

# *Fordham International Law Journal*

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*Volume 25, Issue 1*

2001

*Article 2*

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## Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia

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# Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia

William A. Schabas

## Abstract

There are to date some six significant judicial pronouncements dealing with the interpretation and application of article 4—genocide - of the ICTY Statute: two Rule 61 hearings; the Trial Chamber rulings in Jelusic, Krstic, and Sikirica; and the Appeals Chamber decision in Jelusic. In the course of these judgments, the ICTY has made important pronouncements about the actus reus of genocide, the nature of the protected groups, the quantitative dimension of the crime, and the concept of intent.

It is now nearly a decade since international justice began examining whether genocide was committed in Bosnia. Astonishingly, the really big question—and the most interesting one from a political and historical standpoint—still remains unanswered, namely whether there was an organized plan or policy on the part of the Bosnian Serb leadership, with the complicity of the Belgrade regime, to destroy the Bosnian Muslims within the meaning of article II of the Convention. The ICJ, seized of the matter in March 1993, has yet to adjudicate the question on the merits.

# WAS GENOCIDE COMMITTED IN BOSNIA AND HERZEGOVINA? FIRST JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*William A. Schabas\**

## *INTRODUCTION*

When the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) was established by the Security Council in May of 1993,<sup>1</sup> it held the promise of being the first international tribunal to prosecute the crime of genocide. Back in 1948, the United Nations General Assembly had experienced considerable difficulty determining the appropriate jurisdiction for genocide prosecutions as it was drafting the Convention for the Prevention and Punishment of the Crime of Genocide (“Convention”).<sup>2</sup> After rejecting recognition of universal jurisdiction,<sup>3</sup> the drafters settled on a minimal formula allowing for territorial jurisdiction but holding out the prospect of a yet-to-be-established international criminal court. According to article VI of the Convention:

“[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribu-

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1. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993), annex [hereinafter Statute]. For the preparatory documents, see VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* (1995); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996).

2. Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260A (III), U.N. GAOR, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Convention].

3. In the Sixth Committee of the General Assembly, in 1948, Iran proposed the following amendment to the draft convention: “Add a paragraph: ‘They may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition.’” U.N. Doc. A/C.6/218. The amendment was rejected by twenty-nine votes to six, with ten abstentions. U.N. GAOR, 100th mtg., U.N. Doc. A/C.6/SR.100 (1948).

nal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>4</sup>

Efforts to create such an international tribunal were launched immediately by the General Assembly,<sup>5</sup> but nothing substantial came of them for more than four decades.<sup>6</sup> In late 1992, international organizations began to make charges that genocide was being committed in the ongoing conflict in Bosnia and Herzegovina.<sup>7</sup> An application to the International Court of Justice (“ICJ”) filed by Bosnia and Herzegovina in early 1993 relied on article XI of the 1948 Convention, and focused still more attention on the claim that genocide was being committed. The provisional measures ordered by the Court, on April 8, 1993, seemed to confirm the credibility of the charge.<sup>8</sup> A few days later, in a resolution referring to the ICJ order, the Security Council used the word “genocide” for the first time in its history.<sup>9</sup> And of course, popular journalistic accounts repeatedly described the ongoing atrocities in Bosnia and Herzegovina as

4. Convention, *supra* note 2, art. VI. On the Convention, see generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000).

5. The General Assembly called on the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.” G.A. Res. 260B (III), U.N. GAOR, U.N. Doc. A/810 (1948).

6. See generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

7. See *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, U.N. Doc. S/25274, paras. 55-56 (1993) [hereinafter *Interim Report*]; *The Situation in Bosnia and Herzegovina*, U.N. GAOR, 91st plen. mtg., U.N. Doc. A/RES/47/121 (1992).

8. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugoslavia (Serb. & Mont.))*, Requests for the Indication of Provisional Measures, 1993 I.C.J. 3, 16 (Apr. 8, 1993) [hereinafter *Application*]; see also Laurence Boisson de Chazournes, *Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide*, 39 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 514 (1993); Christine Gray, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 43 INT'L & COMP. L.Q. 704 (1994); Rafaëlle Maison, *Les ordonnances de la Cour internationale de justice dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide*, 3 EUR. J. INT'L L. 381 (1994).

9. See S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg. at 1, U.N. Doc. S/RES/819 (1993).

genocide.<sup>10</sup>

Although the Security Council Resolution did not explicitly identify it as the body contemplated by article VI of the 1948 Convention, when the ICTY was established on May 8, 1993 the Tribunal was given explicit jurisdiction over the crime of genocide in article 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("Statute").<sup>11</sup> The definition set out in article 4 essentially reproduced the text of articles II and III of the 1948 Convention.<sup>12</sup> But it soon became rather clear that the focus of the ICTY would be upon the other two categories of crimes within its subject matter jurisdiction, namely war crimes and crimes against humanity. The initial indictments were extremely parsimonious in making accusations of genocide. The Prosecutor was quite obviously hesitant to present indictments for genocide in the former Yugoslavia, in marked contrast to his policy with respect to indictments before the International Criminal Tribunal for Rwanda ("ICTR").<sup>13</sup> The Prosecutor's caution in preferring accusations of genocide became manifest in the very first case to actually come to trial. After Dusko Tadic was arrested in Germany, national courts proceeded against him for aiding and abetting genocide, as well as torture, murder, and causing grievous bodily harm.<sup>14</sup> Although Tadic was only a minor player in Bosnian war crimes, the youthful International Tribunal was hungry for work and jumped at the chance to preempt the German courts.<sup>15</sup> But the Prosecutor

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10. See generally ROY GUTMAN, *A WITNESS TO GENOCIDE* (1993); MICHAEL A. SELLS, *THE BRIDGE BETRAYED, RELIGION AND GENOCIDE IN BOSNIA* (1996); BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA* (1996); NORMAN CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING" IN EASTERN EUROPE* (1995); FRANCIS A. BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE* (1996).

11. See Statute, *supra* note 1, art. 4(1).

12. Compare *id.* art. 4(2), with Convention, *supra* note 2, arts. II, III.

13. Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994), annex [hereinafter ICTR]. Pursuant to article 15(3) of the ICTR Statute, the Prosecutor of the ICTY also acts as Prosecutor for the ICTR.

14. See MICHAEL SCHARF, *BALKAN JUSTICE 97* (1997); Prosecutor v. Tadic, Case no. IT-94-1-T, Opinion and Judgment, para. 7 (May 7, 1997). Decisions of the ICTY are available at <http://www.un.org/icty/index.html>.

