SEPARATE OPINION OF JUDGE BHANDARI

Introduction

1. I have voted with the majority on all three operative clauses of the present Judgment. However, with respect to the second operative clause, i.e., the rejection of Croatia's principal claim, I wish to qualify and expand upon the rationales for my vote. In so doing, I shall take the present opportunity to expound upon certain reservations I continue to harbour regarding the analysis employed at various points throughout that portion of the Judgment with respect to issues which, in my respectful view, have received inadequate — or even incorrect — attention.

2. At the outset, I wish to underscore that the principal reason for my rejection of Croatia's claim is that the Applicant has failed, in my considered opinion and after having carefully scrutinized the entire evidentiary record in these proceedings, to satisfy the minimum standard of credible evidence required by this Court in its prior jurisprudence (in particular the *Bosnia* Judgment of 2007[1], which dealt with claims of a highly similar nature) in relation to the *dolus specialis* of genocide. In this regard, I take specific note of Croatia's near complete inability to substantiate most of the figures it has averred in terms of number of victims as a consequence of the hostilities that occurred in the regions and during the period at issue. Moreover, I recall that it is a well-settled principle of law that the graver the offence alleged, the higher the standard of proof required for said offence to be established in a court of law. Consequently, I am not "fully convinced" (Judgment, para. 178) that the *only inference available from the evidence on record* is that attacks against ethnic Croats on the territory of Croatia between 1991 and 1995 were perpetrated with the requisite genocidal intent. Thus, although I concur with the majority that the *actus reus* of genocide has been conclusively satisfied with respect to many of the localities averred by Croatia, the Applicant's inability to prove that the *mens rea* of genocide — which, by its very nature, constitutes a charge "of exceptional gravity" *(ibid.)* — has been "clearly established" *(ibid.)* is necessarily fatal to Croatia's entire cause of action.

[1] *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. 43 (hereafter the "*Bosnia* Judgment").

3. Indeed, during the oral hearings phase of these proceedings, in response to a question posed by another Member of the Court, Croatia was compelled to concede that many of its written witness statements would have been inadmissible in a domestic Croatian court of law, to which Serbia responded that such statements would have been likewise inadmissible in the domestic courts of the former Yugoslavia (Judgment, para. 195). Moreover, in response to a question that I posed to the Parties, Croatia maintained that the Court enjoyed a free hand in determining what weight should be given to them, based on established Court jurisprudence pertaining to out-of-court documents (*ibid.*, para. 194). The sum total of these exchanges is that it stands to reason that a party to proceedings before the Court cannot expect to have documents that would be inadmissible before the courts of its own country, and which bear marked deficiencies when assessed using the standards applied in this forum, admitted for proof of their contents; *especially* where the matter to be proved is as grave as the crime of genocide.

4. In reaching this conclusion, I share the majority's sensitivity to "the difficulties of obtaining evidence in the circumstances of th[is] case" (*ibid.*, para. 198), wherein proof had to be gleaned from a *postbellum* context where the juridical infrastructure and other cornerstones of government and civil society typically relied upon by litigants appearing before this Court have been rendered largely absent or at least severely compromised by years of brutal war, massive displacements of populations and other seismic socio-political upheavals. Indeed, so Herculean are these obstacles that I must confess to having harboured a fleeting temptation to relax my approach to the methods of proof obtaining before the instant proceedings, specifically with respect to the documentary evidence adduced by Croatia, much of which admittedly lacks the indicia of reliability normally demanded of documents presented before a judicial body. However, the allure of adopting an elastic approach to Croatia's documents was, to my mind, definitively quelled by the countervailing consideration that the crime of genocide, being "an odious scourge"[2] that is "condemned by the civilized world"[3], carries with it such grievous moral opprobrium that a judicial finding as to its existence can only be countenanced upon the most credible and probative evidence. Consequently, despite the sympathy I have expressed herein regarding the extraordinary evidentiary hurdles faced by the Parties to these proceedings, I ultimately share the majority's finding "that many of the statements produced by Croatia are deficient" (*ibid.*, para. 198), that these deficiencies are irremediable, and that the remainder of the Applicant's evidence has failed to conclusively demonstrate *the only conclusion to be drawn from the evidence it has proffered* is that there existed genocidal intent against the targeted group in question during the time period averred.

[2] Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Preamble.

[3] *Ibid.*

5. This premise having been established, I take note of the fact that in spite of the serious evidentiary deficiencies in Croatia's case, the majority has elected to assess whether the claims of the Applicant, taken at their highest, could nevertheless evince genocidal intent[4]. Following this lead, and notwithstanding my conclusion that Croatia's charges of genocide have failed on evidentiary grounds, I intend to profit from the present opportunity in making certain observations and critiques to the analysis adopted by the majority on the issue of *dolus specialis*, assuming, *arguendo* (as the majority has done), that Croatia's case may be taken at its highest.

6. In brief, it is my respectful view that the Court should have used the present Judgment to lay down clearer guidelines on three principal issues. First, I believe the Court could have provided a better and clearer treatment as to what constitutes genocidal intent. Second, given the proliferation of international criminal tribunals over the past two decades and the consequent exponential expansion of jurisprudence emanating from these juridical bodies, I believe the majority has been derelict in not more fully canvassing the available authorities to provide clear parameters to distinguish between genocide and the oft closely intertwined offences of extermination and/or persecution as a crime against humanity. Third and finally, I believe that the 17 factors advanced by Croatia in support of its contention that genocide occurred deserved a more comprehensive response than the majority's approach of selecting, without any apparent reasoned explanation, five factors deemed "most important" to Croatia's claim of genocidal intent (Judgment, para. 413). I believe that a superior treatment of

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[4] See Judgment, para. 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." (Emphasis added.)

See also, *ibid.*, para. 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."

See also, *ibid.*, para. 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)." (Emphasis added.)

these topics would have been commensurate with the Court's function as not only the principal judicial organ of the United Nations but as a "World Court" from which other international and domestic courts and tribunals seek guidance as a legal authority of the highest order.

Genocidal Intent and the "Substantiality" Criterion

7. For ease of reference, I reproduce the relevant sections of the Genocide Convention in which the substantive provisions of the crime of genocide are enshrined:

> "Article 1: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
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> Article 2: 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:
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> *(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
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> *(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."

As the foregoing text illustrates, the *chapeau* of Article II of the Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole *or in part*, a national, ethnical, racial or religious group, as such" (emphasis added). The fact that the Convention expressly envisages situations where a group may be targeted for destruction "in part" naturally gives rise to the thorny question of when exactly the targeted "part" meets the threshold for genocidal intent. Because the Convention is silent on this point, in the *Bosnia* Judgment the Court relied upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as International Law Commission (ILC) Commentary, to conclude that "part" of the "group" for the purpose of Article II requires an intent "to destroy at least a *substantial* part of the particular group"[5].

[5] *Bosnia* Judgment, p. 126, para. 198; emphasis added.

8. While the "substantiality" criterion enunciated in the *Bosnia* Judgment has been reaffirmed in the instant Judgment (in somewhat modified form, a subject to which I intend to return in short order), this has been done rather tersely and in a way that, in my view, fails to lay down clear parameters that would provide guidance to future adjudicative bodies grappling with this concept. The majority, has also, I fear, neglected to so much as consider possibly relevant jurisprudential developments emanating from the *ad hoc* international criminal tribunals in the intervening eight years since the issuance of the *Bosnia* Judgment. Therefore, in the hopes of elucidating this standard for the sake of posterity, I intend to revisit the *Bosnia* formula to see how that test has been applied in practice by other tribunals in recent years, so as to juxtapose such developments with how the majority has employed said formula in the instant Judgment.

