1995, stated:

> "Can we to agree to our own deaths? Life in Croatia would be worse that any death. Life in Croatia – would that be any life?" [216]

10.100 Further, the Counter-Memorial makes sweeping statements about the number of Serbs that lived and fled from Western Slavonia, again without the support of evidence.[217] Organisations like the OSCE did not have complete data on the number of inhabitants in the area and the number that left. Estimates provided by international organisation were modelled on data based on figures from the 1991 census.

10.101 In any event, Croatian forces did not target civilians. The columns of those fleeing were largely made up of armed members of the rebel Serb army (members of units of the 18th Corps of the SVK as well as members of the 'RSK's' MUP), military vehicles, as well as civilians, a fact also confirmed by the rebel Serbs' Report on the Causes and Manner of the Fall of Western Slavonia.[218] As noted above, the professional conduct of the Croatian armed forces has been recorded in several independent reports that make it clear that innocent civilians, whose deaths are deeply regretted, were unfortunately caught in the crossfire and were not the object of attack.[219] The Croatian Army was issued with Directive No. 5/94 *For the Conduct of Operation Flash*, that stated:

> Ensure that the law of armed conflict in respect of the treatment of prisoners of war and the population within the occupied area be consistently observed by all units of the Croatian Army for the duration of combat activities, for which purpose engage besides the

[215] See para. 10.15 *supra*.

[216] See: RSK, Minutes of the RSK Assembly, 8 February 1995, Annex 146.

[217] While the Counter-Memorial (para. 1146) suggests that about 13,000 Serbs lived in the area, other Serb sources, including prominent rebel Serb politicians from Western Slavonia - Veljko Džakula, Obrad Ivanović, Stevo Harambašić, Miroslav Grozdanić, and others - stated that from the start of the rebellion until 1995 some 6,000 persons of Serb nationality lived in that area.

[218] See: RSK, Report of the Commission Charged with Establishing Responsibility of the Military Organisation for the Fall of Western Slavonia, 13 July 1995, Annex 141.

[219] In this section the Counter-Claim also makes some factual errors. For example, presumably the date of 2 August 1995 in paragraphs 1148 and 1149 should be 2 May 1995.

Military Police the forces of the Ministry of Interior.[220]

10.102 *Finally*, in response to the Respondent's allegations with regard to the events that allegedly took place at the village of Nova Varoš,[221] it is to be stressed that armed members of the rebel Serb forces were also travelling in refugee columns and occasionally carried out attacks against the Croatian forces.[222] This is also confirmed by the rebel Serbs' Report on the Causes and Manner of the Fall of Western Slavonia.[223]

10.103 The Respondent alleges that after Operation *Flash* "the Croatian forces *apparently* tried to remove evidence of their crimes"[224] (emphasis added). This is based on the Report of the UN Special Rapporteur dated 14 July 1995. The quoted extract states:

> "Between 2 and 4 May 1995, the Croatian military *reportedly* conducted an intensive clean-up operation in the areas around Okučani, 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 Okučani 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."[225] (emphasis added)

10.104 Again, the Respondent quotes the Report selectively. *First,* as the UN investigation on Medak Pocket found, the supposed clean-up may very well have simply been ordinary precautions by the Croatian forces to deal with the dead and wounded anticipated in any attack. It is standard military practice to clean up areas after combat operations, a fact that the Respondent will be aware of. The rules governing clean-up operations were defined in 1958 in the SFRY.[226] In cleaning up the area Croatia was not seeking to conceal evidence

[220] J. Bobetko, *Sve moje bitke* [All My Battles], Zagreb, 1996, p. 397.

[221] Counter-Memorial, paras. 1148-1149.

[222] This is borne out by the testimony of one I.B., a member of the SVK, who was also in the refugee column travelling through Nova Varoš and who *inter alia* noticed Serb soldiers carrying both long and short barreled firearms. See Witness statement of I.B., Annex 142.

[223] See Report on the Causes and Manner of the Fall of Western Slavonia, 11 July 1995, Annex 140.

[224] Counter-Memorial, para. 1151.

[225] Periodic report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of Commission resolution 1995/89, UN Doc. A/50/287- S/1995/575, 14 July 1995, para. 12.

[226] See *Uputstvo za asanaciju bojišta* [Instructions on Clearing Up the Battlefield], Federal Secretariat for National Defence, 1958. The Instructions were essential until the end of the JNA's existence and were used by all warring armies. Paragraph 1 of the Instructions' General Provisions specifies that "*asanacija*" of the battlefield is "finding and collecting human and

but, on the contrary, was fulfilling its obligations. It is clear from the UN Special Rapporteur's Report that none of the allegations referred to above were established. Moreover, the comprehensive ICTY investigations of Operation *Flash* did not result in any charges at all with regard to the conduct of this operation.

10.105 A Rapporter of the Political Affairs Committee of the Council of Europe states *inter alia* that he was favourably impressed with the Croatian approach for reconstruction of the area.[227] He found that the Croatian Army had largely withdrawn from Western Slavonia as requested by Security Council Resolution 994.[228]

(1) The Summer of 1995: After Operation *Flash*

10.106 According to the Respondent, Operation *Flash* confirmed to the Serbs in the 'RSK' that UN peacekeepers were unable to protect them from a Croatian attack.[229] It fails to mention that the UN Forces and the Croatian authorities had made every effort to avoid the need for an armed offensive. This is also documented in the rebel Serbs' Report on the Causes and Manner of the Fall of Western Slavonia. The Respondent claims that in the months that followed, the Croatian army continued its gradual advance into the Sector South while "the RSK forces were fighting in the Bihać pocket, in Bosnia and Herzegovina, supporting Mr. Fikret Abdić's forces against the Bosnian Government."[230] It states that 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"[231] and alleges that Croatian forces continued with their advance in disregard of the Security Council presidential statement and despite assurances given by the Croatian Government.[232]

10.107 One of the Reports of the UN Secretary-General, cited by the Respondent, found that the Serb side was in contravention of the cease-fire agreement and had placed several preconditions on meeting with the Croatian military commander. The UN Secretary General also noted that the Serb side

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animal corpses and their disposal (burial, incineration) and removal from the battlefield of anything that might be dangerous or hazardous to health of people and animals. The clearing up of the battlefield prevents water, food, soil and air pollution and thus also forestalls infectious diseases. This was the prescribed procedure aimed at preventing the spread of infectious diseases, especially during warm weather.

227 Council of Europe, Political Affairs Committee, Memorandum on the visit to Zagreb and Western Slavonia, June 1995, Annex 144, para. 16.

228 *Ibid*., para. 25.

229 Counter-Memorial, para. 1155.

230 Counter-Memorial, para. 1156.

231 Counter-Memorial, para. 1156 citing Statement by the President of the Security Council, UN Doc. S/PRST/1995/30, 19 June 1995, para. 2.

232 Counter-Memorial, para. 1156.

had refused an invitation of the Co-Chairman of the Steering Committee of the ICFY to attend talks in Geneva.[233] He noted:

> "In addition […], moves by the Krajina Serb leadership to establish a union with the Bosnian Serbs makes it difficult to stabilize the military situation. While the unification of two self-proclaimed and unrecognised entities would have no international legal validity, senior Croatian Government officials have expressed concern about the effect of such a move on the implementation of the economic agreement of 2 December 1994 … and the commencement of political negotiations."[234]

It is noteworthy that an August 1995 Report of the UN Secretary General cited by the Respondent also found that there had been ceasefire violations by both sides.[235]

10.108 Yet again the Respondent fails to decribe the events accurately. While stating that following Operation *Flash*, the SVK fought on the side of Fikret Abdić against the army of Bosnia and Herzegovina in the Bihać pocket, it fails to mention that Bihać was declared a "safe area" by the UN, and that the SVK's engagement there was in complete contravention of several Security Council Resolutions.[236] With blatant disregard for these resolutions, Serbs from the 'RSK' and the Republika Srpska launched an attack on Bihać, in which the Serb group "Pauk" [Spider] took part in late 1994. This attack was directed by Belgrade.[237] This is yet another example of the leading

[233] See the Report of the Secretary-General of 9 June 1995 (S/1995/467), para. 12, which stated:

"On the Serb side, there remains a major presence in the zone of separation, including over 1,723 soldiers and 84 heavy weapons. Over 303 heavy weapons are deployed in contravention of the 10- and 20-kilometre zones. "

[234] *Ibid*., para. 13.

[235] Report of the Secretary-General Submitted pursuant to Security Council Resolution 981 (1995), UN Doc. S/1995/650, 3 August 1995, para. 4. He found *inter alia* that as of 30 July 1995, there were 83 reported violations of the zone of separation, 47 by the Krajina Serbs and 36 on the Croatian side; in addition, there were 78 reported violations of the 10- and 20-kilometre zones: 68 by the Krajina Serbs and 10 by the Croatian side.

[236] On 6 May 1993 the Security Council adopted Resolution 824, paras. 3-4, wherein it declared that Sarajevo, and other threatened towns, including Bihać should be treated as "safe areas" and should be free from armed attacks and other hostile acts. It demanded the withdrawal of all "Bosnian Serb military or paramilitary units" from these towns. Similarly on 4 June 1993 the Security Council adopted Resolution 836 whereby it extended UNPROFOR's mandate in order to enable it to deter attacks against the "safe areas", to monitor the ceasefire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population.

[237] As stated by General Milisav Sekulić, who then served in the General Staff of the SVK in Knin:

> "From the command aspect, an unusual construction of the command system was created in the operation Spider. The Spider command is crucial and it is not subordinate

role played by the Respondent's power structures among the rebel Serbs in Croatia. Serb attacks on Bihać continued from late 1994, and up to July 1995. A Serb capture of Bihać would have led to the territorial unification of the 'RSK' and the Bosnian Serb republic, and would have given the rebel Serbs in Croatia a strong strategic advantage and aggravated the situation in Croatia's occupied territories. Also, the Serb capture of Bihać would have led to further humanitarian difficulties (just days after the capture of Srebrenica), and the killing of Muslims and Croats in the Bihać area and an influx of more refugees in to Croatia. [238]

10.109 According to the Respondent, following Operation *Flash* international mediators made various efforts to prevent an escalation of the crisis through activities on the ground and under the auspices of the ICFY, but these efforts were unsuccessful.[239] Again the Respondent fails to accurately describe the prevailing attitude of the rebel Serbs, that was directed and supported by Serbia. As noted earlier, pursuant to various decisions and declarations, the rebel Serb authorities rejected all UN resolutions that provided for the restoration of Croatian authority over the 'RSK' and the UNPAs, and their reintegration into Croatia. This attitude continued after Operation *Flash*.[240]

(2) The Alleged Acceptance of The Z-4 Plans by the Rebel Serbs

10.110 The Respondent makes reference to the Z-4 Plan (the draft political agreement) that was presented to the parties in January 1995. In doing so it once again contradicts itself. Initially, the Respondent stated that 'RSK' officials refused to receive the draft until UNPROFOR's mandate was renewed."[241] As noted above, 'officials' of the 'RSK' failed to discuss the draft even after UNCRO was established.[242] The Respondent nevertheless admits

> to either the General Staff of the Army of Republika Srpska or the General Staff of the Serb Army of Krajina. The Spider command was subordinate to Belgrade (partly to the General Staff of the Army of Yugoslavia and partly to a competent body of the State Security of Serbia)."

Milisav Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], Bad Vilbel 2001, p. 92. This is confirmed by the head of the Security Service of the rebel Serbs in Croatia in a letter dated 6 January 1995 referring to the formation of the command outpost of the General Staff of the SVK where he mentioned the name of Jovica Stanišić "[acting] on behalf of the Republic of Serbia." Security Department of the Main Staff of the Serb Army of Krajina, strictly confidential ,6 January 1995, Annex 139.

[238] See Chapter 11 *infra*.

[239] Counter-Memorial, para. 1157.

[240] Acccording to the rebel Serbs, negotiations were only possible if they were seen as an equal party, and that they continued to live in their Serb state, failing which they would opt for a military option, as clearly articulated by Goran Hadžić in the meeting of the 'RSK' Assembly in Okučani, wherein he stated, "The second step consists in organising militarily, re-grouping and liberating the area in question by military means."

[241] Counter-Memorial, para. 1139.

[242] See para. 10.82 *supra*.

that the 'RSK' officials were divided about the plan: while some were open to it, others rejected it.[243] However the Respondent states that "It is a fact, … that on 2 August 1995, Milan Babić, as Prime Minister of the RSK, accepted the Z-4 plan."[244] The evidence before the Court does not support that statement.

10.111 There is no evidence that Milan Babić, the 'Prime Minister' of the 'RSK', accepted the Z-4 plan on 2 August 1995. The article by Klemenčić and Schofield cited by the Respondent does not contain this "fact", nor indeed does it contain a paragraph 158. Available evidence indicates that Babić only showed readiness for further negotiations and did not accept the Z-4 Plan. The evidence shows he wanted to negotiate on the basis of a "modified" plan."245" Further, even if Babić did accept it, it would have had no legal effect because he was not authorised to do so. "246" Only Martić, as a President of the 'RSK' could do so. "247".

10.112 At a meeting held in Geneva on 3 August 1995, Mr. Stoltenberg, the Co-Chairman of the ICFY, presented the parties with a seven-point proposal that envisaged, *inter alia*, negotiations on a final settlement on the basis of the Z-4 Plan, the reopening of the Zagreb-Knin-Split railway and the oil pipeline. These were the same conditions Croatia had set earlier. The Respondent contends that the rebel Serb delegation was "inclined" to accept Stoltenberg's proposal "subject to its clearance by its political leadership", whereas the Croatian delegation rejected it straightaway.[248] This is yet another misrepresentation. According to the transcript of the telephone conversation between "President" Martić and Ilija Prijić, head of 'RSK's' delegation in Geneva, 3 August 1995, Martić told Prijić that the Z-4 Plan was unacceptable

[243] Counter-Memorial, para. 1157.

[244] Counter-Memorial, para. 1157 citing M. Klemenčić & 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.

[245] Milan Babić, the "Prime Minister" of the 'RSK' met with Ambassador Galbraith on 2 August. According to the Yugoslav news agency *Tanjug,* Babić told Galbraith that units of the SVK were no longer stationed in the Bihać region and asked Galbraith to influence Zagreb "to establish peace". Babić apparently showed readiness for further negotiations on the basis of "modified" Z-4 plan that would apply equally to "Western" and "Eastern" 'RSK'. (*Republika Hrvatska, Ministarstvo vanjskih poslova, Odjel za informiranje, Dnevno izvješće 208/95, 3. kolovoza 1995.)* (Daily report of the Department of Information of the Croatian Ministry of Foreign Affairs). From this report it is clear that Babić did not accept anything unconditionally. The Z-4 plan called for integration of the eastern part of 'RSK' but Babić sought a "modified" Z-4 plan that would also give the eastern part of 'RSK' a special status within Croatia.

[246] Babić did not have authorization to accept the Plan from "President" Martić and the "Assembly" of the 'RSK'. He would have needed the approval of the "President" and "Assembly" and the President and the Assembly had already rejected the Z-4 Plan when it was presented in January 1995. (The 'RSK's' Constitution stated that the "Government and each of its members are responsible for their work to the President of the Republic and Assembly.")

[247] See Chapter 11, para. 11.35.

[248] Counter-Memorial, para. 1158.

to the 'RSK' and Prijić agreed with him.[249] The constant prevarication and the failure of the 'RSK'/Serbia to negotiate in good faith were the reasons why seeking a political solution, despite four years of negotiations, proved ultimately futile.

CONCLUSION

10.113 In its conclusions to Chapter XII the Respondent makes some significant admissions. These include the following:

- The Respondent admits that the difficulties faced by UNPROFOR in fulfilling its mandate from the very beginning of its deployment in spring 1992, were "to a considerable extent due to the attitude of the RSK authorities".[250]

- It admits that of the difficulties faced by UNPROFOR, "of particular importance was the RSK's failure to fully demilitarize the UNPAs"[251]; and

- It admits that until 1995 the RSK refused "to consider options involving reintegration of [UNPAs] into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected."[252]

10.114 Despite these admissions, the Respondent seeks to justify its "failures" and "refusals" by alleging that the Croatian authorities threatened that they would integrate the UNPAs by force, on four occasions before *Storm* they undertook "large" military operations for that purpose, and in doing so halted the progress made at the negotiating table and on the ground.[253] Unfortunately, the Respondent fails to acknowledge its own role and attitude, and its continued control and backing to the 'RSK'. Rather, it seeks to lay all the blame of wrongdoing on the 'RSK', a non-existent entity. It fails to state for instance that after Operation *Flash* it sent Mrkšić, a serving member of the VJ, to the 'RSK' to organise its armed forces.

10.115 Yet again the Respondent makes allegations that are not supported by the evidence. Its account is inaccurate and self-contradictory. It seeks to create an impression that Croatia relied exclusively on military options. It ignores diplomatic actions and negotiations for peaceful integration that continued for over four years. The Respondent admits that the rebel Serbs refused to consider any option that would allow Croatia to regain control of

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[249] Dušan Viro, "Slobodan Milošević: The Anatomy of Crime", Profil, Zagreb, 2007, pp. 375-378, Annex 164.
[250] Counter-Memorial, para. 1160.
[251] *Ibid*.
[252] *Ibid*.
[253] *Ibid*., paras. 1160, 1162.

occupied territory, despite UN Security Council Resolutions. The Memorial and Reply show the close ties and relations between the rebel-Serbs and the Respondent, and the refusal of the rebel-Serbs to negotiate was in effect the refusal of the Respondent to pursue a peaceful settlement. As late as 1995 the rebel Serb leadership refused to consider the Z-4 Plan. With the Respondent, the 'RSK', caused Croatia to opt for a military solution. Knin consistently declined political negotiations on the pretext that this would mean acceptance of Croatian authority, and it obstructed the implementation of the Economic Agreement. Knin continued to use Croatian territory to launch attacks on Bosnia in violation of UN Security Council resolutions. As a sovereign state that found its territory subject to rebel control, Croatia had no option but to take the reasonable and proportionate measures it did to regain control over its own territory. Its actions and their justification were recognised internationally.

10.116 This chapter also shows that the activities, intentions and plans of the rebel Serb leadership in Croatia continued to be directed at the fulfilment of aspirations voiced in the 1986 SANU Memorandum, namely the creation of a unified Serbian state in the Balkans, a 'Greater Serbia'. In pursuing this goal, the rebel Serb leadership enjoyed political, financial, military, and logistical direction, control and support for which the Respondent is responsible.

10.117 Throughout Chapter XII, the Respondent attempts to establish the existence of a "plan". While several references are made to the existence of a plan, or a policy,[254] the Court and the Applicant are provided with no evidence to explain its content or any evidence in support of its existence. No actual plan is presented, nor does the Respondent provide any evidence of any plan. The evidence presented in the Memorial and Reply shows that the only plans Croatia had were for a peaceful settlement and to restore and uphold its territorial integrity in accordance with international law.

Contrary to the Respondent's allegations, Croatian forces did not set out to empty the occupied areas of all Serbs, and did not indiscriminately target those who stayed behind. The failure to reach a negotiated settlement and the final military operations to reintegrate rebel Serb occupied areas into Croatia did not mean that the Serbs living in those areas could no longer remain. The Respondent's use of General Bobetko's memoirs, in support of the allegation that the operations were to be conducted for "the cleansing of that whole territory"[255] is quoted out of context. General Bobetko's reference to cleansing in the context of Operation *Flash* is an example of the systematic military preparations for the final operations of the Croatian Army. He was not referring to ethnic cleansing, as the Respondent suggests.[256]

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[254] See for example Counter-Memorial, paras. 1138, 1143, 1163, 1164.

[255] Counter-Memorial, para. 1164.

[256] See J. Bobetko, *Sve moje bitke* [All My Battles], Zagreb, 1996, p. 407 (Counter-Memorial, Annex 50). The Memoir states as follows:

> "It worked out all the assignments to the minutest detail; it was practically constantly

10.118 Although Croatia was ready to liberate the occupied areas by military means if necessary, Croatia was equally willing to negotiate with the rebel Serbs in order to regain sovereignty over the occupied areas and thereby ensure its territorial integrity. This is borne out by its various efforts set out in the preceding pages. However, this was not to be, and in August 1995, the Croatian authorities undertook Operation *Storm* to liberate the so-called Krajina.

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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 11

OPERATION *STORM*

INTRODUCTION

11.1 In its Counter-Claim the Respondent's allegation of genocide is restricted to the "events which occurred in August 1995 and subsequent months" against a "part of the Serbian population in Croatia, namely Serbs living in the territory of the Krajina ('Krajina Serbs')."[1] The Respondent asserts that Croatia's "military leadership prepared for the "final strike" against the Krajina Serbs by conducting preparatory military operations", that a "genocidal plan" was envisaged and finalized at a meeting in Brioni, and that the plan was executed during Operation *Storm* and subsequently.[2] The Respondent contends that Croatia never wanted a peaceful solution and all along planned to use force to "make the Serbs disappear."[3] This claim is entirely without foundation.

11.2 In order to support its case, the Respondent misrepresents or ignores each and every fact that contradicts the claim and draws conclusions that are totally at odds with the relevant facts and actions of the parties at that time. It also misrepresents subsequent actions and laws of the Republic of Croatia by citing out of date reports and ignoring a multitude of relevant facts, including the return of Serb refugees to Croatia. These omissions, misrepresentations and distortions of fact commence with the title of Chapter XIII[4] and continue through virtually every paragraph. Finally, the Respondent ignores many developments and the co-operation between the parties that refute its allegations and of which it was well aware when the Counter-Memorial was being drafted.

11.3 In the very first paragraph, while defining the territory of Krajina where the alleged genocide is said to have taken place, the Respondent seeks to define the Krajina as different and separate from the rest of Croatia. This issue has been dealt with earlier.[5] It is plain from the 1991 census that the area

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[1] Counter-Memorial, paras. 1165, 570 and 1098.

[2] Counter-Memorial, paras. 1168-1173.

[3] Counter-Memorial, paras. 1197, 1198, 1353 *et seq*

[4] Chapter XIII of the Counter-Memorial is titled *Operation Storm as the "New" Genocide against the Serbs in Croatia*. The Republic of Croatia takes strong exception to Serbia's reference to crimes committed during the NDH which is similar to insinuating that the Croats are a genocidal people. It is regrettable that the Republic of Serbia raises this issue once again. All allegations that genocide was committed by the Republic of Croatia against the Serbs in Croatia are denied.

[5] See Chapter 10, para. 10.10. The Krajina was not a "specific geographical territory populated by people with specific social development, different from that of the rest of the population in

in question only came under Serb control after the Serbian actions of 1990 and 1991, and only after the expulsion and killing of the non-Serb population that lived there.[6]

11.4 As set out in the preceding Chapter, from the outset of the Serb rebellion, Croatia sought to re-integrate the territory occupied by the rebel Serbs (who were directed, commanded, controlled or otherwise provided substantial assistance or support by FRY/Serbia) by means of negotiations. Croatia continued to work with the UN and other international agencies for four years. However, rebel Serbs (together with FRY/Serbia) were unwilling to arrive at any meaningful agreement.[7] Despite several opportunities and initiatives they continued to delay any meaningful political dialogue, let alone settlement. This continued through 1994 and into 1995. During this time rebel Serbs also used Croatian territory to launch attacks in to Bosnia and Herzegovina ('BH') in violation of numerous Security Council Resolutions, with a view to acquiring and consolidating territory with the self-proclaimed Serb Republic in BiH (Republika Srpska). Despite this, Croatia persisted with efforts to resolve the situation peacefully. When it became evident that the rebel Serbs had no intention of complying with Security Council Resolutions that called for the re-integration of territory, Croatia decided to re-integrate the occupied territories by military means.

11.5 The Applicant's response to the Counter-Claim is as follows:

> **Section I** describes the conflict in neighbouring BH and the crisis in Bihać brought on by Serb action. It sets out how Croatian forces, in response to a request from Bosnia, assisted the Bosnian Army ('ABiH') in preventing another Srebernica in Bihać. This joint action also prevented a consolidation of the 'RSK' and the Republika Srpska ('RS'). It also describes the Serb plans for a further offensive while the 'RSK' sought to buy time to prepare for it.
>
> **Section II** describes the planning and preparation for the liberation of the occupied territories of Croatia. It refutes the Respondent's claim that Croatia formulated and finalized a "genocidal plan" to make the "Serbs in Croatia disappear" at a meeting of the military establishment of Croatia on the island of Brioni.

Croatia" as claimed by the Respondent. A map of the *Vojna Krajina* is at Annex 147.

[6] In addition the Respondent states that the term 'Krajina' refers to *inter alia* UNPA South which covered the area of Dalmatia, and the 'Pink Zones' which represented territories under Serb control (Counter-Memorial, para. 1165). This is also wrong, as Sector South did not encompass Dalmatia, only parts of Northern Dalmatia and Lika (a fact admitted in the Respondent's footnote 1042).

[7] The Respondent admits this in para. 1160 of its Counter-Memorial.

Section III provides a brief description of the final planning and preparation for Operation *Storm*, describing its conduct and the participants. This is particularly important in the light of the Respondent's reticence in admitting that Operation *Storm* was a combat operation that involved the Croatian forces and the Army of the 'RSK'.

