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Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia

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Abstract
The International Court of Justice's (ICJ) decision in the case of *Croatia* v. *Serbia* raises fundamental questions about the nature of genocidal intent. While the Court was careful not to make a clear departure from established case law on the matter, its emphasis on elements such as 'pattern' and 'scale' – at the expense of the role of individual intent – indicates that the majority on the bench adopted an interpretation which brings the legal concept of genocide closer to an abstract event of mass atrocity than to an act capable of commission even by select individuals. That, however, is an understanding which is not only alien to the traditional interpretation adopted by international criminal tribunals, but also unjustifiable under the established law of state responsibility. This article considers various aspects in the judgment which invite critique in that regard, but also analyses the way in which the ICJ has dealt with the coexistence of intent and certain motives – a crucial aspect of the case which has already been object of some controversy.

Key words
Croatia; genocide; genocidal intent; international criminal law; Serbia

1. The ICJ at a crossroads: Introductory remarks

Commissions of Inquiry and courts with non-criminal jurisdiction often struggle with the concept of genocide. A principal reason for this is to be seen in the fact that, in order to enter a finding that genocide had been committed, it is indispensable to establish the existence of genocidal intent – the intent to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[1] It is an element of such significance that the International Criminal Tribunal for the Former Yugoslavia (ICTY) referred to it as the aspect that 'characterises' the crime.[2]

The need to investigate aspects of a phenomenon which are strongly dependent on the person of the individual perpetrator, certainly puts international criminal courts and tribunals in a privileged position: as a general rule, the individual defendant is in their courtroom, and they will often have access to information which

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1 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Art. II.
2 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, T.Ch. II, 1 September 2004, para. 695.

allows an insight into his mindset. And that is important: the more so, as the *mens rea* of genocide comprises much more than a mere reflection of elements which already exist on the objective side: specific intent in particular constitutes an aspect which goes far beyond that.[3] Commissions of Inquiry, but also the ICJ, which has to operate with tools fashioned for inter-state disputes, usually lack the investigatory possibilities at the disposal of their colleagues at the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

They tend to deal with this problem in at least two different ways. For one, the game of Old Maid has lost none of its popularity – responsibility for a conclusive finding is often passed on to another authority.[4] It is not an option that is easily available to the ICJ: the buck stops here.[5] The other solution is an approach towards the concept of genocide through a readjustment of the focus onto those (perceived) elements of the crime which can be established without the need for a detailed investigation of the mindset of the perpetrators. The Commission of Inquiry on Darfur thus gave prominent room to the question whether the government of Sudan had pursued a 'policy' of genocide.[6] If that path is chosen, the emerging concept becomes more abstract – it approaches the 'macro phenomenon' of genocide, to borrow a term which Stefan Kirsch had coined in 2009.[7] This method is apparent in the reasoning of the ICJ in the case of *Croatia* v. *Serbia* as well; but it is a method which carries difficulties of its own.

Given the limitations which the ICJ and Commissions of Inquiry face, both approaches are certainly understandable, and it may seem uncharitable to blame the relevant bodies for adopting them. Were it not for one consideration: if observers of international atrocities enter a finding that genocide has or has not occurred, while still ostensibly adhering to the traditional legal concept of the crime, they must expect questions about the appropriateness of the methods that led to these results. The ICJ in *Croatia* v. *Serbia* was certainly not shy in expressing its view that the commission of genocide had not been established.[8] Yet the (asserted) starting

3 See *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-T, T.Ch. II, 31 July 2003, para. 520.

4 See Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60 (1 February 2005) ['Darfur Report'], at 4 at II ('a determination that only a competent court can make'); United Nations Office of the High Commissioner for Human Rights, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (August 2010) ('Mapping Exercise'), para. 522 ('Only … judicial determination would be in a position to resolve whether these incidents amount to the crime of genocide'); Human Rights Council, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (7 February 2014), UN Doc. A/HRC/25/CRP.1 ('North Korea Report'), para. 1159 ('This is a subject that would require thorough historical research').

5 But see *infra*, note 79, on the ICJ's reliance on the case law of the ICTY and the decisions of its Prosecutor.

6 Darfur Report, *supra* note 4, at II.

7 S. Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct', (2009) 42 *Creighton Law Review* 347.

8 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015 (not yet published), paras. 441, 515. The Darfur Report was more cautious and noted that the Government of Sudan had 'not pursued a policy of genocide'. Its authors did, however, feel confident enough to state that the 'crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned' (para. 640). The North Korea Report noted that the Commission had

point of its considerations was the pre-existing legal concept of genocide, right down to the element of specific intent, which it called the 'essential characteristic of genocide'.[9] While the purpose of the Court's investigation – the examination of state responsibility – certainly differs from that underlying the work of international criminal tribunals, the position thus adopted makes clear that it saw, at least to a certain degree, ground with their tasks: The definition of the conduct at the core of both state responsibility and individual liability has ostensibly not changed. That, however, invites an analysis of the consistency of the Court's opinion with regard to the subjective element of the crime, and indeed of the concept of genocide that appears to emerge from the ICJ's reasoning in general.

