INTERNATIONAL COURT OF JUSTICE

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

(CROATIA v. SERBIA)

REJOINDER

SUBMITTED BY THE REPUBLIC OF SERBIA

Volume I

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62. District Court in Belgrade, Serbia, Minutes of the witness hearing of Petar Batak, dated 2 July 1997;
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70. BBC, the Speech of President Tuđman in Knin on 26 August 1995, according to Croatian Radio Zagreb;
71. Jutarnji list, Zagreb, 4 May 1998, "War turned me into a killing machine".
72. Ivan Zvonimir Čičak, President of the Croatian Helsinki Committee for Human Rights: "Krajina burning again", authorized article published in *Feral Tribune*, Croatia, on 16 March 1998;
73. Amnesty International Briefing to the UN Committee against Torture", 2010;
74. Youth Initiative for Human Rights Report, "Against Immunity of Power: prosecution of war crimes in Croatia", March 2011;
75. Conclusions of the Government of the Republic of Croatia of 15 April 2011, communicated to the diplomatic missions accredited in Croatia with the diplomatic note No. 2081/11 of 19 April 2011;
76. Letter of the Commissariat for Refugees of the Republic of Serbia, No. 019-542/1 of 5 August 2011.

LIST OF ACRONYMS

Abbreviation	Full name	Comments
ABiH	Army of the Republic of Bosnia and Herzegovina	Bosniak Army involved in Operation Storm in August 1995
CHC	Croatian Helsinki Committee for Human Rights	Non-governmental organization
ECMM	European Community Monitoring Mission	
FRY	Federal Republic of Yugoslavia	Name of Serbia and Montenegro between 27 April 1992 and 3 February 2003
HDZ	Croatian Democratic Union (Hrvatska demokratska zajednica)	Leading political party in Croatia from 1990 to 2000
HV	Croatian Army (Hrvatska vojska)	Army of the Republic of Croatia (established on 3 November 1991)
HVO	Croatian Defence (Hrvatsko vijeće obrane)	Army of the Herzeg-Bosna (Croatian entity in Bosnia and Herzegovina) involved in Operation Storm
ICC	International Criminal Court	
ICTR	International Criminal Tribunal for Rwanda	
ICTY	International Criminal Tribunal for the former Yugoslavia	
ILC	International Law Commission	
JNA	Yugoslav People's Army (Jugoslovenska narodna armija)	Army of the SFRY (ceased to exist on 27 April 1992)
MUP	Ministry of Interior (Ministarstvo unutrašnjih poslova)	Police forces of the former Yugoslav Republics
NDH	Independent State of Croatia (Nezavisna Država Hrvatska)	Nazi puppet State (existed from 1941 to 1945)
RSK	Republika Srpska Krajina	Serb entity in Croatia (existed from 19 December 1991 to 5 August 1995)

SAOs	Serbian Autonomous Regions (Srpske Autonomne Oblasti)	The 1991 Serb entities in Croatia: SAO Krajina (changed its name into RSK on 19 December 1991); SAO Western Slavonia and SAO Slavonia, Baranja and Western Sirmium (both joined to RSK on 26 February 1992)
SDS	Serbian Democratic Party (Srpska demokratska stranka)	Leading political party of the Serbs in Croatia from 1991 to 1995
SFRY	Socialist Federal Republic of Yugoslavia	Federal State composed of six Republics: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia (ceased to exist on 27 April 1992)
SVK	Serbian Army of Krajina (Srpska vojska Krajine)	Army of the Republika Srpska Krajina
TO	Territorial Defence (Teritorijalna odbrana)	Armed forces organized on the territorial basis
UNHCR	United Nations High Commissioner for Refugees	
UNMO	United Nations Military Observers	
UNPA	United Nations Protected Area	Safe heaven in Croatia under the protection of UNPROFOR
UNCRO	United Nations Confidence Restoration Operation	United Nations administration (replaced UNPROFOR on 31 March 1995)
UNPROFOR	United Nations Protection Force	Peace-keeping force in Croatia and Bosnia and Herzegovina from 1991 to 1995
VJ	Yugoslav Army (Vojska Jugoslavije)	Army of the Federal Republic of Yugoslavia
ZNG	National Guard Corps (Zbor narodne garde)	HDZ militia

CHAPTER I
INTRODUCTORY OBSERVATIONS

1. The procedural reference

1. This Rejoinder is submitted in accordance with the Court's Order of 20 January 2009. It supplements the arguments and evidence submitted by the Respondent in the Counter-Memorial of 4 January 2010, and responds to the issues raised by the Applicant in its Reply of 20 December 2010.

2. The issues that still divide the Parties

2. The Rejoinder is structured in conformity with the rule that the Parties' second round written submissions shall not merely repeat their contentions, "but shall be directed to bringing out the issues that still divide them".[1] The Respondent considers that the issues that still divide Serbia and Croatia have to be reasonably limited to the subject-matter of the case, with respect to which the Court's jurisdiction is based exclusively on Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* ("the Genocide Convention"), and they should not extend to larger historical and political disagreements between the Parties. For this reason, the Respondent directs its evidence and arguments to the following factual and legal points:

a) The Republic of Serbia cannot be responsible for acts and omissions that allegedly occurred prior to its existence as a State, i.e. prior to 27 April 1992;

b) The crimes committed against the Croats during the armed conflict in the territory of the Republic of Croatia from 1991 to 1995 do not fulfil the legal elements of the crime of genocide, nor of any other act punishable pursuant to Article III of the Genocide Convention;

c) The crimes committed in the territory of the Republic of Croatia from 1991 to 1995 cannot be attributed to the Republic of Serbia in accordance with the rules of State responsibility;

[1] Article 49, para. 3, of the Rules of Court.

d) Croatian *de jure* organs committed genocide against the Krajina Serbs during and after Operation *Storm* in 1995, which entails international responsibility of the Republic of Croatia.

3. Furthermore, the Respondent believes that, pursuant to the sound administration of justice, the question of methods of proof that still divide the Parties has particular importance for the establishment of factual findings in this case.

4. In order to avoid any doubt, the Respondent preserves the factual claims and legal arguments, as set out in the Counter-Memorial.

3. Overview of the Applicant's case

5. The Applicant's claim is entirely without foundation in fact and in law. Following the evidentiary approach previously adopted in the Memorial, the Applicant continues with its unusual manner of presenting evidence in the second round of the written proceedings. In light of the very precise issues relevant to this case, the Reply of 20 December 2010 is an ambivalent, almost incomprehensible and often misleading compilation of factual allegations and legal arguments. These introductory comments will briefly touch upon some of the most obvious contradictions of the Applicant's position, which will be explained in more detail in the following chapters of the Rejoinder.

A. The Applicant consistently avoids producing evidence for its most serious allegation

6. Whereas the Memorial of 1 March 2001 alleges that 10,572 persons were killed and 1,419 were missing[2] during the five-year-conflict, the Reply claims that "[m]ore than 12,211 people were killed in the Serb military campaign and 1,030 persons are still missing and unaccounted for".[3] The Applicant, however, does not offer any proof that would confirm the alleged number of victims. Rather, the Reply simply refers to four lists made by the Applicant's State bodies themselves.

[2] Memorial, para. 1.09.
[3] Reply, para. 9.7.

7. The first of these is the *Updated List of Missing Persons*, drawn up on 1 September 2010, which contains data on 1,024 individuals[4], and among which are many victims of Serb ethnicity.[5] Furthermore, this list contains the names of Croats who were missing in Bosnia and Herzegovina,[6] as well as in some places that were under the full and exclusive control of the Croatian Governmental forces and far away from military operations.[7] The list also contains the names of ethnic Croats who went missing during the offensive criminal Operations *Maslenica* and *Storm* which were undertaken by the Croatian Government (see *infra*).

8. The second is *the Updated List of Persons Detained in Camps under Serbian Control*, It contains the names of 7,708 individuals.[8] It is unclear how the list of detained persons, of whom the vast majority remained alive and were subsequently exchanged for prisoners of Serbian ethnicity, can amount to proof in support of the allegation that 12,211 people were killed. The list is rather affirmative evidence that individuals who controlled those detention facilities did not have any intent to kill the detainees, let alone to destroy them as a substantial part of their national group.

9. Finally, the Applicant offers two *Lists of Exhumed Bodies*, which contain in total 3,661 names.[9] Again, the lists also contain the names of some Serb victims killed by Croatian units,[10] as well as many unknown persons whose ethnicity has not yet been confirmed. This leads the Respondent to conclude that the Applicant avoids producing a list of the alleged 12,211 victims for one or both of the following reasons: a) such a list does not exist and the number of victims is significantly smaller that the Applicant claims, b) the list includes a number of ethnic Serbs, citizens of the Republic of Croatia, who were killed by Croatian armed forces. For these same reasons the Applicant strongly contests the lists of killed and missing persons of Serb origin made by the non-governmental organization "Veritas", in spite of the fact that the Respondent did not specifically rely upon that document in its counter-claim.

[4] Annex 41 to the Reply.
[5] See Annex 1.
[6] See Annex 3.
[7] See Annex 4.
[8] Annex 42 to the Reply.
[9] Annexes 43 & 44 to the Reply.
[10] See Annex 2.

According to the "Veritas" updated lists, 6,279 Serbs were killed (out of whom 4,269 were identified and buried, and 2,010 are still registered as missing).[11]

10. The Respondent reiterates its sincere regret for all victims of the war and of the crimes committed during the armed conflict in Croatia, whatever legal characterisation of those crimes is adopted, and whatever the national and ethnic origin of the victims. Each victim deserves full respect and remembrance.

B. The Applicant acknowledges that evidentiary materials annexed to the Memorial are invalid

11. The Counter-Memorial contains, *inter alia*, an objection to the witness statements annexed to the Memorial which do not fulfil minimum evidentiary requirements and are accordingly inadmissible. The Respondent has pointed out that 332 out of 433 statements do not contain even the signature of the person who allegedly made the statement.[12] Additionally, the Respondent has found that in 154 out of 433 statements the person or body that took the statement is not indicated. Another 209 statements are actually the official records of police interrogations. These cannot even be used as evidence in cases before either the Croatian or Serbian courts.[13] The Applicant's casual approach to the question of testimony reflects its overall attitude to this case involving charges of exceptional gravity against the respondent State.

12. In order to preserve the misleading impression that there is a large body of evidence supporting its contentions, after filing the Memorial the Applicant then decided to have its police collect the signatures that were missing on witness statements. Thus, the Court can find 188 of these delayed signatures attached to the Reply,[14] together with a claim that 106 of "the original witnesses" are now deceased.[15] This is undoubtedly a very inventive approach to evidence law, not only in relation to the practice of the International Court of Justice (the Court), but to judicial practice in general. The Respondent concludes that the Applicant, through this subsequent action

[11] Available on www.veritas.org.rs.
[12] Counter-Memorial, para. 155.
[13] *Ibid*, para. 156.
[14] Annex 30 to the Reply.
[15] Reply, para. 2.43.

of gathering signatures, has actually acknowledged the invalidity of the large amount of the documentary evidence submitted in support of its Application. Ultimately, it is for the Court to decide upon the admissibility and probative weight of these materials. Respondent will further explain its position in Chapter III below.

C. The Applicant fails to prove the existence of the **dolus specialis** *of the crime of genocide*

13. The Applicant submitted its Memorial on 1 March 2001. Ten years later, reliable evidence of the existence of the required specific intent (*dolus specialis*) for the crime of genocide, described as the intent to destroy the group of Croat people as such, in whole or in part, is still absent. In Chapter VIII of the Counter-Memorial, the Respondent provided a detailed and convincing response to the 16 specific factors on which the Applicant based its inferences.[16] Nonetheless, the Reply has not touched upon that analysis. Rather, it has merely listed the 16 factors again.[17] The Applicant's further legal analysis of the elements that should establish genocidal intent does not have any link with the evidence of the present case. This *ex cathedra* presentation can be used by any party in any case based on the Genocide Convention, including that of the Respondent, but has absolutely no bearing on the present case.

14. One of the rare relevant and reliable documents called upon by the Applicant is the Judgment of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "the ICTY") in the *Martić* case.[18] The Applicant has devoted considerable energy to offering an explanation as to why the ICTY Prosecutor did not charge Milan Martić, "one of the most important and influential political figures in the SAO Krajina and the RSK Government, [who] as Minister of Interior […] exercised absolute authority over the MUP"[19] with the crime of genocide.[20] Yet, as a matter of fact, it should be noted again that the Trial Chamber acquitted Martić of the crime of extermination because it found that "[t]he element that the killings be committed on large scale [had] not been met".[21]

[16] Counter-Memorial, paras. 947-984.
[17] Reply, para. 9.6.
[18] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007.
[19] *Ibid*, para. 498.
[20] See Reply, paras. 2.27 – 2.31.
[21] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 204.

15. The Applicant is fully aware of its weak case, and that awareness is the sole reason why it repeatedly claims that the Respondent has failed to adduce any affirmative evidence in rebuttal to the Memorial (Reply, paras. 1.10 & 9.28), that the Respondent has a duty to provide an "explanation" (paras. 2.81–2.84), and that the Respondent has refused to disclose material evidence (paras. 1.13-1.14, 2.85-2.91), in spite of the fact that the Respondent has so far disclosed 223 confidential documents requested by the Applicant. The Respondent understands these claims merely as the Applicant's quiet attempt to deflect the burden of proof.

D. The Applicant's claim is artificial: no one in Croatia believes that the Croats were the victims of genocide

16. Another paradox of the Applicant's position can be found in the recent statements of the highest Croatian officials: no one seriously believes that the crime of genocide was really committed against the Croatian people during the armed conflict in that country. No one in Croatia today seriously expects that the Court will uphold the Applicant's claim.

17. Thus, the President of Croatia, H.E. Professor Ivo Josipović, who is also a law professor and prominent expert in the field of international criminal law, believed to be one of the authors of the Memorial, on 14 November 2010 stated that both States are "hostages of their claims, which are the time-relics of the different relations between Croatia and Serbia".[22] Similarly, Professor Mirjan Damaška, Agent of Croatia, as a guest columnist of the Croatian weekly "Nacional" on 13 March 2007, openly discussed the slim chances of the Croatian Application being upheld by the Court, but still advocated for the continuation of the proceedings because this would lead, according to him, to "a useful defeat" of the applicant State.[23]

18. In addition, it should be noted that the Reply contains many references to books related to the armed conflicts in the former Yugoslavia and its dissolution (B. Jović, CIA report, N. Barić, L. Silber & A. Little, etc.). The Applicant, however, disregards the fact that these books do not even remotely lead to any conclusion that the events in Croatia were consequences of a genocidal campaign led against the Croat people as such.

[22] http://www.tportal.hr/vijesti/hrvatska/96247/Tadicem-razgovarati-o-povlacenju-tuzbe.html
[23] Mirjan Damaška, "Hrvatsku tužbu ne treba povući", *Nacional*, No. 591, 13 March 2007, available on http://www.nacional.hr/clanak/print/32333.

E. From "All Serbs in a single State" to genocide: the missing connection

19. The Applicant widely exploits the political aim of the Serbian leadership in the beginning of the 1990s that, in the situation of the dissolution of the former SFRY, the only acceptable solution would be that all Serbs continue to live in a single State. Such a programme cannot be seen as genocidal *per se*, if it was not connected with a plan to destroy other national and ethnic groups. In the absence of any proof of such nature, the Applicant unsuccessfully turns to the "Idea of Greater Serbia" of the Serbian oppositional politician Vojislav Šešelj, without any proof that this idea was genocidal or that it had been accepted by the Serbian leadership. The political doctrine of Serbian expansionism, which has been presented in the Memorial as one of the factors from which the genocidal intent can be inferred,[24] is also discussed in the chapter dealing with historical and political background, and again, as evidence of the incitement to genocide. Serbian expansionism thus becomes the leading thesis of the Croatian case, almost as a substitute for the crime of genocide.

20. Again, the Applicant cannot establish this thesis without new contradictions emerging. If President Milošević and his supporters were really so eager to establish the Greater Serbia, then why did the Republic of Serbia not accept the SAO Krajina decision of 1 April 1991 to join Serbia,[25] or why did Slobodan Milošević exert his political influence to prevent the SAO Krajina uniting with Bosnian Krajina, another region with a majority Serb population, in the summer of 1991, or why did Serbian leadership put pressure on the RSK in February 1992 to accept the Vance Plan for comprehensive settlement of the conflict.[26]

F. Mr. Ante Marković as a prime minister of a "non-existent State"

21. In rebuttal to the Respondent assertion that the SFRY, in spite of the drawn out and complicated process of its dissolution, continued to exist during late 1991 and early 1992 and, subsequently, that the Republic of Serbia cannot be responsible for the acts and omissions that allegedly occur prior to its existence as an independent State, the Applicant devotes much attention to explaining how Serbia as one of the six Yugoslav

[24] Memorial, para. 8.16 (1).
[25] See Counter-Memorial, para. 492.
[26] See Reply, para. 3.121, ft. 272.

Federal Units took control over the SFRY Presidency and other Federal Institutions.[27] These two hypotheses are not necessarily in opposition: even if Serbia did take control of the SFRY Presidency (*quod non*),[28] this does not mean that the SFRY as a State ceased to exist. In other words, the factual findings of the ICTY Judgment in the *Martić* case, according to which Serbian President Slobodan Milošević participated in a joint criminal enterprise (JCE) with the JNA General Veljko Kadijević, does not mean that the international responsibility for the acts and omissions that took place in 1991 can be transferred to the State which would came into existence in April 1992.

22. The Respondent has submitted extensive evidence on the functioning of the SFRY organs during 1991 and early 1992,[29] when most crimes described in the Memorial allegedly were committed, but the Applicant has failed to respond to this evidence. For example, the Yugoslav Government (the Federal Executive Council) was very active throughout 1991.[30] Its Prime Minister was Mr. Ante Marković from Croatia. The Applicant has not addressed this significant fact in its Reply. On the other hand, the Applicant argues the relevance of the fact that Mr. Stjepan Mesić, the Chairman of the SFRY Presidency as a representative of Croatia, requested his salary from the Federal Institutions until 1 January 1992, because "no salary was in fact paid after October 1991".[31] The Respondent considers that the Applicant's rebuttal here is actually irrelevant: Mr. Mesić is free to claim any unpaid part of his salary before either the Croatian or Serbian courts, because both States are the equal successors of the former SFR Yugoslavia. Something else is relevant at this point: Mr. Mesić, the official representative of Croatia, was *de jure* Chairman of the Federal Presidency till the end of 1991.[32]

G. President Milošević as "a leader of successful insurrectional movement"

23. In the same manner in which the Applicant tries to portray the SFRY President Mesić and the SFRY Prime Minister Marković as officials of a "phantom state",[33] Serbian President Milošević is portrayed as a leader of a successful insurrectional movement.[34]

[27] Reply, paras. 3.87-3.108.
[28] See Counter-Memorial, paras. 522-529.
[29] *Ibid*, paras. 519-537. See also Annexes 23-31 to the Counter-Memorial.
[30] *Ibid*, para. 530.
[31] Reply, p. 82, footnote 224; see also Annex 26 to the Counter-Memorial.
[32] As a matter of fact, it seems that he was also *de facto* chairman, since he requested to be paid for his work.
[33] Reply, para. 7.48.
[34] *Ibid*, paras. 7.60-7.63.

This is, of course, entirely artificial but the only possible way of connecting the Applicant's claim with the legal principles of State responsibility, and more precisely with Article 10(2) of the ILC Articles on State Responsibility. With total indifference to all available historical sources dealing with the tragic dissolution of the former Yugoslavia, the Court, according to the Applicant, should ignore how the Republic of Croatia seceded from Yugoslavia, and how the Krajina Serbs claimed independence from Croatia. On the contrary, the Applicant asks the Court to imagine that the Republic of Serbia was in fact a secessionist movement within the Federal State. Yet, the Applicant offers no reasonable explanation as to why the Serbian leadership, accused by the Applicant of the political aim "All Serbs in one State", would be in favour of creating a new State. All Serbs already lived in a single State. Its name was Yugoslavia.[35]

H. The Applicant asks for a retroactive application of the Genocide Convention

24. The final but not the least of the paradoxes of Applicant's position in this case is an analysis by which the Genocide Convention is not subject to any temporal limitations, because it is universal in scope and contains obligations *erga omnes*.[36] The Court can surely appreciate how many new cases might be filed with its Registry as a consequence of this attitude, if it were correct. One of them would be a case concerning genocide committed by the Independent State of Croatia against the Serb people during the WWII: "We have won twice", Croatian President Mesić said. "We won on 10 April [the date in 1941 when the Independent State of Croatia was created] when the Axis Powers recognized the Croatian State and we won again because, after the war, we were on the winning side sitting at the table with the victorious powers."[37]

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[35] Indeed, it seems that the Applicant does not draw any significant distinction between the idea of Yugoslavianism and idea of Greater Serbia, as it was suggested by Šime Đodan already in 1971, after the Croatian Spring Movement: "[I]f [a child] is from a mixed marriage, it may be that it is nationally neutral and to gradually evolve into a Yugoslav, to finally, due to a series of circumstances, become an object of political manipulation in favour of the so-called Yugoslav nation, which never existed nor will it really exist, since belonging to the 'Yugoslav' nation is essentially belonging to the Serbian nation, considering that, in the final political analysis, Yugoslavianism, in the national sense, is 'great Serbianism'." The article was published in *Studentski list*, Zagreb, in October 1971. In 1990s Đodan became minister in the HDZ Government.

[36] Reply, paras. 7.3-7.31.

[37] See Counter-Memorial, para. 441, as well as Reply, para. 3.28.

4. Overview of the Respondent's Case

25. From the very beginning of the inter-ethnic tensions and nationalistic euphoria in Croatia, the HDZ Government openly demonstrated its derogatory attitudes and discriminatory policies towards the Serb people.[38] The hate speech against Serbs as a national and ethnic group was directed towards their dehumanization. Serbs were dismissed from their positions in the State administration and the police service, health services, public education and the media. Under the new 1990 Croatian Constitution, the Serb people lost its constitutive position in the Republic and were transformed into a national minority. The discrimination and persecution of the Serbs increased at the beginning of the armed conflict in 1991. Thousands of Serb houses were blown up during 1991 and 1992, while an ethnically motivated killing campaign was carried out in some Croatian cities.

26. This persecution of Serbs continued in 1992-93 through the offensive military actions of the Croatian Government at Miljevci Plateau, Maslenica and the Medak Pocket, and was always accompanied by serious violations of international humanitarian law.[39] Finally, in 1995, Operations *Flash* and *Storm* were carried out with the clear aim to ethnically cleanse the territories under the control of the Krajina Serbs. As the Croatian General Bobetko testifies in his memoirs: "…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".[40]

27. Mr. Stig Hansen, one of the monitors of the European Community Monitoring Mission (ECMM) in the UN Sector South, gave the following statement in his testimony at the ICTY trial against Croatian Commander Ante Gotovina and others: "[T]he operation [*Storm*] had the objective to re-take the geography of the RSK [...] with an empty population".[41]

[38] Counter-Memorial, paras. 430-433, 439-441, 450-466.
[39] *Ibid*, paras. 1119-1134.
[40] See J. Bobetko, *Sve moje bitke* [All My Battles], p. 407 (Annex 50 to the Counter-Memorial).
[41] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Transcripts, 22 January 2009, p. 14905.

28. The Respondent has produced sufficient evidentiary materials to support its claim that Operation *Storm*, which was led by the Croatian *de jure* organs, fulfils the legal elements of the crime of genocide, and consequently that Croatia violated its obligations under the Genocide Convention. The statements of President Tuđman at the Brioni meeting on 31 July 1995, when the operation was planned in detail, can serve as direct evidence of the existence of an intent to destroy the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South).[42] In addition, the existence of the genocidal intent (*dolus specialis*) was confirmed by many other indicators and in particular by the subsequent magnitude of the criminal activities against the Krajina Serbs during and after Operation *Storm*, including: a) the deliberate indiscriminate shelling of the Krajina towns, b) expulsion of the Serb civilian population, c) massive killings of those Serbs who decided to stay in the UN Protected Areas, d) attacks against the helpless refugee columns, e) embargo on the free movement of UN observers, f) massive destruction and looting of Serb property, and finally, g) by imposing administrative measures to prevent the Krajina Serbs returning to their homes.[43]

29. The consequences of the genocidal Operation *Storm* are still visible in the region. More than 50,000 refugees from Croatia still live in Serbia today, while only 68,000 have decided to return to Croatia.[44] Croatia has not convicted any person responsible for the massive killings committed during and after Operation *Storm*. On the contrary, the criminal acts committed are even celebrated in Croatia as a public holiday.[45]

5. Overview of the Applicant's Reply to the counter-claim

30. In support of the counter-claim, the Respondent has produced relevant and reliable documents (see Volume 4 of the Counter-Memorial). On the other side, the Applicant, in its voluminous and repetitive response, offers a very general denial of all of the charges. The Applicant's position is based exclusively on its own political and historical appreciation of the events, while the evidence presented in the Counter-Memorial is completely ignored.

[42] See Counter-Memorial, paras. 1195-1204.
[43] See Chapter VIII below, paras. 727-786.
[44] See Annex 76.
[45] See para. 831 *infra*.

31. When the Applicant disputes the reliability of some materials, this is done in a sweeping manner that betrays a double standard. Thus, the Applicant *inter alia* points out that the Respondent relies upon the report of expert R. Theunens who has been "appointed by the [ICTY] Prosecutor".[46] Yet, at the same time, the Applicant sets out some of its arguments relying mainly on the report of R. de la Brosse, "compiled at the Request of the OTP of the ICTY"[47] in the *Milošević* case. Furthermore, the Applicant itself relies throughout the Reply on various reports prepared by the same expert R. Theunens.[48]

32. Similarly, the Applicant contends that the testimony of UN official observers in *Gotovina et al*. forms part of the material for the Court to consider, "but it does not enjoy any special status".[49] The Applicant forgets that the Respondent has never acclaimed any *special* status for this testimony, but rather that it be acknowledged as the first-hand experience of impartial persons who were in a direct position to get knowledge about the key events during Operation *Storm* and who have been subsequently cross-examined before the UN Criminal Tribunal. Nevertheless, the Applicant claims that this testimony is of "no greater evidential value that any other statement or testimony on which either party relies".[50] Presumably, the Applicant here pretends to secure the equal probative value for the unsigned statements produced by its Police and other State and para-State bodies.

33. The Applicant does not admit that the Croatian forces, in executing the Brioni plan, committed any crime during and after Operation *Storm*. It rather reluctantly states that "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".[51] No particular remorse has been shown for the victims of the crimes committed by the Croatian forces. Even more, the Reply unfairly suggests that the Serbs met their fate by accident; or that they died from natural causes; or committed suicide; or were killed by unknown persons in Bosnia; or, even if they were found killed, that there is insufficient biographical data for their

[46] Reply, para. 11.71.
[47] Annex 106 to the Reply.
[48] For example, see footnotes 129 and 130 on page 120 of the Reply or footnote 158 (page 124).
[49] Reply, para. 2.33.
[50] *Ibid*.
[51] *Ibid*, para. 12.50.

identification, that is to say, they cannot be treated as Serb victims.[52] The Reply of the Republic of Croatia submitted on 20 December 2010 thus can be read as a "defence submission" written in the name of Franjo Tuđman, a member of the JCE, who has *post mortem* found his rightful place in the ICTY Judgment of 15 April 2011 for which Croatian Generals Gotovina and Markač were sentenced.

34. The Respondent notes with satisfaction that the Applicant has accepted most of the legal analysis presented in Chapter II of the Counter-Memorial, which deals with the interpretation of the Genocide Convention. Indeed, this dispute is not primarily about different legal interpretations of the Genocide Convention, but rather about the facts and their legal characterization. In the view of the Respondent, the documents annexed to the counter-claim are convincing evidence that the crime of genocide was committed against the Krajina Serbs at least during and after Operation *Storm* in 1995. With this Rejoinder, the Respondent submits eye-witness statements as new evidentiary material, fully in accordance with the rules of the SFRY criminal proceedings. It means that these statements were taken by the Criminal Court and signed by the witness in question.[53] The Respondent also submits a number of transcripts from the meetings of President Tuđman in August 1995[54] that took place immediately after Operation *Storm*, which entirely confirm the counter-claim.

6. Some comments concerning the historical and political background

35. There is no doubt that the Parties have so far presented to the Court most of their official views to the overall historical and political context of the 1990's armed conflict in Croatia. The Parties have done so in an attempt to convince the Court that the views of their respective governments can assist in better understanding the political events and the origins of that shameful war. However, each side has accused the other's account of being "one-sided, biased",[55] "incomplete, inaccurate and in numerous places misleading"[56].

[52] For examples, see Reply, paras. 11.87, 11.92, 11.100.
[53] Annexes 52-66.
[54] Annexes 67-69.
[55] Counter-Memorial, para. 390.
[56] Reply, para. 3.4.

36. Taking into account both perspectives, the Court can at least better understand how deep the historical discordance between the two sides lies. Finally, it is for the Court to decide how helpful these two narratives are for the subject matter of this case. It bears repeating that the case only concerns the crime of genocide. The Respondent will not further discuss this issue, but in order to avoid any doubt, it expressly denies all the Applicant's claims from Chapter 2 of the Memorial and Chapter 3 of the Reply that are not confirmed by the presentation of the facts contained in the Counter-Memorial.

37. Nevertheless, it is very interesting to note how passionately the Applicant invites the Court to read the various admissions made by the Respondent (for instance, that Serbian nationalists misused recollections of the past, that Serbian nationalism was the leading political idea prior to October 2000, and so on).[57] Yet, this should also be read as a significant difference between the Government of Serbia and the Government of Croatia today, because there has still been no serious admission of the nationalistic policy pursued by the Tuđman's HDZ regime in 1990s by Croatia.

38. It is also very interesting to note that the Respondent, in its presentation of the historical facts, has tried to refer to Croatian and international sources as much as possible,[58] while the Applicant in the Reply frequently relies upon its own sources.[59] This may originate from a misunderstanding of the weight to be attributed to different forms of evidence before the Court, or from a rigid political attitude that national accounts are sufficient in understanding a nation's role in history.

39. Finally, the Respondent observes with satisfaction that the Applicant has neither contested nor denied the Respondent's presentation of facts concerning the crime of genocide committed against Serbs, Jews and Roma in the Independent State of Croatia between 1941 and 1945.[60] This is therefore not in dispute.

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[57] *Ibid*, para. 3.5.
[58] Croatian authors cited by the Respondent in the Counter-Memorial are, for example: F. Jelić-Butić, A. Pavelić, M. Peršen, I. Goldstein, F. Tuđman, V. Ivančić, O. Žunec, N. Barić, M. Špegelj, etc. International authors: E. G. von Horstenau, I. Gutman, K. Pfeifer, E. Zurrof, L. Silber&A. Little, J. Lampe, CIA Report, etc. The Croatian historical sources: Code of Legal Decres and Orders of the Independent State of Croatia, the 1946 Report of the State Commission of Croatia for the Determination of the Crimes of the Occupation Forces and their Collaborators.
[59] For example, the Applicant frequently refers to the following Croatian authors: F. Tuđman, S. Mesić, Lj. Boban, J. Lovrić, M. Čulić, J. Jurčević, S. Biserko, O. Žunec, N. Barić, D. Marijan, *etc*.
[60] Counter-Memorial, paras. 397–420.

7. Structure of the Rejoinder

40. Following these introductory remarks, the Rejoinder is divided into two parts. Part I addresses the Applicant's claim and contains a rebuttal to the factual allegations and legal arguments presented in the Reply, and Part II is devoted to the counter-claim.

41. Part I comprises four chapters. Chapter II contains responses to arguments raised by the Applicant in Chapter 7 of the Reply concerning the relevance of conduct preceding 27 April 1992 and 8 October 1991 respectively. The Respondent considers that this issue, as a question of jurisdiction and admissibility, has a preliminary character.

42. Chapter III addresses the Applicant's approach to the production of evidence, which is strongly objected. Notwithstanding the question of admissibility and probative weight of the evidence produced by the Applicant, Chapter IV responds to the Applicant's factual and legal arguments concerning the application of the Genocide Convention, with the conclusion that the conduct described in the Reply does not fulfil the legal elements of the crime of genocide, nor of any other act punishable pursuant to Article III of the Genocide Convention. Chapter V responds to the Applicant's position vis-à-vis questions of the application of the rules on State responsibility with respect to the alleged conduct, concluding that the crimes committed in the territory of the Republic of Croatia from 1991 to 1995, regardless of their legal characterisation, cannot be attributed to the Republic of Serbia.

43. Part II comprises three chapters. Chapter VI reviews the evidence produced by the Respondent in support to its counter-claim. Chapter VII rebuts the Applicant's allegations concerning the events preceding Operation *Storm*, as an introduction to genocide committed against the Krajina Serbs in 1995. Finally, Chapter VIII contains factual and legal rebuttal to Chapters 11 and 12 of the Reply; it further proves that Croatian *de jure* organs committed genocide against the Krajina Serbs during and after Operation *Storm*, which entails international responsibility of the Republic of Croatia.

44. The annexes to the Rejoinder include 75 written documents divided into three sections: documents relating to the Applicant's claim (Section I); documents relating to the factual background of genocide (Section II), and documents relating to Operation Storm as a violation of the Genocide Convention (Section III).

PART I

THE APPLICANT'S CLAIM

CHAPTER II

RELEVANCE OF CONDUCT PRECEDING 27 APRIL 1992 AND 8 OCTOBER 1991

1. Introduction

45. In Chapter 7 of its Rejoinder the Applicant addresses the Court's "Jurisdiction over Acts Prior to 27 April". Notwithstanding this title, the chapter addresses jurisdictional aspects as well as questions of substantive law.

46. Croatia argues that Article IX of the Genocide Convention confers upon the Court jurisdiction over acts and omissions predating 27 April 1992 (including even those predating 8 October 1991). What is more, it claims that conduct predating these dates (and allegedly violating provisions of the Genocide Convention) is attributable to Serbia and with respect to which claims can be brought by Croatia. This, it further argues, is true irrespective of the fact that Serbia only came into being as a State on 27 April 1992, and irrespective of the further fact that Croatia itself only gained independence (and thus statehood) on 8 October 1991.

47. Before entering into further details, it is worth noting the unusual character of Croatia's claim. This may be worth underlining as Croatia pretends to ignore some of the essential features of its reliance on conduct predating 27 April 1992 and 8 October 1991 respectively. In fact, from Croatia's written pleadings, one gains the impression that it is perfectly in order that facts and materials predating Serbia's and Croatia's existence as States should be introduced into these proceedings. It is not. Indeed, these proceedings – if Croatia's argument is to be accepted – might become the first contentious case opposing (as far as conduct predating 27 April 1992 and 8 October 1991 is concerned) two non-States.

48. As far as the Respondent is concerned, conduct predating 27 April 1992 is based on and relates to the conduct of the Respondent's predecessor State, the Socialist Federal Republic of Yugoslavia (SFRY). Indeed, Croatia in reality claims that Serbia, as one among several equal successor States of the SFRY, may be held responsible for acts

committed by organs of its predecessor State in a period during which Serbia still constituted a mere constituent entity of the SFRY. It is clear that, by not being a State prior to 27 April 1992, Serbia could not incur responsibility under the normal rules of State responsibility. Public international law of course has a long history of addressing questions relating to the transfer of statehood. Yet, it addresses them through the vehicle of State succession. Serbia submits that this indeed would be the natural way of looking at this case insofar as it involves conduct predating 27 April 1992 and 8 October 1991. Croatia however has decided not to approach this case through the lens of State succession. In the whole of Chapter 7 of its Rejoinder, it only once engages with questions relating to Serbia's potential succession to responsibility – and that is in a brief reply to a statement made in Judge Tomka's separate opinion appended to the Court's Judgment on Preliminary Objections.[61] This statement indeed clarifies the reasons that prompted Croatia to avoid the most natural way of dealing with conduct predating the coming into existence of the two Parties, namely that the issue of succession to responsibility does not come within the jurisdiction of the Court under Article IX of the Genocide Convention.[62] Chapter 7 of Croatia's Reply is an attempt to circumvent that simple fact.

49. Another alternative would have been to approach the Parties' conduct predating their existence as independent States from the perspective of the scope of application *ratione temporis* of the Genocide Convention. If indeed Croatia was serious in claiming violations of the Genocide Convention with regard to a time when either one, or both, of the Parties had not achieved statehood, it would have been natural to assert in a straightforward manner that the treaty allegedly violated, the Genocide Convention, applied retroactively. Yet, again, Croatia does not make that argument, at least not in a way that could be characterised as "straightforward". In particular, its Reply leaves unanswered the manifold arguments submitted by Serbia demonstrating that the Genocide Convention does not apply retroactively.[63] Instead, Croatia, as will be shown in more detail below, seeks to introduce retroactivity through the backdoor, by artificially stretching concepts such as the notion of obligations *erga omnes* or by blending treaty and customary rules against genocide.

[61] Reply, paras. 7.70 and 7.71. Other uses of the term "succession" are in citations (e.g. para. 7.16), relate to conduct of Croatia (e.g. para. 7.35) or describe what Serbia/the FRY has not done (e.g. in para. 7.50).
[62] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, Sep. Op. Tomka, para. 13.
[63] Counter-Memorial, paras. 224 *et seq*.

50. Croatia asserts that in addressing questions of jurisdiction *ratione temporis, materiae* and *personae* in detail, Serbia is being "formalistic" so as to avoid responsibility. It is not. Rather, Serbia's position is based on fundamental notions of statehood, State responsibility and the normal rules of treaty law, as codified in the Vienna Convention on the Law of Treaties. In contrast, Croatia avoids approaching the early aspects of this case in any principled manner, but instead amalgamates legal concepts that do not fit the historical process of the dissolution of the SFRY. It does so since it is certainly aware that, while *none* of the acts for which, allegedly, the Respondent is responsible, amount to genocide, any acts that have taken place after 27April 1992 and which are referred to in Croatia's Memorial are even further removed from the possibility of amounting to genocide.

51. As a matter of fact, out of approximately 2,500 and 3,000 alleged killings of Croats for which the Applicant has attempted to offer some evidence in the Memorial and the Reply, only around 100 are alleged to have taken place after 27 April 1992.[64]

52. Finally, it is worth considering the consequences flowing from Croatia's approach to questions of jurisdiction arising under Article IX of the Genocide Convention. Croatia itself is quite open about these. It claims expressly that based on its approach to jurisdiction, the Court would have jurisdiction with regard to acts of genocide committed during World War II, i.e. from 1939 - 1945 (and thus even predating the entry into force of the Genocide Convention as such).[65] If that retroactive extension of the Court's jurisdiction were to be accepted however, where would one stop? On Croatia's argument, jurisdiction based on Article IX of the Genocide Convention would cover conduct that occurred during World War I as well – or indeed during the process of colonization – provided it would fall under the terms of the Genocide Convention as adopted in 1948. More particularly, if Croatia's argument is taken seriously, this would not be restricted to acts amounting to genocide, but would also cover the failure of States to prevent or punish genocide. Criticising Serbia's allegedly

[64] The cases of killings alleged by the Applicant to have taken place after 27 April 1992 are referred to in paras. 4.132, 5.25, 5.88, 5.139, 5.146, 5.202, 5.204, 5.207, 5.210, 5.212 - 5.214, 5.219 and 5.221 – 5.225 of the Memorial, while new allegations are also contained in paras. 6.78 and 6.89 of the Reply. The alleged killings have mostly taken part in the region of Dalmatia. Only 3 of the killings claimed to have been committed after 27 April 1992 have taken place in Eastern Slavonia where, according to the Applicant, the majority of the crimes against Croats have been committed.

[65] Reply, para. 7.11.

"formalist" approach to jurisdiction, Croatia advances an argument that would thus turn Article IX of the Genocide Convention into an open-ended, limitless catch-all jurisdictional clause.

53. Moreover, if Croatia's interpretation of Article IX of the Genocide Convention were considered plausible by other States parties to the Convention, one would have expected to see attempts by contracting parties, including those most concerned, to limit their exposure to the Court's *ratione temporis* jurisdiction by means of reservations as to the temporal scope of its Article IX. Yet no such reservations aimed at restricting the temporal consequences of Article IX were ever made.

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54. While, as mentioned, largely avoiding the terminology of retroactivity and State succession, Croatia does not dispute that for the Court to take account of conduct predating 27 April 1992 (or indeed 8 October 1991), it will cumulatively have to establish two propositions:

First, the Court's jurisdiction under Article IX of the Genocide Convention would have to be shown to cover the period pre-dating the coming into existence of the Respondent and Applicant (i.e. 27 April 1992 and 8 October 1991 respectively).[66]

Second, Serbia would have to be able to incur State responsibility for alleged breaches of international law that occurred at a time when it did not yet exist as an independent State.[67]

Finally, and as a variation of the second aspect, as far as conduct predating 8 October 1991 is concerned, Croatia accepts that in addition to establishing Serbia's responsibility for acts preceding statehood, it must also show that Croatia is entitled to invoke such responsibility even though it itself did not yet exist as an independent State at the relevant time.[68]

[66] Reply, paras. 7.2. and 7.17. *et seq*.
[67] See Reply, paras. 7.32 (where this is put as a question of the Convention's "application *ratione personae*") and 7.43.
[68] Reply, paras. 7.35 *et seq*.

55. The subsequent sections address these propositions in turn, dealing with jurisdiction and attribution of conduct predating 27 April 1992 (Section 3) and the special problems of Croatia's reliance on conduct predating 8 October 1991 (Section 4). Before proceeding with these issues, a number of general remarks seem however to be in order (Section 2).

2. Preliminary remarks

56. The subsequent sections bring out very clearly many crucial differences between the Parties. It may therefore be useful to recall at the outset that Croatia and Serbia are in agreement on a number of fundamental issues. Further preliminary remarks relate to the sources of international law that can form the subject of litigation in the present proceedings and to the relevance of the Court's Judgment on Preliminary Objections of 18 November 2008.

A. Agreement on fundamental issues

57. It is worth noting that Serbia and Croatia are in agreement about a range of fundamental issues, often clarified in the Court's 2008 Judgment on Preliminary Objections. By setting them out succinctly, Serbia seeks to clarify the scope of contention between the Parties. Four seemingly obvious points are worth reiterating:

First, the Parties agree on fundamental aspects of statehood: Croatia gained independence on 8 October 1991, and the Federal Republic of Yugoslavia (FRY) came into existence as a State on 27 April 1992.[69]

Second, there is also agreement on the Parties' status *vis-à-vis* the Genocide Convention. Croatia succeeded to the Convention on 12 October 1992; this is agreed to have produced retroactive effect dating back to the independence of Croatia, i.e. 8 October 1991. As for the Respondent, it is by now clear that the FRY/Serbia succeeded to the Genocide Convention and that its succession was effective from 27 April 1992.[70] Finally, it is beyond dispute that the former SFRY had been a contracting party to the Convention since 12 January 1951.

[69] See e.g. Reply, paras. 7.35 and 7.43.
[70] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 117, where the Court held that

Third, the Parties agree on the relationship between Croatia and Serbia on the one hand, and the former SFRY on the other. Notably, it is agreed that neither the FRY nor Serbia are identical with the SFRY,[71] and the Parties also agree that conduct of the SFRY does not form the subject of litigation in these proceedings. The Parties, however, have different views as to what should be considered as conduct of the SFRY.

Finally, at least in principle (although not in practice), the Parties agree on the scope *ratione materiae* of the Court's jurisdiction. This case is about breaches of the Genocide Convention. It is not about breaches of other rules of international law, or about breaches of customary rules relating to genocide – which of course apply between the Parties, but which are not the subject of these proceedings. This indeed follows by necessary implication from the fact that – as the Court has noted[72] – the case at hand was exclusively instituted on the basis of Article IX of the Genocide Convention, which envisages proceedings in cases involving

> "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment *of the present Convention*".[73]

Serbia submits that Croatia's arguments have to be seen in light of these fundamental considerations.

B. Relationship between treaty and customary rules against genocide

58. Despite accepting *in principle* that this case is about breaches of the Genocide Convention only, the Croatian Reply seeks to avoid the just-mentioned implications for the scope *ratione materiae* of the Court's jurisdiction. Notably, in its arguments, Croatia deliberately mixes concepts of State responsibility arising from violations of the Genocide Convention on the one hand (which are the proper subject of litigation

"the 1992 Declaration and Note [of 27 April 1992] had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention"; as a consequence, "from that date [27 April 1992] *onwards* the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution".

[71] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at paras. 43-51 for an account of the FRY's status.

[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 94

[73] Emphasis added.

before this Court), and State responsibility for violations of customary law amounting to acts of genocide (which are outside the Court's jurisdiction established under Article IX of the Genocide Convention).[74] Croatia seeks justification for its approach in stressing the declaratory character of the Genocide Convention, which – it argues – codifies an existing crime.[75]

59. In response to these suggestions, Serbia invites the Court to apply the principles governing its jurisdiction, not just as a matter of principle, but also as a matter of practice. Serbia recognises that the substantive prohibitions imposed by the Genocide Convention are binding upon parties and non-parties alike as a matter of customary international law. Yet, it submits that Croatia's approach fails to appreciate that even where two sets of rules established by treaty and by customary law respectively, are identical or similar in scope, they retain their separate existence – which in turn may affect the applicable enforcement regimes and the jurisdiction of the Court.

60. This fundamental point is brought out clearly by the Court's jurisprudence. Thus, already in the Court's 1986 Judgment in the *Nicaragua* case, the Court unequivocally stated:

> "There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content […] *these norms retain a separate existence.* This is so from the standpoint of their applicability. […] Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because *the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule.* Thus, if that rule parallels a rule of customary international law, *two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation*, depending on whether they are customary rules or treaty rules. […]
>
> It will therefore be clear that customary international law continues to exist and to apply, *separately from international treaty law,* even where the two categories of law have an identical content."[76]

[74] Reply, para. 7.10
[75] Reply, para. 7.5.
[76] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports 1986, 14, at paras. 177 and 179 (emphasis added).

61. More recently, the Court has confirmed the relevance of such a distinction for jurisdictional purposes in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* – a case requiring the Court to determine the scope of its jurisdiction with respect to another set of equally fundamental rules of contemporary international law, namely those against racial discrimination.

62. In its Judgment of 1 April 2011,[77] the Court drew a clear distinction between disputes about racial discrimination more generally, and the more specific circle of disputes about matters governed by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') with only the latter ones coming within the scope of the Court's jurisdiction in that case under Article 22 CERD. More particularly, the Court held that, prior to Georgia's accession to CERD, differences between Georgia and Russia might be qualified as disputes about racial discrimination; however they could not have amounted to a dispute with respect to the interpretation or application of CERD, and thus were not covered by Article 22 CERD.[78] This again implies that even where customary rules and treaty law rules are identical in substance, they retain their separate existence, and ought to be treated as separate rules for jurisdictional purposes.

63. Serbia submits that the Court should follow the same approach in the present proceedings and reject Croatia's attempts to blur the lines between customary and treaty-based rules against genocide.

C. The Relevance of the Judgment on Preliminary Objections of 18 November 2008

64. A *third* preliminary remark relates to the relevance, at the present stage of the proceedings, of the 2008 Judgment on Preliminary Objections. As is well known, in that Judgment, the Court was faced with a Serbian objection to the effect that jurisdiction under Article IX of the Genocide Convention did not extend to acts preceding 27 April 1992. In its Judgment of 18 November 2008, the Court held that this objection *ratione temporis* "does not possess, in the circumstances of the case, an

[77] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011.
[78] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, at para. 64 (emphasis added).

exclusively preliminary character."[79] As a consequence, the substantive issues raised by Serbia objection remain to be addressed at the present stage of the proceedings.

65. Even though it did not authoritatively pronounce on the substance of Serbia's objection, the Court, in its Judgment on Preliminary Objections, nevertheless made a number of important findings which remain relevant at the present stage of proceedings. In this respect, three points seem worth stressing:

66. *First*, the Court clarified that Croatia's reliance on facts preceding 27 April 1992 raised two separate issues, namely one of jurisdiction and one of admissibility or attribution. In the words of the Court:

> "The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility."[80]

67. *Second*, the Court, in the 2008 Judgment on Preliminary Objections, made clear that its decision on the two issues identified in the quoted paragraph was not prejudged by previous decisions relating to the conflict in the former Yugoslavia. Notably, the Court rejected Croatia's attempt to draw support from the 1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ('*Bosnia* case'). In fact, it is worth noting that it did so in no unclear terms, expressly noting that "the temporal questions to be resolved in the present case are not the same as those dealt with by the Court in 1996".[81] More specifically, it noted that its own 1996

[79] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at 130.
[80] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 129.
[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 123.

finding "was not addressed to the question whether these included facts occurring prior to the coming into existence of the FRY".[82]

68. Against that background, it is surprising that Croatia, in its Reply, continues to refer to para. 34 of the Court's 1996 Judgment to support its claim that obligations imposed by the Genocide Convention are not subject to any temporal restrictions.[83] For the reasons set out in the Counter-Memorial,[84] the issues addressed in para. 34 of the 1996 Judgment in the *Bosnia* case are indeed fundamentally different from the ones arising in the present proceedings. More importantly, in light of the Court's express statements, Serbia submits that the Court's 1996 Judgment cannot be relied on in order to support Croatia's position in the present proceedings.

69. *Third*, the Court merely considered the April 27, 1992 Declaration and the ensuing Note as a "notification of succession by the FRY to the SFRY in relation to the Genocide Convention"[85] but did not attribute to this Declaration and the Note any further legal consequences.

3. Serbia cannot be held responsible for alleged violations of the Genocide Convention prior to 27 April 1992

70. Against that background, it can now be assessed whether Croatia can indeed invoke alleged "facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention".[86]

71. The Respondent submits that it cannot. The following sections set out its argument, already made in detail in the Counter-Memorial (but only partially replied to by Croatia, if at all). The argument proceeds in two main steps:

Section B establishes that jurisdiction under Article IX of the Genocide Convention does not cover conduct prior to 27 April 1992.

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[82] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 123.
[83] See Reply, para. 7.14.
[84] Counter-Memorial, paras. 270-273.
[85] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 117.
[86] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 129.

Section C demonstrates that, irrespective of the scope of the Court's jurisdiction *ratione temporis*, the Respondent cannot be held responsible for alleged breaches of the Genocide Convention predating its coming into existence as an independent State, just as the Applicant cannot bring claims based on events and facts prior to its own independence.[87]

72. It is worth reiterating that for Croatia's argument to succeed, it will have to rebut *both* of these claims, as these establish cumulative conditions. Before demonstrating that neither claim can be established, some remarks about the temporal scope of the Genocide Convention *as a whole* seem in order.

A. The Genocide Convention as such does not apply retroactively

73. As will be discussed below, Croatia puts forward a number of arguments suggesting that it could indeed, in the present proceedings, rely on "facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention".[88]

74. Before addressing these in detail, it is worth noting what Croatia does *not* claim, or at least does not claim expressly. At no point in its Reply does Croatia clearly argue that the Genocide Convention as such applies retroactively. There are, no doubt, dispersed through the text, many hints at some form of retroactivity. Notably, Croatia notes that

> "there is no indication in the wording of the Genocide Convention, nor any hint in the *travaux préparatoires*, to suggest [the Genocide Convention] is subject to temporal limitations of such a kind as relied on by the Respondent"[89]

and instead invokes Articles I and XIV of the Convention which upon Croatia's reading "reflect the intention of the Parties to extend its temporal scope of application".[90]

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[87] The subsequent sections do not distinguish between the position of the Applicant and that of the Respondent. As has been shown in the Counter-Memorial, even if the Court should decide that it has jurisdiction over acts predating 27 April 1992 and that Serbia could have incurred responsibility prior to 27 April 1992, facts and events predating 8 October 1991 (the date of Croatia's independence) could still not form the subject of the presentproceedings. For details see paras. 374 et seq. of the Counter-Memorial. It is worth noting that Croatia has not attempted to address the arguments set out there.

[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 129.

[89] Reply, para. 7.2.

75. Croatia also argues that the Convention is declaratory; it was new only in that it provided for "an authoritative definition" of the crime, as well as for "the effective prevention and punishment of the prohibition of genocide" and "a framework for 'international cooperation' in relation to the application and enforcement of an underlying customary international law prohibition" (which in Croatia's reading does not include enforcement through inter-State proceedings).[91] Croatia furthermore criticizes Serbia's insistence – justified above – on the need to distinguish between the Convention's régime (including its Article IX) and the customary rules against genocide; this distinction (states Croatia) "confuse[s] substantive obligations and jurisdictional provisions, which the Court has always been careful not to do".[92] Finally, Croatia seeks to introduce a distinction between "retroactivity properly so-called" and some other form of retroactivity, which perhaps one might call "retroactivity light": the former ("retroactivity properly so-called") only covers instances in which "the Convention has never applied to a State" at all; the latter (allegedly at stake here) is said to be unproblematic and not governed by the regular presumption against retroactivity of treaties.[93]

76. Serbia submits that this attempt by the Applicant to introduce retroactivity in all but in name is illustrative of the general approach of its Reply, which – as noted above – attempts to blur legal concepts so as to provide for the Court's treaty-based jurisdiction even with regard to a period of time where neither of the Parties were or could have been contracting parties to the respective treaty, and thus neither were bound by the compromissory clause contained in the treaty.

77. To a large extent, Serbia has already dealt with the substantive legal issues at some length in its Counter-Memorial,[94] without however eliciting anything but the briefest response from Croatia. In response to Croatia's attempts to assert retroactivity "through the backdoor", three comments seem in order.

78. *First,* Croatia's attempt to distinguish between different versions of "retroactivity properly so-called" and "retroactivity light" is without foundation. Both versions of

[90] Cf. Reply, para. 7.14.
[91] Reply, paras. 7.10 and 7.6. respectively.
[92] Reply, para. 7.13.
[93] Reply, para. 7.13.
[94] Counter-Memorial, paras. 224 *et seq*.

retroactivity are retroactivity proper, and both are covered by the general presumption against retroactivity. The matter is clear from the most cursory reading of Article 28 of the Vienna Convention on the Law of Treaties (VCLT) (which is widely taken to have codified custom), pursuant to which

> "[u]nless a different intention appears from the treaty or is otherwise established, *its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*."[95]

79. As is clear from the text, no distinction is made between a State that subsequently acceded to a treaty, and a State to which a treaty, in Croatia's words, "has never applied". If anything, it is clear that questions of retroactivity in the sense of Article 28 VCLT only arise if at some point, the State in question did become bound by the treaty: if indeed a "Convention has never applied to a State", then the matter is not one of retroactivity, but governed by the *pacta tertiis* rule. Croatia's distinction simply does not hold water.

80. Indeed, Article 28 VCLT was devised precisely to govern instances like the present one and accordingly the presumption it (as well as the customary international law governing treaties) puts forward very much applies. Even though Croatia – in the Reply as well as in its Memorial – avoids at all costs to speak of retroactivity, it does in effect assert that the provisions of a treaty (to paraphrase Article 28 VCLT) "bind [Serbia] in relation to [an] act or fact which took place … before the date of the entry into force of the treaty with respect to [Serbia]."[96]

81. *Second*, Croatia's decision to avoid the terminology of retroactivity (which would have been the regular way of denoting the effects Croatia asserts) is no doubt indicative. Equally indicative is the fact that, apart from briefly referring to Arts. I and XIV of the Genocide Convention, which will be addressed below, Croatia has not even attempted to engage with Serbia's arguments *against* the retroactive application of the Genocide Convention (and its Article IX), which, *inter alia,* had drawn on its Preamble, as well as its Arts. IV, V, VI and VIII, as well as Article XIII, paras. 2 and 3.[97]

[95] Emphasis added.
[96] Emphasis added.
[97] See Counter-Memorial, paras. 235-262.

82. Neither has Croatia attempted to rebut Serbia's argument based on a comparison between the Genocide Convention on the one hand (which does not mention retroactive effects), and another treaty addressing mass atrocities (including genocide), which does. Thus, the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity,[98] to which Croatia and Serbia are parties, in its Article I specifically provides that no statutory limitation shall apply to the crimes listed in the Convention "irrespective of the date of their commission" – accordingly suggesting that where State parties do intend to imbue a treaty with retroactive validity, they do so expressly.

83. To the extent that Croatia engages with the text of the Genocide Convention in order to justify the claim of retroactivity, its arguments are unconvincing. More specifically, Croatia claims that Arts. I and XIV of the Genocide Convention "reflect the intention of the Parties to extend its temporal scope of application"[99] so as to also cover acts that occurred prior to the entry into force of the Genocide Convention as between the States concerned. This claim, however, is not only unsubstantiated, but seems difficult to sustain.

84. In light of the fact that Article I of the Genocide Convention imposes upon States an obligation to prevent genocide, it is obviously future-oriented, aimed at averting or precluding genocide from even taking place. Indeed, the preamble of the Genocide Convention expressly states that it was meant to "liberate mankind from such an odious scourge" which confirms the overall aim of the Genocide Convention that no more acts of genocide will take place in the future.

85. As for Croatia's reliance on Article XIV of the Genocide Convention, Serbia fails to see how a provision regulating the duration in force*, for the future*, of the Genocide Convention and recognizing a liberal right of withdrawal from it,[100] could be construed so to support the claim of retroactivity.

86. Lastly, in reply to Croatia's repeated references to the special character of the Convention, Serbia would draw the Court's attention to the impact of Croatia's

[98] 754 UNTS 73.
[99] See for such proposition Reply, para. 7.14.
[100] Cf. Article XIV, para.2, and further N. Robinson, *The Genocide Convention* (1960), at 114: "The parties are given the right to denounce the Convention by notification to the Secretary General of the United Nations, at least six months before the expiration date."

reading on the quest for universal participation in the Genocide Convention. As early as 1951, the Court has stressed that

> "[t]he Genocide Convention was […] intended by the General Assembly and by the contracting parties to be definitely universal in scope"[101]

and that

> "[t]he object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate."[102]

87. Yet, Croatia has not addressed the argument put forward by the Respondent[103] that any retroactive application of the Genocide Convention, as proposed by Croatia, might inhibit a newly formed democratic government, once having toppled a previous regime responsible for acts of genocide, from adhering to the Genocide Convention and specifically from accepting the Court's jurisdiction under Article IX of the Genocide Convention. Indeed, it might not be excluded that any such approach would prevent States having gone through the experience of genocide from ever becoming a contracting party of the Genocide Convention for fear of its retroactive applicability. Thus, instead of strengthening the treaty regime, Croatia's approach, if accepted, might lead to those States most concerned from *not* adhering to the Genocide Convention in the first place.

88. In light of the above argument it is not surprising that it was the German government who, as late as 2010, expressly stated:

> "The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 has entered into force on 12 January 1951. For the Federal Republic of Germany it has entered into force on 22 February 1955. *It does not possess retroactive effect.*"[104]

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[101] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, at 23.
[102] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, at 24.
[103] Counter-Memorial, paras. 251-252.
[104] See Deutscher Bundestag [German Federal Parliament] Doc. no 17/1956 (2010), at p. 5 (emphasis added). The German original reads (emphasis added):

89. On the basis of the preceding arguments Croatia is surely right *not* to assert, at least expressly, that the Genocide Convention should apply retroactively. The arguments against retroactivity are numerous and compelling, and it is telling that Croatia has chosen to ignore them almost completely. The simple fact is that – as has been observed by the Convention's leading commentators:

> "[…] it could hardly be contended that the Convention binds the signatories to punish offenders for acts committed previous to its coming into force for the given country.",[105]

and that

> "nothing in the Genocide Convention […} suggest[s] 'a different intention'" [in the sense of Article 28 VCLT] and consequently, "the Genocide Convention is not applicable to acts committed before its effective date".[106]

B. Jurisdiction under Article IX of the Genocide Convention does not cover conduct prior to 27 April 1992

90. Serbia submits that what is true for the Convention *as such* is also true for its compromissory clause, i.e. Article IX of the Genocide Convention. Just like other similar compromissory clauses, Article IX establishes the Court's jurisdiction over disputes between *States parties* to the Genocide Convention, and thus presupposes that both parties to a given dispute are bound by the Convention in question, including its jurisdictional clause, at all material times.

91. As a consequence, the Court's jurisdiction under Article IX would begin to take effect on the *date of the entry into force of the treaty between the parties to the dispute,* i.e. in the case at hand on 27 April 1992.

92. Croatia does not agree with this straightforward position. While not expressly suggesting that the Convention *as such* should apply retroactively, it argues that Article IX extends the Court's jurisdiction *ratione temporis* to events predating 27

"Die Konvention über die Verhütung und Bestrafung des Völkermordes vom 9. Dezember 1948 ist am 12. Januar 1951 in Kraft getreten. Für die Bundesrepublik Deutschland ist sie seit dem 22. Februar 1955 in Kraft. *Sie gilt nicht rückwirkend.*"

[105] N. Robinson, *The GenocideConvention* (1960), p. 114.

[106] W. A. Schabas, *Genocide in International Law* (2nd edn., 2008), p. 529.

April 1992. To support this claim, it advances a bundle of (seemingly contradictory) arguments seeking to establish that

a) Compromissory clauses could be disentangled from the remainder of the treaty of which they form part and *generally* applied retroactively; or that

b) Article IX of the Genocide Convention in any event did not impose *further* temporal limitations on the Court's jurisdiction and thus could be applied in "every dispute concerning responsibility for or in relation to genocide *to which the Convention itself applies*";[107] and that furthermore

c) The special character of obligations imposed by the Genocide Convention justfies a retroactive construction of Article IX of the Genocide Convention.

However, none of these arguments is convincing, and some of them indeed seem to be far-fetched.

1) Compromissory clauses constitute an integral part of the respective treaty

93. The Applicant's first argument rests on the presumption that compromissory clauses gave rise to a special type of obligations since, as Croatia claims, they are "subject to an autonomous interpretation due to their special status within treaties".[108]

94. As noted in the last paragraph, the Applicant itself does not seem entirely convinced by this assertion; hence its alternative statement that Article IX of the Genocide Convention only covered disputes "to which the Convention [that is, presumably, its substantive obligations] applies".[109]

95. That being said, the Applicant seeks to draw support for its approach from the Court's Judgments in the *Nicaragua* and the *Certain Property* cases, as well as those of its predecessor in *Phosphates in Morocco* and *Mavrommatis.* As will be shown below, *none* of these decisions supports the position advanced by the Applicant.

[107] Reply, para. 7.19 (emphasis added).
[108] Reply, para. 7.21
[109] Reply, para. 7.19

96. This, in turn, should not come as a surprise, as any such attempt to disentangle the scope *ratione temporis* of compromissory clauses from the remainder of the respective treaty provisions indeed seems extremely difficult to sustain conceptually. It presupposes a clear distinction between substantive and compromissory clauses of a treaty that is artificial and untenable.

97. For once, Article 28 VCLT, having codified customary law on the matter, does not even hint at any such distinction to be drawn between substantive provisions on the one hand and compromissory clauses on the other. As it deals with treaty obligations generally, one might have expected it to mention a distinction so fundamental as that suggested by Croatia, rather than putting forward a general presumption against retroactivity of treaties *for all its provisions* without distinction.

98. Moreover, dispute settlement provisions share the essential characteristics of substantive treaty commitments: they are the result of treaty negotiations, they impose binding obligations, they require to be interpreted in line with the rules laid down in Arts. 31-33 VCLT (or their customary equivalent), they must be performed in good faith and notwithstanding any domestic law obstacles. Nothing suggests that from the vantage point of the general law of treaties, they should be categorically different from provisions prescribing substantive rights and obligations. Unless relegated to a special (optional) protocol, they form an integral part of a given treaty – and hence dispute settlement provisions such as Article IX of the Genocide Convention only apply between the "Contracting Parties" to *the Treaty.* Yet, Croatia's argument fails to appreciate this integration of Article IX of the Genocide Convention into the treaty.

99. Serbia submits that Croatia's interpretation is furthermore contradicted by the Court's recent Judgment in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination.* Within the context of that case, the Court was faced with an essentially similar jurisdictional clause, Article 22 CERD, which envisages inter-State proceedings about

> "[a]ny dispute between two or more States Parties with respect to the interpretation or application of this Convention".

100. In its assessment of that provision, the Court very clearly treated compromissory clauses as an integral part of the respective treaty and did not consider them to be governed by special, autonomous rules on retroactivity. As has been mentioned already, the Court in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* clearly distinguished between

a) A broader circle of disputes between Georgia and Russia about questions of racial discrimination generally; and

b) The narrower circle of disputes about matters governed by CERD.

101. In so doing, the Court implicitly accepted that for it to exercise jurisdiction over a treaty-based claim (in that case, under CERD), both parties to the underlying dispute would have to be a party to the treaty in question. Rejecting Georgia's claim that ever since the 1990es, Georgia and Russia had been involved in disputes about racial discrimination the Court noted:

> "[…] Georgia has not, in the Court's opinion, cited any document or statement made *before it became party to CERD in July 1999* which provides support for its contention that "the dispute with Russia over ethnic cleansing is long-standing and legitimate and not of recent invention" […]. The Court adds that even if this were the case, *such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention*."[110]

102. The Court thus clearly accepted that for a dispute under CERD to come within the scope of Article 22 CERD, both parties would have to be parties to CERD during the relevant time. It is implicit in this holding that jurisdictional clauses such as Article 22 CERD or Article IX of the Genocide Convention do not, contrary to what Croatia argues in the present case, produce retroactive effects and establish the Court's jurisdiction over disputes originating at a time when one, or both, of the parties were not bound by the respective substantive treaty obligations. Even less so could this be the case where, like in the case at hand, the entities concerned even lacked the status of States during the relevant period and thus could not have become parties of the treaty, even if they had wanted to.

[110] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, at para. 64 (emphasis added).

103. The fundamental proposition to be taken from the – in many respects very similar, and very recent – Judgment by the Court in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* is that compromissory clauses that refer to disputes under a given treaty (including those regulating matters of international public policy and human rights) do not apply retroactively.

104. Against that background, it does not come as a surprise that none of the cases referred to by the Applicant supports the alleged "autonomous" construction of compromissory clauses favouring retroactivity.

105. Insofar as Croatia relies on the *Nicaragua* and *Phosphates in Morocco* cases,[111] there indeed does not seem to be a basis for drawing any conclusions about the temporal scope of compromissory clauses. In *Nicaragua*, the Court indeed noted that declarations accepting the Court's compulsory jurisdiction could be made

> "unconditionally and without limit of time […] or […] limit its effects to disputes arising after a certain date".[112]

106. Similarly, in *Phosphates in Morocco,* the Court's predecessor analysed the temporal scope of France's optional clause declaration.[113]

107. Yet, whatever the implications to be drawn from these passages, it is clear that they were both made with respect to a very different form of accepting the Court's jurisdiction, namely unilateral declarations pursuant to Article 36, para. 2, of the Court's Statute. These, however, are crucially different from compromissory clauses within the meaning of Article 36, para. 1 (such as Article IX of the Genocide Convention, or indeed Article 22 CERD) in that they are self-standing and autonomous.

108. Unlike compromissory clauses, optional clause declarations are precisely *not* integrated into an overall treaty regime, and they do not apply between "Contracting Parties" to that treaty. As a consequence, their retroactive application does not require the artificial

[111] Cf. Reply, paras. 7.22. (footnote 30) and 7.23.
[112] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Preliminary Objections, I.C.J. Reports 1984, p. 392, at para. 59.
[113] *Phosphates in Morocco*, Ser A/B No 74 (1938), at 23-29.

separation between substantive treaty rules and dispute settlement provisions that Croatia's argument requires. If anything, the Court's *Nicaragua* case holding (and, if it is considered relevant at all, the PCIJ's analysis in *Phosphates in Morocco*) thus invites an *argumentum e contrario* and undermines, rather than supports, Croatia's argument.

109. It is worth noting that the crucial distinction between compromissory clauses in the sense of Article 36, para. 1, on the one hand, and optional clause declarations under Article 36, para. 2 on the other, is accepted by a commentator otherwise favourably cited in the Croatian Reply. Precisely addressing the temporal reach of instruments conferring jurisdiction, that commentator noted:

> "As far as compromissory clauses are concerned, the general rule as to the non-retroactivity of treaties enshrined in Articles 4 and 28 of the 1969 Vienna Convention on the Law of Treaties, and specially recalled in certain conventions, may be held to limit the temporal reach of jurisdiction without any necessity to invoke a specific reservation. Here too, then, the optional clause system appears to impose a closer knit of obligations (the presumption being against time limitation) than the compulsory clauses system (the presumption being in favor of time limitation)."[114]

110. It is precisely this latter presumption "in favor of time limitation"[115] that Serbia has invoked since the early stages of the present proceedings.

111. Croatia's reliance on the Court's *Certain Property* case is equally dubious.[116] To be sure, Croatia does not argue that in that case, the Court had recognised retroactive effects of a compromissory clause – which indeed would have been far-fetched, as the Court indeed declined jurisdiction because the dispute did *not* come within the Court's jurisdiction *ratione temporis*. Instead, in Croatia's reading,

> "[i]n *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."[117]

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[114] Robert Kolb, 'The Compromissory Clause of the Convention, in Gaeta (ed.), *The UN Genocide Convention* 2009), at p. 421 [Footnote omitted].
[115] *Ibid*.
[116] Cf. Reply, para. 7.23.
[117] Reply, para. 7.23., referring to *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, para. 43.

