2017

The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide

Milena Sterio

Cleveland-Marshall College of Law, Cleveland State University, m.sterio@csuohio.edu

THE KARADŽIĆ GENOCIDE CONVICTION: INFERENCES, INTENT, AND THE NECESSITY TO REDEFINE GENOCIDE

Milena Sterio[*]

INTRODUCTION

In March 2016, the International Criminal Tribunal for the Former Yugoslavia (ICTY) convicted former Bosnian Serb leader, Radovan Karadžić, of genocide and crimes against humanity and sentenced him to forty years imprisonment.[1] In particular, Karadžić was found guilty of genocide in Srebrenica, the persecution of Bosnians and Croats throughout Bosnia and Herzegovina, terrorizing the population of Sarajevo, and taking United Nations (U.N.) peacekeepers hostage.[2] According to the ICTY Trial Chamber verdict, the crimes were committed as part of four joint criminal enterprises (JCE) in which Karadžić was a protagonist.[3] In July 2016, Karadžić announced, through his defense counsel, that he would appeal the verdict on the ground that he did not get a fair trial—according to Karadžić's attorney, Peter Robinson, "[t]he trial chamber considered him guilty in advance and then constructed the verdict to justify its presumption."[4] Robinson also stated that "[t]he chamber concluded [Karadžić] had an intention to kill the captives from Srebrenica on the basis of its interpretation of a coded telephone conversation. Such a way of drawing conclusions is unfounded and incorrect, so the verdict is unfair."[5] The ICTY prosecutors announced, on their end, that they also would appeal the verdict in order to ask "for Karadzic [sic] to be found guilty of the genocide in seven other Bosnian municipalities in 1992, and for his sentence to be raised to life imprisonment."[6] The appeals chamber of the Mechanism for International Tribunals, which is taking over the remaining work of the ICTY as it shuts down,

---

[*] Professor of Law and Associate Dean for Academic Enrichment, Cleveland-Marshall College of Law.

[1] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 6070–72 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

[2] *Id.* ¶¶ 5824, 5849–50, 5950–51, 6002, 6047.

[3] *Id.* ¶ 6046.

[4] Radosa Milutinovic, *Radovan Karadzic Appeals Against Genocide Conviction*, BALKAN TRANSITIONAL JUST. (July 22, 2016), http://www.balkaninsight.com/en/article/Karadžić-files-appeal-notice-07-22-2016.

[5] *Id.*

[6] *Id.*

will rule on the appeals, but as of now there is no clear deadline for delivering the ruling.[7]

In anticipation of the appeals chamber's definitive ruling on the Karadžić verdict, this Article will address and analyze Karadžić's genocide conviction. The Article will specifically focus on the interpretation of genocide espoused by the ICTY judges in this recent decision. As other commentators have already noted, the most striking finding of the ICTY Trial Chamber was that Karadžić had specific genocidal intent regarding the Srebrenica killings.[8] During the Karadžić trial, the Prosecution had not been able to provide "smoking gun" evidence that Karadžić knew about the killings in Srebrenica as they were taking place; instead, the Prosecution's case was essentially circumstantial.[9] The Trial Chamber accepted the Prosecution's reasoning and drew inferences from indirect evidence.[10] It found that Karadžić was a participant in a JCE, sharing its common purpose: to eliminate Bosnian Muslims from Srebrenica. This common purpose eventually evolved to encompass the agreement to kill all Bosnian adult males and to forcibly transfer women and children.[11] The most important item of evidence that the Trial Chamber took into account was a conversation that Karadžić had with another official, Miroslav Deronjić.[12] From this conversation, the Trial Chamber inferred first that Karadžić knew about the killings at Srebrenica as they were taking place and second that Karadžić, because he did not do anything after this conversation, must have shared Deronjić's (and others') intent to kill Bosnian Muslims at Srebrenica.[13] This interpretation of the intent requirement under the Genocide Convention and the customary law definition of genocide is novel and had not been espoused by other tribunals in the past.

This Article will first discuss and analyze the Genocide Convention and its strict definition of genocide and the "intent" requirement. It will then focus on the evolution of this definition, in light of the recent Karadžić case. This Article will demonstrate that in modern-day conflicts, the finding of genocidal intent

---

7 *Id*.

8 *See infra* Part III.

9 *See* Marko Milanovic, *ICTY Convicts Radovan Karadzic*, EJIL: TALK! (Mar. 25, 2016), http://www.ejiltalk.org/icty-convicts-radovan-Karadzic/.

10 *See id.*

11 *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶¶ 5798, 5810–11, 5814 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.,

12 Milanovic, *supra* note 9.

13 *Id*.

may be an impossible task for the prosecution and that the ICTY Trial Chamber's method of inferring intent based on knowledge and other indirect factors may be the only way that prosecutors will be able to obtain future genocide convictions. This Article will then discuss a possible re-drafting and re-conceptualizing of the genocide definition, in light of modern-day conflicts and warfare.

I. GENOCIDE CONVENTION: A STRICT DEFINITION OF GENOCIDE

The term "genocide" was coined by Polish jurist, Raphaël Lemkin, to describe the Nazis' actions during World War II against the Jews.[14] According to Lemkin, "[g]enocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[15] Lemkin coined the term "genocide" by combining the Greek word *genos* (race, tribe) and the Latin word *caedere* (to kill).[16] According to Lemkin's view of the crime of genocide, "the critical elements of genocide were not the individual acts, though they may be crimes in themselves, but the broader aim to destroy entire human collectivities."[17]

The Holocaust, as well as the trial of the Nazi defendants at Nuremberg, spurred states to negotiate a treaty on genocide to criminalize these atrocities.[18] In December 1948, most U.N. member states agreed upon the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[19] Article II of the Genocide Convention defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a)

---

[14] *What is Genocide?*, U.S. HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007043 (last updated July 2, 2016).

[15] RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

[16] Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, SANTA CLARA L. DIGITAL COMMONS, July 2008, at 1, 15.

[17] *Id*.

[18] *See* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 249 (2002). Although the crime of genocide was not included in the Charter of the International Military Tribunal established to prosecute Nazi war criminals at Nuremberg, the indictment at Nuremberg charged the defendants with "deliberate and systematic genocide" and allegations of genocide appeared in the prosecutors' closing statements. *Id*.

[19] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

> Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[20]

The definition of genocide, as iterated in the Genocide Convention, has become customary international law as well as a *jus cogens* norm of international law.[21] As such, this definition is binding on all states.[22]

The definition of genocide is narrow, as it requires proof that one of the enumerated groups (national, ethnical, racial, or religious) was targeted "as such." Scholars have noted that the definition of genocide under the Genocide Convention is historically attributable to the role of the Soviet Union in this treaty's negotiation—in the late 1940s, Soviet leader Joseph Stalin was committing massive purges of political enemies, and the Soviet Union did not want the persecution of members of political groups to constitute genocide.[23] The specific phrase "as such" had been offered by the Venezuelan representative during the Genocide Convention treaty negotiations as a compromise position, in order to conclude an ongoing discussion about the questions of intent and motive in the definition of genocide.[24] A first draft of the Convention had included, after enumerating protected groups, the phrase "on grounds of the national or racial origin, religious belief, or political opinion of its members."[25] The Venezuelan amendment substituted the words "as such" in lieu of the longer phrase, and the amendment's author justified his proposal by explaining that an enumeration of motives was useless and even dangerous.[26] According to the Venezuelan representative, a restrictive enumeration of motives could be abused by *genocidaires* to help them avoid being charged with genocide, as they would be able to argue that their crimes had been committed for reasons other than

---

[20] *Id.* art. II.