Three aspects in particular require critique. The first relates to the Court's apparent understanding of genocide (inspite of its proclaimed appreciation of the significance of genocidal intent) as a large-scale event whose establishment can be divorced from the circumstances of individual perpetrators. The second aspect is the reverse of the coin: by focusing on a more abstract paradigm, the Court has lost sight of certain elements of the specific intent of individuals which would have deserved detailed consideration. The third aspect concerns the Court's treatment of motives; a point whose significance was also stressed in the separate opinions of individual judges.

2. Observations on the ICJ's treatment of genocidal intent

2.1. The siren song of the macro phenomenon

'Genocide' is a term which, in the public mind, conjures up certain images: Mass atrocities, killings on a large scale – events, therefore, in which the magnitude of the phenomenon and its general objective appearance occupy a prominent position. There is reason to believe that this understanding is essential for the ordinary concept of the crime,[10] but it also has a certain currency in the social sciences.[11]

The law has taken a different direction. Large actual victim numbers are not a prerequisite.[12] Nor is there a requirement that a multitude of perpetrators must have acted to commit genocide. Under the law, the true threshold criterion for genocide is to be seen on the subjective side of the crime – it is only at that point that 'substantiality', with regard to the part of the group that the perpetrator targets, is required (an aspect to which this article will return).[13] All the same, the 'ordinary

'not [been] in a position' to collect sufficient information for a finding that the authorities had the 'intent to physically annihilate' followers of particular religions (para. 1159). The Mapping Exercise likewise found that it was not in a position to determine whether the relevant events amounted to genocide (para. 522).

9 *Croatia v. Serbia*, *supra note 8*, para. 132, and see in general paras. 124–66.

10 See *Oxford English Dictionary* (OED), 'genocide (n.)'. The OED does define genocide as the 'deliberate … extermination of a national or ethnic group', but does not appear to require a heightened form of intent. On the legal requirements of specific intent, see P. Behrens, 'The Mens Rea of Genocide', in P. Behrens and R. Henham, *Elements of Genocide* (2012), 70, at 75–96.

11 See, for instance, L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (1982), 32.

12 See Elements of Crime (2002), UN Doc. PCNICC/2000/1/Add.2, Art. 6, (see first element of each alternative, which in this regard arguably reflects customary international law). (But see in general on the difficulties of reliance on the Elements of Crime in the case of *Croatia v. Serbia*, *infra*, at note 30).

13 See *infra*, section 2.2.

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concept' of genocide creates an image of such strength that even lawyers feel the temptation to revert to these roots.[14]

That tendency is certainly apparent in the instant decision by the ICJ. The Court does not dismiss the importance of intent, but the way it establishes it is through a method which sits better with genocide as a macro phenomenon.

Rather than investigating the mindset of specific individuals, the Court places emphasis on the question of whether there was a 'pattern' which pointed towards the existence of intent,[15] and the non-existence of that element appears to be the chief reason why the ICJ held that the acts committed against the Croat group were not committed with the required *dolus specialis*.[16]

The invocation of a pattern of conduct may, of course, be an appropriate way of proceeding if pattern constitutes a suitable form of evidence for intent – and this is indeed how the ICJ presented its reliance on this element.[17] From a pragmatic perspective, it is an understandable approach. The Court had adopted a particularly high standard of proof for this case: In this regard, it referred with approval to the *Corfu Channel* judgment, in which it found that 'claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.[18] Given the fact that it is difficult even for international criminal tribunals to reach the conclusion that genocide had been committed (in the absence of clear statements made by the defendant at the time or acts that leave no doubt about the underlying intent[19]), reliance on pattern does offer itself as a tempting alternative for a court deprived of the instruments of international criminal justice. It must have appeared even more tempting to the parties themselves, who, according to the ICJ, had to shoulder the burden of proof for those facts which they alleged.[20]

And yet, neither Serbia nor Croatia relied exclusively on 'pattern'. Given the strands of evidence to which each party referred in their memorials and which at times included mentions of very specific incidents,[21] they may well have been led to believe that they had, from their points of view, discharged their duty to conclusively demonstrate the existence of genocidal intent.

