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When Ethnic Cleansing is not Genocide: A Critical Appraisal of the ICJ's Ruling in *Croatia* v. *Serbia* in relation to Deportation and Population Transfer

MARTIN STEINFELD*

Abstract

This article critically examines the concept of ethnic cleansing in light of the ruling of the International Court of Justice (ICJ) in *Croatia* v. *Serbia*. It suggests that the lack of overt reference to it in the Genocide Convention constitutes a significant lacuna in judicial recognition and protection of atrocities committed in both the Former Yugoslavia and more generally, which the ICJ categorically refused to address. Having examined how the ICJ attempted to conceptualize ethnic cleansing as evidence of both the *actus reus* of genocide (particularly in relation to Article II(c) of the Convention) and its *mens rea*, the article then critically assesses the Court's reasoning in its refusal to rule that a violation of the Convention had taken place in relation to deportation and forcible transfer. The article then concludes by contending that the Court simply failed to provide a much-needed and workable precedent to properly include ethnic cleansing within the legal and factual matrix of genocide.

Key words

ethnic cleansing; evidence of the *actus reus*; evidence of the *dolus specialis*; Genocide Convention; ICJ

Ethnic cleansing occupies a distinct void in international law, particularly as there is no overt provision relating to it in the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention). Article II of the Convention states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

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

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

* Dr Martin Steinfeld, Associate Lecturer, The Dickson Poon School of Law, King's College London [martin.steinfeld@kcl.ac.uk].

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

In the International Court of Justice's (ICJ or Court) most recent judgment in *Croatia* v. *Serbia* on the application of the Convention, the Court was given a second opportunity, after the original *Genocide* judgment in 2007, to hold Serbia to account for atrocities that it committed during the Yugoslav civil war in the 1990s and thereby potentially fill such a legal void.[1] The judgment enabled the Court to develop its reasoning on the practical application of the Convention in light of the International Criminal Tribunal for the former Yugoslavia's (ICTY) judgments since 2007; especially the *Martić* and *Stanišić and Simatović* judgments.[2] To reiterate what has already been elaborated upon by others in this symposium, the Court held (by fifteen votes to two) that Serbia could not be held to have breached the Convention because, whilst a number of acts that it committed constituted the *actus reus* of genocide, the *dolus specialis* of genocide was lacking in all respects.[3] The case, then, differs considerably from the *Genocide* judgment of 2007, in which the Court was prepared to hold that Serbia had violated Article II(a) and (b) of the Convention in relation to the massacre that took place at Srebrenica in July 1995.[4] What also distinguishes the recent judgment from the 2007 one is that Serbia made a counterclaim against Croatia for alleged violations of the Convention. The Court held that Croatia had violated Article II(a) and (b) in relation to its conduct during 'Operation "Storm"' in Krajina in 1995 whilst also lacking the *dolus specialis* of genocide.[5] Equally, the Court had the opportunity to elaborate in greater detail than it did in 2007 in relation to what role, if any, ethnic cleansing should play where the Convention contains no provision relating to forcible transfer and where ethnic cleansing is not overtly proscribed by any other international legal instrument.[6] The Court was faced with two immediate problems: a jurisdictional one and one relating to interpretation. In a jurisdictional sense, the Court could only determine the matter by virtue of Article IX of the Convention and thus was restricted 'to the interpretation, application or fulfilment' of the Convention.[7] This jurisdictional restriction made it particularly difficult for both parties to get the Court to resolve any matters that related to ethnic cleansing, as the Court made it clear, reiterating its ruling in the *Genocide* judgment,

1 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43 (hereinafter *Genocide* judgment).

2 *Prosecutor v. Milan Martić*, Judgment, Case No. IT-95–11-T, T.Ch. I, 12 June 2007; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Judgment, Case No. IT-03-69-T, T.Ch. I, 13 May 2013.

3 *Croatia v. Serbia*, The Court determined that Serbia had violated Article II(a) and (b) of the Convention by killing, injuring, and, in other ways ill-treating Croats in Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia but was not prepared to rule that Serbia had violated Article II(c) of the Convention. In any case, all of these acts lacked, in its view, the *dolus specialis* of genocide. See paras. 295, 360, 394, and 440.