112. However, a quick glance at the case shows that the Judgment in *Certain Property* does not even come close to that. Rather than pronouncing (as Croatia suggests) on the temporal scope of jurisdiction – conferring instruments in any comprehensive sense – the Court addressed a very specific issue. It clarified the relevance of provisions *expressly* restricting jurisdiction to facts or situations arising *after a given critical date.* In the circumstances of the case, this was required as Article 27(a) of the European Convention for the Peaceful Settlement of Disputes expressly limited the temporal scope of the Court's jurisdiction to facts or situations arising after the entry into force of the Convention as between the parties. In determining the meaning of that clause (and for that purpose only), the Court drew on its earlier jurisprudence in which it had to assess the effects of similar, express limitations on optional clause declarations[118] – and it was precisely with respect to this discrete point that the Court (noting that the parties were in agreement on the matter anyhow[119]) saw no reason to distinguish between optional clause declarations and treaty-based compromissory clauses.

113. Serbia submits that this context must not be lost sight of when interpreting the *Certain Property* holding. Serbia fails to see how that holding could inform the interpretation of a compromissory clause that – like Article IX of the Genocide Convention – does *not* expressly regulate questions of temporal application, that does *not* depend on the meaning of terms such as "facts and situations arising", and that is applied in proceedings in which the parties (while disagreeing on many issues) have so far not engaged in debates about the facts triggering the "source or real cause of the dispute" before the Court.[120]

114. Perhaps as importantly, Serbia submits that Croatia's blanket reference to *Certain Property* not only takes a discrete holding out of context, but also fails to appreciate that, in the same paragraph relied upon by Croatia, the Court made it abundantly clear that it would not

> "pronounc[e] in any more general sense upon the extent to which such instruments [*i.e.* optional clause declarations on the one hand, and compromissory clauses on the other] are to be treated comparably".[121]

[118] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, paras. 40-46.
[119] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, para. 43 [in fine].
[120] Contrast *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, paras. 47.
[121] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, I.C.J. Reports 2005,* p. 6, 24, para. 43.

115. Serbia submits that this statement directly contradicts Croatia's blanket reference to *Certain Property,* which further confirms that Croatia takes the Court's very limited holding out of context.

116. Of the various precedents invoked by Croatia allegedly supporting the retroactive application of compromissory clauses, this leaves *Mavrommatis.*[122] In that case, the PCIJ indeed observed 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."[123]

117. At first sight, this statement – *at least as quoted by Croatia* – could indeed be taken to provide support for the view that compromissory clauses applied retroactively. However, a more careful analysis reveals that in selectively quoting from the *Mavrommatis case*, Croatia takes the pronouncement out of context and fails to appreciate that it depended on specific features of the dispute then before the Court – none of which is present in the current proceedings. In this respect, three points need to be made.

118. *First*, in a part of the *Mavrommatis* Judgment *not* quoted by Croatia, the PCIJ was careful to note that the broad interpretation of the temporal scope of the Mandate's compromissory clause was necessitated by the specific wording of that provision, which – unlike Article IX of the Genocide Convention – referred to "any dispute *whatsoever* […] which may arise".[124]

119. The importance attached to this specific feature appears from the following table opposing the PCIJ's holding and the passages quoted in the Croatian Reply:

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[122] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* p. 6.

[123] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* at 35 (as quote in para. 7.22. of Croatia's Reply).

[124] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* at 35. Emphqasis added. For details see the Table in the text.

***Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2*, at 35.**	***Mavromatis Palestine Concessions*, as quoted in the Reply, para. 7.22**
"in case**s** of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. **In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that "any dispute whatsoever […][125] which may arise" shall be submitted to the Court […]** The reservation 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."	"in case of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment … The reservation**s** 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."

120. As appears from this comparison, the retroactive effect of Article 26 of the Mandate thus flowed from the specific wording. In the terminology of Article 28 VCLT, this constituted "a different intention [which] appear[ed] from the treaty", and it was on this "different intention" that the PCIJ's pronouncement – accepting, exceptionally, the retroactive effect of a compromissory clause – at least partly depended.

121. *Second*, Croatia's reliance on *Mavrommatis* seems to overlook that in that case, the Court eventually found that questions of retroactivity were irrelevant to the case at hand. Having considered issues relating to its jurisdiction *ratione temporis,* the PCIJ immediately went on to note that in the instance, the Mandate governed the disputed conduct (i.e. the granting of the concessions), as this conduct was on-going:

> "Nevertheless, even supposing that it were admitted as essential that *the act alleged by the Applicant to be contrary to the provisions of the Mandate should have taken place at a period when the mandate was in force,* the Court believes that *this condition is fulfilled in the present case."*[126]

[125] Omission in the original of the Judgment of the PCIJ.
[126] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* at 35 (emphasis added).

122. Accordingly, the PCIJ in *Mavrommatis* saw no need to decide whether or not the Mandate and its compromissory clause applied retroactively – and again, it said so expressly:

> "For these reasons the Court does not feel called to consider whether the provisions of the Mandate, once they are in force, apply retrospectively […]."[127]

123. Finally, the *Mavrommatis* holding also depended on a *third* specific feature of the dispute then before the PCIJ. As may be inferred from the last substantive paragraph of the Judgment, the Court seemed to be influenced by the fact that the mandate system as a whole (of which the Palestine Mandate formed part) dated back to Article 22 of the Covenant of the League of Nations and that it had been operative since 1920.[128] This, the Court seemed to take as yet another indication why the question of retroactivity seemed to be less problematic.

124. To summarise on this point, Croatia's reference to the *Mavrommatis case* fails to appreciate the very dispute-specific reasons which motivated the PCIJ's statement about the temporal scope of compromissory clauses. Serbia submits that these specific features must be taken into account. If they are, then indeed the *Mavrommatis* pronouncement loses its pertinence. It does so because none of the specific features upon which it depended is present in the current proceedings.

125. For one, the Court's jurisdiction under Article IX of the Genocide Convention is limited to disputes specifically arising under the Genocide Convention, but does *not cover* "any dispute whatsoever".

126. Moreover, insofar as Croatia relies on facts that occurred prior to 27 April 1992, it is clear and agreed between the Parties that they were *not* governed by the Genocide Convention (whereas the British conduct in Palestine was governed by the Mandate). Serbia submits that this severely weakens Croatia's reliance on the *Mavrommatis* pronouncement.

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[127] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* at 36.
[128] *Mavromatis Palestine Concessions, PCIJ 1924, Series A, No. 2,* at 36.

127. More generally, the above analysis of jurisprudence undermines Croatia's statement that

> "[i]n 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."[129]

128. Serbia submits that the exact opposite is true. The jurisprudence of the PCIJ and of this Court do not reveal any pattern of retroactivity – neither for substantive provisions nor for compromissory clauses. There is no support whatsoever for Croatia's attempt to introduce an artificial distinction between substantive provisions and dispute settlement clauses. In construing a "consistent jurisprudence" allegedly supporting retroactive effects, Croatia fails to appreciate the essential distinction between compromissory clauses and optional clause declarations. Finally, Croatia's approach is contradicted by the Court's most authoritative pronouncement on the matter, namely its recent holding in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* – a case bearing essential and indeed striking similarities to the present dispute.

2) Article IX of the Genocide Convention does not entail retroactive effects

129. Croatia pursues a second strategy aimed at avoiding the straightforward application of the principle of non-retroactivity. Having argued for the retroactive application of compromissory clauses *as a general matter,* it goes on to suggest that, in any event, the specific compromissory clause applicable to the present dispute, Article IX of the Genocide Convention, were to apply retroactively because of its alleged *special features*. Three such special features are referred to in Croatia's Reply namely (i) the absence, in Article IX and other provisions of the Genocide Convention, of express temporal limitations; (ii) the reference, in Article IX, to the "fulfilment" of the Convention, "including those relating to the responsibility of a State for genocide"; and (iii) the *erga omnes* character of obligations covered by Article IX.

[129] Reply, para. 7.22.

130. Of these three arguments, the first is of little relevance here. It depends on the general rules on retroactivity: only if *as a general matter*, compromissory clauses applied retroactively, one could draw inferences from the absence of any restriction. As has been shown, there is no general rule, let alone presumption, in favour of retroactivity. Rather, retroactivity will have to be established positively, not inferred from a treaty's silence. As a consequence, the absence of express restrictions is not decisive. By contrast, the second and third arguments require to be addressed.

a) Alleged special features of Article IX of the Genocide Convention

131. As for the alleged special features of Article IX of the Genocide Convention, Croatia relies heavily on the wording of Article IX. It notably draws support for its broad (retroactive) interpretation from the fact that the provision refers not only to the interpretation and application of the Convention, but also to its "fulfilment". Croatia argues (referring to the *travaux*[130]) that the "fulfilment"

> "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."[131]

132. As a variation on this theme, Croatia also refers to the last clause of Article IX, pursuant to which the Court's jurisdiction comprises disputes "relating to the responsibility of a State for genocide". This is said to be "clear and must be taken to have been deliberate".[132]

133. However, both arguments are unconvincing. As far as the inclusion, in Article IX of the Genocide Convention, of the term "fulfilment" is concerned, Serbia fails to see how this should affect the *temporal* scope of the provision. No argument to that effect is put forward by Croatia. If anything, Croatia's summary of the *travaux* suggests the opposite.

[130] Reply, paras. 7.29-7.30.
[131] Reply, para. 7.28.
[132] Reply, para.7.71.

134. The key piece of evidence referred to by Croatia is the statement by the Indian delegation, which expressed concern that the addition of the term "fulfilment" (which was not to be found in the Secretariat's and Ad Hoc Committee's drafts of the Convention) would give Article IX of the draft convention a "wider meaning".[133] Yet the "widening" of Article IX that India was concerned about related to the *substantive scope* of the provision, not its *temporal scope*, as is clear from the very Indian statement quoted by Croatia:

> "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."[134]

135. One may add that the concerns of the Indian delegation were based on an understanding of the traditional '"interpretation and application" formula which has been overtaken by subsequent cases. As is well known, the Court has regularly interpreted that formula so to encompass disputes about "the compliance or non-compliance of a party with the provisions of the convention". In this sense, the addition of the word "fulfilment" adds little to the content of Article IX even *ratione materiae* and nothing as to its scope *ratione temporis*.

136. In the light of these factors, Croatia's insistence on the term "fulfillment" seems not to be borne out by the *travaux.* What is more, it is equally difficult to bring it in line with other methods of interpretation. As for the literal meaning, dictionaries define 'fulfilment' as "accomplishment, performance, completion".[135] As has rightly been noted, it is therefore "largely a form of application", and "adds little to the term 'application', as the latter already contains it".[136] What is more, both terms "largely overlap" with the third, namely "interpretation". To draw precise differences between the three would thus be artificial, and the Court's jurisprudence dealing with the various versions of compromissory clauses has not so far provided clear-cut distinctions. All this suggests that not much, if something at all, should be read into

[133] Reply, para. 7.29 (referring to UN Doc. A/C.6, SR.103, Sixth Committee, Summary Records of the 103rd Meeting on 12 November 1948).
[134] UN Doc. A/C.6, SR.103, Sixth Committee, Summary Records of the 103rd Meeting on 12 November 1948.
[135] See e.g. *Oxford English Dictionary*, Online Edition ('fulfilment, *n.'*).
[136] Robert Kolb, 'The Scope *RationeMateriae*of the Compulsory Jurisdiction of the ICJ', in Gaeta (ed.), *The UN Genocide Convention* 2009), at p. 452.

the drafters' decision to add the term "fulfilment" to Article IX of the Genocide Convention. Moreover there is no indication whatsoever to be found in the drafting history to indicate that the drafters had wanted to enlarge the scope *ratione temporis* of the Genocide Convention or its Article IX by adding the term "fulfilment".

137. To conclude, Serbia accepts that disputes about the "compliance or non-compliance of a party with the provisions of the convention" are covered by Article IX of the Genocide Convention. Whether this required the addition of the term "fulfilment" may be a matter for speculation. In any event, neither the drafting history nor other arguments suggest that the addition of the term "fulfilment" should have had (or was intended to have) any effect on the temporal scope of the provision. In this respect, it is simply not a relevant "specific circumstance" that could explain why, exceptionally, Article IX of the Genocide Convention should be able to produce retroactive effects.

138. As regards Croatia's second piece of alleged "evidence", matters are essentially similar. To be sure, Article IX of the Genocide Convention goes beyond other compromissory clauses in expressly mentioning a special class of disputes covered by the clause, namely those "relating to the responsibility of a State for genocide". Perhaps, the addition of that phrase can indeed be "taken to have been deliberate".[137] However, it was clearly *not* intended to affect the temporal scope of the Convention – and Croatia provides not a single argument supporting that interpretation. Quite to the contrary, a natural reading of the overall phrase

> "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, - *including* those relating to the responsibility of a State for genocide […]"[138]

confirms that the "responsibility of a State for genocide" must be the responsibility of a Contracting Party to which the former part of the phrase refers.

139. As a matter of fact, the usage of the term "including" ("*y compris*" in the equally authentic French text) confirms that the "State" referred in the second half of the phrase is identical with the Contracting Party to which the first part refers, and that

[137] Reply, para.7.71.
[138] Emphasis added.

disputes about a State's responsibility are a mere sub-category of disputes covered by Article IX of the Genocide Convention. The addition of the last clause thus was not intended to broaden the scope of Article IX of the Genocide Convention, let alone its temporal scope, but merely served to clarify its substantive scope by, as the Court put it as early as 1996, "not exclud[ing] any *form* of State responsibility".[139]

140. Finally, for a State to incur "responsibility […] for genocide" in the sense of Article IX, it will have to be bound by the Convention. Hence the very phrase that Croatia relies on again presupposes the application – including the temporal application – of the Genocide Convention rather than extending it. All this suggests that the express mentioning, in Article IX of the Genocide Convention, of the special category of disputes "relating to the responsibility of a State for genocide" does not bear on the temporal scope of the provision.

b) The alleged implications of the erga omnes *concept*

141. Seeking to overcome the temporal limitations of jurisdiction under Article IX of the Genocide Convention, Croatia, in its Reply, invokes the *erga omnes* character of obligations flowing from the *Genocide Convention.* It makes the point in para. 7.37 of its Reply, which asserts in no uncertain terms:

> "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."[140]

142. As appears from the above quotation, in Croatia's submission, the *erga omnes* character of obligations is said to affect the two issues addressed in the present chapter, namely questions of jurisdiction *and* Serbia's responsibility under the Genocide Convention. It is the first of these issues that is addressed in the following, while the alleged *erga omnes* effects on the rules of responsibility will be dealt with below.

[139] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, ICJ Reports 1996, 595, at para. 32 (emphasis added).
[140] Reply, para. 7.37.

143. Serbia agrees with Croatia that certain obligations imposed by the Genocide Convention – especially the duty not to commit genocide – give rise to obligations *erga omnes.* This indeed seems clear from the Court's jurisprudence, which has consistently recognised the prohibition against genocide as a fundamental obligation owed to the international community as a whole.[141]

144. Serbia however disagrees with Croatia's assertion of consequences allegedly flowing from the *erga omnes* status of the prohibition. It submits that Croatia's interpretation infers from the *erga omnes* concept effects which are completely unrelated to its rationale. In this respect, Croatia's argument bears out Judge Higgins' observation in the *Wall* Advisory Opinion, pursuant to which

> "The Court's celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase (Judgment, I.C.J. Reports 1970,* p. 32, para. 33) is frequently invoked for more than it can bear."[142]

145. As Judge Higgins made clear "[t]hat dictum was directed to a very specific issue of jurisdictional *locus standi*",[143] namely the idea that States not considered injured under the traditional rules governing international claims would have standing to invoke the responsibility of other States for breaches of certain fundamental obligations.

146. Since recognizing the *erga omnes* concept in the *Barcelona Traction case,* the Court – while yet to be seized with a proper *erga omnes* case – and its members have had ample opportunity to affirm this *erga omnes* effect,[144] which is also reflected in Article 48, para. 1, lit. b) of the ILC's Articles on State Responsibility.[145]

147. While details remain controversial, the Court's jurisprudence, as well as the ILC's work, makes clear that the *erga omnes* concept is designed to facilitate the invocation of *existing* obligations, *not to create new* obligations or extend existing ones. It

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[141] See notably *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (New Application: 1962), ICJ Reports 1970, 3, at 32-33; *East Timor* (Portugal v. Australia), ICJ Reports 1995, p. 90, at 102.
[142] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2003, p. 136, Sep. Op. Higgins, at para. 37.
[143] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2003, p. 136, Sep. Op. Higgins, at para. 37.
[144] See e.g. *East Timor,* ICJ Reports 1995, 90, Diss. Op. Weeramantry, at 213-216; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda), ICJ Reports 2005, p. 168, Sep. Op. Simma, at paras. 32-41.
[145] Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc. A/56/10, at pp. 31 *et seq*.

concerns, in the language of State responsibility, the implementation of responsibility arising from particular internationally wrongful acts, but does not create new primary obligations for the State to whom the (allegedly wrongful) conduct is attributed.[146] Nor less does it affect the regime governing the jurisdiction of this Court – a matter which the ILC's work on State responsibility consciously did not address.[147]

148. In fact, this latter aspect is brought out very clearly by the Court's jurisprudence, and notably its Judgments in the *East Timor case* and the *Armed Activities case.* In the former of these, the Court noted the *erga omnes* nature of the right to self-determination, but observed in clear terms that

> "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things".[148]

149. Accordingly, the Court applied an important principle governing the jurisdiction and admissibility of proceedings, namely the indispensable third party rule, to proceedings concerning the right to self-determination, its *erga omnes* character notwithstanding.

150. In the *Armed Activities case,* the Court, affirming the above-cited *East Timor* statement, made a similar point in even greater clarity when it noted that

> "the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute".[149]

151. As a consequence, the *erga omnes* character of the rights and obligations in question did not affect the regular operation of the rules governing the Court's jurisdiction.[150]

152. Against the background of the Court's unequivocal jurisprudence on the matter, Serbia submits that Croatia's reliance on the *erga omnes* concept in the present case is

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[146] Cf. the ILC's commentary to Article 48 of the Articles on State Responsibility, at para. 2: "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."

[147] Cf. notably the ILC's decision against the inclusion, in the eventual text on State responsibility, of a special part on dispute settlement.

[148] *East Timor* (Portugal v. Australia), ICJ Reports 1995, 90, at 102 (para. 29).

[149] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application), ICJ Reports 2006, 6, at para. 64.

[150] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application), ICJ Reports 2006, 6, at paras. 65-70.

misplaced. Insofar as Croatia accuses Serbia of having violated the Genocide Convention, the "very specific issue of jurisdictional *locus standi*"[151] addressed in the *Barcelona Traction case* simply does not present itself: the case at hand is not a case of "public interest enforcement" by a State that – were it not for the *erga omnes* character of the obligations at stake – could not be considered injured. Rather, it is a case that, insofar as facts preeceding 27 April 1992 are concerned, would require the recognition of retroactive effects of a jurisdictional clause. Even upon the most benevolent interpretation, however, it is hard to see how the temporal scope of the Court's jurisdiction should be affected by the *erga omnes* concept.

153. If indeed, for the Court to exercise jurisdiction over acts prior to 27 April 1992, because of the *erga omnes* character of the obligations involved

> "[t]here [was] no need for both Parties to the dispute to have been Parties to the Convention when the facts giving rise to it took place".[152]

How could it then be maintained that, as the Court has stressed

> "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things"?[153]

And how indeed can Croatia's astonishing assertion that

> "[n]either 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"[154]

be reconciled with the Court's authoritative holding that

> "the mere fact that right and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute"?[155]

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[151] *Ibid*.
[152] Reply, para. 7.37.
[153] Cf. *East Timor* (Portugal v. Australia), ICJ Reports 1995, 90, at 102 (para. 29).
[154] Reply, para. 7.37.
[155] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application), ICJ Reports 2006, 6, at para. 64.

154. From the preceding quotations, it is clear that Croatia invokes the *erga omnes* concept to justify effects which it precisely was not intended to produce – namely to create jurisdictional links that otherwise do not exist. Serbia invites the Court to uphold its previous jurisprudence on obligations *erga omnes* and to affirm the distinction between the *erga omnes* character of an obligation, and the regime of jurisdiction.

155. Accordingly, the attempt by Croatia to rely on the concept of obligations *erga omnes* in order to extent Court's jurisdiction *ratione temporis* seems to be misplaced, while the compromissory clause contained in Article IX of the Genocide Convention, just like the Convention at large, does not possess any retroactive effect.

C. Responsibility for alleged breaches of the Genocide Convention predating 27 April 1992 cannot be transferred to Serbia

156. As was just demonstrated above, the Court's lacks jurisdiction *ratione temporis* and is thus, for that reason alone, not in a position to entertain Croatia's claim. Even if it were otherwise, *quod non*, and if one were to thus assume, be it only *arguendo*, that the Court's jurisdiction *ratione temporis* would cover events predating 27 April 1992*,* Croatia's claim would still not be successful for the reasons that will now be outlined.

157. Croatia is attempting to argue that Serbia may be held responsible for alleged acts of genocide, despite the fact that the Genocide Convention did not apply to those acts (provided they have taken place at all, *quod non*):

i. By virtue of the principle underlying Article 10, para. 2, of the ILC Articles on State Responsibility which is said not only to apply to the facts underlying the dissolution of the SFRY, but which, Croatia argues, is also able to stretch the scope of application *ratione temporis* of the Genocide Convention and State responsibility arising thereunder to a period where the Genocide Convention was not applicable;

ii. By virtue of the constitutional situation in Serbia (since 1990) respectively in the FRY; or finally

iii. By virtue of the Declaration adopted by representatives of the parliaments of the SFRY, as well as those of Serbia and Montenegro, on 27 April 1992 and the ensuing Note.

158. Before proceeding with the analysis, it is worth noting that in its attempt to attribute responsibility to Serbia, Croatia's Reply not only refers to conduct of organs of the former SFRY, but even includes conduct of the RSK within Croatia, arguing that this could be attributed to Serbia by virtue of Article 8 of the ILC Articles on State Responsbility. In Serbia's view, it is telling that in order to "construct" Serbian responsibility, Croatia needs to cumulatively rely on two of the truly exceptional principles of attribution, namely Article 10, para. 2 *and* Article 8 of the ILC Articles on State Responsibility. The necessity to combine these two rules of attribution is yet a further illustration of Croatia's need to blur legal categories in order to make its case.

159. Serbia will comment on the role of the RSK in detail in Chapter V below. For present purposes, it suffices to deal with the legal issues raised by Article 10, para. 2, as well as Serbian constitutional law and the Declaration of 27 April 1992. Serbia will counter these arguments in the following sections and will then briefly discuss the alleged impact of the *erga omnes* concepts on Serbia's responsibility (and Croatia's ability to invoke it), as well as Croatia's claim that alleged breaches of the Genocide Convention were continuous violations.

1) Serbia cannot be held responsible for acts predating 27 April 1992 on the basis of the principle underlying Article 10, para. 2, of the ILC Articles on State Responsibility

160. As previously noted and argued in detail[156] Serbia cannot be held responsible for acts predating 27 April 1992 on the basis of Article 10, para. 2, of the ILC Articles on State Responsibility for six independent reasons which will now be further addressed taking into account the Reply by the Applicant, namely since

a) The content of Article 10, para. 2 ILC Articles on State Responsibility did not, as of 1992, represent customary international law;

b) There was no "movement" aiming at the establishment of the FRY;

c) There did not exist any required movement outside the established State structures;

d) There was a lack of success of any such alleged movement;

[156] Counter-Memorial, paras. 276-364.

e) Article 10, para. 2, of the ILC Articles on State Responsibility constitutes a mere rule of attribution which may not extent the scope of application *ratione temporis* of treaty obligations otherwise not applicable during the relevant time; and finally

f) Since Article 10, para. 2, of the ILC Articles on State Responsibility does not apply in cases where the predecessor State can be held responsible.

It should be noted that *all* of the above six arguments must be rebutted by Croatia if its claim based on Article 10, para. 2 of the ILC's Articles on State Responsibility were to succeed.

a) The content of Article 10, para. 2, of the ILC Articles on State Responsibility did not, as of 1992, represent customary international law

161. It is first worth reiterating that with regard to the case at hand the critical date for establishing a rule of customary law identical to the one now contained in Article 10, para. 2, of the ILC Articles on State Responsibility is April 27, 1992. Thus, the relevant question is not as to whether, as of today, such a rule does exist, *quod non*, to which the Applicant has attempted to provide a positive answer,[157] but rather whether, by the time the alleged violations of international law are claimed to have taken place, i.e. in 1991/ 1992, it did already exist as a rule of positive customary law. Accordingly, any post-1992 State practice or *opinio juris*, if ever there was such, is irrelevant unless it can be proven that it specifically relates back to the pre-1992 period.

162. Yet, even the very few examples Croatia attempts to rely on and refers to, including statements made within the ILC, which are said to prove the existence of the aforesaid rule on attribution, exclusively date from the post-1992 period, while any pre-1992 practice confirming the existence of the alleged rule of customary law contained in the Article 10, para. 2, of the 2001 ILC Articles on State Responsibility is lacking.

163. Moreover, the burden is on the Applicant to prove that, indeed, by the critical date the alleged rule of customary international law had already come into existence rather than for the Respondent to do the contrary.[158]

[157] Reply, paras. 7.52 et seq.
[158] Cf. Counter-Memorial, para. 293.

164. As a matter of fact, the then Special Rapporteur of the ILC himself seems to have argued in favour of the rule now contained in Article 10, para. 2, for reasons of expediency and equity only since the rule was said to "strike a fair balance *at the level of attribution*"[159] rather than for constituting a rule of the *lex lata.*

165. Indeed, when commenting on what was to become Article 10, para. 2, of the ILC Articles on State Responsibility, States in turn, contrary to what Croatia claims,[160] did *not* take a positive stance on the proposed rule and, in particular, did not express any *opinio juris* on the matter. Moreover, the practice of the Eritrean-Ethiopian Claims Commission, on which Croatia also relies,[161] not only again dates from the post-1992 period, but also deals with a different issue namely the issue of the nationality of natural persons rather than matters of State responsibility as such.

166. In sum, Croatia has still not been able to prove that, at the relevant date, the rule underlying Article 10, para. 2, did indeed form part of customary law, *quod non.*

b) Lack of a movement aiming at the establishment of the FRY

167. Similarly, Croatia has still neither been able to identify the claimed "movement" the actions of which are said to be attributable to Serbia by virtue of the alleged rule underlying Article 10, para. 2, of the ILC Articles on State Responsibility.

168. Rather, Croatia refers to "those responsible for the conduct of Serbia's affairs",[162] to "they",[163] or "the perpetrators in question".[164] Yet, even if one were to agree that the term "movement" ought to be broadly construed it must, at the very least, possess *some* contours and structures since otherwise (assuming *arguendo* that Article 10, para. 2, of the ILC Articles on State Responsibility did, as of 1992, represent customary international law) any action by a group of *private* individuals could be attributable under Article 10, para. 2, to the State to be created which certainly is not the case. In

[159] Cf. Reply, para. 7.54 (emphasis in the original) (referring to Crawford, First Report on State Responsibility, YbILC 1998, vol. II/1, para. 279).
[160] Reply, para. 7.57.
[161] Reply, para. 7.57. and fn. 67.
[162] Reply, para. 7.62.
[163] *Ibid*.
[164] Reply, para. 7.63.

particular, any interpretation of Article 10, para. 2, of the ILC Articles of State Responsibility must respect, just like other rules on attribution, as the Court has stressed,

> "the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."[165]

169. Moreover, and as an additional requirement, Croatia itself acknowledges that in order for a movement to qualify as one covered by Article 10, para. 2, (and the alleged parallel norm of customary law) it must have been "aim[ing] at separation or the dissolution of the State".[166]

170. In the case at hand this means that the alleged "Serbian movement" must have *aimed at* either the separation of the FRY from the SFRY or at the dissolution of the SFRY. Yet, as the Respondent has already demonstrated, if ever there was such a movement, *quod non*, its political aim was not to provide for the dissolution of the SFRY or to create a rump State consisting of Serbia and Montenegro only, but rather to preserve the overall predecessor State, i.e. the SFRY in which, obviously, all Serbs could continue to live together in one single State.

171. Contrary to all plausibility and publicly available facts, Croatia indeed claims that it was not Slovenia, Croatia (and later Bosnia and Herzegovina and finally Macedonia) that seceded from the SFRY aiming at the dissolution of the SFRY leaving the rump territory (consisting of Serbia and Montenegro) with no other choice but to create the FRY, but rather that it was the aim of the alleged "Serbian movement" to expel the other constituent republics of the SFRY so as to be able to create the FRY (and later Serbia proper).

172. In that context it should also be noted that if indeed (as claimed) there had been a movement to establish a unified Serbian State beyond the borders of the FRY and including parts of Croatia,[167] the Applicant simply cannot explain why, in 1991, the Republic of Serbia did not accept the SAO Krajina's decision to join Serbia.[168]

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[165] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, p. 43, at para. 406.
[166] Reply, para. 7.59.
[167] Reply, para. 7.62.
[168] Cf. already Counter-Memorial, para. 492.

173. Moreover, even after its coming into existence, the FRY

a) exercised pressure on both, the RSK and the Republica Srspka to accept relevant peace plans (providing for them forming part of Croatia respectively Bosnia and Herzegovina), a fact accepted by the Respondent itself;[169]

b) did not intervene when the RSK was attacked by Croat forces during Operations *Flash* and *Storm*,

which are facts that once again contradict the existence of an alleged plan to unite all Serbs within one single State.

c) Lack of any "movement" outside the established State structures

174. As to the further requirement that the alleged "movement" acted outside the framework of the predecessor State,[170] which requirement the Applicant by now seems to have accepted,[171] Croatia claims that it was "obviously" meant only to "exclude from the scope of Article 10 instances of constitutional advocacy for change".[172]

175. Yet, the Commentary to Article 10, para. 2, on which otherwise Croatia frequently relies, only requires that the actions of the "movement" were not "carried out within the framework of the predecessor State"[173] without otherwise, contrary to what Croatia assumes, limiting the object and purpose of this clause. This is confirmed, as Serbia has already previously shown in more detail, by the ILC's Commentary on Article 10 of its Articles on State Responsibility. Notably, the ILC's refers to the notion of a "revolutionary"[174] movement respectively to movements that are in a "continuing struggle with the constituted structure".[175]

176. In contrast thereto, the JNA, the actions of which constitute, according to the Applicant, in large parts the alleged genocidal activities[176] clearly did not constitute

[169] Reply, para.3.121.
[170] Cf. already Counter-Memorial, paras. 303-307.
[171] Reply, para. 7.60.
[172] Reply, para. 7.60.
[173] See para. 10 of the ILC's Commentary to Art.10 (also quoted in Croatia's Reply, para. 7.59).
[174] Para. 10 of the ILC's Commentary to Art.10 (and cf. already Counter-Memorial, para. 304).
[175] Para. 2 of the ILC's Commentary to Art.10 (and cf. already Counter-Memorial, para. 304).
[176] See notably Chapter 2 of the Memorial and Chapter 3 of the Reply.

such a "revolutionary force". Rather, the JNA acted as a federal organ of the then SFRY and was trying to subdue insurgents forces that were attempting to bring about the secession of Croatia from the SFRY while the JNA was trying to uphold the continued existence of the SFRY[177] rather than, as the Applicant claims, aiming at the creation of the FRY consisting of Serbia and Montenegro only.

177. Accordingly, the account of facts given by Croatia, which tries to bring the developments leading to the dissolution of the SFRY within the scenario contemplated by Article 10, para. 2 ILC Articles on State Responsibility, is misrepresenting the political reality as it unfolded on the ground in 1991/1992.

d) Lack of success of the alleged "movement"

178. For obvious reasons Croatia, in its Reply, does not devote any space to the further requirement clearly contained in the text of Article 10, para. 2, of the ILC Articles on State Responsibility, namely that the movement, in order for its acts to be attributable to the newly created State, must "*succeed* in establishing a new State"[178], i.e. must be successful in reaching its political goals. Contrary to what it still had claimed in its Written Observations,[179] namely that the goal of the Serbian movement had been to create the FRY (which indeed could not seriously be considered a "success"), Croatia now seems to claim that the objective of the alleged movement had been "to unite Serb areas in Croatia and in Bosnia and Herzegovina with Serbia in order to establish a unified Serb State".[180]

179. Yet, a simple look at the map suffices to confirm that both, formerly dominantly ethnically Serb-populated areas of Croatia, as well as the Republika Srpska, do not form part of the FRY or now Serbia, but have rather remained integral parts of Croatia and Bosnia-Herzegovina respectively. It thus does not correspond to reality, to say the least, to claim that the alleged movement succeeded in its goal of creating a new State consisting of a "larger Serbia".

[177] See Counter-Memorial.paras. 504 – 506, as well as Annexes 6, 7 and 8 of this Rejoinder.
[178] Emphasis added.
[179] Cf. Croatia's Written Observations, at para. 3.33.
[180] Reply, para. 7.62.

e) Article 10, para. 2, of the ILC Articles on State Responsibilty as a rule of attribution

180. As to the function of Article 10, para. 2, of the ILC Articles on State Responsibility as a mere rule of attribution Serbia can be brief since Croatia has thought it appropriate to not counter the detailed arguments brought forward by Serbia in that regard.[181]

181. It should be noted, however, that Croatia itself now acknowledges this character of Article 10, para. 2, of the ILC Articles on State Responsibility when stating that "the only question is whether their conduct [*i.e.* that of Serb officials] is *attributable* to Serbia. This, under 10 (2), it is."[182]

182. It must also be taken note of the fact that, in particular, Croatia has not put forward any counter-argument as to the incompatibility of its interpretation of Article 10, para. 2, of the ILC Articles on State Responsibility with the system of unilateral declarations to be made by national liberation movements under Article 1, para. 4 and 96, of the 1977 Additional Protocol I to the Geneva Convention.[183]

183. Finally, with regard to the relevance of the distinction between the treaty-based prohibition of genocide and the parallel prohibition existing under customary law with regard to Article 10, para. 2, of the ILC Articles on State Responsibility, it suffices to refer to the above considerations on the matter.[184] It should be noted, however, at this juncture that Croatia thought it appropriate to simply state "that the conduct of Serbian officials [prior to 27 April 1992] was already governed *by international law* (as declared in the Convention)".[185]

184. Yet, this statement begs the relevant question, since, as shown in detail above,[186] the Court's jurisdiction under Article IX of the Genocide Convention does not extent to violations of customary law regardless of the Genocide Convention's so-called "customary law moorings".[187]

[181] Reply, at paras. 7.64.-7.65.
[182] Reply, para. 7.65.
[183] Counter-Memorial, paras. 347-349.
[184] See *supra*, section 2.B.
[185] Reply, para. 7.65.
[186] *Supra*, section 2.B.
[187] Reply, para. 7.65.

f) Article 10, para. 2, of the ILC Articles on State Responsibility does not apply in cases where the predecessor State can be held responsible

185. Serbia has already dealt with the interrelationship between the law of State succession and the rule underlying Article 10, para. 2, of the ILC Articles on State responsibility.[188] It therefore suffices to recall the exceptional character of Article 10, para. 2 – as stressed by the ILC in its Commentary[189] – which was meant to close a "responsibility gap" solely in those cases where the relevant acts could not be attributed to the predecessor State.

186. Yet, in the case at hand where the SFRY still existed until its dissolution in April 1992 and where the relevant acts (such as the alleged acts of genocide Croatia claims have been committed by JNA units) are attributable to the predecessor State, such required responsibility gap does not exist.

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187. On the whole, it follows that, for a whole set of reasons, both factual and legal, Article 10, para. 2, of the ILC Articles on State Responsibility does not provide, neither generally and indeed even less in the case at hand, a basis for providing for Serbia's responsibility with regard to alleged genocidal acts that Croatia claims have occurred prior to 27 April 1992.

188. As will be shown in the following, Croatia's second and third arguments allegedly justifying a transfer of responsibility equally fail. Croatia notably cannot rely on provisions of Serbian constitutional law to support its claims.

[188] Counter-Memorial, paras. 351-361; and already *supra*.
[189] See para. 6 of the ILC's commentary to Art. 10.

2) Serbia's responsibility for acts committed prior to 27 April 1992 cannot be based on the Constitution of Serbia respectively that of the FRY

a) The 1990 Constitution of the Republic of Serbia

189. Croatia claims that the 1990 Serbian constitution "located [Serbia] as an independent State",[190] that it constituted "an independence constitution"[191] and that accordingly Serbia should be treated concerning acts that took place prior to 27 April 1992 "as an independent State – separate and distinct from the SFRY".[192]

190. Yet, this assumption is contradicted not only by the uniform practice of third States which never treated Serbia as a sovereign State prior to 27 April 1992, but also by both the very text of the Serbian Constitution to which, indeed Croatia itself makes reference, as well as by the practice of organs of the SFRY until the very day the SFRY dissolved.

191. For one, Article 135, para. 1, of the 1990 Serbian Constitution expressly stated that Serbia continued to "[be] part of the Socialist Federal Republic of Yugoslavia".[193] This unequivocal provision in fact *prevented* Serbia from being an independent State, which meant that it could not incur responsibility under the relevant rules of State responsibility.

192. Moreover, Article 135, para. 1, of the 1990 Serbian constitution also explicitly acknowledged that any rights and duties the Republic of Serbia might have, are to be exclusively "realised in the Federation according to Federal Constitution" and will also "be realised in accordance with Federal Constitution."[194]

194. It is thus, to say the least, misleading, to state, as Croatia does,[195] that Article 135, para. 1, of the 1990 Serbian Constitution was meant to subordinate the Federal Constitution of the SFRY to the Constitution of Serbia. Rather the contrary is the case.

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[190] Reply, para. 7.45.
[191] Reply, para. 7.46.
[192] Reply, para. 7.45.
[193] The 1990 Serbian Constitution, as translated and quoted by the Applicant in para. 7.47 of the Reply.
[194] Reply, para. 7.47.
[195] Reply, para. 7.47.

195. This is confirmed by the very practice of the organs of the SFRY. Indeed, as was already shown in both Serbia's Preliminary Objections[196] as well as in its Counter-Memorial[197] in more detail, the Constitutional Court of Yugoslavia (SFRY), in 1991 alone, rendered 24 decisions by which Serbian legislative acts (as indeed those of other republics including that of Croatia as well) were declared unconstitutional as being incompatible with the Federal Constitution. This contradicts the Applicant's claim that "it was entirely a matter for Serbia to decide whether to continue to perform its obligations under the Constitution of the SFRY".[198] Rather, to the contrary, it was for the organs of the SFRY, including its highest judicial body, to determine the compatibility of Serbian acts and actions with the federal legal system.

b) The 1992 Constitution of the FRY

196. Neither can it be argued that the FRY assumed State responsibility for acts committed by the SFRY prior to 27 April 1992 by virtue of Article 16 of the FRY's constitution, which, according to Croatia, represented "Serbia's self-proclaimed continuity with regard to the SFRY".[199]

197. Before entering into details, it is worth noting that in its own Memorial the Applicant was adamant to stress that

> "Neither Croatia nor any of the other Republics of SFRY which became independent accept that FRY was the 'continuation' in a legal sense of the SFRY."[200]

198. Moreover, the sole and only aim of Article 16 of the 1992 constitution of the FRY was to secure that all treaties the SFRY had entered into, would continue to be in force vis-à-vis the FRY. This becomes evident when reading Article 16, para. 1 of the FRY Constitution in conjunction with para. 2 thereof. Para. 2 governs the effects of treaties within the domestic law of the then FRY, while para. 1 circumscribes, as a logical first step, which treaties the FRY is bound by.

[196] Preliminary Objections of Serbia, at para. 4.24.
[197] Counter-Memorial, para. 535.
[198] Reply, para. 7.47.
[199] Reply, heading preceding para. 7.45. and para.7.48.
[200] Memorial, para. 2.138 (with footnote 220).

199. Put otherwise, both provisions are future-oriented as to the fulfilment *ad futurum* of those international obligations by which the FRY is bound, but do not govern international obligations the SFRY might have incurred for having *in the past* allegedly violated international law.

200. What is more, Article 16 of the 1992 FRY Constitution addressed matters of domestic constitutional law only and thus could not provide a basis for any international obligation of Serbia. As the International Law Commission had opportunity to state in its 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations[201] it is only due to "their unilateral behaviour *on the international plan*" that States may find themselves bound by unilateral acts.[202]

3) Serbia responsibility for acts committed prior to 27 April 1992 cannot be based on the 1992 Declaration

201. In its Reply of 20 December 2010 the Applicant – for the first time ever since it had started proceedings against the Respondent in 1999, i.e. after more than eleven years – now not only claims that the declaration adopted on 27 April 1992 amounts to "a unilateral declaration binding it internationally"[203] but that the FRY /Serbia also thereby assumed responsibility for violations of the Genocide Convention for which, otherwise, it could not be held responsible.

202. In this far-reaching reading, the Declaration of 27 April 1992 assumes the role of a *deus ex machina* that suddenly solves all problems Croatia might have faced. Yet it is no such thing, and for three alternative reasons, Croatia's attempt to present it as such must fail:

a) The Declaration did not emanate from authorities that could bind a State by way of a unilateral declaration;

b) It did not assume State responsibility for acts prior to 27 April 1992; and finally,

c) Croatia completely disregards its own behaviour on the matter.

[201] UN Doc/61/10, paras. 177 *et seq*.
[202] *Ibid*., first preambular paragraph of the ILC Guiding Principles.
[203] Reply, para. 7.73

a) The Declaration did not emanate from authorities that could bind a State by way of a unilateral declaration.

203. In its 2008 Judgment in the case at hand, the Court found that the declaration of 27 April 1992 and the ensuing Note did, in the special circumstances of the case, amount to a notification of succession. The Court stressed, however, that this was only the case since the act of the State related to a pre-existing set of circumstances and was essentially confirmatory rather than constitutive in nature and could, for this very reason, be subject to less rigid requirements of form.[204]

204. Conversely, a binding unilateral declaration generally, and one with the content Croatia alleges in particular, creates *new* obligations for the State concerned. It is for this very reason that the Court has consistently held that a unilateral declaration, in order to bind the State in questions, needs to be made by an authority vested with the power to do so, and, in particular, by a head of State, a head of Government or a minister for foreign affairs[205] or, at least, by other members of government with a technical portfolio within the purview of their respective ministry.[206]

205. The declaration of 27 April 1992 was adopted by an *ad hoc* meeting of parliamentarians of the SFRY and those of two of its constituent entities, namely Serbia and Montenegro, none of whom had a mandate, either under international or domestic law, to represent the entities concerned internationally.

b) The Declaration did not assume State responsibility for acts predating 27 April 1992

206. In its 2008 Judgment on Preliminary Objections the Court already had ample opportunity to consider the legal effects of the 1992 declaration and the ensuing Note

[204] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 109.
[205] *Nuclear Tests* (Australia v. France), Judgment, I.C.J. Reports 1974, 253, at paras. 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II), 595, at para. 44; *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002, 3, at para. 53; see also *Legal Status of Eastern Greenland* (Denmark v. Norway), P.C.I.J., Series A/B, No. 53 (1933), at 71.
[206] *Case concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 2006, 6, at para. 46.

and it is worth recalling the essential arguments the Court has developed in that regard which shed significant light on the scope, both *ratione materiae* and *ratione temporis*, of the aforesaid declaration.

207. The Court stressed that "the 1992 declaration must be considered as having had the effects of a notification of succession to treaties"[207]. Yet, as the Court also stated on the same occasion, a notification of succession merely entails the consent to be considered bound by the respective treaty[208] *ad futurum* but not as, by the same token, also assuming State responsibility for alleged treaty violations of its predecessor State that have occurred *in the past.*

208. Indeed, the Court was very careful in limiting the effects of the declaration and the Note, scrupulously analysing its very terms. It stated:

> "In sum, in the present case the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely *the effect that they were, in the view of the Court, intended to have on the face of their terms*: namely, that *from that date onwards* the FRY would be bound by the obligations *of a party* in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution […]."[209]

209. This warrants two remarks. On the one hand, had the Court really wanted to provide the declaration and the Note with the content Croatia now claims it has, it would have not referred to the FRY to be bound "by the obligations *of a party*"[210] as it did. Rather, the Judgment would have necessarily stated that the FRY would be bound by the obligations *of the SFRY*. Yet, this is clearly not what the Judgment says.

210. This limited understanding of the declaration and the ensuing Note, as brought out by the Court's jurisprudence in this very case, is confirmed by the fact that the FRY was

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[207] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 111.
[208] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 109.
[209] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 117 (emphasis added).
[210] Emphasis added.

considered to have entailed treaty obligations arising under the Genocide Convention from 27 April 1992 onwards only, thus for this additional reason also excluding treaty obligations that had come into existence prior to that very date.

211. On the other hand, it should be also noted that in its 2008 Judgment on Serbia's Preliminary Objections, the Court devoted almost ten pages to the legal effect of the declaration dated 27 April 1992 and the ensuing Note.[211] At the same time, the Court soon thereafter found that, in order to decide upon Serbia's preliminary objection *ratione temporis*, it would need to have more elements before it.[212] Given the extent of the written and oral pleadings by the Parties as to the legal effects of the 1992 declaration and the character of any determination of possible further effects of the declaration (including those Croatia now claims) not requiring any further factual findings, it would have been logical, if not mandatory, to already in 2008 decide upon Serbia's preliminary objection *ratione temporis* provided Croatia's reading of the 1992 declaration was correct, *quod non*.

212. Moreover, Croatia's overbroad reading of the 1992 declaration also conflicts with the 2006 ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which instrument provides that

> "[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner."[213]

213. The ILC's Commentary accompanying Principle 7, referring back to the Court's jurisprudence on the matter,[214] further underlines this in particular with regard to, as in the case at hand, declarations made *erga omnes* when stating that

> > "[t]he interpreter must therefore proceed with great caution in determining the legal effects of unilateral declarations, in particular when the unilateral declaration has no specific addressee."[215]

[211] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at paras. 98-117.
[212] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 129.
[213] Principle 7 of the ILC Guiding Principles (UN Doc/61/10).
[214] *Frontier Dispute* (Burkina Faso v. Republic of Mali), ICJ Reports 1986, p. 554, para. 39.
[215] See para. 2 of the ILC's commentary to Principle 7 of the its Guiding Principles (in UN Doc. A/61/10).

214. In addition, according to the Court's constant jurisprudence, in order

> "to assess the intentions of the author of a unilateral act, account must be taken of all the circumstances in which the act occurred".[216]

215. Given the very timing of the declaration, namely while the various armed conflicts surrounding the process of dissolution of the SFRY were ongoing and during a time when allegations of wrongful conduct had already been put forward by various parties involved in the conflict, it seems hard to assume, to say the least, that (as Croatia now claims) the authors of the declaration wanted to formally acknowledge State responsibility for all acts that had occurred prior to the adoption of the declaration and otherwise attributable to the SFRY. Rather, in the light of the Court's findings in 2008, it seems that their sole intention was to safeguard the status of the emerging FRY as a contracting party to all treaties the SFRY had entered into.

c) Croatia disregards its own behaviour vis-à-vis the Declaration of 27 April 1992

216. As the Court has made clear from the very beginning of its jurisprudence on the matter, and confirmed by the ILC's work, the binding character of unilateral declarations is based on the principle of good faith.[217] As the Court put it as early as in 1974:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. […] Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that *the obligation thus created* be respected."[218]

217. As becomes clear from the Court's dictum, it is the unilateral statement and the trust placed into it by the recipient State that creates the binding effect between the States concerned.

218. This is further confirmed by Principle 3 of the ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations which provides

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[216] *Frontier Dispute* (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986, p. 554, at para. 40; see also *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, ICJ Reports 2006, 6, at para. 53; and *Nuclear Tests* (Australia v. France; New Zealand v. France), I.C.J. Reports 1974, 253, at para. 51, and 457, at para. 53.
[217] See Principle 1 of the ILC Guiding Principles (in UN Doc. A/61/10).
[218] *Nuclear Tests* (Australia v. France), ICJ Reports 1974, p. 253, at para.46 (emphasis added).

that, in order to determine any legal effects of a unilateral declaration, it is necessary to take "account of the reactions to which they gave rise"[219] and, in particular, whether third States "take cognizance of commitments undertaken".[220]

219. Yet, as has been previously been shown by the Respondent,[221] the Applicant, from the very time the declaration of 27 April 1992 had been adopted, continuously and uniformly took the position that it did not entail legal consequences and that it could not even make the FRY a contracting party to the treaties the SFRY had entered into, and that the FRY could thus even less incur State responsibility for violations of such treaties.

220. Moreover, as mentioned, the first time Croatia claimed that the declaration dated 27 April 1992 could amount to a binding unilateral declaration allegedly acknowledging the responsibility of the Applicant for acts that had occurred prior to 27 April 1992 was in its 2010 Reply, i.e. 11 years after bringing the case before the Court and 18(!) years after the declaration had been adopted. This stands in sharp contrast to the instances where the Court had found a unilateral declaration to have amounted to a legally binding commitment, where short periods of time between the relevant declarations on the one hand, and the reliance on them on the other had passed. To use the words of the ILC, Croatia had thus never "take[n] cognizance of commitments undertaken"[222] until it now – for obvious reasons – suddenly has begun to argue that the declaration dated 27 April 1992 could amount not only to a legally binding unilateral declaration, but also one possessing a far-reaching and almost unlimited extent.

4) Serbia's cannot be held responsible for acts committed prior to 27 April 1992 nor can Croatia invoke Serbia's responsibility for acts prior to 8 October 1991 on the basis of the concept of obligations **erga omnes**

221. Croatia advances yet another argument aimed at explaining why Serbia should have incurred responsibility for conduct predating its coming into existence as an independent State. In a short passage of its Reply, it stresses the *erga omnes* character

[219] Para. 3 of the ILC's Commentary to Principle 3 of the its Guiding Principles (in UN Doc. A/61/10).
[220] Cf. Principle 3 of the ILC Guiding Principles (in UN Doc. A/61/10).
[221] Preliminary Objections, paras. 3.35.–3.38.
[222] Cf. para. 3 of the ILC's Commentary to Principle 3 of the its Guiding Principles (in UN Doc. A/61/10).

of obligations imposed by the Genocide Convention. This – Croatia asserts – means that regular rules of treaty application can simply be dispensed with:

> "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."[223]

222. Insofar as this passage draws on the *erga omnes* concept to explain effects on the temporal scope of the Court's jurisdiction under Article IX of the Genocide Convention, it has been addressed already.[224] For present purposes, it is interesting to note the astonishing breadth of Croatia assertion. In addition to extending the temporal scope of jurisdictional rules, *erga omnes* – according to Croatia – also makes treaties binding upon entities which, at the relevant time, did not even exist as States. And finally – as may be noted in passing – it even allows entities that would subsequently become States (such as Croatia) to invoke responsibility incurred by other non-States (such as Serbia at the relevant time prior to 27 April 1992).

223. A moment's consideration is sufficient to appreciate the extremes to which Croatia has to go in order to be able to draw support from the *erga omnes* concept. If indeed in treaty-based disputes involving obligations *erga omnes,*

> "[t]here [was] no need for both Parties to the dispute to have been Parties to the Convention when the facts giving rise to it took place",[225]

the *erga omnes* concept would really be a cure-all. However, as has been noted already, it is not. It derives its crucial relevance precisely from the fact that the Court has recognized it in a specific procedural setting, with respect to "a very specific issue of jurisdictional *locus standi*".[226]

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[223] Reply, para. 7.37.
[224] See *supra,* paras. 141-155.
[225] Reply, para. 7.37.
[226] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2003, p. 136, Sep. Op. Higgins, at para. 37.

224. As noted above, the Court's jurisprudence since *Barcelona Traction* clearly shows that the concept *modifies* the implementation of State responsibility, but does not *create* responsibility out of the blue by justifying the retroactive extension of treaties. In fact, the matter is brought out clearly by the celebrated *dictum* which is widely seen to mark the beginning of the *erga omnes* era. As is well known, in *Barcelona Traction,* the Court distinguished obligations *erga omnes* from obligations in the field of diplomatic protection by describing the circle of States that could be seen to have an interest in their protection: hence the former are "the concern of all States", the latter the concern of a particular State (the State of nationality).[227] Yet, nothing in the celebrated passage even remotely hints at the possibility that obligations *erga omnes* should follow a different, special rule of retroactivity.

225. For an obligation *erga omnes* to be "the concern of all States", it must be an obligation in the first place; for the *erga omnes* concept to facilitate the implementation of responsibility, there must be responsibility to begin with. However, as the ILC noted in its work on State responsibility,

> "for responsibility to exist, the breach must occur at a time when the State is bound by the obligation".[228]

226. Nothing in the Court's jurisprudence nor indeed in the ILC's work on State responsibility (i.e. the two main catalysts having recognized and operationalized the concept of *erga omnes* obligations), suggests that this "basic principle"[229] could be modified if the obligations in question were owed *erga omnes.*

227. Indeed, if it were any different, one might ask why the parties, and the Court, spent significant time considering the temporal application of obligations in cases such as *Georgia-Russia* and *Nauru*, or indeed why the Court in its Judgment on Preliminary Objections in the present proceedings carefully established the date from which onwards Serbia could be considered a party to the Genocide Convention. Upon Croatia's extreme understanding of the *erga omnes* concept, all this would have been completely

[227] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (New Application: 1962), ICJ Reports 1970, p. 3, at para. 33.
[228] Para. 1 of the ILC's Commentary to Article 13.
[229] Para. 1 of the ILC's Commentary to Article 13.

unnecessary, as "[t]here would" – to adapt Croatia's argument – have been "no need for both Parties to the dispute to have been Parties to the Convention when the facts giving rise to it took place."[230] The very fact that the Court and the parties felt the need to spend significant time on this suggests how divorced from reality Croatia's *erga omnes* construction is.

228. Read properly, the concept of obligations *erga omnes* does not entail any modification of the rules governing the temporal application of treaties and it provides no basis for attempts to transfer upon Serbia any responsibility that may have been incurred by breaches predating 27 April 1992.

229. Finally, it is worth noting that prior to 8 October 1991, Croatia, not being a State, was not in a position to invoke the responsibility of other States for acts having occurred prior to that very date. As the point has been addressed in more detail in the Counter-Memorial (to which Croatia has not replied), it may suffice to note that the general issue of claims raised by entities that were yet to achieve statehood was addressed in Judge Fitzmaurice's separate opinion in the *Northern Cameroons case.* In it, Judge Fitzmaurice held that claims relating to events predating Cameroon's independence could not form the basis of claims brought by it, holding that as

> "The Applicant State did not exist as such at the date of these acts or events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot ex post facto become one."[231]

Serbia submits that this statement has lost none of its relevance.

5) Serbia cannot be held responsible for acts predating 27 April 1992 on the basis of the concept of "continuous violations"

230. Finally, in a short paragraph Croatia also asserts that irrespective of arguments about retroactivity, conduct predating 27 April 1992 could trigger Serbia's responsibility in the present proceedings as its alleged violations were of a "continuing character".[232]

[230] Reply, para. 7.37.
[231] *Northern Cameroons,* Sep. Op. Fitzmaurice, ICJ Reports 1963, 15, at 130.
[232] Reply ,para. 7.78.

This, Croatia argues, applies to the duty to prevent genocide, to prosecute and punish perpetrators and to the duty to cooperate with international tribunals. These claims warrant several remarks.

231. *First*, as the Court had already occasion to remark and confirm, and as will be addressed further below,[233] under Article VI of the Genocide Convention

> "[p]ersons charged with genocide or any of the other acts enumerated in Article III shall be tried *by a competent tribunal of the State in the territory of which the act was committed* […]."

232. Accordingly, the obligation of Serbia to prosecute, put to trial and eventually punish, persons having committed genocide only encompasses acts of genocide committed in Serbia itself.[234]

233. *Second*, as to the obligation to cooperate with the international tribunal referred to in Article VI of the Genocide Convention, *in casu* the ICTY, it is obvious that States under Article VI of the Genocide Convention only have to co-operate with the tribunal to the extent the person concerned is accused of genocide, or as the Court put it in *Bosnia* case:

> "For it is certain that once such a court has been established, Article VI obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, *which implies that they will arrest persons accused of genocide* who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal."[235]

234. Moreover, Goran Hadžić, which in any event has been indicted by the ICTY solely for crimes against humanity under Article 5 of the ICTY Statute and for violations of the laws or customs of war under Article 3 of the ICTY Statute, but *not for acts of genocide* under Article 4 of the ICTY Statute, has been transferred to the ICTY by

[233] See below, Chapter V, para. 571.
[234] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, p. 43, para. 442.
[235] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, p. 43, at para. 443 (emphasis added).

Serbia on 22 July 2011. Thus, and in any case, the issue of any alleged lack of co-operation by Serbia with the ICTY under Article VI of the Genocide Convention, even if it had arisen, *quod non*, has become moot, which, by the same token, also renders the issue of any continuing character of such obligation obsolete.

235. Finally, *third*, the obligation to prevent genocide neither possesses a continuing character since the obligation underlying Article I of the Genocide Convention aims at preventing acts of genocide from occurring as opposed to preventing their prolongation. This is true even if one were to assume *arguendo* that the (alleged) violation of the obligation to prevent genocide occurring prior to the critical date (i.e. 27 April 1992) allegedly had effects thereafter since, as the ILC has put it, the respective individualized violation of international law itself must have continued:

> "An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues."[236]

236. As a matter of fact, the Court itself has confirmed in its jurisprudence that the obligation to prevent genocide under Article I of the Genocide Convention does *not* amount to an obligation of a continuous character within the meaning of Article 14, para. 2 of the ILC Articles on State Responsibility, but instead is governed by Article 14, para. 3, of the ILC Articles.

237. As the Court put it in the *Bosnia* case:

> "Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:
>
> [...]
>
> The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.'"[237]

[236] See para. 6 of the ILC's Commentary to Article 10.

238. This approach is also reflected in and confirmed by the ILC's commentary on Article 14, para. 3, of its Articles on State Responsibility where the Commission stated *expressis verbis* that

> "[i]f the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act."[238]

239. Accordingly, Croatia's reliance on the concept of "continuous violations", with regard to the obligations to prevent genocide, to prosecute and punish perpetrators respectively is unfounded.

4. Concluding observations

240. In summary, Croatia cannot base its allegations on "facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the (Genocide) Convention".[239] For the reasons set out in the preceding sections, these facts are out with the Court's jurisdiction *ratione temporis* and can have neither entailed the responsibility of Serbia. More specifically, as has been shown, neither the Genocide Convention as such, nor its Article IX, produce retroactive effects. Moreover, responsibility that may have been incurred by the SFRY cannot be transferred to Serbia.

241. As a consequence, conduct predating 27 April 1992 and 8 October 1991 cannot form the basis for a judgment in the present proceedings.

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[237] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, para. 431.
[238] See para. 14 of the ILC's Commentary to Article 14 (footnote omitted).
[239] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, at para. 129.

CHAPTER III

EVIDENCE PRODUCED BY THE APPLICANT

1. Introduction

242. Recent contentious cases before the Court (*Democratic Republic of the Congo v. Uganda* and *Bosnia and Herzegovina v. Serbia and Montenegro*) have highlighted how the questions of fact-finding and the proper use of evidence are important for a thorough deliberation of disputes involving charges of exceptional gravity against a State. Whereas the Memorial devotes no attention to this issue, the Counter-Memorial makes a careful examination of the matter, which is fully in accordance with the previous practice of the Court.[240] Such an approach has compelled the Applicant to reply to the Respondent's observations in detail.[241]

243. It appears that the Applicant agrees in principle with the Respondent concerning the general approach to adopt with respect to the burden and standard of proof. Nevertheless, the Respondent cannot accept the broad propositions that the Applicant submits to the Court without any real connection with its previously expressed general views.[242] A disagreement between the Parties is particularly evident concerning the method of proof: again, the Applicant quotes the same references to the Court's case law that were previously cited by the Respondent, but the Applicant always attaches to them certain conflicting conclusions.[243]

244. In order to rebut the Applicant's assertions and, where necessary, clarify its position, the Respondent will, in accordance with the purpose of this Rejoinder, briefly examine the documentary materials submitted by the Applicant. In addition, the Applicant's proposition that the Court should depart from its previous practice in the *Bosnia* case concerning the decisions of the Prosecutor of the ICTY not to include the charge of genocide in an indictment[244] deserves special attention. Finally, the Respondent will consider some of the Applicant's suggestions which implicitly try to shift the burden of proof.

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[240] Counter-Memorial, Chapter III, Questions of Proof.
[241] Reply, Chapter II.
[242] See, for example, unfounded conclusions of paras. 2.5 and 2.14 of the Reply.
[243] See, para. 2.24 of the Reply.
[244] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 217.

2. Documents submitted by the Applicant that are inadmissible and unreliable

A. Witness statements

245. In the Counter-Memorial, the Respondent observes that the statements submitted as evidence in support of the Memorial do not fulfill minimum evidentiary requirements, as they are either not signed, or it appears that they were not taken by an authorized domestic organ or in accordance with a procedure that would fulfill minimum procedural safeguards. Furthermore, the Respondent observes that these statements (433 in total) were allegedly given by persons with strong interests in this case and consequently, their probative value is in doubt. Also, most of the submitted statements do not contain evidence on which the legal elements of the crime of genocide can be established, that is to say, the documents are irrelevant to the subject matter of this case.

246. The Applicant objects to this claim, and states that "the Court is asked to dismiss the evidence of several hundred individuals who were present during the conflict."[245] Such a view is not very helpful for the purpose of the good administration of justice.

247. *In concreto*, the Respondent observes that 332 out of 433 statements annexed to the Memorial do not contain even the signature of the person who allegedly made the statement in his or her original language. In 154 statements it is not indicated who the person or the entity which took the statement was, while 161 statements do not contain the signature of the person who allegedly took them. Additionally, 209 statements annexed to the Memorial are actually the official records of police interrogations, which are inadmissible as evidence in cases before domestic courts both in Croatia and in Serbia. Indeed, the inadmissibility of the notes taken by police during interrogations would seem to be a wise rule of evidence found in most modern judicial systems, for obvious reasons. The Respondent has provided the Court with the exact numbers of the annexes that it considers inadmissible.[246]

248. In its rebuttal, the Applicant tries to justify the admissibility of these materials on the basis of three very defensive arguments. *First*, the Applicant states that "72 of the

[245] Reply, para. 2.34.
[246] Counter-Memorial, paras. 154-158.

original witness statements were taken in the court proceedings, during the course of which the witness was warned".[247] If this is true, then how is it possible that the signatures cannot be seen on the copies of the court's original records submitted with the Memorial?

249. *Second*, the Applicant invokes the ICTY Decision on Guidelines for the Admission of Evidence Through Witnesses in the *Karadžić* case which reads that "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".[248] But, the question here is not about the admissibility of any document in a general sense, to which the comment in the *Karadžić* case relates. The document in question is a witness statement submitted to the Court without a witness testimony in *viva voce*, i.e. without any opportunity for the Chamber and the opposing Party to check the authenticity and veracity of that statement through cross-examination. The Applicant is completely confusing a rule intended to apply to "documents" and one that concerns evidentiary statements by individuals who may have been witnesses to certain events. The ICTY quite correctly decided upon a rule that did not hinge upon legal formalism. This is not at all the same thing as the admission of an unsigned statement by a "witness" that otherwise has no independent existence as a "document". Alleged witness statements are not "documents" at all; rather, they are purported records of testimony.

250. That the Applicant's reference is quite misleading and drawn out of context becomes clear from another guiding rule set out by the same ICTY decision. Namely, the Trial Chamber in *Karadžić* also stated as follows:

> "As a general rule, the party tendering a piece of evidence shall do so through a witness who is either the author of that piece of evidence, or who can speak to its origins and/or content. The tendering party shall demonstrate some nexus between the witness and the document before offering the document into evidence."[249]

251. Just following the above quoted rules, the ICTY Trial Chamber continues and says that "there will be no blanket prohibition on the admission of evidence simply on the

[247] Reply, para. 2.42.
[248] *Ibid*.
[249] ICTY, *Prosecutor v. Karadzic*, (T-95-5,), Decision on Guidelines for the Admission of Evidence Through Witnesses, 19 May 2010, para. 25.

grounds that the purported author of that evidence has not been called to testify" (because someone else must be called to testify to the origins and/or content of the document in question). Only under these conditions, is a lack of signature not *in and of itself* a reason to find that a document is not authentic (because a witness – the author of the document or someone else – can confirm its authenticity). The Applicant has failed to inform the Court as to who will confirm the authenticity and veracity of 332 unsigned statements annexed to the Memorial.

252. The *third* rebuttal argument raised by the Applicant is that its police later collected 188 signatures missing from the statements allegedly given a decade ago.[250] This extraordinary approach to the production of evidence demonstrates that the Applicant is aware of the invalidity of the witness statements annexed to the Memorial. However, this supplementary action cannot improve the deficiency of the previously submitted materials for three reasons. *Firstly*, the signatures were collected by the Police of the applicant State which, with due respect, cannot be treated as impartial. *Secondly*, each signature was given in the same textual form prepared in advance by the police solely for the purpose of the Applicant's case.[251] *Thirdly*, the statements taken by the police cannot be used as evidence even before the Croatian domestic courts. All of these observations undoubtedly lead to the conclusion that the process of collecting missing signatures did not fulfill minimum procedural safeguards. The Respondent submits that even if such statements are deemed admissible by the Court – a position that the Respondent does not accept – the circumstances of their "authentication" by the police years after they were actually prepared means that they lack any reliability and should be disregarded by the Court.[252]

253. Indeed, the Applicant has neither denied nor responded to the claim that the 209 official records of the Croatian police interrogations annexed to the Memorial cannot be used as evidence. Nevertheless, the Applicant continues with the same practice in the Reply which is supplied with 29 new statements out of which 23 are again the official police records, while the provenance of another five is unknown. Many of

[250] See Annex 30 to the Reply.
[251] *Ibid*.
[252] In that sense, the ICTY Trial Chamber stated: "Reliability is relevant to the admissibility of evidence, particularly if the evidence in question is an out-of-court written statement". (ICTY, *Milutinovic et al,* IT-05-87-T, Decision, 1 September 2006, para.9).

them have not been originally signed and, again, some of those unsigned statements have been supplied with additional statements given in the above mentioned police procedure of collecting signatures.[253]

254. This is how the Supreme Court of Croatia, in its Decision no. I Kž 585/09-11 of 23 March 2010, observed one similar situation in criminal proceedings concerning war crimes against the Serb civilians:

> "However, since the statements of Milka Bunčić, Jovo Krajnović and Mijo Krajnović recorded by the investigators of the International Criminal Tribunal are essentially notes taken by the investigators of the Office of the Prosecutor which represents prosecution before the ICTY [*sic*], these actions of theirs, if they do not concern the cases of a transfer of the ICTY indictment to the domestic jurisdiction, should be equated with the interviews conducted by the domestic prosecutor as a party."[254]

255. In consequence, the Supreme Court of Croatia found that the Trial Chamber had made a procedural error not to exclude these statements from the case folder, which contravened the Code of Criminal Procedure. The Trial Chamber Judgment was reversed. Nevertheless, the fact that a Croatian domestic court may not use as evidence a statement taken by the ICTY investigators because they are not impartial does not seem to have prevented the Government of the same State in a case before the principal judicial organ of the United Nations from referring to the interrogation records made by its own police.

256. Furthermore, the Counter-Memorial stressed that only a small number of statements submitted by the Applicant contain direct knowledge about the offences that could constitute the *actus reus* of genocide.[255] The Applicant correctly notes that "the Respondent frequently asserts that evidence relied upon by the Applicant is hearsay and is accordingly not capable of supporting the Applicant's case". According to the Reply, "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".[256] The Respondent will briefly comment on this proposition.

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[253] See Annexes 1-29 to the Reply.
[254] Supreme Court of Croatia, Decision no. I Kž 585/09-11 of 23 March 2010, p. 5.
[255] Counter-Memorial, para. 145.
[256] Reply, para. 2.44.

257. In the common law tradition, hearsay evidence is generally excluded from criminal trials because of its inherent unreliability. The rule is often attributed to the need to protect lay jury members from evidence whose lack of authority may only be apparent to professional jurists. But the rule is also applied in criminal trials under the common law involving judges without juries. In other legal traditions, the same rule of inadmissibility may not apply, but nevertheless judges will treat such indirect evidence with extreme caution. In civil law countries, according to the principle of *liberté de la preuve*, hearsay is admissible in general, but it is unlikely that the judge, who is free to assess all evidence, would give significant weight if any to hearsay. At the level of international criminal tribunals, there is no prohibition on hearsay as a matter of admissibility, but an overview of the practice of these institutions shows that judges will not convict on the basis of hearsay evidence in the absence of corroboration through other forms of evidence.[257] It is very interesting that the Applicant here invokes the jurisprudence of "the principal international criminal courts and tribunals", although without any reference to their practice, and conveniently forgets the practice of the Court which rejects reliance on hearsay "as allegations falling short of conclusive evidence".[258]

258. The circumstances in which the Applicant obtained hearsay evidence have already been described *supra,* and it is difficult to say that such a procedure of collecting unsigned statements by the police of the applicant State can overcome the general shortcomings of hearsay. Yet, the Applicant's claim that hearsay evidence "should be assessed in the light of its content" is particularly interesting in the context of the content in which the hearsay evidence appears. The problem here is not that the Applicant attempts to use statements which to a certain extent contain hearsay, but in the Applicant's persistent efforts to rely upon the statements which: a) do not fulfill minimum evidentiary requirements, b) contain a great deal of hearsay, and, c) are largely irrelevant to the subject matter of a genocide claim. Under these circumstances, the Respondent does not need to analyze each part of the statements produced by the Applicant, which *prima facie* do not surpass the *Kovačić* shortcomings,[259] on a case-by-case basis.