The invocation of pattern does indeed cause certain difficulties. The fact may be recalled that the ICJ, in *Bosnia and Herzegovina* v. *Serbia and Montenegro*, had shown itself critical of Bosnia's position that the 'very pattern of the atrocities' could demonstrate genocidal intent and stated that it '[could not] agree with such a broad

14 For a troubling example in the context of the ICTR, see Kirsch, *supra* note 7, at 358.
15 See *Croatia v. Serbia*, *supra* note 8, paras. 145, 404; 407; 410; 416; 440; heading before 508; 511.
16 Ibid., para. 440.
17 Ibid., para. 145.
18 Ibid., para. 178.
19 On the value of acts and utterances of the accused, see *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998, para. 728. For a case demonstrating the relevant evidentiary difficulties, see *Stakić*, *supra* note 3,paras. 547, 553, 554.
20 *Croatia v. Serbia*, *supra* note 8, para 174.
21 See *Croatia v. Serbia*, Memorial of the Republic of Croatia (Vol. 1), 1 March 2001 ('Croatia Memorial'), in particular 381–6, paras. 8.16 to 8.17; *Croatia v. Serbia*, Counter-Memorial Submitted by the Republic of Serbia (Vol. 1), 1 December 2009 ('Serbia Counter-Memorial'), in particular 452–63, paras. 1412–52.

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proposition'.[22] For pattern to be accepted as evidence, it would have to be of such a nature that 'it could only point to the existence of such intent'.[23]

Even then, pattern encounters challenges. Evidence has to be relevant, if it wants to be useful.[24] A clear connection to the substantive law is inevitable: Kevin Jon Heller is not far off the mark when he notes that

> [t]he fact that individuals were killed on a nationwide scale does not make it more likely that the defendant killed one of them. The fact that the victims of the nationwide killings were members of a protected group does not make it more likely that the defendant's alleged victims were also members of that group. And the fact that other unnamed individuals specifically intended to destroy a protected group does not make it more likely that the defendant harboured the same specific intent.[25]

This is an observation which retains its validity not only in international criminal law, but in any context in which genocidal intent has to be established, and which thus casts doubt from the outset on the helpfulness of 'pattern' as an independent strand of evidence. But the ICJ in *Croatia* v. *Serbia* went further than that: it showed such strong reliance on this aspect that it turned pattern into the decisive factor on the question whether genocidal intent had existed.[26] By the same token, specific events which, through statements by perpetrators or acts carried out by individuals, may well have indicated the existence of genocidal intent, were dismissed as 'isolated incidents'.[27] If that were an acceptable approach, pattern would take on a significance which reaches far beyond that of a mere element of evidence. The situation is not far different from that of a court which, on a matter of criminal law, decides to acquit a defendant on the charge of murder, because the prosecution had not shown the presence of a certain element – such as the existence of 'base motives' behind the act.[28] Even if that element had not hitherto existed in the definition of the crime, its introduction by the Court (if the Court has authority to do so), has meaning that goes beyond questions of evidence: It has become part of the very concept of the crime, and thus part of the substantive law.

Where genocide is concerned, the introduction of such an element is not free from controversy. On the level of substantive law, there is no persuasive reason why 'pattern' should play any role in the first place. True enough, the ICC's Elements of Crime of 2002 (for the first time in the codified history of genocide) stipulate that the

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22 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43, para. 373.

23 Ibid.

24 This is a point which is inherent to the logic of evidence; but the importance of relevance is also affirmed in the rules of procedure of various international tribunals. See on this P. Behrens, 'Assessment of International Criminal Evidence: The Case of the Unpredictable Génocidaire', (2011) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 666, and *Croatia v. Serbia, supra* note 8, para. 180.

25 K. J. Heller, 'International Criminal Tribunal for Rwanda – Genocide – Conspiracy to Commit Genocide – Complicity in Genocide – Mens Rea – Judicial Notice', (2007) 101 AJIL 159.

26 See on this *Croatia v. Serbia, supra* note 8, section V.B.2. Section V.B. deals with 'genocidal intent', a question which is approached through the question 'Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group?'

27 See *infra*, note 31.

28 The example is taken from the phrasing of '[m]urder under specific aggravating circumstances' in the German Criminal Code (s. 211). German Criminal Code (Michael Bohlander, trs.), available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1803 (accessed 18 June 2015).

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conduct must have been committed 'in the context of a manifest pattern of similar conduct directed against that group' or must have been conduct that could itself have effected 'such destruction'.[29] But the Elements were adopted more than 50 years after the Genocide Convention, and, as Judge Gaja pointed out, they do not constitute a 'subsequent agreement between the parties regarding the interpretation' of the treaty in the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.[30] The Court did not discuss this difficulty; the basis for the introduction of 'pattern' in its considerations thus remains unclear, and the suspicion that it is founded on an understanding of genocide as a macro phenomenon rather than as conduct capable of commission by individuals, suggests itself.

