INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

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

(CROATIA v. SERBIA)

ADDITIONAL PLEADING

OF THE REPUBLIC OF CROATIA

VOLUME 1

30 AUGUST 2012

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CHAPTER 1

INTRODUCTION

SECTION I: OVERVIEW AND STRUCTURE

1.1 The Applicant instituted these proceedings before the International Court of Justice ("the Court") on 2 July 1999. In accordance with an Order of the Court, the Applicant filed its Memorial on 1 March 2001. Following preliminary objections to jurisdiction filed by the Respondent in September 2002, on 18 November 2008 the Court gave a judgment rejecting the Respondent's preliminary objections, with the exception of the objection relating to jurisdiction *ratione temporis* that the Court found did not possess an exclusively preliminary character and should therefore be considered with the Merits. By Order dated 20 January 2009 the Court fixed 20 March 2010 as the date for the Respondent to file its Counter-Memorial. On 4 January 2010 the Respondent filed its Counter-Memorial together with its Counter-Claim. By Order dated 4 February 2010, the Court authorised the submission of a Reply by the Applicant and a Rejoinder by the Respondent, and fixed 20 December 2010 as the time limit for the filing of the Reply and 4 November 2011 as the time limit for the filing of the Rejoinder. The parties submitted the Reply and Rejoinder within the prescribed time limits. By Order dated 23 January 2012 the Court authorised the submission of an additional pleading by the Applicant to further respond to the Counter-Claim and fixed 30 August 2012 as the time limit for that pleading. This Additional Pleading is filed in accordance with that Order.

1.2 The Applicant has followed the dispositions of the Court in using its Additional Pleading for the purposes of responding to factual claims and legal arguments made by the Respondent in its Rejoinder, insofar as they concern the Counter-Claim. For the avoidance of doubt, the Applicant maintains the totality of the factual assertions and legal arguments as set out in the Reply.

1.3 There has been one significant factual development since the Reply was filed: the judgment of the Trial Chamber of the ICTY in *Gotovina.*[1] The ICTY found Ante Gotovina and Mladen Markač guilty of war crimes and crimes against humanity in relation to aspects of their conduct during Operation *Storm*. Those convictions are currently under review by the Appeals Chamber. In the same judgment, the ICTY acquitted Ivan Čermak of all charges. Pending the outcome of the defence appeal, the convictions and findings upon which they were based are necessarily provisional and the Applicant sets

[1] *Prosecutor v Gotovina, Čermak and Markač,* IT-06-90-T, Judgment of the Trial Chamber of 15 April 2011 (hereinafter *"Gotovina* TJ*"*).

out in Chapter 4 of this Additional Pleading specific concerns it has about the ICTY's finding that members of the Croatian government are implicated in any JCE.[2] However, for the purposes of these proceedings the *Gotovina* judgment entirely undermines the Respondent's case that there was a genocidal plan formulated at Brioni to physically destroy the 'Krajina' Serbs, or that any of the actions relied upon in the Counter-Claim were carried out with a genocidal intent. Genocide has been recognised by this Court and the ICTY to be an extreme form of the crime against humanity of persecution.[3] In the *Gotovina* judgment the ICTY specifically found that the most serious forms of persecution - and those capable of being directed at physical destruction of a group - were not part of any JCE within the Croatian government. In those circumstances, the Respondent's case is untenable, whatever the outcome of the Appeals Chamber decision.

1.4 At the outset, the Applicant also makes some general observations about the nature and scope of the Respondent's Rejoinder.

1.5 *First*, the Rejoinder contains almost no new material or allegations and in many cases is simply a repetition or summary of the assertions made in the Counter-Claim.

1.6 *Second*, the Respondent has repeatedly misrepresented the facts and evidence, especially in relation to the findings of the ICTY in *Gotovina* such that particular caution must be exercised in relying upon those aspects of the Rejoinder.

1.7 *Third*, the Rejoinder reveals the Counter-Claim to be predicated on a fundamental misconception about the elements of genocide, and in particular the role that forcible displacement can have in the commission of that crime. A proper legal analysis demonstrates that the Respondent's evidential case taken at its highest cannot amount to genocide.

1.8 *Fourth*, the Rejoinder is replete with exaggerated and unduly emotive language in relation to these proceedings, which it is respectfully submitted undermines the credibility of the Respondent and distracts from the legal and evidential issues which are properly before the Court.[4] The rhetoric and the political posturing which underlies it is particularly troubling in the

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[2] In any event, the ICTY Appeals Chamber has said that the ICTY Trial Chamber's findings as to the existence of a JCE in no way constitute findings of responsibility on the part of Croatia: *Prosecutor v Ante Gotovina, Mladen Markač*, Decision on the Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012, para. 12.

[3] *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, (hereinafter "*Bosnia"*), para. 188.

[4] See for example, Rejoinder, paras 716, 806.

context of the recent statement by the newly elected President of Serbia, who has publicly denied that genocide occurred in Srebrenica in July 1995. That statement is contrary to the case law of this Court and the ICTY and has been rightly condemned by the Prosecutor of the ICTY for being a "backwards step, [which] aggravates the victims' suffering, and jeopardizes the fragile process of reconciliation in the former Yugoslavia."[5]

1.9 Finally in this Section, the Applicant provides a short overview of this Pleading, which is confined to four chapters:

- Chapter 1 is an overview of the Pleading and a response to the issues of proof and evidence raised in Chapter VI of the Rejoinder.

- Chapter 2 addresses the many errors and misstatements in the Respondent's allegations concerning the period of 1991-1995, prior to Operation *Storm*, made in Chapter VII of the Rejoinder.

- Chapter 3 rebuts the false and overstated factual assertions made by the Respondent in relation to the conduct and consequences of Operation *Storm*, including the proper interpretation of the Brioni meeting minutes, in response to the factual assertions in Chapter VIII of the Rejoinder.

- Chapter 4 sets out the Applicant's submissions on the law as it applies to the Counter-Claim, and in particular the fundamental legal errors which the Respondent's case is predicated on, as demonstrated by Chapter VIII of the Rejoinder.

SECTION II: ISSUES OF PROOF AND EVIDENCE

1.10 In this Section the Applicant responds to issues raised in Chapter VI of the Rejoinder relating to methods of proof and evidence. The Applicant maintains, but will not repeat, the legal arguments set out in Chapter 2 of the Reply as to the correct approach to be taken by the Court in relation to the burden of proof and the standard of proof. In relation to the standard of proof, the Applicant does not understand the distinction that the Respondent seeks to draw between the standards of proof required for matters which must be proved in relation the Counter-Claim and the 'factual background' to Operation *Storm.*[6] The Applicant has already addressed in Chapter 2 of the Reply the different standard of proof that applies in relation to violations of the duties to prevent and punish genocide, as compared to the crime of genocide and other acts enu-

[5] See Address of Mr Brammertz to the UN Security Council, 7 June 2012, ICTY Press Release.

[6] Rejoinder, para. 585.

merated in Article III of the Convention.[7] That distinction is not the same as that alluded to by the Respondent in relation to the 'factual background'.

1.11 The Applicant notes that burden of proof has been raised as an issue in the *Gotovina* appeal, in particular in relation to the issue of the Trial Chamber's finding that there was an unlawful attack on civilians and civilian objects during Operation *Storm*. The Applicant supports the submissions made in the Appellant's Brief of Ante Gotovina on the issue of burden of proof in those proceedings. The Appellant has argued that the Trial Chamber's systematic reversal of the burden of proof violated the defendant's presumption of innocence and constitutes an error of law, which invalidates the Judgment.[8] Accordingly, the Applicant submits that the Court should disregard those findings of the Trial Chamber which are the subject of the appeal.

1.12 As discussed further in Chapters 3 and 4 of this Additional Pleading, there are a number of specific aspects of the factual and legal findings made in the *Gotovina* judgment which give cause for concern about the Trial Chamber's judgment being relied upon by this Court. Those findings are subject to an appeal by the Defence; however, even if the findings of the Trial Chamber are upheld, they do not assist the Respondent in this case for the reasons set out in Chapter 4. In particular, the Trial Chamber's judgment in *Gotovina* entirely undermines the Respondent's case that any plan formed at Brioni was genocidal.[9]

1.13 The Respondent has stated in the Rejoinder that: "the question of methods of proof that still divide the Parties has particular importance for the establishment of factual findings in this case".[10] It is not clear precisely what is meant by this: the Respondent has sought to impugn evidential material relied on by the Applicant and the Applicant has also criticised evidential material submitted by the Respondent. The weight to be placed on the various sources on which both Parties rely is the subject of detailed submissions in the pleadings and is subject to final appraisal by the Court. The legal issues relating to the methods of proof which are appropriate in these proceedings are fully addressed by the Applicant in Chapter 2 of the Reply.[11] In the light of the response made by the Respondent in Chapter VI of the Rejoinder it is clear that a key legal issue that divides the Parties is whether or not it is permissible for the Court to draw any inference from the failure of the Prosecutor of the ICTY ("ICTY OTP") to indict individuals for genocide in relation to matters which are the subject of either the Claim or the Counter-Claim.

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[7] Reply, paras 2.6-2.10.

[8] See Appellant's Brief of Ante Gotovina (Public Redacted Version), ICTY IT-06-90-A, Ground 1, at 1.3, pp 47-49.

[9] Chapter 4, paras 4.12-4.19.

[10] Rejoinder, para. 3.

[11] Reply, paras 2.17-2.91.

1.14 As discussed below, the Respondent now seeks to draw an artificial distinction between the implications of there being no ICTY indictment for genocide in matters covered by the Applicant's Claim and those to be drawn from the lack of any indictment for genocide in relation to the Respondent's Counter-Claim. The Applicant's position on this issue remains that set out in the Reply and is that inferences may be drawn in relation to the issue of intent but that ultimately the Court must weigh up the specific evidence presented in each case.[12] This issue is addressed further below.

1.15 Within the framework set out in Chapter 2 of the Reply, the other evidential issues addressed in this Chapter relate to the appraisal of specific materials relied on by the Respondent in presenting its Counter-Claim.

(1) Proof of Genocide - General

1.16 The Respondent asserts that: "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". It adds that: "Genocide is only difficult to prove when it does not actually take place."[13]

1.17 Nevertheless, the Respondent did accept the difficulty of proving genocide in the Counter-Memorial: "The Respondent acknowledges in the Counter-Memorial that it is sometimes difficult to show by direct evidence the intent to commit genocide as the mental element of the crime".[14]

1.18 The Respondent criticises the Applicant's "attempts to shift the burden of proof".[15] It is worth noting that the Court has recently reaffirmed its view that, although as a general rule it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact, this general rule may on occasion have to be applied flexibly, including in circumstances where the Respondent may be in a better position to establish certain facts. In its judgment in the compensation aspect of *Ahmadou Sadiou Diallo*[16] the Court referred to its earlier judgment of 30 November 2010 on the merits and recalled:

> "...that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact (I.C.J. Reports 2010 (II), p. 660, para. 54; see also Application of the Inter-

[12] Reply, paras 2.11-2.16.

[13] Rejoinder, para. 295.

[14] Counter-Memorial, para. 135; Memorial, para. 7.33.

[15] Rejoinder, paras 292-300.

[16] *ICJ Republic of Guinea v Democratic Republic of Congo (Amadou Diallo) (Compensation owed by the Democratic Republic of Congo to the Republic of Guinea)* ICJ Reports 2012, Judgment of 19 June 2012.

> im Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, para. 72; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 71, para. 162). The Court also recognized that this general rule would have to be applied flexibly in this case and, in particular, that the Respondent may be in a better position to establish certain facts (I.C.J. Reports 2010 (II), pp. 660-661, paras. 54-56)."[17]

1.19 In the same proceedings, the Court had earlier affirmed that the general rule expressed by the maxim *onus probandi incumbit actori*, is not an absolute one. In its merits judgment in *Ahmadou Sadiou Diallo* the Court held:

> "However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case."[18]

1.20 The Court's recent approach to the burden of proof is consistent with the position taken by the Court in the *Corfu Channel* case and with the submissions made by the Applicant in Chapter 2 of the Reply.[19]

(2) ICTY Agreed Statements of Fact

1.21 The Respondent refers to the judgment of the Court in the *Bosnia* case and appears to imply that the Court has held that agreed statements of fact presented to the ICTY are of limited evidential value.[20] The Respondent goes on to argue that the findings of fact made in *Martić*, established after a full trial, are considerably more authoritative than those in *Babić*, based on his plea agreement with the Prosecutor.[21]

1.22 In *Bosnia*, the Court considered the weight to be placed on agreed statements of fact following a guilty plea and held that:

> "There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the

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[17] *Ibid.,* para.15; see also *ICJ Republic of Guinea v Democratic Republic of Congo (Amadou Diallo) (Merits),* ICJ Reports 2010 (II), Judgment of 30 November 2010, pp 22-23, paras 53-57.

[18] *Ibid.,* Judgment of 30 November 2010, p.22, para. 54.

[19] Reply, paras 2.81-2.83.

[20] Rejoinder, para. 291.

[21] *Ibid.*

> guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight."[22]

1.23 In these proceedings the Applicant has relied on material contained in the statement of agreed facts presented in the *Babić* case but it has also relied to a great extent on findings of fact made by the ICTY in the *Martić* case (and in a number of other cases).[23] It is clear from reading the Reply that *Babić* is frequently cited together with (usually following) findings made in the *Martić* case and that reliance is placed on both, as well as on other cases.[24] As is clear from the *Bosnia* judgment, the material cited from *Babić* is admissible and is to be given a certain weight, but any implication by the Respondent that this is the sole evidence relied on by the Applicant or is preferred over reliance on *Martić* and other cases, is clearly unfounded.

(3) The ICTY Judgment in *Gotovina*

1.24 The Respondent has relied on several ICTY witness testimonies from the *Gotovina* case. The Applicant notes that the *Gotovina* judgment is subject to ongoing appeals, save in relation to the defendant Čermak who was acquitted.[25] Specific points as to the findings of the Trial Chamber in the Gotovina case and the evidential material presented by the Prosecution are made in Chapters 3 and 4 of this Additional Pleading.

1.25 Contrary to the implication of the Respondent,[26] Croatia does not "deny the commission of any crime". There are completed and ongoing criminal procedures relating to Operation *Storm* in the Republic of Croatia, this is discussed further in Chapter 3.

(4) Additional Evidence

1.26 The Respondent has criticised the quantity of material submitted by the Applicant[27] and refers in this context to Court Practice Direction No. III,

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[22] *Bosnia*, p.95, para. 224, cited at Reply, para. 2.25.

[23] See for example, Reply, para.1.6.

[24] Reply, for example, paras 3.112, 6.32-34, 6.107, 9.30, 9.35-36, 9.39, 9.47, 9.50 and 9.57.

[25] The ICTY Prosecutor has not appealed against General Čermak's acquittal.

[26] Rejoinder, para. 581.

[27] Rejoinder, para. 263.

which in part addresses the tendency towards the proliferation of annexes to written pleadings.[28]

1.27 The Applicant notes that both parties have submitted substantial quantities of evidence in these proceedings. In fact, the approach taken by the Applicant has been, as directed in the Practice Direction, to select documents so as not to overburden the Court. The Applicant has provided examples of incidents which establish a pattern of behaviour. This approach is consistent with paragraph 242 of the Court's judgment in *Bosnia*, which has been cited by the Respondent,[29] and in which the Court states that it is not necessary to examine every incident in order to consider whether there is "persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent". The Respondent has accepted in the Rejoinder that: "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".[30] However, whilst the Respondent is correct that these proceedings concern state responsibility for genocide rather than the criminal liability of individuals,[31] it is also important to recall the standard of proof required for a claim of genocide which in relation to establishing a violation of Articles II and III of the Convention is 'fully conclusive evidence' as discussed in Chapter 2 of the Reply.[32] It follows that such incidents as are put forward as providing evidence of a pattern of atrocities must be proved by evidence that meets this standard of proof.

(5) Hearsay Evidence

1.28 The Respondent has suggested that the Applicant's evidence on the Claim does not meet minimum evidentiary requirements and is irrelevant as well as being hearsay.[33] This is not correct and has been addressed in Chapter 2 of the Reply. The evidence contained in the witness statements is not uncorroborated as they suggest, but needs to be considered in the full context of the breadth of the evidence available. As discussed in Chapter 2 of the Reply,[34]

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[28] ICJ Practice Direction No III provides: "The parties are strongly urged to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their positions. In view of an excessive tendency towards the proliferation and protraction of annexes to written pleadings, the parties are also urged to append to their pleadings only strictly selected documents."

[29] Rejoinder, para. 589.

[30] Rejoinder, para. 770.

[31] Rejoinder, para. 766.

[32] Reply, paras 2.3-2.5.

[33] Rejoinder, paras 257-258.

[34] Reply, para. 2.44.

the ICTY relies on hearsay, and the ICJ will rely on findings of the ICTY - thus it is clear that Court will accept hearsay evidence.[35]

(6) Counter-Claim Annexes

1.29 The Respondent claims that some of documents relied upon by the Applicant are of "highly dubious authenticity" apparently on the basis that "some of the documents ... 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." The Respondent refers in this context to a number of the Annexes to the Croatian Reply which address the Counter-Claim, namely Annexes 123, 131, 146, 150, 153, 157 and 178.[36] The documents referred to are documents produced by the entities of the 'RSK', including Minutes of the Government of the 'RSK', Minutes of the 'RSK' Assembly, a statement issued by the 'RSK' State Information Agency and a Proclamation of the 'RSK' Supreme Defence Council.[37] Accordingly, any lack of signatures or seals on these documents is a consequence of the approach taken by the individuals and entities concerned at the time the documents were produced and is not the responsibility or fault of the Applicant.

(7) The CHC Report and the Veritas Report

1.30 The Respondent asserts that two non-governmental organisation reports on which it relies in the Counter-Memorial: the report prepared by "Veritas" and that prepared by the Croatian Helsinki Committee for Human Rights ("CHC") examine information on victims of Operation *Storm* "in a professional manner".[38] Both reports are seriously flawed for the reasons set out in

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[35] *Bosnia,* para. 223, where the Court concluded that: "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal".

[36] Rejoinder, para. 276.

[37] The documents are: Minutes of the 19th Session of the Government of the 'RSK', 31 December 1991 (Reply, Annex 123); Minutes of the Session of the Assembly of the Republic of Serbian Krajina which Approved the Decision on State Unification with Republika Srpska, 29 May 1995 (Reply, Annex 131); Minutes of the 'RSK' Assembly, 8 February 1995 (Reply, Annex 146); Conclusions of the Government of the Republic of Serbian Krajina Regarding the Negotiations on the Amendment of the Mandate of the United Nations Protective Force in the Occupied Parts of Croatia, Knin, 30 March 1995 (Reply, Annex 150); 'RSK', State Information Agency, Statement of Ratko Mladić, Knin, 30 July 1995 (Reply, Annex 153); and 'RSK', Supreme Defence Council, Proclamation of the State War Throughout the 'RSK', 30 July 1995 (Reply, Annex 157). Annex 178 to the Reply setting out Military Targets in the vicinity of Benkovac, Gračac and Obrovac were exhibits in the *Gotovina* Trial (D248).

[38] Rejoinder, para. 580.

Chapter 2 of the Reply.[39] A number of further issues in respect of these reports have been raised by the Respondent and these are addressed below.

1.31 In relation to the criticisms made of the CHC Report in the Reply, the Respondent asks whether "a person whose fate was connected with a wrong location should not be listed as a victim" or whether "a person whose father's name was unknown could be a legitimate military target".[40] This is disingenuous. The point is that the list is methodologically flawed as evidence of the number and identity of victims of Operation *Storm*. This is a matter of the weight of the evidence presented by the Respondent in support of the Counter-Claim, not of the legal categorisation of persons on which a claim may be based. In relation to the issue as to whether victims of genocide may be civilians or members of military or paramilitary units,[41] the point is that while either may be found to be victims of genocide, correct identification of the civilian or military status of those who died may have implications for factual findings as to the circumstances of their deaths which is itself relevant to issues both of the *actus reus* of genocide and of intent. The point made by the Applicant in the Reply in relation to the deficiencies in the CHC Report was that: "It is clearly impossible to defend a case when even the basic details of the crime alleged remain unspecified" and that "the incomplete and inaccurate details provided by Serbia are insufficient to make out a case of genocide".[42] The Respondent has not responded to these criticisms. Rather it has tried to argue against a legal position on the relevance of the status of the victim in a genocide claim that the Applicant has not taken.

1.32 The Respondent makes no specific rebuttal of the criticisms made in the Reply[43] which were based on an analysis by the Croatian Directory for Detained and Missing Persons and which must therefore be assumed to be accepted while the implications to be drawn from those methodological flaws remain a matter of dispute.

1.33 The Respondent goes on to refer in this regard to the Court's judgment in *Bosnia* that:

"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…"[44]

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[39] Reply, paras 2.65-2.68 and see paras 11.68-70, 11.81-85, 12.10.4 and 12.30.

[40] Rejoinder, para. 588.

[41] *Ibid.*

[42] Reply, paras 11.98-11.101.

[43] Reply, para. 2.65.

[44] *Bosnia,* para. 242.

1.34 The Respondent here fails to distinguish between the provision of examples in order to establish a pattern of behaviour as evidence of genocidal intent[45] and issues relating to the credibility of evidence on which a claim for genocide is based. The Applicant has itself in some cases provided examples of incidents in order not to overburden the Court with evidential material and accepts that this is a proper approach to take to presenting evidence of genocide. However in relation to the incidents selected, it is nevertheless necessary to show that the sources relied on are credible and trustworthy. In the Applicant's submission, the Respondent has failed to defend the credibility of the CHC Report in this regard.

1.35 The Respondent ends by asserting that the CHC Report "proves beyond a reasonable doubt" that the Croatian armed forces during and after Operation *Storm* "committed killings on a massive scale"; and that "all victims registered in the Report were members of the Serbian national and ethnic group". It is of course for the Court to say whether this has, or has not, been proved beyond reasonable doubt. In this regard however, the position of the ICTY Trial Chamber is of interest:

"Exhibit P2402 is a report entitled 'Military Operation Storm and its Aftermath,' published by the Croatian Helsinki Committee and edited by Žarko Puhovski. The report contains un-sourced statements and double entries. Furthermore, during examination of Puhovski in court it became apparent that there were errors in the book. For these reasons, *the Trial Chamber decided not to rely on exhibit P2402 in relation to information described therein if uncorroborated by other evidence.*"[46] (emphasis added)

(8) Reliance on NGO Reports

1.36 The Respondent criticises the Applicant's statement that, in relation to the CHC Report: "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."[47] The Respondent describes the Applicant's position as an "unjustifiably severe and unfair assessment of materials generated by nongovernmental organizations" and goes on to note that international tribunals, including international crimi-

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[45] In relation to which, the Court in *Bosnia* held that: "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent", para. 373, cited in the Reply, para. 2.14.

[46] *Gotovina* TJ, para. 50, p.30.

[47] Rejoinder, para. 752.

nal tribunals, "have found NGO materials to be useful and reliable in adjudicating various issues". The Respondent refers to the ruling in the *Milošević* case, where 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 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."[48]

The Applicant agrees that the Court must consider human rights and other NGO reports on a case by case basis and submits that in this case, the Trial Chamber in *Gotovina* has found the CHC Report to be unreliable. As the *Milošević* ruling referred to above confirms, this is a basis for the Court to disregard the Report.

1.37 In relation to the Veritas Report, the Respondent notes the criticisms made of Mr. Štrbac and refers to the Decision of the Supreme Martial Court of 7 May 1992, relied on by the Applicant in the Reply.[49] The Respondent states that this decision has not been supplied to the Court. This document is publicly available but for the convenience of the Court the Applicant includes the judgment as Annex 1 to this Additional Pleading.[50] The Respondent goes on to state that the Decision 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".[51] In fact, the Court's judgment reports statements made by Mr. Štrbac during the proceedings in its judgment on the case and the quotation relied on by the Applicant is taken directly from the Court's judgment.

1.38 The Respondent then makes the surprising statement that "It is the organization, and not Mr. Štrbac personally, that has collected evidence of the Serb victims in Croatia".[52] The Respondent appears to take the view that the inflammatory and biased comments of the head of an organisation have no bearing on the credibility of material produced by that organisation in contentious proceedings. This is inconsistent with the approach taken by the Court

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[48] Rejoinder, paras 752-755.

[49] Reply, para. 2.68, footnote 99.

[50] Supreme Martial Court, II K No. 111/92, 7 May 1992, Decision, Annex 1.

[51] Rejoinder, para. 591.

[52] Rejoinder, para. 592.

in the *Bosnia* case where the Court held that, in relation to reports from official or independent bodies: "Their value depends, among other things, on the source of the item of evidence (for instance partisan or neutral)...".[53] As discussed in the Reply, the Croatian Helsinki Committee for Human Rights has itself referred to Veritas as biased.[54]

1.39 In addition to the material set out in Chapter 2 of the Reply concerning the bias displayed by Mr. Štrbac, the Applicant submits further evidence of his lack of objectivity in this matter. In particular it is important that the Court be made aware that Savo Štrbac is acting as a member of the Serbian legal team in these proceedings.[55]

1.40 It is also relevant to note that Mr. Štrbac is the author of the article "Crimes against Serbs on the territory of Croatia in the period 1990-1999". The article contains photos of Vukovar but the text under the relevant photo states those shown are victims of Operation *Storm*.[56] A statement made by the photographer, A.A., confirms that the relevant photograph was taken on 18 November 1991 at Vukovar.[57] This constitutes a flagrant and deliberate misuse of this photographic material which records the victims of Vukovar.

1.41 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".[58] The Applicant has addressed the inadequacies of this list in the Reply.[59] It should be noted that the ten cases of inaccuracy were presented *by way of example only* in order to show the Court that the list was unreliable.[60]

(9) The Brioni Transcript and other Transcripts Submitted by the Respondent

1.42 The Respondent asserts that the plan for Operation *Storm* shown in the transcript of the meeting held by Croatian President Franjo Tuđman with

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[53] *Bosnia,* para. 227; see further, Reply, para. 2.22.

[54] Reply, para. 11.70.

[55] "Member of the Serbian legal team before the International Court of Justice Savo Štrbac believes that charges of genocide should not be withdrawn, but to carry process before the court until the end", Extract of Article from "Vesti 011" (Serbian news website), available at: http://www.vesti011.com/2012/02/savo-strbac-treba-isterati-tuzbe-za-genocid-do-kraja/.

[56] Photo of Victims of Vukovar, 18 November 1991, in the article by Savo Štrbac, *Zločini nad Srbima na prostoru Hrvatske u periodu 1990-1999* [Crimes against Serbs on the territory of Croatia in the period 1990-1999], Annex 2.

[57] Official Record of the Statement made by A.A., 10 July 2012, Annex 3.

[58] Rejoinder, para. 592.

[59] Reply, paras 11.68-69.

[60] Reply, para. 11.68.

military officials of the Croatian Army and Police on the island of Brioni on 31 July 1995 "contains direct evidence of intent to destroy the group of Krajina Serbs."[61]

1.43 As set out in the Reply, the Applicant maintains its view that the Respondent has made selective use of the minutes of that meeting and is asking the Court to make unjustified and improper inferences from them. The Applicant treats with caution the findings of the Trial Chamber in *Gotovina* as to the existence of a JCE on the part of Former President Tuđman and others and notes that that this aspect of the case is currently under appeal.[62] Further examination of the issues raised by the Brioni transcript is set out in Chapter 3.

(10) Witness Statements Submitted by the Respondent

1.44 The Respondent has submitted new evidence relating to what it describes as massive crimes against the Serbs taking place at the beginning of the conflict.[63] This evidence relates to events which predate the events of 1995 on which the Counter-Claim is based. It is unclear why these materials have been included as they are not relevant to the Counter-Claim.

1.45 The Respondent also submits new witness statements apparently given before the Serbian and Bosnian domestic courts from 1995 to 1999.[64] The Respondent states that "[i]n 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". The new witness statements are stated to be eyewitness accounts of attacks on refugee columns in August 1995.

1.46 The Applicant has evidence that at least some of these witnesses were forced to give statements concerning these events. In the case of J.B.[65] for example, in a statement dated 21 March 2012, he denies that he made the statement relied on by the Respondent:

> "I hereby state that I did not give the statement I have been presented with, and that I have never in my life been in Banja Luka, nor have I

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[61] Rejoinder, para. 580.

