Chapter 10
The ICTY: Defining Genocide Down

Following the humanitarian bombing of Yugoslavia, NATO badly needed vindication, justification for having dispensed with the legal niceties of U.N. authorization. What better way to show the justness of NATO's cause than a massive, symbolic trial of its chief adversary? The propaganda blitz of 1999 would thus receive the post facto imprimatur of a court resplendent with the sort of legal paraphernalia that is sure to impress the public: solemn judges, fancy robes, headphones, multilingual interpretations, arcane discussions concerning legal procedure, an abject defendant encased in a glass booth, a procession of sobbing victims. "The apprehension and trial of Milosevic, the person most responsible for atrocities in both Kosovo and Bosnia, is critical to achieving lasting peace in the Balkans," wrote Michael Scharf.[1]

Salivating at the prospect of a triumphant re-run of Nuremburg, NATO couldn't wait to get its hands on Yugoslavia's president. Following Milosevic's defeat in the September 2000 presidential election and the Western-supported armed putsch that came a few days later, the NATO powers made clear to Yugoslavia's new leaders that there would be no economic assistance or normalization of relations until Milosevic was at The Hague. On March 30, 2001, the Belgrade authorities arrested Milosevic, ostensibly on charges of financial malfeasance. Their reward was a $50 million aid package from Washington and a warning that not one penny more would be forthcoming until Milosevic was safely behind bars at The Hague. On June 28, 2001, NATO got its wish. In violation of an order issued earlier in the day by Yugoslavia's constitutional court, Belgrade's new rulers permitted NATO to seize Milosevic and take him to The Hague. The next tranche of financial assistance was in the mail.

At this stage, the charges against Milosevic were relatively minor. The May 1999 Kosovo indictment referred only to 340 deaths (fewer than NATO's own estimate of the deaths caused by its bombing), scarcely enough for a reprise of the Eichmann trial, let alone Nuremburg. Moreover, with the sole exception of Racak, all of the killings attributed to Milosevic took place after NATO's attack. Consequently, a conviction for these crimes would still not justify NATO's pre-emptive attack. Western leaders needed the ICTY to demonstrate that it was on account of Milosevic's well-known propensity for genocide that NATO had been forced to launch an aggressive war.

It was no surprise, therefore, when, within days of Milosevic's arrival at The Hague, the ICTY began dropping hints that it was preparing fresh charges, including genocide, against him. Genocide, which had not featured at Nuremburg, is the pride and glory of the U.N. tribunals. The ICTR, which had come into existence more than a year after the ICTY, had beaten the latter to the punch. On May 1, 1998, a former prime minister of Rwanda, Jean Kambanda, had pleaded guilty to genocide and had been sentenced to life imprisonment. Later that year, the ICTR became the first court ever to convict anyone of genocide. On Sept. 2, it convicted a former mayor, Jean-Paul Akayesu, of genocide, finding, among other things, that rape and sexual assault could constitute genocide.[2] The

ICTY wasn't going to be left out of the shuffle. Milosevic was the biggest of the big fish, the leader of the Serbs, the evil mastermind behind the wars. If he wasn't charged with—and convicted of—genocide then the ICTY would be deemed a failure. If, as NATO propagandists insisted, the Serbs had committed genocide, then Milosevic had to have been the one directing this genocide.

However, it wasn't in Kosovo that Milosevic had supposedly perpetrated this genocide. The massive NATO-organized exhumations of the pervious year had come up with too few bodies to make the genocide charge stick. The ICTY turned to Bosnia. Having already charged Karadzic and Mladic with genocide, the ICTY decided to extend the charge to Milosevic, one of the signers of the Dayton accords. Since Milosevic had signed on behalf of Mladic and Karadzic—at the behest of the Western powers, to be sure—he had to have shared their genocidal goals.

Genocidal intent

On Nov. 22, 2001, the ICTY issued its genocide indictment against Milosevic. It made for great headlines and provided yet another occasion for humanitarian self-congratulation. But few gave much thought to how this genocide charge could be proven. Genocide requires a high standard of proof. Where was the evidence that Milosevic intended to commit genocide? There was no *Mein Kampf* among Milosevic's publications. He had made no racist speeches; he had made no derogatory comments about other national groups. He had never touted the supposed racial superiority of the Serbs over their neighbors. He had never advocated the creation of Greater Serbia. He had been the champion of multinational Yugoslavia. (Milosevic's Serbia was the most multinational republic in the Balkans.) There were no forces under his command fighting in Bosnia. There was no evidence that Milosevic ever exercised effective control over the Bosnian Serb armed forces. Above all, there was not a scintilla of evidence that Milosevic's Serbia ever pursued a policy of genocide as a matter of state policy.

Exterminating peoples is a very grave crime. An accumulation of wartime atrocities—killings, rape, torture—will not in and of itself constitute genocide. International law stipulates that the crime of genocide is made up of a number of elements, each one of which must be present and each one of which must be proved.

Raphael Lemkin, who coined the term "genocide" and who helped draft the 1948 Genocide Convention, defined it as signifying

> a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide 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.[3]

There has to be a coordinated plan and it has to be directed against the national group as a whole. The Genocide Convention of 1948, states that genocide refers to the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The convention lists as punishable the crimes of: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." The meaning is clear: There has to be "an intent to destroy." And there has to be a target: a "national, ethnical, racial or religious group, as such." In other words, killings are carried out not with a view to winning a war or to inflicting as much pain and suffering as possible. They are carried out with a view to destroying a targeted group. As World Court Judge Milorad Kreca put it in his separate opinion in the Bosnia genocide case,

> To qualify as genocidal, the intention must be aimed at individuals who constitute the group in their collective capacity, the capacity of members of the protected group whose destruction is an incremental step in the realization of the overall objective of destroying the group.

Genocide requires an instigator or, at the very least, a knowing accomplice. Genocide can't be committed inadvertently or through omission. Responsibility has to be direct; it can't come about through negligence or dereliction of duty. The command responsibility theory of liability cannot apply to genocide. Genocide can't be committed through failure to prevent and punish. According to a 1985 U.N. Commission on Human Rights report,

> It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide. An essential condition is provided by the words "as such"…which stipulates that, in order to be characterized as genocide, crimes against a number of individuals must be directed at their collectivity or at them in their collective character or capacity.[4]

To be sure, the authors of that report realized that intent may be hard to prove in the absence of documentary evidence. Consequently, the U.N. report said that a court could "infer the necessary intent from sufficient evidence, and that in certain cases this would include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of his conduct." This sounds like a command responsibility form of liability. It isn't. The report is saying that there may be times when negligence or recklessness are on such a scale that no other interpretation is possible than that the genocide was the willed outcome. In any case, the United Nations did not adopt this report.