The aversion of the Court towards an understanding of genocide in the traditional legal form, and thus as conduct characterized by the intent of individuals, becomes even clearer when the Court declares that 'it is difficult to establish such intent on the basis of isolated acts'.[31] This too, is more than a statement on 'mere' evidence: It is a finding which allowed the Court to dismiss, at a later stage, acts of members of a paramilitary unit which would have merited consideration as acts carried out with genocidal intent.[32] But it is a step that is not borne out by the logic of the law: On the level of substantive law, there is no reason why the acts and intent of individuals should not qualify as genocide, even if a wider pattern were absent. That, of course, is the conclusion which the ICTY had reached in *Jelisić* when it found that the commission of genocide by a 'lone individual' was a theoretical possibility.[33]

The ICJ's reluctance to allow the concept of genocide to embrace the conduct of individuals is apparent not only with regard to Croatia's claims. Where crimes committed on Serbian victims are concerned, the Court noted that the 'killing of civilians and the ill-treatment of defenceless individuals were not committed on a scale such that they could only point to the existence of a genocidal intent'.[34] But if only acts committed on a large scale can indicate genocidal intent, the acts of individuals would almost unavoidably have to be ruled out. Objective magnitude,

29 Elements of Crime, *supra*, note 12, Art. 6 (see the last element of each alternative).

30 See *Croatia v. Serbia*, *supra* note 8, Separate Opinion (Judge Gaja) ('Gaja Opinion'), para. 2. See also Croatia, maintaining that acts of a 'small number of individuals' may reflect genocidal intent, *Croatia v. Serbia*, *supra* note 8, para. 144.

31 *Croatia v. Serbia*, *supra* note 8, para. 139.

32 See *infra*, at note 57.

33 *Prosecutor v. Goran Jelisić*, Judgment, Case No. IT-95-10-T, T. Ch., 14 December 1999, para. 100. This view by the Trial Chamber has led to some controversy in the literature, with Schabas noting that this position might be called 'the Lee Harvey Oswald theory of genocide'. W. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia', (2001/2002) 25 *Fordham International Law Journal* 31. The Trial Chamber itself referred to the difficulty of proving genocidal intent of an individual if crimes were not widespread (*Jelisić*, para. 101). But that was not the reason why Jelisić was acquitted on the charge of genocide: The reason, rather, was that the Chamber found he had 'killed arbitrarily rather than with the clear intention to destroy a group' (ibid., para. 108). Against that, the Appeals Chamber noted that a 'reasonable trier of fact could have discounted the few incidents where [Jelisic] had shown mercy as aberrations' (Appeals Chamber Judgment, para. 71. On the difficulty caused by inconsistencies in the conduct of perpetrators accused of genocide, see P. Behrens, 'A Moment of Kindness? Inconsistency and Genocidal Intent', in R. Henham and P. Behrens, *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007), 125–40).

34 *Croatia v. Serbia*, *supra* note 8, para. 512.

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from this perspective, appears to enter the very definition of the crime – at the expense of the specific intent of individuals.

It is difficult to find any justification for this displacement of the mental element. It might be tempting to construct reasons by invoking the fact that the ICJ had to deal with state responsibility instead of individual criminal responsibility, and the Court itself emphasized the distinction between the two legal frameworks.[35] But the path towards a 'macro phenomenon' of genocide is precisely not the one which the International Law Commission (ILC) had taken in its Draft Articles on State Responsibility. In that instrument, the ILC used genocide as a principal example for the fact that the element of 'attribution' to a state can be subjective and thus require 'intention or knowledge' of the relevant agents or state organs.[36] It is therefore too easy to claim that state responsibility simply involves different parameters for genocide: here, too, the identification of the *mens rea* of individual perpetrators is an indispensable requirement.

2.2. Ignoring the individual: Missed opportunities and a questionable approach

The 'macro phenomenon' of genocide made its way into the reasoning of the Court through the rear window rather than the front door. But the position it held in the ICJ's perspective is affirmed not least through its refusal to give due consideration to aspects of the case which could have invited a finding of genocide on the basis of the intent of individuals.

One particular point in this regard is the Court's approach towards the concept of substantiality.

