SHORTER ARTICLES, COMMENTS, AND NOTES

GENOCIDAL INTENT BEFORE THE ICTY

I. INTRODUCTION

Several crimes recognised in international criminal law are intimately linked to the horrors of the holocaust. Persecution, extermination, and genocide are historically intertwined notions that in all minds refer to the ordeal of the Jewish people before and during the Second World War. This is particularly so with genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention') is a legal answer to the holocaust. Yet, as any legal notion, genocide goes beyond the characterisation of a specific historical tragedy. It is fated to evolve through legal interpretation, which operates pursuant to certain rules and principles that only subsidiarily rely on the drafting history.[1]

Admittedly, genocide remained 'untouched' for many years: very little opportunity arose for the notion to be considered by judicial bodies within a context other than the holocaust. This has recently changed, however. The creation of the *ad hoc* international criminal tribunals, the increasing involvement of national courts in international criminal law matters, the preparatory work conducted in view of the international criminal court, or the establishment of internationalised criminal courts, have put questions of interpretation of the Genocide Convention before the courts. The sudden intervention of judicial bodies in the field is likely to make the law evolve rapidly. This is particularly true of the ICTY jurisprudence. The characterisation as genocide of the conflict in Bosnia and Herzegovina, although regularly asserted in the political sphere,[2] is not legally obvious. Contrary to the holocaust or the Rwanda of 1994, the objective of the conflict in the former Yugoslavia was not to exterminate an ethnic group, but to rather expel it in order to create ethnically pure territories. The Yugoslav tragedy was characterised as 'ethnic cleansing' rather than genocide directly. The methods used to achieve that goal included not only forcible transfer, but also mass murder, devastation of entire villages, detention of people under abominable conditions, or severe mistreatments, which often caused, if not death, at least serious and long-lasting trauma. The question put before the ICTY is whether ethnic cleansing, carried out under such conditions, is a form of genocide or that genocide is one of the methods used for achieving ethnic cleansing.[3] The ICTY so far has been faced with an added complication while

[1] See Arts 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Art 31 provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The preparatory work of the treaty is classified into the supplementary means of interpretation. Yet, it is usually considered a useful tool to determine the object and purpose of the treaty.

[2] See, for instance, UN Doc AG/Res./47/121 of 18 Dec 1992, in which the United Nations General Assembly labelled ethnic cleansing as a form of genocide.

[3] For a while, it was hoped that the International Court of Justice (ICJ) would consider the question before the ICTY. It has now been 10 years since an application was filed before the ICJ by Bosnia and Herzegovina against the Federal Republic of Yugoslavia for a violation of the

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dealing with this legal question. The first defendants tried for genocide before the ICTY were, for most of them, relatively low calibre criminals. Evidence presented at trial is limited to what is strictly necessary to convict or acquit the defendant brought before the court and the true scale of a criminal conduct, such as the campaign of ethnic cleansing conducted in Bosnia and Herzegovina between 1991 and 1995, is usually not fully perceived through the evidence adduced at the trial of a relatively low-level perpetrator. The first genocide cases considered by the ICTY in fact did not permit to grasp the whole of Bosnia and Herzegovina, as, for instance, the trials against Milošević, Karadžić, or Mladić would allow, and the Tribunal had to determine whether a defendant was guilty of genocide before even being able to rule on whether or not genocide had been committed in Bosnia and Herzegovina between 1991 and 1995.

Three cases of genocide have thus far been decided by the ICTY.[4] The case against Goran Jelisić[5] concerns a young Serb, then aged 23, who alone shot dead about a hundred people over a 15-day period, in May 1992. Almost all his victims were Bosnian Muslim men detained at the Luka Camp near the city of Brčko in eastern Bosnia. The case against Duško Sikirica, Damir Došen and Dragan Kolundžija, similarly deals with wardens in the Keraterm camp, located in the Prijedor municipality.[6] The commander, Duško Sikirica, was charged with genocide and complicity in genocide. He was acquitted of these counts by an oral decision of 21 June

Genocide Convention (the Application of Bosnia and Herzegovina was filed on 20 Mar 1993, on the basis of Art IX of the Genocide Convention). Had the International Court of Justice already made a ruling, the ICTY's starting point would have been simpler. If the ICJ had determined that the ethnic cleansing carried out in Bosnia and Herzegovina constituted genocide, the ICTY most likely would have adopted this conclusion and would have limited its task to determining whether, and to what extent, each accused participated in the crime. Conversely, had the ICJ found that the ethnic cleansing carried out in Bosnia and Herzegovina did not constitute genocide, the genocide charges would most likely have gradually disappeared from the Tribunal's docket. But the case is still pending and the ICTY is the first international jurisdiction to consider this question.

[4] Two Rule 61 decisions also dealt with genocide charges. The 20 Oct 1995 decision in *The Prosecutor v Dragan Nikolić* invited the Prosecutor to add a genocide count to the indictment. The 11 July 1996 Decision in *The Prosecutor v Radovan Karadžić and Ratko Mladić* considered the charge of genocide more extensively. However, those decisions cannot be equated to judgments and their legal findings should be considered with precaution in view of the very limited amount of evidence on which they are based and the lower standard of review applied. Those decisions indeed determine whether 'there are reasonable grounds for believing that the accused committed one or all of the offences for which he is charged in the indictment'. Rule 61 was used, in the early years of the Tribunal, when no accused had yet been arrested, to proceed to a second, more thorough, review of the indictment that could lead to the issuance of an international warrant of arrest.

As of Oct 2002, nineteen individuals have been indicted for genocide and/or complicity of genocide. Two accused are no longer alive: Simo Drljaca died resisting arrest and Milan Kovačević died in custody of heart problems. Momir Talić has been released for medical reasons. Eight are currently in custody at, or awaiting, trial: Momšilo Krajišnik, Radoslav Brđanin, Milomir Stakić, Vidoje Blagojević, Dragan Obrenović, Dragan Jokić, Momir Nikolić and Slobodan Milošević. Radovan Karadžić, Zlatko Maldić, Vinko Pandurević, Ljubomir Borovćanin, and Stojan Zupljanin are still at large.