The Legal Test Enunciated in the Court's *Bosnia* Judgment of 2007

9. As has been correctly observed in the present Judgment, in the *Bosnia* Judgment of 2007, the Court "considered certain issues similar to those before it in the present case" (Judgment, para. 125). On that occasion, the Court expounded the relevant test for determining what constitutes a "part" of the targeted group for the purpose of analysing genocidal intent as follows:

> "[T]he Court refers to *three matters relevant to the determination of 'part' of the 'group'* for the purposes of Article II [of the Genocide Convention]. In the *first* place, the intent must be to destroy at least a *substantial part* of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. *That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)* and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind.
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> *Second*, the Court observes 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 . . . As the ICTY Appeals Chamber has said . . . the *opportunity* available to the perpetrators is significant. *This criterion of opportunity must however be weighed against the first and essential factor of substantiality*. It may

be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indicated the need for caution, lest this approach might distort the definition of genocide [. . .]

A *third* suggested criterion is *qualitative* rather than quantitative. The Appeals Chamber in the *Krstić* case [noted that]

> '. . . In addition to the numeric size of the targeted portion, its *prominence* within the group can be a useful consideration. If 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 . . .'

Establishing *the 'group' requirement will not always depend on the substantiality requirement alone although it is an essential starting-point. It follows in the Court's opinion that the qualitative approach cannot stand alone*. The Appeals Chamber in *Krstić* also expresses that view."[6]

The Court concluded its remarks by noting that "[t]he above list of *criteria is not exhaustive*, but, as just indicated, *the substantiality criterion is critical*. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although *the Court does give this first criterion priority*."[7] Thus, in the *Bosnia* case the Court fastened a tripartite formula, which it indicated was open to future expansion and elaboration, for determining whether a "part" of a group has been targeted with genocidal intent; according to which the criterion of "substantiality" was pre-eminent in that calculus.

10. While the *Bosnia* formula did not draw any bright lines around the contours of what constitutes genocidal intent toward "a part" of the targeted group, it would appear plain from that Judgment and the jurisprudence of the international criminal tribunals that a "substantial" part of the targeted group need not constitute the *majority* thereof, and that there *is no numeric threshold* for discerning a substantial part of the group.

The Legal Test Enunciated in the Present Judgment

11. The pertinent analysis of the law on genocidal intent vis-à-vis "a part" of the targeted group is presented in the present Judgment as follows:

> "The Court recalls that *the destruction of the group 'in part' within the meaning of Article II of the Convention must be assessed by refer-*

[6] *Bosnia* Judgment, pp. 126-127, paras. 198-200 (internal citations omitted; emphasis added).
[7] *Ibid.*, p. 127, para. 201; emphasis added.

> *ence 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' [. . .], and that this is a 'critical' criterion. 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' and that, accordingly, '[t]he area of the perpetrator's activity and control are to be considered [. . .]'. 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 . . .'.
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> *In 2007, the Court held that these factors would have to be assessed in any particular case*. [. . .] 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." (Judgment, para. 142 (internal citations omitted; emphasis added).)

What I find immediately striking from this slightly rebranded iteration of the tripartite test promulgated by the Court in the *Bosnia* Judgment is that, one fleeting reference to the "critical" nature of the "substantiality" criterion (now renamed "the quantitative element") notwithstanding, the rigidly hierarchical structure of the *Bosnia* test, whereby the numerosity of the targeted population was clearly superordinate to the other, supplementary criteria of "opportunity" (now dubbed "the geographic location") and the "qualitative factor" (now dubbed the "prominence" of the targeted group) has been jettisoned in favour of a more equal balancing effort. My distinct impression that the stratification inherent in the *Bosnia* formula has been mollified by the present Judgment (a jurisprudential evolution I applaud) draws further support from the consistently flexible and egalitarian manner in which the Court has *applied* these three factors to the facts at bar, wherein I cannot discern any noticeable supremacy afforded the quantitative element (see, generally, Judgment, paragraphs 413-441).

12. As I shall undertake to demonstrate at a later juncture in this opinion, I believe that this adapted substantiality test has practical consequences for the manner in which the majority has applied the assessment of genocidal intent in the present Judgment, specifically with respect to the events occurring in the city of Vukovar and its environs.

POST-*BOSNIA* JURISPRUDENCE OF THE ICTY AND ICTR

13. As noted above, in the present Judgment the Court has recalled and reaffirmed the tripartite formula for genocidal intent enunciated in *Bosnia* as the approach to be followed in the present case, though not without a significant restructuring of the normative order of the test to be employed. This is naturally consonant with the principle that while no prior judgment of this Court constitutes binding precedent *sensu stricto*[8], "[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" (Judgment, para. 125). As I have noted above, in *Bosnia* the Court explicitly acknowledged the contributions of the ICTY and ICTR in shaping the test that it adopted to assess genocidal intent vis-à-vis a "part" of a targeted group[9]. Consequently — and bearing in mind the nearly eight years that have passed since the promulgation of this Court's *Bosnia* formula — it would seem to me only natural and appropriate to examine whether the jurisprudence of those tribunals in the intervening years reveals any evolution in how the "substantiality" component of genocidal *dolus specialis* has been applied in recent litigious contexts. Such an endeavour is not only consonant with the *Bosnia* Judgment's pronouncement that the criteria enunciated therein were "not exhaustive"[10] and therefore presumably subject to future elucidation, but is also faithful to the present Judgment's self-admonition that the Court will "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" (*ibid.*, para. 129). In a similar vein, I recall the draft Judgment's avowal that while it will rely on the *Bosnia* Judgment "to the extent necessary for its legal reasoning[, t]his will not . . . preclude it, where necessary, from elaborating upon this jurisprudence" (*ibid.*, para. 125).

14. In my respectful view, because the legal standard for genocidal intent has a necessarily vague and dynamic character, it was incumbent upon the Court to fully canvass recent developments in the law to determine how the *Bosnia* formula (as restated in the present Judgment) has been applied in other juridical institutions tasked with applying that test.

[8] ICJ Statute, Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[9] *Bosnia* Judgment, p. 126, para. 198.

[10] *Ibid.*, p. 127, para. 201.

I regret to say that in my estimation the present Judgment has neither fully nor properly canvassed the current jurisprudential standard of genocidal intent emanating from the ICTY and the ICTR. For this reason, I shall now conduct a survey of recent trends in the case law of those tribunals on this subject in an attempt to glean insights as to the present state of the law in this area. As I shall expound hereunder, I take the position that these recent jurisprudential trends would tend to suggest that a pattern of killings such as has been averred in relation to the events that occurred in Croatia between 1991 and 1995[11], and in particular with respect to the region of Eastern Slavonia and the greater Vukovar area, *may* be more indicative of genocidal intent than the majority has acknowledged.

The *Tolimir* ICTY Trial Chamber Judgment

15. On 12 December 2012, the Trial Chamber of the ICTY issued its judgment in the case of *Tolimir* (currently under appeal), in which it provided a comprehensive treatment of the substantiality criterion of genocidal intent. The Trial Chamber recalled that

> "[t]he term 'in whole or in part', relates to the requirement that the perpetrator intended to destroy at least a substantial part of a protected group. While *there is no numeric threshold of victims required*, the targeted portion must comprise 'a significant enough [portion] to have an impact on the group as a whole'. *Although the numerosity of the targeted portion in absolute terms is relevant to substantiality, this is not dispositive*; other relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion and whether the targeted portion of the group is emblematic of the overall group, or is essential to its survival, as well as the area of the perpetrators' activity, control and reach."[12]

These observations made repeated reference to the same section of the analysis contained in the *Krstić* Judgment of the ICTY Appeals Chamber that was relied upon by this Court when it adopted its tripartite test for genocidal intent in the *Bosnia* Judgment.

[11] For the avoidance of any doubt, I recall that while I have found that Croatia's claim fails on evidentiary grounds, I am taking the present opportunity, as the majority has done, to assess Croatia's case taken at its highest.

[12] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, para. 749 (internal citations omitted; emphasis added).