4 *Genocide* judgment, *supra* note 1, para. 297.

5 *Croatia v. Serbia*, *supra* note 1, paras. 499 and 515.

6 With the exception of Article II(e), which does classify as genocide forcibly transferring children of the group to another group. No argument was made, though, by either party that this took place in Croatia during the Yugoslav civil war.

7 *Croatia v. Serbia*, *supra* note 1, para. 84 (citing the wording of the Convention itself).

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that it did not have the jurisdiction to develop a legal doctrine of ethnic cleansing seen as a violation of international human rights or humanitarian law on the grounds of customary international law or as an *erga omnes* obligation.[8] Nor could the Court determine whether there had been a violation of any other written legal instrument as it had been seized of the dispute by virtue of Article IX of the Convention alone. This somewhat narrow jurisdictional basis set the parameters within which both parties to the case and, ultimately, the Court could determine the extent to which ethnic cleansing formed part of the Convention itself. The Court determined that ethnic cleansing was relevant to the interpretation of the Convention in two ways: either forming part of the *actus reus* of genocide as specifically contained within Article II(c) of the Convention or as evidence of *dolus specialis*.[9] Thus, whilst ethnic cleansing can be relevant to determining matters under the Convention, the question is the extent to which this was, in the Court's view, relevant in the case itself.

1. Ethnic cleansing as part of the *actus reus* of genocide

There was some disagreement between Croatia and Serbia as to whether or not ethnic cleansing constitutes an aspect of the *actus reus* of genocide. Serbia submitted that forcible transfer was irrelevant to any interpretation of the Convention, whereas Croatia formed the view that 'forced displacement' could constitute one of the conditions outlined as a violation of Article II(c) of the Convention.[10] Essentially, therefore, for the Court to hold that there had been a violation of Article II(c) on the grounds of ethnic cleansing, it would also have to be determined that other Article II violations had taken place.[11] This argument leaves ethnic cleansing somewhat of an emasculated concept within the parameters of the Convention. The Court determined that ethnic cleansing had to be accompanied by evidence of an intention physically to destroy a protected group, relying on its previous ruling in the 2007 judgment, and that therefore 'the circumstances in which the forced displacements were carried out are critical in this regard'.[12]

The question then was whether such circumstances had been substantiated in the evidence put before the Court. For Croatia, the 'systematic expulsion of Croats from their homes and ... forced displacement' that took place in various regions of Croatia and was perpetrated by a combination of the regular Yugoslav Army (JNA) and Serb paramilitaries can be seen but as part of a much broader, in its view, genocidal plan containing various elements.[13] Thus, Croatia attempted to tie arguments that related to ethnic cleansing with other alleged violations of Article II(c) such as rape, deprivation of food and medical care, forced attempts to display signs of ethnicity,

8 Ibid., para. 85.
9 *Genocide* judgment, *supra* note 1, para. 190 and repeated in *Croatia v. Serbia*, *supra* note 1, para. 162.
10 As the Court summarized: 'Croatia argues that forced displacement, accompanied by other acts listed in Article II of the Convention, and coupled with an intention to destroy the group, is a genocidal act'. Ibid., para. 161.
11 Ibid., para. 163.
12 Ibid.
13 Ibid., para. 361.

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looting property, and vandalizing cultural heritage (such as Catholic churches).[14] The problem that Croatia then faced was that its ability to successfully argue before the ICJ that Serbia had violated Article II(c) of the Convention on the grounds of forced displacement or transfer depended upon the success of the other alleged violations of Article II(c). As has been outlined elsewhere in this symposium, the Court held that Serbia had not violated Article II(c) at all, determining that a violation of Articles II(a) and (b) had taken place instead.[15] Specifically in relation to forced displacement, the Court relied heavily on both the *Martić* and *Stanišić and Simatović* judgments. In one respect, though, the judgment validates Croatia's argument that ethnic cleansing can and should be seen to be part of a complex genocidal matrix within which a number of violations of the Convention took place. For instance, in relation to *Martić* the Court noted that the JNA and Serb paramilitary forces had 'deliberately created a coercive atmosphere in the SAO Krajina and then in the RSK' which involved 'the displacement of the non-Serb population' following 'massive and widespread acts of violence and intimidation' which included 'killings, beatings, robbery and theft, harassment and extensive destruction of houses and Catholic churches' for which there was a 'substantial amount of evidence'.[16] In the circumstances, then, the non-Serb population of these territories had no choice but to move or, alternatively, were forcibly deported. The Court also cited *Stanišić and Simatović* where the ICTY, in its view, 'reached similar findings'.[17]