[5] The written Trial Judgment was rendered on 14 Dec 1999 and the Appeals Judgment on 5 July 2001. Goran Jelisić was sentenced to 40 years in prison.

[6] *The Prosecutor v Duško Sikirica, Damir Došen and Dragan Kolundžija*, IT-95–8-T (3 Sept 2001), hereinafter 'the *Sikirica et al* Judgment on the Defence Motion to Acquit'. Duško Sikirica was alleged to have been the commander of camp, while the other two were alleged to have been shift commanders in the Keraterm camp.

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2001.[7] The Trial Judgment against Radislav Krstić rendered on 2 August 2001[8] concerns the responsibility of an army corps commander for his involvement in the orchestrated massacre of at least 7,500 Muslim men in the Srebrenica enclave from 14 to 19 July 1995. General Krstić was found guilty of genocide and sentenced to 46 years in prison. It is so far the only ICTY judgment that entered a clear conviction of genocide.[9]

The genocide charges brought before the ICTY are based on Article 4 of the ICTY Statute, which takes up *verbatim* the definition found in the Genocide Convention.[10] The customary nature of this definition is indisputable and the International Court of Justice recognised its nature as a peremptory norm of international law as early as 1951.[11]

As with any other crime, two constitutive elements can be distinguished in the crime of genocide:

- the *actus reus*, specified under Article 4(2) of the ICTY Statute as killing, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births and/or forcibly transferring children.
- the *mens rea*, defined in the *chapeau* of Article 4 as the intent to destroy, in whole or in part, a group as such.

The *actus reus* does not give rise to any particular difficulty in the cases brought before the ICTY. Evidence of mass murder and serious bodily or mental harm is sadly all too plentiful. The potential issues which the Chambers must resolve consist of determining whether the confirmed cases of forcible transfer, detention in inhumane conditions, or systematic destruction of property, constitute deliberate infliction on a group of people of conditions of life calculated to bring about its physical destruction in whole or in part within the meaning of Article 4(2)(c) of the ICTY Statute. This issue comes down to determining the intent underpinning the commission of the acts and is thus confused with the discussion on the offence's *mens rea*.

Two levels of *mens rea* should be separated when dealing with crimes of a collective nature such as genocide. The intent to commit the underlying crime, such as murder, does not differ from the one required in any ordinary crime. The judge must

[7] The written Judgment on the Defence Motions to Acquit was rendered on 3 Sept 2001. Duško Sikirica was sentenced to 15 years in the Sentencing Judgment of 13 Nov 2001.

[8] *The Prosecutor v Radislav Krstić*, IT-98–33-T (2 Aug 2001), hereinafter the *Krstić* Trial Judgment.

[9] The *Jelisić* Appeals Judgment found that, in view of the evidence presented, the accused could have been found guilty of genocide by a reasonable trial chamber (paras 68–72) but considered that it was not in the interest of justice to remit the case for further proceedings before a Trial Chamber (para 77).

[10] Under Art II of the Genocide Convention and Art 4 of the ICTY Statute, genocide is defined as follows: 'Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.'

[11] *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Report (1951), 23.

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be satisfied that the individual perpetrated, say a murder, with the intent to commit this particular crime. However, genocide adds another level of *mens rea*. It must be further proven that the underlying crime was committed with the intent to destroy, in whole or in part, a group as such.[12] The difficulties of interpretation reside in the exact meaning of this second layer of intent constituted by the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.

Four different elements can be distinguished within the genocidal intent. There must be:

- an intent;
- to destroy;
- a national, ethnical, racial, or religious group;
- in whole or in part.

The ICTY has successively analysed these four aspects. It should nevertheless be emphasised that the current trends of the jurisprudence are not yet definitive. Most of them emanate from trial judgments and it is a firm bet that the Appeals Chamber will add shades of meaning, clarify or may well indeed overturn the emerging case-law.

II. THE LEVEL OF INTENT

The ICTY has first clarified the level of intent required. The issue is whether the underlying criminal act(s) must *aim* to destroy the group, or whether it is enough that the underlying crime(s) be perpetrated in full knowledge that it will *inevitably* result in the destruction of the group, or, more flexible still, in the knowledge that it will *probably* result in the destruction of the group. In other words, can genocide be committed by recklessness? In all cases, the Prosecution pleaded all three degrees of intent. Yet, the Chambers, including the Appeals Chamber, unanimously decided that genocide is characterised by the fact that it *aims* to destroy a human group.[13] The *Sikirica et al* Trial Judgment interestingly refused to pose the question under those terms. According to this Chamber, the question does not even arise, as the Genocide Convention clearly specifies the intent required. A plain reading of the text suffices to show that the perpetrators must want to destroy the group as such.[14] This first aspect of the genocidal intent thus seems settled in the ICTY's case law: there is no reckless genocide.[15] This interpreta-

[12] Otto Triffterer expresses these two levels of intent as follows: 'there are *two* subjective elements required to establish criminal responsibility for genocide: the *mens rea*, as the pendant to the *actus reus*, *and* the 'intent to destroy [. . .]'. The author emphasises that [. . .] guarantee the rule of law and respect for the principle *nullum crimen sine lege*, the two 'intents' ought to be strictly separated when it comes to prove the facts necessary to establish the innocence or guilt of an accused', in 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', *Leiden Journal of International Law*, vol 14, no 2 (2001), 400.

[13] *Jelisić* Appeal Judgment, para 46: 'the specific intent requires that the perpetrator seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such'; *Krstić* Trial Judgment, para 561: 'mere knowledge of the victims' membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such'.

[14] Ibid, para 60.