Section IV responds to the Respondent's allegation that the Applicant committed genocide through Operation *Storm* and thereafter. It sets out the details of the evacuation plans made and executed by the rebel Serbs during Operation *Storm*, and shows that there was no unlawful shelling of civilians; no forcible mass expulsion of Serbs from the occupied territories; no systematic or widespread destruction of Serb property; and no targetting of Serbs thereafter.

SECTION I: THE CONTINUING PURSUIT FOR A STATE FOR ALL SERBS

11.6 From the outset of the conflict, Croatia's basic goals were to stop the war and prevent further Serbian aggression, and then to re-establish control within its internationally recognized borders. In contravention of several UN resolutions that called for the peaceful reintegration of the territory under Serb control, the political and military leaders of the 'RSK' and the RS continued with their plans for unification within the territories of the two internationally recognized states - Croatia and BH. This compelled Croatia, acting in its legitimate national interest to take steps to prevent this unification. Accordingly, Croatia took lawful and necessary steps to restore Croatian control over the occupied areas in the event that the UN failed in its mission. By 1995 it was apparent that the UN's mission was unlikely to be successful.[8]

(1) Military Actions in Bosnia: The Bihać Crisis

11.7 Based on selected excerpts from the 'Balkan Battlegrounds' Report and General Gotovina's book, the Respondent tries to build a case that from the end of 1994 Croatia started conducting tactical military operations in BH with the "goal of creating conditions for an efficient attack against the Krajina and …the city of Knin."[9] The Respondent's description of various

[8] UNPROFOR had difficulties in fulfilling its mandate from the very beginning of its deployment and Serbia admits that this was "to a considerable extent due to the attitude of the RSK authorities." Serbia also admits that it refused "to consider options involving reintegration of [UNPAs] into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected." See Counter-Memorial, para. 1160.

[9] Counter-Memorial, para. 1175 *et seq.*

military actions from 1994 and 1995 distorts the facts and is not supported by evidence before the Court. From late 1994 Croatia was drawn into events in neighbouring Bosnia for a number of reasons. Paramount amongst these was the continuing joint quest of the 'RSK' (through its army, the SVK) and the RS (through its army, the Vojska Republike Srpske, VRS) to militarily occupy further territories in Bosnia to create a Greater Serbia. As set out earlier, the rebel Serbs rejected the Z-4 Plan that offered them a high degree of autonomy, "almost a state within a state."[10]

11.8 In Bosnia, Serb forces were waging a war against the Army of Bosnia Herzegovina ('ABiH') in the Bihać area. Bihać was strategically important for Croatia because it separated the 'RSK' from the RS in Bosnia along a considerable stretch (118 km). The advance of the VRS (with the SVK[11]) in recovering the territory previously liberated by the 'ABiH' resulted in the President of Bosnia requesting President to prevent attacks on Bihać from Croatian territory.[12] The international community also responded to the Serbian offensive and, when UNPROFOR warnings were ignored by the Serbs, NATO carried out attacks against the SVK.[13] As stated above, the Serb attacks on Bihać were alarming to Croatia, and Croatian forces became engaged in those operations.

11.9 The Croatian forces' first campaign was Operation *Zima* (*Winter*), in November 1994.[14] Its mission was to reduce the Serb pressure on the 'ABiH's' 5th Corps in the Bihać Pocket, which was successful. This was a critical Croatian strategic objective for two reasons. First, if the VRS/SVK forces overran the Bihać Pocket, it would have caused a humanitarian disaster, with massive civilian casualties and an influx of refugees to Croatia, exacerbating its existing refugee burden. Second, preventing the fall of Bihać and the defeat of the 'ABiH's' 5th Corps was essential to prevent a VRS/SVK consolidation, integrating the 'RSK' and the RS into a single entity. The actions in Bihać came to a standstill because of the intervention of the Croatian troops, and the Bihać crisis was averted in the winter of 1994. However, the RS and the 'RSK' had no intention of desisting from the capture of Bihać.[15] The continuing Serb offensive in Bihać through 1995 was an important reason for Croatia to launch

[10] See para. 10.79 *supra*. See also Davor Marijan, "Storm", Zagreb, August 2010, p. 49.

[11] At this time the forces of the Krajina Serbs were restructured, and the command of Operational Group Pauk (Spider) functional on 16 November. War diary of GS VSK, note for 16 November 1994.

[12] H. Šarinić, *Svi moji tajni pregovori sa Slobodanom Miloševićem*, 1993-95 [All My Secret Negotiations with Slobodan Milošević, 1993-95/98], pp. 70-171.

[13] Davor Marijan, "Storm", Zagreb, August 2010, p. 53. See also See Central Intelligence Agency (May 2002), Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995, Vol. I, p. 249 which states that the NATO airstrike had no effect on the Serb advance and nor did Croatia's warning that it would intervene militarily if Bihać was about to fall.

[14] Davor Marijan, "Storm", Zagreb, August 2010, p. 54

[15] Command of the 2nd KK; str conf no. 3-36 of 16 February 1995 cited in Davor Marijan,"Storm", Zagreb, August 2010, p. 56.

Operation *Storm*, however, the Respondent is wrong when it claims that this operation was conducted "with the goal of creating conditions for an efficient attack against Krajina and …the city of Knin."[16]

11.10 After the successful action in Operation *Zima* and a ceasefire that commenced in early 1995, a tenuous calm prevailed until the spring of 1995. In April 1995, Croatian Forces mounted Operation *Skok-1* (*Leap 1*) in the Dinara Mountains, bordering Croatia and Bosnia. This action established control over Mt Dinara and the Livno valley,[17] and achieved the aim of securing a salient point towards Grahovo. Again, this operation was not planned to threaten Knin, as the Respondent alleges.[18]

(2) The Summer of 1995

11.11 Contrary to the allegation that all Croatia's military actions were in preparation of an attack on Knin, the HV's first military operation in Croatia was in Western Slavonia, on the other side of Croatia. Chapter 10 sets out the reasons for Operation *Flash* which liberated Western Slavonia, after a four day offensive in May 1995. It describes how the 'RSK' utilized its "real threat strategy"[19] by carrying out a series of artillery and rocket attacks on several Croatian cities that killed 7 civilians and wounding about 214 others in Zagreb. One rocket struck a children's hospital in the city center.[20]

11.12 Following the liberation of Western Slavonia, Milošević installed General Mrkšić as the new commander of the Army of the rebel Serbs. Mrkšić was a Lieutenant General in the Army of Yugoslavia (VJ).[21] This, once again, demonstrates the continuing control and direction of Serbia over the 'RSK'. Beginning in June 1995, Mrkšić's task was to reorganize the SVK so that by October 1995,

> "We would have been able to inflict such losses as would have proved unbearable for the Republic of Croatia. They would have to give up on the idea of an attack and opt for a peace solution." [22]

11.13 For the Serb leadership, the conclusion of the war was approaching. In Bosnia, the Serb forces (the VRS with SVK) were about to implement their final strategic initiatives in Srebrenica, Žepa, and Bihać. On 1 June 1995, Mrkšić issued an order stating:

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[16] Counter-Memorial, para. 1175.
[17] Davor Marijan, "Storm", Zagreb, August 2010, p. 56.
[18] Counter-Memorial, para. 1177.
[19] See para. 10.93 *supra*.
[20] For details of the military operation, see Davor Marijan, "Storm", Zagreb, August 2010, pp. 56-57.
[21] On the role of Mrkšić see Chapters 4 and 5 generally.
[22] Mrkšić Testimony: 18829:12-23 *Gotovina et al* Trial, 18 June 2009.

> "Soldiers and the officers of the RSK, we are entering the concluding phase of accomplishing of our national aims and we must not allow any further losses of people or territory."[23]

To counter Serb plans, on 4 June, the Croatian Forces, facing the combined elements of the SVK-VRS launched, Operation *Skok 2* (*Leap-2*), with the aim of liberating territory and advancing towards the towns of Bosansko Grahovo and Glamoč.[24] They succeeded.

11.14 The Respondent mentions this Operation briefly,[25] and again misquotes the UN Secretary-General. The UN Secretary-General's Report did not note that "two Croatian army attacks on 4 and 6 June when the Kenyan battalion camp at Civljane sustained shelling from the Croat army". Rather, it stated that an attack on 6 June, from the direction of Mount Dinara, "result[ed] in several bouts of shelling, with three rounds *impacting* inside the Kenyan battalion camp at Civiljane."[26] The Respondent also alleges that the Croatian army's actions put the UNCRO forces at risk, resulting in the President of the Security Council issuing a warning to Croatia.[27] The President's statement, set out below, does not support the Respondent's allegation. While it does mention Croatia it is clearly aimed at all parties to the conflict - Croatia, Serbia and the rebel Serbs, and Bosnia:

> "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. The Council demands that *they fulfil 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..." [28] (emphasis added).

11.15 The Respondent fails to quote another relevant paragraph from the same statement, *viz.*

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[23] See RSK, Command of the 39th Corps., Order: Problems in the Military Organisation and the Elimination of Negative Occurrences which are one of the Causes of Defeat and Losses of the RSK Territory, 1 June 1995, Annex 152.

[24] Davor Marijan, "Storm", Zagreb, August 2010, p. 57.

[25] Counter-Memorial, paras. 1178-1179.

[26] Counter-Memorial, para. 1178. Report of the Secretary-General pursuant to SC Resolution 994, 9 June 1995, UN Doc. S/1995/467, para. 9.

[27] Counter-Memorial, para. 1180.

[28] Statement by the President of the Security Council, 19 June 1995, UN Doc. S/PRST/1995/30.

> "The Security Council could not countenance moves by the local Serb authorities in the Republic of Croatia and the Republic of Bosnia and Herzegovina to establish a union between them, since this would be inconsistent with the Council's commitment to the sovereignty and territorial integrity of the Republic of Croatia and the Republic of Bosnia and Herzegovina."[29]

11.16 It is clear that the President called on "all parties" to respect the international border between the Republics of Croatia and Bosnia. The Respondent admits however that it did no such thing. Instead, the combined Serb forces continued to fight in the Bihać Pocket.[30] On 29 June, at a meeting in Belgrade with *inter alia* Mrkšić, Mladić and General Momčilo Perišić, the Commander of the Army of Yugoslavia, Milošević advised that the "Republika Srpska is ensured, we must seal it and place emphasis on the RSK and defend it."[31] This confirms the Respondent's continuing, active and direct involvement.

(3) Developments in the 'RSK' in 1995

11.17 The political disagreements within the leadership of the 'RSK' during 1995 also demonstrate the extremist nature of its political elite. The "Prime Minister" of the 'RSK', Borislav Mikelić showed readiness to negotiate with Zagreb and signed an Economic Agreement with the Croatian authorities. In accordance with the Agreement of December 1992, the highway in Western Slavonia was opened. However, "President" Martić was against the Agreement, which he considered against the interests of the 'RSK'. As a result, he ordered the closure of the highway in late April 1995 and shortly thereafter the HV re-took Western Slavonia. After this, the Assembly of the 'RSK' replaced Mikelić and voted for unification with the RS in Bosnia-Herzegovina, and Mikelić was proclaimed a "traitor."[32] Instead of opting for constructive negotiations with Zagreb, the authorities of the 'RSK' decided to continue with a policy of avoiding all political compromise.

11.18 On the international front, in January 1995 Croatia had decided against an extension of the UNPROFOR mandate.[33] In the same month

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[29] *Ibid*.

[30] Serbia admits this in para. 1183.

[31] See Mladić's Diary, pp. 201, 203 and 206: Milošević also stated that he would give the Muslim-Croat Federation the areas of Vogosca and Ilijas around Sarajevo, and in exchange "we would enlarge on account of Fikret," meaning the Serbs would take at least some portion of the Bihać Pocket. At another meeting on 30 June, the plan to ultimately take the Bihać Pocket was finalized. Milošević told Mladić, Stanišić, Mrkšić and Fikret Abdić that "we must do something so he [Abdić] can take Cazin [in the Bihać Pocket], and then it will be easier later!", at Annex 149.

[32] N. Barić, *Srpska pobuna u Hrvalskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], pp. 463-487.

[33] See Chapter 10, para. 10.71 *et seq*.

the Serbs turned down the Z-4 Plan.[34] On 31 March 1995, Security Council Resolution 981 confirmed the territorial integrity of Croatia and recognized that major provisions of the Vance Plan remained to be implemented.[35] Martić rejected the new UNCRO mandate and it's control over the borders.[36]

11.19 At this time, the Croatian success in Mt Dinara and the Livno Valley posed a further threat to the morale of the rebel Serbs as this territory had previously been held by the RS. Faced with a common threat, rebel Serbs from Croatia and the BH founded a "Joint Defence Council" on 20 February 1995, in Banja Luka.[37] This was to be responsible for the defence of the people and the territories of the two Serb countries west of the Drina.

11.20 As noted above, an attempt was made to re-organise the SVK after the liberation of Western Slavonia. A new commanding officer (Mrkšić) was brought in from Serbia, and a Special Unit Corps (KSJ) was created. The situation after Operation *Leap-2* highlighted the strategic importance of Western Bosnia for the 'ABiH', the Serbian armies of BiH and 'RSK' (SVK and VRS) and Croatia.

(4) The Second Bihać Crisis

11.21 On 11 July 1995, the Army of Republika Srpska captured the safe area of Srebrenica. This was followed by the genocide at Srebrenica.[38] It is

[34] Martić's position that the plan should not be considered at all was accepted at the extraordinary session of the RSK Assembly held on 8 February in Knin. The Assembly accepted the proposal of the RSK Government to break off and postpone negotiations with the Republic of Croatia on economic and political issues until Croatia withdraws its request for the cancellation of the mandate of UNPROFOR or until the Security Council decides to extend the mandate of the UN peacekeeping forces in the protected zones in the territory of the [RSK], RSK Assembly, Summary of the Minutes of the First Extraordinary Session of the RSK, Knin, 8 February 1996, Annex 148.

[35] Security Council Resolution 981 dated 31 March 1995. The role of the peacekeeping forces was redefined, the name UNPROFOR changed to UNCRO (United Nations Confidence Restoration Operation in Croatia) with a mandate until 30 November 1995. According to the new mandate, UN forces were responsible for the establishment of efficient control over the internationally recognized borders of Croatia, and for controlling and monitoring the crossing of military equipment and personnel from the FRY or RS into the protected areas.

[36] Reuters, "Rebel Serb Leader Rejects UN Mandate Changes", Branimir Grulović, 6 April 1995. See also Conclusions of the Government of the Republic of Serbian Krajina Regarding the Negotiations on the Amendment of the Mandate of the United Nations Protective Force in the Occupied Parts of Croatia, Knin, 30 March 1995, Annex 150. See Chapter 10, paras. 10.77-10.84.

[37] Davor Marijan, "Storm", Zagreb, August 2010, p. 60.

[38] In February 2007 this Court found that the atrocities committed at Srebrenica constituted a genocide, and the Court concluded:

> "that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the [Genocide] Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these

plain that thereafter the Serbs of RS had no intention of stopping their actions and a new attack was mounted on Bihać.[39] Preparations for the offensive started after an agreement between the VRS and the SVK on 4 July. The plan envisaged the defeat of the 'ABiH's' 5th Corps and the establishment of Serb authority over the entire area of the Bihać enclave, seeking to entrench Serb strategic interests by linking all Serb territories. In addition to the VRS, the role of the SVK was to protect the operation, by preventing possible attacks by the Croatian army. The SVK committed two operational and one tactical group to the attack.[40] Members from the Serbian Ministry of Interior [MUP] were actively involved in the operation.[41] On 19 July 1995, combined Serb forces launched an operation against Bihać.[42] On 21 July, the 'ABiH' informed the HV that it had sustained heavy losses in personnel and territory; on 23 July they informed the HV that conditions had deteriorated beyond control and that by the end of the day the Bihać area could be cut up into two. The following day there was an appeal for help to the political and military authorities in Zagreb.[43]

11.22 US Ambassador Galbraith testified at the ICTY that "the last thing the Croatians wanted was for Bihać to fall, then you would have a single Western Serb entity, 'Krajina' and Bosnia."[44] On 20 July 1995, Croatia's Foreign Minister Mate Granić wrote to the Security Council, to stress the gravity of the situation from Croatia's perspective.[45] Croatia believed that the attack on

were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995", *Bosnia*, para. 297.

The Court ruled that Serbia "had violated the obligation to prevent genocide", (Operative Clause 5, p. 170) and that it was take steps to comply with obligations under the Convention and to transfer individuals accused of genocide to the ICTY (Operative Clause 6, p. 170).

[39] Testifying at the *Milošević* Trial at the ICTY, (26 June 2003, p. 23167), Ambassador Galbraith stated:

> "by July of 1995, Croatia and Bosnia were in a state of acute crisis created by the activities of General Ratko Mladić and the Bosnian Serbs who had taken UNPROFOR personnel as hostage, who had taken over the enclave of Srebrenica, massacred the 7.000 men and boys, who attacked Žepa, another UN protected area, had taken that over and were in the process of attacking Bihać."

[40] M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], p. 159. The newly-formed Special Unit Corps was committed as the Second Operational Group (OG-2), and OG Pauk was renamed into First Operational group (OG-1). See Davor Marijan, "Storm", Zagreb, August 2010, pp. 62-63.

[41] RSK, MUP, Special Unit Directorate; no. 0814-2-6299/95 of 31 July 1995; Report cited in Davor Marijan, Storm, Zagreb, August 2010, pp. 62-63.

[42] M. Sekulić, *Knin je pao a Beogradu* [Knin Fell in Belgrade], pp. 160-161.

[43] See Davor Marijan, "Storm", Zagreb, August 2010, p. 63.

[44] *Gotovina et al*, 23 June 2008, Galbraith Testimony, 4922:13-14.

[45] Letter from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, Annex 151, p. 1 states

> "the Minister for Foreign Affairs of Croatia warned the Security Council that "the displacement of the population of Bihać ... would be considered a serious threat to the security and stability of Croatia ...[and] Croatia may be compelled to undertake

Bihać was part of a coordinated set of attacks which also included Srebrenica and Žepa, and was designed to eliminate the enclaves. At a press conference held in Knin on 30 July, Mladić confirmed this stating that his intention was to completely defeat the Muslims in Bihać as they were in Srebrenica and Žepa.[46]

(5) The Agreement at Split: July 1995

11.23 On 22 July 1995, Presidents Tuđman and Izetbegović signed a mutual defence agreement in Split, calling upon Croatia to intervene militarily in Bosnia both to assist Bihać and to continue coordination and cooperation in defence activities.[47] In the relevant part, the Agreement provided as follows:

> "the Republic and Federation of Bosnia-Herzegovina have called upon the Republic of Croatia to extend urgent military and other assistance in the defence against aggression, especially in the area of Bihać, which the Republic of Croatia has accepted"

Agreement has also been reached on the continuation of cooperation and constant coordination of defence activities between Croatia and Bosnia-Herzegovina."[48]

11.24 The Respondent contends that although the "official explanation" for the agreement was to lend military support to Bosnia, "it was obvious…this agreement was only another step towards achieving their primary goal – the takeover of the Krajina by force."[49] Croatia did repeatedly try to integrate the occupied areas, and also provided military support to Bosnia to prevent a second Srebernica in Bihać. The 'Balkan Battlegrounds' Report on which the Respondent relies states that when the "Bosnian government recognised that it might not be able to save Bihać on its own, it was natural for it to ask for Croatian urgent military assistance."[50]

(6) July 1995: Operation *Ljeto*-95 (Summer-95)

11.25 On the basis of the Split Agreement of 25 July 1995, Croatian forces

necessary measures to secure its status and territory."

[46] See RSK, State Information Agency, Statement of Ratko Mladić, Knin, 30 July 1995, Annex 153.

[47] Serbia wrongly states that the Agreement was signed on 22 July 1991, Counter-Memorial, para. 1182.

[48] Declaration on the Implementation of the Washington Agreement, Joint Defense Against Serb Aggression and Reaching a Political Solution Congruent with the Efforts of the International Community, Split, 22 July 1995, Annex 155.

[49] Counter-Memorial, para. 1182.

[50] Central Intelligence Agency (May 2002), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995*, Vol. I, p. 364.

launched Operation *Ljeto* (*Summer-95*) to relieve pressure on the Bihać Pocket by taking the strategically important towns of Grahovo and Glamoč. The intention was to stop that offensive against Bihać and draw the Serb forces towards the Livno Valley.[51] In this context, for the first time the Counter-Claim refers to the use of the force by the 'RSK' when it admits that:

> "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 5th Corps in the Bihać pocket."[52]

The Respondent seeks to portray this as a benign act; it was not.[53]

11.26 The Serb attacks on Bihać demonstrated the continuing aggressive intentions of the rebel Serbs in Croatia and BH with the support and encouragement of FRY/Serbia.[54] In May 1995 the "President" of the Krajina, Milan Martić had stressed the need to finally break the Bosnian Army's 5th Corps in the Bihać enclave, and the need to control the Dinara Mountain through which the Croatian forces had started drawing closer on Knin. In addition, he wanted a military solution to the issue of the "Banija pockets": this presumably, meant pushing the Croatian army back from the bridgehead along the southern bank of the Kupa River. He considered that it was necessary to "rectify eastern borders", by which he meant capture of certain areas in Eastern Slavonia. Finally, he stated that it was necessary to "[liberate] Western Slavonia", where the Serbs had recently suffered a defeat.[55]

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51 Davor Marijan, "Storm", Zagreb, August 2010, p. 64.

52 Counter-Memorial, para. 1183.

53 A Report of the Secretary-General submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, para. 9 stated as follows:

> Fighting between the Bosnian Government Fifth Corps and the separatist forces of Mr. Fikret Abdić, supported by Krajina Serb forces, flared up again. The Fifth Corps attacked Krajina Serb-controlled territory [...]. This generated a strong reaction from the Krajina Serbs, who used armed helicopters for the first time on 16 July 1995 and launched a major counter-offensive on 19 July 1995. ...These operations in the Bihać pocket have caused some 8,000 civilians to abandon their homes to escape the fighting. They have sought refuge in and around the town of Cazin, where they are being assisted by the local authorities, the [ICRC] and the Office of the United Nations High Commissioner for Refugees (UNHCR). The extremely serious humanitarian situation in the pocket is the result of both the fighting and the long-standing denial of access to UNHCR convoys by the Krajina Serb authorities in Knin and Mr. Abdić.

54 In June 1995 there were a series of meetings between the commanders of Krajina Serb Army (General Mrkšić), the Bosnian Serb Army (General Mladić) and the Commander of Army of Yugoslavia (General Momčilo Perišić) to plan operations.

55 RSK, Office of the President of the Republic, Minutes of the Meeting between the President of the RSK and Leaders of the Deputies' Groups, 19 June 1995, Annex 156.

(7) Krajina: In Anticipation of Storm

11.27 While arguing that the Croatian Army used combat activity in Bihać as a pretext for Operation Storm, the Respondent fails to mention the Serb strategy and Serb military preparations. These developments are noted in a Report of the Secretary General, where he stated:

> "The Krajina Serbs are redeploying units to block the Bosnian Croat/ Croatian advance and have used small arms, mortars, artillery and air strikes from the Ubdina airfield to attack Croatian positions within Sector South. During one such air attack on 18 June, an UNCRO observation post came under direct attack, fortunately without significant harm to the Kenyan soldiers occupying it. There has also been regular and frequent shelling […]
>
> In addition to organizational changes, […] Krajina Serb forces are believed to have acquired new and more numerous military equipment and arms. … The Krajina Serbs have also recently displayed new arms and equipment, including small arms, night observation devices and some re-engineered naval surface-to-surface missiles. […]
>
> Following the setback suffered by the Krajina Serbs in Western Slavonia (Sector West) in early May, a new military commander has been appointed and has declared his intention to professionalize the army and adopt a new military doctrine. A new Special Forces Corps has been established and located where it can intervene quickly in either Sector South or North. Army discipline has improved, which, in turn, has reduced, but not totally eliminated, robbery, hijackings and threats against UNCRO personnel and equipment." [56]

11.28 In this period the rebel Serbs failed to implement the Economic Agreement, continued the pursuit for unification with the RS, participated in the war in Bosnia, rejected the Z-4 Plan and Security Council Resolution 981/95. These and other acts made it clear that peaceful re-integration was impossible. Given the events in Western Bosnia, and its effects on Knin,[57] the Croatian leadership decided they had no alternative but to launch an offensive against the rebel Serbs. This belief was strengthened by the knowledge that the Serbs were preparing a further offensive.

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[56] Report of the Secretary-General submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, paras. 7, 13.

[57] The capture of Grahovo and Glamoč cut Knin off from its hinterland causing the Army of the RSK to lose contact with the VRS 2nd Krajina Corps in Drvar, Bosnia and its supply line with the Bosnian Serbs. Links with Serb held ground were reduced to difficult, almost impassable routes, all within range of Croatian artillery.