In 1996, the International Law Commission presented a report to the United Nations articulating customary international law on genocide. Genocidal acts, according to the ILC report, "are by their very nature conscious, intentional or volitional acts….These are not the type of acts that would normally occur by accident or even as a result of mere negligence….The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act."[5]

In other words, a genocidal state of mind is required for genocide to be committed. This is customary international law. Even Bassiouni's Commission of Experts agreed on this point. In its Final Report, it said,

> It is the element of intent to destroy a designated group in whole or in part, which makes crimes of mass murder and crimes against humanity qualify as genocide. To be genocide within the meaning of the Convention, the crimes against a number of individuals must be directed at their collectivity or at them in their collective character or capacity. This can be deduced from the words 'as such' stated in article II of the Convention.[6]

The World Court affirmed this in its 2007 Bosnia decision in which it denied that Serbia had committed genocide in Bosnia. The court said,

> It is not enough to establish…that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*….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. Something more is required. The acts listed in [the Genocide Convention] 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.[7]

The key issue was the "special or specific intent." As ICJ Judge Milenko Kreca put it in his separate concurring opinion, "In the absence of that intent, whatever the degree of atrocity of an act and however similar it might be to the acts referred to in the Convention, that act can still not be called genocide."

Considerations such as these would play little part in the deliberations of a court that was determined to create new international humanitarian law. On Aug. 2, 2001, one month after Milosevic's transfer to The Hague, the ICTY convicted VRS Drina Corps commander General Radislav Krstic, of genocide relating to the July 1995 attack on Srebrenica, and sentenced him to 46 years in prison. To secure its desperately-sought-after genocide conviction, the ICTY twisted the words of the Genocide Convention out of all recognition. It changed the meaning of "intent"; it changed the meaning of "destroy"; it changed the meaning of "group." But, armed with Krstic decision, the ICTY, through its all-embracing "joint criminal enterprise" conspiracy theory, was now able to extend the genocide charge to Milosevic.

Milosevic had to have been in on this Bosnian Serb-led genocide because, in the words of the ICTY's indictment, he exerted "effective control over elements of the JNA and VJ which participated in the planning, preparation, facilitation and execution of the forcible removal of the majority of non-Serbs….He provided financial, logistical and political support to the VRS….He exercised substantial influence over, and assisted, the political leadership of Republika Srpska." Milosevic, the ICTY also claimed, "participated in the planning and preparation of the take-over of municipalities in Bosnia and Herzegovina and the subsequent forcible removal of the majority of non-Serbs…from those municipalities."

"Effective control," "financial…support," "substantial influence"—this was standard ICTY fare, but not terribly useful for its purposes. The ICTY needed to prove genocidal intent and for that it had to have evidence that Milosevic willed genocide. In any case, the ICTY's claims about "effective control" contradicted the accounts and testimony of Westerners who had been direct participants in the events the ICTY purported to be

adjudicating. Owen, Morillon, MacKenzie, Rose had all expressed skepticism about the extent of Milosevic's control over the leaders of the Bosnian Serb republic. The official Dutch government report on Srebrenica concluded that "While it cannot be denied that Milosevic could exert a certain degree of influence on Mladic, it was unclear how far this went." In 2007, the ICJ had also determined that Belgrade did not issue instructions to, or exercise "effective control" over, the VRS.

The ICTY elided the issue of "effective control" by focusing instead on the gratifyingly nebulous notion of "substantial influence." But even here the ICTY was not acting with any consistency. In early 2001, the ICTY had ruled that "substantial influence" does not suffice to establish the kind of superior-subordinate relationship necessary for a command responsibility conviction. In *Prosecutor v. Delalic*, the ICTY appeals court declared that,

> [S]ubstantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions.

Neither state practice nor judicial authority supports "a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed."[8] The ruling seemed unusual, but not when one took into consideration the identity of the defendant in question. Zejnil Delalic was a commander of the First Tactical Group of the Bosnian Muslim forces. The case involved the notorious Celebici camp, which was run by the Bosnian Muslims. According to prosecutors, at Celebici, "detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment." Delalic coordinated Bosnian Muslim and Bosnian Croat forces in the area and had authority over the Celebici camp. The ICTY trial court duly acquitted Delalic, arguing that that he lacked "sufficient command and control over the Čelebići camp and its guards to found his criminal responsibility as a superior for the crimes" committed in the camp. The ICTY appeals court upheld his acquittal.

"The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates," the *Delalic* trial and appeals courts had both asserted.[9] For command responsibility to be applicable, "it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences." *Material ability to prevent and punish*! If the ICTY were serious about this, it would have had to abandon its genocide case against Milosevic. Whatever influence Milosevic may at one time or another have had over Radovan Karadzic or Ratko Mladic and whatever financial or logistical support he may have provided, it was ludicrous to suggest that Milosevic ever had the material ability to prevent and punish crimes committed by forces that were not under his command. Thus, by charging Milosevic with responsibility for possible crimes committed by the Bosnian Serb forces, including the gravest crime of all, the ICTY was not only flouting international criminal law, common sense and the testimony of disinterested outsiders but dicta that it had itself issued a few months earlier.

However, as Scharf had cheerfully admitted, the ICTY was not in the truth-seeking business. "In creating the Yugoslavia tribunal statute," he explained, the U.N. Security Council set three objectives:

> [F]irst, to educate the Serbian people, who were long misled by Milosevic's propaganda, about the acts of aggression, war crimes and crimes against humanity committed by his regime; second, to facilitate national reconciliation by pinning prime responsibility on Milosevic and other top leaders and disclosing the ways in which the Milosevic regime had induced ordinary Serbs to commit atrocities; and third, to promote political catharsis while enabling Serbia's newly elected leaders to distance themselves from the repressive policies of the past. [10]

In other words, the ICTY was created in order to prove what NATO desperately wanted proven: The Serbs were to blame for the wars. The Serbs alone committed genocide. All Serbs everywhere took their marching orders from Slobodan Milosevic.

The ICTY has followed this script diligently. If Milosevic's guilt couldn't be established directly, the ICTY went the indirect route. Milosevic was responsible for genocide, the Nov. 22 indictment claimed, through his control and manipulation of "Serbian state-run media." The media followed Milosevic's orders and "spread exaggerated and false messages of ethnically based attacks by Bosnian Muslims and Croats against Serb people intended to create an atmosphere of fear and hatred among Serbs living in Serbia, Croatia and Bosnia and Herzegovina which contributed to the forcible removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of Bosnia and Herzegovina." The Serbs were collectively guilty. Yet they were also innocent since they had committed their crimes while in thrall to "Milosevic's propaganda." The ICTY could thus assert collective guilt—something the international justice brigade had promised it would not do—but punish only the individuals who had misled the befuddled Serb masses.

The attempt to square the circle ran into problems right away. First, the ICTY needed to prove, rather than to assume, that the stories the Serbian state-run media ran were "exaggerated and false." Second, if the stories were indeed "exaggerated and false," then the ICTY needed to prove that they were known to be "exaggerated and false" and were disseminated with a view to encouraging the forcible removal of non-Serbs. The ICTY would also need to establish that forcible removal amounted to, or at least inevitably led to, genocide. For good measure, the ICTY would need to prove, rather than simply take for granted, that the only media that mattered in Yugoslavia were "Serbian state-run media." "Serbian state-run media" referred to television. However, most newspapers and magazines in Serbia during the 1990s were not under Milosevic's control; indeed they were openly very hostile to Milosevic.

It is interesting to note that only Serbs have been accused of spreading "exaggerated and false messages of ethnically based attacks…intended to create an atmosphere of fear and hatred."[11] The ICTY has never charged non-Serbs with creating an atmosphere of fear and hatred by spreading false and exaggerated stories about Serbs. Yet a number of possible indictees spring to mind. Kofi Annan spoke of "hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers' eyes"—all at the hands of the Serbs. Rudolf Scharping claimed Serbs were forcing children to

"watch their teachers being assassinated." Blair said Serbs were engaging in "racial genocide" in Kosovo.

