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# *The International Court of Justice and the Elements of the Crime of Genocide*

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## **Abstract**

*This article seeks to identify the contribution made by the International Court of Justice (ICJ or Court) to the international criminal law on genocide in its judgment of 26 February 2007 on the Case concerning the Application of the Convention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).<sup>1</sup> The overall assessment is as follows: while the judgment contains welcome clarification and consolidation of the international criminal law on genocide in several respects, the Court did not fully apprehend the complex structure of the crime. Most importantly, the Court did not provide a coherent explanation for its characterization of the atrocities committed in Srebrenica as genocide. This note will not deal in any detail with the concept of a state act of genocide constituting an internationally wrongful act, the ICJ's factual findings, or its approach to admitting and weighing evidence.*

## **1 The Court's Self-restraint Regarding International Criminal Law**

Regarding the sad chain of events that occurred in Bosnia and Herzegovina between 1992 and 1995, the Court declared that it attaches 'the utmost importance to the ... legal findings made by the ICTY'.<sup>2</sup> This statement of self-restraint would appear to be part of the Court's judicial policy in responding to what may be called the '*Tadic*

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<sup>1</sup> *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 Feb. 2007 (hereinafter '*Genocide*' case or judgment).

<sup>2</sup> *Ibid.*, at para. 403.

challenge'.<sup>3</sup> The Court argues for roughly the following division of labour between itself and international *criminal* jurisdictions: where confronted with a preliminary question of international criminal law, the Court will defer to the pertinent case law of an international criminal court; at the same time, the Court expects an international criminal court to exercise a corresponding degree of self-restraint when faced with a preliminary question of general public international law.

Such a division of labour is certainly desirable insofar as it promotes stability and legal certainty in the international legal order. However, these ends must be delicately balanced against the need for substantive justice. In this regard, the *Genocide* judgment could benefit from some refinement. First, the contemplated division of labour should not be mistaken by the Court as a licence to apply its own jurisprudence without responding to legal challenges made to it. The Court must remain open to having its case law challenged on legal grounds, and respond to these challenges in a reasoned manner. Applied to the *Genocide* judgment, this means that it was not good enough for the ICJ to hold that the applicable rule of attribution is 'effective control' based simply on one of its previous judgments. Instead, the ICJ should have squarely addressed the legal challenge posed by the Applicant when it directed the Court to reconcile its rule of attribution with the case law of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>4</sup>

Secondly, and similarly, the Court should not unquestionably accept international criminal law jurisprudence emanating from international criminal tribunals if this case law is still evolving, is inconsistent, or is otherwise open to serious challenge. Accordingly, the ICJ should not have adopted, without explanation, the ICTY's position that genocide was committed in Srebrenica. At the same time, the ICJ must be commended for making findings on the concept of 'protected group' in the definition of genocide, and on the question of whether or not a policy of so-called 'ethnic cleansing' amounts to genocide under international criminal law.

## 2 The Court's Failure to Clarify the Structure of the Crime of Genocide

The structure of the crime of genocide poses quite a problem.<sup>5</sup> The definition lacks an explicit 'contextual' element and thus appears at first sight to be drafted from the perspective of the 'lone individual' seeking to destroy a protected group as such. However, it is clear that a single human being will not, except in the most exceptional circumstances, be capable of destroying a protected group or a part thereof.

It is interesting to note that Raphael Lemkin already stated that '[g]enocide is intended to signify a *coordinated plan of different actions* aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the

<sup>3</sup> On this challenge see Kress, 'L'organe *de facto* en droit international public', 105 *RGDIP* (2001) 93.

<sup>4</sup> *Prosecutor v. Tadic*, IT-94-1-A, judgment, 5 July 1999, at para. 120 ff.

<sup>5</sup> For a more detailed analysis of the crime's structure and elements see Kreß, 'The Crime of Genocide Under International Law', 6 *Int'l Criminal L Rev* (2006) 461.