While a perpetrator of genocide must have had the intent to destroy a protected group at least 'in part', international criminal tribunals and the ILC have, for a long time, accepted that these words must be understood to mean an intended destruction of the relevant group in 'substantial part'.[37]

The Court correctly outlines the main approaches which have been advanced towards this element: The quantitative approach, which proceeds on the basis of a numerical assessment of the targeted part of the group,[38] the 'functional' or 'qualitative' approach which focuses on a significant section of the group (defined, for instance, by its prominence),[39] the geographical approach, which accepts that genocide may be committed in a geographically limited area,[40] but also the fact that the extent of the perpetrator's reach can determine the shape of his intent.[41]

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35 Ibid., para. 129.
36 ILC Draft Articles on State Responsibility, 2001, YILC, Vol. 2, part II, at 34, Art. 2, Commentary, para. 3.
37 See P. Behrens, 'Article 6: Genocide', in M. Klamberg, *Case Matrix Network, ICC Commentary (CLICC)*, at <http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/#c3119> (accessed 18 May 2015).
38 *Croatia v. Serbia*, *supra* note 8, para. 406; see also *Prosecutor v. Vujadin Popović et al.*, Judgment, Case No. IT-05-88-T, T.Ch. II, 10 June 2010, para. 832.
39 *Croatia v. Serbia*, *supra* note 8, para. 406; see also *Brđanin*, *supra* note 2, para. 703.
40 *Croatia v. Serbia*, *supra* note 8, para. 142; *Jelisić*, *supra* note 33, para. 83.
41 *Croatia v. Serbia*, *supra* note 8, para. 142 (referring to the 'area of the perpetrator's activity and control'); *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, para. 13.

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On the basis of these considerations, the Court found that Croatia had 'failed to show' that the perpetrators of the relevant acts had 'availed themselves of opportunities to destroy a substantial part of the protected group'.[42]

This application of the criteria of substantiality has courted controversy. Judge Vucas, for instance, noted that the terms 'prominent', 'significant', and 'substantial' can carry different meanings and pointed out that the 'strategic importance' of the relevant area of settlement should enter into the consideration.[43] Judge Bhandari felt that the Court should not have ignored the finding of the ICTY in *Tolimir* which accepted that the killing of three prominent community leaders, in conjunction with acts of ethnic cleansing, was enough to characterize a series of events as 'possessing genocidal intent'.[44] But there is another aspect which deserves consideration.

While the ICJ was prepared to consider the numerical, the functional, and the geographical approaches, the perpetrator's personal reach made no further appearance in its reasoning.

It is a regrettable development. The 'individualized approach' is one of the most promising methods of establishing substantiality.[45] It is an approach which shows the greatest degree of compatibility with the purpose of the Genocide Convention:[46] a method which determines substantiality by reference to the circumstances of the individual perpetrator. These circumstances go beyond geographical limitations and can show a significant degree of variation: A hundred victims may not fulfil 'substantiality' requirements in the eyes of the head of the armed forces. For a footsoldier, the killing of a hundred victims may be the most he could have done to effect the destruction of the group.

At the same time, the refusal to even consider this approach is consistent with the Court's tendency to promote the concept of genocide as a macro phenomenon: The view of the individual perpetrator cannot enter into the consideration, if the intent of the individual has little significance to begin with.

Other aspects in the Court's reasoning point in the same direction.

It is this same understanding of the concept of genocide which rules out a detailed discussion of a whole range of acts which may have been accompanied by intent to destroy a substantial part of a protected group. Both Croatia and Serbia, for instance, referred to the mutilation of corpses[47] – acts, which, in view of their uselessness

42 *Croatia v. Serbia*, *supra* note 8, para. 437.

43 *Croatia v. Serbia*, *supra* note 8, Dissenting Opinion (Judge Vukas), para. 5.

44 *Croatia v. Serbia*, *supra* note 8, Separate Opinion (Judge Bhandari) ('Bhandari Opinion'), paras. 23 and 22. Tolimir's conviction for genocide for the murder of the three community leaders in Žepa was reversed on appeal two months after the ICJ's judgment in *Croatia v. Serbia*. (See *Prosecutor v. Zdravko Tolimir*, Judgment, Case No. IT-05-88/2-A, A. Ch., 8 April 2015, para. 272. The reasons for that were, however, based on the facts of the situation – the Appeals Chamber expressed its doubts on the Trial Chamber's findings regarding the impact which the killing of these particular community leaders had on the relevant civilian population (ibid., para. 266). On points of law, it supported the Trial Chamber's finding that the selective targeting of leading community figures 'may amount to genocide and may be indicative of genocidal intent' (ibid., para. 263) and Judge Bhandari's points therefore still carry validity and highlight the importance of the establishment of substantiality through the functional approach.

45 See on this *Prosecutor v. Radislav Krstić*, *supra* note 41, para. 13 and Behrens, *supra* note 10, at 95.

46 See also P. Behrens, 'The Need for a Genocide Law', in P. Behrens and R. Henham, *supra* note 10, at 245.

47 Croatia Memorial, *supra* note 21, at 384, footnote 64; at 206, para. 4.166; but see also Serbia Counter-Memorial, *supra* note 21, at 458, para. 1435.

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for military purposes, and, in the particular case, in view of the nature of their commission,[48] invite the question of whether individual perpetrators may in fact have targeted the group as such.