(8) The Serb Strategy: To Buy Time

11.29 On 28 July 1995, Martić declared a state of war throughout the 'RSK' and mobilized its army.[58] The following day a curfew was established and broadcast on TV and on radio.[59] On 30 July, the VRS-SVK counter-offensive plans were prepared with Mladić present in Knin to arrange and coordinate further operations.[60] At a press conference, Mladić stated that the "Croatian formations have attacked and have entered Grahovo and partially entered Glamoč, but I do hope we will retake these and other occupied territories of Republika Srpska very soon."[61] On 31 July, at a press conference Martić stated that he had talked to the President Milošević and obtained from him the promise that "Serbia could no longer be indifferent" if Croatia attacked Knin.[62]

11.30 In light of these events, President Tuđman held a meeting with the senior military leadership in Brioni. Contrary to the Respondent's claim the meeting considered the forthcoming military operation, it did not finalize a "genocidal plan."[63] Aware of the Serb plans, and with the knowledge that a delay would give the Serb forces time to consolidate, Miroslav Tuđman, the Deputy Head of the Office for National Security, outlined the problem:

> "If this [Operation *Storm*] is postponed for two days that means that they [the Serbs] will have four or five days until the end of the operation, they will have time to transfer these forces and you will be subject to an attack over there [Grahovo]. That's their only chance to weaken the pressure on Knin."[64]

11.31 On 2 August 1995, a joint session of the RS/ RSK Joint Defence Council was held in Drvar (in BiH) to discuss "further coordination of operations."[65] The meeting also resulted in an appeal to all Serbs, including the FRY/Serbia, to assist in the defence of Serb territory.[66] On the same day, the 'RSK' Civil Defence Headquarters ordered all subordinate units to prepare for the evacuation of material assets, archives, civil registers, records and confidential documents, movable cultural assets, money, securities and other

[58] Letter from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, Annex 151, p. 2. See also RSK, Supreme Defence Council, Proclamation of the State War Throughout the RSK, 30 July 1995, Annex 157.

[59] See Croatian Intelligence Administration, Situation and Activities of the SVK, 30 July 1995, Annex 158.

[60] See Mladić's Diary, p. 239, Annex 149.

[61] General Ratko Mladić Speaking to the Media in Knin, 30 July 1995, Annex 154.

[62] Davor Marijan, "Storm", Zagreb, August 2010, p. 67. See also RSK, Supreme Defence Council, Proclamation of the State War Throughout the RSK, 30 July 1995, Annex 157.

[63] Counter-Memorial, 1169.

[64] Brioni Transcripts, Counter-Memorial, Annex 52, p. 28.

[65] See Mladić Diary, p. 240, Annex 149.

[66] Letter from the Secretary-General addressed to the President of the Security Council, 7 August 1995, UN Doc. S/1995/666, p. 2. Annex 151.

documents.[67] Plans for evacuation had already begun.[68] Mrkšić issued orders for the defence of the 'RSK'. The rebel Serbs were also counting on the assistance of the VRS and the VJ. Simultaneously with these military preparations, the Serb leadership engaged the international community in sham negotiations to create the impression that they were willing to agree to peace. The aim was to buy time to re-deploy and re-group with additional VRS forces from Eastern Bosnia and retake Grahovo.[69]

11.32 The Respondent contends that by this point "Croatia was by no means ready to accept a peaceful solution."[70] However, the document the Respondent cites in support of this contention does not support the assertion for which it is invoked. To the contrary, the letter cited by the Respondent states that in a meeting with the UN Secretary General's Special Representative, Mr. Akashi, on 29 July 1995, President Tuđman "expressed his Government's willingness to participate in political and military talks with Knin, but stressed that progress on the ground must necessarily follow."[71] It is unclear how the Respondent draws the conclusion that Croatia wanted war at any cost when the document it advances clearly indicated that Croatia was willing to negotiate. President Tuđman also indicated that if immediate progress was not forthcoming, Croatia would take the necessary measures to redress the situation. Specifically, the President insisted on the re-opening of the Adriatic oil pipeline, rapid agreement on the opening of the Zagreb-Knin-Split railway and immediate progress on political re-integration of the Serbs from the occupied territories on the basis of Croatia's Constitution and Law on Minorities. These were all demands that had been made earlier, but the Serbs had failed to comply. The Croatian President also agreed to send representatives to Geneva for the meeting sponsored by the ICFY on 3 August.[72]

11.33 The following day, on 30 July, Akashi held talks with Martić. Requiring more time to launch their counter-attack, Martić agreed to send an 'RSK' delegation to Geneva. The Respondent states that the talks "secured a six-point commitment, including a guarantee that Serbian forces would withdraw fully from the Bihać pocket and desist from further cross-border interference"."73" It contends that despite the fact that Serb forces started to withdraw from Bihać, "President Tuđman kept setting new conditions"."74" The President did not set any new conditions: the conditions remained the same as specified to Mr Akashi the day before. However the concessions

67 See *inter alia* RSK, Civil Defence Headquarters, Order on the Implementation of Preparation for the Evacuation of Assets, Archives, and Records, 2 August 1995: Annex 196.
68 See para. 11.77 *infra.*
69 IKM GŠ VRS, str. con. no. 02/2-187 from 3 August 1995, Directive no. 8 ("Vaganj-95").
70 Counter-Memorial, para. 1186.
71 Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, p. 2, para 3, Annex 151.
72 *Ibid*.
73 Counter-Memorial, para. 1187.
74 Counter-Memorial, para. 1188.

made by the Serbs were insufficient. Even at this point, the Secretary General noted that the "Croatian Government did, however, reaffirm its readiness to participate in the talks at Geneva."[75]

11.34 The Respondent contends that at the meeting held in Geneva on 3 August 1995, the Croatian delegation sought immediate reintegration whereas the Serb delegation requested that there first be a cessation of hostilities.[76] This is a complete distortion of the facts, as is clear from Martić statement of 2 August 1995. He stated:

> "Croatia will most likely conduct new aggression towards the RSK. We attempted to delay this by agreements and negotiations in order for it to be avoided. However, their position is precisely to gain support for a military solution in order to stabilize themselves within, and you know how much instability they are suffering. But if we succeed, and I sincerely hope this will be the case, and we wait "as a host" and defeat them, *then our recognition will be truly imminent. The RSK would then become the utmost reality,* it would be realistic that we be recognized worldwide and that Croatia be defeated, they would be forced to shake our hands and say, the RSK exists."[77] (emphasis added)

11.35 Yet again, the UN Secretary-General describes how the Serbs continued to play for time.[78] The Serb offer to accept the ICFY proposals "as a useful basis for progress, subject to clearance by its political leadership" was clearly yet another time wasting tactic. This is also obvious from the fact that while in Chapter XII, the Respondent stated that Babić accepted the Z-4 Plan on 2 August,[79] it is clear that he only agreed to "negotiate on the basis of [it]," a worthless agreement without the support of Milošević and Martić.[80] As noted earlier, while Babić was "accepting" the Z-4 plan, Martić was instructing his chief negotiator in Geneva, Prijić, that "we cannot accept Z-4 and to delay any agreement with Croatia, with "political talks after the

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[75] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, p. 2, para 3, Annex 151.

[76] Counter-Memorial, para. 1189. (See also para. 1159).

[77] See Milan Martić speaking in Ravni Kotari, 2 August 1995, Annex 161.

[78] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, Annex 151, para. 5 states:

> "After a series of bilateral meetings, [Mr Stoltenberg] 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 Croatian Serb delegation was inclined to accept the paper as a useful basis for progress, subject to clearance by its political leadership…*" (emphasis added)

[79] Counter-Memorial, para. 1157.

[80] Excerpt from the testimony of Milan Babić, *Milošević* Trial, IT-06-90 T, p. 13256, 21 November 2002, Annex 162. See also *Gotovina et al* Trial, 24 June 2008, Galbraith Testimony, 5003:2-11. See also Chapter 10, para. 10.110 *et seq.*

month of August."[81] Thus, the 'RSK' delegation received a command from Knin to reject any compromise.

11.36 As "peace negotiations" in Geneva were underway, the Serb forces were preparing an offensive. By 3 August, the Serb leadership knew that Operation *Storm* would commence the next day, yet they decided to reject peaceful reintegration, and to rely on the international community to pressure Croatia into ending Operation *Storm*.[82] Jovica Stanišić (head of the State Security of the MUP of Serbia and a close associate of Milošević) told Mrkšić to "hold on for a couple of days and that the international community would interfere and save Krajina."[83] Also on 3 August, the day before Operation *Storm* commenced, Serb artillery shelled Dubrovnik and its surroundings, killing at 3 least civilians and wounding others.[84]

11.37 Operation *Storm* commenced on 4 August 1995. The Respondent contends that Croatia only participated in the negotiations for tactical reasons, and that by then it had decided to "destroy Krajina Serbs by the use of military power."[85] Once again the conclusions reached by the Respondent are not supported by the evidence. *First*, Croatia had not decided to "destroy the Krajina Serbs." It had spent 4 years trying to arrive at a peaceful solution. But in the face of the continuing aggressive attitude and actions of the rebel Serb leadership it was left with little choice but to opt for a military solution. *Second*, the evidence shows that even at this late stage the Serb delegation in Geneva had been instructed not to compromise.

SECTION II: PLANNING FOR THE LIBERATION OF OCCUPIED TERRITORY

11.38 The Respondent claims, again, that though the plan for Operation *Storm* was finalized at the Brioni meeting, the decision to use military force was made much earlier, by the end of 1994 at the latest; that from 1992 there were ongoing efforts to strengthen the Croatian army, its combat effectiveness and efficiency; and that it was tested through military operations in 1993

[81] See Excerpts of Intercepts between Milan Martić and Ilija Prijić, Nos. 65 (3 August 1995, 08:50), 66 (3 August 1995, 12:23), 67 (3 August 1995, 14:42), pp. 7-10, Annex 163. See also Dušan Viro, "Slobodan Milošević: The Anatomy of Crime", Profil, Zagreb, 2007, pp. 370-378, Annex 164.

[82] See *inter alia* Regular Daily Report of the 'RSK's' Ministry of Defence, Knin, 31 July 1995, that talks of mobilization to achieve full strength in the SVK; new recruitment; the requisitioning of vehicles and defence preparations, Annex 159. See also SVK, General Staff, Daily Report, 3 August 1995, Annex 160.

[83] *Gotovina et al*, 9 June 2009, Mrkšić' Testimony, 18955:17-22; 18956: 6-16. Similarly, Martić thought that mobilisation would be carried out in Yugoslavia and that Belgrade would support Knin. See Dušan Viro, "Slobodan Milošević: The Anatomy of Crime", Profil, Zagreb, 2007, pp. 370-378, Annex 164.

[84] Davor Marijan, Storm, Zagreb, August 2010, p. 66.

[85] Counter-Memorial, para. 1190.

and 1994 in preparation for "the operation that would satisfy Croatia's strategic interests - Operation *Storm*."[86] It alleges that the military operations undertaken earlier were not intended to regain territories held by the Serbs, but to "remove the Serbs" themselves.[87] The Respondent claims that the attitude of the Croatian authorities towards the Serbian population "crystallized into genocidal intent at the time of operation *Storm*" and that this is evident from the Brioni transcript.[88]

11.39 Before examining the transcript of the Brioni Minutes, the following brief points need to be made:

- Operation *Storm* was not "Croatia's strategic interests." Its interest was in the re-integration of the occupied areas and the Serb population living there on the basis of Croatia's Constitution and Law on Minorities, a goal recognised by the international community.

- Croatia was committed to reaching a peaceful solution that would result in the reintegration of areas under Serb control; however, its experience in dealing with the rebel Serb authorities over four years showed that this was futile.

- As a new State and one that had approximately one third of its territory under occupation by the rebel Serbs (supported and controlled by Belgrade), it was in Croatia's interest to strengthen its army, improve its combat readiness, operational capacity and mobility as well as enhance and reorganise its staffing.[89]

- The plan for Operation *Storm* was not finalized during the Brioni meeting; final military planning took place on 2 August in the War Room of the Ministry of Defence, where the senior military leadership was present.[90]

- Croatia never had a policy to "remove the Serbs" from the occupied areas during Operation *Storm*, Operation *Flash*, or earlier; this is clear from the attitude of the Croatian government after both Operations *Flash* and *Storm*.

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[86] Counter-Memorial, paras. 1191-1193.

[87] Counter-Memorial, para. 1194.

[88] Counter-Memorial, para. 1194. A similar argument is made in para. 1425.

[89] Contrary to what Serbia states: (para. 1191-1192), Reynaud Theunens is not a "Croatian official" but the Prosecution's Expert witness at the Trial of General Gotovina at the ICTY - See *Prosecutor v. Gotovina et al.* (Operation *Storm*), no. IT-06-90. Furthermore, General Bobetko, who allegedly stated that the Vance Plan represented a mere 'pause' which required the improvement of the Croatian army combat readiness was a soldier. His views did not represent the facts or the views of the Croatian government, which is evident from the diplomatic history between 1991 and August 1995.

[90] See para. 11.58 *infra.*

- Finally, Croatia had no "genocidal intent" at the time of Operation *Storm*, before or after it. This is "clear" from a reading of the Brioni transcript.

(1) The Meeting at Brioni, 31 July 1995

11.40 The developments in Bihać and political failures made it plain that time was of the essence and Croatia could not afford any further delay. Alternatives before Croatia were clear: either the Serbs agree to peaceful reintegration of the occupied territory, or force would be used to liberate the occupied territories.

11.41 On 31 July 1995, President Tuđman met with senior military officials on the island of Brioni. The participants at the meeting considered military options for retaking Croatian territory in the event that the Serbs refused to accept peaceful reintegration. The Brioni meeting was not a meeting of the "highest Croatian leaders" as alleged by the Respondent, but a meeting of Croatia's senior military leadership.[91] Nor was it a meeting at which political decisions were made, but one at which the commander-in-chief of the armed forces of a sovereign state together with senior military officials discussed the planning and launch of a military operation for the liberation of its own occupied territories.

11.42 The Respondent claims that virtually every member of the Croatian leadership - political and military - was a part of the "genocidal plan,"[92] the "criminal goal"[93] of which was the permanent removal/destruction of the Serb population from the "Krajina" by force, fear or threat of force, persecution, forced displacement, looting and destruction of property.[94] This is not supported by any evidence: there is no statement at Brioni from which a genocidal intent can be inferred, let alone a plan to commit genocide or any other crimes against Serb civilians. There is no evidence of a criminal plan to forcibly remove the Serb population from Croatia at Brioni, let alone a genocidal one. While there was discussion regarding the use of artillery and psychological warfare, none of it relates to genocidal or even criminal conduct. There is no mention whatsoever of forcible displacement, killings, destruction of property, or obstacles to return for the Serb population.

11.43 The Respondent relies on the mischaracterization of a statement made by the Croatian President. The Respondent repeatedly quotes President saying, "We have to inflict such blows that the Serbs will to all practical purposes

[91] Counter-Memorial, para. 1195. See also paras. 1169 ("top Croatian political and military leadership"); 1194 ("meeting of the Croatian leadership"); paras. 1195, 1418 ("highest Croatian leaders"); para. 1353 (Plan "devised by top civilian and military leadership").
[92] Counter-Memorial, para. 1169.
[93] Counter-Memorial, para. 1197.
[94] Counter-Memorial, pp. 383 *et seq*

disappear."[95] This alleged goal of making the Serbs "disappear" is repeated at least 18 times in the pleading.[96] A more complete contextual examination of what the President said makes it clear that his reference to "Serbs" refers to "Serbian forces", not Serb civilians. He instructed his commanders as follows:

> "Therefore we should leave the east totally alone, and resolve the question of the south and north. 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. […]
>
> Therefore our main task is not Bihać, but instead to inflict such powerful blows in several directions that the Serbian *forces* will no longer be able to recover but will have to capitulate."[97](emphasis added)

The use of the term "capitulate" also points to the conclusion that the statement refers to the capitulation of the Serbian forces, not Serb civilians.

11.44 Recognising that time was of the essence, as the Serbs were preparing their offensive, President Tuđman instructed the HV to complete the military operation in "three to four days, or a maximum of eight days...."[98] The participants at the Meeting, aware of the impending rebel Serb actions to seek to recover lost territory urged that the Croatian offensive *must be completed* within eight days.

11.45 With no evidence of any criminal plan to expel ethnic Serbs, the Respondent is left to invite the Court to infer the existence of such a plan from non-existent circumstantial evidence. In doing so, the Respondent also asks the Court to ignore substantial evidence directly in conflict with its assertion. The evidence before the Court does not support the Respondent's claims.

(a) There was no agreement at Brioni to forcibly remove the Serb population

11.46 The participants of the Brioni Meeting knew that Serb soldiers and civilians were already fleeing Knin and the RSK[99], and would continue to flee

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[95] Counter-Memorial, para. 1197.

[96] See eg. Counter-Memorial, paras. 1197, 1198, 1237, 1328, 1329, 1331, 1334, 1353, 1386, 1397, 1416, 1421 (repeated twice), 1422, 1425, 1431, 1447 (twice), 1462 and 1467.

[97] Brioni Transcripts, Counter-Memorial, Annex 52, p. 2.

[98] Brioni Transcripts, Counter-Memorial, Annex 52, p. 1.

[99] The fall of Grahovo caused Serbs to flee the "Krajina" in the days before Operation *Storm*. Mrkšić reported that 2000 conscripts fled after the fall of Grahovo as did civilians. See RSK, Operations Report, 26 August 1995, Annex 165**,** pp.16, 20. On 29 July Mrkšić ordered units to "take any measures in order to explain the situation in order to prevent the moving away

"if we continue this pressure."[100] The "pressure" referred to the threat of an HV attack, as reflected in a Croatian intelligence assessment on 30 July:

> "[The seizure of Grahovo] has created conditions to threaten Knin directly, which caused fear and panic among local Serbs. It is particularly pronounced *because they are afraid of an HV attack on the entire area of the RSK*. That is why more and more people are leaving Krajina and moving to RS and the FRY."[101] (Emphasis added.)

(b) No Discussion about Directing Artillery against Civilians

11.47 In addition to its expulsion argument, the core of the Respondent's genocide claim is that the President Tuđman ordered the indiscriminate and excessive shelling of civilians to force them to flee.[102] A plain reading of the transcript shows that President Tuđman urged his military commanders to do exactly the opposite of what the Respondent alleges. President Tuđman told his commanders that:

> "you have to enter as quickly as possible and report that you have entered... because that will have a psychological effect in such situations. *The psychological effect of that fall of a town is greater than if you shell it for two days."*[103] (Emphasis added.)

Concerned with shortfalls in ammunition, President Tuđman warned against using artillery ammunition "as if we were Russians or Americans."[104] The Respondent's implication that President Tuđman improperly suggested that artillery be used in Knin to achieve "complete demoralization"[105] fails to mention the importance of Knin as the site of several legitimate military targets. In any event the President never suggested that civilians be targeted.

(c) No Plan to Target Fleeing Civilians

11.48 The departure of civilians and soldiers was ongoing before Operation *Storm* and was anticipated to continue as a result of the rebel Serb leaderships' position that co-existence between Croats and Serbs was impossible.[106] At

of the population from the territory of the RSK," and to court martial and execute deserters, Annex 166.

[100] Brioni Transcripts, Counter-Memorial, Annex 52, p. 15. (emphasis added)

[101] See Croatian Intelligence Administration, Situation and Activities of the SVK, 30 July 1995, Annex 158.

[102] See e.g. Counter-Memorial, paras. 1217 *et seq* and also 1204.

[103] Brioni Transcripts, Counter-Memorial, Annex 52, p. 18.

[104] Brioni Transcripts, Counter-Memorial, Annex 52, p. 21.

[105] Counter-Memorial, para. 1217.

[106] Both Croatian and RSK intelligence confirmed the exodus. On 2 August, HV intelligence reported that "there was an outburst of panic in that area," and that they had overheard an

Brioni, Admiral Davor Domazet, Chief of the Intelligence Service of the Croatian Army, reported that in the SVK ranks "the first problem now is how to flee, and not how to fight."[107] In light of this, President Tuđman cautioned that Domazet's proposed plan was

> "Not providing them with an exit anywhere .....[t]o pull out and flee; instead, you are forcing them to fight to the bitter end ... when we *put pressure on them,* now they are already partly moving out of Knin. 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."*[108]

11.49 The Respondent admits that the participants at the Brioni meeting discussed opening a corridor for the Serbs, but states that this was "in order to avoid bigger losses to the Croatian side."[109] Croatia was right to seek to minimize losses - losses to both sides to the conflict, not just to the "Croatian side." This reasoning was justified from a military and humanitarian perspective.

11.50 The Croatian authorities were aware of the 'RSK' preparations for civilian evacuation to the Republika Srpska in Bosnia and Belgrade.[110] This was borne out by the earlier experience in Western Slavonia in May 1995, and Grahovo in July 1995.[111] President Tuđman never suggested that something be done to *cause* the Serbs to leave; instead, given the Serb leadership's plans to evacuate the civilian population, he stated that they should not be forced to stay and fight, but allowed to leave if they so chose. Accordingly, there is nothing sinister about President Tuđman's order that escape routes be left open. To the contrary, this was proper because it avoided the loss of life that would result from a "fight to the bitter end." In fact, during Operation *Storm* the Security Council insisted that Croatia allow the Serbs to leave.[112]

[SVK] officer saying "the situation in Knin is the same as in Berlin in 1945…", see Annex 167. On 3 August, SVK intelligence reported that elements of "panic" had been noted, and "[f]urthermore, the citizens believe that we are not able to defend ourselves and that, should there be no significant help by the FRY it would be better for the people to resettle to other areas rather than stay here to face encirclement and death." RSK, Security Department, Daily Report, 3 August 1995, Annex 168. p. 4.

[107] Brioni Transcripts, Counter-Memorial, Annex 52, p. 5.

[108] Brioni Transcripts, Counter-Memorial, Annex 52, p. 7. President Tuđman went on to state that "they should be given a way out here…Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other." Brioni Transcripts, Counter-Memorial, Annex 52, p. 15.

[109] Counter-Memorial, para. 1200.

[110] For e.g. Brioni Transcripts, Counter-Memorial, Annex 52, p. 15. See also Croatian Intelligence Administration, Situation and Activities of the SVK, 30 July 1995, Annex 158.

[111] Milisav Sekulić also confirms this. In his book he gives the example of Obrovac where at the beginning of June 1995 the local authorities launched a campaign for the population's collective departure, Sekulić, *Knin je pao u Beogradu* [Knin fell in Belgrade], 2001, pp. 148-150. Besides, the population was moving out of the RSK for the entire duration of the war. Radulović, *Sudbina Krajine* [The Fate of Krajina], 1996, p. 89.

[112] See Security Council Resolution 1009 (1995), para 2(a). See also the Agreement between

(d) No Discussion at Brioni regarding the destruction of property or obstacles to return.

11.51 The Respondent does not allege that the Brioni transcript contains any reference to the use of burning and looting as a means of forcibly removing Serbs. Unlike statements whereby the Respondent attempts to falsely portray the Brioni meeting as an agreement to destroy/expel all Serbs, there is no statement at Brioni that suggests any agreement to commit acts such as murder of civilians or the destruction of property.

11.52 Finally, since the Respondent does not allege that obstacles to return, including alleged discriminatory civil and criminal legislative measures, were discussed at Brioni, it is impossible to ascertain how these alleged acts could have formed a part of Croatia's "genocidal plan." The Respondent has not alleged any agreement other than Brioni and an examination of the evidence does not allow for an inference that there was any other agreement amounting to a "plan" to commit Genocide.

11.53 As more fully discussed in Chapter 12 below, with respect to each alleged method of implementing its supposed "genocidal intention", the actions taken by Croatia both before and after the Brioni Meeting cannot possibly justify a claim that Croatia was engaged in any genocidal or criminal activity.

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11.54 The Respondent raises two other issues that require brief comment. *First*, it states that neither the President nor others present at the Brioni meeting "invited Croatian commandants to respect the rules of humanitarian law during the …operation," and claims that the President "provoked military officers to think about revenge."[113] This allegation is without any foundation. There was no discussion about humanitarian law at the Brioni meeting, as it was a meeting of the senior military leadership to discuss strategic issues. Croatian commanders had instructed soldiers to respect the rules of humanitarian law.[114] Allegations that President Tuđman incited commanders to destroy Knin, is plainly refuted by photos and videos of Knin after Operation *Storm* which show that Knin was in fact not destroyed.

Republic of Croatia and UNCRO, 6 August 1995, Annex 169, para 3.

[113] Counter-Memorial, para. 1204.

[114] See *inter alia* Republic of Croatia, Ministry of Defence, Directive Op. No. 12-4/95, 26 June 1995, Annex 170, which provided that commanders were to ensure that all HV units complied with international humanitarian law regarding the treatment of POWs and civilians in the occupied territories; See also Minutes of the Meetings held at the Defence Ministry of the Republic of Croatia, 2 August 1995 Annex 172, p. 3, wherein commanders were directed to prohibit uncontrolled conduct.

11.55 *Second*, the Respondent asserts that the "Development of a plan targeted against Krajina Serbs was also related to the guarantees prescribed by [Croatia's] Constitutional Law on Minorities, …enacted in 1992"[115]. Stating that under this law Croatia was obliged to assign a number of seats in the Parliament to minorities counting for more than 8% of the total population,[116] the Respondent contends that this meant that "the reintegration of the Krajina Serbs into Croatia would lead to them being a significant political factor, considering that the Serbs made up about 12% of the entire population of Croatia at that time" and that this "was an additional incentive to try and destroy the Krajina Serbs."[117] Not a shred of evidence is offered in support of these unfounded assertions. *First*, this law and other Croatian laws and executive decrees confirm that Croatia had no genocidal plan to make the Krajina Serbs "disappear". Rather, the Act demonstrates that Croatia hoped to integrate the occupied territories through political and peaceful means, thereby guaranteeing the highest standards of civil and political rights to minority groups.[118] *Second*, this Constitutional Act was passed more than three years before Operation *Storm* and between 1992 and 1995 the rebel Serbs did not consider accepting or implementing it.