groups themselves'.<sup>6</sup> This view mirrors the horrifying historical backdrop to the Genocide Convention<sup>7</sup> – the Holocaust – which is clearly reflected in the *travaux préparatoires* of the Convention.<sup>8</sup> It is not just the history and genesis of genocide, however, that cautions against bringing the isolated perpetrator within the scope of the crime – exceptional circumstances apart. The crime's status as a crime under general *international* law also suggests that a clear *international* dimension must exist in respect of the underlying conduct. This dimension will normally be absent in the case of the lone individual. Equally, categorizing the conduct of a lone individual as genocide would disconnect the crime of genocide from its historical roots as a crime against humanity. The requisite contextual element of all crimes against humanity is that they must occur as part of a systematic or widespread attack against any civilian population.<sup>9</sup> Such a disconnection would not only be highly implausible in light of the historical development of the law, but also for reasons of coherency within the corpus of crimes under international law. Indeed, it would be an oddity to dispense with a context requirement for the crime of genocide, while at the same time emphasizing the special stigma that attaches to this crime.<sup>10</sup>

The general exclusion of the lone perpetrator from the scope of the international crime of genocide is broadly in line with the Genocide Convention case law, and subsequent practice. For example, the District Court of Jerusalem inquired into the overall genocidal campaign masterminded by the Nazi leadership,<sup>11</sup> the Chambers of the International Criminal Tribunal for Rwanda (ICTR) concerned themselves with the question of whether or not there was a 'nationwide' genocide in Rwanda in 1994,<sup>12</sup> and the competent Trial Chamber in the groundbreaking ICTY judgment on the charge of the commission of genocide in Bosnia considered it necessary to make a determination regarding the overall 'criminal enterprise'.<sup>13</sup> This mode of analysis was endorsed by states parties when they adopted the Elements of Crimes under the Statute of the International Criminal Court (ICC Elements).<sup>14</sup> The states parties decided to place the conduct of the individual perpetrator 'in the context of a manifest pattern of similar

<sup>6</sup> R. Lemkin, *Axis Rule in Occupied Europe* (1944), at 79 (emphasis added).

<sup>7</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948 (entry into force on 12 Jan. 1951), 78 UNTS 277.

<sup>8</sup> In that respect, reference is made to the Summary Records of the meetings of the Sixth Committee of the General Assembly, UNGAOR, 6th Committee, 3rd session, 1948.

<sup>9</sup> See in particular Art. 7 of the ICC Statute as the first comprehensive codification of crimes against humanity.

<sup>10</sup> In *Prosecutor v. Krstic*, IT-98-33-A, judgment, 19 Apr. 2004, at para. 36, the ICTY Appeals Chamber expressed the following generally held view: '[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium'. This mirrors the characterization of genocide as the 'crime of crimes' in *Prosecutor v. Kambanda*, ICTR-97-23-S, judgment and sentence, 4 Sept. 1998, at para. 16.

<sup>11</sup> *Attorney-General of the Government of Israel v. Eichmann*, Judgment of 12 Dec. 1961, 36 *Int'l L Rep* (1968) 79.

<sup>12</sup> See the groundbreaking judgment in *Prosecutor v. Akayesu*, ICTR-96-4-T, judgment, 2 Sept. 1998, at para. 469.

<sup>13</sup> *Prosecutor v. Krstic*, IT-98-33-T, judgment, 2 Aug. 2001, at para. 549.

<sup>14</sup> ICC-ASP/1/3, Pt. II.; pursuant to Art. 9 of the ICC Statute, the Elements of Crimes are to assist the Court in the interpretation and application of Arts 6, 7, and 8.

conduct' as long as such a perpetrator's conduct cannot 'itself effect such destruction'.<sup>15</sup> As one negotiator confirmed, this 'quasi-contextual element' was 'introduced to avoid the view expressed in the *Jelisc* case that genocide could be committed by a single individual'.<sup>16</sup> Against this backdrop, it is surprising how easily the ICTY's Appeals Chamber concluded that this 'definition adopted in the Elements of Crimes did not reflect customary law' in 1995.<sup>17</sup> In doing so, the Appeals Chamber overlooked a crucial opportunity to clarify the admittedly complex structure of genocide.