15. See Prosecutor v. Tadic, Case no. IT-94-1-1, Application for a Formal Request for Deferral (Nov. 8, 1994).

confined his indictment to war crimes and crimes against humanity, abandoning the charge of genocide.<sup>16</sup> "We were amazed that Germany had no specific evidence on that charge," said Deputy Prosecutor Graham Blewitt.<sup>17</sup> "They were going to attempt to prove it solely on the basis of the testimony of an expert witness. But we thought it would be difficult to establish genocide with respect to Tadic."<sup>18</sup>

Then, the Tribunal's judges sent some encouraging signals to the Prosecutor in two decisions issued pursuant to Rule 61 of the Rules of Procedure and Evidence.<sup>19</sup> The Rule 61 hearing procedure was used in the early years of the ICTY, at a time when judges were starved for trial work. More recently, the Prosecutor has shown no further interest in the mechanism, which was largely designed to allay complaints from continental jurists about the absence of *in absentia* proceedings.<sup>20</sup> Essentially, the Prosecutor presents evidence allowing a Trial Chamber to rule on whether it "is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment."<sup>21</sup> In the

16. See Prosecutor v. Tadic, Case no. IT-94-1-I, Indictments (Dec. 14, 1995).

17. SCHARF, *supra* note 14, at 101.

18. See *id.*; see also Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861 (1997); Raymond M. Brown, *Trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia*, 3 ILSA J. INT'L & COMP. L. 613 (1997).

19. See Prosecutor v. Nikolic, Case no. IT-95-2-R61, Review of Indictment Pursuant to Rule 61 (Oct. 20, 1995); Prosecutor v. Karadzic, Case nos. IT-95-5-R61, IT-95-18-R61, Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence (July 11, 1996). For the text of Rule 61, see Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rule 61, U.N. Doc. IT/32/REV.21 (2001) [hereinafter Rules]. The Rules were adopted on February 11, 1994 and have been periodically amended. The most recent version of the Rules can be found at [http://www.un.org/icty/basic/rpe/IT32\\_rev21con.htm](http://www.un.org/icty/basic/rpe/IT32_rev21con.htm).

20. On the Rule 61 procedure, see generally B.T. Hildreh, *Hunting the Hunters: The United Nations Unleashes its Latest Weapon in the Fight Against Fugitive War Crimes Suspects—Rule 61*, 6 TUL. J. INT'L & COMP. L. 499 (1998); Faiza Patel King, *Public Disclosure in Rule 61 Proceedings Before the International Criminal Tribunal for the Former Yugoslavia*, 29 N.Y.U. J. INT'L L. & POL. 523 (1997); Anne L. Quintal, *Rule 61: The "Voice of the Victims" Screams Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723 (1998); M. Thieroff & E.A. Amley, *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998).

21. Rules, *supra* note 19, Rule 61(C).

October 1995 Rule 61 hearing in *Prosecutor v. Nikolic*, the judges invited the Prosecutor to add an indictment of genocide after hearing evidence of ethnic cleansing, a suggestion that was never taken up.<sup>22</sup>

A year later, a Trial Chamber issued a Rule 61 order confirming one of the rare genocide indictments, that of Bosnian Serb leaders Radovan Karadzic and Ratko Mladic.<sup>23</sup> The Prosecutor offered evidence showing that the pair hoped to drive Muslim and Croat populations from previously mixed areas in order to create an “ethnically cleansed” Serb region in Bosnia and Herzegovina. The Tribunal took the view that individual criminal responsibility for genocide had been established.<sup>24</sup> Turning to the detention camps, the Trial Chamber said:

The Trial Chamber is of the view that the evidence and testimony submitted suffice at this stage to demonstrate the active participation of the highest political and military leaders in the commission of the crimes by Bosnian Serb military and police forces in the detention facilities. The uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of the Bosnian Serb-held territory, the movements of prisoners between the various camps, and the tenor of some of the accused’s statements are strong indications tending to show that Radovan Karadzic and Ratko Mladic planned, ordered or otherwise aided and abetted in the planning, preparation or execution of the genocide perpetrated in the detention facilities.<sup>25</sup>

The Tribunal also considered that liability had been established on the basis of command responsibility.<sup>26</sup> Clearly disappointed by the Prosecutor’s conservatism in charging genocide only with respect to the conditions in the detention camps, the Trial Chamber noted that the evidence revealed a pattern of genocidal acts targeting “[t]he national Bosnian, Bosnian Croat and,

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22. See *Nikolic*, Case no. IT-95-2-R61, para. 34; see also Faiza Patel King & Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*, 8 EUR. J. INT’L L. 123, 130-32 (1997); Rafaëlle Maison, *La décision de la Chambre de première instance no 1 du Tribunal pénal international pour l’ex-Yougoslavie dans l’affaire Nikolic*, 7 EUR. J. INT’L L. 284 (1996). For the indictment in *Nikolic*, see *Prosecutor v. Nikolic*, Case no. IT-94-2-I, Indictment (Nov. 4, 1994).

23. *Karadzic*, Case nos. IT-95-5-R61, IT-95-18-R61.

24. See *id.*

25. *Id.* para. 84.

26. See *id.*

especially, Bosnian Muslim national groups,” inviting the Prosecutor “to consider broadening the scope of the characterization of genocide to include criminal acts listed in the first indictment other than those committed in the detention camps.”<sup>27</sup>

By early 1999, some six years after the establishment of the ICTY, only eight suspects—of more than seventy public indictments—had been accused of genocide.<sup>28</sup> To the great surprise of many observers, Yugoslav president Slobodan Milosevic was charged with crimes against humanity but not genocide with respect to persecution of Kosovar Albanians during the first months of 1999.<sup>29</sup> After Milosevic finally appeared before the ICTY, in July 2001, the Prosecutor pledged to issue a new indictment dealing with events in Croatia and in Bosnia and Herzegovina, declaring that genocide would probably figure among the charges. Nevertheless, the indictment issued in October 2001, with respect to the conflict in Croatia, did not charge genocide.<sup>30</sup>

The first judgment of the ICTY in a genocide case was issued in October 1999.<sup>31</sup> Goran Jelusic, a “low-level” thug driven by hatred of Muslims, was personally responsible for the murder of several dozen victims in concentration camps in the Brcko region of northwest Bosnia and Herzegovina. After indictment and arrest, Jelusic agreed to plead guilty to counts of war crimes and crimes against humanity, but denied responsibility for genocide. The Prosecutor decided, nevertheless, that a trial should proceed in search of a conviction for genocide. She may have

27. *Id.* paras. 84, 94-95.

28. See Prosecutor v. Karadzic, Case nos. IT-95-5-I, IT-95-18-I, Indictments (July 24, 1995 & Nov. 16, 1995); Prosecutor v. Jelusic, Case no. IT-95-10-I, Indictments (July 21, 1995, May 12, 1998 & Oct. 19, 1998); Prosecutor v. Meakic, Case no. IT-95-4-I, Indictments (Feb. 13, 1995 & June 2, 1998); Prosecutor v. Krstic, Case no. IT-98-33-I, Indictment (Nov. 2, 1998); Prosecutor v. Kovacevic, Case no. IT-97-24-I, Indictments (Mar. 13, 1997 & June 23, 1998); Prosecutor v. Sikirica, Case no. IT-95-8-I, Indictment (July 21, 1995).

