3 FÉVRIER 2015

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APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(CROATIE c. SERBIE)

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

(CROATIA *v.* SERBIA)

3 FEBRUARY 2015

JUDGMENT

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ABBREVIATIONS AND ACRONYMS

BiH	*Bosna i Hercegovina* (Bosnia and Herzegovina)
CHC	Croatian Helsinki Committee for Human Rights
FRY	Federal Republic of Yugoslavia
HV	*Hrvatska vojska* (Croatian Army)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
JNA	*Jugoslovenska narodna armija* (Yugoslav People's Army)
MUP	*Ministarstvo unutrašnjih poslova* (Ministry of Interior)
RSK	*Republika Srpska Krajina* (Republic of Serb Krajina)
SAO	*Srpska autonomna oblast* (Serb Autonomous Region)
SAO SBWS	Serb Autonomous Region of Slavonia, Baranja and Western Srem
SDG	*Srpska dobrovoljačka garda* (Serbian Volunteer Guard)
SDS	*Srpska demokratska stranka* (Serb Democratic Party)
SFRY	Socialist Federal Republic of Yugoslavia
SNB	*Služba nacionalne bezbednosti* (National Security Service)
SRS	*Srpska radikalna stranka* (Serbian Radical Party)
TO	*Teritorijalna odbrana* (Territorial Defence)
UNPA	United Nations Protected Area
UNPROFOR	United Nations Protection Force
VJ	*Vojska Jugoslavije* (Yugoslav Army)
VP	*Vojna policija* (Military Police)

INTERNATIONAL COURT OF JUSTICE

YEAR 2015

2015
3 February
General List
No. 118

3 February 2015

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

(CROATIA *v.* SERBIA)

Historical and factual background.

Break-up of the SFRY and emergence of new States — Situation in Croatia — Establishment of Serb autonomous regions — Armed conflict from summer 1991 — Vance plan and deployment of United Nations Protection Force — Operations "Flash" and "Storm" in 1995.

*

Jurisdiction and admissibility.

Croatia's claim — Jurisdiction ratione temporis *regarding events before 27 April 1992 (date the FRY became Party to the Genocide Convention) — Article IX of the Convention — Disputes "relating to the interpretation, application or fulfilment" of the Convention — Convention not retroactive — Question of applicability of Article 10 (2) of ILC Articles on State responsibility — Question of succession to responsibility — Dispute exists concerning whether prior acts could engage responsibility of Serbia — Court has jurisdiction over entirety of Croatia's claim.*

Admissibility of claim — Admissibility of claim for acts before 27 April 1992 involves questions of attribution — Acts prior to 8 October 1991 (date Croatia became Party to the Convention) pertinent to evaluation of alleged violations after that date — Not necessary to rule on these two admissibility questions until the Court has assessed the merits of the claime.

Serbia's counter-claim — Article 80, paragraph 1, of the Rules of Court as adopted on 14 April 1978 — Counter-claim is within the jurisdiction of the Court — Counter-claim is directly connected to claim in fact and law — Counter-claim admissible.

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Genocide Convention as applicable law — Definition of genocide in Article II of the Convention.

Dolus specialis *— Meaning and scope of "destruction" of group — Convention limited to physical or biological destruction — Evidence must establish an intent to destroy group in whole or in part — Meaning of destruction of group "in part" — Inference of* dolus specialis *through pattern of conduct.*

Actus reus *— Meaning and scope of acts listed in Article II of the Convention — Equivalence of terms "killing" and "meurtre" in Article II* (a) *— Requirement that serious bodily or mental harm in Article II* (b) *be such as to contribute to the physical or biological destruction of the group, in whole or in part — Forced displacement as* actus reus *of genocide under Article II* (c) *— Rape and other acts of sexual violence as* actus reus *of genocide under Article II* (d).

*

Burden of proof — For party alleging a fact to demonstrate its existence — Principle not an absolute one — Other party required to co-operate in provision of evidence in its possession — Reversal of burden of proof not appropriate in present case.

Standard of proof — Evidence must be "fully conclusive" — Court must be "fully convinced" that acts have been committed.

Methods of proof — ICTY findings of fact accepted as "highly persuasive" — Absence of charges of genocide in ICTY Indictments — Probative value of various types of reports adduced in evidence — Evidential weight of individual statements annexed to written pleadings.

*

Principal claim.

Actus reus *of genocide.*

Article II (a) *of the Convention — Established that a large number of killings carried out by JNA and Serb forces in localities in Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia — Large majority of victims were members of protected group —* Actus reus *established.*

Article II (b) *— Established that acts of ill-treatment, torture, sexual violence and rape perpetrated in localities in Eastern Slavonia, Western Slavonia and Dalmatia — Acts caused serious bodily or mental harm such as to contribute to the physical or biological destruction of protected group —* Actus reus *established.*

Article II (c) *— Acts of rape not on scale as to amount to infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part — Deprivation of food and medical care not of systematic or general nature — Expulsion, forced displacement and restrictions on movement not calculated to result in physical destruction of group in whole or in part — Forced wearing of insignia of ethnicity cannot fall within scope of Article II* (c) *— Looting of Croat property not calculated to result in physical destruction of group in whole or in part — Destruction and looting of cultural heritage cannot fall within scope of Article II* (c) *— Forced labour not calculated to result in physical destruction of group in whole or in part —* Actus reus *not established.*

Article II (d) *— Rape and acts of sexual violence committed — Not established that perpetrated to prevent births within group —* Actus reus *not established.*

Genocidal intent (dolus specialis) *— Part allegedly targeted — Croats living in identified regions formed substantial part of group — Pattern of conduct existed consisting in widespread attacks on localities with Croat populations from August 1991 — Requirement that intent to destroy the group, in whole or in part, must be only reasonable conclusion to be inferred from pattern of conduct — Context in which acts committed does not make it possible to infer such intent — Not established that perpetrators availed themselves of opportunities to destroy substantial part of protected group — Other factors invoked insufficient to show genocidal intent —* Dolus specialis *not established.*

No violation of the Convention established — Principal claim cannot be upheld — Court not required to pronounce on admissibility of principal claim for acts prior to 8 October 1991 — Court need not consider whether acts prior to 27 April 1992 attributable to SFRY — Court need not consider succession to responsibility.

*

Counter-claim.

Actus reus *of genocide.*

Question whether there was killing of civilians as a result of the shelling of Krajina towns — Analysis of Gotovina *case before ICTY — Indiscriminate shelling not established — No evidence of intentional killing of Serb civilians through shelling —* Actus reus *under Article II* (a) *of the Convention not established.*

Displacement of the Krajina Serb population — Displacement not calculated to bring about physical destruction, in whole or in part, of targeted group — Actus reus *under Article II* (c) *not established.*

Killing of Serbs fleeing in columns — Established that such killings took place — Actus reus *under Article II* (a) *established.*

Killing of Serbs remaining in United Nations protected areas — Factual findings of ICTY Trial Chamber must be accepted as "highly persuasive" — Established that such killings took place — Actus reus *under Article II* (a) *established.*

Ill-treatment of Serbs during and after Operation "Storm" — Analysis of Gotovina *case before ICTY — Established that acts causing serious bodily or mental harm took place —* Actus reus *under Article II* (b) *established.*

Large-scale destruction and looting after Operation "Storm" — Not calculated to bring about physical destruction, in whole or in part, of targeted group — Actus reus *under Article II* (c) *not established.*

Genocidal intent (dolus specialis) *— Brioni transcript does not establish genocidal intent — Pattern of conduct — Distinction between ethnic cleansing and genocide — Acts not committed on a scale that could only reasonably point to existence of genocidal intent —* Dolus specialis *not established.*

No violation of the Convention established — Counter-claim cannot be upheld.

JUDGMENT

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; *Judges* ad hoc VUKAS, KREĆA; *Registrar* COUVREUR.

In the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

the Republic of Croatia,

represented by

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

as Agent;

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

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

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

as Co-Agents;

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

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

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

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

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

Ms Kate Cook, Barrister, Matrix Chambers, London,

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

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London,

as Counsel and Advocates;

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

Ms Helen Law, Barrister, Matrix Chambers, London,

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

as Counsel;

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

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

as Members of the Delegation;

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

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

as Advisers;

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

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

Ms Klaudia Sabljak, Ministry of Justice,

Ms Zrinka Salaj, Ministry of Justice,

Mr. Tomislav Boršić, Ministry of Justice,

Mr. Albert Graho, Ministry of Justice,

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

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

Ms Katherine O'Byrne, Doughty Street Chambers, London,

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

as Assistants;

Ms Victoria Taylor, International Mapping, Maryland,

as Technical Assistant,

and

the Republic of Serbia,

represented by

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

as Agent;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

as Members of the Delegation;

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

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

Mr. Igor Olujić, Attorney at Law, Belgrade,

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

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

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

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

Institution of proceedings, notifications, preliminary objections and filing of written pleadings on the merits

1. The Court recalls that the procedural history of the case, from the date of its introduction on 2 July 1999 until 30 May 2008, was set out in detail in the Court's Judgment of 18 November 2008 on the preliminary objections raised by the Respondent (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008* (hereinafter the "2008 Judgment"), pp. 415-417, paras. 1-19). These details will not be reproduced in full in the present Judgment, but will be summarized in the following paragraphs.

2. On 2 July 1999, the Government of the Republic of Croatia (hereinafter "Croatia") filed an Application against the Federal Republic of Yugoslavia (hereinafter "the FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention"). The Convention was approved by the General Assembly of the United Nations on 9 December 1948 and entered into force on 12 January 1951. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

3. Under Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated a certified copy of the Application to the Government of the FRY; and, in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

4. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute. The Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute and subsequently transmitted to him copies of the written proceedings.

5. By an Order dated 14 September 1999, the Court fixed the time-limits for the filing of a Memorial by Croatia and a Counter-Memorial by the FRY. By Orders of 10 March 2000 and 27 June 2000, these time-limits, at the request of Croatia, were successively extended. The Memorial of Croatia was filed on 1 March 2001, within the time-limit finally prescribed.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Croatia chose Mr. Budislav Vukas and the FRY chose Mr. Milenko Kreća.

7. On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978 and applicable to this case, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. On 25 April 2003, within the time-limit fixed by the Court by Order of 14 November 2002, Croatia filed a statement of its observations and submissions on those preliminary objections.

8. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". Following the announcement of the result of a referendum held in Montenegro on 21 May 2006 (as contemplated in the Constitutional Charter of Serbia and Montenegro), the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006, following which the "Republic of Serbia" (hereinafter "Serbia") remained the sole Respondent in the case (2008 Judgment, *I.C.J. Reports 2008*, pp. 421-423, paras. 23-34).

9. Public hearings were held on the preliminary objections from 26 to 30 May 2008. By its 2008 Judgment, the Court rejected the first and third preliminary objections raised by Serbia. It found that the second objection — that claims based on acts or omissions which took place before 27 April 1992, i.e. the date on which the FRY came into existence as a separate State, lay beyond its jurisdiction and were inadmissible — did not, in the circumstances of the case, possess an exclusively preliminary character and should therefore be considered in the merits phase. Subject to that conclusion, the Court found that it had jurisdiction to entertain Croatia's Application (*I.C.J. Reports 2008*, pp. 466-467, para. 146).

10. By an Order dated 20 January 2009, the Court fixed 22 March 2010 as the time-limit for the filing of the Counter-Memorial of Serbia. The Counter-Memorial, filed on 4 January 2010, contained a counter-claim.

11. At a meeting held by the President of the Court with the representatives of the Parties on 3 February 2010, the Co-Agent of Croatia indicated that her Government did not intend to raise objections to the admissibility of Serbia's counter-claim as such, but wished to be able to respond to the substance of it in a Reply. The Co-Agent of Serbia stated that, in that case, his Government wished to file a Rejoinder.

12. By an Order dated 4 February 2010, the Court directed the submission of a Reply by Croatia and a Rejoinder by Serbia, concerning the claims presented by the Parties, and fixed 20 December 2010 and 4 November 2011 as the respective time-limits for the filing of those pleadings. The Court also instructed the Registrar to inform third States entitled to appear before the Court of Serbia's counter-claim, which was done by letters dated 23 February 2010. The Reply and the Rejoinder were filed within the time-limits thus fixed.

13. By a letter of 30 July 2010, Croatia asked the Court to request Serbia, pursuant to Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce certain documents. Between September 2010 and May 2011, Serbia furnished approximately 200 of the documents requested by Croatia.

By a letter dated 22 June 2011, Serbia, in turn, asked Croatia to provide it with certain documents. Following further exchanges of correspondence between the Parties, Serbia, by a letter of 22 May 2012, communicated to the Court a copy of a letter addressed to Croatia, in which it made various observations concerning the request by each Party for the other to produce documents. In particular, Serbia expressed concern that it had not yet received the documents requested from Croatia, whereas it had transferred, as soon as possible and without requiring a justification, all requested documents that could be found in its State archives; Serbia thus asked that Croatia fulfil its request for documents on the basis of reciprocity.

The Court subsequently received no further correspondence from the Parties regarding the documents that they requested from each other.

14. On 16 January 2012, at a meeting held by the President of the Court with the Agents of the Parties, the Co-Agent of Croatia stated that her Government wished to express its views on Serbia's counter-claim in writing a second time, in an additional pleading.

15. By an Order dated 23 January 2012, the Court authorized Croatia to submit such an additional pleading, and fixed 30 August 2012 as the time-limit for its filing. Croatia filed that pleading within the time-limit thus fixed, and the case was ready for hearing.

16. By a letter dated 14 March 2012, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, asked the Secretary-General of the United Nations to inform him whether the Organization wished to submit written observations under that provision. By a letter dated 4 April 2012, the Secretary-General stated that the Organization did not intend to submit any such observations.

Organization of the oral proceedings and accessibility to the public of the pleadings and transcripts

17. By letters dated 30 August 2012, the Registrar requested the Parties to submit their views on the length of the hearings, and asked them to inform him whether they wished to call witnesses and/or experts. By a letter dated 19 September 2012, Serbia, *inter alia*, informed the Court that it was planning to call eight witnesses and witness-experts; for its part, Croatia, by a letter of 31 October 2012, *inter alia*, informed the Court that it was planning to call twelve witnesses and witness-experts.

18. By a letter dated 11 September 2012, Serbia informed the Court that the Croatian authorities had contacted at least two of the persons whose statements had been appended to its Rejoinder; those two individuals had subsequently gone back on their previous statements. By a letter dated 16 October 2012, the Registrar informed the Parties that the Court directed them to refrain from making contact with persons whose statements were appended to the pleadings of the other Party. Furthermore, in order to enable the Court to assess the consequences that it might have to draw from the contacts made by Croatian authorities, Croatia was requested to inform it of the total number of witnesses contacted, and of how the Croatian police had contacted them; Croatia was further requested to provide the Court with a full list of those persons, with their names and addresses. In case the Serbian authorities had also been in touch with persons whose statements had been appended to one of Croatia's pleadings, the Court sent a similar request to Serbia. By a letter dated 2 November 2012, Croatia explained that the Croatian police had been in contact with five of the persons whose statements had been appended to Serbia's Rejoinder; it provided their names and addresses, as well as a brief description of the manner in which they had been questioned. By a letter dated 26 November 2012, Serbia informed the Court that the Serbian authorities had never been in contact with persons whose statements had been appended to Croatia's pleadings.

19. On 23 November 2012 the President of the Court held a meeting with the representatives of the Parties to discuss the organization of the oral proceedings. At that meeting the Parties were encouraged to reach agreement on the procedure for the examination of witnesses and witness-experts.

20. By a letter dated 16 April 2013, Croatia informed the Court that the Parties had concluded an agreement on the method of examining witnesses and witness-experts, and Serbia confirmed this in a letter of 19 April 2013. That agreement provided, *inter alia*, that each Party would submit to the Court, not later than 15 July 2013, a list of witnesses and witness-experts that

it wished to call, together with their authentic written statements, if such statements had not been annexed to the written pleadings. Each Party would then communicate to the Court, not later than 15 October 2013, the name of any witness or witness-expert called by the other Party that it did not wish to cross-examine. It was further agreed that a Party wishing to call a witness or witness-expert would submit a summary of the witness' testimony or the witness-expert's statement, which would then replace the examination-in-chief.

21. By a letter dated 10 July 2013, Croatia informed the Court that it wished to propose changes to the agreement between the Parties referred to in the previous paragraph. In particular, it proposed the extension, from 15 July to 1 October 2013, of the time-limit for the communication, under Article 57 of the Rules of Court, of information regarding witnesses and witness-experts. By a letter dated 16 July 2013, Serbia informed the Court that it accepted Croatia's proposals. By letters of 17 July 2013, the Registrar informed the Parties that the Court had decided to extend to 1 October 2013 the time-limit for the communication under Article 57 of the Rules of Court of information regarding witnesses and witness-experts, and to extend to 15 November 2013 that relating to the communication by either Party of the names of any witnesses or witness-experts that it did not wish to cross-examine.

22. By a letter dated 8 August 2013, Serbia informed the Court that it wished to produce a new document pursuant to Article 56, paragraph 1, of the Rules of Court. Serbia also supplied the Court with an English translation of extracts from two documents which it described as being readily available (Article 56, paragraph 4, of the Rules of Court) in the original Serbian version. By a letter dated 10 September 2013, Croatia informed the Court that it did not object to the production of these three documents. By letters dated 20 September 2013, the Registrar informed the Parties that the Court had authorized Serbia to produce the new document that it wished to submit under Article 56, paragraph 1, of the Rules of Court, and that Serbia could refer to that document at the hearings; with respect to the other two documents, as they were "readily available", these had been added to the case file.

23. On 1 October 2013 the Parties communicated to the Court information concerning the persons whom they intended to call at the hearings, as well the written testimony and statements which had not been appended to their pleadings. Croatia stated that it wished to call nine witnesses and three witness-experts in support of its claim. For its part, Serbia announced that it was planning to call seven witnesses and one witness-expert in support of its counter-claim.

24. By a letter dated 14 November 2013, Croatia drew the Court's attention to the fact that, between 12 and 14 November 2013, the Serbian press had published three articles that might have implications for the witnesses and witness-experts called to testify in the proceedings. By letters of 21 November 2013, the Registrar informed the Parties of the Court's concerns, and reminded them of their obligation to maintain confidentiality in respect of the information contained in correspondence with the Court, in particular as regards the identity of potential witnesses and witness-experts.

25. By a letter dated 15 November 2013, Croatia informed the Court that it did not wish to cross-examine the witnesses and witness-expert of Serbia, on the understanding that they would not be called to testify before the Court, and that their evidence to the Court would be in the form of their written testimony or statements. Croatia added that, if this understanding was not correct, or if the Court itself wished to cross-examine Serbia's witnesses or witness-expert, it reserved the right to cross-examine them. By a letter of the same date, Serbia, for its part, informed the Court of the names of the five witnesses and one witness-expert of Croatia that it did not wish to cross-examine, thus implying that it did wish to cross-examine the four other witnesses and two other witness-experts announced by Croatia on 1 October 2013.

26. On 22 November 2013 the President of the Court held a meeting with the Agents of the Parties in order to discuss further the organization of the oral proceedings. At that meeting the Parties agreed that it was unnecessary to have witnesses and witness-experts whom they did not intend to cross-examine come to the Court only to confirm their written testimony or statement unless the Court itself decided to put questions to them.

27. By a letter dated 13 December 2013, Serbia informed the Court of the approximate amount of time that it felt it would need in order to cross-examine the four witnesses and two witness-experts called by Croatia who were due to testify in court.

28. By a letter of that same date, Croatia informed the Court that the witnesses and witness-experts who would testify would all speak in Croatian, with the exception of one, who would speak in Serbian.

29. By letters dated 16 December 2013, the Registrar informed the Parties that, at this stage of the proceedings, the Court did not wish to question the witnesses and witness-experts that the Parties were not intending to cross-examine. At the same time, he further informed them that the Court wished to receive from them, by 20 January 2014, certain additional documents concerning their witnesses and witness-experts, and that, with respect to a document the production of which had been requested of Croatia, Serbia would have until 14 February 2014 to file any written observations that it wished to make on this document. By a letter dated 14 January 2014, Serbia provided the Court with the documents requested. By a letter of 22 January 2014, Croatia informed the Court that it would be transmitting the requested document slightly late. That document reached the Court on 31 January 2014. The original time-limit for any written observations on that document by Serbia was extended accordingly. By a letter dated 11 February 2014, Serbia indicated that it did not wish to present any such observations.

30. By a letter dated 30 December 2013, Croatia made certain observations on the procedure for the hearing of its witnesses and witness-experts, in particular with respect to the allocation of time for the said hearings and the order of presentation of the witnesses and witness-experts. By a letter dated 10 January 2014, Serbia presented its own observations on the matter.

31. By a letter dated 17 January 2014, the Registrar asked Croatia to state what arrangements it planned to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for the interpretation into one of the Court's official languages of the evidence of witnesses and witness-experts who would be testifying in Croatian or Serbian. By a letter of the same date, Croatia informed the Registry of its arrangements in that regard; in that same letter Croatia asked the Court to take certain protective measures for two of its witnesses, consisting in particular of hearing their evidence in closed session and referring to them by pseudonyms.

32. Under Article 53, paragraph 2, of the Rules of Court, the Registrar requested the Parties, by letters dated 17 January 2014, to indicate their respective views on the question of making accessible to the public the written pleadings and documents annexed. By a letter dated 24 January 2014, Serbia informed the Court that, with certain exceptions, it consented to copies of its written pleadings and documents annexed being made accessible to the public on the opening of the oral proceedings. Croatia did not make its position known until later (see below, paragraphs 35 and following).

33. By letters dated 7 February 2014, the Registrar informed the Parties of all the decisions taken by the Court concerning the precise details of the procedure for examining the four witnesses and two witness-experts called by Croatia who were due to testify in court (see paragraphs 25-31 above).

The Parties were thus advised that, after making the solemn declaration provided for in Article 64 of the Rules of Court, the witness or witness-expert would be asked to confirm his or her written testimony or statement, which would serve as the examination-in-chief. Serbia would then be given the opportunity to cross-examine the witness or witness-expert, after which Croatia could conduct a re-examination. Finally, there would be an opportunity for Members of the Court to put questions to the witness or witness-expert.

With regard to the protective measures requested for two of the witnesses, the Parties were informed that the Court had agreed to the use of pseudonyms when addressing these witnesses or referring to them; it had also agreed that these witnesses would be heard in closed session, with only Registry staff and members of the official delegations permitted to be present during their examination, and that two separate sets of documents would be produced (one reserved for confidential use by the Court and the Parties, and the other to be made public, with any information that might lead to the identification of the protected witnesses having been deleted).

The Parties were further informed that the Court had decided to prescribe the following measures to ensure the integrity of the testimony and statements of the witnesses and witness-experts: (i) the witnesses and witness-experts would have to remain out of court both

before and after their testimony/statements; (ii) the written testimony/statements of witnesses and witness-experts announced by the Parties on 1 October 2013 (whether or not they appear at the hearings), as well as the verbatim records of the hearings at which the witnesses and witness-experts were examined, would be published only after the closure of the oral proceedings (in redacted form in the case of protected witnesses); (iii) the Parties would have to ensure that the witnesses and witness-experts did not have access to the evidence given by other witnesses and witness-experts before the closure of the oral proceedings; (iv) the Parties would further have to ensure that the witnesses and witness-experts would not be otherwise informed of the testimony/statements of other witnesses and witness-experts and that they would have no contact which could compromise their independence or breach the terms of their solemn declaration; (v) if the Court were to decide that, in general, the annexes to the main pleadings (containing a number of written testimonies on disputed events in the case) should be made available to the public, they would only be published after the closure of the oral proceedings; and (vi) the public could attend the examinations (except the closed sittings), but would be requested not to divulge the content of the testimony/statements until the oral proceedings had closed; the same would apply to the media, who would have to subscribe to a code of conduct under the terms of which they would be allowed to take photographs and make sound recordings, on the express condition that they did not make public the content of the testimony/statements before the oral proceedings had closed.

On the question of the broadcasting of the hearings, the Parties were notified, in the same letters, that the Court had decided that the examinations of the witnesses and witness-experts, whether or not protected, would not be broadcast on the Internet.

Lastly, since Croatia had still not indicated its position regarding the accessibility to the public of the pleadings and documents annexed thereto (see paragraph 32 above), it was again invited to make known its views on that matter.

34. By a letter dated 14 February 2014, Serbia communicated to the Court a list of audio-visual and photographic materials that it intended to present during its oral arguments, as well as electronic versions of those documents. By letter dated 17 February 2014, Croatia transmitted to the Court electronic versions of the audio-visual materials on which it intended to rely during its oral arguments. By letter of 21 February 2014, Serbia asked Croatia to specify the source of some of the audio-visual materials transmitted; that information was provided by Croatia in a letter dated 26 February 2014. By letters dated 27 February 2014, the Registrar informed the Parties that the Court had decided that, during their oral presentations, they would be allowed to use the audio-visual and photographic materials that had been communicated to it.

35. By a letter dated 14 February 2014, Croatia indicated to the Court that it consented to the publication of its pleadings and documents annexed, provided they were published in redacted form and without a number of annexes, in order to ensure the anonymity of the victims and the individuals who provided it with written testimonies. Croatia suggested that the names of those persons appearing in its pleadings be replaced by their initials, and that their written testimonies and the lists of prisoners annexed to the said pleadings be withheld from publication. It added that Serbia should also be asked to redact its own pleadings in the same manner, in so far as they referred to those individuals. Finally, Croatia requested that those individuals should be referred to at the public hearings by their initials or the annex number where their written testimony appeared.

36. By letters dated 17 February 2014, the Registrar asked Serbia to indicate to the Court its views on the measures proposed by Croatia, adding that the final decision on these matters would rest with the Court. He also informed the Parties that, in principle, they were responsible for the production of redacted documents to be made accessible to the public. Croatia was finally asked to provide the redacted versions of its pleadings and documents annexed as it would like them to be published. In response to this request, Croatia, by a letter dated 18 February 2014, communicated to the Court redacted versions of its pleadings and annexes, in which (i) the names of victims and individuals who had provided it with written testimonies were replaced by initials, and (ii) the said written testimonies and the lists of prisoners were removed.

37. By letters of 18 and 25 February 2014, Serbia objected to Croatia's requests, made by the latter in its above-mentioned letter of 14 February 2014 (see paragraph 35 above) and repeated in a letter dated 20 February 2014, to redact the written pleadings and to refer to certain individuals in the public hearings by their initials or the annex number of their written testimony. In its letter dated 25 February 2014, Serbia argued that Croatia had not sufficiently explained why its pleadings and documents annexed had to be redacted in the manner proposed.

38. Regarding the publication of the written testimonies/statements of those witnesses and witness-experts announced on 1 October 2013 but who would not be appearing at the hearings (see paragraph 33 above), Croatia, in a letter dated 24 February 2014, stated that: (i) one of the witnesses had asked that his written testimony be published under a pseudonym and in redacted form; (ii) two witnesses had objected to the publication of their written testimonies; and (iii) one of the witnesses had passed away on 19 January 2014. In its letter of 25 February 2014, Serbia stated that it did not object to the written testimony of the witness referred to in point (i) being published under a pseudonym and in redacted form, or to the written testimonies of the two witnesses referred to in point (ii) not being published, on the understanding that it would be for the Court to decide whether those written testimonies would remain in the case file. Lastly, Serbia indicated that it did not object to the publication of the written testimony of the deceased witness (point (iii)).

39. Following these various exchanges on the publication of the written pleadings, the Registrar, by letters dated 27 February 2014, informed the Parties of the latest decisions of the Court in this regard. The Parties were thus advised that the said pleadings would not be published on the opening of the oral proceedings, as more information was required by the Court before deciding exactly which documents should be redacted (and to what extent) or withheld from publication altogether. Furthermore, (i) if the pleadings and documents annexed were to be made accessible to the public, five annexes of Serbia's Rejoinder would be withheld from publication and the parts of Croatia's Additional Pleading referring to those annexes would be redacted accordingly; (ii) the lists of prisoners contained in the annexes to Croatia's pleadings would be redacted to delete the names of the individuals concerned, but those annexes would not be withheld from publication entirely; and (iii) the written testimonies of witnesses annexed to Croatia's pleadings would be made accessible to the public, unless compelling reasons required otherwise (for example, protection of the witnesses in question or national security issues). As regards the

written testimonies of some witnesses announced by Croatia on 1 October 2013 but who would not be appearing at the hearings: (i) the written testimony of one of the witnesses would be published under a pseudonym and in redacted form; (ii) the written testimonies of two witnesses would be discarded if the individuals concerned continued to object to their publication even under a pseudonym and in redacted form; and (iii) the written testimony of the witness who had passed away would be published.

Croatia was further invited to specify the names of the individuals for whom publication of the unredacted pleadings and annexes thereto would pose a genuine security risk, and to identify the risk in question and the specific parts of its pleadings and annexes that should in its view be redacted. Once that information had been provided, the Court would decide which redactions were justified and which annexes should not be published.

40. In a letter dated 28 February 2014, Croatia commented on the decisions taken by the Court regarding the accessibility to the public of various documents and the conduct of the oral proceedings. In particular, it asked the Court to grant it additional time to redact in the manner prescribed the lists of prisoners contained in its annexes. It further indicated that it accepted the Court's decision to remove from the case file the evidence of the two witnesses who objected to their written testimony being published. However, it did not specify the names of the individuals for whom publication of the unredacted pleadings and documents annexed would pose a genuine security risk, identify the risk in question or the specific parts of its pleadings and annexes that it wished to be redacted.

41. By letters dated 3 March 2014, the Registrar informed the Parties that the Court had decided to grant Croatia's request for additional time to redact the lists of prisoners contained in its annexes and to specify the names of the individuals for whom publication of the unredacted pleadings and documents annexed would pose a genuine security risk. The Parties were also told that, pending the receipt of that information, any individuals whose written testimonies were annexed to Croatia's pleadings were to be referred to at the public sittings only by the annex number of these written testimonies.

42. By a letter dated 14 March 2014, Croatia provided the Court with redacted versions of the above-mentioned lists of prisoners. Referring to the recent decisions taken by the Court, Croatia also addressed the question of the publication of the Parties' written pleadings and documents annexed thereto. It stated in this respect that it did not have the resources to contact each and every one of the individuals named in the written testimonies annexed to its pleadings, in order to ascertain whether the publication of the testimony in which they were named would pose a genuine security risk for them, and on what basis. It therefore proposed the non-publication of the annexes, the publication of redacted versions of the pleadings, and making the full and unredacted pleadings available to the public only at the seat of the Court. By a letter dated 17 March 2014, Serbia objected to Croatia's proposals.

43. By letters dated 18 March 2014, the Registrar informed the Parties that the Court had decided that Croatia's pleadings and their annexes, as well as Serbia's pleadings, would be published in redacted form, to ensure the anonymity of the persons identified by Croatia (victims and individuals whose written testimonies were annexed to Croatia's pleadings). It was specified in the Registrar's letters that these redactions were to be limited to replacing full names by initials, and, exceptionally, when necessary to ensure the protection of the individuals concerned, to deleting other identifying information; with respect to Serbia's pleadings, it would fall on Croatia to identify very precisely the parts it deemed had to be redacted.

44. In a letter dated 24 March 2014, Croatia identified the parts of Serbia's pleadings which in its view had to be redacted. Croatia's letter was communicated to Serbia, which was asked to indicate whether it agreed to the suggested redactions and, if so, to provide electronic versions of its pleadings redacted pursuant to Croatia's suggestions. By a letter dated 27 March 2014, Serbia furnished such electronic versions of its pleadings. By a letter dated 28 March 2014, Croatia provided redacted versions of its pleadings and documents annexed thereto in electronic form.

45. Public hearings were held from 3 March to 1 April 2014, at which the Court heard the oral arguments and replies of:

For Croatia: Ms Vesna Crnić-Grotić,
Ms Andreja Metelko-Zgombić,
Ms Helen Law,
Mr. James Crawford,
Mr. Philippe Sands,
Sir Keir Starmer,
Ms Jana Špero,
Ms Blinne Ní Ghrálaigh,
Ms Maja Seršić,
Mr. Davorin Lapaš,
Ms Anjolie Singh.

For Serbia: Mr. Saša Obradović,
Mr. William Schabas,
Mr. Andreas Zimmermann,
Mr. Christian Tams,
Mr. Novak Lukić,
Mr. Dušan Ignjatović,
Mr. Wayne Jordash.

46. The following witnesses and witness-experts were called by Croatia and heard at two public hearings and one closed hearing, held on 4, 5 and 6 March 2014: as witnesses, Mr. Franjo Kožul, Ms Marija Katić, Ms Paula Milić (pseudonym) and Mr. Ivan Krylo

(pseudonym); and as witness-experts, Ms Sonja Biserko and Mr. Ivan Grujić. They were cross-examined by counsel for Serbia and re-examined by counsel for Croatia. Several judges put questions to the witnesses and witness-experts, who replied orally.