Despite correctly introducing a 'quasi-contextual element' to the crime of genocide, the ICC Elements still fail to explain how its reference to the 'manifest pattern of similar conduct' relates to the definition of the crime. It is submitted that the answer lies in recognizing that, for all practical purposes,<sup>18</sup> an individual perpetrator's genocidal intent requires a genocidal campaign as an implicit point of reference. Without such an objective point of reference, an individual, who lacks the means to single-handedly effect a (partial) group destruction, cannot have a *realistic* genocidal intent. He, rather, only entertains a vain genocidal hope. This leads to the fundamental distinction between collective and individual genocidal intent, which was so well expressed by the Trial Chamber in *Krstic*:

[T]he Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and scale of the crime of genocide ordinarily presume that several protagonists were involved in its preparation. Although the motive of each participant may differ, the objective of the enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the act itself, apart from the intent of particular perpetrators.<sup>19</sup>

The ICJ's *Genocide* judgment afforded it the perfect opportunity to clarify the status of a collective genocidal act because the Court was concerned with the possible commission of genocide *by a state*. Unfortunately, this opportunity was missed. The Court did recognize the possibility of a collective genocidal intent in theory.<sup>20</sup> It failed, however,

<sup>15</sup> See the last common Element of Genocide. The exception 'could itself effect' is—in the words of William Schabas—'little more than a sophomoric *hypothèse d'école*': 'Darfur and the "Odius Scourge": The Commission of Inquiry's Findings on Genocide', 18 *Leiden J Int'l L* (2005) 877.

<sup>16</sup> Wilmshurst, 'Genocide', in R. Cryer *et al.* (eds), *An Introduction to International Criminal Law and Procedure* (2007), at 177; in *Prosecutor v. Jelisc*, IT-95-10-T, judgment, 14 Dec. 1999, at para. 100, the ICTY held that it was '*a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated'; even the *Jelisc* Chamber was cautious enough, though, to add immediately that 'it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system': at para. 101.

<sup>17</sup> Judgment, *supra* note 10, at para. 224.

<sup>18</sup> *Supra* note 15.

<sup>19</sup> *Supra* note 13, at para. 549.

<sup>20</sup> *Supra* note 1, at para. 371. The ICJ recognized that a 'higher authority' may possess genocidal intent, whether within the VRS or the Republika Srpska, or at the level of the Respondent itself. This intent was found not to be made out on the facts, at para. 376. The ICJ nevertheless seemed as a matter of law to admit the possibility of an 'intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent'.

to shed light on the relevance of such a collective intent for the intent of individual perpetrators. Instead, when examining the various incidents of atrocities, the Court seemed to inquire into the possible genocidal intent of unnamed individual perpetrators as though such intent could have existed in the absence of a collective genocidal act.<sup>21</sup> In adopting this mode of analysis, the Court made the same error as the Darfur Commission when it considered it possible that certain unnamed individuals acted with genocidal intent irrespective of the existence of a collective genocidal act.<sup>22</sup> Instead, the Court should have made it clear that, under normal circumstances, the genocidal intent of the individual perpetrator presupposes his or her knowledge of a collective genocidal act.

### 3 The Court's Position on the Material Elements (*Actus Reus*)

The *Genocide* judgment constitutes a welcome contribution to both the concept of 'protected group' and the meaning of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. A question mark must be placed, however, beside the Court's understanding of 'imposing measures intended to prevent births within the group'.

#### A The Concept of Protected Group

Based on the wording and the history of the definition of genocide, the Court rejected a *negative* construction of the concept of 'protected group', which considers as a protected group all individuals rejected by the perpetrators of the atrocities.<sup>23</sup> This is correct and nothing must be added to the compelling reasoning underlying that position.<sup>24</sup> It is worth adding, however, that the Court's reasoning would seem to also exclude – albeit only by implication – a purely *subjective* concept of 'protected group', meaning a conception of the group based on the views of the alleged group or perpetrators. The Court correctly recalled that 'the drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude'.<sup>25</sup> Such an understanding does not only require a *positive* identification of the group, but also an essentially *objective* one.<sup>26</sup> This standard does

<sup>21</sup> See in particular paras 277, 319, 334, and 354.

<sup>22</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General. Pursuant to SC Res. 1564, 18 Sept. 2004, Annex to Letter dated 31 Jan. 2005 from the Secretary-General addressed to the President of the Security Council, S/2005/60, 1 Feb. 2005, at para. 520; for a critique see Kress, 'The Darfur Report and Genocidal Intent', 3 *J Int'l Criminal Justice* (2005) 577.

<sup>23</sup> For such a negative definition see *Prosecutor v. Jelisić*, *supra* note 16, at para. 70.

<sup>24</sup> The pertinent passages of the judgment, *supra* note 1, are paras 193–196; the same position was adopted by the ICTY's Appeals Chamber in *Prosecutor v. Stakić*, IT-97-24-A, judgment, 2 Mar. 2006, at paras 20 ff; for the same view see Kreß, *supra* note 5, at 473 ff.