However, despite the Court being convinced that such acts did take place, it held that Article II(c) had not been breached in relation to forced displacement (as well as all other grounds alleged by Croatia in relation to Article II(c)) because, as the Court put it: 'there is no evidence before the Court enabling it to conclude that the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group'.[18] In other words, the success or failure of ethnic cleansing in terms of Article II(c) was contingent upon the Court's ruling on alleged violations of Article II(a), (b), and (c) (in terms of alleged violations other than ethnic cleansing), coupled with the *dolus specialis*, which was where Croatia's case ultimately failed.[19] The Court also held that Serbia's allegations that the forced displacement of Krajina's Serbian population during 'Operation "Storm"' amounted to the *actus reus* of genocide was similarly ill-founded.[20] Thus, it appeared that the

14 Ibid.

15 Ibid. In relation to killings perpetrated by the JNA or Serb paramilitary forces determined to violate Art. II (a), see paras. 224 (Vukovar), 230 (Boganovici), 240 (Lovas), 245 (Dalj), 256 (Joševica), 261 (Hrvatska Dubica), 267 (Lipovača), 271 (Saborsko), 277 (Poljanak), 284 (Škabrnja and Nadin), 294 (Dubrovnik), and 295. In relation to violations of Art. II(b), see paras. 305 and 311 (Vukovar), 315 (Bapska), 319 (Tovarnik), 324 (Berak), 330 (Lovas), 335 (Dalj), 346 (Voćin), 350 (Đulovac), 354 (Knin), and 360.

16 Ibid., para. 374 (citing *Martić*, paras. 427–31).

17 Ibid., para. 375 (citing *Stanišić and Simatović*, para. 997). Perhaps one notable difference between the two cases is that the Court also cited the ICTY's findings on the scale of ethnic cleansing in the SAO Krajina region between April 1991 and April 1992 (amounting to the forced displacement of 'between 80,000 and 100,000 people').

18 Ibid., para. 376.

19 Particularly violations of Article II(a) and (b) as the Court was at least prepared to rule that the *actus reus* for both had been satisfied. See *supra* note 3.

20 Ibid., paras. 476–80.

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case ultimately turned on both sides' intentions behind the commission of various acts, of which forced displacement was but one.

2. Ethnic cleansing in the context of the *dolus specialis*

It is in relation to the Court's conclusions on the *dolus specialis* that submissions relating to ethnic cleansing became highly relevant and, ultimately, where the judgment took a somewhat ironic twist. Croatia outlined an extensive (and harrowing) list of 17 'factors' – of which forced displacement was but one – from which it claimed that 'the only reasonable inference' that could be drawn is the intention to destroy the Croats in the areas concerned.[21] The ironic twist then occurred when the Court outlined Serbia's defence in relation to *mens rea*. Serbia admitted that 'the evidence shows a multitude of patterns giving rise to inferences of combat and/or forcible transfer and/or punishment' but, for Serbia, this was 'not genocide' because 'the purpose of the attacks was to force [the Croat population] to leave'.[22] In other words, the admission that it fully intended to ethnically cleanse parts of Croatia neutralizes any genocidal claim, even in circumstances where the *actus reus* in relation to Article II(a) and (b) had been proven. The Court was persuaded by this argument, along with the ICTY's reasoning in *Martić*.[23] The Court found that because of the relatively small number of killings involved[24] (that is, violations of Article II(a) of the Convention) by comparison with the 80,000–100,000 Croats who were forced to flee:

> The acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.[25]