29. Prosecutor v. Milosevic, Case no. IT-99-37-I, Indictment (May 24, 1999). Note also that the Supreme Court of Kosovo recently overturned a genocide conviction. See *Kosovo's Top Legal Body Overturns Genocide Conviction*, AGENCE FRANCE-PRESSE ENG. WIRE, Sept. 6, 2001. The Supreme Court of Kosovo stated that “[t]he exactions committed by (former Yugoslav president Slobodan) Milosevic’s regime cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group . . . but its forceful departure from Kosovo.” *Id.*

30. See Prosecutor v. Milosevic, Case no. IT-01-50-I, Indictment (Oct. 8, 2001).

31. See Prosecutor v. Jelusic, Case no. IT-95-10-T, Judgment (Oct. 19, 1999).



viewed *Jelusic* as a “test case” that could guide future prosecutions of genocide. But during the hearing, after she had announced that all of her evidence had been led, the Trial Chamber announced that it would enter an acquittal on the charge of genocide. A summary judgment was issued at the time, on October 19, 1999,<sup>32</sup> followed two months later by more substantial written reasons, on December 14, 1999.<sup>33</sup>

The peremptory manner in which the Trial Chamber dismissed the genocide indictment infuriated the Prosecutor, who charged that judgment had been rendered without her having a chance to be properly heard. In a July 2001 ruling, the Appeals Chamber held that the Trial Chamber ought to have allowed the case to proceed, given that there was sufficient evidence for the defense to rebut.<sup>34</sup> Nevertheless, the Chamber felt that returning the case for hearing before the Trial Chamber, or for rehearing before another Trial Chamber, would not be in the interests of justice.<sup>35</sup> Although it sustained the grievance of the Prosecutor, *Jelusic*’s acquittal for genocide was allowed to stand.<sup>36</sup> The judges of the Appeals Chamber seemed to echo the dissatisfaction of the Trial Chamber at the Prosecutor’s stubborn insistence upon a genocide indictment in a case where the accused had pleaded guilty to crimes against humanity. Indeed, for this “lesser” offence, *Jelusic* was sentenced to forty years in detention, one of the stiffest sentences ever imposed.<sup>37</sup>

Then, in September 2001, in another case dealing with persecution in concentration camps, the Trial Chamber granted a defense motion to dismiss, this time after the Prosecution’s evidence had been heard.<sup>38</sup> Within a few days of the dismissal of the genocide charge, *Sikirica* agreed to plead guilty to a charge of crimes against humanity.

In the midst of these two failures to obtain genocide convictions, the Prosecutor scored an impressive triumph in August 2001 when a Trial Chamber convicted General Radislav Krstic of

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32. *See id.*

33. Prosecutor v. *Jelusic*, Case no. IT-95-10-T, Judgment (Dec. 14, 1999).

34. *See* Prosecutor v. *Jelusic*, Case no. IT-95-10-A, Judgment, para. 57 (July 5, 2001).

35. *See id.* para. 77.

36. *See id.*

37. *See Jelusic*, Case no. IT-95-10-T, Judgment, para. 139 (Dec. 14, 1999).

38. *See* Prosecutor v. *Sikirica*, Case no. IT-95-8-T, Judgment on Defence Motions to Acquit (Sept. 3, 2001).

genocide for the massacre of more than 7,000 male Bosnian Muslims in Srebrenica in July 1995.<sup>39</sup> According to the Tribunal, the Srebrenica events “defy description in their horror and their implications for humankind’s capacity to revert to acts of brutality under the stresses of conflict.”<sup>40</sup> Though not the principal commander of the Bosnian Serb armies, Krstic had played a role in the massacre. The first accused to be convicted of genocide by the ICTY, he was condemned to its most severe sentence to date, forty-six years imprisonment,<sup>41</sup> an indication that like its sister Tribunal in Arusha, the ICTY considers genocide to be the “crime of crimes.”<sup>42</sup>

Thus, there are to date some six significant judicial pronouncements dealing with the interpretation and application of article 4—genocide—of the ICTY Statute: two Rule 61 hearings; the Trial Chamber rulings in *Jelusic*, *Krstic*, and *Sikirica*; and the Appeals Chamber decision in *Jelusic*. In the course of these judgments, the ICTY has made important pronouncements about the *actus reus* of genocide, the nature of the protected groups, the quantitative dimension of the crime, and the concept of intent.

#### I. *ACTUS REUS OF GENOCIDE: IS A PLAN REQUIRED?*

In *Jelusic*, the Prosecution’s evidence indicated that over a two-week period the accused was the principal executioner in the Luka camp. He was shown to have systematically killed Muslim inmates, as well as some Croats. The main victims were Muslim community leaders. Jelusic was charged as both an accomplice and as a principal perpetrator.<sup>43</sup> Examining the evidence, the Trial Chamber, presided over by Judge Claude Jorda, concluded that the Prosecutor had failed to prove the existence of any general or even regional plan to destroy in whole or in part the Bosnian Muslims.<sup>44</sup> The Trial Chamber said that Jelusic could in no way be an accomplice to genocide if in fact genocide

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39. See Prosecutor v. Krstic, Case no. IT-98-33-T, Judgment (Aug. 2, 2001).

40. *Id.* para. 2.

41. See *id.* para. 726.

42. Prosecutor v. Kambanda, Case no. ICTR-97-23-S, Judgment and Sentence, para. 16 (Sept. 4, 1998). Decisions of the ICTR are available at <http://www.ictr.org>.

43. Prosecutor v. Jelusic, Case no. IT-95-10-T, Judgment, para. 3 (Dec. 14, 1999).

44. See *id.* para. 98.

was never committed by others.<sup>45</sup> On this point, it said the Prosecutor had simply failed to prove the perpetration of genocide in Bosnia in the sense of some planned or organized attack on the Muslim population.<sup>46</sup>

Dismissing the charge of complicity, the Trial Chamber proceeded to consider whether or not Jelusic could have committed genocide acting alone, as the principal perpetrator, rather than as an accomplice.<sup>47</sup> This might be called the “Lee Harvey Oswald theory of genocide.” Ultimately, Jelusic was acquitted as a principal perpetrator as well.<sup>48</sup> But the Trial Chamber’s approach is authority for the proposition that genocide may be committed without any requirement of an organized plan or policy of a State or similar entity. According to the Trial Chamber:

Such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *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. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the *ad hoc* committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.<sup>49</sup>

The Trial Chamber’s conclusion was upheld by the Appeals Chamber:

The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence

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45. *See id.*

46. *See id.*

47. *See id.* para. 99.

48. *See id.* para. 108.

49. *Id.* para. 100.

of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.<sup>50</sup>

Certainly, nothing in the text of the definition of genocide explicitly identifies a plan or policy as an element of the crime of genocide.<sup>51</sup> During drafting of the Convention in 1948, proposals to include an explicit requirement that genocide be planned by the government were rejected.<sup>52</sup> Nevertheless, while exceptions cannot be ruled out, it is nearly impossible to imagine genocide that is not planned and organized either by the State itself or by some clique associated with it. Raphael Lemkin, the scholar who first proposed the concept of “genocide” in his book *Axis Rule in Occupied Europe*, spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide.<sup>53</sup> In *Prosecutor v. Kayishema*, the Rwanda Tribunal wrote: “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan, or organization.”<sup>54</sup> Furthermore, the Rwanda Tribunal said that “the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.”<sup>55</sup> The Guatemalan Truth Commission, which examined charges of genocide with respect to atrocities committed during that country’s civil war in the early 1980s, considered it necessary to demonstrate the existence of a plan to exterminate Mayan communities that “obeyed a higher, strategically planned policy, manifested in actions that had a logical and coherent sequence.”<sup>56</sup>

Other authorities have considered this issue in the context

50. *Jelisić*, Case no. IT-95-10-A, para. 48. The Appeals Chamber’s *obiter dictum* was followed in *Prosecutor v. Sikirica*, Case no. IT-95-8-I, Judgment on Defence Motions to Acquit, para. 62 (Aug. 3, 2001).