[15] The ICTY thereby rejected the interpretation recently advocated by some commentators that genocide should comprise those acts whose foreseeable or probable consequence is the total or partial destruction of the group. See in particular Eric David, *Droit des conflits armés* (Bruylant, 1999), 615; Alexander KA Greenawalt, 'Rethinking genocidal intent: the case for a

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tion coincides with the ICTR's.[16] It also permits a distinction between genocide and war crimes resulting in massive destruction. For instance, it would brush aside the claims made by some writers in the 1970s that the Vietnam war conducted by the Americans amounted to genocide.[17] The fact that the Americans were aware that their tactics entailed a substantial likelihood of destroying a large number of Vietnamese would not meet the level of intent required for genocide.

A second aspect of the intent concerns the question of whether it is necessary to prove that the perpetrators sought the destruction of the group *because* of its national, racial, ethnic, or religious characteristics. A plain reading of the Genocide Convention would indicate that this is indeed an element of the crime. The term 'as such' would otherwise have no meaning. This interpretation also corresponds to the intent of the drafters, who regularly referred to this aspect of intent as the motive of the crime. The report of the *ad hoc* Committee on Genocide set up by the UN Economic and Social Council with a view to elaborating a convention on genocide, defines as motive, or *dolus specialis*, the fact that the crime must be committed 'on grounds of national or racial origin'.[18] Likewise, the Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, presented by the special rapporteur of the ILC, Doudou Thiam, in 1986, characterises genocide as a form of crime against humanity and presents 'the motive, *ie*, the intention to harm a person or group of persons because of their race, nationality, religion or political opinions' as the characteristic common to all crimes against humanity.[19] In 1950, Henri Donnedieu de Vabres stated that the theory of genocide departs from common law crimes in that it includes the motive (*ie*, the crime being committed by reason of nationality, race, religion, or opinion) into the elements of the crime.[20] Futhermore, accusations of genocide were on several occasions countered on

knowledge-based interpretation', *Columbia Law Review*, Dec 1999, 2259–94; Alicia Gil Gil, *Derecho penal internacional, especial consideracion del delito de genicidio* (Tecnos: Madrid, 1999; Triffterer, *op cit*, 14, no 2 (2001). The ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports, 1996, 240) also rejected a broad interpretation of intent. It should be noted however that Judge Koroma has called for a broader understanding of intent in his dissenting opinion and deems that a situation should qualify as genocide if the consequences of the act could have been foreseen (ICJ Reports, 577).

[16] *The Prosecutor v Jean-Paul Akayesu*, ICTR-96–4-T (2 Sept 1998), paras 497, 544–7; *The Prosecutor v Clément Kayishema and Obed Ruzindana*, ICTR-95–1-T (21 May 1999), para 91; *The Prosecutor v Georges Anderson Nderubumwe Rutaganda*, ICTR-96–3-T (6 Dec 1999), para 59; *The Prosecutor v Alfred Musema*, ICTR-96–13-T (27 Jan 2000), para 164; *The Prosecutor v Kambanda*, ICTR 97–23-S (4 Sept 1998), para 16.

[17] See *Prevent the Crime of Silence: Reports from the Sessions of the International War Crimes Tribunal founded by Bertrand Russel, selected and edited by Peter Limpnew and Peter Weiss with additional material selected and edited by Ken Coated and a foreword by Noam Chomsky* (Bertrand Russell Peace Foundation Ltd, 1971).

[18] *Ad hoc* Committee on Genocide, Economic and Social Council, UN. Doc E/794 (24 May 1948), 14.

[19] A/CN.4/398 (11 Mar 1986), para 25: [all] writers, all judicial decisions and all the resolutions of international congresses agree that what characterises a crime against humanity is the motive, ie, the intention to harm a person or group of persons because of their race, nationality, religion, or political opinions. What is involved is a special intention which forms part of the crime and gives it its specific nature.'

[20] 'La théorie du génocide (. . .) déroge au droit commun en ce qu'elle englobe le *mobile* dans la constitution légale du délit.' The author defines the motive as the fact that the crime is committed 'en raison de la nationalité, de la race, de la religion, ou de l'opinion'. *Henri Donnedieu de Vabre*s, 'De la piraterie au génocide . . . les nouvelles modalités de la répression universelle' *Le*

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the ground that the destruction was not motivated by hatred for the group destroyed. This was among the arguments advanced by Paraguay to deny that the extermination of the Ache Indians amounted to genocide.[21] Paraguay notably argued that the Ache Indians were decimated because they happened to be located in an economically coveted area. In other words, it denied the accusations of genocide by claiming that the motive behind the destruction sought was not discrimination, but economical gain.[22]

The ICTY did not need to consider this aspect thoroughly. The question did not really arise, as there was no doubt that the conflict in the former Yugoslavia was motivated by ethnic hatred. The ICTY nevertheless seems to confirm that this is an element of the crime of genocide. In the case against Jelisić, the Trial Chamber stated that '[t]he special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims *because* they are part of a group which he is seeking to destroy'.[23] Similarly, the *Krstić* Trial Judgment indicated that 'the intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen *by reason of* their membership in the group whose destruction was sought. Mere knowledge of the victims' membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such'.[24] The *Kupreškić* Trial Judgment indicated in an *obiter dictum* that '[b]oth persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted *because of* such belonging. In both categories what matters is the intent to discriminate: to attack persons *on account of* their ethnic, racial, or religious characteristics'.[25] If so, an intent to physically destroy a group, in whole or in part, to the extent necessary to gain a piece of land for instance, would not constitute genocide. The complete disregard shown for this particular group would not be sufficient to make the intended mass destruction genocidal.[26]

As we have seen, discriminatory intent was regularly designated as the 'motive' of the crime during the preparatory work or the ensuing commentaries of the Genocide Convention. Now, the ICTY has specifically stated that motive is not an element of the crime. The *Jelisić* Appeal Judgment emphasises 'the necessity to distinguish specific intent from motive' and states that '[t]he personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadić* Appeal Judgment, the Appeals Chamber stressed the irrelevance and 'inscrutability of motives in criminal law'(para 269)'.[27] At first glance, this statement

droit privé français au milieu du XXème siècle: études offertes à Georges Ripert, Paris, 1950, Tome 1, 245.