<sup>25</sup> Judgment, *supra* note 1, at para. 194.

<sup>26</sup> Kreß, *supra* note 5, at 373 ff.

not, however, preclude a court from taking into account the *self-perception* of a group when it comes to borderline cases of ethnic groups, as in Rwanda and Darfur.<sup>27</sup> In fact, the Court duly notes that ‘the parties essentially agree that international jurisprudence accepts a combined subjective-objective approach’.<sup>28</sup> In rejecting a negative concept of ‘protected group’ that is implicitly purely subjective, the *Genocide* judgment guards against the transformation of genocide into an unspecific crime of group destruction based on a discriminatory motive.

### **B *Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part***

One of the most important aspects of the *Genocide* judgment is probably its clear distinction between forcible deportation or expulsion, and the infliction of conditions calculated to bring about a group’s physical destruction.<sup>29</sup> In this context, the Court cites with approval the ICTY Trial Chamber judgment in *Stakic*, where it was held that a ‘clear distinction must be drawn between physical destruction and mere dissolution of the group’, and that the ‘expulsion of a group or part of a group does not in itself suffice for genocide’.<sup>30</sup> The Court was correct to apply the narrow legal test of conduct capable of physically destroying members of the group, as opposed to ‘merely’ removing them or dissolving the group as an entity. The correctness of this standard is evidenced by use of the word ‘physical’ in the definition of the material element, and by the well-known rejection of Syria’s proposal that the Convention should contain an expansive conception of genocide that includes forced mass exodus.<sup>31</sup> The ICC Elements’ lamentable reference to ‘systematic expulsion from homes’ will have to be interpreted in light of this.

### **C *Imposing Measures Intended to Prevent Births within the Group***

The Court was referred by the Applicant to the occurrence of ‘forced separations of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces’, and which ‘in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months’.<sup>32</sup> The Bosnian claim that forcible separation of the sexes may amount to genocidal conduct finds support in the ICTR’s *Akayesu* judgment.<sup>33</sup> There,

<sup>27</sup> *Ibid.*, at 476 ff.

<sup>28</sup> Judgment, *supra* note 1, at para. 191.

<sup>29</sup> See in particular para. 190 of the Judgment, *supra* note 1.

<sup>30</sup> *Prosecutor v. Stakic*, IT-97-24-T, judgment, 31 July 2003, at para. 519 (citing Kreß, ‘§220 a/§6 VStGB’, in W. Joecks and K. Mießbach (eds), *Münchener Kommentar zum Strafgesetzbuch* (2003), iii, at 653 ff); para. 519 of the Trial Chamber’s judgment was referred to with approval in *Prosecutor v. Krstic*, *supra* note 10, at para. 33, and not challenged in *Prosecutor v. Stakic* on appeal, *supra* note 24, at para. 46.

<sup>31</sup> Syria proposed the inclusion of ‘imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ as a separate sub-para. of Art. II of the Genocide Convention, *supra* note 7; UN GAOR, 3rd session, 6th Committee, at 176 (note 1) and 186 (vote).

<sup>32</sup> Judgment, *supra* note 1, at para. 355.

<sup>33</sup> *Supra* note 13.

the Chamber interpreted the crime of genocide to encompass 'sexual mutilation, the practice of sterilization, forced birth control, *separation of the sexes* and prohibition of marriages'.<sup>34</sup> The ICJ rejected the Bosnian claim and noted 'that no evidence was provided in support of this statement'.<sup>35</sup> If this comment is meant to refer to the 'decline of the birth rate', the reasoning is flawed because the genocidal act in question does not require the actual prevention of births. Instead, an intention to effect a decline suffices. But perhaps the Court wished to note a lack of evidence regarding the requisite intent. In that case, though, one would have expected the Court to elaborate on the meaning of the word 'intended' in this particular context. At first sight, this may appear to be a rather peripheral observation. It will be shown, however, that the possible intent to reduce the birth rate of the group may be enormously significant in terms of how to characterize the atrocities committed in Srebrenica.<sup>36</sup>

#### 4 The Court's View on Genocidal Intent

Regarding genocidal intent, international criminal lawyers tend to think first and foremost of the alternative *purpose*- and *knowledge*-based approaches. This controversy is not really addressed in the *Genocide* judgment. This is true, even though the term 'specific intent (*dolus generalis*)' is used throughout the judgment.<sup>37</sup> From a comparative criminal law perspective, the term can carry quite different connotations.<sup>38</sup> Since the judgment is inconclusive regarding the said controversy, there is no need to pursue the critique of the predominant *purpose*-based approach any further in this article.<sup>39</sup> Instead, the focus in this section will be on the Court's contribution to the much more important *object* of genocidal intent, that is, the *destruction* of *part* of a group.