SECTION III: PLANNING AND PREPARATION FOR OPERATION *STORM*

11.56 General planning for the liberation of occupied Croatian territories began in 1992. The context was that rebel Serbs had occupied some 30% of the territory of Croatia. Over the years the plans were updated. The last plan for Operation *Storm* was modified a few days before its launch, and provided for the simultaneous attack of Croatian forces in all operational and tactical directions, and an advance to the border between Croatia and BH over a period of up to seven days.

11.57 Operational planning was governed by the HV Main Staff Directives issued on 26 June 1995.[119] The forces of the Zagreb, Karlovac, Gospić and Split Corps Districts were given orders to start intensive preparations, along with the required regrouping and additional mobilization to bring the forces to a state of readiness.[120] This Directive included, *inter alia,* operational guidance

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[115] Counter-Memorial, para. 1199. (emphasis added)

[116] Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia, Official Gazette No. 3/92, entered into force on 17 June 1992.

[117] Counter-Memorial, para. 1199.

[118] This unsubstantiated allegation that President Tuđman wanted the Serbs to disappear thus "preventing them from being a political force in Croatia," is repeated at para.1334 of the Counter-Memorial.

[119] Republic of Croatia, Ministry of Defence, Directive Op. No. 12-4/95, 26 June 1995, Annex 170.

[120] *Ibid*..

for the use of artillery.[121] After the meeting there were intensive preparations including the drawing up of Artillery fire support plans.[122]

(1) Final Planning for Operation *Storm*

11.58 On 2 August 1995, at a meeting at the Ministry of Defense in Zagreb, Šušak, Croatia's Minister of Defence, met with the operational commanders to discuss the combat plans and their respective areas of operation.[123] Croatian officials also met to discuss plans for re-establishing law and order in the liberated terrain immediately following the liberation.[124]

11.59 On 3 August, a number of meetings were held to prepare for military action. These were attended by people such as General Gotovina, Mladen Markač (Commander of the Special units of MUP of Croatia), Marko Rajčić (Head of Artillery of the Split MD, during the Operation *Storm*) and others. By this time the Croatian leadership was aware that the Serbs were strongly opposed to re-integration. The decision to launch Operation *Storm* was taken at a meeting of the National Security Council on the evening of 3 August. Meetings were also held with the Chiefs of Artillery at the various Operational groups to ensure that artillery was used in an efficient manner and so on.[125]

(2) Operation *Storm*

11.60 Operation *Storm* was a large scale and extremely complex endeavour involving multiple axes of attack across a lengthy confrontation line.[126] While the Respondent sets out details of the Croatian forces, it fails to mention that forces of the SVK were involved. Operation *Storm* was divided by the HV Main Staff into four segments all of which faced the SVK.

- The Split Military District (MD) was to take on the North Dalmatian Corps of the SVK;
- MD Zagreb was to take on the Banija Corps of the SVK;

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[121] *Ibid*., p. 6.

[122] See *Gotovina et al*, Witness Statement of Rajčić, the Chief of Artillery of the Split MD, Annex 173.

[123] Minutes of the Meetings held at the Defence Ministry of the Republic of Croatia, 2 August 1995, Annex 172.

[124] *Ibid*. .

[125] For a detailed discussion of Defence Plans as well as the final HV preparation, see Davor Marijan, Storm, Zagreb, August 2010, pp. 70- 74.

[126] Operation Storm was not conducted from four different directions as stated in the Counter-Memorial (para. 1209) but from over 30 directions. A graphic setting out the multiple axes of attack during Operation Storm is set out in Annex 174.

- MD Karlovac was to take on the Kordun Corps of the SVK; and
- MD Gospić was to take on the Lika Corps of the SVK.[127]

11.61 In its short overview on Operation *Storm*, the Respondent states that the outcome of the Operation *Storm* was never in doubt given the manpower of the Croatian Army.[128] The question that arises is: Why didn't the Serb leadership in Knin, fully aware of this strength, accept a political compromise? Why did it opt for war? The Serb leadership's plans for continuing confrontation is clear in a statement by the 'RSK's' "President" Milan Martić:

> "The war between the [Republic of Croatia] and the RSK must end in the victory of one and the defeat of the other side. Until that happens, the war will not and cannot end. […] We will not and must not come out of this war in which we are leading now and which we shall continue to lead wage as the defeated side to be treated as an ethnic community and a national minority. At the end of the war, our status must be as it was: that of a nation building people. We accepted the negotiations with the Croatian side, with the international community as mediators, but little can be expected to come out of the negotiations".[129]

The Respondent seeks to downplay the strength of the SVK. While Croatia had an advantage of manpower, in terms of heavy armament (tanks and artillery) the SVK was equal if not superior to the Croatian army.[130] In any event the comparative strength and composition of the two armies does not have a bearing on the issue of Genocide.

11.62 Operation *Storm* commenced on the morning of 4 August. The Split MD commenced its Operation at 5 AM, with a simultaneous attack on the front lines of the Serb forces and military objectives, including those in Knin. The artillery barrage in Knin was directed against military targets that included the headquarters of the SVK's General Staff, the Northern Barracks, the TVIK factory and the railway intersection.[131] Because of available information

[127] A detailed description of the role of all these forces is set out in Davor Marijan, Storm, Zagreb, August 2010, p. 79 *et seq*. See also CIA, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995*, (May 2002), Vol. I, p. 367 *et seq*

[128] Counter-Memorial, paras. 1213-1214. A similar statement regarding the comparative strength and composition of the HV and SVK is made at para. 1386.

[129] Excerpt from the Speech of the President of the Republic, Milan Martić, Given at the Briefing on the Combat Readiness of the SVK, 10 February 1995, Annex 175.

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

[131] This is admitted by Marko Vrcelj, Chief of Artillery at the SVK Headquarters in Marko Vrcelj, "The War for Serbian Krajina: 1991-1995", Belgrade, 2002, Annex 176, p. 6. See also SVK, Intelligence Department, Intelligence Report, 4 August 1995, Annex 177.

relating to the SVK's military objectives within Knin and the need for the HV to consolidate gains and exploit tactical success, there was also an artillery barrage on the morning of 5 August.[132] The HV infantry entered Knin at 1100 hours on 5 August.[133] Fortunately, the risk of a significant SVK defensive effort in Knin did not materialize as the SVK forces withdrew and Knin was liberated.

SECTION IV: CROATIA DID NOT COMMIT GENOCIDE DURING OPERATION *STORM* OR THEREAFTER

11.63 Serbia alleges that through Operation *Storm* and the events that followed, Croatia "succeeded in its criminal plan to destroy Krajina Serbs."[134] It alleges that Croatian forces carried out the "plan" through: a campaign of heavy and indiscriminate shelling and killings that forced Serb civilians to flee[135]; "systematically" killing every Serb they managed to find, burning every Serb household, looting Serb property, killing Serb animals and polluting wells in Serb villages[136]; the repopulation of Serbian homes with Croats, and the enactment of laws targeting Serbs to prevent their return.[137] Variations of these allegations are repeated throughout the Counter-Claim. The Applicant has already responded to the unfounded claim that there existed a "plan" to destroy all Serbs. It remains to address the conduct of Operation *Storm*.

11.64 The Respondent's Counter-Claim rests on two principle assertions: a) heavy and indiscriminate shelling of Serb civilians causing them to flee, and b) the number of Serbs killed or missing in *Storm* and thereafter. The allegations of indiscriminate shelling are based exclusively on the testimonies of Prosecution witnesses from the ongoing trial in *Gotovina et al.*[138] The evidentiary weight and value to be attached to evidence and testimony from ongoing trials is dealt with in Chapters 2 and 12.

11.65 As described below, the evidence shows that there was no indiscriminate shelling of Serb civilians. This is borne out by initial reports from the SVK Main Staff.[139] Further, the "exodus" of a majority of the Serb population was pursuant to a decision to evacuate taken by the 'RSK's' "Supreme Defence Council", and plans for evacuation had been prepared well

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132 Davor Marijan, "Storm", Zagreb, August 2010, p. 84.

133 *Ibid*., p. 85.

134 Counter-Memorial, para. 1356.

135 Counter-Memorial, paras. 1353-1354.

136 Counter-Memorial, para. 1354.

137 Counter-Memorial, para. 1355.

138 Counter-Memorial, Chapter XIII, Part 4 (b), paras. 121-1228 contains only 3 other references: One reference to General Gotovina's Book, a couple to the report of the Croatian Helsinki Committee for Human Rights and one to the Brioni Transcript.

139 See para. 11.73 *infra*

in advance.[140] The Respondent has failed to mention these detailed plans.

11.66 With regards to the allegations about the number of Serbs killed or missing as a result of Operation *Storm*, the Respondent has not provided the Court with *any* compelling evidence. In this regard, the Respondent relies almost exclusively on a report of the Croatian Helsinki Committee for Human Rights (CHC Report).[141] The weaknesses of methodology used by CHC in collecting information for its Report have been mentioned earlier.[142]

11.67 A preliminary analysis of the data in the CHC Report was carried out by the Croatian Directorate for Detained and Missing Persons.[143] An analysis of the list of "Civilians killed during and after the Military Operation '*Storm*'" (in former UN Sectors South) has broadly identified the following methodological flaws and mistakes/disparities:

1. Mistakes in characterising members of the SVK and paramilitary formations as civilians.

2. Mistakes/disparities in the details regarding the circumstances of deaths. The CHC lists all persons as "killed," whereas official records and documentation provide differently. For e.g. a number of individuals on the List appear to have died from natural causes, accidents, or were combatants who are missing and so on.

3. The biographical details essential for identification are inaccurate or incomplete for a [significant/almost half the] number of those said to be killed. (e.g. wrong name, name of fathers, wrong dates of birth/death, wrong location). In a number of cases, only the victims' name is provided further complicating the process of comparison with other data, and definite identification.

More specific comments in relation to the CHC Report are set out in the appropriate sections *infra*.

11.68 In addition, the Respondent has included at Annex 66 a list of the Serbs who allegedly died or went missing on the territory of Croatia from 1990-1998, prepared by *Veritas*. The Respondent does not, however, refer to Annex 66 at any point in its Counter-Claim. The Applicant accordingly assumes that the Respondent does not rely upon the *Veritas* List in support of the allegations made in the Counter-Claim. The Applicant notes that in any event the *Veritas* List contains various discrepancies, mistakes and methodological flaws. By

[140] See para. 11.77 *et seq*. See also M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], p. 179.

[141] Counter-Memorial, Annex 61, CHC Report.

[142] Chapter 2, para. 2.65.

[143] Counter-Memorial, Annex 61, CHC Report, Tab 1 (the List) was compared with the Applicant's official records and documentation relating to missing persons, exhumed and identified persons.

way of example only, some of the flaws in *Veritas* list of "Direct Victims" include:

- *Veritas* lists as dead or missing individuals who are either still alive or were alive when the list was published.[144]

- It includes names of individuals whose death was unconnected to the military operation. For example individuals who died as follows:

  - in traffic or other accidents;[145]

  - of natural causes;[146]

  - suicides.[147]

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[144] Examples of persons who are either still alive/were alive when the list was published, and who obtained new documents after Operation Storm include:

1. Dušan Korolija: According to Veritas died on 12 September 1995, but according to her Death certificate, he died on 12 April 2009, Annex 179.
2. Nikola Kresojević: According to Veritas went missing on 05 August 1995. Find annexed his Application for the Issuance of an Identity Card dated 10 January 2008, Annex 180.
3. Marijana Poznanović: According to Veritas went missing on 05 August 1995. Find annexed her Application for the Issuance of an Identity Card dated 30 April 2008, Annex 181.

[145] Examples of persons who died in traffic or other accidents include:

1. Mirko Rajšić, born in 1943, member of TO (territorial defense) Glina, was killed in a traffic accident: RSK, Military Post 9138, Extraordinary Event, 16 October 1993, Annex 182.
2. Branko Bajić died in a traffic accident in February 1995: RSK, Police Department, Letter Confirming the Death of Branko Bajić, 22 February 1995, Annex 183.
3. Željko Bolić, died in a traffic accident in August 1993 (crash of UN and local car): RSK, Regional Centre Vrginmost, Operational Report, 27 August 1993, Annex 184.
4. Živko Banda died as a result of falling down stairs when drunk, April 1992: RSK, Command of the 7th Operational Group, Report about Losses, 20 April 1992, Annex 185.
5. Dragan Dobrić died in a traffic accident. His bicycle was hit by an UNPROFOR truck in April 1992: RSK, Command of the 7th Corps., Information for Subordinate Units, 28 April 1993, Annex 186.

[146] Examples of persons who died of natural causes include:

1. Olga Paravinja, wife of Milan, died of natural causes: RSK, Benkovac Municipal Court, On-Site Investigation Record, 7 July 1993, Annex 187.

2. Dragija Popović died of natural causes: RSK, Commission for the Exchange of Prisoners, Transfer of Corpses, 13 July 1993, Annex 188.

[147] Example of a person who committed suicide: Goran Panić, born on 07.06.1972 in Sisak, residing in Belgrade, committed suicide. See RSK, Ministry of the Interior, Report on the Suicide of Goran Panić, 18 July 1995, Annex 189.

11.69 Other flaws with regard to the *Veritas* list are that it contains incomplete or inaccurate biographical details making identification difficult, it does not distinguish between soldiers and civilians; it makes no distinction on the basis of nationality - Croatian Serbs or Serbs and others from outside Croatia are all listed as victims and it also list people who died/were killed outside Croatia. The CHC has in fact stated that *Veritas* has "made the living dead and turned soldiers into civilians."[148]

11.70 The Counter-Claim refers to other "information offered by the non-governmental organisation Veritas" in its Annex 62.[149] The absence of neutrality and independence of the *Veritas team* has been noted in Chapter 2.[150] It is noteworthy that the Croatian Helsinki Committee for Human Rights has "repeatedly and publicly attacked" *Veritas* calling it "biased."[151] All this points to only one conclusion: the documentation of and methodology adopted by *Veritas,* and relied upon by the Respondent is inaccurate, unreliable, and biased.

(1) There Was No "Deliberate Indiscriminate Shelling" during Operation *Storm*

11.71 The Respondent claims that "artillery fire was of special importance" during *Storm* and that the artillery Order issued to the Split MD did not specify the targets of artillery attack. It also claims that certain towns "with no identifiable military targets" were repeatedly shelled.[152] The Respondent bases its assertions almost exclusively on a) the Prosecutors pre-trial brief; b) an Expert appointed by the Prosecutor; and c) witnesses from the ongoing trial of General Gotovina at the ICTY in support of its allegations of "deliberate indiscriminate shelling" by Croatia.[153]

11.72 Relying on the Prosecutors case at the ICTY, the Respondent fails to have taken the trouble to consider the evidence itself. The Artillery Order that put certain towns under artillery fire also directed artillery support to engage in "artillery shelling to rout, neutralise and destroy the enemy's combat disposition at the tactical and operational level … [p]revent the enemy from bringing in new forces … [n]eutralize the artillery positions of enemy batteries and destroy the enemies communications centres and command post."[154]

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[148] Counter-Memorial, Annex 62, p. 283 at 287. The authors of the Veritas Report state that there is a "row" between the two organisations over the number of Serb victims. The Croatian Helsinki Committee for Human Rights has "repeatedly and publicly attacked Veritas calling it "biased."

[149] Counter-Memorial, e.g. paras. 1240, 1259.

[150] Chapter 2, paras. 2.66-2.68.

[151] Counter-Memorial, Annex 62, p. 283 at 287.

[152] Counter-Memorial, paras. 1215-1216.

[153] Counter-Memorial, p. 389 *et seq.*

[154] Order of Attack, Split MD, 2 August 1995, Annex 171. Similarly, the HV Main Staff direc-

11.73 Knin was of special importance, but not for the reasons that the Respondent claims. Knin was the military and political headquarters of the 'RSK' and the centre of important military objectives, logistics concentrations, lines of communication, reserve forces and mobilization points.[155] As noted earlier, it housed the headquarters of the SVK's General Staff, the Northern Barracks, the TVIK factory, and the telegraph and post office, all of which were targeted by the Split MD. Contrary to the Respondent's assertion of indiscriminate shelling, a contemporaneous internal SVK intelligence report from the morning of 4 August establishes that the SVK recognized that the HV artillery was directed at military objectives:

> "The attack of the Croatian Army on the RSK started on 4 August 1995 at 05.00 with the shelling of the towns of Knin, Drniš, Benkovac, Karin, Obrovac, Gračac, Korenica, the Udbina airstrip, Vojnić, Vrginmost and Petrinja. The artillery preparation lasted until 05.30, followed by engagement of individual weapons of 130, 152 and 152 mm caliber and multiple rocket launchers. …
>
> Knin was shelled from Livanjsko Polje and from several directions, and by the time of this report the town has been hit by 200 to 300 projectiles of different types and calibers. *The target of the first strike was the building of the General Staff of the Serbian Army of Krajina, which sustained considerable damage and the almost complete loss of the motor pool. Subsequently the fire was focused on the '1300 Corporals' barracks, the TVIK plant, the railway junction and housing below the Knin fortress [area of the residence of the "RSK president" Mile Martić - author's note] and other targets*."[156] (Emphasis added)

11.74 Invoking the testimonies of witnesses at the *Gotovina et al* trial,[157] the Respondent argues that because shells fell in different parts of Knin it may be inferred that artillery attacks were indiscriminate. This is unpersuasive. The military objectives in Knin were located in various parts of the city and artillery was directed at these specific targets. It was not indiscriminate. There is an abundance of evidence to this effect. International observers began inspecting Knin by 7 August, and their inspections revealed that artillery damage was concentrated on military objectives, that the damage to civilian property was far less than reported, and that the damage was concentrated in

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tive issued prior to Operation Storm, directed the Split MD to do the following:

> "neutraliz[e] GS VRS/Republika Srpska Army Main Staff/ and the 7th Corps Command Post in Knin, the brigades' command posts, concentrations of enemy manpower, armour, and artillery in the area of Knin and Benkovac, including ammunition and fuel depots, while supporting the main forces in attack and preventing an enemy counter-attack from the direction of Knin, Kaštel Žegarski and Benkovac."

See Republic of Croatia, Ministry of Defence, Directive Op. No. 12-4/95, 26 June 1995, Annex 170, p. 6.

155 *Ibid.*

156 See: SVK, Intelligence Department, Intelligence Report, 4 August 1995, Annex 177.

157 Counter-Memorial, paras. 1218-1223. Also paras. 1225-1228.

close proximity to military objectives.[158] Experienced military and political personnel, among the first to assess the effects of artillery observed the targeting was not indiscriminate and had been focused on specific military purposes.[159] No evidence was found by these observers to support allegations of an indiscriminate artillery attack.[160] Their findings indicate a clear view within the international community that Operation *Storm* was executed in a lawful and militarily legitimate manner, and that it resulted in limited civilian losses. These damage assessments are consistent with multiple contemporaneous videos of Knin in the aftermath of its liberation by the HV. This contemporaneous evidence is definitely preferable to the various testimonies cited by the Respondent.

11.75 Relying on the Prosecutor's Pre-trial brief in the *Gotovina et al* case, the Respondent also contends that shelling was conducted with multiple rocket launchers (MRLBs) and other "indiscriminate artillery weapon designed for open field battle and inappropriate for use in populated civilian areas."[161] This allegation is once again refuted by videos of Knin after Operation *Storm* that clearly show that the city was not destroyed. In any event, MBRL's are weapons capable of being directed against military objectives. Furthermore, contrary to

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[158] See the UN Coded Cable from Akashi to the Secretary-General dated 7 August 1995, Annex 214. It states *inter alia* that damage to the town's structure was less than anticipated and large numbers of homes and buildings remained untouched by the fighting. He also noted the hospital was large and in generally good condition.

[159] In his witness statement at the *Gotovina et al* trial, Ambassador Galbraith stated as follows:

> 43: Although I am also sure that people fled the shelling, as I mentioned in the Milošević trial, I did not believe that the shelling was indiscriminate. I base this on reports received from American personnel, both political and military, who saw Knin within a very short time after Storm began, which indicated that there was not a great deal of damage to buildings. The shelling did not look that bad and there did not appear to be that much destruction. It was consistent with what you might expect and not indiscriminate. The people who went were experienced people and military attaches. They reported that there was not a lot of damage to Knin and that there were some legitimate military targets in the city. I have been under shelling and I was in Petrinja shortly after it fell to the HV and the visible damage from the shelling was minimal. The troops at the time seemed behaved but I was back again and not long after the town was trashed.

Witness Statement of Ambassador Peter Galbraith, *Gotovina et al* Trial, IT-06-90-PT, 05/02/2008

[160] *Ibid*, para 44.

> 44: I understand that Colonel Leslie of UNCRO has made observations that are inconsistent with this view but I would express some skepticism about those observations. I also recall that I tried to warn Colonel Leslie that the operation was about to start but that my warnings were ignored.

Similarly, in his testimony at the Milošević trial at the ICTY, Ambassador Galbraith stated (Thursday, 26 June 2003): T 23180:

> The shelling was relatively brief [in Knin] because there was effective no resistance. [...]Knin was not destroyed. In fact, it was not all that heavily damaged. I had embassy officers in there within a few days of the Croatian takeover.

161 Counter-Memorial, para. 1220

the Respondent's claim, the towns of Benkovac, Obrovac and Gračac were shelled because of the military objectives there located. Maps setting out the location and nature of the military targets are annexed to the Reply.[162]

11.76 Finally, claims regarding the indiscriminate and excessive shelling of Knin and other towns have been denied by General Mrkšić, the commander of the SVK during *Storm*. In his testimony, he confirmed that all the locations that were shelled in Knin during *Storm* were military targets.

(2) The Departure of the Serbs was Planned by the RSK Leadership

11.77 Claiming that the shelling forced the Serb population to flee,[163] the Respondent fails to make any reference to the elaborate evacuation plans meticulously put in place by the rebel Serb leadership.[164] From mid July 1995, the authorities of the 'RSK' issued a series of orders regarding the updating of plans and preparations for shelter and evacuation of the population; they required daily reporting on such preparations.[165] On 31 July 1995 the RSK police ("drawing on the experience in Western Slavonia") issued an order to prepare for the evacuation of key documents, including birth records: a clear indication that any evacuation would not be temporary.[166] On 1 August 1995, Mrkšić ordered preparations for the relocation of the SVK's Main Staff, including plans to destroy documents if necessary.[167] As stated earlier, an order was also issued requiring preparations for the evacuation of archives and on 2 August, Civil Protection ordered urgent reports by 19.00 hrs on 3 August concerning plans for sheltering and evacuation.[168] TV Knin broadcast

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[162] See: Maps of Military Targets in the Vicinity of Benkovac, Gračac and Obrovac, Annex 178.

[163] Counter-Memorial, paras. 1229- 1236.

[164] See *supra* n. 11.31. There is extensive evidence that the evacuation of the Serb population was planned long before the launch of Operation *Storm*: See *inter alia* N. Barić, *Srpska pobuna u Hrvatskoj*, pp 546-554; M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], NIDDA Verlang, Bad Vilbel, 2001, pp. 267-268, 179; Radulović, 1996: 101-102. In his Reports, the UN Secretary General had also noted the evacuation plans of the rebel Serb leadership after Operation *Flash*.

[165] See *inter alia* RSK, Civil Defence Headquarters, Order concerning the Implementation of Evacuation and Relief Plans, 29 July 1995 Annex 191; RSK, Drniš Deptartment Ministry of Defence, Directorate on Measures for the Preparation of Evacuation, 31 July 1995, Annex 193, RSK, Ministry of Defence, Military and Civil Affairs Sector, Regular Daily Report, 31 July 1995, Annex 159; RSK, Lika Regional Civilian Protection Headquarters, Order of Mirko Poznanović, 30 July 1995, Annex 192; and RSK, Ministry of Defence, Order of the Republican Civilian Protection Staff, 15 July 1995, Annex 190. and RSK, Civil Defence Headquarters, Request on the Implementation of Civil Defence Plans, Evacuation and Relief, 2 August 1995, Annex 197.

[166] RSK, Ministry of the Interior, Order signed by Minister Tošo Paić, 31 July 1995, Annex 194.

[167] See RSK, Serb Army General Staff, Order on the Relocation of the GŠ SVK, 1 August 1995, Annex 195.

[168] See RSK, Civil Defence Headquarters, Order on the Implementation of Preparation for the Evacuation of Assets, Archives, and Records, 2 August 1995, Annex 196; RSK, Supreme

organized simulated evacuations from towns in both former Sectors North and South to familiarize the population with the evacuation contingency plan in the event of further HV military success.

11.78 On 4 August 1995 the leadership of the 'RSK' ordered the evacuation of the Serb population towards BH even before the arrival of the HV. The decision to evacuate was taken at a session of the "RSK Supreme Defence Council" on the evening of 4 August 1995.[169] The session was attended by Milan Martić, the "President" of the 'RSK' and General Mile Mrkšić, the Commander of the General Staff of the SVK. Evacuation plans provided for the withdrawal of the population towards Bosnia, for onward movement towards Serbia. Facing the possibility of encirclement, and without hope of imminent support from Serbia or the VRS, the Serb leadership signed the order for the evacuation of the municipalities of Knin, Benkovac, Obrovac, Drniš and Gračac.[170] This makes no mention of the shelling of civilians. It provides further evidence that the evacuation was not a result of artillery use by the HV, but rather that it was triggered by the SVK's inability to repel the HV offensive. Late on the night of 4 August, the SVK General Staff also abandoned Knin and moved to the village of Srb.[171]

11.79 Documents annexed to this Reply clearly establish that the Serbs left pursuant to the evacuation orders, with several leaving even before the arrival of the HV.[172] A number of witnesses at the *Gotovina et al* trial have testified to this, including General Mrkšić.[173] The UN Secretary General informed the Security Council that the departure was "orderly"[174] and co-ordinated and it was "difficult ... to determine the extent to which the mass exodus of the Krajina Serb population was brought about by fear of Croatian forces, as opposed to a desire not to live under Croatian authority or encouragement by local leaders

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Defence Council, Decision on Evacuation, 4 August 1995, Annex 198.