Croatia also referred to ethnically derogatory utterances made during the commission of sexual violence – a point which constitutes one element in the list of factors on the basis of which she advanced her claim that genocidal intent had been in existence.[49] The fate of a male victim in Bapska stands out – during severe mistreatment of his genitals, he was told that he would not 'make any more little Croats'.[50] Derogatory utterances had, of course, been accepted by international criminal tribunals as factors on which a finding of genocidal intent could be based.[51] But their acceptance presupposes an understanding of genocide as a crime that can be committed by individuals. For the individualized perspective of substantiality, these cases matter: They may well affirm that a low-ranking individual perpetrator had fulfilled his personal aim to destroy a significant part of the group. But it is consistent with the general position of the ICJ in this case that it refused to engage in a detailed discussion of these events and did not accept them as a basis for a finding in favour of genocidal intent.[52]

Nowhere are the limits of the ICJ's perspective clearer than in the expression of its views regarding the acts of paramilitary groups against Croat victims. The attribution of acts of paramilitaries to a sovereign state is certainly fraught with difficulty, as the 2007 case of *Bosnia and Herzegovina* v. *Serbia and Montenegro* has shown.[53] That, however, was not the reason why the ICJ rejected the Croatian claim.

At issue were instructions by Željko Ražnatović, leader of 'Arkan's Tigers', a paramilitary group involved in the siege of Vukovar. Ražnatović had told his forces 'to take care not to kill Serbs' and that, 'since Serbs were in the basements of buildings and the Croats were upstairs, rocket launchers should be used to "neutralize the first floor"'.[54] For an assessment of the genocidal character of his conduct, statements of this kind carry considerable significance. The deliberate targeting of victims of a particular group 'while excluding the members of other groups'[55] certainly had meaning for trial chambers seeking to establish the existence of genocidal intent: In the *Semanza* case, the Trial Chamber of the ICTR placed particular weight on the fact that the accused had 'instructed soldiers to separate Hutu from Tutsi, who were then

48 Ibid. See also *Akayesu*, *supra* note 19, para. 523 on the significance of the 'general nature' of atrocities.

49 See *Croatia v. Serbia*, *supra* note 8, para. 408. The ICJ interprets the list of 17 points as factors which Croatia invited the Court to consider for a finding that a 'systematic policy of targeting Croats with a view to their elimination from the regions concerned' existed. The nearly identical list in Croatia's memorial, however, makes reference to 'genocidal intent' which the state felt had been evidenced through these factors (Croatia Memorial, *supra* note 21, at 381–5, para. 8.16).

50 Croatia Memorial, *supra* note 21, 170, para. 4.91 (I would like to thank Mr Andrew Merrylees for drawing my attention to this point).

51 See, e.g., *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, Case No. ICTR-95-1-T, T.Ch. I, 21 May 1999, para. 538.

52 On the Court's findings on the events in Bapska and Vukovar, see *infra*, notes 58 and 59.

53 *Bosnia and Herzegovina v. Serbia and Montenegro* case, *supra* note 22, at 204–6, paras. 390–5 and at 214, para. 413.

54 *Croatia v. Serbia*, *supra* note 8, para. 438.

55 *Akayesu*, *supra* note 19, para. 523.

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killed by gunfire and grenades'[56] – a case which, one would have thought, might have shown a sufficient degree of proximity to the situation of Ražnatović's forces at Vukovar.

The ICJ does mention Ražnatović's speech in one paragraph of its judgment. Yet it is hardly a consideration that reaches any level of satisfactory depth: The Court contents itself with stating that the speech appeared to be 'but one isolated phase in the very lengthy siege of Vukovar' and finds that it is 'difficult to infer anything from one isolated instance'.[57]

It is an observation which is, again, consistent with the position of a court which appears to prefer the role of a historian, who applies broad brush strokes, to that of an explorer of the mindset of individual perpetrators. Yet it is a view which leads far away from the concept of genocide that international lawyers, since the first international judgments on the crime had been passed, have employed.

2.3. Intent and motive in the findings of the Court

A phrase which turns up with regularity in the reasoning of the Court is that of the 'only reasonable inference': the events to which the parties refer must admit of no other reasonable interpretation than the one that would support a finding of genocidal intent. It was on the basis of this position that the Court rejected the events in Bapska and other locations: The objective behind the relevant acts may have been the creation of an 'ethnically homogeneous Serb state'.[58] The objective behind the events of Vukovar, on the other hand, may have been the meting out of punishment against the city and its population.[59]

These statements have given rise to controversy. Judge Bhandari, in a Separate Opinion, expressed the view that the Court had 'conflate[d] the distinct legal concepts of *motive* and *intent*' and asserted that the 'existence of a personal motive' did not exclude the simultaneous existence of specific genocidal intent.[60] It is a view which carries some justification, but which also requires clarification on the correlation of the two concepts.