[21] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 18 ¶ 161 (Feb. 26, 2007); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement ¶ 495 (Sept. 2, 1998).

[22] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES 47 (4th ed. 2015).

[23] *Id.* at 483.

[24] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES 572 (1st ed. 2002) (citing excerpt from HURST HANNUM & DAVID HAWK, THE CASE AGAINST THE STANDING COMMITTEE OF THE COMMUNIST PARTY OF KAMPUCHEA (1986)) [hereinafter DUNOFF ET AL., 1st ed.].

[25] *Id.*

[26] *Id.*

those listed in Article II.[27] "The purpose of [his amendment] was to specify that, for genocide to be committed, a group – for instance, a racial group – must be destroyed qua group."[28]

In other words, in order to secure a genocide conviction, a prosecutor must be able to demonstrate that members of a protected group were targeted because of their membership in that protected group. It should also be noted that genocide under the Convention does not require the actual destruction of a protected group; instead, the crime is complete if one of the enumerated acts was committed with the specific intent.[29] However, the motive or motives behind the intent to destroy a protected group are irrelevant.[30] As one scholar has noted, "[p]rovided the requisite intent exists, it matters not whether that intent was fueled by animus toward the protected group, by hopes of financial gain, by a personal grudge against individual group members, by ideological or wartime resistance, by misguided beneficence . . . or indeed by any reason at all."[31] While motive evidence generally has probative value toward establishing genocidal evidence, such evidence does not suffice alone to establish the *mens rea* of genocide. Thus, establishing beyond a reasonable doubt that genocide has occurred may be a difficult prosecutorial task, and some instances of massive killings, perhaps regrettably, do not amount to genocide under the Genocide Convention.

For example, a debate persists whether the Cambodian Khmer Rouge regime committed acts of genocide against the Cambodian population in the late 1970s.[32] The Khmer Rouge regime "launched a revolution abolishing all existing societal institutions, expunging all foreign influences, and transforming the entire population into a collective workforce," and the regime also "acted ruthlessly against all elements suspected of being hostile to the new order."[33] The Khmer Rouge regime particularly targeted professionals, such as teachers

---

[27] *Id.*

[28] *Id.* (alteration in original).

[29] Nersessian, *supra* note 18, at 256 (noting that genocide is an inchoate offense, which criminalizes certain acts with a particular mental state, regardless of whether such acts actually lead to the intended harm).

[30] *See id.* at 268.

[31] *Id.*

[32] *Compare* Phnom Penh, *Did the Khmer Rouge commit genocide?*, IRIN (Sept. 14, 2015), http://www.irinnews.org/report/101989/did-khmer-rouge-commit-genocide, *with Cambodian Genocide*, WORLD WITHOUT GENOCIDE, http://worldwithoutgenocide.org/genocides-and-conflicts/cambodian-genocide (last updated Mar. 2015).

[33] DUNOFF ET AL., 1st ed., *supra* note 24, at 564.

and students, as well as those who spoke a foreign language and were suspected of having ties to foreign countries.[34] It may be argued that these acts constituted genocide under the Genocide Convention because the Khmer Rouge regime displayed a clear intent to destroy a national group "in part."[35] On the other hand, these acts, however reprehensible, arguably fell short of genocide because the victims were not targeted simply because of their membership in the protected Cambodian national group, but instead because of their status "as members of political, professional, or economic groups."[36] In addition, some were simply victims of random violence or harsh conditions imposed on the Cambodian society at large.[37]

Scholars have pointed out that the Genocide Convention drafters most likely did not contemplate the mass killing of one segment of the population by another group or segment of the same national population.[38] Thus, according to this view, the killing of millions of Cambodians because of their specific social, economic, or political status did not constitute genocide under the Genocide Convention, and it would be legally wrong to attempt to interpret the Convention more broadly in order to capture these types of acts. As Steven Ratner and Jason Abrams have suggested, "[a]doption of the alternative legal interpretation, though morally appealing, would, as a practical matter, enlarge the deliberately limited scope of the Convention's list of protected groups, insofar as almost any political, social, or economic element of a population can be viewed as a part of a larger national group."[39]

Similarly, a debate persists about whether the killings of thousands of Poles at Katyn Forest by the Soviets during World War II constitute genocide.[40] In early 1940, members of the Soviet secret police murdered thousands of Poles—mostly members of the Polish intelligentsia, such as military officers, doctors,

---

[34] *Cambodia 1975*, PEACE PLEDGE UNION, http://www.ppu.org.uk/genocide/g_cambodia1.html (last visited Jan. 30, 2017).

[35] STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 285–87 (2d ed. 2001) [hereinafter RATNER & ABRAMS, 2d ed.].

[36] *Id*. at 286.

[37] Jason Abrams, *The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 NEW ENG. L. REV. 303, 305 (2000–2001).

[38] *See* THOMAS K. FORSTER, THE KHMER ROUGE AND THE CRIME OF GENOCIDE: ISSUES OF GENOCIDAL INTENT WITH REGARD TO THE KHMER ROUGE MASS ATROCITIES 127 (2012).

[39] RATNER & ABRAMS, 2d ed., *supra* note 35, at 287.

[40] Milena Sterio, *Katyn Forest Massacre: Of Genocide, State Lies, and Secrecy*, 44 CASE W. RES. J. INT'L L. 615, 626–28 (2012).

engineers, police officers, and teachers.[41] Stalin, the Soviet leader, had sought to eradicate these members of the Polish society because he planned with Adolf Hitler to conquer and divide Poland, and he wished to preventively eliminate members of the Polish society whom he perceived as potential opposition.[42] The Katyn Forest killings were discovered by the Germans in 1943, but the Soviets maintained that the killings had been committed by the Germans.[43] After World War II, despite evidence of Soviet responsibility for this massacre, the Allied Forces accepted the Soviet denial of responsibility and officially blamed the Germans.[44] The Katyn Forest Massacre remained taboo until the end of the Cold War when scholars and various government officials began to embrace the truth behind these killings and to officially designate the Soviet Union as the culprit.[45] As in the Cambodian context, members of the Polish society at Katyn were targeted not because they were members of the Polish national group (a protected group under the Genocide Convention), but because they were members of the Polish intelligentsia (an unprotected group under the Convention). Many agree that "[t]he Soviets certainly had the intent to destroy a part of the Polish national group. However, the subgroup that they targeted (the Polish intelligentsia) is not defined under the Genocide Convention, which only contemplates the destruction of 'national, ethnic, racial or religious' groups 'as such.'"[46]

Under a strict reading of the Genocide Convention, the Katyn Forest Massacre does not amount to genocide in the same way that the killings and other inhumane acts committed by the Khmer Rouge regime against certain members of the Cambodian population did not constitute genocide.[47] One could argue, however, that the Katyn killings did constitute genocide under a broader interpretation of the Genocide Convention. The Soviets certainly intended to destroy a part of the Polish national group.[48] However, "[i]t does not matter that the [Genocide] Convention does not specifically enumerate the subgroup [(members of the Polish intelligentsia)], as the listing of protected groups in

---

41 *Id.* at 625; *see* Maria Szonert-Binienda, *Was Katyn a Genocide?*, 44 CASE W. RES. J. INT'L L. 633, 715 (2012).

42 Sterio, *supra* note 40, at 616.

43 *Id.*

44 *Id.*

45 *Id.* at 626–28.

46 *Id.* at 627.