47. At the hearings, questions were put to the Parties by Members of the Court and replies given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

48. In accordance with the decisions of the Court (see paragraphs 33, 39 and 43 above), the following documents were made public at the close of the oral proceedings: redacted versions of the pleadings and their annexes; written testimonies of the witnesses (in redacted form for the protected witnesses) and written statements of the witness-experts; and verbatim records of the hearings at which the witnesses and witness-experts were examined (in non-redacted form, since neither the Parties nor the protected witnesses requested the Court to redact portions of the verbatim records of the hearing of protected witnesses).

*

Claims made in the Application and submissions presented by the Parties

49. In its Application, the following claims were made by Croatia:

> "While reserving the right to revise, supplement or amend this Application, and, subject to the presentation to the Court of the relevant evidence and legal arguments, Croatia requests the Court to adjudge and declare as follows:
>
> *(a)* that the Federal Republic of Yugoslavia has breached its legal obligations toward the people and Republic of Croatia under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. The Republic of Croatia reserves the right to introduce to the Court at a future date a precise evaluation of the damages caused by the Federal Republic of Yugoslavia."

50. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Croatia,

in the Memorial:

> "On the basis of the facts and legal arguments presented in this Memorial, the Applicant, the Republic of Croatia, respectfully requests the International Court of Justice to adjudge and declare:
>
> 1. That the Respondent, the Federal Republic of Yugoslavia, is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:
>
> *(a)* in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia, including in particular against members of the Croat national or ethnical group on that territory, by
>
> — killing members of the group;
>
> — causing deliberate bodily or mental harm to members of the group;
>
> — deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> — imposing measures intended to prevent births within the group,
>
> with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;
>
> *(b)* in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;
>
> *(c)* in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;
>
> *(d)* in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.
>
> 2. That as a consequence of its responsibility for these breaches of the Convention, the Respondent, the Federal Republic of Yugoslavia, is under the following obligations:
>
> *(a)* to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to

in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes;

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

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

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Republic of Croatia reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Federal Republic of Yugoslavia is held responsible.

The Republic of Croatia reserves the right to supplement or amend these submissions as necessary."

in the Reply:

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

1. That it rejects in its entirety the first submission of the Respondent, as to the inadmissibility of certain claims raised by the Applicant.

2. That the Respondent is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia against members of the Croat national or ethnical group on that territory, by

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group,

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

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

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

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

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

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

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

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible.

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

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

in the Additional Pleading filed on 30 August 2012:

"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."

On behalf of the Government of Serbia,

in the Counter-Memorial:

"On the basis of the facts and legal arguments presented in this Counter-Memorial, the Republic of Serbia respectfully requests the International Court of Justice to adjudge and declare:

I

1. That the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State, or alternatively, before 8 October 1991, when neither the Republic of Croatia nor the Republic of Serbia existed as independent States, are inadmissible.

2. That the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)*, of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 (alternatively, 8 October 1991) be rejected as lacking any basis either in law or in fact.

3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 (alternatively, 8 October 1991) are admissible, that the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)*, of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after the operation *Storm* in August 1995, the following acts with intent to destroy as such the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia:

   — killing members of the group,

   — causing serious bodily or mental harm to members of the group, and

   — deliberately inflicting on the group conditions of life calculated to bring about its partial physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.

6. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.

7. That the violations of international law set out in paragraphs 4, 5 and 6 above constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

   (1) that the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts proscribed by Article III of the Convention committed on its territory before, during and after operation *Storm*; and

(2) that the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) pay full compensation to the members of the Serb national and ethnic group from the Republic of Croatia for all damages and losses caused by the acts of genocide;

(b) establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights;

(c) amend its Law on Public Holidays, Remembrance Days and Non-Working Days, by way of removing the "Day of Victory and Homeland Gratitude" and the "Day of Croatian Defenders", celebrated on the 5th of August, as a day of triumph in the genocidal operation *Storm*, from its list of public holidays.

The Republic of Serbia reserves its right to supplement or amend these submissions in the light of further pleadings."

in the Rejoinder:

"On the basis of the facts and legal arguments presented in the Counter-Memorial and this Rejoinder, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State, are inadmissible.

2. That the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.

3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 are admissible, that the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation *Storm* in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region (UN Protected Areas North and South), as such:

   — killing members of the group,

   — causing serious bodily or mental harm to members of the group, and

   — deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region, as such.

6. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region, as such.

7. That the violations of international law set out in paras. 4, 5 and 6 above constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

   (1) that the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts proscribed by Article III of the Convention committed on its territory during and after Operation *Storm*; and

   (2) that the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

      (a) pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide;

      (b) establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights;

(c) amend its Law on Public Holidays, Remembrance Days and Non-Working Days, by way of removing the "Day of Victory and Homeland Gratitude" and the "Day of Croatian Defenders", celebrated on the 5th of August, as a day of triumph in the genocidal Operation *Storm*, from its list of public holidays.

III

8. That the requests in paras. 1 and 4 of the Submissions of the Republic of Croatia concerning the objections to the counter-claim be rejected as lacking any basis either in law or in fact.

The Republic of Serbia reserves its right to supplement or amend these submissions in the further proceedings."

51. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Croatia,

at the hearing of 21 March 2014, at 10 a.m., with respect to Croatia's claim:

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

1. That it has jurisdiction over all the claims raised by the Applicant, and there exists no bar to admissibility in respect of any of them.

2. That the Respondent is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia against members of the Croat ethnic group on that territory, by:

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group,

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

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

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

(e) in that it has failed to conduct an effective investigation into the fate of Croatian citizens who are missing as a result of the genocidal acts referred to in paragraphs *(a)* and *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.

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

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction including but not limited to the leadership of the JNA during the relevant time period who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (2) *(a)*, or any of the other acts referred to in paragraph (2) *(b)*, and to ensure that those persons, if convicted, are duly punished for their crimes;

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

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

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the

economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible."

at the hearing of 1 April 2014, at 10 a.m., in respect of Serbia's counter-claim:

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

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

On behalf of the Government of Serbia,

at the hearing of 28 March 2014, at 3 p.m., in respect of Croatia's claim and Serbia's counter-claim:

"On the basis of the facts and legal arguments presented in its written and oral pleadings, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the Court lacks jurisdiction to entertain the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e. prior to the date when Serbia came into existence as a State and became bound by the Genocide Convention.

2. In the alternative that the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e. prior to the date when Serbia came into existence as a State and became bound by the Genocide Convention, are inadmissible.

3. That the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.

4. In the further alternative that the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far

as they relate to acts and omissions, whatever their legal qualification, that took place before 8 October 1991, i.e. prior to the date when Croatia came into existence as a State and became bound by the Genocide Convention, are inadmissible.

5. In the final alternative, should the Court find that it has jurisdiction concerning the requests relating to acts and omissions that took place before 27 April 1992 and that they are admissible, respectively that they are admissible insofar as they relate to acts and omissions that took place before 8 October 1991, that the requests in paras. 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

6. That the Republic of Croatia has violated its obligations under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation *Storm* in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region:

— killing members of the group,

— causing serious bodily or mental harm to members of the group, and

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

7. Alternatively, that the Republic of Croatia has violated its obligations under Article III *(b)*, *(c)*, *(d)* and *(e)* of the Convention on the Prevention and Punishment of the Crime of Genocide through the acts of conspiracy, direct and public incitement and attempt to commit genocide, as well as complicity in genocide, against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region.

8. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region.

9. That the violations of international law set out in paras. 6, 7 and 8 of these Submissions constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

(1) That the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts enumerated in Article III of the Convention committed on its territory during and after Operation *Storm*;

(2) That the Republic of Croatia shall immediately amend its Law on Public Holidays, Remembrance Days and Non-Working Days, by way of removing the 'Day of Victory and Homeland Gratitude' and the 'Day of Croatian Defenders', celebrated on the 5th of August, as a day of victory in the genocidal Operation *Storm*, from its list of public holidays; and

(3) That the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) Pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide, in a sum and in a procedure to be determined by the Court in a subsequent phase of this case; and

(b) Establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights."

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I. BACKGROUND

52. In these proceedings, Croatia contends that Serbia is responsible for breaches of the Genocide Convention committed in Croatia between 1991 and 1995. In its counter-claim, Serbia contends that Croatia is itself responsible for breaches of the Convention committed in 1995 in the "Republika Srpska Krajina", an entity established in late 1991 (for further details, see paragraphs 62-70 below). The Court will briefly set out the factual and historical background to the present proceedings, i.e., *(a)* the break-up of the Socialist Federal Republic of Yugoslavia in general and *(b)* the situation in Croatia in particular.

A. The break-up of the Socialist Federal Republic of Yugoslavia and the emergence of new States

53. Until the start of the 1990s, the Socialist Federal Republic of Yugoslavia ("SFRY") consisted of the republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia; the republic of Serbia itself included two autonomous provinces, Vojvodina and Kosovo.

54. Following the death of President Tito, which occurred on 4 May 1980, the SFRY was confronted with an economic crisis lasting almost ten years and growing tensions between its different ethnic and national groups. Towards the end of the 1980s and at the start of the 1990s, certain republics sought greater powers within the federation, and, subsequently, independence from the SFRY.

55. Croatia and Slovenia declared themselves independent from the SFRY on 25 June 1991, although their declarations did not take effect until 8 October 1991. For its part, Macedonia proclaimed its independence on 17 September 1991, and Bosnia and Herzegovina followed suit on 6 March 1992. On 22 May 1992, Croatia, Slovenia, and Bosnia and Herzegovina were admitted as Members of the United Nations, as was the former Yugoslav Republic of Macedonia on 8 April 1993.

56. On 27 April 1992, "the participants of the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration stating in particular:

> "1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations, doc. A/46/915, Ann. II.)

57. On the same date, the Permanent Mission of Yugoslavia to the United Nations sent a Note to the Secretary-General, stating, *inter alia*, that

> "[s]trictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia" (see also paragraph 76 below).

58. This claim by the FRY that it continued the legal personality of the SFRY was debated at length within the international community (in this regard, see *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, pp. 15-23, paras. 28-48; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 303-309, paras. 58-74; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 80-83, paras. 91-97; 2008 Judgment, *I.C.J. Reports* 2008, pp. 426-427, paras. 45-49). As has been noted in the Judgments of the Court cited above, the Security Council, the General Assembly and several States rejected the claim that the FRY continued automatically the membership of the SFRY in the United Nations; the FRY nevertheless maintained this claim for several years. It was not until 27 October 2000 that Mr. Koštunica, the newly elected President of the FRY, sent a letter to the Secretary-General requesting that the FRY be admitted to membership in the United Nations. On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

59. On 4 February 2003, the FRY officially changed its name, becoming "Serbia and Montenegro". Following a referendum of 21 May 2006, in accordance with the Constitutional Charter of Serbia and Montenegro, the Republic of Montenegro declared its independence on 3 June 2006. By a letter dated 3 June 2006, Serbia informed the Secretary-General of the United Nations that, as provided for in Article 60 of the Constitutional Charter of Serbia and Montenegro, the latter's membership in the United Nations would be continued by the Republic of Serbia. Montenegro was admitted into the United Nations as a new member on 28 June 2006. In its Judgment of 18 November 2008 on preliminary objections, the Court found that Montenegro was not a party to the present proceedings, and that Serbia alone remained the Respondent in the case (*I.C.J. Reports 2008*, pp. 421-423, paras. 23-34; see paragraph 8 above).

B. The situation in Croatia

60. The present case mainly concerns events which took place between 1991 and 1995 in the territory of the Republic of Croatia as it had existed within the SFRY. The Court will focus now on the background to those events.

61. First, it should be noted that, according to the official census conducted by the Institute for Statistics of the republic of Croatia at the end of March 1991, the majority of the inhabitants of Croatia (some 78 per cent) were of Croat origin. A number of ethnic and national minorities were also represented; in particular, some 12 per cent of the population was of Serb origin. A significant part of that Serb minority lived close to the republics of Bosnia and Herzegovina and Serbia. While the population in these frontier areas was a mixed one — consisting of Croats and Serbs — there was a majority of Serbs in certain localities. Towns and villages with Serb majorities existed in close proximity to towns and villages with Croat majorities.

62. In political terms, tensions between, on the one hand, the Government of the republic of Croatia and, on the other, the Serbs living in Croatia and opposed to its independence, increased at the start of the 1990s. On 1 July 1990, elected representatives of the Serb Democratic Party in Croatia (SDS) formed the "Union of Municipalities of the Northern Dalmatia and Lika". On 25 July 1990, the Constitution of the republic of Croatia was amended; in particular, a new flag and coat of arms were adopted which, according to Serbia, was perceived by the Serb minority as a sign of hostility towards them. On the same day, a Serb assembly and a "Serb National Council" (the executive organ of the assembly) were established at Srb, north of Knin; they proclaimed themselves to be the political representatives of the Serb population of Croatia and declared the sovereignty and autonomy of the Serbs in Croatia. The "Council" then announced that a referendum would be held on the autonomy of the Croatian Serbs. In August 1990, the Croatian Government attempted to oppose this referendum; the Serb minority responded by erecting roadblocks. The referendum took place between 19 August and 2 September 1990; a substantial majority voted in favour of autonomy.

63. On 21 December 1990, Serbs in the municipalities of northern Dalmatia and Lika proclaimed the "Serb Autonomous Region of Krajina" ("SAO Krajina"). Two other "Serb autonomous regions" were established later: the "SAO Slavonia, Baranja and Western Srem" ("SAO SBWS") in February 1991, and the "SAO Western Slavonia" in August of that year.

64. On 22 December 1990, the Croatian Parliament adopted a new Constitution. According to Serbia, the Croatian Serbs considered that the adoption of this new Constitution deprived them of certain basic rights and removed their status as a constituent nation of Croatia.

65. On 4 January 1991, the SAO Krajina established its own internal affairs secretariat and police and State security services.

66. In spring 1991, clashes broke out between the Croatian armed forces and those of the SAO Krajina and other armed groups. The Yugoslav National Army ("JNA") intervened — officially to separate the protagonists, but, according to Croatia, in support of the Krajina Serbs.

67. In a referendum organized on 12 May 1991 by the SAO Krajina, a majority of Serbs voted in favour of attaching the region to Serbia and staying in the SFRY. One week later, on 19 May 1991, Croatian voters, asked to pronounce by referendum on Croatia's independence from the SFRY, overwhelmingly approved it.

68. As explained above (see paragraph 55), Croatia declared its independence from the SFRY on 25 June 1991, and that declaration took effect on 8 October 1991.

69. By the summer of 1991, an armed conflict had broken out in Croatia, in the course of which the violations of the Genocide Convention alleged by Croatia in this case are claimed to have been committed (see paragraphs 200-442 below). At least from September 1991, the JNA — which, according to Croatia, was by then controlled by the Government of the republic of Serbia — intervened in the fighting against the Croatian Government forces. By late 1991, the JNA and Serb forces (see paragraph 204 below) controlled around one-third of Croatian territory within its boundaries in the SFRY (in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia). These regions, as well as several towns and villages referred to in the present Judgment, are illustrated on the following sketch-map.

70. On 19 December 1991, the Serbs of the SAO Krajina (which then comprised territories in Banovina/Banija, Kordun, Lika and Dalmatia) proclaimed the establishment of the "Republika Srpska Krajina" ("RSK"). Two months later, the SAO Western Slavonia and the SAO SBWS joined the RSK.

71. Negotiations in late 1991 and early 1992, backed by the international community and involving, *inter alia*, representatives of Croatia, Serbia and the SFRY, resulted in the Vance plan (after Cyrus Vance, the United Nations Secretary-General's Special Envoy for Yugoslavia) and the deployment of the United Nations Protection Force ("UNPROFOR"). The Vance plan provided for a ceasefire, demilitarization of those parts of Croatia under the control of the Serb minority and SFRY forces, the return of refugees and the creation of conditions favourable to a permanent political settlement of the conflict. UNPROFOR — which was deployed in spring 1992 in three areas protected by the United Nations (the UNPAs of Eastern Slavonia, Western Slavonia and Krajina) — was divided into four operational sectors: East (Eastern Slavonia), West (Western Slavonia), North and South (these two latter sectors covered the Krajina UNPA).

72. The objectives of the Vance plan and of UNPROFOR were never fully achieved: between 1992 and the spring of 1995, the RSK was not demilitarized, certain military operations were conducted by both parties to the conflict, and attempts to achieve a peaceful settlement failed.

73. In the spring and summer of 1995, Croatia succeeded in re-establishing control over the greater part of the RSK following a series of military operations. Thus it recovered Western Slavonia in May through Operation "Flash", and the Krajina in August through Operation "Storm", during which the facts described in the counter-claim allegedly occurred (see paragraphs 443-522 below). Following the conclusion of the Erdut Agreement on 12 November 1995, Eastern Slavonia was gradually reintegrated into Croatia between 1996 and 1998.

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Regions and selected localities referred to by the Parties

II. JURISDICTION AND ADMISSIBILITY

A. Croatia's claim

(1) Issues of jurisdiction and admissibility which remain to be determined following the 2008 Judgment

74. Serbia has raised a number of objections to the jurisdiction of the Court and to the admissibility of Croatia's claim. In its 2008 Judgment, the Court rejected Serbia's first and third preliminary objections but concluded that Serbia's second preliminary objection did not possess, in the circumstances of the case, an exclusively preliminary character and so reserved decision thereon to the present phase of the proceedings (*I.C.J. Reports 2008*, p. 460, para. 130 and p. 466, para. 146 (point 4)). Before turning to address Serbia's second objection, the Court will first recall certain observations that it made in its 2008 Judgment.

75. In its 2008 Judgment, the Court dismissed Serbia's first preliminary objection in so far as it related to its capacity to participate in the present proceedings (*I.C.J. Reports 2008*, p. 444, para. 91, and p. 466, para. 146 (point 1)).

76. The Court also dismissed Serbia's first preliminary objection in so far as it related to the jurisdiction of the Court *ratione materiae*. It referred to the declaration made by the FRY on 27 April 1992 (the date on which the FRY was proclaimed as a State), which stated that

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.
>
> At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled . . ." (United Nations doc. A/46/915, Ann. II, quoted at *I.C.J. Reports 2008*, pp. 446-447, para. 98.)

The Court also referred to the Note sent that day by the Permanent Mission of Yugoslavia to the United Nations Secretary-General, which stated that

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.

> Strictly respecting the continuity of the international personality of the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I, quoted at *I.C.J. Reports 2008*, p. 447, para. 99.)

The Court pointed out that the FRY had thus "clearly expressed an intention to be bound . . . by the obligations of the Genocide Convention" and concluded:

> "In the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different." (*I.C.J. Reports 2008*, p. 451, para. 111.)

77. The Court considered, however, that it was not in a position to rule upon Serbia's objection to jurisdiction and admissibility *ratione temporis*. This objection was that, in so far as Croatia's claim was based on acts and omissions alleged to have occurred before 27 April 1992, it fell outside the scope of Article IX of the Genocide Convention — and, accordingly, outside the jurisdiction of the Court — because it concerned events which preceded the date on which the FRY came into existence as a State and thus became capable of being a party to the Genocide Convention and that, in any event, that claim was inadmissible. With regard to this objection, the Court stated that

> "In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the [Genocide] Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it." (*I.C.J. Reports 2008*, p. 460, para. 129.)

78. The jurisdiction of the Court, and the admissibility of Croatia's claim, have therefore been settled by the 2008 Judgment so far as that claim relates to events alleged to have taken place as from 27 April 1992. Both jurisdiction and admissibility remain, however, to be determined in so far as the claim concerns events alleged to have occurred before that date. On those questions, the Parties remain in disagreement.

(2) The positions of the Parties regarding jurisdiction and admissibility

79. With regard to the jurisdiction of the Court, Serbia maintains that events said to have occurred before 27 April 1992 cannot give rise to a dispute between itself and Croatia regarding the "interpretation, application or fulfilment" of the Genocide Convention and thus cannot fall within the scope of Article IX of the Convention. It maintains that a distinction has to be made between the obligations of the SFRY and those of the FRY. While the SFRY was a party to the Genocide Convention prior to 27 April 1992, it was only from that date that the FRY became a party to it. Serbia refers to Article 28 of the Vienna Convention on the Law of Treaties, which it maintains states a principle of customary international law. That Article provides:

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

According to Serbia, since the substantive provisions of the Genocide Convention cannot apply retroactively, events alleged to have occurred before the FRY became a party to the Convention cannot engage the responsibility of the FRY and, therefore, of Serbia.

80. With regard to the admissibility of Croatia's claim, Serbia advances two arguments. First, it maintains that events said to have occurred before the FRY came into existence as a State cannot be attributed to the FRY. In Serbia's view, any claim against Serbia in respect of such events must, therefore, be regarded as inadmissible. This argument is advanced as an alternative to the argument regarding jurisdiction. Secondly, Serbia contends, in the further alternative, that in so far as the claim relates to events said to have occurred before 8 October 1991 — the date on which Croatia came into existence as a State and became bound by the Genocide Convention — it must be regarded as inadmissible.

81. Croatia responds that the Court has jurisdiction over the entirety of its claim and that there is no bar to admissibility. For Croatia, the essential point is that the Genocide Convention was in force in the territories concerned throughout the relevant period, because the SFRY was a party to the Convention. According to Croatia, the FRY emerged directly from the SFRY, with the organs of the new State taking over the control of those of the old State during the course of 1991 when the SFRY was "in a process of dissolution" (the phrase used by the Arbitration Commission of the Conference on Yugoslavia in Opinion No. 1, 29 November 1991, 92 *International Law Reports (ILR)*, p. 162). On 27 April 1992, the FRY made a declaration which, as the Court determined in 2008, had the effect of a notification of succession (see paragraph 76 above) to the Genocide Convention and other treaties to which the SFRY had been party. Croatia maintains that there was, therefore, a continuous application of the Convention, that it would be artificial and formalistic to confine jurisdiction to the period from 27 April 1992, and that a decision to limit jurisdiction to events occurring on or after that date would create a "time gap" in the protection afforded by the Convention. Croatia points to the absence of any temporal limitation in the terms of Article IX of the Genocide Convention. At least by the early summer of 1991, according to Croatia, the SFRY had ceased to be a functioning State and what became the FRY was already a State *in statu nascendi*.

82. Croatia therefore relies on what it describes as the customary international law principle stated in Article 10 (2) of the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001. Article 10 (2) provides:

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

According to Croatia, that principle is applicable to the facts of the present case with the result that the acts of the JNA and other armed groups controlled by the movement that later proclaimed the FRY as a State on 27 April 1992, even though they occurred before that date, must be regarded as acts of the FRY for the purposes of State responsibility. In the alternative, Croatia contends that if those acts should instead be attributed to the SFRY, the FRY succeeded to the responsibility of the SFRY for them.

83. Further, Croatia denies that its claim is inadmissible, to the extent that it relies upon events said to have occurred before 8 October 1991. It maintains that the Genocide Convention is not "a bundle of synallagmatic obligations" between parties but creates obligations *erga omnes*. It also emphasizes that the Convention was in force for the benefit of the population of Croatia at all relevant times.

* *

(3) The scope of jurisdiction under Article IX of the Genocide Convention

84. The Court begins by recalling that the only basis for jurisdiction which has been advanced in the present case is Article IX of the Genocide Convention. That Article provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

As the Court noted in its 2008 Judgment,

> "[t]he SFRY signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; it is common ground between the Parties that the SFRY was thus a party to the Convention at the time in the 1990s when it began to disintegrate into separate and independent States" (*I.C.J. Reports 2008*, p. 446, para. 97).

Croatia deposited a notification of succession on 12 October 1992, which it considers took effect from 8 October 1991, the date on which it came into existence as a State. In its Preliminary Objections in the present proceedings, Serbia took the position that it became bound by the Genocide Convention only when the FRY deposited an instrument of accession containing a reservation to Article IX on 12 March 2001. However, as already noted, the Court held, in its 2008 Judgment, that the FRY became a party to the Convention on 27 April 1992 on the basis of the declaration and Note referred to in paragraph 76, above, and was thus bound by the obligations under the Convention (*I.C.J. Reports 2008*, p. 451, para. 111; pp. 454-455, para. 117).

85. The fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention. As the Court explained in its 2007 Judgment in the proceedings between Bosnia and Herzegovina and Serbia, in which Article IX was also the only basis for jurisdiction, Article IX confines the Court to disputes regarding genocide. The Court thus

> "has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 147.)

That does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention.

86. The Court must, however, recall — as it has done on previous occasions — that the absence of a court or tribunal with jurisdiction to resolve disputes about compliance with a particular obligation under international law does not affect the existence and binding force of that obligation. States are required to fulfil their obligations under international law, including international humanitarian law and international human rights law, and they remain responsible for acts contrary to international law which are attributable to them (see, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 148).

87. Furthermore, since Article IX provides for jurisdiction only with regard to "the interpretation, application or fulfilment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in article III", the jurisdiction of the Court does not extend to allegations of violation of the customary international law on genocide. It is, of course, well established that the Convention enshrines principles that also form part of customary international law. Article I provides that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law". The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).
>
> . . . . . .
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

That statement was reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) (Judgment, I.C.J. Reports 2007 (I)*, pp. 110-111, para. 161). In addition, the Court has made clear that the Genocide Convention contains obligations *erga omnes*. Finally, the Court has noted that the prohibition of genocide has the character of a peremptory norm *(jus cogens)* (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 31-32, para. 64).

88. Moreover, the above-mentioned *Congo* v. *Rwanda* Judgment explains:

> "The Court observes, however, as it has already had occasion to emphasize, that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*,

p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties." *(Ibid.)*

In the present case, any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179). Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning an alleged violation of the customary international law obligations regarding genocide.

89. Accordingly, in order to establish that the Court has jurisdiction with regard to the claim of Croatia relating to events alleged to have occurred prior to 27 April 1992, the Applicant must show that its dispute with Serbia regarding these events is a dispute relating to the interpretation, application or fulfilment of the Genocide Convention. It is not enough that these events may have involved violations of the customary international law regarding genocide; the dispute must concern obligations under the Convention itself.

* *

(4) Serbia's objection to jurisdiction

(i) Whether provisions of the Convention are retroactive

90. It is for the Court, on the basis of the submissions of the Parties, and the arguments advanced in support thereof, to determine the subject-matter of the dispute before it. In the present case, the Court considers that the essential subject-matter of the dispute is whether Serbia is responsible for violations of the Genocide Convention and, if so, whether Croatia may invoke that responsibility. Thus stated, the dispute would appear to fall squarely within the terms of Article IX.

91. Serbia maintains that, in so far as Croatia's claim concerns acts said to have occurred before the FRY became party to the Convention on 27 April 1992 (and the great majority of Croatia's allegations concern events before that date), the Convention was not capable of applying to the FRY (and, therefore, any breaches of it cannot be attributable to Serbia). Accordingly, Serbia contends that the dispute regarding those allegations cannot be held to fall within the scope of Article IX.

92. In response, Croatia refers to what it describes as a presumption in favour of the retroactive effect of compromissory clauses, which it maintains finds support in the Judgment of the Permanent Court of International Justice in the case of *Mavrommatis Palestine Concessions (Greece* v. *United Kingdom)*, (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35), and to the absence of any temporal limitation in Article IX of the Genocide Convention.

93. In its 2008 Judgment in the present case, the Court stated "that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*" (*I.C.J. Reports 2008*, p. 458, para. 123; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34). As will be seen, the absence of a temporal limitation in Article IX is not without significance but it is not, in itself, sufficient to establish jurisdiction over that part of Croatia's claim which relates to events said to have occurred before 27 April 1992. Article IX is not a general provision for the settlement of disputes. The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III of the Convention. Accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention.

94. Croatia seeks to address that issue by arguing that some, at least, of the substantive provisions of the Convention are applicable to events occurring before it entered into force for the Respondent. Croatia maintains that the obligation to prevent and punish genocide is not limited to acts of genocide occurring after the Convention enters into force for a particular State but "is capable of encompassing genocide whenever occurring, rather than only genocide occurring in the future after the Convention enters into force for a particular State". Serbia, however, denies that these provisions were ever intended to impose upon a State obligations with regard to events which took place before that State became bound by the Convention.

95. The Court considers that a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the *travaux*

préparatoires suggests a different conclusion. Nor does the fact that the Convention was intended to confirm obligations that already existed in customary international law. A State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring but the fact that it subsequently becomes party to the Convention does not place it under an additional treaty obligation to have prevented those acts from taking place.

96. There is no similar logical barrier to a treaty imposing upon a State an obligation to punish acts which took place before that treaty came into force for that State and certain treaties contain such an obligation. For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968 (United Nations General Assembly resolution 2391 (XXIII); United Nations, *Treaty Series (UNTS)*, Vol. 754, p. 73), is applicable, according to its Article 1, to the crimes specified therein "irrespective of the date of their commission". Similarly, Article 2 (2) of the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 1974 (*European Treaty Series*, No. 82), provides that the Convention is applicable to offences committed before its entry into force in cases where the statutory limitation period had not expired at that time. In both those cases, however, the applicability of the relevant Convention to acts which occurred before it entered into force is the subject of express provision. There is no comparable provision in the Genocide Convention. Moreover, the provisions requiring States to punish acts of genocide (Articles I and IV) are necessarily linked to the obligation (in Article V) for each State party to enact legislation for the purpose of giving effect to the provisions of the Convention. There is no indication that the Convention was intended to require States to enact retroactive legislation.

97. The negotiating history of the Convention also suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past. Thus, the representative of Czechoslovakia stated that the Convention should "include express provisions asserting the peoples' desire to punish all those who, *in the future*, might be tempted to repeat the appalling crimes which had been committed" (United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Minutes of the Sixty-Sixth Meeting*, doc. A/C.6/SR.66, p. 30; emphasis added). Similarly, the representative of the Philippines stated that "[i]t was therefore essential to provide for their punishment *in [the] future*" (*ibid.*, *Minutes of the Ninety-Fifth Meeting*, doc. A/C.6/SR.95, p. 340; emphasis added) and the representative of Peru described the Convention then under negotiation as one "for the punishment of those who would be guilty of violating its provisions *in the future*" (United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Minutes of the Hundred and Ninth Meeting*, doc. A/C.6/SR.109, p. 498; emphasis added). By contrast, in spite of the events immediately preceding the adoption of the Convention — to which many references were made — there was no suggestion that the Convention under consideration was intended to impose an obligation on States to punish acts of genocide committed in the past.

98. Finally, the Court recalls that in its recent Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 422), it held that the comparable provisions of the Convention against Torture, which require each State party to submit to their prosecuting authorities the cases of persons suspected of acts of torture, applied only to acts taking place after the Convention had entered into force for the State concerned, notwithstanding that such acts are considered crimes under customary international law (*ibid.*, p. 457, paras. 99-100).

99. In arguing that some of the substantive obligations imposed by the Convention are retroactive, Croatia focused upon the obligations to prevent and punish genocide. It is, however, the responsibility of a State under the Convention for the commission of acts of genocide that lies at the heart of Croatia's claim. The Court considers that in this respect also the Convention is not retroactive. To hold otherwise would be to disregard the rule expressed in Article 28 of the Vienna Convention on the Law of Treaties. There is no basis for doing so in the text of the Convention or in its negotiating history.

100. The Court thus concludes that the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.

* *

101. Having reached that conclusion, the Court now turns to the question whether the dispute as to acts said to have occurred before 27 April 1992 nevertheless falls within the scope of jurisdiction under Article IX. As the Court has already noted (see paragraph 82 above), Croatia advances two alternative grounds for concluding that it does so. Croatia relies, first, upon Article 10 (2) of the ILC Articles on State Responsibility, and, secondly, upon the law of State succession. The Court will consider each of these arguments in turn.

(ii) Article 10 (2) of the ILC Articles on State Responsibility

102. Article 10 (2) of the ILC Articles on State Responsibility has already been quoted in paragraph 82, above. According to Croatia, that provision is part of customary international law. Croatia maintains that, although the FRY was not proclaimed as a State until 27 April 1992, that proclamation merely formalized a situation that was already established in fact. During the course of 1991, according to Croatia, the leadership of the republic of Serbia and other supporters of what Croatia describes as a "Greater Serbia" movement took control of the JNA and other institutions of the SFRY, while also controlling their own territorial armed forces and various militias and paramilitary groups. This movement was eventually successful in creating a separate State, the

FRY. Croatia contends that its claim in relation to events prior to 27 April 1992 is based upon acts by the JNA and those other armed forces and groups, as well as the Serb political authorities, which were attributable to that movement and thus, by operation of the principle stated in Article 10 (2), to the FRY.