[257] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 43.
[258] ICJ, *Corfu Chanel case (UK v. Albania),* Judgment of 9 April 1949, p. 17.
[259] *Ibid*, pp. 16 & 17: "Without deciding as to the persona1 sincerity of the witness Kovacic, or the truth of what he said, the Court finds that the facts stated by the witness from his persona1 knowledge are not sufficient to prove what the United Kingdom Government considered them to prove. His allegations that he saw mines being loaded upon two Yugoslav minesweepers at Sibenik and that these two vessels departed from Sibenik about October 18th and returned a few days after the occurrence of the explosions do not suffice to constitute

259. The relevance of the statements produced by the Applicant should be assessed in the light of the fact that the Respondent does not dispute that serious crimes were committed against Croat civilians, particularly during the first stage of the armed conflict in 1991. These crimes were characterized by the ICTY as crimes against humanity, and the Respondent does not dispute that finding. For some of these crimes, cases before the Serbian War Crimes Panel are under way. These are the crimes for which the Serbian President on several occasions addressed apologies to the Croatian citizens.[260]

260. Under these circumstances, the Respondent considers that a major issue that still divides the Parties in this case is the question of the existence of *dolus specialis*, *i.e*. the specific intent to destroy a group in whole or in part. This is a matter to be proven by the Applicant in this case. As the Court stated in the *Bosnia* case: "[*dolus specialis*] has to be convincingly shown by reference to particular circumstances".[261] The Respondent cannot see how the statements produced by the Applicant have anything to do with the above-quoted requirement, since they are useless for proving the factors on which State responsibility can be established. This is why the contested statements are irrelevant for the purpose of the Applicant's case.

261. The Applicant does not accept this characterization and asserts that, in any event, the objection to the relevance 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."[262] But, in a case before the Court, a distinction between the admissibility and the probative weight of evidence is without practical sense. It is clear that the Court does not have any special rule concerning the inadmissibility of evidence in the written proceedings, and it is not the Respondent's expectation that the Court will *in limine* dismiss the unsigned statements by excluding them from the case file. The Respondent's objection is rather directed to the process of deliberation, when

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decisive legal proof that the mines were laid by these two vessels in Albanian waters off Saranda. The statements attributed by the witness Kovacic to third parties, of which the Court has received no persona1 and direct confirmation, can be regarded only as allegations falling short of conclusive evidence. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here."

[260] See Counter-Memorial, para. 16.

[261] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 373.

[262] Reply, para. 2.36.

the Court will examine all evidence submitted during the written and oral proceedings. Nevertheless, the statements produced by the Applicant, by their very nature, cannot be seen as other than inadmissible. In order for evidence to be admissible, it must be relevant. For evidence to be relevant, it must tend to prove or disprove some fact that is at issue in the proceedings. It is obvious that the statements in question cannot fulfill these criteria.

262. In conclusion, the Respondent reiterates that the statements submitted by the Applicant do not fulfill minimum evidentiary requirements, and would not even be admissible in evidence before Croatian domestic courts. They were not gathered in accordance with the Croatian rules of criminal procedure. Indeed, the Applicant has offered no response to this argument. Moreoever, the reliability of these materials cannot be checked or, at least, it would take too long, compared to their possible value, to be verified properly before the Court.[263] These statements are full of hearsay, as well as allegations which are not relevant to the matter properly provable in these proceedings.

263. Additionally, in the Respondent's view, even the proper presentation of several hundred witness statements, including an opportunity for the Respondent to comment on the relevance and reliability of each of them, and/or to cross-examine each witness *in viva voce*, would create an unreasonable bias and undue delay in the proceedings. The Applicant's intention is problematic *per se*, and the Respondent considers that the production of such a large amount of documents has been directed solely to confuse the Court in its evaluation. Such an approach to the Court's proceedings has been subsequently dismissed by Practice Direction no. III, which in part addresses the tendency towards the proliferation of annexes to written pleadings.

B. Materials prepared by the applicant State for this case

264. The Counter-Memorial points out that the provenance of maps, photos, lists and graphics presented in the Memorial is largely unknown.[264] In some cases graphics and lists were prepared by the Croatian official bodies (in particular, the graphics called

[263] The requirements of fair proceedings demand that the Respondent be given the right to cross-examine the witnesses in order to fully test the Applicant's case.
[264] Counter-Memorial, paras. 163-166.

"Mass graves", "Lists of detained and missing persons" and list of "Damage to Cultural Monuments on Croatian Territory"). The Respondent contends that the above mentioned bodies cannot be treated as impartial and, consequently, their materials should be considered with great reserve.[265]

265. In its Reply the Applicant admits that "these materials have been prepared by official Croatian agencies to assist in the comprehension of material presented by the Applicant".[266] From this statement, as well as from the statement given in para. 2.58 of the Reply, one can conclude that the Applicant itself does not perceive these materials as evidence, but rather as statements that bear upon the issue, which the Court "may take into account" and "may accord them such legal effect as may be appropriate". The Respondent may agree with such a view in general, but states that these materials should, in any event, be dismissed as inaccurate, unreliable and useless for the purpose of the present case.

266. In this vein, the Respondent will further give a brief exemplary analysis of three updated lists annexed to the Reply (Annexes 41, 43 and 44), the first of which is the list of missing persons updated on 1 September 2010 (Annex 41) that contains names and personal data on 1,024 individuals. It is notworthy that among the listed persons are some Serbs whose names and other personal data are also listed in the "Veritas" Report (Annex 66 to the Counter-Memorial). An exemplary list of these persons who, according to the Report of the NGO "Veritas", were killed by the Croatian governmental and paramilitary forces is annexed now to the Rejoinder.[267]

267. For instance, the names of eight persons from the Croatian list submitted as Annex 41 to the Reply can be found in the Judgment of the Croatian County Court in Rijeka, no. K-11/01, in which Croatian military officers Orešković, Grandić and Norac were convicted for the murder of at least 50 individuals, mostly Serbs but also some Croats.[268] The name of Branko Lovrić, a Serb from Osijek (listed at no. 519 in Annex

[265] *Ibid*, para. 167.
[266] Reply, para. 2.52.
[267] Annex 1.
[268] These eight persons are: Čubelić Mile, listed at no. 148 in Annex 41 to the Reply (ethnic Croat); Hinić Gojko, no. 302 (ethnic Serb); Lazić Petar, no. 490 (ethnic Serb); Marić Borislav, no. 555 (ethnic Serb); Radić Pantelija, no. 762 (ethnic Serb); Stojanović Nikola, no. 837 (ethnic Serb); Tomičić Božidar, no. 918 (ethnic Croat); and Trešnjić Nebojša, no. 927 (ethnic Serb).

41 to the Reply) can also be found in the Judgment of the Zagreb County Court, among the victims of Branimir Glavaš and other accused who were members of the Croatian armed forces.

268. Furthermore, the Applicant's Updated List of Missing Persons contains at least 59 names of Croats who allegedly went missing in Bosnia and Herzegovina,[269] as well as at least 48 names of persons went missing in some parts of Croatia that were under the full control of the Croatian forces.[270] For example, the Croatian daily "Jutarnji list" of 15 July 2006 records that Nuić-Zoričić Ina, an ethnic Croat, listed at no. 646 in Annex 41 to the Reply, was killed by Croatian forces.[271] Also, Grgić Bogdan, a Serb from Zagreb, who was abducted by two armed men in HV uniforms on 23 November 1993,[272] was registered in the Croatian list of missing persons at no. 280. The list also contains the names of Croat persons who went missing during the offensive criminal Operations *Maslenica*[273] and *Storm*[274] led by the Croatian Government.

269. All of these examples should lead any careful observer of the Croatian list of missing persons to the inevitable conclusion that the list can only be perceived as an attempt to confuse the Court, and that it is unhelpful in clarifying the issues in the dispute.

270. The same conclusion can be inferred from the Croatian lists of exhumed bodies (Annexes 43 and 44 to the Reply). For the Respondent, there is no doubt that a great many bodies have been exhumed at different locations in Croatia. In total, 3,661 bodies have been registered in these two lists. Yet, there are at least 144 Serbs among the exhumed, out of which 140 were killed by Croatian forces.[275] In addition, 553 exhumed bodies, according to the Croatian lists, have not yet been identified and the national identity of those victims remains unknown.

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[269] See Annex 3.
[270] See Annex 4.
[271] *Jutarnji list*, Zagreb, 15 July 2006: „Sin Marine Nuić: Tužim državu jer su mi merčepovci ubili majku" (The son of Marina Nuić: I am suing the State because Merčep's people killed my mother).
[272] Amnesty International Report, October 1995, "An Unknown Destination – disappeared in former Yugoslavia".
[273] For example, Jergan Mile, listed at no. 349 in Annex 41 to the Reply; Periša Borislav, no. 709; Troskot Boris, no. 932.
[274] Kiseljak Tihomir, registered at no. 393 in Annex 41 to the Reply; Majkić Rade, no. 537; Smokrović Marijan, no. 819; Zebić Ivan, no. 999.
[275] See Annex no. 2.

271. The unreliablity and inaccuracy of these two lists is evident from the following data:

a) A significant number of exhumed individuals have been registered several times.[276]

b) At the location "Golubnjača III", 25 unidentified bodies have been exhumed. However, this was a notorious execution site of the Ustasha forces during World War II. There is no indication how old the remains discovered at "Golubnjača" are.

c) Among the identified persons, 21 were born before the year 1901. They would have been at least 90-year-olds at the beginning of the armed conflict in Croatia. There is no evidence when and how these persons died.

C. Documents concerning Croatian genocide and war crime cases

272. The Applicant submitted some documents[277] in support of the rebuttal of the Respondent's claim that the factual findings of Croatian domestic judgments are not admissible in the present case because, *firstly*, Croatian law applies a definition of the crime of genocide which is broader than the definition found in the 1948 Genocide Convention, and, *secondly*, these trials before Croatian courts have been widely criticized for their lack of impartiality and fairness.[278]

273. Having in mind that the Applicant has not used any of those domestic judgments as evidence in the present case, any further discussion about this issue and documents submitted by the Applicant in annexes nos. 83 – 91 to the Reply has become moot. However, some documents annexed to this submission assist in illustrating that the Respondent's claim is well founded in fact.[279]

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[276] For instance, Abramović Ive is registered at nos. 844, 858 & 869; Bartolić Slavka is registered at nos. 842, 856 & 867; Belčić Mara is registered at nos. 838 & 852; Borić-Rovišan Milka at nos. 843, 857 & 868; Ferderbar Jana is registered at nos. 845, 859 & 870; Ferderbar Vid is registered at nos. 860, 871 & 846; Gašljević Kata is registered at nos. 839 & 853; Kaurić Ivan is registered at nos. 840 & 854; Mareković Ivan is registered at nos. 849, 863 & 874; Osonički Milka is registered at nos. 841, 855 & 866; Pezerović Šefik is registered at nos. 851, 865 & 876; Špruk Vječeslav is registered at nos. 848, 862 & 873, and so on. All of these names appears at the list submitted as Annex 44 to the Reply.

[277] See Reply, „Domestic Criminal Prosecutions Documents", Annexes nos. 83-91.

[278] Counter-Memorial, paras. 184-199.

[279] See Amnesty International Briefing to the UN Committee against Torture, Annex no. 73; also, YIHR Report, Annex no. 74.

3. Other evidence produced by the Applicant

274. The Respondent does not put into question either the authenticity or the reliability of some exhumation reports annexed to the Applicant's written pleadings. The respondent State equally does not deny that serious crimes were unfortunately committed in Croatia including the murder of numerous civilians. However, it has not been demonstrated yet how those documents, technical in their nature, can usefully contribute to proving the *dolus specialis* of the crime of genocide.

275. The same conclusion can be drawn from the public statements of Yugoslav and RSK officials, as well as from the military documents produced by the Applicant as annexes to its Memorial. They contain neither direct nor indirect evidence about the existence of an intent to destroy the national and ethnical group of the Croat people as such, in whole or in part. Bearing in mind their contents, the produced public statements and military documents are in reality affirmative evidence that the required genocidal intent has never existed on the Yugoslav or Serbian side.

276. The Applicant mentions that the Respondent has not objected to these materials on the basis of any supposed lack of authenticity. This must be the reason why the Applicant produced documents, as annexes to the Reply, of highly dubious authenticity. Indeed, some of the documents, attached to the Reply, are merely pieces of paper, without any signature, seal, available data about a source, or any other information capable of confirming the authenticity of the alleged documents. These shortcomings appear in annexes 123, 131, 146, 150, 153, 157 and 178 to the Reply.

277. In the Reply, the Applicant also refers to four ICTY judgments which can be of considerable assistance in the present case, namely the judgments in the *Martić, Mrkšić et al, Jokić* and *Strugar* cases.[280] In the Respondent's view, these judgments strongly tend to confirm that the acts for which the accused were convicted cannot be legally characterized as genocide.

[280] For more details, see Counter-Memorial, para. 175.

4. Missing evidence to which the Applicant refers in the Reply

278. In the Reply, the Applicant frequently refers to many documents which have not been produced in the record before the Court. Most of them have been referred to in Chapter 4 of the Reply: "The JNA and the Paramilitary Groups". For example, in footnote 110 on page 116 of the Reply, six documents of the Croatian National Guard, dated 7 July, 11 July, 24 July, 5 August, 30 August and 3 September 1991, have been referred to by the Applicant, none of which have been submitted to the Court. The same approach can be registered in footnotes nos. 162 and 164 (page 125), 222 (page 136), 225 and 228 (page 137), 232 – 234 (page 138) and 236 (page 139). None of the referred documents constitutes part of a publication readily available, nor is in possession of the Respondent State's archives. The Respondent denies all allegations based on the documents listed above.

5. Relevance of the ICTY prosecutorial decisions to exclude a charge of genocide from the indictment against Slobodan Milošević

279. The Applicant objects to the conclusion of the Court in the *Bosnia* case that decisions by the ICTY Office of the Prosecutor not to charge genocide are of some relevance (paras. 2.26-2.33). In the *Bosnia* case, the Court stated:

> "Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide."[281]

280. The issue is obviously of relevance to the Applicant's position because the ICTY Prosecutor has never charged an accused with genocide with respect to any of the crimes perpetrated in Croatia. Moreover, after some initial attempts to prosecute the crime of genocide with respect to the conflict in Bosnia and Herzegovina, the Prosecutor has since failed to prove genocide with the exception of cases concerning the Srebrenica massacre of July 1995.

[281] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 217.

281. The Applicant argues that the failure of the ICTY Prosecutor to seek indictments for the crime of genocide with respect to crimes perpetrated in Croatia is not of significance. The Applicant's position is that the Prosecutor pursues the crimes for which he or she has reasonable chances of success, and that this depends upon the accused persons over whom the Prosecutor can obtain custody. The Applicant has since qualified its total dismissal of the relevance of a decision of the Office of the Prosecutor not to proceed on a charge of genocide by saying that if the decision is taken after "considered evaluation", then the decision's importance would be "minimal at best". Thus, according to the Applicant, it is not totally irrelevant. It is of some weight. In the Applicant's view, this depends upon whether the Prosecutor has made a "considered evaluation", although the Applicant fails to explain how the Court could eventually determine this; indeed, the Applicant concedes that it is impossible to know, given that the Prosecutor does not explain how these decisions are made.[282] In contrast, the Respondent submits that, following the Court's position in the *Bosnia* case, it seems logical to presume that decisions by the Prosecutor are not capricious, and that therefore there would always be a "considered evaluation".

282. The Applicant suggests that the Prosecutor may decide not to proceed on a charge for a range of reasons, including "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".[283] The main reason why the Prosecutor will exercise discretion not to charge a specific offence is not mentioned by the Applicant: as a responsible international official the Prosecutor will seek indictments and attempt to prove charges that realistically correspond to the acts that were perpetrated. The Prosecutor of the ICTY has a duty to act strategically and pursue not only the most serious crimes that can be proven, but also the most serious cases. The fact that there have been no charges of genocide with respect to any of the crimes committed against the Croatian

[282] Here, too, the Applicant's assertions are rather too absolute. The Prosecutor provided a public explanation of a decision not to proceed with an investigation into NATO bombing relating to the conflict in Kosovo in 1999: "Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor", The Hague, 13 June 2000, PR/P.I.S./510-e. Moreover, some of the Prosecutors have published memoires or articles commenting on these matters, including Richard Goldstone, whose reflections are cited in the Reply.
[283] Reply, para. 2.27(3).

people indicates that the entity responsible for the most thorough international investigations into the conflict in Croatia during the 1990s has failed to find evidence of the crime of genocide.

283. It is implausible that the Prosecutor decided not to charge genocide in *Milošević*, *Babić* and *Martić* because of the cost or length or manageability of proceedings. In fact, there can be little doubt that the Prosecutor produced the best evidence available, and that this would have been suitable for charges of either crimes against humanity or genocide. No cost, length or manageability issues manifest themselves. The same applies to the other grounds listed.

284. Most of the reasons for the failure of the Prosecutor to pursue genocide charges that are discussed by the Applicant in the Reply are not really germane to the issue in this case. There are no plea agreements by which genocide charges were withdrawn in exchange for a guilty plea with respect to Croatia. In the ICTY cases related to the conflict in Croatia, genocide has never been charged. This points to a policy of the Office of the Prosecutor that is independent of individual factors, especially given that many of the Croatia-related indictments involved senior leaders, including Milošević himself.

285. The remarks by Richard Goldstone,[284] former Prosecutor of the ICTY (from 1994 to 1996), written as a critique of the Court's Judgment in the *Bosnia* case, suggest that decisions by the Office of the Prosecutor were only based upon case-specific criteria whereas in fact they were the product of much reflection and analysis about the legal qualification of the events in Croatia by a sophisticated team of specialists. Judge Goldstone was being a bit cavalier to speak of a "relative handful of individuals" that included Milošević, etc. The decision of the Office of the Prosecutor to charge Milošević with genocide with respect to Bosnia and Herzegovina but not Croatia speaks volumes. It cannot be dismissed as being the result of efforts to save time or streamline an indictment. It is of some interest that Goldstone's remarks do not date from the time when he was Prosecutor, or even shortly afterwards, and they were not made in the context of a general reflection on prosecutorial policy or strategy.

[284] See the Reply, at paras. 2.28-2.31.

Goldstone's remarks followed the Court's ruling in the *Bosnia* case and were intended to challenge the reasoning of the Court because Goldstone was manifestly unhappy with its conclusions. Goldstone's remarks would have had more credibility if they had been made prior to the Judgment, rather than in response to it.

286. In any event, Judge Goldstone was Prosecutor at a very early stage in the work of the Tribunal, when it focussed on low-level accused simply because they were the only defendants over whom it could obtain custody. Over the years of its activity, the ICTY has become increasingly selective, both as a matter of its own evolving internal policy and because it was instructed by the United Nations Security Council to do so. In Security Council resolution 1503, adopted on 28 August 2003, the Council insisted that the Tribunal should be "concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction". Middle and lower-ranking suspects were to be transferred to the national courts. This is known as the "completion strategy". In order to comply with the completion strategy, the Judges of the Tribunal amended the Rules of Procedure and Evidence, adopted Rule 28(A) in 2004:

> "On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal."[285]

287. The Tribunal is to reject indictments that do not meet the standard. The Applicant actually invokes the completion strategy of the ICTY as an explanation for the absence of genocide charges with respect to Croatia. No further explanation is provided. It is hard to grasp the point. Perhaps the implication is that this would expedite matters. But that has never been the sense of the completion strategy, whose purpose is not to shorten trials by reducing charges. The *Martić* trial, involving a senior Serb leader, began on 13 December 2005, long after the completion strategy had been imposed. The trial of Ratko Mladić, who is charged with genocide, promises to prolong the life of the Tribunal for several years. In the context of the completion strategy, the

[285] ICTY, The Rules of Procedure and Evidence, 14 April 2004, available on http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev30_en.pdf

Tribunal has refused to authorize the transfer of accused persons to domestic courts where it considers that the crimes are of great seriousness.[286] It is required, by the Rules of Procedure and Evidence as amended in light of the completion strategy, to decline to transfer cases after assessing "the gravity of the crimes charged and the level of responsibility of the accused".[287]

288. The Applicant further notes that "there is no obligation on the OTP to charge the most serious crimes available on the totality of the evidence".[288] It is accurate to say that the Prosecutor has entire discretion here. But in contrast with domestic legal orders, there is no evidence in the practice of the Office of the Prosecutor to suggest that he or she "undercharges" crimes. Prosecutorial discretion does not mean that the Prosecutor acts in an arbitrary manner. The Prosecutor will, as a general rule, charge the most serious crime that can be sustained with regard to the acts in question. That is why, in some of the Bosnian cases, the Prosecutor did in fact attempt very strenuously to secure convictions for genocide. For example, in *Prosecutor v. Jelisić*, which was tried in 1999, the Prosecutor insisted in proceeding with genocide charges even after the accused had agreed to plead guilty to charges of crimes against humanity.[289] For the Prosecutor, it was important to attempt to establish the most serious qualification of the crimes that was possible. If it was not important for the Prosecutor to establish the crime of genocide, she would readily have accepted the guilty plea for crimes against humanity, which in any event would have resulted in a stiff sentence. And this was the same Prosecutor which, according to the Applicant, did not charge Milošević for genocide in Croatia for the sake of saving time.

289. Furthermore, even if the Prosecutor declines to file charges of genocide, there is no reason why a Trial Chamber could not suggest to the Prosecutor that charges be amended, to the extent that evidence reveals facts that might suggest the commission of genocide. Only the Prosecutor of the Tribunal has the authority to amend an indictment, subject to authorization by the Chamber. But nothing prevents a Chamber

[286] ICTY, *Prosecutor* v. *Dragomir Milošević* (IT-98-29/1-PT), Decision on Referral of the Case Pursuant to Rule 11 *bis*, 8 July 2005; ICTY, *Prosecutor* v. *Lukić* et al. (IT-98-32/1-AR11*bis*), Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007; ICTY, *Prosecutor* v. *Delić* (IT-04-83-PT), Decision on Referral of the Case Pursuant to Rule 11 bis, 9 July 2007.
[287] *Ibid*., Rule 11 *bis* (A).
[288] Reply, para. 2.27.
[289] ICTY, *Prosecutor* v. *Jelisić* (IT-95-10-T), Trial Chamber Judgment of 14 December 1999, para. 11.

from recommending that this be done. There is in fact at least one example of this in the case law of the ICTY. In the *Dragan Nikolić* case, a Trial Chamber proposed that the Prosecutor consider an amendment to charge genocide after it had heard evidence in the context of an *ex parte* hearing pursuant to Rule 61 of the Rules of Procedure and Evidence.[290] The Prosecutor did not act on the suggestion of the Trial Chamber but that merely reflects the Prosecutor's cautious approach to genocide charges and uncertainty within the Office of the Prosecutor, in 1995, that it would be possible to prove genocide in so-called "ethnic cleansing" cases. This proved to be correct, of course, as the case law of the Tribunal demonstrates.

290. The Applicant cautions against attaching importance to decisions in individual cases, given that the matter before the Court concerns State responsibility. That critique could extend to the other rationales provided by the Court in the *Bosnia* case for the use of ICTY materials, of course. In the early years of the ICTY, minor figures far from the seats of power were prosecuted, and it is indeed difficult to extrapolate relevant points with respect to State responsibility from these rather isolated defendants. But that can hardly be said of President Slobodan Milošević. Although he was prosecuted as *ab individual*, in reality the case against him was virtually indistinguishable from that of the State with which he was affiliated. The Respondent refers to the dissenting opinion of Judge Al Khawsawneh.[291] But even if the point that the learned judge makes is accepted, the alleged shortcoming of criminal trials, with their limited focus upon individuals, diminishes considerably when those being prosecuted are at the State's leadership.

291. The Respondent notes the comment by the Court in the Judgment in the *Bosnia* case that the ICTY agreed statements of fact have "a certain weight"[292] only when compared, for example, with findings of fact following a contested trial, which the Court considered to be "highly persuasive".[293] In the case of Croatia, that means that the findings of fact in *Martić*, established after a full trial, are considerably more authoritative than those in *Babić*, based on his plea agreement with the Prosecutor.

[290] ICTY, *Prosecutor v. Nikolić* (IT-95-2-R61), Review of Indictment Pursuant to Rule 61, 20 October 1995, para. 34.
[291] Reply, para. 2.27(7), ft. 38.
[292] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 224.
[293] *Ibid*, para. 223.

6. The Applicant's exit strategy: attempts to shift the burden of proof

292. In conclusion, the Applicant relies upon a limited amount of admissible and reliable documentary evidence. It is still very far from the standard of proof required for the crime of genocide. While a conclusion like this has been described in the Reply as "a characteristically sweeping approach", it cannot be denied that the Applicant has significantly contributed to such an approach by its casual treatment of the question of proof from the very beginning of this case.

293. The Applicant's awareness of the evidentiary deficiencies is visible to a careful reader of the Reply. Although the Applicant now tries to conduct itself in accordance with the Court's well-known practice and claims to accept the principle *actori incumbit onus probandi*, it also tries to shift the burden of proof to the Respondent as inconspicuously as possible. This has been attempted by three claims: a) that the Respondent has a duty to provide "an explanation";[294] b) that the Respondent has failed to advance any positive case in relation to the Applicant's claim;[295] c) that the Respondent has refused to disclose material evidence.[296] Each of these claims deserves a brief answer.

294. It is difficult to understand what the Applicant really means when using the term "explanation". The reasoning from the *Corfu Channel* case[297] cannot be applied here, because the situation is quite different. After all, the Applicant admits this in para. 2.83 of the Reply, leaving a reader without an explanation as to why the *Corfu Channel* case has been quoted in the first place. Nevertheless, the Respondent has given its explanations throughout the Counter-Memorial and continues to do so faithfully in this written pleading. A respondent State cannot be forced to give an explanation which would satisfy a claim of an applicant State or relieve the adversary from the burden of proof.

295. The same objective of the Applicant may be discerned from the observation that the Respondent has failed to advance any positive case in relation to the Applicant's claim. But, this is not a border dispute where two States would compete for the preponderance of evidence. This case is only about genocide, the crime of crimes,

[294] Reply, paras. 2.81 – 2.84.
[295] *Ibid*, para. 5.3 & 5.4.
[296] *Ibid*, paras. 1.13 – 1.14 & 2.85 – 2.91.
[297] ICJ, *Corfu Channel*, pp. 17 - 18.

where the element of *dolus specialis* must be established beyond reasonable doubt. It is often said that it is very difficult to prove the *dolus specialis* of genocide. Actually, when genocide does take place, there is generally little difficulty in establishing the mental element of the crime, which is clear from the statements and behaviour of the perpetrators, as is demonstrated in Chapter VIII of the Rejoinder vis-à-vis the counter-claim. Genocide is only difficult to prove when it does not actually take place. However, it is the Applicant's burden to establish its case. The idea that the Respondent at the same time should have a duty to prove that perpetrators did not posses the required intent is entirely out of question.

296. On the other hand, all reliable evidence produced by the Applicant clearly demonstrates, as noted *supra*, that a genocidal intent against the Croatian people never existed. One example is particularly illustrative. The Applicant has produced a list of persons of Croatian nationality who, according to the data of the Commission for Missing Persons of the Government of the Republic of Serbia (Annex 47 to the Reply, to which the Applicant refers in para. 2.54) were detained on the territory of Serbia in 1991/92. In total, 2,786 Croats were detained on the territory of Serbia in JNA detention facilities. One can reasonably conclude that, if indeed the JNA or the Serbian leadership, who allegedly had control over the Federal Army, had really had the intent to destroy the Croatian national or ethnic group as such, they would have had every opportunity to do so, either by committing mass killings against this group of detainees, or by inflicting on the group the conditions of life calculated to bring about its physical destruction in whole or in part. There is no doubt that opportunities for such acts were ample. Yet, if one takes a look at another annex to the Reply, the List of Missing Persons contained in Annex 41, one will hardly find persons who went missing on the territory of Serbia: merely six of them.[298] In addition, the Respondent now supplies a list of persons arrested in Croatia in 1991-92 who received professional medical treatment from the Military Medical Centre in Novi Sad, Serbia.[299] This is not how an army which possesses an intent to commit genocide usually conducts itself. On the contrary, this is affirmative evidence that such intent had never existed on the side of the JNA or the Serbian leadership.

[298] According to the data shown in Annex 41 to the Reply, the persons went missing on the territory of Serbia are Abjanović Ivica, registered at no. 2; Abjanović Mato, no. 3; Kiš Adam, no. 396; Križevac Zoran, no. 454; Lovrić Marin, no. 515, and Sunara Marko, no. 840.
[299] Annex 5.

297. Finally, the Applicant claims that the Respondent has exclusive access to "evidence (potentially) relevant to the determination of a key issue in the case" and, due to its refusal to produce it, should "face the prospect of adverse inferences being drawn by the Court."[300] The mentioned "refusal" has been explained as follows: "The Respondent has since provided the Applicant with a number of [the requested] documents but has withheld many others".[301]

298. The Respondent has not refused to produce the documents requested by the Applicant. In total, 223 available documents have so far been transferred to the Applicant's legal team, due to the agreed minutes from the meeting between representatives of the Parties held in Belgrade on 3 September 2010. In other words, the Respondent has provided the Applicant with all requested documents that existed in its State archives, and the Court was duly informed of this cooperation.[302] The Respondent cannot provide the Applicant with the minutes of the so-called "Meetings of the Six", which was neither an official body of the former SFRY nor of the Republic of Serbia. There are simply no written minutes available in the archive of the Respondent concerning the meetings of "the Six". Nor does the Applicant have any verifiable information that any verbatim or stenographic record was made during the meetings of the notorious "Six". As a matter of fact, the ICTY Prosecutor has never requested any such documents from Serbia nor introduced them in any case.

299. Moreover, during the above-mentioned meeting of the parties held in Belgrade, the Respondent invited the Applicant to use freely the Yugoslav Archives which, as a part of the legacy of the former Yugoslavia, belongs to all SFRY successors, not only to Serbia.

300. In addition, the Respondent notes that the Applicant relies upon the Agreement on Cooperation between the Chief State Attorney of the Republic of Croatia and the War Crime Prosecutor of the Republic of Serbia of 13 October 2006[303] through which the direct cooperation and exchange of evidence was established between the Parties. Thus, it is difficult to conclude that the Applicant does not have access to documentary evidence. Rather it has simply not succeeded in finding evidence of genocide in all available documentation, including the ICTY archive of hundreds of thousands of documents relating to the armed conflict and the crimes committed in the former Yugoslavia.

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[300] Reply, para. 1.14.
[301] *Ibid*, para. 1.13.
[302] See the Respondent's submissions dated 7 September 2010, 28 September 2010, 15 November 2010, 17 December 2010, and 18 May 2011 respectively.
[303] Annex 81 to the Reply.

CHAPTER IV

APPLICATION OF THE GENOCIDE CONVENTION

301. In the previous Chapter, the Respondent explained why the large amount of evidence produced by the Applicant cannot be taken as credible and reliable. The Respondent, however, does not disagree that serious crimes were committed during the armed conflict in the territory of the Republic of Croatia from 1991 to 1995. This Chapter responds to the Applicant's factual allegations and the legal arguments as they are presented in the Reply. The Respondent will clearly demonstrate that the crimes described in the Memorial and Reply do not fulfil the legal elements of the crime of genocide, nor of any other act punishable pursuant to Article III of the Genocide Convention.

1. General legal comments

A. Genocide and ethnic cleansing

302. Since the Application Instituting Proceedings was filed and the Memorial produced, the scope of Articles II and III of the Convention has been clarified in judgments of the trial chambers and the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia and in the seminal ruling of this Court in the *Bosnia* case. There can be no doubt that the international case law has become consolidated around a relatively restrictive construction of Articles II and III of the Convention. That the definition of genocide should be applied more liberally is an argument that has been expressed only in dissenting opinions.[304] In particular, the case law has insisted upon a distinction between genocide as the term is understood in the Genocide Convention and the concept of "ethnic cleansing", which involves "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area".[305] As the Court explained in the *Bosnia* case:

> "Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be

[304] See, *e.g.*, ICTY, *Prosecutor* v. *Krstić* (Case No: IT-98-33-A), Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004.
[305] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 190, citing Interim Report by the Commission of Experts, UN Doc. S/35374 (1993), para. 55.

> designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."[306]

303. Stubbornly, the Applicant has retained the interpretation of the crime of genocide that inspired its original Application, insisting that acts perpetrated on its own territory, whose intent and whose consequence appears to have been to drive ethnically Croat populations from certain regions, amounted to genocide, despite the lack of any serious evidence indicating that such acts were meant "to destroy, in whole or in part, a national, ethnic, racial or religious group as such". This is not the interpretation that the Respondent prefers. The Respondent considers that the interpretation of Articles II and III of the Convention adopted by the Court in the *Bosnia* case is a correct statement of the law and one that is generally consistent with the rulings of trial chambers and the Appeals Chamber of the ICTY.

B. Different national definitions of genocide do not affect the application of the Genocide Convention

304. The Applicant's original submissions, in 1999 and 2001, were premised on an approach to the interpretation of Article II of the Genocide Convention that has been rather systematically rejected in judicial determinations since that time, including, in particular, the Judgment of the Court in the *Bosnia* case. The Applicant had staked its claim on the prospect of a large and liberal approach being taken to the definition of the crime of genocide, something that at the time of its first filings might have seemed plausible. Refusing to abandon its application in light of the clarification that has been provided by rulings of both this Court and the ICTY, the Applicant invokes examples drawn from national practice. The suggestion seems to be that when national legislators incorporate the crime of genocide in their domestic criminal provisions, they contribute in some way to the interpretation of the provisions of the 1948 Genocide Convention. Innovations in national legislation and in its interpretation may be relevant to an understanding of the customary law of genocide, which exists alongside and in parallel to the Convention. But as the Applicant has done with respect to issues of attribution

[306] *Ibid.*

and the Court's jurisdiction *ratione temporis* (see Chapter II, above), the Applicant likewise blurs the distinction between the customary international law governing the crime of genocide and the provisions of the treaty itself. Even if one were to accept that the initiatives of a limited number of national lawmakers might provide insight into the content of the crime of genocide under customary international law, their relevance to the interpretation of the Genocide Convention as a matter of treaty law is far more doubtful. Indeed, it seems likely that some national legislators intend quite deliberately to enlarge the definition of genocide beyond the bounds of what is found in the Genocide Convention itself out of dissatisfaction with what they perceive to be an overly narrow definition. This may be of relevance in some contexts, but it has no bearing upon proceedings involving the application of the Genocide Convention itself. Even if it did, however, the limited evidence of national innovation in defining the crime of genocide should not be exaggerated.

305. In arguing for an expanded definition of genocide, the Applicant uses authorities from national law in support. In order to bolster its contention that the definition of genocide is enlarged to cover forms of "ethnic cleansing", the Applicant notes that "forcible population displacement" is listed as an act of genocide in Croatian law. The definition of genocide is derived from the law of the SFRY.[307] The Applicant goes on to provide other examples of the same phenomenon: *"*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." The Applicant is however distorting somewhat the extent of the redefinition by national legislators of the crime of genocide. For example, Armenia's legislation speaks of "violent re-settlement directed at the physical elimination of the members of this group" which is arguably much closer to the text of Article II of the Genocide Convention than "forcible population displacement". The same is true of the Russian Federation: "forced resettlement or the creation of other living conditions intended to physically exterminate the members of this group".

306. The Bolivian legislation does not seem to involve ethnic cleansing *per se*. Rather, it is a reformulation of para. (e) of Article II of the Genocide Convention ("Forcibly transferring children of the group to another group") so as to include adults.

[307] Reply para. 2.71, esp. fn 210.

307. Côte d'Ivoire's *Code pénal* says: "Le déplacement ou la dispersion forcée de populations ou d'enfants ou leur placement dans des conditions de vie telles qu'elles doivent aboutir à leur mort ou à leur disparition [...]." Again, this is not an example that supports Applicant's hypothesis.

308. Ethiopia's legislation is as follows: "The compulsory movement or dispersion of peoples or children, or placing them under living conditions calculated to result in their death or disappearance." This is, once again, really a somewhat amended version of para. (c) of Article II of the Genocide Convention, rather than authority for the introduction of "ethnic cleansing" into the definition. No source is given by the Applicant for the legislation being cited. A thorough study published recently by Oxford University Press, authored by David L. Nersessian, catalogues and analyses national legislation concerning genocide. There is nothing in that study to indicate that Costa Rica, Italy, Lithuania and Spain have incorporated "forced displacement" into their genocide legislation.[308] Some States have done this as part of a broader enlargement of the definition in very extravagant directions.

309. It is a fact that the definition of genocide that is found in the 1948 Genocide Convention has been subjected to modification by some national legislators. There have been several attempts to enlarge the definition, some of which amount to a total revision of the concept rather than an incremental expansion. For example, Paraguay includes "forced displacement", but it also adds such acts as "prevents the exercise of their religion or customary practices" and "forcibly disperses the community", and includes "social group" within the scope of the definition.[309] Nevertheless, the vast majority of national statutes adhere faithfully to the definition in the Genocide Convention. The definitions that differ stand out as idiosyncratic rather than as representative of some trend that would be relevant to assessing the scope of the term. In any case, even if the definition of genocide under customary international law were deemed to be different from that of the Genocide Convention, this cannot have any consequence in terms of the exercise of the jurisdiction of the Court pursuant to Article IX of the Convention, which must necessarily have as its basis the definition in the Convention.

[308] David L. Nersessian, Genocide of Political Groups, Oxford: Oxford University Press, 2010, at pp. 294-295, 304-305, 308, 309.
[309] *Ibid.*, p. 312.

C. The nature of the "destruction"

310. In para. 8.9. of the Reply, the Applicant writes:

> "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."

311. In the Memorial, the Applicant stated as follows:

> "On the other hand, it is not necessary that the conduct in question should have as its object the physical destruction of the members of the group. This can be seen from the inclusion in Article II of such elements as paragraphs (d) and (e). For example, the systematic practice of forcibly transferring the children of a protected group so that others will bring them up would result, within a generation, in the disappearance of the group and would amount to its destruction in the sense of Article II. The group, as such, would no longer exist, and those who deliberately engaged in that practice, intending that result, would be guilty of genocide. Yet that practice would involve neither the physical destruction of the parents nor of the children. Article I has to be interpreted as a whole, and the concept of the destruction of a group need not be interpreted as requiring the actual killing of many or most of them: it is not to be interpreted as if genocide were confined to the acts referred to in paragraph (a). In other words, 'intent to destroy' includes cases where a State seeks to destroy a group as an entity, even if it does not seek the physical destruction of many or most of the individual members of the group."[310]

312. In the Counter-Memorial, the Respondent stated: "'Destruction' means physical destruction of a group."[311] So that there is no ambiguity, the Respondent most definitely contests such an interpretation proposed by the Applicant. As a subsidiary argument, should the Court accept the Applicant's contention that "the destruction of a group cannot be equated simply with the physical destruction of members of the group", the Respondent maintains that this approach confirms the validity of the counter-claim. The Applicant's formulation is not without some equivocation and for

[310] Memorial, para. 7.44.
[311] Counter-Memorial, para. 61.

this reason the Respondent considers it necessary to review some principles about the construction of Article 2 of the Genocide Convention and the scope of the "destruction" that is envisaged.

313. Article 2 of the Genocide Convention uses the verb "to destroy". In the early drafts of the Convention, the concept of "destruction" was used more broadly than in the final version. The drafting began within the Secretariat, which had retained three experts, Raphael Lemkin, Vespasian Pella and Henri Donnedieu de Vabres, to prepare an initial version of the draft Convention. Their work was intended to provide the Economic and Social Council, which was responsible for the project at the time, with a range of options that might then be incorporated into a final negotiated agreement. Article I of the draft spoke of the "purpose" of the Convention being "to prevent the destruction of racial, national, linguistic, religious or political groups of human beings".[312] It was followed by a list of "Acts qualified as Genocide" that was prefaced by an introductory paragraph or *chapeau*:

> "In this Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development […]."

314. This was followed by three subparagraphs:

> "Such acts consist of:
> 1) Causing the death of members of a group or injuring their health or physical integrity by:
> a) group massacres or individual executions; or
> b) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or
> c) mutilations and biological experiments imposed for other than curative purposes; or
> d) deprivation of all mean of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.
> 2) Restricting births by:
> a) sterilization and/or compulsory abortion; or
> b) segregation of the sexes; or

[312] UN Doc. E/447, p. 17.

c) obstacles to marriage.

3) Destroying the specific characteristics of the group by:

a) forcible transfer of children to another human group; or

b) forced and systematic exile of individuals representing the culture of a group; or

c) prohibition of the use of the national language even in private intercourse; or

d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship."[313]

315. The Secretariat draft formed the basis of negotiations in the Ad Hoc Committee established by the Economic and Social Council. The Committee reworked the definition of the crime, presenting it in two distinct provisions. Article II was entitled "Physical and biological genocide". Article III was entitled "Cultural genocide".[314] With some drafting changes that are not relevant to the issue of "destruction", Article II of the Ad Hoc Committee version was adopted by the General Assembly and makes up the first four paragraphs of Article 2 of the 1948 Convention. Article III of the Ad Hoc Committee's draft was eliminated by the General Assembly in a very deliberate effort to ensure that the concept of genocide as contemplated by the Convention is restricted to "physical and biological genocide" although the proposed heading or margin note stating this explicitly was not retained in the Convention. There is a certain ambiguity about Article II caused by the addition of Article II(e) of the Genocide Convention, which refers to the forcible transfer of children from one group to another. The act of forcible transfer had been present in the Secretariat draft, in the paragraph dealing with acts that might be labelled "cultural genocide", but it was dropped in the cultural genocide provision of the Ad Hoc Committee draft. Late in debates of the third session of the General Assembly, this alternative was revived on a proposal from Greece, which noted that, while cultural genocide in principle had been excluded, there was one act of cultural genocide about which there had been no real controversy.[315] It is for this reason that Article II(e) refers to an act of genocide that does not refer to physical or biological destruction.

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[313] *Ibid.*
[314] UN Doc. E/800.
[315] UN Doc. A/C.6/242; UN Doc. A/C.6/SR.82 (Vallindas, Greece).

316. As the Court said, in the *Bosnia* case:

> "[A] proposal during the drafting of the Convention to include in the definition 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement."[316]

317. In the *Krstić* case, the ICTY Appeals Chamber wrote:

> "The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated: "[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide."[317]

318. A difficulty is created by the fact that certain punishable acts listed in the paragraphs of Article II of the Convention do not seem likely to lead to the physical destruction of the group. In particular, "causing serious … mental harm" in para. (b) and "forcibly transferring children" in para. (e) would seem good examples.

319. With respect to para. (e), it is clear from the drafting history that the forcible transfer of children was indeed viewed as a form of cultural genocide. It did not, obviously, involve physical extermination but rather the assimilation of a group by the elimination of elements of its cultural identity. As a result, there is somewhat of a

[316] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 190.
[317] ICTY, *Prosecutor* v. *Krstić* (Case No: IT-98-33-A), Appeals Chamber Judgment, of 19 April 2004, para. 25.

paradox in Article II, as it has been interpreted by this Court and by the Appeals Chamber of the ICTY, in that the words "intent to destroy" in the *chapeau* have been held to mean only physical or biological destruction despite the fact that one of the five punishable acts does not properly fit within this description.

320. The other example of an act of genocide that would not seem consistent with physical destruction is that of "causing serious … mental harm to members of the group". It does not appear plausible that such acts, taken alone, could effect the physical destruction of a protected group. Therefore, such acts could be punishable under the Genocide Convention only to the extent that they are perpetrated with the mental or psychological element of the intent to destroy the group in a physical sense. Although not essential, it would seem very unlikely that such acts be the only punishable acts of genocide in a given situation where genocide actually takes place. They would necessarily be accompanied by killing. In the absence of killing, it will be extremely difficult to conclude that there is intent to destroy the group physically. The more evidence there is of massive and systematic killing, the more plausible is the conclusion that this was conducted with the intent to destroy the group in whole or in part. Where evidence of massive and systematic killing is lacking, and where the main elements of the attack on the protected group consist of physical and mental violence falling short of actual homicide, the more unreasonable will be the conclusion that the perpetrators intended to destroy the group in whole or in part.

321. Thus, while a literal reading of Article II of the Convention may bolster the contention that various forms of destruction falling short of physical destruction are contemplated, relying in particular upon the specific acts of genocide enumerated in the subparagraphs, the prevailing interpretation, including the interpretation adopted by this Court in the *Bosnia* case, is that the words "to destroy" in the *chapeau* of Article II mean physical destruction. In other words, the intent must be to destroy the group in a physical sense, even if the specific acts themselves may sometimes appear to fall short of this. It must be borne in mind that the definition applies in the contexts of both individual and State responsibility. The drafting history indicates that the main concern was with a provision that would be applicable to the trials of individuals, although these individuals would be participating in a form of criminality involving structure and organization on a large scale. It is conceivable, for example, that an

individual might commit an assault causing serious bodily or mental harm on a member of the targeted group (Article II(b)). The individual offender might not, strictly speaking, contribute to the physical extermination of the group in committing such a crime. To the extent that the individual did so with the intent to destroy the group in a physical sense, then that individual would be guilty of genocide. In the case of an assault by one individual on another that caused serious bodily or mental harm, however, the intent to destroy the group might not be an easy inference or deduction.

D. Who can perpetrate genocide and how to prove it

322. This is one of the inevitable conundrums that results from treating the Genocide Convention and its definition of the crime as being applicable to both individual and State responsibility. One construction, though it is an approach that the Respondent considers to be implausible, is to treat the definition of genocide as one that is applicable essentially to individual criminal responsibility, like ordinary crimes such as murder and assault. As long as the individual perpetrates such a crime with the intent to destroy the group in whole or in part, then genocide has been committed, according to this theory. Presumably, then, State responsibility would be incurred as a result of this individual to the extent that the individual's conduct can be attributable to the State. One corollary of this thesis is that an individual, even a marginal and insignificant one, without any role in the activities of the State, acting alone, can perpetrate genocide.

323. The better view, the Respondent submits, is that liability for genocide starts with the State or its organs, and then is perpetrated by individuals who act in order to further a policy of the State. The words "with intent to destroy" that appear in the chapeau of Article II turn the interpreter towards the State itself. Only if the State seeks the physical extermination of the group, as opposed to its relocation, or its disappearance in a cultural sense, can we say that liability under the Genocide Convention is engaged.

324. Support for this view can be found in the Elements of Crimes of the Rome Statute of the International Criminal Court. The Elements of Crimes are intended to "assist the Court in the interpretation and application" of the definitions of crimes, including the

definition of genocide set out in Article 6 of the Rome Statute.[318] The Elements of Crimes were adopted by consensus by the Preparatory Commission of the International Criminal Court, a body whose participants included many States that are not yet parties to the Rome Statute, such as the United States, China and the Russian Federation. They were subsequently incorporated into the applicable law of the Court by consensus at the first meeting of the Assembly of States Parties, in September 2002.[319] The Elements of Crimes require that, in order for an individual to be found guilty of genocide, the following must be established:

> "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."

325. Clearly, this provision eliminates the possibility that conduct of individuals who act in isolation could be deemed to be genocide and a violation of the Convention, because such individuals are incapable of responsibility for a "manifest pattern" and are unable of effecting the destruction of a group. The Elements of Crimes thus make an especially helpful contribution to the interpretation of Article II of the Genocide Convention by providing a link between individual behaviour and the acts of the State. It is the State that is capable of effecting the destruction of the group.[320]

326. For these reasons, the words "with intent to destroy" that appear in the *chapeau* of Article II should not be overly coloured by the specific acts found in the subparagraphs. These acts, in the context of individual responsibility, may appear to fall short of physical destruction. In addition to the clear exception created by the Genocide Convention with regard to the case of forcibly transferring children from one group to another, attention might also be directed to the notion of "causing serious… mental harm". Many violent crimes will cause serious mental harm to individual victims, but it is inconceivable that such acts, even when perpetrated by more than one individual, could ever attain the level capable of effecting the destruction of the group.

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[318] Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art. 9.
[319] Elements of Crimes, ASP/1/3, pp. 108-55.
[320] Indeed, with respect to genocide, there are isolated pronouncements by the ICTY holding that an individual, acting alone, may perpetrate genocide, providing that he or she kills a member of the targeted group with the genocidal intent: ICTY, *Prosecutor* v. *Jelisić* (IT-95-10-T), Trial Chamber Judgment of 14 December 1999, para. 100; ICTY, *Prosecutor* v. *Jelisić* (IT-95-10-A), Appeals Chamber Judgment of 5 July 2001, para. 48.

327. When making proof of general intent, it is quite normal to rely upon inferences. Persons are deemed to intend the consequences of their acts. Absent evidence to the contrary, it is presumed that acts were perpetrated intentionally. But the same cannot be the case with offences of specific intent, like the crime of genocide.

328. Something additional is required precisely because there will often be more than one inference that can be drawn from the facts. For example, upon proof that a member of a national, ethnic, racial or religious group has been killed, various forms of criminal intent may be inferred, including negligence, general intent, the intent to commit crimes against humanity and the intent to commit genocide.. In its recent rulings on the application for an arrest warrant in the *Bashir* case, the Pre-Trial Chamber of the International Criminal Court refused to confirm charges of genocide because it said that this was not the only inference that could be drawn from the facts.[321]

329. The Appeals Chamber ordered the Pre-Trial Chamber to reconsider the application because it held that at the stage of issuance of an arrest warrant it was sufficient that genocide be one of the possible inferences, but it was not necessary for it to be the only inference.[322] Nevertheless, it is clear that, at the trial stage, where the Court must determine guilt or innocence, genocidal intent must be the only inference for a conviction to result. The situation is the same before this Court, where the question is not whether genocide may be one of the inferences to be drawn from the facts: it must be the only possible inference.

E. Genocidal intent cannot be inferred from "widespread and systematic attack" on civilian population

330. In the Reply, the Applicant introduces its theoretical discussion of the issue of genocidal intent with the observation that

> "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".[323]

[321] ICC, *Prosecutor* v. *Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.
[322] ICC, *Prosecutor* v. *Bashir* (ICC-02/05-01/09-OA), Judgment on the appeal of the Prosecutor against the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 February 2010.
[323] Reply, para. 9.48.

331. It is an interesting observation because the concept of "widespread and systematic attack" is taken from the law concerning crimes against humanity rather than that of the crime of genocide.[324] But care should be taken in transposing the language of crimes against humanity to the application of the Genocide Convention lest the distinct concepts become muddled. In particular, proof of a widespread and/or systematic attack on a civilian population committed with a discriminatory intent is not sufficient to prove the crime of genocide. Moreover, to the extent that proof of intent depends upon inference, as the Applicant suggests, it is attempting to infer genocidal intent from what would amount to proof of crimes against humanity, thereby failing to distinguish between these two distinct, albeit related categories of international crimes. The Respondent notes that while the United Nations was able to adopt a convention dealing with the crime of genocide in the years following its establishment, the adoption of a convention on crimes against humanity has eluded the organization for more than six decades. States are clearly prepared to assume obligations with respect to the crime of genocide that they will not undertake for the broader and often more nebulous concept of crimes against humanity.

332. The Respondent submits that proof of acts causing serious bodily or mental harm to members of a group, in this case the Croats, is not sufficient to establish the *actus reus* of the crime of genocide. Nor is it sufficient to establish that members of the group were killed, or that inhumane conditions of life were inflicted. The overarching *actus reus* of the crime of genocide is in fact the destruction of the group, in whole or in part. Such an *actus reus* involves a multitude of individual acts that contribute to this destruction. Proof that the physical or material element of genocide has been committed requires evidence not only of one of the enumerated acts in article II of the Convention but also that the group was in fact destroyed, in whole or in part. Otherwise, it becomes virtually impossible to distinguish genocide from other punishable international crimes deemed by international legislators to be less serious and to attract consequences that are less grave, such as "ethnic cleansing" and the crime against humanity of persecution. It is for this reason that the debate about genocide has never been engaged by the ICTY in the Croatian cases. There simply is an insuffient factual underpinning to require that the question about genocidal intent be posed.

[324] See, e.g., Rome Statute, Art. 7(1).

F. Conditions of life

333. The Applicant focuses particular attention on the third act of genocide: "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[325] The Applicant insists that "the actual physical destruction of the group does not need to have occurred" and claims that "Respondent has acknowledged that 'systematic expulsion from homes' can, according to the Court in its 2007 Judgment, also fall under Article II(c)".[326] Lest there be any misunderstanding here, the Respondent insists that the intention involve the physical destruction of the group. Systematic expulsion from homes may be a punishable act perpetrated within the context of a genocide, but it must be part of a "manifest pattern" that is capable of effecting the physical destruction of the group, and not merely its displacement elsewhere. The Applicant oversimplifies the Respondent's position and thereby distorts it. The above-cited paragraph in the Applicant's Reply contains a footnote to the Counter-Memorial. For the record, here is what that paragraph says:

> "Consequently, in order for deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part to constitute genocide, the prohibited acts must be accompanied with the intent to destroy the group. This is particularly relevant for the present case, since a large number of crimes committed against both Croats and Serbs could be qualified as 'ethnic cleansing', the practice which is usually equated to 'systematic expulsion from homes', and which can, according to the Court, constitute genocide, provided such action is carried out with the necessary specific intent. The Applicant, however, failed to prove that the expulsion of Croats, where it has occurred, was accompanied by the intent to destroy that population, while the Respondent will prove that the expulsion of Serbs was carried out with the required specific intent."[327]

The Applicant conveniently omitted the words "provided such action is carried out with the necessary specific intent".

334. The Applicant then goes on to make an astounding assertion: "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)."[328] This is obviously false. It shows the danger of trying to dissociate the individual paragraphs in Article II from the *chapeau.*

[325] Reply, para. 8.22.
[326] Reply, para. 8.22. Also, para. 947(3).
[327] Counter-Memorial, para. 84.
[328] Reply, para. 8.24.

G. Significance of attacks on religious symbols

335. In the Reply, the Applicant returns to its argument based upon the intentional destruction of objects of cultural and religious importance.[329] The Applicant refers to an admission made by the Respondent with respect to such acts, but insists on describing the Respondent's discussion of the matter "inadequate". But all that the Respondent did was to rely upon a paragraph in the Judgment in the *Bosnia* case that confirmed the exclusion of attacks on cultural and religious objects from the scope of the Convention. Within the context of litigation whose framework is established by the definition of the crime of genocide set out in the Genocide Convention, the relevance of the intentional destruction of objects of cultural and religious importance is that they may contribute to the evidence of genocidal intent. But absent evidence of the intent to destroy physically a protected group, proof that cultural and religious objects were targeted cannot fill the holes in a flimsy allegation. In the Counter-Memorial, the Respondent noted that the destruction of objects of cultural and religious importance is not a punishable act of genocide listed in Article II of the Convention. To the extent that debate on this point persists, the Respondent points to the early draft of the Convention, cited above, where explicit provision was made for attacks on cultural and religious objects under the rubric of what was called cultural genocide. Such acts were explicitly rejected as the drafting of the Convention progressed.

H. Preventing births within the group

336. In the Reply, the Applicant merely confirms the existence of a dispute between the parties on the application of this provision.[330] The Applicant's position seems to be that because there is some evidence of rapes being committed by Serb combatants during the conflict, that this establishes that such measures were intended to prevent births within the group with the intent to destroy the group. The Respondent notes that the Prosecutor of the ICTY has never made such a preposterous allegation in indictments for genocide with respect to the conflict in Bosnia and Herzegovina, whether they concerned Srebrenica or other acts and locations. It would have been more helpful if the Applicant had simply withdrawn this far-fetched aspect of its

[329] Reply, para. 8.23.
[330] Reply, para. 8.25.

claim.[331] Indeed, in the more general discussion on the physical or material element of genocide, in para. 8.47 of the Reply, the Applicant appears to abandon the gratuitous charge relating to preventing births within the group.

I. Other acts of genocide

337. Article III of the 1948 Genocide Convention lists what are sometimes called the "other acts" of genocide. Of course, genocide itself is contemplated by para. (a) of Article III. The Convention goes on to list four additional acts: conspiracy, direct and public incitement, attempt and complicity. In the Reply, at para. 8.27, the Applicant states: "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)." Careful scrutiny of Article III of the Convention should be sufficient to demonstrate that such an allegation is not very constructive. Three of the four acts listed in article III are what are called "inchoate crimes" in the literature. They are punishable even if genocide is not committed. They are preparatory acts. If genocide itself is established, as the Applicant insists will be the case, then findings on the inchoate crimes become superfluous. This seems to be the position taken by the Applicant elsewhere in the Reply.[332]

338. Perhaps this can be seen most clearly with respect to "attempt", which is one of the paragraphs in Article III. If the Court rules that the Respondent is responsible for acts of genocide under Article III(a), what would possibly be the sense of ruling that "individuals under its command or control" also *attempted* to commit genocide. In criminal prosecutions, a charge of attempt may sometimes be sustained where the prosecution fails to prove that the crime itself was perpetrated by the accused person. But where the crime itself is established, any charge of attempt is dropped.

339. The same observation can be made with respect to conspiracy, which is listed in Article III(b) of the Genocide Convention. Understandings of the concept of conspiracy vary depending upon the legal system in question. It is well accepted that the drafters of the

[331] Reply, para. 8.26.
[332] Reply, paras. 8.30 and 8.31.

Convention intended to cover so-called inchoate conspiracy, which is a concept known in the common law. Accordingly, where two or more people agree to perpetrate a crime they may be found guilty of conspiracy even if the crime that is the subject of their agreement is not actually committed. At the level of individual criminal responsibility, it may make sense to proceed with prosecutions for both genocide as such and conspiracy, and to convict on one or both counts depending upon the evidence. In particular, if evidence of genocide is lacking, proof that the accused participated in a conspiracy to commit the crime may be necessary in order to address impunity. But this makes little sense at the level of State responsibility, where the starting point is the involvement of the State, as the Applicant itself makes clear in its Reply.

340. The third inchoate act of genocide is direct and public incitement. The Applicant made some rather summary allegations in the Memorial[333] identifying acts of "incitement" and "hate speech", although it generally stopped short of claiming that these amounted to "direct and public incitement" pursuant to Article III(c) of the Genocide Convention. These allegations were addressed in the Counter-Memorial.[334] In the Reply, the Applicant returns to the point and refers to evidence produced by the Office of the Prosecutor in the *Milošević* trial[335], but the report by Professor de la Brosse adds nothing to the Applicant's case, since it concerns only hate speech and does not contain a single reference to incitement to genocide.[336] It is relevant to note that while there has been occasional evidence of "hate speech" in the case law of the ICTY, there have been no indictments for "direct and public incitement to commit genocide", even in the *Srebrenica* cases.

341. In the Reply, the Applicant also refers to the *Babić* case, noting that the Plea Agreement included an acknowledgement that the Accused had participated in "making ethnically inflammatory speeches aimed at fomenting an atmosphere of fear and hatred amongst the Serb population of the region".[337] The reference usefully highlights the fact that there is a distinction between words that incite hatred and

[333] Memorial, paras. 7.79-7.82, 8.23-8.26.
[334] Counter-Memorial, paras. 991-993.
[335] Reply, para. 9.52.
[336] It is worth noting how the Applicant misrepresents the findings of the report, by putting a reference to it behind its own words and thereby creating an illusion that the expert of the ICTY made conclusions which are actually only allegations made by the Applicant. This is typical for the Applicant's presentation of the case and further demonstrates its inherent weakness.
[337] Reply, para. 9.52.

"direct and public incitement to commit genocide". Proof of incitement to hatred is not sufficient to bring the conduct within the frame of Article III of the Genocide Convention. The ICTR Appeals Chamber has considered this distinction, notably in the so-called *Media case*:

> "The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention."[338]

342. The Appeals Chamber cautioned about confounding hate speech and direct and public incitement to commit genocide:

> "The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute [i.e. for incitement to comit genocide], he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide."[339]

343. For these reasons, the Applicant's claim in the Reply that the admissions in the *Babić* Plea Agreement should be taken as "further evidence of direct and public incitement" is plainly incorrect.

344. Finally, Article III(e) of the 1948 Convention makes "complicity" a punishable act of genocide. In the Reply, the Applicant devotes four paragraphs to this issue.[340] However, these paragraphs offer nothing new in support of the Applicant's allegations and actually demonstrate that the Applicant's intention to accuse the Respondent of every possible

[338] ICTR, *Nahimana et al.* v. *Prosecutor* (ICTR-99-52-A), Appeals Chamber Judgment of 28 November 2007, para. 692; footnote omitted.
[339] *Ibid.*, para. 693.
[340] Reply, 9.54-9.57. Also : Memorial, 7.85-7.95; Reply, 8.33.-8.37.

violation of the Convention can lead to very illogical consequences, such as accusing the same person of being a principal perpetrator and an accomplice, at the same time and based on absolutely the same finding of the ICTY.[341] The Respondent's position concerning this is fairly relaxed – since genocide has not been committed the Respondent cannot be held responsible either for commission or for complicity.

2. Rebuttal to the alleged genocidal activities in Eastern Slavonia

345. Chapter 5 of the Reply deals with events in Eastern Slavonia. It reviews material concerning various localities in this area, mainly in the period of 1991 and early 1992, drawing upon the Applicant's submissions, the Counter-Memorial and other sources, including the case law of the ICTY.

A. Some general remarks

346. In paras. 5.3 and 5.4 of the Reply, the Applicant accuses the Respondent of failing to produce "evidence" which it says "it must have in its possession".[342] The conclusion that the Applicant draws from this argument is that the Court should accept certain unspecified aspects of the evidence produced as being "unchallenged". This proposition is incorrect in law. Evidence must be weighed by the Court in accordance with principles of evidence that are well known and well-established. The fact that one party does not produce evidence in response does not mean either that the evidence of the other party is "unchallenged" or that the evidence should be accepted. The adverse party may challenge the credibility, the reliability and the relevance of such "unchallenged" evidence. This approach is especially important because "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive"[343] and the Court requires "proof at a high level of certainty appropriate to the seriousness of the allegation".[344]

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[341] Reply, 9.56-9.57.
[342] See also *supra*, Chapter III, paras. 297-300.
[343] *Corfu Channel* (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, para. 209.
[344] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, para. 210.

347. The Applicant points to criminal prosecutions involving Croatian Serb elements with respect to the conflict in Eastern Slavonia (paras. 5.7-5.8 of the Reply). That various crimes may have been committed by forces associated with the Croatian Serbs during the period of the conflict in Croatia is not, of course, in question. That the Respondent condemns such activity is established by the existence of prosecutions before the courts of Serbia, of which the Applicant takes due note.[345] However, none of the prosecutions, be they by the ICTY or by the courts of Serbia, were for genocide. Thus, the existence of such prosecutions is of marginal relevance to these proceedings and most certainly cannot be taken to advance the Applicant's case. On the other hand, Croatian courts did in fact register some convictions against Serbs for the crime of genocide. But these prosecutions were flagrantly politicized and relied upon extravagant definitions of the crime.[346] The Respondent notes that the Applicant has wisely resisted invoking these precedents which, had they been credible, might have been helpful to its case.

348. In paras. 5.9 to 5.11 of the Reply, the Applicant refers to new documents emanating from the JNA, claiming that these provide evidence of genocidal intent. The language in these documents is actually quite consistent with purely military objectives and activities. Like most language used in military operations, where there is talk of "mopping up" and "destruction" of "the enemy", it is possible to adopt extravagant interpretations, and that is what the Applicant has done. It is also worth noting that the Applicant interprets clear references to "Ustasha forces" as proof of a genocidal intent, claiming that they referred to the entire Croat population, while elsewhere in the Reply the Applicant devotes a lot of effort to interpret the words of its President, directed at the disappearance of Serbs (without specification), as relating to "Serbian forces".[347] Thus, according to the Applicant, when the JNA uses the word "forces" it means "population", while when President Tuđman uses the words "Serbs", he means "forces".

349. In paras. 5.12 and 5.13 of the Reply, the Applicant considers exhumation data. The validity of this material, which demonstrates that people died violently in Eastern Slavonia in 1991 and early 1992 – a matter that is not really in dispute – is discussed in this Rejoinder in Chapter III. This material amounts to nothing more than evidence

[345] Reply, para. 5.8.
[346] See Counter-Memorial, paras. 184 – 199.
[347] Reply, paras. 11.40-11.45.

of irregular burials, presumably of individuals killed during the period of the conflict. This evidence is therefore of little worth, if any, and most certainly cannot contribute significantly to any finding that the crime of genocide may have been committed. It is interesting that the exhumation reports do not provide evidence of genuinely mass graves of the sort found in Srebrenica, Rwanda and Eastern Europe following World War II. Rather, the burials seem to be of relatively small clusters of deceased persons, dispersed throughout the various regions and municipalities of Slavonia. This is not decisive, of course, but it is a relevant observation in making an assessment of whether the crime of genocide took place. The existence (or lack of it) of mass graves is a useful indicator pointing to an intent (or lack of it) to destroy a protected group.

B. Response to the specific allegations with respect to certain places in Eastern Slavonia

1) Tenja

350. Applicant considers events in Tenja in paras. 5.14-5.19 of the Reply.[348] Even if the facts alleged in the Memorial, as complemented by those of the Reply, are accepted, they paint a picture of an oppressive situation described by the ICTY Prosecutor, in one of the very rare references to Tenja in the proceedings of that Tribunal, as being "to chase the Croatian civilians out of the village of Tenja".[349] This is obviously inconsistent with a claim of genocide, which necessitates proof of the intent to destroy physically the targeted group.

351. The Memorial contains an entirely gratuitous and unsupported suggestion to the effect that "Croatian women were routinely raped".[350] This was challenged in the Counter-Memorial.[351] There is no explanation in the Reply, and therefore it should be presumed to have been abandoned by the Applicant.

352. The main component of the Reply is the description of new evidence which, the Applicant claims, corroborates the accounts of the witnesses. A careful reading of para. 5.17 of the Reply, which consumes one and a half pages, indicates that the Assistant Pathologist had examined eight bodies that he could identify and determined

[348] See also: Memorial 4.20-4.30, Counter-Memorial 659-664.
[349] ICTY, *Prosecutor v. Šešelj* (IT-03-67-T), Transcript, 6 July 2010, page 16234, lines 23-24 (cross-examination of defence witness Nenad Jović by Prosecutor Mathias Marcussen).
[350] Memorial, para. 425.
[351] Counter-Memorial, para. 662.

they had died of gunshot wounds. That is all. This corroborates the obvious fact that there was an armed conflict underway at the time (July to December 1991) but it corroborates little else and is of no assistance in addressing the issue of genocide. In its reply to the counter-claim, the Applicant itself stated this clearly enough:

> "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 death occurred or the identity of the perpetrator."[352]

2) Dalj

353. The Applicant considers events in Dalj in paras. 5.20-5.26 of the Reply.[353] The lengthy, detailed description of various episodes in an armed conflict, including consequences for civilians, certainly supports charges of violations of the laws of armed conflict but there is nothing to strengthen the Applicant's allegation that genocide was committed. Evidence of orders that a population be "displaced" and "banished" points to the possibility of forced displacement, but in no way indicates genocidal intent.

354. The Reply further takes issue with the observation in the Counter-Memorial that "it is obvious that an armed conflict took place in this village, with the Croatian forces constituting one side in that conflict".[354] The Reply says the acts alleged to have been committed "are not actions explicable by a legitimate armed conflict, but are evidence of the targeting of a civilian population […]."[355] But the Respondent has never contended that all loss of life in Dalj or for that matter elsewhere in the territory concerned by the Application, was the result of *lawful* acts of war. Nor does it have any difficulty with the admission, noted with satisfaction by the Applicant, that "the JNA was involved in the attack on Dalj".[356] Modern warfare often involves violations of the rules of international humanitarian law protecting civilians, by one or several parties to the conflict, and it would be preposterous to suggest that the military conflicts in the

[352] Reply, para. 12.47.
[353] See also: Memorial 4.31-4.37, Counter-Memorial 665-671.
[354] Counter-Memorial, para. 667.
[355] Reply, para. 5.22.
[356] Reply, para. 5.25.

former Yugoslavia were an exception. In any case, convictions of Serb combatants for war crimes are common enough at the ICTY and it is unrealistic to deny that they occurred. That is not the point here. The issue is whether evidence of the armed conflict and killings in Dalj, as described in the Memorial, the Reply and the evidence submitted, leads inexorably to the conclusion that acts of genocide were perpetrated. Even a summary review of this material indicates that there are many explanations for the killings other than the single one that the Applicant seeks to establish.