[62] See Appellant's Brief of Ante Gotovina (Public Redacted Version), ICTY IT-06-90-A, Ground 3 (pp. 67-82) and Ground 4 of the Appeal (pp. 82-120) and see Appellants Brief of Mladen Markač (Public Redacted Version) ICTY IT-06-90-A , 5 October 2011, Ground 1(A) Existence of JCE pp. 3-41.

[63] Rejoinder, para. 585.

[64] Rejoinder, para. 582, paras 756-760, Annexes 52-66.

[65] Rejoinder, Annex 64.

> ever spoken to any service, police, court, or the like about the events that took place during or after the Operation *Storm*. I am not familiar with any of the events mentioned in "my" statement, nor did I witness any execution, killing, graves or the like; as for the signature in the Record, I state that it is not mine, although it looks like mine. J.B. further states that as early as 1986, he was exempted from military service as he suffered from schizophrenia and that, consequently, he was not a member of the Army of the 'RSK' /Republic of Serbian Krajina/, either. During the Homeland War he lived in Polača with his mother Ljubica and occupied himself with farming and cattle breeding. Occasionally he worked as a night guard for the Knin caterer Živko Šarić and his restaurant at the Knin Fortress. During the Operation *Storm* he stayed in his house together with his mother Ljubica and he was there, together with other villagers when the Croatian Army arrived…"[66]

1.47 In a statement dated 20 April 2012, M.O. confirmed the coer- cive circumstances in which he was forced, in 1997, to make a statement as to the events of 1995:[67]

> "M.O. has talked about these events on two occasions - in 1996 with the members of an international organisation who visited him in Novi Grad and in 1997 when he gave a statement to the investigatory judge.
>
> M.O. does not like to speak about these events, so in 1997, he ignored the subpoena of the Investigatory Judge in Novi Grad and was brought in by the police (the police officer Zec still on duty in Novi Grad), to wait for the hearing by the morning. During this hearing, the judge Radulović attacked him by saying what kind of a man he was, what kind of a Serb, that he would persecute him from Bosnia to Croatia because he didn't appear at the court upon subpoena. The judge dictated what he wanted and he would have signed a death sentence, as scared as he was because of the torment he was exposed to - Judge Radaković investigated him in Novi Grad for about a month.
>
> M.O. says he ended up in a psychiatry department and that he has psychiatric problems and is in treatment; he submits evidence of this - a xerox copy of medical finding from Prijedor General Hospital, dated 29 August 2009 with the following diagnosis: Reactive paranoid status."

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[66] Statement of J.B., 21 March 2012, Annex 4.

[67] Rejoinder, Annex 57; Statement of M.O., 20 April 2012, Annex 5.

(11) Missing 'RSK' Documents

1.48 Serbia responds to the Applicant's submission that it is in possession of missing 'RSK' documentation by stating that it is evident from the Reply that the Applicant actually holds this documentation and refers to the following annexes: 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).[68] The Respondent also states that "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."[69]

1.49 The Applicant does not have access to the entire archive of the 'RSK'. The Applicant is only in possession of those documents that were *left behind* when 'RSK' officials left. Furthermore, there is clear documentary evidence that the 'RSK's' plans for evacuation provided specifically for the removal of certain documentation held by the Serbs including: "rapid evacuation" of specified archives including weapons registers and records of dead and wounded, "all existing records" relating to defence preparations and police duty service log books among many other items.[70] An Order of the 'RSK' Serb Army General Staff (Order on the Relocation of the GS SVK) dated 1 August 1995 commands officers of departments, sections and organs of the General Staff of the Serb Krajina Army to "sort and pack" documentation according to that which is going to be taken to the 'new location' and that which is going to be destroyed.[71] An Order of the 'RSK' Republican Civil Defence Headquarters dated 2 August 1995 required regional civil defence staff to proceed immediately to the implementation of evacuation plans including the evacuation of archives, civil registers, records and confidential papers.[72] Accordingly it is clear that 'RSK' staff were ordered to evacuate extensive archive material including material relating to military activity, intelligence material and information relating to those killed and wounded in conflict.

(12) Croatia's Full Cooperation with the ICTY-OTP

1.50 The Respondent acknowledges that the ICTY Trial Chamber in *Gotovina* denied the Prosecutor's request for the production of certain military documents said to be in the possession of the Applicant on the basis that "it was unable to determine with sufficient certainty the whereabouts of these

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[68] Rejoinder, para. 596.

[69] *Ibid*.

[70] Reply, Annex 194.

[71] Reply, Annex 195.

[72] Reply, Annex 196.

documents and therefore whether they were accessible to Croatia".[73] The Respondent notes that the Chamber emphasized that its decision was without prejudice to the Applicant's obligation to co-operate with the Tribunal in regard to the matter pursuant to Article 29 of the Tribunal's Statute.[74] The Respondent states that it believes that "the missing documents" could be even more important for a charge of genocide than for the *Gotovina* proceedings and "reserves its right to request them.[75]

1.51 The Office of the Prosecutor is no longer seeking such documents. On 3 May 2012, the Chief Prosecutor of the ICTY, Serge Brammertz, met with the Croatian Deputy Prime Minister and Chairman of the Council for Cooperation with the ICTY and other international courts in Zagreb and confirmed that there were no outstanding issues that might burden relations between Croatia and his office. A month earlier Mr. Brammertz had told media that his office was no longer insisting on the delivery of documents relating to Operation *Storm*.[76]

1.52 In relation to the issue of the Parties' cooperation with the ICTY, the Applicant notes that in his report to the UN Security Council on 7 June 2012, Mr. Brammertz refers to the fact that: "Day-to-day cooperation provided by states of the former Yugoslavia to the Office of the Prosecutor fully meets expectations". However he then goes on to identify two exceptions to this neither of which relate to the Applicant, including "Serbia's lack of progress towards investigating and prosecuting individuals who assisted ICTY fugitives while at large. We have raised this issue repeatedly over the past few years but we see little evidence of action."[77]

1.53 Furthermore, the Respondent does not explain why the so-called "missing documents" are relevant or why they would be important for a charge of genocide. The Applicant submits that such speculative general assertions carry no weight.

(13) The Decision Not to Indict for Genocide and the Respondent's Attempt to Draw an Artificial Distinction between the Claim and Counter-Claim

1.54 The Respondent takes note of the fact that the ICTY has not indicted anyone for genocide for crimes committed by Croatian armed forces during

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[73] Rejoinder, paras 597-598.

[74] Rejoinder, para. 598.

[75] Rejoinder, para. 600.

[76] See article "*No outstanding issues with Croatia"*, dated 3 May 2012, available at: http://daily.tportal.hr/191500/Brammertz-No-outstanding-issues-with-Croatia.html.

[77] See Address of Mr Brammertz to the UN Security Council, 7 June 2012, ICTY Press Release.

Operation *Storm*, and submits that there is "a significant difference" between the Applicant's and the Respondent's case in this respect.[78]

1.55 The Applicant has addressed this issue in the Reply.[79] It would only add that this attempt by the Respondent to distinguish the two situations is both artificial and disingenuous. The Respondent seeks to base a distinction on the fact that: "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". This distinction is untenable since the convictions are based on findings relating to the overall geographical scope of, and the overall context for, Operation *Storm*.

1.56 The Trial Chamber's findings as to the existence of the JCE are subject to appeal,[80] together with the findings as to the individual participation of the two generals convicted.[81] The decision of the ICTY Prosecutor not to indict the three *Gotovina* defendants for the crime of genocide also serves to indicate the Prosecutor's view of the type and extent of criminal responsibility of the Croatian government. The Prosecutor evidently found no basis for bringing such a charge against the defendants or of mounting a case based on a wider participation in a genocidal JCE.

1.57 The Applicant addresses in the following chapters the factual and legal issues that divide the Parties in relation to the Counter-Claim. The central dispute which underlies these more specific issues, however, arises from the Respondent's cynical attempt for the purposes of these proceedings to characterise Operation *Storm* as a conflict which resembles in scale, impact and legal characterisation, the 1991-1995 war on which the Applicant's claim is based.[82]

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[78] Rejoinder, paras 601-603, 766.

[79] Reply, paras 2.27-2.33.

[80] See Appellant's Brief of Ante Gotovina (Public Redacted Version), ICTY IT-06-90-A, Ground 3 (pp. 67-82) and Ground 4 of the Appeal (pp. 82-120) and see Appellant's Brief of Mladen Markač (Public Redacted Version) ICTY IT-06-90-A , 5 October 2011, Ground 1(A) Existence of JCE pp. 3-41.

[81] The Applicant's position on this aspect of the Trial Chamber's judgment is set out in the Motion to Intervene and Statement of Interest, ICTY Appeals Chamber, 12 December 2011.

[82] Chapter 4, paras 4.44-4.45.

CHAPTER 2

CROATIA AND THE 'RSK'/SERBIA 1991- 1995

INTRODUCTION

2.1 The allegations that the Applicant committed genocide against the Serbs in the self-proclaimed Republika Srpska Krajina ("'RSK'") are restricted to Operation *Storm* which commenced on 4 August 1995.[83] As in the Counter-Memorial, no allegations of the commission of genocidal acts are made prior to this date, and the Applicant responds to Chapter VII of the Rejoinder for the sake of completeness. In any event, the Respondent's various allegations of human rights violations by the Applicant fall outside the Court's jurisdiction and the Respondent recognises that the Court has jurisdiction only under the Genocide Convention. [84]

2.2 This Chapter responds to allegations that the Respondent repeats in its Rejoinder even though they were comprehensively rebutted in the Applicant's Reply. Chapter 10 of the Reply provided a detailed factual account of the events that led up to the commencement of Operation *Storm*, as a response to the Respondent's unsatisfactory, incomplete and misleading "factual background."[85] Once again, the Respondent's pleadings are misleading. In several instances, the Respondent merely re-states what it had said earlier, entirely ignoring the Applicant's response or deliberately miscasting the Applicant's arguments. In fact it is unclear why the Respondent devotes 34 pages to this Chapter, when it fails to respond to most of the contents of the Reply: indeed, it appears that the Respondent has failed even to read significant parts of Chapter 10. In several instances, the Respondent appears to have forgotten its own case, put forward in its Counter-Memorial. This Chapter also notes these contradictions between the Counter-Memorial and the Rejoinder.

2.3 Before describing the events leading up to Operation *Storm*, certain points need to be made about the Respondent's use of evidence. *First*, as stated earlier, the Rejoinder contains numerous misrepresentations of facts and events or they are described out of context. This approach is most evident in Chapters VII and VIII of the Rejoinder. As in the Counter-Memorial, the political and military context and the timeline of the events in question are materially different from those presented in the Rejoinder. These misrepresentations are also identified. *Second*, after presenting its 'facts' the Respondent proceeds to make sweeping deductions and draw erroneous conclusions,

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[83] Counter-Memorial, para. 1098 and Chapter XIII; Rejoinder, para. 688.

[84] Counter-Memorial, para. 211.

[85] Counter-Memorial, Chapter XII.

without any evidence in support, that are patently at odds with the available records. A clear example of this is its description of the meeting in Brioni and the conclusions it draws therefrom that Operation *Storm* was genocidal. *Finally*, having failed to address issues that are relevant to these proceedings, but which clearly undermine its arguments and case, the Respondent nonetheless devotes several pages to new material and matters that are outside the scope of this case. In doing so, it further undermines its own case.

2.4 This Chapter addresses certain preliminary issues before responding to the allegations regarding events in Croatia from 1991 to 1995, up to Operation *Storm.* More particularly, these include allegations regarding the alleged "massive crimes" perpetrated against the Serbs in Croatia,[86] and the claim that negotiations with the rebel Serbs were heading towards a peaceful solution when Croatia opted for Operation *Storm* in order to 'violently cleanse Krajina of Serbs.'[87] Operation *Storm* and the events surrounding it are dealt with in Chapter 3.

SECTION I: PRELIMINARY ISSUES

2.5 The Respondent is somewhat selective regarding the issues it wishes to engage with. As an example it states that it:

> "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*. 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."[88]

It is unclear at which point the Respondent proposes to deal with this argument given that this is the last round of written pleadings.

2.6 In the Reply, the Applicant had responded to Serbia's suggestion that the 'RSK' was a legally established entity, distinct from both Serbia and Croatia, whereas, in fact, the 'RSK' was an illegal entity that for four years occupied territory that was an integral part of Croatia.[89] Plate 1 shows the

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[86] Rejoinder, paras 606 *et seq*.

[87] Rejoinder, para. 666.

[88] Rejoinder, para. 605 (emphasis added).

[89] Reply, para. 10.11. The 'RSK' consisted of three territorial units: the first in Eastern Slavonia, Baranja and Simirium; the second in Western Slavonia; and the third, the largest, situated in central Croatia along Croatia's border with Bosnia - the so-called 'Krajina'. All the areas over which the self-proclaimed 'RSK' exercised control were sometimes referred to as the 'Krajina'. The last two units accounted for 85% of the area of the 'RSK'. For four years the rebel Serbs controlled 17,028 km, with a border of 923 km that separated it from the rest of Croatia, under the control of the lawfully elected Croatian authorities.

territory that was illegally occupied by the 'RSK'. Chapter 3 of the Reply described how the 'RSK' emerged and how its very existence was only made possible through the continuing direction, command, control, support and backing of the FRY/Serbia.[90] The Respondent admits the close connections between the FRY/Serbia and the 'RSK', and that it provided the 'RSK' and its Army (SVK) with political and financial assistance.[91] It also "does not dispute" that it provided the "Croatian Serbs" support for the establishment of their armed forces in the form of combat training, the provision of weapons and other material, as well as officers.[92]

2.7 Instead, the Respondent devotes 13 pages to presenting new evidence regarding crimes that allegedly occurred in 1991 - 1992, which clearly have no bearing on the issues before the Court.[93] 34 new exhibits relating to "massive crimes committed against the Serb people dating to the very beginning of the armed conflict" are submitted. These include several new witness statements, an OSCE Report from 1991-1992, as well as 8 excerpts from one Serbian book.[94] This new evidence is presented in response to Croatia's criticism that Serbia had made several wide-ranging allegations without *any* evidence in support.[95] Even if the Applicant accepts this new material as "credible and reliable" as the Respondent asserts, it is wholly outside the purview of the subject matter of the Counter-Claim and therefore simply not relevant. The Respondent admits that this evidence pertains to matters that do not fall within the subject matter of the dispute.[96]

2.8 Similarly, the Respondent repeats its earlier grievance that the Applicant has not fully investigated and prosecuted those guilty of 'massive crimes' committed against the Serbs in 1991/1992.[97] The Applicant had addressed this issue in the Reply.[98] Once again, virtually every allegation regarding Croatia's

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[90] See e.g. Reply, para. 3.67-3.80. See also paras 10.09-10.10.

[91] Rejoinder, paras 555, 559. In para. 537 the Respondent somewhat grudgingly stated that it "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."

[92] Rejoinder, paras 546 and 557.

[93] Rejoinder, pp. 227-240.

[94] Rejoinder, para. 585 and Annex Nos. 10-43.

[95] Reply, paras 3.114- 3.116.

[96] Rejoinder, para. 608.

[97] Rejoinder, para. 624.

[98] Reply, paras 2.69 *et seq.*

failure to fully investigate or prosecute is outdated, a misrepresentation or simply false.[99]

SECTION II: FACTUAL BACKGROUND UP TO OPERATION *FLASH*

2.9 Chapter 10 of the Reply provided a detailed factual account of the events leading up to Operation Storm. In the interest of brevity, that account is not repeated, but is maintained in full. In this Chapter, the Applicant merely flags the issues on which the Respondent has not made any response, or where its response calls for comment.

(1) Serb Nationalism and Hate Speech

2.10 The Memorial and the Reply dealt extensively with the rise of nationalism in the SFRY/Serbia and more particularly the rise of Greater Serbian nationalism after the death of President Tito.[100] The Reply also addressed the Respondent's comments on the issue of Croatian nationalism.[101] In any event, the Respondent admitted that prior to October 2000 "… Serbian nationalism was the leading political idea."[102] The Applicant understood that this matter was accordingly not in dispute. It is therefore a surprise that even now, in its Rejoinder, the Respondent uses the language and propaganda of the "undemocratic regime in Serbia before 2000", a regime that the Respondent previously stated that it would "not attempt to justify or defend."[103]

2.11 The Reply set out details of the hate speech propagated and promoted by the Serbian state-controlled media and the Serbian leadership[104] and the

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[99] For example regarding the events set out at paras 613-614 of the Rejoinder (*Kerestinec*) the County State Attorney's Office has issued indictments against 5 members of the Croatian Army (HV) for war crimes, and criminal proceedings are underway; para. 615 (*Lora 1*) a judgment has been rendered in one case and 7 persons were convicted and sentenced to 6-8 years imprisonment; para. 616 (*Lora 2 and Lora 3*) a criminal investigation is underway; paras 619-620 (Marino Selo) the Supreme Court confirmed the County Court Osijek's verdict and 2 people having been sentenced to 12 years and 15 years respectively for war crimes; para. 621 (Trnava, Medare) a criminal investigation is underway; paras 622, 624 (Paulin Dvor) the Croatian Supreme Court has upheld the Osijek County Court's verdict and one defendant has been sentenced to 15 years for war crimes and another defendant, who was retried, has been sentenced to 11 years by the Osijek County Court; para. 623 (Sarvaš) criminal investigations are underway to identify unknown perpetrators of war crimes committed in August 1991.

[100] Reply, paras 3.6 *et seq.*; Memorial, paras 2.36 *et seq*.

[101] Reply, paras 3.7, 3.17-3.24.

[102] Counter-Memorial, para. 423.

[103] *Ibid*.

[104] See Reply, paras 3.12-3.33; Memorial, paras 2.51-53 on the "Demonization of the Croats". See also Hate Speech, Memorial, vol 5, appendix 3, in particular paras 30-38.

impact it had on the Serbs in the region.[105] As set out in the Reply, the ICTY proceedings have provided a wealth of new material on this issue, including the Expert Report of Professor de la Brosse on '*Political Propaganda and the Plan to Create a State for all Serbs: Consequences of using the media for ultra-nationalist ends*'.[106] It describes in detail how history was manipulated to serve the objectives of the Serb nationalists in Serbia, and how Milošević relied on the state-controlled media to consolidate power.[107] Its more important conclusions were also set out in the Reply.[108] In the Counter-Memorial, the Respondent admitted that: "hate speech was abundant in Serbian media at the end of the 1980s and during the 1990s." However, it argued that none of the evidence presented by the Applicant with regard to hate speech fell under the legal elements of the crime of genocide.[109] In its Rejoinder it now appears to adopt a different approach.

2.12 Serbia argues that the escalation of the conflict in Croatia and the growing number of Croatian victims resulted in Croat politicians and intellectuals making public statements against the Serbs, and this "created a general context of deep national, ethnic and religious hatred which finally led to genocide during and after Operation Storm."[110] The point may be put simply: according to Serbia, when hate speech emanates from Serbian state-controlled media and is made by its highest officials it is irrelevant, but when it's made by any Croatians, in any medium, it is relevant, and results in genocide.

2.13 The Applicant did not deny that the speeches quoted by the Respondent were made, but it pointed to the context and timing of the speeches. The Respondent acknowledges that these speeches were made when the "conflict in Croatia escalated and number of Croatian victims rose."[111] The Applicant had also criticized some of the sources cited by the Respondent, including a private tabloid newspaper that was criticized by Croatian mainstream media and the Croatian Ministry of Information.[112] The Respondent repeats some of its earlier comments and additionally refers to comments made by private individuals.[113] The featured comments are not representative and not even re-

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[105] See Reply, paras 3.57 *et seq* and Memorial, pp. 53-67.

[106] Reply, Annex 106.

[107] *Ibid*., pp. 59-74.

[108] Reply, para. 3.16.

[109] Counter-Memorial, paras 434-435. See the response in the Reply, paras 3.15 *et seq*.

[110] Rejoinder, para. 632.

[111] *Ibid.*

[112] Reply, paras 3.26 *et seq*. Once again the Respondent refers to *Slobodni tjednik,* a private tabloid, as a "notorious example" that published in»ammatory articles against Serbs. It then proceeds to misrepresent the Applicant's Reply. This is apparent from reading what the Applicant stated in Reply, para. 3.26 and what the Respondent claims it stated in Rejoinder, para. 635.

[113] Rejoinder, paras 635-636.

motely comparable with the intensity, coherence and extent of Serbian propaganda. These comments were occasionally reported in the period when the Republic of Croatia was exposed to an onslaught by Serbian rebels and the Respondent State.

2.14 In any event the examples cited by the Respondent are in sharp contrast with the Serbian hate speech that emanated from Serbian state media and its most senior leaders. [114] In 2009, the Independent Association of Serbian Journalists (NUNS) filed a criminal complaint with the Serbian Office of the War Crimes Prosecutor regarding the responsibility of the Serb media for the crime of inciting genocide and war crimes.[115] Pursuant to this, last year, the Serbian War Crime Prosecutor's Office published a report on the ongoing investigation into the role of some Serbian journalists in inciting war crimes in the 1990s.[116] Similarly, in May 2011, the Management Board of the Radio Television of Serbia Broadcasting Association issued a public apology for the views/statements expressed by them which were broadcast in the programmes of the public networks RTB and the RTS in the 1990s.[117]

(2) Serbian Non-Compliance with the Vance Plan

2.15 The Respondent does not challenge the Applicant's account regarding the Vance Plan, the deployment of the United Nations Protection Force ("UNPROFOR") and the creation of the United Nations Protected Areas ("UNPAs").[118] Plate 2 shows the UNPAs in Croatia. It also does not dispute

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[114] The Vukovar Tragedy 1991: *In The Net of Propaganda Lies and Armed Power of JNA*, Vol. I, Sonja Biserko (Ed.) This book produced by the Serbian Helsinki Committee endeavors to document the real causes of the former Yugoslavia's disintegration. The material and documentation compiled in two volumes throws light on the pre-war political and social context and is a valuable source of information. It states *inter alia*

> "The Serbian political aspirations towards Croatia did not disappear even after the trials at the Hague Tribunal. They date since the creation of first Yugoslavia and have never ceased. They adjusted to the circumstances, but in all critical situations in Yugoslavia, the Great-Serbian aspiration towards almost the entire territory of Croatia came to surface. The exodus of the Serbs from Croatia in 1995 was organised in Belgrade with the aim to consolidate the Serbian ethnic territories in Republic of Srpska and Vojvodina."

The book on the Vukovar tragedy is the 5th edition in the series publicized under the project "Coming to Grips with Serbia's Prevalent Ideological Matrix"

[115] Criminal Complaint lodged by the Independent Association of Journalists in Serbia with the Office of the War Crimes Prosecutor, 1 July 2009, Annex 6.

[116] See Media War Crimes under Investigation in Serbia, 10 January 2012, (accessed 20 May 2012), http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/01/10/feature-01.

[117] Programme Statement of the Management Board of Radio Television Serbia, 23 May 2011, Annex 7.

[118] Reply, paras 3.120-3.126, 10.17 *et seq.* The UNPAs are set out in the Memorial, Volume 3, Plate 2.7. Three UNPAs were identified: Eastern Slavonia, Western Slavonia and 'Krajina'. However, their exact boundaries were not defined.

that the Plan was "an interim arrangement" to create the conditions for peace required for the negotiation of an overall settlement to the conflict, and it was not intended to prejudice or otherwise affect the outcome of negotiations for a comprehensive settlement of the conflict.[119] As set out in the Reply, in order to avoid the outbreak of further hostilities, Croatia accepted UNPROFOR assistance in reinstating Croatian authority in these areas even though the Vance Plan required that these areas be handed back to Croatia following the JNA's withdrawal.[120] The Respondent accepts that the rebel Serb authorities resisted the re-establishment of Croatian authority in this area.[121] In doing so it admitted that the rebel Serbs (together with the FRY) began violating the Vance Plan from its very inception in February 1992.[122]

(a) Continuing human rights violations faced by Croats in the rebel Serb occupied territories

2.16 As noted in the Reply, the rebel Serbs consolidated the gains of their genocidal campaign, cleansed occupied territory of non-Serbs and destroyed non-Serb property (including cultural and religious monuments), making conditions of life impossible for Croat and other non-Serb populations.[123] The actions of the Respondent and the rebel Serbs, described in detail in the Memorial and the Reply,[124] were condemned by the UN and the international community, including by the UN Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia in February 1993.[125] The conditions of the Croats were also noted by the Trial Chamber in the *Gotovina* case.[126] Other members of the international community, including the US State Department and international human rights organizations made similar findings.[127] This situation continued through the years of Serb occupation. In *Martić*, the ICTY Trial Chamber found as fact: "a continuation of incidents of killings, harassments, robbery, beatings,

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[119] The role and functions of the UNPROFOR were set out in a Report of the UN Secretary General pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, Reply, Annex 92. See also Reply, paras 3.122, 10.20

[120] Reply, para. 10.21.

[121] Counter-Memorial, paras 1118, 1121.

[122] The Reply noted the inconsistency within the Counter-Memorial regarding the alleged acceptance of the Vance Plan by the rebel Serbs and the role of FRY/Serbia in this regard. (See Reply, para. 3.121.)

[123] Reply, paras 10.34-10.38.

[124] Memorial, Chapters 4 and 5; Reply, Chapters 3 to 6.

[125] Reply, para. 10.34 setting out details of the Reports of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia.

[126] *Gotovina* TJ, para. 1683.

[127] Reply, para. 10.35 (details of US State Department Reports) and para. 10.36 (Human Rights Watch Report).

burning or houses, theft, and destruction of churches carried out against the non-Serb population" on the territory of the 'RSK' during 1992. It also found further reports of killings, intimidation and theft continued throughout 1993.[128]

2.17 In a December 1994 Resolution on the "situation in the occupied territories of Croatia", the General Assembly *inter alia* condemned the "Serbian self-proclaimed authorities in the Serbian-controlled territories of Croatia" for their militant actions that had resulted in the ethnic cleansing of the UNPAs and for their constant refusal to comply with Security Council resolutions. It urged the restoration of the authority of the Republic of Croatia in the entire territory, calling for the utmost respect for human and minority rights in the territory of Croatia, and for efforts to achieve a political solution within the framework of the International Conference on the Former Yugoslavia (ICFY).[129] The following year, the General Assembly recognized, once again, that the "leadership in territories under the control of Serbs in ... Croatia, and the commanders of Serb paramilitary forces and political and military leaders in the [FRY bore] primary responsibility" for the violations of human rights and international humanitarian law.[130] It expressed serious concern at the lawlessness in the Serbian-controlled territories of Croatia and the physical violence and insecurity faced by non-Serb populations in those territories.[131] At this time the FRY was already the subject of UN sanctions, imposed as a consequence of its lawless actions. [132]

2.18 In the Reply, the Applicant set out Reports and Resolutions for each year of the conflict, from 1991 to 1995. These recognised the plight of the Croats living the rebel Serb occupied territory and called on the FRY/Serbia and the rebel Serbs to comply with the Vance Plan. The Respondent once again fails to address the attitudes and actions of the FRY/Serbia and the 'RSK' authorities towards the Croats living in the rebel Serb occupied territories, and how these areas came to be almost exclusively inhabited by Serbs. It is noteworthy that the Respondent has not denied that it violated other obligations under the Vance Plan, including the return of Croat and other non-Serb refugees and displaced people to the UNPAs, and ensuring that the composition of the police forces in the UNPAs reflected the pre-conflict ethnic composition of the population. These were also central to the Plan, and the failure to comply undermined all efforts to end the conflict.[133]

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[128] *Prosecutor v. Martić*, IT-95-11-T, Judgment of 12 June 2007 (hereinafter *"Martić"*), paras 327-328.

[129] UN General Assembly Resolution A/RES/49/43 of 9 December 1994, Memorial, Vol.4, Annex 4, p. 25.

[130] UN General Assembly Resolution A/RES/49/196 of 10 March 1995, para. 4. See also Reply, para. 10.37.

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

[132] See e.g. UN Security Council Resolutions 757 (1992), 787 (1992) and 820 (1993).

[133] Reply, para. 10.42 (internal citations omitted).