103. Serbia counters that Article 10 (2) represents progressive development of the law and did not form part of customary international law in 1991-1992. It is therefore inapplicable to the present case. Furthermore, even if Article 10 (2) had become part of customary law at that time, it is not applicable to the facts of the present case, since there was no "movement" that succeeded in creating a new State. Serbia also denies that the acts on which Croatia's claim is based were attributable to an entity that might be regarded as a Serbian State *in statu nascendi* during the period before 27 April 1992. Finally, Serbia contends that even if Article 10 (2) were applicable, it would not suffice to bring within the scope of Article IX that part of Croatia's claim which concerns events said to have occurred before 27 April 1992. According to Serbia, Article 10 (2) of the ILC Articles is no more than a principle of attribution; it has no bearing on the question of what obligations bind the new State or the earlier "movement", nor does it make treaty obligations accepted by the new State after its emergence retroactively applicable to acts of the pre-State "movement", even if it treats those acts as attributable to the new State. On that basis, Serbia argues that any "movement" which might have existed before 27 April 1992 was not a party to the Genocide Convention and could, therefore, only have been bound by the customary international law prohibition of genocide.

104. The Court considers that, even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

In the present case, the FRY was not bound by the obligations contained in the Genocide Convention until it became party to that Convention. In its 2008 Judgment, the Court held that succession resulted from the declaration made by the FRY on 27 April 1992 and its Note of the same date (see paragraph 76, above). The date on which the notification of succession was made coincided with the date on which the new State came into existence. The Court has already found, in its 2008 Judgment, that the effect of the declaration and Note of 27 April 1992 was "that *from that date onwards* the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution" (*I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added).

105. The FRY was, therefore, bound by the Genocide Convention only with effect from 27 April 1992. Accordingly, even if the acts prior to 27 April 1992 on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have

involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide. Article 10 (2) cannot, therefore, serve to bring the dispute regarding those acts within the scope of Article IX of the Convention. That conclusion makes it unnecessary for the Court to consider whether Article 10 (2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter), or whether, if it did so, the conditions for its application are satisfied in the present case.

* *

(iii) Succession to responsibility

106. The Court therefore turns to Croatia's alternative argument that the FRY succeeded to the responsibility of the SFRY. This argument is based upon the premise that the acts prior to 27 April 1992 on which Croatia bases its claim were attributable to the SFRY and in breach of the SFRY's obligations under the Genocide Convention to which it was, at the relevant time, a party. Croatia then argues that, when the FRY succeeded to the treaty obligations of the SFRY on 27 April 1992, it also succeeded to the responsibility already incurred by the latter for these alleged violations of the Genocide Convention.

107. Croatia advances two separate grounds on which it claims the FRY succeeded to the responsibility of the SFRY. First, it claims that this succession came about as a result of the application of the principles of general international law regarding State succession. In this context, it relies upon the award of the arbitration tribunal in the *Lighthouses Arbitration between France and Greece, Claims No. 11 and 4*, 24 July 1956 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 155; 23 *ILR* 81), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make it appropriate to hold the latter responsible for the former's wrongdoing. The tribunal considered that whether there would be a succession to responsibility would depend on the particular facts of each case. Croatia contends that the facts of the present case, in which the dissolution of the SFRY was a gradual process involving armed conflict between what became its successor States and in which one of the entities which emerged as a successor — the FRY — largely controlled the armed forces of the SFRY during the last year of the latter's formal existence, justify the succession of the FRY to the responsibility incurred by the SFRY for the acts of armed forces that subsequently became organs of the FRY. Secondly, Croatia argues that the FRY, by the declaration of 27 April 1992 already discussed, indicated not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations.

108. Serbia maintains that this alternative argument is a new claim introduced by Croatia only at the oral phase of the proceedings and is hence inadmissible. In the event that the Court decides that it can entertain it, Serbia argues that neither Article IX, nor the other provisions of the

Genocide Convention, makes any provision for the transmission of responsibility by succession, so that any succession would have to be by operation of principles outside the Convention and a dispute regarding those principles would not therefore fall within the scope of Article IX. In any event, Serbia contends that there is no principle of succession to responsibility in general international law. It maintains that the *Lighthouses* case was concerned with the violation of private rights under a concession contract and is of no relevance to responsibility for alleged violations of the Genocide Convention. According to Serbia, the declaration of 27 April 1992 was concerned only with succession to the treaties themselves and not with succession to responsibility. Serbia further maintains that all issues of succession to the rights and obligations of the SFRY are governed by the Agreement on Succession Issues, 2001 (*UNTS*, Vol. 2262, p. 251), which lays down a procedure for considering outstanding claims against the SFRY. Finally, Serbia argues that the Court should, in any event, decline to exercise jurisdiction on the alternative basis advanced by Croatia, because of the principle enunciated by the Court in its Judgments in *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America) (Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19) and *East Timor (Portugal* v. *Australia) (Judgment, I.C.J. Reports 1995*, p. 90).

109. While the Court has made clear that an applicant may not introduce a new claim which has the effect of transforming the subject-matter of the dispute (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108), it is not persuaded that, in advancing its argument regarding State succession, Croatia has introduced a new claim into the proceedings. The Court has already stated that the subject-matter of the dispute is whether or not Serbia is responsible for violations of the Genocide Convention (see paragraph 90 above), including those allegedly committed before 27 April 1992. The question whether Serbia is responsible for such alleged violations must be distinguished from the manner in which that responsibility is said to be established. Croatia initially maintained — and continues to advance as its principal argument — that the FRY (and, thus, Serbia) incurred responsibility for the conduct which Croatia contends violated the Convention, because that conduct was directly attributable to the FRY. However, Croatia also advances, as an alternative argument, that, if that conduct was attributable to the SFRY, then the FRY (and, consequently, Serbia) incurred responsibility on the basis of succession. Croatia has not, therefore, introduced a new claim but advanced, in support of its original claim, a new argument as to the manner in which Serbia's responsibility is said to be established. Moreover, that argument involves no new title of jurisdiction but concerns the interpretation and application of the title of jurisdiction invoked in the Application, namely Article IX of the Genocide Convention.

110. As noted at paragraph 77 above, the Court observed in 2008, when deciding that Serbia's objections to jurisdiction and admissibility *ratione temporis* did not possess an exclusively preliminary character, that the issues of jurisdiction and merits are closely related and the Court needed to have more elements before it in order to be in a position to make findings on each of those issues. Now that the Court, having received the further pleadings and heard the oral arguments of the Parties, is in possession of those additional elements, it can distinguish what has to be decided in order to determine the question of jurisdiction from those decisions which properly belong only to the merits.

111. In relation to jurisdiction, the question which has to be decided is confined to whether the dispute between the Parties is one which falls within the jurisdiction of the Court under Article IX of the Genocide Convention. That dispute will do so only if it is one concerning the interpretation, application or fulfilment of the Convention, which includes disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention.

112. Within the framework of the dispute, as analysed in paragraphs 90 and 109, above, it is possible to identify a number of contested points. Thus, on Croatia's alternative argument, in order to determine whether Serbia is responsible for violations of the Convention, the Court would need to decide:

(1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;

(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

(3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.

While there is no dispute that many (though not all) of the acts relied upon by Croatia took place, the Parties disagree over whether or not they constituted violations of the Genocide Convention. In addition, Serbia rejects Croatia's argument that Serbia has incurred responsibility, on whatever basis, for those acts.

113. What has to be decided in order to determine whether or not the Court possesses jurisdiction with regard to the claim concerning acts said to have taken place before 27 April 1992 is whether the dispute between the Parties on the three issues set out in the preceding paragraph falls within the scope of Article IX. The issues in dispute concern the interpretation, application and fulfilment of the provisions of the Genocide Convention. There is no suggestion here of giving retroactive effect to the provisions of the Convention. Both Parties agree that the SFRY was bound by the Convention at the time when it is alleged that the relevant acts occurred. Whether those acts were contrary to the provisions of the Convention and, if so, whether they were attributable to and thus engaged the responsibility of the SFRY are matters falling squarely within the scope *ratione materiae* of the jurisdiction provided for in Article IX.

114. So far as the third issue in dispute is concerned, the question the Court is asked to decide is whether the FRY — and, therefore, Serbia — is responsible for acts of genocide and other acts enumerated in Article III of the Convention allegedly attributable to the SFRY. Article IX provides for the Court's jurisdiction in relation to "[d]isputes . . . relating to the interpretation, application or fulfilment of the . . . Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". Croatia's contention is that Serbia is responsible for the breaches of the Genocide Convention which it maintains were committed before 27 April 1992. On Croatia's principal argument, that responsibility results from the direct attribution of those breaches to the FRY, and thus to Serbia, while on Croatia's alternative argument (with which this part of the Judgment is concerned), responsibility is said to

result from succession. The Court notes that Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged. While Croatia's arguments regarding the third issue identified in paragraph 112 above raise serious questions of law and fact, those questions form part of the merits of the dispute. They would require a decision only if the Court finds that the acts relied upon by Croatia were contrary to the Convention and were attributable to the SFRY at the time of their commission.

115. It is true that whether or not the Respondent State succeeds, as Croatia contends, to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law. However, that does not take the dispute regarding the third issue outside the scope of Article IX. As the Court explained in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,

> "[t]he jurisdiction of the Court is founded on Article IX of the Genocide Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts." (*I.C.J. Reports 2007 (I)*, p. 105, para. 149.)

The Court considers that the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States referred to in the passage just quoted. The Convention itself does not specify the circumstances that give rise to the responsibility of a State, which must be determined under general international law. The fact that the application — or even the existence — of a rule on some aspect of State responsibility or State succession in connection with allegations of genocide may be vigorously contested between the parties to a case under Article IX does not mean that the dispute between them ceases to fall within the category of "disputes . . . relating to the interpretation, application or fulfilment of the [Genocide] Convention, including those relating to the responsibility of a State for genocide". Since Croatia's alternative argument calls for a determination whether the SFRY was responsible for acts of genocide allegedly committed when the SFRY was a party to the Convention, the Court's conclusion regarding the temporal scope of Article IX does not constitute a barrier to jurisdiction.

116. With regard to Serbia's arguments based on the Judgments in *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America) (Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19) and *East Timor (Portugal* v. *Australia) (Judgment, I.C.J. Reports 1995*, p. 90), the Court recalls that those Judgments concern one aspect of "the fundamental principles of its Statute . . . that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*ibid.*, p. 101, para. 26). In both *Monetary Gold* and *East Timor*, the Court declined to exercise its jurisdiction to adjudicate upon the application, because it considered that to do so would have been contrary to the right of a State not party to the

proceedings not to have the Court rule upon its conduct without its consent. That rationale has no application to a State which no longer exists, as is the case with the SFRY, since such a State no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court. So far as concerns the position of the other successor States to the SFRY, it is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim. The principle discussed by the Court in the *Monetary Gold* case is therefore inapplicable (cf. *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55).

117. Having concluded in its 2008 Judgment that the present dispute falls within Article IX of the Genocide Convention in so far as it concerns acts said to have occurred after 27 April 1992, the Court now finds that, to the extent that the dispute concerns acts said to have occurred before that date, it also falls within the scope of Article IX and that the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim. In reaching that conclusion, it is not necessary to decide whether the FRY, and therefore Serbia, actually succeeded to any responsibility that might have been incurred by the SFRY, any more than it is necessary to decide whether acts contrary to the Genocide Convention took place before 27 April 1992 or, if they did, to whom those acts were attributable. Those questions are matters for the merits to be considered — to the extent necessary — in the following sections of this Judgment.

* *

(5) Admissibility

118. The Court therefore turns to the two alternative arguments advanced by Serbia regarding the admissibility of the claim. The first such argument is that a claim based upon events said to have occurred before the FRY came into existence as a State on 27 April 1992 is inadmissible. The Court recalls that it has already, in its 2008 Judgment, held that this argument involves questions of attribution. The Court observes that it is not necessary to determine these matters before it has considered on the merits the acts alleged by Croatia.

119. Serbia's second alternative argument is that, even if a claim might be admissible in relation to events said to have occurred before the FRY came into existence as a State, Croatia could not maintain a claim in relation to events alleged to have taken place before it became a party to the Genocide Convention on 8 October 1991. The Court observes that Croatia has not made discrete claims in respect of the events before and after 8 October 1991; rather, it has advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991 and has referred, in the case of many towns and villages, to acts of violence taking place both immediately prior to, and immediately following, 8 October 1991. In this context, what happened

prior to 8 October 1991 is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention. In these circumstances, the Court considers that it is not necessary to rule upon Serbia's second alternative argument before it has examined and assessed the totality of the evidence advanced by Croatia.

B. Serbia's counter-claim

120. With regard to the counter-claim made by Serbia, Article 80, paragraph 1, of the Rules of Court as adopted on 14 April 1978, which, as the Court has already noted (see paragraph 7, above), is applicable to this case as the Application was submitted prior to 1 February 2001, provides that

> "A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court."

121. In its counter-claim, Serbia alleges that Croatia violated its obligations under the Genocide Convention by taking action, and failing to punish the action taken, against the Serb population in the Krajina region of Croatia. The counter-claim relates exclusively to the fighting which took place in the summer of 1995 in the course of what was described by Croatia as Operation "Storm" and its aftermath. By the time that Operation "Storm" took place, both Croatia and the FRY had been parties to the Genocide Convention for several years. Croatia does not contest that the counter-claim thus falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

122. With regard to the requirement that the counter-claim be directly connected with the subject-matter of the claim, Serbia maintains that the counter-claim raises "virtually identical legal issues related to the interpretation of the Genocide Convention . . . as well as related issues of State responsibility arising under the Convention and general international law" as those raised by the claim and that the claim and counter-claim relate to the same armed conflict and share "a common territorial and temporal setting". Croatia denies that the counter-claim is based on the same "factual complex" as the claim and highlights what it maintains are a number of significant differences between them, including the fact that the events to which the claim relates took place over a much wider geographical area and that most of them occurred more than two years before the events on which the counter-claim is based.

123. The Court notes, however, that Croatia does not submit that the counter-claim is inadmissible; the factual differences suggested by Croatia are invoked in support of its arguments on the merits of the counter-claim (something which will be considered in Part VI of this Judgment). The Court considers that the counter-claim is directly connected with the claim of Croatia both in fact and in law. The legal basis for both the claim and the counter-claim is the Genocide Convention. Moreover, even if one accepts that the factual differences suggested by

Croatia exist, the hostilities in Croatia in 1991-1992 that gave rise to most of the allegations in the claim were directly connected with those in the summer of 1995, not least because Operation "Storm" was launched as a response to what Croatia maintained was the occupation of part of its territory as a result of the earlier fighting. The Court therefore concludes that the requirements of Article 80, paragraph 1, of the Rules of Court are satisfied. As Article IX is the only basis for jurisdiction which has been advanced in respect of the counter-claim, the comments made in paragraphs 85 to 88 above are equally applicable to the counter-claim.

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III. APPLICABLE LAW: THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

124. The Genocide Convention, which is binding on the Parties, and the sole basis on which the Court has jurisdiction, is the law applicable to the present case. Accordingly, the Court can rule only on alleged breaches of that Convention (see paragraphs 85-88 above).

125. In ruling on disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, the Court bases itself on the Convention, but also on the other relevant rules of international law, in particular those governing the interpretation of treaties and the responsibility of States for internationally wrongful acts. Moreover, as it observed in its Judgment of 18 November 2008 on the preliminary objections in the present case,

> "[i]n general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions . . . unless it finds very particular reasons to do so" (*I.C.J. Reports 2008*, p. 449, para. 104).

In this connection, the Court recalls that, in its Judgment of 26 February 2007 in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, it considered certain issues similar to those before it in the present case. It will take into account that Judgment to the extent necessary for its legal reasoning here. This will not, however, preclude it, where necessary, from elaborating upon this jurisprudence, in light of the arguments of the Parties in the present case.

126. In its final submissions, Croatia requests the Court to rule on Serbia's responsibility for alleged breaches of the Convention. According to the Applicant, a distinction must be drawn between the issue of Serbia's international responsibility for a series of crimes, which is a matter for the Court in this case, and that of individual responsibility for particular crimes, which it is the function of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to determine.

127. For its part, Serbia points out that the Court's Judgment in 2007 was built upon the case law of the ICTY, and that its analysis used individual criminal responsibility rather than State responsibility as the starting-point.

128. The Court recalls that, in its 2007 Judgment, it observed that "if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed" (*I.C.J. Reports 2007 (I)*, p. 119, para. 180). It may consist of acts, attributable to the State, committed by a person or a group of persons whose individual criminal responsibility has already been established. But the Court also envisaged an alternative scenario, in which "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (*ibid.*, p. 120, para. 182).

In either of these situations, the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically, Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, states that "[t]he characterization of an act of a State as internationally wrongful is governed by international law."

129. State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.

It is for the Court, in applying the Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. That is a task for the criminal courts or tribunals empowered to do so, in accordance with appropriate procedures. The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case. If it is established that genocide has been committed, the Court will then seek to determine the responsibility of the State, on the basis of the rules of general international law governing the responsibility of States for internationally wrongful acts.

130. Article II of the Convention defines genocide in the following terms:

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

According to that Article, genocide contains two constituent elements: the physical element, namely the act perpetrated or *actus reus*, and the mental element, or *mens rea*. Although analytically distinct, the two elements are linked. The determination of *actus reus* can require an inquiry into intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of intent.

131. The Court will begin by defining the intent to commit genocide, before analysing the legal issues raised by the acts referred to in Article II of the Convention.

A. The *mens rea* of genocide

132. The "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" is the essential characteristic of genocide, which distinguishes it from other serious crimes.

It is regarded as a *dolus specialis*, that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved (*I.C.J. Reports 2007 (I)*, p. 121, para. 187).

133. In the present case, the Parties differ (1) on the meaning and scope of "destruction" of a group, (2) on the meaning of destruction of a group "in part", and finally (3) on what constitutes the evidence of the *dolus specialis*.

1. The meaning and scope of "destruction" of a group

(a) *Physical or biological destruction of the group*

134. Croatia argues that the required intent is not limited to the intent to physically destroy the group, but includes also the intent to stop it from functioning as a unit. Thus, according to

Croatia, genocide as defined in Article II of the Convention need not take the form of physical destruction of the group. As evidence of this, it points out that some of the acts of genocide listed in Article II of the Convention do not imply the physical destruction of the group. By way of example, it cites "causing serious . . . mental harm to members of the group" (subparagraph *(b)* of Article II), and "forcibly transferring children of the group to another group" (subparagraph *(e)* of that Article).

135. Serbia, on the contrary, rejects this functional approach to the destruction of the group, taking the view that what counts is the intent to destroy the group in a physical sense, even if the acts listed in Article II may sometimes appear to fall short of causing such physical destruction.

136. The Court notes that the *travaux préparatoires* of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context (see Report of the *ad hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Proceedings of the Economic and Social Council, 7th Session, Supplement No. 6*, doc. E/794; and United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Minutes of the Eighty-Third Meeting*, pp. 193-207, doc. A/C.6/SR.83).

It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group (Report of the ILC on the work of its Forty-eighth Session, *Yearbook of the ILC*, 1996, Vol. II, Part Two, pp. 45-46, para. 12, quoted by the Court in its 2007 Judgment, *I.C.J. Reports 2007 (I)*, p. 186, para. 344).

It follows that "causing serious . . . mental harm to members of the group" within the meaning of Article II *(b)*, even if it does not directly concern the physical or biological destruction of members of the group, must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part.

As regards the forcible transfer of children of the group to another group within the meaning of Article II *(e)*, this can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.

(b) ***Scale of destruction of the group***

137. Croatia contends that the extermination of the group is not required according to the definition of genocide as set out in Article II of the Convention. It argues that there is a requirement to prove that the perpetrator intended to destroy the group, in whole or in part, and that that intent need not necessarily involve the extermination of the group. Croatia has even argued that a small number of victims who are members of the group would suffice, citing the *travaux préparatoires*, and in particular the draft amendment proposed by the French delegation to the Sixth Committee of the General Assembly (United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Minutes of the Seventy-Third Meeting*, pp. 90-91, doc. A/C.6/SR.73; and *ibid., Annex to the Minutes of the Two-Hundred and Twenty-Fourth Meeting*, p. 22, doc. A/C.6/224), even though that proposal was ultimately withdrawn.

According to Serbia, extermination, as a crime against humanity, may be related to genocide in that both crimes are directed against a large number of victims. It accepts that, in order to demonstrate the existence of genocide, it is necessary to prove that the acts were committed with the intent to destroy the group physically. It argues, however, that, where there is evidence of extermination, "the deduction that the perpetrator intended the physical destruction of the targeted group will be much more plausible". Conversely, where there is no evidence of extermination, this deduction of genocidal intent "will be implausible, absent other compelling evidence".

138. The Court considers that Article II of the Convention, including the phrase "committed with intent to destroy", must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", as prescribed by customary law as reflected in Article 31 of the Vienna Convention on the Law of Treaties.

139. The Preamble to the Genocide Convention emphasizes that "genocide has inflicted great losses on humanity", and that the Contracting Parties have set themselves the aim of "liberat[ing] mankind from such an odious scourge". As the Court noted in 1951 and recalled in 2007, an object of the Convention was the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 125, para. 194).

The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution (*I.C.J. Reports 2007 (I)*, pp. 121-122, paras. 187-188).

Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part.

2. The meaning of destruction of the group "in part"

140. Croatia accepts that, according to the case law of the Court and of the international criminal tribunals, "the intent to destroy . . . in part" the protected group relates to a substantial part of that group. However, it objects to a purely numerical approach to this criterion, arguing that the emphasis should be on the geographical location of the part of the group, within a region, or a subregion or a community, as well as the opportunities presented to the perpetrators of the crime to destroy the group.

141. Serbia focuses on the criterion that the targeted part of the group must be substantial and on the established case law in that regard, while accepting that it might be relevant to consider the issue of opportunity.

142. The Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that "the intent must be to destroy at least a substantial part of the particular group" (*I.C.J. Reports 2007 (I)*, p. 126, para. 198), and that this is a "critical" criterion (*ibid.*, p. 127, para. 201). The Court further noted that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" (*ibid.*, p. 126, para. 199) and that, accordingly, "[t]he area of the perpetrator's activity and control are to be considered" *(ibid.)*. Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]" (IT-98-33-A, Judgment of 19 April 2004, para. 12, reference omitted, cited in *I.C.J. Reports 2007 (I)*, p. 127, para. 200).

In 2007, the Court held that these factors would have to be assessed in any particular case (*ibid.*, p. 127, para. 201). It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.

3. Evidence of the *dolus specialis*

143. The Parties agree that the *dolus specialis* is to be sought, first, in the State's policy, while at the same time accepting that such intent will seldom be expressly stated. They agree that, alternatively, the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct. They disagree, however, on the number and nature of instances of such conduct required for this purpose.

144. Croatia considers that conduct of this kind may be reflected in the actions of a small number of identified individuals, whereas Serbia cites the Elements of Crimes, adopted pursuant to the Rome Statute of the International Criminal Court, which refer to "a manifest pattern of similar conduct directed against [the] group". The Respondent considers that this excludes the possibility of genocide being committed by a single individual or a small number of individuals.

145. In the absence of a State plan expressing the intent to commit genocide, it is necessary, in the Court's view, to clarify the process whereby such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. In its 2007 Judgment, the Court held that

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent" (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373).

The Parties have cited this passage of the Judgment, and they accept that intent may be inferred from a pattern of conduct, but they disagree on how this pattern should be characterized, and on the criterion by reference to which the Court should assess its existence.

146. Croatia considers that the above criterion, as defined in 2007, is excessively restrictive and not based on any precedent, and asks the Court to reconsider it. It points out that it has been unable to find any decision of an international court or tribunal since 2007 in which this criterion has been applied. It invites the Court to draw inspiration from the following passage in the ICTY Trial Judgment in the *Tolimir* case (currently under appeal) in order to modify the criterion laid down by it in 2007 regarding evidence of *dolus specialis*:

> "Indications of such intent are rarely overt, however, and thus it is permissible to infer the existence of genocidal intent based on 'all of the evidence taken together', as long as this inference is 'the only reasonable [one] available on the evidence'." (*Tolimir*, IT-05-88/2-T, Trial Chamber, Judgment of 12 December 2012, para. 745.)

According to Croatia, even where there may be other possible explanations for a pattern of conduct, the Court is bound to find that there was *dolus specialis* if it is fully convinced that the only reasonable inference to be drawn from that conduct is one of genocidal intent.

147. For its part, Serbia points out that, even though the ICTY Trial Chamber in the *Tolimir* case did not cite paragraph 373 of the Court's 2007 Judgment, its conclusion that the inference of genocidal intent must be "the only reasonable [one] available on the evidence" was consistent with that passage in the Court's Judgment. Serbia accordingly takes the view that the two approaches to the criterion of genocidal intent — the only possible inference (the line taken in the Court's 2007 Judgment), or the only reasonable inference (the ICTY's approach in its decision in the *Tolimir* case) — come to the same thing and are both equally stringent.

148. The Court recalls that, in the passage in question in its 2007 Judgment, it accepted the possibility of genocidal intent being established indirectly by inference. The notion of "reasonableness" must necessarily be regarded as implicit in the reasoning of the Court. Thus, to state that, "for a pattern of conduct to be accepted as evidence of . . . existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent" amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question. To interpret paragraph 373 of the 2007 Judgment in any other way would make it impossible to reach conclusions by way of inference. It follows that the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case is in substance identical with that laid down by the Court in its 2007 Judgment.

B. The *actus reus* of genocide

149. The acts listed in Article II of the Convention constitute the *actus reus* of genocide. Such acts are proscribed in the context of genocide inasmuch as they are directed against the members of the protected group and reflect the intent to destroy that group in whole or in part. As the Court has already pointed out, such acts cannot be taken in isolation, but must be assessed in the context of the prevention and punishment of genocide, which is the object of the Convention.

150. The Court will review the categories of acts in issue between the Parties in order to determine their meaning and scope. It will begin by addressing the issue of whether acts committed during the course of an armed conflict must, in order to constitute the *actus reus* of genocide, be unlawful under international humanitarian law *(jus in bello)*.

1. The relationship between the Convention and international humanitarian law

151. Both in the proceedings on the principal claim and in those on the counter-claim, the Parties debated the relationship between international humanitarian law and the Convention. They disagreed on the issue of whether acts which are lawful under international humanitarian law can constitute the *actus reus* of genocide.

152. On the principal claim, Serbia argued that acts committed by Serb forces occurred during what it described as "legitimate combat" with Croatian armed forces. Croatia replied that the Convention applied both in times of peace and in times of war and that, in any event, the attacks on Croat localities by the Serb forces had not been conducted in accordance with international humanitarian law.

On the counter-claim, Croatia recalled that the ICTY Appeals Chamber had held in *Gotovina* (IT-06-90-A, Appeals Judgment, 16 November 2012, hereinafter "*Gotovina* Appeals Judgment") that the shelling of Serb towns during Operation "Storm" had not been indiscriminate and hence was not contrary to international humanitarian law. Serbia, for its part, argued that, even if the Operation "Storm" attacks had been conducted in compliance with international humanitarian law, they could still constitute the *actus reus* of genocide.

153. The Court notes that the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), "whether committed in time of peace or in time of war" (Article I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects.

The Court recalls that it has jurisdiction to rule only on violations of the Genocide Convention, and not on breaches of obligations under international humanitarian law (see paragraph 85 above). The Court is called upon here to decide a dispute concerning the

interpretation and application of that Convention, and will not therefore rule, in general or in abstract terms, on the relationship between the Convention and international humanitarian law.

In so far as both of these bodies of rules may be applicable in the context of a particular armed conflict, the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention.

2. The meaning and scope of the physical acts in question

154. In subparagraphs *(a)* to *(e)* of Article II, the Convention lists the acts which constitute the *actus reus* of genocide. The Court will examine each in turn, with the exception of "[f]orcibly transferring children of the group to another group" (subparagraph *(e)*), which is not relied on by either of the Parties in this case.

(a) ***Killing members of the group***

155. The Court notes that there is no disagreement between the Parties on the definition of killing in the sense of subparagraph *(a)* of Article II of the Convention.

156. The Court observes that the words "killing" and "meurtre" appear in the English and French versions respectively of subparagraph *(a)* of Article II of the Convention. For the Court, these words have the same meaning, and refer to the act of intentionally killing members of the group (*I.C.J. Reports 2007 (I)*, p. 121, para. 186 and *Blagojević and Jokić*, IT-02-60-T, Trial Chamber, Judgment of 17 January 2005, para. 642).

(b) ***Causing serious bodily or mental harm to members of the group***

157. The Parties disagree on whether causing serious bodily or mental harm to members of the group must contribute to the destruction of the group, in whole or in part, in order to constitute the *actus reus* of genocide for purposes of Article II *(b)* of the Convention. Croatia argues that there is no need to show that the harm itself contributed to the destruction of the group. Serbia, on the other hand, contends that the harm must be so serious that it threatens the group with destruction.

The Court considers that, in the context of Article II, and in particular of its *chapeau*, and in light of the Convention's object and purpose, the ordinary meaning of "serious" is that the bodily or mental harm referred to in subparagraph *(b)* of that Article must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

The Convention's *travaux préparatoires* confirm this interpretation. Thus the representative of the United Kingdom, in proposing an amendment to characterize the harm as "grievous" in the English version of the Convention, stated that "[i]t would not be appropriate to include, in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to the physical destruction of the group". Upon the proposal of the representative of India, the term "grievous" was eventually replaced by the term "serious" in the English version of the Convention,

without affecting the idea behind the proposal of the representative of the United Kingdom (United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Minutes of the Eighty-First Meeting*, pp. 175 and 179, doc. A/C.6/SR.81, and United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee, Annex to Minutes of the Meetings*, p. 21, doc. A/C.6/222).

In its commentary on the Draft Code of Crimes against the Peace and Security of Mankind, the ILC adopted a similar interpretation according to which "[t]he bodily or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part" (Report of the ILC on the work of its Forty-eighth Session, *Yearbook of the ILC*, 1996, Vol. II, Part Two, p. 46, para. 14).

Finally, that is the interpretation of "serious harm" adopted by the ICTY, in particular in the *Krajišnik* case where the Trial Chamber ruled that the harm must be such "as to contribute, or tend to contribute, to the destruction of the group or part thereof" (IT-00-39-T, Judgment of 27 September 2006, para. 862; see also *Tolimir*, IT-05-88/2-T, Trial Chamber, Judgment of 12 December 2012, para. 738).

The Court concludes that the serious bodily or mental harm within the meaning of Article II *(b)* of the Convention must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

158. The Court recalls that rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II *(b)* of the Convention (*I.C.J. Reports 2007 (I)*, p. 167, para. 300 (citing in particular the judgment of the ICTY Trial Chamber, rendered on 31 July 2003 in the *Stakić* case, IT-97-24-T) and p. 175, para. 319).

159. The Parties also disagree on the meaning and scope of the notion of "causing serious mental harm to members of the group". For Croatia, this includes the psychological suffering caused to their surviving relatives by the disappearance of members of the group. It thus argues that Article II *(b)* has been the subject of a continuing breach in the present case, since insufficient action has been initiated by Serbia to ascertain the fate of individuals having disappeared during the events cited in support of the principal claim.

For the Respondent, this is not an issue covered by the Genocide Convention, but by human rights instruments, and falls outside the scope of the present case.

160. In the Court's view, the persistent refusal of the competent authorities to provide relatives of individuals who disappeared in the context of an alleged genocide with information in their possession, which would enable the relatives to establish with certainty whether those individuals are dead, and if so, how they died, is capable of causing psychological suffering. The Court concludes, however, that, to fall within Article II *(b)* of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

(c) ***Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction***

161. Deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II *(c)* of the Convention, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group (see, *inter alia*, *Stakić*, IT-97-24-T, Trial Chamber, Judgment of 31 July 2003, paras. 517 and 518). Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion (*Brđanin*, IT-99-36-T, Trial Chamber, Judgment of 1 September 2004, para. 691). Some of these acts were indeed alleged by the Parties in support of their respective claims, and those allegations will be examined by the Court later in the Judgment.

The Parties disagree, however, on whether forced displacement should be characterized as "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", in the sense of Article II *(c)* of the Convention. They agree that the forced displacement of the population cannot constitute, as such, the *actus reus* of genocide within the meaning of subparagraph *(c)* of Article II of the Convention. However, Croatia argues that forced displacement, accompanied by other acts listed in Article II of the Convention, and coupled with an intent to destroy the group, is a genocidal act. For its part, Serbia maintains that neither the case law of the Court nor that of the ICTY has accepted that forced displacement can constitute genocide within the meaning of Article II of the Convention.

162. The Court recalls that, in its 2007 Judgment, it stated that

> "[n]either 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" (*I.C.J. Reports 2007 (I)*, p. 123, para. 190; emphasis in original).

It explained, however, that

> "[t]his 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 . . . In other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or

> absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own. That said, it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts." (*I.C.J. Reports 2007 (I)*, p. 123, para. 190.)

163. The Court has no reason here to depart from its previous conclusions. In order to determine whether the forced displacements alleged by the Parties constitute genocide in the sense of Article II of the Convention (subparagraph *(c)*, in particular), it will seek to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group. The circumstances in which the forced displacements were carried out are critical in this regard.