[21] Killings occurred especially between 1968 and 1970, under the dictatorship of Stroessner.

[22] See Leo Kuper, *The Prevention of Genocide* (New Haven, Conn.: Yale University Press, 1985), 12.

[23] *The Prosecutor v Goran Jelisić*, IT-95–10-T (14 Dec 1999), hereinafter 'The *Jelisić* Trial Judgment', para 67. Emphasis added.

[24] *Krstić* Trial Judgment, para 561. Emphasis added.

[25] *The Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić*, IT-95–16-T (14 Jan 2000), hereinafter 'The *Kupreškić* Trial judgment', para 636. Emphasis added.

[26] This element could permit to distinguish genocide from the crime of extermination listed as a crime against humanity under Article 5 of the ICTY Statute.

[27] *Jelisić* Appeal Judgment, para 49.

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could be understood as rejecting discriminatory intent as an element of the crime. This, in our view, would be a wrong understanding of the ICTY's case-law. In reality, the term 'motive', as used in the *Tadić* or *Jelisić* Appeal Judgments, only relates to the individual's motivations in knowingly participating in the crime. It thus has a different meaning than the one previously described. In the first context, motive relates to the discriminatory nature of the crime itself, rather than the state of mind of a particular participant. It is important to distinguish the meaning ascribed to motive in both contexts, as a motive requirement in the first understanding (referring to the discriminatory nature of the crime), is compatible with the Appeals Chamber's finding, that personal motive of one particular participant is irrelevant to a finding of persecution or genocide. It would be fully consistent with the *Tadić* Appeal Judgment to find an individual, who denounces his neighbour or spouse on purely personal grounds, guilty of persecution, as long as it is established that he knew his act fitted into a pattern of mass crimes committed on political, racial and/or religious grounds.[28] Motive, referring to the discriminatory nature of the crime, is nevertheless required and the ICTY jurisprudence should be read as merely emphasising that this specific feature of the crime is not necessarily what motivates a particular individual to participate in the crime. This in fact is probably what was meant by the *Tadić* Trial Chamber when it required that the act not be committed on purely personal reasons in order to qualify as persecution. The Trial Chamber thereby expressed that the act must be committed with knowledge that it fits into a pattern of widespread or systematic acts committed on discriminatory grounds.[29] While the reasons why the overall crime was committed and those why one particular individual participated in the commission of the crime may differ, it is always necessary to prove that the crime was committed on discriminatory grounds. Motive, in its original meaning, referring to the discriminatory nature of the crime, is an element of the crime of genocide.

Consequently, it is submitted that the ICTY case law should be read as presenting both the special intent, defined as the aim to destroy a group, and the motive, being the discriminatory grounds of the crime, as elements of the crime of genocide.

III. TO DESTROY

The second aspect of the genocidal intent concerns the type of destruction covered by the Genocide Convention. The issue is whether genocide only covers an intent to physically or biologically destroy a group, or whether it also encompasses a 'sociological'

[28] The trial judgment rendered on 15 Mar 2002 against Milorad Krnojelac (*The Prosecutor v Milorad Krnojelac*, Judgment, IT-97–25-T, 15 Mar 2002), departs from this reasoning and puts as a requirement that the accused 'must consciously intend to discriminate'. It adds that [w]hile the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one'. Pursuant to this judgment, the mere awareness of the discriminatory nature of the widespread or systematic attack would not be sufficient to find the accused guilty of persecution.

[29] The Trial Chamber, in support of its finding, mentions a German case arising from the Second World War in which the accused was found guilty of a crime against humanity for denouncing his wife to the Gestapo on the basis of her anti-Nazi remarks. The District court of Hamburg found that, whilst the accused did not necessarily act on the ground of racial hatred, he nevertheless knew that his act would fall within the general mass persecution of the Jews (OGHBZ, Decision of the District Court (Landgericht) Hamburg of 11 Nov 1948, STS 78/48, Justiz und NS-Verbrechen II, 1945–66, 491, 499, quoted in the *Tadić* Trial Judgment, para 658).

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or cultural destruction of the group, which would allow acts such as forcible transfer to be included among the acts whose goal is the destruction of a group as such. The ICTY judgments have consistently found that the destruction referred to under the Genocide Convention only covers a physical or biological destruction and does not include cultural destruction.[30] The ICTY has thereby clearly refused to automatically label ethnic cleansing as genocide.

This position is probably wise. First, little basis can be found to conclude that 'cultural genocide' is recognised as falling under the definition of genocide under customary international law and the ICTY is bound to apply a definition that reflects beyond doubt the state of customary international law, in conformity with the principle of legality. This interpretation is also required by the general principle of criminal law *in dubio pro reo*.[31] Admittedly, some national jurisdictions have found otherwise. In particular, German courts have extended the notion to a social destruction of the group.[32] But this interpretation is far from being agreed by all[33] and cannot be considered to reflect customary international law.

Still, some could argue that genocide, as defined by Raphael Lemkin, who coined

[30] *Krstić* Trial Judgment, para 580; *Jelisić* Trial Judgment, paras 78–83; *Sikirica et al* Judgment on Defence Motion to Acquit, paras 63–86. The case law however does make it possible to take into consideration attacks on the group's symbols, such as the cultural or religious buildings, as further evidence of the intent to target the group as a distinct entity. See *The Prosecutor v Radovan Karadžić and Ratko Mladić*, IT-95–5-R61, IT-95–18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para 94.