(b) Failure of the Serbs to demilitarize

2.19 The Reply noted that the rebel Serbs refused to demilitarize, a fact that is admitted by the Respondent.[134] As noted earlier, *first*, when the JNA finally withdrew from Croatia towards the end of May 1992, it left behind much of its weaponry with the Serb TO and police, in plain violation of the Vance Plan's provisions for demilitarisation. *Second*, (also admitted by the Respondent) the TO units that were to be disbanded and demobilized were transferred to "special police" and border units.[135] Thus, while the TOs were disbanded and technically demobilized, their structure remained intact and available for fresh mobilization. Recognising the failure to demilitarise and demobilize, the Security Council expressed concern at the creation of Serb paramilitary forces in the UNPAs and urged all parties and others concerned to comply with their obligations to withdraw and disarm under the Vance Plan.[136]

2.20 The Respondent's somewhat contradictory approach to demilitarization was dealt with in the Reply.[137] In the Rejoinder it makes one further observation on the subject. It calls attention to an alleged contradiction in the Applicant's approach. It states:

> "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 a prepared plan. 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."[138]

It is unclear how these issues are related, or why they should be contradictory. Yes, the Serbs refused to demilitarize, a fact that the Respondent admits. That has no bearing on the issue of Serbs leaving Croatia in 1995, pursuant to evacuation plans. This issue, as well as the *Gotovina* case before the ICTY, are dealt with in the following chapters.

2.21 The Respondent however, persists with its contradictory and confusing stand on the alleged demilitarization of the RSK.[139] It admits that the "Krajina was not fully demilitarized,"[140] and virtually every other aspect of the Vance Plan continued to be flouted. There was no improvement in the situa-

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[134] The Respondent admits this in Counter-Memorial, see *inter alia* paras 1160, 1122.

[135] Counter-Memorial, para. 1121.

[136] See UN Security Council Resolution 779 (1992), 6 October 1992, preamble and para. 4. See also Reply, para. 10.39.

[137] Reply, para. 10.40 (internal citations omitted).

[138] Rejoinder, para. 667.

[139] Rejoinder, para. 668.

[140] *Ibid*.

tion and on several occasions the UN found that the rebel Serbs bore the greatest responsibility for the situation in the UNPAs and the failure of UNPROFOR to fulfil its mandate.[141] A February 1993 Report of the Secretary-General expressly singled out the non-cooperation of the rebel Serb authorities that "prevented the UNPROFOR from achieving the demilitarizing of the UNPAs and the disarming of the Serb Territorial Defences and irregular forces."[142]

2.22 In yet another example of the Respondent's misrepresentation and distortion of the order of events, it states that crimes were committed against the Serb civilians even after the deployment of the UNPROFOR, referring to the events in Maslenica, Medak and during Operation *Flash*.[143] Before addressing these allegations two points need to be made. *Firstly,* the allegations are made out of context and the Respondent's account is inaccurate, as is clearly set out below. *Secondly,* and more importantly, the Respondent appears to have toned down its description of these events. In the Counter-Memorial the Respondent alleged that the Applicant had, on four occasions before *Storm* undertaken "large" military operations against the rebel Serbs and in so doing halted the alleged progress made at the negotiating table and on the ground.[144] In the Rejoinder its claims appear more modest. It makes no mention of its earlier allegations regarding Miljevci[145], and its allegations regarding the events in Maslenica, Medak and during Operation *Flash* are also much diminished. The Respondent accuses the Applicant of "serious mischaracterizations" with regard to these events. [146] That allegation is baseless.

(c) Operation Maslenica (January 1993)

2.23 In the Reply, the Applicant fully refuted the Respondent's allegations regarding Croatia's so-called "attack" on Maslenica and other locations in January 1993.[147] In the Rejoinder, the Respondent primarily challenges the Applicant's characterisation of this action as achieving a "legitimate humanitarian and military objective," arguing instead that this was an "attack on a protected zone."[148]

2.24 Once again, the Respondent is silent as to the reason for the Operation: namely, to re-establish transport and communication links between the

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[141] Reply, paras 10.44-10.46 (internal citations omitted).

[142] See Further Report of the Secretary-General pursuant to Security Council Resolution 743 (1992), UN Doc. S/25264, 10 February 1993, paras 12-13.

[143] Rejoinder, paras 639 *et seq.*

[144] Counter-Memorial, paras 1160, 1162.

[145] Counter-Memorial, paras 1119-1120. These were dealt with in the Reply, paras 10.22- 10.24.

[146] Rejoinder, para. 641.

[147] Reply, paras 10.47-10.51.

[148] Rejoinder, paras 642-643.

north and south of Croatia that had been severed by the 1991 occupation by the JNA and the rebel Serbs. The destruction of the Maslenica Bridge north-east of the city of Zadar, which was the main land route between northern and southern Croatia, had left the Dalmatian coast accessible only by ferry. This situation was untenable in the long run, because the region was severed from the rest of the country, despite nominally having a land link. The usual land routes through Bosnia, Lika and Dalmatia were controlled by the Serbs both in Croatia and Bosnia-Herzegovina. This forced traffic and commerce to use ferryboat services and bridges connecting Pag Island and mainland Dalmatia, which were often affected by bad weather. The Pag Bridge was also damaged by the JNA airforce in 1991, causing doubts about its long-term use. This was the only traffic route for the supply of humanitarian and other aid to parts of Croatia and Bosnia and Herzegovina. In this way, Croatia achieved a legitimate humanitarian and military objective. The Respondent fails to mention that, shortly before the Operation, the Serb authorities in Knin had rejected any negotiations on the re-establishment of transport links in the area.[149]

2.25 In support of its arguments, the Respondent selectively cites Security Council Resolution 802 (1993) (which the Applicant had referred to in the Reply).[150] It excludes those sections of the Resolution that censure FRY/Serbia and the rebel Serbs, in particular failing to state that Security Council was:

> *Deeply concerned also by the lack of cooperation in recent months by the Serb local authorities in the areas under the protection of UNPROFOR control, and by threats to widen the conflict*,
>
> […]
>
> 3. *Demands also that the heavy weapons seized from the UNPROFOR-controlled storage areas be returned immediately to UNPROFOR*;
>
> 4. Demands that *all parties and others* concerned comply strictly with the cease-fire arrangements already agreed and cooperate fully and unconditionally in the implementation of the United Nations peace-keeping plan (S/23280, annex III), *including the disbanding and demobilization of Serb Territorial Defence units or other units of similar functions*; […];
>
> 6. Demands that *all parties and others* concerned respect fully the safety of United Nations personnel; […];
>
> 8. Calls upon *all parties and others* concerned to cooperate with UNPROFOR in resolving all remaining issues connected with the

[149] Reply, para. 10.48.

[150] Reply, para. 10.51.

> implementation of the peace-keeping plan, *including allowing civilian traffic freely to use the Maslenica crossing;*
>
> 9. Calls again *upon all parties and others* concerned to cooperate fully with the International Conference on the Former Yugoslavia and *to refrain from any actions or threats which might undermine the current efforts aimed at reaching a political settlement* […] (Emphasis added)

2.26 The Respondent's other misrepresentations with regard to Maslenica are noted in the Reply. The Respondent admitted that after these events there was a remobilization of rebel Serb forces and that they removed stored weapons, including heavy weapons, from UN controlled storage areas.[151] As set out above, the Security Council demanded the immediate return of these weapons. This also rebuts the Respondent's argument regarding demilitarization by the rebel Serbs.

2.27 In the following months, the position of the Croats that remained in the UNPAs worsened and the Serb attitude towards the UNPROFOR "gravely deteriorated."[152] There were reports of several incidents including the killing of at least three UNPROFOR personnel and threats to take hostages or exact revenge on UNPROFOR personnel.[153] The Secretary General once again found that non-cooperation by the rebel Serbs was preventing the successful implementation of UNPROFOR's mandate and stated that the local Serb leadership was "repeatedly" told that the "only basis for settlement was their acceptance of Croatian sovereignty in return for guarantees of their minority rights. They never accepted this position…"[154]

2.28 Despite this, Croatia continued to hope for a peaceful solution, while recognising that it had the right to establish control over its entire territory.[155] As stated in the Reply, the use of armed force was not Croatia's first option. The Republic of Croatia considered that the UNPROFOR should be given enforcement powers to oblige the Serbs to comply with Security Council Resolutions, and to do so with specific objectives against a set timetable, failing which it would not agree to further extensions of the UNPROFOR's mandate.[156]

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[151] Counter-Memorial, paras 1124, 1127.

[152] Reply, para. 10.52.

[153] Report of the Secretary-General pursuant to Security Council Resolution 815 (1993), UN Doc. S/25777, 15 May 1993, para. 15.

[154] *Ibid*., para. 4.

[155] Reply, para. 10.54.

[156] Report of the Secretary-General pursuant to Security Council Resolution 815 (1993), UN Doc. S/25777, 15 May 1993, para. 19.

(d) The Medak Pocket (September 1993)

2.29 In the Counter-Memorial, the Respondent made various allegations regarding the limited Croatian operations in the Medak Pocket that sought to eliminate the threat posed to Gospić and its environs by Serb shelling, from the summer of 1991 onwards.[157] These were comprehensively refuted in the Reply.[158] As stated there, during 1993, the artillery attacks targeting civilians, facilities and infrastructure intensified and their severity and frequency made it practically impossible to conduct everyday life. These facts are not denied in the Rejoinder. The Respondent only points to an alleged "contradiction" stating that while the reason behind the attack was an attempt to stop shelling Gospić from a Serbian stronghold, even after the take-over, Gospić remained within the range of the SVK heavy artillery.[159] There is no contradiction here. The Applicant recognised this in the Reply, but stated that "[a]lthough Gospić remained within the range of the SVK heavy artillery, the operation eliminated a direct threat to the civilian population and ensured the basic preconditions for the normalization of life and the functioning of the economy and transport links within a wider area."[160]

2.30 In the Counter-Memorial, the Respondent alleged *inter alia* that the Croatian "attack" was accompanied by ethnic cleansing, arbitrary executions and the destruction and damage of certain hamlets.[161] The allegations of ethnic cleansing and arbitrary executions were unsupported by evidence. The Respondent only put forth the November 1993 Report of the Special Rapporteur of the Commission on Human Rights which had been superceded by the Final Report of the UN Commission of Experts, on the Medak Investigation, of 28 December 1994.[162] There is no doubt that the Respondent was aware of this Report, but failed to mention it. The Reply set out the findings of this Final Report in some detail.[163] The Respondent appears to accept the findings of the Final Report, but seems not to have read the Re-

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[157] Counter-Memorial, paras 1130-1134.

[158] Reply, paras 10.55-10.61 (internal footnotes omitted).

[159] Rejoinder, para. 644.

[160] Reply, para. 10.57.

[161] Counter-Memorial, para. 1132.

[162] Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674/Add.2 (Vol. I) Annex VII, Medak Investigation, 28 December 1994, Reply, Annex 126.

[163] Reply, para. 10.59. The UN Team found for e.g. "no evidence implicating any specific identifiable individual in the direct planning, instigation, ordering, commission, aiding or abetting of any of these crimes." It therefore, concentrated on indirect, *i.e.* command responsibility. It found "no convincing general pattern of the deaths occurring in the pocket" and found that the majority (71%) of the located dead were military personnel. It found that initial postmortem examinations and examinations conducted by the Serb authorities were "unsatisfactory" and the conclusions reached were "unreliable." It also found local witnesses "unreliable" or "contradictory." (internal citations omitted).

ply. There the Applicant specifically stated that the Report had concluded that there was "wanton destruction" of property and recommended that two Croatian officers be charged with war crimes.[164] The Respondent merely restates these finding.[165] The Respondent also accuses the Applicant of having "forgotten the facts established in judgments rendered by its own courts in relation to these crimes."[166] This also indicates that the Respondent failed to read the Reply, which specifically mentioned the proceedings against Generals Ademi and Norac at the ICTY and before the Croatian Courts, and the fact that in May 2008, General Norac was sentenced to 7 years for the commission of war crimes.[167]

2.31 The Respondent admits that immediately after Croatian forces launched the operation in the Medak Pocket Serb forces retaliated by shelling the Croatian frontline and urban targets, including Karlovac and areas near Zagreb.[168]

(3) Continuing Efforts to Arrive at a Peaceful solution

2.32 From these events in 1993, the Respondent moves on to Operation *Flash.* It makes no response to the Applicant's detailed narrative on the continuing efforts to arrive at a peaceful solution through 1993, 1994 and up to May 1995, when Operation *Flash* was launched.[169] In the Reply, the Applicant noted how efforts to make peace by Serb politicians were viewed as treason by the rebel Serbs.[170] The Respondent does not challenge this but nevertheless argues that "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."[171] Once again, no evidence is produced in support of this statement. On the Serbian side it is plain that there was no intention of peaceful settlement. Moreover, these were not "contentious territories" as the Respondent argues: they were an integral part of the territory of Croatia.

2.33 A month after the events in the Medak Pocket, in October 1993, the Security Council reaffirmed the territorial integrity of Croatia and the importance of the full and prompt implementation of the peacekeeping plan, including the provisions for demilitarization of the UNPAs. It called upon

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[164] Reply, para. 10.60.

[165] Rejoinder, paras 645, 646.

[166] Rejoinder, para. 648.

[167] Reply para. 10.60.

[168] Counter-Memorial, para. 1130; Reply para. 10.61.

[169] Reply, paras 10.62 *et seq.*

[170] Reply, para. 10.63.

[171] Rejoinder, para. 666.

the signatories of the plan, in particular the FRY (Serbia and Montenegro), to cooperate in the full implementation, stressing that the first step was restoring the authority of Croatia over the pink zones.[172] In the continued hope of securing the peaceful integration of these areas, and referring to the to the Security Council Resolution 871, on 1 November 1993, President Tuđman announced a new peace initiative. He called for a ceasefire agreement and the normalisation of relations between Zagreb and Knin. He offered the rebel Serbs in UN protected areas supplies and other forms of aid in the coming winter months. He offered to pay pensions and establish the Croatian welfare and health care systems in areas under UN control. The rebel Serbs were guaranteed full local autonomy (self-rule) in the two districts of Knin and Glina, where the rebel Serbs had been a majority before the war, and cultural autonomy in the entire territory of Croatia.[173]

2.34 In November 1993, the parties held talks on a ceasefire agreement, and on economic matters, and in March 1994, a general ceasefire agreement was signed and generally held till May 1995.[174] While the Respondent attempts to portray a picture of continuing progress, this was not the case, and there is absolutely no contradiction in the Applicant's case, as alleged by the Respondent.[175] The Applicant admits that the ceasefire held, however, there was no progress regarding the Economic Agreement, and more importantly a political settlement. Any expectations for agreement on issues of mutual economic benefit, followed by talks on a final political settlement, were brought to an end in April and May 1994, when the rebel Serb authorities in Knin issued statements closing the door on political reconciliation, including announcements of their intention to pursue full integration with other Serb areas.[176] Talks in the summer of 1994 were cancelled. Negotiations then focused on an economic cooperation agreement, which was signed in December 1994. However, it was soon apparent that the rebel Serbs had no desire to fully implement the Agreement, instead, seeking closer ties with Serbia and the Republika Srpska.[177] It was in these circumstances that Croatia decided not to agree to an extension of UNPROFOR's mandate.[178] Croatia's decision resulted from the failure of

[172] Security Council Resolution 871 (1993), UN Doc. S/RES/871, 3 October 1993, paras 3. 4 and 7. See Reply, para. 10.64.

[173] See Peace Initiative of the President of the Republic of Croatia, Dr. Franjo Tuđman, Zagreb, 1 November 1993, Annex 8.

[174] Reply, para. 10.65.

[175] Rejoinder, para. 671.

[176] Reply, para. 10.66.

[177] Reply, paras 10.68-10.70.

[178] Reply, paras 10.72 *et seq.*

UNPROFOR to perform the functions it was tasked with, a fact that the UN recognised repeatedly.[179]

2.35 In any event, in March 1995, Croatia announced its readiness to negotiate a mandate for a new peacekeeping force with the Security Council. Even at this stage it was hoped that the new UN mandate and the implementation of the Economic Agreement would lead to the "erosion" of the 'RSK' and ultimately to the peaceful reintegration of these areas into Croatia.[180] However, this was not to be.

(4) The Z-4 Plan and its Rejection by the Rebel Serbs

2.36 Once again, in an effort to show that Croatia was "not genuine in its efforts for peace", the Respondent attempts to manipulate the facts with regard to the Z-4 Plan. The Reply already set out how the Respondent had contradicted itself regarding the alleged acceptance of the Plan.[181] That account stands and is not contradicted by the Respondent's textual manipulation in the Rejoinder.[182] The Z-4 Plan was presented to Croatia and the rebel Serb leadership on 30 January 1995.[183] Croatia, with some reservations, accepted the Plan, while the Respondent claims that the rebel Serbs declined to negotiate because of Croatia's decision not to extend the UNPROFOR's mandate. The evidence before the Court tells a different story. The 'RSK's' rejection of the Z-4 Plan was not prompted by Croatia's decision not to extend UNPROFOR's mandate: it was part of the rebel Serb policy to negotiate with Croatia as representatives of an independent sovereign state, as equals, whereas the international community recognised that the UNPAs were integral parts of the territory of Croatia and that Croatia had a right to preserve its territorial integrity.[184] This is a clear example of the fact that the Serb rebels had no intention

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[179] Reply, paras 10.74-10.76 (internal citations omitted). See also *The United Nations and the Situation in the Former Yugoslavia*, Reference Paper, Revision 4, UN, Department of Public Information, For Information - Not an Official Record, New York, July 1995, 8, which states: "However, non-cooperation by the local Serb authorities had prevented UNPROFOR from achieving the demilitarization of the UNPAs and the disarming of the Serb Territorial Defence and irregular forces in those areas and in the 'pink zones'. As a result, UNPROFOR had not been able to establish the conditions of peace and security that would have permitted the voluntary return of refugees and displaced persons to their homes in these areas. Nor had it been able to establish the border controls called for in resolution 769 (1992)"

[180] Reply, para. 10.77.

[181] Reply, paras 10.110 - 10.112.

[182] Rejoinder, paras 673 *et seq.*

[183] It *inter alia* envisaged a high degree of autonomy for the 'Krajina' region within Croatia, and provided that Eastern Slavonia, Baranja, Western Sirmium, and Western Slavonia would be reincorporated into Croatia with lesser forms of autonomy. It provided for a five-year transition period for the restoration of full sovereignty for Croatia.

[184] Nikica Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp. 474-480 cited in the Reply, para. 10.79.

of seeking a peaceful resolution, and that no option other than independence was acceptable to them. In the event that they were unable to secure territory, the rebel Serbs followed a set pattern: they would leave a territory, rather than accept Croatian sovereignty. A similar pattern was followed in Western Slavonia after *Flash,* in the 'Krajina' after *Storm* and in Bosnia.

2.37 In the Reply, the Applicant stated that on 8 February 1995, the Assembly of the 'RSK' decided to postpone the implementation of the economic agreement.[185] This affected further negotiations on a political agreement and the officials of the 'RSK' refused to accept the draft 'Z-4 Plan' until the extension of UNPROFOR's mandate had been assured. The Respondent admits as much.[186] The Respondent's other allegations in this regard have already been refuted.[187]

2.38 The non-renewal of UNPROFOR's mandate was merely a pretext to avoid implementing the Economic Agreement and negotiating for a peaceful settlement. This was confirmed when Croatia agreed to the United Nations Confidence Restoration Operation ("UNCRO") but the rebel Serbs failed to initiate negotiations on the Z-4 Plan instead expressing dissatisfaction with the new mandate.[188] This was recognised by the ICTY Trial Chamber in *Martić* which stated *inter alia* that there was "evidence that Milan Martić acted under the instruction of Slobodan Milošević to reject the Z-4 Plan." [189]

2.39 UNCRO was established on 31 March 1995.[190] At a meeting of their "Assembly", at Borovo Selo on 20 May 1995, the Serb population in the 'RSK' rejected the name UNCRO on the grounds that it prejudged a political solution, and rejected the operative provisions of Security Council Resolution 981 (1995) (which treated the rebel Serb-held territories as part of Croatia and established UNCRO's mandate). The "Assembly" expressed its readiness for further cooperation with the UN in the search for a peaceful and just solution to the conflict "based on principles of impartiality and equal honouring of the sovereign rights of the Serb nation in the Republic of Serb Krajina."[191]

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[185] Reply, para. 10.80.

[186] Rejoinder, para. 673.

[187] Reply, paras 10.79 *et seq.*

[188] Reply, para. 10.82, citing Nikica Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], Zagreb, 2005, pp. 489-490.

[189] *Martić,* para. 157, states:

> "On 30 January 1995, Milan Martić, as President of the RSK, refused to accept the Z-4 Plan, as Croatia had announced that it would not accept an extension of UNPROFOR's mandate. The mandate was eventually extended in March 1995 and focused on reconstruction and cooperation, however Milan Martić continued to refuse to negotiate the Z-4 Plan because the reshaped UNPROFOR, now called UNCRO, was not a protection force."

[190] Security Council Resolution 981 of 31 March 1995. It was deployed pursuant to Security Council Resolution 990 of 28 April 1995.

[191] Report of the Secretary-General submitted pursuant to Security Council Resolution 994 (1995), 9 June 1995. UN Doc. S/1995/467, para. 18 cited in the Reply, para. 10.84.

SECTION III: OPERATION *FLASH* (MAY 1995) AND AFTER

2.40 The Reply set out a detailed and chronological account of the events leading up to Operation *Flash,* and the manner in which it was conducted.[192] Once again, the Respondent is silent regarding the reasons for *Flash* and continues to misrepresent the manner in which Operation *Flash* was conducted. It appears however to have accepted the Applicant's account of how the rebel Serbs thwarted all initiatives to arrive at any peaceful settlement; failed to comply with the Vance Plan despite several opportunities to do so; continued to seek unification with Serbia and the Republika Srpska and issued orders for combat readiness and reinforcement.[193] It was in this context that Croatia decided to take steps, by military means, to restore its authority over Western Slavonia.

2.41 In the Counter-Memorial, the Respondent quoted selectively from various Reports of the Secretary General and statements of the President of the Security Council.[194] In the Rejoinder it now bases its case on wholly new evidence. It offers 7 new witness statements to support its allegation that *Flash* was the "most notorious criminal action" prior to *Storm.*[195] It is unable to offer any independent 3rd party evidence in support of this allegation, as there is none. While mention has already been made of these new materials, some additional comments are called for. *First*, the context in which these witness statements were made is unclear. It appears that they were not made in the context of an actual legal proceeding, but solely for the purpose of producing "new" evidence. *Second*, five of the seven statements were made before the same judge in Banja Luka (Bosnia). *Third*, all the statements made before the Judge in Banja Luka follow the same narrative pattern in depicting events. *Fourth*, the Witness statement of I.B.,[196] who was present in Western Slavonia through the years of occupation provides a firsthand account of the events in the Okučani area and directly refutes at least two of the statements presented by the Respondent (Dušan Bošnjak and Milena Milojević). In any event, as these events preceded *Storm*, they are irrelevant to the case before the Court. *Finally*, it is noteworthy that through the Rejoinder, including in its description of *Flash,* the Respondent uses individual statements, taken out of context and reproduces them at length only for purposes of producing "new" evidence. It gives them great attention even if they can be easily refuted, such as the statement that "the road from Okučani to the bridge on the Sava River was all covered in blood". Similarly it now refers to *Flash* as the "*most notorious criminal action*" prior to *Storm* when several international observers commended the

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[192] Reply, paras 10.85 *et seq.*

[193] Reply, para. 10.85.

[194] Reply, para. 10.86 citing the Counter-Memorial, paras 1142 *et seq.*

[195] Rejoinder, paras 651 *et seq*.

[196] Record of the Statement of I.B., 20 April 2012, Annex 9. His first statement is set out at Reply, Annex 142.

conduct of the Operation. This only serves to further undermine the Respondent's claims and credibility, and the evidence it presents in support.

2.42 The Respondent's reliance on the Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995[197] does not help the Respondent at all.[198] This document was extensively referred to by the Applicant, and provides a chronological outline of attempts by both Croatia and UNCRO to open the highway through Western Slavonia through peaceful means. It states *inter alia* that instead of reopening the motorway as instructed by the Croatian Ministry of Internal Affairs, the SVK Main Staff ordered that combat readiness be raised to a level allowing quick mobilisation which was conducted between 28 and 30 April, with 95-100% success.

2.43 The Reply also sets out that *Flash*, which began on 1 May 1995, was effectively over in 30 hours and subsequently the Secretary General referred to the "evident efforts of the Croatian Government to achieve high standards of respect for the Serbs' human rights.[199] In contrast, the rebel Serbs responded to Operation *Flash* by firing missiles at the capital of Croatia, Zagreb deliberately targeting civilians and shelling Karlovac and Sisak on 2 and 3 May resulting in 7 deaths and injuring over 200 civilians.[200] It also admits that during this time, rebel Serbs removed heavy weapons from UN storage depots.[201] In the face of these facts the Respondent argues that there was a "real possibility" of progress, but Croatia provoked the conflict in order to cleanse the area of Serbs.[202] The Respondent cannot however produce any evidence in support of this claim.

2.44 Again, the Respondent alleges that the Serbs fleeing as a result of *Flash* were targeted by Croatian forces.[203] In response to the Applicant's criticism that these allegations were unsupported, the Respondent now relies on the new witness statements which have already been referred to. The Ap-

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[197] Reply, Annex 140 (Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995.) Some of the Reports very instructive findings are set out in the Reply, para. 10.92.

[198] Rejoinder, para. 658.

[199] See Report of the Secretary-General, dated 9 June 1995 (S/1995/467), para. 15 cited in the Reply, para. 10.91

[200] Counter-Memorial, para. 1142. See also Reply, para. 10.93 which sets out that Martić was directly responsible for these attacks and refers to the *Martić* decision at the ICTY, which states *inter alia* that he admitted to it on television and that spoke of "massive rocket attacks on Zagreb which would leave 100,000 people dead."

[201] Rejoinder, para. 659. The removal of weapons and the rebel Serb's obstruction of the movement of the peacekeepers is referred to in the Report of the Secretary-General pursuant to Security Council Resolution 994 (1995), 9 June 1995, UN Doc. S/1995/467, para. 7.

[202] Rejoinder, para 663.

[203] Rejoinder, paras 652 *et seq.*

plicant responded to allegations regarding the departure of the Serbs in the Reply, and those submissions are maintained.[204] The Serb population did not leave because they were driven out by the Croatian forces. Their "exodus" was planned by the rebel Serb leadership. This fact is confirmed by the rebel Serb commission charged with establishing responsibility for the fall of Western Slavonia[205] that states *inter alia* how some civilians and soldiers began withdrawing even before the launch of the offensive. It specifically mentions "evacuation orders" made by the SVK commanders; the disruptive nature of the evacuation process and the fact that soldiers and civilians were evacuating together.[206] A similar pattern was observed after Operation *Storm.*

2.45 Contrary to the Respondent's allegation that the Serbs that remained in Western Slavonia were persecuted,[207] in a Report of 9 June 1995, the UN Secretary-General noted that the Croatian Government sought to encourage Serbs to remain in the Sector and issued personal documents, including citizenship papers and passports, to those who applied for them.[208] However, while Croatia was encouraging the Serbs to stay, the rebel Serb leaders were encouraging them to leave, and they put enormous pressure on the UN authorities to facilitate the departure of the Serbs from the area.[209] A significant contributory factor for the departure of the Serbs during *Flash* and later *Storm* was the years of propaganda and indoctrination by the FRY/rebel Serbs that the Croatian Government was undemocratic and genocidal, that Croats were 'Ustashe' and that it was impossible for the Serbs to live in Croatia, under Croatian authority. The highest officials in the 'RSK' made statements to this effect. For example in February 1995, Milan Martić, the President of the 'RSK' stated:

> "Can we to agree to our own deaths? Life in Croatia would be worse than any death. Life in Croatia - would that be any life?" [210]

After *Flash*, Serbs in the rebel areas voiced their anger at the Croats to UN representatives, stating that "they would rather die of hunger than talk and trade with Croats now".[211] Serbs who chose to remain in Croatia after Operation *Flash* were seen as traitors.

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[204] Reply, paras 10.94 *et seq.*

[205] See RSK, Report of the Commission Charged with Establishing Responsibility of the Military Organisation for the Fall of Western Slavonia, 13 July 1995, Reply, Annex 141. See also the Report on the Causes and Manner of the Fall of Western Slavonia, produced by rebel Serbs on 11 July 1995, Reply, Annex 140.

[206] Reply, para. 10.97 (internal citations omitted).

[207] Rejoinder, para. 657.

[208] Report of the Secretary-General of 9 June 1995, para. 14 cited in the Reply, para. 10.98.

[209] Reply, para.10.98 (internal citation omitted).

[210] Reply, Annex 146 (RSK, Minutes of the RSK Assembly, 8 February 1995). See also para. 3.50, *infra*.