47 RATNER & ABRAMS, 2d ed., *supra* note 35, at 286.

48 Sterio, *supra* note 40, at 627.

Article II [is not] exhaustive."[49] In other words, the Convention drafters certainly intended for the treaty to cover crimes such as the Katyn Forest killings or the Khmer Rouge killings. The drafters must have wanted for such rogue leaders as Stalin or Pol Pot to face criminal responsibility. Thus, a strict interpretation of the Genocide Convention would have the perverse effect of absolving potential criminals of responsibility and denying justice to victims of horrific atrocities. The Katyn Forest Massacre could be interpreted as constituting genocide under a less narrow reading and interpretation of the Genocide Convention.[50]

The Genocide Convention remains the most important treaty on the crime of genocide, and its definition of genocide has been embraced and at times reproduced verbatim in the statutes of modern-day international criminal tribunals.[51] The interpretation and understanding of genocide thus remain crucial in present-day cases pending before various tribunals.[52] The Part below will discuss recent genocide cases decided in the international tribunals, such as the *Akayesu* case in the International Criminal Tribunal for Rwanda (ICTR), the Bosnia law suit against Serbia in the International Court of Justice (ICJ), and the *Karadžić* case in the ICTY. This Part will demonstrate the difficulty of establishing genocidal intent in order to secure a conviction under the Genocide Convention and the necessity for prosecutors and judges to resort to inferences in order to establish such intent.

II. MODERN-DAY UNDERSTANDING OF THE GENOCIDE CONVENTION: *AKAYESU*, *KAYISHEMA*, *BOSNIA V. SERBIA*, AND *KARADŽIĆ*

The ICTR completed its first trial in October 1998 when it convicted Jean-Paul Akayesu, a Rwandan regional official, of genocide.[53] The *Akayesu* judgment was the first time in history that an international court had interpreted

---

[49] *Id*. at 628.

[50] For a general view advocating for a broader reading of the Genocide Convention, see John Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 CASE W. RES. J. INT'L L. 243 (2007) (documenting the dissatisfaction with a narrow interpretation of the Genocide Convention).

[51] *See* Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 288–89, 354–55 (1999).

[52] *See* Nersessian, *supra* note 18, at 276; Tatiana E. Sainati, *Toward a Comparative Approach to the Crime of Genocide*, 62 DUKE L.J. 161, 161 (2012).

[53] Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda*, 11 FLA. J. INT'L L. 517, 518, 528 (1996-1997); Press Release, U.N. Mechanism for International Criminal Tribunals, Jean-Paul Akayesu Sentenced to Life Imprisonment (Oct. 2, 1998).

and applied the Genocide Convention.[54] The Court embraced a more expansive interpretation of the Genocide Convention when it decided that "the intention of the drafters of the Genocide Convention . . . was patently to ensure the protection of any stable and permanent group."[55] The ICTR thus held that groups other than the four enumerated in the Genocide Convention should be protected, as long as "membership . . . would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[56] In other words, the ICTR embraced "a flexible, subjective view of ethnicity"[57] in order to ensure that groups in which membership is determined at birth and not subject to change are protected groups under the Genocide Convention. The ICTR found that the Tutsis constituted an immutable, stable, and permanent ethnic group, which, according to the tribunal, would fall within one of the four protected groups in the definition of the Genocide Convention.[58] On the issue of genocidal intent, the ICTR adopted a traditional view, requiring the showing of special intent:

> the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.[59]

---

[54] U.N. Secretary-General, *Report of the 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 Neighbouring States Between 1 January and 31 December 1994*, ¶ 15, U.N. Doc. A/54/315 (Sept. 7, 1999). Although Akayesu was charged with genocide under the ICTR Statute, Article 2, it should be noted that the ICTR Statute definition of genocide embraced, verbatim, the Genocide Convention's definition of genocide. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement ¶ 494 (Sept. 2, 1998).

[55] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, ¶¶ 511, 516.

[56] *Id*.

[57] Van Schaack, *supra* note 16, at 21.

[58] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, ¶ 702.

[59] *Id.* ¶ 521.

The ICTR recognized, however, that establishing genocidal intent through concrete evidence is a particularly difficult legal task.[60] The Court held that genocidal intent may be inferred in certain circumstances.[61]

> The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[62]

The *Akayesu* Court thus adopted a more expansive view of which groups may constitute one of the four protected groups under the Genocide Convention, but embraced a narrow view of the intent requirement by emphasizing that a protected group must be targeted "as such."[63] In recognizing the difficulty in establishing such specific intent, the ICTR judges confirmed that intent may be inferred and deduced within the general genocidal context.[64] A similar reasoning regarding the necessity to infer genocidal intent was embraced in the *Kayishema* case by the ICTR.[65] In *Kayishema*, ICTR judges held that the vast number of Tutsi victims constituted evidence of the defendant's intent to destroy this ethnic group.[66] However, the *Akayesu* and *Kayishema* courts have warned that victim numbers are not dispositive and that the overall social and political context within which genocidal acts are committed are relevant towards the finding of genocide.[67] According to the *Akayesu* and *Kayishema* cases, factors to take into account when examining whether genocidal intent exists include: the scale and

---

[60] INT'L CRIMINAL LAW SERVS., INTERNATIONAL CRIMINAL LAW & PRACTICE TRAINING MATERIALS: GENOCIDE 10, 44, http://wcjp.unicri.it/deliverables/docs/Module_6_Genocide.pdf.

[61] *See id.* at 10–12, 21, 24–25, 44–45.

[62] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 523 (Sept. 2, 1998).

[63] *Id.* ¶ 485.

[64] *See* Nersessian, *supra* note 18, at 268–69, 271–72 (criticizing the Trial Chamber in the *Akayesu* case for conceiving of genocidal intent in particularly narrow terms by holding that the intent requirement under the definition of genocide may only be satisfied if prosecutors can show that the defendant committed murder with intent to cause death).

[65] Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 91 (May 21, 1999), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-95-1/trial-judgements/en/990521.pdf.

[66] *Id.* ¶ 533.

[67] Nersessian, *supra* note 18, at 266.

nature of the atrocities, the discriminatory targeting of only particular groups, methodical and systematic planning of the killings and other genocidal acts, weapons employed and the extent of victims' injuries, and documents which may reflect participation in or knowledge of the atrocities.[68]

A strict reading of the Genocide Convention was espoused by the ICJ a decade later. In the 1990s, Bosnia-Herzegovina initiated proceedings in the ICJ against Serbia for violations of the Genocide Convention.[69] Article IX of the Genocide Convention provides that the ICJ shall have jurisdiction over all disputes arising under the Convention.[70] The ICJ decided in 2007 that the Srebrenica massacre, where approximately 5,000–8,000 Bosniak males were killed, constituted an act of genocide because it had been committed with the intent to destroy a protected (national) group in whole or in part.[71] The ICJ found, however, that other atrocities committed in Bosnia had not been committed with the same genocidal intent and thus did not amount to genocide under the Genocide Convention.[72] The ICJ noted that it was not enough to establish "that deliberate unlawful killings of members of the group have occurred," but "[t]he additional intent must also be established . . . ."[73]

> It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. . . . The acts listed in Article II must be done with intent to destroy the group *as such* in whole or in part. The words "as such" emphasize that intent to destroy the protected group.[74]

---

[68] *Id.* Some earlier ICTY cases are consistent with this interpretation of the intent requirement for genocide. *See* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 73 (Dec. 14, 1999), http://www.refworld.org/docid/4147fe474.html. In *Jelisić*, the ICTY Trial Chamber confirmed that the existence of genocidal acts toward one specific protected group may be used in establishing the presumption of genocidal intent. *Id.* (holding that "an individual knowingly acting against the backdrop of widespread and systematic violence being committed against only one specific group could not reasonably deny that he chose his victims discriminatorily").