(d) ***Measures intended to prevent births within the group***

164. According to Croatia, rape and other acts of sexual violence can fall within subparagraph *(d)* of Article II of the Convention, which covers measures intended to prevent births within the group. In support of this contention, it refers to the observation of the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Akayesu* case that the mental effects of rape could lead members of the group not to procreate. Croatia also cites the Trial Chamber's conclusion that, "in patriarchal societies where membership of a group is determined by the identity of the father", rape could be "an example of a measure intended to prevent births within a group" (ICTR-96-4-T, Trial Chamber 1, Judgment of 2 September 1998, paras. 507-508).

165. Serbia disputes the contention that rape and other acts of sexual violence can fall within the terms of Article II *(d)* of the Convention, unless they are of a systematic nature — which, it contends, is not the case here.

166. The Court considers that rape and other acts of sexual violence, which may also fall within subparagraphs *(b)* and *(c)* of Article II, are capable of constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention.

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IV. QUESTIONS OF PROOF

167. In support of their respective claim and counter-claim, the Parties have alleged a number of facts which have been contested, to some degree, by one side or the other. The existence of the alleged facts must be established before applying the relevant rules of international law.

168. The Court observes, however, that as regards the principal claim, the differences between the Parties relate less to the existence of the facts than to their characterization by reference to the Convention and, in particular, to the inferences to be drawn from them in respect of proof of specific intent *(dolus specialis)*.

169. The Parties have discussed at some length the burden of proof, the standard of proof and the methods of proof. The Court will consider these questions in turn.

A. The burden of proof

170. Croatia recognizes that the *actori incumbit probatio* principle should generally apply, but considers that in the present case, Serbia should co-operate in putting before the Court all relevant evidence in its possession concerning the facts relied on in support of the principal claim. The Respondent is best placed, in Croatia's view, to provide explanations of acts which are claimed to have taken place in a territory over which Serbia exercised exclusive control. Moreover, Serbia is said to have failed to offer explanations or produce evidence in rebuttal of the Applicant's claims. Croatia considers that the Court should draw adverse inferences from this in respect of Serbia.

171. For Serbia, Croatia is seeking, in this way, to reverse the burden of proof. It maintains that one party cannot be forced to give an explanation in response to the claims of the other party. It further contends that it has adequately rebutted Croatia's claims by giving explanations and producing reliable evidence.

172. The Court recalls that it is for the party alleging a fact to demonstrate its existence. This principle is not an absolute one, however, since "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of [the] 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" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). In particular, the Court has recognized that there may be circumstances in which the Applicant cannot be required to prove a "negative fact" (*ibid.*, p. 661, para. 55).

173. Whilst the burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate "in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it" (*Pulp Mills on the*

River Uruguay (Argentina v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* p. 71, para. 163). In this regard, the Court recalls that, between September 2010 and May 2011, Serbia provided Croatia with approximately 200 documents requested by the latter (see paragraph 13 above).

174. In the present case, neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof. It is not for Serbia to prove a negative fact, for example the absence of facts constituting the *actus reus* of genocide within the meaning of Article II of the Convention in localities to which Croatia called the Court's attention.

175. Consequently, it is for Croatia to demonstrate the existence of the facts put forward in support of its claims, and the Court cannot demand of Serbia that it provide explanations of the facts alleged by the Applicant.

176. The same principles are applicable, *mutatis mutandis*, in respect of the counter-claim.

B. The standard of proof

177. The Parties agree on the fact that the standard of proof, laid down by the Court in its 2007 Judgment in the proceedings between Bosnia and Herzegovina and Serbia is applicable in the present case.

178. The Court, after recalling that "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17)", added that it "requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts." (*I.C.J. Reports 2007 (I)*, p. 129, para. 209.)

179. Allegations similar to those examined in the 2007 Judgment have been made in the present dispute, both in the principal claim and in the counter-claim. Hence, in the present case, the Court will apply the same standard of proof.

C. Methods of proof

180. In order to rule on the facts alleged, the Court must assess the relevance and probative value of the evidence proffered by the Parties in support of their versions of the facts (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 58).

181. The Court observes that certain facts at issue in the present case have formed the subject of proceedings before the ICTY, some of which are still pending, and that the Parties have made copious reference to documents arising from the proceedings of that Tribunal (indictments by the Prosecutor, decisions and judgments of the Trial Chamber, judgments of the Appeals Chamber, written and oral evidence).

182. The Parties agree, in general, on the evidential weight to be given to these various documents, following the approach adopted in the 2007 Judgment, according to which the Court "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", and "any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight" (*I.C.J. Reports 2007 (I)*, p. 134, para. 223).

183. They differ, however, on the probative value to be attributed to the ICTY Prosecutor's decisions not to include a charge of genocide in an indictment, and on that to be accorded, respectively, to the judgment of the ICTY Trial Chamber in the case concerning *Gotovina et al.* (IT-06-90-T, Judgment of 15 April 2011, hereinafter the "*Gotovina* Trial Judgment") and the judgment of the Appeals Chamber in the same case.

184. As regards the probative value of the ICTY Prosecutor's decisions not to include a charge of genocide in an indictment, the Court recalls that it drew the following distinction in its 2007 Judgment:

> "as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide." (*I.C.J. Reports 2007 (I)*, p. 132, para. 217.)

185. Croatia, which has contested this distinction, argues that the Court should not accord probative value to the Prosecutor's decisions not to include a charge of genocide in an indictment, since the Prosecutor has a discretionary power as to what charges, if any, to bring. The Prosecutor's decision, according to Croatia, might have been influenced by various factors, without it meaning that the facts in question do not, for the Prosecutor, constitute genocide, or that he or she has no evidence of their existence.

186. Serbia, for its part, recognizes that such a decision does not create an irrebuttable presumption, but considers that the Court should nonetheless accord it some degree of probative value.

187. The fact that the Prosecutor has discretion to bring charges does not call into question the approach which the Court adopted in its 2007 Judgment (see *I.C.J. Reports 2007 (I)*, p. 132, para. 217, reproduced at paragraph 184). The Court did not intend to turn the absence of charges

into decisive proof that there had not been genocide, but took the view that this factor may be of significance and would be taken into consideration. In the present case, there is no reason for the Court to depart from that approach. The persons charged by the Prosecutor included very senior members of the political and military leadership of the principal participants in the hostilities which took place in Croatia between 1991 and 1995. The charges brought against them included, in many cases, allegations about the overall strategy adopted by the leadership in question and about the existence of a joint criminal enterprise. In that context, the fact that charges of genocide were not included in any of the indictments is of greater significance than would have been the case had the defendants occupied much lower positions in the chain of command. In addition, the Court cannot fail to note that the indictment in the case of the highest ranking defendant of all, former President Milošević, did include charges of genocide in relation to the conflict in Bosnia and Herzegovina, whereas no such charges were brought in the part of the indictment concerned with the hostilities in Croatia.

188. As regards the evidential weight to be given to the judgments of the ICTY in the *Gotovina* case, the Court will return to this question in due course when examining the counter-claim (see paragraphs 464-472 below).

189. The Court observes that in addition to materials from the ICTY, the Parties have made use of many other documents, from a variety of sources, and have discussed their evidential weight. In particular, they have referred to several reports from official or independent bodies, and to statements with diverse origins and content.

190. The Court recalls that it has held, with regard to reports from official or independent bodies, that their value

> "depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)" (*I.C.J. Reports 2007 (I)*, p. 135, para. 227).

191. It will consider the probative value of the reports in question on a case-by-case basis, in accordance with these criteria, when examining the merits of the claims.

192. The Court notes that Croatia annexed to its written pleadings numerous statements by individuals, some of whom were called to give oral testimony before the Court. Serbia asserts that many of the statements produced by Croatia are flawed in such a way as to call into question their probative value: certain statements are said not to have been signed by their authors or by the persons who took them, or not to specify the circumstances in which they were allegedly taken. In

particular, it is claimed that some statements were taken by the Croatian police and that, as a consequence, they cannot be regarded as impartial and would not even be admissible before Croatian courts. Lastly, a large number of statements submitted by Croatia are said not to demonstrate a direct knowledge of the facts on the part of their authors, but to represent hearsay evidence.

193. Croatia acknowledges that some of the statements annexed to its Memorial were not initially signed by those who made them. It points out, however, that it collected a number of signatures at a later stage and appended the signed statements to its Reply. Croatia adds that some of the individuals who had not signed their statements have testified before the ICTY, and that their evidence given before the Tribunal was consistent with that contained in the unsigned statements. Lastly, Croatia considers that the hearsay evidence is relevant and should be assessed in the light of its content and the circumstances in which it was obtained.

194. During the oral proceedings, a Member of the Court put a question to the Parties concerning the probative value to be given to the various types of statements annexed to the Parties' written pleadings, according to whether or not the author had been called to give oral testimony and cross-examined by the opposing Party. In reply, Croatia maintained that all the statements had the same probative value, but that it was for the Court to determine what weight should be given to them, on the basis of the criteria set forth in the 2007 Judgment. Serbia, for its part, drew a distinction between the statements of individuals called to give oral testimony in these proceedings, whether or not they had been cross-examined, and the statements of individuals who were not so called. According to the Respondent, whereas the former should all be accorded the same probative value, the latter should be treated as out-of-court statements and assessed as such in light of the criteria established in the 2007 Judgment, in the same way as all other documentary evidence furnished by the Parties. Serbia stated that the Court should nonetheless give special attention to the evidence given before the ICTY and to testimonies before national courts. It added, finally, that the unsigned statements and those produced in unknown circumstances, as well as the statements prepared by official bodies whose impartiality had not been established, should be disregarded.

195. Another Member of the Court put a question to Croatia concerning the admissibility before Croatian courts of the unsigned statements attached to its Memorial. Croatia replied that statements taken by the police or other authorities were not necessarily signed and were not themselves admissible before Croatian courts. Croatia explained, however, that these formed the basis upon which an investigating judge could interrogate the individual concerned, giving rise to a signed statement that would be admissible before Croatian courts. Serbia indicated that if a party appeared before a court in the former Yugoslavia with an unsigned out-of-court statement, it would not be admitted into evidence.

196. The Court recalls that neither its Statute nor its Rules lay down any specific requirements concerning the admissibility of statements which are presented by the parties in the course of contentious proceedings, whether the persons making those statements were called to give oral testimony or not. The Court leaves the parties free to determine the form in which they

present this type of evidence. Consequently, the absence of signatures of the persons who made the statements or took them does not in principle exclude these documents. However, the Court has to ensure that documents, which purport to contain the statements of individuals who are not called to give oral testimony, faithfully record the evidence actually given by those individuals. Moreover, the Court recalls that even affidavits will be treated "with caution" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made.

197. The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" *(ibid.)*. On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68, referring to *Corfu Channel, I.C.J. Reports 1949*, p. 17). Lastly, the Court has recognized that "in some cases evidence which is contemporaneous with the period concerned may be of special value" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244).

198. The Court recognizes the difficulties of obtaining evidence in the circumstances of the case. Nevertheless, it notes that many of the statements produced by Croatia are deficient.

Thus, certain statements consist of records of interviews by the Croatian police of one or sometimes several individuals which are not signed by those persons and contain no indication that those individuals were aware of the content. Moreover, the words used appear to be those of the police officers themselves. The Court cannot accord evidential weight to such statements.

Other statements appear to record the words of the witness but are not signed. Some of these statements were subsequently confirmed by signed supplementary statements deposited with the Reply and can, therefore, be given the same evidential weight as statements which bore the signature of the witness when they were initially produced to the Court. In some cases, the witness in question has testified before the Court or before the ICTY and that testimony has confirmed the content of the original statement to which the Court can, therefore, also accord some evidential weight. However, the Court cannot accord evidential weight to those statements which are neither signed nor confirmed.

199. Certain statements present difficulties in that they fail to mention the circumstances in which they were given or were only made several years after the events to which they refer. The Court might nonetheless accord some evidential weight to these statements. Other statements are not eyewitness accounts of the facts. The Court will accord evidential weight to these statements only where they have been confirmed by other witnesses, either before the Court or before the ICTY, or where they have been corroborated by credible evidence. The Court will refer to these categories of statements subsequently when it examines Croatia's allegations.

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V. CONSIDERATION OF THE MERITS OF THE PRINCIPAL CLAIM

200. The Court will now examine Croatia's claims relating to the commission of genocide between 1991 and 1995 in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia.

201. The Court will seek first to determine whether the alleged acts have been established and, if so, whether they fall into the categories of acts listed in Article II of the Convention; and then, should that be established, whether those physical acts were committed with intent to destroy the protected group, in whole or in part.

202. Only if the Court finds that there has been genocide within the meaning of Article II of the Convention will it consider the questions of the admissibility of the principal claim in respect of the acts prior to 8 October 1991 and whether any acts in respect of which the claim is held to be admissible can entail the responsibility of Serbia.

A. The *actus reus* of genocide

1. Introduction

203. The Court does not consider it necessary to deal separately with each of the incidents mentioned by the Applicant, nor to compile an exhaustive list of the alleged acts. It will focus on the allegations concerning localities put forward by Croatia as representing examples of systematic and widespread acts committed against the protected group, from which an intent to destroy it, in whole or in part, could be inferred. These are the localities cited by Croatia during the oral proceedings or in regard to which it called witnesses to give oral testimony, as well as those where the occurrence of certain acts has been established before the ICTY.

204. Croatia's allegations refer to acts committed by the JNA and other entities (police and defence forces of the SAOs and the RSK — territorial defence forces (TO), units of the Ministry of the Interior (MUP), *Milicija Krajine* — and paramilitary groups) which are allegedly attributable to Serbia. Solely for the purpose of discussing the facts which form the subject of the principal claim, the Court will use the terms "Serbs" or "Serb forces" to designate entities other than the JNA, without prejudice to the question of the attribution of their conduct.

205. Under the terms of Article II of the Convention, genocide covers acts committed with intent to destroy a national, ethnical, racial or religious group in whole or in part. In its written pleadings, Croatia defines that group as the Croat national or ethnical group on the territory of Croatia, which is not contested by Serbia. For the purposes of its discussion, the Court will designate that group using the terms "Croats" or "protected group" interchangeably.

206. Croatia claims that acts constituting the *actus reus* of genocide within the meaning of Article II *(a)* to *(d)* of the Convention were committed by the JNA and Serb forces against members of the protected group as defined in the previous paragraph. The Court will consider these claims by referring in turn to the categories of acts laid down in Article II of the Convention and assessing whether they have been established to the standard set out in paragraphs 178 and 179.

207. Serbia acknowledges that war crimes, crimes against humanity and other atrocities were perpetrated against Croats by various armed groups, although it maintains that it has not been established that those crimes were committed with the intent to destroy the Croat group, in whole or in part, or that they are attributable to Serbia.

208. The Court notes that the ICTY found that, from the summer of 1991, the JNA and Serb forces had perpetrated numerous crimes (including killing, torture, ill-treatment and forced displacement) against Croats in the regions of Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia (see, in particular, IT-95-13/1-T, Trial Chamber, Judgment of 27 September 2007 (hereinafter "*Mrkšić* Trial Judgment"); IT-95-11-T, Trial Chamber, Judgment of 12 June 2007 (hereinafter "*Martić* Trial Judgment"); IT-03-69-T, Trial Chamber, Judgment of 30 May 2013 (hereinafter "*Stanišić and Simatović* Trial Judgment")).

2. Article II *(a)*: killing members of the protected group

209. Article II *(a)* of the Convention concerns the killing of members of the protected group. Croatia claims that large numbers of ethnic Croats were killed between 1991 and 1995 by the JNA and Serb forces in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia.

210. In response, Serbia contests the probative value of the evidence presented by Croatia. Further, while it acknowledges that many ethnic Croats were killed, it disputes that the killings were committed with genocidal intent or that such intent is attributable to it.

211. The Court will consider in turn Croatia's claims concerning killings perpetrated by the JNA and Serb forces in various localities.

Region of Eastern Slavonia

(a) ***Vukovar and its surrounding area***

212. Croatia attaches particular importance to the events which took place in Vukovar and its surrounding area in the autumn of 1991. According to the Applicant, the JNA and Serb forces killed several hundred civilians in that multi-ethnic city in Eastern Slavonia, situated on the border with Serbia and intended to become, under the plans for a "Greater Serbia", the capital of the new Serbian region of Slavonia, Baranja and Western Srem.

213. Croatia first asserts that, between the end of August and 18 November 1991, Vukovar was besieged and subjected to sustained and indiscriminate shelling, laying waste to the city. It alleges that between 1,100 and 1,700 people, 70 per cent of whom were civilians, were killed during that period. According to the Applicant, the attacks on Vukovar were directed not simply against an opposing military force, but also against the civilian population; moreover, those attacks are said to show that the aim of the JNA and Serb forces was the destruction of the Croats of Vukovar.

214. The Applicant then claims that hundreds of Croats were killed when the JNA and Serb forces moved forward to seize ground, burning, raping and killing as they did so.

215. Finally, Croatia contends that, following the fall of all districts of Vukovar on 18 November 1991, the JNA and Serb forces continued to target Croat survivors. In particular, it alleges that 350 Croat detainees at Velepromet and another 260 at Ovčara were killed after having been evacuated from Vukovar and from its hospital in particular.

216. In response to the accusations made against it, Serbia argues that, on the whole, the written statements provided by Croatia in support of its allegations do not fulfil the minimum evidentiary requirements. It further maintains that much of the evidence presented by Croatia is hearsay, contradictory, vague or from unreliable sources.

217. Serbia does not deny, however, that crimes were committed in Vukovar and its surrounding area. Nevertheless, it argues that the figures advanced by Croatia are very clearly exaggerated and that the Applicant has not (1) produced reliable evidence relating to the number of persons allegedly killed, (2) attempted to distinguish between the deaths resulting from a legitimate use of force and those resulting from criminal acts, (3) specified what proportion of the alleged victims were civilians and what proportion were combatants, and (4) demonstrated that all victims were of Croat ethnicity. Although Serbia admits that "incidents" occurred, it considers that it was an excess of violence which led to the commission of crimes, by a minority, and that those crimes were directed against members of the Croatian forces, who represented but a very small fraction of all those evacuated from Vukovar. Serbia adds that while the use of force by the assailants may have exceeded the needs of a normal military operation, and while it certainly caused grave suffering to the civilian population, regardless of ethnicity, there is nothing to suggest that the attack on Vukovar was carried out with the intent to destroy the Croat population as such.

218. The Court will first consider the allegations concerning those killed during the siege and capture of Vukovar. The Parties have debated the number of victims, their status and ethnicity and the circumstances in which they died. The Court need not resolve all those issues. It observes that, while there is still some uncertainty surrounding these questions, it is clear that the attack on Vukovar was not confined to military objectives; it was also directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out). Although the indictment in the *Mrkšić et al.* case did not contain a charge relating to the siege of Vukovar, the Trial Chamber found:

> "470 . . .The duration of the fighting, the gross disparity between the numbers of the Serb and Croatian forces engaged in the battle and in the armament and equipment available to the opposing forces and, above all, the nature and extent of the devastation brought on Vukovar and its immediate surroundings by the massive Serb forces over the prolonged military engagement, demonstrate, in the finding of the Chamber, that the Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population, trapped as they were by the Serb military blockade of Vukovar and its surroundings and forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults. What occurred was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained.
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> 472. It is in this setting that the Chamber finds that, at the time relevant to the Indictment, there was in fact, not only a military operation against the Croat forces in and around Vukovar, but also a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in

> the wider Vukovar area. The extensive damage to civilian property and civilian infrastructure, the number of civilians killed or wounded during the military operations and the high number of civilians displaced or forced to flee clearly indicate that the attack was carried out in an indiscriminate way, contrary to international law. It was an unlawful attack. Indeed it was also directed in part deliberately against the civilian population." (*Mrkšić* Trial Judgment, paras. 470 and 472; references omitted.)

219. The Chamber's findings confirm that numerous Croat civilians were killed by the JNA and Serb forces during the siege and capture of Vukovar (*ibid.*, paras. 468-469). Moreover, the Respondent admits that the fighting which occurred in Vukovar and its surrounding area caused grave suffering to the civilian population. Although Serbia has suggested that Serb civilians trapped in the city of Vukovar may also have been killed, the fact remains, as established before the ICTY, that many of the victims were Croat and that the attacks were chiefly directed against Croats and other non-Serbs (*Mrkšić* Trial Judgment, paras. 468-469, 472). In addition, statements produced by Croatia, to which the Court can give evidential weight, support the Applicant's allegations concerning the killing of Croat civilians during the siege and capture of Vukovar.

220. The Court will now examine the allegations that Croats were killed after the surrender of Vukovar, in particular those relating to the events at Ovčara and Velepromet. In respect of Ovčara, the findings of the ICTY in the aforementioned *Mrkšić et al.* case largely substantiate Croatia's position. The Court thus notes that, according to the Trial Chamber, 194 persons suspected of involvement in the Croatian forces and evacuated from Vukovar hospital on the morning of 20 November 1991 were killed by members of Serb forces at Ovčara that same evening and night (20-21 November 1991) (*Mrkšić* Trial Judgment, para. 509); it appears from this finding that almost all the victims were of Croat ethnicity (*ibid.*, para. 496), were considered to be prisoners of war and, for the most part, were sick or wounded (*ibid.*, para. 510).

Serbia takes note of the *Mrkšić* Trial Judgment and does not contest the fact that these killings were committed at Ovčara, adding that "[t]his was the gravest mass murder in which Croats were the victims during the entire conflict". The Respondent also acknowledges that the Higher Court in Belgrade convicted 15 Serbs for war crimes committed at Ovčara.

221. The ICTY also found that acts of ill-treatment occurred at Velepromet and that several individuals suspected of involvement in the Croatian forces were killed there by members of Serb forces, including at least 15 Croats (*Mrkšić* Trial Judgment, paras. 163, 165, 167). Serbia notes the finding of the ICTY on this issue, but insists on the fact that the number of persons killed at Velepromet is far below the 350 alleged by the Applicant.

222. Finally, the Court observes that the statement of Mr. Franjo Kožul, called for oral testimony by Croatia and who appeared before the Court, also substantiates certain of the Applicant's allegations. Mr. Kožul states that he was evacuated from Vukovar hospital and taken to Velepromet, where he witnessed various acts of violence and, in particular, saw a member of the

Serb forces holding the head of a prisoner he had decapitated, a claim which was not challenged by Serbia. The Court considers that it is therefore bound to give some evidential weight to this testimony. The statement of F.G. also provides evidence of the fact that decapitations occurred at Velepromet. This individual states that he was saved from decapitation at the last moment by a JNA officer, and that he saw "approximately fifteen decapitated bodies in [a] hole".

223. The Court concludes that Croat detainees were killed at Velepromet by Serb forces, although it is unable to determine the exact number. However, it takes note of the ICTY's finding that civilians detained at Velepromet and not suspected of involvement in the Croatian forces were evacuated to destinations in Croatia or Serbia on 20 November 1991 (*Mrkšić* Trial Judgment, para. 168).

224. In light of the foregoing, the Court concludes that it is established that killings were perpetrated by the JNA and Serb forces against Croats in Vukovar and its surrounding area during the siege and capture of Vukovar, and by Serb forces at the Ovčara and Velepromet camps.

(b) ***Bogdanovci***

225. The Applicant claims that no fewer than 87 Croats were killed in the predominantly Croat village of Bogdanovci, approximately 8 km south-east of Vukovar, during and after the attacks carried out on the village on 2 October and 10 November 1991 by the JNA and Serb forces. In support of its arguments, Croatia produces a number of written statements.

226. One of the statements on which Croatia relies is that of Ms Marija Katić, who was called for oral testimony and appeared before the Court. In her written statement, Ms Katić names eight individuals who she says were killed by grenades thrown into the basement of a house on 2 October 1991, and a further three individuals who she believes were killed by firearms on the same day. She adds that another ten people were killed during the subsequent destruction of Bogdanovci.

227. Croatia also relies on an unsigned police record of an interview.

228. The Respondent disputes the probative value of the statements produced by Croatia in support of its allegations, on the grounds that they do not contain the signatures of the individuals said to have given them and, in some cases, that it is not even possible to identify the person or body to whom they were made. It further argues that these statements are based on hearsay evidence, are imprecise and contradict one another. Serbia contends that the events which occurred in Bogdanovci on 2 October and 10 November 1991 were part of a legitimate military operation and that Croatian forces were actively involved in the fighting, destroying tanks and armoured vehicles and inflicting heavy losses on the JNA and Serb forces. It admits in this regard that

"[u]ndoubtedly horrible crimes were committed in that town", but argues that "once again, the pattern is combat and excesses arising therein".

229. The Court notes that many statements provided by Croatia were made several years after the events in Bogdanovci are alleged to have taken place and accordingly may be given only limited evidential weight. To those statements which do not constitute first-hand accounts of the events, the Court gives no evidential weight. In this regard, the Court notes that, although Ms Katić confirmed her account when testifying, it is not certain that she witnessed at first hand all the killings which she mentions. Finally, the Court recalls that no evidential weight can be given to an unsigned police record of an interview.

230. Taking account of Serbia's admission (see paragraph 228 above) and the evidence put before it, the Court concludes that a number of Croats were killed by the JNA and Serb forces in Bogdanovci on both 2 October and 10 November 1991, although it is unable to determine the exact number.

(c) ***Lovas***

231. Croatia claims that dozens of people were killed by the JNA and Serb forces in Lovas, a predominantly Croat village situated approximately 20 km south-east of Vukovar, between October 1991 and the end of December 1991.

232. The Applicant states that the village was attacked by the JNA and Serb paramilitary forces, despite the fact that it offered no resistance, that there were no Croatian forces in the village and that its residents had given up their arms following an ultimatum from the JNA. According to Croatia, on 10 October 1991, at least 20 Croat civilians lost their lives during an artillery attack carried out by the JNA against the Croat-inhabited areas of the village. Others were subsequently massacred by Serb paramilitary groups and the JNA infantry, which stormed the village on the same day.

233. Croatia then contends that, one week after that attack, all the Croat males of fighting age were rounded up and tortured. According to the Applicant, 11 of them died as a result of the ill-treatment they received. Croatia goes on to claim that the following day, on 18 October 1991, some of the survivors were forced to march to a field, not far from the village. One man was executed en route because he was unable to keep up with the group, due to injuries inflicted the previous night. Once at the field, Serb forces ordered the prisoners to walk forward holding hands, and to sweep the ground with their feet, in order to clear the area of mines. One or more mines then exploded, before the Serb forces opened fire on the survivors. At least 21 men died during what has become known as the Lovas "minefield massacre". Finally, Croatia submits that, between 19 October 1991 and the beginning of 1992, the violence against Croat civilians continued and a further 68 people were killed.

234. For its part, Serbia argues that the written statements relied on by the Applicant in support of its allegations that killings were committed in Lovas do not fulfil the minimum evidentiary requirements and that, in any event, they do not corroborate Croatia's claims, in particular because they show that there was Croatian resistance during the attack of 10 October 1991. Serbia concedes, nevertheless, that 14 individuals have appeared before a Belgrade court accused of killing 68 Croats from the village of Lovas, and that some of the alleged acts referred to during that trial "probably amount to war crimes and might also be deemed crimes against humanity"; it insists, however, that there is nothing to support an accusation of genocide.

235. The Court notes that some of the facts alleged by Croatia have been established before the ICTY. Thus, although the attack on Lovas was not referred to in the indictment in the *Mrkšić et al.* case, the Tribunal's Trial Chamber concluded that "Serb 'volunteers' in Lovas had attacked specific homes on 10 October 1991 killing 22 Croats" (*Mrkšić* Trial Judgment, para. 47).

236. With respect to the "minefield massacre", Croatia relies on various items of evidence in order to establish its allegations. In particular, the statement of Stjepan Peulić, a witness called by Croatia to give oral testimony but whom Serbia did not wish to cross-examine (see paragraph 25 above) and whose accounts have not been otherwise contradicted, may be given evidential weight. Mr. Peulić offers a first-hand account of being held throughout the night of 17 October 1991, with approximately 100 other Croats, and tortured. He states that the following day, they were further tortured, and ordered to go out to a field. On the road, he witnessed the killing of one Croat who could not keep up because of injuries sustained during the torture. He testifies that he was then ordered by Serb forces in mottled uniforms to walk through a field, holding hands with other detained Croats and sweeping for mines with their legs. He states that at "[a]round 1.00 hrs, when we activated the first mine, someone shouted 'Lie down' and we all probably did lie down, and the mentioned Serbo-Chetniks started firing at us fiercely from all their infantry weapons, and the shooting lasted for about 15 minutes". According to Mr. Peulić, an estimated 17 people were killed on the field, most of whom he recalled by name.

237. Croatia further relies on the indictment prepared by the War Crimes Prosecutor for the Belgrade District Court, issued against 14 Serbs accused of killings committed in Lovas, including the "minefield massacre". In a judgment of 26 June 2012, the Higher Court of Belgrade convicted the 14 accused of war crimes. The Court notes, however, that this judgment was quashed by the Belgrade Appeals Court in January 2014 due to shortcomings in the Higher Court's findings regarding the individual criminal responsibility of the accused, and that the accused must be retried. The Court takes the view that, in the absence of definitive findings, adopted by a court at the close of a rigorous process, it can give no evidential weight to the War Crimes Prosecutor's indictment.

238. Croatia also invokes another document from domestic judicial proceedings, namely the statement of Aleksandar Vasiljević, Chief of Security in the Federal Secretariat for National Defence from 1 June 1991 to 5 August 1992, given to the Belgrade Military Court in 1999. In that statement, Mr. Vasiljević mentions the fact that he was informed on 28 October 1991 not only of the "minefield massacre", but also of the execution of some 70 civilians in Lovas. The Court notes that this statement was made by a former JNA officer to a Serbian court in the context of a war crimes prosecution. Mr. Vasiljević also testified before the ICTY during the trial of Slobodan Milošević. His testimony before that Tribunal confirms his statement, in so far as he admits having been informed of the "minefield massacre". In the Court's view, this statement has some evidential weight.

239. In addition, Croatia relies on a documentary film produced by a Serbian television channel, in which individuals are interviewed and offer first-hand accounts of the "minefield massacre". Evidence of this kind and other documentary material (such as press articles and extracts from books) are merely of a secondary nature and may only be used to confirm the existence of facts established by other evidence, as the Court has previously explained:

> "[T]he Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62.)

In the present case, the Serbian television documentary does corroborate the evidence set out above.

240. Finally, the Court observes that Serbia does not deny that killings were committed in Lovas, but contests their characterization under the Convention (see paragraph 234 above). Taking all this evidence into account, the Court finds that it is established that Croat civilians were killed by the JNA and Serb forces in the village of Lovas between 10 October 1991 and the end of December 1991, although it is unable to determine their precise number.

(d) ***Dalj***

241. According to the Applicant, a great number of Croats were killed in Dalj, a village situated to the north of Vukovar in which approximately one fifth of the population was of Croat ethnicity. Croatia first contends that dozens of Croats died during the attack carried out by the JNA and Serb paramilitary groups on 1 August 1991: it alleges that civilians were directly targeted and that Croatian combatants were executed after they had surrendered. It further claims that several Croats captured at or taken to Dalj were murdered by Serb forces in the autumn of 1991. In response, Serbia states, as it does with respect to claims concerning other localities, that the evidence presented by Croatia is insufficient to establish its allegations. Although the Respondent appears to accept that a number of people were killed in Dalj, it argues that the Applicant has not shown that these were acts of genocide.

242. The Court notes that Croatia relies on several individual statements in order to establish its allegations. With respect to the killings allegedly carried out on 1 August 1991, certain of the statements relied on are not signed or confirmed; the others do not appear to provide a first-hand account of the killings alleged. The Court concludes that Croatia has not produced sufficient evidence to substantiate its claim that Croats were killed by the JNA and Serb forces on 1 August 1991.

With respect to the killings allegedly perpetrated later, in the autumn of 1991, the Court observes that the statement of B.I. was subsequently confirmed by this individual. B.I. states that, after having surrendered on 21 November 1991, he was put on a truck with others and driven to Dalj. On the way, 35 people were forced off the truck; he then heard gunshots and these people did not return. After having arrived in Dalj, he was taken out to a mass grave, in which he saw "many corpses", and watched as other Croats in his group were shot and fell into the grave. He was saved because the shots fired at him only hit his arm and an attempt to slit his throat with a knife also failed. The Court considers that it can rely on this statement by a person who provides a first-hand account.

243. Croatia has also produced exhumation reports which indicate that Croats, including Croatian combatants, were killed by firearms, without, however, specifying the circumstances of their deaths.