[211] See RSK, Ministry of the Interior, State Security Department, Doc. No. 08/2-0-1224/95, Knin, 8 June 1995, with excerpt from the Weekly Civilian Affairs Report, Annex 10.

2.46 Finally, it is worth mentioning again that a comprehensive ICTY investigation of Operation *Flash* did not result in any charges at all with regard to the conduct of this operation.

2.47 In a Report after *Flash*, the UN Secretary-General noted that the rebel Serbs were in contravention of the cease-fire agreement and had placed several preconditions on meeting with the Croatian military commander.[212] He also noted that the "moves by the Krajina Serb leadership to establish a union with the Bosnian Serbs makes it difficult to stabilize the military situation. While the unification of two self-proclaimed and unrecognised entities would have no international legal validity, senior Croatian Government officials have expressed concern about the effect of such a move on the implementation of the economic agreement of 2 December 1994 … and the commencement of political negotiations."[213]

2.48 Despite these facts the Respondent argues that it was "Croatia that was not genuine in its alleged peaceful efforts".[214] It cites Ambassador Galbraith's testimony at the ICTY and the UN Secretary General's Report of 3 August 1995.[215] These citations merely strengthen Croatia's case.[216] The Respondent also argues that both Mrkšić's testimony in *Gotovina* and his order of 1 June 1995 show that he wanted to accept a peaceful solution.[217] The record shows otherwise. In fact Mrkšić stated that his task was to reorganize the SVK, so that by October 1995, "[w]e would have been able to inflict such losses as would have proved unbearable for the Republic of Croatia. They would have to give up on the idea of an attack and opt for a peace solution."[218] It is unclear how the Respondent sees this statement as proof of the fact that the rebel Serbs wanted peace.

(5) Continuing Failure of Peace Initiatives After *Flash:* The Negotiations in Geneva

2.49 The Reply set out an account of the events in the days before *Storm.* That account stands. It showed how the contents of a letter from the Secre-

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[212] See the Report of the Secretary-General of 9 June 1995 (S/1995/467), para. 12.

[213] *Ibid*.

[214] Rejoinder, p. 259.

[215] Rejoinder, paras 680-681.

[216] Though Galbraith states that he believed that Croatia would take over the 'Krajina' in November 2004, this did not happen and Croatia continued to negotiate in the hope of a peaceful solution. The Secretary General's Report supports Croatia's account of the happenings in Bosnia over that summer, *viz* that the rebel Serbs were assisting Serb forces in BH in contravention of several UN Resolutions. See Reply, paras 11.07 *et seq.*

[217] Rejoinder, para. 672 and Mrkšić's Order of 1 June 1995, Reply, Annex 152.

[218] *Gotovina* Trial Transcript, 18 June 2009, p. 18829:12-23, Mrkšić Testimony.

tary General to the President of the Security Council, did not advance the Respondent's case that Croatia wanted war at any cost.[219] On the contrary it clearly indicated that Croatia was willing to negotiate. Once again, the Respondent turns to the letter and alleges that the Applicant "misinterprets [its] substance."[220] A plain reading of the letter does not support the Respondent's argument. It reveals that the rebel Serb delegation continued to prevaricate.[221] This is clear from Martić's comments on 2 August 1995, where he stated:

> "Croatia will most likely conduct new aggression towards the RSK. *We attempted to delay this by agreements and negotiations in order for it to be avoided.* However, their position is precisely to gain support for a military solution in order to stabilize themselves within, and you know how much instability they are suffering. But if we succeed, and I sincerely hope this will be the case, and we wait "as a host" and defeat them, then *our recognition will be truly imminent. The RSK would then become the utmost reality, it would be realistic that we be recognized worldwide and that Croatia be defeated, they would be forced to shake our hands and say, the RSK exists*."[222] (emphasis added)

2.50 The letter clearly indicates that the Serbs continued to stall negotiations.[223] The Serb offer to accept the ICFY proposals "as a useful basis for progress, subject to clearance by its political leadership" was yet another time wasting tactic. According to the Respondent, Mr. Akashi's statement to the ICTY in the *Gotovina* case provides the "proper context in light of which the negotiations have to be assessed", and that Mr. Akashi confirmed that towards the end of the meeting Martić accepted the agreement. The Respondent set out an excerpt from the testimony that allegedly supports this.[224] This is a blatant manipulation of Akashi's testimony. Akashi testified that Martić and the Krajina Serb leadership initially claimed to agree to Akashi's proposal, but towards the end of the meeting Martić changed his mind. This is

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[219] Reply, paras 11.32 *et seq.* See Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, Reply, Annex 151.

[220] Rejoinder, para. 674.

[221] Reply, paras 11.32-11.35.

[222] See Milan Martić speaking in Ravni Kotari, 2 August 1995, Reply, Annex 161.

[223] Letter dated 7 August 1995 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/1995/666, Annex 151, para. 5 states:

> "After a series of bilateral meetings, [Mr Stoltenberg] the Co-Chairman presented to the two delegations a list of seven points covering, *inter alia*, the reopening of the oil pipeline, the reopening of the Zagreb-Knin-Split railway and negotiations on a final settlement on the basis of the 'Zagreb-4' plan. *The Croatian Serb delegation was inclined to accept the paper as a useful basis for progress, subject to clearance by its political leadership…*" (emphasis added)

[224] Rejoinder, para. 676.

clear from Akashi's earlier testimony.[225] Furthermore, Akashi informed Kofi Annan, that Martić had, in fact, refused to sign the agreement.[226] Therefore, it is clear that Martić did not agree to Akashi's proposal. Also, while Babić was "accepting" the Z-4 plan (as the Respondent argues)[227], Martić was instructing his chief negotiator in Geneva, Prijić, that they could not accept Z-4 and to delay any agreement with Croatia, with political talks after the month of August.[228]

2.51 As these "peace negotiations" in Geneva were underway, the Serb forces were preparing an offensive. By 3 August, the Serb leadership knew that Operation *Storm* would commence the next day, yet they decided to reject peaceful reintegration, and to rely on the international community to pressure Croatia into ending Operation *Storm*.[229] Despite these facts, the Respondent continues to allege that Croatia did not want peace as its "concealed intent was not to allow the Serb population to remain on its territory." [230]

2.52 Despite its convoluted arguments in this regard, the fundamental facts remain unchanged, and are, in substance, admitted by the Respondent.

- The Respondent admits that the UNPROFOR's difficulties in fulfilling its mandate from the very beginning of its deployment in 1992, were "to a considerable extent due to the attitude of the RSK authorities"[231]

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[225] *Gotovina* Trial Transcript, 16 September 2009, p. 21753-21754. Akashi stated:

> Q: But my question for you is: Based on the portion of the cable I wrote to you and based on the video where you stated that you received the agreement of Mr. Martić and others, did you, in fact, consider that you had reached such agreement with the Krajina leadership, despite the behaviour of Mr. Martić and Mr. Macura at the meeting?
>
> A: I believe that Mr. Martić agreed with us to observe these six points during our meeting. *However, as I told you yesterday and is described in my cable to New York, he changed -- he apparently changed his mind, and he decided to backtrack on that, and we were extremely disappointed and disturbed by his sudden change of attitude.* I think his colleagues who are with him were also taken by surprise, and, therefore, we wanted to tell the entire press that there was an agreement at some point in time, and then there were subsequent change of mind by Mr. Martić. So I wanted everybody to know that there was agreement; then by some emotional turn of events, only one person in the Knin leadership felt that he could not honour it, he did not want to honour it. (emphasis added)

[226] UN, Coded Cable from Akashi to Kofi Annan, Meeting in Knin, 1 August 1995, Annex 11.

[227] Rejoinder, para. 675.

[228] Reply, para. 10. 112. See also Excerpts of Intercepts between Milan Martić and Ilija Prijić, Nos. 65 (3 August 1995, 14:42), Reply, Annex 163. Similarly, Dušan Viro, "Slobodan Milošević: The Anatomy of Crime", Profil, Zagreb, 2007, pp. 370-378, Reply, Annex 164.

[229] Reply, para. 11.36.

[230] Rejoinder, para. 677.

[231] Counter-Memorial, para. 1160.

- The Respondent admits that of these difficulties, "of particular importance was the RSK's failure to fully demilitarize the UNPAs"[232]; and that "Krajina was not fully demilitarized" [233]

- The Respondent admits that until 1995 the 'RSK' refused "to consider options involving reintegration of [UNPAs] into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected."[234]

2.53 Despite these admissions, the Respondent continues to make futile arguments that "negotiations were heading towards a peaceful solution and that there was no need for an attack by Croatia"[235]; that there was "progress between the parties"[236] (though at para 677 they also admit to the "failure of peace negotiations") and that Croatia was "not genuine" in its efforts for peace.[237] Once again, these allegations are unsubstantiated and contradictory. They ignore four years of diplomatic actions and negotiations that ultimately failed. They also ignore the attitude of the rebel Serbs in these negotiations. This attitude was exemplified by a representative in the "RSK" Assembly from Daruvar, who alleged that Veljko Džakula (then Deputy Prime Minister of the "RSK" government and president of the "Municipal District of Western Slavonia") had committed high treason by signing the Daruvar Agreement on peaceful settlement in Eastern Slavonia. He echoed the prevailing position of a vast majority of the rebel Serbs, when he stated that that he did not want autonomy and local self-government, that he could have had this before the war as well but had not wanted this. Referring to the Daruvar Agreement he stated: "This territory is now held by the Ustashas, people want to return but not under the Ustasha rule - never!" [238]

2.54 During this time Knin continued to seek closer ties with Serbia and the Republika Srpska and continued to use Croatian territory to launch attacks on the UN safe haven of Bihać in Bosnia in violation of UN Security Council resolutions. This is borne out by the record and not denied by the Respondent. Even at this stage, on 17 July 1995, in a meeting with senior Croatian leaders, President Tuđman stated that Croatia would not launch a military operation against the 'Krajina' Serbs until the end of the UNCRO mandate, and only if the UN operation resulted in a failure would Croatia opt for military action. He stated:

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[232] *Ibid*.

[233] Rejoinder, para. 668.

[234] Counter-Memorial, para. 1160.

[235] Rejoinder, para. 666.

[236] Rejoinder, para. 255.

[237] Rejoinder, para. 259.

[238] Reply, para. 10.63, footnote 133.

> "In these circumstances, we shall not undertake any operations on Croatian soil until the end of the UNCRO mandate. However, it has to be stressed that in a political sense, particularly in military publications, and also in public, that we demand that UNCRO implement its actions, implement its mandate, in order to create an atmosphere, a climate in which the international community can then accept with an understanding what we will have to undertake, if we do not reach a peaceful solution with the help of Europe and the world as it is."[239]

2.55 As a sovereign state that found its territory subject to rebel control, Croatia took the necessary lawful measures to regain control over its own territory through Operation *Storm*.

[239] Minutes of the meeting of the President of the Republic of Croatia, Dr Franjo Tuđman, with a delegation from the Ministry of Defence and senior military officials, held on 17 July 1995 in Brioni, available at: http://bit.ly/OB8Go5.

CHAPTER 3

OPERATION *STORM*

INTRODUCTION

3.1 As noted in Croatia's Reply, Operation *Storm* was a military and police operation aimed at regaining territory that had been illegally occupied by the rebel Serbs (directed, commanded, controlled and provided with substantial assistance or support by FRY/Serbia) in 1991. It was conducted after 4 years of unsuccessful negotiation for a peaceful settlement, under the auspices of the UN and other international agencies. Despite every effort, the rebel Serbs (together with FRY/Serbia) refused to consider options involving reintegration of these territories into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected.[240] Despite several opportunities they continued to delay any meaningful political dialogue, let alone settlement. By 1995 the UN recognised that it had failed in its mandate for which it primarily blamed the rebel Serbs.[241] During this time the rebel Serbs sought unification with Serbia and the Republika Srpska in Bosnia and Herzegovina ('BH'), and used Croatian territory to launch attacks into neighbouring BH in flagrant violation of numerous Security Council Resolutions. The Respondent does not dispute this. Last ditch efforts to negotiate a peaceful settlement failed, and on 4 August 1995, Croatia launched Operation *Storm.*

3.2 Operation *Storm* was not a "brutal attack" on the 'Krajina' with the purpose of "entirely eliminating Serb life in that territory" as the Respondent alleges. [242] Its aim was not to drive out Serbs who had been resident in the region "as part of a centuries-old community" as alleged.[243] This claim, and the claims that the Applicant carried out forcible displacement, mass killings, indiscriminate shelling, plunder and destruction of Serb property are entirely without foundation. The Applicant does not accept that some of these acts are, as a matter of law, capable of amounting to genocidal acts: this issue is addressed in Chapter 4. In any event, while characterised somewhat differently in the Counter-Memorial, each one of these allegations were comprehensively refuted in the Reply.

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[240] The Respondent admits this in para. 1160 of its Counter-Memorial.

[241] UNPROFOR had difficulties in fulfilling its mandate from the very beginning of its deployment and Serbia admits that this was "to a considerable extent due to the attitude of the RSK authorities." Serbia also admits that it refused "to consider options involving reintegration of [UNPAs] into Croatia, despite the clear commitment of the Security Council that Croatia's sovereignty and territorial integrity should be respected." See Counter-Memorial, para. 1160.

[242] Rejoinder, para. 688.

[243] *Ibid.*

3.3 Once again, the Respondent attempts to define the 'Krajina' as different and separate from the rest of Croatia. It was not a "distinct geographically located community" and all the Serbs resident in the area in 1995 were not "part of a centuries-old community."[244] This issue has been dealt with earlier[245], and will be touched upon in the following Chapter.

3.4 While it is a fact that a number of Serbs left the area, before, during or after *Storm,* this departure occurred for a variety of reasons, including an anti-Croatian propaganda induced belief that Serbs could not live with Croats or under Croatian authority. Others fled because they were made to flee by the rebel Serb forces. They were not "driven" from the area and there was no "forcible displacement." There was no "indiscriminate shelling" of towns and villages; no targeting of those who stayed and no policy of imposing barriers to the return of the Serb refugees. The Applicant took measures to prevent unlawful acts before, during and after *Storm*, including investigations and legal proceedings to punish individual perpetrators of such acts.

3.5 The Applicant's response to Serbia's allegations regarding Operation *Storm* is as follows:

> **Section I** responds to Serbia's allegations regarding the planning and preparation for the liberation of the occupied territories, in particular the allegation that the minutes of the meeting at Brioni "directly prove the *dolus specialis* of the crime of genocide."[246]
>
> **Section II** responds to the allegation that the Applicant committed genocide through Operation *Storm* and thereafter. As set out in the Reply, there was (1) no "deliberate indiscriminate" shelling; (2) no forcible expulsion of the Serbs; (3) no targeting of those fleeing and no "systematic killing"; and (4) no imposition of barriers to their return.

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[244] Rejoinder, para. 690.

[245] Reply, para. 10.10 that states *inter alia* that no region called the "Krajina" ever existed in the territory of Croatia. From a historical and geographical perspective, Vojna Krajina (Military Krajina) was the border separating the Hapsburg and Ottoman Empires and was spread over a considerably larger area than the rebel Serb occupied territories, and the inhabitants of the region were both Serbs and Croats. Similarly, throughout history and more recently, Serbs lived and worked in other areas in Croatia, and numerous Croatian citizens, representing different ethnicities, lived in Krajina. According to the last census conducted in Yugoslavia in 1991, the areas that later came to be occupied and held by the rebel Serbs and the JNA (the area of the 'RSK') were inhabited by 287,830 Serbs (52.4% of the population). The rest of the population was made up of Croats and people of other ethnicities. Later, as a result of the Serb aggression in 1991 a majority of the Croats fled from these areas and the population demographic changed. It is noteworthy that according to the census conducted by the National Institute of Statistics of the Republic of Croatia, on 31 March 1991, there were more citizens of Serb nationality living in Zagreb than in Knin. A map of the *Vojna Krajina* is at Reply, Annex 147.

[246] See e.g. Rejoinder, para. 692.

* * *

3.6 Before proceeding to Section I, two preliminary comments are required. The *first* pertains to the use of evidence and the *second* to the noteworthy omissions/admissions made by the Respondent.

3.7 The introductory chapter has made some observations on the Respondent's use of evidence. A particularly notable feature is the Respondent's new evidence, including 15 witness statements from Serbian and Bosnian domestic Courts.[247] These appear to have been submitted in response to the Applicant's criticism of the Respondent's reliance on the discredited *Veritas* Report and the flawed CHC Report.[248] Another feature of some note is the Respondent's insistence on citing witness testimony from the *Gotovina* trial, rather than relying on the judgment. There are examples of testimony being discredited during cross-examination and subsequently not specifically relied upon by the Trial Chamber, such that its accuracy is questionable and the Respondent's reliance upon it is problematic.[249] It is submitted that the Court must exercise much caution when relying on testimony.

3.8 The second issue of some significance is that the Respondent appears to have accepted the Applicant's account of various matters as set out in the Reply. The Respondent has not challenged the Applicant's account of the military actions in Bosnia over the summer of 1995, where the Respondent and the 'RSK' were acting in clear contravention of the directions of the UN; the political and military developments in the 'RSK' and the continuing pursuit of a state for all Serbs.[250]

SECTION I: PLANNING FOR THE LIBERATION OF OCCUPIED TERRITORY

3.9 The Applicant set out the context in which the Brioni meeting of 31 July 1995 was held, its purpose and its participants.[251] The Respondent claims that the attitude of the Croatian authorities towards the Serbian population

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[247] Rejoinder, para. 582.

[248] As to the flaws in the CHC Report see Chapter 1, para. 1.35.

[249] An example of this can be seen with respect to the evidence of John Hill cited by the Respondents at Rejoinder, para. 701. Hill's testimony regarding his interaction with Major I.J, a Croatian military police commander was refuted by Major I.J., who also testified at the Trial that he could not speak English and therefore could not communicate properly. See trial transcript, pages 27517-27518). See also Reply, para. 2.33 which deals with reliance on the testimony of witnesses generally.

[250] Reply, paras 11.07-11.28.

[251] Reply, paras 11.40 *et seq.*

"crystallized into genocidal intent at the time of operation Storm" and that this is evident from the Brioni transcript.[252] In the Rejoinder it states that these minutes directly prove the "*dolus specialis* of the crime of genocide."[253]

3.10 Two remarks are called for regarding the transcript. *Firstly,* the transcript of the Brioni minutes is the sole evidence the Respondent relies upon and this is the translation of a transcription made from a tape of the meeting.[254] At the Gotovina *et al* Trial, no participant confirmed it. Although Rajčić, a prosecution witness, confirmed that he attended the meeting, he disputed that it was an accurate record.[255]

3.11 *Secondly,* while the Respondent claims that the Applicant does not deny the "accuracy" of the Transcript,[256] this is not entirely true. Accuracy, authenticity and reliability are all different issues, though they may overlap. Annex 52 may well be authentic transcript of a genuine recording, however the Applicant places on record its concerns regarding putting too much emphasis on it. Briefly these are as follows:

i. There are several gaps in the recording. This is clear from the annexed document. These gaps are indicated by ellipses where whole parts of speeches may not have been recorded. There are also other markings on it - several markings such as ("unclear"), ("Several voices heard simultaneously"), ("papers being shuffled"), ("Intermingling of voices") and so on that show that the recording from which the transcript was made was far from a complete and accurate recording.

ii. The transcript doesn't provide any indication of the general mood of the meeting, its (in)formality, whether anything said was said sardonically or ironically. Things may have been added, or lost in translation, including nuances and idiomatic expressions that are sometimes incapable of direct translation. In short, the Court has no evidence of the myriad, nonverbal and situational factors

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[252] Counter-Memorial, para. 1194.

[253] Rejoinder, para. 692.

[254] Counter-Memorial, Annex 52.

[255] The Trial Chamber in *Gotovina* noted that Rajčić commented on the Brioni transcript, *Gotovina* TJ, para. 1985. In his testimony (T16596), he stated:

> "First of all Mr Russo, this body of text that we see does not correspond, neither in its format, nor in its content, to - with the meeting I attended on the 31st of July at Brioni. If you wish our communication to continue along these lines, then I would have to read the whole text, but I believe I can say with full responsibility that this piece of text I've read does not correspond, neither in terms of format, nor in terms of content, with the meeting I attended and the way developed."

[256] Rejoinder, para. 693.

which would provide vital context to what was said and its significance.

iii. Issues with regard to the quality of the translation were also noted by the Trial Chamber.[257]

(1) The Meeting at Brioni, 31 July 1995

3.12 As set out in the Reply, on 31 July 1995, President Tuđman met with senior military officials at Brioni to consider military options for re-taking Croatian territory in the event that the Serbs refused to accept peaceful reintegration. The participants at the meeting were not discussing plans to "re-conquer the territory of the [RSK], i.e. the protected areas of UN Sectors South and North" as the Respondent alleges.[258] *Firstly*, Croatia was seeking to liberate territory that had been occupied for nearly 4 years, a fact recognised by the international community and *secondly* in seeking to do so it was not "reconquering… protected areas." By July 1995, the UNPROFOR had been replaced with the UNCRO, and its mandate and functions differed. The UNCRO was an interim arrangement to create the conditions that would facilitate a negotiated settlement consistent with the *territorial integrity of Croatia* and which would guarantee the security and rights of all communities living in Croatia. In fact, by that time the so-called "protected areas" were referred to as "former Sectors North and South."

3.13 The Applicant reiterates and maintains all the submissions it made with regard to the Brioni Minutes in its Reply.[259] The Brioni Meeting is the sole basis for the Respondent's conclusion that an alleged "criminal goal" came into being by that date. Absent any such criminal goal at the Brioni Meeting, there is no foundation whatsoever for the Respondent's claim.

3.14 Yet again, the Respondent claims that President Tuđman shared a "criminal goal" with his top military leadership at Brioni, that the "Serbs would to all practical purposes disappear."[260] In doing so, the Respondent, continues to mischaracterise a statement of the President. In the Counter-Memorial, the Respondent had repeated this alleged goal of making the Serbs "disappear" no less than 18 times.[261] It is the same in the Rejoinder.[262] As stated earlier, a contextual examination of what the President said made it clear that his reference

[257] See e.g. *Gotovina* TJ, para. 1994.

[258] Rejoinder, para. 695.

[259] Reply, paras 11.40-11.52, see particularly 11.42.

[260] Rejoinder, para. 695.

[261] See e.g. Counter-Memorial, paras 1197, 1198, 1237, 1328, 1329, 1331, 1334, 1353, 1386, 1397, 1416, 1421 (repeated twice), 1422, 1425, 1431, 1447 (twice), 1462 and 1467.

[262] Rejoinder, paras 348, 695-699, 702, 703, 712, 714, 717, 728, 761, 779, 784, 829.

to "Serbs" was a reference to "Serbian forces", not Serb civilians. This was also clear from the use of the word "capitulate" which indicated that the statement referred to the capitulation of the Serbian forces, not Serb civilians.[263] This interpretation has been accepted by the Trial Chamber in the *Gotovina* case which found that:

> "When read in its context, the Trial Chamber considers that this particular statement focused mainly on the Serb military forces, rather than the Serb civilian population."[264]

3.15 There is also nothing sinister or criminal about President Tuđman's other statement, referred to as a "convincing example" of his alleged disregard for Serb civilians.[265] A reading of the Transcript shows, again, how the Respondent is selective in its quotation. His statement related to a discussion on the impact of evacuations on the morale of SVK forces and avoidance of a "bloody last stand."[266] There was no suggestion that beyond leaving a way out, HV forces should cause a Serb departure through the commission of crimes.

3.16 The Respondent states that the events that followed Brioni confirmed Tuđman's words that he was in favour of "destroying everything."[267] It is also alleged that the Serbs who decided to stay "were hunted down and killed", their houses set on fire and looted, their cattle killed, and wells poisoned.[268] The Respondent argues that this is a clear indication that the President's "aim was to destroy the Serb people of Krajina, as such."[269] These allegations were made in the Counter Memorial and were fully repudiated in the Reply. The Respondent again ignores or misrepresents relevant facts that contradict the case it seeks to put forth. It draws conclusions at odds with the actions of the parties at that time. In doing so it either ignores the contents of the Reply, or miscasts the Applicant's response.

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[263] See Brioni Minutes, Counter-Memorial, Annex 52, p. 2.The President instructed his commanders as follows:

> "Therefore we should leave the east totally alone, and resolve the question of the south and north. In which way do we resolve it? This is the subject of our discussion today. We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must *capitulate* within a few days. […]
>
> Therefore our main task is not Bihać, but instead to in»ict such powerful blows in several directions that the Serbian *forces* will no longer be able to recover but will have to capitulate." (emphasis added)

[264] *Gotovina* TJ, para. 1990.

[265] Brioni Minutes, Counter-Memorial, Annex 52, p. 15 referred to in the Rejoinder, paras 698, 699.

[266] Reply, para. 11.48 citing Brioni Minutes, Counter-Memorial, Annex 52, p. 7.

[267] Rejoinder, paras 700-701.

[268] Rejoinder, para. 701.

[269] Rejoinder, para. 702.

(a) No "criminal agreement directed at the Serb population" was reached at Brioni

3.17 The Respondent alleges that a statement made by General Gotovina confirmed that the "aim of the operation was to remove the Serbs from Krajina." In the statement in question, Gotovina stated:

> "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." [270] (Emphasis in the Rejoinder)

3.18 Yet again, the Respondent fails to set out the context in which Gotovina made this statement. The statement was made in response to what the President had just said and should be analysed in that context. The President had said how it was important for the civilians to evacuate because "then the army will follow them" and then seeing the "columns set out" this will have a "psychological impact." In other words, the departure of civilians and the departure of the army would have a mutually reinforcing effect on each other and the evacuation. Gotovina's response that "a large number of civilians are already evacuating Knin" was a factual statement. Those present at the meeting were aware of this. The ongoing departure had already been the subject of discussion. However, the Respondent ignores the context and argues that this statement confirmed that the aim was to remove civilians per se, divorced from the military objective of swiftly defeating an enemy army. The Applicant had addressed this issue in the Reply.[271] As explained there, the "pressure" referred to the threat of an HV attack.

3.19 According to the Respondent, the argument that the Serbs fled because they were afraid of an HV attack "does not have any significance for the legal characterization of this case." [272] They argue that the past experience of the Serbs (after *Flash*) and the subsequent killings and crimes in Sectors North and South prove that the fears of the Serbs were fully justified, and they had to flee to save their lives.[273] Chapter 4 deals with the legal characterisation of the Respondent's case.

3.20 As regards the Respondent's other allegations, *firstly,* its allegations regarding *Flash*, (which are outside the purview of the case) have been dealt

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[270] Rejoinder, para. 703 citing the Brioni Minutes, p. 15.

[271] Reply, para. 11.46. See also Reply Annexes 165, pp.16, 20; Annex 166 which demonstrate that the Serb civilians and soldiers were fleeing the 'Krajina' in the days before Operation *Storm*.

[272] Rejoinder, para. 704.

[273] *Ibid*.

with in Chapter 2. *Secondly*, the central plank of the Respondent's case is that the Applicant developed a plan to drive out Serb civilians permanently using unlawful shelling and creating legal obstacles to their return. Yet neither of these objectives were discussed at Brioni. On the contrary, Tuđman's view, as expressed at Brioni was that it was better that a town should fall (without shelling) rather than that it should be shelled.[274] Therefore the Respondent's interpretation of Brioni in light of "subsequent" events - i.e. finding that systematic unlawful shelling subsequently occurred and that obstacles to return were subsequently created, and that the Brioni discussions must, therefore, have been an agreement to implement those objectives - reflects flawed reasoning. Likewise, President Tuđman's statements on the days and weeks following Brioni cannot cast light on what was in the minds of the other participants at Brioni. Nor can subsequent discussions concerning the return of Serbs and policies related thereto provide any basis for inferring that these matters were agreed to at Brioni, particularly when there was no discussion at Brioni whatsoever about preventing Serbs from returning.

3.21 It is noteworthy that the Respondent, mentions the evacuation plans of the Serbs for the first time in the Rejoinder.[275] It argues however, that the Croatian military leaders did not give the Krajina Serbs "any genuine choice" and that their "massive displacement was organized and executed against their will."[276] It goes on to argue that at the Brioni meeting, "President Tuđman 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."[277] As set out in the Reply, there is overwhelming evidence that the 'RSK's' evacuation orders and propaganda induced fear of Croatia and its military which led to Serb civilian departures. The evidence and arguments in relation to this issue are set out below.