For the better part of 10 years, the Western media lived on a steady diet of made-up stories of Serb concentration camps and rape camps, of Serbs playing football with severed heads, of Serbs executing 100,000 men, of Serbs mutilating bodies at Racak, of Serbs forcing "a man to cut open his grandson's stomach and eat part of his liver"[12] (this entirely unlikely story came from the mouth of one of the ICTY's own employees, Judge Riad, one of the trial judges in the Krstic case). Without question, these false stories incited hatred toward the Serbs and led to crimes against Serbs, chief among them NATO's 11-week bombing campaign. The ICTY either believed these allegations to be true or pardonable exaggerations—they are the sorts of things the Serbs would have done if given the chance to do so. Or perhaps the Serbs actually did do those things, but the evidence had yet to be discovered.

The Krstic decision

The ICTY was clearly very proud of the reasoning by which it arrived at its Aug. 2, 2001, genocide conviction of Radislav Krstic. Heaping praise upon itself, the court began its judgment by misquoting Hegel and went on with mellifluous, self-congratulatory phrases: "doing its duty in meting out justice," "creating a better world," "meticulous analysis" and "scrupulous examination." Not only that, the court had been "particularly vigilant" about keeping "the necessary distance for carrying out its work of justice with the requisite calm and as objectively as possible."[13] Needless to say, these laudatory words made their way into awed media accounts of this "historic" ruling.

After all the self-congratulation, the abysmal reasoning of the judgment comes as a bit of a shock. Extraordinarily, the court couldn't even come up with a coherent account of what it believed had happened at Srebrenica. At times, the Krstic judgment suggested that the Bosnian Serbs took 7,000 or 8,000 men out of the town and executed them in cold blood. "The forensic evidence supports the Prosecution's claim that, following the take-over of Srebrenica, thousands of Bosnian Muslim men were summarily executed and consigned to mass graves," the court announced. "7,000 to 8,000 Bosnian Muslim men and boys were executed in the most cruel manner." Fine: This is the commonly-held view of what happened at Srebrenica, one that the ICTY has done much to foster.

At other times, however, the Krstic judgment suggested that the Muslim men were killed while they were seeking to reach Bosnian Muslim lines. In other words, they were killed while undertaking a military operation, namely, a strategic retreat—a very different proposition entirely. Srebrenica's military-aged men, the court explained, "decided to flee through the woods towards Tuzla much further to the north in territory under Bosnian Muslim control. About ten to fifteen thousand men formed a column several kilometres long and left on foot through the woods." At the head and at the rear of the column was the 28th Division of the Bosnian Muslim army. "About one-third was able to get through, including 3,000 men of the 28th Division," the judges said. "The first of these arrived in Bosnian Muslim controlled territory on 16 July. The others, subjected to shelling and

automatic weapons fire, were captured or surrendered…. In all, 7 to 8,000 men were captured by the Serbian forces. Almost all of them were killed." "About ten to fifteen thousand men," [a]bout one-third"—the vagueness of these numbers contrasts starkly with the pinpoint—and unchanging—precision of the number of men the Serbs had supposedly executed at Srebrenica.

This retreat to Tuzla story contradicts the more popular story. If the fleeing Muslim men, armed members of the 28th Division, were subjected to shelling and automatic weapons fire, how could they have been "summarily executed"? How could the court be sure that the men who didn't reach Tuzla were either captured or surrendered and killed afterward? How could the court know that no one was killed in combat? More important, how was the ICTY able to determine that armed military-aged men are civilians? A retreating army is redeploying; it is not a refugee convoy. The Bosnian Serbs were under no obligation to help Muslim forces to redeploy. Killing Muslim fighters while they are fleeing is not genocide; it is not even a war crime. As the Krstic court acknowledged, the Muslim armed forces had refused to surrender. Mladic had "demanded that the ABiH lay down its weapons," and had promised Srebrenica town leaders that "he would organize the transport of the population." By refusing to surrender, the Bosnian Muslim men became a legitimate military target. Yet the ICTY has continued to insist that the attack on the column constituted an attack on civilians. In its 2010 Srebrenica judgment, it declared:

> The same conditions that prompted the women, children, and the elderly to flee to Potocari, including the catastrophic humanitarian situation due to the restrictions of humanitarian aid and the military attack against the enclave, similarly compelled the formation of the column and the departure of the men. It therefore also formed an intrinsic part of the widespread and systematic attack against the civilian population. In the case of the military component of the column, albeit their flight with the column has not been found to constitute a part of the forcible transfer, the Trial Chamber finds it was undoubtedly the direct consequence of the military assault on the enclave by the VRS, which in and of itself constituted a widespread and systematic attack against a civilian population.[14]

The circular argument seems to runs like this: The Bosnian Muslim armed forces fled in terror in the face of a Serb armed attack against a civilian target. Therefore, firing on retreating Muslim armed forces constituted an attack against civilians.

The ICTY's problem had been foreshadowed by the August 1995 report on Srebrenica written by the Special Rapporteur of the Commission on Human Rights. The report said, "Attacks against combatants are permitted in the course of normal warfare. This poses a problem in the situation in question as the initial column and subsequent splinter groups were comprised of a mixture of civilians and combatants. Thus it would be necessary to determine on a case-by-case basis whether each individual attack on a particular group constitutes a violation of international humanitarian law."[15]

Not only that, international war crimes law specifically prohibits armies from using civilians as shields. Article 51 (7) of the 1977 Protocol Additional to the Geneva Conventions says,

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor

> or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

By including civilian refugees within a retreating armed column, whether to prevent Serb attacks or to cause a humanitarian disaster in order to provoke NATO into action, the Muslims had violated international humanitarian law.

Thoroughly confusing issues, the Krstic court jumped from one version of Srebrenica to the other as necessity dictated. High emotion was more important than getting facts straight or numbers to add up.

The court's arithmetic was as shaky as its reasoning: At one point, the court claimed that about one-third of the column "was able to get through, including 3,000 men of the 28th Division." However, the court also said that "On 16 July 1995, Lieutenant Colonel Vinko Pandurevic, the Commander of the Zvornik Brigade, reported that, in view of the enormous pressure on his Brigade, he had taken a unilateral decision to open up a corridor to allow about 5,000 unarmed members of the Bosnian Muslim column to pass through."[16]

So, 3,000 men of the 28th Division got through, plus 5,000 unarmed men were allowed through. That already comes to 8,000. Recall that the Krstic court repeatedly refers to retreating Bosnian Muslim column as comprising "between 10,000 and 15,000 men." If the column was 10,000 strong, then only 2,000 would remain unaccounted for. If it were 15,000 strong, 7,000 would remain unaccounted for. Either way, it is hard to see how the court could come up with the 7 to 8,000 executed Muslim men number. The court had already acknowledged that there were very few military-aged men among the 25,000 civilians who crowded into the U.N. compound at Potocari.