51. See Statute, *supra* note 1, art. 4(2).

52. See U.N. Doc. E/AC.25/SR.4, at 3-6 (1948); see also *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

53. See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE, LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

54. *Prosecutor v. Kayishema*, Case no. ICTR-95-1-T, Judgment, para. 94 (May 21, 1999).

55. *Id.* para. 276.

56. *Conclusions, Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, para. 120, available at <http://hrdata.aaas.org/ceh/report/english/toc.html>.

of discussion of the mental element, holding that the plan or circumstances of genocide must be known to the offender, thereby implicitly confirming that a plan or policy is a material element of the crime.<sup>57</sup> In *Attorney Gen. v. Eichmann*, the Israeli district court in Jerusalem found that Eichmann knew of the “secret of the plan for extermination” only since June 1941, and acquitted him of genocide prior to that date.<sup>58</sup> According to the commentary of the International Law Commission on its Draft Code of Crimes Against the Peace and Security of Mankind:

The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.<sup>59</sup>

Although individual offenders need not participate in devising the plan, if they commit acts of genocide with knowledge of the plan, then the requirements of the Convention are met.<sup>60</sup>

The draft Elements of Crimes (“Elements”) was adopted by the Preparatory Commission of the International Criminal Court in June 2000.<sup>61</sup> An element of the crime of genocide in the draft requires that “[t]he conduct took place in the context of a mani-

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57. See e.g., *Attorney Gen. v. Eichmann*, 36 I.L.R. 18 (D.C. Jm. 1968) (Israel).

58. See *id.* para. 195.

59. *Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6-July 26, 1996*, U.N. GAOR, 51st sess., U.N. Doc. A/51/10, art. 17 Commentary 10 (1996) [hereinafter *Commission Report*].

60. See e.g., Proposal by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates, and Yemen, Comments on the proposal submitted by the United States of America concerning terminology and the crime of genocide, U.N. Doc. PCNICC/1999/WGEC/DP.4, at 4 (1999).

61. See *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://www.un.org/law/icc/statute/elements/elemfra.htm> [hereinafter *Elements*].

fest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”<sup>62</sup> This is what the Elements deem to be “contextual circumstances,”<sup>63</sup> to distinguish such facts from the classic criminal law concept of material element or *actus reus*. The term “circumstance” appears in article 30 of the Rome Statute of the International Criminal Court (“Rome Statute”), requiring as a component of the *mens rea* of crimes that an accused have “awareness that a circumstance exists.”<sup>64</sup> Three additional provisions appear in the Elements that complete but also complicate the construction of this somewhat puzzling text about genocidal conduct. The term “in the context of” includes the initial acts in an emerging pattern, the term “manifest” is deemed an objective qualification, and:

Notwithstanding the normal requirement for a mental element provided for in article 30 [of the Rome Statute], and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.<sup>65</sup>

The Elements eschew the word “plan” in favor of a “manifest pattern of similar conduct,”<sup>66</sup> but any difference between the two expressions appears to be entirely semantic. Alternatively, the context may be “conduct that could itself effect such destruction.”<sup>67</sup> These criteria should be enough to eliminate the Lee Harvey Oswald scenario.

The Office of the Prosecutor of the *ad hoc* tribunals has addressed the issue stating that “proof of the objective context in which genocidal acts are committed with requisite intent is an integral part of the proof of a genocide case.”<sup>68</sup> However, the Prosecutor has quarrelled vigorously with any suggestion that the existence of a plan is an “element” of the crime. The Prose-

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62. *Id.* at 6.

63. *Id.* at 5; see WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001).

64. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 30(3) (1998), available at [http://www.un.org/law/icc/statute/99\\_corr/3.htm](http://www.un.org/law/icc/statute/99_corr/3.htm).

65. *Elements*, *supra* note 61, at 6.

66. *See id.*

67. *Id.*

68. Prosecutor v. Jelusic, Case no. IT-95-10-A, Prosecution’s Appeal Brief (Redacted Version), para. 64 (July 14, 2000).

cutor has argued that the existence of a plan is not an “element,” but an “integral part” of proof of a case. Perhaps the Prosecutor prefers to reserve the term “element” for the *actus reus* and *mens rea*, but to admit a requirement that proof also be made of “context” as an “integral part.” This distinction may not always be easy to understand. The Office of the Prosecutor has contended that the “objective context”—or what the Elements call the “manifest pattern of similar conduct”—may be limited to “persecution” as it is contemplated by the crimes against humanity provisions. This is a refinement on the Lee Harvey Oswald scenario, because the lone *génocidaire* no longer operates in isolation, but rather within a context of widespread or systematic persecution that nevertheless falls short of genocide.

Thus, there seems to be little argument with the notion that context is an implied element in the definition of genocide. The debate is apparently about the scale of such “context,” with the Office of the Prosecutor, and no doubt some interpreters of the draft Elements, contending that the plan or pattern need only be one of widespread or systematic persecution on racial or ethnic grounds (a “crimes against humanity policy”)<sup>69</sup> rather than one of intentional destruction of a racial or ethnic group (a “genocidal policy”). On this issue, judges are confronted with what is essentially a policy determination, because the words of the Convention definition of genocide can evidently bear either approach. Requiring evidence of a plan or policy ensures a more appropriate stigmatization of the crime of genocide. The ICTY’s role is to contribute to peace, accountability, and ultimately reconciliation within a context of collective atrocity. Directing its fire at what are really no more than isolated social deviants can only distort the historical record in an unnecessarily provocative fashion. If Serb militias did not, in a collective sense, commit genocide during the Bosnian war, such genocide convictions may not assist the Tribunal in its restorative function and may ultimately prove to be counterproductive. But even assuming that there is no requirement of proof of genocidal context, a responsible international prosecutor, conscious of the need to focus precious resources on genuinely significant cases, ought to

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69. According to the Trial Chamber of the ICTY, “a policy must exist to commit [crimes against humanity], although it need not be the policy of a State.” *Prosecutor v. Tadic*, Case no. IT-94-I-T, Opinion and Judgment, para. 655 (May 7, 1997).

discourage prosecution of individual maniacs who seem to possess preposterous and unrealistic genocidal plans that are not shared by others. When a prosecutor fails in this task, judges may express their dissatisfaction, as they did in *Jelusic*.<sup>70</sup>

## II. PROTECTED GROUPS

Article 4 of the ICTY Statute says that genocide consists of the intentional destruction of a "national, ethnical, racial or religious group."<sup>71</sup> This has been one of the most controversial aspects of the definition of genocide. Critics have complained about the definition's limited scope and its exclusion of political and other groups,<sup>72</sup> proposed that it be amended to expand its scope,<sup>73</sup> or argued that judges should impose a dynamic interpretation upon the provision.<sup>74</sup> Amendment has proven to be out of the question. When States were given an opportunity to revise the definition at the Rome Conference in June-July 1998, they chose to reaffirm the text adopted by the General Assembly of the United Nations some fifty years earlier.<sup>75</sup> Some of the

70. See *Prosecutor v. Jelusic*, Case no. IT-95-10-T, Judgment (Dec. 14, 1999); *Prosecutor v. Jelusic*, Case no. IT-95-10-A, Judgment (July 5, 2001).