Although the ICJ had previously stated that it was prepared to agree with its own reasoning in the *Genocide* case that evidence of ethnic cleansing may be 'indicative of the presence of specific intent', in actual fact it led the Court to draw quite the opposite conclusion.[26] Therefore, even if Serbia had acted strategically and systematically in its behaviour toward the local Croat population (which it did, see below), so long as it could satisfy the Court that all it was intending to do was to render an area 'ethnically homogenous' or create a 'Greater Serbia', it would not be held to violate the Convention.[27] Ethnic cleansing then, in effect, became a rather cruel 'trump card' that could be used as a comprehensive defence against any allegations that it had committed acts of genocide. This was certainly not the line of the reasoning that Croatia expected would transpire from the judgment when it placed continuing emphasis on Serbia's ethnic cleansing aspirations as, in its view, strong evidence of

21 Ibid., paras. 408–9.
22 Ibid., para. 412.
23 Ibid., paras. 426–8.
24 Ibid., para. 437. Croatia alleged that 12,500 Croats were murdered, a figure which Serbia disputed.
25 Ibid., para. 435.
26 Ibid., para. 434.
27 Ibid., paras. 426 and 420 respectively.

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the *dolus specialis*.[28] The problem that Croatia faced, as compared to Bosnia in the 2007 case, was that it also had to deal with its own allegations of ethnic cleansing as evidence of the *dolus specialis* and, if anything, because of the infamous 'Brioni Transcript' (which has been outlined in more detail elsewhere in this symposium), evidence against it was more damning by virtue of its existence.[29] This counter-allegation by Serbia, and the perception of the need for relative parity between the two parties, was evidently on the Court's mind as its conclusion on intent in relation to Croatia was very similar to the reasoning it adopted in relation to Serbia.[30] The use of ethnic cleansing as a 'shield' designed to protect a state from allegations that it had violated the Convention, as opposed to the 'sword' that Croatia intended it to be, proved to be one of the most controversial aspects of the Court's judgment in *Croatia* v. *Serbia*.

3. Was the ICJ justified in its reasoning in relation to forcible transfer and deportation?

Can the ICJ's reasoning be justified? According to Milanovic, the Court 'displayed a laudable degree of both restraint (which is after all *de rigeur* for the ICJ) and consensus' and, importantly, was 'entirely consistent' with the *Genocide* judgment.[31] Likewise, Kuhrt's assessment was that the decision was evidence not of the Court's 'weakness' but of problems that are inherent in the narrow definition of genocide in the Convention.[32] Thus, in this narrow sense ethnic cleansing and genocide appear to be mutually exclusive. There is certainly force in both of these positions. Equally, by contrast with Rajković's assessment of the *Genocide* case, the reasoning of the Court could be classified as *both* 'Good Law' *and* 'Good Politics' in that the outcome was satisfactory to both parties.[33] Indeed, both Serbia and Croatia engaged in what

28 Ibid. See, in particular, paras. 408 and 434–7.

29 Ibid., paras. 501–7. The point being made here is that at least in relation to the 'Brioni Transcript' there was evidence that was recorded of a meeting that took place in which senior Croatian military officials discussed their preparation for 'Operation Storm', in contrast with the claim being made against Serbia where no such 'high level' meeting was cited. In other words, the inferences that could be drawn from such a transcript are another matter (and, indeed, beyond the scope of this article). As the ICTY revealed in *Prosecutor v. Ante Gotovina and Mladen Markač*, there was judicial disagreement on how the transcript could be interpreted in terms of whether it established that the appellants had committed various acts of murder and inhumane acts as a crime against humanity in a joint criminal enterprise; Judgment, Case No. IT-06–90-A, A.Ch. 16 November 2012, para. 4. Whilst the original trial judgment was prepared to rule that the transcript was evidence of the intention by high-level Croat officials to forcibly remove the entire Serb population of the Krajina region, this was overruled on appeal on the basis of it not being the case that its 'only reasonable interpretation' was of a joint criminal enterprise to that effect. Ibid., para. 97.

30 Compare *Croatia v. Serbia, supra* note 1, paras. 510–14 with paras. 161–3 and paras. 434–40.

31 M. Milanovic, 'On the Entirely Predictable Outcome of *Croatia v. Serbia*', *EJIL: Talk!*, 6 February 2015, www.ejiltalk.org/on-the-entirely-predictable-outcome-of-croatia-v-serbia (accessed 19 July 2015).