(b) No plan to direct artillery against civilians

3.22 The core of the Respondent's genocide claim is that President Tuđman ordered the indiscriminate and excessive shelling of civilians to force them to flee.[278] A plain reading of the transcript shows that the President urged his military commanders to do exactly the opposite. He told his commanders that the "psychological effect of the fall of a town is greater than if you shell it for two days"[279], and urged them to use artillery sparingly.[280] The Respondent ac-

[274] Brioni Minutes, Counter-Memorial, Annex 52, p. 18.

[275] Rejoinder, para. 704.

[276] Rejoinder, para. 705.

[277] *Ibid*.

[278] See e.g. Counter-Memorial, paras 1215 *et seq.* Rejoinder, paras 707 *et seq.*

[279] Brioni Minutes, Counter-Memorial, Annex 52, p. 18.

[280] *Ibid*., p. 21. See also Reply, para. 11.47.

cepts this, but argues that the President's statement only applied to the town of Gračac and not Knin.[281] In support of its allegations on the shelling of Knin, the Respondent relies on the testimony of two witnesses from the *Gotovina* trial - Andrew Leslie and Joseph Bellerose.[282] However, as set out below, contrary to these testimonies the Trial Chamber was unable to identify a single Serb civilian victim of shelling.[283]

(c) No decision to target fleeing civilians

3.23 The Respondent accepts the Applicant's submissions that the departure of civilians and soldiers was ongoing before Operation *Storm*.[284] It also accepts the fact that there was no discussion regarding the targeting of civilians/civilian columns. It now argues that the decision to target fleeing civilians "was directly provoked by the wording and atmosphere at the Brioni meeting." [285] As set out earlier, the Brioni transcript, is just that - a transcript, it is impossible to extrapolate what the atmosphere was like on the basis of it.

3.24 The minutes of the meeting of 2 August 1995, attended by a number of high ranking military officials, including the Minister of Defence and Generals Gotovina and Markač show the there was no "plan" to force Serb civilians out the Krajina or to target them. At the meeting, two days before *Storm* was launched, and two days after Brioni, the Croatian Defence Minister Šušak "stressed to the participants that the [m]ilitary police must be more energetic in its actions and must prevent all offences," and instructed the MD Commanders to pass on to the other commanders, the prohibition of any kind of uncontrolled conduct (torching, looting, etc).[286] These instructions are plainly inconsistent with any alleged plan to permanently expel Serb civilians from the Krajina, direct artillery at them or indeed target fleeing civilians.

(d) No discussion at Brioni regarding the murder of civilians and the destruction of property

3.25 The Respondent does not allege that there was any discussion regarding the murder of civilians, the destruction of property or any alleged obstacles to return at Brioni.[287] Given that the Respondent has not referred to any "agreement" other than Brioni where the *dolus specialis* is said to

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[281] Rejoinder, para.708.

[282] Rejoinder, paras 709-710.

[283] See paras 3.37, *infra*.

[284] Reply, para. 11.48.

[285] Rejoinder, para. 712.

[286] See Minutes of the Meetings held at the Defence Ministry of the Republic of Croatia, 2 August 1995, Reply, Annex 172. See also *Gotovina* TJ, para. 1987.

[287] Reply, paras 11.51-11.53.

have emerged, it is impossible to ascertain how these alleged acts could have formed a part of Croatia's "genocidal plan."

3.26 The Respondent's reliance on the Brioni Minutes does not stand up to serious scrutiny. As stated time and again, the Brioni Meeting concerned Croatia's legitimate plan to re-integrate its occupied territory, a right it had under international law.

SECTION II: CROATIA DID NOT COMMIT GENOCIDE DURING OPERATION *STORM* OR THEREAFTER

3.27 The Respondent does not challenge the Applicant's account of the planning for *Storm,* including details of operational planning and guidance for the use of artillery. Nor does it challenge the Applicant's brief operational account of Operation *Storm,* its combatants - the Croatian armed forces and the SVK- and their weapons.[288] A full account of Operation *Storm* is set out in the Reply.[289] The Applicant has already responded to the unfounded claim that there existed a "plan" to destroy all Serbs.[290] It now addresses the new allegations regarding the conduct of Operation *Storm* as raised in the latest pleading.

(1) There Was No "Deliberate Indiscriminate Shelling" During Operation *Storm*

3.28 The Respondent alleges that the Applicant undertook deliberate indiscriminate shelling during Operation *Storm* resulting in a mass exodus of Serbs from the 'Krajina'.[291] The Respondent's allegations are unsustainable and cannot be upheld; it therefore follows that its arguments on the expulsion of Serbs from the 'Krajina' (allegedly resulting from deliberate indiscriminate shelling) must also be rejected. Serbia's case on shelling rests almost entirely on testimonies and evidence adduced before the *Gotovina* proceedings. In its Rejoinder the Respondent merely restates its earlier submissions and quotes one paragraph from the *Gotovina* Trial Chamber judgment, which is subject to an on-going appeal.

3.29 It is noteworthy that the Respondent's case on shelling has been scaled back significantly in the Rejoinder. Its arguments now focus almost exclusively on the shelling in Knin on 4 and 5 August 1995. In the Counter-Memorial the Respondent had referred to shelling in Knin, Bosansko Grahovo, Benko-

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[288] Reply, paras 11.60-11.61.

[289] Reply, paras 11.56 *et seq.*

[290] See e.g. Reply, paras 10.117 and 11.42.

[291] Counter-Memorial, paras 1215-1228; Rejoinder, paras 723-728.

vac, Obrovac, Gračac, Kistanje, Uzdolje, Kovačić, Plavno, Polača, Buković, Kruševo, Žegar, Zelengrad, Zaton, Bilišane, Muškovići and Bogatnik.[292] Most of these settlements are not mentioned in the Rejoinder. Serbia's arguments are now restricted to Knin, Benkovac, Obrovac and Gračac.[293] The weakness of Serbia's argument is reflected in the small number of pages it has dedicated to shelling in the Rejoinder.[294]

3.30 As set out above, the sole objective of Operation *Storm* was to enable Croatia to regain control of its territory illegally occupied by the rebel Serbs. It was carried out in full compliance with all applicable international rules. Artillery was used by HV forces solely to engage legitimate and pre-determined military targets in Knin, Benkovac, Obrovac and Gračac. The Trial Chamber in *Gotovina* identified legitimate military objectives in each of these towns.[295] Serbia itself recognises that Knin was subject to shelling because it was "the main city of the RSK" and as such was the military and political nerve-centre of the RSK.[296] With regard to Benkovac, Obrovac and Gračac, the Respondent erroneously stated that these "were shelled repeatedly despite having no identifiable military targets".[297] The Applicant refuted this allegation in the Reply, setting out that all three towns were shelled because legitimate military objectives were located there. Maps showing the location and nature of the military targets were annexed to the Reply but the Respondent has failed to address this.[298]

3.31 The Respondent advances four arguments relating to deliberate indiscriminate shelling: *first,* the Respondent accuses the Applicant of not adequately addressing the trial testimony advanced in the Counter-Memorial; *second*, it refers to one line from an Artillery Order of 2 August 1995; *third*, it erroneously argues that Croatia's reliance on an SVK Intelligence Report of 4 August and the testimony of SVK Commander General Mrkšić is misguided; and *fourth*, the Respondent relies on the findings of the Trial Chamber in the on-going *Gotovina* case.[299] Each of these will be addressed in turn.[300]

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[292] Counter-Memorial, paras 1215-1216; 1225.

[293] Rejoinder, para. 724.

[294] The Respondent dedicates only 2 of 322 pages in the Rejoinder to shelling.

[295] *Gotovina* TJ, paras 1899-1902; 1919; 1929-1931; 1939.

[296] Counter-Memorial, para. 1217; Reply para. 11.73.

[297] Counter-Memorial, para. 1216.

[298] Reply, para. 11.75; Reply, Annex 178.

[299] Rejoinder, paras 723-728.

[300] One argument the Respondent has dropped is its assertion in the Counter-Memorial that multiple rockets launchers (MBRLs) are "designed for open field battle and inappropriate for use in the populated civilian areas" and hence were inherently indiscriminate. (Counter-Memorial, para. 1220.) The Trial Chamber in *Gotovina* found that "although MBRLs are generally less accurate than Howitzers or mortars, their use by the HV in respect of Knin on 4 and 5 August 1995 was not inherently indiscriminate." (*Gotovina* TJ, para. 1897).

3.32 *Firstly,* contrary to the Respondent's assertion, the Reply explicitly addressed the *Gotovina* testimonies invoked by it.[301] The testimonies, rather than constituting evidence of indiscriminate shelling, are a reflection of the high number of legitimate military targets located in Knin. At least 9 different military targets were spread across the city of Knin.[302] The fact that artillery was fired at multiple targets in Knin is not evidence of deliberate indiscriminate shelling. Moreover, some key statements of witnesses relied upon by the Respondent have been refuted during the Trial and in the Trial Chamber's decision of 15 April 2011:

i. The Respondent referred to testimony by Mira Gubor, a laboratory assistant, that 120 people were killed and between 160 and 180 were injured by shelling and Knin.[303] John William Hill's testimony that 6 people were killed and 4 injured by a shell landing close to the UN compound in Knin is also referred to.[304] The Respondent also relies on testimony by Andrew Leslie to the effect that he witnessed "large quantities of dead, men, women and children, stacked in the hospital corridors in a pile.[305] These statements are clearly inaccurate. The Trial Chamber's judgment in *Gotovina* does not identify a single death or injury resulting from the shelling of Knin.[306]

ii. According to the Respondent a UN engineer for Sector South, Joseph Bellarose, testified that "the shelling of Knin was not directed at specific military targets but was deliberate harassment shelling."[307] However, this is patently inconsistent with the Tribunal's finding that, even when using its own highly restrictive 200-meter test (discussed below) 94.5% of all artillery projectiles fired at Knin were found to be directed at military objectives.[308]

iii. The Respondent also cites the testimony of Alun Roberts, a UN Press Officer, stating that "about 200 civilian locations were hit during the shelling of Knin."[309] However, Mr Roberts was only

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[301] Reply, para. 11.74.

[302] *Gotovina* TJ, paras 1899-1902.

[303] Counter-Memorial, para. 1223.

[304] Counter-Memorial, para. 1222.

[305] Counter-Memorial, para. 1223.

[306] *Gotovina* TJ, para. 1364; ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, para. 101.

[307] Counter-Memorial, para. 1220.

[308] ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, Annex A.

[309] Counter-Memorial, para. 1220; Rejoinder, para. 710.

> able to specifically identify five civilian buildings damaged by shelling. His estimate is contradicted by the Trial Chamber's findings that only 50 HV shells landed more than 200 metres from legitimate military targets and that most of these fell in open fields.[310]

3.33 *Secondly*, the Respondent quotes nine words ("shell the towns of Drvar, Knin, Benkovac, Obrovac, Gračac") from a 4-page HV Artillery Order of 2 August 1995 without explaining how these words are helpful to its case.[311] As explained in the Reply, the Order which put these towns under artillery fire explicitly directed the artillery support to engage in shelling to "rout, neutralise and destroy the enemy's combat disposition at the tactical level", to "[p]revent the enemy from bringing in new forces" and to "neutralise the artillery positions of the enemy batteries and destroy the enemies communications centres and command post."[312] If the Respondent believes that these nine words are evidence of an order to indiscriminately shell Knin, it is evidently reading these words out of context.[313] The Artillery Order of 2 August clearly put in place a plan to solely target predetermined legitimate military objects. This is the view expressed in an Amicus Curiae Submission prepared for the Trial Chamber in *Gotovina* by 12 leading military operational experts.[314] The *Amicus* Brief argues that rather than interpreting such orders "in the abstract" the Appeals Chamber should "consider the common reality […] that considering such explicit terms in the abstract can be quite misleading."[315]

3.34 Moreover, the Head of Artillery of the Split MD during Operation *Storm*, Marko Rajčić, has testified that he did not interpret that line as an order to shell the town indiscriminately, nor to treat the whole town as a target:

> "As can be seen in Section 3 of this Order to Attack - Attachment for Artillery, following Section 7 of the Operational order, I also planned

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[310] *Gotovina* TJ paras 1903-1904; ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, para. 83.

[311] Order of Attack, Split MD, 2 August 1995, Reply, Annex 171. See also Counter-Memorial, para. 1216 and Rejoinder, para. 724.

[312] Reply, para. 11.72.

[313] The Respondent's arguments regarding Croatia's alleged failure to provide artillery documents (Rejoinder, paras 724 and 732) is dealt with in Chapter 1, paras 1.50-1.51.

[314] Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm, 12 January 2012 ("*Amicus Curiae* Brief"). The Appeals Chamber declined to grant leave to file the *Amicus Curiae* Brief on 14 February 2012.

[315] *Ibid*., para. 14. The distinguished authors of the *Amicus* Brief also explain that it is unsurprising that the order employed "imprecise terminology" because it was prepared by non-legal staff officers who did so under the pressures of on-going combat (para. 15).

> fire on the towns of Drvar, Knin, Benkovac, Obrovac and Gračac. I relayed this order with the exact same language as stated in Section 7 of the operational order, because there was no need for clarification. It was clear to me, and to all the commanders of the subordinate units that this meant to fire at the selected military objectives in these towns and in accordance with the existing plans and source lists of military objectives." [316]

3.35 *Thirdly*, the Respondent seeks to discredit an SVK Intelligence Report relied upon by the Applicant to show that HV artillery was directed at legitimate military objects.[317] The Respondent alleges that the Intelligence Report was "issued in the morning of 4 August, at so early stage of the operation that no reasonable conclusion can be inferred from that."[318] The Trial Chamber in *Gotovina* held that over the course of two days approximately 900 rounds of artillery were fired at Knin.[319] The SVK intelligence report was prepared at 10:00am on 4 August by which time 200-300 projectiles (by the SVK's own admission) had been fired by HV forces, amounting to more than around 20% of all shells fired on 4 and 5 August.[320] Moreover, the very testimony relied on by the Respondent in the Counter-Memorial contradicts its assertion in the Rejoinder that the SVK Intelligence Report predates the purported indiscriminate shelling. In the Counter-Memorial the Respondent alleged that "during the morning hours of 4 August [Andrew Leslie] observed explosions all over the city of consistent nature while later the shelling became grouped across specific regions of the city."[321] The Respondent fails to explain how this account of alleged indiscriminate shelling "during the early hours of 4 August" can be reconciled with the SVK Intelligence Report prepared at 10:00am on 4 August which describes artillery fire directed solely at legitimate military objects.

3.36 The Respondent's *fourth* argument rests on the Trial Chamber's findings that the HV's shelling of Knin was indiscriminate and unlawful.[322] An

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[316] Reply, Annex 173, para. 45. Marko Rajčić also explained in his testimony to the ICTY that the formulation "putting the towns under fire" meant that the targets in those towns were to be under constant fire, which referred to a combat activity known as harassing fire and disruptive fire on enemy combat elements." See *Gotovina* TJ, para. 1188, citing Marko Rajčić, T. 16590.

[317] Rejoinder para. 725; Reply para. 11.73 and Reply, Annex 177. ("The target of the first strike was the building of the General Staff of the Serbian Army of Krajina, which sustained considerable damage and the almost complete loss of the motor pool. Subsequently the fire focused on the '1300 Corporals' barracks, the TVIK plant, the railway junction and housing below the Knin fortress [area of the residence of the "RSK president" Mile Martić - author's note] and other targets.")

[318] Rejoinder, para. 725.

[319] *Gotovina* TJ, para. 1909.

[320] SVK, Intelligence Department, Intelligence Report, 4 August 1995, Reply, Annex 177.

[321] Counter-Memorial, para. 1220.

[322] Rejoinder, para. 727.

important initial observation is that the decision of the Trial Chamber has been appealed. The first ground of the appeal is that "[t]he Trail Chamber erred in facts and law when concluding that there was an unlawful attack on civilians and civilian objects".[323]

3.37 It is submitted that the Trial Chamber erred in fact and in law with regard to its pronouncements on shelling by HV forces. The Trial Chamber received forensic evidence in relation to only three bodies of persons who were allegedly killed in Knin. The Trial Chamber held that "[t]he evidence received does not establish a link between any of these three deceased and the shelling of Knin on 4 and 5 August 1995."[324] The Appeal Brief of Ante Gotovina before the ICTY Appeals Chamber highlights the fact that "[t]he Trial Chamber was unable to establish a single death or injury" resulting from the shelling and that it was "unable to identify a single civilian terrorized by any disputed shelling incident." [325] However, despite the failure to establish a link between the three deceased and the shelling, the Trial Chamber held that Knin was subjected to indiscriminate shelling.[326] The Applicant submits that in view of the lack of evidence of deaths or serious injury resulting from the shelling of Knin, the Trial Chamber erred in its finding that Knin was subjected to indiscriminate shelling.

3.38 Moreover, the *Gotovina* Trial Chamber's pronouncements on the use of artillery and targeting during Operation *Storm* have been widely criticised by academics, specialists in the field of international humanitarian law and military law experts. As mentioned above, an *Amicus Curiae* Brief was filed by 12 highly distinguished individuals, amongst whom are retired military legal advisors, three ex-Judge Advocate Generals and a former senior legal advisor of war matters for the US Army.[327] Concerned that "the '*Gotovina*' judgment has the potential to become the '*Tadić* of

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[323] ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, p. 4.

[324] *Gotovina* TJ, para. 1364.

[325] ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, para. 101.

[326] A lack of proof of death or injury alone means that there cannot be a finding of indiscriminate attacks under Article 3 of the ICTY Statute. The ICTY Appeals Chamber in *Kordić* upheld an earlier finding that "an element of the conviction for the crime of unlawful attack directed against civilians or civilian objects under Article 3 of the Statute is that the attacks must be shown to have caused deaths and/or serious bodily injuries or extensive damage to civilian objects." (*Prosecutor v. Kordić*, IT-95-14/2-A, Judgment of the Appeals Chamber of the 17 December 2004, paras 55-57).

[327] Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm, 12 January 2012 ("*Amicus Curiae* Brief"). These individuals collectively possess 290 years experience.

targeting law'"[328] the *Amicus* Brief reviewed the Trial Chamber's judgment "with particular focus on the portion of the judgment addressing the allegation of unlawful attacks against the city of Knin"[329] and came to the conclusion that "the methodology utilized by the Trial Chamber when assessing operational effects is inconsistent with operational practice and artillery capabilities."[330]

3.39 The International Humanitarian Law Clinic at Emory University Law School convened a group of military operational law experts to discuss the legal issues and implications of the *Gotovina* Trial Chamber decision.[331] The experts shared the concerns of the *Amicus Curiae* because, as the Emory Law School Report explains, the judgment has "extraordinary import for future operations and conflicts" because the case is "the first - and likely the only - case assessing complex targeting decisions involving the use of artillery against a range of military objectives in populated areas during a sustained assault."[332] The Report states that the experts agreed that "the legal analysis as presently conceived is flawed on multiple levels".[333] The Applicant shares the view of the authors of the *Amicus Curiae* Brief and the experts convened by Emory Law School that the findings of the Trial Court pertaining to shelling and targeting are deeply flawed.

(a) Regardless of the Trial Chamber's Judgment in Gotovina, the evidence overwhelmingly shows that artillery rounds were not fired indiscriminately

3.40 The shelling of Knin was not indiscriminate because even by the Trial Chamber's own calculation (which the Applicant believes is wrong) 94.5% of shells were held to have been fired at legitimate military targets. Reputable third sources have corroborated the view that the shelling was not indiscriminate.[334] Moreover, the SVK's Chief of Artillery has admitted that the HV

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[328] *Ibid.,* para. 2.

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

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

[331] Emory University School of Law, Operation Law Experts Roundtable on the Gotovina Judgment: *Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, Public Law & Legal Theory Research Paper Series, Research paper No. 12-186, (hereinafter "Emory Paper") available at: http://ssrn.com/abstract=1994414.

[332] *Ibid*., p. 2.

[333] *Ibid*., p. 4.

[334] A UN Cable from Special Envoy Akashi to the Secretary General states *inter alia* that the damage to Knin was less than anticipated and that large numbers of homes remained untouched (UN Coded Cable from Akashi to the Secretary General dated 7 August 1995, Reply Annex 214). A Report by the UN Secretary General to the Security Council dated 23 August 1995 states that Knin was subjected to "concentrated shelling" (Report of the UN Secretary General, S/1993/730, dated 23 August 1995). See also Reply, para. 11.74.

artillery fire was "planned out to a single smallest detail: each projectile and each artillery fire."[335] As stated above, the Trial Chamber was unable to find conclusive evidence of a single civilian death or serious injury resulting from the shelling of Knin.[336]

3.41 The Trial Chamber found that at least 900 projectiles were fired at Knin on 4 and 5 August. The Chamber found that of these approximately 900 projectiles, 50 impacted more than 200 metres from objects identified by the HV as military targets.[337] It was held that approximately 40 projectiles "impacted near the ECMM building".[338] This represents 80% (40 out of 50) of all projectiles deemed by the Trial Chamber to have been fired indiscriminately. However, the figure appears to be based solely on the testimony of one unreliable witness, Murray Dawes. For instance, the Trial Chamber rejected Dawes' contention that HV forces had fired cluster bombs at Knin.[339] Other witnesses before the Trial Chamber could not identify anywhere near as many projectiles impacting in the vicinity of the ECMM.[340] It is also patently obvious that some of the Trial Chamber's legal findings are contradicted by its own factual determinations. For example, the Trial Chamber held that Gračac had been subjected to indiscriminate shelling, despite simultaneously finding that "Gračac town showed limited signs of damage".[341] The findings of the Trial Chamber in relation to Knin are also refuted by photos and videos of Knin after Operation *Storm* which plainly show that Knin did not suffer wide-spread damage from shelling.[342]

(b) The findings of the Trial Chamber in Gotovina are based on an arbitrary and overly restrictive margin of error

3.42 The Trial Chamber in *Gotovina* imposes an arbitrary and overly restrictive margin of error in its assessment of the shelling carried out by Croatian forces during *Storm*. Without any adequate explanation the Trial Chamber decided that any artillery projectile impacting more than 200 me-

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[335] Marko Vrcelj, "The War for Serbian Krajina: 1991-1995", Belgrade, 2002, Reply, Annex 176, p. 6. See also SVK, Intelligence Department, Intelligence Report, 4 August 1995, Reply, Annex 177.

[336] *Gotovina* TJ, para. 1364; ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, para. 101.

[337] *Gotovina* TJ, paras 1903-1905.

[338] *Gotovina* TJ, para. 1903.

[339] *Gotovina* TJ, para. 1371.

[340] *Gotovina* TJ, para. 1388.

[341] *Gotovina* TJ, paras 697 and 1935.

[342] Reply, paras 11.74-11.75.

ters from a known military target would be presumed to have been fired indiscriminately.[343] The Report of Emory Law School explains:

> "After setting forth, without explanation, a 200-meter radius of error as the means for determining which effects were attributable to lawful objects of attack, the Trial Chamber found that just under 5% of the artillery shells landed beyond that radius of error. It then inferred the intent to unlawfully attack civilians from this 5% of shells landing outside the radius of error, without further explanation or analysis."[344]

3.43 The Trial Chamber recognised Andrew Leslie as "a military officer with extensive experience in artillery".[345] Leslie testified that the HV used a variety of area target weapons systems "for which a landing within a 400-meter radius of the target with the first shot would be 'acceptable'".[346] He was the only witness with military expertise who was actually present in Knin at the time of shelling. However, the Trial Chamber ignored his testimony. If applied, Leslie's 400-meter formula reduces the number of shells impacting outside the acceptable range of error from 4.5% to 0.1%. Only one shell, out of approximately 900, was held by the Trial Chamber to have impacted more than 400 meters from a known military objective in Knin.[347]

3.44 The authors of the *Amicus Curiae* Brief also expressed deep concern at the arbitrary 200-meter standard which they found to be "fundamentally inconsistent with the realities of operational employment of artillery and other indirect fire assets." They found that it was "operationally invalid and has no pragmatic foundation."[348] It is noteworthy that the *Amicus Curiae* Brief states

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[343] In the determination of a margin of error, the Trial Chamber did not take into consideration any of the relevant factors that affect the accuracy of artillery. The Chamber itself concedes that despite the fact that variations in the locations of impact depend on a number of factors, it did not receive any detailed evidence on this. (*Gotovina* TJ, para.1898). The *Amicus Curiae* Brief lists the most prominent variables impacting the precision of artillery projectiles, *inter alia* the quality of intelligence, equipment and munitions; the location of fire support assets; the training and capability of forces; weather; terrain; fatigue (*Amicus Curiae* Brief, para. 22). It is difficult to see how then the Chamber could conclusively determine that a variation of more than 200 meters amounts to an indiscriminate attack.

[344] Emory Paper, p. 4.

[345] *Gotovina* TJ, para. 1167.

[346] *Ibid.*

[347] ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, Annex A. See also the *Amicus Curiae* Brief, paras 18-19.

[348] See the *Amicus Curiae* Brief, para. 16. The authors urge the ICTY Appeals Chamber to apply a "more operationally realistic radius of permissible error" and encourage the application of the 400-meter standard proposed by Andrew Leslie (para. 18.).

that even assuming the 200-meter standard, the factual findings of the Trial Chamber do not support a finding of indiscriminate shelling.[349]

(c) The Trial Chamber improperly decided that projectiles impacting more than 200 meters from known military targets were deliberately fired into civilian areas

3.45 The Trial Chamber erroneously made the assumption that artillery projectiles impacting more than 200 meters from known military targets were deliberately fired into civilian areas.[350] Most of the shells impacting beyond the 200-meter radius landed in open fields.[351] The Trial Chamber itself conceded that it was not possible to get a full account of all military targets in Knin.[352] It also conceded that it was not able to establish exactly how many projectiles impacted civilian objects in Knin.[353] Whatever standard is applied, only a very small number of projectiles landed outside an acceptable radius of impact. It is submitted that the Trial Chamber could not possibly infer an indiscriminate attack from such a small percentage given that not all military objectives could be identified and it was not known how many projectiles impacted civilian objects. The evidence put forward certainly does not prove indiscriminate shelling beyond a reasonable doubt. Rather the evidence points to a concentrated military operation limited to flushing out rebel Serb forces from Knin, Benkovac, Obrovac and Gračac. It is noteworthy that the Respondent itself recognises that the shelling undertaken by HV forces during Operation *Storm* does not constitute evidence of genocidal intent; it states:

> "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

[349] *Ibid*., para. 18-19. Further, the individual report appended to the *Amicus* Brief by Robert H. Scales Jr., a former US Army Chief of Staff and leading expert in artillery and indirect fire, makes the point that "if every technical aspect of every mission fired were perfect, normal dispersion alone would result in some small percentage of rockets and shells landing outside a 200-meter radius." (Scales Report, p. 10.) The individual report of Wilson A. Shoffner, an equally distinguished artillery expert, explains that "[t]here is no scientific, mathematical or practical justification" for the 200-meter standard, that it is "totally inconsistent with the science and practice of artillery and rocket fire." (Schoffner Report, pps 2-4) Finally, the report of Ronald H. Griffith, a former Vice Chief of Staff in the US Army states that the HV artillery fires "were effectively planned and executed, and within both U.S. and Russian standards of accuracy." (Ronald H. Griffith Report p. 2.)

[350] *Gotovina* TJ, paras 1906; 1920; 1922; 1932; 1934; 1940; 1942.

[351] *Gotovina* TJ, paras 1903-1904; ICTY Appeals Chamber, Appellant's Brief of Ante Gotovina, Case No. IT-06-90-A, 2 August 2011, para. 83.

[352] *Gotovina* TJ, para. 1267.

[353] *Gotovina* TJ, para. 1909.

during and after Operation Storm, the shelling demonstrates that the Brioni messages concerning the disappearance of the Serbs were well understood and fully implemented."[354]

(2) The Departure of the Serbs

3.46 There was no discussion regarding forcibly removing the Serb population from 'Krajina' at Brioni [355] Now the Respondent alleges that the "instructions from Brioni" were implemented through the "intentional expulsion of the Serb population from the Krajina region."[356] As with other allegations and claims, the Respondent recasts the Applicant's arguments with respect to the departure of the Serbs and then proceeds to respond to those rather than responding to the Applicant's actual arguments. Contrary to the Respondent's claim, the Applicant did not "[try] to prove that the departure of the Serbs from Krajina was voluntary and planned by the RSK leadership." [357] This is a complete mischaracterisation of the Applicant's position. The Applicant had set out a number of reasons for the departure of the Serbs.[358] The Applicant stands by those reasons and submissions.