71. Statute, *supra* note 1, art. 4(2).

72. See Frank Chalk & Kurt Jonassohn, *The Conceptual Framework*, in *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 11 (Frank Chalk & Kurt Jonassohn eds., 1990).

73. See 2 PIETER NICOLAAS DROST, *THE CRIME OF STATE: GENOCIDE* 122-23 (1959).

74. See Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 *MD. J. INT'L L. & TRADE* 193, 210-18 (1993); Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 *YALE L.J.* 2259, 2280-82 (1997).

75. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Compilation of Proposals*, U.N. GAOR, Preparatory Comm. on the Establishment of an International Criminal Court, 51st sess., U.N. Doc. A/51/22, Vol. I, para. 61 (1996).

There was a suggestion to expand the definition of the crime of genocide contained in the Convention to encompass social and political groups. This suggestion was supported by some delegations who felt that any gap in the definition should be filled. However, other delegations expressed opposition to amending the definition contained in the Convention, which was binding on all States as a matter of customary law and which had been incorporated in the implementing legislation of the numerous States parties to the Convention. The view was expressed that the amendment of existing conventions was beyond the scope of the present exercise. Concern was also expressed that providing for different definitions of the crime of genocide in the statute could result in the International Court of Justice and the international criminal court rendering conflicting decisions with respect to the same situation under the two respective instruments. It was suggested that acts such as murder that could qualify as genocide when committed against one of the groups



Trial Chamber decisions of the ICTR, vexed by how to categorize the Rwandan Tutsi minority, have ruled that the enumeration in the Convention definition of genocide should be interpreted so as to encompass any “stable and permanent” group.<sup>76</sup>

The ICTY considered the issue for the first time in *Krstic*. Using a historical analysis, and relying on texts in similar human rights instruments, the ICTY observed that the four categories protected by the Convention correspond in large measure to what other texts have designated “national minorities.”

National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous. European instruments on human rights use the term “national minorities,” while universal instruments more commonly make reference to “ethnic, religious or linguistic minorities”; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F. Capotorti commented that “the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word ‘racial’ by the word ‘ethnic’ in all references to minority groups described by their ethnic origin.” The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.” The preparatory work on the Genocide Convention also reflects that the term “ethnical” was added at a later stage in order to better define the type of groups protected by the Convention and ensure that the term “national” would

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referred to in the Convention could also constitute crimes against humanity when committed against members of other groups, including social or political groups.

Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 89 (Roy S. Lee ed., 1999) (explaining that Egypt was the source of the proposal).

76. See *Prosecutor v. Akayesu*, Case no. ICTR-96-4-T, Judgment, para. 516 (Sept. 2, 1998). Other judges of the ICTR have not endorsed this expansive interpretation, classifying the Tutsi as an “ethnic group” within the literal definition of genocide. See *Prosecutor v. Kayishema*, Case no. ICTR-95-1-T, Judgment, para. 291 (May 21, 1999).

not be understood as encompassing purely political groups.<sup>77</sup>

Accordingly,

The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what were recognised, before the second world war, as 'national minorities,' rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.<sup>78</sup>

The targeted group, said the Trial Chamber, was "Bosnian Muslims."<sup>79</sup>

The *Krstic* Trial Chamber has struck an appropriate balance in interpreting the provision. It avoids the narrow positivism of an approach that focuses on individual definitions for the four categories. At the same time, it respects the intent of the drafters, orienting genocide prosecution to the genuine object and purpose of the Convention, which was to protect national minorities from attacks upon their right to existence. It is striking that the Trial Chamber does not even allude to the case law of the ICTR on this point.<sup>80</sup>

A related question is whether the group is to be determined according to objective or subjective criteria. The ICTR has been split on this point, with some judgments supporting the view that the group must have some objective existence,<sup>81</sup> and others contending that it is the perpetrator who determines the existence and definition of the group irrespective of objective considerations.<sup>82</sup> The ICTY seems clearly to favor the subjective approach. In *Jelusic*, the Trial Chamber said:

77. Prosecutor v. *Krstic*, Case no. IT-98-33-T, Judgment, para. 555 (Aug. 2, 2001) (references omitted).

78. *Id.* para. 556.

79. *Id.* para. 560.

80. For a criticism of the ICTR's approach to the protected groups, see William A. Schabas, *L'affaire Akayesu*, in *GÉNOCIDÉ(S)* 111-20 (Katia Boustany & Daniel Dormoy eds., 1999); William A. Schabas, *Prosecutor v. Akayesu, Commentary*, in II ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999, at 539-54 (André Klip & Goran Sluiter eds., 2001). See also Diane Marie Amann, *Prosecutor v. Akayesu*, 93 AM. J. INT'L L. 195 (1999).

81. See e.g., Prosecutor v. Rutaganda, Case no. ICTR-96-3-T, Judgment, para. 57 (Dec. 6, 1999).

82. See e.g., Prosecutor v. Kayishema, Case no. ICTR-95-1-T, Judgment, para. 98 (May 21, 1999).

Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irrefutable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.<sup>83</sup>

These views were endorsed by another Trial Chamber in *Krstic*.<sup>84</sup>

This approach is appealing up to a point, especially because the perpetrator's intent is a decisive element in the crime of genocide. Its flaw is, at least in theory, allowing genocide to be committed against a group that does not have any real objective existence. To make an analogy with ordinary criminal law, many penal codes stigmatize patricide, that is, the killing of one's parents. But the murderer who kills an individual believing, erroneously, that he or she is killing a parent, is only a murderer, not a patricide. The same reasoning must apply to the crime of genocide. Although helpful to an extent, the subjective approach flounders because law cannot permit the crime to be defined by the offender alone. It is necessary, therefore, to determine some objective existence of the four groups. This issue may not be of great practical significance, however. In the words of the former High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe, Max van der Stoep, "I know a minority when I see one."<sup>85</sup> Judges will too.<sup>86</sup>

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83. Prosecutor v. Jelisić, Case no. IT-95-10-T, Judgment, para. 70 (Dec. 14, 1999).

84. See Prosecutor v. Krstić, Case no. IT-98-33-T, Judgment, para. 557 (Aug. 2, 2001).

85. Max van der Stoep, *Prevention of Minority Conflicts*, in THE CSCE AND THE TURBULENT NEW EUROPE 148 (L.B. Sohn ed., 1993).

86. See *id.* Van der Stoep's comment was inspired by a judge, United States Supreme Court Justice Potter Stewart, who had said the same thing about pornography. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963).