16. After summarizing these widely accepted elements of the law on genocidal intent, the Trial Chamber in *Tolimir* further recalled a passage from an earlier judgment of the ICTY Trial Chamber in the case of *Jelisić*[13], which was cited approvingly in a passage of the *Krstić* Appeals Judgment[14] that was referenced favourably by the Court in the *Bosnia* Judgment[15]. As the *Tolimir* Trial Chamber recalled:

> "The *Jelisić* Trial Chamber held that as well as consisting of the desire to exterminate a very large number of members of the group, genocidal intent may also consist of the desired destruction *of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group* as such."[16]

The Trial Chamber then made the following further observations about the *Jelisić* Trial Judgment:

> "The *Jelisić* Trial Chamber cited the Final Report of the Commission of Experts formed pursuant to Security Council Resolution 780 which found
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> '[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others — the totality per se may be a strong indication of genocide *regardless of the actual numbers killed*. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. *If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee*, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.'. . .
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> The Commission of Experts Report stated, further, that
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> '[s]imilarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus the intent to destroy the fabric of a society through the extermination of its leadership, *when accompanied by*

[13] *Prosecutor* v. *Jelisić*, Trial Judgment, 14 December 1999, para. 82.
[14] *Prosecutor* v. *Krstić*, Appeals Judgment, 19 April 2004, para. 8 and fn. 10.
[15] *Bosnia* Judgment, p. 126, para. 198.
[16] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, para. 749; citing *Prosecutor* v. *Jelisić*, Trial Judgment, 14 December 1999, para. 82.

> *other acts of elimination of a segment of society*, can also be deemed genocide.'"[17]

17. The Trial Chamber then proceeded to apply this more flexible concept of substantiality to the factual circumstances of that case, which involved, *inter alia*, the killing of *three* prominent members of the Bosnian Muslim population of Zepa enclave in Eastern Bosnia and Herzegovina ("BiH"). As the Trial Chamber recalled, Zepa was a village situated approximately 20 kilometres from Srebrenica that had a population of less than 3,000 inhabitants prior to the war, but which saw its population swell to as many as 10,000 people by July 1995, as Bosnian Muslims from other surrounding areas in Eastern BiH sought refuge from the prevailing hostilities, such that "[d]uring the conflict the population of Zepa consisted entirely of Bosnian Muslims"[18].

18. Regarding the three individuals killed, the Trial Chamber made the following observations:

> "The three leaders were Mehmed Hajrić, the Mayor of the municipality and President of the War Presidency, Colonel Avdo Palić, Commander of the ABiH Zepa Brigade . . . and Amir Imamović, the Head of the Civil Protection Unit. They were, therefore, among the most prominent leaders of the enclave . . . [T]hose responsible for killing Hajrić, Palić and Imamović targeted them because they were leading figures in the Zepa enclave at the time that it was populated by Bosnian Muslims. *These killings should not be viewed in isolation* . . . it is significant to consider the connection between the VRS operations in Srebrenica and Zepa. The respective attacks and takeovers of the enclaves were synchronized by the [same] leadership and included the same forces. The takeover of Zepa enclave followed less than two weeks after the capture of Srebrenica, during a time in which the news of the murders of thousands of Bosnian Muslim men was starting to spread. *While the individuals killed were only three in number, in view of the size of Zepa, they constituted the core of its civilian and military leadership*. The mayor, who was also a religious leader, the military commander and the head of the Civil Protection Unit, especially during a period of conflict, were key to the survival of a small community. Moreover, the killing of Palić, who at this time enjoyed a special status as the defender of the Bosnian Muslim population of Zepa, had a symbolic purpose for the survival of the Bosnian Muslims of Eastern BiH. While the majority accepts that the Bosnian Serb Forces did not kill the entirety of the Bosnian Muslim leadership of Zepa . . . it does not consider this to be a factor against

[17] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, fn. 3138; emphasis added; citing Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), UN doc. S/1994/674, ("Commission of Experts Report"), para. 94.

[18] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, paras. 598-599.

> its determination that *the acts of murder against these three men constitutes genocide*."[19]

The Trial Chamber then proceeded to reach the following further conclusions:

> "In accordance with the *Jelisić* Trial Chamber's finding in which it relied on the Commission of Experts Report the Majority also takes into account the fate of the remaining population of Zepa; *their forcible transfer immediately prior to the killing of these three leaders is a factor which supports its finding of genocidal intent. To ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient in the case of Zepa to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders* . . . The Majority has no doubt that the murder of [these three leaders] was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such."[20]

19. I acknowledge that these conclusions — which were subject to a dissenting opinion and are currently awaiting a judgment from the ICTY Appeals Chamber — must be treated with a requisite degree of caution. Such limitations having been duly conceded, in my view the passages cited above from the *Tolimir* Trial Judgment nevertheless evince a concerted departure from the narrower ambit of the tripartite test adopted by this Court in the *Bosnia* Judgment. Given that the present Judgment has likewise determined to apply the *Bosnia* formula in a more flexible manner that places less emphasis on the primacy of the quantitative element, I am both surprised and disheartened by the majority's refusal to make any mention of the most recent judicial pronouncement of the ICTY on this highly pertinent and substantively fluid area of law.

20. Specifically, the *Tolimir* Judgment's finding of genocide where only three killings were proven marks a clear and unambiguous departure from the *Bosnia* formula's dogged insistence that the numerosity of the victims of predicate acts under Article II of the Genocide Convention be considered a pre-eminent factor in the substantiality equation. Rather, *Tolimir* presents a rather striking example of a case where not only were the three individuals killed low in *absolute* terms, but against the backdrop of a homogeneous religious community of approximately 10,000 it is dubious to suggest that their deaths could constitute a high *relative* "numerosity in relation to the group as a whole"[21]. Rather, in finding genocidal intent, the *Tolimir* Trial Chamber placed heavy emphasis on the prominence of the targeted population and the fact that the

[19] *Prosecutor* v. *Tolimir*, Judgment, 12 December 2012, paras. 778-780; emphasis added.
[20] *Ibid.*, paras. 781-782; emphasis added.
[21] *Ibid.*, para. 749.

attackers exercised complete control over the enclave during the period in question.

21. Finally, what cannot be overlooked is that apart from three killings, the gravamen of the atrocities perpetrated at Zepa constituted the complete forcible transfer of its entire Bosnian Muslim population, a community of thousands, away from that enclave and into Bosnian-controlled territory. While *Tolimir* certainly did not go so far as to pronounce that the "ethnic cleansing" of these thousands of Bosnian Muslims from Zepa enclave (in conjunction with means taken to ensure their non-return, such as destruction of homes and places of worship) constituted genocide per se, it did clearly and unequivocally affirm that this mass displacement of the civilian population, when combined with the very limited targeted killing of prominent local leaders, constituted an attempt to *physically destroy* a significant part of the Bosnian Muslim group of Eastern BiH, *by depriving that community of the means of reconstituting itself within that geographical area*. On this final point, it would appear to be a clear evolution of the position adopted by this Court in the *Bosnia* Judgment as to what constitutes "physical destruction" of the group for the purpose of Article II of the Genocide Convention, where it was held that

> "*[i]t will be convenient at this point to consider what legal significance the expression ['ethnic cleansing'] may have [under the Genocide Convention]*. It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'. . . It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted . . . *It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide* . . . As the ICTY has observed, while
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> 'there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'. . . [a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group

> or part of a group does not in itself suffice for genocide.'"[22]

In the present Judgment, this relationship has been revisited in the following terms:

> "The Court recalls that, in its 2007 Judgment, it stated that
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> '[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.* [. . .]'
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> 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.'" (Judgment, para. 162 (internal citations omitted; emphasis added).)