[31] The ICTY case law reiterated this principle of interpretation prevailing in criminal law on several occasions. See for instance *The Prosecutor v Duško Tadić*, IT-94–1-A (15 Oct 1998), para 73: 'in applying these criteria, any doubt should be resolved in favour of the Defence in accordance with the principle *in dubio pro reo*'; *The Prosecutor v Delalić et al* IT-96–21-T (16 Nov 1998), para 413: 'where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain this. This is why ambiguous criminal statutes are to be construed *contra proferentem.*' Similar statements have been made by the ICTR. See, for instance, *The Prosecutor v Jean-Paul Akayesu*, para 319: 'the general principles of law stipulate that, in criminal matters, the version favorable to the accused should be selected.'

[32] See, for instance, Federal Constitutional Court, 2 BvR 1290/99, 12 Dec 2000, para (III)(4)(a)(aa): 'the statutory definition of genocide defends a supra-individual object of legal protection, ie, the *social* existence of the group [. . .] the intent to destroy the group [. . .] extends beyond physical and biological extermination [. . .] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group' (emphasis added).

[33] See, for instance, the recent jurisprudence in Kosovo. On 9 Apr 2001, the Supreme Court of Kosovo reversed the conviction of genocide pronounced by the District Court of Mitrovica against the defendant Miroslav Vuković and stated in *dicta*: 'The exactions committed by Milošević's regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forcefully departure from Kosovo as a result of systematic campaign of terror including murders, rapes, arsons, and severe maltreatments. Such criminal acts correspond to the definition of crimes against humanity given by international laws (widespread or systematic plan of attack against civilian population during the war) or be qualified war crimes as per Article 142 of the CLY.' It thereby distinguished ethnic cleansing, which clearly constitutes a crime against humanity, from the crime of genocide. The Federal Republic of Yugoslavia's Criminal Code 141, which defines the crime of genocide, lists 'forcible dislocation of the population' as one of the *actus reus* of genocide. This act is usually considered to be covered by Art II, subpara (c) of the Genocide Convention, *ie*, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

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the term in 1944, was not limited to physical destruction, but covered all forms of destruction of a group as a distinct social entity.[34] The definition proposed by Lemkin in 1944 should however be read in context. Before the Genocide Convention was signed, Lemkin's endeavour was to criminalise any wrongful act committed against members of a group, out of hatred towards this particular group. As early as 1933, he proposed to the fifth International Conference for the Unification of Criminal Law the creation of the crimes of barbarism and vandalism, defined respectively as a punishable action against the life, bodily integrity, liberty, dignity, or economic existence of a person belonging to a specific community, and the destruction of the cultural or artistic works of a specific community, committed out of hatred towards a racial, religious, or social community, or with a view to extermination thereof.[35] His efforts were thus not limited to the mere criminalisation of an enterprise aiming at the physical destruction of a community, but rather covered all wrongful acts motivated by discrimination. Yet Lemkin's statements regarding the Genocide Convention clearly limited its scope to the physical destruction of a human group.[36] Such was indeed the intention of the drafters who explicitly rejected the 'cultural' destruction from the crime of genocide.[37]

Likewise, some Second World War judgments appear to have understood the notion of genocide as encompassing all forms of destruction of a human group. As an example, the indictment against Ulrich Greifelt *et al* charged the accused with implementing a systematic programme of genocide which sought to destroy foreign nations and ethnic groups, such destruction being understood as the extermination of the group members, but also the destruction of all elements characterising the group's identity.[38] But here again, one should keep in mind that those statements were made at a time when genocide was not yet recognised as a crime *per se*. Genocide became a crime under international law when the Genocide Convention entered into force. While the term 'genocide' is found in some of the post-World War trials, notably in the indictment before the IMT, it was not then used as a legal qualification. Instead, it was legally subsumed under the crimes of persecution and/or extermination, both crimes against humanity. Two legal concepts then existed, while there are now three to cover the same reality. The 1996 ILC Report in fact states that genocide as currently defined corresponds to the second category of crime against humanity established under Article 6(c) of the Nuremberg Tribunal's Statute, namely the crime of persecution.[39] Such statement is misleading, however, as genocide cannot simply be viewed as merely synonymous with the crime of persecution. This, indeed, would be contrary to the rule

[34] *Axis Rule in Occupied Europe*, 79, 87–9.

[35] Actes de la Vème Conférence internationale pour l'unification du droit pénal (Paris, 1935), 48–56.

[36] Letter of Raphael Lemkin published in 'Executive Sessions of the US Senate Foreign Relations Committee', Historical Series 781–805 (1976), 370.

[37] The notion of cultural genocide was rejected by the General Assembly Sixth Committee by 25 votes to 6, with 4 abstentions and 13 delegations absent.

[38] *USA v Ulrich Greifelt et al*, Trials of War Criminals, vol XIV (1948), 2: 'The acts, conduct, plans and enterprises charged in Paragraph 1 of this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics.' See also the judgments rendered by the Polish Supreme Court against Amon Leopold Goeth (Trials of War Criminals, vol VII, no 37, 8) and Rudolf Franz Ferdinand Hoess (Trials of War Criminals, vol VII, no 38, 24).

[39] ILC Draft Code, commentary of Art 17, 106.

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of interpretation *ut res magis valeat quam pereat*, also referred to as the rule of effectiveness. As restated by the *Tadić* Appeal judgment on the merits, 'it is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that lawmakers enact or agree upon rules that are well thought out and meaningful in all their elements'.[40] Judge Abi-Saab also referred to the principle of 'normative economy' in his separate opinion to the *Tadić* Appeal Judgment on jurisdiction and asserted that '[t]he principle of 'normative economy' or '*économie des notions'* being a categorical logical imperative for any legal system, a legal system cannot withstand the existence within its confines of two concepts or rules that fulfil essentially the same function or bear divergently on any one situation, however slight the divergence may be. The International Criminal Tribunal for the former Yugoslavia, together with the International Tribunal for Rwanda, are thus afforded a unique opportunity to assume the responsibility for the further rationalisation of these categories at some distance from historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order'.[41] The ICTY must ascribe to each notion, genocide, persecution and extermination, a meaning and a scope, which do not lead to rendering any of those notions superfluous. As a result, elements found in the post world war jurisprudence on genocide should be taken with caution as they rather refer to the crime of persecution.[42] To rely on those elements would thus result in broadening the notion of genocide so as to make it synonymous with the crime of persecution.