[69] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 18 ¶ 1 (Feb. 26).

[70] Genocide Convention, *supra* note 19, art. IX ("Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

[71] *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. 18 ¶ 297.

[72] *Id.* ¶¶ 277, 319.

[73] *Id.* ¶ 187.

[74] *Id*. (emphasis added).

The ICJ also distinguished between persecution as a crime against humanity and genocide. It cited the ICTY *Kupreškić* case, explaining that "[w]hile in the case of persecution the discriminatory intent can take multifarious inhumane forms . . . in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong."[75] The ICJ also distinguished between ethnic cleansing and genocide. It defined ethnic cleansing as "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area" and cautioned that ethnic cleansing can be a form of genocide only if it falls within one of the categories of acts prohibited by Article II of the Genocide Convention.[76]

> 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 a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[77]

The ICJ ultimately held that Serbia was not responsible under the Genocide Convention for genocide directly, but was responsible for failure to prevent genocide in Bosnia.[78] In a subsequent ruling in 2015, the World Court ruled that Serbia had not committed genocide in its war with Croatia during the 1990s.[79] In this ruling, the ICJ confirmed again that acts of ethnic cleansing may not amount to genocide if such acts do not carry with them the specific intent to physically destroy a protected group. The *Akayesu* and *Kayishema* cases in the ICTR and the *Bosnia v. Serbia* case in the ICJ display international judges narrowly interpreting the intent requirement under the Genocide Convention. The *Karadžić* case, discussed below, demonstrates an evolution in judicial interpretation of the Convention, as ICTY judges in *Karadžić* appear more willing to infer genocidal intent and to embrace a generally broader view of the Convention.

---

[75] *Id.* ¶ 188.

[76] *Id.* ¶ 190 (citing Interim Report by the Commission of Experts, S/35274, ¶ 55 (1993)).

[77] *Id.* ¶ 190.

[78] *Id.* ¶¶ 461–62, 471.

[79] *UN Court Dismisses Croatia and Serbia Genocide Claims*, BBC NEWS (Feb. 3, 2015), http://www.bbc.com/news/world-europe-31104973.

On March 24, 2016, the ICTY Trial Chamber convicted Radovan Karadžić, the former political leader of the Bosnian Serbs during the 1990s civil war, for numerous crimes committed during the conflict and sentenced him to forty years imprisonment.[80] The case against Karadžić was complex and consisted of four different sets of charges: the crimes in a number of Bosnian municipalities; the siege of Sarajevo; the taking of U.N. hostages; and the Srebrenica massacre.[81] This Article will focus on the two sets of charges for genocide that had been asserted against Karadžić—one for genocide in Bosnian municipalities other than Srebrenica and one related to the Srebrenica genocide. The ICTY Trial Chamber acquitted Karadžić of the former but convicted him of the latter.[82]

Karadžić was charged for genocide under Article 4 of the ICTY Statute.[83] Article 4 adopts the same definition of genocide as the Genocide Convention and is thus reflective of customary law.[84] Regarding genocide charges in Bosnian municipalities, the Trial Chamber (like the ICJ in the *Bosnia v. Serbia* case discussed above) found that the crimes in the municipalities satisfied the *actus reus* of genocide, but that the specific *mens rea* had not been proven beyond a reasonable doubt.[85] For example, the Chamber thought that genocidal intent could not be inferred from the speeches, statements, and actions of Karadžić and other members of the joint criminal enterprise, or from the overall pattern of the crimes.[86] The Chamber noted that while Karadžić and others may have engaged in ethnic cleansing by attempting to remove Muslim Bosnians from many parts of Bosnia, this finding does not lead to the establishment of genocidal intent.[87] The Trial Chamber also noted that Karadžić and other JCE participants made statements and engaged in acts that had two effects: first, "identifying the historic enemies of the Bosnian Serbs and furthering the

---

[80] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶¶ 2536–3537, 6070–72 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

[81] Milanovic, *supra* note 9.

[82] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, ¶¶ 2537, 6071.

[83] *Id*. at 203, ¶¶ 537–38.

[84] *Id.* ¶ 539.

[85] *Id*. ¶¶ 2625–26.

[86] *Id.* ¶¶ 2605, 2625.

[87] *See, e.g.*, KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW II 15–16 (2014). On this issue, the ICTY Trial Chamber was consistent with the view of many scholars who had already distinguished between ethnic cleansing and the existence of genocidal intent and thus genocide. *Id*.

objective of ethnic separation,"[88] and second, "show[ing] that the Bosnian Serbs were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives and assert their historic territorial claims."[89] The Trial Chamber noted that by these statements and acts, Karadžić "intended to threaten the Bosnian Muslims against pursuing independence for [Bosnia & Herzegovina] and [show] that he was fully aware that a potential conflict would be extremely violent."[90] However, this type of evidence did not suffice to establish that Karadžić (and others) had the genocidal intent to physically destroy the Bosniaks and other non-Serbs in Bosnian municipalities.[91] Thus, Karadžić was acquitted on this charge.

Karadžić was, however, found guilty of genocide for the Srebrenica killings. Here, the ICTY Trial Chamber found that Karadžić had the specific intent to order the killings, but reached this conclusion based on an inference.[92] In fact, the prosecution was never able to find concrete evidence that Karadžić truly knew that the killings would occur and that Karadžić intended for the killings to take place.[93] Instead, the prosecution's case was circumstantial.[94] The Trial Chamber first discussed the development of the common plan, or the JCE, to eliminate all Bosnian Muslims from Srebrenica, which eventually morphed into an agreement to kill all Bosniak adult males while forcibly transferring the women and children out of the area.[95] The Trial Chamber held that:

> The Chamber is of the view that by designing and conducting a simultaneous operation to kill the Bosnian Muslim men and boys of Srebrenica while the forcible removal of the women, children, and elderly men was ongoing, the common purpose of the plan to eliminate the Bosnian Muslims in Srebrenica was expanded so as to include the

---

88 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 2598 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

89 *Id.* ¶ 2599.

90 *Id.* ¶ 2600.

91 *See id.* ¶ 2605. "[T]he evidence does not support a conclusion that the only reasonable inference is that the Accused or any of the alleged members of the Overarching JCE had the intent to physically destroy the Bosnian Muslim and/or the Bosnian Croat groups in the Count 1 Municipalities as such." *Id.*

92 Milanovic, *supra* note 9.

93 *Id.*

94 *Id.*

95 *Id.*

> killing of all the men and boys, and multiple members of the plan agreed to it.[96]

The Chamber thus concluded that:

> [T]he members of the Srebrenica JCE who agreed to the expansion of means so as to encompass the killing of the men and boys intended to kill all the able-bodied Bosnian Muslim males, which intent in the circumstances is tantamount to the intent to destroy the Bosnian Muslims in Srebrenica.[97]

The Trial Chamber also concluded that Karadžić was a participant of this JCE based on a conversation that Karadžić had with Miroslav Deronjić, the civilian administrator of the Srebrenica region, who had been appointed to this post by Karadžić himself.[98] The Chamber found:

> [A]t approximately 8 p.m. on 13 July, Deronjić and the Accused spoke through an intermediary about the fate of the thousands of Bosnian Muslim male detainees then being held on buses and in detention facilities in Bratunac town. . . . The Chamber notes that, despite the fact that Deronjić and the Accused did not explicitly mention the killing of detainees during the conversation, they spoke in code, referring to the detainees as "goods" which had to be placed "inside the warehouses before twelve tomorrow". The Accused further specified, "not in the warehouses /?over there/, but somewhere else", [sic] which the Chamber has already interpreted as a direction to move the detainees to Zvornik. The Chamber recalls that, earlier that evening, Deronjić had complained to Beara about the detainees' presence in Bratunac, and that upon encountering Deronjić in Bratunac town, Davidović had urged him to use his connections to the Accused to have the buses moved. Moreover, the Chamber recalls that immediately after this conversation, Beara and Deronjić discussed *where*—not whether—the detainees were to be killed. It is therefore clear that at the time of Beara and Deronjić's conversation, a decision had already been made to kill the detainees, and Deronjić invoked the Accused's authority to convince Beara to accede to their movement to Zvornik. In the Chamber's view, the use of code to refer to the detainees, as well as the direction to move them toward Zvornik,

---

[96] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 5736 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

[97] *Id.* ¶ 5741.