22. In my respectful view, the ICTY Trial Chamber in *Tolimir* has burst open the tight confines of the dictum promulgated in *Bosnia* and reaffirmed in the present Judgment. By finding that the confluence of killing three prominent community leaders (which constitute genocidal acts as per Article II *(a)* of the Convention) in parallel to massive acts of

[22] *Bosnia* Judgment, pp. 122-123, para. 190 (internal citations omitted; emphasis added).

ethnic cleansing (which are non-genocidal atrocities per se; see Judgment, para. 162) was sufficient to characterize *the entire series of events occurring at Zepa as possessing genocidal intent*, the Trial Chamber clearly went above and beyond this Court in *Bosnia* and the present Judgment, if not in its application of the letter of the applicable law, then clearly in its appreciation of the spirit thereof. Stated differently, there is no indication in *Tolimir* that the approximately 10,000 denizens of Zepa enclave who were forcibly removed from the area and prevented from returning were targeted for physical or biological destruction as envisaged by Article II of the Convention. Rather, the Trial Chamber *found that their permanent removal from that geographical area* (in conjunction with the destruction of a diminutive core of its civil and military leadership) was enough to constitute "physical or biological" destruction under the terms of Article II of the Convention. This cannot but be described as a clear departure from the Court's analysis in *Bosnia* and certain other judgments rendered by the ICTY upon which the Court in *Bosnia* relied. Not only has the quantitative element that featured so prominently in *Bosnia* been eschewed, but the *Tolimir* Judgment has clearly pushed the boundaries of what constitutes physical or biological destruction by expressly incorporating non-fatal *geographical* concerns. In other words, according to my reading of *Tolimir* the Trial Chamber clearly found that genocidal intent was established not because the approximately 10,000 Bosnian Muslims of Zepa enclave were targeted for elimination per se, but rather because they were targeted for elimination *from that specific location*.

23. Granted, the majority's reticence to adopt a *Tolimir*-style approach may be readily (and defensibly) explained by considerations such as the fact that the case remains under appeal and that the finding of genocide at Zepa was linked (although obliquely) to the now widely recognized genocide that was perpetrated by the same attackers at Srebrenica some 20 kilometres away and mere days beforehand. Nevertheless, in my respectful view, to ignore *Tolimir* completely constitutes a failure by the majority to heed its own undertaking to "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" (Judgment, para. 129). I shall return to this aspect of the *Tolimir* precedent when dissecting the present Judgment's treatment of Croat victims during the siege of Vukovar and its aftermath (see *infra*).

THE *POPOVIĆ* ICTY TRIAL CHAMBER JUDGMENT

24. In the *Popović* case, the Trial Chamber of the ICTY provided an analysis on the substantiality component in relation to the killing of several thousand Bosnian Muslim men at Srebrenica enclave in Eastern Bosnia and Herzegovina in July 1995. It is to be recalled that both the Court and several Trial and Appeals Chambers of the ICTY have consistently held that the massacre at Srebrenica constituted genocide. Consequently, while the *Popović* Trial Chamber's finding of genocidal intent in relation to the Srebrenica massacre is not in itself a novel jurisprudential development, in expounding this notion the Trial Chamber made the following noteworthy remarks:

> "The Trial Chamber finds that the Muslims of Eastern Bosnia constitute a substantial component of the entire group, Bosnian Muslims. As has been found by the Appeals Chamber, although the size of the Bosnian Muslim population in Srebrenica before its capture . . . was a small percentage of the overall Muslim population of BiH at the time, the import of the community is not appreciated solely by its size. *The Srebrenica enclave was of immense importance to the Bosnian Serb leadership because: (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica;* (2) most of the Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and *(3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defenceless and be 'emblematic' of the fate of all Bosnian Muslims.*"[23]

25. In my respectful view, the first and third factors enumerated by the Trial Chamber in *Popović* may have warranted consideration when conducting an assessment of genocidal intent in the present Judgment, particularly with reference to the attack on Vukovar municipality. Regarding the first factor, I note that the Judgment has recalled that:

> "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*

[23] *Prosecutor* v. *Popović et al.*, Trial Judgment, 10 June 2010, para. 865; emphasis added.

> *plans for a 'Greater Serbia', the capital of the new Serbian region of Slavonia, Baranja and Western Srem.*" (Judgment, para. 212; emphasis added.)

This averred emblematic significance of Vukovar can be further inferred from the findings of the ICTY Trial Chamber in *Mrkšić*, as accepted by the Court in the instant Judgment, which found that during the approximately three-month siege of Vukovar:

> "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 organized, *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 . . .
>
> 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* . . ."[24]

In my view, this sustained, ethnically discriminatory attack, aimed in part at the slow and systematic destruction of the Croat civilian populace of Vukovar, provides implicit evidence of its strategic importance in terms of allowing the expansionist policy of "Greater Serbia" to gain a pivotal foothold within Croatian territory, and thus heightens the prominence of the Vukovar Croat subgroup when assessing genocidal intent vis-à-vis that municipality and its environs.

26. Regarding the third criterion enunciated in *Popović*, I recall that the evacuation of Vukovar hospital on 20 November 1991, through which many Croats were interned at nearby concentration camps and subse-

[24] Judgment, para. 218; citing *Mrkšić*, paras. 470 and 472.

quently killed, severely beaten and/or otherwise subjected to serious forms of physical and psychological abuse, was conducted in violation of the Zagreb Agreement, which purported to allow for the safe evacuation of those internally displaced Vukovar Croats who had sought refuge at the local hospital under the supervision of neutral international monitors. I believe that the deliberate and cynical manner in which this international agreement was violated, to the grave detriment of those who made the assumption that a widely publicized agreement would guarantee their safety, allows for the inference that the sorry plight of the victims from Vukovar hospital and those subsequently interned in concentration and death camps, could certainly, to paraphrase *Popović*, "demonstrate to the Vukovar Croats their defencelessness and be emblematic of the fate of all ethnic Croats on Croatian territory".

The *Nizeyimana* ICTR Trial Chamber Judgment

27. In the *Nizeyimana* case, the accused was convicted at trial for genocide in relation to, *inter alia*, the killing of Rosalie Gicanda, a member of the targeted Tutsi ethnic group and former Queen of Rwanda. In applying the substantiality criterion of genocidal intent, the Trial Chamber stressed that

> "[t]he fact *that this operation targeted one Tutsi in particular in no way impacts the conclusion that the perpetrators possessed the intent to destroy at least a substantial part of the Tutsi ethnic group.* The Chamber reiterates that this killing must be viewed in the context of the targeted and systematic killing of Tutsis perpetrated . . . in Butare [town] around this time. Moreover, *the symbolic importance of the killing of Gicanda as a means of identifying the enemy is also relevant.*"[25]

In that regard, the Trial Chamber noted that it had "no doubt that the murder of Gicanda . . . who was a symbol of the former [Tutsi] monarchy, *was killed in order to set a striking example that Tutsis, as well as Hutus sympathetic to the plight of the Tutsis, were the enemy*"[26]. The Trial Chamber further stressed the nexus between this particular attack and the significantly increased violence against Tutsi civilians in Butare town following an incendiary speech by the President of Rwanda on 19 April 1994 in which he exhorted the population to seek out and kill Tutsis.

28. In relation to a separate incident, the Trial Chamber found that the killing of one Pierre Claver Karenzi, a Tutsi lecturer at a local university

[25] *Prosecutor* v. *Nizeyimana*, Trial Judgment, 19 June 2012, para. 1530; emphasis added.

[26] *Ibid.*, para. 1511; emphasis added.

who was considered "a prominent figure in Butare" town also constituted genocide. Again the Trial Chamber found that

> "*Karenzi's murder is also emblematic* of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis at roadblocks manned by . . . soldiers in Butare town. Consequently, *while this incident only resulted in the killing of one Tutsi, the Chamber has no doubt that the physical perpetrator acted with the specific intent to destroy at least a substantial part of the Tutsi group*."[27]

Once again the Trial Chamber found that this attack was linked to the broader context of significantly increased targeted killings of the Tutsi ethnic group in Butare town around that time in the wake of the President's speech.