Even more baffling was the Krstic court's assertion that "Overall…as many as 8,000 to 10,000 men from the Muslim column of 10,000 to 15,000 men were eventually reported as missing."[17] The court here was probably referring to the International Committee of the Red Cross' press release from September 1995, in which it disclosed that it had

> received over 10,000 requests for family news from civilians who were transferred to Tuzla in central Bosnia. About 2,000 of these requests were from different family members seeking the same individuals. An in-depth analysis has shown that the remaining 8,000 requests fall into two categories: about 5,000 concern individuals who apparently fled the enclave before it fell, while the remaining 3,000 relate to persons reportedly arrested by the Bosnian Serb forces.[18]

This release from the Red Cross was to cause an enormous amount of confusion, leading to immediate claims that 8,000 Srebrenica men had been killed.

An inability to come up with a coherent Srebrenica narrative was only the start of the Krstic court's problems. The ICTY wanted a genocide conviction very badly. However, the forensic evidence unearthed by the Srebrenica investigators failed to indicate anything remotely resembling genocide. According to the Krstic court, "the experts were able to conservatively estimate that a minimum of 2,028 separate bodies were exhumed from the mass-graves. Identity documents and belongings, found in most of the exhumed graves, suggest that the victims were linked with Srebrenica."[19] This 2,028 number was

well short of 7 to 8,000. The numbers were still falling well short of the desired total by the time ICTY forensic investigator Dean Manning came to testify in the Milosevic trial. On Jan. 26, 2004, Manning estimated that "the number of bodies located within the exhumed graves conducted by the ICTY" was 2,570. Now, the region had been the scene of fairly intense fighting for more than three years. Serbs had killed Muslims. But Muslims had also killed Serbs. Many bodies had to have been buried there—and in mass graves. There was no time for individual burials, certainly not during the summer when bodies decompose very quickly. Serbs and Muslims are physically indistinguishable from one another.

How was the Krstic court able then to conclude that all of the exhumed bodies were Muslims from Srebrenica? Indeed, how could it determine that the bodies were those of Muslims, rather than Serbs? "[A]rtefacts found at the majority of the gravesites, such as verses from the Koran, suggest the presence of victims with Muslim religious affiliation," the Krstic court explained. The presence of verses from the Koran was a little surprising. For years, Western commentators had urged their governments to support the Bosnian Muslims on the ground that here were Muslims who were entirely secular. Now, apparently their most personal belongings consisted of verses from the Koran. Be that as it may, the court made no mention of how many such verses from the Koran were found or what other kinds of artifacts were taken to be evidence of buried Muslims. The court also adopted a curiously reticent tone: The presence of "victims with Muslim religious affiliation" was only suggested.

As for how they died, forensic evidence showed that the "overwhelming majority of victims located in the graves" died of gunshot wounds. No surprise there. However, the court concluded that "the majority of bodies exhumed were not killed in combat; they were killed in mass executions." How was it able to determine that? Investigators had discovered 448 blindfolds and 423 ligatures. These numbers have remained remarkably consistent. In its June 2010 Srebrenica judgment, the ICTY referred to 448 blindfolds and 413 ligatures.[20] Blindfolds and ligatures "are inconsistent with combat casualties." The term "majority" sounds strange. What does it mean? 51%? 75%? 90%? It is hard to see how 448 blindfolds and 423 ligatures would allow anyone to conclude that the majority of 2,028 exhumed bodies comprised execution victims. And how does one go from 448 to 7 to 8,000? Incidentally, the ICTY was guilty of double-counting here since a number of the exhumed corpses had both blindfolds and ligatures. According to forensic expert Ljubisa Simic,

> The total number of cases (or purported bodies) with blindfolds and/or ligatures is, by our count, 442….Some had only blindfolds, others had only ligatures, but many had both. Thus there was much overlap between the two groups. However, this is not mentioned anywhere in the judgment nor is there the slightest allusion to the fact that in a significant number of cases the same individuals may have had a blindfold and a ligature.[21]

Indeed, the court undermined its claim that the presence of ligatures and blindfolds proved that the majority were executed by explaining that

> at those sites where no blindfolds or ligatures were found during exhumations, the evidence that the victims were not killed in combat was less compelling. Significantly, some of the gravesites located in the Nova Kasaba and Konjevic

> Polje area, where intense fighting took place between the Bosnian Serb and Bosnian Muslim forces, on 12 and 13 July 1995, were amongst those where very few blindfolds and ligatures were uncovered.

Intense fighting took place! So now we're not talking about execution victims. July 12 and 13 weren't the only days on which heavy fighting took place. On July 15, according to the Krstic court, the Zvornik Brigade had notified Drina Corps Command of "heavy combat with the Bosnian Muslim column, as well as the actions of Bosnian Muslim forces who were attacking the front line in an effort to assist the column in breaking through." On July 16, Pandurevic, the commander of the Zvornik Brigade, "reported that, in view of the enormous pressure on his Brigade, he had taken a unilateral decision to open up a corridor to allow about 5,000 unarmed members of the Bosnian Muslim column to pass through."[22] Unarmed, of course—this after all that heavy fighting!

Yet, in a fine demonstration of its "meticulous analysis," the court happily concluded that, "Although the Trial Chamber cannot dismiss the possibility that some of the exhumed bodies were killed in combat, it accepts that the majority of the victims were executed."

The Krstic court had blithely discounted the evidence it had heard. On the basis of several hundred blindfolds and ligatures, the judges announced that

> It has been established beyond all reasonable doubt that Bosnian Muslim men residing in the enclave were murdered, in mass executions or individually….Bosnian Serb forces executed several thousand Bosnian Muslim men. The total number is likely to be within the range of 7,000-8,000 men.

Beyond all reasonable doubt! The claim sounded impressive, but there was very little to justify it.

In the absence of forensic evidence, what was the basis of the claim that the Serbs had executed 7,000 to 8,000 men? It goes back to the assertions made by the Bosnian Muslim government in July 1995 that 8,000 men from Srebrenica remained unaccounted for. Subsequently, the men were deemed missing, presumed dead. Then they were deemed dead. Finally, they were deemed to have been executed. This progression, all in a matter of months was quite extraordinary. How was it possible to be so definitive about these numbers when no one even knew the size of Srebrenica's population at the time of the attack? Estimates ranged from 35,000 to 42,000. The ICTY was even unsure whether the number of men in the column that set out from Srebrenica to Tuzla was 10,000 or 15,000.

The Krstic court wasn't on any more solid ground when it came to witnesses. Though the ICTY prides itself, as Judge Patricia M. Wald has explained, on "lavish use of witness testimony," the Krstic court was strikingly short of eyewitnesses. Wald, one of the three Krstic trial judges and a long-time judge on the U.S. Circuit Court of Appeals for the District of Columbia (second only to the U.S. Supreme Court in importance), explained the lack of witnesses as a consequence of the effectiveness of the massacres—"only one or two victims survived. Sometimes, despite extensive rumors of executions, there were no survivors at all and therefore no witnesses."[23] Extraordinary efficiency from people who a little more than three years later at Racak absent-mindedly left the bodies of 43 executed civilians lying around for the KLA and NATO observers to stumble upon the next day.