244. The Court further notes that in the *Stanišić and Simatović* Trial Judgment, currently under appeal on different grounds, the ICTY Trial Chamber found that some of the alleged crimes had been committed in this locality. In its Judgment, the Chamber concluded that, on or around 21 September 1991, members of a Serb paramilitary group killed ten people held at the police building in Dalj, eight of whom were Croats (*Stanišić and Simatović* Trial Judgment, paras. 419-420 and 975). The Chamber also found that 22 other detainees had been killed in this locality on 4 and 5 October 1991, and that 17 of those victims were Croat civilians (*ibid.*, paras. 432 and 975).

245. The evidence presented by Croatia, considered in the light of the findings of the ICTY in the *Stanišić and Simatović* Trial Judgment, is sufficient for the Court to conclude that members of the protected group were killed by Serb forces in the village of Dalj between September and November 1991.

Region of Western Slavonia

Voćin

246. Croatia claims that killings were committed by Serb forces against Croats in the village of Voćin (Podravska Slatina municipality), in which approximately one third of the population was of Croat ethnicity. Relying on statements appended to its written pleadings, Croatia contends in particular that at least 35 Croats were killed between 12 and 14 December 1991 by Serb forces driven out of Voćin.

247. For its part, Serbia argues that the crimes allegedly committed throughout the Podravska Slatina municipality cannot be substantiated by the evidence in the case file, in particular because that evidence constitutes hearsay.

248. Croatia has referred to the statements appended to its written pleadings in order to support its allegations. Most of these statements are unsigned and were not otherwise confirmed; they will not be considered further. The Court observes that the statement of M.S. was subsequently confirmed by this individual. However, her evidence as to the killing of Croats by Serbs is hearsay. In particular, M.S. states that Serbs committed a massacre in Voćin on 13 December 1991, but she does not seem to have personally witnessed the killing of Croats as she hid in a shelter when the Serb forces attacked the Croats in the village. The Court finds that this evidence is insufficient to establish the killing of Croats in this locality.

249. In support of its allegation of a massacre in Voćin around 13 December 1991, Croatia also relies on the report of a non-governmental organization, Helsinki Watch, sent to Slobodan Milošević and General Blagoje Adžić on 21 January 1992 and based on investigations carried out by that organization (hereinafter the "Helsinki Watch report"). According to the report, Serb forces withdrawing from the villages of Hum and Voćin killed 43 Croats in December 1991. The Court recalls that the value of such documents depends on the source of the information contained therein, the process by which they were generated and their quality or character (see paragraph 190 above). In this regard, it notes that the basis for the report's findings on the alleged killings in Voćin is unclear, as it refers to unidentified eyewitnesses and autopsy reports that are not appended. The Court therefore concludes that this report, on its own, is insufficient to prove Croatia's allegations.

At the hearings, Croatia also presented audio-visual materials (an excerpt from a BBC documentary and photographs taken from a book) showing victims alleged to have been killed during this massacre. The BBC documentary and photographs taken from the book "Mass Killing and Genocide in Croatia in 1991/92: A Book of Evidence" show several bodies which are said to be the victims of the massacre at Voćin. As the Court has previously explained (see paragraph 239 above), this kind of evidence cannot, on its own, establish the facts alleged.

250. In the opinion of the Court, although the material before it raises grounds for grave suspicions about what occurred at Voćin, Croatia has not produced sufficient evidence to substantiate its claim that Croats were killed by Serb forces in that locality in December 1991.

Region of Banovina/Banija

(a) ***Joševica***

251. Croatia claims that several Croats were killed by Serb forces in Joševica, a village situated in the Glina municipality and populated almost exclusively by Croats. It states that Serb paramilitary forces killed three villagers on 5 November 1991. On 16 December 1991, those Serb forces are said to have returned to the village and searched the houses one by one in order to slaughter Croat citizens; 21 people were reportedly killed in this way. According to the Applicant, the majority of Croats left the village following these killings; only ten stayed behind. Of those ten, four were then killed in 1992. The remaining Croats then left the village.

252. Serbia repeats its general assertion regarding flaws in the statements appended to Croatia's written pleadings (see paragraph 192 above). Serbia also states that the Applicant has not produced any detailed information in support of its claim that killings were perpetrated in 1992. Finally, it observes that no individual has been indicted or sentenced by the ICTY for the alleged crimes.

253. Croatia relies on statements in order to substantiate its allegations. Among them is that of Ms Paula Milić (pseudonym), who was called for oral testimony and appeared before the Court. The Court notes that, according to her statement, Ms Milić witnessed the killings committed on 5 November 1991 by Serb forces. This part of her statement was not contested by Serbia. Moreover, it is corroborated by the statement of I.Š., who attests to having subsequently buried the three individuals named by Ms Milić. For these reasons, the Court considers that Ms Milić's testimony has evidential weight.

254. With respect to the alleged killings on 16 December 1991, Croatia provides a statement by A.Š. Although this statement originally took the form of a police record, it has subsequently been confirmed by A.Š., and the Court considers that it can give it evidential weight. A.Š. describes Serb forces in mottled uniforms entering her home on 16 December 1991 and firing shots at her and others. While suffering from gunshot wounds, she crawled on her knees from one grandchild to another and to her cousin and she saw that they were all dead. A medical report is attached to the statement, confirming her gunshot wounds. Her evidence of killings on 16 December 1991 is corroborated by the statement of I.Š., examined in the previous paragraph.

255. Croatia also relies on the Helsinki Watch Report (see paragraph 249 above). The relevant section of the report describes the killing of Croats by Serb forces in Joševica in mid-December 1991. The ICTY referred to it in its judgment in the *Martić* case (*Martić* Trial Judgment, para. 324, footnote 1002) before finding that Croats had been killed in the SAO Krajina in 1991, but that does not give the report value as such. However, the Court notes that this report confirms the evidence outlined above.

256. In light of the foregoing, the Court concludes that Croatia has established that Serb forces carried out killings of Croats in Joševica on 5 November 1991 and 16 December 1991. In contrast, Croatia has failed to provide sufficient evidence that killings were committed in 1992, the statements relied on in this regard being neither signed nor confirmed.

(b) ***Hrvatska Dubica and its surrounding area***

257. Croatia claims that numerous Croats were killed by units of the JNA and Serb forces in the Hrvatska Kostajnica municipality, notably inhabitants of the villages of Hrvatska Dubica, Cerovljani and Baćin. In particular, the Applicant alleges that, in October 1991, 60 ethnic Croats from the surrounding villages were rounded up and held at the fire station in Hrvatska Dubica. They were then executed by a firing squad in a meadow close to Baćin and their bodies subsequently buried in a previously prepared mass grave.

258. In response, Serbia disputes the probative value of the evidence produced by Croatia. It notes, however, the conclusions of the ICTY Trial Chamber in the *Martić* case, in which it was found that a number of killings of Croats had taken place in this area.

259. The Court notes that several of the crimes whose perpetration has been alleged by the Applicant have been examined by the Chambers of the ICTY. In its Judgment rendered on 12 June 2007 in the *Martić* case, the Trial Chamber concluded that 41 civilians (the large majority Croats) from Hrvatska Dubica were executed on 21 October 1991 by Serb forces (*Martić* Trial Judgment, paras. 183, 354, 358). The Trial Chamber further found that nine civilians from Cerovljani and seven civilians from Baćin were executed on or around 20-21 October 1991 by the JNA or Serb forces, or a combination thereof, and that a further 21 inhabitants of Baćin were killed during the month of October 1991 by the JNA or Serb forces, or a combination thereof (*Martić* Trial Judgment, paras. 188-191, 359, 363-365, 367). The ICTY Trial Chamber in the *Stanišić and Simatović* case reached the same conclusions concerning the victims from Hrvatska Dubica and Cerovljani (*Stanišić and Simatović* Trial Judgment, paras. 56-64 and 975).

260. These findings substantiate the evidence presented by Croatia before the Court. In particular, Croatia has produced the statement made before a Croatian court by Mr. Miloš Andrić (pseudonym), whom it called for oral testimony but whom Serbia did not wish to cross-examine. In his statement, Mr. Andrić indicates in particular that, following the Baćin massacre, he was present in person during the identification of the bodies in the mass grave; he states that civilians had been heaped in the grave, all crumpled, and that many of them had been beaten to death, struck on the head by blunt instruments.

261. The Court concludes that a significant number of Croat civilians were killed by the JNA and Serb forces in Hrvatska Dubica and its surrounding area during October 1991.

Region of Kordun

Lipovača

262. The Applicant alleges that the JNA seized the Croat-majority village of Lipovača at the end of September or the beginning of October 1991, causing most of its inhabitants to flee; only 16 Croats remained. It claims that seven Croat civilians were then killed by Serb forces on 28 October 1991, which led to the departure of a further four Croats from the village. According to Croatia, the five remaining Croats were subsequently killed on 31 December 1991. The Applicant points out that the ICTY Trial Chamber in the *Martić* case examined in detail the events which took place in Lipovača and concluded that seven Croat civilians had been killed by Serb forces at the end of October 1991 (*Martić* Trial Judgment, paras. 202-208).

263. The Respondent concedes that the ICTY's judgment in the *Martić* case confirmed the killing of seven civilians by Serb paramilitary forces in Lipovača at the end of October 1991. It maintains, however, that the other alleged crimes have not been convincingly established.

264. The Court notes that the ICTY has examined the Lipovača killings in two judgments. In the *Martić* Trial Judgment, the Trial Chamber found that the seven individuals alleged by the Applicant to have been killed on 28 October 1991 had indeed been executed in Lipovača on or around that date after the arrival of Serb forces. It held that there was direct evidence of the Croat ethnicity of three of the victims and deduced from all the evidence available to it that the other four victims were also Croats (*Martić* Trial Judgment, para. 370). However, in the *Stanišić and Simatović* case, the Trial Chamber concluded that the Croat ethnicity of only three of the victims had been established (*Stanišić and Simatović* Trial Judgment, para. 67).

265. In respect of the killings allegedly committed in December 1991, the *Martić* Trial Chamber found that the five persons named by the Applicant had been killed at some point during the occupation of the village by Serb forces, although the accused was not convicted of those killings because they were not listed in the indictment (*Martić* Trial Judgment, footnote 555). The *Stanišić and Simatović* Trial Chamber also concluded that those five individuals had been killed in Lipovača, but added that it could not determine who had committed these killings, and did not consider them any further (*Stanišić and Simatović* Trial Judgment, para. 68). In neither of these cases did the Trial Chamber rule on the ethnicity of the victims.

266. The only statement produced by Croatia in support of its allegation relating to the killings of 31 December 1991 is based on hearsay and does not, in the opinion of the Court, make it possible for the existence of the facts in question to be established. Consequently, the Court is unable to uphold the Applicant's claim that five Croats were killed on 31 December 1991.

267. The Court deduces however from the foregoing that it has been established that Serb forces killed at least three Croats on 28 October 1991 in Lipovača.

Region of Lika

(a) ***Saborsko***

268. The Applicant states that the village of Saborsko, situated in the Ogulin municipality and populated predominantly by Croats, was surrounded and shelled by Serb paramilitary forces from the beginning of August 1991 until 12 November of the same year, when it was attacked by combined JNA and Serb paramilitary forces. According to Croatia, following aerial bombardments and sustained artillery and mortar fire, the JNA and Serb paramilitaries entered the village and began destroying property belonging to Croats and killing the remaining civilian population. Croatia points out that, in the *Martić* and *Stanišić and Simatović* cases, the ICTY examined in detail the events which took place in Saborsko.

269. Serbia recognizes that "most of the acts alleged to have taken place in Saborsko have been confirmed by the judgment[s] of the ICTY"; it adds, however, that they were not committed with genocidal intent.

270. Since Serbia does not dispute the existence of the alleged facts to the extent that they have been established before the ICTY, the Court will refer to the ICTY's conclusions. Thus, the Trial Chamber in the *Martić* case concluded that 20 people had been killed by the JNA and Serb forces on 12 November 1991, at least 13 of whom were civilians not taking an active part in the hostilities at the time of their death. The Chamber further found that the killings had been carried out with intent to discriminate on the basis of Croat ethnicity (*Martić* Trial Judgment, paras. 233-234, 379 and 383). In the *Stanišić and Simatović* case, the Trial Chamber confirmed the killings of nine Croats in Saborsko on 12 November 1991 by the JNA and Serb forces, but noted that it had received insufficient evidence on the circumstances in which the other 11 persons had been killed (*Stanišić and Simatović* Trial Judgment, paras. 102-107, 975). The Court also notes that certain statements produced by Croatia corroborate the findings of the ICTY.

271. In light of the foregoing, the Court concludes that it has been established that the JNA and Serb forces killed several Croats in Saborsko on 12 November 1991.

(b) ***Poljanak***

272. Croatia claims that in 1991, the village of Poljanak (Titova Korenica municipality) had 160 inhabitants, 145 of whom were Croats. In the autumn of 1991, numerous Croat civilians from the village were allegedly killed by the JNA and Serb forces.

273. The Applicant relies in particular on the factual findings of the ICTY Trial Chamber in the *Martić* Judgment (*Martić* Trial Judgment, paras. 211-213 and 216-219) in claiming that, between September and November 1991, several attacks were carried out against civilians in Poljanak and its hamlet Vukovići.

274. Serbia acknowledges that, in the *Martić* Judgment, the ICTY Trial Chamber confirmed that a number of killings had been committed in Poljanak.

275. The Court observes that several of the crimes whose perpetration is alleged by the Applicant were examined by the ICTY Trial Chamber in its *Martić* Judgment. In particular, that Chamber concluded that:

— one Croat civilian had been killed on 8 October 1991 by the JNA and armed inhabitants (*Martić* Trial Judgment, paras. 212, 371, 377);

— on or around 14 October 1991, two Croat civilians had been found hanged in their homes, although it was not clear from the evidence whether these men had been murdered or committed suicide (*ibid.*, para. 212 and footnote 566);

— on 7 November 1991, seven Croat civilians had been lined up and executed by the JNA and armed inhabitants at the house of Nikola "Šojka" Vuković, while the latter had been shot from the window while he was lying sick in his bed (*ibid.*, paras. 214, 371, 377);

— finally, also on 7 November 1991, 20 Serb soldiers had surrounded a family home in Poljanak and then shot two Croat men, having separated them from the women and a boy (*ibid.*, paras. 216-218, 372, 377).

276. The Court also notes that the Appeals Chamber in the *Martić* case concluded that the perpetrators of three of these murders (that committed on 8 October 1991 and the murders of two men on 7 November 1991) could not be identified with certainty and thus acquitted the accused of those crimes (IT-95-11-A, Judgment of 8 October 2008, paras. 200-201). However, it upheld the finding that the accused was responsible for the massacre of eight Croats on 7 November 1991 by the JNA and armed inhabitants (*ibid.*, paras. 204-206). Subsequently, the Trial Chamber in the *Stanišić and Simatović* case also concluded that the said massacre had been established (*Stanišić and Simatović* Trial Judgment, paras. 85 and 975). The Court notes that the ICTY's findings are not contested by Serbia. Consequently, it does not deem it necessary to examine the other evidence produced by Croatia, in particular the statements appended to its written pleadings.

277. The Court deduces from the foregoing that it has been established that several killings were perpetrated by the JNA and Serb forces in Poljanak against members of the protected group in November 1991.

Region of Dalmatia

(a) ***Škabrnja and its surrounding area***

278. Croatia claims that, on 18 and 19 November 1991, the JNA and Serb forces killed dozens of Croat civilians in Škabrnja and the neighbouring village of Nadin, both located in the Zadar municipality of Dalmatia, and populated almost exclusively by ethnic Croats.

279. The Applicant alleges that, throughout September and October 1991, Škabrnja and Nadin were subjected to mortar fire and aerial bombardments with no military justification. It claims that, following the deaths of three civilians at the start of October, the majority of Škabrnja's inhabitants had been evacuated; most, however, had returned after a ceasefire agreement was signed on 5 November 1991. Croatia asserts that, in breach of that agreement, the JNA and Serb forces launched a full-scale aerial and ground assault on the two villages on 18 and 19 November 1991. According to the Applicant, after intensive shelling, infantry troops and heavily armed paramilitaries invaded Škabrnja; JNA tanks fired on houses, the school and a church, while Serb forces fired rocket launchers at dwellings.

280. Croatia maintains that, after occupying Škabrnja and Nadin, Serb forces attacked Croat civilians. It claims that those forces killed civilians who had hidden in the basements of their houses during the fighting. In particular, the Applicant invokes, in support of its allegations, the factual findings of the ICTY in the *Martić* and *Stanišić and Simatović* cases, pointing out that the Tribunal ruled that there had been a number of killings of Croat civilians in Škabrnja and Nadin.

281. In response to the accusations made against it, Serbia does not deny that crimes were perpetrated in the two above-mentioned villages. It accepts that atrocities were committed against the civilian population and admits that the majority of the killings alleged by the Applicant have been confirmed by the ICTY's Trial judgment in the *Martić* case. The Respondent argues, however, that fierce fighting occurred before the JNA and Serb forces entered the village of Škabrnja, resulting in heavy losses to those forces, and that some Croatian combatants were dressed in civilian clothing.

282. Croatia bases its allegations on the statement of Mr. Ivan Krylo (pseudonym), whom it called for oral testimony. Mr. Krylo appeared before the Court and was cross-examined by Serbia at a closed hearing (see paragraph 46 above). The Court notes that, in his written statement, Mr. Krylo states that a number of people had taken shelter in the basements of their homes during the fighting which took place in Škabrnja on the morning of 18 November 1991, and that, after invading the village, the JNA and Serb forces flushed those people out and shot several of them. Mr. Krylo further claims that he was taken prisoner along with other villagers, and detained and subjected to violence over the course of the following months. The Court notes that Serbia did not

dispute that killings had been perpetrated against the inhabitants of Škabrnja. During Mr. Krylo's cross-examination, its questions focused on the fighting that preceded the capture of the village. The Respondent even accepted that "when the town surrendered to the Serb forces, there were atrocities committed on civilians".

283. The Court next observes that, in the *Martić* case, the Trial Chamber noted that around 50 people had been murdered by the JNA and Serb forces in Škabrnja and the surrounding villages, including Nadin, on 18 and 19 November 1991, observing that "the majority of the victims in Škabrnja . . . were of Croat ethnicity" (*Martić* Trial Judgment, paras. 386-391, 398); the Tribunal also found that 18 civilians had been murdered by the JNA and Serb forces in Škabrnja between 18 November 1991 and 11 March 1992 (*ibid.*, para. 392). The Court further observes that, in the *Stanišić and Simatović* case, the Trial Chamber held that 37 Croats had been murdered in Škabrnja on 18 November 1991 by the JNA and Serb forces (*Stanišić and Simatović* Trial Judgment, paras. 131-136, 975).

284. In light of the foregoing, the Court concludes that it has been established that killings were perpetrated by the JNA and Serb forces in Škabrnja and Nadin against members of the protected group between 18 November 1991 and 11 March 1992.

(b) ***Bruška***

285. The Applicant alleges that, on 21 December 1991, Serb paramilitaries killed nine Croats in the village of Bruška, in the Benkovac municipality, which had a population that was approximately 90 per cent Croat. It adds that another Croat was murdered in June 1992. The Applicant points out that, in the *Martić* case, the ICTY Trial Chamber examined in detail the events which took place in Bruška and concluded that the nine individuals named had been killed on 21 December 1991 by the Krajina militia *(Milicija Krajine)*. The Chamber further concluded that those individuals were all civilians, not taking an active part in the hostilities at the time of their death, and that the killings had been carried out with intent to discriminate on the basis of Croat ethnicity (*Martić* Trial Judgment, paras. 400 and 403).

286. The Respondent accepts that the *Martić* Trial Chamber examined the events which took place in the Benkovac municipality and found that nine Croats had been killed in Bruška. It maintains, however, that the allegations concerning other crimes are not supported by sufficient evidence.

287. In respect of the killings of 21 December 1991, the Court finds, in light of the foregoing, that it has been conclusively established that the nine individuals named by the Applicant were killed on that day by the *Milicija Krajine*, and that those individuals are the same as those listed in the judgment rendered by the ICTY in the *Martić* case, referred to above, and in the *Stanišić and Simatović* case (*Stanišić and Simatović* Trial Judgment, paras. 145-147).

288. With regard to the killing alleged to have been perpetrated in June 1992, the Court observes that this was not examined by the Trial Chamber in either the *Martić* case or the *Stanišić and Simatović* case. Furthermore, it notes that the statement produced by Croatia in support of this claim does not constitute a first-hand account of the events in question. In the Court's view, the Applicant has not proved that this killing took place.

(c) ***Dubrovnik***

289. The Applicant claims that numerous Croat civilians were killed by the JNA in or around Dubrovnik, a town where 80 per cent of the population was of Croat origin. It states that, on 1 October 1991, the JNA instituted a blockade of Dubrovnik from land, sea and air, and that civilians were given an opportunity to leave the town at the end of that month. Thereafter, according to Croatia, all supplies were cut off and the town was bombarded with heavy artillery until the end of the year. The Applicant claims that 123 civilians from Dubrovnik were killed during the course of these events.

290. For its part, the Respondent argues that the evidence submitted by the Applicant cannot substantiate its allegations, because it is either inadmissible or it has no probative value. It also points out that the crimes allegedly committed in Dubrovnik were examined by two ICTY Trial Chambers in the *Jokić* and *Strugar* cases, and that those Chambers concluded that there had been a limited number of civilian victims.

291. The Court notes that only one of the statements produced on the subject of this locality describes a death which could be categorized as a killing within the meaning of Article II *(a)* of the Convention. This statement is not a first-hand account however and is insufficient, on its own, to prove Croatia's allegations.

292. The Applicant also has presented letters from the Croatian police in support of its claim regarding the number of victims. The Court observes that these were drawn up specifically for the purposes of the present case. As the Court has had occasion to observe in the past, it "will treat with caution evidentiary materials specially prepared for th[e] case and also materials emanating from a single source" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61). Furthermore, these letters do not indicate the circumstances in which the 123 supposed victims were killed, nor whether they were Croats. As regards the other documents prepared by the Dubrovnik Police Department, although drawn up at the time of the events and not solely for the purposes of this case, they have not been corroborated by evidence from an independent source and appear only to refer to two deaths which might be categorized as killings within the meaning of Article II *(a)*.

293. In the *Jokić* and *Strugar* cases, it was established before the ICTY that two civilians had been killed during the unlawful shelling of the old town on 6 December 1991 (*Jokić*, IT-01-42/1-S, Trial Chamber, Sentencing Judgment of 18 March 2004, para. 27; *Strugar*, IT-01-42-T, Trial

Chamber, Judgment of 31 January 2005 (hereinafter "*Strugar* Trial Judgment"), paras. 248, 250, 256, 259 and 289). In the *Strugar* case, the ICTY also found that at least one individual had been killed during the shelling of the town on 5 October 1991 (*Strugar* Trial Judgment, para. 49).

294. The Court concludes from the foregoing that it has been established that some killings were perpetrated by the JNA against the Croats of Dubrovnik between October and December 1991, although not on the scale alleged by Croatia.

Conclusion

295. On the basis of the facts set out above, the Court considers it established that a large number of killings were carried out by the JNA and Serb forces during the conflict in several localities in Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia. Furthermore, the evidence presented shows that a large majority of the victims were members of the protected group, which suggests that they may have been systematically targeted. The Court notes that while the Respondent has contested the veracity of certain allegations, the number of victims and the motives of the perpetrators, as well as the circumstances of the killings and their legal categorization, it has not disputed the fact that members of the protected group were killed in the regions in question. The Court thus finds that it has been proved by conclusive evidence that killings of members of the protected group, as defined above (see paragraph 205), were committed, and that the *actus reus* of genocide specified in Article II *(a)* of the Convention has therefore been established. At this stage of its reasoning, the Court is not required to draw up a complete list of the killings carried out, nor to make a conclusive finding as to the total number of victims.

3. Article II *(b)*: causing serious bodily or mental harm to members of the group

296. Croatia alleges that the JNA and Serb forces also inflicted serious bodily harm on Croats. Such harm is alleged to have taken the form of physical injury, ill-treatment and acts of torture, rape and sexual violence. Moreover, Serbia's failure to co-operate in the process of tracing and identifying missing persons is alleged to have caused their surviving relatives psychological pain constituting serious mental harm.

297. The Court will examine in turn Croatia's allegations concerning the various localities where acts causing serious bodily or mental harm to members of the protected group were allegedly perpetrated, after which it will address the alleged infliction of mental harm on the relatives of missing persons.

Region of Eastern Slavonia

(a) *Vukovar*

298. Croatia claims that, between August and December 1991 at Vukovar, the JNA and Serb forces injured Croat civilians and prisoners of war, subjected them to ill-treatment and torture, and also committed rape and sexual violence. For the purposes of the Court's analysis, Croatia's claims will be examined successively by reference to the various phases of the battle for Vukovar.

(i) The shelling of Vukovar

299. Croatia claims that, during the shelling of Vukovar by the JNA between 25 August and 18 November 1991, large numbers of Croat civilians were injured. According to Serbia, the only reason that the ICTY found the attack on Vukovar to have been unlawful was that it was partly directed against civilians. However, Serbia argues that the attack must be considered in the wider context of a lawful military operation against the Croatian armed forces.

300. The Court recalls that, in the *Mrkšić et al.* case, the ICTY found that large numbers of civilians had been injured by the JNA and Serb forces during the siege of Vukovar (*Mrkšić* Trial Judgment, para. 472, reproduced in paragraph 218 above).

301. The Court regards the Tribunal's factual findings as sufficient to confirm that, during the attack on Vukovar and the surrounding area, the JNA and Serb forces injured a large number of Croat civilians, without it being necessary to determine their exact number.

(ii) The capture of Vukovar and its surrounding area

302. Croatia claims that, during the capture of Vukovar and the surrounding area, which took place between mid-September and mid-November 1991, the JNA and Serb forces perpetrated acts of ill-treatment, torture and rape against Croat civilians. They are also alleged to have deported Croat civilians to camps located in Serbia, where they were subjected to torture and ill-treatment.

303. Serbia disputes Croatia's allegations. It argues that they are unfounded, and that the statements presented by Croatia are mere hearsay and lack precision.

304. The Court notes that Croatia's allegations rely essentially on statements that were either signed or subsequently confirmed. Although some of these statements were made several years after the events in question, they are by victims or eyewitnesses of acts of ill-treatment, torture and rape. The Court gives evidential weight to these statements.

305. Accordingly, the Court finds that Croatia has shown that acts of ill-treatment, torture and rape were perpetrated against Croats by the JNA and Serb forces during the capture of Vukovar and the surrounding area.

(iii) The invasion of Vukovar hospital and the transfers to Ovčara and Velepromet camps

306. Croatia alleges that, on 19 and 20 November 1991, the JNA and Serb forces invaded the hospital at Vukovar where Croats had taken refuge and subsequently transferred them to camps at Ovčara and Velepromet, where they were ill-treated and tortured. Croatia further alleges that Croat women were raped at Velepromet.

307. Serbia admits that crimes were committed at Ovčara by Serb forces. However, it points out that, in the *Mrkšić et al.* case, the accused were not prosecuted for genocide, and that the ICTY characterized the crimes in question as war crimes.

308. Regarding the events at Ovčara, the Court notes that Serbia does not dispute that they took place. In the *Mrkšić et al.* case, the ICTY made the following findings on those events:

> "530. The Chamber is persuaded and finds that the beatings of prisoners of war from Vukovar hospital outside the hangar on 20 November 1991 were well capable of inflicting severe physical pain, and in very many cases they did so. They constitute the *actus reus* of torture. The Chamber is also satisfied that the acts of grave and persistent mistreatment to so many prisoners that occurred inside the hangar during the afternoon of 20 November 1991 were such as to constitute the *actus reus* of torture.
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> 531. Turning to the *mens rea* requisite for the offence of torture the Chamber refers to the nature and duration of the beatings, the implements used by the perpetrators to inflict suffering, the number of persons attacking individual victims, the verbal threats and abuse occurring simultaneously with the beatings, and the terribly threatening atmosphere in which the victims were detained as they were beaten. All these factors indicate that the beatings outside and in the hangar were carried out intentionally.
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> 536. Further, the Chamber is persuaded and finds that the beatings of prisoners of war from Vukovar hospital outside and inside the hangar on 20 November 1991 constitute the *actus reus* of cruel treatment. The Chamber is satisfied that these beatings were carried out with the requisite *mens rea* to constitute cruel treatment.
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> . . . . . .

> 538. With respect to the *mens rea* requisite for cruel treatment, the Chamber accepts that in keeping the prisoners under constant threat of beatings and physical abuse, in creating an atmosphere of fear, in depriving the prisoners of food and water as well as toilet facilities, the direct perpetrators acted with the intent to cause physical suffering, or an affront to the detainees' human dignity, or in the knowledge that cruel treatment was a probable consequence of their acts, or with all or some of these intents. The Chamber finds that the intent requisite for cruel treatment has been established." (*Mrkšić* Trial Judgment, paras. 530, 531, 536 and 538.)

309. The Court notes that Serbia does not dispute the existence of the facts found by the ICTY. It considers that the Tribunal's findings are sufficient to establish that acts of ill-treatment and torture were perpetrated against Croats by certain members of the JNA and Serb forces at Ovčara.

310. Regarding the events at Velepromet, Croatia has produced a statement by Mr. Franjo Kožul, who appeared before the Court, and to whose testimony the Court has already given evidential weight (see paragraph 222 above). Mr. Kožul described scenes of ill-treatment. His testimony is corroborated by the findings of the ICTY in the *Mrkšić et al.* case. Although these facts were not referred to in the indictment, the Trial Chamber found that

> "on 19 November 1991 some hundreds of non-Serb people were taken from the Vukovar hospital and transferred to the facility of Velepromet by Serb forces. Others arrived at Velepromet from elsewhere. At Velepromet these people were separated according to their ethnicity and suspicion of involvement in the Croatian forces. The Chamber finds it established that interrogations of some of these people were conducted at Velepromet in the course of which the suspects were beaten, insulted or otherwise mistreated. A number of them were shot dead at Velepromet, some of them on 19 November 1991. The Chamber finds that many, if not all, of the persons responsible for the brutal interrogations and killings were members of the Serb TO or paramilitary units." (*Mrkšić* Trial Judgment, para. 167.)

Croatia has also produced a statement of an individual, B.V., who was taken from Velepromet to the JNA barracks and raped by five men. The Court considers that it must give this statement evidential weight.

311. The Court finds that Croatia has shown that acts of ill-treatment and rape were perpetrated against Croats by Serb forces at Velepromet.

(b) ***Bapska***

312. Croatia claims that, from October 1991, the JNA and Serb forces perpetrated acts of ill-treatment and torture against the Croat inhabitants of Bapska, a village located 26 km south-east

of Vukovar, with a population some 90 per cent of whom were Croats. The JNA and Serb forces also allegedly committed rape and other acts of sexual violence. Croatia has produced a number of statements in support of its allegations.

313. Serbia disputes the probative value of those statements.

314. Among the items produced by Croatia, the Court notes the signed statement of F.K., as well as those of A.Š., J.K. and P.M., which were subsequently confirmed. The authors of those statements are victims of ill-treatment, as well as rape and other acts of sexual violence. The Court considers that it must give these statements evidential weight.

315. The Court accordingly finds that Croatia has established that, from October 1991 to January 1994 at Bapska, the JNA and Serb forces subjected members of the protected group to acts of ill-treatment and committed rape and other acts of sexual violence.

(c) ***Tovarnik***

316. Croatia claims that, from September 1991 and continuing throughout the year 1992, the JNA and Serb forces perpetrated acts of ill-treatment, torture and sexual violence (including rape and castration) against Croats in the village of Tovarnik, located south-east of Vukovar and having a majority Croat population, and that Croats were transferred to Begejci camp, where they were tortured.

317. Serbia contends that Croatia has failed to prove the perpetration of such acts at Tovarnik. It disputes the probative value of the statements produced by Croatia in support of its allegations.

318. The Court notes that Croatia mainly bases its allegations on statements appended to its written pleadings. The Court considers that it can give credence to several signed or confirmed statements. These statements were made by victims of acts of ill-treatment, or by persons having witnessed such acts, as well as acts of sexual violence perpetrated against Croats at Tovarnik.

319. The Court accordingly finds that Croatia has shown that acts of ill-treatment and sexual violence were perpetrated against Croats by the JNA and Serb forces at Tovarnik, in or around the month of September 1991. It finds in contrast that the allegations of rape have not been established.

(d) ***Berak***

320. Croatia alleges that, between September and December 1991, the JNA and Serb forces perpetrated acts of ill-treatment against the Croat inhabitants of the village of Berak, located some

16 km from Vukovar and having a majority Croat population, and that those forces established a prison camp in the village, where Croats were allegedly tortured. Several instances of rape are also alleged.

321. Serbia maintains that Croatia has failed to provide sufficient evidence of the acts alleged by it. It contends that the statements produced by Croatia lack probative value. It further points out that the ICTY has not prosecuted or convicted any individuals for crimes committed at Berak.

322. Croatia bases its allegations on statements appended to its written pleadings. The Court considers that it can give credence to several statements which have been confirmed subsequently. These are accounts by victims of acts of ill-treatment or rape, or by individuals who witnessed such acts.