3.47 *Firstly*, there was an ongoing departure of the Serbs through the four years of the existence of the 'RSK'. These departures increased through 1995, especially after *Flash.* The departures were attributed to a number of reasons including difficult living conditions, poverty and general insecurity in the 'RSK'. A general feeling of panic among the people was further intensified by both the leading politicians of the 'RSK' and by representatives of the Serbian Orthodox Church. These factors were recognised by a number of Serb leaders in the 'RSK' and Serbia, both contemporaneously and later.[359] There is nothing "sinister" about this as alleged by the Respondent.[360] In fact the Trial Chamber in *Gotovina* also noted the poor living conditions in Knin.[361]

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[354] Rejoinder, para. 728.

[355] Reply, paras 11.46 and 11.77 *et seq*.

[356] Rejoinder, para. 729. It quotes a Report of the UN Secretary General that states, factually, that the exodus of the Serbs created a humanitarian crisis of major proportions. The Report does not support the Respondent with regard to its argument of any "intentional expulsion."

[357] Rejoinder, para. 730.

[358] Reply, paras 11.77 -11.84.

[359] See *inter alia* Reply, Annex 152, an RSK document, dated 1 June 1995, in which Mrkšić recognises the various problems faced by the RSK including poor leadership, dysfunctional courts, smuggling, weakness of the military establishment and the resulting demoralisation of the RSK citizens. See also Milisav Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade], 2001, p. 232 referred to in the Reply, para. 11.82.

[360] Rejoinder, para. 742.

[361] The Trial Chamber observed that "in some cases, poor living conditions in Knin, the departure of others, and the imminent approach of Croatian forces may have had some bearing on persons leaving." (*Gotovina* TJ, para. 1743).

3.48 In another book, Florence Hartmann, the one-time spokesperson of the Prosecutor of the ICTY also noted other problems in the 'RSK' including low wages and shortages of power supply that were compounded by difficulties in obtaining basic supplies. She noted the fact that the 'RSK' had no independent sources of revenue and that the Krajina could not survive on its own and was completely dependent on financial assistance from Belgrade. Many Serbian families, she wrote, were leaving the area, but "this slow evacuation of the people was one of the best-kept secrets of the Knin authorities."[362]

3.49 *Secondly,* the authorities of the 'RSK' had made very elaborate evacuation plans from 1993 onwards.[363] It is noteworthy that the Respondent now accepts the existence of evacuation plans, even though it seeks to undermine them.[364] The development of the evacuation plans and their implementation is dealt with in the section that follows.

3.50 *Thirdly,* the 'RSK' leadership's anti-Croatian propaganda resulted in some Serbs leaving as they simply did not want to live in Croatia. This was a logical consequence of the persistently advanced thesis of the Serb leadership that any co-existence between the Serbs and Croats was impossible.[365] The Reply provided examples of statements by the Serb leadership and others to this effect, including the statement of Savo Štrbac, the President of *Veritas* the "independent NGO" whose Reports the Respondent relies upon so heavily.[366] This is also clear from a number of testimonies offered at the *Gotovina* Trial[367], and events after Operation *Flash*.[368] While the Respondent may seek to play this down, there is no getting away from the fact that years of propaganda had an effect on the Serb population in the Krajina.

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[362] Florence Hartmann, *Milošević- dijagonala laufera* [Milošević- The Bishop's Diagonal], Dan Graf (FRY), 2001, p. 220.

[363] As set out in the Reply there is extensive evidence that the evacuation of the Serb population was planned long before the launch of Operation *Storm,* Reply, paras 11.77 *et seq*. See also Nikica Barić, *Srpska pobuna u Hrvatskoj 1990-1995* [Serb Rebellion in Croatia 1990-1995], pp 546-554*;* Milisav Sekulić, *Knin je pao u Beogradu* [Knin Fell in Belgrade]**,** NIDDA Verlang, Bad Vilbel, 2001, pp. 267-268, 179; Radulović, 1996: 101-102.

[364] Rejoinder, para. 734.

[365] Reply, paras 11.80-11.81. See also the statement of Jovan Opačić, one of the leaders of the rebel Serbs in the so-called RSK, who stated that psychological factors were the most important causes of war. The war was caused, he said to the Belgrade weekly *Nin*, primarily by the collective paranoid fear of the Serbian population that they would be slaughtered. See Zorica Stanivuković, *The Fate of the Abandoned People*, *Nin* issue 2374 of 28 June 1996.

[366] Reply, Annex 200, Transcript of Video Clip of Savo Štrbac Speaking from a TV Studio in Banja Luka, 7 August 1995.

[367] Galbraith, Puhovski, Lazarević and Granić were just some of the witnesses at the *Gotovina* Trial that testified on the issue.

[368] Reply, paras 10.94, 10. 97-10.1.00

3.51 *Fourthly*, there is evidence that several Serbs were compelled to leave by the 'RSK' authorities and its armed forces. This was referred to in the Reply, and reference was made to the CHC Report on which the Respondent relies.[369] The fact that Serbs were forced to flee by the 'RSK' authorities/SVK forces is also clear from the accounts of individuals whose testimonies are annexed to these pleadings. These are just a few examples of the many such requests for return that Croatia received after Operation *Storm.*

i. In the *Request for Return to the Republic of Croatia* filed at the Office of the Government of the Republic of Croatia in Belgrade in October 1995, J.K. stated that she left Obrovac under the order of the "local authorities."[370]

ii. In the *Request for Return to the Republic of Croatia* filed at the Office of the Government of the Republic of Croatia in Belgrade in January 1996, M.M. stated: "The reason for leaving [Croatia] was the organised displacement of the entire popula- tion before the Croatian Army action "Oluja" /Storm/, under the pressure of the military and civilian authorities of the so-called "Krajina" and due to the imposed general psychosis of fear and panic."[371]

iii. In the *Request for Return to the Republic of Croatia* filed at the Office of the Government of the Republic of Croatia in Belgrade in January 1996, S.P. stated that her reason for leaving Croatia was "the pressure of the Krajina police" and that she did not go of her own free will.[372]

iv. In the *Request for Return to the Republic of Croatia* filed at the Office of the Government of the Republic of Croatia in Belgrade in February 1996, S.G., stated that he was ordered to leave by the command of the military unit in which he was a con- script.[373]

3.52 *Fifthly,* there is no doubt that a military operation on the scale of Operation *Storm* is bound to result in the large scale movement of civilians, even

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[369] Reply, para. 11. 83 and notes.

[370] Request for Return to the Republic of Croatia filed by J.K., October 1995, Annex 12.

[371] Request for Return to the Republic of Croatia filed by M.M., January 1996, Annex 13

[372] Request for Return to the Republic of Croatia filed by S.P., January 1996, Annex 14.

[373] Request for Return to the Republic of Croatia filed by S.G., February 1996, Annex 15

a military operation like *Storm* that was lawfully conducted.[374] This is not a remarkable observation, as the Respondent suggests.[375] In fact it accepts this when it admits that "Serbs of Krajina abandoned their homes in huge numbers out of fear that they would be attacked and exterminated." [376] This is one of the Applicant's submissions, namely that a number of Serbs fled before *Storm* commenced, before any alleged indiscriminate shelling and that the "fear" was based on the years of propaganda by the Serb leadership. This was also noted by the Trial Chamber.[377] Once again the Applicant refers to the witness statements of Serbs who fled.

i. Witness Statement of D.Đ.: "I left my house together with my family on 07 August 1995, among the last ones in my vil- lage, only after two members of the "Krajina" police, whom I did not know, had come to my house telling me: "What are you wait- ing for, the Ustashas are coming, they will slaughter you all…"[378]

ii. The Official Note of the Statement by N.G.: "When the "Storm" VRA started, I was not aware of the developments and on Sunday, 06 August 1995, […] I saw that all the villagers were preparing and packing their belongings for the departure. […] At that moment the Croatian Army was not even close to our village, nor was there any shooting in the vicinity. […], a man from our village dropped by my place and asked me whether I was also preparing for the departure. I told him I was not preparing because I did not intend to go anywhere and besides, I did not have oil for my tractor. That man then told me that I had better go as well because if I remained in the village I could even be killed, since the atmosphere in the village was such. I took those words seriously. […]"[379]

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[374] Reply, para. 12.32. As set out in the Reply, both Croatian and RSK intelligence confirmed the exodus. On 2 August, HV intelligence reported that "there was an outburst of panic in that area," and that they had overheard an [SVK] officer saying "the situation in Knin is the same as in Berlin in 1945…", see Reply, Annex 167. On 3 August, SVK intelligence reported that elements of "panic" had been noted, and "[f]urthermore, the citizens believe that we are not able to defend ourselves and that, should there be no significant help by the FRY it would be better for the people to resettle to other areas rather than stay here to face encirclement and death." RSK, Security Department, Daily Report, 3 August 1995, Reply, Annex 168. p. 4.

[375] Rejoinder, para. 743.

[376] Rejoinder, para. 744 (emphasis added).

[377] The Trial Chamber found on the basis of the evidence before it that some "persons left because of a fear of the violence commonly associated with armed con»ict, or general fears of Croatian forces or distrust of Croatian authorities." *Gotovina* TJ, para. 1762.

[378] Official Note of the Statement by D.Đ., Annex 17.

[379] Official Note of the Statement by N.G., Annex 18.

3.53 *Finally,* the Respondent's reliance on the Trial Chamber's judgment in *Gotovina* to show a "massive exodus" is misplaced.[380] *Firstly*, the Trial Chamber in *Gotovina* found only that the Serbs from Knin, Benkovac, Obrovac and Gračac were forced to leave.[381] It found that in the remaining parts of the Krajina, Serbs left for reasons that were not caused by any illegal conduct by Croatian authorities.[382] *Secondly*, even though the Trial Chamber claimed that at least 20,000 Serbs fled in fear of shelling, it has not identified by name any Serb civilian who claimed to have fled due to fear of shelling.

3.54 Even with respect to the finding of the Trial Court that the Serbs in Knin, Benkovac, Obrovac and Gračac were forced to leave, the Chamber had no adequate basis to discount the overwhelming body of reliable evidence of 'RSK' evacuation orders and propaganda-induced fear of a Croatian military victory as causes of the Serb civilians' departure. The evidence clearly established that Serbs left the 'Krajina' for a combination of reasons, unrelated to any alleged unlawful shelling. As set out above, the Trial Chamber was unable to identify even one victim of shelling in any of the four towns of Knin, Benkovac, Obrovac and Gračac. There was no finding by the Trial Chamber that any civilian was even injured by shelling.[383] This is also apparent from the fact that there were reports of evacuation from some villages in Eastern Slavonia, which was over 450 kilometres from the Krajina.[384] In any event, these findings of the Trial Chamber are also the subject of an appeal.

3.55 In her book, Florence Hartmann concludes: "Every refugee could confirm that the population fled following the call of its leadership; every soldier could testify about Serbian soldiers being deliberately withdrawn, about no shifts coming to night duty service in the areas where officers deserted, and about heavy weapons withdrawn in an organized manner. In short, about the conscious decision to leave Krajina."[385]

3.56 At the time in question, the UN Secretary General had informed the Security Council that it was "difficult ... to determine the extent to which the mass exodus of the Krajina Serb population was brought about by fear of Croatian forces, as opposed to a desire not to live under Croatian authority or encouragement by local leaders to depart."[386] He made no mention of indiscriminate shelling.

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[380] Rejoinder, para. 740 citing the *Gotovina* TJ, para. 1539.

[381] *Gotovina* TJ, para. 1745.

[382] *Gotovina* TJ, paras 1754, 1755 and 1762.

[383] See para. 3.37, *supra*.

[384] See excerpt from Electronic Surveillance Centre, Transcript for Eastern Slavonia, 4 August 1995, Annex 24.

[385] Florence Hartmann, *Milošević- dijagonala laufera* [Milošević- The Bishop's Diagonal], Dan Graf (FRY), 2001, p. 228.

[386] Report of the UN Secretary General, S/1993/730, dated 23 August 1995, p. 3.

(3) The 'RSK's' Evacuation Plans

3.57 The Respondent accepts the existence of the Plans, but continues to argue that indiscriminate shelling forced the Serb population to flee.[387] It states that the "existence" of the plans for evacuation was common practice in the former Yugoslavia, but seeks to argue that the plans were not in fact put into operation.[388] On the contrary, documentation in the possession of the Applicant shows that the departure of Serbs from the 'RSK' was planned, ordered and carried out both before and during *Storm.* Significant numbers left following these orders before the Croatian forces even entered the occupied territory.

3.58 Based on the available information, it is clear that the 'RSK' had detailed evacuation plans for the civilian population from at least 1993. Over the years these plans were updated and modified and widely distributed. The Civilian Protection ("CZ") staff was tasked with implementing the plans together with the Army. These early plans were detailed, precise and comprehensive, defining evacuation routes (the direction of movement and exit zones); the order of evacuation based on age, gender and other characteristics; details of the signal for evacuation; and designated drivers and vehicles. The fuel required for vehicles to be used for an evacuation had been provided over a year before Operation *Storm*. The Applicant had annexed a number of evacuation orders in the Reply, however 4 further documents set out the detailed nature of the preparation of the 'RSK' authorities.[389]

i. Detailed evacuation plans were made for Banovina where "the 31st Infantry Brigade" of the SVK communicated the evacuation plan to all its officers on 18 February 1993.[390] The Plan set out details for the agencies responsible for evacuation; routes and exit zone; resources for the evacuation, including details of vehicles and drivers; the signal to indicate an evacuation, as well as assembly points for the population. This document was widely disseminated.

ii. A second document, dated 26 January 1993 from *Autotransport Benkovac* to the "Crisis Staff of the Benkovac Municipal Assembly" sets out plans for evacuating the civilian population of North Dalmatia. It lists the names of drivers on permanent call, reserve

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[387] Rejoinder, para. 732.

[388] Rejoinder, para. 734.

[389] The Applicant has in its possession other documents relating to the planning and preparation for the evacuation from 1993, however these are not being filed but are available if the Court deems it necessary.

[390] Evacuation Plan of the 31st Infantry Brigade Command, 18 February 1993, together with the Plan drawn up by the "CZ Staff, Petrinja Department", February 1993, Annex 25.

drivers, and those to be called in case of a large-scale evacuation or an emergency evacuation. It specifies the location of vehicles in case of evacuation and their capacity. It also sets out details of the number of kilometres that buses could travel with the available fuel. [391]

iii. In August 1994 the "Republican Civilian Protection Staff" in Knin drew up a comprehensive document entitled "Assessment of Threats and Possibilities for Protection and Rescue". [392] This is referred to by the Trial Chamber in *Gotovina.*[393] This document *inter alia* sets out a pyramidal (hierarchic) structure of the Civilian Protection Staff ("CZ")[394] responsible for carrying out quick and effective evacuation in accordance with the decisions of the "appropriate organs" and set out details on training of personnel for collective protection. The document was adopted at a meeting of the Republican CZ Staff on 14 July 1995, a fortnight before Operation *Storm* commenced.

iv. The final new document illustrates how the orders and instructions regarding evacuation were distributed through the pyramid of structures and how early the orders were issued. A document issued by the Republican CZ Staff in Knin, on 1 May 1995 indicates how preparations were made to ensure that all designated agencies remained on alert. This document, orders activation/mobilisation of all "regional and municipal Civilian Protection Staff" at the beginning of Operation *Flash*.[395] It introduced continuous permanent duty rosters and preparation for evacuation and care for the population. Between nine and ten in the morning of 1 May the Serbian population in Western Slavonia was informed of the evacuation and its implementation began at 1300 hours the same day.[396]

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[391] *Autotransport Benkovac* to the "Crisis Staff of the Benkovac Municipal Assembly", Plan of Evacuation of the Civilian Population, 26 January 1993, Annex 26.

[392] Republican Civilian Protection Staff, Assessment of Threats and Possibilities for Protection and Rescue*,* Knin, August 1994, Annex 27.

[393] *Gotovina* TJ, para. 1514

[394] At the top of the pyramid was Republican Civilian Protection Staff > Regional Civilian Protection Staff > Municipal Civilian Protection Staff > the Civilian Protection staffs in parts of the municipal territory. At the bottom of the pyramid were Civilian Protection commissioners in large apartment buildings, blocks of buildings, streets, populated areas and companies, and other legal entities.

[395] Order of the Republican CZ Staff, strictly confidential, Knin, 1 May 1995, Annex 28.

[396] Croatian Helsinki Committee for Human Rights, Department for Activism, *Report on the Military and Police Operation Storm*, Part III, Former UN Sector West, Zagreb 2002, 12.

These early plans were gradually elaborated to the smallest detail, so that by late 1994 and early 1995, everything was in place to carry out a quick and effective evacuation if the need arose.

3.59 As set out in the Reply from mid July 1995, the authorities of the 'RSK' issued a series of orders to update the plans and preparations for shelter and evacuation of the population and sought daily reports of these preparations. Documents annexed to the Reply include the following:

- An Order dated 15 July 1995, was issued by the Regional Civilian Protection Staff, Lika-Korenica administration, to the Municipal CZ staffs in Gračac, Donji Lapac, Vrhovine and Plaški, with the "goal of taking adequate measures to protect and rescue the population and material goods." It *inter alia* provides for evacuation and the movement of people; the activation of the regional and municipal CZ Staff; and the establishment of continuous duty rosters. The authorities were required to prepare for evacuation in co-operation with the SVK and send daily reports to the Regional CZ Staff. [397]

- By an Order dated 30 July, the Lika Regional CZ Staff ordered the Plaški CZ Headquarters to increase the state of alert and *inter alia* update plans for evacuation and relief. It ordered them to establish the extent to which private companies would be involved with implementing measures to assist with relocation and evacuation of the population; to send regular reports and directed them to maintain "constant contact" with the Army "to follow the situation on the ground."[398]

- By an Order dated 31 July, the Drniš CZ Staff directed the Northern Dalmatia directorate to *inter alia* introduce continuous duty for its staff in light of the "new situation" and "focus …on evacuation related preparation." It noted that the list of the population to be evacuated had been updated, fuel for evacuation had been issued in November 1994, and the fitness of vehicles had been checked.[399]

- On 31 July 1995 the 'RSK' police ("drawing on the experience in Western Slavonia") issued an order to prepare for the evacuation of key documents, including birth records; personnel files, defence records and other materials.[400] A clear indication that any evacuation would not be temporary.

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[397] RSK, Ministry of Defence, Order of the Republican Civilian Protection Staff, 15 July 1995, Reply, Annex 190.

[398] RSK, Lika Regional Civilian Protection Headquarters, Order of Mirko Poznanović, 30 July 1995, Reply, Annex 192.

[399] RSK, Drniš Deptartment Ministry of Defence, Directorate on Measures for the Preparation of Evacuation, 31 July 1995, Reply, Annex 193

[400] RSK, Ministry of the Interior, Order signed by Minister Tošo Paić, 31 July 1995, Reply, Annex 194.

- On 31 July 1995, the 'RSK's' Ministry of Defence noted *inter alia* that the CZ staff were updating plans for protection and evacuation. It noted that the staff was trying to prevent movements of the population caused by rumours that had already caused "panic and uncontrolled movement."[401]

- On 1 August 1995, Mrkšić ordered preparations for the immediate relocation of the SVK's Main Staff, including plans to destroy documents if necessary.[402]

- On 2 August 1995, the Republican CZ Staff ordered immediate evacuation of material assets, archives and money.[403] The Order provided that the evacuation of assets was to be carried out with certain categories of the population. TV Knin broadcast organized simulated evacuations from towns in both former Sectors North and South to familiarize the population with the evacuation contingency plan in the event of further HV military success.[404]

- On the same day, 2 August 1995, the Republican CZ Staff requested for reports, within 24 hours, regarding the updating of evacuation plans, their preparation, distribution and the material support required for the evacuation.[405]

- On 4 August 1995 the 'RSK' Supreme Defence Council ordered the evacuation of the Serb population towards BH even before the arrival of the Croatian Army. This decision was taken on the evening of 4 August 1995.[406] As set out in the Reply, this Order made no mention of the shelling of civilians and provides further evidence that the evacuation was not a result of artillery use by the HV, but rather that it was triggered by the SVK's inability to repel the HV offensive. [407]

3.60 The Respondent does not challenge this evidence, it only puts forward a very weak response. It simply states that these documents show that "their

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[401] RSK, Ministry of Defence, Military and Civil Affairs Sector, Regular Daily Report, 31 July 1995, Reply, Annex 159.

[402] See RSK, Serb Army General Staff, Order on the Relocation of the GŠ SVK, 1 August 1995, Reply, Annex 195.

[403] See RSK, Republican Civil Defence Headquarters, Order on the Implementation of Preparation for the Evacuation of Assets, Archives, and Records, 2 August 1995, Reply, Annex 196.

[404] Reply, para. 11.77.

[405] See RSK, Republican Civil Defence Headquarters, Request on the Implementation of Civil Defence Plans, Evacuation and Relief, 2 August 1995, Reply, Annex 197.

[406] See RSK, Supreme Defence Council, Decision on Evacuation, 4 August 1995, Reply, Annex 198.

[407] Reply, para. 11.78.

purpose was not to evacuate the entire Serb population to Bosnia and Herzegovina or Serbia" and that a number of the documents indicate "preparations for resistance." [408] Irrespective of where the evacuees were to go or whether resistance was called for, the predominant purpose of these documents was to show that evacuation plans had been prepared in advance and that there was a policy that in the face of any military action by Croatia, the Serbs in the 'RSK' would leave. The Respondent doesn't challenge that. It merely refers to three documents filed with the Reply in an attempt to show that they did not relate to evacuation. Even a cursory look at the documents proves otherwise.

3.61 Referring to Annex 191, the Respondent seeks to argue that the document shows a "*routine preparation for defense and does not support the Applicant's claim.*"[409] The document in question was issued on 29 July 1995 by the 'RSK's' Republican Civil Protection Staff in preparation for the imminent declaration of war by the 'RSK' that came the very next day.[410] It required *inter alia* the Regional CZ Staff to be activated immediately and for staff to be kept on 24 hour call. The Municipal CZ Staff was directed to update relief and evacuation plans and provide the Republican CZ Staff with a report the very next day. Copies of the Order were sent to Regional CZ Staff in North Dalmatia, Lika, Kordun, Banija, Eastern Slavonia, Baranja and Western Srem. The document speaks for itself. There is nothing "routine" about it.

3.62 Instead of referring to the several documents regarding evacuation that referred to above and annexed to the Reply, the Respondent refers to Annex 166 of the Reply (an Order signed by General Mrkšić, Commander of the SVK General Staff on 29 July 1995) and argues that the "order purported to prevent departure of families of professional serviceman and the population from the territory of the RSK."[411] That is correct. This document was not put forward to show evacuation plans, but to prove that there was an ongoing departure of civilians and soldiers from the 'RSK' even before *Storm* commenced. Dated 29 July 1995, the Order also notes the deterioration of the military and security situation and the rising panic in the 'RSK'.

3.63 Finally, the Respondent claims that Annex 198 to the Reply pertains only to the evacuation of "people who were unfit for combat," only from Knin, Benkovac, Obrovac, Drniš and Gračac and that the population was to be evacuated to towns within the territory of the 'RSK'.[412] This is irrelevant. Several Annexes referred to above, and annexed to the Reply, are not referred

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[408] Rejoinder, para. 735.

[409] Rejoinder, para. 736 (emphasis supplied).

[410] See RSK, Supreme Defence Council, Proclamation of the State of War throughout the RSK, 30 July 1995, Reply, Annex 157.

[411] Rejoinder, para. 737.

[412] Rejoinder, para. 738.

to by the Respondent. These clearly demonstrate the existence of evacuation plans and their activation and implementation. A number of witnesses at the *Gotovina* trial testified to the ongoing departure of the Serbs, both before and after the launch of *Storm.*[413] The Trial Chamber also noted the existence of the evacuation plans.[414]

3.64 Some recently disclosed material by the Prosecution in the *Gotovina* Trial sheds further light on this issue, namely:

i. *Shorthand notes from 41st Enlarged Session of Supreme Defence Council (FRY), 14 August 1995:* President Milošević stated that on the day of Operation *Storm*, the RSK was ordered to leave the Krajina without engaging the HV. The RSK mingled within the columns of evacuating civilians. According to Milošević, the decision to evacuate caused the exodus, and was made in spite of the fact that the RSK "had all conditions provided for defence". The RSK's unreasonable and shameful decision to withdraw was executed with "practically no resistance and no casualties".[415]

ii. *Minutes from 43rd Session of Supreme Defence Council (FRY) 29 August 1995*: Item 1 on the session's agenda was "[i]n view of the fact that the territory of the RSK was abandoned pursuant to a decision of the RSK leadership, due to which the defence of

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[413] Reply, para. 11.79 and the testimonies cited therein. As well as the testimonies referred to by the Trial Chamber, paras 1512-1516. See also the Request for Return to the Republic of Croatia filed by Ž.J., October 1995, Annex 16. He states that the evacuation was ordered by the "local authorities."

[414] The Trial Chamber in *Gotovina* noted *inter alia* that the RSK authorities had held evacuation drills (e.g. *Gotovina* TJ, para. 1515); that there were reports of people being forced to leave against their will; it noted the existence of several annexes set out in the Reply e.g. Reply, Annex 198 and others. Other documents presented at the Trial included the following exhibits: D337 (RSK authorities requested UNHCR and UNPF assistance in evacuating 32,000 civilians); D1516, para. 6 "in the course of 4 August the RSK government issued a public statement calling the entire population in the endangered areas to evacuate, which caused a chaos within the units and their dispersion, because the solders started leaving in order to go home and help their families with evacuation"; D951 Ratko Mladić in a phone conversation with an unknown person: "Well, in the north, things are good, but down south, it looks like they did something stupid. They wrote an evacuation order for women and children, and that caused a mass exodus." The Chamber also considered the Testimony of Mrkšić who testified regarding the existence of evacuation plans, evacuation drills and the fact that he sought to prevent the departure of soldiers and civilians in July 1995, before *Storm*. See *Gotovina* TJ, paras 1515-1516.

[415] These documents were referred to in the Appellants Brief of Mladen Markač (Public Redacted Version) ICTY IT-06-90-A, 5 October 2011, para. 318 (i) 0345-8372-8405 Eng, P. 27/36. Milošević goes on to say that the RSK did not defend the Krajina at all but, rather, according to reports from police officers and citizens, ordered people to evacuate as soon as artillery preparation terminated (p. 28/36, 36/36).

> the RSK ceased to exist, the SDC concludes that there is no more basis for providing assistance to the RSK armed forces". [416]

3.65 As set out in the Reply, there was no policy to expel Serbs from the occupied territories and various efforts were made to encourage the Serbs to stay. On 4 August, using all forms of media, President Tuđman appealed to the Serbs to remain "at home."[417] Further, Croatia had in place legal protections for minority groups, both in the Constitution and in other legal provisions.

(4) Response to Claims About the "Victims of *Storm*"

3.66 The Respondent claims that it provided a "convincing account of the systematic attacks of the Croatian Army on the fleeing Krajina Serbs,"[418] however, it admits that the Applicant criticises its sources of information (such as they were) of being unreliable and inconsistent. [419] In other words the Respondent's account of the targeting of the fleeing Serbs was far from convincing, and as set out in the Reply, the CHC Report relied upon by the Respondent contains several discrepancies and inconsistencies which were noted in the Reply.[420] The Applicant's stand with regard to the CHC Report has been vindicated by the Trial Chamber's views on the Report. [421]

(a) Croatia did not target fleeing Serb civilians

3.67 Once again the Respondent alleges that escaping Serbs were victims of attack, however in the Rejoinder it now refers to "the systematic attack of the Croatian forces,"[422] rather than attacks by "both Croatian military forces and Croatian civilians" referred to in the Counter-Memorial.[423] Once again it relies on the CHC Report for these allegations.

3.68 Contrary to the Respondent's claim, the Applicant did not "completely ignore the evidence presented" and make "just general remarks." [424]

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[416] Appellants Brief of Mladen Markač (Public Redacted Version) ICTY IT-06-90-A, 5 October 2011, para. 318 (iii) 0308-8830-8831: Eng. P. 1.

[417] See Appeal to Croatian Citizens of Serb Nationality from President Franjo Tuđman, Zagreb, 4 August 1995, Reply, Annex 201.

[418] Rejoinder, para. 745.

[419] Rejoinder, para. 751.