[169] See RSK, Supreme Defence Council, Decision on Evacuation, 4 August 1995 Annex 198.

[170] *Ibid*. In his book *Knin je pao u Beogradu* [Knin Fell in Belgrade], in a chapter entitled *The Worst Possible Decision – Evacuation Of the Population* and *Urging the People to Flee,* Milisav Sekulić, head of the Operations and Training Section of the General Staff of the SVK describes the planned evacuation of the Serb population.

[171] Davor Marijan, Storm, Zagreb, August 2010, p. 84.

[172] See for e.g. the Testimony of Ambassador Galbraith, Milošević Trial, Thursday, 26 June 2003, p. 23181

> "the population had -- almost all of it had already left before the Croatian military entered the towns"

In response to a question about whether he was aware of Serbs leaving ahead of Operation Storm. He stated:

> "I am aware of that, and it is clear that at least some part of the Serbian population left on the orders of the leaders and not in response to the military action. It also, of course, suggests an awareness of the imminence of military action." (Thursday, 26 June 2003: Galbraith, 23205)

[173] *Gotovina et al* Trial, 19 June 2009, Mrkšić Testimony: 18935:7-14. Mrkšić testified to the fact that civilians followed the evacuation order not because of the shelling, but because of the fear that Croatia would successfully reclaim its territory.

[174] *Gotovina et al* Trial, 11 April 2008, Flynn Testimony: 1308:15-18.

to depart."[175] This evidence demonstrates the falsity of the Respondent's claim that "indiscriminate shelling" was responsible for the Serb civilians leaving.

11.80 The Evacuation was also a logical consequence of the persistently advanced thesis of the Serb leadership that any co-existence between the Serbs and Croats was impossible. There are numerous statements by the Serb leadership to this effect. For example, in early January 1995, the Command of the SVK's 26th Infantry Brigade listed numerous problems/weaknesses suffered by the Serb people, but still concluded:

> "Despite the above problems we estimate that the vast majority of members of the [SVK] and the citizens of Banija are very much opposed to the possibility of the so-called reintegration of the Krajina into Croatia. Were anyone to place their bets on this, they would definitely be counting on a civil war among the Serbs. Some fighters in the units consider life together with Croats possible and that those who recognize the RSK and accept it as a sovereign state and their homeland may return. Any other possibility is thought of as: the continuation of the genocidal policy that has been perpetuated against the Serbs in this area for more than 200 years; leading to the exodus of Serbs from the land inhabited by us for centuries and to the extinguishment of Serbhood in general […] What is reassuring is the spirit of our fighters and citizens as well as their decision to persevere in the fight for freedom and independence of the RSK, i.e. the Krajina's integration into the corpus of Serbhood in the Balkans, although a certain number of waverers and defeatists express doubt in the [SVK] and everyone and recognize overall treason of Serbs and Serb interests."[176]

11.81 Savo Štrbac, the President of *Veritas* the "independent NGO" whose Reports the Respondent relies upon, explained the decision to evacuate as follows:

> "All of us who were in a position to speak to international officials constantly kept warning them of this fact and spoke of it, that the Croats didn't want to live with us and that we cannot allow ourselves to live with them so that the genocide committed against us in the past would not be repeated, and I use the term we "cannot allow ourselves" because it has a stronger meaning than "we do not wish to live with them," we do not and cannot of course live with them and because of this it was necessary first and foremost that we preserve our biological potential, our people. We could have died off. The civilian population could have been killed. Our civilians and women could have been

[175] Report of the UN Secretary General, S/1993/730, dated 23 August 1995, para. 10.
[176] Military Post 9139, Kostajnica, No. 1841-2, Information to the units, 8 January 1995, Annex 199.

> killed. We need our biological potential for something that is hopefully yet to come."[177]

11.82 In addition, the manner in which the 'RSK' was created and administered resulted in difficult living conditions, poverty and insecurity which also undoubtedly resulted in the departures.[178] On the eve of Operation *Storm*, a Yugoslav Army colonel engaged in the SVK Air Force and Air Defence stated:

> As you travel across the RSK and visit its towns, you can easily note that nothing has been done in terms of development. The existing resources are being exploited and the outcome is sought from the other side. There is no normal objective such as required from every organised society. All social wealth is stagnating. Popular culture has taken a wrong turn. All sense of reality in terms of time and space has been lost ….The people of the RSK are exhausted by the condition which stifles every initiative. Fear from the Ustasha killers has gradually and systematically prevailed Because of "destroy everything Croatian" people live in fear of the Ustasha doctrine "destroy everything Serbian." And when the self-preservation instinct is not channelled, it is clear what manifestations are possible.[179]

11.83 Moreover there is evidence that the leadership of the 'RSK' compelled the Serb population to leave. Reports of Serb refugees also mention their suffering at the hands of the Serb army. Even the CHC Report that the Respondent relies on refers to the killings of Serbs who did not want to leave in the columns, at the hands of the Serb army. See as an example the statement of N. Drače who stated:

> "Our leaders frightened the whole population regarding the Croatian army. We had to run away. We, who did not run, hid and did not reveal that we were staying in the region, otherwise we had to run or Serbs would have tried to kill us. They were checking the houses in order to see whether the people were leaving or not."[180]

11.84 In spite of the Respondent's expansive claims that the region was completely emptied of Serbs, it admits that the precise number is "undetermined."[181] Relying on the CHC Report and *Veritas*, it estimates that

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[177] Transcript of Video Clip of Savo Šrbac Speaking from a TV Studio in Banja Luka, 7 August 1995, Annex 200.

[178] N. Barić, *Srpska pobuna u Hrvalskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], pp. 535-546; M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], 2001, pp. 145-146.

[179] See also M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], 2001, p. 232.

[180] Statement by N. Drače, 23. July 1998, CHC Report, "Military Operation Storm and its Aftermath", p. 14.

[181] Counter-Memorial, para. 1234.

between 180,000 and 220,000 people were forced to leave.[182] It is submitted that these are only *estimates*, as it has been impossible to establish with any certainty the numbers of Serbs that lived in the 'RSK', the number who left during Operation *Storm* or earlier, or the number who were ordered to leave by the Serb leadership or left on their own account. In any event all estimates vary greatly.[183]

(3) Response to the Respondent's Claims about the Victims of Storm

11.85 As with any military conflict, it cannot be denied that there were Serb victims during Operation *Storm*. But there was no policy to expel Serbs from the occupied territories or to commit genocide or any other internationally wrongful acts. Several efforts were made to minimize loss of life and suffering. Despite this, the Respondent alleges that the "crimes …against the Serbs were of such a nature and of such proportions that Tuđman's order that 'Krajina Serbs should disappear' was successfully accomplished,"[184] and that Croatian organs subsequently "restricted movement in the area … in an effort to conceal the crimes" and ensure that the exact number of victims was not established.[185] This is wrong. *First*, no order to commit crimes was executed, since no such order existed. As stated above, the Respondent mischaracterises a statement made by President Tuđman who was referring to Serb soldiers and not Serb civilians.[186] All efforts were made to encourage the Serbs to stay. On 4 August, President Tuđman appealed to the Serbs to remain "at home."[187] Further, Croatia had in place legal protections for minority groups, both in the Constitution and in other legal provisions. *Second*, movement restrictions are standard military procedure in connection with the *inter alia* an obligation to clear the terrain (this was also necessary given that *Storm* was conducted in the middle of summer)[188] as well as to secure the safety of military personnel and civilians. *Third*, no precise data on the number of Serbs killed or missing during *Storm* has been established. To establish the figures, the Respondent

[182] Counter-Memorial, paras. 1234-1235.

[183] The CHC Report sets out the figure between 180,000-200,000. *Veritas* put the number at 220,000.; M. Pupovac, *Raspad Jugoslavije i Srbi u Hrvatskoj* [Breakdown of Yugoslavia and Serbs in Croatia], *Ljetopis Srpskog kulturnog društva "Prosvjeta"* [Yearbook of the Serbian Cultural Society "Prosvjeta"], No. 2, pp. 256-264 in relation to both operations *Flash* and *Storm* talks of the "exodus" of 150,000 and 200,000 Krajina Serbs. At his trial Slobodan Milošević referred to 250,000 fleeing as a result of *Storm* and *Flash*: See ICTY, Friday, 6 December 2002, p. 14022. Others estimate number somewhere between 110,000 and 121,000 (Žunec, *Goli život: socijetalne dimenzije pobune Srba u Hrvatskoj* [Naked life: social dimensions of the Serb rebellion in Croatia], 2007, p. 726) and between 100,000 and 150,000. (N. Barić, *Srpska pobuna u Hrvatskoj* [Serb Rebellion in Croatia 1990-1995], Zagreb, p. 522.)

[184] Counter-Memorial, para 1237.

[185] Counter-Memorial, paras 1237-1238.

[186] See para. 11.43 *supra*.

[187] See Appeal to Croatian Citizens of Serb Nationality from President Franjo Tuđman, Zagreb, 4 August 1995, Annex 201.

[188] See Chapter 10, para. 10.104.

relies on the CHC Report and *Veritas,* which set forth widely differing figures,[189] and as stated above, there are flaws and discrepancies in both those lists.[190] Yet again, the Respondent's assertions are not supported by evidence before the Court.

11.86 Finally, the Respondent makes several unsubstantiated allegations regarding the numbers killed or missing. For example, it alleges that "the killing of Serbs was mainly carried out while Serbs were fleeing the area in columns, or while they were in their houses, for those Serbs who did not or could not escape fast enough."[191] Similarly, the Respondent alleges that there were more killings in Sector North "probably due to the fact that the evacuation started earlier, which gave the HV time to organise and direct the shelling of columns." [192] There is no evidence offered in support of these statements.

(a) Croatia Did Not Target Fleeing Serb Civilians

11.87 The Respondent alleges that escaping "Serbs" were victims to Croatian military and civilian attacks.[193] A number of general remarks need to be made. *First*, the Respondent does not claim that all the "Serbs" in escaping columns were civilians; they also comprised armed members of the SVK (both in uniform and without). This is admitted by the Respondent, that refers to artillery fire against an "SVK column."[194] *Second*, the Croatian forces did not target civilians. *Third*, the columns passed through areas of ongoing fighting and were on occasion caught in the crossfire. This is also admitted.[195] *Fourth*, the 'ABiH' (5th Corps) was also involved in the fighting. This too is admitted,[196] and it follows that the Applicant cannot be held responsible for

[189] Counter-Memorial, paras.1239-1240. The CHC Report states that 667 civilians Serbs were killed/missing during *Storm* (410 victims from Sector South and 267 from Sector North), whereas *Veritas* claims that 1922 Serbs were killed. (Counter-Memorial, Annex 62). In 2005, an association of exiled Serbs announced that 1,792 persons died, out of which 996 were civilians. See D. Perić, *Marginalije o izbjeglištvu krajiških Srba deset godina kasnije* [Marginalia On the Exile of Krajina Serbs Ten Years On], 2005 in V. Ćurić Mišina (ed.) *Republika Srpska Krajina: deset godina poslije* [Republika Srpska Krajina: Ten Years On], Beograd, 2005, p. 221.

[190] See paras 11.66 - 11.70.

[191] Counter-Memorial, para. 1241.

[192] Counter-Memorial , para.1243.

[193] Counter-Memorial , para.1242 *et seq.*

[194] Counter-Memorial, para. 1257. Numerous statements by refugees from these columns contain admissions that armed members of the SVK were also travelling in the column and that the column had been cut off and stopped several times by Serb tanks and artillery that were carrying out combat activities against the positions of the HV and the Army of BiH, See CHC Report, "Military Operation Storm and it's Aftermath", pp. 218 and 221.

[195] See Counter-Memorial, para. 1244 which states that a column was caught in a crossfire. This is also described in M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], pp 226-227.

[196] Counter-Memorial, paras. 1243 (mentions the presence of the "5th Corps of the BiH Army") and 1248 (states 'This was a Muslim area and they were firing at us.')

their acts. *Fifth*, the Serbs themselves caused casualties. *Sixth*, the Applicant cannot be held responsible for acts that were committed in Bosnia, by unknown persons.[197] Furthermore, deplorable though it was, harassment by Croatian civilians cannot amount to a genocidal act. In any event, the HV did what was possible in the circumstances to minimise civilian casualties.

11.88 The Respondent fails to mention that some refugee columns were going through areas of ongoing action, in Banovina and Kordun.[198] The fighting was concluded on 8 August 1995 with the surrender of the SVK's 21st Kordun Corps.[199] Pursuant to an Agreement of Surrender, rebel Serb soldiers were to surrender their arms and equipment. They were permitted to keep some small weapons after which the Croatian forces were to ensure a safe passage to Serb civilians and soldiers towards Bosnia (Republika Srpska) and FRY/Serbia.[200] As a result, in spite of some incidents with Croat civilians, Serb civilians and soldiers left Croatia safely. This also confirms that the columns were comprised of both civilians and members of the SVK. Even Serb sources admit the HV's professional conduct towards the SVK's 21st Kordun Corps and the civilians who on 7 August 1995 found themselves in the midst of fighting in the area of Topusko.[201]

11.89 As noted above, fighting was also ongoing on the border of Croatia and Bosnia during Operation *Storm*, in which the Bosnian Army's 5th Corps was involved.[202] The CHC Report relied upon by the Respondent confirms this.[203] The forces of the SVK were also active in various areas, and researchers and NGO's have confirmed that the losses to the Serb side cannot be solely attributed to actions of the Croatian forces.[204]

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[197] The Counter-Memorial, at para. 1253 states that: "Unfortunately, the Serbs were not spared even when they managed to cross the border and enter into the Republic of Srpska." Relying on a Human Rights Watch Report, Serbia states that that the Croatian Airforce bombed Serb columns in the RS.

[198] M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], 2001, pp. 216, 223.

[199] See the Agreement on the Surrender of the 21st Corps., Glina, 8 August 1995, Annex 202.

[200] In his memoirs, Drago Kovačević, the Serb mayor of Knin and a "minister" in the government of the 'RSK', wrote:

> "As many as 15,000 people remained under blockade in Kordun and were concentrated in Topusko where a UNPROFOR camp was located. The Belgrade television reported on them some contradictory things. There were even reports about some 10,000 of them being murdered in the woods of Spačva. Luckily, they appeared at the crossing in Batrovci on 12 August …"

Drago Kovačević, Kavez, Krajina u dogovorenom ratu, [Cage, Krajina in an Arranged War], Belgrade, 2003, p 98.

[201] M. Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], pp. 217-221.

[202] This was confirmed by the letter from Colonel Pettis to Brigadier Pleština, 8 August 1995, Annex 203.

[203] CHC Report (2000): *Military Operation Storm and it's Aftermath*, pp. 217 and 222.

[204] For e.g. Žunec, *Goli život: socijetalne dimenzije pobune Srba u Hrvatskoj* [Naked life: social dimensions of the Serb rebellion in Croatia], 2007, p. 842. *Veritas* also admits this in Annex 62, p. 288 where it states that the 'ABiH' was active in the border belts.

11.90 A regrettable attack by Croatian civilians on a Serb column in Sisak[205] is relied upon to create an impression that Croatian civilians attacked Serb civilians on a massive scale. That is not the case. Moreover, after this incident the Ministry of Interior of Croatia took steps to prevent a repeat of such incidents. On the Kutina-Županja stretch the HV and the local population helped and cared for the exhausted people in the column.[206]

11.91 Finally, while challenging the credibility and weight attached to witness statements submitted by the Applicant, the Respondent proceeds to rely on statements given to an NGO! Almost all the allegations with regard to the "killing of Serbs while they were escaping in columns" is based on statements from the CHC Report, which are not annexed.[207] It is not clear when these statements were made, who made them, to whom were they made and so on. In light of the Respondent's submission in relation to the Applicant's evidence, it is curious that it would now rely on evidence that was not taken by 'an authorized domestic organ' or by a procedure that would guarantee 'minimum procedural safeguards.'[208]

11.92 As stated above, an analysis of the CHC Report indicates many discrepancies and inconsistencies. The CHC's List of 76 individuals killed or missing (in relation to the columns) has been compared with the official records and documentation of the Ministry of Family, Croatian Homeland War Veterans and Intergeneration Solidarity. This establishes *inter alia* that of the 76 persons listed only 44 persons are registered with Croatia's Directorate for Imprisoned and Missing Persons ('Directorate'). No request for search has ever been filed with respect to the remaining 32 with either the ICRC or the Directorate, or have their remains been identified after exhumation. Of the 44 persons identified the following mistakes and disparities have been identified.

1. A number of Serbs listed as killed or missing in refugee columns were members of the army of the 'RSK' and paramilitary formations. As per official records 12 of the 44 persons were members of the SVK.[209]

2. There are also mistakes in the description of the circumstances of the deaths of 2 individuals based on a comparison of the List with the official records and documentation of the Directorate.[210]

3. There are either mistakes or insufficient biographical data for an

[205] Counter-Memorial, paras. 1242, 1245.
[206] CHC Report (2000): *Military Operation Storm and it's Aftermath*, p. 215.
[207] See Counter-Memorial, Chapter XIII, (5)(A), pp. 398-404.
[208] Counter-Memorial, para. 153.
[209] See Tables: Errors in Status of Persons in the CHC Report (Operation Storm) Attachements 2A and 2B, Annexes 204 and 205.
[210] See Annex 206, (Discrepancy Regarding Circumstances of Suffering, Attachment 3)

> accurate comparison and definite identification of individuals. Of the 44 persons who are registered there were mistakes with respect to biographical data (mistake in surname, personal name, father's name and year of birth) with regard to 22 persons. Further, biographical data is incomplete (father's name or the year of birth are missing) with respect to 8 others.[211]

11.93 The preceding paragraphs apply equally with regard to the columns through Sector South, though the Respondent admits there were fewer attacks in Sector South.[212] In any event, the Respondent has failed to provide any evidence of a Croatian plan to target civilians and no credible evidence of any artillery attacks that targetted civilians.

(b) Croatia Did Not "Systematically" Kill the Serbs that Stayed Behind

11.94 Croatia denies that its forces did in any way "systematically target" the Serbs who stayed in the UNPA's during and after *Storm*.[213] No evidence is tendered in support of this assertion. Recognising that it has no independent evidence in support of this allegation, the Respondent seeks to provide "short overview of the killings committed in Sectors North and South … [using] information and facts from official international bodies and sources originating from Croatian organisations."[214] Quoting *Veritas*, the Respondent states that the majority of killings were committed in August 1995 but continued throughout 1995.[215] No further particulars are provided. Once again it relies predominantly on the CHC Report which is referred to as "sources originating from Croatian organisations."[216] It is noteworthy that once again it offers no evidence at all that the killings were systematic or targeted. The Brioni transcript provides nothing in support of the contention regarding the targeting of civilians.

Sector South

11.95 Claiming that civilians in Knin were shot by Croatian forces upon entering the city, the Respondent cites witness statements from the *Gotovina et al* trial to demonstrate the "magnitude of killings."[217] Once again, the CHC Report is extensively quoted regarding several alleged killings. However, the

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[211] See Annex 207 (List of Persons with Incorrect Personal Data) and Annex 208 (List of Persons with Incomplete Personal Data).

[212] Counter-Memorial, para. 1254.

[213] Counter-Memorial, para. 1258.

[214] Counter-Memorial, para. 1260.

[215] Counter-Memorial, para. 1260.

[216] *Ibid*.

[217] Counter-Memorial, para. 1262 refers to several testimonies of Prosecution witnesses at the *Gotovina et al* Trial. One witness mentions seeing "10-20 dead people"; another claims to have observed "tens of dead civilians"; another mentions "several bodies of victims"; and still another states that "everywhere he looked, [he saw] numerous dead civilians."

Respondent provides no evidence that this was a "systematic" or "targeted" activity. It is noteworthy that the Respondent adds important caveats admitting that it is difficult to establish the real numbers, and that there is no precise information about particular events.[218]

11.96 The Respondent's "short overview of killings" is in fact an erroneous reproduction of a CHC list that is annexed to the Counter-Memorial but is not referred to.[219] For example in a number of instances, the Respondent states that more civilians were killed in particular locations than the Report it relies upon actually states.[220] The Respondent also makes mistakes with respect to the names of victims and villages were the alleged killings are said to have occurred.[221] It refers to the alleged killings of unnamed persons. No dates of killings are provided. Some allegations fail to specify a name, date and or location.[222] With respect to some allegations, the Respondent fails to cite any source at all – it merely makes blanket assertions like "Killings were committed in all other places where Serbs stayed behind."[223] Even in the few instances that the Counter-Memorial differentiates betweens soldiers and civilians, it alleges that killings occurred but does not set out how the soldiers died.[224] There are also other descrepencies in the list. This is particularly the case for the list of civilians said to have been killed during and after Operation *Storm* in former Sector South.[225] All these issues impact on the reliability and

[218] For e.g. Counter-Memorial, paras. 1261 (where it is admitted that real numbers are difficult to establish) and 1289 which states:

> In the village of Srb, seven Serbs were killed. 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, Birovaca, Brezovac Dobroselski, Brotinja, Dobašnica, Dobroselo, Doljani, Donji Lapac, Gornji Lapac, Kunovac, Kupirovo, Lapačka Korita, Obljaj, Opačića Dolina, Misljenovac and Tiškovac Lički. [Emphasis added]

The Counter-Memorial refers to the CHC Report but fails to provide any details.

[219] Counter-Memorial, Annex 61, Tab 1.

[220] For eg Counter Memorial, para. 1304 relying on the CHC Report states that there were 10 Serbs killed in Slunj whereas the CHC Report, p. 240 states 6; Counter Memorial, para. 1304 states 14 killed in Vojnić while the CHC Report, p 241 states 8; Counter Memorial, para. 1307 states 35 killed in Glina while the CHC Report, pp. 247- 248 states 18; Counter Memorial, para. 1311 states at least 45 Serbs killed in Dvor while the CHC Report, pp. p 242-254 states 38; Counter Memorial, para. 1307 states 20 Serbs killed in Gvozd while the CHC Report, pp 242-254 states about 15 Serbs.

[221] For e.g. there are no villages called Kestenjak, Jagodnja Gornja, Brotinja, Lapačka Korita, Opačića Dolina and Tiškovac Lički in the Republic of Croatia

[222] For eg, Counter-Memorial, paras. 1267, 1269- 1271, 1274, 1282, 1283, 1286 (no names); 1280 (no dates); 1271- 1273, 1276, 1278-1279, 1289- 1294, 1297 (no name or date); 1289, 1296, 1298-1299 (no names, no dates and no numbers are specified).

[223] For eg, Counter-Memorial, para. 1279.

[224] For eg, Counter-Memorial, para. 1298.

[225] A variety of examples are offered to demonstrate this: First, while the CHC Report, (An-

accuracy of the CHC Report.

11.97 The Respondent alleges that the so-called "systematic killing" of Serbs continued in former Sector South after Operation *Storm* and refers *inter alia* to alleged killings that occurred between November 1995 and April 1996 and even between 1996 and 1999.[226] Again, in some cases no details are provided - no names, no dates, no locations. It is also unclear how these later "killings" are related to the Respondent's claims that are restricted to the events of August 1995 and subsequent months.

Sector North

11.98 With respect to Sector North, the Counter-Memorial is even leaner on evidence. Once again the Respondent relies on the CHC Report and makes numerous unsubstantiated allegations. The allegations are vague with respect to the acts committed and the perpetrators of the acts. The following paragraph from the Counter-Memorial is symptomatic of the manifest inadequacies of the Respondent's claim:

> "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,

nex 61, Tab 1) lists 410 ordinal numbers, ordinal numbers 119 and 120 are repeated. That means that the list contains 412 persons. However, of those 412 persons, it appears that 7 persons are listed twice. As a result there are 405 individuals on that list. Persons that appear twice in the CHC's report:

1. Ordinals Nos 30 and 44: Mićo Perić
2. Ordinal Nos 322 and 323: Đuro Rasula
3. Ordinal Nos 187 and 189: Mirko Štrbac
4. Ordinal Nos 324 and 326: Mićo Rasula
5. Ordinal Nos 219 and 410: Dmitar Vujnović
6. Ordinal Nos 239 and 240: Marta Vujnović
7. Ordinal Nos 62 and 218: Draginja Vukša

Second, a comparison of the CHC's List of individuals allegedly killed with the records and documentation of the Croatian Directorate for Imprisoned and Missing Persons establishes that of the 405 persons listed only 207 are registered with the Directorate. No search proceedings have ever been initiated for the rest with either the ICRC or the Directorate, nor have their remains been identified after exhumations. Off the 207 persons identified several mistakes and disparities have been identified. Like with other CHC data, a number of Serbs Civilians listed as killed were in fact members of army of the 'RSK' and paramilitary formations. There are also mistakes in the description of the circumstances of death: There are examples of persons who died before Operation Storm, that died from natural causes and so on. Once again there are deficiencies with regard to biographical data rendering positive identification impossible.