### III. *DO NUMBERS MATTER? "IN WHOLE OR IN PART"*

There has been much confusion about the requirement in the definition of genocide that the group be destroyed "in whole or in part."<sup>87</sup> These terms appear in the *chapeau* of the definition and refer to the genocidal intent. Thus, the reference is not to the physical act, as if there must be some quantitative threshold where mass murder turns into genocide, but rather the intent of the perpetrators. The actual result, in terms of quantity, will nevertheless be relevant in that it assists the trier of fact to draw conclusions about intent based on the behavior of the offender. The greater the number of actual victims, the more plausible becomes the deduction that the perpetrators intended to destroy the group, in whole or in part.

This still does not resolve the problem of construing the meaning of the term "in part." Could it be genocidal to target only a few persons for murder because of their membership in a particular ethnic group? A literal reading of the definition would seem to support such an interpretation. Nevertheless, this construction is absurd, and totally incompatible with the drafting history, the context, and the object and purpose of the Convention.

The authorities have added a gloss to the definition, requiring that the intended destruction be of a "substantial" part of the group. One of first academic writers on the subject, Nehemiah Robinson, said the real point of the provision is to encompass genocide where it is directed against a part of a country, or a single town.<sup>88</sup> Genocide is aimed at destroying "a multitude of persons of the same group," as long as the number is "substantial."<sup>89</sup>

[T]he intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individ-

87. See Convention, *supra* note 1, art. 4(2).

88. See NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 63 (1959).

89. *Id.* But the adjective "substantial" appears earlier, in submissions by Raphael Lemkin to the United States Congress. See 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976).

ual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.<sup>90</sup>

The International Law Commission considered that “[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”<sup>91</sup> Similarly, the final draft statute of the Preparatory Committee of the International Criminal Court noted that “[t]he reference to ‘intent to destroy, in whole or in part . . . a group, as such’ was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.”<sup>92</sup> The ICTR, in *Prosecutor v. Kayishema*, said “that ‘in part’ requires the intention to destroy a considerable number of individuals.”<sup>93</sup> In *Prosecutor v. Jelusic*, the ICTY said that genocide must involve the intent to destroy a “substantial” part, although not necessarily a “very important part.”<sup>94</sup>

That genocide may be directed against a group within a very limited region has been readily accepted by the ICTY. It has tended to focus its analysis on municipalities or regions, rather than on Bosnia or the former Yugoslavia taken as a whole. In *Jelusic*, the Trial Chamber held that “international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone.”<sup>95</sup> Similarly, in *Prosecutor v. Krstic*, the Trial Chamber said:

The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumula-

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90. *Commission Report*, *supra* note 59, art. 17 Commentary 6.

91. *Id.* art. 17 Commentary 8.

92. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, Jurisdiction, Admissibility and Applicable Law*, U.N. Doc. A/CONF.183/2/Add.1, at 11 n.1 (1998), available at <http://www.un.org/law/n9810105.pdf>.

93. *Prosecutor v. Kayishema*, Case no. ICTR-95-1-T, Judgment, para. 97 (May 21, 1999).

94. *Prosecutor v. Jelusic*, Case no. IT-95-10-T, Judgment (Oct. 19, 1999).

95. *Jelusic*, Case no. IT-95-10-T, para. 83 (Dec. 14, 1999); see *Prosecutor v. Sikirica*, Case no. IT-95-8-I, Judgment on Defence Motions to Acquit, para. 68 (Sept. 3, 2001).

tion of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.<sup>96</sup>

In *Prosecutor v. Sikirica*, the ICTY looked at the numbers in detail, noting that in the Keraterm camp the inmate population represented at most 2 to 2.8% of the Bosnian Muslims of the Prijedor region.<sup>97</sup> While admitting that this did not definitively establish whether or not the perpetrators of killings in the camp had the intent to destroy a broader number, the judges said, “when that fact is considered along with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred.”<sup>98</sup>

Although the concept of genocide on a limited geographic scale seems perfectly compatible with the object and purpose of the Convention, it does raise questions relating to the plan or policy issue. Localized genocide may tend to suggest the absence of a plan or policy on a national level, and while it may result in convictions of low-level officials within the municipality or region, it may also create a presumption that the crime was

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96. *Prosecutor v. Krstic*, Case no. IT-98-33-T, Judgment, para. 590 (Aug. 2, 2001).

97. *See Sikirica*, Case no. IT-95-8-I, para. 72.

98. *Id.* para. 75.

not in fact organized on a larger scale. In Rwanda, this problem does not really arise. The Prosecutor's case began with general evidence about the genocidal plan on a national scale, presented by expert witnesses, and this has been echoed in the judgments.<sup>99</sup> A major part of the first important judgment of the ICTR is entitled "Genocide in Rwanda in 1994?"<sup>100</sup> Yet no similar discussion appears in any of the judgments of the ICTY to date. In fact, the Prosecutor has not developed the same type of argument before the ICTY, insisting instead on the local context.

Accordingly, before the ICTY, the Prosecutor has argued that:

In view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruction of a group, or a significant section thereof, should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographic sense.<sup>101</sup>

It has been argued that the protected group may be defined qualitatively as well as quantitatively or, in other words, that a "significant" rather than a "substantial" part of the group must be targeted. This approach to the definition of genocide surfaced in the report of the Commission of Experts established by the Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia. According to one of its members, Professor Cherif Bassiouni, the Commission considered the definition in the Convention to be "sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women."<sup>102</sup> The Commission stated:

If essentially the total leadership of a group is targeted, it

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99. See e.g., Prosecutor v. Akayesu, Case no. ICTR-96-4-T, Judgment, paras. 112-29 (Sept. 2, 1998).

100. *Id.*

101. Prosecutor v. Karadzic, Case nos. IT-95-18-R61, IT-95-5-R61, Transcript of hearing, at 15-16 (June 27, 1996).

102. M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. FORUM 279, 323 (1994).

could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others—the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.<sup>103</sup>

The Trial Chamber in *Jelisić* discussed this approach when it reviewed the arguments of the Prosecutor.<sup>104</sup> According to the Trial Chamber, it might be possible to infer the requisite genocidal intent from the “desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.”<sup>105</sup> Ultimately, it found it was not possible “to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community.”<sup>106</sup>

The same scenario of relatively small numbers of killings in concentration camps returned in *Sikirica*, but again, the judges could not discern any pattern in the camp killings that suggested the intent to destroy a “significant” part of the local Muslim com-

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103. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, U.N. Doc. S/1994/674, para. 94 (1994) [hereinafter *Expert Report*]. The idea that “in part” referred to a “significant part” can be traced to the special rapporteur of the Sub-Commission on Human Rights, Benjamin Whitaker. See Benjamin Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/6, at 16, para. 29 (1985).