However, the ICTY didn't give up on witnesses entirely. It claimed to have at its disposal the testimony of a man who was not simply an eyewitness but an active participant in the executions. Drazen Erdemovic, a Bosnian Croat who served, successively, in the Yugoslav People's Army (JNA), Alija Izetbegovic's ABiH, the Croatian HVO and, finally, in the army of the Republika Srpska, recounted for the ICTY a horrific tale of mass murder. According to his story, he and seven or so members of the unit to which he belonged, the 10th Sabotage Detachment, were ordered by an unidentified VRS lieutenant colonel to go to Branjevo military farm, near Pilica, to execute Muslim prisoners of war. At the farm, over a period of about five hours, Erdemovic and members of his unit, a number of whom were Croats and Slovenes, shot in cold blood some 1,200 unarmed Muslims bussed in from Srebrenica. Erdemovic claimed to have personally executed between 70 and 100 men.

In February 1996, the Serbian authorities arrested Erdemovic and, surprisingly, transferred him swiftly to The Hague. ICTY prosecutors kept him under wraps, allowing only a few stage-managed appearances during which he was protected from serious cross-examination. On May 22, 1996, the ICTY indicted him for crimes against humanity, though not genocide. On May 31, he pleaded guilty to one crime against humanity. On June 27, a commission of experts concluded that Erdemovic's mental condition did not permit his standing trial. However, a few days afterward, on July 5, Erdemovic was happily testifying in Rule 61 hearings against Karadzic and Mladic. Using Erdemovic's testimony, the ICTY, on July 11, issued international arrest warrants against Karadzic and Mladic.

On Nov. 29, 1996, the ICTY sentenced Erdemovic to 10 years' imprisonment—a remarkably lenient sentence for a court that cheerfully doles out decades' long terms for much less grave crimes. In 1998, Goran Jelisic pleaded guilty to violations of the laws or customs of war and crimes against humanity arising from the murder of 12 people in Brcko in 1992; he was sentenced to 40 years in prison.[24]

The ICTY's generosity didn't satisfy Erdemovic. The supposedly contrite mass executioner appealed, claiming that his offences had been committed under duress and "without the possibility of another moral choice." The prosecutors agreed. On Jan. 14, 1998, the trial court reconvened, and Erdemovic, with the consent of the prosecutors, withdrew his guilty plea to crime against humanity and, instead, pleaded guilty to the lesser crime of violation of the laws or customs of war. The prosecutors urged the court to show leniency to Erdemovic, arguing that he had provided very significant cooperation. The judges obliged and reduced Erdemovic's sentence to five years. As it turned out, he only served 3 ½ years.

The ICTY's extraordinary show of compassion was not the strangest aspect of the case. More bizarre has been its reluctance to conduct any kind of a serious investigation into what may have happened at Branjevo farm. There were gaping holes in Erdemovic's story, yet neither prosecutors nor judges nor, shockingly, defense attorneys have made the slightest attempt to challenge Erdemovic's claims. It was bad enough that Erdemovic

had offered contradictory accounts of what happened at Branjevo farm: Erdemovic often got dates mixed up (sometimes the killings were carried out on July 16, sometimes on July 20); sometimes he had the drivers of the buses who brought the men to Branjevo taking part in the killings, sometimes he had them believing that they were simply facilitating a prisoner exchange; sometimes Erdemovic claimed that he had taken part in the executions because he was afraid for his life, sometimes he claimed that he had refused to carry out orders, yet suffered no adverse consequences. Erdemovic also failed to offer a plausible account of how eight men, armed only with Kalashnikovs, could kill 1200 men in five hours.

Not least of Erdemovic's unlikely claims was his assertion that the leader of the execution squad was one Brano Gojkovic, a mere private. However, according to Erdemovic, one member of the execution squad taking orders from Gojkovic was Franc Kos, who was a lieutenant. This made absolutely no sense and cried out for explanation. There is no army in the world in which a private issues orders to an officer. Yet the judges chose not to probe the matter.

Erdemovic also claimed that his unit had been paid lavishly to carry out the killings. To ABC's Vanessa Vasic-Janekovic, he had claimed that his unit had been promised 12 kilograms of gold.[25] However, he could not say who promised this or whether payment was ever made. The 12 kilograms of gold story was of course at odds with Erdemovic's claim that he had taken part in the killings only because he was afraid for his life. The ICTY wasn't interested in pursuing the gold story. Understandably so. It didn't want to hear anything that appeared to suggest that the 10th Sabotage Detachment may have been a mercenary group for hire, operating outside of normal Bosnian Serb command and control channels.

Not only has the ICTY demonstrated an extraordinary lack of curiosity about the event often described as Europe's worst atrocity since World War II, it has shown no interest in prosecuting any other member of the 10th Sabotage Detachment, even anyone actually named by Erdemovic as having taken part in the killings. Many of these men have been living openly for years, yet the ICTY has made no effort to have them arrested or, more astonishingly, to call them as witnesses in any of the Srebrenica trials. Instead, the ICTY has relied wholly on Erdemovic, who traipses in and out of court, testifying in one trial after another. Even when the ICTY had within its grasp two of Erdemovic's named co-killers, it elected not to take them into custody. Evidently, the narrative it had constructed out of one man's testimony is too politically useful to require any corroboration. Or, rather, it is too politically useful to risk challenge.

There was first the commander of the 10th Sabotage Detachment—Milorad Pelemis. In 2000, the Serbian authorities arrested Pelemis and charged him with spying for France. In November 2000, one month after the coup against Milosevic, Pelemis was acquitted on all charges. At no time during his imprisonment did the ICTY seek to extradite Pelemis, or even to interview him. The ICTY's lack of interest was remarkable. Pelemis, who had seniority over Erdemovic, would surely have provided plenty of additional details and named names. Since 2000, he has lived openly in Belgrade untroubled by ICTY

investigators. Other than a reporter for *Newsday* (New York) in 2006, no journalist has bothered to seek him out to find out about Srebrenica.[26]

Also neglected by the ICTY was one Marko Boskic, another Bosnian Croat member of the 10th Sabotage Detachment. According to Erdemovic, Boskic took part in the Branjevo farm killings. It has been known since 1996 Erdemovic had named Boskic as one of the killers. On Nov. 19, 1996, ICTY "investigator" Jean-Rene Ruez testified,

> The officer in charge of the Unit who ordered the murder…is Lieutenant Pelemis who is in charge of the 10th Sabotage Unit. The members of the execution group who were involved…their names were also given by Mr. Erdemovic; the head of that group being Brano Gojkovic. The other members being Aleksandar Cvetkovic, Marko Boskic, Zoran Goranja, Stanko Savanovic, Vlastimir Golijan, Franc Kos.[27]

Four years later, in 2000, Boskic entered the United States without any trouble at all. In May 1996, the *Boston Globe* even ran an article on Boskic (at that time residing in Bosnia).[28] During his sojourn in the United States, Boskic had repeated run-ins with the law, which led to numerous arrests on charges of drunken driving and serious assault. Finally, in August 2004, he was arrested and charged with having lied on his immigration application, specifically with having failed to disclose that he had been a member of the 10th Sabotage Detachment and a participant in the Branjevo farm massacre. The ICTY announced immediately that it had no interest in seeking Boskic's extradition. A spokesman claimed that the tribunal only had resources to go after the big fish. "We are a small institution with a limited capacity," said Anton Nikiforov, an adviser to Carla del Ponte. "We go after the main players, those who planned and ordered the killings."[29] He didn't explain how the ICTY could go after the "main players" who "planned and ordered the killings" without obtaining first the evidence and testimony of those who actually carried out the killings.