[226] Counter-Memorial, para. 1300 citing the CHC Report, Annex 61, Tab 1 that lists 24 civilians killed in sector south in the period from 1996 to 1999.

> 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." [227]

This paragraph fails to specify both who committed the alleged acts as well as the identity of the victims. It is clearly impossible to defend a case when even the basic details of the crime alleged remain unspecified.

11.99 Once again, like with regard to Sector South, the Respondent makes expansive unsubstantiated allegations of "systematic killings" without offering evidence in support. It states *inter alia* that "Serbs from Sector North also left their homes fleeing from Croatian forces. A small number of elderly Serbs who stayed behind were systematically killed."[228] Citing again the CHC Report, it alleges killings in Karlovac, Plaški, Slunj, the municipality of Vojnić.[229] The Respondent provides no specifics regarding the individuals allegedly killed or the dates when the killings are said to have taken place. It only refers to the CHC Report without any other evidence.[230]

11.100 An analysis of the CHC Report indicates that a number of civilians alleged to have been killed/missing as a result of Operation *Storm*, in the former Sector North, died before Operation *Storm*; died from natural causes; committed suicide; or were killed by accident; or were members of the SVK;[231] or died much later. With respect to others listed as "murdered or missing", the CHC also lists persons killed by the 'ABiH' and Serb paramilitaries, or in certain cases does not state who the perpetrators were.

11.101 Once again it is reiterated that the incomplete and inaccurate details provided by Serbia are insufficient to make out a case of genocide. The crimes alleged to have been committed are not sufficiently supported by the evidence. In any event, Serbia has not shown that any crime was committed with a genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Applicant. For these reasons, the Applicant submits that the totality of the Respondent's allegations relating to the killing of Serbs that stayed in the liberated areas is unsupported by evidence and should be dismissed in their entirety.

11.102 Serbia's reliance on the CHC Report of 2001 does not reveal the progress made between the parties in terms of identifying the missing and

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[227] Counter-Memorial, para. 1302.

[228] Counter-Memorial, para. 1304.

[229] Counter-Memorial, paras. 1304 - 1311.

[230] This is in sharp contrast to the way the Applicant has presened its case in the Memorial and in Chapters 5 and 6 of the Reply which includes the direct testimony of hundreds of witnesses.

[231] See Counter-Memorial, Annex 61, Tab 3 (List of Murdered and Missing Civilians in the area of the former Sector North with descriptions of executions)

dead. Serbia fails to mention the ongoing co-operation between Croatia's Directorate for Detained and Missing Persons and Serbia's Commission for Missing Persons.[232]

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

11.103 The Respondent makes allegations concerning looting and destruction of property that cannot in any way support a genocide claim.[233] Moreover, the evidence demonstrates that these acts were not "tolerated" or "planned" by the Croatian government, as alleged.[234] The Applicant does not assert that no looting or destruction took place; rather it is clear that there is no evidence to show that the Croatian government planned, ordered, committed, aided or abetted, in the destruction and looting of Serbian property. The looting was not systematic, and was not condoned or otherwise supported by the Croatian government.

11.104 The Respondent does not allege that the destruction of civilian property was discussed by the participants at the Brioni meeting. There is no evidence of a plan for the destruction of Serb property and nor can a plan be inferred from the facts set out by the Respondent. Mr. Akashi, amongst others, indicated that he "did not in any way associate the continued burning and looting … with the Government."[235] To the contrary, territory liberated during Operation *Storm* was immediately returned to the constitutional order of Croatia and attempts were made to guarantee law and order, including personal safety and protection of property.[236] Even prior to Operation *Storm*, President Tuđman had issued a direct order to Ivan Jarnjak, Croatia's Minister of Internal Affairs to ensure that law and order was restored quickly in the liberated areas.[237] This included establishing police stations, courts, and other essential governmental functions.[238]Although governmental institutions may not have been fully effective in implementing these plans in the immediate aftermath of Operation *Storm*, a post-conflict crime wave does not establish the existence of a plan for the commission of the crimes alleged.

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[232] See Cahapter 2, para. 2.54.

[233] Counter-Memorial, para. 1312.

[234] Counter-Memorial, para. 1322.

[235] See: UN, Coded Cable, Meeting with Mr Šarinić, 9 September 1995, Annex 209.

[236] See: Republic of Croatia, Ministry of Defence, Order on the Work of the Military Police, Cooperation Between and Joint Work of the Civilian and Military Police, and Obligations of the Military Police towards Detained Members of Para-Military and Para-Police Formations, 3 August 1995, Annex 210; See also Government of the Republic of Croatia, Minutes from the 257th Closed Session of the Government of Croatia, 4 August 1995, Annex 211.

[237] See Minutes of the Meetings held at the Defence Ministry of the Republic of Croatia, 2 August 1995, Annex 172.

[238] This is admitted by Serbia. See Counter-Memorial, para. 1321 which mentions police administration in the formerly occupied areas and the fact that there was co-operation between the civil and military police in providing security to the liberated areas.

11.105 There was no widespread or systematic destruction of "symbols of presence of the Serbian community", as alleged by the Respondent or otherwise.[239] There was no systematic destruction or burning of churches, monasteries and cultural monuments. Both during and after Operation *Storm* not a single Orthodox Church was destroyed or burnt and not a single Orthodox cemetery desecrated by the Croatian government. During the entire period of the occupation (from 1991 to 1995), of some 30 Orthodox buildings, only the church of St. Nedjelja in Dabar (Vrlika) was slightly damaged. Orthodox churches and chapels, outside the 'RSK' either suffered no damage or were only negligibly damaged. Immediately after Operation *Storm*, the Split-Dalmatia Police Department established police outposts in the liberated territories for the purpose of protecting persons of Serb nationality and their property. The police devoted special attention to the protection of sacred buildings of the Serbian Orthodox Church.[240]

11.106 Some further comments are also called for with respect to the Respondent's allegations of the destruction and looting of property and the method it has employed to prove these.

1. The Respondent provides no independent evidence of burning and looting. The source and support for almost all allegations are drawn from testimonies at the ongoing *Gotovina et al* trial.[241] (Testimonies from the ongoing trial are referred to and relied upon in every paragraph of this section of the Counter-Memorial). In addition the Respondent also relies on the Prosecutors pre-trial brief.[242]

2. Other allegations are advanced on the basis of "independent reports," e.g. the UNMO report and the CHC Report,[243] the reliability and accuracy of which have been challenged at the *Gotovina et al* trial. Some of the grounds for challenge include

[239] Counter-Memorial, para. 1312.

[240] See Split – Dalmatia Police Administration, Submission of the Report about the Situation Regarding the Sacral Facilities of the Serbian Orthodox Church in the Liberated Territory, 22 August 1995, Annex 212; Split – Dalmatia Police Administration, Submission of the Report on the Establishment of the Vrlika Branch Police Station and Others, 5 August 1995, Annex 213, that refer inter alia to the establishment of police outposts and police activities in the newly liberated areas.

[241] By way of example see Counter-Memorial, para. 1313. With regard to Knin, Serbia relies on two testimonies from the ongoing ICTY Trial. The witness in question did not mention any looting and burning but that he saw animals had been shot. There is no mention of who shot them. The footnote refers to "systematic looting" after the HV entered the city. This could simply be rebutted by another witness who testified that small scale looting was conducted by the low ranks and never observed to take place in the presence of officers. See *Gotovina et al* Trial, 25 September 2008, Williams Testimony: 9548:9-16 and *Gotovina et al* Trial, 18 December 2008, Boucher Testimony:13972:25-13973:3.

[242] Counter-Memorial, *inter alia* paras. 1312, 1317.

[243] Counter-Memorial, *inter alia* paras. 1312, 1317, 1320, 1323, 1325.

the fact that these Reports employ unreliable methodology; fail to distinguish between damage that occurred pre and post *Storm*; exaggerate the number of properties said to have been destroyed (in some villages the number of properties said to have been destroyed is higher than those that existed in the village, based on the official 1991 property census); and the scale of crimes is also exaggerated.

3. The UN reports invoked by the Respondent do not support its case.[244] In one instance the Respondent claims that "it was clear to the UN that such destruction could not be done without the existence of a systematic and premeditated plan" but in fact this statement is supported by a citation of the CHC Report and not by any UN authority.[245]

4. It makes sweeping claims unsupported by evidence. For example, in paragraph 1322 the Respondent states that the "UN Reports *suspected* that the destruction was planned and not just tolerated by the Croatian government." There is no citation in support. After citing the CHC Report, it then concludes that "it is obvious thus that the destruction was not only tolerated but actually perpetrated by *de jure* organs of Croatia". It is unclear how the Respondent arrived at this conclusion.

5. The Respondent fails to mention that a number of sources reveal that houses and buildings in the occupied areas were destroyed by Serbs who were evacuating.[246] Some statements by Serbs who

[244] For example in the Counter-Memorial, para. 1312, in order to support of its allegation that the destruction of Serb property was "systematic" Serbia quotes a UN Report. The Report in question does not state either that the alleged acts were systematic, nor does it name the perpetrators of the acts mentioned. The Report also states that it is based on "numerous other reports." The Report states:

> "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 Žažvići, Đevrske 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 Drniš 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 Mirčete in Sector South." (Emphasis added)

[245] Counter-Memorial, para. 1320.

[246] See as examples the following statements of Serbs who fled Croatia following Operation *Storm*.

fled Croatia reveal that various buildings or facilities were set on fire "so that they would not be left to Croats."[247]

6. The Respondent provides no evidence of the planned or systematic nature of the alleged acts and cannot do so, as there is none.

7. Even claims that the alleged acts were "tolerated" or "planned" are based on opinion, not evidence.[248]

8. Finally, the Croatian police and judiciary instituted several hundred proceedings concerning the destruction of Serb property.

11.107 There was no organized and systematic effort by the Croatian government to target Serbian property.[249] Similarly, the suggestion that the movement of UNCRO was restricted to prevent it from monitoring the situation and thereby allowing the Croatian forces time to clean up evidence is denied. The restriction was entirely justified initially in the context of the ongoing combat and in order to prevent any UNCRO casualties and later for mop up operations. As noted above, the Croatian government made a number of efforts to stop the post-conflict crime that did occur. As set out above, orders to prevent crime and protect individuals and property were issued by various civilian and military organs.

11.108 The crimes alleged to have been committed are not supported by

"As Politika reports, one soldier from the Knin valley who, as is also stated in his leave, was granted leave immediately before the attack to take a bath, is "packing" his entire hamlet (40 persons) into a big eighteen-wheeler and taking them to Belgrade. The only resident who will remain is the driver's 63-year-old father: the man is taking a rifle and leaving for the battlefield and he intends to fight until his strength fails him and later he intends to set fire to his house and only then to flee." (Vreme weekly, 14 August 1995, p. 4) (Emphasis added)

"While withdrawing towards Srb and Drvar we passed through desolate villages. There were no dead or wounded civilians or soldiers, only empty houses and farm animals. One could occasionally hear explosions in certain facilities that had been mined by Serbs themselves after their departure so that they would not fall into the hands of Croats – hospitals, post offices, depots containing weapons that they had not succeeded in pulling out. A column of refugees was far ahead of us." (Testimony of 32-year-old M.Č. from Obrovac, wounded while withdrawing near the village of Srb and taken to the Military Medical Academy in Belgrade for treatment; documented in the double issue of the independent political daily Naša Borba 193-194 of 12-13 August, p. 9.) (Emphasis added)

[247] For example, before having fled Donji Lapac, Serbs set fire to the *Kamensko* hotel, the police station and "at least 3 to 4 other facilities" according to the CHC Report cited extensively by Serbia. See CHC Report, "Military Operation Storm and its Aftermath", Zagreb, 2001, pp. 25 (footnote 23) and 34.

[248] For e.g. Counter-Memorial, para. 1322 Serbia states that the "UN Reports *suspected* that the destruction was planned and not just tolerated by the Croatian government." It then concludes that "it is obvious thus that the destruction was not only tolerated but actually perpetrated by *de jure* organs of Croatia". No support at all is provided for this allegation.

[249] Counter-Memorial, paras. 1317, 1321.

the evidence. There is no evidence that the alleged burning and looting of property was planned, was systematic or was condoned by the Croatian government. In any event, the Respondent has not shown that if the crimes were committed they were committed with genocidal intent or that the crimes or the alleged genocidal intent can be attributed to the Applicant. For these reasons, the Applicant submits that all of the Respondent's allegations in this regard should be dismissed in their entirety and no inference that these crimes were ordered or approved in furtherance of a genocidal plan can be made.

(5) Croatia did not Target Krajina Serbs after Operation *Storm*

11.109 Lastly the Respondent alleges that in an "effort to ensure that Serbs would disappear from Krajina, the Croatian Government re-populated the region with Croats"[250]; ignored UN resolutions that called for the return of the Serbs[251]; took legislative measures that targeted the Serbs[252]; and used its criminal justice system in a discriminatory manner.[253] All these allegations are manifestly wrong.

11.110 Serbia further claims that "ethnically motivated killing of Serbs" continued to take place long after Operation *Storm*, even as late as 1999.[254] The Respondent seems to suggest that the death of all persons of Serb ethnicity in the Republic of Croatia, from the end of Storm onwards was an "ethnically motivated killing." This is clearly not the case.

11.111 Once again, with regard to evidence, a number of the Respondent's allegations are based on *inter alia* the CHC Report of 2001[255], the Prosecutors pre-trial brief[256] and testimonies from the *Gotovina et al* case.[257] Respondent has referred to a number of outdated Reports of various international organizations and NGOs,[258] and this is addressed in Chapter 2. In addition the Respondent has mischaracterised Croatian Law, and presented an inaccurate account of the Croatian criminal justice system. There is no criminal impunity for perpetrators of crimes in Croatia. Finally, in its attempts to show that Croatia "successfully implemented" its plans to ensure that the "Krajina Serbs ceased to exist,"[259] the Respondent fails to even mention the numbers of Serbs who have returned to Croatia after the war.

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[250] Counter-Memorial, para.1328.
[251] Counter-Memorial, para.1329.
[252] Counter-Memorial, paras. 1338-1346.
[253] Counter-Memorial, paras. 1347-1352.
[254] Counter-Memorial, para.1335.
[255] See Counter-Memorial, paras. 1328, 1335.
[256] See Counter-Memorial, paras. 1330, 1334.
[257] See Counter-Memorial, paras. 1331, 1344, 1346.
[258] See for e.g. A Human Rights Watch report of 1996 referred to in Counter-Memorial, paras. 1337, 1351; similarly an Amnesty International report from 2004.
[259] Counter-Memorial, para. 1327

(a) Croatia did not impose unreasonable obstacles to the return of Serb Civilians

11.112 During the war (1991 – 1996) the Republic of Croatia provided shelter for over one million people. This included 550,000 internally displaced persons (IDPs) and 400,000 refugees from the region. The Croatian Government was in favour of organised return once minimum conditions for return, including basic infrastructure were ensured. As High Commissioner for Refugees Sadako Ogata stated in the address delivered in Geneva on 10 October 1995

> "the repatriation must take place in an organized, phased manner. If it is to take place in dignity, attention must be paid to ensuring that for example, adequate accommodation and basic essential services are available in the places of return. […]
>
> Returning large numbers of refugees to areas which are not yet ready to receive them can have very serious consequences not only for the refugees themselves, but for the stability in the area concerned."

She envisaged that the repatriation process would broadly take place in three phases: first, the return of displaced persons from Bosnia and Herzegovina and Croatia; second, repatriation from the other Republics of the former Yugoslavia and thirdly a return from countries which had granted temporary protection or resettlement. This pattern was largely followed in the region, including in Croatia. However, nothing in the legislative or administrative framework precluded individuals returning at any time of their choice – notwithstanding the damage to the infrastructure in war-torn areas – if they so wished. Individuals were able to return on humanitarian grounds.[260]

11.113 The return process in Croatia started as soon as the appropriate conditions were set.[261] Up to the end of 1997, 118,000 IDPs and refugees had returned to their homes including about 30,000 ethnic Serbs. In order to speed up the process of return, in 1998 the Croatian Government adopted the *Programme of Return and Care for Displaced Persons, Refugees and Resettled Persons*, which included provisions for the accommodation of former holders of occupancy rights.

11.114 Furthermore, since 1995, there have been a series of bilateral and international agreements aimed at affecting a two-way return of refugees. Up to now, 347,807 persons have been repatriated to Croatia, of which 221,097

[260] See Letter from Minister Mate Granić to German Foreign Minister Klaus Kinkel, 25 August 1995, Annex 215.

[261] It should be borne in mind that some 195,000 housing units were destroyed in Croatia during the war and some areas were stripped of even basic services.

were IDPs and 126,710 were refugees.[262]

(b) Croatia's Legislative Measures did not target Serbs

11.115 The Respondent alleges that the Croatian government re-populated the region with "180,000 Croats" initially for 10 years and then forever.[263] The correct position is that Croatia provided shelter during the war to a significant number of refugees from Bosnia and Herzegovina, of whom some 120,000 subsequently relocated permanently in Croatia, because they were unable to return to Bosnia and Herzegovina.
The Respondent's argument that there was a permanent confiscation of property is wrong and misrepresents the facts and Croatian law. This was confirmed by the European Court of Human Rights in, for example, Radanović v. Croatia, (Application No. 9056/02, Judgment of 21 December 2006, paragraph 43), where it was held that the owner was not deprived of the title of the property.

11.116 The Respondent also ignores the circumstances under which Croatian authorities were operating in the wake of Operation *Storm*. The enacting of the Temporary Takeover of Property Law in August 1995 was in pursuance of the following legitimate aims: a) protecting from deterioration and devastation the property which had been abandoned by its owners; b) enabling the persons whose homes had been destroyed in the war to temporarily solve their housing needs; c) securing the repossession of property of persons who had left Croatia but were subsequently returning; and d) protecting those refugees and displaced persons who had been placed in abandoned houses and flats. It should also be noted that, following the adoption of the 1998 Programme of Return, in August 1998 the Act on Termination of the Takeover Act entered into force providing for the possibility for those persons whose property had been given for accommodation to others during their absence from Croatia to apply for repossession of their property. This issue is today largely resolved, with more then 19,264 property units repossessed by the owners and only 16 cases still pending.

11.117 It is important to note that the Republic of Croatia has invested considerable resources on reconstruction and housing.[264] In addition, the

[262] According to the UNHCR office in the Republic of Croatia, regional returns are as follows:

- 47,158 returns registered by the Knin office
- 5,913 returns registered by the Osijek office
- 48,033 returns registered by the Sisak office
- 8,427 returns registered by the Zagreb office
- and the rest of returns registered by other offices

[263] Counter-Memorial, para. 1328. It is entirely unclear how the CHC Report, relied upon by Serbia, came to state that the area was re-settled by "180,000 Croats."

[264] The total war damage in Croatia is estimated to be over $ 37 billion. More than 146,600 damaged and destroyed housing units have been rebuilt. Croatia has financed the direct costs

regional and local infrastructure reconstruction programmes, the programme for economic and social recovery (PSGO) and other projects financed with EU funds, for strengthening and developing less developed areas, are all aimed towards sustainable return and the integration for returnees. From the outset of the implementation of the Programme of Return in 1998, the Applicant established consultative mechanisms with various international partners (OSCE, UNHCR, CoE and later the European Commission) and adopted and implemented legislative, administrative and other measures, which have provided the conditions for the sustainable return of all refugees and IDPs.

11.118 In October 2004 a public awareness campaign by the Government of Croatia and the OSCE began aimed at encouraging return to the Republic of Croatia. The campaign was widely broadcast in the region under the title *Croatia is Home to All its Citizens*. In June 2008 the Croatian Government adopted an Action Plan for the Accelerated Implementation of the Housing Care Programme for former tenancy right holders, providing a clear implementation time-line. The Action Plan aims to resolve 4,900 housing care cases and has so far resulted in fully meeting its targets for 2007 and 2008. In June 2010, the Government adopted a Revised Action Plan, under which a total of 1,265 families will be provided with housing care by the end of 2010, while a further 805 families are to be provided with housing care in 2011. The beneficiaries of housing care are now able to purchase allocated flats, outside areas of special state concern, on favourable terms.

11.119 In addition to measures facilitating return to Croatia, Croatia is actively involved in a regional process for the comprehensive resolution of refugee issues, based on an agreement that refugees should freely chose between return and local integration (as introduced by Sarajevo Declaration of 2005). In this respect, the Presidents of Croatia and Serbia have also confirmed in November 2010 a political agreement providing the framework for solution of outstanding refugee issues, based on the real needs still existing on the ground. An international donor conference is planned for mid 2011 in order to support the final resolution of this issue in the region.

11.120 These programmes and developments demonstrate that Croatia did not enact executive and legislative measures "intended to prevent any possibility that Krajina Serbs would reclaim their property."[265] On the contrary, it has provided a comprehensive framework facilitating return. The number of Serb returnees is a testament to this. Despite the fact that some of these programmes have been underway for over a decade, and the Respondent is well aware of them, it has failed to mention them.

11.121 The Respondent also alleges that Croatia adopted amendments to

of reconstruction, involving in some cases the reconstruction of entire cities. €5.3 billion has been invested to date, only 5% of which was provided by international sources.

[265] Counter-Memorial , para.1346.

the electoral Act whereby the number of Croatian Serb representatives in Parliament was reduced to three from twelve.[266] *First*, the amendments were adopted as a provisional solution pending the new census. *Second*, it is this very Act that bears witness to the fact that there was never any plan to make the Serbs disappear. During the entire time that the 'RSK' existed, the Serbs were entitled to 12 representatives in Parliament. It is clear from this fact alone that Croatia wished to integrate the Serbs from the "Krajina" into its polity. However, the Serb leadership in Knin rejected any such proposals, considering any form of integration unacceptable.

(c) There is no Criminal Impunity for Perpetrators of Crimes

11.122 The Respondent alleges that under pressure from the international community, in September 1996, Croatia adopted an Amnesty Law which was to be applied to rebel Serbs, but in practice it did not bring good results.[267] *First*, this law was one amongst many enacted to enable the reaching of a political solution to the Serb rebellion in Croatia. In fact Croatia had adopted an Amnesty Law in 1992 for those who took part in the armed rebellion. This law was extended in May 1995 to include Serb soldiers who were taken prisoner during *Flash*.[268]

11.123 The Respondent also fails to mention that the 1996 Law was adopted to facilitate the peaceful integration of the Croatian Danube region. Following the military operations of 1995, only parts of Eastern Croatia remained under Serb control. The peaceful integration of these areas into Croatian jurisdiction was made possible by an agreement between Zagreb and local Serbs, the UN and Belgrade. This peaceful re-integration was successfully completed in 1998.[269]

11.124 The Applicant has responded to the Respondent's general allegations regarding Croatia's criminal justice system in Chapter 2, see in particular para. 2.69.

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[266] Counter-Memorial , para.1345.

[267] Counter-Memorial , para.1352.

[268] N. Barić, Srpska pobuna u Hrvalskoj 1990-1995 [Serb Rebellion in Croatia 1990-1995], pp 165-166.

[269] The integration was successfully implemented. On the success of the new UN peace-keeping mission during which peaceful integration of the Croatian Danube region was carried out from 1996 to 1998 see David Streling JONES (Captain), "UNTAES: A Success Story in the Former Yugoslavia", Military Intelligence Professional Bulletin, United States of America, Department of the Army, 1998 January-March, http://www.fas.org/irp/agency/army/tradoc/usaic/mipb/1998-1/JONESfnl.htm visited on 15 January 2010.

CONCLUSIONS

11.125 As set out above, the primary purpose of Operation *Storm* was to establish the territorial integrity of Croatia, although the Operation also had a humanitarian component (i.e., to prevent a "repeat-Srebrenica" in Bihać).

11.126 The Croatian Government had no plan to destroy the Krajina Serbs by conducting Operation *Storm*. Contrary to the Respondent's claim no such plan was drawn up at the Brioni meeting. There was no indiscriminate shelling of Serb civilians by the Croatian forces. Contrary to the Respondents claim that the Applicant carried out large-scale unlawful shelling to terrorize Serb civilians, the evidence fails to support a finding that the HV's use of artillery was extensive or indiscriminate.

11.127 The realization of the impending defeat of the SVK and a refusal to accept Croatian sovereignty were the primary motivators for the evacuation orders and mass evacuation from the 'RSK'. It had little to do with alleged targeting or the unlawful use of artillery. There was no plan to target fleeing Serb civilians and there was no systematic killing of the Serbs that remained. Without proof of indiscriminate shelling resulting in the so-called "exodus" of the Serbs, and in the absence of evidence regarding systematic and planned killings, the Respondent's claim of genocide completely fails.

11.128 Further, there was no systematic looting and burning of property by Croatia. Croatia took measures to prevent unlawful acts and initiated investigations and legal proceedings to punish individual perpetrators of such acts. As set out above, Croatia did not adopt legal measures to target the Serbs with a view to ensuring that they did not return.

11.129 Finally, it is submitted that the Respondent's Counter-Claim is completely undermined by the lack of independent evidence. It has failed to produce original documentation (its own or the records relating to the so called RSK) which have left it in the invidious position of placing great reliance on dubious documentation including that prepared by *Veritas* and the methodologically flawed CHC Report. Furthermore, the evidence that has been provided is not sufficiently particularised.