323. Croatia has also produced a report prepared by Stanko Penavić, Deputy Defence Commander of Berak at the time of the events in question, concerning the 87 persons held at Berak between 2 October and 1 December 1991. That report lists individuals injured or raped and corroborates the previous evidence.

324. The Court accordingly finds that Croatia has shown that acts of ill-treatment and rape were perpetrated against members of the protected group by Serb forces and the JNA at Berak between September and October 1991.

(e) ***Lovas***

325. Croatia alleges that Serb forces perpetrated acts of torture, as well as rape and other acts of sexual violence against Croats in the village of Lovas between October 1991 and December 1991. Croats are also alleged to have been injured during the "minefield massacre" (see paragraph 233 above).

326. Serbia has disputed the probative value of the statements presented by Croatia, but admits that the suspected perpetrators of some of the acts alleged by Croatia are being prosecuted before Serbian courts. It argues, however, that these were not acts of genocide, but rather war crimes or crimes against humanity.

327. In support of its allegations, Croatia relies on the indictment prepared by the War Crimes Prosecutor for the Belgrade District Court, issued against 14 Serbs accused, *inter alia*, of ill-treatment and torture of Croat civilians at Lovas, to which the Court has already found that it cannot give any evidential weight in itself (see paragraph 237 above).

328. Croatia also relies on a number of statements, in particular that of Stjepan Peulić, a witness whom Serbia did not wish to cross-examine (see paragraph 25 above), to whose statement the Court has already given evidential weight (see paragraph 236 above). Mr. Peulić describes the ill-treatment suffered by him at the hands of Serb forces. Croatia also produces a statement by another victim of ill-treatment by Serb forces, to which the Court also gives evidential weight.

Regarding the allegations of rape, one of the statements is from an individual alleged to have been raped by a member of Serb forces, but it is neither signed nor confirmed. The Court considers that it cannot give it evidential weight. Another statement refers to rape of Croat women by Serb forces, but its author did not witness the events at first hand. The Court cannot give this statement any evidential weight.

329. Croatia further relies on a documentary film produced by a Serbian television channel, which includes descriptions of the "minefield massacre". While a documentary of this kind cannot in itself serve to prove the facts alleged (see paragraph 239 above), it does corroborate the previous evidence with respect to the allegations of ill-treatment.

330. In light of the foregoing, the Court finds that Croatia has established that acts of ill-treatment were perpetrated against members of the protected group by Serb forces at Lovas between October and December 1991. It considers that the allegations of rape and other acts of sexual violence have not been proved.

(f) ***Dalj***

331. Croatia alleges that, following the occupation of the village of Dalj by the JNA as from 1 August 1991, Serb forces perpetrated acts of ill-treatment and torture against Croat civilians, and that Croat soldiers and civilians captured during the hostilities at Vukovar were transferred to Dalj, where they were tortured and raped.

332. Serbia maintains that Croatia has failed to provide sufficient evidence of the facts which it alleges. It disputes the probative value of the statements produced by Croatia.

333. The Court notes that Croatia's allegations are based on statements by individuals. It observes that some of these are unsigned and were taken by the Croatian police, and cannot be relied on by the Court, for the reasons set out previously (see paragraph 198 above). Another statement was made by a victim of ill-treatment. It seems to have been been made before a court in domestic judicial proceedings. However, it is neither signed, nor confirmed. The Court cannot give it any evidential weight. On the other hand, some statements were signed or subsequently confirmed. They are by victims of ill-treatment. The Court considers that it must give them evidential weight.

334. The Court notes that, in the *Stanišić and Simatović* case, the ICTY Trial Chamber found that

> "following the take-over of Dalj, civilians, policemen, as well as a person called Dafinić, who the Trial Chamber elsewhere found was an SNB member . . . engaged in looting of houses. In August 1991, Croats, including Zlatko Antunović, and Hungarians were detained by Milorad Stričević and the TO at the Dalj police station and were beaten by members of the SDG. In September 1991, the detainees of the Dalj police station were forced to engage in manual labour and were further beaten by the aforementioned. Members of the Prigrevica paramilitaries also participated in the beatings." (*Stanišić and Simatović* Trial Judgment, para. 528; reference omitted.)

335. The Court considers that these findings of the ICTY corroborate the statements produced by Croatia. The Court accordingly finds that Croatia has proved that, following the capture of Dalj in August 1991, Serb forces perpetrated acts of ill-treatment against Croats. On the other hand, it finds that the allegations of rape have not been proved.

Region of Western Slavonia

(a) *Kusonje*

336. Croatia claims that, on 8 September 1991, a group of Croat soldiers was ambushed and took refuge in the village of Kusonje, where they were captured and then tortured by Serb forces, before being killed.

337. Serbia disputes the probative value of the evidence produced by Croatia, and moreover observes that no individual has been prosecuted or convicted by the ICTY on account of acts committed at Kusonje.

338. In support of its allegations, Croatia relies on two statements taken by the Croatian police, which are not signed or otherwise confirmed by the individuals allegedly having made these statements. The Court cannot give evidential weight to these statements.

339. The other evidence produced by Croatia consists of a list of dead civilians in the municipality of Pakrac and a video showing the exhumation of a mass grave; these do not concern the events alleged to have taken place on or around 8 September 1991 at Kusonje.

340. The Court accordingly considers that Croatia has failed to provide sufficient evidence that Serb forces perpetrated acts of torture at Kusonje on or around 8 September 1991.

(b) ***Voćin***

341. Croatia alleges that, between August and December 1991 at Voćin, Serb forces subjected Croats to ill-treatment and torture, and raped Croat women.

342. Serbia disputes the probative value of the evidence presented by Croatia, describing it as hearsay. Serbia notes that Slobodan Milošević's indictment at the ICTY refers to the murder of 32 Croat civilians at Voćin on 13 December 1991 by Serb paramilitaries, but that there is no reference in any judgment or indictment of the ICTY to any of the other crimes.

343. The Court notes that Croatia's allegations rest essentially on statements. It observes that the statement by M.S. refers to ill-treatment of Croats by Serbs, but the author does not appear to have witnessed this directly. The Court thus cannot give the statement any evidential weight in this regard. A statement by a nurse, D.V., working in the clinic at Voćin also describes ill-treatment of Croats by Serb forces inside the clinic. This statement appears to have been made in the context of domestic judicial proceedings, but contains no details about the nature of the proceedings or the court where the statement was made. Moreover, the statement is not signed. The Court thus considers that it cannot give it any evidential weight. On the other hand, the statement by F.D. is signed, and can be given evidential weight as regards the allegations of ill-treatment. The author describes the acts of ill-treatment to which he and others with him were subjected at the hands of Serb forces in late August 1991. Serbia acknowledges, moreover, that his statement represents a first-hand account of ill-treatment and beatings. In his statement, F.D. also claims to have heard a woman screaming and assumed that she was being raped. However, it appears that he did not witness this alleged rape directly. Accordingly, the Court cannot give it evidential weight with respect to the allegations of rape.

344. Croatia cites a publication entitled *The Anatomy of Deceit* by Doctor Jerry Blaskovich, in which he describes the torture suffered by a Croat at the hands of Serb forces. The Court recalls that a publication of this kind can only constitute secondary evidence and can only be used to corroborate facts established by other evidence (see paragraph 239 above). The Court is therefore unable to find, solely on the basis of this publication, that acts of torture were committed at Voćin by Serb forces.

345. Croatia also cites the report of Helsinki Watch. The Court notes that the section describing acts of ill-treatment and torture perpetrated by Serb forces at Voćin in late December 1991 relies on eyewitness testimony and autopsy reports. It recalls that the authors of the testimony are not identified, and that the autopsy reports are not appended to the Helsinki Watch report (see paragraph 249 above). The Court is unable to conclude, on the basis of that report alone, that acts of ill-treatment and torture were perpetrated by Serb forces at Voćin in December 1991.

346. In light of the above, the Court accordingly finds that Croatia has shown that acts of ill-treatment were perpetrated against Croats by Serb forces at Voćin in August 1991. It finds that Croatia has not proved its allegations of rape.

(c) ***Đulovac***

347. Croatia contends that, from September 1991, Serb forces ill-treated and tortured (in particular mutilated) Croats living in the village of Đulovac, located in the municipality of Daruvar and with a Croat population of around 50 per cent. Serb forces also allegedly established a prison in the village's veterinary station and tortured villagers there, before transferring them to other camps.

348. Serbia disputes the probative value of the statements produced by Croatia in support of these allegations, and further points out that no individual has been prosecuted or convicted by the ICTY for crimes committed in the municipality of Daruvar.

349. The Court notes that Croatia relies on statements to which it can give evidential weight. This is the case, in particular, for two signed statements made, respectively, before a Croatian investigating judge and the representative of the Croatian Government in the Daruvar municipality, by victims of ill-treatment inflicted by the Serb forces.

350. While these statements do not substantiate all of Croatia's allegations, the Court concludes that Serb forces perpetrated acts of ill-treatment against Croats at Đulovac between September and December 1991.

Region of Dalmatia

Knin

351. Croatia alleges that acts of ill-treatment, torture and sexual violence were perpetrated against Croats in detention centres located in the former hospital at Knin and in the barracks of the JNA 9th Corps.

352. Croatia produces *inter alia* two statements by victims of ill-treatment and torture perpetrated by Serb forces in the former hospital at Knin. One of these victims also witnessed acts of sexual violence, and his statement represents a first-hand account of the events in question. The Court considers that it can give these statements evidential weight.

353. The Court notes that this evidence is corroborated by the findings of the ICTY. Thus, in the *Martić* case, the ICTY found that between 120 and 300 persons were detained in the former hospital at Knin (for the period from mid-1991 to mid-1992), and between 75 and 200 persons

were detained in the barracks of the JNA 9th Corps, amongst whom were Croat and non-Serb civilians, as well as members of the Croatian armed forces. The ICTY found that these persons had been subjected to ill-treatment by Serb forces or other individuals and that those acts had caused them serious physical and mental suffering. The Tribunal described these acts as torture and cruel and inhumane treatment, and noted that they had been committed with discriminatory intent based on ethnic origin (*Martić* Trial Judgment, paras. 407-415). The Tribunal also accepted that, at the former hospital at Knin, some of the prisoners were subjected to acts of sexual violence (*ibid.*, para. 288). In the *Stanišić and Simatović* case, the Trial Chamber made similar findings (*Stanišić and Simatović* Trial Judgment, paras. 387-390).

354. The Court considers that it has been established that acts of ill-treatment, torture and sexual violence were perpetrated against Croat civilians between mid-1991 and mid-1992, at detention centres located in the former hospital at Knin and the barracks of the JNA 9th Corps.

Missing persons

355. The Court notes that, late on in the oral proceedings, Croatia raised the argument that the psychological pain suffered by the relatives of missing persons constituted serious mental harm within the meaning of Article II *(b)* of the Convention.

356. The Court has accepted that the psychological pain suffered by the relatives of individuals who have disappeared in the context of an alleged genocide, as a result of the persistent refusal of the competent authorities to provide the information in their possession which would enable these relatives to establish with certainty whether and how the persons concerned died, can in certain circumstances constitute serious mental harm within the meaning of Article II *(b)* of the Convention (see paragraph 160 above). The Court acknowledges that in the present case, the relatives of individuals who disappeared during the events that took place on the territory of Croatia between 1991 and 1995 suffer psychological distress as a result of the continuing uncertainty which they face. However, Croatia has failed to provide any evidence of psychological suffering sufficient to constitute serious mental harm within the meaning of Article II *(b)* of the Convention.

357. The Parties debated the fate of missing persons. The Court notes that the Parties disagree on the number and ethnicity of the persons having disappeared. However, since it is not disputed that many individuals have disappeared, it is not for the Court to determine their precise number and ethnicity.

358. In reply to a question by a Member of the Court as to whether there had been any recent initiatives to ascertain the fate of missing or disappeared persons, the Parties stated that, following their agreement in 1995 at Dayton to co-operate in tracing missing persons, some progress had been made, but they admitted that this remained insufficient.

359. The Court notes that the Parties have expressed their willingness, in the interest of the families concerned, to elucidate the fate of those who disappeared in Croatia between 1991 and 1995. It notes Serbia's assurance that it will fulfil its responsibilities in the co-operation process with Croatia. The Court encourages the Parties to pursue that co-operation in good faith and to utilize all means available to them in order that the issue of the fate of missing persons can be settled as quickly as possible.

Conclusion

360. In light of the foregoing, the Court considers it established that during the conflict in a number of localities in Eastern Slavonia, Western Slavonia, and Dalmatia, the JNA and Serb forces injured members of the protected group as defined above (see paragraph 205) and perpetrated acts of ill-treatment, torture, sexual violence and rape. These acts caused such bodily or mental harm as to contribute to the physical or biological destruction of the protected group. The Court considers that the *actus reus* of genocide within the meaning of Article II *(b)* of the Convention has accordingly been established.

4. Article II *(c)*: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

361. Croatia asserts that the JNA and Serb forces deliberately inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II *(c)* of the Convention, at a number of localities within Croatia. Croatia refers to acts of rape committed by the JNA and Serb forces. It claims that Croats were deprived of food and medical care. According to Croatia, the JNA and Serb forces instituted a policy of systematic expulsion of Croats from their homes and of forced displacement from the areas under their control. Croats are alleged to have been forced to display signs of their ethnicity. The JNA and Serb forces allegedly destroyed and looted Croat property and vandalized their cultural heritage. Finally, Croats are claimed to have been subjected to forced labour. The Court will examine in turn each of Croatia's various allegations.

Rape

362. Croatia alleges that multiple acts of rape were committed by the JNA and Serb forces against Croat women, both in various localities throughout Croatian territory and in camps.

363. In support of its allegations, Croatia relies on statements appended to its written pleadings. The Court notes that some of these statements constitute first-hand accounts of the events in question. It notes the statement by a member of Serb forces, contemporary with the facts, who confesses to acts of rape. However, that statement is neither signed nor confirmed. The Court cannot therefore give it any evidential weight. On the other hand, there are a number of direct,

detailed accounts of rape by members of the JNA or Serb forces given by the victims. The Court considers that there is sufficient reliable evidence to establish that a number of instances of rape and other acts of sexual violence were perpetrated within the context of the conflict. It recalls that Croatia has established that acts of rape were committed in a number of localities in Eastern Slavonia and that they caused serious bodily and mental harm to members of the protected group (see paragraphs 305, 311, 315 and 324 above).

364. Nevertheless, it has not been shown that these occurrences were on such a scale as to have amounted also to inflicting conditions of life on the group that were capable of bringing about its physical destruction in whole or in part.

Deprivation of food

365. Croatia alleges that the JNA and Serb forces subjected Croats to food deprivation.

366. The Court notes that some of the statements produced by Croatia refer to occasional denials of food supplies to Croats. However, these statements do not suffice to show that such denials were of a systematic or general nature.

367. Regarding Dubrovnik, the Court notes that in the *Strugar* case the ICTY found that

> "[b]ecause of the blockade that had been enforced by the JNA the population of Dubrovnik, including the Old Town, had been without normal running water and electricity supplies for some weeks and essential products to sustain the population, such as food and medical supplies, were in extremely short supply" (*Strugar* Trial Judgment, para. 176; reference omitted).

The Court considers that it has not been established that this restriction on food supplies was calculated to bring about the physical destruction in whole or in part of the Croat inhabitants of Dubrovnik, within the meaning of Article II *(c)* of the Convention.

368. The Court concludes that Croatia has not established that the JNA and Serb forces denied access by Croats to food supplies, thereby subjecting them to food deprivation in a manner capable of falling within the scope of Article II *(c)* of the Convention.

Deprivation of medical care

369. Croatia alleges that Croats were deprived of medical care.

370. The Court notes that Croatia's allegations rely on statements appended to its written pleadings which are not signed or confirmed by the declarants. This evidence cannot demonstrate a practice of a systematic or general nature.

371. In regard to Dubrovnik, the Court relies on the findings of the ICTY in the *Strugar* case cited above (see paragraph 367). The Court likewise recalls that it has not been established that the denial of medical supplies was imposed with the intention of causing the physical destruction, in whole or in part, of the Croat inhabitants of Dubrovnik.

372. The Court concludes that Croatia has failed to show deprivations of medical care such as to be capable of coming within the scope of Article II *(c)* of the Convention.

Systematic expulsion from homes and forced displacement

373. Croatia alleges that the JNA and Serb forces systematically expelled Croats from their homes and forcibly displaced them from the areas under their control throughout the Croatian territory.

374. The Court notes that, in the *Martić* case, the ICTY found that between 1991 and 1995, the JNA and Serb forces had deliberately created a coercive atmosphere in the SAO Krajina, and then in the RSK, with the aim of forcing the non-Serb population to leave that territory:

> "427. From August 1991 and into early 1992, forces of the TO and the police of the SAO Krajina and of the JNA attacked Croat-majority villages and areas, including the villages of Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Škabrnja and Nadin. The displacement of the non-Serb population which followed these attacks was not merely the consequence of military action, but the primary objective of it . . .
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> 428. The Trial Chamber considers the evidence to establish beyond reasonable doubt that the systematic acts of violence and intimidation carried out, *inter alia*, by the JNA, the TO and the *Milicija Krajine* against the non-Serb population in the villages created a coercive atmosphere in which the non-Serb population did not have a genuine choice in their displacement. Based on this evidence, the Trial Chamber concludes that the intention behind these acts was to drive out the non-Serb population from the territory of the SAO Krajina . . .
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> . . . . . .

430. With regard to the period from 1992 to 1995, the Trial Chamber has been furnished with a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population, which were pervasive through the RSK territory. The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive atmosphere which had the effect of forcing out the non-Serb population from the territory of the RSK. As a consequence, almost the entire non-Serb population left the RSK . . .

431. Based on the substantial evidence referred to above, the Trial Chamber finds that due to the coercive atmosphere in the RSK from 1992 through 1995, almost the entire non-Serb population was forcibly removed to territories under the control of Croatia. The elements of the crime of deportation (Count 10) have therefore been met." (*Martić* Trial Judgment, paras. 427, 428, 430 and 431; references omitted.)

375. The ICTY reached similar findings in the *Stanišić and Simatović* case regarding the SAO Krajina (and then the RSK) and the SAO SBWS:

"997. The Trial Chamber recalls its findings . . . that from April 1991 to April 1992, between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina (and subsequently the Krajina area of the RSK). They did so as a result of the situation prevailing in the region at the time of their respective departures, which was created by a combination of: the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment of Croat persons; and the looting and destruction of property. These actions were committed by the local Serb authorities and the members and units of the JNA (including JNA reservists), the SAO Krajina TO, the SAO Krajina Police, and Serb paramilitary units, as well as local Serbs and certain named individuals (including Milan Martić). The Trial Chamber notes that the persons fleeing were Croats and other non-Serbs and that their ethnicity thus corresponds to the charges in the Indictment.

998. The Trial Chamber finds that the aforementioned acts caused duress and fear of violence such that they created an environment in which the Croats and other non-Serbs in the SAO Krajina had no choice but to leave. Therefore, the Trial Chamber finds that those who left were forcibly displaced. Considering the circumstances of the forcible displacement, and absent any indication to the contrary, the Trial Chamber finds that the displaced individuals were forced to leave an area in which they were lawfully present.

. . . . . .

1049. The Trial Chamber recalls its findings … that between 1991 and 1992, the JNA, Šešelj's men, Serbian volunteers, local authorities, SRS, paramilitaries from

> Prigrevica, SNB, police, TO, a "Special Unit", and the SDG launched attacks all over the SAO SBWS, causing thousands of people to flee. The Trial Chamber recalls that these attacks involved acts of forcible transfer, detentions, destruction of a Catholic Church, looting, restriction of freedom, forced labour, beatings, killings, threats, and harassment. The Trial Chamber notes that a significant number of those people who fled were Croats, and other non-Serbs and concludes that their ethnicity thus corresponds to the charges in the Indictment.
>
> 1050. The Trial Chamber considers that the aforementioned acts caused duress and fear of violence such that they created an environment in which the Croats and other non-Serbs had no choice but to leave. Therefore, the Trial Chamber finds that those who left were forcibly displaced. The Trial Chamber finds, having considered that those who were forcibly displaced were inhabitants of the SAO SBWS, absent any indication to the contrary, were lawfully present there." (*Stanišić and Simatović* Trial Judgment, paras. 997, 998, 1049 and 1050.)

376. In the Court's view, the findings of the ICTY show that the JNA and Serb forces carried out expulsions and forced displacements of Croats in the SAO Krajina (and then the RSK) and the SAO SBWS. The Court recalls that the forced displacement of a population does not, as such, constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention (see paragraph 162 above). Such characterization would depend on the circumstances in which the forced displacement was carried out (see paragraph 163 above). The Court notes that, in the present case, the forced displacement of the population is a consequence of the commission of acts capable of constituting the *actus reus* of genocide, in particular as defined in Article II *(a)* to *(c)* of the Convention. However, the Court notes that there is no evidence before the Court enabling it to conclude that the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group.

377. In these circumstances, the Court finds that Croatia has failed to show that the forced displacement of Croats by the JNA and Serb forces is capable of constituting the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Restrictions on movement

378. Croatia alleges that in many villages, the movements of Croats were restricted.

379. The Court refers to the findings of the Trial Chamber in the *Stanišić and Simatović* case, which state that between 1991 and 1992, the JNA and Serb forces imposed restrictions on the free movement of Croats living in the SAO Krajina (and then in the RSK) and the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049, reproduced at paragraph 375 above; see also para. 1250, not reproduced). The Court considers that these findings constitute sufficient evidence to substantiate Croatia's allegations.

380. The Court notes that the restrictions on the movement of the Croats were part of the creation of a climate of coercion and terror, with the aim of forcing those persons to leave the territories under the control of the JNA and Serb forces. The Court recalls that Article II *(c)* of the Convention refers only to conditions of life calculated to bring about the physical destruction of the group. It considers that restrictions on freedom of movement may undermine the social bond between members of the group, and hence lead to the destruction of the group's cultural identity. However, such restrictions cannot be regarded as calculated to bring about the group's physical destruction, which is the sole criterion in Article II *(c)* of the Convention. The Court accordingly concludes that the restrictions on movement imposed on Croats by the JNA and Serb forces do not constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Forced wearing of insignia of ethnicity

381. Croatia alleges that, in certain localities, Croats were obliged to wear insignia of ethnicity, in the form of a white ribbon on their sleeves, or a white sheet attached to their houses.

382. The Court considers that the purpose of forcing individuals to wear signs of their membership of a group is to stigmatize the group's members. This enables the authors of such acts to identify the members of the group. The aim is not the immediate physical destruction of the group, but it may represent a preliminary step towards perpetration of the acts listed in Article II of the Convention against the group members thus identified. Consequently, forcing individuals to wear insignia of their ethnicity does not in itself fall within the scope of Article II *(c)* of the Convention, but it might be taken into account for the purpose of establishing whether or not there existed an intent to destroy the protected group, in whole or in part.

Looting of property belonging to Croats

383. Croatia alleges that Croat property was repeatedly looted in a number of localities.

384. The Court refers to the findings of the ICTY Trial Chamber in the *Stanišić and Simatović* case. According to the ICTY, between 1991 and 1992, the JNA and Serb forces looted the property of Croat and non-Serb civilians in the SAO Krajina (and then in the RSK) and in the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049, reproduced at paragraph 375 above; see also para. 1250, not reproduced). The Court considers that these findings suffice to substantiate the facts alleged by Croatia.

385. The Court is of the view, however, that it has not been established that such attacks on Croat property were intended to inflict on the Croat group "conditions of life calculated to bring about its physical destruction in whole or in part". Accordingly, the looting of Croat property by the JNA and Serb forces cannot constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Destruction and looting of the cultural heritage

386. Croatia alleges that the JNA and Serb forces destroyed and looted assets forming part of the cultural heritage and monuments of the Croats.

387. The Court notes that in the *Babić* case, where the accused pleaded guilty, the ICTY found that the JNA and Serb forces had, between 1 August 1991 and 15 February 1992, established in the SAO Krajina a régime of persecutions designed to drive the Croat and other non-Serb populations out of the territory. These persecutions included the deliberate destruction of cultural institutions, historic monuments and sacred sites of the Croat and other non-Serb populations in various localities (IT-03-72-S, Trial Chamber, Sentencing Judgment of 29 June 2004 (hereinafter "*Babić* Trial Judgment"), para. 15). The Tribunal made similar findings in the *Martić* case, where it held that in 1991 and 1992, the JNA and Serb forces had destroyed churches and religious buildings in Croatian towns and villages located in the SAO Krajina, and then in the RSK (*Martić* Trial Judgment, paras. 324 and 327).

388. The Court recalls that it held in 2007 that

> "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts." (*I.C.J. Reports 2007 (I)*, pp. 185-186, para. 344.)

389. The Court considers that there is no compelling reason in the present case for it to depart from that approach. It accordingly finds that it is unnecessary to proceed any further with its examination of Croatia's allegations in order to establish the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

390. The Court recalls, however, that it may take account of attacks on cultural and religious property in order to establish an intent to destroy the group physically (*ibid.*, p. 186, para. 344).

Forced labour

391. Croatia alleges that the JNA and Serb forces obliged Croats to perform forced labour in numerous localities.

392. The Court again refers to the findings of the ICTY Trial Chamber in the *Stanišić and Simatović* case. These show that between 1991 and 1992, the JNA and Serb forces obliged Croat civilians to perform forced labour in the SAO Krajina (and then in the RSK) and in the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049 reproduced above at paragraph 375; see also para. 1250, not reproduced).

393. The Court considers that these findings suffice to establish the facts alleged by Croatia. The Court takes the view that the characterization of forced labour as the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention depends on the conditions under which that labour is carried out. In this regard, the Court notes that in the *Stanišić and Simatović* case, the ICTY Trial Chamber found that forced labour formed part of a series of actions aimed at the forced expulsion of the Croat population (*Stanišić and Simatović* Trial Judgment, paras. 998 and 1050, reproduced above at paragraph 375). The Court finds in this instance that Croatia has not established that the forced labour imposed on the Croat population is capable of constituting the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Conclusion

394. The Court concludes that Croatia has failed to establish that acts capable of constituting the *actus reus* of genocide, within the meaning of Article II *(c)* of the Convention, were committed by the JNA and Serb forces.

5. Article II *(d)*: measures intended to prevent births within the group

395. Croatia alleges that, as well as rape, the JNA and Serb forces committed other acts of sexual violence (in particular castrations) against Croats, constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention.

396. Serbia maintains that, in order to be regarded as measures intended to prevent births within the group, within the meaning of Article II *(d)* of the Convention, it is necessary for the rape and other acts of sexual violence to have been carried out systematically, whereas in the present case such acts were merely random incidents, and hence cannot constitute such measures.

397. The Court recalls that it has already found that Croatia has failed to provide sufficient evidence that acts of rape were carried out on such a scale that it can be said that they inflicted conditions of life on the group that were capable of bringing about its physical destruction in whole or in part (see paragraph 364 above). Similarly, Croatia has not provided sufficient evidence that rape was committed in order to prevent births within the group, within the meaning of Article II *(d)*. The Court will therefore concentrate on the other acts of sexual violence alleged by Croatia.

398. Croatia relies principally on statements appended to its written pleadings. The Court notes that several of these statements, which are signed or confirmed, are by victims or eyewitnesses of acts of sexual violence. They are mutually consistent and constitute first-hand

accounts of the events in question. The Court considers that there is sufficiently reliable evidence that acts of sexual violence did indeed take place, in particular involving the targeting of the genitalia of Croat males. It recalls that the ICTY also established that acts of sexual violence were perpetrated by the JNA and Serb forces in the SAO Krajina (and then in the RSK) and in the SAO SBWS between 1991 and 1992 (*Stanišić and Simatović* Trial Judgment, para. 997, reproduced above at paragraph 375; see also para. 1250, not reproduced).

399. Nevertheless, Croatia has produced no evidence that the acts of sexual violence were perpetrated in order to prevent births within the group.

400. The Court accordingly finds that Croatia has failed to show that rapes and other acts of sexual violence were perpetrated by the JNA and Serb forces against Croats in order to prevent births within the group, and that, hence, the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention has not been established.

Conclusion on the *actus reus* of genocide

401. The Court is fully convinced that, in various localities in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs *(a)* and *(b)* of Article II of the Convention, and that the *actus reus* of genocide has been established.

B. The genocidal intent *(dolus specialis)*

402. The *actus reus* of genocide having been established, the Court will now examine whether the acts perpetrated by the JNA and Serb forces were committed with intent to destroy, in whole or in part, the protected group as defined above (see paragraph 205).

403. Croatia contends that the crimes committed by the JNA and Serb forces represent a pattern of conduct from which the only reasonable conclusion to be drawn is an intent on the part of the Serbian authorities to destroy in part the Croat group. It maintains that the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia targeted by those crimes constituted a substantial part of the protected group, and that the intent to destroy the protected group "in part", which characterizes genocide as defined in Article II of the Convention, is thus established.

404. The Court will begin by examining whether the Croats living in the above regions constituted a substantial part of the protected group. If so, it will then seek to determine whether the acts proved to have been committed by the JNA and Serb forces represented a pattern of conduct from which the only reasonable conclusion to be drawn is an intent on the part of the Serbian authorities to destroy "in part" the protected group.

1. Did the Croats living in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constitute a substantial part of the protected group?

405. According to Croatia, the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constituted a substantial part of the Croat group targeted by the genocidal intent.

406. As the Court has already recalled (see paragraph 142 above), it must take account not only of the quantitative element, but also of the geographic location and prominence of the targeted part of the group in order to determine whether it constitutes a substantial part of the protected group.

Regarding the quantitative element, Croatia maintains that the target group was "the Croat population that was, at the relevant time, living in Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika, and Dalmatia, including those living as groups in individual villages". It provides data taken from the last official census carried out in 1991 in the SFRY, which is not disputed by Serbia. According to that data, the ethnic Croat population living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika, and Dalmatia in 1991 numbered between 1.7 and 1.8 million. It constituted slightly less than half of the ethnic Croat population living in Croatia. According to the 1991 census, the total population of Croatia was approximately 4.8 million persons, of which 78 per cent were ethnic Croats.

Regarding the geographic location of the part of the group concerned, the Court has already found (see paragraphs 295, 360 and 401 above) that the acts committed by the JNA and Serb forces in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, targeted the Croats living in those regions, within which these armed forces exercised and sought to expand their control.

Finally as regards the prominence of that part of the group, the Court notes that Croatia has provided no information on this point.

The Court concludes from the foregoing that the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constituted a substantial part of the Croat group.

* *

2. Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group?

407. The Court will now examine whether Croatia has established the existence of a pattern of conduct from which the only reasonable conclusion to be drawn is an intent of the Serb authorities to destroy that substantial part of the group.

408. Croatia argues that the scale and consistent nature of the crimes committed by the JNA and Serb forces evince a clear intention to bring about the physical destruction of the Croats. It contends that these crimes constitute a pattern of conduct from which the only reasonable inference to be drawn is that the Serb leaders were motivated by genocidal intent. Croatia thus sets out a series of 17 factors which it believes, individually or taken together, could lead the Court to conclude that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned: (1) the political doctrine of Serbian expansionism which created the climate for genocidal policies aimed at destroying the Croat population living in areas earmarked to become part of "Greater Serbia"; (2) the statements of public officials, including demonization of Croats and propaganda on the part of State-controlled media; (3) the fact that the pattern of attacks on groups of Croats far exceeded any legitimate military objective necessary to secure control of the regions concerned; (4) contemporaneous video footage evidencing the genocidal intent of those carrying out the attacks; (5) the explicit recognition by the JNA that paramilitary groups were engaging in genocidal acts; (6) the close co-operation between the JNA and the Serb paramilitary groups responsible for some of the worst atrocities, implying close planning and logistical support; (7) the systematic nature and sheer scale of the attacks on groups of Croats; (8) the fact that ethnic Croats were constantly singled out for attack while local Serbs were excluded; (9) the fact that during the occupation, ethnic Croats were required to identify themselves and their property as such by wearing white ribbons tied around their arms and by affixing white cloths to their homes; (10) the number of Croats killed and missing as a proportion of the local population; (11) the nature, degree and extent of the injuries inflicted (through physical attacks, acts of torture, inhuman and degrading treatment, rape and sexual violence), "including injuries with recognizable ethnic characteristics"; (12) the use of ethnically derogatory language in the course of acts of killing, torture and rape; (13) the forced displacement of Croats and the organized means adopted to this end; (14) the systematic looting and destruction of Croat cultural and religious monuments; (15) the suppression of Croat culture and religious practices among the remaining population; (16) the consequent permanent and evidently intended demographic changes to the regions concerned; (17) the failure to punish the crimes which the Applicant alleges to be genocide.