[98] *Id.* ¶¶ 5772–5773, 5811.

> demonstrates the malign intent behind the conversation. *The Chamber finds that this conversation, in addition to the Accused's subsequent acts as described further below, demonstrate beyond reasonable doubt the Accused's agreement to the expansion of the objective to encompass the killing of the Bosnian Muslim males*.[99]

The Trial Chamber also noted that Karadžić continued to seek information about what was happening in Srebrenica through various channels, and he had a meeting with Deronjić on July 14, 1995.[100] This meeting was pivotal in the reasoning and legal analysis of the Trial Chamber. According to the Trial Chamber, Karadžić met with Deronjić alone between 12:40 p.m. and 1:10 p.m. on July 14; both leaders later met together with a larger delegation from Srebrenica for about four hours.[101] The Trial Chamber concluded:

> In relation to the content of the conversation between Deronjić and the Accused prior to their meeting with the larger group, the Chamber notes that it has no direct evidence thereof. However, it received evidence that, during the second meeting, Deronjić reported on the situation in Srebrenica. As stated above, the Chamber is satisfied that Deronjić had been aware of the killings at the Kravica Warehouse since the evening of 13 July. More importantly, the Chamber recalls the conversation between the Accused and Deronjić the night before in which the Accused ordered the transfer of the detainees from Bratunac to Zvornik. The Chamber also recalls Deronjić's participation in the efforts to bury the bodies of those killed at the Kravica Warehouse, starting in the early hours of 14 July. The Chamber also received evidence that the Accused and Deronjić had frequent communications, either by telephone or in person, during the Srebrenica operation. According to officials from Bratunac municipality, in his official capacity as civilian commissioner of Srebrenica, Deronjić should have reported about the killings at the Kravica Warehouse to the Accused. More specifically, Simić testified that Deronjić told him that he had informed the Accused about the events at the Kravica Warehouse the day after the incident. The Chamber received evidence that there was no mention or discussion about the executions of detainees in Srebrenica during the meeting with the Srebrenica representatives. Nevertheless, the Chamber has no doubt that during the individual meeting between Deronjić and the Accused, they both discussed the killings at the Kravica Warehouse, and the implementation of the

---

99 *Id.* ¶ 5805 (second emphasis added).
100 *Id.* ¶ 5807.
101 *Id.*

> Accused's order to transport the detainees from Bratunac to Zvornik by midday that day.[102]

The Trial Chamber thus relied on the conversations between Deronjić and Karadžić to infer that Karadžić knew about the killings in Srebrenica as they took place. The Trial Chamber, however, drew inferences about the content of these conversations, about which it had almost no direct evidence. After establishing that Karadžić knew about the Srebrenica killings, the Trial Chamber also needed to demonstrate, beyond a reasonable doubt, that Karadžić, as a participant of the JCE, intended for the killings to take place.[103] The Trial Chamber reached this determination based on yet another inference:

> The Chamber also finds that the Accused adopted and embraced the expansion of the plan to entail the killing the [sic] Bosnian Muslim men and boys in Srebrenica during his conversation with Deronjić on the evening of 13 July [1995]. Given the Accused's position as RS President and Supreme Commander, as well as the evidence demonstrating the continuous flow of information he was seeking and receiving from the ground from many different sources the Chamber considers that the Accused must have known about the killing aspect of the plan to eliminate at some point prior to his conversation with Deronjić in the evening of 13 July. However, the Chamber can only make a positive determination as to the Accused's agreement to the expansion of the means so as to encompass the killing of the men and boys as of the moment of the conversation with Deronjić. The Accused's shared intent is reaffirmed by the fact that, from the moment he directed Deronjić to move the detainees to Zvornik the Accused became, and subsequently continued to be, actively involved in overseeing the implementation of the plan to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys.[104]

---

[102] *Id.* ¶ 5808.

[103] *Id.* ¶¶ 5810, 5814.

[104] *Id.* ¶ 5811. It should also be noted that Karadžić's conviction rested on the theory of Joint Criminal Enterprise, and that his intent to order and implement killings at Srebrenica had to have been shared with other members of the JCE. *See* Kai Ambos, *Karadzic's Genocidal Intent as the "Only Reasonable Inference"?*, EJIL: TALK! (Apr. 1, 2016), http://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/ [hereinafter Ambos, *Karadzic's Genocidal Intent*]. Scholars have already warned about the inherent difficulty of inferring genocidal intent in situations of JCE regarding the Karadžić judgment. *Id.* According to Professor Kai Ambos,

> [u]p to this point, the Chamber has at best indirectly affirmed Karadzic's genocidal intent. Explicitly, it has only found—quite plausibly—his knowledge and inferred from this, his shared intent with regard to the Srebrenica (expanded) JCE. Yet, depending on the definition of this JCE,

According to the Trial Chamber, Karadžić was "actively involved" in supervising and implementing the plan to eliminate Bosniaks from Srebrenica by disseminating false information about what happened there.[105] The Chamber concluded that this act showed that "the Accused intended to shield the true actions of the Bosnian Serb Forces from international attention and intervention."[106] The Trial Chamber also established that Karadžić's failure to prosecute the direct perpetrators of the Srebrenica massacre, as well as his praise and reward of the direct perpetrators, demonstrate Karadžić's genocidal intent: "in the Chamber's view, there is no doubt that the Accused knew that the thousands of Bosnian Muslim male detainees being held by the Bosnian Serb Forces in the Srebrenica area constituted a very significant percentage of the Bosnian Muslim males from Srebrenica."[107]

Moreover, based on Karadžić's actions and knowledge about the events at Srebrenica, the Trial Chamber inferred that Karadžić must have agreed with the other participants of the JCE that Bosniaks should be eliminated from Srebrenica.[108]

> The Chamber therefore takes particular note of the fact that, despite his contemporaneous knowledge of its progress as set out above, the Accused agreed with and therefore did not intervene to halt or hinder the killing aspect of the plan to eliminate between the evening of 13 July and 17 July. Instead, he ordered that the detainees be moved to Zvornik, where they were killed. Moreover, once Pandurević reported on 16 July that he had opened a corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karišik was promptly sent to investigate and the corridor was closed within a day. Finally, the Chamber recalls that although he touted the opening of the corridor when speaking to the international press, in a closed session of the Bosnian Serb Assembly held weeks later, the Accused expressed regret that the Bosnian Muslim males had managed to pass through Bosnian Serb lines. Accordingly, the Chamber considers that the only reasonable inference available on such evidence

---

> this intent could be limited to the (forced) removal of Bosnian Muslims, perhaps also including some killing, but this does not necessarily amount to the intent to destroy this group as such.