##### A (*The Intent to*) *Destroy (a Group in Whole or in Part)*

As is well known, the crucial question is whether the concept of *destruction* extends to the destruction of the group as a *social* entity, as was held by German courts.<sup>40</sup> As is equally well known, the ICTY Trial Chamber in *Krstic* explicitly rejected the social

<sup>34</sup> *Ibid.*, at para. 507 (emphasis added).

<sup>35</sup> *Ibid.*, at para. 355.

<sup>36</sup> *Infra* sect. 5.

<sup>37</sup> Judgment, *supra* note 1, at para. 187.

<sup>38</sup> Kreß, *supra* note 5, at 494.

<sup>39</sup> But see Kress, *supra* note 22, at 565 ff; and Kreß, *supra* note 5, at 492 ff.

<sup>40</sup> For the jurisprudence in the *Jorgic* case see 'Amtliche Sammlung der Entscheidungen des Bundesgerichtshofs', in 45 *Strafsachen* 81; upheld by the *Bundesverfassungsgericht* (Federal Constitutional Court) [2001] *Neue Juristische Wochenschrift* (NJW) (2001) 1850; for an analysis see Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia', 3 *J Int'l Criminal Justice* (2005) 398. At the time of writing, the decisions in the *Jorgic* case are being challenged before the European Court of Human Rights (ECtHR) for violation of, *inter alia*, Art. 7 of the European Convention on Human Rights; for a defence of the German case law see Werle, 'German Jurisprudence on Genocidal Intent and the European Convention of Human Rights and Fundamental Freedoms', in K. Nuotio (ed.), *Festschrift in Honour of Raimo Lahti* (2007), 43.

concept of group destruction,<sup>41</sup> a position that was upheld on appeal,<sup>42</sup> and followed by the Darfur Commission.<sup>43</sup> Still, the law was not, according to some, settled at the time of the *Krstic* judgment. For example, Judge Shahabuddeen dissented from the majority in the *Krstic* Appeals Chamber judgment and stated that, ‘provided that there is a listed act, the intent to destroy a group as a group is capable of being proved by evidence of an intent to cause the non-physical destruction of the group in whole or in part’.<sup>44</sup> As well, the ICTY Trial Chamber in *Blagojevic* held in quite confusing terms that ‘the physical or biological destruction of the group is the likely outcome of a forcible transfer of a population when this transfer was conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members’.<sup>45</sup>

Against this backdrop of inconsistent case law (and in light of the pending challenge before the European Court of Human Rights on the legality of the German case law), observers anxiously anticipated learning what position the ICJ would take on the issue. In addition, the Court’s factual finding that there was no intent to physically or biologically destroy *all* Bosnian Muslims meant that the only way to find the occurrence of a nationwide genocide was by adopting a social concept of group destruction. The Court appears to have rejected this social conception in favour of a narrow one limited to physical or biological group destruction:

Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of the 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.<sup>46</sup>

It is somewhat unfortunate that the clarity of this passage suffers – as is true of the whole paragraph – from a constant oscillation between genocidal *intent* and the *conduct* element of ‘inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’. In that respect, the least ambiguous application in the *Genocide* judgment of a narrow physical or biological concept of group destruction is where the Court was unable to find an intent to destroy regarding the siege of Sarajevo. It quotes with approval the holding of the ICTY Trial Chamber in *Galic* that ‘the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to *wipe out* or even *deplete* the civilian population

<sup>41</sup> The Chamber stated that, ‘despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group’: *Prosecutor v. Krstic*, *supra* note 13, at para. 580.

<sup>42</sup> *Prosecutor v. Krstic*, *supra* note 10, at para. 26.

<sup>43</sup> Report, *supra* note 22, at paras 515, 517, 518, and 520.

<sup>44</sup> *Supra* note 10, at para. 48 in conjunction with para. 55.

<sup>45</sup> *Prosecutor v. Blagojevic et al.*, IT-02-60-T, judgment, 17 Jan. 2005, at para. 666; as was noted in Kreß, *supra* note 5, at 488. The *Blagojevic* judgment comes very close to precisely the German case law that was rejected in *Krstic*; for a concurring view see Werle, *supra* note 40, at 45.