One must recognise, however, that to include the notion of cultural destruction in the crime of genocide would not necessarily be contrary to the principle of effectiveness, as genocide and persecution would still have a distinguishing feature: the crime of persecution is committed against members of a particular group, whose basic rights as human beings are denied by reason of their group belonging. Genocide is committed against a 'group, as such', whose right to exist as a specific entity is denied. The interpretation which would define genocidal intent as any intent to destroy a group as such, whether physically or by other means, would thus not necessarily overlap with the crime of persecution as defined in the ICTY case-law.[43] Such an interpretation might even permit the distinction of genocide from the crime of extermination, which would be concerned with a massive physical destruction, the purpose of which is not necessarily the destruction of a human group, as such. A dynamic interpretation that would not show strict deference to the principle *in pro dubio reo* hence could extend the meaning of genocidal intent to an intent to destroy a group, as a distinct social entity, which would not be limited to a purely physical or biological destruction. Such interpretation, which emphasises the fact that the victim of genocide is 'a group, as

[40] *Tadić* Appeal Judgment, IT-94–1-A, 15 July 1999, para 284. [41] Page 2.

[42] The *Kupreškić* Trial Judgment heavily relied on the Second World Way judgments to determine the notion of persecution under customary international law (see paras 593–604). It also clearly distinguished persecution from genocide by describing persecution as encompassing all crimes against humanity 'which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group" ' (para 606).

[43] See William Shabas, *Genocide in International Law, the Crime of the Crimes* (Cambridge: Cambridge University Press, 2000) 229–30, who considers that such interpretation is defendable, on the basis of the letter and objectives of the Genocide Convention as well as the need for a dynamic interpretation of legal instruments that protect human rights.

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such', would in turn need to be strict on the definition of 'the group' in order to keep the crimes of genocide and persecution distinct.

IV. A NATIONAL, ETHNIC, RACIAL, OR RELIGIOUS GROUP

The third aspect addresses the definition of the group: to what kind of group does the expression 'national, ethnic, racial or religious group' refer? If it is applied to the cases before the ICTY, should the group be defined as all the Muslims on earth, or rather as the Bosnian Muslims, or else as the Bosnian Muslims living within one municipality of Bosnia and Herzegovina such as Brčko, Srebrenica, Prijedor or Bosanski Šamac? Further, could the group be defined by way of 'negative criteria', which would consist of identifying individuals as *not* being members of a particular group? The group of the 'non-Serbs' would correspond to this last charaterisation. The ICTY, as well as the ICTR, have shown unease in defining the group. Some ICTR judgments have tried to define each group listed in the Genocide Convention,[44] while others have avoided this difficult task. Some judgments have favoured a definition of the group based on subjective criteria, while others have partly relied on objective criteria. Overall, however, the ICTY has mostly avoided the question and the *Krstić* Trial Judgment is the first ICTY judgment that devotes some developments to the question. It is striking that this leads the Trial Chamber to adopt a reference group that is different from the one thus far chosen in the ICTY judgments. Most judgments take the Bosnian Muslims of the geographical zone covered in the indictment as the reference group. The *Jelisić* Trial Judgment seems to choose the group of the Bosnian Muslims living in Brčko.[45] It further notes, in an *obiter dictum*, that the group can be defined according to negative criteria and that a group such as the non-Serbs within a particular municipality would fall within the groups protected by the Genocide Convention.[46] The *Sikirica et al* case defines the group as the Bosnian Muslims living in the Prijedor municipality[47] and emphasises that '[w]hether the group belongs to a country or a region or a single community, it is clear that it must belong to a geographic area, limited though it may be'.[48]

The *Krstić* Trial Judgment opts for a different approach and takes the 'Bosnian Muslims' as the reference group.[49] The Trial Chamber thereby declines to define the group on the basis of geographical criteria.[50] Surely, most human groups do in fact live in circumscribed geographical areas. However, the Trial Chamber deems that the Genocide Convention does not define the group on the basis of this criterion. The group is described on the sole basis of its national, racial, ethnical or religious characteristics.

[44] *Akayesu* Trial Judgment, paras 510–16.

[45] The Trial Chamber did not delve into the definition of the group and it is unclear whether the judgment refers to the Muslims of Brčko as the 'group, as such', or as the substantial part of the group that the Bosnian Serbs allegedly intended to destroy. See paras 72 and 83.

[46] *Jelisić* Trial Judgment, para 71.

[47] Para 61: '[the Prosecution] must establish the intent to destroy in whole or in part the Bosnian Muslim or Bosnian Croat populations in Prijedor.'

[48] Para 68.

[49] *Krstić* Trial Judgment, para 560.

[50] The designation of the group on the basis of its geographical existence has notably been advocated by Cherif Bassiouni. See 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' 5 *Criminal Law Forum*, 323–4.

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The Trial Chamber goes on to state that the Muslims living in Brčko, those living in Bosanski Šamac or Prijedor, belong to the same group, within the meaning of Article 4, that is, the group of Bosnian Muslims and 'no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica, at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention'.[51] In designating the reference group as the Bosnian Muslims, the Trial Chamber notably relies on the fact that the Bosnian Muslims constituted the only group recognised as a distinct national group by the constitution of the former Yugoslavia. It also deems that this characterisation corresponds to the perception of both the victims and the perpetrators of the crime, who targeted individuals by reasons of their belonging to the Bosnian Muslim group. The Trial Chamber thus chooses to define the group by subjective criteria. However, those subjective criteria are not assessed at the level of one particular individual. An individual who would arbitrarily decide to label as an ethnic group, for example, all the people who play football on Sundays, would be unsuccessful in creating a group protected by the Genocide Convention. The subjective criteria considered here rather refer to the social context and the common perceptions of a specific human group. The Trial Chamber concludes: 'A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the *Nikolić*[52] and *Jelisić*[53] cases, the Chamber identifies the relevant group by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'.[54]