409. All these elements indicate, according to Croatia, the existence of a pattern of conduct from which the only reasonable inference is an intent to destroy, in whole or in part, the Croat group.

410. Consequently, the Court will examine first whether the acts committed by the JNA and Serb forces form part of a pattern of conduct and, if so, it will then consider whether an intent to destroy the Croat group is the only reasonable conclusion that can be inferred from that pattern of conduct.

411. The Parties disagree on the existence of a pattern of conduct. Croatia considers that the scale, intensity and systematic nature of the attacks directed against the Croat population, based on the same *modus operandi*, demonstrate the existence of a pattern of conduct. According to Croatia, the JNA and Serb forces applied a massive use of force which can only be explained by an intent to destroy the group in whole or in part.

412. Serbia does not contest the systematic and widespread nature of certain attacks. However, it claims that these were intended to force the Croats to leave the regions concerned. In this regard, it cites the *Martić* and *Mrkšić et al.* cases, in which the ICTY found that the purpose of the attacks on the Croat population was to force it to leave.

Serbia points out that, in the *Martić* case, although the accused had not been charged with genocide, there was nothing to prevent the Trial Chamber from concluding that the attacks indicated an intent to persecute or to exterminate "or worse", but that it had not done so. Regarding the attack on Vukovar and the surrounding area, Serbia submits that, in the *Mrkšić et al.* case, the Trial Chamber found that the purpose of that attack was also to punish the town's Croat population, but not to destroy it.

Serbia maintains that the evidence "shows a multitude of patterns giving rise to inferences of combat and/or forcible transfer and/or punishment", but not genocide.

413. The Court considers that, of the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent, the most important are those that concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population (i.e., the third, seventh, eighth, tenth and eleventh factors identified in paragraph 408, above).

414. The Court notes that, in the *Mrkšić et al.* case, the ICTY Trial Chamber found that in Eastern Slavonia:

> "the system of attack employed by the JNA typically evolved along the following lines: '*(a)* tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour; *(b)* there is then artillery or mortar shelling for several days, mostly aimed at the Croatian parts of the village; in this stage churches are often hit and destroyed; *(c)* in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with JNA military authorities do not lead, with the exception of Ilok, to peaceful arrangements; with or without waiting for the results of the ultimata a military attack is carried out;

> and *(d)* at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varied from murder, killing, burning and looting, to discrimination'" (*Mrkšić* Trial Judgment, para. 43, citing the testimony of Ambassador Kypr of the European Community Monitoring Mission; reference omitted).

The Tribunal adopted similar conclusions in the *Martić* case:

> "[t]he area or village in question would be shelled, after which ground units would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to prevent their return and widespread looting would be carried out. In some instances the police and the TO of the SAO Krajina organised transport for the non-Serb population in order to remove it from SAO Krajina territory to locations under Croatian control. Moreover, members of the non-Serb population would be rounded up and taken away to detention facilities, including in central Knin, and eventually exchanged and transported to areas under Croatian control." (*Martić* Trial Judgment, para. 427; reference omitted.)

415. The Court likewise notes that there were similarities, in terms of the *modus operandi* used, between some of the attacks confirmed to have taken place. Thus it observes that the JNA and Serb forces would attack and occupy the localities and create a climate of fear and coercion, by committing a number of acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Finally, the occupation would end with the forced expulsion of the Croat population from these localities.

416. The findings of the Court and those of the ICTY are mutually consistent, and establish the existence of a pattern of conduct that consisted, from August 1991, in widespread attacks by the JNA and Serb forces on localities with Croat populations in various regions of Croatia, according to a generally similar *modus operandi*.

417. The Court recalls that, for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, it must be "such that it could only point to the existence of such intent" (*I.C.J. Reports 2007 (I)*, p. 197, para. 373). This signifies that, for the Court, intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct (see paragraph 148 above).

418. In its oral argument, Croatia put forward two factors which, in its view, should lead the Court to conclude that intent to destroy is the only reasonable inference to be drawn from the pattern of conduct previously established: the context in which those acts were committed and the opportunity which the JNA and Serb forces had of destroying the Croat population. The Court will examine these in turn.

(a) ***Context***

419. The Court will examine the context in which the acts constituting the *actus reus* of genocide within the meaning of subparagraphs *(a)* and *(b)* of the Convention were committed, in order to determine the aim pursued by the authors of those acts.

420. Croatia claims that the acts committed by the JNA and Serb forces against Croats between 1991 and 1995 represented the implementation, by the Serb nationalists and leadership, of the objective of a "Greater Serbia". That entailed unifying those parts of the territories of the various entities of the SFRY in which ethnic Serbs were living. Croatia relies *inter alia* on a memorandum prepared in 1986 by the Serbian Academy of Sciences and Arts (hereinafter "the SANU Memorandum"), which allegedly contributed to the rebirth of the idea of a "Greater Serbia". Croatia contends that the destruction of the Croats in these areas, who were perceived as a threat to the Serb people, was necessary for the creation of "Greater Serbia". In this regard, the SANU Memorandum is claimed to have acted as a catalyst for the genocide of the Croats.

421. Serbia contests Croatia's historical approach and argues that it is conflating issues, since the idea of a "Greater Serbia" never implied an intent to commit genocide against the Croats.

422. The Court considers that there is no need to enter into a debate on the political and historical origins of the events that took place in Croatia between 1991 and 1995. It notes that the SANU Memorandum cited by Croatia has no official standing and certainly does not contemplate the destruction of the Croats. It cannot be regarded, either by itself or in connection with any of the other factors relied on by Croatia, as an expression of the *dolus specialis*.

423. The Court will seek to determine what aim was being pursued by the JNA and Serb forces when they committed acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention, where those acts have been established before the Court.

424. The Court notes that the ICTY has stated the political objective being pursued by the leadership of the SAO Krajina and then the RSK, and shared with the leaderships in Serbia and in the Republika Srpska in Bosnia and Herzegovina as follows:

> "442 . . . The evidence establishes the existence, as of early 1991, of a political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish an unified territory. Moreover, the evidence establishes that the SAO Krajina, and subsequently the RSK, government and authorities fully embraced and advocated this objective, and strove to accomplish it in cooperation with the Serb leaderships in Serbia and in the RS in BiH.
>
> . . . . . .

> 445. From at least August 1991, the political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation. In the Trial Chamber's view, this campaign of violence and intimidation against the Croat and non-Serb population was a consequence of the position taken by the SAO Krajina and subsequently the RSK leadership that co-existence with the Croat and other non-Serb population, in Milan Martić's words, 'in our Serbian territories of the SAO Krajina', was impossible. Thus, the implementation of the political objective to establish a unified Serb territory in these circumstances necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory. The Trial Chamber therefore finds beyond reasonable doubt that the common purpose of the [joint criminal enterprise] was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 and 11 [deportation and forcible transfer]." (*Martić* Trial Judgment, paras. 442 and 445; reference omitted.)

425. In its Trial Chamber Judgment in the *Babić* case, the ICTY, following the defendant's guilty plea, held that there had been a joint criminal enterprise whose objective "was the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of Croatia through a campaign of persecutions in order to make that territory a Serb-dominated state" (*Babić* Trial Judgment, para. 34).

426. According to the ICTY, the leadership of Serbia and that of the Serbs in Croatia, *inter alia*, shared the objective of creating an ethnically homogeneous Serb State. That was the context in which acts were committed that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. However, the conclusion of the ICTY indicates that those acts were not committed with intent to destroy the Croats, but rather with that of forcing them to leave the regions concerned so that an ethnically homogeneous Serb State could be created. The Court agrees with this conclusion. As the Tribunal found in the *Martić* case:

> "427. From August 1991 and into early 1992, forces of the TO and the police of the SAO Krajina and of the JNA attacked Croat-majority villages and areas, including the villages of Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Škabrnja and Nadin. The displacement of the non-Serb population which followed these attacks was not merely the consequence of military action, but the primary objective of it . . .
>
> . . . . . .
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> 430. With regard to the period from 1992 to 1995, the Trial Chamber has been furnished with a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population, which were pervasive throughout the RSK territory. The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive atmosphere which had the effect of forcing out the non-Serb population from the territory of the RSK. As a consequence, almost the entire non-Serb population left the RSK . . .

> 431. Based on the substantial evidence referred to above, the Trial Chamber finds that due to the coercive atmosphere in the RSK from 1992 through 1995, almost the entire non-Serb population was forcibly removed to territories under the control of Croatia." (*Martić* Trial Judgment, paras. 427, 430 and 431.)

427. The ICTY made similar findings in the *Stanišić and Simatović* Trial Judgment (paras. 997, 998, 1050 (reproduced at paragraph 375 above) and 1000, not reproduced).

428. The Court therefore concludes that Croatia's contentions regarding the overall context do not support its assertion that genocidal intent is the only reasonable inference to be drawn.

429. As regards the events at Vukovar, to which Croatia has given particular attention, the Court notes that in the *Mrkšić et al.* case, the ICTY found that the attack on that city constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia's grip on the SFRY:

> "471 . . . The declaration by Croatia of its independence of the Yugoslav Federation and the associated social unrest within Croatia was met with determined military reaction by Serb forces. It was in this political scenario that the city and people of Vukovar and those living in its close proximity in the Vukovar municipality became a means of demonstrating to the Croatian people, and those of other Yugoslav Republics, the harmful consequences to them of their actions. In the view of the Chamber the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so, as an example to those who did not accept the Serb controlled Federal government in Belgrade, and its interpretation of the laws of SFRY, or the role of the JNA for which the maintenance of the Yugoslav Federation was a fundamental element in the continued existence of the JNA." (*Mrkšić* Trial Judgment, para. 471.)

It follows from the above, and from the fact that numerous Croats of Vukovar were evacuated (see paragraph 436 below), that the existence of intent to physically destroy the Croatian population is not the only reasonable conclusion that can be drawn from the illegal attack on Vukovar.

430. In the same case, the ICTY made findings as to the intent of the perpetrators of the ill-treatment inflicted on the prisoners of war at Ovčara:

> "535. The Serb TO and paramilitary harboured quite intense feelings of animosity toward the Croat forces. The prisoners of war taken from Vukovar hospital and transported to Ovčara were representative of the Croat forces and, therefore, represented their enemy. The brutality of the beatings that took place at Ovčara on 20 November 1991 by the Serb TO and paramilitaries, and possibly by some JNA

> soldiers acting on their own account, is evidence of the hatred and the desire to punish the enemy forces. It is clear from this evidence, in the Chamber's finding, that acts of mistreatment outside and inside the hangar were intended to punish the prisoners for their involvement, or believed involvement, in Croat forces before the fall of Vukovar." (*Mrkšić* Trial Judgment, para. 535.)

The conclusions of the ICTY indicate that the intent of the perpetrators of the ill-treatment at Ovčara was not to physically destroy the members of the protected group, as such, but to punish them because of their status as enemies, in a military sense.

(b) ***Opportunity***

431. Croatia contends that the JNA and Serb forces systematically committed acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* to *(d)* of the Convention once the opportunity to do so was presented to them, i.e., when they attacked and occupied various Croat localities. According to Croatia, this factor demonstrates that their intention was to destroy the Croat group in whole or in part.

432. Serbia contests Croatia's approach. It refers to several instances of the JNA and Serb forces sparing Croats by not killing them. Moreover, it argues that the criterion of opportunity must be weighed against that of substantiality. For Serbia, the limited number of Croat victims, seen in the light of the opportunities for killing supposedly available to the JNA and Serb forces, cannot give rise to an inference that an intent to destroy was present.

433. The Court will not seek to determine whether or not, in each of the localities it has previously considered, the JNA and Serb forces made systematic use of the opportunities to physically destroy Croats.

434. The Court considers, on the other hand, that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part. The Court has previously found that Croatia has not demonstrated that such forced displacement constituted the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention (see paragraph 377 above). Nonetheless, the Court recalls that the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be "indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts" (see paragraph 162 above quoting *I.C.J. Reports 2007 (I)*, p. 123, para. 190).

435. In the present case, as emerges in particular from the findings of the ICTY, forced displacement was the instrument of a policy aimed at establishing an ethnically homogeneous Serb State. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical

destruction. The ICTY has estimated that between April 1991 and April 1992, between 80,000 and 100,000 persons fled the SAO Krajina (and then the RSK) (*Stanišić and Simatović* Trial Judgment, para. 997). The Court finds that the acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.

436. Regarding the events at Vukovar, to which Croatia has given particular attention, the Court notes that, in the *Mrkšić et al.* case, the ICTY established several instances of the JNA and Serb forces evacuating civilians, particularly Croats (*Mrkšić* Trial Judgment, paras. 157-160, 168, 204 and 207). The ICTY further found that Croat combatants captured by the JNA and Serb forces had not all been executed. Thus, following their surrender to the JNA, an initial group of Croat combatants was transferred on 18 November 1991 to Ovčara, and then to Sremska Mitrovica in Serbia, where they were held as prisoners of war (*ibid.*, paras. 145-155). Similarly, a group of Croat combatants held at Velepromet was transferred to Sremska Mitrovica on 19-20 November 1991, while civilians not suspected of having fought alongside Croat forces were evacuated to destinations in Croatia or Serbia (*ibid.*, para. 168). This shows that, in many cases, the JNA and Serb forces did not kill those Croats who had fallen into their hands.

437. The Court considers that it is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct — an issue on which it will make no ruling — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group.

The Court concludes from the foregoing that Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.

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438. Croatia points to activities of Serb paramilitaries as evidence of the *dolus specialis*. In particular, it relies upon a videotape of Željko Ražnatović or "Arkan", leader of a Serb paramilitary group known as the "Serbian Volunteer Guard" or "Arkan's Tigers", made during the siege of Vukovar on 1 November 1991, showing him instructing his forces to take care not to kill Serbs and saying that since Serbs were in the basements of buildings and the Croats were upstairs, rocket launchers should be used to "neutralize the first floor". Even if Arkan's actions were attributable to Serbia, this speech appears to be but one isolated phase in the very lengthy siege of Vukovar, a

siege in which, as the Court has already found (see paragraphs 218-219, 301 and 305 above), the degree of violence used by attacking forces was excessive, and during which grave suffering was undoubtedly caused to the civilian population as Serbia acknowledged at least to some extent. It is difficult to infer anything from one isolated instance.

Croatia also relies upon the report of a JNA security officer, dated 13 October 1991, which stated that Arkan's troops were "committing uncontrolled genocide and various acts of terrorism" in the greater area of Vukovar. The Serbian Assistant Minister of Defence was informed of the report. Yet taking the report as a whole, no justification or examples are given to support the use of the word "genocide".

439. Finally, the Court considers that the series of 17 factors invoked by Croatia do not lead to the conclusion that there was an intent to destroy, in whole or in part, the Croats in the regions concerned.

Conclusion on the *dolus specialis*

440. Thus, in the opinion of the Court, Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. The acts constituting the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide.

The Court further notes that the ICTY prosecutor has never charged any individual on account of genocide against the Croat population in the context of the armed conflict which took place in the territory of Croatia in the period 1991-1995 (see paragraph 187 above).

C. General conclusion on Croatia's claim

441. It follows from the foregoing that Croatia has failed to substantiate its allegation that genocide was committed. Accordingly, no issue of responsibility under the Convention for the commission of genocide can arise in the present case. Nor can there be any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide.

In view of the fact that *dolus specialis* has not been established by Croatia, its claims of conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide also necessarily fail.

Accordingly, Croatia's claim must be dismissed in its entirety.

442. Consequently, the Court is not required to pronounce on the inadmissibility of the principal claim as argued by Serbia in respect of acts prior to 8 October 1991. Nor does it need to consider whether acts alleged to have taken place before 27 April 1992 are attributable to the SFRY, or, if so, whether Serbia succeeded to the SFRY's responsibility on account of those acts.

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VI. CONSIDERATION OF THE MERITS OF THE COUNTER-CLAIM

443. In its Counter-Memorial Serbia made a counter-claim containing a number of submissions. In its final version, as presented by the Agent of Serbia at the close of the public hearings, that counter-claim is reproduced *in extenso* in paragraph 51 of the present Judgment. It constitutes Section II of Serbia's final submissions, and contains four paragraphs numbered 6 to 9.

444. In substance, Serbia asks the Court to declare that Croatia has violated the Genocide Convention by committing against the Serb national and ethnical group living in Croatia, during and after Operation "Storm" in 1995, acts prohibited by Article II of the Convention, with intent to destroy that group as such, in whole or in part (paragraph 6 of the final submissions).

Alternatively, Serbia claims — and asks the Court to declare — that Croatia has committed acts amounting to conspiracy to commit genocide, incitement and attempt to commit genocide and complicity in genocide, within the meaning of Article III of the Convention (paragraph 7).

Additionally, Serbia asks the Court to declare that Croatia has violated its obligations under the Convention to punish the perpetrators of the acts referred to in the preceding paragraphs (paragraph 8).

Finally, Serbia asks the Court, having found that Croatia's international responsibility has been engaged, to order the latter to take a number of measures in order to ensure full compliance with its obligations under the Convention and to redress the injurious consequences of the internationally wrongful acts attributable to it (paragraph 9).

445. The Court will begin by examining the submissions set out in paragraph 6 of Serbia's final submissions. The result of this examination will largely condition the way in which it approaches the submissions set out in the subsequent paragraphs.

A. Examination of the principal submissions in the counter-claim: whether acts of genocide attributable to Croatia were committed against the national and ethnical group of Serbs living in Croatia during and after Operation "Storm"

446. Serbia claims that Croatia committed the following acts defined in Article II of the Convention as constituting genocide: killings of members of the national and ethnical group of Serbs living in Croatia (II *(a)*); causing serious bodily or mental harm to members of the same group (II *(b)*); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (II *(c)*), all of these acts having been committed with intent to destroy, in whole or in part, the group as such.

447. Two points were not disputed between the Parties, and may be regarded by the Court as settled.

448. First, the Serbs living in Croatia at the time of the events in question — who represented a minority of the population — did indeed constitute a "national [or] ethnical" "group" within the meaning of Article II of the Genocide Convention, and the Serbs living in the Krajina region, who were directly affected by Operation "Storm", constituted a "substantial part" of that national or ethnical group, in the sense in which that expression is used in paragraph 198 of the Judgment rendered by the Court in 2007 in the case between Bosnia and Herzegovina and Serbia and Montenegro (see paragraph 142 above).

The Court therefore concludes that, if acts falling within the terms of Article II of the Convention were committed against the Krajina Serbs, and if they were perpetrated with intent to destroy that group of persons, it should accordingly find that the constituent elements of genocide were present, since the requirement of "intent to destroy at least a substantial part of the [national or ethnical] group" would be met (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 126, para. 198).

449. Secondly, the acts alleged by Serbia — or at least the vast majority of them — assuming them to be proved, were committed by the regular armed forces or police of Croatia.

It follows that these acts would be such as to engage Croatia's international responsibility if they were unlawful, simply because they were carried out by one or more of its organs. That would remain true, under the law governing the international responsibility of States, even if the author of the acts had acted contrary to the instructions given or exceeded his or her authority (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242, para. 214). Thus the Court's consideration of the counter-claim presents no difficulty in terms of the attributability of the alleged unlawful acts to the State whose international responsibility is in issue (namely the Applicant).

450. On the other hand, the Parties completely disagree on two key questions.

First, Croatia denies that the greater part of the acts alleged by Serbia even took place; and secondly, it denies that those acts, even if some of them were proved, were carried out with intent to destroy, in whole or in part, the national or ethnical group of the Croatian Serbs as such.

451. It is these two questions that the Court will now examine. It will first seek to ascertain whether acts constituting the physical element of genocide — that is to say, acts falling within the categories defined in Article II of the Convention — were in fact committed (the issue of the *actus reus*). It will then proceed, if any of the acts in question have been established, to rule on the question of whether they were committed with genocidal intent (the issue of the *dolus specialis*).

1. The *actus reus* of genocide

452. Serbia contends that Croatia committed various acts falling within the scope of subparagraphs *(a)*, *(b)* and *(c)* of Article II of the Genocide Convention, namely:

— indiscriminate shelling of Krajina towns, in particular Knin, allegedly resulting in the killing of Serb civilians within the meaning of subparagraph *(a)* of Article II;

— forced displacement of the Serb population of the Krajina, falling within the scope of subparagraph *(c)* of Article II;

— the killing of Serbs fleeing in columns the towns under attack, within the scope of subparagraph *(a)* of Article II;

— the killing of Serbs who remained, after Operation "Storm", within UN-protected areas of the Krajina (UNPAs), acts which are also covered by subparagraph *(a)* of Article II;

— infliction of ill-treatment on Serbs during and after Operation "Storm", within the scope of subparagraphs *(b)* and *(c)* of Article II;

— large-scale destruction and looting of Serb property during and after Operation "Storm", within the scope of subparagraph *(c)* of Article II.

453. Serbia further cites administrative and other measures allegedly taken by Croatia to prevent Serbs having fled the Krajina during Operation "Storm" from subsequently returning home.

However, in the Court's view, this matter was not relied on by Serbia as evidence of the *actus reus* of genocide, but rather as evidence of specific intent to destroy the targeted group in whole or in part, in other words, to prove the *dolus specialis*. It will accordingly be discussed later, under point 2.

(a) ***The evidence presented by Serbia in support of the facts alleged***

454. In support of its factual allegations, Serbia relies on a range of evidence from various sources, the bulk of which has been challenged by Croatia in terms of its relevance and credibility.

455. First, Serbia relies on publications by two non-governmental organizations, one Croatian, the other Serbian: the Croatian Helsinki Committee for Human Rights (hereinafter CHC), and the Veritas organization.

The first of these published a report in 2001 in Zagreb, entitled *Military Operation "Storm" and its Aftermath*; the second has published a list of the victims of Operation "Storm", which is regularly updated.

456. Croatia challenges the credibility of these two publications. It notes that they contain numerous errors, inaccuracies and inconsistencies, and that, moreover, the Veritas organization is neither independent nor impartial, in particular because its director held high office under several Governments of the RSK.

457. The Court agrees that neither the CHC report nor that of Veritas possesses such evidential weight as to enable the Court to consider a fact proved solely on the basis of those documents; indeed, Serbia itself has admitted that the reports contain factual errors. However, the Court does not consider those documents as so lacking in informational value that they should be wholly disregarded. The Court may take account of the information they contain whenever it appears to corroborate evidence from other sources. This approach is similar to that taken by the ICTY Trial Chamber in relation to the CHC report in the *Gotovina* case (*Gotovina* Trial Judgment, para. 50), to which the Court will return later in the present Judgment.

458. Serbia further bases its allegations on a number of other documents or testimonies, in particular: the Report on the situation of human rights in the territory of the former Yugoslavia of 7 November 1995, presented to the United Nations General Assembly and the Security Council by Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to resolution 1995/89 of the said Commission and decision 1995/920 of the Economic and Social Council; a report from the non-governmental organization Human Rights Watch, entitled "Impunity for Abuses Committed during 'Operation Storm', and the Denial of the Right of Refugees to Return to the Krajina", dating from August 1996; the expert report of Mr. Reynaud Theunens, entitled "Croatian Armed Forces and Operation Storm", submitted by the Prosecutor's Office of the ICTY in the *Gotovina* case; the statements of witnesses before national courts in Serbia and Bosnia and Herzegovina regarding the events at issue in the present case; the testimony of individuals heard by the ICTY in the *Gotovina* case; and finally, the written statements of seven witnesses and a witness-expert presented by Serbia in the present case, in respect of whom Croatia waived its right of cross-examination.

459. The Court considers that it must give evidential weight to the first of the above-mentioned documents, by reason both of the independent status of its author, and of the fact that it was prepared at the request of organs of the United Nations, for purposes of the exercise of their functions. The Court notes that Croatia has not disputed the objective nature of that report, even though it does not agree with certain of its factual findings.

The Court will accord evidential weight to the statements by the eight individuals called by Serbia to testify before it. However, it should be emphasized that the fact that Croatia declined to cross-examine those witnesses in no sense implies an obligation on the Court to accept all of their testimony as accurate. Moreover, Croatia clearly stated that its decision not to cross-examine the witnesses did not mean that it accepted their testimonies as accurate; on the contrary, it expressed significant reservations in relation to some of them.

The other documents and testimony referred to in the preceding paragraph will be duly considered by the Court, without, however, being regarded as conclusive proof of the facts alleged.

460. Finally, the Parties cited extensively from the Trial and Appeals Chamber Judgments of the ICTY in the *Gotovina* case, while largely disagreeing on the conclusions to be drawn from them.

The Parties' disagreement actually relates to the first of Serbia's claims, namely that Croatia carried out indiscriminate shelling of the Krajina towns at the start of Operation "Storm", thus causing numerous deaths among the civilian population.

The scope of the ICTY decisions in the *Gotovina* case will thus be examined below, in relation to the issue of whether that claim has been effectively established.

461. It suffices, at this stage, to recall that the fact that no high-ranking Croatian civilian or military officer has been found guilty of genocide by the ICTY — or indeed of any other charge — in relation to the events which took place during and after Operation "Storm" does not in itself preclude the Court from finding that Croatia's international responsibility is engaged for violation of the Genocide Convention (see in this regard *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 119-120, paras. 180-182). Likewise, the fact that the ICTY Prosecutor has never included a count of genocide in the indictments in cases relating to Operation "Storm" does not automatically mean that Serbia's counter-claim must be dismissed.

Indeed, the Parties do not appear to disagree on these two propositions. Croatia, however, emphasizes that the absence of any conviction by the ICTY and, moreover, the absence of any prosecution for genocide in relation to Operation "Storm" greatly weakens the thesis underlying Serbia's counter-claim, namely that genocide was committed by the organs of Croatia.

(b) ***Whether the acts alleged by Serbia have been effectively proved***

462. The Court will now examine the various categories of acts alleged by Serbia in support of its counter-claim, in order to ascertain whether, in each case, they have been proved on the basis of the evidence presented to the Court. It will do so following the order indicated in paragraph 452 above, namely: (i) killing of civilians as a result of the indiscriminate shelling of Krajina towns; (ii) forced displacement of the Serb population from the Krajina; (iii) killing of Serbs fleeing in columns from the towns under attack; (iv) killing of Serbs having remained in the areas of the Krajina protected by the United Nations; (v) infliction of ill-treatment on Serbs during and after Operation "Storm".

(i) Killing of civilians as a result of the allegedly indiscriminate shelling of Krajina towns

463. According to Serbia, from the start of the military actions in connection with Operation "Storm", Croatian armed forces indiscriminately shelled several towns and villages in the Krajina, an area with a majority Serb population, namely Knin, the most important town in the region, but also Benkovac, Obrovac, Gračac, Bosansko, Grahovo, Kijani, Kistanje, Uzdolje, Kovačić, Plavno, Polača and Buković.

The shelling was allegedly aimed both at military targets — where these existed — and the civilian population, causing a large number of deaths among civilians. According to the Respondent, in the municipality of Knin alone there were 357 deaths, including 237 civilians, many of them as a result of indiscriminate shelling. Moreover, according to Serbia the shelling was ordered with the intention of forcing the Serb population to flee the Krajina. This aspect, which relates to the second category of acts alleged by Serbia, namely the forced displacement of the Serb population, will be discussed in the following section.

According to Croatia, on the contrary, the shelling of Krajina towns was directed exclusively at military targets, and if it caused civilian casualties — the number of which, in any event, was far lower than that alleged by Serbia — that was not the consequence of any deliberate intent to target the civilian population, but solely of the proximity of military objectives to areas inhabited by that population. In support of its position, Croatia relies on the findings of the ICTY Appeals Chamber in the *Gotovina* case.

464. Since the Parties draw essentially contrary conclusions from the decisions of the ICTY in the *Gotovina* case, and since those decisions are highly relevant for purposes of the present case, the Court will briefly discuss the proceedings before the ICTY in that case, and summarize the decisions rendered at first instance, and then on appeal.

465. The proceedings which resulted in those decisions were initiated by the ICTY Prosecutor in 2001 and 2006 against Ante Gotovina, Ivan Čermak and Mladen Markač, three Croat generals who had played various leading roles in August 1995 in connection with Operation "Storm", the declared aim of which was to enable the Government of Croatia to regain control over the Krajina, then controlled by the authorities of the RSK.

The main charges against all three accused were persecution, killing and murder, deportation and forcible transfer of the population, cruel and inhumane acts and the wanton destruction of towns and villages.

In substance, the Prosecutor argued that Croatian armed forces had carried out indiscriminate artillery attacks on a large number of towns and villages in the Krajina, deliberately targeting civilian areas as well as military objectives. Those attacks had caused the deaths of large numbers of civilians, and the destruction of property unconnected with any military target, as well as the departure of the majority of the population, which had fled the shelled areas.

466. By its Judgment of 15 April 2011, the Trial Chamber acquitted General Čermak, but convicted Generals Gotovina and Markač, sentencing them to terms of imprisonment of 24 and 18 years respectively.

The Chamber held that these two defendants had taken part in a joint criminal enterprise aimed at the expulsion of the Serb civilian population from the Krajina, through indiscriminate shelling of the four towns of Knin, Benkovac, Obrovac and Gračac, the purpose of which — alongside any strictly military objectives — was to terrorize and demoralize the population so as to force it to flee.

The Trial Chamber accordingly found the two accused guilty of, *inter alia*, murder, deportation, persecution, destruction and inhumane acts (*Gotovina* Trial Judgment, paras. 2619, 2622).

467. In order to reach this conclusion, the Trial Chamber relied, first, on certain documents, including the transcript of a meeting held at Brioni on 31 July 1995, just a few days before the launch of the operation, under the chairmanship of President Tudjman (that transcript will be discussed later in the present Judgment) and secondly, and above all, on the so-called "200 Metre Standard" (*ibid.*, paras. 1970-1995, 2305, 2311), under which only shells impacting less than 200 metres from an identifiable military target could be regarded as having been aimed at that target, whilst those impacting more than 200 metres from a military target should be regarded as evidence that the attack was deliberately aimed at both civilian and military targets, and was therefore indiscriminate (*ibid.*, para. 1898).

Applying that standard to the case before it, the Trial Chamber found that the artillery attacks on the four towns mentioned above (but not on the other Krajina towns and villages) had been indiscriminate, since a large proportion of shells had fallen over 200 metres from any identifiable military target (*ibid.*, paras. 1899-1906, 1917-1921, 1927-1933, 1939-1941).

468. In its Judgment of 16 November 2012 in the *Gotovina* case, the Appeals Chamber disagreed with the Trial Chamber's analysis and reversed the latter's decision.

The Appeals Chamber held that the "200 Metre Standard" had no basis in law and lacked any convincing justification. The Chamber accordingly concluded that the Trial Chamber could not reasonably find, simply by applying that standard, that the four towns in question had been shelled indiscriminately. It further held that the Trial Chamber's reasoning was essentially based on the application of the standard in question, and that none of the evidence before the Court — particularly the Brioni Transcript — showed convincingly that the Croatian armed forces had deliberately targeted the civilian population (*Gotovina* Appeals Judgment, paras. 61, 64-65, 77-83, 93). The Appeals Chamber accordingly found that the prosecution had failed to prove a "joint criminal enterprise", and acquitted the two accused on all of the counts in the indictment (including murder and deportation) (*ibid.*, para. 158).

469. The Court recalls, as it stated in 2007, that it "should in principle accept as highly persuasive relevant findings of facts made by the Tribunal at trial, unless of course they have been upset on appeal" (see paragraph 182 above).

That should lead the Court, in the present case, to give the greatest weight to factual findings by the Trial Chamber which were not reversed by the Appeals Chamber, and to give due weight to the findings and determinations of the Appeals Chamber on the issue of whether or not the shelling of the Krajina towns during Operation "Storm" was indiscriminate.

470. Against this approach, Serbia argued that the findings of an ICTY Appeals Chamber should not necessarily be accorded more weight than those of a Trial Chamber. Indeed, according to Serbia, the members of the Appeals Chamber are appointed at random and vary from one case to another, so that they have no greater experience or authority than those of the Trial Chamber having ruled on the same case. Serbia argues that the main difference between the two benches appears to be that the former consists of five judges, whilst the latter is composed of three judges. Moreover, the decision of the Trial Chamber was unanimous when it convicted Gotovina and Markač, whereas the Appeals Chamber reached its decision to acquit them by a majority of three against two. Serbia points out that, overall, the majority of the judges having sat in the *Gotovina* case were of the view that the Croatian forces did engage in indiscriminate shelling of the four above-mentioned Krajina towns.

It would follow, according to Serbia, that in the particular circumstances of the present case the Court should not attach any greater importance to the findings of the Appeals Chamber than to those of the Trial Chamber, and should form its own view of the persuasiveness of the arguments accepted by each of the two benches.

471. Irrespective of the manner in which the members of the Appeals Chamber are chosen — a matter on which it is not for the Court to pronounce — the latter's decisions represent the last word of the ICTY on the cases before it when one of the parties has chosen to appeal from the Trial Chamber's Judgment. Accordingly, the Court cannot treat the findings and determinations of the Trial Chamber as being on an equal footing with those of the Appeals Chamber. In cases of disagreement, it is bound to accord greater weight to what the Appeals Chamber Judgment says, while ultimately retaining the power to decide the issues before it on the facts and the law.