29. Finally, the Trial Chamber found genocidal intent in relation to another incident where two Tutsi civilians were killed and another seriously injured at a military roadblock. As the Trial Chamber reasoned,

> "*[w]hile these attacks only resulted in the deaths of two Tutsis and the serious bodily harm of a third, the Chamber has no doubt that the perpetrators acted with the intent to destroy at least a substantial part of the Tutsi group. These attacks were emblematic of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis* at this roadblock and others manned by . . . soldiers in Butare town."[28]

What is particularly noteworthy about this specific finding of genocidal intent is the Trial Chamber's determination that the attack on the three Tutsi victims was "emblematic" of the overall group *not* because of the *individual prominence of the victims within the community* (there was no evidence on record to suggest such a conclusion), but rather because the attack on them embodied a *modus operandi for the systematic destruction of the Tutsi group in Butare town generally*. In other words, Tutsis at the roadblock were "emblematic" of the overall group not because of *who they were*, but rather *the manner in which they were attacked*. While indicia of "prominence" through the *modus operandi* of the attack may be gleaned from the killings of Gicanda and Karenzi, the fact that the victims of this third attack did not hold any prominent positions within the Tutsi community only further underscores the point. Consequently, I find these exemplars from the *Nizeyimana* Trial Judgment to signal a clear departure from what was envisaged by the "qualitative approach" in the Court's *Bosnia* Judgment (and subsequently rebranded as the "prominence" of the targeted group in the instant Judgment), and believe that the present Judgment's analysis would have been enriched by a consideration of this recent,

[27] *Prosecutor* v. *Nizeyimana*, Trial Judgment, 19 June 2012, para. 1530; emphasis added.

[28] *Ibid.*, para. 1521; emphasis added.

pertinent jurisprudential development on the law of genocidal *dolus specialis*.

30. Applying the *Nizeyimana* precedent to the facts at bar, I would note that the present Judgment recalls that the *Mrkšić* Trial Chamber found that the attacks in Eastern Slavonia generally followed a consistent pattern:

> "[T]he 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 . . . to peaceful arrangements;. . . *(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."[29]

The Judgment also recalled that in the *Martić* case, the ICTY Trial Chamber made similar findings regarding the pattern of attacks perpetrated by Serb forces in Croatia:

> "[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 organized 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."[30]

After considering, *inter alia*, these findings from the ICTY, the present Judgment concludes that:

> "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

[29] Judgment, para. 414, citing *Mrkšić* Trial Judgment, para. 43.
[30] *Ibid.*, para. 427.

> 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.
>
> 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*." (Judgment, paras. 415-416.)

31. Bearing this established pattern of conduct throughout various parts of the territory of Croatia in mind, I would further recall that the Applicant has presented the siege of Vukovar as representing a paradigmatic example of the *modus operandi* outlined above. As counsel for Croatia stated during the oral hearing phase of this case,

> "*[W]hat happened at Vukovar was repeated again and again across Eastern Slavonia and across Croatia as a whole in the course of this conflict*. This pattern may have varied from village to village, town to town and across different regions. But, properly analysed, the 'pattern' discloses that there was an intention to 'destroy' a part of the Croat group in question. The artillery or mortar shelling was wholly disproportionate and, in places, such as Vukovar, essentially destroyed the entire city. And the murderous attacks were never intended as part of the mere expulsion of a part of the Croat group in question."[31]

Consequently, I believe that in view of the *Nizeyimana* Trial Judgment, the Judgment's analysis with respect to substantiality could have been enhanced by considering the *modus operandi* of the attack on Vukovar, being a microcosm for the manner in which a much wider conflict was waged, for the purpose of assessing whether the "prominence" of the Vukovar Croats could factor into the calculus as to whether they were targeted with genocidal intent.

The *Hategekimana* ICTR Trial Chamber Judgment

32. In the case of *Hategekimana*, the accused was convicted, *inter alia*, of genocide for the murder of *three* Tutsi women *during an attack on their home* by militia and soldiers. In determining genocidal intent, the Trial Chamber noted that in addition to the fact that the three women were singled out because of their ethnicity, the Chamber had received "extensive evidence . . . about the targeting of Tutsi civilians in Butare [province] following the speech of interim President Sindikubwabo on 19 April 1994", which resulted in "*many Tutsi civilians being killed in their*

[31] CR 2014/8, p. 47 (Starmer); emphasis added.

homes over the course of many days". The Chamber found that "[g]iven the scale of the killings *and their context*, the only reasonable inference is that the assailants [who killed the women] possessed the intent to destroy in whole or in part a substantial part of the Tutsi group"[32]. Once again we see an example where an attack against a targeted group that resulted in a comparatively low *absolute* and *relative* number of victims was nevertheless deemed to possess genocidal intent, due at least in part to the *modus operandi* of the manner in which they were killed.

The *Munyakazi* ICTR Trial Chamber Judgment

33. In the case of *Munyakazi*, the accused was convicted of genocide for, *inter alia*, an attack on a parish that killed between 60 and 100 Tutsi refugees. The Trial Chamber observed that the attack occurred the day after a much larger attack on a different parish where approximately 5,000 to 6,000 Tutsis were killed by the same group of perpetrators. Considering both attacks as a whole, the Trial Chamber found genocidal intent for a substantial part of the Tutsi ethnic group[33]. This finding of genocide evokes many parallels with the ICTY Trial Chamber's finding of genocide in relation to Zepa enclave in the *Tolimir* Judgment, which also featured an attack on one geographic area where a relatively small number of victims were killed (Zepa) but which was closely linked, in terms of geography, time, and the identity of the perpetrators, to a previous, considerably more sizeable attack (Srebrenica).

Other ICTR Trial Chamber Judgments

34. In keeping with the pattern demonstrated above, since the Court's issuance of the *Bosnia* Judgment in 2007, the ICTR has made findings of genocide in relation to scenarios where "the quantitative element" (to use the nomenclature adopted by the present Judgment) figured far less prominently in the calculus as to whether the attacks were perpetrated with genocidal intent than a strict application of the *Bosnia* formula would dictate. In this regard, we see that genocidal intent in several instances was inferred in large part due to the geographic profile of the *situs* of the attack and/or the prominence of the victims (whether said prominence was measured in terms of personal standing in the

[32] *Prosecutor* v. *Hategekimana*, Trial Judgment, 6 December 2010, para. 673; emphasis added.

[33] *Prosecutor* v. *Munyakazi*, Trial Judgment, 5 July 2010, paras. 496, 499-500.

community of the victim or the *modus operandi* of how the attack unfolded)[34]. In sum, what we see is a clearly more flexible application of genocidal *dolus specialis* that would tend to challenge the pre-eminence afforded the substantiality criterion in the *Bosnia* case.

35. For the avoidance of any doubt, I wish to underscore my recognition that there are obviously significant contextual differences between the crimes prosecuted in relation to Croatia before the ICTY (and, by extension, the subject-matter presently before the Court) and those relating to Rwanda before the ICTR, not the least of which is the sheer disparity in scale of the atrocities that occurred during the course of the respective conflicts. Hence I recall that Croatia's case — taken at its highest — is that the hostilities that form the backdrop to the present Judgment resulted in *12,500 Croat deaths*, whereas *conservative estimates* of the carnage in Rwanda posit that at least *half a million ethnic Tutsis and moderate Hutus were killed* during the course of the genocide that unfolded in that country in 1994 — a genocide, which, it should be noted, was the subject of an express finding of judicial notice by the ICTR Appeals Chamber[35]. Indeed, I recall that the Court stipulated in the present Judgment that it would give particular preference to jurisprudence emanating from the ICTY (see *supra*, paragraph 13, citing paragraph 129 of the Judgment), and I understand this perfectly sensible decision to be motivated in large part by the plain fact that the cases before the ICTY involve much closer historical, socio-political and legal issues to those presented in the case at bar than cases appearing before the ICTR.

36. In sum, while I am by no means advocating the wholesale importation of ICTR case law into the jurisprudence of this Court, my concern lies with what I find to be essentially the complete disregard of the most prolific judicial body to have interpreted and applied the Genocide Convention in the course of human history. With the greatest of respect to my learned colleagues, failure to so much as consult this ample body of jurisprudence, to my mind, constitutes a failure by the Court in its duty and its undertaking to keep abreast of the most recent and pertinent developments in the law of genocide in the present Judgment.