<sup>46</sup> Judgment, *supra* note 1, at para. 190.



through *attrition*.<sup>47</sup> This narrow approach is correct, despite weighty opposing arguments.<sup>48</sup> Contrary to what Judge Shahabuddeen believes, the interpretation of the word 'destroy' should not be disconnected from the list of genocidal *acts*. Otherwise, the conscious decision of the Sixth Committee to confine the international criminalization of genocide to an exhaustive list of five forms of attacks could be sidestepped. The destructive goal must therefore be the result of a generalized commission of one or more of those acts that form the crime's *actus reus*, and this seems to be precisely the position taken by the ICJ.

### **B (The Intent to Destroy) a Group (in Whole or) in Part**

Not surprisingly, the Court took the words 'in part' to refer to a requirement of *substantiality*.<sup>49</sup> The Court went on to say that 'the part targeted must be significant enough to have an impact on the group as a whole'.<sup>50</sup> While the Court recognized that the prominence of certain individuals may provide a *qualitative* justification to consider them members of the protected group, the Court convincingly rejected the view espoused by the ICTY Trial Chamber in *Krstic* that a relevant part of the group *must* form a 'distinct entity'.<sup>51</sup> Finally, the Court seemed to accept the idea that the members of a group living within a *geographically limited area* may form a part of this group. In this respect, however, the Court held that 'the area of the perpetrator's activity and control are to be considered'. Unfortunately, this reasoning is flawed because once again the lone perpetrator is the yardstick used by the Court to determine the scope of a contextual element.<sup>52</sup> This kind of analysis fails to appreciate the crime's collective nature. In any event, the judgment's considerations *in abstracto*, if taken together, leave considerable room for concretization.

## **5 The Atrocities Committed in Srebrenica as Crimes of Genocide**

The ICJ had no difficulty, of course, in finding that acts of killing and of causing serious bodily and mental harm had been committed in Srebrenica in July 1995. The crucial question was whether those acts had been committed with the intent to destroy a *part* of the protected group concerned, that latter group being the Bosnian Muslims.<sup>53</sup>

<sup>47</sup> *Prosecutor v. Galic*, IT-98-29-T, judgment, 5 Dec. 2003, at para. 593, cited in Judgment, *supra* note 1, at para. 328 (emphasis added).

<sup>48</sup> For a more detailed analysis see Kreß, *supra* note 5, at 486 ff.

<sup>49</sup> Judgment, *supra* note 1, at para. 198.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Prosecutor v. Krstic*, *supra* note 13, at para. 590; for a critique see Kreß, *supra* note 5, at 491 (n. 154), cited in Judgment, *supra* note 1, at para. 200.

<sup>52</sup> See *supra* sect. 2.

<sup>53</sup> The Bosnian Muslims were characterized as a *national* group within the meaning of the Convention (*Prosecutor v. Krstic*, *supra* note 10, at para. 15); the considerable difficulty in distinguishing national groups from ethnic groups will not be pursued any further in this note; but see Kreß, *supra* note 5, at 476.

Following the ICTY Appeals Chamber in *Krstic*,<sup>54</sup> the Court considered the Bosnian Muslims of Srebrenica to form a part of the Bosnian Muslim group, within the meaning of the crime's definition.<sup>55</sup> Instead of giving reasons, the Court cited the following passage in the *Krstic* appeals judgment:

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 ... 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.<sup>56</sup>

This way of dealing with a decisive question is very unsatisfactory indeed. This is all the more so because the quoted passage alludes to a *qualitative* criterion, but does *not* define it. One is thus left with the impression that the ICJ has offered a purely *quantitative* threshold: about 40,000 individuals forming about 3 per cent of the entire group apparently sufficed. It must be seriously doubted whether the drafters of the Genocide Convention intended the crime's scope to be so drastically expanded through the words 'in part'. The significance of these words was hardly ever discussed during the negotiations.<sup>57</sup> That said, the *Genocide* judgment and the ensuing international acquiescence constitute a most important element of subsequent practice in support of such an expansion. Incidentally, the Srebrenica precedent will also be of relevance for the scope of crimes against humanity. This is because it would seem illogical to apply a relatively higher quantitative standard to the element 'any civilian population' within the definition of this group of crimes.