104. See *Prosecutor v. Jelisić*, Case no. IT-95-10-T, Judgment, para. 82 (Dec. 14, 1999).

105. *Id.*

106. *Id.* para. 93.



munity so as to threaten its survival.<sup>107</sup> The victims were butchers, café owners, lawyers, pilots, schoolteachers, and taxi-drivers but not, apparently, community leaders.<sup>108</sup> The Trial Chamber observed that “they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service.”<sup>109</sup>

The test, then, using the “significant group” approach, is whether the destruction of a social strata threatens the group’s survival as a whole. In *Jelusic*, these were “representative figures.” In *Sikirica*, they were community leaders. But in *Krstic*, where the victims were men and boys of military age, there was no real suggestion that they were community leaders or representative figures. Indeed, it would seem likely that the leaders of the community would be men *above* military age. There was unchallenged evidence that General Krstic had organized the transfer of women, children, and the elderly from the Srebrenica area so that they would not be affected by the coming holocaust.<sup>110</sup> Did General Krstic also transfer the wise old leaders of the community? The judgment doesn’t say.

The “significant part” approach inevitably leads to speculation about what the killing of one or another strata in a community will do to its survival. Perhaps killing the “leaders” will do the trick. But somebody bent upon destroying a group might more logically focus on the children, or the women, as they ensure the group’s survival. And this results in value judgments about how important one or another group may be to the survival of the community. In *Krstic*, the Prosecutor had argued that “what remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. It’s a community in despair; it’s a community clinging to memories; it’s a community that is lacking leadership; it’s a community that’s a shadow of what it once was.”<sup>111</sup> And yet the alleged intent of the perpetrators—this is really unchallenged in the judg-

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107. See Prosecutor v. Sikirica, Case no. IT-95-8-I, Judgment on Defence Motions to Acquit, para. 80 (Aug. 3, 2001).

108. See *id.*

109. *Id.*

110. See Prosecutor v. Krstic, Case no. IT-98-33-T, Judgment, para. 609 (Aug. 2, 2001).

111. *Id.* para. 592.

ment—was to “ethnically cleanse” the region of Muslims, not to destroy the group in a physical sense.<sup>112</sup> The Trial Chamber appeared to accept the Prosecutor’s contention that the intent in killing the men and boys of military age was to eliminate the community as a whole.<sup>113</sup>

This seems a rather enormous deduction to make on the basis that men and boys of military age were massacred. Can there not be other plausible explanations for the destruction of 7,000 men and boys in Srebrenica? Could they not have been targeted precisely because they were of *military* age, and thus actual or potential combatants? Would someone truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenseless men and boys, go to the trouble of organizing transport so that women, children, and the elderly could be evacuated? It is certainly striking that another Trial Chamber, in *Sikirica*, dismissed the “significant part” argument after noting that the common denominator of the victims was that they were men of military age and nothing more, as if this were insufficient.<sup>114</sup>

Here is the explanation provided by the Trial Chamber in *Krstic*:

Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance

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112. *See id.*

113. *See id.* para. 594.

114. *See Sikirica*, Case no. IT-95-8-I, para. 81.

of the Bosnian Muslim population at Srebrenica.<sup>115</sup>

There is a world of difference between physical destruction of a group and “a lasting impact” upon a community. If the intent of the Serb forces was to have a “lasting impact” on Srebrenica’s Muslims, then they did not intend to destroy the community. The classic genocides of the twentieth century, those of European Jews and Rwandan Tutsis, are distinguished by the insistence upon killing the women and children, precisely to ensure that the group is effectively destroyed. But the issue is not whether the massacre of the men and boys of military age was really effective in destroying the Srebrenica Muslims. The crime of genocide does not require a result, and courts need not determine whether the actual method was well chosen. Still, to the extent that the genocidal technique is incomplete and perhaps illogical, this will cast doubts on whether or not real genuine intent was present. As “crimes against humanity,” the atrocities of July 1995 in Srebrenica surely qualify. But categorizing them as “genocide” seems to distort the definition unreasonably.

#### IV. “SPECIFIC INTENT” OR *DOLUS SPECIALIS*

Judgments of the ICTY and the ICTR have helped to complicate the issue of genocidal intent by using the terms *dolus specialis*<sup>116</sup> and “special intent”<sup>117</sup> to describe the particular mental element or *mens rea* of the crime of genocide, despite the fact that the mental element or *mens rea* is already set out within the definition itself.<sup>118</sup> In *Prosecutor v. Kambanda* the ICTR Trial Chamber observed: “The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent ‘to destroy in whole

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115. *Krstic*, Case no. IT-98-33-T, para. 595 (reference omitted).

Finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica.

*Id.* para. 634.

116. *See* *Prosecutor v. Akayesu*, Case no. ICTR-96-4-T, Judgment, paras. 122, 498, 499, 517, 540 (Sept. 2 1998).

117. *Id.* paras. 498, 499, 510, 517, 518, 544, 568.

118. *See* Statute, *supra* note 1.

or in part, a national, ethnic, racial or religious group as such’.”<sup>119</sup> In *Jelusic*, the ICTY Trial Chamber used the expression only once, in what is essentially a concluding paragraph of the December 14 judgment: “The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide.”<sup>120</sup> In explanation, the Trial Chamber said “he killed arbitrarily rather than with the clear intention to destroy a group.”<sup>121</sup>

The issue was raised by the Office of the Prosecutor on appeal in the *Jelusic* case.<sup>122</sup> For the Prosecutor, the concept of *dolus specialis* set too high a standard, and could not be equated with the common law concepts of “specific intent” or “special intent.”<sup>123</sup> The Appeals Chamber dealt with the matter rather laconically, saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant “specific intent.”<sup>124</sup> The Appeals Chamber used the term “specific intent” to describe “the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such,” or, in other words, the normative requirement set out in the *chapeau* of the definition of genocide.<sup>125</sup>

The definition requires that the accused commit one of five punishable acts, of which “killing” sits at the top of the list and is arguably the most serious.<sup>126</sup> Obviously, the accused must have the intent to commit the act of “killing.” In the common law system, “killing” *simpliciter* is a crime of “specific intent,” in that the accused may rebut a charge with evidence that he or she lacked the “specific” intent to murder, for example because of voluntary intoxication.<sup>127</sup> The result is acquittal of the crime of murder but conviction for the lesser and included crime of manslaughter or involuntary homicide, itself a crime of “general in-

119. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, para. 16 (Sept. 4, 1998).

120. Prosecutor v. Jelusic, Case no. IT-95-10-T, Judgment, para. 108 (Dec. 14, 1999).

121. *Id.*

122. *Jelusic*, Case no. IT-95-10-A, Prosecution's Appeal Brief (Redacted Version), para. 4.22 (July 14, 2000).

123. *See id.*; *see generally* Prosecutor v. Sikirica, Case no. IT-95-8-T, Judgment on Defense Motions to Acquit, para. 27 (Sept. 3, 2001).

124. *See Jelusic*, Case no. IT-95-10-A, Judgment, para. 51 (July 5, 2001).

125. *See id.* para. 45.

126. *See* Statute, *supra* note 1, art. 4(2)(a).

127. *See* Dir. of Pub. Prosecutions. v. Beard, [1920] A.C. 479 (H.L.).

tent.” But for “killing” to constitute the crime of genocide, it must be accompanied by the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.”<sup>128</sup> This presumably is all that is meant by the *dolus specialis*, or the special intent, or the specific intent of the crime of genocide.