It was left to a Massachusetts federal court in 2006 to convict Boskic on two counts of immigration document fraud and to sentence him to five years in prison.

In April 2010, the United States extradited Boskic—not to The Hague but to Bosnia. On July19, Boskic pleaded guilty to taking part in mass executions at Branjevo farm and was sentenced to 10 years in prison. Like Erdemovic, he received nothing but praise and sympathy from prosecutors and judges. "This is the lowest sentence for such a crime. The tribunal took as a mitigating circumstance the fact that Boskic took part in the crime since he was forced to do so and that he had pleaded guilty," the presiding judge was quoted as saying.[30] The Bosnia State Prosecutor's Office recommended a sentence of five to 10 years. By pleading guilty, it said, "Boskic had provided significant information about the Srebrenica atrocities and about others involved in planning, preparing, ordering and carrying out the execution of captive Srebrenica residents and in removing traces of the crime."[31] Associations of Srebrenica survivors were also said to be satisfied with the leniency shown toward Boskic. They had "consented to the relatively mild punishment recommended, given that the information Boskic is offering can help trace and punish many of those responsible." This was all very strange since the names of those allegedly

responsible had been common knowledge since 1996 and no one had bothered—or indeed bothers—to do anything about it.

Though Erdemovic is the ICTY's star witness, it accepts his testimony only as long as it appears to support the Serb genocide thesis. Whenever Erdemovic says anything that brings the thesis into question, the ICTY discounts it. For example, Erdemovic claimed that his unit was ordered to carry out the executions by a lieutenant colonel from the army of Republika Srpska. There was one drawback: Erdemovic has never been able to identify this lieutenant colonel. Years went by, and the ICTY still couldn't determine who this officer was. A lieutenant colonel couldn't have been that hard to track down. Finally, in June 2010, the ICTY ruled that Erdemovic's lieutenant colonel was none other than defendant Vujadin Popovic, whom it convicted of genocide and sent away for life. The Popovic judgment mentioned Erdemovic's name 66 times—an extraordinary level of dependence on one man, someone whose claims to this day remain uncorroborated.

The Popovic court had a major problem though. Erdemovic had failed to identify Popovic as the lieutenant colonel. With typical dishonesty, the ICTY accepted everything Erdemovic said but discounted his inability to identify Popovic. "There is no evidence before the Trial Chamber of any other Lieutenant Colonel in Pilica at this time," the court announced in its June 10 judgment. "In light of this, the Trial Chamber is satisfied that there is no other reasonable conclusion available on the evidence but that the Lieutenant Colonel whom Erdemovic saw at Branjevo Military Farm and in Pilica town on 16 July was Popovic."

But maybe Erdemovic was wrong or had lied about the lieutenant colonel? And why had he failed to identify him? "The Trial Chamber has carefully considered the fact that Erdemovic was unable to identify Popovic in a photo line up. However, the Trial Chamber considers that given the traumatic circumstances in which Erdemovic met Popovic and the significant passage of time since then, Erdemovic's failure to identify Popovic in a photo line up does not raise a reasonable doubt as to the Trial Chamber's conclusion that the man whom Erdemovic saw at Pilica on 16 July was, in fact, Popovic."[32] *Does not raise a reasonable doubt*? What exactly would raise a reasonable doubt at the ICTY? The only evidence linking Popovic to the alleged Branjevo farm killings is Erdemovic's eyewitness testimony. But this same eyewitness testimony can be ignored if it fails to deliver the desired results. Moreover, the passage of time is neither here nor there. Since 1996, Erdemovic had been repeatedly shown photos and video footage of just about everybody who could have been that lieutenant colonel. Not once has Erdemovic been able to identify anyone. Also, if the passage of time renders eyewitness testimony unreliable, then the ICTY really should not be in the business of holding trials concerning events that took place nearly two decades ago.

Erdemovic's testimony, even if true, would still not suffice to sustain a genocide conviction. He was too vague about details and unable to point a finger at anyone more senior than a lieutenant. So the Krstic court decided to go beyond Erdemovic's claims whenever needs dictated. For example, the Krstic court declared that Erdemovic had

testified that two Drina Corps brigades, the Zvornik and Bratunac brigades, had taken part in the massacre.

The Zvornik Brigade had to have been involved in the executions, the court explained, because Erdemovic had testified that members of his unit met the Bosnian Serb lieutenant colonel directing the executions at Zvornik Brigade headquarters. But Erdemovic had said no such thing. He only said that his unit had gone to Zvornik to pick up this (unnamed) army officer. Erdemovic had made no mention of Zvornik brigade headquarters. The same went for the court's Bratunac Brigade claim. Relying entirely on Erdemovic, the court said that "members of the Bratunac Brigade arrived at Branjevo Farm during the course of the afternoon on 16 July 1995 and participated in the killings."[33] But Erdemovic had not referred to the Bratunac Brigade. To the contrary, throughout his testimony, he referred to "the men from Bratunac" or the "people from Bratunac." That locals rather than the military may have carried out the killings would support the testimony of Morillon, who spoke of his long-standing fear that the Serbs of Bratunac would one day take revenge against Oric's men in Srebrenica:

> I feared that the Serbs, the local Serbs, the Serbs of Bratunac, these militiamen, they wanted to take their revenge for everything that they attributed to Naser Oric. It wasn't just Naser Oric that they wanted to revenge, take their revenge on, they wanted to revenge their dead on Orthodox Christmas. They were in this hellish circle of revenge. It was more than revenge that animated them all. Not only the men. The women, the entire population was imbued with this. It wasn't the sickness of fear that had infected the entire population of Bosnia-Herzegovina, the fear of being dominated, of being eliminated, it was pure hatred.[34]

Erdemovic pointedly avoided saying "Bratunac Brigade." During cross-examination, Krstic's counsel had asked Erdemovic whether these so-called men from Bratunac had specified the unit to which they belonged. Erdemovic responded vaguely: "I don't know exactly whether they were from Bratunac, nor did I talk to them." Krstic's counsel persisted: "So it was not stated that members of such and such a brigade were coming, but simply men from Bratunac," Erdemovic replied, "Yes."[35] In the face of such prevarication, the *Krstic* court's categorical assertions—"beyond all reasonable doubt," no less—about the supposed involvement of the Bratunac and Zvornik brigades in the executions hardly exemplified "scrupulous examination" or "careful weighing" of the evidence.

Ad hoc genocide

The ICTY wanted very badly to reach a genocide judgment, but the material it had to hand was rather flimsy. Genocide, in the words of the Genocide Convention of 1948, refers to the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." (Article 4 of the ICTY Statute follows the Genocide Convention, almost word-for-word.) Genocide thus requires, first, the "intent to destroy," and, second, a purported group of victims constituting a clearly-defined "national, ethnical, racial or religious group."

The ICTY was in trouble right away. There was no evidence of an "intent to destroy" any group, other than perhaps the Muslims 28th Division, on the part of the Bosnian Serbs.