The Trial Chamber also refused to label the Bosnian Muslims as an ethnic, a racial, a national, or a religious group. It first noted that the preparatory work of the Genocide Convention shows that the list set out referred to the then prevailing concept of minorities.[55] It then considered the work conducted in the context of the international protection of minorities and concluded that no clear distinction exists in law between the notions of national minority, ethnical group or racial group. It notably referred to a study conducted by F. Capotorti for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, indicating that, from 1950, the expression 'ethnic group' was used in the UN institutions simply as a replacement for what was previously designed as 'racial group', a term which was by then considered derogatory and scientifically incorrect. As a result, the *Krstić* Trial Judgment did not try to separately define each group listed in the Genocide Convention, as the *Akayesu* Trial Judgment endeavoured, but merely concluded that the Bosnian Muslims formed a group protected by Article 4 of the ICTY Statute.

The choice of the Bosnian Muslims as the reference group is probably more respectful towards the text of the Genocide Convention and better reflects the nature of the war conducted in Bosnia and Herzegovina. Still, various reference groups can be found in the ICTY case law and the issue is not yet settled. Such divergent interpretations obviously have a big impact on an eventual finding of genocide, as an analysis of the fourth aspect of genocidal intent will show.

[51] *Krstić* Trial Judgment, para 559.

[52] *The Prosecutor v Nikolić*, Review of the Indictment pursuant to Rule 61, Decision of Trial Chamber I, 20 Oct 1995, IT-94–2-R61, para 27.

[53] *Jelisić* Trial Judgment, para 70.

[54] *Krstić* Trial Judgment, para 557.

[55] See para 556.

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V. IN WHOLE OR IN PART

The fourth aspect of genocidal intent concerns what should be understood by the expression 'in whole or in part'. It signifies clearly that it is not necessary to seek the eradication of the whole group. It is enough to seek to destroy a part of that group. But how great a part does this have to be?

It should first be pointed out that this aspect relates to the intent, as opposed to the actual destruction. It is not a matter of establishing whether all or part of a group was actually destroyed, but of ascertaining whether the perpetrators of the crime intended to destroy the group in whole or in part. This was probably not the case at the very beginning of the drafting history of the Convention,[56] and this aspect of the Genocide Convention is certainly the most difficult to interpret.

Genocide at first refers to a large-scale operation whose goal is to physically eliminate a human group. While murder deals with intentional destruction of an individual, genocide deals with the intentional destruction of a group. This is why it is usually perceived as a crime of the utmost gravity. However, an interpretation that would only rely on the letter of the Genocide Convention could reach a much broader range of criminal behaviours. The mere letter of the Convention allows any intention to partially destroy a group to fall within the definition of genocide. Stretched to its limit, nothing in the letter of the Convention prevents the interpretation that the intended destruction of not only a group, but also of a couple of group members, could be characterised as genocide. Both realities are very different in both scope and nature and the question as to whether both are covered by the definition of genocide will depend on the interpretation given to the term 'in part'.

Some NGOs, such as Amnesty International,[57] have promoted the interpretation whereby the intended destruction of any part would meet the definition of genocide. This solution seems unreasonable. If all intention to destroy any part of a human group is deemed to meet the definition of genocide, then any killing of more than one member of a particular group would show an intent to partially destroy this group. If so, the intent underlying the *actus reus* and the *mens rea* specific to the crime of genocide would overlap, so that genocidal intent, which constitutes the distinguishing feature of genocide, would disappear. Such interpretation would also obviously depart from the object and purpose of the Genocide Convention and negate the gravity of the crime of genocide. Finally, it would cancel any distinction between the crimes of persecution and genocide, in contradiction of the principle of effectiveness previously described.

It is in fact commonly accepted that the part one intends to destroy must be 'substantial'. All ICTY and ICTR judgments have recognised this to reflect customary

[56] The preamble of the General Assembly resolution 96(I) states that 'many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part'. See also the commentary of the representative of the United Kingdom, Sir Gerald Fitzmaurice, UN Doc A/C6/SR. 73. It does seem that some confusion was made between the *actus reus* and the *mens rea* during the discussions. See, for instance, the debates within the Sixth Committee, where some representatives argued that the intent must be to destroy an entire group, but that genocide could be accomplished in stages, initially only affecting parts of the group (UN GAOR C.6 at 92–7).

[57] See, for instance, 'the ICC, making the right choices—Part I defining the crimes and permissible defences and initiating a prosecution' Jan 1997, AI, index: IOR 40/01/97, 22.

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international law.[58] But what should be understood by a 'substantial' part of the group? On what criteria should such part be evaluated? Three different criteria have been used in the ICTY jurisprudence.

The part, which one seeks to destroy, must represent a large number relative to the size of the whole group.[59]

The destruction must target a qualitatively significant part of the group: an intent to systematically eliminate the elite of a group, for example, would be considered substantial.[60]

The *Krstić* Trial Chamber judgment has been more innovative, probably in order to overcome the fact that no prior determination has been made as to whether genocide was committed in Bosnia and Herzegovina and that this Trial Chamber did not have the possibility, in view of the limited scope of the case, to examine the fate of all the Bosnian Muslims during the conflict in Bosnia. The Trial Chamber 'reintroduced' the 'geographic' criterion that it had deliberately set aside while designating the group.[61] It considered that an intent to destroy the part of the group living in a given geographical zone, such as a region or even a municipality, could be regarded as an intent to destroy a substantial part of the group, as long as the perpetrators of the crime had perceived this part of the group as a distinct entity to be eliminated *as such*, as opposed to a multitude of individuals.[62] The Trial Chamber thus used some kind of 'sub-group' notion, the 'sub-group' being the Bosnian Muslims in Srebrenica, perceived by the perpetrators of the crime as referring to an entity to be eliminated as such. As one can see, the Trial Chamber here mostly relied on the intention of the perpetrators. It analysed whether the evidence presented permitted the conclusion that the perpetrators viewed their targeted victims as 'a group as such'. Whilst the perception of the perpetrators was found insufficient in itself to define the human groups protected by the Genocide Convention, it seems on the other hand to be key in assessing whether there was an intention to destroy a group as such, in part.