[420] Reply, paras 11.85, 11.91-11.92. Also more generally on the CHC Report see paras 2.65 and 11.67.

[421] See para. 1.35, *supra.*

[422] Rejoinder, para. 745.

[423] Counter-Memorial, paras 1242 *et seq*.

[424] Rejoinder, para. 746.

The so-called general remarks were offered by way of an introduction, before responding to the rest of the Respondent's claims.[425] As set out in the Reply, the Applicant did not target "civilian" columns. Admittedly, some columns (comprised of combatants and civilians) passed through areas of ongoing fighting and were on occasion caught in the crossfire, however, civilians were not targeted. The Applicant never stated that civilians become legitimate targets because they flee with soldiers, as the Respondent seeks to argue.[426] The Respondent claims that the targeting of civilians was confirmed by the Trial Chamber in *Gotovina*. It provides no citation in support.[427] This is yet another example of its misrepresentation of the Trial Chamber judgment. As set out in the Reply, Croatia maintains that it cannot be held responsible for any casualties caused by the Bosnian Army's 5th Corps which was also involved in the fighting, or for any columns targeted in BH. There is nothing connected or confused about this, as the Respondent alleges.[428] The Respondent's allegation that the "ABiH 5th Corps was attached to the HV" [429] is dealt with in the following Chapter.[430]

3.69 As stated in the Reply, there were reports of Serb forces causing casualties amongst the retreating Serb population. A Slovenian newspaper dated 7 August 1995 provides an account of airplanes of the so-called Army of Republic Srpska bombing a convoy of Serb soldiers and civilians retreating from Croatia. It was reported that more than 20 persons were killed and over 100 injured during the three attacks.[431] There are also Serbs who departed in the columns who attest to this fact. In his statement, D.C., a driver to a Colonel of the SVK states that upon arriving in Serbia his mother told him "that she went in a column via Žirovac and that the tanks led by Mile Nova- ković were treading over a part of our column in order to pass towards Dvor as quickly as possible, and the Muslims from the formations of the 5th Corps attacked the column from the right flank, and there were casualties there." He states that at that moment the Croatian Army could not have attacked the column in Žirovac, particularly not from the right side.[432] Similarly, in her statement, M.M. talks of the killing of her Serb neighbour, Nikola, by "members of the Serbian army, that is, 'Arkan's men'" when he told them that "he had no intention to fight for anyone any more."[433]

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[425] Reply, para. 11.8.

[426] Rejoinder, para. 746. This issue has been addressed in para. 1.31, *supra*.

[427] Rejoinder, para. 747.

[428] Rejoinder, para. 748.

[429] *Ibid.*

[430] Chapter 4, para. 4.39.

[431] News Report in the Slovenian Newspaper *Delo*, 7 August 1995, Annex 29.

[432] Official Note of the Statement by D.C., Annex 19.

[433] Official Note of the Statement by M.M., Annex 20.

3.70 Once again the Respondent relies on the CHC Report in support of its allegations. The Applicant had challenged the credibility and weight attached to the CHC Report on a number of grounds, not least in the light of the Respondent's views regarding witness statements. The Applicant had also noted that almost all the Respondent's allegations with regard to the "killing of Serbs while they were escaping in columns" were based on statements from the CHC Report, which were not annexed and therefore it is not clear when these statements were made, who made them, to whom were they made and so on.[434]

3.71 The Respondent admits now that the CHC 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."[435] The Applicant has set out its views on this subject in Chapter 1. Those are not repeated here.

3.72 Recognising the Applicant's criticisms regarding its reliance on the CHC Report, the Respondent has submitted twelve new witness statements regarding the alleged Croatian attacks on refugee columns. [436] The Applicant has already set out its criticisms in this regard.[437] The Applicant also submits a few new witness statements from Serbs in the columns that illustrate *inter alia* that the columns were made up of civilians and combatants; that those fleeing were well treated; that some Serbs were made to leave by the Serb authorities, often against their will and so on.

3.73 D.C., a driver to a Colonel of the SVK mentions the con- tinuing involvement of the Serbian Army in the 'RSK's' forces. Referring to the negotiations at Topusko, regarding the surrender of the 21st Corp, he states that when their commander (Čedomir Bulat) returned from the meeting with the Croatian Army/HV (represented by General Stipetić) he directed them to lay down their weapons. He recalls that General Stipetić ordered the Croatian soldiers not to go among the Serb civilians. At one point General Stipetić asked Čedomir Bulat why he did not ask the civilians to return to their homes, but Bulat said he could not send people back. D.C. states that General Stipetić tried to persuade people to return to their homes and offered to personally escort them. [438]

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[434] Reply, paras 11.91, 11.92.

[435] Rejoinder, para. 751.

[436] Rejoinder, paras 756- 760.

[437] See paras 1.45-1.47 and para. 3.7, *supra*. See also the Statement of M.O., 20 April 2012, Annex 5 and the Statement of J.B., 21 March 2012, Annex 4.

[438] Official Note of the Statement by D.C., Annex 19.

3.74 In his statement D.Đ. states that he and his family left their home on 7 August 1995, and set off in the direction of Vojnić, Gvozd and Topusko and further on towards Serbia. He states that in Topusko, General Stipetić appealed to all the Serbs in the column to return to their houses, guaranteeing them safety. The HV soldiers also urged them to return home and members of the Croatian Red Cross provided them food. D.Đ. was one of the early returnees.[439]

3.75 In her statement M.V. states that she only left for Serbia on 7 August, after "seeing that the villagers from the neighbouring village of Perjasica were leaving."[440] She mentions that prior to *Storm* she heard the appeals of President Tuđman "who called on the Serbian population over the radio to remain at their homes, saying that nothing bad would happen to them." She states that she left home "before seeing the HV or the police, nor did they force us to leave our houses" and that she only left because "everybody was leaving."

3.76 T.C. states that the evacuation had been planned in advance of *Storm*, and that he and the other villagers followed the plans. He states that as per the plan, he and the others set off in a column towards Dvor na Uni. On the way they encountered members of the Croatian Ministry of the Interior who asked him why they were going towards Bosnia, when he could go back home. They told him that the President of Croatia had guaranteed that he could return home safely. He states that the policemen provided those in the column with food and water, but despite the offer to stay in Croatia he and the others refused "because we were afraid of the Army of the Krajina SAO /Serbian Autonomous District,/ which specifically insisted that we leave [Croatia] immediately…."[441]

3.77 It is noteworthy that the Respondent does not challenge the Applicant's account regarding the surrender of SVK's 21st Kordun Corp and the treatment of Serb soldiers and civilians in Topusko on 7 August 1995.[442] The Reports of the Croatian Military Police in this regard show that the Respondent's allegations regarding the treatment of those in columns is unfounded.[443] The Reports show that the Military Police in Topusko (i) provided security to the moving columns of combatants and Serb civilians; (ii) transferred members of the paramilitaries to the investigative judge of military courts; (iii)

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[439] Official Note of the Statement by D.Đ., Annex 17. See also the Official Note of the statement by N.G., Annex 18 and the Official Note of the Statement by M.J, Annex 21

[440] Official Note of the Statement by M.V., Annex 22.

[441] Official Note of the Statement by T.C., Annex 23.

[442] Reply, para. 11.88.

[443] Report on the Employment of RH Armed Forces Military Police Units in Storm, 11 August 1995, Annex 30. This refers to 4 columns having left Croatia and 10 moving through Croatia. Similar Reports also exist dated 10 August 1995, 12 August 1995 and 13 August 1995.

took the injured to medical centres; (iv) took civilians to reception centres[444]; (v) provided traffic support and (vi) filed a criminal report against an HV soldier found to have fired at one of the columns. The individual was sent to an investigating judge.[445]

3.78 In light of all these facts, the Respondent's allegation that the "killings sent a message to those who survived that return was not possible" and clarified "the meaning of the words of Croatian President at the Brioni Island"[446] is clearly unsustainable.

(b) There was no "systematic killing"

3.79 The Rejoinder repeats a number of the generalised allegations it made in the Counter-Memorial without engaging with the arguments set out in the Reply.[447] Once again, Croatia denies that it carried out a "systematic killing campaign" against the Serbs. The Respondent has still not provided any evidence to show that there was a systematic campaign and the Brioni transcript provides nothing in support of this contention.

3.80 The Respondent argues that the Applicant "ignores the evidence presented in the Counter-Memorial."[448] This is incorrect. After examining the evidence, the Applicant criticised the Respondent's extensive reliance on the CHC Report. With respect to some alleged killings in Sector South, the Respondent relied on an erroneous reproduction of a CHC list. For example, in a number of instances, the Respondent stated that more civilians were killed in particular locations than the Report set out. The Respondent also made mistakes with respect to the names of victims and villages were the alleged killings are said to have occurred. Some allegations failed to specify a name, date and or location. With respect to other allegations, the Respondent failed to cite any source at all, making only blanket assertions like "Killings were committed in all other places where Serbs stayed behind." The Applicant noted these and other discrepancies in the Reply.[449] Similar flaws were noted with respect to the allegations regarding Sector North, which was supported by even less evidence.[450] These are not merely "methodological flaws"[451] and the Respond-

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[444] See the Order of the Ministry of the Interior Establishing Reception Centres, 5 August 1995, Annex 31 that provides that Reception Centres were to be established immediately, and were to be organised in accordance with the Geneva Conventions on the Treatment of Civilians.

[445] See Report on the Employment of RH Armed Forces Military Police Units in Storm, 11 August 1995, Annex 30.

[446] Rejoinder para. 761.

[447] Rejoinder, paras 762 *et seq*.

[448] Rejoinder, para. 764.

[449] Reply, paras 11.95-11.97 (internal citations omitted).

[450] Reply, paras 11.98-11.100 (internal citations omitted).

[451] Rejoinder, para. 767.

ent has failed to respond to them. The Respondent also failed to provide any evidence that this was a "systematic" or "targeted" activity.[452]

3.81 It is apparent that the Respondent noted these criticisms because once again it relies on new testimony to make its case. Recognising that it has failed to provide any particulars about the death of the victims, such as their full names, exact place and date of their killings, data about perpetrators, and so on, it accuses the Applicant of misunderstanding the "methods of proof required for a dispute concerning the application of the Genocide Convention."[453] This has been dealt with in Chapter 1. Even if the Applicant accepted the Respondent's argument, the incomplete and inaccurate details provided by the Respondent are insufficient to make out a case of genocide, let alone defend one.

3.82 Recognising the insufficiency of the evidence, the Respondent states that it did not have access to the "crime scenes of Operation Storm" and that UN observers were also denied free movement.[454] It seeks to differentiate its claim from the case before the ICTY.[455] Once again, this issue has been dealt with in Chapter 1. The Reply dealt with the allegations regarding the restriction of movement of the UN observers.[456]

3.83 Contrary to the Respondent's assertion,[457] the Applicant had noted the ICTY witness testimonies that had been relied upon in the Counter Memorial.[458] It had also set out its views on the evidentiary value of these. It was noted that at the time of drafting the Reply, there had been no judgment of the ICTY and no assessment of the reliability or accuracy of the factual statements and testimony on which Serbia relied.[459] By so stating, the Applicant did not accept the testimony.

3.84 Now the Respondent refers to certain factual findings made by the Trial Chamber in the *Gotovina* case with respect to specific murders and killings.[460] As stated earlier, the Trial Chamber's judgment is subject to an ongoing appeal. It may 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 this however does not entail

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[452] Reply, para. 11.95.

[453] Rejoinder, para. 764.

[454] Rejoinder, paras 765-766.

[455] Rejoinder, para. 766.

[456] Reply, para. 11.85.

[457] Rejoinder, para. 767.

[458] Reply, para. 11.95, footnote 217.

[459] Reply, para. 2.33.

[460] Rejoinder, para. 767.

the responsibility of the Applicant State for genocide. In any event, the Trial Chamber found that "the common objective [of the JCE within the Croatian government] did not amount to, or involve the commission of the crimes of persecution (disappearances, wanton destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions), destruction, plunder, murder, inhumane acts, and cruel treatment." [461]

3.85 As regards the Respondent's allegations regarding Croatian investigatory policy after Operation *Storm*, the Trial Chamber received testimony from several witnesses and examined documentary evidence in this regard.[462] The testimony of Christopher Albiston, an independent consultant specializing in policing, security and intelligence and an expert in conflict and post-conflict policing is particularly noteworthy. He testified that post Operation *Storm* there was a functioning criminal justice system in which the Croatian authorities were genuinely attempting to address crime, and the police were playing their role in recording and passing on details of crimes in the relevant areas. He saw no evidence of organized failings to re-establish law and order, or deliberate obstruction of this task, by the Croatian authorities. Nor was there an attitude of tolerance or indifference on the part of Croatian authorities towards crimes such as looting, burning and killing, although there was evidence of failings by individual police officers. [463] The Trial Chamber noted the efforts of the Croatian law enforcement authorities to investigate and prosecute crimes, as well as the obstacles they faced, and noted *inter alia* "that the insufficient response by the Croatian law enforcement authorities and judiciary can to some extent be explained by the […] obstacles they faced and their need to perform other duties in August and September 1995." [464] The Trial Chamber could not positively establish that the Croatian authorities had a policy of non-investigation of crimes committed against Krajina Serbs during and following Operation Storm. [465]

(c) Serbia's allegations of looting and destruction are denied

3.86 It is noteworthy, that the Respondent's expansive allegations regarding looting and the destruction of property have now been significantly watered down, meriting a mere page in the Rejoinder. In response to the Applicant's detailed response,[466] the Rejoinder sets out two paragraphs referring to the Counter Memorial,[467] without engaging in *any* response. The contents of

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[461] *Gotovina* TJ, para. 2321. See further Chapter 4, para. 4.13.

[462] *Gotovina* TJ, paras 2100 *et seq.*

[463] *Gotovina* TJ, para. 2108 (internal citations omitted). See also para. 2137.

[464] *Gotovina* TJ, para. 2203.

[465] *Ibid*.

[466] Reply, paras 11.103 - 11.108.

[467] Rejoinder paras 773-774 relying on Counter Memorial, paras 1312-1325.

the Reply are maintained in their entirety. The evidence demonstrates that the alleged acts were not "tolerated" or "planned" by the Croatian government.[468] The Applicant does not assert that no looting or destruction took place; rather it is clear that there is no evidence that the Croatian government planned, ordered, committed, aided or abetted, in the destruction and looting of Serbian property. Looting was not condoned or otherwise supported by the Croatian government.

3.87 The Respondent's reliance on the ICTY judgment is of no help either. Once again, the Respondent's characterisation of the Trial Court's judgment needs to be treated with caution. While the Trial Chamber found 22 specific incidents of destruction of property owned or inhabited by Serbs in Sector South, the Trial Chamber found, that the evidence before it did

> "..not indicate that members of the Croatian political and military leadership intended that property inhabited or owned by Krajina Serbs should be destroyed or plundered. Further, it does not indicate that these acts were initiated or supported by members of the leadership. Rather, the evidence includes several examples of meetings and statements […], indicating that the leadership, including Tuđman, disapproved of the destruction of property. Based on the foregoing, the Trial Chamber does not find that destruction and plunder were within the purpose of the joint criminal enterprise." [469]

3.88 Further, as set out earlier there were reports of the Serbs destroying houses and buildings while they were retreating before the Croatian Army.[470] The Belgrade daily *Naša borba* published a statement by 'Krajina' soldiers who described their retreat before the arrival of the HV as follows:

"Retreating toward Srb and Drvar, we passed through deserted places. There were no dead or wounded civilians or soldiers, just empty houses and domestic animals. Explosions were heard occasionally in some buildings which were blown up by the Serbs themselves, after their departure, so they would

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[468] Reply, para. 11. 103.

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

[470] See the Official Note of the Statement by N.G., Annex 18. He states that while he was still in the column he learnt that his house had been set on fire by Serb soldiers. He left for Serbia with the others, but returned as soon as he could and rebuilt his house. See also the Official Note of the Statement by M.J., Annex 21. He states that "when the "Storm" started, I decided to leave my house on 06 August 1995, at around 6 o'clock in the afternoon because I saw that everybody was leaving." Later when he was in Serbia he learned that his house and others had been destroyed by the rebel Serb authorities.

not end up in Croatian hands - hospitals, post offices, depots with weapons which they did not manage to evacuate."[471]

(5) Croatia Did not Impose Any barriers to the Return of Serb Refugees

3.89 Croatia did not impose any legal barriers on the return of Serb refugees. During this time the Applicant took all the reasonable and necessary measures it could in the difficult circumstances. The Applicant has set these out in the Reply. In particular, the Reply responded to the Respondent's allegations that in an "effort to ensure that Serbs would disappear from Krajina, the Croatian Government re-populated the region with Croats"; it ignored UN resolutions that called for the return of the Serbs; it took legislative measures that targeted the Serbs; and it used its criminal justice system in a discriminatory manner.[472]

3.90 Reading through the rhetoric in the Rejoinder, it is clear that the Respondent merely repeats its earlier allegations regarding allegedly "restrictive" executive and legislative measures relating to the right to return; housing[473] and criminal impunity for perpetrators of crime.[474] All of these issues were dealt with in the Reply.

3.91 The Respondent criticises the Applicant for citing recent and current developments and documents and states that the "reports from the relevant time are particularly important to this case."[475] The Applicant does not dispute this, however in the light of significant changes since the time of reporting, the Applicant is of the view that more recent Reports are equally important, especially since a number of laws and policies referred to by the Respondent were subsequently amended or repealed to facilitate return.

3.92 As set out in the Reply, during the war Croatia provided shelter for over one million people. The Croatian Government was in favour of organised return once minimum conditions for return, including basic infrastructure and restoration of institutions necessary for maintaining law and order, were ensured.[476] There was nothing in the legislative or administrative framework that precluded individuals returning at any time of their choice, notwithstanding the damage to the infrastructure in war-torn areas - if they so wished. Individuals were also

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[471] V. Milovanović, O. Mamuzić, *Leci sa uputstvima za povlačenje*, [Pamphlets with Instructions for Retreat], *Naša borba* (Belgrade), 12-13 August 1995, 9.

[472] Reply, paras 11.109 *et seq.*

[473] Rejoinder, paras 776-780, 816, 820, 821.

[474] Rejoinder, paras 816, 822, 823.

[475] Rejoinder, para. 775.

[476] See Letter from Minister Mate Granić to German Foreign Minister Klaus Kinkel, 25 August 1995, Reply, Annex 215.

able to return on humanitarian grounds.[477] The return process started as soon as the appropriate conditions were set. The Reply sets out details of the various programmes in place for the returning refugees.[478] In 1998, the government also adopted a "*Procedure for Individual Return of the Persons Who Left the Republic of Croatia"* and *"Mandatory Instructions on Obtaining required Documents for the Procedure for the Individual return of Persons who left the Republic of Croatia.*" This was advertised in the Serbian paper *Politika* and provided the methods by which individuals who sought to return to Croatia could do so. [479] In any event, Serbs began returning to the area in 1995 itself. Bilateral and international agreements aimed at affecting a two-way return of refugees was also referred to in the Reply. [480] The Respondent notes the return of Serb refugees but alleges that Croatia is "avoiding to inform" how many where of Serb ethnicity.[481] However just two paragraphs later it sets out a number - it states that "only 68,000 have returned to Croatia." [482] By the end of 2011, 389,172 persons had returned to Croatia, of which 246,142 were IDPs and 143,030 were refugees. Of these, 132,068 were registered returning Serbs (107,668 refugees and 24,940 IDPs). Furthermore, as Serbia is well aware, a bilateral process of data exchange between Croatia and Serbia, facilitated by the UNHCR, was concluded in November 2011. The results of the process are outlined in a UNHCR Report, which was discussed and agreed upon with the governments of Serbia and Croatia. As a result of this, UNHCR identified and referred 15,285 persons for de-registration after they had achieved at least one durable solution benchmark, using the Serbian 2010 refugee database as a starting point. The data exchange process formed a basis for the elaboration of the Regional Programme on Durable Solutions for Refugees and Internally Displaced Persons, adopted on 7 November 2011 by Bosnia and Herzegovina, Croatia, Montenegro and Serbia.[483]

3.93 It is noteworthy that under Serbian Law refugees are bound by the same requirements regarding military service as citizens. As a result some, refugees from 'Krajina' were inducted in to military service in Serbia and upon mobilization were sent back to Eastern Slavonia in Croatia. This was a much greater obstacle to their return, and was an obstacle created by the Respondent.[484]

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[477] Reply, para. 11.112.

[478] Reply, para. 11.113.

[479] Procedure for Individual Return of the Persons Who Left the Republic of Croatia (Mandatory Instructions), Zagreb, 14 May 1998, Annex 32.

[480] Reply, paras 11.114, 11.119.

[481] Rejoinder, para. 816.

[482] Rejoinder, para. 819.

[483] Report on the Exchange of Data Relevant for Current and Former Croatian Refugees in Serbia - Process and Results, November 2011, UNHCR.

[484] See Report of the Status of Human Rights in Serbia, December 1995, Helsinki Committee for Human Rights Serbia, para. 93-94 and 98 (which refers to the Serbian Law on Refugees, Official Gazette 18/92, Art. 2(2)).

3.94 The Respondent once again misrepresents Croatian property law.[485] This issue was dealt with in the Reply.[486] The rationale behind the promulgation and implementation of the *Law on Temporary Takeover* was the protection of properties, as well as the interests of their owners and potential creditors, irrespective of ethnicity. It sought to protect the relevant properties from theft and vandalism. The Trial Chamber in *Gotovina*, noted the Explanation of the Law that stated:

> "many Croatian citizens of Serbian nationality left [Croatia] and […] left behind a large quantity of valuable property […] [that was] subjected to various forms of theft and damage, and the relevant bodies of [Croatia] - despite all their efforts - cannot fully and successfully protect this property and thereby also the interests of its owners, the interests of possible creditors and especially the interests of [Croatia] in whose territory it is situated." [487]

3.95 Given the large number of refugees and IDPs in Croatia it was entirely reasonable to make temporary provisions for those properties to be occupied.[488] The Law in question was agreed upon, and monitored by the international community, and was not criminal in nature or objective.[489]

3.96 The OSCE has been monitoring aspects of the Croatian Housing Care Programme and in its November 2011 Status Report it found *inter alia* that Croatia had "fully accomplished" the benchmarks set by the OSCE, in order to resolve the outstanding issue of former occupany/tenancy rights holders (OTR) wishing to return to Croatia.[490] Having established that the Programme had gone beyond the OSCE benchmarks and that Croatia had "fully accomplished" what was agreed that there was no need to continue to monitor the Programme.[491] In this context, the Respondent's reference to a Council of Eu-

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[485] Rejoinder, para. 816.

[486] Reply, paras 11.115-11.118.

[487] *Gotovina* TJ, para. 2070.

[488] Reply, para. 11.116. The Applicant points out that between 1991 and 1995 Croatia provided shelter for over one million people, (including 550,000 internally displaced persons and 400,000 refugees from the region).

[489] See for example, the European Court of Human Rights, in *Saratlić v. Croatia*, 35670/03, ECtHR, 24/10/06, affirmed the State's "legitimate interest in housing displaced persons in the property left behind by persons who left Croatia during the war ". It further held that "the system which allows such persons to remain in the occupied property before they have been provided with adequate housing is not in itself in contradiction with the guarantees contained in Article 1 of Protocol 1, providing that it ensures sufficient safeguards for the protection of the applicant's property rights."

[490] Status Report of the Head of the OSCE Office in Zagreb to the OSCE Permanent Council, 22 November 2011, Annex 33.

[491] *Ibid*., pp. 7-8.

rope Report of 2010 is clearly outdated.[492] These programmes and developments demonstrate that that Croatia did not enact legal barriers to the return of Serb refugees and there has been considerable headway made in ensuring that the rights of OTR holders has been upheld.

3.97 The Respondent also makes some generalised comments on criminal impunity for the perpetrators of crimes against Serbs.[493] These allegations were dealt with in the Reply.[494] Croatia is committed to investigation, prosecution and punishment of all war crimes committed during the conflict in Croatia, regardless of the ethnicity of the perpetrators. The Reply noted that the Respondent's failure to acknowledge the ongoing co-operation between the parties with regard to war crimes prosecution as well as national commissions for missing person. The Respondent admits this[495] but alleges continuing impunity.[496]

3.98 The OSCE also monitors war crimes proceedings in Croatia.[497] The OSCE notes that the Croatian Chief State Attorney's War Crimes database is the "core resource for analyzing Croatia's established track record in investigating and prosecuting domestic war crimes cases."[498] It notes the "significant efforts of Croatia" in the prosecution of war crimes. Its analysis shows that Croatia is "clearly succeeding in ensuring that war crimes proceedings are conducted in an impartial manner by the independent judicial bodies." It states that the system is further strengthened by institutions that are capable of investigating crimes in a "transparent and efficient manner."[499] The Report also notes the ongoing regional co-operation, and Croatia's active participation in enhancing this. It states that inter-state co-operation between Croatia and Serbia has been "firmly and consistently enhanced during the last years" and sets out details of this.[500] In furtherance of the bilateral co-operation between the parties, the representatives of the State Attorney's Office of Croatia, along with War Crimes Prosecutor's Office of Serbia visited Denmark from 23 to 25 January 2012, to question members of the Danish peace-keeping battalion, stationed at Dvor na Uni in August 1995, where unidentified military

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[492] Rejoinder, para. 820 and relatedly 821.

[493] Rejoinder, paras 816, 817, 822, 823. It is noteworthy that the 1996 Human Rights Watch Report cited in support of its allegations was one of the documents that the Gotovina Trial Chamber disregarded, *inter alia* on the ground that "the majority of evidence contained therein comes from indirect sources". See *Gotovina* TJ, para. 55.

[494] Reply, paras 11.122 and 2.69.

[495] Rejoinder, para. 817.

[496] Rejoinder, paras 822-823.

[497] Status Report of the Head of the OSCE Office in Zagreb to the OSCE Permanent Council, 22 November 2011, Annex 33.

[498] *Ibid*, (p. 1).

[499] *Ibid*.

[500] *Ibid*, (p. 3).

members killed twelve civilians, most of whom were handicapped. Further cooperation between the two prosecution offices will continue in this case. [501]

3.99 The OSCE Report also refers to the improved legislative framework for the prosecution of war crimes, which *inter alia* provides for an increased efficiency and impartiality in both investigation and prosecution. Priority cases have been identified at the national and regional levels and special teams have been established to investigate the most sensitive cases. [502] It also notes efforts to address previously un-investigated and unprosecuted crimes. [503]

3.100 As regards Missing Persons, since the early 1990s, Croatia has worked systematically to identify missing persons, and the resolve and political will to address this issue remain strong. Various initiatives and other measures implemented by the competent bodies in Croatia have led to the resolution of the majority of cases involving detained and missing persons. In December 2011, a meeting was held between representatives from the Directorate for the Imprisoned and Missing of the Croatian Ministry of Veterans' Affairs, the Committee of the Serbian Government for Missing Persons, the Institute for Missing Persons in Bosnia and Herzegovina and the International Committee for Missing Persons regarding measures for speeding up the process of finding missing persons. [504]

CONCLUSION

3.101 As set out before, the primary purpose of Operation *Storm,* as a military and police operation, was to establish the territorial integrity of Croatia. This was accepted by the Trial Chamber that found that "the primary focus of the [Brioni] meeting .... [was] whether, how, and when a military operation against the SVK should be launched".[505] Similarly, the Chamber acknowledged that "all measures taken at the time, were taken in the context of an

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[501] See Croatia's Periodic Report to the European Commission on the Fulfilment of Obligations Arising from Chapter 23, "Judiciary and Fundamental Rights", March 2012, Annex 34.

[502] See Status Report of the Head of the OSCE Office in Zagreb to the OSCE Permanent Council, 22 November 2011, Annex 33, (p. 4). The Report notes that a significant number of cases have been transferred to four specialised war crimes courts and notes other procedural and substantive improvements, like improved witness and victim support and NGO's monitoring and capacity building. (pp. 4-6).

[503] *Ibid*, (p. 5). It notes that increased efforts in this field resulted in the opening of new cases in 2011, like a case against Merčep charged with command and individual responsibility for the torture and death of more than 50 predominantly Serb civilians at the end of 1991. Other investigations have been launched regarding events in Sisak in 1991.

[504] Croatia's Periodic Report to the European Commission on the Fulfilment of Obligations Arising from Chapter 23, "Judiciary and Fundamental Rights", March 2012, Annex 34.