Even if the ICTY were right and the Serbs had executed 8,000 "male Muslim prisoners," in cold blood, that would still count as a horrific wartime atrocity, not genocide. During the Bosnian war all sides regarded males, whether they were wearing military uniforms or not, as fair game. According to Francis Roy Thomas, a senior U.N. military observer in Bosnia through 1993 and 1994, "One of the local 'realities' worth noting that on both sides, all males were considered to be soldiers whether or not they were wearing a uniform at the time they were shot. It was thus not a case of 'wanton killing of civilians' if a man were involved."[36]

Most damaging to a genocide finding, there was no evidence that, prior to the capture of the town, the Bosnian Serbs had intended to kill the town's military-aged men. The Krstic court itself said that it is "not stating, nor does it wish to suggest, that a plan to commit genocide existed prior to the attack on Srebrenica or even right before the city fell." Moreover, as the court acknowledged, the Bosnian Serb forces had not even planned to capture the town. The Bosnian Serb plan "was aimed at reducing the 'safe area' of Srebrenica to its urban core and was a step towards the larger VRS goal of plunging the Bosnian Muslim population into humanitarian crisis and, ultimately, eliminating the enclave."[37]

Reducing Srebrenica to its urban core made military and political sense. Fighting off Muslim incursions from Srebrenica was diverting Serb resources at a time when the Serbs were under attack around Sarajevo and in western Bosnia. In addition, since the Muslims did not dispute that the 1993 Mladic-Morillon-Halilovic agreements had envisaged the demilitarization of Srebrenica's urban core, reduction of the town to its urban core would end the argument about how those agreements were to be interpreted.

The Bosnian Serbs entered Srebrenica but found, to their surprise, that the 28th Division had withdrawn. With the town undefended, they did what any army would do: they took over the town. The VRS military plan, the Krstic court admitted, "certainly did not include a VRS scheme to bus the Bosnian Muslim civilian population out of the enclave, nor to execute all the military aged Bosnian Muslim men."[38]

Despite the Krstic court's valiant effort to massage the evidence in order to make it support the desired conclusions, there simply wasn't enough material on the record to indicate that, even after the fall of the town, the Serbs sought the removal of its Muslim population. The Serbs wanted to capture and destroy the Muslims' 28th Division. But they did not order Srebrenica's civilian population to leave. The Krstic court tried to make it appear otherwise. In its judgment, the trial court claimed that Mladic had made it clear to DutchBat and Srebrenica's town leaders that Srebrenica's Muslims had two choices: they could either leave or face extinction. The court acknowledged that during the July 11 meeting at the Hotel Fontana in Bratunac, Mladic had "said that the population had to choose whether to stay or, if they were not staying, where to go." However, Mladic had "used threatening language" and had "demanded that all ABiH troops within the area of the former enclave lay down their arms." He also "made it clear that, if this did not happen, the survival of the Bosnian Muslim population would be in danger. General Mladic said he wanted a clear position on whether the Bosnian Muslims wanted to

'survive, stay, or disappear.' " The court concluded, "To those present at the meeting that night it seemed clear that staying would not be an option for the Bosnian Muslim civilians of Srebrenica."[39]

Furthermore, the Krstic court explained, on the following morning Mladic spelled out the Muslims' situation in even direr terms. "General Mladic again made it clear that survival of the Srebrenica Muslims was conditional upon a military surrender." According to the court, Mladic said

> you can either survive or disappear…For your survival, I request: that all your armed men who attacked and committed crimes—and many did—against our people, hand over their weapons to the Army of the Republika Srpska…on handing over weapons you may…choose to stay in the territory….or, if it suits you, go where you want. The wish of every individual will be observed, no matter how many of you there are.

According to the ICTY, these comments prove that Mladic was blackmailing the civilians: either disclosure of the whereabouts of the 28th Division or extinction. By interpreting Mladic's words in this way the Krstic sought to establish Serb genocidal intent. In typical ICTY fashion though, the court elided the key issue. Did Mladic mean that Srebrenica's Muslims would all be killed? Or did he mean that they would all have to leave the town. Or did he mean that if the Muslim men who had fled the town refuse to surrender then they would all be killed since the odds were so heavily stacked against them? These are critical questions, particularly if you are trying to prove genocidal intent.

So what did Mladic say? According to the transcript accompanying the Srebrenica video in the ICTY Legal Library, this is what Mladic said at the third Fontana meeting:

> I want to help you, but I want absolute cooperation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbors. All you have to do is say what you want. As I [said] last night you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes—and many did—against our people, surrender their weapons to the VRS. Upon surrendering the weapons you may choose to stay in the territory or, if you so wish, go wherever you want. The wish of every individual will be observed no matter how many of you there are….The rest of your army can disarm and surrender their weapons to my officers in the presence of UNPROFOR officers. You can choose to stay or you can choose to leave….If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go….It is your choice to leave—and I don't want to influence this—I don't mind anyhow. I have nothing against the innocent and guiltless. You can choose…If you want to go east, across Serbia or to it, I don't mind. If you want to go west, you can say where you want to go.[40]

Mladic's meaning is clear. Srebrenica had been surrendered without a fight. Therefore, the members of the defeated army must give up their weapons. If they fail to do so they would be killed. The 28th Division had disappeared. Mladic wanted to know its whereabouts. Mladic has no problem with the Srebrenica's civilian population. He said several times that anyone who wanted to stay on in Srebrenica could do so.

One person who attended all of the Fontana meetings was Colonel Thomas Karremans, commanding officer of DutchBat. Karremans testified in 1996 in the Rule 61 hearings

against Mladic and Karadzic. Karremans did not testify in the Krstic or Popvic trials, though he did testify in the Blagojevic trial.[41]

According to Karremans' testimony in 1996, Mladic at the first Hotel Fontana meeting had asked "that all Bosnian soldiers should lay down their weapons and deliver those weapons in the hands of the BSA. He said that he had a clear attitude towards the BiH soldiers, survive or disappear." At the second meeting on the following morning, Mladic said more or less the same thing. He again "stated that handing over the weapons by BiH soldiers would mean survival of them; 'If they should keep their weapons,' he said, 'that will be their death.' He stated that if BiH soldiers should hand over their weapons, that they will be treated according to the Geneva Conventions."[42] At the third meeting on the following day, Mladic "again said regarding the BiH forces, the same expression as the day before, 'survive or disappear.' He again requested to the BiH forces to hand over their weapons, even criminals amongst them could hand over their weapons." Furthermore, Mladic "stated that BiH forces could hand over their weapons in the presence of UN forces, UNPROFOR, he stated in general. I think he meant Dutch BAT."

So, on three separate occasions, Karremans understood Mladic to be saying that it was the Bosnian soldiers, not Srebrenica's civilians, who had the choice: survive or disappear. If they handed in their weapons, they would survive. If not, they would disappear. Mladic had made no threats against the civilian population. His threats were exclusively directed at soldiers. In fact, according to Karremans, Mladic said that "the guarded population in and around the [Potocari] compound had the choice either to stay in Srebrenica or to be evacuated, to be evacuated to Serbia, to the Bosnian territory around Tuzla, or even to foreign countries." Mladic's actions were consistent with this interpretation. Srebrenica's civilians were unharmed and were bussed to safety.

Yet, for the next decade and a half, the ICTY continued to misrepresent the gist of the Hotel Fontana meetings and to extract unwarranted conclusions from them. A measure of how heavily the ICTY relies on the Hotel Fontana meetings to support its genocide contention is the number of times it brings up the meetings. The 2010 Popovic judgment mentions Hotel Fontana no less than 95 times! Admittedly, the judgment came in at a grotesque 882 pages. Nonetheless, it still averaged to more than one mention per 10 pages.