[34] See, e.g., *Prosecutor* v. *Nsengimana*, Trial Judgment, 17 November 2009, paras. 834-836; *Prosecutor* v. *Renzaho*, Trial Judgment, 14 July 2009, paras. 768-769; *Prosecutor* v. *Rukundo*, Trial Judgment, 27 February 2009, paras. 72, 74, 76; *Prosecutor* v. *Nchamihigo*, Trial Judgment, 12 November 2008, paras. 333-336, 346-347, 354, 357.

[35] This landmark decision was delivered by the Appeals Chamber on Prosecutor's Appeal on Judicial Notice, dated 16 June 2006, in the trial of *Prosecutor* v. *Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44AR73 (C).

CONCLUSION ON THE COURT'S TREATMENT OF POST-*BOSNIA* JURISPRUDENCE OF THE ICTY AND ICTR

37. In view of the observations above, I believe that the jurisprudence of the *ad hoc* international criminal tribunals in the years following the issuance of this Court's *Bosnia* Judgment demonstrate a dilution of the rigidly hierarchical tripartite formula for discerning genocidal intent as promulgated in that precedent, whereby the numerosity of the targeted population was clearly designed to serve as the pre-eminent concern in any such calculus. As I have noted above, while there are traces of a mollified approach to be found in the Judgment's gentle refastening of the *Bosnia* formula into a more egalitarian weighing of the three criteria to be applied in the present Judgment, in my respectful view it was incumbent upon the Court to take the further step of explicitly acknowledging and engaging the recent, pertinent jurisprudential developments presented by the ICTY and ICTR in this area of law and to incorporate, if and where appropriate, any evolutions to the *Bosnia* test that are not only strictly necessary for the disposition of the merits of the present dispute, but which may elucidate the development this legal area has undergone over the past eight years. In other words, even if it were not appropriate or even correct to *apply* such precedents to the facts at bar, in my considered opinion it was *certainly* appropriate to at least *consider* such key developments, if only to explain why they ought to be distinguished from the present case. Such an approach, I suggest, would be wholly commensurate with the Court's role as a pre-eminent global judicial forum to which other international dispute resolution mechanisms turn in search of guidance on such important and arcane points of law. Consequently, I regret that the majority has missed a prime opportunity to improve the clarity and authority of this area of public international law.

THE MAJORITY'S CONCLUSIONS ON GENOCIDAL INTENT IN THE PRESENT JUDGMENT

38. In assessing whether the targeted group was "substantial" for purposes of the *chapeau* of Article II of the Genocide Convention, the Judgment recalls Croatia's submission

> "that *the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia* [who were targeted for destruction by JNA and affiliated Serb forces] *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" (Judgment, para. 403; emphasis added).

The Judgment also recalls that "[i]n its written pleadings, Croatia defines [the overall protected] group [at issue in its Claim] as *the Croat national or ethnical group on the territory of Croatia*, which is not contested by Serbia" (see *ibid.*, para. 205; emphasis added). Relying on official census data from 1991 — the year in which the hostilities that are the subject-matter of the present dispute commenced — adduced by Croatia, and uncontested by Serbia, the Judgment finds that "the ethnic Croat population living in the [identified] regions . . . numbered between 1.7 and 1.8 million [individuals . . . and] constituted slightly less than half of the ethnic population living in Croatia" (see *ibid.*, para. 406). The Judgment further concludes "that acts committed by JNA and Serb forces in the [identified] regions . . . targeted the Croats living in those regions, within which these armed forces exercised and sought to expand their control" *(ibid)*. While the majority also found that "as regards the prominence of that part of the group, the Court notes that Croatia has provided no information on this point" *(ibid.)* — a conclusion I do not share, and to which I shall return presently — "[t]he Court [nevertheless] concludes from the foregoing that the Croats living in the [identified] regions . . . constituted a substantial part of the Croat group" *(ibid.)*. Despite my misgivings about the majority's pronouncement as to the ostensible lack of evidence regarding the prominence of the Croat ethnic group at issue, I am in full agreement with the majority's general conclusion that the part of the ethnic Croat group identified by the Applicant constituted a substantial part of the overall Croat ethnic group living within the territory of Croatia during the relevant period.

39. It is to be further recalled that the Judgment concludes that:

> "The Court is fully convinced that, in [the] various [identified] localities . . . the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs *(a)* [killing members of the group] and *(b)* [causing serious bodily or mental harm to members of the group] of Article II of the Convention, and that the *actus reus* of genocide has been established." (*Ibid.*, para. 401.)

I am also in complete agreement with the majority on this point. Where I depart from the majority is in *the manner of reasoning through which it has arrived at its conclusion that* "[t]he 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" (*ibid.*, para. 440). While I again recall that I have joined the majority in rejecting Croatia's claim that genocide was committed against the targeted Croat population *on evidentiary grounds*, given that the majority has elected to take Croatia's case at its highest prior to dismissing it, I shall proceed to make certain observations and critiques

regarding its approach to the analysis of genocidal *dolus specialis* as pertains to Croatia's allegations.

The Geographic Area Considered by the Majority when Assessing *Dolus Specialis*

40. As I have noted, *supra*, the Judgment characterizes Croatia's delimitation of the relevant "part" of the ethnic Croat group as being "the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia" (Judgment, para. 403). While I agree with this conclusion as pertains to these six geographical locales, I am also mindful of the fact that the gravamen of Croatia's case focused heavily on the specific region of Eastern Slavonia, and in particular the city of Vukovar and its environs. As counsel for Croatia submitted during the oral hearing phase of this case:

> "*Even when judged against the other atrocities detailed by the Applicant before this Court . . . the events in Vukovar plumbed new depths*. Serbian forces carried out a sustained campaign of shelling; systematic expulsion; denial of food, water, electricity, sanitation and medical treatment; bombing; burning; brutal killings and torture *which reduced the city to rubble and destroyed its Croat population*. It started with roadblocks and ended with torture camps and mass execution. In human terms, the scar will never heal.
>
> The events at Vukovar are significant and they are known around the world. They deserve to be examined in context, in detail and in full."[36]

This heavy reliance by Croatia on the events at Vukovar throughout this case is even conceded by Serbia when it acknowledges in its written Rejoinder that "*[t]he most significant episodes in Eastern Slavonia took place in Vukovar*, and these attract the bulk of the discussion in the Reply, as they did in the Memorial and Counter-Memorial"[37]. Indeed, on more than one occasion it has been expressly recognized by the Court in the present Judgment that "Croatia has given particular attention" to "the events at Vukovar" in pursuing its claims in this case (Judgment, paras. 429 and 436).

41. Moreover, there is clear precedent from this Court that an analysis of genocidal intent may be confined to a geographic area notably smaller than the six expansive regions considered by the present Judgment, *even if the Applicant framed its cause of action with respect to a wider geograph-*

[36] CR 2014/8, pp. 28-29, paras. 1-2 (Starmer); emphasis added.
[37] Rejoinder of Serbia, para. 370; emphasis added.

ical area. This was of course precisely what occurred in the 2007 *Bosnia* Judgment, wherein the Court made a finding of genocide solely with respect to Srebrenica, a Bosnian Muslim enclave consisting of upwards of 30,000 people where more than 7,000 military-aged Bosnian Muslim men were systematically rounded up and executed while the remaining population of approximately 25,000 Bosnian Muslims — mostly women, children and the elderly — were ethnically cleansed from the enclave[38]. It is to be recalled that *this isolated finding of genocide was made in spite of the Applicant Bosnia and Herzegovina's much broader allegations of genocide*, which included events in the capital city of Sarajevo, as well as acts that occurred at various other municipalities and camps spread across the territory of BiH.