It is true that the ad hoc tribunals have expressed the view that motives are 'irrelevant' in criminal law[61] and have spoken of the need to distinguish between motives and intent.[62] At the same time, trial chambers themselves have referred to specific intent as a form of motive,[63] and the Appeals Chamber in *Bagambiki* case expressed the view that motive may be 'a required element in crimes such as specific intent crimes'.[64] There are good reasons for that perspective: Specific

56 *Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, T.Ch., 15 May 2003, para. 429. The Trial Chamber's approach in this regard was not disturbed on appeal: *Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-A, A. Ch., 20 May 2005.
57 *Croatia v. Serbia*, *supra* note 8, para. 438.
58 Ibid., para. 425, see also paras. 426–8.
59 Ibid., para. 429. The Court entered a similar finding where the events at Ovcara were concerned, para. 430.
60 Bhandari Opinion, *supra* note 44, para. 50.
61 *Prosecutor v. Duško Tadić*, Judgment, Case No. IT-94-1-A, A. Ch., 15 July 1999, para. 268.
62 *Prosecutor v. Milorad Krnojelac*, Judgment, Case No. IT-97-25-A, A. Ch., 17 September 2003, para. 102.
63 *Akayesu*, *supra* note 19, para. 522; *Jelisić*, *supra* note 33, para. 79.
64 *Prosecutor v. Ntagerura, Bagambiki, Imanishimwe*, Judgment, Case No. ICTR-99-46-A, A. Ch., 7 July 2006, para. 694.

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genocidal intent, as opposed to the 'basic' *mens rea*, is not merely a mirror of the objective side of the crime – it lays down particular reasons on whose basis the underlying act must have been adopted. As such, motive and specific intent are virtually indistinguishable.[65]

That, however, still leaves the question whether the existence of certain, non-genocidal motives bars the existence of specific genocidal intent. The ICJ's views on the acts in Bapska and in Vukovar appear to point in this direction.

There may indeed be motives which do not permit the simultaneous existence of genocidal intent: A perpetrator whose intent it is to protect the group as a whole, cannot logically be said to have acted in order to achieve its destruction. But if that consideration applied to every possible non-genocidal reason, a perpetrator would have to be acquitted if he can credibly show (to use an example by Triffterer) that sadism had been the specific motive behind the destruction of a substantial part of the group.[66] Some motives are entirely compatible with genocidal intent, and there is no reason why collective punishments (or indeed the creation of a 'pure' Serbian state) could not fall in this category.

At the same time, there seems less of an appetite to accept the simultaneous existence of genocidal intent and military considerations. In the particular case, the Court thus expressed the view that certain statements which the Serbian side had advanced as evidence for Croatian genocidal intent were 'indicative of the designation of a military objective, rather than of the intention to secure the physical destruction of a human group',[67] and it does not appear that this was a finding to which Judge Bhandari took exception. But the preferred position of military reasons in that regard is questionable: They, too, can easily coexist with genocidal intent; the more so, as a military target (such as the military-aged part of the population) may, due to its significance for the survival of the collective, constitute a 'substantial part' of the group.

It appears more accurate to distinguish between instances of absolute and relative incompatibility of motives and genocidal intent and to restrict absolute incompatibility to cases in which the perpetrator's aim had been the protection of the group.[68] Room for *relative* incompatibility exists when a competing motive can, in theory, coexist with genocidal intent but does, due to the circumstances of the particular situation, occupy such a prominent place in the mind of the perpetrator that it replaces the *dolus specialis* of genocide.[69]

The phrase of the 'only reasonable inference' thus does not lose its power, and the ICJ cannot be faulted for adopting this approach. Making an inference, however, presupposes an active engagement with the possible motives in the mindset of the perpetrator, a detailed assessment of their relative weight, and careful evaluation of

65 On the relationship between the two concepts, see P. Behrens, 'Genocide and the Question of Motives', (2012) 10:3 *Journal of International Criminal Justice* 501, at 503–10.
66 O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', (2001) 14 LJIL 339, at 405.
67 Ibid.
68 See Behrens, *supra* note 65, at 519–22.
69 Ibid.

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the question whether motives such as the punishment of a group can really be said to have replaced the intent to destroy it or whether they rather served to reinforce the latter. That considerations of this kind had been performed by the majority in the ICJ, is not apparent from the judgment.