472. The Court concludes from the foregoing that it is unable to find that there was any indiscriminate shelling of the Krajina towns deliberately intended to cause civilian casualties. It would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on an issue of this kind. Serbia has indeed drawn the Court's attention to the controversy aroused by the Appeals Chamber's Judgment. However, no evidence, whether prior or subsequent to that Judgment, has been put before the Court which would incontrovertibly show that the Croatian authorities deliberately intended to shell the civilian areas of towns inhabited by Serbs. In particular, no such intent is apparent from the Brioni Transcript, which will be subjected to a more detailed analysis below in relation to the existence of the *dolus specialis*. Nor can such intent be regarded as incontrovertibly established on the basis of the statements by persons having testified before the ICTY Trial Chamber in the *Gotovina* case, and cited as witnesses by Serbia in the present case.

473. Serbia further argues that, even if the Court were unwilling to reject the finding of the Appeals Chamber that the artillery attacks on the Krajina towns were not indiscriminate, and thus lawful under international humanitarian law, that would not prevent it from holding that those attacks, conducted in the course of an armed conflict, were unlawful under the Genocide Convention, if they were motivated by an intent to destroy the Serb population of the Krajina, in whole or in part.

474. There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.

However, it is not the task of the Court in the context of the counter-claim to rule on the relationship between international humanitarian law and the Genocide Convention. The question to which it must respond is whether the artillery attacks on the Krajina towns in August 1995, in so far as they resulted in civilian casualties, constituted "killing [of] members of the [Krajina Serb] group", within the meaning of Article II *(a)* of the Genocide Convention, so that they may accordingly be regarded as constituting the *actus reus* of genocide.

"Killing" within the meaning of Article II *(a)* of the Convention always presupposes the existence of an intentional element (which is altogether distinct from the "specific intent" necessary to establish genocide), namely the intent to cause death (see paragraph 186 of the 2007 *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment, which states that "'[k]illing' must be intentional", cited in the present Judgment at paragraph 156 above). It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II *(a)* of the Genocide Convention.

475. The Court concludes for the foregoing reasons that it has not been shown that "killing[s] [of] members of the [protected] group", within the meaning of Article II of the Convention, were committed as a result of the artillery attacks on towns in that region during Operation "Storm" in August 1995.

(ii) Forced displacement of the Krajina Serb population

476. Serbia contends that the mass exodus of Serbs from the Krajina, whose numbers it estimates at a total of between 180,000 and 220,000 persons, was a forcible one, resulting from a political plan deliberately designed by the Croatian authorities to force the population of Serb origin living in Croatia to leave and to be replaced by a population of Croat origin.

Croatia disputes this claim, arguing that the Serbs who left the Krajina during and immediately after Operation "Storm" did so because of the risk of violence commonly associated with an armed conflict, or of the fear generally instilled in them by the Croatian forces, but without being forced to do so by the latter. It further contends that "the 'exodus' of a majority of the Serb population was pursuant to a decision to evacuate taken by the 'RSK's' 'Supreme Defence Council'". Croatia cites the Judgment of the ICTY Appeals Chamber in *Gotovina*, in which the Chamber overturned the findings of the Trial Chamber that the Serb exodus had been provoked by unlawful attacks on the towns of Knin, Benkovac, Gračac and Obrovac.

477. The only question facing the Court is whether genocide was committed during Operation "Storm". The forced displacement of a population, even if proved, would not in itself constitute the *actus reus* of genocide.

As the Court stated in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,

> "[ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide . . . [the] deportation or

> displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group . . . 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." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 123, para. 190; emphasis in the original.)

478. Combined with other elements, in particular with the commission of acts prohibited by Article II, the forced displacement of a population may contribute to the proof of genocidal intent (see paragraphs 162-163 above).

479. In the present case, the Court notes that it is not disputed that a substantial part of the Serb population of the Krajina fled that region as a direct consequence of the military actions carried out by Croatian forces during Operation "Storm", in particular the shelling of the four towns referred to above. It further notes that the transcript of the Brioni meeting, to which it will return later (see paragraphs 501-507 below), makes it clear that the highest Croatian political and military authorities were well aware that Operation "Storm" would provoke a mass exodus of the Serb population; they even to some extent predicated their military planning on such an exodus, which they considered not only probable, but desirable (see paragraph 504 below).

480. In any event, even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina, such displacement would only be capable of constituting the *actus reus* of genocide if it was calculated to bring about the physical destruction, in whole or in part, of the targeted group, thus bringing it within the scope of subparagraph *(c)* of Article II of the Convention.

The Court finds that the evidence before it does not support such a conclusion. Even if there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been shown that such a policy was aimed at causing the physical destruction of the population in question.

(iii) Killing of Serbs fleeing in columns from the towns under attack

481. According to Serbia, the columns of Serbs fleeing their homes were targeted by artillery shelling and aerial bombardment, gunfire by infantry, and even attacks by Croatian civilians. It was in areas of Sector North that the majority of the attacks are alleged to have taken place. Serbia relies on testimony that, in the morning of 4 August 1995, that is to say, at the start of the attack on Knin, long convoys of refugees fleeing neighbouring municipalities were shelled as they passed

through Knin. Serbia alleges that the roads followed by those convoys were deliberately shelled by Croatian forces, as were convoys of civilians fleeing Knin on 5 August. Serbia further cites reports by Human Rights Watch and the CHC. According to the latter, on 6 August Serbs had already formed a column fleeing the Croatian forces which had taken the towns of Knin, Obrovac and Benkovac in Sector South. Convoys of Serb refugees on other roads were allegedly also attacked, and there were likewise attacks on civilians near the towns of Glina and Živorac (on the road between Glina and Dvor), Maja and Cetingrad (in Sector North), as well as on Vrhovine and Petrovac (in Sector South). In support of its allegations, Serbia has also produced statements by 12 witnesses who testified before the courts of Serbia and Bosnia and Herzegovina.

Croatia denies these accusations. It asserts that civilians fleeing the towns and villages targeted by the military operation were passing through combat zones, so that they could have been victims of gunfire not specifically directed at them, and that the columns that were fired on also included both civilians and soldiers.

Croatia further asserts that almost all of the Respondent's allegations on this issue are based on the CHC report, whose reliability it challenges.

482. The Court notes that the ICTY did not address the question of attacks on columns of fleeing Serbs. It must rule in this regard on the basis of the evidence presented to it by the Parties.

483. The Court finds that the evidence produced by Serbia is not entirely conclusive. As it has indicated, the Court cannot consider a fact proved solely on the basis of the reports of CHC and Human Rights Watch (see paragraphs 457-459 above). The statements of witnesses before courts in Serbia and Bosnia and Herzegovina do not always demonstrate direct knowledge of the facts. In any event, this evidence leaves a substantial degree of doubt, in particular regarding the scale and origin of the attacks suffered by the columns of Serb refugees.

484. However, the Court considers that there is sufficient evidence to establish that such attacks did take place, and that they were in part carried out by Croatian forces, or with their acquiescence.

In this regard, the Court attaches some weight to the following passage from the Report of Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, in which she stated the following concerning Operation "Storm":

> "Fleeing civilians were subject to various forms of harassment, including military assaults and acts by Croatian civilians. On 8 August, a refugee column was shelled between Glina and Dvor, resulting in at least 4 dead and 10 wounded. A serious incident occurred in Sisak on 9 August, when a Croatian mob attacked a refugee column with stones, resulting in the injury of many persons. One woman

> subsequently died of her wounds. Croatian police watched passively until United Nations civilian police monitors showed up and prompted them to intervene. The Special Rapporteur met some Krajina refugees in Belgrade. They informed her of the tragic circumstances of their flight, which was particularly traumatic for children, the elderly, the sick and wounded." (United Nations, doc. S/1995/933, p. 7, para. 18.)

The Court furthermore gives evidential weight to certain statements cited by Serbia from persons who directly witnessed such attacks and gave evidence before courts in Serbia and Bosnia and Herzegovina during the years following Operation "Storm". In particular, Mr. Boris Martinović described how, having fled Glina following the shelling of that town between 4 and 7 August 1995, his refugee column joined another column fleeing Knin and the region of Kordun, and how the entire convoy was then shelled by the Croatian army near Brezovo Polje, and again near Gornji Zirovac. Similarly, Mr. Mirko Mrkobrad, who appeared as a witness in the present case, stated that he had been in a refugee column, which was shelled by Croat forces near a place called Ravno Rasce on 8 August 1995.

485. The Court's conclusion is that killings were in fact committed during the flight of the refugee columns, even if it is unable to determine their number, and even though there is significant doubt as to whether they were carried out systematically. These killings, which fall within the scope of subparagraph *(a)* of Article II of the Genocide Convention, constitute the *actus reus* of genocide.

(iv) Killing of Serbs having remained in the areas of the Krajina protected by the United Nations

486. Serbia contends that during Operation "Storm", and after it had been officially terminated, Croatian units in the United Nations protected areas (UNPAs) within the RSK systematically carried out executions of Serb civilians and of soldiers who had laid down their arms. It alleges that, while the majority of the killings were committed in August 1995, they continued until the end of the year, during which time Croatian forces systematically massacred Serbs who had not fled the captured villages. The Respondent admits that, while the majority of killings which took place in Sector South are, in its view, now well established and recorded, the information available regarding those perpetrated in Sector North is more fragmentary. It maintains, however, that Croatian forces carried out systematic executions of Serb civilians having remained in the UNPAs both in the southern and in the northern sectors. It refers in particular to the findings of the Trial Chamber in the *Gotovina* case, which it says confirm that Croatian military units and special police continued to target the Serb civilian population of the Krajina after Operation "Storm" and committed more than 40 specified murders in August and September 1995.

Croatia disputes these allegations. It admits that crimes were committed against Serbs during Operation "Storm" and in its immediate aftermath, but contends that these were isolated acts, whose perpetrators have been convicted by the Croatian courts; on the contrary, there were no systematic killings of Serbs who had remained in the UNPAs. Croatia further challenges the reliability of the CHC report, on which Serbia's allegations are largely founded.

487. The Court finds that the occurrence of summary executions of Serbs in the UNPAs during Operation "Storm" and the following weeks has been established by the testimony of a number of witnesses heard by the ICTY in the *Gotovina* case.

488. The Trial Chamber was sufficiently convinced by that evidence to accept it as proof that Croatian military units and special police carried out killings of Serbs in at least seven towns of the Krajina.

Thus, the Chamber considered it established that four Serbs were killed by one or more members of the Croatian special police on 7 August 1995 in Oraovac, Donji Lapac municipality (see *Gotovina* Trial Judgment, paras. 217-218), and that three people were killed by members of the Croatian army in Evernik municipality (two on 7 August 1995 in the village of Mokro Polje and one on or about 18 August in the village of Oton Polje) (*ibid.*, paras. 226-227, 231-232). It also regarded as proved the killing by members of the Croatian army of three people in the village of Zrmanja, Gračac municipality, in August and September 1995 (*ibid.*, paras. 246, 254-256), of one person in the village of Rudele, Kistanje municipality, at the start of August 1995 (*ibid.*, para. 312), and of one person in Kolarina, in the Benkovac municipality, on 28 September 1995 (*ibid.*, paras. 207, 1848). Lastly, it considered it established that a certain number of killings were committed in the municipalities of Knin and Orlič by Croatian military units and special police, with a total of 23 victims in Knin between 5 and 25 August 1995 (*ibid.*, paras. 313-481) and nine in Orlič on 6 August of the same year (*ibid.*, paras. 489-526). The Trial Chamber found that the victims were all civilians or people who had been detained or otherwise placed *hors de combat* (*ibid.*, paras. 1733, 1849).

489. While the reports of the non-governmental organizations CHC and Veritas cannot be regarded as sufficiently credible to establish the numbers of Serb civilian victims in the UNPAs, their findings nonetheless corroborate other evidence that summary executions occurred. Moreover, Croatia itself has admitted that some killings did take place.

490. The Court notes that, although the Appeals Chamber overturned the Trial Chamber's Judgment, it did not reverse the latter's factual findings regarding the killings and ill-treatment of Serbs by members of the Croatian army and police. Its reasoning, which is summarized above, was based on the fact that the Trial Chamber had erred in finding that the shelling of the "four towns" had been indiscriminate; that the shelling could not have been found to have been indiscriminate on the basis of the evidence before the Appeals Chamber; and that accordingly the existence of a joint criminal enterprise to expel the Krajina Serbs had not been established. In so ruling, the Appeals Chamber made no finding, because it had no need to do so, on the various individual acts of killing and ill-treatment noted — and regarded as proved — by the Trial Chamber. It should be emphasized in this regard that the task of the Appeals Chamber was to rule on the individual criminal responsibility of two high-ranking Croatian officials, and not on that of other members of the Croatian armed forces and police having committed crimes during Operation "Storm", and — obviously — still less on the international responsibility of Croatia, which is the task incumbent upon this Court.

491. The Court accordingly considers that the factual findings in the Trial Chamber Judgment on the killing of Serbs during and after Operation "Storm" within the UNPAs must be accepted as "highly persuasive", since they were not "upset on appeal" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 134, para. 223).

492. In addition, the Court also notes that the Report presented by Mrs. Elisabeth Rehn to the General Assembly and the Security Council, which it has already cited, states the following:

> "Evidence gathered so far indicates that violations of human rights and humanitarian law which were committed during and after operation 'Storm' include the following:
>
> . . . . . .
>
> *(c)* killing of remaining Serb civilians . . ." (United Nations, doc. S/1995/933, p. 8, para. 23.)

493. The Court finds that acts falling within subparagraph *(a)* of Article II of the Genocide Convention were committed by members of the Croatian armed forces against a number of Serb civilians, and soldiers who had surrendered, who remained in the areas of which the Croatian army had taken control during Operation "Storm". Those acts are "killings" constituting the *actus reus* of genocide.

(v) Ill-treatment of Serbs during and after Operation "Storm"

494. Serbia alleges that, during and immediately after Operation "Storm", a number of Serbs were ill-treated and tortured by Croatian forces. It relies on statements by several individuals having testified before courts in Serbia, as well as on the various available reports on Operation "Storm". It also cites the findings of the Trial Chamber in the *Gotovina* case, which purportedly confirm that Croatian military units and special police carried out a large number of inhumane acts and acts of cruel treatment against Serbs throughout August and September 1995.

Croatia denies these charges. It contests both the probative value of the evidence produced by Serbia and the scale of the acts invoked. It insists that, in any event, it was never the intention of the Croatian leadership, and of President Tudjman in particular, to destroy the Krajina Serbs.

495. The same considerations as those set out in the previous section regarding the allegations of killings of Serbs in the UNPAs lead the Court to the view that there is sufficient

evidence of ill-treatment of Serbs. The ICTY Trial Chamber in the *Gotovina* case found that such acts had in fact taken place, and considered it as established that Serb civilians and soldiers who had laid down their arms were ill-treated by Croatian military units and special police in at least four towns in the Krajina; it describes these acts in detail in Section 4 of its Judgment.

Thus, the Trial Chamber considered it established that a Serb civilian by the name of Konstantin Drča was arrested outside his home at around 4.30 p.m. on 11 August 1995 by people in uniform armed with automatic rifles, and transported to a house in Benkovac, where he was held until 15 March 1996. During his detention, members of the Croatian military police (VP) beat him several times and threatened to slit his throat (*Gotovina* Trial Judgment, para. 1111). The Chamber also found that, in Gračac, a civilian by the name of Bogdan Brkić was the victim of ill-treatment by members of the Croatian army (HV), who tied him to a tree, put some textiles underneath him, and set them alight, causing him pain (*ibid.*, para. 1120). In Knin, on 5 August 1995 and in the days that followed, ten Serbs were — often severely — beaten, threatened, injured and ill-treated by members of the Croatian military police and army (*ibid.*, paras. 316, 322, 476, 1136, 1138, 1141, 1146). The victims were civilians or soldiers who had laid down their arms. In Orlič, on 16 August 1995, members of Croatian military units or special police attempted to burn an elderly Serb woman (*ibid.*, para. 1158).

The Trial Chamber described these actions as "inhumane acts" and "cruel treatment" (*ibid.*, para. 1800). For the reasons given above, the Appeals Chamber did not upset those findings.

In her Report, the Special Rapporteur of the Commission on Human Rights included among the "violations of human rights and humanitarian law which were committed during and after Operation Storm", "[t]hreats and ill-treatment against the Serb minority population by Croatian soldiers and policemen and also by Croatian civilians" (United Nations, doc. S/1995/993, p. 8, para. 23).

496. It is clear from the detailed description in the ICTY Trial Chamber Judgment in the *Gotovina* case that many of the acts in question were at least of a degree of gravity such as would enable them to be characterized as falling within subparagraph *(b)* of Article II of the Genocide Convention.

In light of the preceding conclusion, the Court does not consider it necessary, at this stage of its reasoning, to determine whether those acts, or certain of them, also amounted to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" within the meaning of subparagraph *(c)* of Article II of the Convention.

(vi) Large-scale destruction and looting of Serb property during and after Operation "Storm"

497. Serbia contends that, during and immediately after operation "Storm", Croatian forces systematically looted and destroyed Serb houses. They are also alleged to have killed and burned livestock, polluted and destroyed wells and stolen stocks of firewood in Serb villages. Croatia

disputes the scale of the acts alleged by Serbia and argues that, in any event, the Respondent has failed to show that the Croatian Government in any way planned, ordered, committed or encouraged such acts. Moreover, according to Croatia, such acts cannot constitute the *actus reus* of genocide within the meaning of Article II of the Convention.

498. The Court recalls that, in order to come within the scope of Article II *(c)* of the Genocide Convention, the acts alleged by Serbia must have been such as to have inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part. The Court finds that the evidence before it does not enable it to reach such a conclusion in the present case. Even if Serb property was looted and destroyed, it has in any event not been established that this was aimed at bringing about the physical destruction of the Serb population of the Krajina.

Conclusion as to the existence of the *actus reus* of genocide

499. In light of the above, the Court is fully convinced that, during and after Operation "Storm", Croatian armed forces and police perpetrated acts against the Serb population falling within subparagraphs *(a)* and *(b)* of Article II of the Genocide Convention, and that these acts constituted the *actus reus* of genocide.

The Court must accordingly now determine whether the existence of the specific intent *(dolus specialis)* which characterizes genocide has been established in the present case.

2. The genocidal intent *(dolus specialis)*

500. Serbia contends that the acts perpetrated by Croatia against the Serb population of the Krajina and allegedly falling within subparagraphs *(a)*, *(b)* and *(c)* of Article II of the Genocide Convention were committed with the intent of destroying the Krajina Serbs, a substantial part of the national and ethnical group of the Serbs in Croatia.

According to Serbia, the existence of that genocidal intent can be inferred, first, from the actual language of the transcript of the meeting held at Brioni on 31 July 1995, and secondly, and in any event, from the pattern of conduct that is apparent from the totality of the actions decided upon and implemented by the Croatian authorities during and immediately after Operation "Storm" — a pattern of conduct such that it can only denote the existence of genocidal intent.

(a) *The Brioni Transcript*

501. On 31 July 1995 a meeting of Croatia's top military leaders was held on the island of Brioni under the chairmanship of the President of the Republic of Croatia, Franjo Tudjman, in order to prepare Operation "Storm", which was indeed launched a few days later.

The full transcript of the discussions at that meeting, which were recorded, was produced before the ICTY during the *Gotovina* proceedings, then produced by Serbia before the Court for purposes of the present case. With a few isolated exceptions, the actual words of the participants are reproduced in that transcript.

502. According to Serbia, several passages from the transcript demonstrate the intention of the Croatian authorities, at the highest level, physically to eliminate the Krajina Serbs.

Serbia relies on the following passages.

At the start of the meeting President Tudjman is quoted 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."

Later on in the discussion the Croatian President further stated:

> "And, particularly, gentlemen, please remember how many Croatian villages and town have been destroyed, but that's still not the situation in Knin today…"

At a later point, he continued:

"[b]ut I said, and we've said it here, that they should be given a way out here . . . Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other."

To which General Gotovina replied:

> "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."

A little later, the President's son, Miroslav Tudjman, stated:

> "It is realistic to expect that when this is cleared and their forces [Serb armed forces] pulled out [from the Krajina] then they can prepare after ten days. In that time we will clear the entire area."

Finally, President Tudjman said:

> "If we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing."

503. Croatia disputes Serbia's interpretation of the Brioni Transcript. According to the Applicant, the Brioni discussions related exclusively to military and strategic issues: it was a matter of planning Operation "Storm" in the most effective way, rather than settling the fate of the Serb population living in Krajina. Only a biased reading of certain passages taken out of context could suggest — wrongly in Croatia's view — the existence of a plan aimed at destroying the civilian population. Croatia further contends that this was the conclusion of both the ICTY Trial Chamber and the Appeals Chamber in the *Gotovina* case in regard to the meaning and scope of the Brioni Transcript.

504. The Court is not persuaded by the arguments that Serbia seeks to derive from the Brioni Transcript.

In the Court's view, the passages quoted above, which are taken from the transcript of a meeting which lasted almost two hours, are far from demonstrating an intention on the part of the Croatian leaders physically to destroy the group of Croatian Serbs, or the substantial part of that group constituted by the Serbs living in Krajina.

President Tudjman's reference — on which Serbia places so much emphasis — to the aim of the Croatian forces being "to inflict such blows that the Serbs will to all practical purposes disappear" must be read in context, and specifically in light of what immediately follows: "that is to say, the areas we do not take at once must capitulate within a few days". Taken as a whole, that sentence is clearly more indicative of the designation of a military objective, rather than of the intention to secure the physical destruction of a human group.

The fact that the President subsequently asked the meeting to "remember how many Croatian villages and towns [had] been destroyed", while pointing out that this was "still not the situation in Knin", does not establish an intent on his part to destroy the Serb population of the Krajina.

Similarly, the concern expressed by the Croatian Head of State that the Serb civilians should be left with accessible escape routes, "[b]ecause it is important that those civilians set out, and then the army will follow them", in no way suggests any intent to destroy the Serb group as such, but is better understood as an aspect of military strategy. And it is clarified in particular by the final part of the same sentence: "and when the columns [of civilians and soldiers] set out, they will have a psychological impact on each other".

The same applies to General Gotovina's reply, where he foresees that there would not be many Serb civilians left in the area once the Croatian military offensive has begun, except for "those who have to stay, who have no possibility of leaving". Although not directly linked to any strategic considerations, that remark in no way suggests an intention physically to eliminate the Serb population.

Furthermore, the remark by Miroslav Tudjman ("When . . . their forces [have] pulled out, then they can prepare after ten days. In that time we will clear the entire area"), while containing a certain ambiguity, which the context cannot dispel, does not represent sufficiently persuasive evidence of a genocidal intent.

Finally, President Tudjman's statement that he would be "in favour of destroying everything by shelling prior to advancing" — if the Croat forces "had enough" ammunition — was made in the context of a discussion on the need to use the military resources available to those forces with restraint. It cannot be interpreted as reflecting an intent on the President's part to destroy the Krajina Serbs as such.

505. At most, the view might be taken that the Brioni Transcript shows that the leaders of Croatia envisaged that the military offensive they were preparing would have the effect of causing the flight of the great majority of the Serb population of the Krajina, that they were satisfied with that consequence and that, in any case, they would do nothing to prevent it because, on the contrary, they wished to encourage the departure of the Serb civilians.

However, even that interpretation, assuming it to be correct, would be far from providing a sufficient basis for the Court to make a finding of the existence of the specific intent which characterizes genocide.

506. The Court further notes that this conclusion is confirmed by the way the Brioni Transcript was dealt with by the ICTY Trial and Appeals Chambers in their decisions in the *Gotovina* case.

The Trial Chamber found that certain items in the transcript constituted evidence, together with other elements, of the existence of a concerted plan by the Croatian leaders to expel the Serb civilian population of the Krajina (the "joint criminal enterprise"). However, the Chamber found no evidence of an intention physically to destroy the group of the Krajina Serbs. In particular, with regard to the first remark of President Tudjman quoted above ("We have to inflict such blows that the Serbs will to all practical purposes disappear"), the Trial Chamber found that "when read in its context this particular statement focuses mainly on the Serb military forces, rather than the Serb civilian population" (*Gotovina* Trial Judgment, para. 1990).

As for the Appeals Chamber, it did not go nearly as far as the Trial Chamber, expressing itself as follows:

> "[O]utside th[e] context [of unlawful attacks], it was not reasonable to find that the only possible interpretation of the Brioni Transcript involved a [joint criminal enterprise] to forcibly deport Serb civilians. Portions of the Brioni Transcript deemed incriminating by the Trial Chamber can be interpreted, absent the context of unlawful artillery attacks, as inconclusive with respect to the existence of a [joint criminal enterprise], reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction. Thus discussion of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts. Other

> parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the town of Knin, could be reasonably construed as using shorthand to describe the military forces stationed in an area, or intending to demonstrate potential military power in the context of planning a military operation." (*Gotovina* Appeals Judgment, para. 93.)

507. In conclusion, the Court considers that, even taken together and interpreted in light of the contemporaneous overall political and military context, the passages from the Brioni Transcript quoted by Serbia, like the rest of the document, do not establish the existence of the specific intent *(dolus specialis)* which characterizes genocide.

(b) ***Existence of a pattern of conduct indicating genocidal intent***

508. Serbia contends that, even if the Court were to find that the Brioni Transcript does not constitute evidence of Croatia's genocidal intent, and even if none of the acts alleged by the Respondent is in itself evidence of the existence of such intent, the acts and statements of the Croatian authorities taken as a whole, before, during and immediately after Operation "Storm" manifest a consistent pattern of conduct which can only show that those authorities were animated by a desire to destroy, in whole or in part, the group of Serbs living in Croatia. This is said to emerge, in particular, from the series of military operations conducted by Croatia from 1992 to 1995, during which Croatian forces allegedly committed war crimes and serious human rights violations against Serbs in Croatia. According to Serbia, this period was characterized by a policy of systematic discrimination against the Serbs, culminating in Operation "Storm", which marked the point at which the campaign turned into one aimed at the actual destruction of the group.

509. Croatia vigorously disputes that assertion. It maintains that the purpose of all the acts and statements of the Croatian authorities cited by Serbia was strictly confined to regaining possession of areas under Serb control. It had first sought to achieve that aim by peaceful means, but eventually had no other choice but recourse to force. It considers that the evidence presented by Serbia is far from establishing a pattern of conduct such that it can only show an intention to destroy the protected group, in whole or in part.

510. In this regard, the Court recalls two findings from its Judgment rendered in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, which it has already referred to earlier in the present Judgment, and which must now be regarded as solidly rooted in its jurisprudence.

First, what is generally called "ethnic cleansing" does not in itself constitute a form of genocide. Genocide presupposes the intent physically to destroy, in whole or in part, a human group as such, and not merely a desire to expel it from a specific territory. Acts of "ethnic cleansing" can indeed be elements in the implementation of a genocidal plan, but on condition that there exists an intention physically to destroy the targeted group and not merely to secure its forced displacement (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I),* p. 122, para. 190).

Secondly, for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent (see paragraphs 145-148 above).

511. In light of the two preceding propositions, Serbia's "pattern of conduct" argument cannot succeed. The Court cannot see in the pattern of conduct on the part of the Croatian authorities immediately before, during and after Operation "Storm" a series of acts which could only reasonably be understood as reflecting the intention, on the part of those authorities, physically to destroy, in whole or in part, the group of Serbs living in Croatia.

512. As has already been stated above, not all of the acts alleged by Serbia as constituting the physical element of genocide have been factually proved. Those which have been proved — in particular the killing of civilians and the ill-treatment of defenceless individuals — were not committed on a scale such that they could only point to the existence of a genocidal intent.

513. It is true that Serbia also cited, in its argument on Croatia's "pattern of conduct", the administrative measures imposed to prevent the Krajina Serbs from returning home. According to Serbia, these confirm the conclusion — which it asks the Court to draw — that the real target of Operation "Storm" was the Serb population.

514. In the Court's view, even if Serbia's allegations in regard to the refusal to allow the Serb refuges to return home — allegations disputed by Croatia — were true, that would still not prove the existence of the *dolus specialis*: genocide presupposes the intent to destroy a group as such, and not to inflict damage upon it or to remove it from a territory, irrespective of how such actions might be characterized in law.

Conclusion regarding the existence of the *dolus specialis*, and general conclusion on the commission of genocide

515. The Court concludes from the foregoing that the existence of the *dolus specialis* has not been established.

Accordingly, the Court finds that it has not been proved that genocide was committed during and after Operation "Storm" against the Serb population of Croatia.

B. Discussion of the other submissions in the counter-claim

1. Alternative submissions

516. In the alternative, in the event that the Court does not uphold the principal submissions asking it to find that Croatia is internationally responsible for acts of genocide attributable to it, Serbia requests the Court to find that Croatia has violated its obligations under subparagraphs *(b)*, *(c)*, *(d)* and *(e)* of Article III of the Genocide Convention, namely its obligations not to commit acts constituting: "*(b)* Conspiracy to commit genocide; *(c)* Direct and public incitement to commit genocide; *(d)* Attempt to commit genocide; and *(e)* Complicity in genocide".

517. Since the Court has not found any acts capable of being characterized as genocide in connection with the events during and after Operation "Storm", it is bound to conclude that Croatia did not breach its obligations under subparagraph *(e)* of Article III. Moreover, in the absence of the necessary specific intent which characterizes genocide, Croatia cannot be considered to have engaged in "conspiracy to commit genocide" or "direct and public incitement to commit genocide", or in an attempt to commit genocide, all of which presuppose the existence of such an intent.

It follows that the alternative submissions must be rejected.

2. Subsidiary submissions

518. On a subsidiary basis, irrespective of whether the Court upholds its principal and alternative submissions, Serbia requests the Court to find that Croatia has violated its obligation to punish acts of genocide committed against the Serb ethnical and national group living in Croatia, an obligation incumbent upon it under Article VI of the Genocide Convention, which provides:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

519. Since Serbia has failed to prove the existence of an act of genocide, or of any of the other acts mentioned in Article III of the Convention, committed against the Serb population living in Croatia, its subsidiary submissions must also necessarily be rejected.

3. Submissions requesting the cessation of the internationally wrongful acts attributable to Croatia and reparation in respect of their injurious consequences

520. Serbia asks the Court to order Croatia immediately to take effective steps to comply with its obligation to punish the authors of the acts of genocide committed on its territory during and after Operation "Storm", and to take various measures to make good the damage and loss caused by its violations of the Genocide Convention, in particular by compensating the victims.

521. Since the present Judgment has found that no internationally wrongful act in relation to the Genocide Convention has been committed by Croatia, these submissions must also be rejected.

General conclusion on the counter-claim

522. For all of the foregoing reasons, the Court finds that the counter-claim must be dismissed in its entirety.

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523. The Court has already referred to the issue of missing persons (see paragraphs 357-359 above), in the context of its examination of the principal claim. It notes that individuals also disappeared during Operation "Storm" and its immediate aftermath. It can only reiterate its request to both Parties to continue their co-operation with a view to settling as soon as possible the issue of the fate of missing persons.

The Court recalls, furthermore, that its jurisdiction in this case is based on Article IX of the Genocide Convention, and that it can therefore only rule within the limits imposed by that instrument. Its findings are therefore without prejudice to any question regarding the Parties' possible responsibility in respect of any violation of international obligations other than those arising under the Convention itself. In so far as such violations may have taken place, the Parties remain liable for their consequences. The Court encourages the Parties to continue their co-operation with a view to offering appropriate reparation to the victims of such violations, thus consolidating peace and stability in the region.

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VII. OPERATIVE CLAUSE

524. For these reasons,

THE COURT,

(1) By eleven votes to six,

Rejects the second jurisdictional objection raised by Serbia and *finds* that its jurisdiction to entertain Croatia's claim extends to acts prior to 27 April 1992;

IN FAVOUR: *Vice-President* Sepúlveda-Amor; *Judges* Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Bhandari; *Judge* ad hoc Vukas;

AGAINST: *President* Tomka; *Judges* Owada, Skotnikov, Xue, Sebutinde; *Judge* ad hoc Kreća;

(2) By fifteen votes to two,

Rejects Croatia's claim;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Kreća;

AGAINST: *Judge* Cançado Trindade; *Judge* ad hoc Vukas;

(3) Unanimously,

Rejects Serbia's counter-claim.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Croatia and the Government of the Republic of Serbia, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

President TOMKA appends a separate opinion to the Judgment of the Court; Judges OWADA, KEITH and SKOTNIKOV append separate opinions to the Judgment of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment of the Court; Judges XUE and DONOGHUE append declarations to the Judgment of the Court; Judges GAJA, SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judge *ad hoc* VUKAS appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* KREĆA appends a separate opinion to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.

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