355. For example, at para. 5.24 of the Reply, the Applicant cites a witness who observed Zoran Čalošević giving orders that "the remaining non-Serb population of Dalj would be displaced and banished". As the Court has already held, the definition of genocide is not met when groups are defined negatively (the "non-Serb population"). Moreover, displacement and banishment is not synonymous with physical destruction and, while reprehensible, does not meet the definition of genocide set out in the Convention.

356. There is a lengthy citation from the Indictment in the Milošević case, but the Applicant concedes that this is only a discussion for "context" rather than for the substance of the charges,[357] and therefore the Respondent sees no use in pursuing the debate. As the Court has already held, charges in an indictment are unproven allegations and cannot be helpful in the creation of a factual record of the events.

3) Berak

357. The Applicant considers events in Berak in paras. 5.27-5.31 of the Reply.[358] The Applicant notes that since the memorial was prepared, it has obtained updated data indicating that forty-six bodies were exhumed from various sites in the area.[359] But what does this prove? As with the other locations examined above, the Applicant seems to consider that it is sufficient to establish that war crimes were committed to make its case under the Genocide Convention. For example, the Applicant charges that the Respondent "has not advanced any positive evidence of there being an armed conflict or combat activities in Berak at the relevant time", explaining the Applicant's claim that there were "no Croatian armed forces in the village when it was attacked and, despite

[357] Reply, para. 5.26.
[358] See also: Memorial, paras. 4.38-4.46; Counter-Memorial, paras. 6.72-6.76.
[359] Reply, para. 527.

JNA attempts to provoke an armed conflict, there was in fact no resistance".[360] While such allegations might be relevant in a prosecution for war crimes or crimes against humanity, they bring the Court no closer to assessing whether genocide was perpetrated.

4) Bogdanovci

358. The Applicant considers events in Bogdanovci in paras. 5.32-5.34 of the Reply.[361] As it has done with other localities in Eastern Slavonia, the Applicant argues that this was not a military engagement. This claim is hard to square with references, in the Memorial, to "relentless attacks using heavy artillery and infantry".[362] But if it were not a military engagement, what did these attacks consist of and who was being attacked? In any event, there is nothing substantially new in the Reply with respect to Bogdanovci, aside from the Applicant's claim that a failure by the Respondent to produce contrary evidence to an allegation should imply that it is established as a fact, a position that the Respondent considers to be contrary to all principles of evidence as discussed elsewhere in this Rejoinder.

359. The Respondent further draws the attention of the Court to a sentence in the Memorial: "The occupation was designed to make continued Croatian life in Bogdanovci impossible."[363] Possibly in 2001 when the Applicant prepared its Memorial it believed that "acts designed to make continued life of an ethnic group within a specific location impossible" met the definition of genocide. Subsequent case law confirms that this is not the legal test. The Applicant's allegation may meet the test for some forms of crimes against humanity but it cannot fulfil the criteria for the definition of genocide.

5) Šarengrad

360. The Applicant considers events in Šarengrad in paras. 5.35-5.38 of the Reply.[364] The discussion here is similar to that of the other locations in Eastern Slavonia. Details about alleged attacks upon civilians appear to be disputed, but these disputes do not really bear in a meaningful way upon the central issue in this litigation. That there was an armed

[360] Reply, para. 530.
[361] See also: Memorial 4.47-4.55, Counter-Memorial 6.77-6,82.
[362] Memorial, para. 4.53.
[363] Memorial, para. 4.55.
[364] See also: Memorial 4.56-4.61, Counter-Memorial 6.83-6.88.

conflict in Eastern Slavonia during the relevant period is hardly in dispute. That it involved acts directed against civilians is not really in dispute either. Yet, nothing in the Reply contributes to a better understanding of whether these acts and other acts in Eastern Slavonia did amount to violations of the Genocide Convention. All that the material in the Reply highlights is that the Application and the Memorial reflect a conception of the crime of genocide that may have appeared plausible in 1999 and 2001, at a time when the case law had not yet become consolidated, but that is no longer consistent with the view consistently taken by both, the Court and the ICTY in more recent Judgments.

361. To return to the Memorial, it says that "out of 904 villagers of Croatian nationality who lived in Šarengrad in 1991, 798 were exiled and during the occupation 4 persons disappeared and their destiny is still unknown. After these events 80% of the population was Serb."[365] This may describe forcible displacement of population but it, once gain, does not correspond to the definition of genocide as contained in the Genocide Convention.

362. In the Reply, the Applicant attempts to take the Respondent to task for its description of the Milošević indictment, asserting that the Respondent incorrectly states that Milošević was charged with the destruction of homes and property: "the actual charge was the crime against humanity of persecutions".[366] Of course, both descriptions are accurate. The facts involved "destruction of homes and property" while the legal characterization of these acts was "crimes against humanity". But if the Applicant wants to fault the Respondent for omitting apparently inconvenient legal details, it, too, is guilty of this, for it ought to have said "the actual charge was the crime against humanity of persecution, and not the crime of genocide".

6) Ilok

363. The Applicant considers events in Ilok in paras. 5.39-5.42 of the Reply[367] and offers comments that are very similar to those with respect to Šarengrad. They consist of allegations of bodies that were exhumed, a report of abusive remarks to a woman, and a reference to the Milošević indictment that attaches significance to the fact that it

[365] Memorial, para. 4.56.
[366] Reply, para. 5.37.
[367] See also: Memorial 4.62-4.72, Counter-Memorial 6.89-6.94.

involves a charge of crimes against humanity while not addressing the fact that it did not involve any charge of genocide. The only reference in the Milošević indictment to Ilok is an allegation of "the deportation to Serbia of at least **5,000** inhabitants from Ilok".[368]

7) Tompojevci

364. The Applicant considers events in Tompojevci in paras. 5.43-5.45 of the Reply.[369] The allegations are similar in nature to those in the preceding portions of the Reply, in that they paint a picture of expulsion of Croats that may be compatible with a charge of forcible displacement but that do not in any way correspond to genocide. The claims in the Memorial were obviously prepared in light of certain assumptions about the definition of genocide that case law has shown to be unfounded.

8) Bapska

365. The Applicant considers events in Bapska in paras. 5.46-5.49 of the Reply.[370] Once again, the Applicant suggests that the Respondent misrepresented the Milošević indictment by failing to mention that the charge was crimes against humanity. One good explanation for the Respondent's failure to indicate this is that this is a case concerning genocide and not one concerning crimes against humanity.

9) Tovarnik

366. The Applicant considers events in Tovarnik in paras. 5.50-5.53 of the Reply.[371] In para. 5.53, the Applicant states: "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, para. 4.95, in which it is noted that Milošević had told his soldiers that their task was to 'kill and destroy everything Croatian', and paras. 4.97-98)". Why is this "highly significant"? There has been no finding of fact by any tribunal about this allegation with respect to Milošević. There is no serious evidence that "Milošević had told his soldiers that their task was to 'kill and destroy everything

[368] ICTY, *Prosecutor v. Slobodan Milošević* (IT-02-54-T), Second Amended Indictment, 27 July 2004, para. 36(k) (emphasis in the original).
[369] See also: Memorial 4.73-4.80, Counter-Memorial 6.95-6.99.
[370] See also: Memorial 4.81-4.93, Counter-Memorial 700-704.
[371] See also: Memorial 4.94-4.106, Counter-Memorial 705-711.

Croatian'". Milošević was not charged with making such a statement and nowhere in the record of his own trial is there any evidence to suggest that he ever made such a statement. The "authority" in the Memorial for this statement is a witness statement by JV; *assuming* that a Serb soldier actually told her such a thing, this is hardly evidence that Milošević made such a remark. It is a textbook example of uncorroborated hearsay, and the Court should disregard it entirely.

10) Sotin

367. The Applicant considers events in Sotin in paras. 5.53-5.56 of the Reply.[372] The Applicant says that the Respondent has failed to respond to evidence of "genocidal intent", giving as an example para. 4.111 of the Memorial. Actually, para. 4.111 describes very brutal abuse and torture of a father and son by unnamed soldiers in an unnamed location, where they were subjected to sexual violence. However, this example of an isolated derogatory crime against two individuals in no way supports or assists in a claim of genocide.

11) Lovas

368. The Applicant considers events in Lovas in paras. 5.57-5.62 of the Reply.[373] The allegations with respect to Lovas consist largely of a lengthy reference to a trial held in Belgrade. There is a harrowing description of what probably amount to war crimes and might also be deemed crimes against humanity, but there is nothing here to assist a claim that genocide was perpetrated. As with previous localities, the Applicant presents evidence of a body count for exhumations, demonstrating that individuals died in the locality, but without any further information to indicate the cause of death, the circumstances of death and the identity of victims that might assist the Court in assessing the validity of a genocide charge.

12) Tordinci

369. The Applicant considers events in Tordinci in paras. 5.63-5.64 of the Reply.[374] The brief remarks in the reply dealing with Tordinci are similar in nature to those for the other localities and there is no need to add further comments here.

[372] See also: Memorial 4.107-4.115, Counter-Memorial 712-716.
[373] See also: Memorial 4.116-4.113, Counter-Memorial 717-721.
[374] See also: Memorial 4.133-4.138, Counter-Memorial 722-726.

13) Vukovar

370. The Applicant considers events in Vukovar in paras. 5.65-5.82 of the Reply.[375] The most significant episodes in the conflict in Eastern Slavonia took place in Vukovar, and these attract the bulk of the discussion in the Reply, as they did in the Memorial and the Counter-Memorial. The Applicant refers to the decisions of the International Criminal Tribunal for the former Yugoslavia concerning the Vukovar region, asserting that they "represent an illustration of the extent and gravity of the atrocities visited upon the Croat".[376] The Respondent observes, once again, that the crime of genocide has never been charged by the ICTY with respect to the events in Vukovar in 1991, nor have the judges ever suggested this to be the way to characterize the nature of such events.

371. In the Reply, at para. 5.71, the Applicant states: "The suggestion at paragraph 731 [of the Counter-Memorial] 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…" Perhaps the comment in the Counter-Memorial needs some explanation. Shelling is a method of "killing" so it is certainly capable of being a genocidal act. But in the absence of further evidence it also suggests an engagement that is essentially military in nature and not an approach to killing that would suggest intent to destroy a national group. For one thing, it is not a particularly good way to distinguish between Croats (allegedly targeted with the required *dolus specialis*) and other groups not targeted for genocide. In that respect it is particularly relevant to note that a significant number of Serbs continued to live in Vukovar during the shelling of the town.

372. As a matter of fact, the convictions before the ICTY concerning Vukovar have not even involved crimes against humanity. JNA General Mile Mrkšić and Major Veselin Šljivančanin were convicted of the war crime of torture with respect to prisoners of war, while Mrkšić was also convicted of the war crimes of killing and cruel treatment. They were acquitted of charges of crimes against humanity at trial,[377] and the Prosecutor's appeal was dismissed.[378] The third co-defendant, Miroslav Radić, was acquitted of all charges.[379]

[375] See also: Memorial, 4.139-4.192, Counter-Memorial, 727-748.
[376] Reply, para. 5.65.
[377] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, 711-714.
[378] ICTY, *Prosecutor v. Šljivančanin et al.* (IT-95-13/1-A), Appeals Chamber Judgment of 5 May 2009, para. 44.
[379] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, para. 714.

373. Thus, with respect to the events at the Vukovar Hospital and Ovčara Farm, it is incorrect to state that "findings are, in essence, the same as the case asserted by the Applicant".[380] The Applicant is clearly uncomfortable with the judgments of the ICTY in the *Vukovar* case (*Mrkšić et al*.), and goes to some pains to insist that, by their own admission, the judges of the ICTY "made it clear" that they were considering "only a limited part of the atrocities committed in Vukovar".[381] As the Applicant explains in the Reply, the judges of the Trial Chamber did not hesitate in underscoring examples of atrocities of which they heard evidence but that were not included in the indictment. The Applicant's objective here is to mitigate the damage done to its case by the judgments of the Tribunal in *Mrkšić et al*.

374. But the Applicant's approach is not as helpful to its case as it may think. By demonstrating that judges of the ICTY are willing to comment upon crimes and situations that are not actually included in the indictment, the Applicant enhances the significance of the absence of references to genocide in the judgments of the Tribunals with respect to the Croatia cases. If the Trial Chamber in *Mrkšić et al.* was comfortable indicating that other crimes than those charged in the indictment may have been committed, why would it hesitate to use the term "genocide" if this seemed appropriate under the circumstances?

C. Conclusions with respect to Eastern Slavonia

375. With respect to the charges concerning alleged genocide committed in Eastern Slavonia, the Reply contains rather lengthy recitals of alleged atrocities that were committed in the course of an armed conflict. As is well known, the conflict had an important ethnic dimension. Ethnic hatred no doubt figured in much of the behaviour of those responsible for the crimes that were committed. But there is nothing new in this material referred to in the Reply to strengthen the Applicant's case.

376. In its Memorial, the Applicant relied upon a large and expansive interpretation of the crime of genocide that had been defended by some writers and human rights activists. At the time it filed its Application and submitted the Memorial, there was a virtual absence of recent judicial decisions on the subject and perhaps, therefore, an unclear situation in terms of the scope of the crime. That has all changed, with the ruling of this Court in the *Bosnia* case and several important decisions of the Trial and Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia. In the Reply, the Applicant tries to reformat its claims and its evidence in order to correspond to the prevailing interpretation of the crime of genocide. The case law and other relevant materials of the ICTY in the cases concerning Croatia are of no assistance to the Applicant in this respect. The Applicant is arguing a case that has become plainly overtaken and outdated by the clarification of the law to the extent that it might every have been arguable.

[380] Reply, 5.80.
[381] Reply, para. 5.74.

3. Rebuttal to alleged genocidal activities in the rest of Croatia

A. Some general remarks

377. The discussion in Chapter 6 of the Reply of the events elsewhere in Croatia is similar to that of Eastern Slavonia, which has always been the focus of the Applicant's case. The weaknesses in the Applicant's discussion of Eastern Slavonia are repeated in its review of the facts concerning the rest of Croatia. As the Applicant contended in the Memorial, the "same genocidal pattern analysed in detail in the case of Eastern Slavonia, was repeated elsewhere in these other occupied areas".[382] Thus, the frailties of the case concerning Eastern Slavonia also pervade this portion of the Applicant's submissions and in particular Chapter 6 of the Reply.

378. The Applicant attempts to smother the Court with details of various apparent violations of the laws or customs of war committed during an ethnic conflict in the hope that this may all add up to the crime of genocide. In fact, the Applicant hews to the erroneous interpretation of the crime that it adopted at the time that it filed its Application and its Memorial. Since then, clarification of the law by this Court and by the ICTY has confirmed the mistaken perspective taken by the Applicant. In the Reply – its first substantive submission in this case since the important judgments of this Court and of the Appeals Chamber of the ICTY concerning the scope of the crime of genocide – the Applicant has struggled to repackage its evidence to fit it in the interpretation of the Genocide Convention adopted by the Court and the ICTY. But this attempt was bound to fail.

B. Western Slavonia

379. The Serbian Autonomous Region (Srpska autonomna oblast – SAO) of Western Slavonia was established in August 1991. It was later integrated into the Republic of Serbian Krajina (RSK). As a result of Operation *Flash* in May 1995, the region fell again under the control of the Croatian government. The judgments of the ICTY have not addressed the situation in Western Slavonia in any significant way.

[382] Memorial, para. 1.30.

380. The Applicant considers events in *Pakrac* in paras. 6.2-6.7 of the Reply.[383] The discussion concerns responsibility for individual killings and offers no assistance in assessing the validity of charges of genocide.

381. There is an isolated account of an alleged rape associated with mutilation of the body and murder in the Memorial.[384] Another allegation concerns the alleged torture and mutilation of captured prisoners of war by other soldiers.[385] The Reply faults the Respondent for not addressing these allegations. In addition to the inherent unreliability of these allegations,[386] the Respondent submits that nothing in these alleged facts contributes to an assessment of whether or not genocide took place. Theoretically, of course, such acts might correspond to the *actus reus* of genocide. However, in the absence of any compelling evidence that they were committed with specific genocidal intent, they may be described using a variety of criminal law qualifications.

382. The Applicant considers events in *Podravska Slatina* in paras. 6.8-6.13 of the Reply.[387] As with *Pakrac*, it affirms that the Respondent has not answered specific charges. The Respondent is not sure what to make of the Applicant's reference to the Respondent's "comments on the allegations which it does address".[388] After all, if it did not address the allegations, then how can it be explained that it made "comments"? The affirmation that the Respondent did not answer charges of rape[389] sounds quite damning, but on closer examination, the actual allegation consists of a report from a witness who "heard a woman being raped".[390] The woman is not identified in the Memorial. The Respondent has no way of replying to such a charge. This is one among many examples where the Court cannot reasonably expect an answer from the Respondent to a rather gratuitous allegation, not properly identified, described or substantiated. Under general principles of law, there is no shift of a burden of proof with respect to vague allegations of this nature.

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[383] See also: Memorial, paras. 5.15-5.27; Counter-Memorial, paras. 749-755.
[384] Memorial, para. 5.17.
[385] Memorial, para. 5.27.
[386] See Chapter III, section 2.A.
[387] See also: Memorial, paras. 5.28-5.49; Counter-Memorial, paras. 756-766.
[388] Reply, para. 6.9.
[389] Reply, para. 6.8.
[390] Memorial, para. 5.30.

383. Another case of this sort appears in para. 5.33 of the Memorial. Allegedly, an unidentified Croat who was tied to a tree had his legs slashed with a chain saw and then was cut in half "by Serb soldiers". The source is a newspaper or journal article from 1998, seven years after the events, and a report entitled "Anatomy of Deceit" signed by someone named "Dr. Jerry Blaskovich" in something called "Modern Times". But "Anatomy of Deceit" appears to be a book, and the reference is not to the book itself, which was published in 1998, but to a book review. Nothing suggests that Blaskovich himself was a witness to this event. The Respondent does not consider that any burden has shifted on it to rebut such enormous and extravagant allegations, no matter how horrible they may sound, given the lack of any reliable authority or source. Yet the Reply faults the Respondent for not providing a direct answer to this story,[391] which is in fact answered in para. 971 of the Counter-Memorial.

384. It is not the Respondent's contention that war crimes and other atrocities were not perpetrated during the conflict in 1991 in Podravska Slatina. But the Respondent cannot be expected to answer each and every allegation, no matter how gratuitous and inadequately explained or substantiated. In any event, these accusations refer to relatively isolated acts and occurrences, and even if proved, would do little or nothing to assist the Court in evaluating the central issue in these proceedings, namely whether the mental element of the crime of genocide existed with the Respondent or anyone else for whose actions the Applicant claims the Respondent is responsible.

385. The Applicant considers events in Daruvar in paras. 6.14-6.19 of the Reply.[392] Once again, the Applicant comments on the fact that the Respondent "fails" to comment on the certain allegations. The first of these is an allegation of "physical and psychological violence" in para. 5.52 of the Memorial. The paragraph has no reference and there is no indication of the source of the accusations. It claims that five civilians were captured by "rebel Serbs" and "physically and psychologically maltreated". No details are provided as to the nature of such maltreatment. The Respondent takes the view that the burden of proof does not shift when an allegation is set forth in such a vague and unsubstantiated manner. The Court should simply disregard para. 5.52 of the Memorial.

[391] Reply, para. 6.8.
[392] See also: Memorial, paras. 5.50-5.; Counter-Memorial, paras. 756-766.

386. Again, the Respondent is not denying that war crimes and similar atrocities were perpetrated during the armed conflict. Such allegations, in the absence of further evidence indicating that they were perpetrated with the specific intent to destroy a national, ethnic, racial or religious group, do not, however, assist the Court in determining the central legal question in these proceedings.

C. Banija

387. The Applicant considers events in the Municipality of *Glina* in paras. 6.20-6.24 of the Reply.[393] As it did in the various sections concerning Western Slavonia, the Applicant faults the Respondent for failing to refer to certain atrocities mentioned in its Memorial. Here it cites "the physical and psychological violence (Memorial, para. 5.52) and torture (paras. 5.53-54) including mutilation (para. 5.55) that was visited upon the Croat population of Glina Municipality". Paras. 5.52-5.55 of the Memorial refer to Dulovac in the Municipality of Daruvar and have nothing to do with the Municipality of Glina. Obviously, the Applicant has made a mistake, but what it intended is not apparent to the Respondent and this makes it impossible to reply.

388. In para. 6.21, the Applicant reports a statement by MČ who claims to have heard Dr Dušan Jović call upon Serbs to "kill and slay every living creature of Croatian origin". This is a serious allegation, but one that the Respondent is incapable of denying or confirming. Dušan Jović allegedly disappeared from sight in 1992. The Respondent knows of no witnesses who can assist in either denying or confirming the statement. No evidence is provided to indicate when and where the statement was made, or to whom aside from the general words "Serbs'.

389. Other paragraphs in the Reply concerning the Municipality of Glina rehearse material that has already been presented exhaustively before the Court. These may provide evidence of war crimes and other atrocities committed during an armed conflict, but they do not provide any elements to indicate that the perpetrators intended the physical destruction of a national, ethnic, racial or religious group.

[393] See also: Memorial, paras. 5.78-5.93; Counter-Memorial, paras. 777-787.

390. The Applicant considers events in the Municipality of Petrinja (paras. 6.25-6.28 of the Reply), Dvor na Uni (paras. 6.29-6.31) and Hrvatska Kostajnica (paras. 6.32-6.39).[394] The allegations are similar in nature to those for the Municipalities of Glina and for Eastern Slavonia, in particular the claim that Respondent has not answered every single allegation in the Memorial. As the Respondent has explained repeatedly, such allegations are vague and general in nature, and often not substantiated with adequate references. The Respondent does not believe that it is under a burden to offer any answer.

391. The Applicant refers at great length to various findings of the ICTY in *Martić*. Of course, *Martić* was not even charged with genocide. Moreoever, the Trial Chamber never even suggested that the facts in evidence might have justified a conviction for the crime of genocide (see *infra*, Section 4).

D. Kordun and Lika

392. The situation in Kordun and Lika during the conflict is described in considerable detail in the decision of the ICTY in *Martić* case. The Applicant interprets this decision as indicating a finding of fact by the Trial Chamber that "killings were a methodical and cruel attack on an unarmed civilian population, driven by ethnicity of the victims".[395] A careful reading of the Counter-Memorial indicates that the Respondent is not denying that killings took place, that they were methodical, directed at civilians, and driven by ethnicity. These were condemned in the Judgment as crimes against humanity. However, the Respondent is critical of the methodology of the Applicant, which makes no distinction between persons killed as a result of warfare and those who were intentionally targeted on the basis of ethnicity.

393. The Applicant considers events in the Municipality of Vrginmost (paras. 6.42-6.44 of the Reply), Slunj (paras. 6.45-6.52), Ogulin (paras. 6.53-6.57), Karlovac (paras. 6.58-6.60), Otočac (paras. 6.61-6.63), Gospić (paras. 6.64-6.65), Titova Korenica (paras. 6.66-6.70) and Gračac (paras. 6.71-6.72).[396] The allegations are similar in nature to

[394] See also: Memorial, paras. 5.94-5.122; Counter-Memorial, paras. 788-821.
[395] Reply, para. 6.56.
[396] See also: Memorial, paras. 5.138-5.186; Counter-Memorial, paras. 822-873.

those for Western Slavonia and Eastern Slavonia, as is the reaction from the Respondent. It appears that much of the disagreement is about the interpretation of the scope of the decision of the ICTY in *Martić*. It is expected that the Court will make its own assessment of the significance of the Judgment in *Martić*, including the fact that the Tribunal made no finding of genocide.

E. Dalmatia

394. The Applicant considers events in the Municipalities of Šibenik (paras. 6.73-6.74 of the Reply), Drniš (paras. 6.75-6.79), *Knin* (6.80-6.85), [397] Obrovac (paras. 6.88-6.89 of the Reply), Benkovac (paras. 6.90-6.92) and Zadar (paras. 6.93-6.94). The allegations are similar in nature to those for other areas, as is the reaction from the Respondent.

395. The Applicant concedes that there have been no prosecutions by the ICTY with regard to the Municipalities of Šibenik and Drniš, but notes that there is reference to the Municipality of Drniš in two paragraphs of the Judgment of the Trial Chamber in *Martić.* This observation is useful for two reasons.

396. *First*, it demonstrates that the Trial Chambers of the ICTY are not averse to pronouncing themselves *ultra petita*, so to speak. And this makes their silence on certain matters quite significant. In its attempts to "package" the judicial determinations of the ICTY, the Applicant has contended that the failure of the Tribunal to speak to certain issues of fact and law is not significant and, in effect, neutral, but this is obviously not the case.

397. *Second*, the reference to the Municipality of Drniš in the Judgment in *Martić* case provides its own explanation as to why there have been no prosecutions by the Tribunal. In that Judgment, the Trial Chamber observed that there was "harassment and intimidation" of the Croat population. Probably, the Prosecutor did not consider "harassment and intimidation" to fall within the subject-matter jurisdiction of the Tribunal, which can only prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, crimes against humanity and genocide.

[397] See also: Memorial, paras. 5.202-5.231; Counter-Memorial, paras. 874-911.

398. As it did with respect to the Municipality of Drniš, the Applicant attempts to extract implications from the Judgment of the Trial Chamber in *Martić* vis-à-vis Municipality of Knin in order to make it show more than it actually does, but thereby no doubt unintentionally but very effectively bolsters the Respondent's contention that the silence of the Tribunal on certain matters speaks volumes.

399. It is uncontested that Milan Martić, the leader of the Croatian Serb regime at the time, was neither charged nor convicted of killings in Knin. Thus, the Applicant places "reliance upon the fact that the killings had occurred, and that they formed part of the overall pattern of persecution of the Croat population", as well as to "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".[398] But the Prosecutor did not charge Martić with genocide either. If the Trial Chamber was willing enough to go beyond the indictment and make general observations about crimes that were not charged, why did it not accuse Martić of the crime of genocide, which is also within the subject-matter jurisdiction of the Tribunal?

400. Concerning the Municipalities of Obrovac, Benkovac and Zadar, the allegations are similar in nature to those for the other municipalities, as is the reaction from the Respondent. It appears that much of the disagreement is about the interpretation of the scope of the decision of the ICTY in *Martić*. It is expected that the Court will make its own assessment of the significance of the Judgment in *Martić* case, including the fact that the Tribunal made no finding of genocide.

401. The Applicant considers events in the Municipality of Sinj in paras. 6.95-6.96 of the Reply.[399] The Applicant submits new material, produced within the United Nations, to demonstrate that Serb combatants placed explosives in an unsuccessful attempt to destroy a hydro-electric dam. There were no victims of this "crime". There is much speculation in the Memorial about the purpose behind the efforts to destroy the dam. However, there is no actual evidence other than pure surmise as to the purported intent. The new material produced by the Applicant cites one team of United Nations experts warning that destruction of the dam might create "a major environmental

[398] Reply, para. 6.80.
[399] See also: Memorial, paras. 5.232-5.234; Counter-Memorial, paras. 912-916.

disaster". Apparently the United Nations experts did not view the placing of explosives as anything other than an act of war and they did not suggest any genocidal motive. A second memorandum produced by the Applicant says that Serb negotiators admitted to placing explosives but said "they were ready to demine" the dam, suggesting that one reason for doing this was to strengthen a military position for the purposes of negotiations rather than the intentional destruction of a national or ethnic group. The third and final memorandum does not impute any motive whatsoever to those who placed explosives on the dam. Rather it reports on the need to remove the mines so as to enable work to be done to open a channel and relieve pressure upon the dam, failing which there might be a major disaster. There is no suggestion that those who placed the explosives were, at the time, threatening to destroy the dam.

402. The new materials produced by the Applicant tend to confirm that any placing of explosives in the Peruča hydro-electric dam *cannot* have been done "in order to exterminate a large part of the local Croat population", which is the extravagant, speculative and unfounded accusation of the Applicant.

403. Finally, the Applicant considers events in *Dubrovnik* in paras. 6.97-6.105 of the Reply.[400] Most of the materials in the Reply concern the two relevant decisions of the ICTY. In one, Admiral Miodrag Jokić pleaded guilty to charges of violations of the laws or customs of war and was sentenced to seven years' imprisonment.[401] In the second, General Pavle Strugar was convicted of violations of the laws and customs of war, and received a sentence of seven years.[402] They were not charged with crimes against humanity, much less with genocide, and there was no suggestion in the Judgment that evidence suggested such charges might be sustainable. The Applicant's insistence in these proceedings on the events in Dubrovnik is simply a distraction from the real issue, and is certainly not helpful to the Court.

404. Applicant speaks to the point, made in the Counter-Memorial, that the *Jokić* and *Strugar* cases deal with military engagements in December 1991, but claims that there

[400] See also: Memorial, paras. 5.235-5.241; Counter-Memorial, paras. 918-925.
[401] ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-S), Sentencing Judgment of18 March 2004; ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-A), Judgment on Sentencing Appeal, 30 August 2005.
[402] ICTY, *Prosecutor* v. *Strugar* (IT-01-42-T), Trial Chamber Judgment of 31 January 2005; ICTY, *Prosecutor* v. *Strugar* (IT-01-42-A), Appeals Chamber Judgment of 17 July 2008.

were other relevant events that took place earlier in the year and that are not addressed in the Judgment. This is typical of the Applicant's confused and contradictory approach to the case law of the International Criminal Tribunal for the former Yugoslavia. When the Trial Chamber in *Martić* or in *Mrkšić* went beyond the indictment to speak of other events, the Applicant notes this with satisfaction and deems this to strengthen its case; when the Trial Chamber is silent, the Applicant treats this as a neutral development, rather than drawing the logical conclusion that the silence of the Tribunal on factual and legal issues considerably weakens its case.

4. Relevance of the ICTY cases for the Applicant's claim

A. Brief review of the ICTY cases to which the Applicant refers

405. The Applicant notes that since filing the Memorial "the ICTY has rendered a number of judgments that are relevant to these proceedings" (Reply, para. 3.112). The Applicant does not accurately describe the four cases to which it refers or their significance.

406. The first case, that of Milan Babić, President of the Republic of Srpska Krajina, was a conviction that resulted from a plea agreement by which the accused accepted certain facts in exchange for a reduction in the charges; many factors may explain the reasons for such an admission. Milan Babić was convicted by the ICTY on only one count, namely the crime against humanity of persecution. The indictment covered the period from about 1 August 1991 to 15 February 1992, which in any case does not, as demonstrated, fall within the Court's jurisdiction *ratione temporis*. Needless to say, he was not charged with genocide. The word "genocide" does not appear in the Indictment[403] or the Plea Agreement,[404] or in any of the decisions of the Trial and Appeals Chambers.[405]

407. The second case, that of Milan Martić, again involves a conviction for crimes against humanity and not for genocide. Milan Martić held various leadership positions in the SAO Krajina and the Republic of Serbian Krajina over the period from 4 January 1991 until

[403] ICTY, *Prosecutor v. Babić* (IT-03-72, "RSK"), Initial Indictment of 6 November 2003.
[404] ICTY, *Prosecutor v. Babić* (IT-03-72), Plea Agreement and Factual Statement of 22 January 2004, available on http://www.icty.org/x/cases/babic/custom4/en/040122a.pdf.
[405] ICTY, *Prosecutor* v. *Babić* (IT-03-72-S), Sentencing Judgment of 29 June 2004; ICTY, *Prosecutor* v. *Babić* (IT-03-72-A), Judgment on Sentencing Appeal of 18 July 2005.

August 1995, including President, Minister of Defence and Minister of Internal Affairs. He was convicted by the ICTY Trial Chamber for a range of war crimes and crimes against humanity and was sentenced to thirty-five years' imprisonment. The word genocide did not appear in the Indictment or in the Judgments of the Trial and Appeals Chambers, aside from a few isolated references to the term with respect to allegations directed at Croats rather than Serbs. The Trial Chamber concluded that Martić was responsible for various atrocities committed in association with military operations and raids directed at predominantly Croat villages in the SAO Krajina during 1991. Furthermore, he was found guilty as a result of acts of violence and intimidation against Croat and other non-Serb populations in the Krajina region during the 1992-1995 period that included killings, beatings, robbery, theft, harassment and destruction of houses and Catholic churches. The Applicant relies upon various findings of fact made by the Trial Chamber with respect to Hrvatska Dubica, Cerovljani, Baćin and the surroundings, Lipovača and neighbouring hamlets, Vukovići and Poljanak, Saborsko, Vaganac, Škabrnja, Bruska, ill-treatment in various detention facilities and the shelling of Zagreb on 2 and 3 May 1995.[406] With respect to the shelling of Zagreb, Martić was convicted of war crimes but acquitted on the count of persecution as a crime against humanity because of the lack of sufficient evidence of discriminatory intent based upon ethnicity.[407]

408. Finally, there are the two Dubrovnik cases of Miodrag Jokić and Pavle Strugar. The former pleaded guilty to charges of violations of the laws or customs of war, while the latter was convicted following trial. Both accused were convicted on the basis of superior or command responsibility (that is, in the absence of proof that they ordered the attacks, they are held responsible for failing to prevent those persons under their command from committing the crimes in question and for failing to punish or discipline them subsequently). Each of them received a sentence of seven years' imprisonment. The Prosecutor did not charge crimes against humanity or genocide in these cases, and the judges never suggested that the charges had not been correctly formulated. In the case of a guilty plea following negotiation between the Prosecutor and Accused Jokić, the Tribunal has a special responsibility to ensure that the charges are appropriate, and that the conduct of the accused has not been inadequately characterized, as this would be a perversion of

[406] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 4.40-4.45.
[407] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, ICTY, *Prosecutor* v. *Martić* (IT-95-11-A), Appeals Chamber Judgment of 8 October 2008.

justice. The fact that the Tribunal concurred with the guilty plea of Jokić for charges of violations of the laws or customs of war confirms that it assessed the facts of the attack on Dubrovnik in the same manner as the Prosecutor.[408]

B. Erroneous reference to "eradication" as a factual finding of the ICTY

409. Para. 1.6 of the Reply asserts: "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 […]." This is a rather sly misrepresentation of the findings of the ICTY judgments. The conclusion was indeed reached that there was a JCE in which Serb leaders, including Milošević, participated. Nowhere in the decisions, however, is the word "eradicate" employed. In *Babić*, the Trial Chamber described the purpose of the JCE as being "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."[409] In *Martić*, the Trial Chamber concluded that the purpose of the JCE was "the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population".[410]

410. There is little detail in the *Babić* decision, because it resulted from a guilty plea and a statement of facts agreed by the defence and the Prosecutor. In fact, Babić testified in the *Martić* trial, where the Trial Chamber expressed some hesitation about the reliability of Babić's testimony in a general sense.[411] Babić never completed his testimony and committed suicide in his cell after testifying for the Prosecutor but prior to being questioned by the defence.

411. The *Martić* decision provides a more complete understanding of the nature of the attack upon the Croat population in Krajina. The Judgment refers to evidence of "displacement of the Croat population as a result of harassment and intimidation",[412] to "the displacement of

[408] ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-S), Sentencing Judgment, 18 March 2004; ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-A), Judgment on Sentencing Appeal, 30 August 2005; ICTY, *Prosecutor* v. *Strugar* (IT-01-42-T), Trial Chamber Judgment of 31 January 2005; ICTY, *Prosecutor* v. *Strugar* (IT-01-42-A), Appeals Chamber Judgment of 17 July 2008.
[409] ICTY, *Prosecutor* v. *Babić* (IT-03-72-S), Sentencing Judgment, of 29 June 2004, para. 16.
[410] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 445.
[411] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, paras. 32-34.
[412] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 299.

the non-Serb population"[413] and of "such a coercive atmosphere that the Croat and other non-Serb inhabitants of the RSK were left with no option but to flee".[414] It also says that: "Acts of violence and intimidation against the Croat and other non-Serb population, including killings, beatings, robbery, theft, harassment and destruction of houses and Catholic churches, were prevalent in the RSK during the period between 1992 and 1995, and resulted in an exodus of the Croat and other non-Serb population from the territory of the RSK."[415] For this reason, the exaggerated nuance placed on those decisions in the Reply by use of the word "eradicate", with its genocidal connotation, is not helpful to the Court.

C. Genocide and extermination in the light of the ICTY findings

412. In the final paragraph of the section of the Reply dealing with Banija,[416] the Applicant distorts statements made in the Counter-Memorial. In paras. 817 and 818, the Respondent did not assert that genocidal acts cannot take place if there is no extermination, but was actually speaking to another point. The Respondent was noting the rejection of the charge of the crime against humanity of extermination by the ICTY Trial Chamber in the *Martić* case. It did so because it found that the killings lacked the element of scale necessary for perpetration of the crime against humanity of extermination. According to the Trial Chamber:

> "Having considered these factors, as well as the totality of the evidence surrounding the killing incidents charged as extermination, the Trial Chamber finds that the evidence is insufficient to establish that the crime of extermination was committed on an accumulated basis. Thus, the element that the killings be committed on large scale has not been met."[417]

The Prosecutor did not appeal the acquittal on the extermination count.

413. Extermination is the crime against humanity that comes closest to genocide, although obviously extermination as a crime against humanity may also involve groups other than those listed in the definition of genocide. As explained above, it is theoretically possible that acts of genocide may be perpetrated, and therefore genocide committed, even in the absence of evidence of extermination. Nevertheless, it must be proven that these acts

[413] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 300.
[414] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 444.
[415] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 351.
[416] Reply, para. 6.41.
[417] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 404.

were carried out with the intent to destroy the group physically, that is, to exterminate it. That acts falling short of extermination are punishable under the Genocide Convention is hardly a radical proposition. One need only look to Article III, and the inchoate crimes of attempt, conspiracy and direct and public incitement. But in the absence of other evidence that the perpetrator intended the physical destruction of the group, it will be difficult to make the case to the requisite level of proof.

414. In criminal law, the mental element of the crime is usually a logical deduction from the physical act. Individuals are deemed to intend the consequences of their acts. But this cannot be the case with genocide, precisely because of the requirement of a specific intent to destroy the group physically. As a result, evidence of physical or psychological attacks on a group is unlikely to contribute to the conclusion that the perpetrator intended the destruction of the group where evidence of extermination is absent. Where there is evidence of extermination, the deduction that the perpetrator intended the physical destruction of the targeted group will be much more plausible. Where there is no evidence of extermination, this will be implausible, absent other compelling evidence of the perpetrator's genocidal intent.

415. For these reasons, the analysis in the Reply is erroneous. At para. 6.41, the Applicant states:

> "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."

416. The Applicant's problem is that it cannot prove genocide to the extent that it relies upon "physical and psychological methods" falling short of extermination. It is in this context that the acquittal of Milan Martić on charges of extermination by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia is relevant to the present proceedings.

D. Limitted effects of the ICTY findings of the joint criminal enterprise in the Martić case

417. The many weaknesses of its case, in terms of the relevant facts and the applicable law, the Applicant seeks to compensate by referring to the finding on the existence of a JCE in the ICTY Judgment in the *Martić* case, as a kind of a wild card which is

supposed to confirm all of the Applicant's allegations. Therefore, the *Martić* Judgment is invoked as an alleged proof that genocide has been committed,[418] that it can be attributed to the Respondent,[419] and even as a basis for the application of Article 10 (2) of the ILC Articles on State Responsibility.[420] In reality, however, the *Martić* Judgment proves much less than the Applicant wants to read into it and, with some of its main findings, actually supports the Respondent's position in this case.

418. Firstly, while the *Martić* Judgment did find that JCE, whose common purpose "was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population"[421], existed, and that this JCE, apart from Milan Martić, 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", the Trial Chamber only explained the role of the accused Martić in that JCE, while the other alleged members, who were not on trial in that case, are only briefly mentioned, if mentioned at all. This stands in sharp contrast to the practice of other trial chambers of the ICTY, such as, for example, the Trial Chamber in *Gotovina et al.* case. In that case, although the former President of Croatia Franjo Tudjman was not on trial, the Trial Chamber found that he was a key member of the JCE directed against the Serbian population in Krajina.[422] But, in order to reach this conclusion, the Trial Chamber devoted almost two hundred pages to the analysis of Tudjman's participation in and contribution to the JCE.[423]

419. Secondly, the limited effect of the finding on the JCE in *Martić* is further illustrated by the fact that out of 11 individuals named as members of the same JCE with Martić, four (Blagoje Adžić, Radmilo Bogdanović, Veljko Kadijević and Captain Dragan Vasiljković) were never indicted before the ICTY for any crime, while three (Radovan Karadžić, Ratko Mladić and Vojislav Šešelj) were never indicted for any crime established by the *Martić* Judgment.

420. Thirdly, although the members of the JCE, as found by the Trial Chamber, included all of the most important people in the leadership of Serbia, Republika Srpska Krajina, Republika

[418] See ex. Reply, paras. 9.34 – 9.35.
[419] See ex. Reply, paras. 9.67, 9.71, 9.75 *etc*.
[420] Reply, para. 7.62
[421] ICTY, *Prosecutor v. Martić*, Judgment, 12 June 2007, paras. 445-446.
[422] ICTY, *Prosecutor v. Gotovina et al.*, Judgment, 15 April 2011, paras. 2314-2316.
[423] *Ibid*, paras. 1966 – 2321.

Srpska and the JNA, the crime of genocide was never charged by the Prosecutor, while the Trial Chamber never requested the Prosecutor to amend the charges to include genocide.

421. Furthermore, the goal of the JCE as found by the Trial Chamber was "the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population"[424] and not genocide or, as the Applicant claims, eradication of the Croatian civilian population.[425] As a matter of fact, according to the Trial Chamber in *Martić*, only crimes of deportation and forcible transfer were found to be within the common purpose of the JCE, while the other crimes for which was Martić found guilty (such as murder, torture or imprisonment) were found to be outside of that common purpose.[426] Although Martić was found guilty for the crimes outside the common purpose, that was done on the basis of Martić's individual relationship to and knowledge of the crimes, namely because he "willingly took the risk that the crimes which have been found to be outside the common purpose might be perpetrated against the non-Serb population".[427] Accordingly, the *Martić* Judgment does not contain any finding, not even a sparse or an unsubstantiated one, that any crime committed in SAO Krajina, other than deportation and forcible transfer, can be attributed to any of the alleged members of the JCE (apart from Martić himself) on the basis of their participation in that criminal enterprise.

422. Finally, in the light of such a heavy reliance of the Applicant on the findings of the ICTY on JCE in the *Martić* case, one has to note that the official position of the Applicant's Government vis-à-vis the institution of a JCE is quite different. Namely, after the ICTY had issued its Judgment in the *Gotovina et al.* case, the Government of Croatia, obviously not very satisfied with that Judgment, adopted a conclusion by which it declared that "the allegations of a joint criminal enterprise presented in regard of the *Storm* military and police action, that to the Republic of Croatia is a legitimate defence action to liberate its state territory, are unacceptable".[428] The second paragraph of the Government's conclusion accepts, as the official position of Croatia, "the conclusions of the Study of the Croatian Academy of Legal Sciences: The Theory of Joint Criminal

[424] ICTY, *Prosecutor v. Martić*, Judgment, 12 June 2007, paras. 445-446.
[425] See Reply, para. 9.34.
[426] ICTY, *Prosecutor v. Martić*, Judgment, 12 June 2007, para. 454.
[427] *Ibid.*
[428] Conclusions of the Government of the Republic of Croatia of 15 April 2011, communicated to the diplomatic missions accredited in Croatia with the diplomatic note No. 2081/11 of 19 April 2011(Annex 75).

Enterprise and International Criminal Law – Challenges and Controversies."[429] These conclusions, annexed to the Conclusions of the Government of Croatia, read as follows:

> "1) Joint criminal enterprise was not part of international customary law at the time the offences with which the accused are charged were committed.
>
> 2) Joint criminal enterprise is contrary to the principle of guilt, which is one of the fundamental principles of contemporary criminal law.
>
> 3) Through the dangerous expansion of the elements of guilt (*mens rea expansion*), joint criminal enterprise has come very close to guilt by association which the Statute does not regulate.
>
> 4) Drawing a conclusion on the existence of the accused's intention from objective circumstances (inference) in the second and third category of JCE is questionable from the aspect of the principle of presumption of innocence which, *inter alia*, is regulated by Article 21/3 of the Statute.
>
> 5) The ICTY's jurisprudence in relation to JCE theory and the provision of the Statute in which this theory is allegedly contained "by implication" is not in unison and is not consistent with the principles of legal certainty and justice.
>
> 6) The extensive application of JCE theory to the entire political and military structures of a state and to other "known and unknown" persons does not fulfil the requirement of precise charges and may produce wrong impression of "political influence" on international criminal justice system.
>
> 7) Indictments conceived broadly, following JCE theory, which contain a "collective" accusation of not only the person against whom the proceedings are conducted, but of the entire state and military structures, as well as "persons known and unknown", mean that the very purpose of the foundation and operation of ICTY is threatened.
>
> 8) Giving credibility to JCE theory in international criminal adjudication involves the risk that national criminal prosecution bodies will apply it even more extensively and to the greater detriment of protected human rights. Its application undermines the contemporary criminal law building founded on traditional pillars of legal dogmatics.
>
> 9) The extensive application of JCE theory will have negative consequences in the process of the affirmation of international criminal law and adjudication.
>
> 10) In jurisprudence of international criminal tribunals JCE theory should be replaced by other firmly established concepts of individual criminal responsibility, such as co-perpetration and perpetration by means."[430]

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[429] *Ibid.*

[430] *Ibid*. The full study is available on the web page of the Croatian Academy of Legal Sciences, at: http://www.pravo.hr/_download/repository/Studija_o_zajednickom_zlocinackom_pothvatu_engleska_verzija.pdf last visited on 4 August 2011

423. The Respondent leaves it to the Court to appreciate the importance of these conclusions, which obviously represent the official position of the Applicant's Government as of, at least, 15 April 2011. Perhaps the Applicant can offer some clarification on that in the later stages of this case.

CHAPTER V

THE QUESTION OF ATTRIBUTION

1. Introduction

424. The Respondent has addressed the legal aspects of the question of attribution in Chapter IX of the Counter-Memorial, while some factual elements have been dealt with in Chapter VI of the Counter-Memorial, entitled "Participants in the Armed Conflict in Croatia 1991 – 1995". In its Reply, the Applicant has addressed the legal aspects of attribution in Section III of Chapter 9, while factual elements have been addressed in Chapter 4. In this Chapter the Respondent will address both legal and factual aspects of the question of attribution, taking into consideration that the Applicant has offered very little new evidence in support of its claims.

425. The main position of the Applicant, which it seeks to draw from the ICTY judgments, is that:

> "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."[431]

426. Therefore, in order to prove that the crimes allegedly committed against Croats can be attributed to the Respondent, the Applicant would have to prove: first, that the JNA was operating in Croatia under the direction and control of the Respondent; and second, that the crimes allegedly committed by volunteer groups, paramilitaries and various armed forces of Republika Srpska Krajina (such as TO and *Milicija Krajine*) occurred under the direction and control of the JNA over those groups. Further in this Chapter, the Respondent will demonstrate that neither of these two requirements has been met.

[431] Reply, para. 9.62.

427. Before doing that, the Respondent wishes to reiterate its principal position that it cannot, even theoretically, be held responsible for any event that had occurred before 27 April 1992, that is before the FRY came to existence. This question has been addressed in Chapter II of this Rejoinder and the Respondent will here only remind the Court that most of the events that are claimed to constitute "genocidal activities" by the Applicant relate to the period of time before the FRY was created and only very few of them are alleged to have taken place after April 1992, while a vast majority of the incidents described in the Memorial took place in 1991.[432]

2. Applicable law

428. As the Respondent already noted in the Counter-Memorial, the Applicant and the Respondent are in agreement that Articles 4, 8 and 11 of the ILC Articles on State Responsibility are relevant and may be applied in the present case.[433] According to these provisions, conduct is attributable to a State if (a) it is the conduct of any State organ (Article 4), or (b) it is the conduct of the person or group of persons acting on the instructions of, or under the direction or control of, the State in question (Article 8), or (c) conduct, which is otherwise not attributable to the State, is acknowledged and adopted by the State as its own (Article 11). Following the Respondent's convincing arguments as to why Article 11 does not apply in the circumstances of this case,[434] the Applicant seems to have decided not to pursue any more this line of reasoning in the Reply. Therefore, the present analysis will be limited to the application of Articles 4 and 8 of the ILC Articles on State Responsibility.

429. As also noted in the Counter-Memorial, the Applicant and the Respondent disagree on the applicability of the principle underlying Article 10, para. 2 of the ILC Articles on State Responsibility, both as a matter of principle, as well as with regard to the case at hand.[435] This issue has been addressed earlier in this Rejoinder.[436]

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[432] Out of between 2.500 and 3.000 alleged killings of Croats for which the Applicant has oferred some evidence in the Memorial and the Reply, only around 100 are alleged to have taken place after 27 April 1992. The cases of killings alleged by the Applicant to have taken place after 27 April 1992 are referred to in paras. 4.132, 5.25, 5.88, 5.139, 5.146, 5.202, 5.204, 5.207, 5.210, 5.212 - 5.214, 5.219 and 5.221 – 5.225 of the Memorial, while new allegations are also contained in paras. 6.78 and 6.89 of the Reply. The killings have mostly taken part in the region of Dalmatia. Only 3 of the killings claimed to have been committed after 27 April 1992 have taken place in Eastern Slavonia where, according to the Applicant, the majority of the crimes against Croats have been committed.
[433] *Ibid*, paras. 1001-1002.
[434] *Ibid*, paras. 1034-1043.
[435] *Ibid*, para. 1003.

3. The alleged control of the Respondent over the JNA

A. General remarks

430. The Applicant alleges that some of the crimes against Croats were committed by the JNA itself, while in other cases it claims that the JNA had effective control over the TO, paramilitaries or other forces who committed the crimes. In any case, however, in order for these crimes to be attributed to the Respondent, the Applicant would have to prove that either Article 4 or Article 8 of the ILC Articles on State Responsibility apply.

431. While the Applicant reluctantly acknowledges that the JNA was not a *de jure* organ of the Respondent, it claims that "it is to be regarded as a *de facto* organ of the FRY, or at the very least as having operated at all 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."[437] Therefore, the Applicant's main position seems to be that Article 4 of the ILC Articles on State Responsibility, as interpreted by the Court in the Judgment in the the *Bosnia* case,[438] is to be applied in the present case, while the application of Article 8 is alleged to be subsidiary. However, the Applicant's claims concerning the application of Articles 4 and 8 are often interwoven and presented together, while the alleged facts on which the Applicant bases its claims on the application of either of the two articles are often the same. Most of these claims have already been addressed in the Counter-Memorial and will be further addressed in this Chapter.

432. Nevertheless, the Respondent needs to stress once again that, as a matter of fact and a matter of law, its responsibility for the actions of the JNA cannot even arise for the reason that the Respondent did not exist before 27 April 1992 and thus did not coexist with the JNA and at the time when the vast majority of the alleged crimes have taken place. For that reason, the following analysis is given only *ex abundanti cautela* and by way of a subsidiary argument

[436] See *supra*, Chapter II, section C.1.
[437] Reply, para. 9.67.
[438] See *ibid*, paras. 9.59-9.60.

B. The SFRY Presidency

433. The starting point of the Applicant's contention that the JNA was a *de facto* organ of the FRY is its assertion that the SFRY Presidency, as the main organ of the SFRY and the supreme commander of the JNA, ceased to function from mid-1991. This assertion has been elaborated in greater detail in the Memorial and the Respondent has already successfully rebutted all of the Applicant's claims in the relevant part of the Counter-Memorial.[439] In particular, the Respondent has shown that:

a) The dissolution of the SFRY was an extended process which was completed in April 1992 when the FRY came into being, as confirmed by the fact that the Security Council started to refer to the "former Yugoslavia" only on 15 May 1992;

b) In 1991 and early 1992, the SFRY was still recognized as a functioning State and a subject of international law, and as such participated in international relations;

c) In 1991 and early 1992, the SFRY organs continued to function and were headed by individuals coming from different SFRY republics;

d) These organs, in particular the JNA, were not *de facto* organs of the "emerging FRY" or Serbia but *de jure* organs of the SFRY.[440]

434. In the Reply, the Applicant failed to offer any new evidence to rebut the Respondent's position and instead resorted to simply repeating its assertions from the Memorial, by referring to certain paragraphs of the Memorial and the same evidence referred to in the Memorial. For that reason, the Respondent feels no need to further address the Applicant's claims on this issue from the Reply and leaves it to the Court to appreciate and evaluate the positions of both sides.

435. The one thing the Respondent wishes to point out is a rather peculiar manner in which the Applicant attempts to dismiss the evidence presented by the Respondent. Namely, in paras. 516-518 of the Counter-Memorial the Respondent referred to the evidence presented during the preliminary objections proceedings demonstrating that the SFRY was regarded as a functioning State and subject of international law in 1991 and early

[439] See Counter-Memorial, paras. 509-537.
[440] *Ibid*, para. 537.

1992. The documents referred to by the Respondent prove that throughout 1991 and in early 1992: (a) the SFRY concluded bilateral and multilateral agreements and undertook various treaty actions, which were recognized and accepted as valid by other States and international organizations; (b) the SFRY continued to take part in diplomatic conferences and meetings; and (c) States continued to maintain their diplomatic missions to the SFRY, while new heads of missions continued to be accredited by notifications to the SFRY Presidency until early 1992.

436. The Applicant does not contest any of the evidence presented (since that would be impossible), but goes on to claim the following:

> "In order to demonstrate that the SFRY was a functioning state and a subject of International Law in 1991 and early 1992 ... 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. The Applicant notes that no letter by a Member State of the European Community is included, since none was sent."[441]

437. Does the Applicant try to suggest that the diplomatic actions of the former USSR, Indonesia and Mali – three countries from three different continents – are somehow less relevant from the perspective of international law than the diplomatic actions of the Member States of the European Community?

C. Alleged "Serbianization" and restructuring of the JNA

438. In the Memorial, the Applicant claims that the JNA was from the mid-1980s gradually transformed into a "Serbian Army" and that it underwent a process of "Serbianisation" which was reflected in (a) changes to the JNA's ethnic composition and management and (b) its restructuring in 1988.[442] The Respondent has rebutted these assertions in the Counter-Memorial[443] and, in the Reply, the Applicant had very little to offer in further support of its claims.

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[441] Reply, para. 3.91 (footnotes omitted).
[442] Memorial, para. 3.14 *et seq.*
[443] See Counter-Memorial, paras. 580-587.

439. As a matter of fact, the Applicant has, albeit reluctantly, accepted two main points of the Respondent, that is: 1) that the relative proportions of Serbs and Croats in the JNA and the ethnic structure of the Army had remained unchanged during the 1980s and up to 1991,[444] and 2) that the 1988 restructuring of the JNA had been done pursuant to a decision adopted by the SFRY Presidency, which consisted of representatives of all republics and autonomous provinces.[445]

440. The Applicant, however, insists on the fact that, although the relative proportions of Serbs and Croats in the JNA remained the same in the relevant period, Serbs were over-represented and Croats under-represented in the JNA officer corps.[446] The Respondent does not challenge this disproportion which, as already explained in the Counter-Memorial, should be seen in light of the fact that over the years the number of Croats (and Slovenes) who applied to military schools and academies had been much lower than their ratio in the overall population. In connection to this, it should be added that in the JNA one did not become an officer over night, but only after long studies in military schools and academies. Thus, any disproportion in the ethnic structure of the JNA in the 1980s had its roots in the 1970s or earlier (when those officers who were active in the 1980s had begun their studies) and not even the Applicant claims that the alleged "Serbianization" of the JNA started in the 1970s or earlier. In any case, the mere fact that this percentage remained the same throughout the whole period in which, according to the Applicant, the JNA was preparing for genocide against the Croats, clearly proves that there was no "Serbianization" of the JNA.

441. Furthermore, one document submitted as evidence by the Applicant with the Reply clearly shows that the vast majority of the high ranking Croatian officers in the JNA decided to remain in that army even during the conflict. Thus, replying to an enquiry by the Head of the Croatian Office for Cooperation with International Criminal Courts (and current Co-Agent of Croatia before the Court), Mr. Gordan Markotić, the Council for Succession to Military Property of the Croatian Ministry of Defence, stated the following:

> "1. as regards the number of generals who crossed to the Croatian Army:
>
> The greatest number of high-ranking JNA corps of Croatian ethnicity or any other ethnicity, who had been born in the Republic of Croatia, did not put themselves at the disposal of the Republic of Croatia, i.e. the Croatian Army (hereinafter referred to as: the "HV"), either at the start of the war or later. Out of total of 235 generals who were active during that period only seven generals and admirals, i.e. around three per cent of the total general corps, did

[444] Reply, para. 4.17.
[445] *Ibid*, para. 4.23.
[446] *Ibid*, para. 4.17.

> this. Specifically, no more than three active generals (Josip Ignac, Petar Stipetić and Ivan Štimac), two retired generals (Anton Tus and Tomislav Biondić – retired at the start of the 1990s) and two active admirals (Josip Erceg and Božidar Grubišić) joined the ranks of the HV. All other active generals and admirals remained on the opposite side ..."[447]

442. As noted above, concerning the 1988 restructuring of the JNA, the Applicant has accepted that this had been done pursuant to a decision adopted by the SFRY Presidency, which consisted of representatives of all republics and autonomous provinces. The Applicant, still, goes on to claim that "the proposal which the Republics approved differed from the changes actually implemented within the JNA"[448] and that Slovenia and even Montenegro had certain objections.[449] However, the Applicant does not specify these objections and, what is most significant, does not mention that any objection to the 1988 restructuring of the JNA had been expressed by Croatia.

443. The Applicant further claims that the "Serbianization" of the JNA is evidenced by the fact that the JNA did not react to the changes to the Serbian Constitution in September 1990 which, according to the Applicant, usurped three basic competences of the Federation.[450] However, these claims of the Applicant are without basis since it was not the task of the JNA to react to any change to the constitution of any of the Republics of the SFRY. On the other hand, it was the task of the JNA to protect the SFRY and it reacted in Croatia only after the Croatian authorities started the war of secession and began to directly target JNA personnel and property. Serbia, on the contrary, did not try to secede from the SFRY and it did not attack the JNA, so there was no reason for the JNA to react in any way to the constitutional changes in Serbia.

444. Finally, in an attempt to substantiate its claims on the alleged "Serbianization" of the JNA, the Applicant quotes the following passage from the "Balkan Battlegrounds" Report:

> "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."[451]

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[447] Letter from the Council for Succession to Military Property to the Ministry of Justice, 23 November 2010, Annex 108 with the Reply.
[448] Reply, para. 4.23.
[449] *Ibid.*
[450] *Ibid*, para. 4.31.
[451] Central Intelligence Agency (CIA), Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990–1995 (2002), Vol. I, p. 93, as quoted in Reply, para. 4.38.

445. If anything, this sentence proves that, if indeed there were some changes in the ethnic structure of the JNA in the second half of 1991, they were the result of circumstances outside the control of the JNA or Serbia, namely the desertion of conscripts and the refusal of some republics of the SFRY to send new conscripts to the JNA.

D. The role of the JNA in the conflict in Croatia

446. According to the Applicant, the "Serbianization" and the restructuring of the JNA should be seen as a lead-up to the alleged genocide committed by and under the control of the JNA from 1991 onwards. This assertion of the Applicant, however, completely distorts the reality of the nature of the conflict in Croatia and the role of the JNA in that conflict.

447. First of all, the Applicant constantly omits to explain its role in the events that preceded the armed conflict in Croatia, its preparation for the war or the process of creation of Croatian armed forces.[452] It is as if the Applicant wants to claim that the Croatian armed forces did not even exist and that the JNA and various forces of the Croatian Serbs fought only bare-handed Croatian civilians.

448. The reality was, however, quite different and, as the Respondent already showed in the Counter-Memorial, the HDZ government in Croatia started to prepare for an armed conflict already in mid-1990. The armed forces of Croatia gradually grew and by January 1992 the Croatian Army (HV) numbered some 200,000 troops, while the Ministry of the Interior (MUP) had over 40,000 personnel.[453] The creation of the armed forces started in 1990, initially within the MUP, where the number of policemen almost doubled, while at the same time ethnic Serbs were cleansed from the force.[454]

449. Simultaneously, ethnic Serbs in the self-proclaimed autonomous regions in Croatia started organizing themselves, in reaction not only to constitutional changes by which they were stripped of the status of a constituent nation of the Croatian State,[455] but also due to an increasingly negative attitude towards the Serbs in Croatia[456] and, in particular, to the emergence of ethnically clean Croatian armed forces as a sign of things to come.

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[452] See Counter-Memorial, paras. 467-472 and 575-577.
[453] *Ibid*, para. 575.
[454] *Ibid*, para. 468, quoting "Balkan Battlegrounds".
[455] *Ibid*, paras. 458-464.
[456] *Ibid*, paras. 434-455.

450. As the Respondent already explained in the Counter-Memorial, the first armed clashes between Croatian forces, on the one side, and the Territorial Defense and MUP forces of the SAO Krajina, on the other, took place in the spring of 1991 in Pakrac, Plitvice and Borovo Selo. In all these cases, the JNA units intervened as peacekeepers by positioning themselves as a buffer between the conflicting parties and the peacekeeping role of the JNA was confirmed by third-party sources.[457]

451. The position in which the JNA found itself in Croatia was anything but easy and it is well summarized by the Trial Chamber in the *Mrkšić et al.* case before the ICTY:

> "By early 1991 the attitude of both the political leadership and the general public in Croatia became increasingly hostile towards the JNA. Of course, the JNA had been constituted as the national military force of the Yugoslav federation, but it had come to be typically perceived in Croatia as aligned with Serb interests and effectively commanded from Belgrade by a Serb dominated leadership. In the course of 1991 many Croat and other non-Serb officers and men of the JNA left the JNA, in many cases to take up arms against the JNA in Croatia. In March 1991 Croatian forces "blocked", *i.e.* effectively blockaded, the JNA barracks in Bjelovar and Varaždin. Increasingly acts of hostility or aggression were manifested against JNA personnel in various parts of Croatia. By July-August 1991 a general strategy was adopted to block JNA barracks on Croatian territory by cutting off water, electricity, food supply, and communications to the JNA barracks."[458]

452. A few paragraphs later in the same Judgment, the Trial Chamber referred to some of the hostile acts against the JNA personnel:

> "In western Croatia, on 6 May 1991, a JNA soldier was strangled in Split in front of TV cameras. A report of the Federal Secretariat for National Defence to the SFRY Presidency of 8 August 1991 indicated that from 9 May until 4 August 1991, 340 attacks against JNA units and members in Croatia were carried out, in which six JNA soldiers and officers were killed and 83 were wounded."[459]

453. Acting on the order of its Ministry of Defence, on 14 September 1991 Croatian forces mounted an all-out attack on the JNA barracks and facilities in Croatia. They

[457] *Ibid*, paras. 501-502, quoting "Balkan Battlegrounds".
[458] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, para. 23 (footnotes omitted).
[459] *Ibid*, para. 26 (footnotes omitted).

surrounded and blockaded every JNA barracks or facilities on the territory of Croatia and overran many of the isolated JNA posts. In some cases, Croatian forces committed massacres of the JNA soldiers, such as on 21 September 1991 in the town of Karlovac, where they killed 13 JNA soldiers that had surrendered their weapons and had been promised free passage out of the town.[460]

454. It is obvious, thus, that the JNA was not acting in Croatia according to any previously designed plan or in pursuit of the alleged "Greater Serbia" project. The Respondent, on the other hand, does not dispute that the role of the JNA in Croatia gradually changed from a peacekeeping force to one of the warring parties. This change, however, came only as a reaction to hostile and criminal actions undertaken by the newly created Croatian armed forces who started a war for secession against the SFRY – the country that the JNA was tasked to protect.

455. Nevertheless, even after the JNA became a party to the conflict, it did not become "a Serbian Army", as suggested by the Applicant, but remained a *de jure* organ of the SFRY.[461] The JNA's participation in the armed conflict in Croatia was effectively over by the end of 1991, after the ceasefire agreement was concluded in Sarajevo on 2 January 1992, and it completely withdrew from Croatia by mid-1992.

E. The role of General Kadijević

456. The Applicant has failed to offer any concrete evidence that any of the actions of the JNA in Croatia (or elsewhere) had been ordered or instructed by the Serbian leadership. For that reason, the Applicant places a lot of emphasis, both in the Memorial and in the Reply, on the role of General Veljko Kadijević, the Federal Secretary for National Defence (*i.e.* Minister of Defence) at the time. Thus, in the Memorial, the Applicant extensively quoted from two books by General Kadijević and Borislav Jović, the member of the SFRY Presidency from Serbia, who both wrote about their views on the events leading to the break-up of the SFRY. Some of the same passages from those books are again quoted in the Reply.

[460] See Counter-Memorial, paras. 504-506, quoting "Balkan Battlegrounds".
[461] See *Ibid*, paras. 588-604.

457. The Respondent does not dispute that a number of meetings between General Kadijević, Borislav Jović and the then President of Serbia, Slobodan Milošević, indeed took place and that various issues concerning the situation in Croatia and the rest of the SFRY were discussed. However, the memoirs of both Kadijević and Jović clearly show that neither Milošević, nor even Jović, as one member of the SFRY Presidency, were able to issue orders or instructions to General Kadijević and that, at the most, the three of them (sometimes together with some other people) consulted about the events taking place in Croatia.

458. For example, in para. 3.98 of the Reply, the Applicant quotes a passage from the Kadijević book in which he wrote that the JNA had identified three categories of members of the SFRY Presidency, depending on their commitment to the preservation of the SFRY and whether they could be trusted by the JNA or not. This passage clearly shows that neither Serbia nor any other republic of the SFRY was able to issue orders or instructions to the JNA, but that, on the contrary, the JNA identified those members of the SFRY Presidency that could be trusted. Furthermore, the categorization of the members of the SFRY Presidency was not done based on their commitment to the alleged "Greater Serbia" project, but on their commitment to "Yugoslavia and to its democratic transformation by peaceful means".[462]

459. As a further proof of General Kadijević's alleged dependence on the Serbian leadership, the Applicant refers to a passage from the Jović book, saying that in early April 1991, Milošević and Jović demanded from Kadijević, and eventually obtained, his promise that the JNA would protect the Krajina.[463] The mere fact that Milošević and Jović had to ask Kadijević to promise them that the JNA would protect the ethnically Serbian population in the Krajina shows that the JNA was not under control of the Serbian leadership, since otherwise Milošević and Jović would certainly not have to ask Kadijević to promise them anything – they would simply order it. The Respondent has already pointed out in the Counter-Memorial to a similar example, when the Serbian leadership had to ask Kadijević to give them a precise answer on whether the JNA would conduct a redeployment of the military.[464]

[462] Veljko Kadijević, *Moje vidjenje raspada*, p. 91, as quoted in the Reply, para. 3.98.
[463] See Reply, para. 4.48.
[464] See Counter-Memorial, para. 602.

460. Another example can be found in the quotations from the Jović book in paras. 3.64-65 of the Reply. In this case Jović discussed the idea of cutting off Slovenia and Croatia from the SFRY, first with Kadijević and then with Milošević. He then recorded that Milošević "[...] agrees with the idea of "throwing out" Slovenia and Croatia, but he asks me whether the army will execute such a command".[465] Again, how can the Serbian leadership, headed by Milošević, be in complete control of the JNA and at the same time ask whether the JNA would execute a command?

461. In the Counter-Memorial, the Respondent quoted a passage from the Jović book which clearly shows the nature of the relationship between Kadijević and the military in general, on the one side, and Slobodan Milošević on the other:

> "I will also record an observation from the last, not so short period of our drama, about a latent distrust and almost conflict between Slobodan Milošević and the military, in parctiular, General Kadijević. Their conflict and distrust are less felt at the meetings attended by all of us (six), and much more when one of them is alone – with me."[466]

462. This passage was recorded on 25 October 1991 and it is significant not only in that it shows that the Serbian leadership did not have complete control over the JNA and that Milošević and Kadijević were at most uneasy political allies, but also that this was the case as late as on 25 October 1991, when, according to the Applicant, the JNA was firmly engaged in alleged genocidal activities in Croatia as a *de facto* organ of the Respondent, which in any case did not even exist yet as a subject of international law.

463. In the Reply, the Applicant further claims that the Respondent's position that the JNA was and remained an organ of the SFRY cannot be maintained since:

> "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."[467]

[465] Borislav Jović, *Poslednji dani SFRJ*, p. 161, as quoted in the Reply, para. 3.65.
[466] Borislav Jović, *Poslednji dani SFRJ*, p. 402 (Annex 29 with the Counter-Memorial).
[467] Reply, para. 9.67.

464. The Respondent does not dispute that the Trial Chamber of the ICTY indeed concluded that General Kadijević was a party to the JCE whose common purpose was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population in the SAO Krajina.[468] However, the Respondent will demonstrate that this conclusion of the ICTY Trial Chamber has to be taken with reserve and that it does not, in any case, prove that the JNA was a *de facto* organ of the Respondent or that it acted under the Respondent's direction or control.