Whether there was an intent to destroy the Muslim community in Srebrenica remains a question. Interestingly, the Court approached the question from the perspective of *collective* activity.<sup>58</sup> This approach is correct, of course, but does not fit easily with the Court's simultaneous search for the genocidal intent of unnamed individual perpetrators as if no such collective campaign had been necessary.<sup>59</sup> This brings us to the burning question of what reasons were given by the Court in support of the conclusion that there was a *collective* intent to destroy the Srebrenica part of the Bosnian Muslim group. Very sadly, the Court provided none. Instead, the Court was here again content with stating that it 'has no reason to depart from the Tribunal's [the ICTY's] determination'.<sup>60</sup> This, with all due respect, and in recognition of the Court's judicial

<sup>54</sup> *Prosecutor v. Krstic*, *supra* note 10, at para. 15.

<sup>55</sup> This means that the collective intent to destroy could *not* have been derived from the plan to kill, meaning *physically* to destroy the group of 7,000 to 8,000 Muslim men in Srebrenica. This is because this group was only *part* of the identified *part* of the protected group.

<sup>56</sup> Judgment, *supra* note 1, at para. 296, citing *Prosecutor v. Krstic*, *supra* note 10, at para. 15.

<sup>57</sup> On the lack of discussion on the purported meaning of the words 'in part' during the negotiations see Kreß, *supra* note 5, at 489. For scholarly criticism of the risk of 'distorting the crime's definition unreasonably' through an overly generous interpretation of the words 'in part' see Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal of the Former Yugoslavia', 25 *Fordham Int'l LJ* (2002) 45; Kreß, *supra* note 5, at 491.

<sup>58</sup> Judgment, *supra* note 1, at paras. 292 ff.

<sup>59</sup> *Supra* sect. 2, text accompanying note 20.

<sup>60</sup> Judgment, *supra* note 1, at para. 295.

policy to achieve international coordination by an exercise of judicial self-restraint in fields of 'lesser expertise',<sup>61</sup> is an entirely inappropriate approach to dealing with the key question of a contentious case. Instead, the Court had a duty to explain how a collective intent to destroy the Srebrenica part of the Bosnian Muslims could be reconciled with the concept of physical or biological group destruction to which the judgment generally adheres. Instead, it relied on the ICTY appeals judgment in *Krstic*, which held that the atrocities committed in Srebrenica 'would inevitably result in the *physical disappearance* of the Bosnian Muslim population at Srebrenica'.<sup>62</sup> Here, physical disappearance means lasting expulsion, not destruction. Having adopted the narrow standard of physical or biological group destruction, the ICJ's endorsement of this passage is perplexing.

Barring physical destruction, one wonders whether the existence of a collective intent to destroy the Bosnian Muslims in Srebrenica can be explained in some other way based on the narrow physical or biological interpretation of 'destruction', which is preferred. Perhaps more convincing reasoning can be found in the following passage of the *Krstic* appeals judgement, which the Court curiously did not cite:

Evidence introduced at trial supported that finding, by showing that, with the majority of men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.<sup>63</sup>

Quite clearly, this refers to the concept of *biological* destruction and it would appear to make sense to think in that direction. Surprisingly, however, neither the ICTY Chambers in *Krstic* nor, as we have seen, the ICJ characterized the Srebrenica campaign as the (generalized) imposition of measures intended to prevent births within the group. Perhaps this failure constitutes the one missing element to a coherent explanation of the atrocities committed in Srebrenica as genocide under international law.

## Concluding Observation

The ICJ agreed with the ICTY Appeals Chamber in *Krstic* 'that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide'.<sup>64</sup> Indeed, the unspeakable atrocities committed in Srebrenica evince a feeling of horror in all of us. However, this feeling should not silence the international criminal lawyer's insistence on a compelling legal explanation of this most egregious crime.

<sup>61</sup> *Supra* sect. 1.

<sup>62</sup> Judgment, *supra* note 1, at para. 293 (emphasis added), citing *Prosecutor v. Krstic*, *supra* note 10, at para. 28, which in turn is a quotation from *Prosecutor v. Krstic*, *supra* note 13, at para. 595.

<sup>63</sup> *Prosecutor v. Krstic*, *supra* note 10, at para. 28.

<sup>64</sup> Judgment, *supra* note 1, at para. 293, citing *Prosecutor v. Krstic*, *supra* note 10, at para. 37.