The *Krstić* Trial Judgment, however, manages to conclude that a genocide was committed in Srebrenica in July 1995, by using the substantial character twice successively, which is, perhaps, legally questionable. The genocidal intent proved in the *Krstić* case is an intent to destroy a substantial part of a substantial part. The Trial Chamber considers, first, that the intent to destroy the Bosnian Muslims in Srebrenica, as a 'sub-group', constitutes an intent to destroy a substantial part of the 'Bosnian Muslim' group. It is the result of the application of the geographical criterion. But the Trial Chamber does not stop there and uses the 'substantial' criterion a second time.

[58] *Jelisić* Trial Judgment, para 82; *Krstić* Trial Judgment, paras 590–1.

[59] *Jelisić* Trial Judgment, para 82; *Sikirica et al* Judgment on Defence Motion to Acquit, para 65: 'This part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group'; This is also consistent with the solution retained in the 'Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law', UN Doc. A/AC.249/1998/CRP.8, 2 n.1 : 'the 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 the group.'

[60] *Jelisić* Trial Judgment, para 82; *Sikirica et al* Judgment on Defence Motion to Acquit, paras 76–7; *Krstić* Trial Judgment, paras 585–7.

[61] The judgments that chose to define the group on the basis of a geographical criterion did not need to use it again when the substantial character was assessed.

[62] Para 590.

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The Trial Chamber considers, secondly, that the intent to destroy all the military-aged men within this sub-group constitutes an intent to destroy a substantial part of this sub-group, not only from a quantitative viewpoint (7,500 persons out of 25,000 to 30,000 Bosnian Muslims living in Srebrenica were killed),[63] but also according to its qualitative aspect.[64] However, the Trial Chamber also refers on several occasions to the forcible transfer of the women and children while discussing the genocide charge. The Chamber notably concludes that the 'the Bosnian Serb forces knew, by the time they decided to kill all 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 of the Bosnian Muslim population at Srebrenica'.[65] Physical disappearance from Srebrenica however does not amount to physical destruction of the group as such, and it is unclear whether the Chamber treated the combination of the massacres and the forcible transfer as actually resulting in the destruction of the sub-group, which would mean that the Chamber flirted with the notion of cultural genocide, or whether it strictly applied the notion of physical destruction and viewed the forcible transfer as evidence of the perpetrators' intent to eventually obtain the physical destruction of the Bosnian Muslims of Srebrenica as a whole, the whole group being doomed to physically disappear as a result of the extermination of three generations of men.

VI. CONCLUSION

This summarises the interpretation proposed thus far by the ICTY in respect of genocidal intent. Whilst the ICTR deals with a 'clear' case of genocide, the factual situations put before the ICTY are at the edge of what could be perceived as a genocide. The ICTY is faced with many questions of interpretation pertaining to the *mens rea* of genocide, which so far have not been thoroughly dealt with by any other international jurisdiction.[66] It is not unlikely that the ICTY's contribution in this field will help not only ascertain but also develop customary international law in relation to the definition and scope of genocide.

The ICTY's case-law has already clarified the level of intent required in the crime of genocide. The three other aspects of the genocidal intent, however, still remain unclear. How to define the groups protected by the Genocide Convention? Is the destruction referred to in the Genocide Convention only physical and biological or is it broader? What does an intention to partially destroy a group as such mean? The scope of the crime of genocide is dependant on the answer given to these questions. The *Krstić* Trial Judgment of 2 August 2001 is so far the only ICTY judgment that proposes an answer to these three questions after a careful analysis of all four aspects of the genocidal intent. Yet, and as we have seen, its conclusions are not always consistent with the interpretation adopted in other judgments. As was pointed out at the beginning of this article, the Appeals Chamber still has to rule on the matter and the interpretations proposed, particularly in the *Krstić* Trial Judgment,[67] are likely to be reconsidered on appeal.

[63] Para 594. [64] Para 595. [65] Para 595. See also para 634.

[66] The case brought by Bosnia and Hezegovina before the ICJ against the Federal Republic of Yugoslavia is still pending.

[67] General Krstić has lodged an appeal against the Trial Judgment rendered on 2 Aug 2001, notably on the ground that the Trial Chamber erred in finding the accused guilty of genocide. Defence Appeal Brief, 10 Jan 2002.

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To determine the meaning of the genocidal intent under customary international law is undoubtedly one of the most difficult tasks put before the ICTY. There are two main reasons for this. First, the four aspects of the genocidal intent analysed in this article are linked. Any interpretation of one aspect impacts upon the interpretation to be given to the other aspects and one cannot interpret one of them without considering the consequences for the others. Second, genocide presents common features with, yet is distinct from, other crimes covered in the ICTY Statute, particularly persecution and extermination. The ICTY must take due account of the principle of effectiveness when interpreting the crime of genocide and verify that the definition of this crime does not entirely overlap with other crimes enshrined in the ICTY Statute. Such a task is complicated by the fact that none of these three crimes have a crystal-clear definition under customary international law but, on the contrary, are historically linked, if not mingled, to cover one single reality.

The Appeals Chamber of the ICTY, in considering the genocidal intent, will thus have a very difficult task, but also a unique opportunity to not only clarify the scope of genocide, but also, applying the principle of effectiveness, to properly delineate the originally intertwined notions of persecution, extermination and genocide. Surely, the international judge will here feel how fine the line between applying and creating law can be.

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* Legal Officer, ICTY Chambers. The opinions expressed in this article are solely those of the author and do not necessarily reflect those of the United Nations or ICTY.

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