CHAPTER 12

THERE WAS NO GENOCIDE AGAINST SERBS IN THE 'RSK' AND NO RESPONSIBILITY OF CROATIA

SECTION I: INTRODUCTION

12.1 This Chapter responds to the Counter-Claim against the Applicant alleging that the crime of genocide was committed against the Serb civilian population of the area designated by the Serb leadership as 'Krajina' during Operation *Storm* and its aftermath. It refutes the allegation, which is axiomatic to the Respondent's Counter-Claim, that a genocidal plan or policy was adopted by the Croatian political and military leadership during a meeting on the island of Brioni on 31 July 1995. It also refutes the allegation that any inference of genocidal intent can be drawn from the manner in which Operation *Storm* was conducted, from events that are alleged to have occurred in its aftermath, or from the legislative and executive policies of Croatia in relation to the return of the Serb civilian population of 'Krajina', and the protection of their civil and political rights.

SECTION II: THE CRIME OF GENOCIDE

12.2 The Applicant does not dispute the Respondent's claim that Croatian Serbs constitute a separate national or ethnic group.[1] Indeed, as the Respondent rightly points out,[2] their status as an identifiable national minority has, at all material times, been recognised under Croatian law, and has been guaranteed constitutional protection (including the right to proportional representation). Nor does the Applicant dispute that the Serb civilian population living in 'Krajina' represented a substantial part of that national or ethnic group.

12.3 The Applicant denies, however, that the goal of Operation *Storm* was directed to, or included in any way, the physical destruction of the Serb population living in 'Krajina'. Croatia's primary intention[3] in pursuing Operation *Storm* was to achieve the lawful restoration of control over its sovereign territory, restoring its internationally recognised borders, and re-integrating those territories that had been unlawfully occupied by Serbia since its aggression in 1991 and 1992. These areas constituted approximately one third of the territory of Croatia. In view of the total absence of willingness on the part of the rebel Serbs to negotiate the peaceful re-integration of that territory, the Government of Croatia had no other options, and was fully

[1] Counter-Memorial, paras. 1361-1366.

[2] Counter-Memorial, para. 1364.

[3] As noted in Chapters 10 and 11 above, Croatia's secondary purpose was humanitarian intervention in the territory of Bosnia-Herzegovina to prevent a Serbian massacre occurring in Bihać, as had occurred in Srebrenica.

entitled to bring the unlawful occupation to an end by lawful military means. Croatia had in place measures to ensure that the Serb population living in 'Krajina' could remain in (or return to) their homes, with guaranteed civil and political rights.

(1) No evidence of genocidal intent

12.4 The Respondent argues that a genocidal intent behind Operation *Storm* is proved by the existence of a formal plan or policy to commit genocide. It alleges that this plan was adopted during a meeting on the island of Brioni on 31 July 1995.[4] The Respondent expressly acknowledges that its case on genocidal intent depends upon the interpretation of the transcript of that meeting. In addition however the Respondent argues that that the allegedly genocidal plan formed at Brioni was subsequently carried into effect. The Respondent submits that the manner in which Operation *Storm* was conducted, taken in conjunction with the alleged persecution of Serb population living in 'Krajina', not only proves the commission of acts contrary to Article II (the physical element of the crime of genocide) but also confirms that the policy of the Croatian leadership was to destroy the Serb population living in 'Krajina' (and thus supports the inference which the Respondent seeks to draw from President Tuđman's statement during the Brioni meeting). None of these submissions withstand scrutiny.

12.5 The physical factors upon which the Respondent relies are: (i) the military superiority of the Croatian forces engaged Operation *Storm*; (ii) the allegedly indiscriminate shelling of civilian targets; (iii) the displacement of Serb civilians; (iv) the numbers of civilians killed during military operations; (v) the killing of Serb civilians escaping in refugee convoys; (vi) the murder of Serb civilians that remained in UNPA sectors South and North; (vii) the destruction and looting of Serb-owned property; (viii) the imposition of obstacles to the return of Serb civilians; (ix) the imposition of legislative measures which allegedly discriminated against Serb civilians; and (x) failure to bring perpetrators of crimes against Serb civilians to justice.[5]

12.6 The Applicant denies that the elements relied upon by the Respondent, taken individually or in conjunction with one another, are capable of proving genocidal intent. At the outset, the Applicant draws the Court's attention to the way in which the Respondent has chosen to put its case on *dolus specialis*. The Respondent does not assert that the factors listed in paragraph 12.5(i)-(x), even if viewed cumulatively, are capable of evincing genocidal intent on the part of Croatia. The Respondent expressly accepts that if it is unable to prove that a plan or policy to commit genocide was adopted at Brioni, as it alleges,

[4] Counter-Memorial, paras. 1414-1422.
[5] Counter-Memorial, para. 1391 *et seq.*.

then its case on genocidal intent must fail (and therefore the Counter-Claim is bound to be dismissed in its entirety). The factual allegations made about the conduct of Operation *Storm*, and its aftermath, are said to be no more than confirmatory evidence of the genocidal plan allegedly formed at Brioni. It is thus apparent that the entire Counter-Claim, as pleaded, hinges on the inferences which the Respondent invites the Court to draw from the Brioni transcript.

12.7 The Applicant recalls that the Respondent bears the burden of proving genocidal intent such that the Court is fully convinced of it. Given the gravity of the allegation, the Court will exercise considerable care before finding a sufficiently clear indication of genocidal intent in the evidence. For the reasons summarised below, and more fully developed in Chapter 11, the Applicant submits that the transcript of the Brioni meeting contains no evidence of intent on the part of the Croatian leadership to bring about the physical destruction of the Serb civilian population of 'Krajina'. Indeed, the reverse is true. The meeting was solely concerned with the implementation of a strategy for military engagement with the combined Serb forces, and the lawful means to give effect to the objective of recovering sovereign control of Croatian sovereign territory.

12.8 The inferences that the Respondent seeks to draw from the Brioni transcript in turn depend entirely upon a selective and distorted misreading of a single sentence uttered by President Tuđman and the absence of any objection from the other participants at the meeting. Read objectively and in context it is clear that the words used by President Tuđman were directed to the lawful military objective of securing the defeat, retreat and expulsion of Serb military forces from the territory of Croatia. Basing itself upon a tortuous and disingenuous misreading of this statement, the Respondent then seeks to build its entire case around the proposition that President Tuđman was referring to the civilian population of 'SAO Krajina', rather than to its armed forces. The Applicant invites the Court to conclude that a fair and objective reading of President Tuđman's statement, in its context, demonstrates conclusively that the opposite is true.

12.9 This ought to be sufficient to dispose of the Respondent's genocide claim as pleaded since, by its own admission, the remaining matters upon which it relies cannot prove genocidal intent. That said, the Applicant expressly denies that all or any of the factual allegations summarised at paragraph 12.5(i) to (x) above is capable of establishing the *dolus specialis* for the crime of genocide. Each of the allegations is unfounded, based upon unreliable evidence, or grossly exaggerated, and the inferences which the Respondent seeks to draw are wholly unrealistic. The Applicant recalls, in this context, that the Court will only draw an inference from an alleged pattern of crimes if the proven facts leave no room for doubt as to the existence of a

genocidal intent. Genocidal intent must be conclusively proved, and it is only where such an inference is inevitable that the Court will be in a position to conclude that crimes were committed with the intention to bring about the physical destruction of a targeted group. In the Applicant's submission, the evidence falls very far short of that mark. Indeed, it is fully consistent with the proposition that Croatia pursued legitimate and lawful political and military objectives. To the extent that individual crimes may have been committed on the ground, these crimes do not begin to prove a criminal intent on the part of the Croatian political and military leadership (or any person associated with that leadership). They certainly provide no evidence whatsoever of genocidal intent.

12.10 Before addressing the evidence in detail, the Applicant would make four general submissions about the evidential sources upon which the Respondent has relied:

1. The Respondent has made extensive use of the OTP pre-trial brief in the extant prosecution of the *Gotovina et al* case. The document is cited as authority for the allegations which it contains. The Applicant submits that this is a wholly impermissible line of reasoning. In accordance with the guidance given by the Court in its *Bosnia* judgment,[6] the inclusion of factual allegations in an Indictment issued by the OTP is of no evidential weight in proceedings before the ICJ under the Genocide Convention.[7] If that is so, then it must follow that the elaboration of such allegations in a pre-trial brief submitted by the OTP is equally of no evidential value.

2. The Respondent has also relied upon extensive citation of the statements and testimony of witnesses who have given evidence in the *Gotovina et al* case. At the time of writing, there has been no judgment of the ICTY recording definitive findings of fact based upon that evidence, and no assessment of the reliability or accuracy of the factual statements on which the Respondent relies. Accordingly, that testimony is of no greater evidential value than any other statement or testimony on which either party relies. It forms part of the material for the Court to consider, but it does not enjoy any special status. It will be for the Court to determine what weight, if any, to attach to that evidence.

3. The Respondent relies heavily on reports by the Croatian Helsinki Committee for Human Rights ('CHC') for its assessment of the number of Serb civilian casualties incurred during Operation

[6] *Bosnia,* paras. 218 - 219.
[7] See Chapter 2, paras. 2.25-32, *supra.*

Storm and thereafter, and relies almost exclusively on "evidence" collected by the CHC in support of its allegation that Croatian forces fired upon retreating refugee convoys. As the Applicant has pointed out above,[8] the methodology adopted by the CHC for determining the number of Serb civilian casualties is manifestly unreliable. The "evidence" adduced in support of the allegation of attacks on refugee convoys is based upon statements of anonymous witnesses. The Applicant submits that statements obtained by an NGO from individuals whose identities are unknown can be of no more evidential weight in proceedings before the ICJ than before a criminal tribunal. Even the Respondent is unaware of the identity or reliability of the sources on which it relies. In the absence of any information about a particular witness, it is impossible for the Court to evaluate the credibility, reliability, or potential bias of the testimony. Accordingly it should be disregarded in its entirety.

4. The Respondent also relies on data supplied by *Veritas*. The Applicant submits that this organisation lacks any semblance of independence, and that the methodology it employed is demonstrably unreliable. The bias of *Veritas* is well-illustrated in the statements made by Savo Štrbac, its President, who has said that peaceful co-existence between Serbs and Croats in the region is unacceptable, since the Serb population needed to preserve its "biological potential". The Court should not place any reliance at all on the "evidence" provided by *Veritas*.[9]

(a) No plan or policy to destroy the Serb civilian population of 'Krajina'

12.11 The primary purpose of Operation *Storm* was to achieve the re-integration of the occupied areas, in accordance with international law. The evidence demonstrates clearly that Croatia had been committed to reaching a peaceful re-integration of those territories through negotiation, but the conduct of the rebel Serb authorities, over the four years of occupation, had proved that this was futile. Croatia was fully entitled to conclude that the occupation had to be brought to an end by force. In the years preceding Operation *Storm*, Croatia strengthened its armed forces, making improvements to their combat-readiness, operational capacity, mobility and staffing, in preparation for military action. This was precisely because the rebel Serb authorities had proved repeatedly their determination to forestall a negotiated settlement, and were backed in this stance by the Government and forces of the FRY. It was no part of Croatia's political or military strategy to eradicate the Serb civilian population from 'Krajina'. On the contrary, following both Operation *Flash* and Operation *Storm*, the Government of Croatia took extensive measures to

[8] Chapter 2, para. 2.65.
[9] Chapter 2, paras. 2.66-68.

reassure and protect the Serb civilian population and has gone to considerable lengths to bring about the repatriation of that population, often in co-operation with the FRY.[10]

12.12 On 31 July 1995 President Tuđman met with members of the Croatian military leadership on the island of Brioni. The purpose of the meeting was to discuss the options for military action. By that time it was apparent that the rebel Serb authorities had no serious intention of negotiating peaceful re-integration. For his part, President Tuđman had made Croatia's position clear: either the Serb rebel authorities agreed to immediate action to achieve peaceful re-integration, or Croatia would achieve re-integration through the use of military force. The rebel Serb delegation in Geneva, however, had clearly received instructions to adopt stalling tactics in order to buy sufficient time for Serb forces (including forces of the FRY) to mobilise more effectively. If Croatia was to retain its military advantage (in terms of strategic deployment and superior military capability) it had no option but to act quickly and decisively.

12.13 The transcript of the Brioni meeting discloses no evidence whatsoever of an intention on the part of any of those present to eradicate the Serb civilian population of 'Krajina'. The Respondent relies on a single statement made by President Tuđman.[11] The more extensive quotation reads:

> "Therefore we should leave the east totally alone, and resolve the question of the south and north. 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."

12.14 On a fair and objective reading of the transcript it is clear that when the President spoke of causing the Serbs to "disappear" he was referring, in the context of an armed conflict, to Serb forces rather than to the Serb civilian population. The statement that areas that could not be "taken" immediately must be forced to "capitulate" within a few days is plainly a reference to the maximum length of time the Croatian forces could be allowed to overcome the Serb military defences and force the surrender of the Serb forces. Read objectively and in context, the President was plainly saying that if it did not prove possible for the HV immediately to overcome the Serb defensive positions in any particular area (that is, if the forces defending those positions did not immediately "capitulate") then the HV would have to use sufficient military power to ensure that the defending forces were overcome within a few days at most. This was, after all, a meeting with senior military commanders, to plan the execution of a military operation. In that context, the meaning of the

[10] Chapter 10, para. 10.98 and Chapter 11, paras. 11.112 - 11.120.

[11] The Counter-Memorial cites this sentence no less than 18 times. For the references see Chapter 11, *supra*.

passage cited above is clear. If there were any lingering uncertainty about the President's meaning, it is put beyond doubt by the words which immediately follow this passage of the transcript, and encapsulate the intention behind the earlier citation in slightly different language:

> "Therefore our main task is not Bihać, but instead to inflict such powerful blows in several directions that the Serbian *forces* will no longer be able to recover but will have to capitulate."[12](emphasis added)

The meaning of this statement admits of no doubt whatsoever. It explains precisely the point the President was making at this part of the discussion, and it could not be clearer. The President was instructing his senior military personnel that Croatian forces were to use overwhelming force in order to subdue *the Serb forces*, to bring about their surrender (or "*capitulation*" as it is described in both passages) within a few days at most and to expel them from the territory that had been unlawfully occupied by force.

12.15 There was, however, no suggestion of the forced deportation or mass expulsion of the Serb civilian population. Nor was there any suggestion that the military offensive would target Serb civilians or Serb civilian property. As the history set out in Chapters 10 and 11 demonstrates beyond doubt, the Croatian Presidency and Government went to considerable lengths during and after Operation *Flash* and Operation *Storm* to persuade the Serb civilian population to remain (in the face of orchestrated attempts by the "authorities" of the 'RSK' in particular to bring about a mass evacuation). The participants at the Brioni meeting were well aware that the 'RSK' "authorities" had made detailed plans for the evacuation of 'Krajina' and that Serb combatants and civilians had already begun to leave (towards Bosnia and Serbia) in anticipation of a Croatian military attack in the area. During the Brioni meeting it was noted that rebel Serb forces were looking for an opportunity to flee the conflict, and it was anticipated that the military and civilian evacuation of the area would intensify once hostilities began. The evacuation of a civilian population may be expected in the face of a military campaign, and those present at Brioni were well aware of this.

12.16 President Tuđman observed that the military strategy devised by Admiral Davor Domazet made no provision for an orderly retreat of Serb forces, or the evacuation of Serb civilians in the face of the advancing Croatia offensive. The President said that the absence of such a corridor would prevent Serb forces from pulling out and fleeing the conflict. He observed that under the proposed plan "you are forcing them to *fight* to the bitter end" (emphasis added). He therefore ordered that an evacuation corridor should be left open. The President's conclusion was clear:

[12] Chapter 11, para. 11.43. See Brioni Transcripts, Counter-Memorial, Annex 52, p. 2.

> "When we put pressure on them, now they are already partly moving out of Knin. 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."[13]

It is fanciful for the Respondent to seek to impute a genocidal (or other criminal) purpose to remarks, made on a single occasion, the meaning of which gives no possible support for the Respondent's reading, on their face, or when taken in context. President Tuđman was simply directing that Croatian military deployments on the ground should ensure an avenue of retreat so that it would not be necessary for Serb forces to stand and fight to the end. The alternative was encirclement, and an inevitable escalation of military and civilian casualties. In military and humanitarian terms this decision was fully justified, and lawful.

12.17 The Respondent's suggestion that there is some significance to be attached to the absence of any reference to humanitarian law at the Brioni meeting is unreasonable and unwarranted. This was a meeting to plan military strategy, whereas the duty to instruct troops on the ground to observe humanitarian law is part of the implementation of a military strategy. The evidence shows that such instructions were in fact given to Croatian armed forces on the eve of Operation *Storm*.[14]

12.18 In his remarks at Brioni, the President advised against the extensive use of heavy artillery during the campaign, but advocated the shelling of targets in Knin because it was a vital centre of military operations for the forces of the 'RSK' and contained a significant number of strategically important military targets. The suggestion that the President instructed the military to destroy Knin is wholly unfounded. As the evidence shows, Croatian military strikes targeted military installations, and not civilian targets, during the attack on Knin. There is nothing in the transcript to suggest that the President contemplated indiscriminate shelling or the shelling of civilians or civilian targets there or elsewhere in the occupied territories. Indeed, the reverse is true.[15]

(b) The magnitude and nature of Operation Storm is not evidence of genocidal intent

12.19 The fact that Croatia had made effective military preparations for the liberation of the occupied territories is not evidence of genocidal intent. Rather, it was part of a responsible military strategy. Croatia had been

[13] Chapter 11, para. 11.48.
[14] Chapter 11, para. 11.54 and the annexes cited there.
[15] Chapter 11, para. 11.47.

pursuing a peaceful diplomatic and political solution for over four years. Those efforts had been met with intransigence and filibustering on the part of the secessionist Serb authorities. Fully aware that a peaceful political solution might be difficult to achieve, the Croatian government had at the same time been planning for the possibility of lawful military action to restore Croatia's territorial integrity.[16] Those preparations began in 1992 and the plans for military action were periodically updated.

12.20 The detailed military strategy for Operation *Storm* was only finalised in the days before it was launched. It provided for a simultaneous attack by HV forces in all operational and tactical directions, and an advance to the border between Croatia and Bosnia, which was to be completed within seven days. This was a large scale and complex military operation involving multiple axes of attack across a lengthy confrontation line. MD Split was to engage with the North Dalmatia Corps of the SVK; MD Zagreb was to engage with the Banovina Corps of the SVK; MD Karlovac was to engage with the Kordun Corps of the SVK; and MD Gospić was to engage with the Lika Corps of the SVK. Whilst HV forces outnumbered those of the SVK, the latter was at least equally well-equipped in terms of tanks and artillery. The SVK had 300 tanks, 295 armoured battle vehicles and 360 pieces of heavy artillery.

12.21 On the Croatian side, operational planning was governed by HV Main Staff Directives issued on 26 June 1995 which directed HV forces to begin intensive preparations, including re-grouping and mobilization, to bring the forces into a state of combat-readiness. On 4 August those forces, and forces of the MUP of Croatia, were issued with orders to commence combat operations.[17] The operation was swift and effective.

12.22 None of this, however, even begins to suggest a criminal intent, still less a genocidal intent. Operation *Storm* was a competently prepared, carefully planned and professionally executed military operation, which succeeded in achieving its objective quickly and efficiently, with a minimum of civilian casualties, and limited damage to civilian property. It stands in stark contrast to the Serb military operation in 1991 and 1992.

(c) There was no indiscriminate shelling, or targeted shelling of civilian targets, at Knin or elsewhere

12.23 The Respondent falsely claims that Operation *Storm* was characterised by the indiscriminate use of heavy artillery, with the intention and effect of inflicting damage to civilian targets. Quite apart from the fact that the Brioni transcripts reflect President Tuđman's clear order that artillery should be used sparingly, the evidence simply does not bear out the Respondent's allegation.

[16] Chapter 11, e.g. paras. 11.39, 11.56.
[17] Chapter 11, paras. 11.60, 11.62.

12.24 Operation *Storm* began in the early hours of 4 August. At 5 a.m. MD Split launched a simultaneous attack on a series of Serb military targets, including military installations located in Knin. The Respondent claims that the artillery Order to the MD Split failed to specify any targets, and implies that this amounted to permission to direct artillery at civilian targets. In fact, the Artillery Order directed artillery support to engage in "artillery shelling to rout, neutralise and destroy the enemy's combat disposition at the tactical and operational level … [p]revent the enemy from bringing in new forces … [n]eutralize the artillery positions of enemy batteries and destroy the enemies communications centres and command post."[18]

12.25 The military targets in Knin were amongst the most significant linchpins in the SVK infrastructure. Knin was the military and political headquarters of the 'RSK' and the centre of important military targets, logistics concentrations, lines of communication, reserve forces and mobilisation points. These included the headquarters of the SVK General Staff, the Northern Barracks, the TVIK factory, the telegraph and post office, and the railway intersection in the town. A contemporaneous report from SVK intelligence confirms that HV artillery fire was directed at military targets in Knin. The report notes that the first strike was on the building of the SVK General Staff, and its fleet of cars, both of which sustained heavy damage, and that other strikes on the 4 August were directed on the Northern Barracks (which housed 1300 combatants), on the TVIK factory and on the railway hub. Late on the evening of the 4 August, the SVK General Staff abandoned Knin and relocated to the village of Srb. Given the military and strategic importance of these and other military targets in Knin, there was a further artillery barrage the following morning. HV forces entered the town at 1100 hours on 5 August and encountered very little military resistance from the forces of the SVK.[19]

12.26 The Respondent points to evidence that artillery damage was caused to certain civilian property in Knin, and suggests that this is proof of indiscriminate shelling. This is contrary to the evidence. All of the contemporary military assessments confirm that the HV attack was properly focussed on legitimate military targets. International observers entering Knin two days after its liberation confirmed that artillery damage was concentrated on military targets, that the damage to civilian property was far less than expected, and that such

[18] Order of Attack, Split MD, 2 August 1995, Annex 171. Similarly, the HV Main Staff directive issued prior to Operation *Storm*, directed the Split MD to do the following:

> "neutraliz[e] GS VRS/Republika Srpska Army Main Staff/ and the 7th Corps Command Post in Knin, the brigades' command posts, concentrations of enemy manpower, armour, and artillery in the area of Knin and Benkovac, including ammunition and fuel depots, while supporting the main forces in attack and preventing an enemy counter-attack from the direction of Knin, Kaštel Žegarski and Benkovac."

See Republic of Croatia, Ministry of Defence, Directive Op. No. 12-4/95, 26 June 1995, Annex 170, p. 6.

[19] Chapter 11, paras. 11.62 and 11.73.

damage as had been caused to civilian property was concentrated in areas of close proximity to legitimate military objectives. This is the clearest possible evidence that any collateral damage to civilian property was proportionate to the lawful military objectives being pursued. The experienced personnel who made these assessments found no evidence of indiscriminate shelling in Knin.[20]

12.27 The same is true of the artillery fire directed at the towns of Benkovac, Obrovac and Gračac, which the Respondent claims to have been indiscriminate. These towns each contained important military installations which were the target of artillery fire by HV forces. The plans annexed to this Reply demonstrate clearly the location of these military targets in these and other towns.[21]

(d) The numbers of civilian casualties killed in HV military operations is not evidence of genocidal intent

12.28 The Respondent alleges that the total number of Serb civilians who lost their lives during and after Operation *Storm* is, in itself, evidence of genocidal intent. The Counter-Memorial accepts that there is no precise figure for the number of deaths, but proceeds to cite a figure of 677 civilians who allegedly died *or went missing* during *and in the 100 days after* Operation *Storm*. This figure is drawn from the CHC Report. The Applicant has grave reservations about the methodology adopted by the CHC, which are fully elaborated in Chapters 2 and 11, *supra*. However, even taking this figure at face value, it is clear that the number of civilian casualties incurred as a direct result of the military action taken during Operation *Storm* was limited. Whilst any civilian casualty of armed conflict is a matter of grave regret and concern, the total number listed by the CHC as dead or missing (even if taken at face value) does not suggest any intention on the part of the Applicant to target Serb civilians. The Applicant recalls that this figure represents just over one twentieth of the total number of Croat civilian casualties inflicted by the Serb forces during the 1991 and 1992 offensives to capture and occupy the same territory.

12.29 On a close analysis of the CHC figures however, the actual number of civilian casualties inflicted during the military operation itself is significantly lower than 677. The CHC estimate includes not only those whose remains have been identified (or who have otherwise been confirmed dead) but also those who are listed as still missing and whose fate is unknown. More importantly, it includes Serb civilians who died in the 100 days *after* the campaign was concluded. The Respondent itself asserts that the majority of Serb civilian casualties were not killed in the course of the military attacks that comprised Operation *Storm*, but died as the result of alleged unlawful (and unauthorised)

[20] Chapter 11, para. 11.74.
[21] See Annex 178.

attacks on the retreating refugee convoys.[22] For the reasons set out in Chapter 11,[23] and summarised below, the Applicant submits that there is no credible evidence to prove that any such attacks as may have occurred were attributable to the Croatian armed forces, or to the Croatian State. The important point for present purposes, however, is that on the Respondent's own case, it is only a minority of the 677 individuals listed by the CHC that can be considered as civilian casualties of authorised military action taken during Operation *Storm*.