Id.

[105] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶ 5811 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

[106] *Id*.

[107] *Id*. ¶¶ 5813, 5829.

[108] *Id*. ¶¶ 5810, 5814, 5821.

> is that the Accused shared with Mladić, Beara, and Popović the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed, which, in the Chamber's view, amounts to the intent to destroy the Bosnian Muslims in Srebrenica.[109]

The above-discussed decision of the Trial Chamber can be interpreted as a novel understanding of the *mens rea* requirement for genocide.[110] In fact, the entire reasoning of the Trial Chamber rests on what reasonable inferences can be drawn from Karadžić's conversation and other contacts with Deronjić. As Marko Milanovic has noted, "[i]t is clear that had it not been for the phone conversation and subsequent meeting with Deronjić, Karadžić could not have been convicted as a participant in the genocidal JCE."[111] However, scholars have pointed out that it is not entirely clear that the only reasonable inference from these conversations between Karadžić and Deronjić is that Karadžić knew about the killings.[112] One could argue, for example, that Karadžić may have been informed about the plan to forcibly transfer all Bosniak males from the Srebrenica area, but not to kill them. It is not clear that the "beyond a reasonable doubt" prosecutorial standard had been established in this case regarding Karadžić's *mens rea* to participate in the genocidal JCE at Srebrenica.

On the other hand, in the face of overwhelming evidence indicating that genocidal acts had occurred in Srebrenica and that Karadžić was the general leader of Bosnian Serbs who did nothing to stop the genocide from taking place, it appears reasonable that the ICTY would determine that Karadžić must have *intended* for such genocidal acts to take place.[113] As the ICTY Trial Chamber did in *Karadžić*, inferring knowledge and then basing intent on the inferred knowledge may be the only available judicial strategy for judges examining cases under the narrow definition of genocide under the Genocide Convention.[114] Under the Convention, the general culpability of the defendant must be established "beyond a reasonable doubt" and imposing the genocide label upon a particular defendant is important for the historical legacy of the conflict.[115] The Part below will discuss the *Karadžić* approach and the necessity

---

109 *Id.* ¶ 5830.

110 *See* AMBOS, *supra* note 87.

111 Milanovic, *supra* note 9.

112 *Id. See* Ambos, *Karadzic's Genocidal Intent*, *supra* note 104.

113 Ambos, *Karadzic's Genocidal Intent*, *supra* note 104.

114 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 4708 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), http://www.icty.org/x/cases/Karadžić/tjug/en/160324_judgement.pdf.

115 *See* Milanovic, *supra* note 9. *See generally* Genocide Convention, *supra* note 19.

to revisit the strict interpretation of genocide under the Convention in light of modern-day conflicts.

III. RE-CONCEPTUALIZING GENOCIDE?

The ICTR Trial Chamber held in *Akayesu* that "intent is a mental factor which is difficult, even impossible, to determine."[116] As noted above, the ICTR recognized in the *Akayesu* case that, because concrete evidence of genocidal intent is most likely unavailable, intent must be inferred from other factual circumstances.[117] Thus, as early as *Akayesu*, international courts recognized the necessity to infer genocidal intent. The ICTY had also embraced this approach in some of its earlier cases.[118] Specifically, the ICTY Trial Chamber held that specific intent for the crime of genocide

> may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group - acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.[119]

Thus, in relatively recent case law, both the ICTR and the ICTY have recognized the necessity to infer genocidal intent based on overall factual circumstances of a particular conflict. The Genocide Convention was negotiated in the wake of World War II with the Holocaust paradigm as backdrop.[120] It is fair to assume that the Genocide Convention drafters did not envision modern-day conflicts where leaders may target, in a genocidal manner, citizens of their own countries and members of their own societies.[121] It is also reasonable to

---

[116] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement ¶ 523 (Sept. 2, 1998).

[117] *Id.*

[118] *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 73 (Dec. 14, 1999), http://www.refworld.org/docid/4147fe474.html; Quigley, *supra* note 50.

[119] Prosecutor v. Karadžić, IT-95-5-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94 (July 11, 1996), http://www.icty.org/x/cases/mladic/related/en/rev-ii960716-e.pdf.

[120] *See supra* Part I. *See generally Incitement to Genocide in International Law*, HOLOCAUST ENCYCLOPEDIA, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007839 (last updated July 2, 2016).

[121] Kok-Thay Eng, *Redefining Genocide*, GENOCIDE WATCH: THE INT'L ALLIANCE TO END GENOCIDE, http://www.genocidewatch.org/redefininggenocide.html (last visited Jan. 30, 2017).

recognize that most rogue leaders, prone to engaging in genocidal behaviors against particular groups, do not publish edicts and other documents demonstrating specific genocidal intent.[122] While Hitler meticulously documented his plans to persecute Jews,[123] other rogue leaders such as Pol Pot, Slobodan Milošević, Radovan Karadžić, or Jean-Paul Akayesu did not engage in such written planning and did not leave the same type of evidentiary trail behind them.[124] In order to secure any genocide convictions, prosecutors in both the ICTR and the ICTY have had to infer genocidal intent from specific patterns of acts and behaviors.[125] With this context in mind, it appears that the *Karadžić* court did nothing particularly unusual when it announced that it would infer Karadžić's intent as a general matter.

The ICTY did, however, engage in somewhat unusual judicial reasoning when, in discussing Karadžić's alleged intent, it adopted the "only reasonable inference" standard, which was based on evidence that did little to establish that Karadžić actually knew about the Srebrenica killings and agreed that the killings should go forward.[126] The ICTY decided, as discussed above, that Karadžić must have known about the killings at Srebrenica and, based on other factors, he must have agreed with the plan to kill thousands of Bosniaks at Srebrenica.[127] Thus, the ICTY Trial Chamber went beyond what the *Akayesu* and *Kayishama* courts and the ICJ had done. The Chamber imputed knowledge to Karadžić about the Srebrenica killings based on Karadžić's conversation and meeting with Deronjić, and then from that inference of actual knowledge, inferred genocidal intent. As other scholars have already noted, even if Karadžić did know about the plan to eliminate Bosniaks from Srebrenica, it could be argued that Karadžić

---

122 Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach*, 5 GENOCIDE STUD. & PREVENTION: AN INT'L J. 238, 242 (2010).

123 *See "Final Solution": Overview*, HOLOCAUST ENCYCLOPEDIA, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005151 (last updated July 2, 2016).

124 *See* STEVEN R. RATNER & JASON J. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 237 (1st ed., 1997); MICHAEL J. KELLY, PROSECUTING CORPORATIONS FOR GENOCIDE 76 (Oxford Univ. Press 2016); Steve Coll, *In the Shadow of the Holocaust*, WASH. POST (Sept. 25, 1994), https://www.washingtonpost.com/archive/lifestyle/magazine/1994/09/25/in-the-shadow-of-the-holocaust/8a08e0b4-c929-4694-9f68-7597b5e254dc/.

125 INT'L CRIMINAL LAW SERVS., *supra* note 60, at 10–11.

126 *See* Milanovic, *supra* note 9; Ambos, *Karadzic's Genocidal Intent*, *supra* note 104.