But it would probably be preferable to eschew importation of enigmatic concepts like *dolus specialis* or “specific intent” from national systems of criminal law. They seem valuable only to the extent that they recall what can in any case be gleaned from the plain words of the definition of the international crime of genocide. The *Sikirica* Trial Chamber accused the Prosecutor of unnecessarily complicating matters by introducing a debate about theories of intent, noting that the matter should be resolved with reference to the text of the provision:

The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the chapeau to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent.<sup>129</sup>

In its commentary on the 1996 Code of Crimes Against the Peace and Security of Mankind, the International Law Commission qualified genocide’s specific intent as “the distinguishing characteristic of this particular crime under international law.”<sup>130</sup>

The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts com-

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128. Statute, *supra* note 1, art. 4(2).

129. Prosecutor v. Sikirica, Case no. IT-95-8-T, Judgment on Defence Motions to Acquit, para. 60 (Sept. 3, 2001) (references omitted).

130. *Commission Report*, *supra* note 59, art. 17 Commentary 5.

bined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.<sup>131</sup>

*Krstic* demonstrates the practical consequences of the Appeals Chamber's pronouncement on the mental element of genocide in *Jelisić*. Evidence showed that General Krstic participated in a common criminal enterprise involving the destruction of Bosnian Muslim men and boys of military age. Although he organized the evacuation of women, children, and the elderly, he also participated in the subsequent operations, and these involved the summary executions. There was no evidence that he either killed personally the Muslim men or boys, that he was present when they were killed, or that he ordered their killing. Nevertheless, as a participant in the overall military operation, the Trial Chamber considered it sufficient that he had knowledge that extermination was being carried out.<sup>132</sup> But even here, there was no direct evidence of his knowledge of the mass killings. Nevertheless, "General Krstic could only surmise that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all."<sup>133</sup> Indeed, Krstic was commander, both *de facto* and *de jure*, of the Drina Corps, which "rendered tangible and substantial assistance and technical support to the detention, killing and burial" of the victims.<sup>134</sup> The Trial Chamber seems to have *presumed* that General Krstic knew of the summary executions.

This is certainly a mental element that falls shy of the standard of *dolus specialis* in continental law systems. Nevertheless, it would appear consistent with the text of the definition, to the extent that General Krstic had knowledge of the plan to destroy the Bosnian Muslims of Srebrenica and participated actively in it. One interesting result of the *Krstic* Trial Chamber's analysis concerns the concept of command responsibility, which is set

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131. *Id.*

132. See Prosecutor v. Krstic, Case no. IT-98-33-T, Judgment, para. 624, 644 (Aug. 2, 2001).

133. *Id.* para. 622.

134. *Id.* para. 624.

out in article 7(3) of the ICTY Statute.<sup>135</sup> Krstic might have been convicted on the basis of this evidence. The Trial Chamber opted for the more demanding route,<sup>136</sup> however, in effect presuming that he commanded his troops to participate in the massacres, although nowhere does it state this explicitly. Still, if he is convicted *qua* commander because his troops actually carried out what the Trial Chamber deems to be genocidal acts, then it is because he gave the orders, and not because his troops carried out acts that he ought to have known about, that is, the scenario contemplated command responsibility. It is a bold decision, based on circumstantial evidence and presumptions, but one that is far more satisfying from the standpoint of criminal law theory than a discounted conviction relying only upon proof of negligence.

Accordingly, the issue of whether or not genocide can actually be convicted on the basis of command responsibility still remains to be decided. After all, the knowledge requirement of command responsibility (“had reason to know”) is an objective negligence standard that manifestly falls short of the “specific intent” required by the *chapeau* of the genocide provision. And yet article 7(3) of the ICTY Statute clearly contemplates this apparently contradictory hypothesis, namely that a person who only “had reason to know” also had the intent to destroy a protected group.<sup>137</sup>

### CONCLUSION

It is now nearly a decade since international justice began examining whether genocide was committed in Bosnia. Astonishingly, the really big question—and the most interesting one from a political and historical standpoint—still remains unanswered, namely whether there was an organized plan or policy on the part of the Bosnian Serb leadership, with the complicity of the Belgrade regime, to destroy the Bosnian Muslims within the meaning of article II of the Convention. The ICJ, seized of the matter in March 1993, has yet to adjudicate the question on the merits.<sup>138</sup> Given the sluggish pace of the case—allegedly due

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135. See Statute, *supra* note 1, art. 7(3).

136. *Krstic*, Case no. IT-98-33-T, para. 605.

137. See Statute, *supra* note 1, art. 7(3).

138. See Application, *supra* note 8.

to political stalemates within the government of Bosnia and Herzegovina—a final judgment may never be issued.<sup>139</sup> As for the criminal trials before the ICTY, they too have so far been indecisive.

To date, the Tribunal has addressed two types of cases. The first might be called the “camp cases,” in that they concern persecution of members of ethnic minorities within the concentration camps that proliferated in Bosnia and Herzegovina during the 1992-1995 war. Even under the Nazis, only a minority of the concentration camps were actually extermination camps. The Prosecutor appears to have made a mechanistic equation between concentration camps and genocide, but has been unable to get a conviction after two attempts. The second category of cases deals with the massacre at Srebrenica in July 1995. The *Krstic* conviction, if upheld on appeal, will impact upon other cases relating to the same atrocity. For example, Karadzic and Mladic have been indicted for genocide with respect to Srebrenica,<sup>140</sup> and a similar result to that in *Krstic* is to be anticipated if they are ever brought to book. Yet Srebrenica remains an exceptional case. Indeed, that is how the Prosecutor presented it, focusing on the possibility of genocide being committed on a narrow regional scale.

The third category of genocide indictment is by far the most significant. This category deals with the policy of the Bosnian Serb leadership. Indictments of this type have been issued against Karadzic and Mladic,<sup>141</sup> as well as against other Bosnian Serb supremos like Biljana Plavsic.<sup>142</sup> If the Prosecutor is to make good her pledge to prosecute Milosevic for genocide, she will almost certainly have to link him to this third category of genocide. None of the existing judgments on genocide is of any assistance to the Prosecutor in this respect. The acquittals of Jelusic and Sikirica in the “camp cases” suggest that no genocidal

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139. Two other types of applications based upon the Convention are also pending before the ICJ, by Yugoslavia against several NATO powers relating to the bombing campaign in 1999, and by Croatia against Yugoslavia dealing with ethnic cleansing in the Knin region, eastern and western Slavonia, and Dalmatia. See International Court of Justice, Current Docket of the Court, available at <http://www.icj.law.gla.ac.uk/icjwww/idocket.htm>.

140. See Prosecutor v. Karadzic, Case no. IT-95-18, Indictment (Nov. 14, 1995).

141. See *id.*

142. See Prosecutor v. Krajisnik, Case no. IT-00-39 & 40-PT, Consolidated indictment (Feb. 23, 2001).



pattern can be established there. As for Srebrenica, circumstantial proof or evidentiary presumptions may have been enough for General Krstic, who was present and who commanded operational troops, but this can hardly be enough to make the link with the authorities in Belgrade.