12.30 The Respondent also makes passing reference to an estimate of 1,200 Serb civilian casualties, cited in the *Veritas* Report. As noted above, the Applicant submits that this organisation lacks any semblance of independence, and that the methodology it employed is demonstrably unreliable. Even on these figures, however, the submissions made above would apply with equal force.

(e) The displacement of Serb civilians was not the intention behind Operation Storm

12.31 The Respondent alleges that the Serb civilian evacuation was the direct and intended result of the HV military offensive, and that it was the principal purpose behind Operation *Storm*. As the Applicant has pointed out, the primary objective of Operation *Storm* was the lawful restoration of the territorial integrity of a sovereign state, within its internationally recognised borders and conducted in accordance with international law. The Applicant has already pointed out that the leaflets contemplated at the Brioni meeting were to include an appeal to Serb civilians to remain in Croatia. On 4 August President Tuđman appealed to the Serb population to stay. Moreover, Croatia had constitutional and legal protections in place which recognised the Serb civilian population of Croatia as a national minority, and guaranteed its civil and political rights. There is no question therefore of Croatia having planned or effected the "ethnic cleansing" of 'Krajina'. The position of the Croatian Government throughout the period from 1991 to 1995 was that the solution lay in peaceful co-existence between the Serb and Croat civilian populations of the area. As the Applicant has demonstrated however, the settled policy of the 'RSK' authorities was that peaceful co-existence between the two communities was impossible.

12.32 A military operation on the scale of Operation *Storm* is bound to result in the large scale movement of civilians. The evidence confirms that the evacuation of the Serb civilian population of 'Krajina' was the result of a detailed evacuation plan put in place by the 'RSK' "Supreme Defence Council" long before Operation *Storm*. Its stated purpose was to protect the

[22] Counter-Memorial, para. 1241.
[23] Chapter 11, paras. 11.87 - 93.

civilian population and to "relieve Serbian fighters holding the defence lines of the burden of care for their families". However, the evidence suggests that it was also motivated by the conviction on the part of the 'RSK' leadership that peaceful co-existence, under Croatian Government control, and within the national boundaries of Croatia, was unacceptable to the secessionist Serb movement in Croatia.[24]

12.33 Accordingly, on 29 July 1995 an order was issued by the 'RSK' authorities requiring the immediate update of evacuation plans; on 31 July 1995 the 'RSK' police issued an order for the evacuation of civil documents; and on 2 August 1995 Civil Protection ordered urgent reports on the implementation of plans for the evacuation of the civilian population. The 'RSK' authorities organised television broadcasts on TV Knin showing simulated evacuations from towns in former sectors North and South to familiarise the population with evacuation contingency plans. The evacuation began before the arrival of HV forces. On 4 August the 'RSK' Supreme Defence Council ordered the formal and orderly evacuation of the civilian population of Knin, Benkovac, Obrovac, Drniš and Gračac, across the border into Bosnia and thereafter to Serbia. There is evidence that in some cases, 'RSK' forces carried out the evacuation by force.[25]

12.34 The Applicant, as noted above, does not dispute that this evacuation was in part motivated by the intention of the 'RSK' "authorities" to take steps to protect the civilian population, particularly since its own military and strategic headquarters (which were legitimate military targets for the HV) had been located in densely populated areas. However, as the UN Secretary General's office noted at the time, there was a political determination amongst the 'RSK' leadership, shared by the Serb civilian population of the 'RSK', to leave Croatia if the occupied territories were restored to Croatian Government control. The restoration of Croatian Government control would inevitably lead to the return (under Government protection) of the Croat civilian population that had been displaced during the Serbian aggression of 1991 and 1992. This in turn would require peaceful co-existence between the two communities, under the terms of the Constitution. It had been the consistent position of the 'RSK' that peaceful co-existence between Serbs and Croats in the region was impossible, and that the restoration of Croatia's territorial integrity was unacceptable. The Secretary General informed the Security Council that the evacuation of the Serb civilian population from the occupied territories had been "orderly" but that it was "difficult to determine" whether it was the result of fear of the HV military attack, or whether it was motivated by "a desire not to live under Croatian authority, or encouragement by local leaders to depart".

12.35 The evacuation of the Serb civilian population of the area designated

[24] Chapter 11, paras. 11.77 - 84.
[25] Chapter 11, paras. 11.78 and 11. 83.

by the Serb leadership as 'Krajina' was not, therefore, a forced expulsion of the kind that was inflicted on the Croat civilian population when the Serb forces took control of the region in 1991 and 1992. It was not a campaign of "ethnic cleansing", even if (as the result of action taken by the 'RSK' authorities) Operation *Storm* led to the displacement of the majority of the Serb civilian population. Serb civilians were not rounded up by the HV and driven to the border, as had occurred during the earlier military campaign. Rather, the evacuation was planned and implemented by the authorities of the 'RSK'.

12.36 The Applicant recalls that even where forced displacement has occurred with the intention of "ethnically cleansing" an area of territory, this does not amount to genocide, nor is it evidence of genocidal intent, unless its purpose is to bring about the physical destruction of an ethnic group in whole or in part, rather than merely its dissolution or displacement.[26] Operation *Storm* was not aimed even at achieving the displacement of the Serb civilian population of the area, let alone its destruction. The aim of the Croatian leadership was to restore Croatian national boundaries, and to achieve peaceful co-existence between the two communities through the return of the displaced Croat population, and the implementation of constitutional protection for the Serb population as a national minority. Such a solution was unacceptable to the leadership of the 'RSK'. To the extent that the Serb civilian population of 'Krajina' was in fact displaced as a result of Operation *Storm*, this was due to measures taken by the 'RSK' to evacuate the territory in the face of proportionate military action taken by Croatia to achieve its lawful military objectives.

(f) Croatia is not responsible for the deaths of Serb civilians fleeing in refugee convoys

12.37 The Respondent alleges that Croatia is responsible for targeting civilians in refugee convoys evacuating the conflict zone. In support of this allegation it relies heavily on statements made by anonymous witnesses to the CHC. Those statements are not annexed to the Counter-Memorial, and the identity of those who made the statements is unknown. As the Applicant has pointed out above, this makes it impossible for the Court to evaluate the credibility or reliability of the statements, or the summary extracts reproduced by the CHC. This material is of no evidential value.

12.38 To the extent that the Respondent cites identifiable and independent sources, the allegations are as follows:

1. Mrs. Elizabeth Rehn, the Special Rapporteur of the Commission on Human Rights filed a report alleging that fleeing civilians

[26] See Chapter 8, *supra*.

"were subjected to various forms of harassment including military assaults and attacks by Croatian civilians". She refers to the alleged shelling of a refugee column between Glina and Davor on 8 August 1995 which resulted in four fatalities; and an attack by a "Croatian mob" in Sisak on 9 August 1995 which resulted in one fatality.

2. Human Rights Watch reported an incident of military attack on a convoy passing close to Petrovac (which has also been the subject of evidence in the ongoing *Gotovina et al* trial in the ICTY), and a further incident in which a convoy was fired upon inside the Republic of Srpska.

12.39 In the context of an allegation of genocide, it is first necessary to put the scale of these alleged attacks in context. The Respondent accepts that there is no reliable data on the total number of civilian fatalities caused by these alleged incidents, but relies on an estimate provided by a Belgrade-based NGO (the Humanitarian Law Centre) which suggests that 300 people were killed in total. This figure does not reliably distinguish between civilians and military personnel.

12.40 If, and to the extent that, attacks on civilian refugees fleeing the conflict occurred, whether they were perpetrated by members of the HV, by the armed forces of Bosnia-Herzegovina, or by civilians, the Applicant considers that to be deplorable and to amount to the commission of individual crimes. There is, however, very limited reliable evidence to identify the perpetrators of such attacks, and none is cited by the Respondent. Nor is there reliable evidence to prove that any or all of the attacks were targeted against civilians, rather than evacuating military personnel. Most significantly, there is not the slightest evidence to suggest that any attack on civilian personnel was authorised by HV commanders, or was contemplated or foreseen by any senior HV personnel.

12.41 Based on the evidence adduced by the Respondent, the Applicant makes three principal submissions. First, the Applicant submits that there is insufficient evidence to enable the Court to infer that any attack by the HV on a retreating "column" involved an attack directed at civilians so as to amount to the commission of a war crime:

1. It is clear that the columns of people evacuating the territory of Croatia included not only civilian refugees, but also combatants. There is evidence that such columns were intermingled. Indeed, the Respondent admits that the attack near Petrovac involved the use of artillery fire on what it describes as an "SVK column". The Respondent has adduced no evidence that would enable the Court to determine whether any military personnel were unarmed and

hors de combat at the time. In the Applicant's submission, the Court could not safely conclude that this attack, even if it occurred as alleged, constituted a war crime without a much more detailed consideration of the evidence, including an accurate assessment of the number of active combatants that were in the SVK column that was allegedly fired upon. Given that this convoy included military personnel, the alleged attack is certainly not evidence of genocide. Since it is clear that a number of the retreating columns included military personnel, it would dangerous to draw any generalised conclusions from the evidence adduced by the Respondent.

2. The evidence also establishes that a number of the refugee columns passed through combat zones where active hostilities were continuing. This was the case in relation to Banovina and Kordun and Topusko as well as in other areas. Without a far more detailed analysis of each alleged incident, the possibility that some civilians were killed in cross-fire cannot be safely excluded.

12.42 Secondly, the Applicant submits that there is no reliable evidence enabling the Court to conclude that there was a pattern of attacks perpetrated by forces of the HV or that Croatia is otherwise internationally responsible for them:

1. The evidence establishes that forces of the ABiH 5th Corps were involved in the fighting, particularly along the border between Croatia and Bosnia. The possibility that some of the attacks relied upon by the Respondent were perpetrated by forces of the ABiH cannot be excluded. The Respondent has not alleged that such forces were *de facto* organs of Croatia, or that they were operating under the direction and control of Croatia so as to meet the tests for State responsibility laid down by the Court in its *Bosnia* judgment. Nor could such an allegation reasonably be made on the evidence.

2. The allegations made in the Counter-Memorial include allegations that Croatian civilians harassed and attacked Serb civilians in the retreating refugee convoys. That is one of the allegations made by Mrs. Rehn The Respondent has not alleged that the Applicant bears international responsibility for random acts of violence that may have been perpetrated by civilians, and has not pleaded an allegation of failure to prevent genocide. Nor could it do so in the light of the criteria laid down by the Court in the *Bosnia* case.

12.43 Thirdly, the Applicant submits that if, and insofar as it is proved that HV forces unlawfully fired upon civilian targets in the refugee convoys, this would represent the commission of a war crime by the perpetrators. In the absence, however, of any evidence establishing that such attacks were authorised at a senior level within the HV, or within the political leadership of Croatia, it would not amount to evidence of genocidal intent.

12.44 In summary, the Applicant submits that the Respondent has failed to prove: (a) that the alleged attacks occurred on a systematic scale; (b) that all or any of them involved unlawful military action by the HV against civilian targets; (c) that they were authorised by the military or political leadership of Croatia, or (d) that they are otherwise attributable to Croatia, on the applicable principles of State Responsibility.

(g) Croatia is not responsible for the killing of Serb civilians that remained

12.45 The Respondent alleges that as ground forces entered the conurbations in the occupied territories they killed combatants that were *hors de combat* and civilians. It cites Mrs Rehn's report which alleges that after the HV had assumed control of certain areas, and particularly Knin, its forces killed individuals without military justification. It describes the discovery of 120 bodies (although it is impossible to determine how many of these were combatants killed in action), and suggests that "a common murder method was shots in the back of the head."

12.46 This section of the Respondent's Counter-Memorial cites numerous instances in which individual Serb civilians were found dead, in sectors South and North, in circumstances suggesting that they may have been murdered. Examples include elderly people found dead with their throats cut,[27] decapitated or mutilated remains,[28] bodies observed in the streets, found inside their homes, or found in shallow graves.[29] As regards Knin, the Respondent relies on a CHRC report alleging that 13 people were killed by the HV ground forces entering the town.[30]

12.47 Allegations made at this level of generality are extremely difficult to respond to. In the absence of any detailed accounts, or descriptions of victims, the perpetrators or the circumstances of an incident, it is unreasonable to expect the Court to draw inferences adverse to the Applicant. The mere finding of mortal remains, even if there is forensic evidence that the cause of death is suggestive of murder, does not provide sufficient information to enable reliable conclusions to be drawn as to the circumstances in which the

[27] Counter-Memorial, para. 1258
[28] Counter-Memorial, para. 1268.
[29] Counter-Memorial, paras. 1262, 1265 and 1281.
[30] Counter-Memorial, para. 1261.

death occurred or the identity of the perpetrator. It cannot simply be assumed, from the finding of mortal remains, that each death was a murder and that it must have been perpetrated by the Applicant's armed forces.

12.48 Moreover, it must be borne in mind that at least some of these deaths must have occurred in the context of a military operation as ground troops entered towns which had been defended by the 'RSK' and sought to bring the area under effective control. In such a situation, there is an inevitable risk that individuals encountered on entry will be treated as hostile unless they promptly and convincingly demonstrate peaceful intent. All of these factors make it impossible for the Court to draw generalised inferences from the finding of a relatively limited number of human remains in the absence of specific factual allegations concerning the manner in which any individual met their death.

12.49 Insofar as the Counter-Memorial includes any specific allegation of murder by members of the HV or the Croatian MUP, it relies on anonymous statements collected by the CHRC which are not themselves appended. As the Applicant has already observed, a second summary of an anonymous witness statement is of no evidential value. Apart from this material, the only direct testimony adduced by the Respondent derives from international monitors who gave evidence during the *Gotovina et al* trial as to the finding of human remains, but who were not in a position to give any direct testimony as to the circumstances in which the deaths occurred.

12.50 In these circumstances the Applicant submits that no reliable inferences can be drawn from the evidence adduced by the Respondent. It may well be that some of these deaths were attributable to the acts of individual members of the HV and the Croatian MUP, and it may be that some of those amounted to the war crime of murder. It is impossible however to know how many of the fatalities (or which of them) fall into this category. The one certainty is that the Respondent has adduced no evidence whatsoever to suggest that the HV or MUP commanders had any policy of targeting civilians, and there is no basis for suggesting that any crimes that may have been committed were part of an organised, or systematic, plan to kill civilians.

(h) Croatia is not responsible for the destruction and looting of Serb civilian property

12.51 The Applicant does not dispute that acts of looting or destruction took place in the execution of Operation *Storm*, although the extent of these crimes is grossly overstated by the Respondent. The Court in the *Bosnia* case held that the destruction of civilian property (including sites of cultural and religious significance) does not constitute a genocidal act within Article II(c) since it does not necessarily connote an intention to bring about the physical destruction of the persons making up a protected group.

12.52 Whilst a planned or systematic campaign of destruction aimed at eliminating all signs or symbols of the presence of a protected group can contribute to an inference of genocidal intent, the Respondent has adduced no evidence to suggest, much less to prove, that the crimes against property on which it relies were systematically perpetrated, or that they were authorised or tolerated by the Croatian Government or the HV command. On the contrary:

1. There is nothing in the Brioni transcript (which the Respondent asserts to be the formation of a policy of genocide) to suggest that attacks should or would be mounted on Serb civilian or cultural property. On the contrary, it is clear that President Tuđman intended to (and did) make public appeals to the Serb civilian population to remain in their homes.

2. The perpetrators of the attacks on which the Respondent relies are in most cases unidentified such that it is impossible to attribute responsibility to the Applicant. Insofar as those attacks may have been perpetrated by private individuals, those acts cannot be attributed to the Applicant, and the Respondent has made no allegation of failure to prevent acts of genocide by non-state actors.

3. The territory liberated during the Operation was promptly returned to the constitutional order of Croatia, and attempts were made to guarantee law and order, including the personal safety of civilians and the protection of property. Police stations, courts and other essential governmental institutions were quickly established. The fact that crimes against property may have been committed does not establish that these were authorised, permitted to occur or otherwise tolerated. Numerous orders to prevent crime and protect individuals and property were issued by various civilian and military organs, and the Croatian police and judiciary issued over a thousand sets of legal proceedings concerning the destruction of Serb-owned property.

4. There is no evidence of widespread attacks on symbols of cultural or religious significance to the Serb population of 'Krajina'. On the contrary, the evidence shows that during and after Operation *Storm*, there were no attacks at all on Serb Orthodox churches or cemeteries. Of 30 Orthodox churches in the occupied territory, only the church of St. Nedjelja in Dabar was slightly damaged.

(i) Croatia did not impose unreasonable obstacles to the return of Serb civilians

12.53 The Applicant has, in Chapter 11, addressed in detail the Respondent's argument that it imposed unreasonable obstacles to the return of Serb civilians: see paragraphs 11.112-114, *supra*. The Applicant reiterates that between 1991 and 1995 Croatia provided shelter for over one million people, (including 550,000 internally displaced persons and 400,000 refugees from the region). The Croatian Government favoured organised return at the earliest possible opportunity, and that process commenced as soon as the appropriate conditions were in place. To that end, the Government adopted a *Programme of Return and Care for Displaced Persons, Refugees and Resettled Persons* and a series and bilateral and international agreements, facilitating repatriation.

(j) Croatia did not adopt legislative measures to deter the return of Serb civilians

12.54 The Respondent alleges that the Applicant took legislative measures designed to inhibit the return of Serb refugees including the permanent confiscation of Serb-owned property and the amendment of the election Act to reduce Serb representation in Parliament. As stated in Chapter 11, there was no permanent confiscation of Serb-owned property.[31] Without prejudice to its detailed response, the Applicant would observe that neither of these measures is remotely capable of constituting a genocidal act, or of evidencing genocidal intent.

12.55 In any event, the assertion is factually inaccurate. The Applicant has adopted numerous measures, including programmes, campaigns and political agreements, to encourage and facilitate the return of Serb civilians. It has invested considerable resources on reconstruction and housing, aimed towards the sustainable return and integration of returnees. The number of Serb returnees illustrates the extent and success of the Applicant's endeavours.

12.56 The Respondent's further assertion that Croatia adopted amendments to its electoral Act with a view to discriminating against Croatian Serbs is equally without foundation. The Act is predicated on proportional representation and is itself demonstrative of the fact that the Applicant did not at any time discriminate against Croatian Serbs.

(k) Croatia is not responsible for failure to punish acts of genocide

12.57 Finally the Respondent alleges that the Applicant has granted effective immunity from criminal prosecution to individuals of Croat nationality guilty of genocide. The Respondent's criticisms of the Croatian criminal justice system are addressed by the Applicant in Chapter 2, at paragraph 2.69 *et seq*.. It is not credible for the Respondent to allege that Croatia's prosecutorial system is capable of evincing genocidal intent.

[31] Chapter 11, paras. 11.115-121.

(2) The Physical Element: Genocidal Acts

12.58 The Applicant submits that there is no evidence that genocidal acts were committed by the forces of Croatia:

1. *Killing Members of the group* (Article II(a): Whilst it is undeniable that there were civilian casualties during Operation *Storm* and thereafter, the Respondent has adduced no reliable evidence to prove that such casualties resulted from the *unlawful* acts by the armed forces of Croatia (that is, acts in breach of international humanitarian law). Insofar as there is evidence of the deaths of non-combatants, there is no reliable evidence as to the circumstances of death or the identity of the perpetrators.

2. *Causing serious bodily or mental harm to members of the group* (Article II(b)): Again, there is no convincing evidence that bodily or mental harm was inflicted unlawfully (in breach of international humanitarian law).

3. *Deliberately inflicting on the group conditions of life designed to bring about its destruction in whole or in part* (Article II(c)): For the reasons set out above, there is no evidence of genocidal intent on the part of the Government of Croatia, or those for whom it bears international responsibility and accordingly there is no evidence capable of sustaining the alleged breach of Article II(c). As the Applicant has pointed out previously, neither the displacement of individuals from the protected group, nor the destruction of property can constitute and unlawful act contrary to Article II(c).

12.59 The Respondent has sought to suggest that in its original application the Applicant acknowledged, against its own interest, that the Serb civilian population of 'Krajina' was a victim of genocide in 1995.[32] This suggestion is without any merit or foundation and is strongly denied. It is based upon an allegation, made in the originating application filed in 1999, that the FRY (not Croatia) was responsible for effecting the forced displacement of the Serb civilian population in 1995 for purely political reasons, and that this was capable of constituting a violation of the Genocide Convention. As the Applicant made clear in its 2001 Memorial,[33] that allegation (which bears no resemblance whatever to the allegation made by the Respondent in its counter-claim) was no longer being pursued. As the Respondent is well aware, the Applicant does not, and never has, acknowledged that Operation *Storm*, or its aftermath, constituted genocide. For the avoidance of doubt, the Applicant's consistent position (since the filing of its Memorial) has been that although

[32] Counter-Memorial, para. 1453.
[33] Memorial, para. 1.06

the suffering of the Croatian Serbs in 1995 is beyond doubt, and although that suffering was exacerbated by an evacuation plan motivated in part by political considerations, it does not meet the elements of a crime attributable to the FRY (or any other State) under the Genocide Convention.

SECTION III: THE CRIMES OF CONSPIRACY, INCITEMENT, ATTEMPT AND COMPLICITY (ARTICLE III)

12.60 The Respondent alleges a conspiracy to commit genocide contrary to Article III. The allegation is based solely on its misreading of the Brioni transcript and the inferences it seeks to draw from this. The Applicant has already addressed these issues in Section II above.

SECTION IV: ATTRIBUTION

12.61 The Applicant accepts that it bears international responsibility for the statements and acts of those present at the Brioni meeting and for the conduct of military personnel of the HV and police personnel of the Croatian MUP during and after Operation *Storm* ("the Croatian armed forces"). For the reasons already elaborated, there is nothing in the transcript of the Brioni meeting to evidence any genocidal intent, and nothing in the acts properly attributable to the Croatian armed forces from which such intent is capable of being inferred.

12.62 Insofar as any of the acts alleged by the Respondent were, or may have been committed by the forces of ABiH, or by civilians, the Applicant disputes that it can be held internationally responsible for those acts. Applying the principles of attribution laid down by the Court in its *Bosnia* judgment, those acts cannot be attributed to the Croatian State, and the Respondent has made no allegation under Article I of a failure to prevent acts of genocide being perpetrated by persons or entities for which it does not bear international responsibility.

SECTION V: NO EVIDENCE OF FAILURE TO PUNISH ALLEGED VIOLATIONS OF ARTICLES II AND III OF THE CONVENTION

12.63 The Respondent alleges that the Applicant has failed to punish genocide, as required by Article I and other complimentary provisions of the Genocide Convention. This allegation is based upon the proposition that President Tuđman and others formed a genocidal plan at Brioni, and that this engaged the Applicant's duty under Article I to prosecute them for the crime of genocide, or conspiracy to commit genocide. Since the Applicant does not accept that the Brioni meeting provides the slightest evidence of genocidal intent, nor that such an intent is to be inferred from the execution of Operation *Storm* or its aftermath, it follows that the Applicant disputes that its obligation under Article I has been engaged.

12.64 Insofar as the Respondent relies on allegations of ethnic bias in the prosecution of war crimes, the Applicant has set out in Chapter 2, above, its comprehensive response: see paragraph 2.69 *et seq.*; see also, paragraph 12.57, *supra*.

CONCLUSION

12.65 The Respondent has wholly failed to prove the allegation made in its Counter-Claim. On the Respondent's pleaded case, that allegation depends upon the suggestion that the selective and misleading quotations it has plucked from transcript of the Brioni meeting convincingly prove the formation of a plan or policy to bring about the physical destruction of the Serb civilian population of 'Krajina'. If the Court does not find that allegation proved then, as the Respondent acknowledges, its entire Counter-Claim must fail. In the Applicant's submission the Brioni transcript does not begin to suggest, still less to prove, the formation of such a plan or policy. Operation *Storm* was conceived for a lawful purpose, and executed with professionalism and with a minimum of civilian casualties. Whilst individual crimes may have been committed, there is no evidence from which the Court could infer the *dolus specialis* for the crime of genocide, and no evidence that genocidal acts, attributable to the Applicant, were committed during or after Operation *Storm*.

SUBMISSIONS

On the basis of the facts and legal arguments presented in its Memorial and in this Reply, the Applicant respectfully requests the International Court of Justice to adjudge and declare:

1. That it rejects in its entirety the first submission of the Respondent, as to the inadmissibility of certain claims raised by the Applicant.

2. That the Respondent is responsible for violations of the Convention of 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 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.

3. That as a consequence of its responsibility for these breaches of the Convention, the Respondent 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), and to ensure that those persons, if convicted, are duly punished for their crimes;

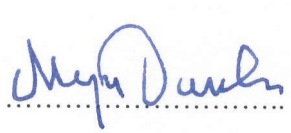
(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to cooperate with the authorities of the Applicant to jointly ascertain the 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. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible.

4. That, in relation to the counter-claims put forward in the Counter-Memorial, it rejects in their entirety the fourth, fifth, sixth and seventh submissions of the Respondent on the grounds that they are not founded in fact or law.

The Applicant reserves the right to supplement or amend these submissions as necessary.

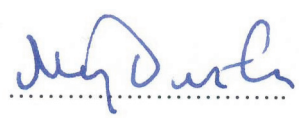


Agent of the Republic of Croatia

Zagreb, 15 December 2010

CERTIFICATION

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.



Agent of the Republic of Croatia

Zagreb, 15 December 2010