3. Concluding remarks

That the ICJ aided the development of international law in significant aspects, should not be denied. One of its stronger observations concerns the affirmation of the restrictive view of the definition of (intended) destruction: In this regard, the Court preserved the threshold of the crime by insisting that this condition has to refer to the 'physical or biological' (rather than cultural) destruction of the group.[70] The Court also reaffirmed, in principle, the criteria which the international criminal tribunals had established on the evaluation of substantiality.[71]

Nor is it possible to deny that the evaluation of genocidal intent – and indeed, of the entire concept of genocide – carried difficulties for a body which has no criminal jurisdiction.[72] It is, in this regard, illuminating to consider the separate opinion of Judge Skotnikov, who noted that the Court had to deal with matters 'which it is ill-equipped to resolve'.[73]

And yet, it is clear that the Court was guided by a concept of genocide which differed markedly from that employed in international law that far: A concept which, with its reliance on pattern and its emphasis on scale, its rejection of the individualized perspective and of so-called 'isolated incidents', moves much closer to genocide as a macro phenomenon.

There may even be reasons for such a development. The fact must be taken into account that several judges, in their separate opinions, promoted a concept of genocide under the law of state responsibility that appears to differ from that prevailing under international criminal law.[74] The acceptance of the 'macro phenomenon' of genocide would, of course, be a deviation from the way in which authorities on state responsibility had approached the concept thus far.[75] But it is within the authority of the ICJ to take this step, if such a finding can be supported by state practice subsequent to the conclusion of the Genocide Convention[76] and to find, for instance, that the requirement of 'intent' would, for the purposes of state responsibility, have to be replaced by a legal element of 'pattern' or 'policy'.[77]

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70 *Croatia v. Serbia*, *supra* note 8, para. 136.
71 See *supra* notes 38–41.
72 See *supra* after note 2.
73 *Croatia v. Serbia*, *supra* note 8, Separate Opinion (Judge Skotnikov), para. 12. For an opposing view, see *Croatia v. Serbia*, *supra* note 8, Separate Opinion (Judge Sebutinde) ('Sebutinde Opinion'), para. 21.
74 Gaja Opinion, *supra* note 30, para. 3; Sebutinde Opinion, *supra* note 73, para. 21.
75 The view which the ILC had adopted in its Draft Articles on State Responsibility with regard to genocide is illuminating: There, genocide appears as an example of a wrongful act which requires 'intention or knowledge' of the relevant agents or state organs. See *supra*, note 36 and *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 22, para. 376.
76 See 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 31(3)(b).
77 See also W. A. Schabas, 'State Policy as an Element of International Crimes', (2008) 98 *Journal of Criminal Law and Criminology* 953, at 970.

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The ICJ did none of this. Its deviation from the traditional line is apparent to everybody who compares its findings to the case law of the ad hoc tribunals and its own 2007 judgment in *Bosnia and Herzegovina* v. *Serbia and Montenegro*;[78] but it is a creeping change. On the face of it, the traditional elements are still in place, and the Court was careful not to declare an open breach. Instead, the judgment is awash with references to the case law of the ICTY (at least to those cases that advance its cause). At times, reliance on others is taken to extremes: References are made not only to the ICTY, but also to its Prosecutor, and even to the Prosecutor's decision *not* to charge individuals with genocide committed against the Croatian population.[79]

This is not a strong judgment, and certainly not one which provides 'clear guidelines' on the principal issues.[80] It shows a court which, to employ Hilaire Belloc's words, is keen to 'keep ahold of nurse for fear of finding something worse'.[81] One may have sympathy – the position is certainly understandable. A light in the dark it is not.

78 The very careful consideration of the massacre at Srebrenica in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* may be recalled in that context – a consideration which went far beyond the establishment of an abstract 'pattern' and referred to the intent of specific perpetrators, including 'some members of the VRS Main Staff' (*Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 22, at 292–7). It is true that, where events outside Srebrenica were concerned, the Court examined the claim, advanced by the applicant, that a 'pattern' of certain acts could amount to evidence for genocidal intent (ibid., para. 370). But even in that regard, it did not limit itself to a consideration of pattern as the ultimate decisive aspect on that question: The ICJ thus also submitted certain statements to examination (see, e.g., the Strategic Goals issued by Momčilo Krajišnik in 1992, ibid., paras. 371–2). Where pattern itself was concerned, the Court expressed itself in highly critical terms, noting that it did not agree with the 'broad proposition' made by the applicant that 'the very pattern of the atrocities' demonstrated the necessary intent (para. 373).

79 A situation which has already resulted in fierce criticism, principally on account of the fact that the Prosecutor may have had reasons other than legal considerations to refrain from charging the crime. Sebutinde Opinion, *supra* note 73, paras. 17–21. See also *Croatia v. Serbia*, *supra* note 8, para. 185.

80 See on this also Bhandari Opinion, *supra* note 44, para. 6.

81 H. Belloc, 'Jim, Who Ran Away From his Nurse and Was Eaten by a Lion', in H. Belloc, *Cautionary Tales for Children* (1907).

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