465. First of all, it should be noted that General Kadijević was not on trial either in this case or in any other case before the ICTY. He was not authorized to submit evidence or make other submissions to the ICTY and he was not even heard as a witness. The trial itself was also not directly concerned with the actions of the JNA in Croatia, but primarily with the role of Milan Martić, one of the most senior figures in the SAO Krajina. Therefore, any finding of the Trial Chamber on the alleged participation of General Kadijević in the JCE has to be taken with reserve.

466. Of course, the *Martić* case was not the first case before the ICTY in which the Trial Chamber found persons not on trial to be members of a JCE. However, this case differs significantly from some other cases for the reason that the Trial Chamber did not write a single sentence to explain Kadijević's role in or his contribution to the JCE, while his name is otherwise mentioned in the Judgment only on several occasions and without direct connection to particular crimes.

467. This stands in sharp contrast to, for example, the Judgment in the *Gotovina et al.* case, where the Trial Chamber found that Franjo Tuđman, the former President of Croatia, not only participated in, but was also a key member of JCE whose common objective was the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer.[469] In this case, although Tuđman was not on trial, the Trial Chamber devoted almost two hundred pages to the analysis of Tuđman's participation in and contribution to the JCE.[470]

[468] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, paras. 445-446.
[469] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 2314-2316.
[470] *Ibid*, pp. 992-1177.

468. Furthermore, even if one could accept the finding of the Trial Chamber in *Martić* as being conclusive, the fact that Veljko Kadijević was found to be a member of the JCE together with Milan Martić, Slobodan Milošević, Radovan Karadžić and others does not in any way prove that he or the JNA were fully dependent on the Respondent. Actually, the very fact that General Kadijević was listed as a member of the JCE together with other people who held the most senior ranks in Serbia, Republika Srpska and Republika Srpska Krajina shows that he was not merely a pawn in Milošević's or anybody else's hands and that the JNA he commanded was independent from Serbia or from any other legal or illegal entity in the SFRY.

469. Finally, it should be noted that the Trial Chamber in *Martić* also included General Blagoje Adžić, the Chief of General Staff of the JNA at the time, in the list of persons found to be members of the JCE. While the Applicant places much less emphasis on the role of General Adžić and mentions him rather rarely in its submissions, the Respondent submits that all that is said above with respect to General Kadijević also applies, *mutatis mutandis*, to General Adžić.

F. The crimes allegedly committed by the JNA

470. The Respondent does not dispute that some of the crimes committed against Croats in the second part of 1991 were committed by some members of the JNA. However, as will be shown further in the text, the findings of the ICTY do not support the Applicant's claim that these crimes were committed as a part of the alleged genocidal policy. Additionally, the Applicant has also failed to offer even a hint of proof that any of the crimes committed by the JNA members had been committed on the instructions of the leadership of Serbia at that time, provided of course that any action of the Serbian leadership before 27 April 1992 can incur the responsibility of the Respondent (*quod non*).

471. The Applicant claims that the ICTY Judgments in *Martić, Babić, Mrkšić et al, Strugar* and *Jokić* "provide strong support for key elements of the Applicant's case"[471], namely that the Respondent has committed genocide against Croats. As will be demonstrated, these Judgments do not even come close to proving the Applicant's assertions.

[471] Reply, para. 9.30.

1) Strugar and Jokić Judgments

472. General Pavle Strugar and Admiral Miodrag Jokić have both been sentenced for the crimes committed on 6 December 1991, when the JNA shelled the Old Town in Dubrovnik, killed two persons, wounded another three (or two according to the *Strugar* Judgment) and caused damage to the Old Town. It was not established that any of the two accused had ordered the shelling.[472] Jokić, who pleaded guilty, was sentenced for aiding and abetting and for failing to prevent and to punish the crimes, while Strugar, who underwent the whole trial, was sentenced based only on command responsibility, that is for failing to prevent and to punish the crimes committed on 6 December 1991.

473. The Applicant claims that the case against Strugar and Jokić was just a "sample" case and that many more people were killed during the JNA blockade of the town of Dubrovnik.[473] The Respondent does not dispute that more than two Croats were killed during the fighting between Croatian forces and the JNA in the Dubrovnik area. However, the facts of the case, as summarized by the ICTY Trial Chamber,[474] clearly show that Croatian forces were present in Dubrovnik and they bitterly fought the JNA, which included the attack on the JNA barracks at Ploče and the killing of the JNA soldiers from those barracks.[475] The Trial Chamber has found that Admiral Jokić and General Strugar were appointed as commanders of the JNA units participating in the fighting as of 7 October and 12 October, respectively.[476] Therefore, while the Respondent is unable to analyze the prosecutorial policy of Ms. Carla Del Ponte, the ICTY Prosecutor at the time, or her decisions to prosecute or not prosecute for certain events, it is clear that, by deciding not to prosecute any event prior to 6 December 1991 (nor to subsequently withdraw the charges), the ICTY Prosecutor showed that she considered that these events were either not illegal or not of sufficient gravity to warrant a prosecution by the ICTY. In any case, the fact that it was not found that either Strugar or Jokić had ordered the attacks and that it was also found that Jokić immediately expressed his remorse for the shelling on 6 December 1991,[477] clearly shows that the attacks on Dubrovnik do not even remotely satisfy the requirements of the crime of genocide.

[472] ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-S), Sentencing Judgment, 18 March 2004, para. 26.
ICTY, *Prosecutor* v. *Strugar* (IT-01-42-T), Trial Chamber Judgment of 31 January 2005, para. 348.
[473] Reply, para. 6.97.
[474] ICTY, *Prosecutor* v. *Strugar* (IT-01-42-T), Trial Chamber Judgment of 31 January 2005, paras. 12-78.
[475] *Ibid*, para. 27.
[476] *Ibid*, para. 24.
[477] ICTY, *Prosecutor* v. *Jokić* (IT-01-42/1-S), Sentencing Judgment, 18 March 2004, paras. 89-92.

474. More significantly, the Trial Chamber in *Strugar* addressed the position of General Veljko Kadijević towards the shelling and accepted Admiral Jokić's testimony that Kadijević was furious because the attack on Dubrovnik on 6 December had taken place after the ceasefire agreement. In reaction to finding out about the attack, Kadijević immediately summoned the two accused to Belgrade, while in the meantime Strugar ordered Jokić to have the attack stopped.[478] It is, therefore, obvious that neither General Kadijević nor the rest of the leadership of the JNA knew about the attack on Dubrovnik on 6 December 1991, which can only lead to the conclusion that there was no JNA policy aimed at the destruction of Croats.

475. Even more significantly, the *Strugar and Jokić* Judgments do not even mention Slobodan Milošević or any other organ of the Republic of Serbia in any way and they do not contain even a hint that the attack on Dubrovnik or any crime committed during the attack were ordered or instructed by the leadership of Serbia.

2) Mrkšić et al. Judgment

476. The ICTY case against Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin deals with the events in Vukovar, although it does not deal directly with the battle for Vukovar. In this respect, the Respondent again does not dispute that a certain number of Croats died in Vukovar during the siege and that some of the victims were civilians. However, while the battle for Vukovar was the longest battle fought between the JNA and various forces of the Croatian Serbs on one side and the Croatian forces on the other, and while this battle was also the subject of great interest for the international community and international media, it is significant that the ICTY Prosecutor has not charged anyone with the alleged crimes committed in the course of the battle. Similarly as in the case of Dubrovnik, the Respondent cannot and will not analyze the decision of the then Prosecutor, Richard Goldstone (or any of his successors), not to prosecute the three accused or anyone else for the crimes allegedly committed during the battle. Nevertheless, the Respondent submits that the lack of prosecutions for these events demonstrates that, at least according to the information available to the ICTY Prosecutor, the events during the three months of the battle for Vukovar did not warrant an ICTY prosecution either because nothing illegal has been suspected or because the

[478] ICTY, *Prosecutor* v. *Strugar* (IT-01-42-T), Trial Chamber Judgment of 31 January 2005, para. 146.

suspected crimes were not of a sufficient gravity. This stands in sharp contrast to, for example, the siege of Sarajevo, where a number of people have been indicted and some of them have already been sentenced for the crimes committed during the siege.

477. The *Mrkšić et al.* case is thus concerned solely with the crimes committed in "Ovčara" on 20 November 1991. The first accused in this case, Mile Mrkšić was found guilty for aiding and abetting murder, torture and cruel treatment as violations of the laws and customs of war. The second accused, Miroslav Radić, was acquitted of all charges. The third accused, Veselin Šljivančanin, was in the first instance found guilty for aiding and abetting torture as a violation of the laws and customs of war. His sentence was first overturned on the appeal and he was then also found guilty for aiding and abetting murder. However, the sentence was again overturned in the review procedure, when Šljivančanin was again acquitted of murder and the initial sentence from the first instance for aiding and abetting torture was confirmed.[479] All the three accused were acquitted of the charges for the alleged participation in a JCE and they were acquitted of all charges for crimes against humanity.

478. In the Reply, the Applicant tries to portray the *Mrkšić et al.* Judgment as a confirmation of its allegation that genocide had been committed by and under the instructions of the JNA and, in turn, of the Respondent. However, the Judgment proves quite the contrary. In this section, the Applicant will deal solely with the nature of the crimes committed at Ovčara and the direct responsibility of the JNA for those crimes, while the relationship between the JNA and the forces of the Croatian Serbs will be addressed in a later section of this Chapter.[480]

479. Possibly the most important finding of the Trial Chamber in the *Mrkšić et al.* Judgment was the one concerning the alleged existence of a JCE and a plan to commit murders of the Croatian prisoners of war at Ovčara. In this respect, the Trial Chamber, after a long and thorough analysis, concluded:

> "The facts, as the Chamber has found them to be established by the evidence, do not support the Prosecution case that there was a joint criminal enterprise involving any of the three Accused, together with others including local TOs, to murder and maltreat the Croat prisoners of war,

[479] ICTY, *Prosecutor v. Šljivančanin et al.* (IT-95-13/1-A), Review Judgment, 8 December 2010.
[480] See Section 4 *infra*.

who had been taken from the hospital to the hangar at Ovčara via the JNA barracks on 20 November 1991. 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 on their own individual volition. The evidence does not offer any support for the view that Mile Mrkšić, or either of the other Accused, ordered or participated in the murders or the maltreatment of the prisoners, or that they planned or intended that the murders or maltreatment should occur, or that the murders or maltreatment were pursuant to their common purpose or were the natural and foreseeable consequence of their common purpose."[481]

480. Having found that there was no JCE, plan or common purpose aimed at killing or even maltreatment of the Croatian prisoners of war, the Trial Chamber proceeded to establish the responsibility of each of the accused for the crimes committed at Ovčara. Earlier in the Judgment, the Trial Chamber found that the murders of prisoners took place after the JNA soldiers had withdrawn from "Ovčara" and that the order for the withdrawal of the JNA soldiers had been given by Mrkšić. [482] Thus it remained for the Trial Chamber to determine the guilt of each of the accused, in particular Mrkšić, taking the order to withdraw the JNA soldiers as a starting point.

481. In this respect, the Trial Chamber first found that Mrkšić had not ordered that the prisoners of war be murdered. This finding is summarized as follows:

> "615. The Prosecution submits that Mile Mrkšić is responsible for having ordered JNA soldiers under his command to deliver custody of the detainees taken from the Vukovar hospital to other Serb forces under his command (members of TO and paramilitary units) which allegedly committed the crimes charged in this Indictment. It is submitted that when he made this order, Mile Mrkšić either intended, or at least was aware of the substantial likelihood, that the order would result in the persecution, extermination, murder, cruel treatment, torture and other inhumane acts of the detainees by members of the TO and paramilitary units.
>
> 616. This submission appears to confuse the *actus reus* of ordering and the mental element or *mens rea* that must accompany an order. The Prosecution contends that Mile Mrkšić ordered JNA soldiers to deliver custody of the prisoners of war to other Serb forces. It is more accurately the case that Mile Mrkšić ordered the withdrawal of the remaining JNA soldiers guarding the prisoners of war; it was a consequence of that withdrawal that custody of the prisoners passed to the Serb TO and paramilitary forces that were then at Ovčara.

[481] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, para. 608.
[482] *Ibid*, paras. 293-294.

617. However, this order is precisely formulated, Mile Mrkšić did not order that the prisoners of war be murdered. His order to the JNA soldiers was not an order to commit any offence. He gave no order to the Serb TO and paramilitary forces that were then at Ovčara and who later executed the prisoners of war. That being the case one of the essential elements of ordering has not been established. The *actus reus* has not been proved. It is therefore not necessary to consider the other and distinct element, namely the *mens rea*. For this reason the Prosecution has failed to establish that Mile Mrkšić is guilty of ordering the murder of the prisoners of war who were killed at Ovčara."[483]

482. Eventually, the Trial Chamber found Mrkšić guilty for aiding and abetting the crime of murder, having satisfied itself that Mrkšić "was indeed aware that the TO and paramilitary forces at Ovčara presented a grave threat to the prisoners of war, a threat he anticipated would manifest itself in considerable and life threatening violence and indeed death" and that "the probability, indeed the considerable likelihood, that prisoners of war would be gravely injured and murdered was, in the established circumstances [...] obvious to Mile Mrkšić and to anyone with his knowledge of the attitude of the TO and paramilitary forces to the Croat forces".[484] The Trial Chamber also found Mrkšić guilty of aiding and abetting the crimes of torture and cruel treatment.[485]

483. Further in the Judgment, after acquitting Miroslav Radić of all charges, the Trial Chamber considered the connection of Veselin Šljivančanin with the crimes committed at Ovčara and found that it has not been established that Šljivančanin aided and abetted the commission of murder at Ovčara in any manner argued by the Prosecutor.[486] The Trial Chamber did, however, find him guilty of aiding and abetting torture and cruel treatment.[487]

484. For the question of attribution of the crimes committed at Ovčara it is also important to determine whether Mrkšić made the decision to withdraw the JNA soldiers from Ovčara himself, or whether he did so on orders from his superiors. The Trial Chamber briefly addressed this issue and found the following:

"Despite suspicions, there is no basis in the evidence on which it could be concluded that Mile Mrkšić consulted his superiors in Belgrade. No communications of this nature have

[483] *Ibid*, paras. 615-617 (footnotes omitted).
[484] *Ibid*, paras. 621-622.
[485] *Ibid*, paras. 629 and 632.
[486] *Ibid*, paras. 653-676.
[487] *Ibid*, para. 674.

been produced, and there is no hint of such matters in the oral evidence. There is evidence of involvement of officers from 1 MD and the Security Administration, including General Vasiljević and Colonel Pavković, in the preparation of the evacuation of the prisoners of war from Vukovar hospital, but no evidence has been adduced demonstrating or suggesting their participation in the final handover of the prisoners to the TOs and paramilitaries. On the evidence, the relevant decisions with respect to the prisoners of war then in the custody of forces under his command were those of Mile Mrkšić."[488]

485. The Trial Chamber also considered the motives behind Mrkšić's decision to hand over custody over the prisoners of war to the TO. The Chamber first found that the original plan of the JNA, which Mrkšić was to implement, was to transport the prisoners to Sremska Mitrovica "for questioning as war crimes suspects and trial and subject to that, for a prisoner of war exchange at a later time".[489] However, while Croatian prisoners captured on previous days were indeed transported to Sremska Mitrovica, Mrkšić, following the session of the Government of SAO Slavonia, Baranja and Western Srem that took place on 20 November 1991, made a different decision with respect to the prisoners who were later killed at Ovčara. The Trial Chamber explained the reasons behind Mrkšić's decision in the following way:

> "In the circumstances, it is more likely that Mile Mrkšić was concerned to avoid a confrontation between the gmtbr [guards motorized brigade], and the other JNA forces under his command, and the local Serb population, represented by the SAO "government" which was an attempt by the Serb people of the region to establish their own non-Croat governmental administration, and in particular the local TOs who saw themselves as the armed force of the local Serb people and the "government", and Serb paramilitaries who had fought the Croat forces. As discussed elsewhere, emotions were highly charged among these people. While a confrontation with the TOs and any who might support them could be dealt with, given the numbers and power of the JNA forces commanded by Mile Mrkšić, it would create an embarrassing and politically difficult situation."[490]

486. To briefly summarize, the findings of the Trial Chamber in the *Mrkšić et al.* case show the following:

a) The killings at Ovčara were perpetrated by local TO members and paramilitaries. It is possible, but not established, that one or more JNA soldiers may have been directly involved in the killings, but acting individually and in isolation.

[488] *Ibid*, para. 586 (footnotes omitted).
[489] *Ibid*, para. 579.
[490] *Ibid*, para. 586.

b) There was no JCE, plan or common purpose aimed at killing or maltreatment of the prisoners of war held at Ovčara.

c) The killings at Ovčara came as a consequence of the decision by the commander of the Operational Group "South", Mile Mrkšić, to withdraw the JNA soldiers from Ovčara. However, it was not established that Mrkšić ordered or even wanted the commission of crimes – he was found guilty because it was probable to him that prisoners of war, once left in the hands of the local TO and paramilitaries, would be gravely injured and murdered.

d) There is no evidence that Mrkšić consulted his superiors in the JNA before taking the decision to withdraw the JNA soldiers from Ovčara. On the contrary, there is evidence that the JNA leadership wanted the prisoners of war to be taken to Sremska Mitrovica for interrogation as war crimes suspects, and later exchanged for prisoners held by Croatian forces. Thus, it was established that the relevant decisions with respect to the prisoners of war were taken solely by Mrkšić.

e) There is no evidence of any involvement of any organ of the Republic of Serbia in any of the events surrounding the crimes committed at Ovčara, and, in particular, there is no evidence that any action or decision of the JNA or of Mrkšić himself had been taken on the instructions by any of the organs of the Republic of Serbia.

3) Babić and Martić Judgments

487. The Applicant further relies to the two ICTY judgments dealing with the events in the Krajina region of Croatia, that is, judgments in the cases against Milan Babić and Milan Martić, two of the most senior leaders of Serbs in Croatia. However, neither of the two judgments confirms the Applicant's claims on the alleged participation of the JNA in the commission of crimes in Krajina.

488. First of all, it should be stated that the *Babić* Judgment was rendered following his guilty plea and the factual basis of this plea, reproduced in the Judgment, contains only a general statement that: "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."[491] The Trial Chamber did not analyze anywhere in the Judgment whether and in what form the JNA directly participated in the commission of crimes to which Babić pleaded guilty. It is therefore submitted that the *Babić* Judgment is clearly inconclusive as to the participation of the JNA in the commission of crimes covered by the Indictment and of no particular use for the Court in this case.

489. On the other hand, unlike Babić, Martić underwent a full trial and the Trial Chamber did analyze the individual crimes alleged by the Indictment. However, as will be shown, despite a much more thorough analysis, the *Martić* Judgment remained equally inconclusive as to the participation of the JNA in the crimes that were found to have been committed. There are two main reasons for this. Firstly, Martić was not a member of the JNA and he was thus not interested in establishing the exact circumstances of the JNA involvement in the individual incidents covered by the Indictment. Secondly, the Trial Chamber found Martić guilty on the basis of his participation in the JCE and, having found that the crimes that had been committed either fell within the common purpose of that enterprise or were consequences of the JCE foreseeable to Martić, the Trial Chamber did not need to exactly establish which, if any, of the crimes had been committed by the JNA. While this line of reasoning might have been enough for the Trial Chamber to establish Martić's individual criminal responsibility, it was certainly not enough to establish whether the JNA participated in the commission of the particular crimes, especially murders.

490. Examples of the inconclusiveness (as to the participation of the JNA in the commission of crimes) of the Trial Chamber's finding in the *Martić* case can be found throughout the Judgment. Thus, on two occasions the Trial Chamber found that: "[...] the above-mentioned victims [...] were killed [...] 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."[492]

491. Admittedly, even if the Trial Chamber had wanted to determine in each particular case who the perpetrators were, that task would have been quite difficult taking into consideration the fact that most, if not all of the forces participating in the conflict

[491] ICTY, *Prosecutor* v. *Babić* (IT-03-72-S), Sentencing Judgment of 29 June 2004, para. 14.
[492] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, paras. 359 and 365.

wore the same uniforms. Thus, in relation to the events in Škabrnja, the Trial Chamber, referring to several witness statements, found:

> "245. The TO present in Škabrnja wore the same uniforms, caps and helmets as the JNA. However, the TO also wore the Serbian flag on their uniforms and some members had a white band on the left shoulder. There is evidence that some TO soldiers wore SAO Krajina patches on their uniforms.
>
> 246. Paramilitary units, in the evidence often referred to simply as "Chetniks", were present in Škabrnja and wore various kinds of JNA uniforms, some with an insignia with four Cyrillic "S", and different kinds of hats, including berets, fur hats with cockades and hats. Their faces were painted, however the evidence shows that at least some of them appeared to be local."[493]

492. A few paragraphs later, however, the Trial Chamber, quoting a witness statement, refers to "ten JNA soldiers" whose faces were painted,[494] which can only indicate that these people were not regular JNA soldiers but members of some paramilitary unit. Elsewhere in the Judgment, the Trial Chamber refers to a woman in the JNA uniform.[495] It is well known that there were no women in the JNA, so this woman could have only been a member of some paramilitary formation or possibly Krajina TO.

493. The Respondent, again, does not dispute that the JNA units were involved in the fighting against Croatian armed forces in the Krajina region in the second part of 1991. The Respondent equally does not dispute that there is a possibility that some units or individual members of the JNA were involved in the commission of some particular crimes against Croats. However, the *Martić* Judgment remained inconclusive in this regard and its findings concerning the alleged participation of the JNA in the commission of crimes cannot be taken as established facts. On the other hand, the same Judgment contains several references to situations in which the JNA officers and soldiers prevented killings of Croats by the soldiers of SAO Krajina.[496]

494. It is thus obvious that, if ever there was some involvement of the JNA in the commission of crimes in Krajina at the time covered by the *Martić* Judgment, that was

[493] *Ibid*, paras. 245-246 (footnotes omitted).
[494] *Ibid*, para. 248.
[495] *Ibid*, para. 182.
[496] *Ibid*, paras. 249 and 251.

not part of any plan or policy adopted at the level of the JNA command. This is, in a way, confirmed by the fact that, even though Generals Veljko Kadijević and Blagoje Adžić, the two people who effectively commanded the JNA at the time, were listed as members of the JCE in the *Martić* Judgment, neither of them has ever been indicted before the ICTY for any crime allegedly committed by the JNA either in Krajina, or in Vukovar, or in Dubrovnik, or anywhere else in Croatia. More significantly, and with regard to the Respondent's alleged control over the JNA, the *Martić* Judgment contains no evidence that any action of the JNA in Krajina was ordered or instructed by any organ of the Republic of Serbia.

G. Interim conclusions

495. In the preceding paragraphs and relevant paragraphs of the Counter-Memorial, the Respondent has analyzed the participation of the JNA in the conflict in Croatia and its relation to the leadership of Serbia at that time. It was demonstrated that the JNA participated in the conflict first as a peacekeeping force and became involved as one of the warring parties only after being directly attacked by Croatian forces. While some units and individual members of the JNA might have committed some crimes during the conflict and while some JNA officers have been found responsible for crimes committed by other forces, the Applicant has failed to prove that any of the crimes has been committed as a part of a plan or a policy aimed at the destruction of the Croats.

496. In relation to the question of attribution, provided that it is theoretically possible (*quod non*) for the Respondent to incur any responsibility for the events that took place before it came into existence, it was demonstrated that the Applicant has failed to prove that the responsibility of the Respondent for the actions of the JNA could be engaged either on the basis of Article 4 or on the basis of Article 8 of the ILC Articles on State Responsibility. In other words, the Applicant has failed to prove either that the JNA was a *de facto* organ of the Respondent or that any of the actions of the JNA in Croatia, and in particular any action during which crimes might have been committed, had been taken on the instructions, or under the direction and control of the Respondent.

4. The alleged control of the JNA over the forces of Croatian Serbs and paramilitaries

497. The Applicant alleges that the JNA had command and control over all joint military operations with the forces of the SAO Krajina.[497] The Respondent has already addressed the relationship of the JNA and various forces of the Croatian Serbs, as well as of the JNA and paramilitary units in the Counter-Memorial.[498] Further in this text, the Respondent will restate some of its main points from the Counter-Memorial and reply to the new claims advanced by the Applicant, in particular those based on the ICTY judgments.

498. It should be repeated, however, that even if the JNA were found to have had command and control over the forces of Croatian Serbs and paramilitary units (*quod non*), that would still engage only the responsibility of the SFRY, and not the Respondent, since the Respondent did not exist at the same time when the JNA existed, that is before 27 April 1992.

A. The alleged control of the JNA over the RSK Armed Forces

499. The forces of Croatian Serbs before 18 May 1992, when the Serb Army of Krajina (SVK) was created, consisted of TO and MUP units, and later also *Milicija Krajine* – a special purpose unit under the authority of the Ministry of Defence of the SAO Krajina.[499] As the Respondent stated in the Counter-Memorial, the local TO and MUP units or parts thereof, on the territory of municipalities in Croatia that had a majority or a substantial minority of the Serb population, started to operate as TO and MUP units of the emerging Serb regions in Croatia with the spreading of the conflict in 1991, and largely as a reaction to the rapid increase in the number of forces under the control of the Croatian Government. As the SAO Krajina and other Serb autonomous regions in Croatia were established at the end of 1990 and during the course of 1991, and subsequently when the RSK was established on 19 December 1991, these units were created and organized according to the laws of these regions and then of the RSK, and not under the internal law of either the SFRY, the FRY (which in any event only came into existence on 27 April 1992), Croatia or even less the Republic of Serbia (at the relevant time still a constituent entity of the SFRY).[500]

[497] Reply, para. 9.71.
[498] See Counter-Memorial, Chapters VI and IX.
[499] *Ibid*, paras. 609-611.
[500] *Ibid*, para. 1016.

500. The decisions concerning the establishment of these forces had been taken while the JNA still had a neutral role in the conflict. Thus, *Milicija Krajine* was established on 29 May 1991,[501] and on 1 August 1991 the Government of the SAO Krajina proclaimed *Milicija Krajine* and the TO forces of Krajina to be "armed forces" of the SAO Krajina, under the command of the president of the government of the SAO Krajina, who was also the commander of the TO forces.[502]

501. The armed forces of the SAO Krajina and other ethnic Serb regions in Croatia, as well as the MUP units of the SAO Krajina, fought independently or, once the JNA became a warring party in Croatia, in cooperation with the JNA. It is not disputed that, at times, these units were subordinated to the JNA, but this was done on the basis of a decision of the relevant authority of the RSK/Serb region in Croatia.[503] In order to counter the Respondent's position, the Applicant refers throughout the Reply to the Judgments of the ICTY in the *Mrkšić* and *Martić* cases. However, the Respondent will now demonstrate that these decisions do not prove that the crimes found to have been committed by the forces of Croatian Serbs can be attributed to the JNA/SFRY either on the basis of Article 4 or on the basis of Article 8 of the ILC Articles on State Responsibility. This analysis, of course, should be considered as only subsidiary, since the Parties essentially agree that the conduct of the SFRY is not the subject of litigation in the present case.[504]

502. The *Martić* Judgment makes a clear distinction between the JNA and the forces of Croatian Serbs. Thus, in para. 344 of the Judgment, the Trial Chamber concludes:

> "Furthermore, evidence shows that the [SAO Krajina] 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."[505]

503. This is completely in line with the Respondent's position from the Counter-Memorial that the forces of Croatian Serbs were established by their leadership and that they fought in cooperation, and not under the command of the JNA.

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[501] See Gazette of Krajina, no. 4/1991, p. 188, Annex 16 with the Counter-Memorial.
[502] See Decision on the Implementation of the Law on Defence of the Republic of Serbia on the Territory of the Serbian Autonomous Region of Krajina, Article 5, The Gazette of Krajina, no. 8/1991, Annex 17 with the Counter-Memorial.
[503] See Counter-Memorial, paras. 634 and 1017.
[504] See para. 57 above.
[505] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 344.

504. In another paragraph, quoted also by the Applicant in para. 4.40 of the Reply, the Trial Chamber analyzed the conduct of operations in Krajina and concluded:

> "142. [...] 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."[506]

505. While the Applicant quotes this paragraph as a proof of the JNA's control over the Krajina armed forces, the findings of the Trial Chamber actually show that both the MUP and the TO of Krajina were independent units which could, under particular circumstances and subject to decisions of their commanders, be subordinated to the JNA units for the conduct of particular operations, or simply participate in the operations in cooperation with the JNA. Furthermore, it was possible for a TO unit to be in command of the joint operation if that unit was larger than the participating JNA unit, although this was normally not the case on the ground. In any case, however, it is clear from the two quoted findings of the Trial Chamber in *Martić* that neither MUP nor TO of Krajina formed part of the JNA and, for that reason, they cannot be considered as or equated with *de jure* or *de facto* organs of the SFRY (whose responsibility, in any case, is not the subject of litigation in the present case before the Court). Consequently, Article 4 of the ILC Articles on State Responsibility cannot apply.

506. The *Mrkšić* Judgment does not alter this conclusion. Although the Trial Chamber did find that the local TO units, as well as volunteer and paramilitary units, had been subordinated to the JNA during the entire battle for Vukovar, it nevertheless drew a

[506] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 142 (footnotes omitted).

clear distinction, throughout the Judgment, between the JNA units, on the one side, and the local TO units, volunteers and paramilitaries, on the other. This means that neither of the latter units formed part of the JNA and thus the responsibility of the JNA for their actions cannot be based on Article 4 of the ILC Articles on State Responsibility.

507. It remains, therefore, to be seen whether the responsibility of the JNA, and consequently theoretically the SFRY, can be established on the basis of Article 8 of the ILC Articles on State Responsibility, that is whether the units of the Croatian Serbs acted on the instructions of, or under the direction or control of the JNA. In this regard, the Respondent first recalls the Court's interpretation of Article 8 of the ILC Articles on State Responsibility, according to which:

> "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[507]

And that:

> "it has to be proved that they [the persons who performed the acts] acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, *in respect of each operation in which the alleged violations occurred*, not generally in respect of the overall actions taken by the person or groups of persons having committed the violations."[508]

508. In this regard, the *Martić* Judgment is not very useful for the reasons explained above in paras. 489-493. Namely, the Trial Chamber in *Martić* was not directly concerned with the JNA's participation and involvement in the crimes found to have been committed and it did not analyze, with respect to any of the individual crimes, whether the crimes had been committed while the JNA exercised its effective control over the forces who committed the crimes or whether the JNA had specifically instructed the commission of the crimes. As it was already stated above, the Trial Chamber equally

[507] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, para. 115.
[508] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 400 (emphasis added).

did not analyze or distinguish which, if any, of the crimes found to have been committed had been committed by the JNA itself. For all these reasons, the findings of the Trial Chamber in *Martić* remain inconclusive as to the principal question of concern for the Court, that is, attribution of the actions of the SAO Krajina forces to the JNA on the basis of Article 8 of the ILC Articles on State Responsibility.

509. The situation is, however, entirely different when it comes to the *Mrkšić* Judgment. In this case, the Trial Chamber analyzed in respect of almost every detail possible the events relevant to the crimes committed at Ovčara and the findings of the Trial Chamber are such that they only confirm that these crimes cannot be attributed to the JNA.

510. Thus, as already discussed above,[509] after finding that the killings at "Ovčara" had been perpetrated by local TO members and paramilitaries, the Trial Chamber proceeded to find that there was no JCE for the commission of crimes charged in the Indictment. In the words of the Trial Chamber:

> "The evidence does not offer any support for the view that Mile Mrkšić, or either of the other Accused, ordered or participated in the murders or the maltreatment of the prisoners, or that they planned or intended that the murders or maltreatment should occur, or that the murders or maltreatment were pursuant to their common purpose or were the natural and foreseeable consequence of their common purpose."[510]

511. The Trial Chamber equally found that Mrkšić did not order that the prisoners of war be murdered. He gave an order to the JNA soldiers to withdraw from Ovčara, but this order was not an order to commit any offence. He gave no order to the Serb TO and paramilitary forces that were then at Ovčara and who later executed the prisoners of war.[511]

512. In addition, the *Mrkšić* Judgment contains a number of paragraphs which illustrate the relationship between the JNA and the local Serbian forces (TO and paramilitaries) and clearly show that the JNA did not exercise effective control over the latter. First of all, the Trial Chamber extensively discussed the meeting of the Government of the SAO

[509] See paras. 476-486 above.
[510] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, para. 608.
[511] *Ibid*, paras. 615-617.

Slavonia, Baranja and Western Srem that took place on 20 November 1991.[512] The Chamber's account of this meeting, as well as a subsequent statement to the press by Goran Hadžić, the Prime Minister in that Government, show that the participants at the Government session discussed the fate of the captured prisoners and decided that the prisoners should not be transported to Sremska Mitrovica and then exchanged, as had been done with previous groups of prisoners, but instead that the prisoners should be put on trial before the local judiciary.[513] This finding of the Trial Chamber, as well as the mere fact that the SAO Government met and discussed the fate of prisoners, is a clear confirmation that the Serbs from Croatia had their own political structures that were independent from the SFRY. Furthermore, these structures were taking decisions that reflected the state of mind of the local Serbs, in particular those engaged in the TO and paramilitary units, and these decisions were contrary to the decisions and plans of the JNA.

513. In this regard, elsewhere in the Judgment the Trial Chamber found:

> "Further, the cause of concern was the conduct of a group of people, comprising TOs, paramilitary personnel, including local Serb volunteers, who together were marking the surrender of the Croat forces by pursuing Croat prisoners of war. This group, while some of them were still formally under the command of OG South, were also persons who, it can be understood in the political situation, saw the so called government of SAO as their "government", and it was the concern of these people that the prisoners of war were "their" prisoners, not JNA prisoners, and that it was for them or at least for their "government" to determine the fate of the prisoners."[514]

514. It is, thus, submitted that the findings of the Trial Chamber in *Mrkšić* clearly point to the conclusion that the crime committed at "Ovčara" was neither committed under the instructions of the JNA nor that the JNA exercised its effective control over the Serb TO and paramilitary forces at the time when the crime was committed. Accordingly, this crime cannot be attributed to the JNA/SFRY on the basis of Article 8 of the ILC Articles on State Responsibility.

[512] *Ibid*, paras. 225-233 and 585-588 in particular, but references to this meeting can be found throughout the judgment.
[513] *Ibid*, para. 226-228.
[514] *Ibid*, para. 301.

B. The alleged control of the JNA over the paramilitary units

515. The Applicant also claims that the JNA had control over various volunteer and paramilitary units that participated in the conflict. In order, however, to prove that any action of the paramilitaries could be attributed to the JNA/SFRY either on the basis of Article 4 or on the basis of Article 8 of the ILC Articles on State Responsibility, the Applicant would have to prove either that the paramilitary units were *de jure* units of the JNA or that they acted under the JNA's instructions or its effective control in the course of particular operations when the alleged crimes had been committed. The Applicant has failed to prove either of the two.

516. Both in the Memorial and in the Reply, the Applicant claims that members of volunteer paramilitary groups were integrated into the JNA by an order of the Federal Secretariat for National Defense of the SFRY dated 13 September 1991.[515] In the Counter-Memorial, the Respondent already explained that, according to the order of 13 September 1991, volunteers were *individually* integrated into the JNA and had to file an individual application (the relevant form was appended to the order). The volunteers that applied would be accepted to the JNA upon a decision of an appropriate military officer and would be assigned to a JNA unit. Such volunteers would be equal to other JNA members. This means that for each volunteer that was integrated into the JNA there would be an individual decision to that effect.[516] The Applicant has failed to identify, either in the Memorial or in the Reply, specific instances in which volunteers were incorporated into the JNA.

517. Quite to the contrary, the documents submitted by the Applicant with both the Memorial and the Reply show that the above order was never implemented with respect to the volunteer or paramilitary units, since the JNA and General Kadijević were issuing instructions that volunteer and paramilitary units either accept the JNA command or be disarmed and removed from the battlefield both in mid-October[517] and mid-December 1991.[518]

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[515] See Memorial, para. 3.80; Reply, para. 4.108.
[516] See Counter-Memorial, paras. 649-650.
[517] Command of the 1st Military District, Strictly Confidential No. 1614-82 27, 15 October 1991, Annex 67 with the Reply.
[518] Federal Secretariat for National Defence, Order of 10 December 1991, Annex 74 with the Memorial.

518. In order to compensate for the obvious lack of evidence that volunteer and paramilitary units were integrated in the JNA, the Applicant refers to the findings of the ICTY in the *Mrkšić* and *Martić* Judgments. However, neither of the two Judgments confirms that the volunteer or paramilitary units were integrated in the JNA collectively.

519. The *Martić* Judgment is rather sparse on this issue, since it only occasionally mentions paramilitary units, without analyzing their status or relation to the JNA and other forces participating in the conflict. However, this Judgment also illustrates that the paramilitary units were at times confused with the "official" units of the SAO Krajina. Thus, one of the witnesses, quoted by the Trial Chamber in the Judgment, identified "reserve forces, Martić's troops or Martić's army" as paramilitary forces, saying that for him "a paramilitary unit is the same thing as a reserve force or the TO".[519]

520. The Trial Chamber in *Mrkšić* devoted more attention to the status of volunteers and paramilitary units and, what is very significant as it confirms the Respondent's position, made a clear distinction between individual volunteers and volunteer (paramilitary) units. According to the Chamber, there were first:

> "[I]ndividuals who were not subject to military service and who had been accepted and had joined the armed forces at their own request. In this way volunteers became either members of the JNA or TO. The volunteers had the same rights and duties as the other military personnel and conscripts."[520]

On the other hand:

> "While individuals could and did volunteer in this way, it was also common for volunteer units to be formed under the auspices of organisations such as political parties or trade unions and for these units, trained and equipped, to present for voluntary service, usually as TO. These often wore distinguishing emblems. Volunteers, especially volunteer units, were often referred to as paramilitaries [...]."[521]

521. In the rest of the *Mrkšić* Judgment, the Trial Chamber continued to refer to the paramilitary units almost always together with the units of the local TO and made a clear distinction between the JNA units, on the one side, and the local TO units, volunteers and paramilitaries on the other.[522]

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[519] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para. 203 and footnote 539.
[520] ICTY, *Prosecutor v. Mrkšić et al.* (IT-95-13/1-T), Trial Chamber Judgment of 27 September 2007, para. 83.
[521] *Ibid.*
[522] See above, para. 506.

522. Accordingly, neither the *Martić* nor the *Mrkšić* Judgment confirmed that paramilitary units had been integrated in or had been treated as part of the JNA and accordingly the responsibility of the JNA/SFRY for their actions cannot be based on Article 4 of the ILC Articles on State Responsibility. In as much as some individual volunteers might have been accepted in the JNA, they should indeed be regarded equal to the JNA members. However, the Applicant has failed to show that any of the individual volunteers had been accepted in the JNA or that any of thus integrated volunteers had committed any crime.

523. Concerning the possible attribution of the alleged crimes committed by paramilitaries to the JNA/SFRY on the basis of Article 8 of the ILC Articles on State Responsibility, all that is said above with respect to the alleged responsibility of the JNA for the actions of the formal forces of Croatian Serbs (MUP, TO and *Milicija Krajine*) equally applies here. Therefore, the findings of the Trial Chamber in *Martić* remain inconclusive as to this issue, since the Trial Chamber did not precisely identify either the exact crimes committed by paramilitary units or whether any of the crimes had been committed under the effective control or under the instructions of the JNA.[523]

524. On the other hand, the Trial Chamber in *Mrkšić* did analyze, in great detail, the crimes found to have been committed and the relation of the JNA and Mile Mrkšić towards the crimes. In this regard, however, all that is said above with respect to the TO units equally applies to paramilitaries and it is submitted that the crime at Ovčara, committed jointly by local TO and paramilitary units, cannot be attributed to the JNA/SFRY on the basis of Article 8 of the ILC Articles on State Responsibility.

525. The Applicant also refers to the finding of the Trial Chamber in *Martić* that Vojislav Šešelj, Serbian politician whose volunteers participated in the conflict in Croatia, was party to the JCE together with generals Veljko Kadijević and Blagoje Adžić of the JNA, Slobodan Milošević and others, and seeks to draw the proof of attribution from this finding.[524] The Respondent has already addressed in the Counter-Memorial the evidence which the Applicant had submitted concerning the alleged attribution of the actions of the Šešelj's volunteer units to the SFRY or the Respondent, which in any

[523] See above, paras. 489-493 and 508.
[524] Reply, para. 4.106.

case did not exist at the time to which the evidence submitted by the Applicant and the *Martić* Judgment correspond. The Respondent has demonstrated that the evidence submitted by the Applicant is neither reliable nor sufficient to establish the responsibility of either the SFRY or the Respondent on that basis.[525] The Respondent will now show that the *Martić* Judgment is equally not sufficient for a finding on attribution.

526. The Respondent, of course, does not dispute that the Trial Chamber in *Martić* indeed found that Šešelj was party to the JCE. However, as in the case of generals Veljko Kadijević and Blagoje Adžić, the Trial Chamber did not explain in a single sentence in which way Šešelj had participated in or contributed to the JCE. Apart from the paragraph which lists Šešelj as one of the members of the JCE, the Judgment mentions him on only two more occasions, both times with respect to the same incident,[526] and without any explanation of his direct involvement in the crimes found to have been committed. The Judgment, on the other hand, does not contain a single reference to the Šešelj volunteer units. It is thus submitted that the findings of the Trial Chamber in *Martić* on the alleged participation of Vojislav Šešelj in the JCE are inconclusive and have to be taken by the Court with a strong reserve. Furthermore, even if the findings in *Martić* are to be taken as conclusive (*quod non*), the mere fact that Šešelj was listed as party to the JCE does not prove that his actions or the actions of his units can be attributed to either the JNA/SFRY or even less to the Respondent which did not even exist at the time covered by the Judgment.

C. The status of the Territorial Defence of Serbia

527. In the Reply, the Applicant emphasizes its "discovery" that the Territorial Defence (TO) units from the Republic of Serbia participated in 1991 in the conflict in Croatia, in particular in Eastern Slavonia, and seeks to engage the responsibility of the Respondent on this basis.[527] In this respect, the Respondent's main position remains the same, that is, the Respondent cannot even theoretically be responsible for any

[525] See Counter-Memorial, paras. 641-645.
[526] Šešelj allegedly visited the old hospital in Knin where detainees of Croatian ethnicity have been held and insulted the detainees asking them "how many Serbian children they slaughtered, how many mothers". See ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, paras. 288 and 416.
[527] Reply, paras. 4.78-4.84.

event occurring before 27 April 1992, i.e. before the Respondent came into existence as a State. Nevertheless, even if this is left aside for a moment, the evidence referred to by the Applicant still does not prove that Serbia had control over the TO units from that republic that were engaged in combat on the Croatian territory as units attached and subordinated to the JNA. Furthermore, some of the evidence referred to by the Applicant actually shows that there was a clear difference in the status and the relationship with the JNA between TO units from Serbia and TO units composed of Croatian Serbs.

528. In this regard, the Respondent does not dispute that the TO units from Serbia that were engaged in the conflict in Eastern Slavonia were fully subordinated to the JNA. This follows from the document of the Command of the 1st Military District from 16 November 1991, the same document referred to by the Applicant on page 121 of the Reply in footnote 136. In relation to this document, however, the Respondent has to note that, although the document can hardly be considered as readily available, the Applicant referred to it without submitting it as evidence, which is not particularly helpful for the Court.[528] For that reason, the Respondent submits the said document with this Rejoinder.[529]

529. This document provides a full overview of the JNA units that were engaged in Eastern Slavonia at the time of the writing of the document, as well as of the units of TO Serbia that were attached and subordinated to the respective JNA units. The Respondent, accordingly, does not dispute that TO units from the Republic of Serbia were under the effective control of the JNA throughout all operations that took place in Eastern Slavonia. For that reason, any action of the TO units from Serbia should be equated to the actions of the JNA and attributed to the JNA and, consequently, the SFRY. This further means that the actions of the TO units from Serbia, which were fully subordinated to the JNA, cannot be attributed to the Respondent either on the basis of Article 4 or on the basis of Article 8 of the ILC Articles on State Responsibility.

[528] The Applicant did the same for a number of other documents, see Chapter III, para. 278.
[529] Command of the 1st Military District, Strictly Confidential nr. 1614-162, 16 November 1991 (Annex 9).

530. The Applicant has not offered any credible evidence that Serbia had control over the TO units coming from that republic that were engaged in combat in Eastern Slavonia. The only thing that the Applicant had to say about this was that: "In early July 1991, parts of the TO's of Serbia and of Bosnia and Herzegovina were mobilized", and that: "In Serbia, such a decision could not have been made without the agreement of President Milošević".[530] However, the Applicant reasoning is based on pure speculation about Milošević's knowledge of the mobilization and it does not explain how did it happen that TO in Bosnia and Herzegovina, where Milošević was not the president, was also mobilized. In any case, even if Milošević knew about the mobilization, which was indeed quite likely since he was the President of Serbia, that still does not prove that he or any other organ of the Republic of Serbia had effective control over the TO units while they were engaged in Eastern Slavonia under the command of the JNA.

531. On the other hand, the above mentioned document of the 1st Military District confirms that the local TO units of Croatian Serbs were not considered as part of the JNA. While the document gives a comprehensive overview of the forces under the command of the JNA, including the units of TO Serbia, none of the TO units of Croatian Serbs was listed in the document and it is obvious that the JNA did not consider these units as its part. As explained above, the TO units of Croatian Serbs were formed independently as the armed forces of the emerging Serb regions in Croatia with the spreading of the conflict in 1991 and they were never integrated in the JNA, although they were occasionally subordinated to the JNA for the conduct of particular operations.

D. Interim conclusions

532. On the basis of the foregoing and the relevant paragraphs of the Counter-Memorial, it is submitted that the Applicant has failed to prove that the forces of Croatian Serbs (TO, MUP, *Milicija Krajine*) and paramilitary units had been *de jure* or *de facto* parts of the JNA, and consequently *de jure* or *de facto* organs of the SFRY, at any time. The Applicant has further failed to prove that the JNA had had or had exercised effective

[530] Reply, para. 4.78.

control over the forces of the Croatian Serbs and paramilitary units at the time when some of these units had committed crimes against Croatian population. The Applicant has equally failed to prove that any of the crimes committed by the forces of Croatian Serbs or paramilitary units had been committed under the instructions of the JNA. For these reasons, it is submitted that none of the crimes committed by the forces of Croatian Serbs or paramilitary units can be attributed to the JNA/SFRY on the basis of either Article 4 or Article 8 of the ILC Articles on State Responsibility.

533. As far as the TO from Serbia is concerned, these units, unlike the units of local Croatian Serbs TO, were fully integrated and subordinated to the JNA and their actions should be equated to those of the JNA. However, since the actions of the JNA cannot be attributed to the Respondent for the reasons explained earlier in this Chapter and in Chapter III of this Rejoinder, neither can the actions of the TO units from Serbia that were subordinated to the JNA at all times while engaged outside of Serbia. The Applicant has failed to prove that the Republic of Serbia ever had control over the TO units from Serbia while they were engaged in combat in Eastern Slavonia or that any of the actions of these units, fully subordinated to the JNA, had been taken on the instructions from Serbia.

5. The alleged control of the Respondent over the forces of Croatian Serbs and paramilitaries

534. Apart from claiming that the JNA was a *de facto* organ of the Respondent and that through the JNA the Respondent exercised its control over the forces of Croatian Serbs and paramilitaries, the Applicant occasionally asserts that the Respondent exercised the alleged control over the forces of Croatian Serbs and paramilitaries directly, that is, either through the Serbian MUP or through Milošević's political influence on the leadership of Croatian Serbs.

535. At the outset, the Respondent stresses once again that, as a matter of fact and as a matter of law, it cannot bear any responsibility for any of the events that took place before 27 April 1992, that is before the FRY came into existence as a state. Nevertheless, for the sake of completeness of this analysis and *ex abundanti cautela*, the Respondent will address some of the claims raised by the Applicant.

536. In the first place, the Respondent has already given its account of the historical and political background to the conflict in Croatia in the Counter-Memorial.[531] It was demonstrated that the political organization of the Serbs in Croatia who lived in areas with the majority or substantial minority of Serbian population was a result of a Croatian policy to dissociate itself from the SFRY and was, to a large extent, motivated by the fear held by the Serbian population that genocide committed against the Serbs during World War II in the Independent State of Croatia would be repeated under the new nationalistic government in Croatia, which had denied Serbs the status of a constitutional people as one of its first steps after taking power.

537. The Respondent does not deny that the leadership of the Republic of Serbia at the time, headed by Slobodan Milošević, publicly or covertly, politically, and perhaps financially, supported the establishment of the Serb territorial autonomy in Croatia. However, this political or even financial support does not make the organs established by the Croatian Serbs either *de jure* or *de facto* organs of the Republic of Serbia and the Applicant has failed to produce any credible evidence in that regard. The Applicant has equally failed to produce any credible evidence that the establishment of the Serb territorial autonomy in Croatia or political organization of Croatian Serbs was effected under the effective control or directions of the Republic of Serbia, but that would in any case be irrelevant since these actions, although illegal under the legal order of both the SFRY and Croatia, were not forbidden by international law.

538. Accordingly, since the Reply mostly repeats the Applicant's assertions from the Memorial without offering anything new on the subject, the Respondent finds that the issue of the establishment of the Serb territorial autonomy in Croatia and other political issues that preceded the conflict in Croatia, as much as they contain matters relevant to the question of attribution, have been sufficiently addressed in the Counter-Memorial. For that reason, the Respondent feels no need to further address the Applicant's claims on this issue from the Reply and leaves it to the Court to appreciate and evaluate the positions of both sides.

[531] See Chapter V of the Counter-Memorial.

539. The same can be said for the Applicant's claims that the actions of various forces of Croatian Serbs and paramilitaries should be attributed to the Respondent. In connection to this, the Respondent will, nevertheless, address a few points raised in the Reply.

540. In the introduction to the factual analysis of the question of attribution in the Reply, the Applicant twice repeats the claim that the ICTY has found that the JNA and other participants in military operations in Croatia acted under the effective control and direction of the then President of Serbia, Slobodan Milošević, and the "Serb leadership".[532]

541. However, neither of the two assertions is accompanied by a quotation from an ICTY judgment or even by a reference to a paragraph of an ICTY judgment that would confirm the Applicant's claims. This is, of course, for the reason that there is no ICTY judgment that contains the alleged finding, while the Applicant, by making these assertions, intentionally confuses and misrepresents the other findings of the ICTY.

542. Namely, there is absolutely no judgment of the ICTY that contains the finding that: "all perpetrators participated in military operations on the instructions of, or under the effective direction and control of"[533] Milošević himself. Even the Indictment against Milošević, which the Applicant quoted in para. 9.63 of the Reply, only claims that the various forces engaged in combat acted "under the effective control of Slobodan Milošević *or other participants in the joint criminal enterprise*".[534] Thus, it is submitted that there is no conclusive finding by the ICTY that Milošević had effective control over any of the forces that participated in the conflict in Croatia. Equally, there is no conclusive finding of the ICTY that Milošević exercised the alleged effective

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[532] Reply, paras. 9.62 and 9.64. In para. 9.62 the Applicant claims that:
"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."
In para. 9.64, the Applicant claims that:
"The ICTY had found that these crimes [on Croat civilian population] 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."

[533] Reply, para. 9.64.

[534] ICTY, *Prosecutor v. Slobodan Milošević* (IT-02-54-T), Second Amended Indictment, 27 July 2004, para. 68 (emphasis added).

control over the forces which committed the crimes in Croatia at the time when the crimes were committed or that any of the crimes was committed under his instructions or direction.

543. As far as the rest of the Applicant's claim is concerned, namely that: "the ICTY has found that [...] all perpetrators participated in military operations on the instructions of, or under the effective direction and control of [...] the other members of the Serb leadership for whose criminal acts the FRY is internationally responsible",[535] this is both inaccurate and misleading. It is inaccurate since it obviously refers to all persons that the Applicant sees as the part of the "Serb leadership", that is Serb leaders from Croatia (such as Martić and Babić), JNA leadership (Kadijević and Adžić) and the leadership of the Republic of Serbia (Milošević in the first place). It is misleading since it attempts to claim that the ICTY has found that the FRY is internationally responsible for the acts of these persons, something the ICTY has never found as it was not its task to do it in the first place.

544. In this way, the Applicant tries to present to the Court the question of attribution as already solved by the ICTY, while in truth the judgments of the ICTY do not confirm that any of the crimes committed in Croatia can be attributed to the Respondent on the basis of the relevant articles of the ILC Articles on State Responsibility and the Court's practice in that regard.[536]

545. Apart from this, the Applicant offers very little evidence for its occasional claims that the Respondent directly controlled the forces of Croatian Serbs and paramilitaries. Some of the evidence relates to training of the forces of Croatian Serbs (Krajina MUP in the first place) by instructors coming from the Serbian MUP, some to the assistance in weapons and other material which Serbia provided to Croatian Serbs for the establishment of their armed forces (again to Krajina MUP in the first place) and some to the alleged links between paramilitary leaders (primarily Arkan) and the leadership of the Republic of Serbia.

[535] Reply, para. 9.64.
[536] For a more thorough analysis of the relevant ICTY judgments see the discussion earlier in this Chapter.

546. The Respondent reserves its position with respect to the individual evidence produced by the Applicant, but in general does not dispute that Serbia provided some support to the Croatian Serbs for the establishment of their armed forces. However, this support, which took the form of occasional combat training and the occasional provision of weapons and other material, is not enough to consider the forces established in Serb autonomous regions in Croatia as either *de jure* or *de facto* organs of Serbia, since it clearly does not amount to "complete dependence" in terms of the Court's findings in the *Bosnia* Judgment. Equally, the occasional combat training and the occasional provision of weapons does not prove that the Republic of Serbia had or exercised effective control over the forces of Croatian Serbs at the time when these forces were engaged in combat operations and in particular when some of these forces committed crimes against Croatian population.

547. Regarding Arkan, the Respondent does not dispute that Arkan had certain political connections with the leadership of Serbia, although the nature and the extent of these connections are not easy to determine. Nevertheless, even if some political connections of Arkan and the leadership of Serbia existed, this is still far from the proof of the "complete dependence" and does not make Arkan and his unit either *de jure* or *de facto* organs of Serbia. Likewise, the Applicant has offered no evidence that Serbia had or exercised effective control over Arkan and his unit at the time when they were engaged in combat operations and in particular when (and if) they committed crimes against Croatian population. As a matter of fact, the Applicant itself discusses Arkan extensively under the heading of "failure to prevent",[537] confirming thereby that even it does not consider that Arkan was under the control of any authorities at that time.

548. In conclusion, the Applicant has failed to prove that the actions of the political structures and the armed forces of Croatian Serbs, or of the paramilitary units can be attributed to the Respondent on the basis of either Article 4 or Article 8 of the ILC Articles on State Responsibility. This, of course, is only provided that the responsibility of the Respondent for the events before 27 April 1992 could theoretically be engaged, which it cannot.

[537] Reply, 9.83 – 9.89.

6. The alleged control of the Respondent over the RSK and its Armed Forces after 27 April 1992

549. As the Respondent has already stated in this Rejoinder, its principal position concerning the question of attribution is that it cannot be held responsible for any event that took place before 27 April 1992, that is before the FRY came into existence. For that reason, the analysis of the issues relating to attribution has to be divided into: a) analysis of the conduct of the SFRY State organs, i.e. before 27 April 1992, and b) analysis of the conduct of the FRY State organs, i.e. after 27 April 1992.[538]

550. This division becomes particularly important in light of the fact that only very few of the incidents described in the Memorial are alleged to have taken place after April 1992, while a vast majority of those incidents took place in 1991.[539] The Respondent notes that, although the Applicant continues to claim in the Reply that the Respondent is responsible for the events that took place before 27 April 1992, it has nevertheless tacitly accepted that the analysis should be divided according to the temporal criteria. Accordingly, the events from before April 1992 and the allegations on the attribution of these events to the Respondent are dealt with by the Applicant in Parts I and II of the Reply (in particular in Chapters 4, 7 and 9), devoted to the Applicant's claims against the Respondent. On the other hand, the allegations concerning the links between the Respondent and the RSK after 27 April 1992 are presented exclusively in Part III, dealing with the counter-claims.

551. In the previous sections of this Chapter the Respondent has demonstrated that, even if it were theoretically possible for it to bear any responsibility for events before 27 April 1992 (*quod non*), the Applicant still failed to prove that any crimes committed against the Croatian population before 27 April 1992 could be attributed to the Respondent on the basis of articles 4 and 8 of the ILC Articles on State Responsibility, either directly or through the alleged control of the Respondent over the JNA. In the subsequent paragraphs the Respondent will demonstrate that it cannot bear any responsibility either for acts committed after 27 April 1992.

[538] See Counter-Memorial, para. 1007.
[539] See para. 427 above with footnote 432.

552. As already shown in the Counter-Memorial, the process of the creation of the Republika Srpska Krajina, the political entity of the Croatian Serbs, was a lengthy process which took place in 1991 and 1992 through a number of decisions taken by the political bodies formed and governed by the Serbs from Croatia. Officially, the RSK was created on 19 December 1991 from the SAO Krajina, while on 26 February 1992 it was joined by the SAO Western Slavonia and the Serbian Regions of Slavonia, Baranja and Western Sirmium. Throughout its existence, until 1995, the RSK exercised *de facto* control over substantial territory and had an independent government with organized armed forces under its control.[540]

553. Therefore, in order to prove that the crimes allegedly committed by the armed forces of the RSK after 27 April 1992 could be attributed to the Respondent, the Applicant would have to prove that either the RSK as a political entity or its armed forces were *de jure* or *de facto* organs of the Respondent or that the crimes were committed under the Respondent's direction or control. The Applicant has failed to prove either of the two.

554. Firstly, the Applicant has failed to prove that the RSK as a whole or any of its organs were *de jure* organs of the Respondent. Truthfully, the Applicant does not seem to really pursue this line of reasoning and instead it claims that the RSK and its Army, the SVK, were *de facto* organs of the Respondent. However, the evidence submitted by the Applicant does not support this allegation.[541]

555. Namely, the Respondent does not dispute that the FRY provided political and financial assistance to the RSK during its existence, including financial assistance to the Army of the RSK. However, this assistance was not of such kind that the RSK or the SVK, to apply the Court's standard developed in the *Bosnia* case

> "could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy".[542]

556. In other words, this assistance was not of such kind that the relationship between the FRY, on the one side, and the RSK or the SVK, on the other, could be described as "complete dependence".

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[540] See Counter-Memorial, paras. 486-498, 609-620, see also above, paras. 499-501.
[541] See, in particular, Reply, paras. 10.25-10.33.
[542] See ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, para. 394.

557. Furthermore, while the Respondent does not dispute that a certain number of VJ officers who originated from Croatia volunteered to serve in the SVK, this does not prove that the SVK was a *de facto* part of the VJ, nor that the VJ had control over the SVK. While in the service of the SVK, these individuals were subordinated to the authorities of the RSK and not the FRY, and they acted on behalf of the RSK. Accordingly, they could not leave their posts in the SVK without the consent of the RSK authorities, as is clear from the evidence provided by the Applicant itself both in the Memorial and in the Reply.[543]

558. The Applicant places a lot of emphasis on the attempts of the RSK to unite with the Respondent and the Republika Srpska.[544] However, all of the documents and decisions to which the Applicant refers come either from the RSK or from the RS and none comes from the Respondent. The attempts of the RSK for unification were, thus, never accepted by the Respondent and the Respondent did not even react to these attempts in any way. It is, of course, a well known fact that the unification of the RSK, the RS and the Respondent never took place. As a matter of fact, not even the unification of the RSK and the RS was effected and the most that the authorities of the two self-proclaimed Serbian entities did was to create a few joint bodies which never rendered any significant decision. Actually, it seems that the authorities of the RSK were the only who really strived for the unification, while their wishes were not shared either by the Respondent or even by the Republika Srpska. Thus, according to a Croatian author Nikica Barić (the same which the Applicant quotes in support of its claims), the Republika Srpska "was not ready to concretely achieve the unification despite its declaratory statements in favor of it".[545]

559. The Applicant also discussed in some length the Operation *Pauk*, conducted in the Bihać pocket in Bosnia and Herzegovina.[546] However, even though the evidence provided by the Applicant proves that some individuals from the official organs of the Respondent were involved in the operation, this is irrelevant for the present case because: 1) the operation was conducted on the territory of Bosnia and Herzegovina, 2) the Applicant has not identified any single crime committed in the course of this

[543] See annex 116 with the Memorial, vol. 4, and annex 122 with the Reply.
[544] See Reply, paras. 10.68-10.70.
[545] Nikica Barić, *Srpska pobuna u Hrvatskoj 1990-1995 (The Serb Rebellion in Croatia)*, Zagreb, 2005, p. 201.
[546] See Reply, paras. 10.106-10.109.

operation nor was any such crime established by the ICTY, 3) even if some crimes have been committed (*quod non*), the possible victims were Bosnian Muslims and not Croats. Incidentally, it is quite telling that the Operation *Pauk* was mentioned only as a part of the Applicant's defense against the counter-claims and not as a part of the allegations on the crimes allegedly committed by or with the assistance of the Respondent.

560. It is thus submitted that the Applicant has failed to prove that the actions of the RSK or any of its organs, including the SVK, that took place after 27 April 1992, can be attributed to the Respondent on the basis of Article 4 of the ILC Articles on State Responsibility. Equally, the Applicant has failed to offer any evidence, either with the Memorial or with the Reply, that would prove or even suggest that any of the crimes allegedly or truly committed after 27 April 1992 had been committed by the RSK forces under the effective control or direction of the Respondent. Accordingly, the responsibility of the Respondent for these acts cannot be engaged on the basis of Article 8 of the ILC Articles on State Responsibility either.

7. The alleged violation of the obligations to prevent and punish the crime of genocide

A. Obligation to prevent

561. As already stated in the Counter-Memorial, in accordance with the Court's *Bosnia* Judgment, the question of the Respondent's violation of the obligation to prevent genocide can arise only if the Court finds that: (a) genocide has been committed against Croats, (b) it was not committed by organs or persons or groups whose conduct is attributable to the Respondent, (c) the Respondent is not responsible for complicity in genocide, (d) the Respondent was aware of the possibility that genocide would be committed but failed to take reasonable action to prevent it, and (e) the Respondent was in a position to influence the actions of the principal perpetrator.

562. Therefore, the first and the most important condition for the existence of the violation of the obligation to prevent genocide is the actual commission of genocide. Having in mind that the Respondent has already demonstrated, both in the Counter-Memorial and in this Rejoinder, that neither genocide nor any other act prohibited by the

Genocide Convention was committed against Croats, it follows that the Respondent has, accordingly, not violated its obligation to prevent genocide.

563. In addition, the Respondent submits that it cannot, in any case, be responsible for the failure to prevent the alleged genocide since the Applicant has failed to prove that the Respondent was in a position to sufficiently influence the actions of the principal perpetrators of the alleged genocide. Finally, since all of the evidence to which the Applicant referred to in the relevant section of the Reply[547] relates to the events from 1991, the responsibility of the Respondent cannot even be considered since the Respondent did not exist as a State before 27 April 1992.

564. Turning, nevertheless, to the new evidence submitted by the Applicant, which concerns the activities of Željko Ražnjatović "Arkan" and his paramilitary unit, the Respondent submits that this evidence is not sufficient to establish either that genocide has been committed or that the Respondent (non-existent at the time) failed to prevent it. What it does indicate, however, is that Arkan obviously was not under effective control of the JNA or any other authority at the time.

565. From the perspective of the alleged genocide committed by Arkan's unit, the alleged crimes of that unit are not identified or specified, not even approximately, and the Applicant tries to blend the allegations of the crimes allegedly committed by Arkan's unit with the other crimes alleged to have been committed against the Croats. The Applicant thus refers to Arkan's alleged boasting in public that his paramilitary group would 'mop up' after houses had been shelled, and then goes on to claim that approximately 1,700 people were killed in Vukovar, of whom 70% were civilians.[548] The Applicant however does not attempt to separate the participation of Arkan in the events in Vukovar and it is not clear whether it wants to allege that Arkan and his forces perpetrated genocide in a sense that was separate from the overall allegations of the alleged genocide perpetrated by the Respondent. This all leaves one big confusion as to what is that the Applicant actually claims before the Court. Fortunately, though, this confusion has no practical consequences since, whichever way one looks at the events, genocide has not been committed and there was nothing to prevent in the first place.

547 Reply, paras. 9.83-9.89.
548 Reply, para. 9.88.

B. Obligation to punish

566. In the Counter-Memorial, the Respondent showed that it could not be held responsible for failing to punish genocide since, in the first place, neither genocide nor any of the acts enumerated in Article III of the Genocide Convention had been committed. In addition, the Respondent showed that, even if the Court would find that some of the acts prohibited by the Genocide Convention had been committed (*quod non*), the Respondent would still not be responsible for failure to punish them because the alleged crimes had neither been committed on the Respondent's territory nor had anyone been charged by the ICTY for genocide committed in Croatia.[549]

567. Still, while acknowledging that a number of persons charged by the ICTY have been arrested and transferred to the ICTY by the Respondent since the filing of the Memorial, the Applicant continues to claim that the Respondent has violated its obligation to punish genocide by failing to arrest Goran Hadžić, former high official of the Croatian Serbs, in spite of the fact that Hadžić was never charged for genocide before the ICTY. The Applicant then extensively quotes a press statement by the former Prosecutor of the ICTY, Carla Del Ponte, in which Ms. Del Ponte expressed her views and assessments concerning the circumstances of the delivery of the indictment and arrest warrant to the Serbian authorities and Hadžić's escape.[550]

568. Taking into consideration that Goran Hadžić was arrested in Serbia on 20 July 2011 and transferred to the ICTY on 22 July 2011, the Respondent considers this part of the Applicant's submissions moot. Accordingly, the Respondent does not feel the need to discuss the Applicant's assumptions on the circumstances of Hadžić's escape,[551] since they in any case represent pure speculation and are not based on the quoted statement of the ICTY Prosecutor.

569. The Respondent, however, wishes to point out that at the time when Ms. Del Ponte made her statement the total number of accused at large was 22, while at the moment of the writing of this text, seven years later, there are no remaining fugitives before the ICTY. This outstanding achievement was in the most part due to the Respondent's efforts, which clearly demonstrates the Respondent's willingness to fully cooperate with the ICTY.

[549] See Counter-Memorial, paras. 1051-1057.
[550] Reply, para. 9.93.
[551] Reply, para. 9.94.

8. Conclusion

570. On the basis of the arguments set above, it is submitted that:

a) The Respondent cannot, as a matter of fact and as a matter of law, be held responsible for any alleged violation of the Genocide Convention that took place before 27 April 1992;

b) In any case, the Applicant has failed to prove that any action or any crime, allegedly or truly committed by the JNA, can be attributed to the Respondent on the basis of the ILC Articles on State Responsibility and the relevant practice of the Court;

c) The Applicant has equally failed to prove that any action or any crime, allegedly or truly committed by the forces of Croatian Serbs or paramilitary units, can be attributed to the Respondent on the basis of the ILC Articles on State Responsibility and the relevant practice of the Court, either directly or through the Respondent's alleged control over the JNA;

d) The Respondent has not violated the obligations to prevent and to punish genocide.

SUMMARY OF PART I

571. In Part I of this Rejoinder, the Respondent has shown that the Applicant's case is based on:

a) Erroneous interpretation of the Genocide Convention, the rules on State responsibility and the practice of the Court,

b) Evidence that does not satisfy the standard of proof required for the charges of such gravity as those advanced by the Applicant and which is, in any case, not credible and reliable,

c) Erroneous interpretation of that evidence in a way purported to prove the Applicant's allegations, while the evidence, such as it is, actually disproves those allegations.

572. Thus, in order to establish the jurisdiction of the Court for the events that took place before 27 April 1992, that is before the Respondent came to existence as a State, the Applicant implicitly asks the Court to apply Article IX of the Genocide Convention retroactively, so as to cover the period predating the coming into existence of the Respondent (27 April 1992) and even of the Applicant (8 October 1991).

573. Since this is still not enough for the Respondent to incur State responsibility for the alleged breaches of the Genocide Convention that occurred at the time when the Respondent still did not exist as a State, the Applicant then asks the Court to apply Article 10(2) of the ILC Articles on State Responsibility (even though this Article does not represent customary international law) despite the fact that none of the conditions for the application of this article is met.

574. If this first obstacle is surpassed (and it is not), the Applicant then wants the Court to find that genocide has been committed against the Croats because "when the evidence is viewed as a whole" it is inevitable to infer that "the policy of 'ethnic cleansing' through the commission of crimes against humanity and war crimes [...] was pursued with the intention of bringing about the destruction of the group" and not "merely its dissolution or the displacement of its members".[552] But the Applicant still does not offer any evidence of the existence of the alleged genocidal intent and instead repeatedly asks the Court to infer the intent from the ICTY's findings that some of the actual crimes alleged by the Applicant have been committed. At the same time,

[552] Reply, para. 9.24.

however, the Applicant chooses to disregard the fact that, when the ICTY had the opportunity to view the alleged crimes as a whole, such as in the indictment against Slobodan Milošević, it did not even try to qualify those crimes as genocide.