127 Press Release, International Criminal Tribunal for the Former Yugoslavia, Seven Senior Bosnian Serb Officials Convicted of Srebenica Crimes (June 10, 2010).

only agreed to the removal of Bosniaks but not to their killing.[128] "Karadžić's certain knowledge of the events at Srebrenica, allows for many (reasonable) inferences."[129]

The judicial gymnastics performed by the ICTY Trial Chamber in order to convict Karadžić perfectly demonstrate the difficult legal standards of genocide under the Genocide Convention. While many may agree that the double inference—that of knowledge leading to that of intent—is not the most sound judicial analysis,[130] others would argue that the Genocide Convention is simply too narrow for modern-day warfare.[131] If one is serious about the crime of genocide and labeling certain acts as genocide for the sake of their historical legacy, then one should dispose of appropriate legal tools in order to secure genocide convictions and verdicts. It may be time to revisit the Genocide Convention's definition of genocide. The definition of genocide could be revisited in two different ways: first, by eliminating the phrase "as such" and second, by interpreting the intent requirement behind the crime of ethnic cleansing more closely to the intent requirement behind the crime of genocide itself, to allow for acts of ethnic cleansing to constitute genocide.

First, eliminating the phrase "as such" may help re-conceptualize the definition of genocide. Genocide would consist of various enumerated acts (in Article II of the Genocide Convention), committed against members of one of the four protected groups. This type of re-drafting of the genocide definition would allow for Khmer Rouge-committed killings of the Cambodian intelligentsia and Soviet killings of Polish intelligentsia at Katyn to rise to the level of genocide. In other words, acts committed with some specific motivation, such as eliminating members of a society's elite classes, would constitute genocide as long as they resulted in the destruction of a protected group, in whole or in part. This approach would allow for acts of reprehensible persecution of members of a subgroup within one of the protected groups to constitute genocide. For example, if individuals exhibiting homosexual characteristics within a larger national group were persecuted in a manner corresponding with one of the enumerated *actus reus* from the genocide definition, then this type of

---

128 Press Release, International Criminal Tribunal for the Former Yugoslavia, Tribunal Convicts Radovan Karadžić for Crimes in Bosnia and Herzegovina (Mar. 24, 2016).

129 Ambos, *Karadzic's Genocidal Intent*, *supra* note 104.

130 *Id.*

131 *See Overview: Defining Genocide*, CTR. ON L. & GLOBALIZATION, http://clg.portalxm.com/library/evidence.cfm?evidence_summary_id=250040 (last visited Jan. 30, 2017).

persecution would amount to genocide, because a protected (national) group was being destroyed—regardless of the more specific motivation behind the acts of destruction (to destroy homosexual members of a protected group). Similarly, if only those speaking a foreign language or belonging to a specific political party within a larger national group were targeted in a genocidal manner, these acts would also amount to genocide because part of a national group was being destroyed.[132]

The drafting history of the Genocide Convention indicates that the treaty drafters did not contemplate the mass killing of one segment of a group by other members of the same group. Because of this, the drafters adopted a restrictive view of the definition of genocide.[133] Thus, it may be argued that this definition no longer corresponds to the realities of modern-day warfare. The ICTR, as mentioned above, has already accepted a broader view of protected groups by holding that such groups are those where membership is an immutable characteristic.[134] The ICTR presumably did so in order to ensure that Tutsis were recognized as a protected group under the Genocide Convention, in the context of a modern-day conflict where part of a national group is targeting another part of the same group.[135] Sadly, other recent conflicts have exhibited similar characteristics[136] and in order to effectively utilize the criminalization of genocide as a tool of international criminal law, it may be time to re-conceptualize the Convention's restrictive definition.[137]

---

[132] Another way to reach a similar result—extending the protections of the Genocide Convention to other types of groups—would be to interpret the listing of protected groups in Article II of the Convention as non-exhaustive. Some scholars have already argued that political groups, because they may coincide with other groups, such as national groups, are covered by Article II. *See, e.g.*, PIETER N. DROST, THE CRIME OF STATE: GENOCIDE 62 (1950). A similar argument could be made for other types of subgroups of protected groups, or groups which may coincide with protected groups. *Id. But see* Nersessian, *supra* note 18, at 262 (arguing that the Genocide Convention should not extend to cover political groups or other non-protected groups).

[133] RATNER & ABRAMS, 2d ed., *supra* note 35, at 246 ("[T]he drafters did not appear to have contemplated the mass killing of one segment of a group by another segment of that same group"). The authors also noted "the deliberately limited scope of the Convention's list of protected groups." *Id.*

[134] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement ¶ 495 (Sept. 2, 1998).

[135] *See* David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, 2 NOTRE DAME J. INT'L & COMP. L. 167, 190–91 (2011).

[136] John Kerry, U.S. Sec'y of State, Remarks on Daesh and Genocide at the Press Briefing Room (Mar. 17, 2016), http://www.state.gov/secretary/remarks/2016/03/254782.htm.

[137] It should be noted, however, that revising a large multilateral treaty, such as the Genocide Convention, is a time-consuming and difficult endeavor that may be virtually impossible to accomplish because agreement by most treaty parties would be necessary. States may have very little political will to re-negotiate a large multilateral treaty, and the likelihood of treaty revision is very small in the near future. Nonetheless, the idea of revising the Genocide Convention is important and should remain the subject of scholarly discussions.

Second, the intent requirement behind acts of ethnic cleansing could be interpreted as coinciding with the special intent requirement behind genocide. This type of novel approach would potentially allow for some acts of ethnic cleansing to be labeled as genocide. Thus far, courts have been mindful to draw a distinction between acts of ethnic cleansing lacking genocidal intent and actual acts of genocide,[138] coupled with the specific intent to destroy a protected group. Ethnic cleansing typically implies "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."[139] However, acts of ethnic cleansing are not always committed with the intent to destroy a group or part of a group.

> Just as acts of ethnic cleansing may be used as support for, but do not constitute genocidal acts, a policy of ethnic cleansing may be used as evidence of, but does not itself constitute, genocidal intent. That is, the *act* of forcibly displacing a population may amount to genocide if it is in furtherance of a genocidal policy. But a *policy* of ethnic cleansing does not establish genocidal intent, even if the implementation of such a policy entails genocidal acts that cause physical or biological destruction. According to the ICTY and the ICJ, the basis for classifying ethnic cleansing separately from genocide is simple: a policy of ethnic cleansing is not the same as the intent to destroy.[140]

The distinction may no longer have a logical basis in light of modern-day conflicts, where ethnic cleansing has become a routine tool of warfare and where the label of genocide may bring necessary closure, providing a historical narrative and establish a relevant legacy. In fact, the U.N. General Assembly has recognized, in a 1992 resolution condemning the violence taking place in the former Yugoslavia, that ethnic cleansing could constitute a form of genocide.[141] In practice, many ethnic cleansing practices are coupled with the intent to eliminate specific groups from specific geographic areas and the line between genocide and ethnic cleansing may be very difficult to draw.[142] Some have already pointed out that displacing a group, under a policy of ethnic cleansing,

---

[138] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 18 ¶ 190 (Feb. 26).

[139] *Id*. (quoting Interim Report by the Commission of Experts, S/35374, ¶ 55 (1993)).

[140] Micol Sirkin, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U.L. REV. 489, 506 (2010) (emphasis in original).

[141] George J. Andreopoulos, *Ethnic Cleansing: War Crime*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/topic/ethnic-cleansing (last updated Aug. 9, 2016).