42. In view of these considerations, my ensuing remarks shall confine themselves to the majority's analysis of genocidal intent regarding the events at Vukovar. While I must reiterate, for the sake of absolute clarity, that it is not my contention that genocidal intent was established with respect to the events occurring on Croatian soil between 1991 and 1995 (including Vukovar), I steadfastly believe that the majority has failed to fully and properly canvass the events at Vukovar, being as they are the cornerstone of Croatia's case in the instant proceedings, and thus I intend to present additional considerations that I believe the majority was remiss in failing to consider when determining whether genocide was perpetrated against the Vukovar Croats.

The Siege of Vukovar

43. During the oral hearing phase of these proceedings, Croatia cited uncontested census statistics indicating that in 1991 Vukovar "had a population of just over 21,000 Croats [and] 14,500 Serbs"[39], whereas "[e]ven after the peaceful reintegration of the region, only 7,500 of the original 21,500 Croat population of Vukovar in 1991 have ever returned to the city"[40]. Counsel for Croatia further averred that during the siege of Vukovar that lasted from August to November 1991, between 1,100 and 1,700 Croats were killed, whereas after the fall of the city and the ensuing occupation by JNA and Serb forces, an additional 2,000 Croats were killed[41]. I recall and share the majority's conclusion that the Croat population in all six geographic regions relied upon by the Applicant constitutes a substantial part of the overall Croat ethnic group within the

[38] *Bosnia* Judgment, p. 155, para. 278, citing *Krstić* Trial Judgment, para. 1.

[39] CR 2014/8, p. 29, para. 7 (Starmer).
[40] *Ibid.*, p. 47, para. 85 (Starmer).
[41] CR 2014/12, p. 11 (Starmer).

territory of Croatia. However, I further recall my remarks above that there is clear precedent for considering a much smaller geographic and demographic area for the purpose of determining whether that subgroup constitutes a "substantial" part of the overall group, and hence conclude that the Vukovar Croats *in and of themselves* — in addition to their inclusion in "the substantial" subgroup comprising the six geographic regions as recognized by the Judgment — constituted a substantial part of the overall ethnic Croat group within the geographical territory of Croatia during the relevant period. In this regard, I would recall the Court's characterization of what constituted a "substantial" part of the targeted group in question from the following passage of the *Bosnia* Judgment, in which certain conclusions of the ICTY Appeals Chamber in the *Krstić* case were adopted:

> "The Court now turns to the requirement of Article II that there must be the intent to destroy a protected 'group' in whole or in part . . . the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them . . . Against that background it turns to the findings in the *Krstić* case . . . in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.
>
> > 'In this case, having identified the protected group as the national group of Bosnian Muslims, *the Trial Chamber concluded that the part . . . targeted was the Bosnian Muslims of Srebrenica*, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. *Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size*.'
>
> The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.
>
> The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention *were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina* as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995."[42]

[42] *Bosnia* Judgment, p. 166, paras. 296-297 (internal citations omitted); emphasis added.

44. Setting aside the different *conclusions* as to whether genocidal intent was proven in the *Bosnia* Judgment versus the present Judgment, on the issue of *how* substantiality was assessed, I believe it would have been entirely appropriate, given, *inter alia*, the size of the ethnic Croat population of Vukovar, the Judgment's recognition that during the siege and capture of the city the attack was "directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out)"[43] — which, to my mind, rendered the city a *de facto* ethnic Croat enclave — and finally its emblematic importance to the ethnic Croat population within Croatia generally (for reasons of military strategic importance as a key focal point in the expansive strategy of "Greater Serbia", as expounded *supra*), for the majority to have conducted a specialized analysis of the attack on Vukovar. While I acknowledge that the attack on Vukovar and its aftermath was considered as part of an overarching *mélange* of factors when evaluating whether genocidal intent existed with respect to the six geographic territories identified in Croatia's pleadings, in my respectful view such an analysis lacks clarity and coherency and would have been improved by an explicit, separate examination of the events at Vukovar.

45. As I have painstakingly underscored throughout this opinion, it is my definitive conclusion that Croatia has failed to satisfy the minimum standard of credible evidence required by this Court to allow me to be "fully convinced" that a finding of genocidal intent vis-à-vis the protected ethnic Croat group is the only reasonable inference to be drawn from the evidentiary record proffered by the Applicant. Indeed, when pressed by a Member of the Court during the oral hearing phase, counsel for Croatia made the critical concession that the number of victims it was alleging was difficult to ascertain with precision[44], which I find to epitomize the many probative shortcomings of the Applicant's cause of action. This position having been reaffirmed, and again following the majority's election to take Croatia's figures at their highest, I am somewhat puzzled by the lack of analysis as to why the averred killing of upwards of 3,000 eth-

[43] Judgment, para. 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)*." (Emphasis added.)

[44] CR 2014/12, pp. 11-12 (Starmer).

nic Croats in Vukovar out of a pre-war population of 21,500 would not constitute sufficient physical destruction of the group pursuant to Article II *(a)* of the Convention to satisfy the "quantitative element" as adopted by the present Judgment. While there may be good reasons for such a negative finding, the paucity of analysis conducted by the majority to this end is discouraging.

46. In addition to my misgivings regarding the majority's application of the quantitative element regarding the number of Vukovar Croats allegedly killed during and after the siege of that city, Croatia has presented a series of 17 contextual factors which, in its estimation,

> "constitute a pattern of conduct from which the only reasonable inference to be drawn is that the Serb leaders were motivated by genocidal intent . . . [and which], 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" (Judgment, para. 408).

Consequently, "[a]ll 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" (*ibid.*, para. 409). For ease of reference, these factors have been reproduced in their totality at paragraph 408 of the present Judgment.

47. In the Judgment, the majority has determined

> "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 [by Croatia])" (*ibid.*, para. 413).

Regrettably, the majority provides no *ratio* for this critical distinction, and consequently excludes as "less important", without any justification, factors such as "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' [Croatia's first factor]", "the statements of public officials, including demonization of Croats and propaganda on the part of State-controlled media [Croatia's second factor]", "the explicit recognition by the JNA that paramilitary groups were engaging in genocidal acts [Croatia's fifth factor]"; and "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 [Croatia's ninth factor]", to name a few (see Judgment, para. 408).

48. While an exhaustive treatment of how these factors may be, contrary to the view of the majority, "more important" in deciphering genocidal intent lies beyond the scope of the present opinion, I must admit I find myself flummoxed by some of these exclusions. One need only look to readily available historical examples to find scenarios where such factors clearly and unequivocally played a major role in inciting and perpetuating incipient and ongoing genocides. To that end, I would briefly recall the Nazi expansionist political doctrine of *Lebensraum* (which would fall neatly under the rubric of Croatia's first factor) and their ghettoization of marginalized groups through the forced wearing of religiously denoted attire (e.g., armbands bearing the "Star of David") for the Jews of occupied Europe (for which one can find many commonalities in Croatia's ninth factor). To take a more recent historical example, I would note the undeniable role played by popular media (especially radio) up to and during the Rwandan genocide in the promotion of a demagogic "Hutu Power" ideology that sought to vilify and ostracize the Tutsi ethnic minority population through the ubiquitous use of the epithet of *"inyenzi"* (cockroaches) and other comparable slurs (which aligns with Croatia's second factor). In each of these three examples, the averred acts are not, strictly speaking, genocidal per se in accordance with Article II of the Genocide Convention, but for the majority to rather summarily dismiss their potency as precursors to or indicia of genocidal intent is, to my mind, both puzzling and troubling. Finally, how "the explicit recognition of genocidal intent of those carrying out the acts" (Croatia's fifth factor) does not figure prominently into the equation of genocidal intent is simply beyond me.

The Distinction between Criminal Intent and Motive

49. In the present Judgment "the Court notes that in the *Mrkšić* case, the ICTY found that the attack on [Vukovar] constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia's grip on the SFRY" (see para. 429). The Judgment then reproduces the following block quotation from *Mrkšić* in support of this conclusion:

> "The declaration of 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 close proximity in the Vukovar municipality became a means of demonstrating to the Croatian people, and those of other Yugoslav Republics, the harmful consequences 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.*"[45]

As a brief aside, the quoted passage from *Mrkšić*, which forms part of the uncontested evidentiary record in this case, is positively laden with explicit references to the emblematic nature of the Vukovar Croats vis-à-vis the remainder of the ethnic Croat population, thus only further weakening the majority's assertion that Croatia "has provided no information" as to "the prominence of that part of the group" of the ethnic Croat population that it contends was targeted for genocide[46].