575. The Applicant again relies on a number of elements, invoked first in the Memorial, which are supposed to prove the genocidal intent.[553] However, apart from repeating these elements, the Applicant does not offer anything to rebut the Respondent's thorough analysis, in the Counter-Memorial, of each and every element and the successful demonstration that none of these elements, even if established, proves the existence of the alleged genocidal intent, whether they are considered individually or collectively.[554] The Applicant, on the other hand, claims that "all but the last of these elements has been substantially confirmed by judicial findings of the ICTY in proceedings brought against senior Serb officials",[555] but offers absolutely no quotation nor even a reference to any ICTY decision in support of these claims.

576. The Applicant's original submissions in the Application and the Memorial were premised on an approach to the interpretation of Article II of the Genocide Convention that has been systematically rejected in judicial determinations since that time, both by the ICTY and the Court. In the Reply, the Applicant has struggled to repackage its evidence to fit it in the interpretation of the Genocide Convention adopted by the Court and the ICTY, but this attempt was bound to fail.

577. The Applicant is equally unable to prove that the alleged crimes can be attributed to the Respondent. Leaving aside for the moment very important issue of the Court's jurisdiction *ratione temporis* for the events preceding the Respondent's coming into existence as a State and the question whether the Respondent can even theoretically be responsible for these events, the Applicant has nevertheless failed to prove that the actions of the JNA or the Croatian Serbs or the paramilitaries could be attributed to Serbia on the basis of either Article 4 or Article 8 of the ILC Articles on State Responsibility. The Applicant has equally failed to prove that the actions of the RSK after 27 April 1992 (when the Respondent became a State) could be attributed to the Respondent on the basis of either of the two mentioned articles.

553 Reply, para. 9.6.
554 See Counter-Memorial, paras. 947-983.
555 Reply, para. 9.7.

578. These many weaknesses of its case, in terms of the relevant facts and the applicable law, the Applicant seeks to compensate by referring to the finding on the existence of a JCE in the *Martić* Judgment, as a kind of a wild card which is supposed to confirm all of the Applicant's allegations. In reality, however, the *Martić* Judgment proves much less than the Applicant wants to read into it and, with some of its main findings, actually supports the Respondent's position in this case.

PART II

THE RESPONDENT'S COUNTER-CLAIM

CHAPTER VI

EVIDENCE PRODUCED BY THE RESPONDENT

1. Brief overview

579. The Respondent has established its counter-claim on the relevant, reliable and irrefutable documents which have been produced to the Court in annexes 52-65 to the Counter-Memorial (Volume IV). Among those documentary materials, the Court can find a significant compilation of human rights reporting in the days following Operation *Storm* prepared by the UN monitoring teams[556] and European Community Monitoring Mission,[557] as well as by the UN Special Rapporteur of the Commission on Human Rights.[558] These documents are brief accounts of the situation observed directly on the territory of the RSK from August to November 1995. The impartiality and professional approach of the authors of these documents have never been challenged. In addition to these documents, the Counter-Memorial has frequently referred to the ICTY witness testimonies from the *Gotovina et al.* case.[559]

580. Furthermore, the Respondent has submitted two reports of the non-governmental organizations – "Veritas"[560] and Croatian Helsinki Committee for Human Rights (hereinafter "CHC")[561] which, in a professional manner, examined information on victims of Operation *Storm*. The plan for Operation *Storm* has been shown in the original transcript of the meeting held by Croatian President Franjo Tuđman with military officials of the Croatian Army and Police on the island of Brioni on 31 July 1995. It has been accepted as evidence in the ICTY case *Gotovina et al*.[562] The Respondent finds that this plan contains direct evidence of intent to destroy the group of Krajina Serbs. Excerpts from the report "Croatian Armed Forces and Operation Storm"[563] written by Reynaud Theunens, an expert engaged by the ICTY Prosecution in *Gotovina et al*, contain sufficient data for the international responsibility of the Republic of Croatia to be established.

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[556] Annexes nos. 55, 57 & 58 to the Counter-Memorial.
[557] Annexes nos. 54 & 60 to the Counter-Memorial.
[558] Annex 59 to the Counter-Memorial.
[559] www.icty.org/case/gotovina/4#trans. Some excerpts from those testimonies are produced now as annexes to the Rejoinder, nos. 44 – 51.
[560] Annex 62 to the Counter-Memorial.
[561] Annex 61 to the Counter-Memorial.
[562] Annex 52 to the Counter-Memorial.
[563] Annex 64 to the Counter-Memorial.

581. However, the Respondent could not suppose that the Applicant would deny the commission of any crime by the Croatian armed forces during and after Operation *Storm* as a result of the plan prepared in detail by President Tuđman and his supporters on the Brioni Island. That approach of the Applicant requires an appropriate reaction: one of the objectives of this Rejoinder is to clearly demonstrate sufficient examples of the acts of genocide committed in August 1995 and afterwards.

582. Thus, the Respondent submits 15 witness statements given before the Serbian and Bosnian domestic courts from 1995 to 1999.[564] All of these statements have been taken in accordance with the domestic rules of criminal procedure, which are very similar in Serbia, Croatia and Bosnia and Herzegovina. In these testimonies, the Court will find horrific eye-witness accounts of the massive crimes committed by the Croatian Governmental forces, which can only be termed genocide.

583. In addition to the Brioni transcript of 31 July 1995, the Respondent submits excerpts from three transcripts made during Tuđman's meetings with his close supporters in August 1995, when the military operation was over, but the criminal operation was still under way.[565] These three documents are again exhibits from the *Gotovina et al.* case. They further strengthen the Respondent's position concerning the correct meaning of Tuđman's words on Brioni. It is also confirmed by his address to the crowd in Knin on 26 August 1995, when the success of Operation *Storm* was celebrated.

584. On 15 April 2011, the ICTY Trial Chamber found General Gotovina guilty of crimes against humanity and violations of the laws or customs of war, and sentenced him to 24-years' imprisonment, whilst General Markač was sentenced to 18 years for the same crimes.[566] The factual finding of this Judgment should prompt Applicant's representatives in the further proceedings before the Court to admit, at least, the commission of crimes against humanity prepared in advance at the meeting on Brioni Island.

[564] Annexex nos. 52 – 66 to the Rejoinder.
[565] Annexes nos. 67-69 to the Rejoinder.
[566] Available on www.icty.org/case/gotovina/4#tjug.

585. Consistent with its approach to the question of proof adopted in the Counter-Memorial, the Respondent will continue to make a distinction between the standards of proof required, on one hand, for matters that must be proven in relation to its counter-claim, and on the other hand, for the factual background of Operation *Storm*. Annexed to the Rejoinder are 34 exhibits relating to massive crimes committed against the Serb people dating to the very beginning of the armed conflict.[567] These materials contain witness statements given before domestic courts, the OSCE Report concerning war-time killings of civilians in Sisak in 1991-92, some original documents collected and translated by a group of Serbian authors, but also some statements sent to the Federal Assembly or given to the State Expert Team for Collecting Evidence of Crimes against Humanity and International Law. The names of some witnesses who suffered exceptionally grave humiliation are protected. They are being produced in the supplementary confidential submission.

2. Objections to the counter-claim evidence

586. The Applicant has submitted two objections to the documentary evidence presented by the Respondent. The first objection is related to the CHC Report[568] and based on the alleged methodological flaws which led to the purported inaccuracy of the Report, whilst the second objection is directed to the reports written by the Centre for Collecting Documents and Information "Veritas",[569] on the basis of alleged lack of neutrality and objectivity of the head of that organization, Mr. Savo Štrbac.

A. Objections to the CHC Report

587. The CHC Report "Military Operation 'Storm' and It's [*sic*] Aftermath", published in the Croatian capital in 2001, was a remarkable and affirmative attempt of that non-governmental organization, whose members clearly did not support the political and military objectives of the Krajina Serbs, to examine the real consequences of the operation. The Report was based on an in-field investigation which, although limited in sources, was directed to collecting all available and verifiable information about the victims. From the very broad Report, the Respondent has produced to the Court only

[567] Annexes 10 – 43.
[568] Annex 61 to the Counter-Memorial.
[569] Annexes nos. 62 & 66 to the Counter-Memorial.

those parts relating to the crimes committed against Serb civilians in the UN Sectors North and South, as well as against persons from the refugee columns.

588. The insubstantiated objection to this report becomes clear upon reading the Reply. This is how the Applicant presents "the significant methodological flaws and mistakes" discovered by it's official bodies:

> "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) […]"[570]

With regard to the matter asserted by the Respondent, this objection is inappropriate. In searching for a rationale for this objection, one could ask whether this means that a person whose fate was connected with a wrong location should not be listed as a victim. Or that a person whose father's name was unknown could be legitimate military target?[571]

> "2. Mistakes in characterising members of the SVK and paramilitary formations as civilians […]"[572]

Even if this objection is accurate, it is unclear why the Applicant would like to advance such an objection. Whether or not the victims of genocide are civilians or members of military or paramilitary units is not germane to the main issue. Combatants, and persons of combatant age, can certainly be victims of genocide in the same way as civilians. The issue is not their identity as combatants or non-combatants but rather their ethnicity.

> "3. 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."[573]

This objection might be relevant if it were true. But how many individuals, according to the Croatian official records, died from natural causes and accidents? In fact, the Applicant does not provide the Court with its "official records and documentation of

[570] Reply, para. 2.65.
[571] See Annex 208 to the Reply.
[572] Reply, para. 2.65.
[573] *Ibid*.

the Ministry of Family, Croatian Homeland War Veterans and Intergeneration Solidarity" to which it has referred.[574] Why would the Court accept the Applicant's assertion without any proof about the number of individuals who died from natural causes and accidents? How many died in this way? What were the accidents? What methodology has been used in the creation of the official data? Can the Applicant's official data concerning so sensitive matter be considered impartial and reliable? The questions are many and not one is answered by the Applicant.

589. In conclusion, the Applicant, *firstly*, has failed to prove its assertion that the CHC Report contains some methodological flaws. That allegation has not been proved by any serious analysis. *Secondly*, several weak examples of inaccuracy produced in Annexes nos. 204-208 to the Reply are irrelevant for what the Report is being used to prove. Indeed, as the Court says in the *Bosnia* Judgment,

> "it is not necessary to examine every single incident reported by the Applicant, nor it is 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…"[575]

590. The same conclusion is applicable to the Respondent's counter-claim. It is indeed not necessary that the Respondent prove each and every death of the RSK civilians and soldiers killed during and after Operation *Storm* by the indiscriminate shelling of the towns, by attacking to the helpless refugee columns and by the execution of those who decided to remain at home. The CHC Report proves beyond a reasonable doubt that: a) the Croatian armed forces during and after Operation *Storm* committed killings on a massive scale; and b) all victims registered in the Report were members of the Serbian national and ethnic group.

B. Objections to the "Veritas" Reports

591. The objections to the "Veritas" 2007 Report "Victims of the *Storm* and *Post-Storm*" and 2009 Report "Serb Victims of War and Post-War in the Territories of Croatia and the former Republic of Serbian Krajina 1990-1998" are mainly based on the

[574] *Ibid*, para. 11.92.
[575] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 242.

argumentum ad hominem regarding Mr. Štrbac, the head of this non-governmental organization. In support of its assertion that Mr. Štrbac is ready "to manipulate the presentation of events of and facts about the Homeland War",[576] the Applicant refers to one statement allegedly given by Mr. Štrbac in his capacity as defense counsel before the Supreme Martial Court in 1992.[577] The source of this allegation is Decision no. II K.111/92 of 7 May 1992, which, again, has not been submitted to the Court. The Respondent has verified the above mentioned Decision of the Supreme Martial Court and found that it does not contain any quotation of a statement given by Mr. Štrbac. The quotation to which the Applicant refers in para. 2.68 of the Reply is actually the Military Court's interpretation of the appeal's submission, and not at all a statement directly given by Mr. Štrbac. The Applicant's presentation of this issue is quite misleading. It goes to the core of its critique of the "Veritas" report.

592. Even if the Military Court interpreted the defense submission precisely, it should be noted that Mr. Štrbac is not a witness, nor an expert witness, nor defense counsel in this case. He is merely the head of an NGO. It is the organization, and not Mr. Štrbac personally, that has collected evidence of the Serb victims in Croatia. As far as the methodology of the Report produced in Annex 66 to the Counter-Memorial is concerned, the Respondent observes that only ten cases of inaccuracies among 6,119 victims have been registered by the Applicant's official bodies.[578] This is an error that can commonly emerge rather than a consequence of some methodological flaws.

593. This is how the ICTY Prosecution evaluated the work of the NGO "Veritas" in 2000:

> "The Centre "Veritas", led by Mr. Savo Štrbac, has assisted and still assists the work of the Office of the Prosecutor in a professional, serious and responsible manner by collecting information about certain events which occurred during the period 1990-1995 in Croatia. In addition "Veritas" identifies and provides access by the Office of the Prosecutor to the victims and witnesses of violations of the international humanitarian law which fall within the mandate of this Tribunal.
>
> The Office of the Prosecutor is familiar with the general directions of activity of Centre "Veritas" aimed at the two main issues – *Missing in War* and *Witnesses for The Hague* –

[576] Reply, para. 2.67.
[577] Reply, para. 2.68, footnote 99.
[578] See Reply, para. 11.68.

which, if properly funded and successfully managed, could advance considerably some important investigations conducted by the Office of the Prosecutor."[579]

594. In a similar way, the activities of the "Veritas" were evaluated by the UN Liaison Office in Belgrade:

> "On the basis of direct insight into the work of **Veritas** and following its activities, we have an impression that it is a serious organization, which can provide its contribution into the findings of the true developments in Krajina during the period of 1990-1995, regarding violations of the international humanitarian law and establishing the destiny of missing persons."[580]

595. In light of the fact that Croatia has failed to show its official records concerning the alleged 12,211 victims, the updated list of 6,279 Serb victims according to the "Veritas" Report presents a completely different image of the Croatian armed conflict. It is for this reason that Croatia objects so vehemently to the moral credibility of Mr. Štrbac.

C. Whereabouts of the RSK documents

596. In rebuttal to the counter-claim, the Applicant frequently submits that the Respondent is in possession of the documentation of the Republic of Srpska Krajina to which the Applicant does not have access.[581] In fact, it is evident from the very Reply that the Applicant actually holds this documentation: see annexes to the Reply no. 120 (Minutes on the Session of the RSK Government), no. 156 (Minutes of the Meeting between the President of the RSK and Leaders of the Deputies' Groups), no. 160 (Daily Report of the General Staff of the SVK), no. 168 (Daily Report of the RSK Security Department). It is obvious also from the website of the Croatian Memorial Centre of the Homeland War (HMCDR) that Croatia has access to the entire archive of the Republic of Serbian Krajina.[582] Nevertheless, the Applicant has used that archive for the purpose of the current case in a very selective manner.

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[579] Annex 63 to the Counter-Memorial. See also www.veritas.org.rs/srpski/preporuke.htm
[580] *Ibid*.
[581] Reply, para. 1.9.
[582] Source: www.centardomovinskograta.hr/izdanja_centra.html. In particular, the HMCDR Report 2005-2009 (page 12) confirms how many the RSK documents are in the possession of this organization (www.centardomovinskograta.hr/pdf/izvjesce_o_radu_centra_od_njegova_osnutka_2005-do-2009-godine.pdf).

3. The HV artillery documents from Operation *Storm*

597. The Counter-Memorial has drawn the Court's attention to some missing military and police documents of the applicant State that were requested by the ICTY Prosecutor in 2007 in the *Gotovina et al.* case, and which are also expected to contain relevant information concerning the current case. Among these documents are regular military reports issued during Operation *Storm*, orders for attacks and orders to continue attacks, war/operations diaries, plans of actions, lists of targets, artillery deployment maps, etc. The Respondent has quoted the ICTY Sixteenth Annual Report dated 31 July 2009, in which the Prosecutor stated that

> "since 2007, Croatia [had] continuously failed to hand over key military documents related to Operation Storm. Moreover, progress [had been] limited in the investigation which the Court [had] ordered Croatia to conduct into the missing documents. The Office of the Prosecutor [had] raised with Croatia concerns about the focus, manner, and methodology of the investigation conducted."[583]

598. The Applicant did not comment on these developments in its Reply. In the meantime, the ICTY Trial Chamber in *Gotovina et al.* denied the Prosecutor's request for the production of the above mentioned documents for the reason that it was unable to determine with sufficient certainty the whereabouts of these documents and therefore whether they were accessable to Croatia. The Chamber, however, emphasized that its decision is without prejudice to Croatia's obligation to co-operate with the Tribunal in regard to the matter pursuant to Article 29 of the Tribunal's Statute.[584]

599. In his address to the UN Security Council on 6 December 2010, the ICTY Prosecutor Mr. Serge Brammertz stressed that the OTP's request for important military documents relating to Operation *Storm* remained the key outstanding issue. Once again, the Prosecutor observed that the reports produced by the Croatian Government in relation to the search for the missing documents had revealed inconsistencies and had raised questions that had not been resolved.[585]

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[583] Counter-Memorial, para. 204, footnote 144.
[584] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Public Decision on Prosecution's Application for an Order pursuant to Rule 54 *bis* directing the Government of the Republic of Croatia to produce Documents or Information, dated 26 July 2010.
[585] Available on www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/101206_proc_brammertz_un_sc_en.pdf

600. Having in mind the limited scope of the charges against the three Croatian Generals, the missing documents did not have an impact on the ICTY Judgment of 15 April 2011, by which two of the three generals were convicted for the crimes against humanity. The Respondent believes that the missing documents could be even more important for a charge of genocide. In the light of the ICTY Trial Chamber Decision of 26 July 2010 in *Gotovina et al*., the Respondent considers it of no avail to request the Court to call upon the Agent of the Applicant to produce the missing military documents of Operation Storm. If verifiable information on the existence of these documents appears, the Respondent reserves its right to request them.

4. The scope of the ICTY charges against the Croatian Generals and its significance

601. The Applicant claims that no probative value should be accorded to the decision of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia not to include a charge of genocide with respect to the acts upon which the Applicant bases its claim.[586] On the other side, the Respondent takes a view that the fact that the ICTY Prosecutor has decided to exclude a charge of genocide in the cases where the atrocities were committed by Serbs may be significant, in the light of the Court's position taken in the *Bosnia* case.[587] Accordingly, the Respondent takes note of the fact that the ICTY has not indicted anyone for genocide for the crimes committed by Croatian armed forces during Operation *Storm*, but submits that there is a significant difference between the Applicant's and the Respondent's case in this respect.

602. Namely, Serbian President Slobodan Milošević was charged with the most serious crimes committed by Serbs in Croatia which fully coincide, in terms of the relevant time-period and the territory, with the Applicant's allegations in this case. The same cannot be said of the Croatian generals. Generals Gotovina, Čermak and Markač were accused within the limits of what the ICTY Prosecutor considered to have been their own personal participation in the JCE. They were not the highest ranking officers in the Croatian army or police – Gotovina was the Commander of the Split Military District; Čermak only the Commander of the Knin Garrison established on 5 August

[586] Reply, para. 2.27.
[587] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 217.

1995, and Markač an Assistent Minister of Interior and the Commander of the Special Police. On 8 June 2001, when the Indictment against General Gotovina was confirmed by the ICTY,[588] all his superiors that were present on the Brioni Island on 31 July 1995 had already passed away: General Zvonimir Červenko, the former Head of the General Staff of the Croatian Army died in February 2001; Gojko Šušak, the former Minister of Defence, died in 1998, and Franjo Tuđman, the former President of Croatia died in 1999. At the moment of the confirmation of the Initial Indictment, the investigation in this case had not been finished yet. Indeed, due to the ICTY prosecutorial policy, this was one of the last invetigations of the ICTY. On 24 February 2004 an additional Indictment against Generals Čermak and Markač was confirmed. The indictment against the three Croatian Generals was thus geographicaly limited to the zone of their responsibility, that is to say, to the UN Sector South, which is only a part of the crime scene of Operation *Storm*.[589] In the Counter-Memorial, the Respondent presented credible evidence that the UN Sector North was also a scene of grave violations of international humanitarian law.[590]

603. Consequently, the absence of genocide charges in the *Gotovina et al*. proceedings does not have the same import as it does in the *Milošević* case. Tuđman escaped prosecution, and we will probably never know what the Prosecutor would have included in his indictment. Be that as it may, the counter-claim of the Respondent is consderably broader in scope than the Indictment of the three Croatian Generals.

[588] See the ICTY, Case Information Sheet, available on www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf.
[589] Sector South comprised of towns of Knin, Gračac and Obrovac, as well as some small municipalities as Civljane, Donji Lapac, Drniš, Ervenik, Kistanje, Lišane Ostrovičke, Lisičić, Nadvoda, Oklaj and Orlić.
[590] Counter-Memorial, paras. 1301 – 1311.

CHAPTER VII

FACTUAL BACKGROUND OF OPERATION *STORM:* MASSIVE CRIMES AGAINST SERBS IN CROATIA 1991-1995

1. Introductory remarks

604. In this Chapter, the Respondent will respond to allegations concerning the factual background presented throughout the Reply, but principally in Chapter 10 and to a limited extent in Chapters 3 and 11. While this section presents some introductory remarks, in the second section new evidence on crimes committed against the Croatian Serbs in 1991/92 will be presented. The third section deals with the existence of an overall context of national, ethnic and religious hatred directed against Serbs from the very beginning of the armed conflict in Croatia, which contributed in creating the atmosphere in which Operation *Storm* was planned and executed. The fourth section will discuss the continuation of human rights violations faced by Serbs after deployment of UNPROFOR onwards and the Applicant's position regarding these events; the fifth section will deal with the alleged refusal of peace plans by the RSK, while the sixth section will provide evidence that it was actually the Republic of Croatia that was not genuine in its alleged peaceful efforts. All events described in this Chapter are included as the factual background of the later Operation *Storm*.

605. The Respondent will not address at this point the argument presented by the Applicant in respect of the legality of the status of the RSK as it does not have much bearing on the issue before the Court.[591] In order not to overburden the Court with numerous issues that do not directly relate to the main issue at dispute, the Respondent will focus only on answering those arguments raised by the Applicant which are important for the Court's assessment.

2. Massive crimes committed against the Croatian Serbs in 1991/92

606. In paras. 538-559 of the Counter-Memorial, the Respondent briefly reported about a discrimination and systematic violation of human rights of the Serbs in Croatia in 1991. Some notorious examples of extrajudicial executions, disappearances and

[591] See para 10.11 of the Reply.

crimes committed in the prison camps run by the Croatian authorities have been listed as a part of the background to the crimes which are the subject matter of this case. The Respondent could not expect that such notorious atrocities would be disputed by the Applicant: most of the sources to which the Respondent referred were of Croatian or international origin, including judgments of Croatian courts.[592]

607. Nevertheless, the Applicant harshly replies that

> "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. […] 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'."[593]

608. The Respondent finds that such an approach to the events, which are notorious and well known to anyone in Croatia who wants to face the past, deserves to be answered now. The credible and reliable evidence will be therefore presented. This evidence will meet the standard of proof required for the establishment of factual elements that are not the subject matter of the dispute, but indicate its context which is important for a full understanding of the dispute.

A. Evidence of the massive crimes committed against Serbs in Croatia in 1991/92

609. As has already been presented in the Counter-Memorial, the discrimination and persecution of the Serbs in Croatia by the Tuđman Government existed from 1990 onwards and increased at the beginning of the armed conflict in 1991. Annex 32 to this Rejoinder is a copy of the original receipt for the explosives received by the local members of the Croatian Democratic Union of Vinkovci, Županja and Vukovar, the towns of Eastern Slavonia. The receipt was signed on 21 November 1990, much before the beginning of the armed conflict in Croatia. Between 2,000 and 3,000 homes owned by ethnic Serbs were consequently blown up, according to the research made by Croatian

[592] See Counter-Memorial, footnotes 462-503.
[593] Reply, para. 3.115.

historian Nikica Barić.[594] Annex 37 to the Counter-Memorial contains an exemplary series of articles published in the Croatian press in 1990 and 1991. All of them briefly reported about the night attacks on the Serbs and their properties. A common characteristic of all those news is that the perpetrators were usually "unknown".

610. Even if this series of short articles published in the Croatian dailies cannot convince the Applicant that massive crimes against the Serb population were committed in Croatia, the Respondent's assertions are further supported by witness statements taken fully in accordance with the rules of criminal procedure. This is how witness Lazo Stojić, in his statement given before the District Court in Zrenjanin on 27 November 1996, testified about the violations of human rights in Sisak where he lived from 1954 to 1991:

> "In 1990, as I already said, and again in 1991 following the Croatian elections, discrimination against Serbs by Croats was increased: Serbs were dismissed from their jobs and a real campaign of harassment against them began in their places of work. The harassment was reflected in the fact that Serbs were not allowed to work on certain cases and, in other words, Croats by-passed them regarding the jobs that were their responsibility.
>
> This form of nationalism was intensified every day to turn into the booby-trapping of shops and locals owned by Sisak Serbs. Alongside, there was maltreatment by machinegun fire against the windows and fronts of houses owned by Serbs.
>
> I remember a few such cases very vividly. For instance, mines were planted in the local of Ilija Kačar several times. I believe that he now lives in Belgrade. His local was blown up on several occasions.
>
> I also remember the mining of the local meat shop owned by a Serb entrepreneur named Novaković.
>
> Also mined was the shop of Mirko Gavrilović in 1991. At that time, detonations could be heard overnight across Sisak, mostly in the quarters inhabited by Serbs and the next day, we found out the names of the owners of those shops or houses. I can't recall at the moment all the names of people whose shops or homes had been blown up, but I know that there were many such instances.
>
> All this created great fear among Serbs like me, living in Sisak, so much so that a Serb could literally not meet another Serb in the street. I too experienced a lot of embarrassment in the street. […]

[594] Nikica Barić, *Srpska pobuna u Hrvatskoj 1990-1995. (Serb Rebellion in Croatia 1990-1995),* Golden marketing-Tehnička knjiga, Zagreb, 2005, p. 137.

> In August 1991, while I still worked at the medical centre, a neighbour of mine was killed by the police. His name was Jovan Crnobrnja, who used to work at the Sisak Police Headquarters, while his wife Dobrila worked with me. The day before he was killed, Jovo Crnobrnja went to see his wife at work and saw me too. I learned from his wife that the Croatian police killed him in front of her in their home and I know that his wife Dobrila suffered a nervous breakdown because of it and was rushed to hospital. I know that after Jovo Crnobrnja was killed, the newspaper "Večernji list" reported on its pages the next day that Jovo Crnobrnja had ambushed a police patrol and that he was killed in the fire with policemen, which was not true. He was killed purely and simply because he was a Serb. He was a very honest man and was not a rabid or nationally coloured man. All this went on through the night when the police and civilians killed Serbs and one could not get hold of any name of those Croatian police officers."[595]

611. In his statement, witness Stojić continued to testify about the killings of the Serbs in Sisak: according to him, the victims included Dragan Rajšić, five members of Vila family, daughter of Jovo and Vera Solar, Božić who was a driver of "Slavija Trans" from Petrinja, and Stojić's workmate Dragan Sundać. When he heard that the Sisak Police had a list of Serbs including him, Mr. Stojić decided to escape from the town.[596] In 2009, the OSCE Office in Zagreb published an updated "sample list of 35 yet unaccounted-for war-time killings of Serb civilians in the Sisak area. The list [was] based on data from civil compensation claim files, forensic reports, interviews with relatives, NGOs and media information. Most listed killing incidents seem to form part of more extensive crime patterns which remain unprosecuted."[597] According to the 2010 Amnesty International Briefing to the UN Committee against Torture, around a hundred Serb civilians were killed or disappeared in the town of Sisak.[598]

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[595] District Court in Zrenjanin, Serbia, Minutes of the witness hearing of Lazo Stojić, dated 27 November 1996 (Annex 11).
[596] *Ibid*.
[597] OSCE Report: "Unaddressed war-time killings of civilians in Sisak in 1991-92, April 2009 (Annex 11). The Report continues: "As part of the attack on the **Serb civilian population in the town of Sisak** (22 listed victims), five members of the Vila family were killed in August 1991. Unaddressed war crimes cases include the detention, mistreatment and killing in the **ORA detention facility** (five listed victims), the abduction and killings of Serb employees of the **Sisak oil factory** (four listed victims) and the **22 August 1991 "Thunders" Operation** in surrounding villages (nine listed victims). Regarding the latter, not even forensic examination of the bodies was undertaken. The available sample data demonstrate crime patterns. Seventeen of the listed victims were killed by gunshots. Eleven victims' bodies indicate serious *ante mortem* mistreatment. The bodies of thirteen listed victims were disposed of in the river following their killing, the bodies of another three in Sisak's old town."
[598] Annex 73 to the Rejoinder, page 8.

612. The same situation also existed in other Croatian towns. Witness Milan Crnković testified about the situation in Karlovac. In his statement, given on 2 May 1997 before the Basic Court in Banja Luka, Bosnia and Herzegovina, he described how Serbs had been dismissed from their jobs in the police and the local courts and from other executive posts. He also described the campaign of harassment and intimidation of the Serb population, which had began in 1990 in the media and was later followed by demonstrations of the paramilitary units which sang the Ustashe songs in the streets of Karlovac. The situation deteriorated day by day and culminated when the Croatian paramilitary units besieged the JNA barracks.[599]

613. The Counter-Memorial also briefly reports on the camps run by the Croatian Government where the prisoners of war and civilians were subjected to torture, maltreatment, rapes and killings.[600] One of the worst camps was Kerestinec in the vicinity of the Croatian capital Zagreb. Due to the horrific humiliation described in the statements given in 1993 and 1994 to the State Commission established in accordance with UN SC res. 780 (1992), the Respondent has decided to protect the names of victims who gave those statements. They are produced to the Court and the Applicant in the supplementary confidential submission. The statement of Witness SER 002, a reserve JNA soldier from Serbia who was arrested on 11 January 1992 by the Croatian Police, contains, *inter alia*, a description of his detention in Kerestinec:

> "On the third day of our arrival in Kerestinec they took the four of us to the room where we had previously written our statements. "Vet" and four other HOS men were in. They asked me the date of my birth. When I said "August", instead of "Kolovoz" as they say in Croatian, they beat me viciously for that. The four HOS guys used karate punches and kicks. On that occasion they broke my right underarm and five ribs. One of them punched N. so hard in the head that he fell down and then, "Vet" came up to him trying to cut his tooth out by a knife. Having failed, he forced me to lick the blood off the knife. When all the five of them got tired of beating us, they made us beat one another. If our strike was not good enough, they would beat the one who didn't do it properly. Then, they told us to unzip our pants and pull them down and put our penises into one another's mouths until we ejaculated. After that, they told me to lie down with my belly on the table and ordered R. to have an intercourse with me. Then we reversed the roles: R. was sprawled on his belly and I had to have an intercourse with him. All that time, "Vet" and the HOS guys watched and laughed at us. When this torment was over, they sent us to a bathroom to have a shower with completely cold water.

[599] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Milan Crnković, dated 2 May 1997 (Annex 10).
[600] Counter-Memorial, paras. 548-551.

> During the time we were detained in this camp, they took us twice into the corridor over night to waltz to the sound of music with elderly lady prisoners. On the first such occasion we had nothing on from waist down and ladies from waist up, while on the second occasion elderly ladies were stripped off their clothes from waist down and we men from waist up. With the dance over, women had to stand up against the wall and watch us masturbate."[601]

614. The similar account of the horrific conditions that the Croatian guards imposed on the Serb prisoners in the Kerestinec camp can be found in the statement of SER 001,[602] while the statement of Saša Mirković contains information about the torture and murder of prisoners of war Bratislav Bjelobrk, Dušan Bjelobrk, Rade Uzelac, Slobodan Jakšić and Saša Kostić, who were detained in the camp in Slavonski Brod in May 1992.[603]

615. The situation was no better in Dalmatian towns which were also far from any battlefield and under the full control of the Croatian Government. Witness Marko Dragaš testifies about his personal experience from the town of Šibenik,[604] while witness Nenad Kanazir gives an account on the situation in the town of Zadar, his unjustified arrest and torture he suffered in the dungeon of Lora Harbor in the town of Split.[605]

616. Witness Vojkan Živković, a JNA officer captured by the Croatian forces in March 1992, gives a following account on his days spent in the Lora dungeon:

> "My unit withdrew to another village and we battled with the Croatian forces until 2 March 1992. During this fighting, I was wounded in my left leg and was also injured in the head, in a hand-grenade explosion. I was also taken prisoner by ZNG forces, on that occasion. As soon as they caught me wounded and injured, they threw me into a nearby stream and started drowning me. Then they took me out of water and walked over me. They kicked me all over my body. […]On 3 March 1992, I was transferred from the prison at Draćevac to a military prison located within the naval port of Lora, in Split. I was driven to Lora together with 6 other JNA soldiers, most of whom were active soldiers, but there were also some reservists among them.[…] As soon as they took us out of this truck, a group of guards was already lined up waiting to beat us,

[601] Statement of Witness *SER 002* given to the Expert Team for Collecting Evidence of Crimes against Humanity and International Law, dated 30 December 1993 (Annex 15).
[602] Statement of Witness *SER 001* given to the Expert Team for Collecting Evidence of Crimes against Humanity and International Law, dated 3 March 1994 (Annex 14).
[603] Statement of Saša Mirković given to the Expert Team for Collecting Evidence of Crimes against Humanity and International Law, dated 25 April 1994 (Annex 13).
[604] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Marko Dragaš, dated 29 June 1998 (Annex 18).
[605] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Nenad Kanazir, dated 30 April 1997 (Annex 16).

kick us with their boots and hit us with rifle butts and clubs. […] The cell I was in was the size of 2 by 3 metres. It had no beds and no chairs or any other furniture. The floor was made of concrete. I had no blanket or mattress to sleep or sit on, and I lay there on the concrete floor itself. As soon as I was put into this cell, I was beaten. A group of 3 guards burst in and they beat me, kicked me and hit me with baseball bats, all over my body. […] Tomo Dujic again gave me a piece of paper with a text which says that I had killed Croatian soldiers and civilians, to sign it, and since I refused, he told a guard to cut off my fingers. Then the guard who was present in the office came to me, pulled out his knife, put my hand onto the table, took my right hand first, and then he made a move to cut my index finger, of which I even have a scar today." *The investigating magistrate noted that, having the witness shown his right hand index finger and a visible scar in the middle of it, as well as that he had the same scar also on the index finger of this left hand.* "Having started cutting my right had index finger, the guard took my left hand and repeated the same process with my left hand index finger. Then, Dujic stopped him and told me to sit on a chair, tying my arms and legs to it himself, after which he tied two wires on the improvised earrings that had already been put into my ears at Draćevac. I noticed that the wires were connected to the field inductor telephone. Then, Dujic turned the handle of the telephone and switched on the electric current. That was a 115 volt current and it caused strong electric shocks and pains so that my whole body twitched, following which Dujic tied the wires to my legs and to my penis so that this torture lasted for several hours. […] After these electric shocks, they used to take me back to my cell, and I recall that, after a while, some children came in and beat me also with various objects. I believe that one of them was the son of Dujic or another prison guard. […] Again, they threw me into my cell and the guards brought German Shepherd dogs which were trained and gave them orders to dig their teeth into my neck. After that, they would sooth the dogs and the guards would force me to kiss the dog, which held me by the neck, on its mouth. After this torture, the guards would take me and the others to the prison grounds, saying that they were taking us out for execution by shooting, because we were all sentenced to death and they lined us up against the wall. One of the guards who wore a black cap with a slit on the head would stand out, pull out his gun and shoot me and others, just missing our heads. During my detention at Lora, I was taken out a dozen times for these mock 'shootings'. […] My detention in these prisons in Croatia that I would refer to as detention camps has resulted in my terrible physical and psychological condition, even today. For instance, when I was captured I weighed 97 kg and when I was exchanged, I weighed only 46 kg. I had my ribs broken in these prisons, five ribs on my right hand side and two on my left hand side. I can prove it with my medical documents."[606]

[606] First Municipal Court in Belgrade, Minutes of Witness Hearing of Vojkan Živković dated 21 February 2002 (Annex 45 to the Counter-Memorial).

617. According to the Judgment of the Croatian District Court of Rijeka K.11/01 dated 24 March 2003, more than 32 Serb civilians were executed in the town of Gospić on 17 and 18 October 1991 by the Croatian Army.[607] Thus, it is very strange that the Applicant overlooked this Judgment when it declared that there was no credible evidence presented on the numerous executions of Serbs. More information about the suffering of the Serbian People in the area of Northern Dalmatia in the spring of 1991 can be found in Annex 17 to this Rejoinder.

618. The same pattern of atrocities inflicted on the Serbs is characteristic for the whole of Croatia. Evidence about massive crimes committed against the Serbs in Western Slavonia includes witness statements of Milka Bunčić Kukić and Jovo Krajnović, taken by the District Court in Belgrade in 1996 and 1998 respectively; a witness statement of Đurđa Vujasin concerning the massacre of Serbs from the village of Mašićka Šagovina on 19 December 1991; a copy of the threatening letter received by a Serb Radovan Radosavljević shortly before he was killed in Daruvar on 25 February 1992, together with his wife and two sons; a monitoring report of the trial for war crimes committed in the town of Virovitica in 1991; tracing request for victim Milos Grmuša who went missing in the town of Petrinja on 19 July 1991; and a list of non grata Serbs posted on several hundred places in Podravska Slatina on 15 January 1992.[608] These various documents are annexed to the Rejoinder to demonstrate clearly and without any doubt that the Croatian Government forces committed all forms of persecution of Serbs already in 1991. As an example, this is how witness Jovo Krajnović testified about his personal experience:

> "I used to live with my family in the village of Kip in the Municipality of Daruvar and my village was predominantly Serb. There were a few Czech and Croatian homes. Up until the first multi-party elections in Croatia or more precisely, until the creation of the HDZ (Croatian Democratic Union) party, we all by and large lived in harmony and without any major inter-ethnic frictions, whether at work or in the community. I went to work as usual up to 15 November 1991 when at 6:00 a.m. Croatian military police encircled my house in the village (No. 35) and arrested me and my father, and the other Serb villagers. That morning, I was all dressed up and I waited for a colleague of mine to give me a ride to Daruvar for work at the machine factory "Dalit" when the Croatian police came to the house. One of them hit me and my father Mijo: they tied us and forced us into the yard. There, a few military police members (MPs) that I didn't know beat us."[609]

[607] See Annex 41 to the Counter-Memorial.
[608] Annexes 20 – 26.
[609] District Court in Belgrade, Minutes of the witness hearing of Jovo Krajnović, dated 1 June 1998 (Annex 20).

619. Witness Krajnović further gives an account on the horrific torture of the Serbs detained in the place called Ribarske Kolibe in Marino Selo, including the executions of at least 13 men. Witness continues:

> "On Wednesday, 20 November 1991, the Croatian soldiers brought me into a hotel room where they interrogated prisoners. They told me to sit on a chair and tied my hands on the back; they took off my shoes and tied my legs to the chair. They tied each toe with one piece of wire to the inductor and began rolling it. I shook all over from those electric shocks. When this treatment of theirs was over, I rolled down the stairs into the basement. They took Nikola Krajnović out of the basement after me and severely beat him, because he had no Deutsch Marks that they asked him to give them. They punctured his earlobe with a knife and put a bullet into the puncture and connected it with the wire to the inductor. They cut off his other ear. They subjected him to torture by electric shocks until he collapsed from the chair. They dumped him out. The next one to be taken out was Milan Popović. They cut off both his ears. They did the same to Pero Novković and Savo Gojković. One ZNG member threw Savo Gojković's ear before my father Mijo Krajnović and forced him to gulp it down. […] In Marino Selo, the Croatian soldiers had smashed all my teeth, broken three ribs, injured my spine and broken my jaw at three places."[610]

620. The Croatian non-governmental organization "Centre for Peace, Non-Violence and Human Rights" from Osijek also reports about the atrocities in monitoring reports on the domestic trial for war crimes committed in Marino Selo. The trial is ongoing.[611]

621. Witness Dušan Kovač testifies how Serbs were killed by the Croatian armed forces in villages Trnava and Medare in Western Slavonia:

> "In the middle of 1991, the Croatian army coming from neighbouring Croatian villages stormed the Serb villages of Trnava and Medare, plundering Serbian property and going back to those Croat villages. At that time, Serb villages organized territorial defence units in which I also took part. During the attack by the Croatian army on the villages of Trnava and Medare, on 14 August 1991, the Croatian soldiers arrested me in my home. During that attack on the village of Medare, Croatian soldiers killed Milan Zakula. They massacred him in his home. They also killed my neighbour Dusan Strbac. They beat me severely and took me to Slavonska Pozega, detaining me at the District prison. I was held up there for 28 days and, during this time, they interrogated and beat me several times. They fractured my lower

[610] *Ibid*.
[611] See Annex 40 to the Counter-Memorial.

jaw on the left side of my face; they damaged my left kidney as well. They mostly kicked me with their shoes or punched me. I still feel the terrible consequences of those beatings in the form of kidney pains or aches and pains in other parts of my body."[612]

622. The "Centre for Peace, Non-Violence and Human Rights" from Osijek also reported on the Croatian trials for massive war crimes committed in Osijek and Paulin Dvor, two places in Eastern Slavonia. In Osijek, at least twelve Serb civilians were executed in 1991 and thrown into the Drava River, while others were tortured and killed in the garage of the National Defence Secretariat.[613] In December 1991, eighteen residents of Paulin Dvor were also killed. However, a person accused for this crime has been acquitted.[614]

623. The Respondent also provides the Court with some additional sources about the crimes committed against the Serbs in the towns and villages of Eastern Slavonia, including Vukovar,[615] Sotin,[616] Borovo[617] and Sarvaš.[618] According to the 2011 Youth Initiative for Human Rights (YIHR) Report, from early April 1991, Vukovar was a place of "systematic terror over citizens of Serbian nationality". Most kidnappings and murders were committed in the summer of 1991.[619]

B. Evidence that the massive crimes committed against Serbs in 1991/92 have not been fully investigated and prosecuted

624. Although the situation concerning the prosecution for war crimes in Croatia has improved in the last few years under significant pressure from the international community, the Respondent presents evidence which clearly shows that some massive

[612] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Dušan Kovač, dated 1 July 1998 (Annex 40). See also, Minutes of the witness hearing of Dušan Bošnjak (Annex 39).
[613] See Annex 38 to the Counter-Memorial.
[614] See Annex 39 to the Counter-Memorial.
[615] Municipal Court in Vukovar, Croatia, Minutes of the petitioner hearing of Nada Nikolić, dated 21 November 2006 (Annex 28); Excerpt from the letter by Helsinki Watch to Dr. Franjo Tuđman, President of the Republic of Croatia, concerning crimes committed in Vukovar and Sisak, published in Dabić, Lukić, Perović & Šalić, "Persecution of Serbs and Ethnic Cleansing in Croatia 1991-1998 – Documents and Testimonies", Belgrade, 1998, pp. 91-93 (Annex 29).
[616] Military Court in Belgrade, Serbia, Minutes of the witness hearing of Smilja Ivković, dated 27 January 1993 (Annex 27).
[617] Statement of Vlatka Stepanović from Borovo, received by the Federal Assembly of the SFR Yugoslavia on 7 April 1992 (Annex 30).
[618] Letter of Bogdanka Radović from the Village of Sarvaš to the Federal Assembly of the SFR Yugoslavia, dated 2 August 1991 (Annex 31) and List of the Serb Victims killed on 2 August 1991 in Sarvaš, prepared by the Local Community of Jelenovo, Municipality of Dalj (Annex 32).
[619] Annex 74 to the Rejoinder, p. 11. The Youth Initiative for Human Rights is a regional non-governmental organization. In March 2011, this NGO published a report "Against immunity of power: prosecution of war crimes in Croatia".

crimes against Serb civilians remain unaddressed. For example, this is the case with the above mentioned mass murder in Paulin Dvor (see the Monitoring Report of the Centre for Peace, Non-Violance and Human Rights from Osijek, Croatia),[620] massive executions and terror in Sisak (the 2009 OSCE Report on the unaddressed war-time killings of civilians in Sisak in 1991-92;[621] the 2010 Amnesty International Briefing to the UN Committee against Torture;[622] the 2011 YIHR Report, p. 12[623]), kidnapping and murders committed in Vukovar (YIHR Report, p. 11[624]), as well as massive expulsion of the Serb population from the vicinity of Požega in October 1991, when at least 1,000 buildings were destroyed, 1,462 civilians forcibly displaced, and 44 civilians killed (YIHR Report, p. 14[625]).

C. Evidence that massive crimes against Serbs in 1991/92 were committed by Croatian officials

625. From the very beginning of the armed conflict in Croatia, the leaders of Croatia's ruling party, the HDZ, were involved in the planning and perpetration of the crimes against the JNA and Serb population. On 25 January 1991, Television Belgrade and Television Sarajevo broadcast a film compiled from the videos, pictures and other information obtained by the Counter-Intelligence Service of the JNA, entitled: "The Truth about the Armament of the HDZ in Croatia".[626] One of the videos filmed in secrect shows Croatian Defence Minister Martin Špegelj making a clear statement that the JNA officers were planed to be executed: "Each officer is covered with five men in Virovitica, and all of them will be cut down while they are still at home. [...] Because, they [The HDZ paramilitary units] got a task, no doubt, no one alive can come to the barracks."[627] This was how the Croatian "peaceful" struggle for independence was planned in early 1991 by the Tuđman's political party.

[620] Annex 39 to the Counter-Memorial.
[621] Annex 12 to the Rejoinder.
[622] Annex 73 to the Rejoinder.
[623] Annex 74 to the Rejoinder.
[624] *Ibid*.
[625] *Ibid*.
[626] Memorial, para. 2.97.
[627] TV Belgrade, video footage, "The Truth about the Armament of the HDZ in Croatia", 25 January 1991, referred to by the Applicant in the Memorial, para. 2.97.

626. When the Memorial mentions the outbreak of the conflict at Borovo Selo and the killing of twelve Croatian policemen,[628] it forgets to note the preceding event – a night attack on this village with anti-tank missiles, involving radical HDZ activists led by Gojko Šušak. The eye-witness to the attack was the regional police chief Josip Reihl-Kir, who was a moderate person and who had worked tirelessly on both sides to restore mutual trust. The HDZ extremists killed him on 1 July 1991.[629]

627. On 13 September 1991, the then Defence Minister of the Republic of Croatia Luka Bebić (and the current President of the Croatian Parliament) issued an order to all ZNG units, as a military formation of the HDZ, and to all Crisis Committees, to start cutting off all municipal services and the supply of fuel to the JNA in Croatia, and blocking of barracks, storage depots, and all routes used for the Army movements. Commanders in the field were also authorized to undertake appropriate actions if necessary.[630] Only a week later, there was a first mass execution of the JNA soldiers on Korana Bridge in Karlovac, when 13 soldiers were killed and two wounded. Only one Croatian policeman, Mihajlo Hrastov, was charged with this crime in Croatia. However, he was three times acquitted of all charges. The criminal proceedings were reinstituted again, and he was found guilty in 2009 by the Croatian Supreme Court. In 2010, his sentence was reduced from eight to seven-years of imprisonment. Finally, the Croatian Constitutional Court in December 2010 quashed the conviction again.

628. Branimir Glavaš, a former Secretary of the Osijek County National Defense and a member of the Croatian Parliament, was found guilty and sentenced to ten years in prison by the District Court in Zagreb in 2009 for ordering murders of Serb civilians in Osijek.[631] Yet, he managed to escape justice, fleeing from Croatia to neighboring Bosnia and Herzegovina. Another Accused, Tomislav Merčep, was also a Croatian local National Defense Secretary, responsible for the town of Vukovar. He was arrested in 2010 under the order of the Croatian Court. He is indicted for killing 43 civilians, disappearances of 3 persons, as well as torture and inhumane treatment committed in Pakračka Poljana and Zagreb.

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[628] Memorial, para. 2.102.
[629] See Laura Silber & Allan Little, *The Death of Yugoslavia*, Penguin Books, BBC Books, 1997, pp. 140-144.
[630] Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995*, Vol. I, Chapter 10, p, 95, Washington DC, 2002.
[631] See Annex 38 to the Counter-Memorial.

629. The District Court in Rijeka convicted General Mirko Norac, a commander of the 118th HV Brigade, as well as Tihomir Orešković, a Secretary of the Gospić Operational Headquarter, for massive executions of the Serb civilians in that town in 1991.[632] In addition, it is obvious from the very Judgment of the Split District Court that the military prison in Lora harbor in Split was run in 1992 by the Croatian military police. Also, in 2009, six Croatian military policemen were convicted for war crimes in relation to the murder of 17 Serbs in Pakračka Poljana.[633] These recent judgments of the Croatian courts show that the Applicant's claim that "there is no evidence that alleged acts were carried out by local military and political officials" is untenable.

D. Evidence that the Croatian Government was aware that the Croatian armed forces had committed massive crimes against the Serbs in 1991/92

630. The Respondent will further present evidence that Croatian President Franjo Tuđman was well informed that the Croatian armed forces had committed massive crimes against the Serb population and still did nothing to punish the crimes committed and to prevent the further commission of such crimes. In November 1991, Mr. Ante Karić, Chairman of the Emergency Headquarters for the Municipality of Gospić, duly informed Croatian President about the terror in that town and its vicinity.[634] On 13 February 1992, the international NGO "Helsinki Watch" also sent a letter to the Croatian President in order to inform him about the crimes committed against the Serb civilians in Vukovar and Sisak.[635] It is impossible that the information contained therein remained unknown to the Croatian authorities. By his public statement given shortly after the 2011 ICTY verdict in *Gotovina et al.* case, Mr. Stjepan Mesić confirmed that he was present in December 1991 when President Tuđman was informed by one of the ministers that Serbian villages in Western Slavonia were being burned "in three shifts".[636] Finally, it is impossible that the Croatian Government did not note the UN reports submitted by the Special Rapporteur on human rights in the territory of the former Yugoslavia in 1993 and 1994, to which the Respondent has

[632] See Annex 41 to the Counter-Memorial.
[633] See Counter-Memorial, para. 544.
[634] Annex 19.
[635] Annex 29.
[636] http://www.novilist.hr/hr/Vijesti/Hrvatska/Mesic-Kljucni-dokaz-Haagu-dostavio-je-Karamarko-Tudman-je-znao-da-srpska-sela-gore-u-tri-smjene, last visited on 29 July 2011.

referred in the Counter-Memorial. According to the Tenth periodic report, dated 16 January 1995, the Rapporteur received information that between 100 and 200 Serbs were killed in Gospić in mid-October 1991 by Croatian army soldiers.[637]

631. However, this did not prompt the Croatian Government to prevent further ethnically motivated killings. Instead of directing Croatian commanders to show respect for international humanitarian law, the Croatian President and top military officials prepared further criminal actions: Operations *Flash* and *Storm*. Instead of punishing perpetrators of the above-mentioned crimes, the Croatian Government promoted them. Thus, Tomislav Merčep became Deputy Minister of the Interior, while Gojko Šušak was appointed Minister of Defence of the Republic of Croatia. Mirko Norac, liable for the killings in the area of Gospić, became one of the commanders in field of Operation *Storm*.

3. Context of national, ethnic and religious hatred

632. While the conflict in Croatia escalated and number of Croatian victims rose, many Croat politicians and intellectuals were giving public statements which pretended to portray the Serbian nation as animals, beasts or creatures of lower value than normal people. This public dehumanization of the enemy created a general context of deep national, ethnic and religious hatred which finally led to genocide during and after Operation *Storm*. It was only one step from such statements to the merciless killings of helpless Serbian civilians and those who were *hors de combat*.

633. The Counter-Memorial refers to the statement of Marjan Jurić, Member of the Croatian Parliament, at the session held on 1-3 August 1991, which *inter alia* reads:

> "Our almighty God has created at the same time both good people and a lot of vermin. One of such vermin is the moth which, when let into the closet, in fact when it comes into it, it eats at the shirt, then it turns to the pullover; it eats and eats until it has eaten everything away. The same is true of those who came to us as our guest-workers."[638]

This statement refers to the Serb population in Croatia. The Applicant does not dispute the accuracy of the quotation.[639]

[637] Counter-Memorial, para. 546 and fn. 478.
[638] Counter-Memorial, para. 440.
[639] Reply, para. 3.27.

634. In a similar manner, Šime Đodan, Special Envoy of the Croatian President Franjo Tuđman, in his speech at a traditional competition in Sinj held in August 1991, stated: "The Serbs had pointed heads and probably also small brains."[640]

635. The Counter-Memorial also points out the Croatian magazine *Slobodni tjednik* (Free Weekly) as a notorious example of a tabloid which only published inflammatory articles about Serbs.[641] The Reply answers that *Slobodni tjednik* was a private tabloid and the mainstream Croatian media distanced itself from it.[642] As an example, the Applicant offers a quote from the weekly *Danas* (Today) that should represent the position of the Croatian mainstream media reporting.[643] Yet, the following quote comes from an article published in *Danas* on 12 November 1991, in which Krešimir Dolenčić, Director of *Gavella* Theatre in Zagreb, described Serbs in the following way:

> **"**Beasts from the East stand no chance. A monkey smashes everything around the house and it is all the same to the animal whether it smashed a glass or a Chinese vase, because it is unable to tell the difference. There is no way that the monkey has any chances in the fight against the human. There will always be a way to put it to sleep and place it in a cage where it belongs. [...] The distinction between us and them is like between computers of the first and the fifth generation. **They should either be held in captivity or destroyed**, because nothing better could be expected of them. There could not be much talk or negotiation with them. I am convinced that their culture is below the primitive level, since primitive cultures can be interesting and rich spiritually."[644]

636. There is no doubt that the above-quoted statement went beyond mere hate-speech.[645] This statement publicly and directly communicated the call to members of the general public at large for destroying Serbs. The specific genocidal intent is obvious from the very text of this message.

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[640] N. Barić, *Serb Rebellion in Croatia 1990-1995 (Srpska pobuna u Hrvatskoj 1990-1995.*), Zagreb, 2005, p. 137.
[641] Couner-Memorial, para. 438.
[642] Reply, para. 3.26.
[643] *Ibid*, footnote 64.
[644] See Annex 51 to the Counter-Memorial.
[645] "Hate-speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human", ICTR, *Nahimana et al.* v. *Prosecutor* (ICTR-99-52-A), Appeals Chamber Judgment of 28 November 2007, para. 1072.

637. This atmosphere persistently existed in Croatia even after 1991. For instance, Zvonimir Šekulin, Editor-in-chief of *Hrvatski vijesnik*, in his interview published in magazine *Globus,* Zagreb, on 9 September 1994, stated:

> "Considering that the *Hrvatski vijesnik* really runs a column entitled 'hard-core Serb pornographic pages', I also admit that this newspaper is in part pornographic as the Serbs themselves are pornography. Photograph of Patriarch Pavle [Head of the Serbian Orthodox Church], published on these pages, is more pornographic than the photos of the biggest whores. […] [N*ame*] wrote that I said that some people were vermin. But I say that only the so-called Serbian people are vermin."[646]

638. All of these statements were reprinted in Annex 51 to the Counter-Memorial. Not one of the above mentioned persons have ever been indicted in Croatia for these statements, neither as direct and public incitement to genocide nor as any other crime under the Croatian domestic criminal law. This was an overall context in which Operation *Storm* took place. As Croatian philosopher and vice-president of the Croatian Helsinki Committee for Human Rights Professor Žarko Puhovski stated in the documentary *Storm over Krajina*,

> "a large number of incidents [during Operation *Storm*] … were influenced by motions, [b]ut these incidents, these motions had been prepared for years through propaganda, from television to the president of the country and all public factors in Croatia who convinced the Croatian population and especially the soldiers that the Serbs are guilty as such and that they should be punished as such."[647]

4. Massive crimes against Serbs after the deployment of UNPROFOR in 1992

639. In this section the Respondent will further show that crimes were committed against Serb civilians even after the deployment of UNPROFOR which preceded the genocide in August 1995 against Krajina Serbs and will address the Applicant's position towards such crimes. While the Applicant acknowledged that the Respondent admitted the victims on Croatian side,[648] the Applicant does not show even an attempt to express remorse for the Serbian victims. Accordingly, the Respondent does not

[646] See Annex 51 to the Counter-Memorial.
[647] ICTY, *Prosecutor v. Gotovina et al*, Transcripts, 13 Fabruary 2009, page 15901; available on http://www.icty.org/x/cases/gotovina/trans/en/090213ED.htm
[648] Reply, para.10.16.

generally dispute that there were numerous Croatian civilian victims – it only disputes that any such crimes amounted to genocide and that those victims were victims of genocide, approach also taken in the Counter-Memorial. The Applicant takes the polar opposite position, completely dismissing all allegations of crimes against Serbs. The Respondent finds this particularly striking considering that Serb victims killed prior to Operation *Storm* are not even claimed to be the victims of genocide and there is therefore no need for the Applicant to attempt to dismiss those casualties in the present proceeding. Furthermore, crimes committed in Maslenica, Medak Pocket or Western Slavonia are hardly in dispute as their existence was affirmed by documents. The truth that civilians on both sides suffered by the hands of the other side cannot therefore be denied. This is clearly visible from, among other things, reports on the status of refugees and displaced persons relating to combat activities that were taking place in Croatia. For example the US State Department reported the situation on the ground before 1993 in the following manner:

> "According to statistics compiled by the United Nations High Commissioner for Refugees (UNHCR), as of October 1993, there was a total of 247,000 Croatian and other non-Serbian displaced persons coming from areas under the control of the 'RSK' and 254,000 Serbian displaced persons and refugees from the rest of Croatia, an estimated 87,000 of whom were inhabitants of the UNPA's."[649]

640. Therefore, any attempt on the part of the Applicant to deny the crimes committed by its forces cannot succeed and it moreover further undermines its objectivity in these proceedings, the methodology it relies on in presenting the facts, and the way it is using evidence in support of its claims.

641. Returning to the subject matter of the Reply, in the present submission the Respondent will reply only to the Applicant's most serious mischaracterizations of crimes committed against Serbs which were set out in the Counter-Memorial. As for the other crimes against Serb victims before Operation *Storm*, the Court is referred to the updated list of Serbs who were killed.[650] The following paragraphs therefore deal with actions taken by Croatia in Maslenica, Medak Pocket, and during Operation *Flash*.

[649] Croatia Human Rights Practices, 1993, U.S. Department of State, 31 January 1994.
[650] See www.veritas.org.rs

A. Operation Maslenica

642. At the outset, the Respondent has to note the Applicant's position in relation to Operation *Maslenica*, namely that Croatia achieved a legitimate humanitarian and military objective through this operation.[651] However, the UN Security Council took a different position in relation to this attack, stating in its resolution 802/93 that it was:

> "Deeply concerned by the information provided by the Secretary-General to the Security Council on 25 January 1993 on the rapid and violent deterioration of the situation in Croatia as a result of military attacks by Croatian armed forces on the areas under the protection of the United Nation Protection Force (UNPROFOR),
>
> Strongly condemning those attacks which have led to casualties and loss of life in UNPROFOR, as well as among the civilian population,
>
> Demands the immediate cessation of hostile activities by Croatian armed forces within or adjacent to the United Nation Protected Areas and the withdrawal of the Croatian armed forces from these areas…"

643. What is furthermore problematic is that the Applicant simply fails to acknowledge that the operation was an attack on a protected zone and that it was planned in advance by Croatian armed forces. It ignores the fact that Croatia refused to withdraw pursuant to the UN SC resolution 802 and that this action resulted in forced expulsion out of the protected area of over 10,000 Serbs[652] who were never allowed to return to their homes.[653] In addition to ignoring certain facts, the Applicant also misrepresents others in an effort to present its actions as fully legitimate. For example, the Applicant states that the RSK forces detonated explosives on Peruča Dam calling upon the Report of the UN Secretary General from 16 March 1994 and Security Council resolution 779.[654] However, this Security Council resolution is based on the report of the Secretary General from 28 September 1992 that is not cited by the Applicant. This report does not mention any such incident, namely that the explosive was detonated or that the Dam was damaged by the RSK forces.[655] This clearly shows that the

[651] Reply, para.10.48.
[652] N. Barić, *Serb Rebellion in Croatia 1990-1995 (Srpska pobuna u Hrvatskoj 1990-1995.*), Zagreb, 2005, page.186.
[653] See UN SC res. 802 (25 January 1993), see also Counter Memorial, para.1125.
[654] See Reply para.10.49, footnote 100.
[655] See Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992) and 762 (1992), 28 September 1992, UN Doc. S/24600, paras. 29-30.

Applicant's portrayal of events in Maslenica fails to include significant aspects which seriously bring into question the alleged legitimate objectives of the attack, as well as the Applicant's version of the events represented in the Reply.

B. Medak Pocket

644. The Respondent will begin addressing the Applicant's allegations in this respect by referring to the Applicant's alleged reason for the attack on the Medak Pocket, namely the allegation that the reason behind the attack was an attempt to stop the shelling of Gospić from Serbian strongholds.[656] This is in contradiction with the fact that after the takeover of the Medak Pocket the town of Gospić nevertheless remained within the range of the SVK heavy artillery.[657]

645. The sources invoked by the Applicant such as the Final Report of the UN Commission of Experts, more specifically its Annex VII, which is used in an attempt to dispute the Respondent's evidence, also do not help the Applicant. A closer look at the said Annex VII only further reaffirms the Respondent's case, as the Special Rapporteur noted that:

> "As UN forces entered the Pocket, they found every building burning or demolished. There were hundreds of such buildings in the several villages and hamlets, none of which were habitable. Special sweep teams assessed and recorded damage, searched for survivors and collected bodies. The teams included UNPROFOR medical officers, UNCIVPOLs, and soldiers."[658]

646. And the Applicant fails to appreciate that the UN Final Report also states that:

> „Unlike the deaths arising from the Medak Pocket Operation, there is a clear, obvious and overwhelming pattern of wanton destruction. Hundreds of homes were destroyed, virtually hundreds of other buildings were destroyed, most animals were killed or taken, virtually all personal property was destroyed or taken, all vehicles and farm equipment

[656] See Reply, para.10.57.
[657] See the CIA map of Operation Storm, map no. 9 with the Counter-Memorial, Sourse: *Balkan Battlegrounds*.
[658] See Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), 27 May 1994, UN Doc. S/1994/674, Annex VII, para.36.

were destroyed or taken, haystacks were fired, and many wells were polluted. Devastation was total. The timing of the destruction is inconsistent with any legitimate military conduct or of military necessity. The bulk of this destruction occurred on 16 September, according to the many eyewitnesses. The sounds of the explosions, the rising of the smoke from fires, and the fact many buildings were still on fire as UN personnel entered the Pocket establish this."[659]

647. The fact referred to by the Respondent in the Counter-Memorial that Croatian forces were preventing entry of UNPROFOR into the area, in an attempt to complete the ethnic cleansing of the Serbian population, is confirmed by Annex VII of the Final Report:

„As the UN forces began to deploy into the Pocket on 16 September, they could hear tens of explosions and see new smoke rising from Croat-controlled territory. There were no Serb forces in those areas nor had there been for many days. Such explosions and smoke had not been seen before 15 September. They also heard small arms fire from the same area. There are many witnesses to this including nearly all Canbat I personnel, UNMOs, UNCIVPOLs, UN civilian personnel, UN and Canadian Forces public affairs personnel and news reporters. All suspected that the Croats were engaged in ethnic cleansing of the Pocket before turning it over to the UN. [...]

At noon, 16 September, Croat forces prevented Canbat I soldiers from crossing into the Pocket. ...UN personnel felt the delay was a deliberate tactic used by the Croats to give them more time to complete their ethnic cleansing of the Pocket."[660]

648. In a mere effort to dismiss all allegations of crimes which had taken place in the Medak Pocket, the Applicant seems to have also forgotten the facts established in judgments rendered by its own courts in relation to these crimes. This pertains to the case against Ademi and Norac which was transferred to the Croatian judiciary according to Rule 11*bis* of the ICTY Rules of Procedure and Evidence on 1 November 2005.[661] The proceeding, although very problematic in the sense of the scope of the Indictment, type of responsibility and the level of punishment, did establish that serious crimes against Serb's civilians, POWs and property had been perpetrated in the

[659] *Ibid*, para.88.
[660] *Ibid*, paras. 32-34.
[661] ICTY, *Ademi and Norac*, IT-01-46 & IT-04-76, Decision for Referal to the Authorities of the Republic of Croatia pursuant to Rule 11*bis*, 14 September 2005.

Medak Pocket in September 1993. The Accused Mirko Norac was found guilty of killing, including that of civilians Nedeljko and Stana Krajnović (that were killed and burned), and Djuro and Stevo Vujnović, destruction of more than 150 houses in six villages, killing of war prisoners Nikola Stojisavljević (who was first wounded with gun and than hanged from the three and the knifes were thrown at him) and killing of Nikola Bulje (who was humiliated in different ways before he died – he was hit with a whip and salt was poured on his wounds).[662]

649. This same case, unfortunately, also refutes the Applicant's claim that it has held its highest officials accountable for all crimes which took place in Medak Pocket at the time. Responsibility was therefore not established for the killing of more than 30 civilians, many of whom were killed in a very brutal manner,[663] as charged in the Indictment, or killings of at least 5 war prisoners. This is also reaffirmed in reports made by NGOs in relation to the Judgment against Mirko Norac. For example, the NGO "Centre for Dealing with the Past" issued the following statement in respect to the finding of the second instance court:

> "[...] By passing the sentence upon appeal in the case against the accused Rahim Ademi and Mirko Norac for the crime committed at Medacki Dzep, the judiciary has not been half way through in bringing to justice those responsible for the serious crime in which dozens of civilians were killed (around 40 bodies were hidden in an organized fashion-collected and thrown into the septic tank and buried) and by destroying more then a hundred houses and a number of farmhouses in villages of Rajcevici, Krajnovici, Potkonjaci, Drljici, Strunici, Veliki Kraj, Donje Selo i Divosel the civilian population were prevented from getting back to their homes and therefore all these villages remained uninhabited even today [...]." [664]

650. Although involvement in atrocities was established, the defendant Mirko Norac was not only given a light sentence at the first instance, his sentence was later reduced by the Supreme Court of Croatia. He also continues to enjoy benefits while serving his

[662] District Court in Zagreb, *Ademi and Norac* case, excerpt from the Judgment of 29 May 2008 (Annex 35).
[663] Murder of Bosiljka Bjegović, 84-year-old blind woman in front of her house; murder of Sara Kričković in the basement of her house, where her neck was cut; murder of disabled Dmitar Jović; murder of Boja Pjevač, whose three fingers were cut; murder of retarded Milan Rajčević who was tied between two threes, stabbed by the knifes that were thrown at him and at the end put on fire.
[664] Available on http://www.documenta.hr/documenta/attachments/189_Povodom%20presude%20VSCroatia%20-%20Medacki%20dzep.doc

time in prison,[665] which together with other noted facts in relation to his conviction further demonstrates that Croatia considers this man, twice convicted for crimes against Serbs,[666] to be a war hero rather than a war criminal.

C. Operation Flash

651. Operation *Flash* was the most notorious criminal action preceding the genocide committed in Operation *Storm*. In regard to this operation, the Applicant again chooses to simply dismiss the killings and other crimes committed by the Croatian Army. This however cannot stand in face of abundant evidence speaking about those crimes, such as the evidence which the Respondent presented in the Counter-Memorial and the evidence that will be briefly discussed below.

652. The nature of the crimes committed during Operation *Flash* are best understood from statements of Serb victims. The Serb population fled in the face of the Croatian Army from the area of Okučani, but also from other areas, towards Bosanska Gradiška and the Republica Srpska. The column of Serbs was moving very slowly toward the bridge on the River Sava, which allowed Croat forces to shell and shoot at the column. On the road and on the side of the road there were many bodies of killed civilians, damaged and destroyed tractors, destroyed and damaged passengers vehicles and trucks. Among dead bodies there were bodies of women, children and elderly.[667] This was described by eye witness Dušan Bošnjak:

> "The convoy of tractors and horse-drawn carts left on the morning of 2 May. When we came to the village of Nova Varos, which was halfway through between Okucani and Gradiska, we were attacked with the heaviest gunfire from both sides, by the Croatian army. About 3.5 kilometres of the road were covered by so many bodies of dead Serbs that it was difficult to walk without stepping on them. [...]
>
> The Croatian soldiers overturned tractors and set them relentlessly on fire, killing elderly men, women and children. Their bodies lay on the road or by the roadside. I recognized many men, women and children among those killed. They were all from the village of

[665] Norac was given provisional relief from prison to be able to attend his wedding celebration with 400 guests which became the main event in the Croatian newspapers - http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/36619/Default.aspx.

[666] Norac was also convicted for crimes which took place in Gospić , see District Court Rijeka, *Orešković et al.*, Judgment of 24 March 2003 (Annex 41 to the Counter-Memorial).

[667] See Annex 37 (witness statement of Anđelko Đurić) and Annex 38 (witness statement of Milena Milojević).