[142] *Id*.

may effectively destroy a group.[143] Thus, the distinction between ethnic cleansing and genocide becomes meaningless. In places like Bosnia and South Sudan,[144] it may be that both ethnic cleansing and genocide took place, and it may be impossible to separate the two types of acts meaningfully. Some have already criticized the *Karadžić* judgment because of its willingness to label only the Srebrenica killings as genocide and its holding that other acts in other municipalities did not amount to genocide.[145] This has allowed nationalist groups in both Serbia and Bosnia to welcome and criticize the judgment at the same time, further fueling nationalistic tendencies and instability in the region.[146] Professor Marko Milanovic described the reactions as "exactly what one might have expected—while many Bosniaks welcomed the conviction, they also decried the acquittal for genocide outside Srebrenica, whereas the current Bosnian Serb president has decried the judgment as yet another example of the ICTY's anti-Serb bias."[147] If the legal definitions of genocide and ethnic cleansing, and in particular the *mens rea* requirements behind the two, were interpreted similarly, many acts of ethnic cleansing could arguably constitute genocide. Courts like the *Karadžić* Trial Chamber may be in an easier legal position where they would no longer need to always distinguish between ethnic cleansing and genocide.

Thus, the definition of genocide could be re-conceptualized if the intent requirement behind genocide were more broadly aligned with the intent requirement behind acts of ethnic cleansing. Under a traditional view distinguishing between ethnic cleansing and genocide, acts amounting to ethnic cleansing are committed with the intent to achieve ethnic homogeneity, whereas acts of genocide are committed with the intent to destroy.[148] It may be possible to argue that the two types of intent are not distinct.

---

143 Sirkin, *supra* note 140, at 514.

144 *See* Sandro Krkljes, *Bosnian Genocide*, WORLD WITHOUT GENOCIDE (Mar. 2014), http://worldwithoutgenocide.org/genocides-and-conflicts/bosnian-genocide. *See generally Darfur Genocide*, WORLD WITHOUT GENOCIDE, http://worldwithoutgenocide.org/ genocides-and-conflicts/darfur-genocide (last visited Jan. 30, 2017).

145 *See generally* Stéphanie Maupas, *Question of Genocide at the Heart of Karadzic Judgment*, JUST. INFO (Mar. 25, 2016), http://www.justiceinfo.net/en/component/k2/26585-question-of-genocide-at-the-heart-of-Karadzic-judgment.html.

146 *See* Tim Hume, *Radovan Karadzic Found Guilty of Genocide, Sentenced to 40 Years*, CNN (Mar. 24, 2016), http://www.cnn.com/2016/03/24/europe/Karadzic-war-crimes-verdict/.

147 Milanovic, *supra* note 9.

148 Sirkin, *supra* note 140, at 491.

> Where a policy of ethnic cleansing aims to forcibly remove an ethnic group from a substantial geographic region and the portion of the group constitutes either a large or a significant portion of the entire ethnic group, the intent to destroy is established.
>
> Instead of interpreting the intent to achieve ethnic homogeneity as distinct from the intent to destroy, international courts and tribunals ought to interpret a policy of ethnic cleansing as a genocidal policy where evidence sufficiently meets the stringent requirements for genocidal intent—the specific intent to destroy a protected group "as such."[149]

This type of interpretation of the specific intent requirement behind ethnic cleansing[150] would allow courts to establish acts of genocide in cases like *Karadžić*, where evidence of the former may be rampant but where, under a strict reading of the Genocide Convention, *mens rea* for genocide itself may be difficult to prove. The *Karadžić* case itself perfectly demonstrates this type of legal difficulty and underscores the necessity of establishing a closer parallel between ethnic cleansing and genocide.

Moreover, maintaining a strict definition of genocide may lead toward the inability of various courts to label certain acts as genocide. Thus, horrific acts committed against specific groups on a wide spread basis may not amount to genocide. Genocide has been viewed in international criminal law as the most serious crime,[151] more heinous than crimes against humanity and war crimes.

> However, classifying an atrocity as genocide has a much greater legal and political effect than classifying it as a crime against humanity. The legal significance does not lie in the severity of the sentence but rather in the stability and certainty that the Genocide Convention provides. Crimes against humanity are articulated only in statutes founding international criminal courts or tribunals and not in any multilateral treaty or agreement like the Genocide Convention. The Genocide Convention and its legislative history have generated special legal duties and remedies. Unlike crimes against humanity, the crime of genocide clearly creates obligations on state parties to the Convention

---

149 *Id.* at 525.

150 Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 18 ¶ 190 (Feb. 26) (quoting Interim Report by the Commission of Experts, S/35374, ¶ 55 (1993) (defining ethnic cleansing)).

151 Sirkin, *supra* note 140, at 496.

> and provides state parties with civil remedies not available to states victimized by crimes against humanity.[152]

While this view may be completely unfounded, it has permeated the international criminal law community, and prosecutors within several international criminal tribunals have clamored for the opportunity to secure genocide convictions.[153] Under these circumstances, failing to attach the label of genocide to a specific perpetrator may be viewed as a failure of international criminal justice and as a vindication of reprehensible crimes and policies. If genocide occurred in Bosnia but not in South Sudan, this somehow suggests that lesser crimes took place in the latter and that victims of the latter may be less worthy of international attention. "By categorizing ethnic cleansing as persecution and not as genocide, international courts and tribunals devalue the permanent destruction that ethnic cleansing causes."[154] If we continue to believe in the gravity of genocide, we should re-conceptualize the term so that it corresponds better to modern-day conflicts and enables courts and prosecutors to effectively use it.

As Professor Milanovic stated, "[t]he disconnect between [genocide's] incoherent public perception and the technical, legal (and morally completely arbitrary) definition of the concept, coupled with the special stigma attached to this word (which consequentially devalues all other international crimes as somehow being 'less bad'), creates fertile ground for political manipulation."[155] In other words, while the crime of genocide was appropriately coined and created in the wake of World War II, with the Holocaust paradigm as a model, it may be time to revisit this crime's definition, in order to assign it a more meaningful legal and political significance.

CONCLUSION

The *Karadžić* verdict in the ICTY is significant because it assigns individual criminal responsibility to one of the highest members of the Bosnian Serb leadership. Additionally, it contributes to the tribunal's overall legacy—that of

---

152 *Id.*

153 *See Global Voices: Middle East*, INST. FOR WAR & PEACE REPORTING (Jan. 25, 2010), https://iwpr.net/global-voices/prosecutors-seek-genocide-verdict-chemical-ali. *See also Lawyers to Seek Genocide Charge Against Sudan's Bashir*, REUTERS: AFRICA (June 30, 2009), http://af.reuters.com/article/topNews/idAFJOE55T03K20090630.

154 Sirkin, *supra* note 140, at 517.

155 Marko Milanovic, *The Shameful Twenty Years of Srebrenica*, EJIL: TALK! (July 13, 2015), http://www.ejiltalk.org/the-shameful-twenty-years-of-srebrenica/.

creating a historical narrative for the region and attributing genocidal acts to specific leaders in the conflict. The verdict, however, also demonstrates the difficulty in applying a strict, historical view of genocide to modern-day conflicts. Most recent conflicts have been marred by incidents of ethnic cleansing and abhorrent violence where leaders have left very little paper evidence of their intentions, rendering any future prosecutions and convictions difficult. Modern-day courts increasingly rely on circumstantial evidence and infer the existence of genocidal intent based on the existence of overall patterns of persecution toward specific protected groups. In this climate, it is not surprising that the *Karadžić* Trial Chamber resorted to somewhat convoluted judicial reasoning in order to convict this defendant. Instead of encouraging future tribunals to engage in questionable legal analysis, it may be better to revisit our understanding of genocide in order to redefine its legal meaning and close the gap between ethnic cleansing and genocide.