32 N. Kuhrt, 'Is the Croatia vs Serbia Genocide Verdict a Reminder of The Hague's Insignificance?, *Telegraph*, 4 February 2015, www.telegraph.co.uk/news/worldnews/europe/serbia/11389426/Is-the-Croatia-vs-Serbia-genocide-verdict-a-reminder-of-The-Hagues-insignificance.html (accessed 19 July 2015). Likewise, as Lieberman states: 'Ethnic cleansing shares with genocide the goal of achieving purity but the two can differ in their ultimate aims: ethnic cleansing seeks the forced removal of an undesired group or groups where genocide pursues the group's "destruction"'. B. Lieberman '"Ethnic Cleansing" versus Genocide?', in D. Bloxham and A. D. Moses (eds.) *The Oxford Handbook of Genocide Studies* (2010), 42 at 45.

33 N. Rajković, 'On "Bad Law" and "Good Politics": The Politics of the ICJ Genocide Case and Its Interpretation', (2008) 21 LJIL 885.

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could be termed acts of metaphorical 'self-flagellation', preparing to apologize for the crimes that both committed against civilians of both ethnicities with a view to peaceful reconciliation, an issue that Judge Keith, in his separate opinion, paid particular attention to.[34] Ultimately, both sides were found to have committed the *actus reus* of genocide but not to have been sufficiently morally deplorable to seek each other's mutual destruction.

Yet, another interpretation of the reasoning of the ICJ is that it represented a pyrrhic victory for the victims of the atrocities who could comfort themselves in the thought that their appearance in thousands of shallow graves dotting the former Yugoslav countryside was merely an unfortunate side effect of an intention simply to change the demographics of a given area. Furthermore, do ethnic cleansing and genocide need to be characterized in such mutually exclusive terms? In the context of ethnic cleansing, it would seem to be difficult, if not impossible, for any state to be held legally responsible for acts of genocide according to the Court's interpretation of the Convention. Equally, it could be suggested that the ICJ's approach is divorced from the modern reality of genocide.[35] In terms of interpretation, for instance, it is perfectly possible to portray ethnic cleansing as a fundamental aspect of genocide.[36] As Quigley put it: 'an intent to expel, far from contradicting an intent to destroy a group, may help to prove such an intent'.[37] Indeed, this point was made vividly by Judge Cancado Trindade's dissenting opinion. Whilst Milanovic appears to dismiss the opinion – describing it as 'an awesome display of Cancadotrindadeness' – his appeared to be the only voice within the Court to suggest that ethnic cleansing and genocide should not be seen to be mutually exclusive.[38] As he states: 'the initial "intent to remove", degenerates into "intent to destroy", the targeted group. In such

34 *Croatia v. Serbia*, *supra* note 1, Separate Opinion (Judge Keith), paras. 35–36.

35 As Vajda suggests, in her cogent analysis of the 'restrictive' approach that international tribunals appeared to have consistently taken in relation to conceptualizing ethnic cleansing within genocide: 'adjusting the norm would make the prohibition of genocide more applicable to the modern challenges instead of merely serving a symbolic function as a reminder of the Holocaust'. M. Vajda, 'Ethnic Cleansing as Genocide – Assessing the Croatian Genocide Case before the ICJ', (2015) 15 *International Criminal Law Review* 147, at 149.