Medare. I saw the Croatian soldiers killing Milan Daic and wounding his namesake father Milan in the back. I also saw when they wounded Milan Daic's cousin Aco, in seven places. As I drove in my tractor with a trailer, I managed to load many of those wounded who were still alive. I don't know their exact number, but the trailer, which could carry a load of 5 tons, was full of wounded people. I managed to drive the tractor to the Save bridge and to cross to the other bank of the river into Gradiska, in the Republic of Srpska. I was shot, together with my tractor and trailer, and those pictures were shown on the Banja Luka television."[668]

653. Witness Milena Milojević described what she witnessed on the road:

> "The convoy crawled and was constantly incessantly targeted by the Croatian army all the way until it reached the Sava bridge. The shell-fire became very heavy when we got near the village of Nova Varos, which is half way through and farther on to the village of Kanalstruk. The road wound through the forest there and the Croatian army opened fire at the convoy from both sides of the road, hiding in the forest. People driving in tractor-trailers, horse-drawn carts fell on the road or by the roadside, and their bodies lay in the trailers or horse-drawn carts or below them. There were many dead bodies of women, children, elderly people and others."[669]

654. Specific accounts of children that were killed were also given by witness Milena Milojević who testified that Nemanja Gojić, age 9, and Dajana Gojić, age 7, were killed in the convoy.[670] Witness Anđelko Đurić stated that the road from Okučani to the bridge on River Sava was all covered in blood.[671] However, witnesses also stated that soon after the events the road to Okučani to Gradiška was shown on the television and was completely clean free of any traces of dead bodies and destroyed vehicles. According to the witnesses this was done very fast in order to conceal the extent of the crimes committed,[672] by first burning the bodies and then by burying them while UNPROFOR was being denied access to the area.[673]

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[668] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Dušan Bošnjak, dated 22 September 1995 (Annex 39).
[669] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Milena Milojević, dated 22 September 1995 (Annex 38).
[670] *Ibid*.
[671] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Anđelko Đurić, dated 1 July 1998 (Annex 37).
[672] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Milena Milojević, dated 22 September 1995 (Annex 38).
[673] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Dušan Bošnjak, dated 22 September 1995 (Annex 39).

655. Witness Radojica Vuković gave an account of killing of his family members who stayed behind the refugee column. In the village of Merdare, which was a scene of massive crimes already in 1991 (see *supra* in this Chapter, Section 2.A), two of his brothers were executed together with their spouses and children.[674] The bodies of family Vuković were identified only in March 2011.[675]

656. In addition to this, the criminal intent of Croatian forces towards Serbs can be seen from witness statements describing conditions under which they were detained. Witness Zoran Malinić described how, while detained in Varaždin, the victims were continuously beaten while being interrogated and how they were not given water. Malinić was also tortured while he was detained in Bjelovar. He testified that 17 prisoners were lined up against the wall and beaten with steel bars, with electric wires, wooden buttons. When he was exchanged on 4 August 1997 he weighed 62 kilos compared with 85 kilos when he had been arrested.[676]

657. The few Serbs who remained in Western Slavonia were, according to the testimony of witnesses, persecuted by the Croatian forces. Witness Branko Mudrinić testified that after he was released from detention as a civilian and returned to Pakrac, he and other Serbs there were prevented from leaving their houses because Croatian police told them that Serbs are not allowed to move around the town. He confirmed that in the evening hours Croatian police entered the Serbian apartments threatening that Serbs should either leave as soon as possible or expect to be taken to prison camps and executed.[677]

658. The Respondent will also address at this point arguments adduced by the Applicant in its Reply in support of its thesis that Operation *Flash* was justified since it was provoked by the Serbian side. One of the most cited documents in section IV is a Serb Report on the Causes and Manner of the Fall of Western Slavonia.[678] Contrary to the

[674] Basic Court in Gradiška, Bosnia and Herzegovina, Minutes of the witness hearing of Radojica Vuković, dated 20 September 1995 (Annex 41).
[675] http://www.politika.rs/vesti/najnovije-vesti/Identifikovani-posmrtni-ostaci-17-Srba-ubijenih-u-Hrvatskoj.lt.html
[676] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Zoran Malinić, dated 27 June 1998 (Annex 43).
[677] Basic Court in Prijedor, Bosnia and Herzegovina, Minutes of the witness hearing of Branko Mudrinić, dated 10 April 1997 (Annex 42).
[678] Annex 140 of the Reply.

Applicant's arguments, the report plainly reaffirms what was written by the Respondent in the Counter-Memorial about the preparation of the plan for an attack Serbs territory in Western Slavonia long before Operation *Flash* took place.

> "Members of the army, the police and local municipal authorities through their work prevented the functioning of the rule of law on the territory of Western Slavonia. These structures aided by Knin highest level, prevented the RSK as a state to comply with a single international agreement that it had signed itself. In this way, they directly helped Croatia by proving a pretext for a military attack, before the eyes of the whole world, despite all the warnings. The fact is that *Croatia had long before prepared a plan of the attack on Western Slavonia,* that our authorities had known about that plan and that the plan itself envisaged its realization once the Serbs could be accused before the whole world of provoking an attack. That is precisely what happened on 1 May 1995."[679]

659. Information from the report further confirms that the Serb heavy artillery was kept with UNPROFOR and could not have been deployed when Operation *Flash* begun.

> "Insufficient perseverance and tenacity of defence was caused by late deployment of heavy hardware, as they had been held in the depots of UN forces. The hardware left the depots and was sent to the areas of deployment when the aggression had already begun."[680]

660. The allegation that the rebel Serbs committed several crimes in the period preceding Operation *Flash* is supposedly supported by a reference to a book of Nikica Barić, *Serb Rebellion in Croatia 1990–1991*.[681] This was obviously a mistake considering that the book makes no reference to such crimes. Notably, on p. 492 of the book there is an explanation that Operation *Flash* was planned well in advance. Barić, who was cited by the Applicant, states that the attack on Western Slavonia was not at all provoked by the closing of the highway. He furthermore notes that Tuđman and his associates agreed to stage a new attack on motor vehicles if there was a possibility that the highway would be opened. This staged attack was prepared in order to show that a peaceful solution was not possible.[682]

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[679] *Ibid* (emphasis added).
[680] *Ibid*.
[681] See Reply, para.10.89, footnote 186.
[682] See N.Barić, Srpska pobuna u Hrvatskoj 1990 – 1995, Zagreb, 2005, pp. 492-493.

661. This was actually discussed at length on 30 April 1995 during the session of Croatia's Council for Defense and National Security.[683] President Tuđman explained to the participants:

> **"President**: So, at six a.m. when they start, we should say Serbian forces caused an incident again. I told Ministers that they should go in two or three cars and let them shoot at them [...]
> **Gojko Šušak**: We will do our best, Mr. President.
> **President**: So, a new incident and police forces went to take control of the highway.
> **Gojko Šušak**: Mr. President, the worst case scenario would be to go in, lets say, two cars, two vans, leave them, have them riddled all over with bullets, and film this for television, if there is no other option."[684]

662. What is even more symptomatic about the behaviour of the Croatian leadership is that they knew that the Serbs were trying to open the highway. As stated by Ivan Jarnjak on the 30 April meeting:

> **"Ivan Jarnjak**: […] what is striking, Mr. President, is that those who came from their side yesterday, said this – that they had been treated fairly, actually more than fairly, that one could almost feel panic, insecurity, among the Serbs, that they did their best to be as cooperative as possible and all the morning they insisted on opening the highway. But we refused and stuck to what we had agreed the previous day."[685]

663. The quoted sources show that Croatia actually knew that there was a real possibility that the highway would be opened and did everything to provoke further conflict because their real intent was to cleanse Western Slavonia of Serbs regardless of the means required to accomplish that.

664. As for the Applicant's allegation that the Serb population left not because it was being driven out but pursuant to an "exodus" plan made by the rebel Serb leadership,[686] this issue will be dealt in greater length in the next section. The Respondent, however, reminds the Court that chilling testimonies of Serb witnesses presented above clearly refute this allegation.

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[683] Document is in the possession of the Applicant. It was published in the weekly newspaper NIN, Belgrade on 6 February 2004, available at: http://www.nin.co.rs/pages/article.php?id=14735
[684] *Ibid*.
[685] *Ibid*.
[686] See Reply, para.10.97.

665. The Respondent also points to Croatia's attitude of both denying and justifying the crimes committed against Serbs during Operation *Flash* and during the previous operations in Maslenica and the Medak Pocket, which fostered a climate of a tacit understanding that serious crimes against the Serbs were acceptable and justifiable. This attitude helped pave the way for the genocide that was perpetrated against Krajina Serbs and, unfortunately, this attitude remains in place even today. During the celebration of 16 years of Operation *Flash* the current President of the Croatian Assembly, Luka Bebić, stated that the military action *Flash* had "lightened the upcoming *Storm*", and that the "military Operation *Flash* famously began and finished."[687]

5. Refusal of the peace plans by the RSK

666. The Respondent now turns to the Applicant's allegation that a peaceful resolution of the conflict was not a possibility due to the RSK's position in that respect. The Applicant states that although it was willing to reach such a settlement and was extensively involved in negotiations to that end, the RSK constantly refused to engage in any meaningful dialogue.[688] However evidence shows that negotiations were heading towards a peaceful solution and that there was no need for an attack by Croatia, because it would have accordingly achieved its goal, which was the reintegration of contentious territories, through peace negotiations. It nonetheless consciously opted for Operation *Storm* because a peaceful solution would have implied that Krajina Serbs would remain in Croatia. This is confirmed by the ICTY first instance Judgment in *Gotovina et al.* case where the Trial Chamber found that the JCE developed by the Croatian leadership envisaged quite the contrary of what the Applicant is arguing, namely the plan to violently cleanse Krajina of Serbs.

A. Refusal of the RSK to fully demilitarize

667. It should also be noted at the outset that the Applicant's claim that Serbs refused to accept any peace plans and constantly armed themselves for defense is contradictory to another claim also advanced by the Applicant – that Serbs left Croatia according to

[687] See http://www.index.hr/vijesti/clanak/bebic-bljesak-je-obasjao-nadolazecu-oluju/549679.aspx, last visited 17 May 2011.
[688] Thesis that Croatia was trying to achieve a peaceful solution by negotiations unlike the RSK was advanced in paras.11.4, 11.12, 11.16, 11.20-11.22, 11.25, 11.29, 11.31, 11.36.

a prepared plan.[689] In addition to that, this thesis was also presented by the defense in the *Gotovina et al* case and was turned down by the ICTY Trial Chamber.[690]

668. At the outset, the Respondent wishes to respond to the Applicant's reference to demilitarization. As noted in the Counter-Memorial, demilitarization of the RSK began with withdrawal of JNA forces, pursuant to the Vence Plan.[691] The Respondent acknowledged that Krajina was not fully demilitarized. However, when alleging that some units of the RSK had automatic rifles and machine guns the Applicant fails to acknowledge that the RSK in fact did hand over its heavy artillery to the UN.[692] Therefore, although the RSK did not fully demilitarize, it did in fact voluntarily hand over its most important weaponry. This was confirmed in the *Martić* Judgment cited by the Applicant.[693] The part of the Judgment not cited by the Applicant notes:

> "Thus, the Vance Plan was interpreted by the RSK authorities to mean that UNPROFOR was to protect the population in the areas of deployment. In this context, the Trial Chamber notes that Croatian forces carried out several armed incursions into the UNPAs between 1992 and 1995, including on the Miljevac plateau on 21 June 1992, Maslenica on 22 January 1993, Medak pocket on 9 and 12 September 1993, and Operation Flash from 1 May 1995."[694]

669. The Applicant further selectively cites the Special Rapporteur Tadeusz Mazowiecki Report omitting to cite the end of para. 13 of the Report that states that

> "[…] from November 1992 onwards, the situation improved in all but a few areas. The maintenance of law and order was gradually enhanced through the reorganization and redeployment of the local police. The carrying of 'long arms', in breach of the agreed plan, greatly diminished, and by January 1993 such arms were being carried only by the 'border militia'. The Serb authorities had informed UNPROFOR that these, too, would be withdrawn once they were sure that UNPROFOR could exercise full protection against Croatian incursions across the line of confrontation."[695]

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[689] In relation to Operation *Flash* see Reply paras. 10.97-10.100; and in relation to Operation *Storm* see Reply paras 11.31,11.65, 11.77-11.86.
[690] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 1512-1539.
[691] Counter Memorial, para.1121.
[692] See Counter Memorial para 1121-1122.
[693] Reply, para.10.40.
[694] ICTY, *Prosecutor* v. *Martić* (IT-95-11-T), Trial Chamber Judgment of 12 June 2007, para.153.
[695] See Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, 10 February 1993, UN Doc. E/CN.4/1993/50.

670. It is therefore obvious that the Applicant's assertion that the Respondent is contradictory in his statements regarding factors which had impact on demilitarization of the RSK is incorrect.[696] The weapons in possession of the Serbs mentioned in the Report above were sufficient to defend a civilian population from small scale actions and incursions but were not enough to defend it from more serious attacks by Croatian forces. Therefore, the RSK was in fact demilitarized to a large extent and did in fact heavily rely on UN forces for protection (which failed in that respect). The aforementioned outcomes of various attacks by the Croatian army and the victims on Serbian side clearly confirm this point as Serbs, because of the failure of UN forces to provide protection when situation became critical, were obviously not able to defend themselves despite efforts to that effect.

B. There was progress between the parties

671. The Applicant asserts, in response to Chapter XII of the Counter-Memorial, that there was no real progress between the parties (Croatia and the RSK).[697] However, the analysis provided by the Applicant is contradictory even *prima facie*.[698] While the Applicant acknowledges that the RSK signed a general ceasefire agreement, it asserts that negotiations were impossible through the summer of 1994.[699] The Secretary-General's report from 17 September 1994 also noted that after June 1994 the Serb side continued to express support for the cease-fire agreement and that discussions between the two sides were held in Knin of 5 August.[700] Furthermore, an Economic Agreement was signed on 2 December 1994 and the highway was opened in Sectors East and West on 21 December 1994. However, as was shown *supra*, the Croatian leadership even provoked an incident[701] in order to halt the existing progress and implement its plans to cleanse the Western Slavonia of Serbs.

672. Evidence relied on by the Applicant in respect to this argument, which it repeats in Chapter 11 of the Reply, is also taken out of context. For example, in paras 11.12 and 11.13 of the Reply, as evidence that the RSK was not willing to reach a peaceful solution the Applicant cites Mrkšić's testimony in the *Gotovina* case and Mrkšić's

[696] Reply, para.10.40.
[697] Reply, para.10.41.
[698] Reply, paras. 10.62-10.67.
[699] Reply, paras. 10.64-10.65.
[700] See Report of the Secretary-General pursuant to Security Council Resolution 908 (1994), 17 September 1994, UN Doc. S/1994/1067.
[701] See paras. 666-669 above.

order dated 1 June 1995 (Annex 152 with the Reply). Both of these documents however show that Mrkšić is saying that he wants to do everything in his power to turn Croatia away from the attack and to accept a peaceful solution.

C. Refusal of the Z4 plan

673. The allegation that the Z4 plan was turned down by Serbs (para. 11.18) is also erroneous. During the extraordinary session of the RSK, on 8 February 1995,[702] there was no decision to withdraw from the negotiations until the mandate of the UN peacekeeping forces was extended. What actually happened during the Assembly session was a discussion about requesting an extension of the UN mandate and postponing negotiations until such a decision was made. The Assembly accepted this proposal. At the Assembly session on 30 March 1995, the RSK was trying to find ways to keep its political position when Croatia proclaimed its sovereignty over the entire territory.[703] Considering that on 1 May Croatia engaged in the Operation *Flash*, which had well known consequences for Serbian population of Western Slavonia, it becomes more than clear why the RSK was not very eager to accept a new UNCRO mandate instead of UNPROFOR.

674. The Applicant furthermore misinterprets the substance of the Letter from the Secretary-General addressed to the President of the Security Council, dated 7 August (Annex 151 to the Reply) with the view of eliminating its responsibility for continuation of hostilities between the two sides, and namely the beginning of Operation *Storm*.[704] However, a careful reading of this letter sheds a completely different light in regards to attribution of blame:

> "Meanwhile, on 29 July, my Special Representative, Mr. Yasushi Akashi, had met with President Tuđman to forestall what appeared to be an imminent military confrontation. 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. If such progress was not achieved in a matter of days, Croatia would take whatever measures it deemed necessary to redress the situation. Specifically the President insisted on the reopening of the Adriatic oil pipeline within 24 hours, rapid agreement on the opening of the Zagreb-Knin-Split railway and immediate progress on political re-

[702] See Annex 148 to the Reply.
[703] See Annex 150 to the Reply.
[704] See paras 11.32-11.35 of the Reply.

integration of the Serbs on the basis of Croatia's Constitution and Law on Minorities. President Tuđman did, however, agree to send representatives to Geneva for the meeting sponsored by the International Conference on 3 August.

My Special Representative held emergency talks on 30 July with the local Serb authorities in Knin. He secured a six-point commitment that their forces would withdraw fully from the Bihac pocket and desist from further cross-border interference (see annex I). However, the Croatian Government considered these commitments insufficient. In a written reply, President Tuđman rejected the agreement, on the grounds that it did not meet the terms he had presented to my Special Representative (see annex II). The Croatian Government did, however, reaffirm its readiness to participate in the talks at Geneva. On 3 August, at Geneva, Mr. Stoltenberg duly chaired the meeting of the representatives of the Croatian Government and the Croatian Serbs. The former took the position that the Croatian Serb leadership must immediately accept reintegration under the Croatian Constitution and Laws. The Croatian Serb delegation proceeded from the starting-point that there should be a cessation of hostilities, following which other issues could be discussed. After a series of bilateral meetings, the Co-Chairman presented to the two delegations a list of seven points covering, inter alia, the reopening of the oil pipeline, the reopening of the Zagreb-Knin-Split railway and negotiations on a final settlement on the basis of the "Zagreb-4" plan. *The Croatian Serb delegation was inclined to accept the paper as a useful basis for progress, subject to clearance by its political leadership, but the Croatian Government delegation's view was that the paper did not address its fundamental concern for the Krajina Serbs to be reintegrated under the Croatian Constitution and Laws.*

Following the Croatian Government's rejection of the paper prepared at Geneva, I telephoned President Tuđman on the evening of 3 August and urged the utmost restraint. At the same time, I instructed Mr. Stoltenberg to proceed to Zagreb the next morning and to continue to work closely with Mr. Akashi in trying to prevent an outbreak of hostilities.

Despite these United Nations efforts and similar efforts by various Member States, at 0500 hours on 4 August the Croatian Army launched a major offensive against the Krajina region (Sectors North and South)." (emphasis added)

675. The Applicant also cites, in para. 11.35 of the Reply, Babić's testimony in the *Milošević* case,[705] in particular the part where Babić is saying that he personally accepted the plan but had to confirm with Milošević. In support of this the Applicant cites the Galbraith testimony that Babić accepted the plan but that there were doubts that he would have more leverage than Milošević and Martić as to the final outcome –

[705] Annex 162 to the Reply.

i.e. acceptance of the plan. However, this fragment of a more comprehensive account comes into context when one looks at the rest of Babić's testimony which the Applicant omitted to cite. From that testimony it is clear that Milošević told Babić that he was in favor of accepting the plan and that everything should be done peacefully. Furthermore, Babić said that he publicly announced that the plan was accepted. The omitted part of Babić's testimony explains that he spoke with Slobodan Milošević in relation to the Z-4 plan and that Milošević told him "Yes, yes. Just slowly, slowly, everything should be conducted calmly or peacefully".[706] Furthermore, to the question by the prosecution regarding the urgency on 3 August and whether he had an ultimatum from Mr. Galbraith to accept the plan immediately Mr. Babić responded:

> "Answer: Yes. Reactions were to come the following day. I was to give a statement, and this was to be implemented, what I had accepted and what I was to make public by way of a statement.
>
> Question: Did you actually have an ultimatum from Mr. Galbraith to accept the plan right now, otherwise consequences would happen?
>
> A: He said what we could expect if we didn't accept, which meant a Croatian aggression, and that we could fare the same as Western Slavonia.
>
> Q: And did you accept it publicly, and could prevent this aggression?
>
> A: Yes, I did. I made a statement to that effect, that I accepted.
>
> Q: Was the RSK then attacked?
>
> A: Yes, it was, the next day, in the morning."[707]

676. The statement given by Mr. Akashi to the ICTY in the *Gotovina et al.* case provides a proper context in light of which the negotiations have to be assessed. Mr. Akashi confirmed that situation during and after the meeting when the signing of the agreement was discussed with Mr. Babić. According to the witness, during the negotiations an agreement was reached with Mr. Martić on six important matters.[708] The witness confirmed that towards the end of the meeting Martić accepted the agreement:

> "And Mr. Martić, somehow, had a sudden change of mind, and the -- originally we discussed and agreed to go before the press to show that agreement had, indeed, been

[706] ICTY, *Prosecutor v. Milošević* , Transcripts, 21 November 2003, witness Babić, page 13259.
[707] ICTY, *Prosecutor v. Milošević* , Transcripts, 21 November 2003, witness Babić, pages 13259-13260.
[708] ICTY, *Prosecutor v. Gotovina* , Transcripts, 16 September 2009, witness Akashi, pages 21756-21757.

reached. Therefore, sort of a defusing the atmosphere of impending crisis. […] But at some point in time, we were certain that there was a set of assurances given to us when they were all clear-headed."[709]

677. All of the above clearly shows that the Applicant's argument that the RSK leadership was the only side to blame for failure of peace negotiation cannot stand because, as will be shown in the following subsection, Croatia's concealed intent was not to allow the Serb population to remain on its territory.

6. It was Croatia that was not genuine in its alleged peaceful efforts

678. The Applicant in para. 11.31 of the Reply states that "[s]imultaneously with the military preparation, the Serb leadership engaged the international community in sham negotiations to create the impression that they are willing to agree to peace". However, in this section, evidence will be presented that directly shows that it was the Croatian leadership that conducted sham negotiations knowing that its plan to get rid of the Serbian population would be outright condemned by the international community if it ever came to light.

679. The fact that Croatia was not acting in good faith in its allegedly peaceful efforts to resolve the situation can be seen from its offensive military attacks. The previous section showed that prior to Operation *Storm*, Croatia, although allegedly involved in peaceful negotiations, conducted the unlawful and criminal operations of the Medak Pocket and *Flash*. The fact that during the course of 1994 Croatia undertook several such attacks is not even disputed by the Applicant. In para. 11.9 it accepts that Operation *Winter* was conducted in November 1994, in para. 11.10, that Operation *Leap 1* was conducted in the mountains bordering Croatia and Bosnia in April 1995, and it further accepts in para. 11.13 that Operation *Leap 2* took place on 4 June 1995, and in para. 11.25 that Operation *Summer 95* was undertaken in July 1995 (when Croatian forces conquered towns of Glamoč and Grahovo).

680. It is also submitted that excuses and explanations provided by Croatia for such offensive actions cannot dispel the fact that they were conducted against protected areas and had resulted in violent and massive crimes. Furthermore, the Applicant's presentation of

[709] ICTY, *Prosecutor v. Gotovina* , Transcripts, 16 September 2009, witness Akashi, pages 21756-21757.

reasons for such military actions is one-sided and simply ignores the facts cited in the Counter-Memorial that cannot be refuted. For example, in para. 11.22, the Applicant cites Mr. Galbraith's testimony in order to show the reason behind the attack of Croatia on Bihać, but fails to cite an answer previously given by Mr. Galbraith's that shows that the plan to attack Krajina preceded any of these events:

> "THE WITNESS: Let me clarify. I knew substantially before June 10th, and this is reflected in lots of documents, that it was Tuđman's plan in 1994 to take the Krajina militarily. As is true for the entry on this date, we believed that he would do this when the United Nations mandate ran out November 30th. The reason being that that would be a time of the year when it would be very difficult for weather reasons for Serbia to resupply the Krajina, but where it would be still relatively easy for Croatian forces to attack up from the coast and where it wouldn't do any damage to the Croatian tourist season."[710]

681. Further, in para. 11.25 the Applicant cites the Report of the Secretary-General regarding the conflict in Bosanska Krajina. Part of the Report showing the reasons for the actions by the SVK was however not cited by the Applicant:

> "Sector North saw relatively little activity except in the area bordering the Bihac pocket. Fighting between the Bosnian Government Fifth Corps and the separatist forces of Mr. Fikret Abdic, supported by Krajina Serb forces, flared up again. The Fifth Corps attacked Krajina Serb-controlled territory in Sector North on both the east and the west sides of the pocket. This generated a strong reaction from the Krajina Serbs […]."[711]

682. The document produced as Annex 211 to the Reply and invoked in para. 11.104, also speaks in favor of the fact that it was Croatia, not the RSK, who did not participate in the negotiations in good faith. This document, which reflects the 257th closed session of the Government of the Republic of Croatia, shows a statement of Deputy Prime Minister, Mr. Granić, that Croatia had a problem because Serbs accepted the Stoltenberg plan.[712] This statement plainly suggests that Croatia did not want a peaceful solution of the conflict and that any step in direction towards peace taken by the RSK leadership, like the acceptance of the Stoltenberg plan, was viewed as being negative in the light of Croatian plans. This statement taken together with Tuđman's

[710] ICTY *Prosecutor v. Gotovina*, Transcripts, 23 June 2008, witness Galbraith, pages 4921-4922.
[711] See Report of the Secretary-General Submitted pursuant to Security Council Resolution 981 (1995), 3 August 1995, UN Doc. S/1995/650, para.9.
[712] See Annex 211 to the Reply (page 484 of the original document).

statement to provoke casualties on the Croatian side (see *supra*) shows the irony of the Applicant's accusations of the RSK.

683. Finally, the Applicant fails to address the words of late President Tuđman where he openly stated that Croatia did not have the intention to negotiate:

> "I'm going to Geneva to hide this and not to talk. I won't send a minister but the assistant foreign minister. That's on Thursday. So I want to hide what we are preparing for the day after. And we can rebut any argument in the world about how we didn't want to talk…"[713]

684. When Mr. Akashi testified before the ICTY Trial Chamber in the *Gotovina et al.* case, the representative of the Prosecution Office read the previous passage of the Brioni Minutes to him and asked:

> "Question: Now, Mr. Akashi, in your statement to the Gotovina Defence at paragraph 5, you described President Tuđman as a reliable negotiator. Now when you said that, you were not aware of this passage I just read to you; correct?
> Answer: That's correct."[714]

685. One separate part of Chapter 10 of the Reply is devoted to reasons behind the Croatian refusal to extend the UNPROFOR mandate, namely relying on Tuđman's public speeches to show that this refusal did not mean much because Croatia in fact did not give up hope for a peaceful solution.[715] One should first note that Tuđman's and other speeches of Croatian officials were made predominately from 1993 and 1994, while the refusal of the UNPROFOR mandate happened in January 1995.[716] Moreover, Tuđman's subsequent acts and statements made behind closed doors show the insincerity of his public statements.

[713] Brioni Minutes, p.32.
[714] ICTY *Prosecutor v. Gotovina*, Transcripts, 16 September 2009, witness Akashi, pages 21758-9.
[715] Reply, para.10.72.
[716] See annexes with the Reply nos. 133 (June 1993), 134 (December 1993), 135 (August 1994), and footnotes 155 (May 1994).

CHAPTER VIII

OPERATION *STORM* AS A VIOLATION OF THE GENOCIDE CONVENTION

686. While Chapter 11 of the Croatian Reply ("Operation *Storm*") can be read as a factual rebuttal to the counter-claim, Chapter 12 of the same submission, under the heading "There was no genocide against Serbs in the 'RSK' and no responsibility of Croatia", apparently deals with legal issues of the Respondent's counter-claims. However, both chapters of the Reply mainly discuss evidentiary issues. In the Respondent's view, it seems appropriate to answer all issues raised by Chapters 11 and 12 of the Reply together, in their logical context. This will be done in this Chapter.

1. Relation between the claim and counter-claim

687. It is in the nature of a counter-claim that a respondent State may answer the allegations of an applicant State by advancing its position on the law and the facts, but then add to its contentions that if the Court accepts certain legal and factual claims by the Applicant, the Respondent says in effect *tu quoque.* Although both the claim and counter-claim in this case belong to the same factual complex, the factual issues involved in the counter-claim are somewhat distinct from those advanced in the Applicant's submission. The same cannot be said about the legal issues, as they involve the interpretation of the same provisions. The Respondent has advanced an interpretation of the provisions of the Genocide Convention that is in line with the arguments it has made previously before this Court, but obviously taking into account the Court's pronouncements in the *Bosnia* case, including some of the views expressed in the separate and dissenting opinions of members of the Court. In assessing the Respondent's legal arguments with respect to the counter-claim, the Court is asked to bear in mind that these are premised on the possibility that the Court actually accepts some of the interpretative proposals advanced by the Applicant and with which the Respondent takes issue. However, this does not mean that the counter-claim is fully dependent on the Applicant's claim, because the two claims are based on the different factual grounds and evidence.

688. In the Counter-Memorial, the Respondent presented a counter-claim charging that the Applicant was liable for the crime of genocide perpetrated during Operation *Storm* in August 1995 (see especially chapters XIII and XIV). Operation *Storm* consisted of a brutal attack on the Krajina region, using a range of military and terrorist methods and techniques, with the purpose of entirely eliminating Serb life in that territory. As many as 200,000 Serbs who had been resident in the region as part of a centuries-old community were driven from the area with the view that they not be allowed to return. The forcible displacement of the Serb population was accompanied by mass killings, in particular of those who decided to stay at their homes, as well as by other prohibited acts, such as the indiscriminate shelling of the Krajina towns and villages, the plunder and destruction of Serb property, and the total eradication of life of the Serb community in the Krajina region. This was, as the Counter-Memorial explained, the intentional destruction of the Krajina Serbs and it amounted to a violation of articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide.

2. The protected group

689. The Respondent notes that the Applicant does not disagree with its proposal on the nature of the protected group: "The Applicant does not dispute the Respondent's claim that Croatian Serbs constitute a separate national or ethnic group […] Nor does the Applicant dispute that the Serb civilian population living in 'Krajina' represented a substantial part of that national or ethnic group."[717]

690. In addition, the Respondent has also argued that the Krajina Serbs represented a distinct geographically located community in an area which was of immense importance to Croatian Serbs and the historical centre of Serbian life in Croatia for centuries.[718] Neither of these contentions nor their legal implications have been challenged by the Applicant. Consequently, it seems that this issue is not in dispute between the Parties.

[717] Reply, para. 12.2.
[718] Counter-Memorial, paras. 1375-1390.

3. Difference between "goal" and "intent"

691. The Applicant offers in defence for its actions in Operation *Storm* the proposal that its "goal" was not the physical destruction of the Serb population of Krajina. Here it confounds the idea of "goal" with "intention" although these are not identical concepts. Criminal law makes a clear distinction between "goal" or "purpose", which is often labelled "motive", and "intent", which refers to acts that are not accidental or automatic, and result from a conscious and active mind. In para. 12.3 of the Reply, the Applicant appears to be using the word "intention" when it actually is speaking of the "purpose", "goal" or "motive". The Reply affirms: "Croatia's primary intention in pursuing Operation *Storm* was to achieve the lawful restoration of control over its sovereign territory, restoring its internationally recognised borders, and reintegrating those territories that had been unlawfully occupied by Serbia since its aggression in 1991 and 1992." Footnote 3 indicates what it claims was its "secondary purpose": "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."[719] But the argument that other purposes lay behind the intentional destruction of a national or ethnic group is no answer to a charge of genocide. After all, Hitler claimed his "purpose" was to unite ethnic Germans in one State, to recover territory that had been taken from Germany in the past, and to obtain *Lebensraum* for Germans in Europe. The genocide of the European Jews may not have been his primary or even his secondary purpose, but it changes nothing to the charge that he did so intentionally.

4. Reading of the Brioni Minutes of 31 July 1995

692. The Respondent has provided the Court with the Minutes of the meeting held by the President of the Republic of Croatia, Dr. Franjo Tuđman, with military officials, on 31 July 1995 at Brioni Island.[720] This material, in the Respondent's view, directly proves the *dolus specialis* of the crime of genocide.

[719] Reply, para. 12.3.
[720] Annex 52 to the Counter-Memorial.

693. In its Reply, the Applicant argues that "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".[721] Furthermore, the Applicant tries to convince the Court that the Respondent relies on the mischaracterization of an introductory statement made by the Croatian President who, *inter alia*, said:

> "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."[722]

The Respondent notes that the Applicant does not deny the accuracy of the translation of the Brioni Minutes that was prepared originally by the ICTY.

694. According to the Applicant, "the use of term 'capitulate' also points to the conclusion that the statement refers to the capitulation of the Serbian forces, not Serb civilians".[723] The Respondent will further demonstrate that the Applicant's interpretation of the *Brioni* Minutes is nothing but an unsuccessful attempt to escape its responsibility for genocide against the Krajina Serbs.

A. Who had to disappear from Croatia: Serb forces, Serb people, or all of them?

695. There is no doubt that the Brioni meeting was a gathering of the Croatian senior military leadership led by the State President as the Commander-in-chief of the Croatian armed forces.[724] Also, it is not contested that these officials discussed the plan for re-conquering (the Applicant would say "liberating") territory of the Republika Srpska Krajina, i.e. the protected areas of the UN Sectors North and South. Nevertheless, the Brioni Minutes clearly show that President Tuđman, as a key member of the JCE identified in the ICTY Judgment in *Gotovina et al*, gave a clear message concerning the destiny of the Serb people in the protected areas, sharing thus his criminal goal with the top military officials of the Croatian armed forces who were obliged to execute his orders. The Serbs would to all practical purposes disappear, Tuđman said. Yet, he added: "…that is to say, the areas

[721] Reply, para. 11.42.
[722] Brioni Minutes, p.2.
[723] Reply, para. 11.43.
[724] *Ibid*,, para. 11.41.

we do not take at once must capitulate within a few days". The Applicant relies on a detail that later, on the same page, one can find in Tuđman's statement a goal that also "the Serbian forces …[would] have to capitulate".[725] From the Applicant's point of view, this is sufficient to lead the Court to the conclusion that the Croatian President, ordering his military officials that the Serbs "to all practical purposes disappear", allegedly referred to their forces, and not to civilians.

696. The question is whether President Tuđman really referred to the Serbian armed forces when he used the term "Serbs". While Admiral Davor Domazet, who spoke after President Tuđman, in his military-style presentation mainly used the term "adversary", Tuđman used different expressions to refer to those to whom the Governmental action should be directed: "the Serbs", "the Serbian forces", "the enemy", "the Knin Serbs", "the adversary", "the areas", "some minor enclaves" and so on. At the very beginning of his introductory speech in which he said that the Serbs would to all practical purposes disappear, Tuđman made the following statement:

> "However, the situation as its stands now is that the United Nations representatives, Akashi, Stoltenberg and ***the Serbs*** have deprived of us this reason, since they are in the process of withdrawing ***their forces*** from the Bihać area."[726]

It is clear that Tuđman here distinguished between "the Serbs" and "their forces".

697. Yet, the point here is not so much which term the President of Croatia used but rather what he really meant about the destiny of the Krajina Serb national and ethnic group. The Croatian President did not indicate any difference in treatment depending upon whether his troops were dealing with Serb forces, Serb politicians or Serb civilians – all of them had to disappear in one way or another, that is to say, leave Croatian soil or be killed.

698. Page 15 of the Brioni Minutes offers a convincing example of Tuđman's attitude with respect to the Serb civilians. Tuđman said:

> "[W]e must take those points in order to completely vanquish the enemy later and force him to capitulate. But I've said, and we've said here, 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."[727]

[725] *Ibid*, para. 11.43.
[726] Brioni Minutes, p. 1 (emphasis added).
[727] *Ibid*, p. 15.

699. Thus, Tuđman talked about the civilians and the army separately, but nevertheless, the treatment of both was the same: the Serb army and the civilians were together in the columns, they had a psychological impact on each other, and they both had to get out and disappear. The Croatian President treated both the Serb forces and civilians as enemies who had to be completely vanquished. His language is clear and unambiguous, and it cannot be softened by interpretation.

700. The same intent can be seen on the page 22 of the Brioni Minutes, where the following words of President Tuđman were recorded:

> "If we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing."[728]

Once again, the Croatian President did not talk about the Serbian forces and military targets only; he recommended that he would be in favour of destroying ***everything.*** None of the participants at the meeting protested.

701. The events that followed the Brioni meeting confirmed Tuđman's words. The Krajina Serbs were attacked by deliberate indiscriminate shelling in order to be forced to flee their homes, towns and villages. And if some parts of Krajina towns escaped shelling, this was only because Croatian forces did not have enough ammunition to shell everything. Those who decided to stay at home in spite of the threat were hunted down and killed. Their houses were set on fire and looted. Their cattle were killed, and their wells were poisoned. The Governmental forces did not show any difference in treatment between the Serb army and the civilians. Mr. John William Hill, UN Military Police commander in Sector South, testified before the ICTY about what he witnessed in the streets of Knin during Operation *Storm*. His words demonstrate that Croatian soldiers treated all Serbs as enemies:

> "In front of the camp, I saw an individual with a shaved head and grey uniform, almost like an overall uniform with a black belt. But he was carrying an MP-5, which is a sub-machine gun. It was suppressed with a laser sight. He had an old man at his feet, almost like a dog. I had asked Ivan [Jurić, Croatian Military Police commander] what he was, and he said he was counter-terrorist unit. And I asked if that was part of the military police, and he said, yes, that they had military police, the HV. But as part of the military police, they had a counter-terrorism unit. I asked Ivan, I said, 'Well, who are terrorists?' And he said, 'Serbs'."[729]

[728] *Ibid*, p. 22.
[729] ICTY, Gotovina et al, IT-06-90, Testimony of Witness John William Hill, 28 May 2008, Transcript pp. 3785-3786.

702. Finally, the Serbs disappeared from Krajina and the main goal of President Tuđman was executed. Only eleven days after the meeting at Brioni Island, he commenced discussion with his Party supporters on how to organize a new register of the population and how to amend the Electoral Law, as well as the Constitutional Law on Human Rights and National Minorities.[730] Thus, it is highly difficult to conclude that Tuđman at Brioni talked merely about the disappearance, destroying and vanquishing of the Serbian forces. His aim was to destroy the Serb people of Krajina, as such.

B. Criminal agreement directed against the Serb population was reached at Brioni

703. In light of the previous analysis, the Respondent will further discuss some factual allegations misleadingly invoked by the Applicant. The first of them has been expressed in para. 11.46 of the Reply in the following words: "there was no agreement at Brioni to forcibly remove the Serb population". Quite to the contrary, at the very beginning of the Brioni meeting the Croatian President, as previously demonstrated, gave an instruction to the senior military officials that the Serbs should for all practical purposes disappear. Further discussions were directed to the issue of how to remove the Serb people together with their armed forces, with minimum losses on the Governmental side. In that sense, General Gotovina confirmed that the aim of the operation was to remove the Serbs from Krajina:

> "A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that ***if we continue this pressure***, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving."[731]

704. The Applicant's argument that the Serbs fled the region because they were afraid of an HV attack[732] does not have any significance for the legal characterization of this case. The previous experience of the Serb people in the areas attacked by the Governmental forces (for example, Operation *Flash*, see *supra*), as well as the subsequent killings and other serious crimes which were committed in the Sectors North and South, prove that the fears of the Serb people were fully justified. They had to flee in order to save

[730] See Excerpts from the Minutes of the session of the Presidency of the Croatian Democratic Union (HDZ) held on 11 August 1995 at the Presidential Palace in Zagreb (Annex 67).
[731] Brioni Minutes, p. 15 (emphasis added).
[732] Reply, para. 11.46, which quotes the Croatian Intelligence Report of 30 July 1995 (Annex 158 to the Reply).

their lives. For that reason, it is not astonishing, as the Applicant pretends to show, that the Krajina Serbs had some plans for evacuation in the case of the massive Croatian attack.

705. In the Counter-Memorial, the Respondent presented the practice of the ICTY, according to which the forced character of the acts could be deduced from the absence of a genuine choice.[733] The Croatian military leaders did not give any genuine choice to the Krajina Serbs. Their massive displacement was organized and executed against their will. President Tuđman at the Brioni meeting considered only two options: a) that the Serbs be pushed out and forced to flee, or b) that the Serbs be forced to fight to "the bitter end". An option in which the Serbs could freely continue to live in Krajina was not considered at all. Tuđman preferred the option (a) merely for the reason to minimize the engagement and losses of the Governmental forces.[734] For that reason, the Croatian military leaders even planned psychological effects in order to remove as many civilians as possible. Thus, President Tuđman discussed special public messages which should be "constantly repeated on TV and on the radio"[735]. His son, Dr. Miroslav Tuđman, asked:

> "Should the information be relayed over the radio as to which routes are open for them to use to pull out?"
>
> **President**: "Yes, that should be said, not the fact that the routes are open, but that it has been noticed that civilians are getting out by using such and such a route.
>
> **Dr. Miroslav Tuđman**: "Can we say this at some point at the beginning of the operation? Can we publicise the fact so they know that the civilians are using these routes to withdraw?"
>
> **President**: "Yes, it should be said that they have set out with passenger cars, and so on."[736]

[733] Counter-Memorial, para. 1440.
[734] Brioni minutes, p. 7: "It's all very well that the Admiral is now supposed to close off their remaining three exits, but you are not providing them with an exit anywhere. There is no way out to […] (to close it off). To pull out and flee, instead, you are forcing them to fight to the bitter end, which exacts a greater engagement and greater losses on our side. Therefore, let us also please take this into consideration because it's true, they are absolutely demoralized, and just as they have started moving out of Grahovo and Glamoc, 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 […]"
[735] Brioni Minutes, p. 23.
[736] *Ibid*.

706. It is quite unfortunate that, in arguing its case, the Applicant stipulates that the Security Council "insisted" that Croatia allow the Serbs to leave the attacked area.[737] This cynically untrue argument is undermined by the relevant paragraph of the SC resolution 1009 (1995) which reads as follows:

> "2. Demands further that the Government of the Republic of Croatia, in conformity with internationally recognized standards and in compliance with the agreement of 6 August 1995 between the Republic of Croatia and the United Nations Peace Forces (a) respect fully the rights of the local Serb population including their rights to *remain, leave or return in safety*, (b) allow access to this population by international humanitarian organizations, and (c) create conditions conducive to the return of those persons who have left their homes; […]." (Emphasis added).

C. There was a plan to direct artillery against Serb civilians

707. Contrary to the Applicant's argument expressed in para. 11.47 of the Reply, President Tuđman and his subordinates discussed and planned to use artillery against the Serb civilians. Although he was afraid of the lack of ammunition during the forthcoming criminal operation, it was evident that the Croatian President "would be in favour of destroying everything by shelling prior to advancing", only if he had enough ammunition.[738]

708. In order to escape this unavoidable factual finding, the Applicant tries to mislead the Court with respect to another quote of President Tuđman: "The psychological effect of the fall of a town is greater than if you shell it for two days."[739] But, the Applicant avoids informing the Court that this statement was related to the town of Gračac, an important strategic point in which the HV had to "enter as quickly as possible". Concerning the destiny of the town of Knin, the capital of the Krajina Serbs, Tuđman had no doubt:

> "Accordingly, we should provide for certain forces which will be directly engaged in the direction of Knin. And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today [...]."[740]

[737] Reply, para. 11.50.
[738] *Ibid*, p. 22.
[739] *Ibid*, p. 18.
[740] *Ibid*, p. 10.

709. Some UNCRO officers who directly observed the shelling of Knin testified about their firsthand experience before the ICTY in the *Gotovina et al.* case. General Lesli, Chief of Staff of the UN Sector South, stated that, at his visit to the Knin hospital on the morning of 5 August, "there were large quantities of dead, men, women, and children, stacked in the hospital corridors in a pile". Asked by the Presiding Judge to estimate more precisely the number of victims of shelling, the witness answered that "the number [had not been] lower than 30 and probably no higher than 50 to 60."[741]

710. Witness Bellerose was the UN Sector engineer who observed the shelling from the balcony of the UN HQ building. He gave the following statement: "In my opinion the shelling of Knin was carried out to drive away the civilian population. The shelling was not directed at specific military targets. I believe it was deliberate harassment shelling."[742] Asked to explain his opinion, Mr. Bellerose testified:

> "In my opinion, if there would have been military target in those locations that would have been causing a threat to the Croat forces, they would have been more intensive and direct at a specific target, be more concentrated. […] The artillery fire wasn't concentrated into one location. It was landing all over the town more to a random fashion and at a random interval."[743]

711. In order to have a full impression of what really happened in the town of Knin, the above quoted eyewitness statements can be compared now with the statement of General Gotovina given to President Tuđman at the Brioni meeting. Gotovina said:

> "At this moment, we can engage in extremely precise operations at Knin, systematically, without aiming at the barracks in which UNCRO is located. (We have all the photographs, and know exactly […]. At this moment, all of our weapons are guided, directly guided."[744]

[741] ICTY, *Gotovina et al.,* IT-06-90, Testimony of Witness Andrew Lesli, 22 April 2008, Transcript pp. 1967-68.
[742] ICTY, *Gotovina et al.,* IT-06-90, Testimony of Witness Joseph Lorenzo Claude Bellerose, 7 July 2008, Transcript p. 5871.
[743] *Ibid*.
[744] Brioni Minutes, p. 15.

D. The decision to target fleeing civilians was directly provoked by the wording and atmosphere at the Brioni meeting

712. Although it is obvious that the participants at the Brioni meeting did not directly discuss targeting civilian columns who pulled out from the Krajina, such criminal acts were committed against the Serb people (see evidence presented *infra*) as a direct consequence of the wording and atmosphere which President Tuđman shared with his senior military officials on that occasion. If the Croat forces were instructed to "inflict such blows that the Serbs [would] to all practical purposes disappear"[745], then it is not strange that one of the methods was air strikes and artillery attacks on the fleeing columns of desperate people.[746]

5. Evidence of *dolus specialis* for the crime of genocide

713. The plans for the destruction of the Serb population in Krajina were finalized at the meeting held on Brioni Island in the Adriatic Sea,. Under the heading "No Evidence of Genocidal Intent", the Applicant claims that "the Respondent expressly acknowledges that its case on genocidal intent depends upon the interpretation of the transcript of that meeting."[747] It continues: "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, then its case on genocidal intent must fail."[748] The Brioni transcripts are obviously very important to the Respondent's counter-claim, but it is not accurate to say that the counter-claim "depends upon the interpretation of the transcript of that meeting". The Brioni transcripts are of great assistance in clarifying the intent of the military and political leadership of the Applicant. They contribute to an appreciation of this intent. There is, by the way, nothing comparable to the Brioni transcripts with respect to the conduct of the Respondent in the events that are germane to these proceedings. In the Counter-Memorial, the Respondent described the Brioni transcripts as being of "exceptional importance",[749] and they are.

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[745] *Ibid*, p. 2.
[746] See below, paras. 751-767.
[747] Reply, para. 12.4.
[748] Reply, para. 12.6.
[749] Counter-Memorial, para. 179.

714. It is at the Brioni meeting that the President of Croatia instructed his military personal "to inflict such blows that the Serbs to all practical purposes disappear". As demonstrated above, he clearly expressed his objectives concerning the Serb armed forces and the Serb civilians without any distinction in regard to their destiny. He also pointed out that he "would be in favour of destroying everything by shelling prior to advancing", and moreover, he implicitly invited the Croatian Army to take revenge against the Krajina Serbs. He said: "And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today […]."[750]

715. The Applicant's Reply contends "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'".[751] Obviously a statement by the President of a country prior to a major military operation that suggests its objective is to bring about the disappearance of a national or ethnic group that has inhabited the territory for centuries cannot be simply dismissed with the claim that there is "no evidence of intent". This is evidence of genocidal intent. The question is whether the words, taken in their context, including the actions that were taken subsequently and in their implementation, are sufficiently compelling, credible and consistent to conclude that Applicant is responsible for genocide as a result of Operation *Storm*.

716. The Reply urges a "fair reading" of these disgraceful remarks. The Applicant attaches importance to the fact that this was delivered to military men,[752] as if that changes anything. It was a military operation; the President had to give the message to the military forces. The Applicant explains: "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."[753] In the eyes of the Applicant, President Tuđman was a true humanitarian, doing his utmost to ensure that civilians, especially of the "other" ethnic group, should be spared in this apocalyptic military adventure aimed at establishing the final ceasefire line in a brutal conflict.

[750] Brioni Minutes, p. 10.
[751] Reply, para. 12.7.
[752] Reply, para. 12.14.
[753] Reply, para. 12.16.

717. The Respondent persists in its interpretation of these remarks as evidence of the genocidal intent of the Croatian leadership. The context of the remarks is, of course, decisive. That context includes the subsequent behaviour of those whose conduct was governed by Tuđman's remarks. It should be recalled that he was speaking to an inner circle of military leaders where his remarks could be more frank and direct than if he were in a public environment. It was important for him to be clearly understood. There was no need for him to speak in euphemism. It is preposterous, as the Applicant argues, that "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".[754] Viewed in this way, the word "disappear" and the absence of any qualification take on a special importance.

718. The Applicant provides the Court with two military documents as counter-evidence that the Croatian commanding officers were to ensure compliance with international humanitarian law (Reply, Annexes 170 & 172). The existence of these documents is not in dispute, but the respect for the orders contained within is. Not surprisingly, it seems that the commanding officers chose to observe the messages of their President given at Brioni rather than the orders. Actually, how the participants of the Brioni meeting conveyed President Tuđman's messages to their subordinates can be best understood from the testimony of witness John William Hill, UN Military Police Commander in Sector South. Mr. Hill described his first direct contacts with Croatian soldiers in front of the UN camp in Knin on 4 August 1995 to the Trial Chamber in the *Gotovina et al* case:

> "The Croats told us that 'We must stay in the camp'. I was there discussing with the soldiers. Two of them were Canadians. One was on top of a tank. I talked to him and asked him how the offensive had gone. They said they took 30 hours to take Drnis, and then it only took five from there to Knin.
>
> I asked what they were going to do. **He said they were going to kill all the Serb.** The other individual, who was from, I believe, Montreal or Ottawa, was on the left, was infanteer. And I had asked him, because he spoke good English, what he was doing there, and he said he had come back to fight against the Serbs and that he had been waiting for this since 1945. He was approximately 22 years old." [755]

[754] *Ibid*.
[755] ICTY, *Prosecutor v. Gotovina et al,* IT-06-90, Testimony of Witness John William Hill, 27 May 2008, Transcript pp. 3750-3751.

719. Colonel Hill also described an incident with a UN interpreter of Serbian origin that occurred in downtown Knin where an HV officer intended to kill that individual. Mr. Hill stated to the Trial Chamber:

> "We negotiated back and forth that he could not shoot the individual, it was not his responsibility, the individual belonged to me.
>
> And, eventually, he agreed that the individual would go with me; however, he said that he could not guarantee the safety of the individual if his soldiers saw him, or my safety which was the first time they said that. He said that any helicopters leaving our camp with Serbs would be shot down, and **any Serb men of military age, 19 to 60, who leave our camp would be shot.**"[756]

720. These examples clearly show that Croatian soldiers were armed with the intent to kill all Serbs. In 1998, the Croatian daily "Jutarnji list" brought a dramatic account of one HV soldier, which can serve as additional and illustrative example of the real intent of the Croatian army:

> "The plan was to clean everything up as soon as possible. Some will get out and we'll waste the others. […] There were no civilians for us; they were simply all enemies. […] It was an unwritten order that there were no prisoners of war to be taken but, for the sake of saving our face before the world public opinion, a very small number of prisoners of war were nonetheless left alive. One in twenty were left to be interviewed with newsmen and taken pictures of, to show how merciful and good we were. The aim was to liberate the Krajina at all costs. […] We called the Udbina road 'the road of the corpses' because hundreds of corpses were scattered across it. We were those who killed people and after us, there came the forces which held positions and made sure that the corpses were removed. They loaded them onto refrigerator trucks. There were also the trucks used by *Jakopec* meat industry, as well as refrigerator trucks of some other meat companies. On our way back we saw refrigerator trucks full of corpses put into bags. […] When we stormed into Lapac, some people managed to flee while many of them were killed. We found their still warm soups on the table. We received orders to clean everything up and leave no prisoners of war. We entered the city and saw people fleeing in panic before us. We intersected the road between Donji Lapac and Srb, their only way out. We killed many people then. There were bodies lying all over the place and terrible stench could be smelt even the following day."[757]

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[756] *Ibid*, p. 3767.
[757] *Jutarnji list*, Zagreb, 4 May 1998 , page 8: "War turned me into a killing machine" (Annex 71).

6. The conduct of the Croatian Armed Forces confirms the existence of the genocidal intent

721. The *dolus specialis* of the crime of genocide that is manifested in the statement of the Croatian President at the Brioni Island and in the words of some Croatian soldiers can also be confirmed by the general conduct of the Croatian armed forces which followed the Brioni meeting. Executors of Operation Storm accomplished all of Tuđman's instructions. The group of the Krajina Serbs, which represented 30% of the Serbian population in Croatia that existed in 1991,[758] was attacked in whole and subjected to deliberate indiscriminate shelling, expulsion, massive killings, destruction and looting of their homes and property in order to secure that they would never come back. The crimes were committed against Serb civilians, *hors de combat* and combatants, without any distinction among them. This magnitude of the criminal activities, convincingly demonstrated in the Counter-Memorial, confirms that the words of President Tuđman were not misunderstood by his soldiers.

722. With regard to the events in the UN Sector South, the ICTY Judgment in *Gotovina et al* of 15 April 2011 fully confirms the previous view:

> "The […] evidence […] shows that the whole Serb population of the southern portion of the Krajina region during a relatively short period of time became victim of a large number of crimes, including persecution, murder, inhumane acts, destruction and plunder of property, and deportation. Although the categories of perpetrators might have changed over time, the victims were always Krajina Serbs remaining in the area and as a result almost all of the Krajina Serb population left their homes during or within weeks or months following Operation Storm. The evidence shows that the persons targeted primarily were members of the civilian population. Based on the evidence described above, including the evidence with regard to individual counts in the Indictment, the Trial Chamber finds beyond a reasonable doubt that there was a widespread and systematic attack directed against the Serb civilian population of the southern portion of the Krajina region."[759]

[758] See Counter-Memorial, para. 1372.
[759] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 1720-1721.

A. Croatia undertook deliberate indiscriminate shelling of the Krajina Serbs

723. The deliberate indiscriminate shelling of the Krajina towns and villages has been presented in the Counter-Memorial by numerous relevant and probative exhibits.[760] In rebuttal to the statements of 14 eye-witnesses and one expert cited by the Respondent,[761] the Applicant offers a single statement of the US Ambassador to Croatia Peter Galbraith, who said that he was in the town of Petrinja "not long after the town was trashed".[762] The Applicant fails to address the statements of a vast number of UN military officers cited in the Counter-Memorial whose testimonies conflict Galbraith's statement.

724. In addition, the Applicant refers to an Order of Attack issued by the Split Military District on 2 August 1995 and quotes some parts of that document which are not in direct relation to the issue.[763] The fact that the quoted sentences from the first three paragraphs of this order relate to military tasks does not negate the fact that fourth paragraph reads: "Shell the towns of Drvar, Knin, Benkovac, Obrovac and Gračac."[764] However, this paragraph of the document has been omitted by the Applicant who allegedly believes that only military targets were shelled. At this point, it seems that the Applicant has had some important reasons not to provide the ICTY with the artillery documents from Operation Storm requested repeatedly by the Office of the Prosecutor, or at least not to provide it with satisfactory information about the circumstances of disappearance of those relevant documents.[765]

725. The Applicant also refers to one document of the SVK Intelligence Department issued in the morning of 4 August, at so early stage of the operation that no reasonable conclusion can be inferred from that.[766] Finally, the Applicant invokes in a very general manner the testimony of the SVK Commander General Mrkšić before the ICTY, but without any reference to the specific case or relevant page of the ICTY transcripts.

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[760] Counter-Memorial, paras. 1215-1228.
[761] Witnesses: Roland Dagerfield, Adreas Dreyer, Joseph Bellarose, Peter Marti, John William Hill, Alun Roberts, Andrew Lesli, Jacques Morneu, Alain Robert Forand, Mira Grubor, Jovan Dopuđ, Sava Mirković, Vida Gaćeša and Herman Steenbergen. Expert: Reynaud Theunens.
[762] Reply, footnotes 159 and 160 with para. 11.74.
[763] Reply, para. 11.72.
[764] See Annex 171 to the Reply.
[765] See more, Counter-Memorial, paras. 200-205; also, *supra*, paras. 602-605.
[766] Reply, para. 11.73.

726. The Respondent has already presented *supra* the accuracy of the HV directly guided artillery (see the statement of General Gotovina at the Brioni meeting[767]). This was confirmed by the ICTY's factual finding in *Gotovina et al*. The following exemplary quote demonstrates the thorough factual examination made by the ICTY Trial Chamber regarding the shelling of civilian areas of the town of Knin:

> "The Trial Chamber has considered several factors in determining whether the artillery impacts in these areas could have been the result of errors or inaccuracies in the HV's artillery fire. In this respect, the Trial Chamber has considered specifically the abovementioned testimony of expert Konings and of Rajčić and Leslie on the accuracy of the HV's artillery weaponry at the range used on 4 and 5 August 1995 during the shelling of Knin. The Trial Chamber considers firstly that at distances of 300 to 700 metres, these areas of impacts were relatively far away from identified artillery targets. Secondly, a significant number of artillery projectiles, namely at least 50, landed in these areas. Thirdly, the areas are spread out across Knin, to its southern, eastern, and northern outskirts. Finally, the Trial Chamber recalls that on at least two occasions, the TS-4 reported firing at the general area of Knin or at Knin, without specifying an artillery target. In conclusion, the Trial Chamber finds that too many projectiles impacted in areas which were too far away from identified artillery targets and which were located around Knin, for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire. Thus, the Trial Chamber finds that the HV deliberately fired the artillery projectiles targeting these areas in Knin."[768]

727. The Trial Chamber found beyond a reasonable doubt that as a result the HV's shelling of Knin on 4 and 5 August 1995 constituted an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in Knin.[769] The same factual conclusions have been reached in relation to the towns of Benkovac, Gračac and Obrovac.

728. In order to avoid any doubt and further debate, the Respondent stresses that the deliberate indiscriminate shelling of the Krajina towns and villages is not evidence of the genocidal intent *per se*. However, as a part of a range of widespread and systematic criminal acts committed during and after Operation *Storm*, the shelling demonstrates that the Brioni messages concerning the disappearance of the Serbs were well understood and fully implemented.

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[767] Brioni Minutes, p. 15.
[768] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 1906.
[769] *Ibid*, para. 1911.

B. Croatia removed Serbs from the Krajina region by force

729. In the Counter-Memorial, the Respondent showed that the instructions from Brioni were also implemented through the intentional expulsion of the Serb population from the Krajina region.[770] The Respondent has quoted a Report of the UN Secretary-General of 18 October 1995, the part of which reads as follows:

> "The exodus of 200,000 Krajina Serbs fleeing the Croatian offensive in early August created a humanitarian crisis of major proportions. It is now estimated that only about 3,000 Krajina Serbs remain in the former Sector North and about 2,000 in the former Sector South […]."[771]

730. The Applicant has not denied this estimate, and has even admitted that "Operation *Storm* led to the displacement of the majority of the Serb civilian population".[772] Still, the Applicant tries to prove that the departure of Serbs from Krajina was voluntary and planned by the RSK leadership. The Applicant states that "[f]rom 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 […]."[773] In addition, it advances the argument that the Krajina Serbs departed from the region due to the attitude of their leadership that "any co-existence between the Serbs and Croats was impossible",[774] as well as due to "difficult living conditions, poverty and insecurity".[775]

731. The argument about the alleged voluntary emigration of Serbs from Croatia completely ignores what President Tuđman said at the Brioni meeting:

> "It is important that those civilians set out, and then army will follow them, and when the columns set out, they will have a psychological impact on each other".[776]

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[770] Counter-Memorial, para. 1229-1236, 1438-1447.
[771] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 27. See also the ICTY, ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011Judgment, para. 1712: "According to another report by the UN Secretary-General to the UN Security Council, dated 29 September 1995, more than 90 per cent of the Serb inhabitants had fled Sectors North and South, and the continuing reports of human rights abuses and of looting and burning were not conducive to their possible return. According to the report, despite Croatian government statements that Serbs were welcome to return, UNCRO continued to receive well-documented reports of human rights abuses and destruction of property from HRAT. On 21 December 1995, the UN Secretary-General reported that according to the ICRC, there were slightly more than 9,000 Serbs in the former UN Sectors North and South, whereof approximately 75 per cent were elderly, disabled, or otherwise 'vulnerable'."
[772] Reply, para. 12.35
[773] Reply, para. 11.77.
[774] Ibid, para. 11.80-11.81.
[775] *Ibid*, para. 11.82.
[776] Brioni Minutes, p. 15 (Annex 52 to the Counter-Memorial).

732. It also completely ignores how the Krajina Serbs were subjected to indiscriminate shelling, by which they were forced to run away from the line of fire that was gradually moving forward. Nevertheless, the Applicant claims that "the evacuation was not a result of artillery use by the HV".[777] In light of the fact that the crucial HV artillery documents are hidden and/or destroyed, the Applicant's claims cannot be verified.

733. This is how witness Boris Martinović testified before the Basic Court in Banja Luka, Bosnia and Herzegovina, in 1997:

> "The attack of the Croatian army was preceded by the heavy shelling of Glina and its surroundings, which lasted all day on 4 – 7 August 1995, forcing the local population to leave their homes and seek shelter in the direction of Dvor-upon-Una and further on in the territory of the Republic of Srpska. The shelling was very intense and even before the population left their homes, there were victims. Shelling was an indication that the Croatian infantry would launch an attack, which was why convoys of people fled the area. As a matter of fact, the civilian population was not fleeing; they were actually retreating. They used passenger cars, freight vehicles, tractors and horse-drawn carts. There were many of them who walked because they had no means of transport. Convoys of refugees fleeing Knin and Kordun joined and the entire convoy became very long. As the convoys moved on, Croatian warplanes flew over, causing panic on the ground. However, after the overflight of these planes, the convoy would continue its movement. The convoy was shelled by the Croatian army at Brezovo Polje, which is some 20 kilometres away from Glina. I saw for myself six bodies of killed civilians, but I had no time to turn them over and inspect them to see if I could recognize anyone. The second shelling of the convoy came when we were close to Gornji Zirovac."[778]

734. Furthermore, the existence of some plans for evacuation does not automatically mean that the Serbs were not expelled from their homes by force. According to the 1990 Law on Overall People Defense of the Republic of Croatia ("Narodne Novine" no. 47/90), evacuation was defined and envisaged in such a way that in the case of war, imminent danger of war and other extraordinary circumstances it is possible to organize evacuation of people, organizations and communities and that such evacuation is to be planned by municipalities, in accordance with the general defense

[777] Reply, para. 11.78.
[778] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Boris Martinović, dated 7 May 1997 (Annex 53).

plan of the Republic.[779] The same system existed in other republics of the former Yugoslavia after its dissolution. A very similar law was in force in the RSK (Law on Defense, accompanied with the Special Decision of the RSK Government, "Official Gazette" no. 2/93). It prescribed that one of the measures of civilian protection was evacuation. Article 65 envisaged that in time of imminent danger of war, state of war or state of emergency, evacuation of population, or namely specific categories of population (children, elderly, etc.) from a certain part of the territory can be ordered. Such evacuation would have been done in accordance with the general defense plan. Thus, the existence of plans for evacuation was a common practice in the former Yugoslavia, including both the RSK and the Republic of Croatia.

735. In support of the thesis that the Krajina Serbs were not displaced from the region by force, but evacuated by orders of their local authorities, the Applicant submitted some RSK documents, majority of which were seized by the Croatian Army following Operation Storm.[780] However, the contents of these documents show that their purpose was not to evacuate the entire Serb population to Bosnia and Herzegovina or Serbia. Quite to the contrary, a number of documents cited by the Applicant indicate preparations for resistance.

736. For instance, a document submitted as Annex 191 to the Reply is the Civil Defense Headquarters Order, dated 29 July 1995, which deals with plans of conducting evacuation and rescue but also with other methods of preparing the population for a military attack. The content of the document shows a routine preparation for defense and does not support the Applicant's claim.

737. A document submitted by the Applicant as Annex 166 is an Order signed by General Mrkšić, Commander of the SVK General Staff. The Order purported to prevent departure of families of professional serviceman and the population from the territory of the RSK.

738. Finally, a document submitted as Annex 198 to the Reply is a decision for evacuation made by the RSK Supreme Defense Council, in the evening hours of 4 August 1995. This document shows that the Order actually pertains only to the evacuation of people who were unfit for combat. Furthermore, evacuation was ordered only from those municipalities that

[779] Article 144 of the Law on Overall People Defense of the Republic of Croatia ("Narodne Novine" 47/90).
[780] Reply, paras. 11.77-78, footnotes 165-169.

were in an imminent danger of being taken over or had already been taken over, such as: Knin, Benkovac, Obrovac, Drniš and Gračac. Moreover, the document shows that population should be evacuated to the towns of Srb and Lapac that are within the territory of the RSK. There was no order for evacuation to Serbia or Bosnia-Herzegovina.

739. Again, the Applicant invokes in very general terms the statement of General Mile Mrkšić, given before the ICTY Trial Chamber in *Gotovina et al.* case.[781] Yet, his witness statement actually supports the Respondent's position expressed in the previous paragraph:

> "Question: General, the evacuation which was ordered by the Supreme Defence Council, that evacuation was never intended, much less planned, as a permanent removal of the entire civilian population into Bosnia, was it?
>
> Answer: That should not have been that. The population was supposed to be moved. We were always expecting the international community to stop that at any point and for us to return from Srb.
>
> Q. Now, your plan was to move the civilians to the area of Srb and to hold out until international pressure forced the Croatians to stop their advance; is that right?
> Yes, that's correct. […] Correct, because we didn't have the forces to stop them ourselves."[782]

740. After all, the finding of the ICTY in *Gotovina et al.* dismisses any doubt, if any existed at all, concerning the reasons for the massive exodus of the Serbian population. The Trial Chamber says:

> "[R]eviewing the testimonies of people who left their homes, there are no or few indications that their decisions to do so was initiated by RSK or SVK authorities. Further, the evidence does not indicate that the movement of people itself was in any way organized, for example with SVK providing assistance or security for the people leaving. Rather, as Mrkšić testified, many SVK soldiers left their units in order to assist their own families leaving and as a result the units collapsed. Based on the above, the Trial Chamber finds that in general people did not leave their homes due to any evacuation planned or organized by the RSK and SVK authorities."[783]

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[781] Reply, para. 11.79.
[782] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Testimony of Witness Mile Mrkšić, 23 June 2009, Transcript pp. 19076-19077.
[783] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011Judgment, para. 1539. Also, see excerpts from the testimonies of the Protected Witnesses P-136 (Annex 49) and P-054 (Annex 50).

741. The Trial Chamber concluded that the fear of violence and duress caused by the shelling of the towns of Benkovac, Gračac, Knin and Obrovac created an environment in which those present there had no choice but to leave. Consequently, the Trial Chamber found that the shelling amounted to the forcible displacement of the population on 4 and 5 August 1995.[784]

742. In light of the shelling and killings committed against Krajina Serbs from the very commencement of Operation Storm it is sinister to state that the departure was a result of "difficult living conditions, poverty and insecurity", as the Applicant does.[785] The Croatian armed forces actually did everything to prove the unfortunate thesis of the Serb leadership that "any co-existence between the Serbs and Croats was impossible".[786]

743. However, it seems that the Applicant had realized that its arguments made in Chapter 11 had not been very convincing, and thus, it made some additional efforts to advance a new thesis in Chapter 12 of the Reply, which deals with legal issues arising from Operation *Storm*. The Applicant states: "A military operation on the scale of Operation *Storm* is bound to result in the large scale movement of civilians".[787]

744. Is it true that large-scale movement of civilians is a necessary outcome of a military operation merely because of the scale of that operation? In accordance with international humanitarian law, civilians are not to be made the object of attack. If they are sufficiently reassured that they are not targeted, it is wrong to presume that population displacement is inevitable. In fact, the Serbs of Krajina abandoned their homes in huge numbers out of fear that they would be attacked and exterminated. The destiny of those who decided to stay behind shows that the fear was justified.

C. Croatia targetted the fleeing Krajina Serbs

745. The Counter-Memorial gives a convincing account of the systematic attacks of the Croatian Army on the fleeing Krajina Serbs. According to the Croatian CHC Report, four attacks on the refugee columns occurred in the territory of the UN Sector North,

[784] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011Judgment, para. 1745.
[785] See Reply, para.11.82.
[786] Reply, para. 11.80. For example, see CHC Report, *Military Operation Storm and Its Aftermath*, Zagreb, 2001, p. 22, quoted in para. 1445 of the Counter-Memorial.
[787] Reply, para. 12.32.

near the places called Glina, Žirovac, Maja and Cetingrad.[788] The fifth happened in the territory of Bosnia and Herzegovina, near Petrovac, where the Serbs from the Sector South were pulling out.[789] In addition to the CHC Report from 2001, the Respondent has quoted the following entry of the 4th HV Guards Brigade Operative Logbook for 7 August 1995:

> "Our artillery was hitting the column pulling from Petrovac to Grahovo, the score is excellent, the Chetniks have many dead and wounded […]." [790]

746. Nevertheless, the Applicant completely ignores the evidence presented in the Counter-Memorial and offers just general remarks. First, it observes that "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)."[791] This remark is without any relevance to the issue. As the Respondent has presented in the Counter-Memorial, the refugee columns ran for their lives in a completely chaotic and unorganized manner. They did not have any protection. Civilians do not become a legitimate military target because they flee together with soldiers.