[505] *Gotovina* TJ, para. 1990.

armed conflict that had been ongoing in the territory of the former Yugoslavia for many years and of Croatia having faced an occupation of part of its territory." [506]

3.102 It is plain that the Croatian Government had no plan to destroy the Krajina Serbs, by Operation *Storm* or otherwise. No such plan was drawn up at the Brioni meeting, there was no indiscriminate shelling of Serb civilians by the Croatian forces, and the HV's use of artillery was neither extensive nor indiscriminate. A fear of impending military defeat, a refusal to accept Croatian sovereignty and the evacuation orders were just some of the motivators for the departure of the Serbs. There was no plan to target fleeing Serbs civilians and no systematic killing of the Serbs who remained. The Respondent's claim of genocide is hopeless and without any foundation.

3.103 Croatia took measures to prevent unlawful acts, and initiated investigations and legal proceedings to punish individual perpetrators of such acts. Croatia did not adopt measures to target the Serbs with a view to ensuring that they did not return. It adopted necessary and appropriate measures to deal with the difficult situation it found itself in 1995, regarding both the influx of refugees and the presence of IDPs as well as housing. These measures were monitored by the international community.

3.104 As more fully discussed in the following Chapter, with respect to each alleged method of implementing its "genocidal intention", the actions taken by Croatia, both before and after the Brioni Meeting, cannot possibly justify a claim that Croatia was engaged in any criminal activity, let alone a genocidal one.

[506] *Gotovina* TJ, para. 2309.

CHAPTER 4

THERE WAS NO GENOCIDE AGAINST SERBS IN THE 'RSK' AND NO RESPONSIBILITY OF CROATIA

SECTION I: INTRODUCTION

4.1 The Respondent has elected to address the evidential and legal issues in relation to the Counter-Claim together in Chapter VIII of the Rejoinder. This is in contrast to the structure it chose to adopt when it first pleaded the Counter-Claim in its Counter-Memorial (see Chapters XIII and XIV), and to the structure which the Applicant adopted when responding to the allegations in its Reply (see Chapters 11 and 12). This merging of the issues in its Rejoinder has enabled the Respondent to gloss over a number of legal issues which fundamentally undermine its Counter-Claim. The Applicant maintains the division of evidential and legal issues in this Additional Pleading so as to highlight the multiple and manifest weaknesses in the Respondent's case.

4.2 In this Chapter the Applicant addresses the legal issues which arise as a consequence of the evidential analysis set out in Chapter 3, including those which have been ignored or understated by the Respondent. The following key conclusions can be drawn from this analysis:

a. As a matter of law, there is no basis for a finding of genocidal intent by the Croatian political and military leadership.

b. As a matter of law, there is no basis for a finding that genocidal acts within the meaning of Article II(a)-(e) of the Genocide Convention were committed by Croatian armed forces. The Respondent's case is misconceived in law with regard to forcible displacement and other acts which it asserts are capable of being genocidal, and it continues to overlook the significance of the JCE findings in *Gotovina* for its pleaded case.

c. Any proper comparison of the Claim and Counter-Claim demonstrates that it is wholly implausible for the Respondent to assert genocide in relation to Operation *Storm* whilst maintaining that its own systematic and lengthy campaign against Croat civilians, conducted by way of illegal military incursions into Croatian territory, did not amount to genocide. *Storm* was a military operation which was designed to regain control of Croatian territory illegally occupied by rebel Serbs, an objective far removed from any genocidal intent or conduct.

SECTION II: THE CRIME OF GENOCIDE

(1) The Mental Element: No Genocidal Intent

(a) The Protected Group

4.3 The Respondent argues 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.[507] It is said that the Applicant does not challenge this, or its legal consequences.[508] That is wrong and misleading: the Applicant challenged it expressly in its Reply[509] and maintains the same position in this Additional Pleading. For the reasons already set out in earlier pleadings,[510] the 'Krajina' did not have the significance for Serbs which the Respondent now asserts.

4.4 As a matter of law, the Applicant accepts (1) that Croatian Serbs constituted a separate national or ethnic group and (2) that the Serb civilian population living in the 'Krajina' represented a substantial part of that group.[511] But if what the Respondent seeks to assert - and this is not clear - is that the 'Krajina' Serbs were themselves a separate ethnic or national group, or that they had a specific geographical connection to the 'Krajina' which is in some way relevant to the allegation that any forcible displacement of them from that location would amount to genocide, that is not accepted either as a matter of law or fact. The important legal point is the one on which there is no dispute: that *if* there had been a genocidal plan to physically destroy the 'Krajina' Serbs, that would constitute an intention to destroy part of a national or ethnic group. There was as a matter of fact no such plan, and the Applicant fails to see the relevance of the Respondent's assertions as to the location or significance of the group.

(b) The Relationship Between Motive and Intent

4.5 The Respondent asserts that the Applicant has confounded the concepts of 'goal' and 'intent' and that this is in some way significant for the present case. This wholly semantic objection is baseless and irrelevant. The Applicant well understands the difference between these terms and recognises that there may, in certain cases, be a significant distinction between a person's 'goal' (or motive) and the acts which they may be taken to have intended.

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[507] Rejoinder, para. 690.

[508] *Ibid.*

[509] Reply, paras 10.10-10.11; 11.3; see also para. 3.3, *supra*.

[510] See also Memorial, Chapter 2, especially Plate 9 at p. 64.

[511] Reply, para. 12.2.

But in the present case the Respondent squarely alleges that there was an explicit and express agreement to commit genocide by physically destroying the 'Krajina' Serbs which was formed at the Brioni meeting and which, it says, is evidenced by the transcript of that meeting. This is not a case in which the Respondent alleges that, hidden beneath a 'goal' which was lawful on its face, was a genocidal intention.

4.6 For that reason, the distinction which the Respondent seems concerned to articulate is wholly irrelevant. If the Respondent is right about its interpretation of the Brioni meeting minutes, then it was both the goal and the intention of the Applicant to commit genocide. If the Respondent is wrong, then there was no genocide and no goal or intention to achieve the physical destruction of the 'Krajina' Serbs. In meeting the allegation levelled at it, the Applicant is entitled and bound to say that both the goal *and* the intention of the Applicant was not the physical destruction of the 'Krajina' Serbs.

(c) The Respondent's Case on Intent

4.7 The Respondent's case on intent is that "the plans for the destruction of the Serb population in Krajina were finalized at the meeting held on Brioni Island".[512] The Respondent relies on two evidential sources to substantiate what it says is the genocidal intent in this case:

a. The transcript from the Brioni meeting; and

b. The subsequent acts of the Croatian military, said to confirm the interpretation of the Brioni meeting which the Respondent contends for.

The Brioni Meeting

4.8 The Applicant has set out a detailed factual analysis of the Brioni meeting transcript in Chapter 3, highlighting the selective, misleading and flawed approach the Respondent has taken to the interpretation of that document. The Applicant maintains that there was no criminal plan of any type formulated at Brioni.

4.9 For the purpose of the present case, the Respondent must prove fully conclusively[513] that a genocidal plan was agreed: one that intended to *physically destroy* the 'Krajina' Serbs. It does not suffice as a matter of law for the Respondent to establish that there was a criminal plan formulated at Brioni to commit war crimes or even crimes against humanity: for example, a plan to

[512] Rejoinder, para. 713.

[513] *Bosnia*, para. 209.

forcibly remove all the Serbs from the 'Krajina' under threat of serious harm if they did not leave is insufficient.[514]

4.10 This Court in the *Bosnia* case emphasised the significance of the requirement that there be an intent to *physically destroy* the relevant group, citing the *Stakić* judgment from the ICTY:

> "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. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić,* IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." *(Stakić,* IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.)"[515]

4.11 The Respondent has not adduced any evidence which is capable of establishing the specific intent for genocide. Even the *Gotovina* judgment on which the Respondent repeatedly relies undermines its own case on this issue. The Applicant reiterates that the findings in the *Gotovina* case are subject to an appeal by the Defence, but even if those findings are upheld they do not assist the Respondent.

4.12 The ICTY was of the view that senior members of the Croatian government, including President Tuđman, were party to a JCE. The Applicant makes two observations about the conclusion there was such a JCE:

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[514] *Prosecutor v. Stakić,* IT-97-24-T, Judgment of the Trial Chamber of 31 July 2003 (hereinafter *"Stakić"*), para. 519.

[515] *Bosnia,* para. 190.

a. *First*, the findings of the ICTY are currently subject to an appeal; and

b. *Second,* even if the Appeals Chamber upholds this particular aspect of the judgment, the Applicant observes that that Chamber specifically rejected the application of the Republic of Croatia to intervene in the appeal proceedings to make submissions on the findings about the scope of the JCE.[516] There is a point of fundamental legal importance for the ICTY proceedings which arises out of this situation: the ICTY expressed a positive view that persons not indicted before it were complicit in a JCE to commit crimes against humanity; that view has potential consequences for the Croatian State; it is wrong in principle for a court to express such views whilst refusing to hear submissions offered by the State which stands to be directly affected by them. Accordingly, the Applicant submits that this Court should approach any views expressed by the Appeal Chamber which implicate senior members of the Croatian government in a JCE with a high degree of caution.

4.13 In any event, in the ICTY's view the common objective of any JCE within the Croatian government was considerably more limited than contended for by the Prosecution. The Prosecution had alleged that the common objectives of the JCE had included persecution by murder, inhumane acts, cruel treatment, disappearances, plunder or wanton destruction. The Trial Chamber rejected those arguments in their entirety and found:[517]

> "that the common objective did not amount to, or involve the commission of the crimes of persecution (disappearances, wanton destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions), destruction, plunder, murder, inhumane acts, and cruel treatment."

4.14 The common objective of the JCE was, according to the Trial Chamber's findings, limited to crimes directed at *removing,* in contrast to *physically destroying*, the Serb population in the 'Krajina'.[518]

4.15 As this Court recognised in *Bosnia*, citing the ICTY judgment in *Kupreškić,* genocide is in essence an extreme form of the crime against hu-

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[516] Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia*,* 8 February 2012.

[517] *Gotovina* TJ, para. 2321.

[518] *Ibid*., paras 2310-2314.

manity of persecution of individuals.[519] Where the ICTY is of the view that the common objective of any JCE within the Croatian government in relation to Operation *Storm* was limited to persecution in its less serious form (excluding, for example, murder, inhumane acts, cruel treatment, and disappearances),[520] it is inconceivable that the same events could be said to amount to genocide.

4.16 The judgment in *Gotovina* wholly undermines the Respondent's case that any plan formed at Brioni was genocidal. The Trial Chamber highlighted in the second paragraph of its conclusions on the scope of the JCE that President Tuđman "emphasised the importance of leaving the civilians 'a way out'."[521]

4.17 It is notable that the Respondent does not confront these findings at any stage in its Rejoinder. Rather, it actively misleads the Court by paragraphs which state, for example:

> "It is obvious from all the 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."[522]

4.18 It is right that the ICTY found that members of the Croatian military forces and Special Police had committed crimes, but it is quite wrong to state that they were "underlying acts of genocide": in so far as they were acts of murder, inhumane treatment or disappearances, for example, they were not

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[519] *Bosnia*, para. 188, citing *Prosecutor v. Kupreškić et al*, IT-95-16-T, Judgment of the Trial Chamber of 14 January 2000, para. 636, which states:

> "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."

[520] *Gotovina* TJ, para. 2321.

[521] *Ibid*., para. 2304.

[522] Rejoinder, para. 809.

even considered to be acts within the intended common objective of the JCE which, in the ICTY's view, existed within the Croatian government.

4.19 Such is the paucity of the Respondent's case, and so damaging are the findings of the ICTY in *Gotovina* for that case, that the Respondent feels compelled to deliberately mislead the Court. That, the Applicant suggests, is the hallmark of the very weak case put forward by Serbia.

Subsequent Acts

4.20 The Respondent's case is that the genocidal intent formed at Brioni was confirmed by the subsequent conduct of the Croatian armed forces.[523] The Applicant has addressed in Chapter 3 the evidence which undermines the factual allegations made by the Respondent in support of this assertion.

4.21 As a matter of law, it is clear that if the Court is satisfied any plan agreed at Brioni was not genocidal (and the Applicant would suggest that this conclusion, at the least, is inevitable, given the findings of the ICTY set out above), this secondary aspect of the Respondent's case falls away. It is not the Respondent's case that the intention for genocide can be inferred from the pattern of conduct during Operation *Storm* alone and nor, sensibly, could that be its case. This Court made it clear in the *Bosnia* case that the threshold to be applied to infer genocide from a pattern of conduct is exacting: genocidal intent must be the *only* reasonable inference capable of being drawn from the facts, which must themselves have been convincingly established. The Applicant has addressed this issue in detail in its submissions on the Claim, and reiterates those submissions here.[524] Plainly in the present case, genocidal intent, if it could be established at all, is not the only inference which can be drawn from the subsequent acts: the ICTY has already taken a different view, having considered in a single case all the relevant facts which are now being advanced by the Respondent in this case. This is, of course, distinct from the situation in the Claim, where no single ICTY case has considered the pattern of crimes which were committed against the Croatian population by the Respondent over a considerably longer period and a much greater geographical area, although there have been many convictions for crimes against humanity and war crimes.

4.22 Finally in this section, the Applicant draws the Court's attention to another example of the Respondent's deliberate and blatant misrepresentation of the ICTY's judgment in *Gotovina*. As part of its allegation that the "general conduct of the Croatian armed forces which followed the Brioni meeting" confirmed the existence of genocidal intent, the Respondent cites part of the

[523] Rejoinder, para. 721.

[524] Reply, paras 9.20-9.24.

Gotovina judgment which it says "fully confirms" this view.[525] The paragraphs from the ICTY judgment find that crimes of persecution, murder, inhumane acts, destruction and plunder of property and deportation had been committed against the 'Krajina' Serbs. But of course the Respondent well knows that the ICTY found the vast majority of those crimes to be *outside* the scope of the JCE said to have been formed at Brioni, and thus the suggestion that their commission confirms the existence of a genocidal plan formed at that meeting is nothing less than a calculated attempt to mislead this Court. The Applicant regrets that a high degree of caution should be exercised when considering the Respondent's citation and characterisation of the *Gotovina* judgment. The Respondent's pleadings go well beyond any acceptable approach to the presentation of evidence in adversarial proceedings, especially in a case with facts and issues as complex and detailed as the present one.

(2) The Physical Element: No Genocidal Acts

(a) Killing Members of the Group

4.23 The Respondent's Rejoinder approaches proof of the physical element of genocide in a wholly superficial manner, which is both inadequate and unacceptable. This is most clearly borne out in relation to the killings which it purports to rely on. At paragraph 796 it is simply said:

> **"**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".

4.24 This paragraph contains no citations whatsoever to any part of the Trial Chamber's judgment. It is entirely unclear which killings, of whom, where or when, the Respondent relies on. How, in those circumstances, the Court is expected to assess the Respondent's case within the legal framework of the Genocide Convention is not explained. The Applicant reiterates that the burden is on the Respondent to prove the allegations it makes and to do so using evidence which is "fully conclusive."[526] Where the Respondent cannot even make the effort to provide the citations to the judgment on which it places such heavy reliance, and which runs to 1377 pages and 2685 paragraphs, a question must be raised about the seriousness with which it is approaching these proceedings.

4.25 Moreover, the Respondent's summary of the ICTY's findings is again wrong: the ICTY did not identify a single person killed by shelling in Knin, Benkovac, Obrovac and Gračac.[527]

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[525] Rejoinder, paras 721-722.

[526] *Bosnia,* paras 204, 209.

[527] See para. 3.37, *supra*.

4.26 In any event, the Applicant maintains the position set out in the Reply: there were no killings of 'Krajina' Serbs by Croat forces which were perpetrated with genocidal intent and the Respondent has adduced no new evidence in support of that assertion. On the contrary, the ICTY's findings set out above are that murder and disappearances were not even within the scope of the common objectives of any JCE within the Croatian government.[528]

(b) Causing Serious Bodily or Mental Harm to Members of the Group

4.27 Again, the Respondent adopts a wholly superficial approach to this aspect of its case. Reliance is placed on the findings of the ICTY in *Gotovina*, this time in relation to inhumane treatment.[529] But again, the Respondent fails to address the fundamental flaw with this reliance: even if the appeal in *Gotovina* is unsuccessful, those acts were found by the ICTY to fall outside the scope of any JCE to commit crimes against humanity involving the Croatian government.[530] How, then, it can be said by the Respondent that those identical acts were "driven by the same intent to destroy the group of Krajina Serbs as such" is entirely unexplained and incredible.[531]

(c) Deliberately Inflicting on the Group Conditions of Life Designed to Bring About its Destruction in Whole or in Part

4.28 The Respondent's case is that there is "ample evidence" in the *Gotovina* judgment to establish that the Croatian government deliberately infllicted conditions of life on the 'Krajina' Serbs designed to bring about their destruction.[532] There are again no citations to any acts or findings which are relied upon nor any explanation of how they are capable of meeting the high threshold imposed by Article II(c). The Respondent is quite wrong to say that the Applicant does not "dispute the issue of the *actus reus*": the Applicant disputes both the facts and the law as presented by the Respondent on this issue.[533]

4.29 The thrust of the Respondent's submissions in its Rejoinder under Article II(c) appears to fall into two categories:[534]

a. The forcible displacement of the 'Krajina' Serbs;

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[528] See para. 4.13, *supra*.

[529] Paragraph 1794 of the *Gotovina* judgment is cited by the Respondent at paragraph 797 of the Rejoinder. Paragraph 1794 is one of those dealing with the legal findings about acts of inhumane treatment, which begins at paragraph 1790 of the Judgment.

[530] See para. 4.13, *supra*.

[531] Rejoinder, para. 798.

[532] Rejoinder, para. 799.

[533] *Ibid*.; Reply, Chapters 11 and 12.

[534] Rejoinder, para. 800.

b. Physical and legal barriers to return, including looting and destruction of property.

4.30 The Respondent's case is misconceived in law. Even if the Respondent were able to meet the (insurmountable) evidential difficulties identified in Chapter 3 of this Additional Pleading, neither of those acts is capable of amounting to the infliction of conditions of life designed to bring about the destruction of the 'Krajina' Serbs.

Forcible Transfer

4.31 The central, indeed pivotal, allegation in the Respondent's case is the alleged forcible displacement of 200,000 Serbs from the 'Krajina':

> "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 in 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."[535]

4.32 As a matter of law, it is not genocide to forcibly remove an entire population from an area, nor to intend to do so. Whilst such conduct may amount to a crime against humanity, it lacks the central feature of genocide: the intention to *physically destroy* the group, in whole or in part. Forcible transfer does not *destroy* a group; it *moves* it. As the ICTY has explained:

> "It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide. As Kreß has stated, "[t]his is true even if the expulsion can be characterised as a tendency to the dissolution of the group, taking the form of its fragmentation or assimilation. This is because the dissolution of the group is not to be equated with physical destruction". In this context the Chamber recalls that a proposal by Syria in the Sixth Committee to include "[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" as a separate

[535] Rejoinder, para. 688 (emphasis added).

> sub-paragraph of Article II of the Convention against Genocide was rejected by twenty-nine votes to five, with eight abstentions."[536]

4.33 This Court cited parts of that paragraph in its own judgment in the *Bosnia* case, excerpted above at paragraph 4.10. Indeed, this Court held that the stated intention in relation to Srebrenica - to carry out "'[p]lanned and well-thought-out combat operations' … to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'" - was not sufficient, precisely because expulsion of the inhabitants would have achieved the purpose of the operation, and expulsion is not a genocidal act.[537]

4.34 The Applicant accepts, of course, there may be circumstances in which forcible transfer is carried out in a manner which does have the effect of *physically* destroying the group: by moving all the men to one location and all the women to another, thereby preventing procreation; or by killing all the men and forcibly transferring all the women, again to prevent procreation. Or if forcible transfer is coupled with the withholding of food or medical care, such that those transferred inevitably die. But in order to be a genocidal act, it must be established that the act was designed to bring about the physical destruction of the group. Absent that design, forcible transfer is of no relevance to an allegation of genocide. In this case, the Respondent has not even asserted even less evidenced any allegation that the purpose and method of any forced displacement was the destruction, as opposed to the removal, of the 'Krajina' Serbs.

4.35 Finally, the Applicant notes the reference by the Respondent to the initial application in these proceedings. For present purposes there are no "legal consequences" of that application, contrary to the Respondent's suggestion: the question of whether forcible displacement can amount to genocide and in what circumstances is a matter of law which this Court is competent to determine; what the Applicant said in its initial application cannot sensibly have any influence upon that.

Physical and legal barriers to return, including destruction of property

4.36 Even if, contrary to the Applicant's submission, the Respondent were able to make out the allegations which were first advanced in the Counter-Memorial, paragraphs 1406-1409, and those which are now made in the Rejoinder at paragraphs 773-780, they are incapable as a matter of law of amounting to acts contrary to Article II(c), because they do not and could never entail the *physical destruction* of the group. Measures designed to prevent a group from

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[536] *Stakić*, para. 519. Parts of this paragraph are cited in this Court's judgment in the *Bosnia*, para. 333.

[537] *Bosnia,* paras 280-281.

returning to a geographical area cannot be equated with measures designed to *physically destroy* that group. The Respondent continues to ignore the principal legal flaw in its case: forcible deportation, and measures used to achieve and maintain that end, is not genocide.

SECTION III: CONSPIRACY TO COMMIT GENOCIDE

4.37 The Respondent advances no new arguments on this issue. The Applicant challenges the interpretation of the Brioni minutes on which this aspect of the Respondent's case depends, for all the reasons set out in Chapter 3.

SECTION IV: ATTRIBUTION

4.38 The Respondent appears to overlook the Applicant's clear and frank acceptance in the Reply that it bears international responsibility for the "statements and acts of those present at the Brioni meeting and for the conduct of military personnel of the HV and police personnel of the Croatian MUP during and after Operation *Storm"*.[538] Why the Respondent elects to do so is entirely unclear, but the assertion at paragraph 809 of the Rejoinder is nothing short of bizarre, in light of the Applicant's pleaded position:

> "It is hard to conceive how the Applicant, after a long period of acceptance and celebration of Operation *Storm* and of the participation of the army in this operation, can today attempt to claim that somebody else may have been culpable for the crimes committed during the operation."

4.39 In relation to actions by the ABiH or civilians, the Applicant's position is as set out in the Reply: it does not and cannot bear responsibility for those acts. The Respondent advances various assertions in the Rejoinder on this issue but at no stage does it grapple with or apply the legal test for attribution set out in this Court's judgment in the *Bosnia* case.[539] This Court emphasised that it is necessary for the party alleging genocide to "clearly establish"[540] that either (1) the entities that committed the genocide were organs of the State or (b) that they were acting on the instructions of an organ of the State or under the effective direction and control of such an organ.[541]

4.40 That test is plainly not met and the Respondent has not advanced any reasoned argument to the contrary. The highest the Respondent can put its case is that:

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[538] Reply, para. 12.61.

[539] As set out in the Reply, paras 9.58-9.61.

[540] *Bosnia*, para. 209.

[541] *Bosnia*, paras 385-415.

> "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. 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 crimes committed by that unit during the operation."[542]

4.41 An assertion that something "could imply" attribution falls woefully short of the standard to be applied both as a matter of law and evidence. The allegation that any conduct of the ABiH 5th Corps is attributable to the Applicant is baseless.

SECTION V: NO FAILURE TO PUNISH ALLEGED VIOLATIONS OF ARTICLES II AND III OF THE CONVENTION

4.42 The Respondent's case on the Applicant's alleged failure to punish genocide is unclear and unstructured. For the avoidance of doubt, the Applicant's position is as follows:

a. There has been no genocide and accordingly there is no obligation to punish anyone for it. The Respondent's case on failure to punish is nothing more than a subsidiary of its primary case which, for the reasons set out in the Reply and in this Additional Pleading, has no foundation in evidence or law.

b. Any obligation to prosecute has in any event been discharged by the Applicant's cooperation with the ICTY in its prosecution of Ante Gotovina, Mladen Markač and Ivan Čermak. The obligation in Article VI of the Convention is in the alternative: either to prosecute in the State's own domestic courts *or* to cooperate with prosecution by an international penal tribunal, which includes the ICTY. Accordingly, the Respondent is wrong to say that the issue in relation to the ICTY does not arise on the facts of the present case:[543] on the contrary, even if there was an obligation to punish, it has been discharged by cooperation with the ICTY.

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[542] Rejoinder, para. 812 (emphasis added).

[543] *Ibid*, para. 804.

c. This Court has no jurisdiction over an allegation of failure to punish any crime which does not amount to genocide. The assertion that the Applicant is under a duty to prosecute other crimes as a result of international human rights norms, such as the European Convention on Human Rights ('ECHR'), is both irrelevant to these proceedings and wrong in law. The ECHR did not come into force in relation to the Applicant until 5 November 1997. Accordingly, the ECHR has no application to the matters which are the subject of the Respondent's Counter-Claim: not even the European Court of Human Rights would have jurisdiction *ratione temporis* over them.

4.43 Finally, the Applicant deprecates the Respondent's suggestion that these legal proceedings should be used to "contribute to setting the Applicant on a path that better acknowledge its history."[544] The purpose of this Court's adjudication of both the Claim and the Counter-Claim, and the only purpose of it, is to determine whether as a matter of law and evidence either party is liable for breaches of their obligations under the Genocide Convention. The Respondent's explicit and seemingly fervent desire to achieve something more aptly described as political point-scoring undermines its credibility in these proceedings.

SECTION VI: RELATIONSHIP BETWEEN THE CLAIM AND COUNTER-CLAIM

4.44 The Applicant concludes its submissions with some short observations about the comparative nature and strength of the Counter-Claim when considered alongside the Claim which forms the basis of these proceedings:

a. The Claim concerns actions by the Serbian State which were undoubtedly unlawful as a matter of international law, because they were designed to seize territory internationally recognised as Croatian as part of a plan to establish a 'Greater Serbia' outside the international boundaries of the Serbian State. There is no justification in law for the very premise of the Serbian incursion into Croatian territory. In contrast, the Counter-Claim concerns a military operation which had at its core an entirely legitimate objective as a matter of international law: the liberation of Croatian territory which had been unlawfully occupied by rebel Serbs, aided and abetted by the Serbian State, following the collapse of negotiations to achieve this objective by peaceful means.

b. The Claim concerns a consistent and systematic pattern of crimes meticulously organised and directed at destroying the Croat popu-

[544] *Ibid*, para. 806.

lation, which took place over a number of years in numerous locations across large parts of Croatia. In stark contrast, the Counter-Claim concerns far fewer and disparate incidents which took place in a very limited geographical area in a much shorter time frame.

c. The Claim is predicated on many crimes which have been found individually by the ICTY to amount to war crimes or crimes against humanity. No case determined by the ICTY has ever considered the totality of those crimes and whether, viewed in their full context, they can amount to genocide. This Court's judgment will be the first pronouncement upon that issue. In contrast, the ICTY has considered the entirety of Operation *Storm* and its legal characterisation, concluding that its intended common objective amounted to the crime against humanity of persecution, in its lesser form, excluding murder and inhumane treatment. Whilst it is the Applicant's position pending the appeal that this is an overstatement of criminal liability arising from Operation *Storm,* it is respectfully submitted that this Court's approach to the findings of the ICTY render it impossible to see how a finding of the much graver crime of genocide in these proceedings could now be justified.

4.45 As the Applicant explained in Chapter 1 of this Additional Pleading, at the crux of this Counter-Claim is the Respondent's cynical attempt for the purposes of these proceedings to characterise Operation *Storm* as a conflict which resembles in scale, impact and legal characterisation, the 1991-1995 war on which the Applicant's claim is based. In doing so, the Respondent seeks to draw the attention of this Court away from the genocidal campaign led by the Respondent between 1991-1995, by seeking to artificially equate this campaign with Operation *Storm*, which was a legitimate military operation directed at the liberation of occupied territory.

SUBMISSIONS

On the basis of the facts and legal arguments presented in its Memorial, its Reply and in this Additional Pleading, the Applicant respectfully requests the International Court of Justice to adjudge and declare:

1. That, in relation to the counter-claims put forward in the Rejoinder, it rejects in their entirety the fourth, fifth, sixth, seventh and eighth submissions of the Respondent on the grounds that they are not founded in fact or law.

The Applicant reserves the right to supplement or amend these submissions as necessary.

Agent of the Republic of Croatia

Zagreb, 03 August 2012

CERTIFICATION

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Agent of the Republic of Croatia

Zagreb, 03 August 2012