36 This is arguably what the ICTY did in *Prosecutor v. Zdravko Tolimir*, Judgment, Case No. IT-05–88/2-A, A.Ch., 8 April 2015. In the case, the ICTY was prepared to re-affirm the trial judgement's determination that ethnic cleansing can violate Art. 4(2)(b) of the ICTY Statute on genocide (phrased identically to Art. II of the Convention) as constituting the causing of 'serious mental harm', although only in relation to forcible transfer that took place at Srebrenica and not Žepa. Ibid., paras. 212 and 219–21. In Srebrenica what was persuasive to the ICTY was the extremity of the circumstances of forcible transfer in that Bosnian Muslim women, children, and the elderly were forcibly separated from male family members (not knowing of the latters' fate) and were then subjected to 'appalling conditions' in their transfer, causing 'profound trauma'. Ibid., para. 210. This violated Art. 4(2)(b) because it 'caused grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life so as to threaten the physical destruction of the group in whole or in part'. Ibid., para. 212. In Žepa, though, the ICTY was prepared to allow the appellant's appeal on the grounds that such 'grave and long-term' disadvantages had not been satisfied as the circumstances in Žepa were entirely different because no such separation of male Bosnian Muslims took place and the psychological harm alleged resulted from pressure being 'exerted' on the Muslim population to leave, combined with threats and news emerging of what was taking place at Srebrenica, rather than because a substantial portion of the protected had disappeared and possibly been murdered. Ibid., paras. 215–16. The ICJ in *Croatia v. Serbia*, though, did not even consider forcible transfer in the context of a potential violation of Art. II(b) of the Convention.

37 Quigley himself cites Damrosch and UN General Assembly Resolution 47/21 as evidence of the view that the ethnic cleansing and genocide that took place in Bosnia were effectively part of the same genocidal plan. See J. Quigley, *The Genocide Convention: An International Law Analysis* (2006), 195.

38 See Milanovic, *supra* note 31. See also, Vajda, *supra* note 35, at 154.

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circumstances, there is no sense in trying to camouflage genocide with the use of the expression "ethnic cleansing"'.[39] Indeed it is certainly conceivable that such an argument could have been made on the facts as presented to the Court. For instance, the Court cites *Martić* in which the tactics adopted by Serb forces in SAO Krajina were outlined, appearing to be systematic, deliberately orchestrated and where the intention to kill would not appear to be easily distinguishable from the intention to ethnically cleanse.[40] Forcible removal, expulsion, and deportation of entire populations has long been widely condemned by the international community. The *Croatia* v. *Serbia* case presented a unique opportunity for the ICJ – the world's pre-eminent court – to condemn such atrocities and to provide a workable precedent to facilitate the proper investigation of such crimes, bring those responsible to justice, and prevent such morally deplorable crimes taking place in the future. On the issue of ethnic cleansing, the ICJ undoubtedly failed to set such a precedent.

39 *Croatia v. Serbia*, *supra* note 1, Dissenting Opinion (Judge Cançado Trindade), para. 241.

40 Ibid., para. 414. The standard protocol, as the Court outlined in citing *Martić*, appeared to be that a village would be shelled, then troops would enter it and start killing and committing other acts of violence against the local Croat population. This would then be followed by looting, the destruction of property and churches, leading finally to the forcible removal of the remaining population. In other words, Serb troops would enter a village with the explicit intention of murdering a sizeable portion of its population with a view to establishing a 'Greater Serbia' and it would appear to be almost impossible to cognitively separate off the intention to achieve a nationalistic aim through fully intending to kill whilst at the same time desiring to 'spare' others through ethnic cleansing. Indeed, the mindset, in which those committing various heinous crimes often have multiple purposes, is arguably essentially at the heart of the modern world of ethnic conflict and this could have been reflected in the Court's reasoning. It should be noted that the prosecutors in the case chose not to charge the defendant with genocide, choosing instead to try to secure a conviction under Art. 3 (Violations of the laws or customs of war) and/or Art. 5 (Crimes against humanity). *Martić*, *supra* note 2, paras. 3–8; See also *Gotovina and Markač* where the prosecutor indicted the defendants on the same grounds; *Prosecutor v. Gotovina and Markač*, Judgement, Case No. IT-06-90-T, T. Ch., 15 April 2011, para. 1. On one level, therefore, the ICJ's reasoning in *Croatia v. Serbia* was merely reflecting the lack of a conviction by the ICTY on the grounds of genocide in the *Martić* case. However, it does not follow that, because no decision was taken to prosecute the defendant for violating Art. 4 of the ICTY Statute, a conviction on the grounds of genocide would not have been secured. Indeed, in *Martić* what cannot be ignored in relation to the case was that the prosecution was able, inter alia, to secure a conviction against the defendant for violating Art. 5(d) of the ICTY Statute in relation to deportation. *Martić*, *supra* note 2, paras. 426–32.