747. Second, the Applicant claims that "the Croatian forces did not target civilians".[792] This statement sounds like a solemn declaration of a general rule, which must be respected as such. However, Operation *Storm* demonstrated a rather different practice of the Croatian forces. This was confirmed by the ICTY Judgment in *Gotovina et al*, vis-à-vis the Sector South. Thus, the Croatian forces did target civilians.

748. The third and fourth general remarks made by the Applicant are somehow connected and confused: "the columns passed through areas of ongoing fighting and were on occasion caught in the crossfire […] The 'ABIH' (5th Corps) was also involved in the fighting […] It follows that the Applicant cannot be held responsible for their acts."[793] It is not quite clear whether the Applicant wants to say that the Krajina Serbs, who allegedly decided to depart from the region voluntary and in a way organized by their local authorities, now

[788] Counter-Memorial, paras. 1243-1253.
[789] *Ibid*, paras. 1254-1257.
[790] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Reynaud Theunens, Expert report: *Croatian Armed Forces and Operation Storm*, Part II, p. 189.
[791] Reply, para. 11.87.
[792] *Ibid*.
[793] *Ibid*.

voluntary chose a way through the crossfire, or that they were forced to go to the exits left open upon the generous instructions made by President Tuđman at Brioni Island. It would be really unfortunate if the Croatian President could not presume the crossfire when he planned the humanitarian objectives of Operation *Storm* with his military leadership. And who was engaged in that crossfire? The Serbian Army of Krajina obviously not, because they decided, according to the Applicant, to flee the region due to "difficult living conditions, poverty and insecurity". It is difficult to imagine such people fighting. Was it then that the Army of Bosnia and Herzegovina fought against the Croatian Army there? Yet, at least from undisputed part of the Brioni Minutes, as well as from the map of Operation *Storm* made by the US Central Intelligence Agency and proposed by the Applicant as Annex 174 to the Reply, it follows that the ABiH 5th Corps was attached to the HV.[794] From eye-witness testimony of Boris Martinović, it is evident that the attack on the Serb column by the 5th Corps near Donji Žirovac was done in coordination with Croatian forces because the witness saw Croat soldiers attacking the column from one and Muslim soldiers from the other side of the road.[795]

749. Fifth, the Applicant claims that "the Serbs themselves caused casualties".[796] No evidence has been proposed for this unbelievable allegation, so it is impossible for the Respondent to even try to discuss it.

750. Sixth, the Applicant says that it "cannot be held responsible for acts that were committed in Bosnia, by unknown persons."[797] Yet, the persons who committed those acts in Bosnia and Herzegovina are very well known to the Croatian Government because, as their Operative Logbook confirms, they belonged to the 4th Guards Brigade of Croatian official armed forces (HV).[798]

751. In addition, the Applicant criticizes the source of information about the attacks on the refugee columns as unreliable and inconsistent.[799] The Respondent has already made some observations in the Chapter dealing with the questions of proof in regard to the

[794] See *infra*, paras. 817-819.
[795] Basic Court in Banja Luka, Bosnia and Herzegovina, Minutes of the witness hearing of Boris Martinović, dated 7 May 1997 (Annex 53).
[796] Reply, para. 11.87.
[797] *Ibid*.
[798] See para. 751 *supra*.
[799] Reply, paras. 11.91, 11.92, 12.10(3).

Applicant's objections to the CHC 2001 Report.[800] The Report "Military Operation 'Storm' and Its Aftermath", published in Zagreb, was a remarkable attempt of that non-governmental organization, whose members did not support the political and military objectives of the Krajina Serbs, to examine the real consequences of the operation. The Report was based on the in-field-investigation which, although limited in sources, was directed to the collection of all available and verifiable information about the victims. As the Court pronounced in the *Bosnia* case, "it is not necessary to examine every single incident reported by the Applicant, nor it is necessary to make an exhaustive list of the allegations".[801] This Report, of course, cannot provide the Court with names of each and every victim and perpetrator of the genocidal acts, and therefore it cannot serve to the ICTY in examination of the personal criminal liability. But it proves beyond a reasonable doubt that the Serb refugee columns were intentionally attacked and that people were killed in them.

752. In Chapter 12, the Applicant even adds a new argument concerning the CHC Report. It suggests 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."[802]

753. This is unjustifably severe and unfair assessment of materials generated by non-governmental organizations. International tribunals, including international criminal tribunals, have found NGO materials to be useful and reliable in adjudicating various issues. It is true that they could not be decisive in ruling on core issues of guilt or innocence but that does not mean they lack evidential weight merely because they are based upon sources that are not identified. In the Milosevic case, the Trial Chamber said:

> "In most cases, human rights reports constitute hearsay evidence, which is admissible under Rule 89 (C), provided it is relevant and reliable. Whether such evidence will be evidence on which the Trial Chamber could convict depends on a number of factors, including the way

[800] See paras. 592-595 *supra.*
[801] ICJ, *Bosnia* case, para. 242.
[802] Reply, para. 12.10(3).

in which the evidence was collected and presented, the nature of the evidence, for example how general or specific it is, and whether it is the only evidence relating to a specific charge. These reports must therefore be considered on a case by case basis."[803]

754. The Respondent notes that the sources of such reports are usually not identified out of concern for their safety and security, and not because of any sinister motive. Those who use such material must balance the difficulty in evaluating the credibility of the sources with the overall credibility of the organization that has furnished the report.

755. There are many examples in the case law of the international criminal tribunals of reliance upon NGO reports. For example, the International Criminal Tribunal for Rwanda has regularly referred to and relied upon materials produced by organizations like Human Rights Watch.[804] The United Nations reports are not very different. They are assembled by independent experts or by consultants based upon a range of unspecified, anonymous sources. They will be worded more cautiously because of the association with the United Nations, and this is the source of their credibility and authority. The Respondent notes that the Applicant has not hesitated to invoke various reports from independent experts retained by the United Nations. Yet the same concerns it expresses with regard to NGO materials are present. Again, as is the case with NGOs, international criminal tribunals regularly refer to reports prepared by experts for the United Nations.

756. Nevertheless, the Respondent, in addition to the evidence produced with the Counter-Memorial, submits now twelve witness statements given before the domestic criminal courts in Serbia and Bosnia and Herzegovina, from 1995 to 1998.[805] These are the statements of eye-witnesses of the Croatian attacks on the refugee columns. The traumatic experience and vivid memory of these individuals will depict the horrific scenes of genocide. All of those statements were given in accordance with the criminal rules applicable in the territory of the former Yugoslavia.

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[803] *Prosecutor* v. *Milošević* (IT-02-54-T), Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 38 (reference omitted).

[804] For example, the Appeals Chamber of the International Criminal Tribunal for Rwanda relied upon a report of the NGO Human Rights Watch in concluding that it should take judicial notice that genocide was committed in Rwanda in 1994: *Prosecutor* v. *Karamera (Case No. ICTR-98-44-AR73(C)),* Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, para. 35, fn. 58.

[805] See annexes nos. 52 – 66, Minutes of the witness hearing of Mirko Mrkobrad, Boris Martinović, Dragomir Kotur, Božo Ivanović, Ljubica Krasulja, MO, Dara Valentić, Mile Vračar, Dušanka Mraović, Sava Utržen, Jovica Piplica and Željko Dubajić.

757. Witness Mirko Mrkobrad testifies:

> "I think it was a Sunday, 8 August 1995 I was in a refugee convoy. […] When the convoy reached the so-called Ravno Rasce, the Croatian army staged its attack. The convoy was cut off from its left flank so that it was halved. I found myself in the other part of the convoy heading for Glina. Before the Croatian army attacked us, we had been bombarded by the artillery. The shelling lasted for some ten minutes. […] Since the shelling continued, there were a number of dead and wounded people in the convoy I was in, meaning the severed part of it. I can't be more specific about the dead and wounded, but my wild guess was that there were at least 30 dead and many more wounded people. […] When the shelling stopped, we could see a unit of the Croatian army of approximately 50 soldiers wearing sub-machine guns, rocket launchers and stingers. Part of the convoy in front of the burning vehicle continued its flight to Bosnia and the part of it I was in, was in disarray, turning back to Glina. The Croatian soldiers used machineguns and mortars to fire upon this part of the convoy. People were falling down as if they had been mowed down. It was hard to tell the number of dead and wounded. […] When the convoy managed to get to Glina, which was some 15 kilometres away from Ravno Rasce, the Croatian army had already taken control of Glina. The convoy was allowed to get into Glina and, when it was in the centre of the town, it was surrounded from all sides by the Croatian army. […] From the position I was on, roundabout near the outpatient hospital in Glina, I estimated that there were some 600 refugees, women and children, mainly civilians and a very small number of uniformed people. All of a sudden, a small-arms fire was opened at them. People were falling down like flies."[806]

758. Witness Božo Ivanović stated:

> "I picked up a little boy and put him in my car, heading for Dvor. When I reached Dvor, it was shelled by Ustashe from Kostajnica, and the residential quarters were under direct attack. There was a tractor in front of me in the convoy with the trailer carrying hay. The trailer was packed with people. There were probably between 15 and 20 of them. At one point, the tractor and trailer were hit by a grenade and people flew like mannequins in the air and they were instantly dead. With my little companion, I fled from the car and sheltered in a deserted house. Next to me, there was a stranger who also took shelter in the same building. I saw that he had lost part of his leg. He was practically legless, even though he was not aware of it. Another man was hit in the forehead and his wound was bleeding."[807]

[806] District Court in Požarevac, Serbia, Minutes of witness hearing of Mirko Mrkobrad, dated 13 March 1997 (Annex 52).
[807] Municipal Court of Vršac, Serbia, Minutes of witness hearing of Božo Ivanović, dated 17 April 1997 (Annex 55).

759. And this is how witness MO describes his dreadful eye-witness experience:

> "In August 1995 I worked as a driver at the urgent care day centre in Novi Grad. On 7 August 1995, I was given orders to drive the ambulance in the afternoon in the direction of Dvor-upon-Una and the village of Zirovac so as to drive the injured civilians at which the Croatian Army opened strong fire at close range. I was accompanied by another urgent care vehicle bearing the Red Cross sign, driven by Milan Popovic. When we reached the village of Trgovo, which is situated along the Novi Grad – Glina road, I saw that both sides of the roadway were crowded by overturned and damaged tractors and trailers, horse-drawn carts and other vehicles. All of them were bullet ridden and destroyed by explosives so that they were rendered inoperable for further travel. I was told that the Croatian Army attacked from close range a convoy of refugees moving from Glina to Novi Grad on that section of the road. The civilians had left those vehicles and fled in panic. There were many dead civilians in those vehicles and around them, but how many there were I could not tell, because I had no time to make the count or to look around. I know that there were surviving children who cried, so I put at least seven of them into the ambulance that I drove and proceeded further to do the job I had been given."[808]

760. The similar situation was in the Sector South. Witness Sava Utržen testifies what he saw immediately after the Croatian soldiers entered into Knin:

> "I saw that the Croatian soldiers intercepted a convoy of civilians fleeing Knin on their tractors. The Croatian soldiers killed four tractor drivers and threw their bodies into the river. Before they killed those drivers whom they called "Chetniks", they shot them and threw them into the river. I saw afterwards the Croatian soldiers bringing a group of Serb soldiers, whom they have brutally beaten and taken to the *Slavko Rodic* barracks. Beside the barracks, there were many dead bodies of civilians killed in the street. I noticed that there were women among the dead, but I had not seen any dead children. The bodies were mainly in the street which the fleeing civilians used on their way out of Knin heading for Bosansko Grahovo. I saw about 25 killed civilians in the same street. Their bodies were lying beside the abandoned tractors. There were also civilians killed in the tractor trailers in which they tried to flee in the direction of Bosansko Grahovo."[809]

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[808] Basic Court in Novi Grad, Bosnia and Herzegovina, Minutes of witness hearing of MO, dated 2 April 1997 (Annex 57).

[809] Basic Court in Prijedor, Bosnia and Herzegovina, Minutes of witness hearing of Sava Utržen, dated 7 April, 1997 (Annex 61). See also minutes of witness hearing of Jovica Piplica (Annex 65) and Željko Dubajić (Annex 66), concerning the shelling of the refugee column near Petrovac.

761. The killings described above were the manuscript of genocide committed by the Croatian Army and Police. There was no military need to attack the fleeing refugee columns. The refugees were attacked for a sole reason: to be destroyed as a national group living in Krajina. At the same time, the killings sent a message to those who survived that return was not possible. These killings clarify, if any clarification is still necessary, the meaning of the words of Croatian President at the Brioni Island: "We have to inflict such blows that the Serbs will to all practical purposes disappear."

D. Croatia systematically killed the Krajina Serbs who stayed behind

762. Numerous examples of the systematic killing campaign directed against the members of the Serb national group who did not flee from the Krajina region but stayed at their homes have been presented in the Counter-Memorial.[810] The Special Rapporteur of the UN Commission on Human Rights Mme Elisabeth Rehn reported:

> "Field staff of the Centre for Human Rights received numerous reports of killing taking place in former sectors South and North while the military operation was ongoing, without any military justification, and after the Croatian army had assumed control of the region. More than 120 bodies have been discovered by the United Nations and reports of killings have been especially numerous in the Knin area. According to information received, a common murder method was shots in the back of the head."[811]

763. Witness Sava Utržen confirms this by his first hand account:

> "Croatian soldiers killed those Kninians and Serb soldiers who happened to be at the bridge near the *Slavko Rodic* barracks or on the street when they pushed into Knin. I saw with my own eyes how the Croatian soldiers killed a civilian filming their entrance with his camera. […] I discovered that he was a reporter and cameraman from Sarajevo."[812]

764. In the characteristically sweeping approach, the Chapter 11 of the Applicant's Reply completely ignores the evidence presented by the Counter-Memorial vis-à-vis the systematic killings of the Serbs who stayed behind. Some problematic objections are raised again. For example, the Applicant accuses the Respondent of failure to provide

[810] Counter-Memorial, paras. 1258-1311.
[811] See Annex 59 to the Counter-Memorial, p. 9, para. 24.
[812] Basic Court in Prijedor, Bosnia and Herzegovina, Minutes of witness hearing of Sava Utržen, dated 7 April 1997 (Annex 61).

more particulars about the death of the victims, such as their full names, exact place and date of their killings, data about perpetrators, etc.[813] At this point, it seems that the Applicant once again misunderstands the methods of proof required for a dispute concerning the application of the Genocide Convention. As has already been explained in Chapters III and VI of this Rejoinder, the Parties should present evidence of genocide; this is not a case concerning specific murders.

765. It is well known that the Respondent did not have access to the crime scenes of Operation Storm. It was not in position to conduct investigations there. In the days following the operation even the UN observers were denied free movement. Andrew Brook Lesli, Chief of staff of the UN Sector South, testified before the ICTY about an embargo on free movement imposed to his staff:

> "Question: And just to be clear on the exchange of points of view, did you demand on behalf of UNCRO that UNCRO personnel be permitted to leave the compound?
>
> Answer: Yes.
>
> Q. And did you explain for what purpose UNCRO wanted to leave the compound?
>
> Yes.
>
> Q. And what was that purpose?
>
> To ensure that the laws of war were being respected, to ensure that no humanitarian violations were being perpetrated, to allow us access and visibility as per the United Nations Security Council resolutions which granted us such, and I also mentioned that we were willing to accept the responsibility and risk in doing so.
>
> Q. Okay. If you recall, what response did you receive to the demand
>
> to leave the compound?
>
> Endless repetitions of no.
>
> Q. How long did -- for how long did the tank remain there and how long was UNCRO personnel prevented from leaving the camp?
>
> We were prevented from leaving the camp up until the 9th of August, where I believe I was one of the first outside of the camp."[814]

[813] Reply, paras. 11.94 – 11.101.
[814] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Testimony of Witness Andrew Lesli, 22 April 2008, Transcript pp. 1972-73. (Annex 46).

766. A similar account has been given by J. W. Hill, UN Military Police Commander in Sector South .[815] Under these circumstances, it is not strange that even the ICTY Trial Chamber could not find sufficient information about all perpetrators and their affiliation in the case concerning the specific incidents of murders that had to be deliberate in relation to the individual criminal liability of the Croatian Generals, out of whom one belonged to the Police and the other two to the Croatian Army. Yet, the matter properly provable in this case is significantly different than in the ICTY case, as previously explained in Chapter VI of this Rejoinder. This is not a case about the individual criminal responsibility of the middle rank officers, but about the State responsibility. Both the HV led by General Gotovina and the Special Police led by General Markač belonged to the Republic of Croatia. For that reason, the exact data about the place or time of each death, which for sure occurred in the territory of Croatia during and after Operation *Storm*, as well as the names of perpetrators, are not relevant for the core issue of this case.

767. The Applicant again points out some "methodological flows" of the CHC Report as a source for the Respondent's claim. The Respondent has already replied to this sort of objections in the previous sections.[816] The witness testimonies given in the ICTY *Gotovina et al.* case, to which the Respondent also refers in the Counter-Memorial, have not been opposed in the Reply. Moreover, the ICTY Judgment of 15 April 2011 confirms that, at least in the Sector South, members of Croatian military forces and the Special Police committed more than 40 specific murders.[817] However, the ICTY Judgment also confirms that other mass killing incidents occurred, as for example the massacre of all remaining inhabitants of the village of Kijane on 8 August in the Gračac Municipality.[818] It is also significant that the Croatian War Crimes Prosecutor Mr. Mladen Bajić testified in the *Gotovina et al*. case that his office had disinterred about 300 bodies in Knin in 2001. He verified that most of the bodies were buried "without an on-site investigation or criminal report being filed, and this was a significant factor in delaying the prosecution of the incidents".[819] The Judgment reads:

> "128 of the disinterred bodies had been identified at the time of his testimony. Of those 128, 104 were killed by fire-arm wounds to the chest, head, and abdomen with some of the wounds occurring at point-blank range. Of these persons killed by fire-arms, 75 victims were killed around the time of 4-7 August 1995 with the remaining victims being killed in the 30 subsequent days (i.e., in the wake of Operation *Storm*)."[820]

[815] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Testimony of Witness John William Hill, 27 May 2008, Transcript p. 3750. (Annex 44). See also Counter-Memorial, paras. 1237-38, 1258, 1263, 1318-19.
[816] See paras. 757-761 *supra.*
[817] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para 1710.
[818] *Ibid*, paras. 257-259.
[819] *Ibid*, para. 2119.
[820] *Ibid* (footnotes omitted).

768. The Applicant offers some counter-allegations claiming 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 died much later".[821] No evidence has been produced here. It seems that the Applicant has forgotten that a party asserting a fact must establish it.

769. However, it is important to note that in Chapter 12 of the Reply, the Applicant slightly changes its position in the direction of recognition of the victims among those Serbs who stayed behind. There, the Applicant states: "[T]he 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, decapitated or mutilated remains, bodies observed in the streets, found inside their homes, or found in shallow graves. As regards Knin, the Respondent relies on a CHC report alleging that 13 people were killed by the HV ground forces entering the town."[822] The Applicant continues: "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."[823]

770. The Applicant is reluctant to admit its responsibility for death of these victims. It suggests how "extremely difficult" is to respond to the allegations due to their "level of generality".[824] Yet, a certain level of generality is definitely required in the examination of the crime of genocide, according to the Court's practice in the *Bosnia* case (para. 242).

771. The Applicant continues: "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 death occurred or the identity of the perpetrator."[825] But the Respondent does not ask for any conclusion to be drawn. The evidence here directly points to the obvious facts. Otherwise, who could cut throats of the elderly Serb women after Operation *Storm* in a hamlet in the surrounding area of Podinarje where "only a few elderly people remained

[821] Reply, para. 11.100.
[822] Reply, para. 12.46 (footnotes ommited).
[823] *Ibid*, para. 12.50.
[824] *Ibid*, para. 12.47.
[825] *Ibid*.

to live",[826] if not the units who took that area under their exclusive control? What would be the unknown circumstances of their death in this case? And, is the name of the perpetrator really necessary for the examination of State responsibility?

772. Yet, the next thesis of the Applicant fully demonstrates how weak its position is. Namely, the Applicant urges the Court to bear in mind that "*at least some of these deaths* must have occurred in the context of a military operation as ground troops entered towns".[827] The Applicant suggests that "there is an inevitable risk that individuals encountered on entry will be treated as hostile unless they promptly and convincingly demonstrate peaceful intent."[828] These semi-admissions speak for themselves and a comment is not necessary.

E. Croatia imposed physical barriers to the return of the Serb refugees

773. In the Counter-Memorial, the Respondent has produced credible and reliable evidence that the systematic killings of Serbs in the Krajina region were followed by other activities geared toward destroying every possibility that Serbs who were not killed could live in the region.[829] The Counter-Memorial reads that upon entering the Serb populated villages, Croatian forces killed Serbs that they managed to find, destroyed houses and other Serb property, killed livestock, polluted wells and waterways, and stole or removed fire-wood stored for the upcoming winter.[830] UNMO Report from 4 November 1995 on Sector South states that 17,270 houses were destroyed or damaged after the commencement of Operation Storm.[831] As of the end of September 1995, the European Community Monitoring Mission (ECMM) documented that 73 per cent of Serb houses were burned and looted in 243 villages investigated.[832]

774. Although the Applicant has undertaken some serious efforts to put into question the above-mentioned facts,[833] the ICTY Judgment in *Gotovina et al*. fully confirms the Respondent's assertions concerning the Sector South. Thus, the Trial Chamber found beyond a reasonable

[826] CHC Report, Zagreb, 2001, p. 46.
[827] Reply, para. 12.48 (emphasis added)
[828] *Ibid.*
[829] Counter-Memorial, paras. 1312-1325.
[830] *Ibid*, para. 1312.
[831] UNMO HQ Sector South & Human Rights Activities Team (HRAT), Survey Report on the Humanitarian Rights Situation in Sector South, 4 October-4 November 1995 (Annex 58 to the Counter-Memorial).
[832] Counter-Memorial, para. 1325.
[833] Reply, paras. 11.103-11.108.

doubt that 22 specific incidents of destruction of property owned or inhabited by Serbs had been committed in eight municipalities in the Sector South. The destruction was of "large scale" either on the basis of the value or on the basis of the number of destroyed objects. Further, the destruction cannot reasonably be explained by military necessity. Finally, the Trial Chamber found that the perpetrators intended the destruction.[834] Similar reasoning was applied in the case of plunder of the property owned or inhabited by Serbs.[835]

F. Croatia imposed legal barriers to the return of the Serb refugees

775. In its Counter-Memorial, the Respondent has produced sufficient information about the actions of the Croatian Government targeting the Serb population after Operation Storm.[836] On the other hand, the Applicant has apparently missed the point in the Reply where it has discussed the recent and current developments concerning the legislative and administrative measures that should provide the conditions for the return of all refugees. The Applicant has even argued that the Respondent has referred to "a number of outdated reports of various international organizations and NGO's".[837] Yet, this case is not about Croatia's admission to the European Union, but about genocide committed during and after Operation *Storm* in 1995, and it is normal that the reports from the relevant time are particularly important for this case.

776. However, the Applicant has neither denied nor challenged the contents of the "outdated" reports presented by the Counter-Memorial. No answer has been given to the following Report of the UN Secretary-General from 18 October 1995:

> "[T]he United Nations High Commissioner for Human Rights, UNCHR and UNCRO, as well as a number of Member States and independent human rights organizations, have expressed their concerns over the fact that serious violations of human rights have taken place and have continued to occur after the military operations had been successfully concluded. These violations, together with a number of recently adopted executive and legislative measures, appear de facto to restrict the civil, political, economic and social rights of the Croatian Serb population and the refugees' right to return, in contravention of international conventions."[838]

[834] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 1767-1773.
[835] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 1780-1785.
[836] Counter-Memorial, paras. 1326-1352.
[837] Reply, para. 11.111.
[838] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 28.

777. The restrictive measures imposed on the Croatian Serb population can shed more light on the intent of the Croatian leadership. Among the annexes to this submission, the Court can find excerpts from the records of three meetings held by President Tuđman in August 1995 with other State officials and his political associates.[839] The Minutes of the session of the Presidency of the Croatian Democratic Union, held on 11 August 1995 at the Presidential Palace in Zagreb, show the horrific scale of ethnic cleansing, as well as the intent of the Croatian President, who discussed with his associates how to resettle the Serbian Krajina with ethnic Croats and how to prevent Serb refugees from returning:

> "**Dr Jure Radic**: Nothing is more important […] in Croatia today than this, because people are coming, Croats, and […] you know that Vojnic used to have only 51 inhabitants today, it's a town of 15,000 people, tomorrow we can fill it up with 15,000. In addition, Lapac has 14 inhabitants, 14 Croats, Donji Lapac 14 inhabitants. It's more than the number of houses… I agree, but it's strategically so important, and it's in such a position that we must repair the houses, Gojko [he talked to Gojko Susak] and put Croats there, such is the position of the place.
>
> **President**: I am with the more radical, if someone has left the country and does not appear there, I don't know, a month, or three months, etc, that shall be considered, think of the wording, state property, etc. We have come out of a war, etc, define it like that.
>
> **Nikica Valentic**: Not three months, three months is too long, because we…
> **President**: OK, a month, then."[840]

778. The plan of urgent colonization of the Croats in Serbian houses was further discussed between President Tuđman and Minister Jure Radić, obviously an expert on demographic stabilisation of ethnic cleansing, at the meeting held on 22 August at the Presidential Palace in Zagreb:

> "**Dr Jure Radic**: …I defined 5 priorities according to the urgency of colonising these places with Croats… If you ask me this thing right here is the first and the second priority, we should bring Croats back here urgently and this area should be urgently colonised with Croats and we should by no means let more that 10% of Serbs be here ever again. Because, that's where we were cut off.
>
> **President**: Not even 10%."[841]

[839] Annexes 67-69.
[840] Annex 67, pp. 11 and 12.

779. These words are a direct reflection of President Tuđman's state of mind from the Brioni Island three weeks earlier, when he instructed his military personal that they "have to inflict such blows that the Serbs [would] to all practical purposes disappear". These *ex post facto* documents confirm that the instruction was not related to the armed forces of the adversary, but to the Serbian population of Krajina as such.

780. This was further confirmed by the testimony before the ICTY of Mr. Peter Galbraith, former US Ambassador in Croatia, a witness particularly appreciated by the Applicant. Although his estimations of the shelling of Knin are highly doubtful because he was not an eye-witness of that event,[842] his testimony in part concerning his firsthand experiences must be taken with due respect. This is a summary of his testimony in *Gotovina et al.* case, cited in the Judgment of 15 April 2011:

> "1999. According to Galbraith, Tuđman preferred a reasonably or basically homogenous Croatia. He believed and stated that the Serbs in Croatia were too numerous and constituted a strategic threat to the state. Tuđman spoke approvingly of population transfers, and also believed that Croats should leave areas that he did not think they could hold. He considered both Muslims and Serbs as part of a different civilization than Croats. Tuđman believed in the idea of a "Greater Croatia".
>
> 2000. Tuđman informed Galbraith after the Krajina Serbs had left Croatia in August 1995 that these Serbs could not return. According to a US embassy cable dated 11 December 1995, Tuđman had told a visiting US congressman that it would be "impossible for these Serbs to return to the place where their families lived for centuries". Galbraith stated that since this was Tuđman's policy, it was also Croatia's policy. He added that senior figures in the Croatian leadership, including Šarinić, shared this view. Galbraith recalled, for example, Šarinić describing Serbs as "a cancer on the stomach of Croatia".
>
> 2001. Further, Tuđman's wish was that Croats from the diaspora might come and settle in the Krajina. According to Galbraith, Tuđman took action to ensure that Serbs did not return. This included enacting laws confiscating property with the aim of preventing people from returning. Initially people were only given 30 days to return with the risk of otherwise losing their property. According to Galbraith, given the disciplined nature of the HV and the fact that the leadership was fully in command and had full power to prevent crimes, these crimes that were committed, in particular the destruction of Serb property, were either ordered, or it was a matter of policy to tolerate or encourage them. Further indications of this were the scale and time over which the crimes occurred. Galbraith knew of no specific attempts by Croatia to bring matters under contol."[843]

[841] See Annex 68.
[842] See Reply, para. 11.74, footnote 59.
[843] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, paras. 1999-2001 (footnotes omitted).

7. Motive for genocide

781. A purpose behind a course of action can be important to better understand how and why *dolus specialis* of the crime of genocide was formed. At this point the Respondent will not discuss the publicly proclaimed "goal" of Operation *Storm*.[844] Instead, it will show how the criminal goal to eradicate all life of the Serb national group from the Krajina region was established. In other words, this part will explain why was it that the Croatian President had the intent to commit genocide against the Serb population of Krajina, and how did it happen that his criminal intention, clearly and undoubtedly expressed at the meeting on Brioni, was so smoothly accepted by his subordinates.

A. Solution of the Serbian question in Croatia

782. There is no doubt that the rebel Serbs and their entity caused serious problems to the sovereign functioning of the Croatian State and its Government. The Reply reads:

> "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."[845]

783. Two critical points – political and economic - are equally important for a better understanding of the Governmental attitude towards the rebel Serbs. Firstly, the number of the Serbs in Croatia made them a significant factor on the Croatian political scene. According to the 1991 census there were around 580,000 Serbs in Croatia constituting approximately 12% of its total population.[846] Yet, the Croatian President Franjo Tuđman, who was described as "protofascist" by Mr. Efraim Zuroff, Director of the Simon Wiesenthal Centre in Jerusalem,[847] wanted Croatian people to be "the master in their own house". That is why he urged Admiral Domazet at the Brioni meeting, where Operation Storm were planned, to open one exit through which the Serb columns can pull out and

[844] See para. 697 *supra*.
[845] Reply, para. 3.132.
[846] R. Petrović, *The national composition of Yugoslav population 1991*, Yugoslav Survey, 1992, No. 1, p.12.
[847] See E. Zuroff, *Operation Last Chance*, New York, 2009, p. 136 (Annex 9 to the Counter-Memorial).

flee.[848] This is also why only eleven days later he discussed how to organize new register of the Croatian population, as well as the amendments to the Electoral Law and Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities in the Republic of Croatia.[849]

784. The second important factor was the geographical position of the Republic of Croatia and the Republic of Srpska Krajina in it.[850] There is no doubt that the RSK divided Croatia into two parts, Slavonia and Dalmatia, and the maintenance of economic and traffic ties between these two regions was very difficult. Yet a military intervention against the Republic of Srpska Krajina would still not have meant the end of Croatian problems with the disputed sovereignty over the areas predominantly inhabited by Serbs: even if the armed rebellion could have been defeated, this rebellion could have been later transformed into many other forms of disobedience. For that reason, the Croatian President decided that only the "disappearance" of the Republic of Srpska Krajina and its population can reunite Croatia and secure it from the inter-ethnic conflicts in the future.

785. Tuđman's attitude towards the Krajina Serbs can be seen in his euphoric, victorious public statement given in Knin, on 26 August 1995:

> "[T]here can be no return to the past, to the times when they the Serbs were spreading cancer in the heart of Croatia, cancer which was destroying the Croatian national being and which did not allow the Croatian people to be the master in its own house and did not allow Croatia to lead an independent and sovereign life under this wide, blue sky and within the world community of sovereign nations."[851]

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[848] Brioni Minutes, p. 7 (Annex 52 to the Counter-Memorial).

[849] See Annex 67 to the Rejoinder, in particular the following conversation:
"**President**: Naturally, the Government must render the decision on amendments to the Electoral Law, the decision on register of ethnic minorities which should probably be made at the beginning of September (1st September). Please, 1st September…
Drago Krpina: How shall we elect Serbs to the Sabor [the Parliament of the Republic of Croatia]?
President: So, there, after the register.
Drago Krpina: But, we are not obliged to 8 % any more. (No, no.)
President: Precisely so, to determine the percentage, because on that basis the amendments to the Constitutional Law should be made, because I know that you will…
Drago Krpina: Mister President, the Constitutional Law must be changed.
President: Yes, well yes, and because of that, we need the register in order to have what we all know, in order to have a real basis for it.
Nikica Valentic: From the political point of view, is it opportunistic to determine that there are 3 % of Serbs in Croatia at this moment?
President: It will not be at this moment, it will be in a month."

[850] See the maps nos. 4, 5 and 6 annexed to the Counter-Memorial (Volume III).

[851] BBC Summary of World Broadcasts, August 28, 1995, Monday, Part 2 Central Europe, the Balkans; Former Yugoslavia; Croatia; EE/D2393/C.

786. This negation of any possibility of further existence of the Serbs in Croatia was merely repeated by the Tuđman's Minister of Foreign Affairs Hrvoje Šarinić in his conversation with Ambassador Galbright: "We cannot accept them to come back. They are a cancer in the stomach of Croatia".[852] The choice of metaphor is a damning one. This is the same poisonous language that characterized genocidal statements in Rwanda, aptly described by the ICTR in the *Nahimana et al.* case.[853] The concept of "cancer" implies a subversive, poisonous presence, and one that requires elimination. It confirms the sense of Tuđman's infamous reference at Brioni some days earlier. [854]

B. Tuđman's "scientific" justification of genocide

787. That Croatian President Tuđman was not hesitant to apply the genocidal policy as a last resort in solving the inter-ethnic conflict in his newly independent State is evidenced by his book "Wastelands of Historical Reality", translated in English as "Horrors of War". In that book, Dr. Tuđman tried to justify genocide from a historical point of view:

> "All this successive pogrom-like violence against big foreign ethnic populations numbering even millions of people have always been aimed at 'final' solution: removing a foreign – if not an enemy fifth column of one's national being. Seen from this point of view – and this can only account for the incessant repetition of historical events – such violent even genocidal changes that were made also after the end of the Second World War always bring about dual consequences. On the one hand, they inevitably deepen historical discord […] On the other hand, they bring about ethnic homogenization of some peoples, leading to more harmony in the national composition of the population and state borders of individual countries, thus also having possible positive impact on developments in the future, in the sense of fewer reasons of fresh violence and pretexts for the outbreak of new conflicts and international friction."[855]

[852] ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Testimony of Witness Peter Galbraight, 23 June 2008, Transcript, p. 4939.
[853] *Prosecutor* v. *Nahimana* et al. (ICTR-99-52-T), Judgment and Sentence, 3 December 2003; *Prosecutor* v. *Nahimana* et al. (ICTR-99-52-A), Judgment, 28 November 2007.
[854] This statement can also be compared with the similar one of Dr. Mladen Lorković, the NDH Minister of Foreign Affairs: "Croatian people must clean itself from all elements which are its misfortune; which are foreign and strange to that people; which dissolute from one evil to another through decades and centuries. Those are our Serbs and our Jews." (*Croatian People*, 28 June 1941).
[855] Dr. Franjo Tuđman, *Wastelands of Historical Reality*, Nakladni zavod Matice Hrvatske, Zagreb, p. 163.

788. Thus, it is not strange that someone like Dr. Tuđman, once he became a head of the nation, decided to sacrifice some historical discord, in order to reach "more harmony in the national composition of the population" and "positive impact on developments in the future" in Croatia.

C. Revenge

789. Furthermore, it is not disputed that the Serbian side committed crimes during the armed conflict in Croatia, particularly in 1991. In such a situation, the calling for national revenge was nothing new in the long history of Balkan's conflicts. Croatian President made such an implicit call at a very important moment, at the meeting with top military officials at Brioni Island, in the dawn of Operation *Storm*:

> "And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today [...]."[856]

790. In a televised address on 26 August 1995, he even tried to find an excuse for perpetrators engaged in the reprisal:

> "[F]rom biblical times, as of the Old Testament which advocated the principle of an eye for an eye, a tooth for a tooth, and its New Testament which was unsuccessful in overcoming this type of resentment amongst people against whom sufferance and evil have been afflicted, so that they never again […] respond to those who committed evil with evil. No country in the world, not even the most sophisticated armies […] were able to prevent incidents from happening during the wars, and neither were we able to, although we condemn all incidents which took place and call upon the Croatian people not to commit acts of retaliation, not to destroy the homes of Serbs who left because this is now Croatian property!"[857]

8. Specific acts of genocide

A. Killing members of the group

791. The Court can find in the Counter-Memorial (paras. 1237 – 1311), as well as in the previous paragraphs of the Rejoinder,[858] a lot of evidence that the Croatian armed forces killed members of the Krajina Serb national and ethnic group, as such.

[856] Brioni Minutes, p. 10 (Annex 52 to the Counter-Memorial).
[857] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 2008.
[858] See for example paras. 751, 763-766, 768-769, 773.

792. In para. 11.85 of the Reply, the Applicant, in rebuttal to the Respondent's claim about the victims of Operation Storm, makes three general remarks. *First*, "no order to commit crimes was executed, since no such order existed". This is simply not correct. The Respondent's previous analysis clearly demonstrates that the instruction for the eradication of the Serbian life in Krajina was given on the Brioni Island on 31 July 1995. It was documented by the Minutes from that meeting produced as Annex 52 to the Counter-Memorial. *Second*, the Applicant claims that all efforts were made to encourage the Serbs to stay. Allegedly, "[o]n 4 August, President Tuđman appealed to the Serbs to remain 'at home'." However, the Applicant ignores the words of its President from the Brioni Island:

> "A leaflet of this sort - general chaos, the victory of the Croatian Army supported by the international community and so forth (Serbs, you are already withdrawing, and so forth), and we are appealing to you not to withdraw, we guarantee […] This means giving them a way out, while pretending to guarantee civil rights, etc."[859]

793. Finally, there is no doubt that many Serb civilians who decided to stay behind met their destiny at their homes, as the evidence shows. *Third*, the Applicant claims that "no precise data on the number of Serbs killed or missing during *Storm* has been established". Yet, is the precise number really necessary for this case? The evidence offered by the Respondent has established that the Croatian armed forces killed the Krajina Sebs *en masse*.

794. The Applicant does not contest the fact that members of the group were killed, thereby acknowledging the *actus reus* of the first act of genocide enumerated in Article 2 of the Convention. According to the Applicant, "[w]hilst 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."[860] This reference to international humanitarian law is perplexing in that it suggests that acts intended to destroy a national, ethnic, racial or religious group in whole or in part might not be genocidal to the extent that they were "lawful" acts of war. The Respondent submits that the lawfulness of the belligerent activity is irrelevant if the act is associated with genocidal intent.

[859] Brioni Minutes, p. 29.
[860] Reply, para. 12.58.

795. In any case, the alleged "lawful" nature of the killing of civilians by Croat armed forces, upon which the Applicant stakes its first line of defence to this charge, is effectively demolished by the findings of the Trial Chamber in *Gotovina et al*. According to the Trial Chamber,

> "members of the Croatian military forces and the Special Police committed *unlawful* attacks on civilians and civilian objects, as the crime against humanity of persecution, against the towns of Knin, Benkovac, Obrovac, and Gračac. The Trial Chamber finds that crimes were committed throughout the Indictment area in August and September 1995".[861]

796. The Court is referred to the Judgment of the Trial Chamber, with its highly detailed analysis of specific incidents, including the unlawful shelling of important population centres like the city of Knin. The findings of the Tribunal are based on evidence from experienced military observers and human rights monitors, including members of the European Union Monitoring Mission, as well as upon expert testimony with respect to the purported military purposes of artillery attacks on towns that the defendants in the case unsuccessfully invoked.

B. Causing serious bodily or mental harm

797. The Counter-Memorial presents well-documented examples of causing serious bodily or mental harm to the members of the Krajina Serb national and ethnic group (paras. 1399 – 1401). As in the case of killing, the Applicant attempts to refute the allegation that the second enumerated act of genocide was perpetrated by Croat forces with the strange suggestion that "there is no convincing evidence that bodily or mental harm was inflicted unlawfully (in breach of international humanitarian law)".[862] Again, this argument can be laid to rest by even the most summary consultation of the Judgment of the ICTY Trial Chamber in *Gotovina et al*:

> "When assessing whether the acts directed against the victims in those incidents caused serious mental or physical suffering or injury, the Trial Chamber considered the circumstances under which the acts were carried out, in particular where the victims were at the time, as well as the victims' age and gender. The Trial Chamber further considered the number of perpetrators, whether the perpetrators were armed, and whether they used

[861] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 1710 (emphasis added).
[862] Reply, para. 1258.

some kind of weapon for the ill-treatment. The Trial Chamber finds that all the victims in the incidents referred to above were subjected to acts that caused serious mental or physical suffering or injury and that the perpetrators of the acts intended this result."[863]

798. In the view of the Respondent, such serious bodily and mental harm was conducted in addition to the killings and forcible displacement of the Serb population, driven by the same intent to destroy the group of Krajina Serbs as such.

C. Conditions of life

799. With respect to the third act of genocide, namely "[d]eliberately inflicting on the group conditions of life designed to bring about its destruction in whole or in part", there is ample evidence in the Trial Chamber Judgment in *Gotovina et al*., as well as in other authorities previously cited and submitted by the Respondent, to establish the *actus reus* (see Counter-Memorial, paras. 1406-1409). The Applicant does not in fact dispute the issue of the *actus reus* in the Reply, but insists that there "is no evidence of genocidal intent on the part of the Government of Croatia".[864] As the Respondent has indicated above, this is not a sustainable statement, not only taking into account the remarks of the President of Croatia during the Brioni meeting but many other facts that indicate that the Applicant's intent was to destroy forever Serb life in the Krajina.

800. The Respondent takes note of the statement by the Applicant that neither the displacement of individuals from the protected group, nor the destruction of property can constitute an unlawful act contrary to Article II(c).[865]

801. The Respondent also takes note of the claim in the Reply with respect to the statement in the Application that initiated these proceedings, where it is stated that the evacuation of "Croatian citizens of Serb ethnicity in the Knin region" (Republika Srpska Krajina) amounted to "a second round of 'ethnic cleansing', in violation of the Genocide Convention".[866] The Applicant has now retreated from this allegation, it appears.[867] The Respondent will leave it to the Court to assess the legal consequences

[863] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 1794.
[864] Reply, para. 12.58(3).
[865] *Ibid*.
[866] Application instituting proceedings, paras. 2 and 33.
[867] Reply, para. 12.59.

of the Applicant's admission in the Application instituting proceedings. It confines itself to the observation that this is characteristic of the Applicant's cavalier use of the term genocide, a term that it casually uses to describe the behaviour of others while being incapable to assess its own conduct using the same standard. In this respect, it is interesting that in the Reply the Applicant explains that it included the allegations on the genocide against the Serb population in the Application because it thought that the FRY and not Croatia was responsible.[868] So, does a crime become or cease to be genocide depending on who is responsible for it?

9. Conspiracy to commit genocide

802. The Reply to the charge of conspiracy to commit genocide, which is set out in detail in the Counter-Memorial,[869] confines itself to little more than a simple denial, arguing that the Respondent has "misread" the remarks of President Tuđman at the Brioni meeting.[870] The arguments of the Respondent are not addressed and they are not challenged. The Respondent reiterates that the Brioni Minutes provides very compelling evidence of the existence of a genocidal conspiracy.

10. Failure to punish

803. The obligation to prosecute and punish genocide is a consequence of several provisions of the Genocide Convention, including articles 1, 4, 5 and 6. It should be noted that the Convention points to a primary responsibility of the territorial State for prosecution of the crime. According to article VI,

> "Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

804. In the *Bosnia* case, the Court examined whether the International Criminal Tribunal for the former Yugoslavia was described by the expression "such international penal tribunal".[871] That issue need not arise here because there is no debate in the present

[868] *Ibid.*
[869] Counter-Memorial, paras. 1465-1469.
[870] Reply, para. 12.60.
[871] ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91, para. 445.

proceedings as to the fact that Operation *Storm*, including its planning and preparation, took place on the territory of the Applicant. It is Applicant's responsibility to ensure that such acts are punished in accordance with article VI of the Convention. Although the Court does not have jurisdiction over the obligation to prosecute more generally, the Respondent notes that even if the acts are not given the qualification of genocide before the courts of the Applicant, the latter is in any case under a duty to prosecute the atrocities associated with Operation *Storm* pursuant to its obligations under international human rights norms such as the European Convention on Human Rights, because these constitute serious violent crimes against the person. It has not done so.

805. According to the Report by the UN Secretary-General to the UN Security Council, dated 14 February 1996:

> "[t]he discrepancy […] between the number of apparent violations of the right to life recorded by United Nations investigators in the former Sectors – at least 150 – and the number of cases acknowledged by the Croatian authorities continues to be unaccountably large. While the Government has pursued prosecutions in the most dramatic cases, e.g. the massacre of nine Serbs at Varivode, and some others, there is little evidence of progress in resolving the many other reported cases of individual killings."[872]

806. The Applicant continues to present Operation Storm as a patriotic struggle to reclaim territory rather than what it was in reality, a brutal expulsion of an ethnic group from a territory it has inhabited for generations. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has already brought the Applicant closer to reality, although the reaction of its government and its civil society to the decision in *Gotovina et al.* shows just how far it remains from accepting the importance of justice, be it international or national. The Respondent urges the Court to contribute to setting the Applicant on a path that better acknowledges its history.

11. Attribution of acts of genocide to Croatia

807. The fact that crimes during and after Operation *Storm* are attributable to the Republic of Croatia cannot be in dispute in light of all the evidence presented to date. The evidence clearly shows that numerous underlying crimes which represented the actus

[872] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 2103.

reus of the crime of genocide were perpetrated by members of the Croatian army and police as *de jure* organs of the Applicant, while the genocidal plan was designed by the highest leadership of Croatia.[873]

808. Attribution of all such crimes against Krajina Serbs to the Applicant is obvious from several facts. Namely, the genocidal plan was confirmed on Brioni by the highest Croatian political and military officials and was ordered on that occasion by the Supreme Commander of the Croatian armed forces, President Franjo Tuđman. This genocidal plan was coordinated and its implementation on the ground was supervised by the highest military and police officers, many of whom were present at Brioni and had received the criminal orders from the President himself. Croatian armed forces enclosed Krajina so that nobody could enter and witness the crimes being committed. They had complete and effective control of the entire territory of Krajina and all individuals participating in Operation *Storm* were under direct command and control of the Croatian political and military leadership. Individual crimes were committed by Croatian soldiers and police officers. Finally, Operation *Storm* and the disappearance of Krajina Serbs from the territory of Republic of Croatia is celebrated by the Applicant, while military and police commanders, who were later accused and found guilty of crimes before the ICTY, had been promoted after the operation and are still celebrated in Croatia as heroes.

809. It is hard to conceive how the Applicant, after a long period of acceptance and celebration of Operation *Storm* and of the participation of its army in this operation, can today attempt to claim that somebody else may have been culpable for the crimes committed during the operation. It is obvious from all evidence presented that it was actually the Croatian army and police that had orchestrated and committed the underlying acts of genocide committed against the Krajina Serb population. This was furthermore confirmed by the Judgment in *Gotovina* et al. that clearly identified "members of the Croatian military forces and the Special Police", as perpetrators of these crimes.[874]

[873] See Counter-Memorial, paras. 1316-1322, 1337.
[874] ICTY, *Prosecutor v. Gotovina et al* (IT-06-90-T), Trial Chamber Judgment of 15 April 2011, para. 1710.

810. Actually, one can see from the Reply that even the Applicant is aware of the fact that it cannot deny its responsibility for Operation *Storm* considering that it chose to specifically dispute only the killings of Krajina Serbs fleeing in the columns.[875] The Applicant, namely, claims that it cannot be responsible for murders perpetrated by the "ABIH" (5th Corps).[876]

811. Nevertheless, from the new evidence and the eye-witness statements offered with this Rejoinder it is even more clear that it was the Croatian army who conducted majority of attacks on the column and most of the killings of Serbs. Evidence of Mirko Mrkobad and Božo Ivanović were already cited and the two clearly state seeing Croatian forces, not somebody else, targeting Serb columns near the towns of Glina and Dvor na Uni.[877] The entry from the 4th HV Guards Brigade Operative Logbook for 7 August 1995 was also cited and shows a report by the Croatian unit that the 4th HV Brigade was attacking the column and that many "Chetniks" had died and were wounded.[878]

812. Concerning the participation of the 5th Corps of the Army of Bosnia and Herzegovina in Operation *Storm* and the crimes committed in the course of the operation, the Respondent submits that the participation of the Army of Bosnia and Herzegovina units in Operation *Storm* was planned in advance, while one of the overall objectives of Operation *Storm* was quick merging with 5th ABIH Corps.[879] The Respondent does not possess a document that would precisely explain the basis for the participation of the 5th Corps of the Army of Bosnia and Herzegovina in the operation, but the minutes of the Brioni meeting demonstrate that the participants, who were members of only Croatian institutions, discussed how and where the 5th ABIH Corps should be deployed and what military actions it should take.[880] This could imply that the 5th ABIH Corps was put under full disposal and under full command and control of the Croatian Army for the purpose of Operation *Storm*, in which case Croatia, and not Bosnia and Herzegovina, should bear responsibility for the actions of that unit and the

[875] Reply, para. 11.87.
[876] Ibid.
[877] Annexes 52 and 55.
[878] See para. 751 above.
[879] See Reply, Annex 174 (map made by the US Central Intelligence Agency and printed in Central Intelligence Agency (CIA), *Balkan Battlegrounds: A Military History of the Yugoslav Conflict 1990-1995* (2002), ICTY, *Prosecutor* v. *Gotovina* et al. (IT-06-90-T), Reynaud Theunens, Expert Report: *Croatian Armed Forces and Operation Storm,* Part II, p. 96., O. Žunec, Naked Life (Goli Život), Zagreb, 2007, p.842.
[880] Brioni Minutes, pp. 4, 9, 16-18.

crimes committed by that unit during the operation. This even more so since the operation was genocidal from its very inception and the crimes committed were not excesses committed during regular military operation but rather a direct consequence of the genocidal plan expressed at the Brioni meeting.

813. In any case, however, it is of very little importance what the status of the 5th ABIH Corps really was, namely whether it acted under the instructions of Croatia or independently, since the facts of the case and the evidence presented clearly show that it was undoubtedly the Croatian army and the Police which committed most of the crimes during and after Operation *Storm*, including most of the killings of the people in the refugee columns. Therefore, whether or not some of the crimes against the Serbs during Operation *Storm* were indeed perpetrated by the Army of Bosnia and Herzegovina changes nothing in terms of responsibility of Croatia for genocide committed against the Serbian population. The bulk of the genocidal acts during and after Operation *Storm* was committed by the official organs of Croatia and Croatia accordingly bears international responsibility for that genocide.

12. Disappearance of the RSK and other consequences of genocide

814. On 7 August 1995, at 18:00, Croatian Minister of Defense Gojko Šušak released a statement that the military Operation *Storm* was completed. He stated that the Croatian forces reached the internationally recognized borders of the Republic of Croatia. The criminal operation, as it was demonstrated *supra*, continued in the coming weeks. Mass killing incidents occurred in the village of Grubori, on 25 August, in Gošići, on 27 August, and in Varivode, on 28 September 1995.[881] Those Serbs imprisoned during and after the operation were tortured and humiliated.[882] The houses and other properties of the Krajina Serbs were devastated. Even in 1998, Mr. Ivan Zvonimir Čičak, President of the Croatian Helsinki Committee for Human Rights, reported how the houses of Krajina were still set on fire:

> "It all began by mysterious stories about numerous fires in Banija and Kordun regions 'because of dry grass'. However, the dry grass swallowed up the houses as well. But when the smoke was gone, Croatian Helsinki Committee monitors discovered that the purpose

[881] See Counter-Memorial, para. 1281-1283.
[882] See witness statements of Mirko Mrkobrad (Annex 52), Mile Vračar (Annex 59), Dušanka Mraović (Annex 60), Milan Beric (Annex 63).

of the fire was to further the planned burning of houses to prevent possible return of Serbs. Croatian Helsinki Committee monitors have filmed in the Municipality of Vrginmost as many as 47 newly burned households, meaning that more than a hundred buildings have been burnt down. Similarly, 20 houses were burnt down in Korenica, Topusko, Kistanje, Donje Budacko and there are even news of the new burning coming in from all sides. […]

It is that method of burning houses when, for instance, a returnee gets all documents properly signed within the process which lasts for months, but as soon as he crosses the Croatian border or even while he is on his way from the border to his former home, his house suddenly catches fire and burns down. That was what happened in Topusko these days when a returning family with two children was on its way home. Two days before their arrival in Topusko, their home simply burned down."[883]

815. The Republic of Serbian Krajina seized to exist on 7 August 1995. The Serb life was physically eradicated in the wide region of the UN Sectors North and South. This is how Amnesty International reported about the situation in Krajina three years later:

"Driving through the Krajina three years later the countryside retains an abnormal air. The majority of houses have been completely destroyed by fire or looting, and fields are overgrown. Here and there sown fields and laundry on the clothesline indicate life; however, most commonly the clothes hanging on the line include military uniforms or the cars parked in the drive bear license plates from Bosnia-Herzegovina. Apart from the devastated property, evidence of the human rights violations is unseen. However, town cemeteries contain row after row of closely packed wooden crosses marked only with numbers and the initials 'NN' – unidentified."[884]

816. In paras. 1326-1352 of the Counter-Memorial, the Respondent reported about the Applicant's legislative measures and physical obstacles imposed to prevent return of the Serb refugees in the years following the operation. While the criminal impunity was imposed in favour of the perpetrators of the killings and other acts of genocide, indictments were issued against the Krajina Serbs *en masse*, charging them with genocide, war crimes and armed rebellion against Croatia.[885] The Respondent based these claims on reliable international reports. Not one of them was contested or denied

[883] Ivan Zvonimir Čičak, President of the Croatian Helsinki Committee for Human Rights: *Krajina Burning Again*, authorized article published in *Feral Tribune*, Croatia, on 16 March 1998.
[884] Amnesty International, *Croatia: Impunity for killing after Storm*, August 1998, p. 2, AI Index: EUR 64/04/98.
[885] Human Rights Watch Report, *Impunity for abuses committed during Operation Storm, and the denial of the right of refugees to return to the Krajina,* August 1996, Vol.8, No. 13(D), pp. 29-31 (para. 1351 of the Counter-Memorial).

by the Applicant's Reply. Instead, the Applicant tries to demonstrate a positive image of its humanitarian efforts, by producing some recent data concerning the process of return of refugees, but still avoiding to inform how many of those refugees returning to Croatia are of the Serb ethnic origin.

817. While the relations between Serbia and Croatia have significantly improved after 2000 in many fields, including bilateral political relations, regional co-operation, trade and investments, tourism, culture,[886] co-operation between the war crimes prosecutors, as well as between national commissions for missing persons,[887] many consequences of Operation *Storm* are still present and visible.

818. According to public data of the non-governmental organization "Veritas", **6,279** Serbs from Croatia have so far been registered as killed during and after the armed conflict in that country,[888] out of which **1,787** are believed to be the victims of Operation *Storm*.[889]

819. According to the official registry of the Commesariat for Refugees of the Republic of Serbia prepared in co-ordination with UNHCR, a total number of Croatian Serb refugees in 1996 in Serbia was **290,667**.[890] In the meantime, only 68,000 have returned to Croatia. Most of the others have obtained the citizenship of the Republic of Serbia, while 56,363 persons originating from Croatia are still refugees today. Their return is not easy. The United States 2010 Human Rights Report concerning Croatia, *inter alia*, reads as follows:

> "While constitutional protections against discrimination applied to all minorities, open discrimination and harassment continued against ethnic Serbs and Roma. Incidents, including looting, physical threats, verbal abuse, and spraying graffiti on Serb property, continued in the Dalmatian hinterland and the central part of the country."[891]

[886] In 2011, for example, Mr. Slobodan Šnajder, one of the leading Croatian writers, published his moving story about expulsion of Serbs from Croatia in the Belgrade's Literature Magazine.
[887] See Counter-Memorial, paras. 15-17.
[888] 4,269 Serb victims have been identified and buried, while 2,010 are still registered as missing.
[889] See www.veritas.org.rs.
[890] Letter of the Commissariat for Refugees of the Republic of Serbia, No. 019-542/1 of 5 August 2011 (Annex 76).
[891] US, Department of State, Bureau of Democracy, Human Rights and Labor, 2010 Country Reports on Human Rights Practices, Croatia, April 8, 2011, http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154418.htm

820. By his report of 17 June 2010, Mr. Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, commends "the Croatian authorities' efforts to resolve the crucial human rights issues arising out of the forced displacement that occurred during the 1991-1995 war. He underlines that the right to *voluntary return in safety and dignity* is a fundamental, internationally established principle corresponding to a right of all refugees and internally displaced persons."[892] The Report particularly emphasized one specific problem of the Serb refugees:

> "The Commissioner is concerned by the situation of holders of socially owned flats ('Holders of occupancy/tenancy rights' – 'OTR holders'). This form of housing represented 70% of housing units in the former Yugoslavia. The OTR status had many characteristics of that of ownership as the occupancy/tenancy right was kept for one's lifetime. Until 1995 most OTR holders were able to transform their right into ownership by paying a symbolic sum. This however was not the case for a large number of refugees, mostly ethnic Serbs, whose rights were terminated when they fled during the armed conflict. Ethnic Serbs in areas that were outside government control lost their right *ex lege* when the conflict ended. The Commissioner was informed that 23,800 persons, mainly ethnic Serbs, lost their entitlements."[893]

821. In July 2011, Mr. Miodrag Linta, President of the Coalition of the Refugee Associations stated:

> "Annex G to the Vienna Agreement explicitly says that the rights of all citizens existing on 31 December 1990 will be protected, restored or compensated. This Annex also provides that all contracts concluded during the war - mostly under threat or duress - will become null and void. Unfortunately, it has been a decade since the signing and seven years since the entry into force of the Agreement, that is, since the Croatian Sabor ratified it, being the last among the parliaments of the former Yugoslav republics to do so, and none of the provisions concerning our rights have been complied with. […] We demand free access to and disposal of our houses of which we were unlawfully dispossessed and which were given for occupancy by other persons, because most of the 10,000 Serb houses were sold illegally, while some 10,000 Serbian families were forced to conclude residency swap agreements."[894]

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[892] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Croatia from 6 to 9 April 2010, Strasbourg, 17 June 2010, CommDH(2010)20, para. 53, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1636837 .
[893] *Ibid*, para. 29.
[894] *Politika*, Belgrade, 30 July 2011.

822. The continuing impunity for genocide, crimes against humanity and war crimes committed during the 1991-1995 armed conflict remains the main human rights problem in the Republic of Croatia. The many perpetrators of such crimes committed against Croatian Serbs largely continue to enjoy impunity while the victims and their families are denied access to justice and redress.[895]

823. The Respondent notes that the Applicant did not deny the statement of its Ministry of Justice given to the ICTY in the 2005 written submission in *Ademi and Norac* case to which the Counter-Memorial referred. Namely, the Ministry confirmed that ethnic differences in the criminal proceedings are "readily understandable" given the "open wounds of war".[896] But, even in the cases where the investigations have been opened, the feeling of justice among the families of Serb victims is hard reached. Thus, the Judgment against Mihajlo Hrastov, accused for murder of 13 JNA soldiers on the Korana Bridge in Karlovac, have so far been reversed four times. An overwhelming majority of Karlovac residents saw Hrastov as one of the heroes of the homeland war who saved the city from being overtaken by the enemy army. While waiting for his judgment to take effect, his supporters were publicly raising money for his cause, organizing campaigns of support and benefit events.[897] When Đuro Brodarac, a war-time chief of police in the town of Sisak, died as a suspect in detention in July 2011, the Croatian Parliament (Sabor) even opened a book of condolences in his honor.[898] Branimir Glavaš, infamous commander of the Osijek defense, was sentenced by the District Court in Zagreb to ten years in prison, but managed to escape to neighboring Bosnia and Herzegovina.[899] Finally, General Mirko Norac serves his sentence in the Croatian jail, but enjoys benefits, including a provisional release for the reason of his wedding celebration which became the main event in the Croatian newspapers.[900]

824. The unwillingness of the Croatian Government and society to face the past is particularly visible in relation to the ICTY decisions. The Judgment of 15 April 2011 in the case *Gotovina et al.* was followed by the massive demonstrations in Croatia.

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[895] See the 2010 Amnesty International Briefing to the UN Committee against Torture (Annex 73) and the 2011 Report of the Youth Initiative for Human Rights (Annex 74).
[896] See Counter-Memorial, para. 197.
[897] Jutarnji list, *Hrastov case: Although considered hero by Karlovac residents, Prosecutor asks for harsher sentencing*, 8 July 2009.
[898] http://www.jutarnji.hr/preminuo-duro-brodarac--andrija-hebrang--tragedija-je-da-bolesnog--junaka-saljemo-u-zatvor/959160
[899] Voice of America, Arhives and News, *Branimir Glavas on the run*, 8 May 2009.
[900] http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/36619/Default.

The Prime Minister Jadranka Kosor stated that the factual finding of the Trial Chamber concerning the JCE, led by the Croatian leadership, is unacceptable to her Government,[901] while the President of the Croatian Parliament Luka Bebić denied that Generals Gotovina and Markač could be liable.[902] The City Council of Split decided on 21 April 2011, seven days after the ICTY Judgment, to rename one of the squares after General Ante Gotovina.[903]

825. In such environment, it is not strange at all that the 5th of August is still celebrated as a public holiday in honor of Operation *Storm*.[904] On that day in 2011, the Croatian leadership participated at the celebration in Knin, where a monument devoted to this criminal operation was unveiled. During her speech at the celebration, Croatian Prime Minister Jadranka Kosor expressed her special appreciation for Croatian Generals Ante Gotovina and Mladen Markač, two persons sentenced by the ICTY for very serious crimes committed during Operation *Storm*.[905] Her mention of the two generals was followed by the standing ovation of the entire Croatian leadership.

826. Indeed, Operation *Storm* often gets mythological dimensions of collective admiration, or as one member of Croatian ruling party has put it:

> "This century hasn't seen, considering certain comparative elements, such a liberating action as Operation *Storm*. And that is a visible proof of the great Croat vitality. It is a proof that in one moment this people were touched by God."[906]

[901] http://www.index.hr/vijesti/clanak/kosor-istine-se-ne-bojimo-josipovic-zlocinacki-pothvat-nije-postojao/547323.aspx
[902] http://www.index.hr/vijesti/clanak/luka-bebic-ako -je-tudjman-zlocinac-onda-sam-i-ja-zlocinac/547374.aspx
[903] http://wwwdnevno.hr/vijesti/split_dobio_trg_ante_gotovine/28879.html
[904] See Counter-Memorial, paras. 1473-1476.
[905] http://www.dalmacijanews.com/Hrvatska/View/tabid/77/ID/63219/Kosor-u-Kninu-Hvala-Markacu-i-Gotovini-FOTO-VIDEO.aspx, last visited on 30 August 2011
[906] Maja Freundlich, HDZ, Magazine *We* (*Mi*), June 1997, according to Jovan Mirić, *Twihlight of Mind* (*Sumrak intelekta)*, Zagreb, 2006, p. 84.

SUMMARY OF PART II

827. In this Rejoinder, the Respondent presented convincing evidence of mass-killings and other serious violations of international humanitarian law against the Serb people from the very beginning of the armed conflict in Croatia. The hate speech against Serbs as a national and ethnic group was directed to their dehumanization. Such a policy of the HDZ Government culminated in 1995, when Operations *Flash* and *Storm* were executed with an aim to ethnically cleanse the territory where the Krajina Serbs lived for centuries. As Croatian philosopher Žarko Puhovski stated, the crimes committed during and after Operation *Storm* "had been prepared for years through propaganda, from television to the president of the country and all public factors in Croatia who convinced the Croatian population and especially the soldiers that the Serbs are guilty as such and that they should be punished as such".[907]

828. The Respondent does not contest that the Serbian side also committed serious crimes during the armed conflict in Croatia, but submits that, even if the Court accepts some proposals for the interpretation of the Genocide Convention advanced by the Applicant, the only case of genocide was in fact Operation *Storm*. That criminal operation was planned and executed with *mens rea* required by the Genocide Convention, and proved by credible and reliable evidence. The requirements of proper standard and methods of proof convinced the Respondent to limit its counter-claim to Operation *Storm*. The other crimes and atrocities against the Serb population of Croatia, described in this Rejoinder, have been included as the factual background.

829. The existence of the intent of the Croatian President Franjo Tuđman and top military leaders of the Croatian Army and Police to destroy the Krajina Serb national and ethnical group as such, in whole or in part, is confirmed by the Minutes of the meeting held on the Brioni Island on 31 July 1995.[908] Although this was a meeting where the military aspects of the upcoming operation were discussed, the Croatian President and other participants were not hesitant to use the expressions such as to "have to inflict such blows that the Serbs … to all practical purposes disappear", or to "be in favour of

[907] ICTY, *Prosecutor v. Gotovina et al*, Transcripts, 13 Fabruary 2009, page 15901; available on http://www.icty.org/x/cases/gotovina/trans/en/090213ED.htm
[908] Annex 52 to the Counter-Memorial.

destroying everything", or to "pretend to guarantee civil rights", or to "clear the entire area", *etc*.[909] Some mitigating interpretations of these words, adduced by the Applicant in the Reply, cannot bear the test of the comparison with the subsequent events which clearly point to the real meaning of the instructions and recommendations given by the Croatian President. The magnitude of the subsequent criminal acts against the Krajina Serbs in the UN Protected Areas South and North during and after Operation *Storm* also confirms the existence of the *dolus specialis* of the crime of genocide.

830. The Krajina Serbs who represented the substantial part of the Croatian Serb national and ethnical group, as well as a distinct geographically located community and historical centre of the Serbian life in Croatia, were subjected to mass killings, either by merciless attacks to the refugee columns or by executions of those who stayed behind. The killings were accompanied by causing serious bodily or mental harm to members of the group, in particular those who were attacked while pulling out in refugee columns and those who were captured and subsequently tortured in Croatian prisons. The group of Krajina Serbs was also subjected to conditions of life which were calculated to bring about the physical eradication of its life in the territory of Krajina: deliberate and indiscriminate shelling of the Krajina towns, forcible displacement of the Serb civilians, massive destruction and looting of Serb property, and finally, imposing administrative measures to prevent the Krajina Serbs from returning to their homes.

831. According to public data of the NGO "Veritas", 1,787 members of the Krajina Serb national and ethnical group are believed to be killed as a result of the Brioni conspiracy.[910] According to the Report of UN Secretary-General of 18 October 1995, approximately 200,000 Krajina Serbs fled from the region attacked by the Croatian Governmental Forces.[911] The killings and the expulsion were results of the same intent. Destiny of those who stayed at their homes confirms that had the more Serbs decided to stay behind, the more of them would have been killed.

[909] *Ibid*.
[910] Data available on www.veritas.org.rs.
[911] The situation in the occupied territories of Croatia: Report of the Secretary-General, 18 October 1995, UN Doc. A/50/648, para. 27.

832. The ICTY Trial Chamber Judgment of 15 April 2011 in the case *Gotovina et al.* confirms that massive crimes were committed against the Serb population in Sector South during and after Operation *Storm*.[912] Two middle-ranking Croatian Generals were convicted in accordance with their personal role in the JCE run by the Croatian Government. President Tuđman and other high-ranking architects of genocide died before the ICTY investigation was completed.

833. However, the State responsibility of the Republic of Croatia for the crime of genocide cannot be easily disputed: the crimes were committed on the Croatian territory by its *de jure* organs. In addition, the Applicant is responsible for its failure to punish those liable for the crime of genocide. Moreover, the Applicant continues to celebrate Operation *Storm* as its "Day of Victory and Homeland Gratitude", in spite of the finding of the International Criminal Tribunal for the former Yugoslavia.

[912] Available on http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol1.pdf and http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf .

SUBMISSIONS

834. On the basis of the facts and legal arguments presented in the Counter-Memorial and this Rejoinder, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the requests in paras. 2(a), 2(b), 2(c), 2(d), 3(a), 3(b), 3(c) and 3(d) of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, *i.e.* prior to the date when Serbia came into existence as a State, are inadmissible.

2. That the requests in paras. 2(a), 2(b), 2(c), 2(d), 3(a), 3(b), 3(c) and 3(d) of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.

3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 are admissible, that the requests in paras. 2(a), 2(b), 2(c), 2(d), 3(a), 3(b), 3(c) and 3(d) of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation *Storm* in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region (UN Protected Areas North and South), as such:
   - killing members of the group,
   - causing serious bodily or mental harm to members of the group, and
   - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region, as such.

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

7. That the violations of international law set out in paras. 4, 5 and 6 above constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

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

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

   a) Pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide;

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

   c) Amend its Law on Public Holidays, Remembrance Days and Non-Working Days, by way of removing the "Day of Victory and Homeland Gratitude" and the "Day of Croatian Defenders", celebrated on the 5th of August, as a day of triumph in the genocidal Operation *Storm*, from its list of public holidays.

III

8. That the requests in paras. 1 and 4 of the Submissions of the Republic of Croatia concerning the objections to the counter-claim be rejected as lacking any basis either in law or in fact.

   The Republic of Serbia reserves its right to supplement or amend these submissions in the further proceedings.

The Hague, 1 November 2011

Saša Obradović,
Agent of the Republic of Serbia