50. However, returning to the point under consideration, the majority relies on the quoted passage from *Mrkšić* to conclude that

> "[i]t follows from the above, and from the fact that numerous Croats of Vukovar were evacuated . . . that the existence of intent to physically destroy the Croat population is not the only reasonable inference that can be drawn from the illegal attack on Vukovar" (Judgment, para. 429).

In my view, this line of reasoning appears to conflate the distinct legal concepts of *motive* and *intent* in finding that the "punishment" of the Vukovar Croats could *preclude* a finding that they were targeted with genocidal intent. To this end I would recall the language of the ICTY Appeals Chamber in the *Krnojelac* Judgment, which recalled

> "its case law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, set out 'the necessity to distinguish specific intent from motive. *The personal motive of the perpetrator of the crime of genocide may be, for example*, to obtain personal economic benefits, *or political advantage or some form of power*. The existence of a personal motive *does not preclude the perpetrator from also having the specific intent to commit genocide*'."[47]

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[45] *Mrkšić* Trial Judgment, para. 471; emphasis added.

[46] Judgment, para. 406. While the Judgment was referring more generally to the ethnic Croat population in the six geographical areas of Croatia alleged by the Applicant, it stands to reason that Vukovar, being not only situated within the areas contemplated but constituting the gravamen of Croatia's case, would constitute at least *some evidence* of the prominence of at least a part of the targeted group in question.

[47] *Prosecutor* v. *Krnojelac*, Appeals Judgment, 17 September 2003, para. 102; emphasis added.

Similar language for this proposition can be found in a number of other Judgments pronounced by the ICTY[48] and ICTR[49]. In view of this distinction, I find the Judgment's analysis of the motivation underlying the attack on Vukovar to be problematic, as it fails to account for the possibility, as clearly stipulated in the aforementioned authorities, that genocidal *intent* may exist *simultaneously* with other, *ulterior motives*. In this regard, I would recall the finding in *Popović* that the massacre at Srebrenica enclave was in part motivated by the strategic advantage of uniting a "Greater Serbia". Never was it suggested that this tactical motivation precluded the attack from possessing genocidal intent. Consequently, I am unpersuaded by the Judgment's dismissal of genocidal intent vis-à-vis Vukovar based on the finding that the attack was animated by political and/or retributive motives, and respectfully but firmly believe that the majority has committed a basic error of law in finding that the existence of a punitive motive for the attack on Vukovar precludes genocidal intent as "the only reasonable inference that can be drawn from the illegal attack" (Judgment, para. 429).

Discretion of the ICTY Prosecutor in Laying a Charge of Genocide

51. I recall that in the *Bosnia* Judgment, the Court determined that:

> "[A]s a general proposition the inclusion of charges in an indictment cannot be given [evidentiary] 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."[50]

No legal authority whatsoever is cited for the rationale underlying the disparate probative weight that the Court decided to afford the ICTY Prosecutor's decision to include or exclude a charge of genocide in an indictment,

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[48] See, e.g., *Prosecutor* v. *Blaškić*, Appeals Judgment, 29 July 2004, para. 694.

> "*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law . . ."

[49] See, e.g., *Prosecutor* v. *Karera*, Trial Judgment, 7 December 2007, para. 534. ("The perpetrator need not be solely motivated by a genocidal intent and having a personal motive will not preclude such a specific intent.")

[50] *Bosnia* Judgment, p. 132, para. 217.

nor does the *Bosnia* Judgment offer any reasoned explanation for this distinction. Indeed, in my respectful view such a distinction is unsustainable as a matter of basic logical construction, and in contrast to the majority I find myself drawn to the poignant submission of counsel for Croatia, who argued during the oral hearing phase of this case that in accordance with the prevailing rules of procedure obtaining at that tribunal,

> "[T]he judicial arm of the ICTY will review each indictment, including the charges that *have* been included, and has the power to dismiss any count not supported by the evidence. But the judicial arm has no way of reviewing the charges that have *not* been included, or the reasons for non-inclusion. It would therefore be illogical to afford greater evidential weight to an unreviewable decision without reasons *not* to include a charge, than the reviewable decision to *include* a charge."[51]

Moreover, I believe that Croatia has raised cogent arguments exposing the various political, logistical and other constraints that may animate an exercise of prosecutorial discretion not to lay a criminal charge, including: (1) the availability (or lack thereof) of evidence at the onset of proceedings; (2) the focus of a criminal prosecution on individual accused, often in relation to very circumscribed crime sites, rather than the much broader question of State responsibility for genocide encompassing large geographical expanses; (3) the lack of any obligation falling on the ICTY Prosecutor to provide reasons for not laying a charge; (4) the need to selectively employ the finite resources of that Tribunal, especially in view of the massive institutional constraints imposed by the United Nations Security Council's imposition of a "Completion Strategy" mandating the completion of all the Tribunal's work by fixed dates; and (5) the fact that whereas decisions to include a charge are subject to judicial review, decisions not to include a charge are not[52].

52. In light of these trenchant insights, and in view of the Court's pronouncement in *Bosnia* that the lack of probative value for a decision to lay a charge of genocide constitutes "a general proposition" rather than a definite rule, in my respectful view the jurisprudence of this Court would be fortified by a more expansive treatment of this subject. Alas, given the opportunity to clarify the Court's position concerning prosecutorial discretion in the present Judgment, the majority has apparently elected to demur. Instead of a reasoned account that explains the distinction, the Judgment makes the following pronouncement:

[51] CR 2014/6, p. 39 (Starmer); emphasis in original.
[52] *Ibid.*, pp. 33-42 (Starmer).

> "*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* . . . 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.*" (Judgment, para. 187; emphasis added.)

Not only does this purported defence of the *Bosnia* distinction skirt the central issue by failing to provide a single rationale as to why the decision to *include* a charge of genocide in an indictment ought to be given differential weight than a decision to *exclude* such a charge, but the example of the *Milošević* case relied upon by the Judgment to prove its point in fact tends to defeat its own position. As that juxtaposition plainly illustrates, if *the decision not to charge Milošević with genocide* in respect of crimes committed in respect of Croatia is noteworthy, then surely the same must be said of *the corollary decision to charge him with genocide* in respect of crimes committed in Bosnia and Herzegovina. To my mind, these are two sides of the same coin and the draft's failure to make heads or tails of its quizzical distinction, by invoking a litany of irrelevant considerations, leaves me unmoved.

53. In sum, through its belaboured attempt to justify the distinction regarding the differential probative value afforded the inclusion or exclusion of charges of genocide in an indictment, which to this day fails to cite a single germane legal authority and which poignantly avoids engaging any of the Applicant Croatia's arguments, the majority has not, to my satisfaction, explained the logically and legally problematic distinction it first iterated in the *Bosnia* Judgment and has now reiterated in the present Judgment. I can only express my regret at this missed opportunity.

Conclusion

54. For the reasons I have explained at length throughout the course of this opinion, while I share the majority's conviction that the Applicant Croatia has not discharged its evidentiary burden in relation to the second operative clause of this Judgment, I have felt compelled to voice my many (and at times strenuous) objections to the manner in which the majority has treated the issue of genocidal intent as regards the claims put forward by Croatia. Given my tepid support for the second operative clause, which is based primarily on evidentiary concerns, there are many aspects of the reasoning employed by the Judgment en route to the conclusion contained in that dispositive paragraph that I would distance myself from as a jurist. Perhaps most disconcerting is that the foregoing does not constitute an exhaustive exposition of my dissatisfaction with the Judgment's approach to genocidal *dolus specialis*, but merely a survey of some of my more salient concerns.

(*Signed*) Dalveer Bhandari.