In any case, whether Mladic wanted Srebrenica's residents to stay or to go did not matter. The Muslims didn't want to stay in Srebrenica and they couldn't stay on at the U.N. compound. Had the Muslims intended to stay in Srebrenica, the town's men would not have fled days before the Serbs' arrival. Mladic organized the evacuation of Srebrenica's civilians. By Balkan war standards, this was quite generous. The Croatian authorities did not organize an evacuation of the civilian population during Operation Storm. They attacked with artillery and aircraft a column that comprised women and children. In any case, the 28th Division did not surrender and Srebrenica's civilians were not killed.

Finding the right 'group'

The destruction of a group must mean what it says: the destruction of a people in its entirety or, at very least, a substantial number of its members. Eight thousand Srebrenica men could scarcely be considered a substantial part of the Bosnian Muslim population. Happily for the ICTY, the meaning of "substantial" had already been defined down by Bassiouni's commission. "Destruction of a group in whole or in part does not mean that the group in its entirety must be exterminated. The words 'in whole or in part' were inserted in the text to make it clear that it is not necessary to aim at killing all the members of the group," Bassioni's commission said in its report.[43] Selective targeting of members of a group can also be genocide, because killing the leaders of a group could be tantamount to genocide. "Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others—the totality per se may be a strong indication of genocide regardless of the actual numbers killed." It would definitely amount to genocide

> [i]f a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the [Genocide] Convention in a spirit consistent with its purpose.

Killing academics, religious, administrative and business leaders could be genocide. But targeting law enforcement and military people could also be genocide. The "extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenseless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well," Bassiouni wrote in his report. "Thus, the intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide."[44] In this way, of course, almost any act of war, including attacks on legitimate military targets, could fall under the rubric of genocide.

As for genocide's requirement that the targeted victim constitute a "national, ethnical, racial or religious group," it is clear that Srebrenica's Muslim inhabitants couldn't possibly comprise such a "group." Still less could the military-aged male population of Srebrenica comprise it. For genocide purposes, the only possible "national, ethnical, racial or religious group" had to be Bosnia's Muslims as a whole.

To be sure, from the beginning, the ICTY hasn't been too sure how it should classify groups. At times, the ICTY has taken the standard approach as articulated by Bassiouni's commission of experts in its final report. "The different groups relevant to the conflict in the former Yugoslavia—the Serbs, the Croats, the Muslims, the Gypsies and others—all have status as ethnic groups, and may, at least in part, be characterized by religion, ethnicity and nationality," the experts wrote. "It is not a condition that the victim group be a minority, it might as well be a numerical majority," they added. This is the orthodox view. To the Bassiouni team, this was obviously far too restrictive. So Bassiouni also suggested a looser, more politically correct form of classification. Groups can have a real existence (if that's the preference of their members) but they can also exist solely in the minds of those who would stigmatize them.

What would happen, the Final Report's authors asked, if there was "more than one victim groups, and each group as such is protected"? Suppose "group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A"? The Bassiouni team's answer was that all of the victim groups should then be taken as constituting a larger entity. "In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition. It seems relevant to analyse the fate of the non-A group along similar lines as if the non-A group had been homogenous."[45] In other words, Bassiouni had conjured out of thin air a brand new group for war crimes trials purposes—an entirely fictional group, to be sure, the defining characteristic of which is being stigmatized by the perpetrator of a crime. Furthermore, Bassiouni suggested, suppose "group B and to a lesser degree group C have provided the non-A group with all its leaders." Genocide would as a feeble legal instrument "if the overall circumstances of mixed groups were not covered. The core of this reasoning is that in one-against-everyone-else cases the question of a significant number or a significant section of the group must be answered with reference to all the target groups as a larger whole." Not only has a fictional national or ethnic group been created, but merely targeting its nominal leaders would constitute genocide.

The Bassiouni commission's report referred almost exclusively to Serbs and non-Serbs, the latter being not only the victims of the former but also burdened with an identity created by the former. The ICTY was obviously only too happy to adopt this line of reasoning. In December 1999, the trial court in the case of Bosnian Serb Goran Jelisic announced in its judgment that "to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation." Instead, the ICTY would "evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community." Pursuing this Sartrean logic, according to which the Jew only exists in the mind of the anti-Semite, the Jelisic court declared that "It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators."

The Jelisic court explained that the perpetrators of a crime can stigmatize a group by attributing to it "characteristics which they deem to be particular to a national, ethnical, racial or religious group." But they can also stigmatize a group by identifying its members "as not being part of the group to which the perpetrators of the crime consider that they themselves belong."[46] In subsequent cases, the ICTY happily adopted the principle that stigma creates the group. Both the Krstic and Blagojevic trial courts said they would identify "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."[47]

This was exactly the opposite what the ICTR had determined in the case of Jean-Paul Akayesu. The ICTR had asserted that "a common criterion in the four types of groups

protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[48]

The Rwanda tribunal had said that the Genocide Convention protects "stable groups"—groups "constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups." The ICTY arrived at the opposite conclusion: It is the perpetrator of the crime who creates the group. However, this is an imaginary creation. It is inferred by the ICTY and then imputed to the alleged perpetrator. In this way, the ICTY is able to construct groups on an ad hoc basis in accordance with its needs.

The Krstic court toyed with the idea of designating Srebrenica's victims in terms of who they weren't. The court "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." But in the end it dropped the idea, hesitantly concluding that the targeted group in Srebrenica was the Muslims of Bosnia as a whole.

According to the Krstic court, the Bosnian Muslims were a nation, and had been recognized as such by every Yugoslav Constitution since 1963. This was not at all true. What was true was that, from the 1960s on, Yugoslavia's Muslims ceased to be considered a religious group and became a national group for census purposes. One could self-identify as a Muslim, but not as a Bosnian Muslim. Serbia has for a long time had a large Muslim population located in the Sandzak region. According to the ICTY's reasoning, Bosnia's Muslims would have been a nation, but not the Sandzak Muslims. The truth is, Bosnian Muslims were not recognized as a nation either in the 1963 or in the 1974 Yugoslav constitution. Bosnia's Muslims were first recognized as one of the three constituent peoples of Bosnia and Herzegovina in the 1963 constitution of Bosnia and Herzegovina. Hitherto, Bosnia's constitution had specified only two constituent peoples: Serbs and Croats. The Muslims were held to be either Serbs or Croats who had converted to Islam. Neither the 1963 nor the 1974 Yugoslav constitution mentions the Bosnian Muslims. Bosnian Muslims were as much a nation as the Bosnian Serbs or the Bosnian Croats or the Croatian Serbs. Bosnia's Serbs were of course members of the Serbian nation, much as Bosnia's Croats were members of the Croatian nation. The ICTY obviously didn't want to go down this path, since it would then have to acknowledge that Bosnia was made up of three nations, no one of which, either singly or in combination, had the right to impose its will on any other. Muslim self-determination could not come at the expense of the Serbs, and vice versa. The constitution of Bosnia was crafted so as to prohibit any two of its nations ganging up on a third, which is precisely what happened in October 1991, when the Bosnian parliament adopted its sovereignty declaration and in February 1992, when Bosnia went ahead with a plebiscite on independence.

The ICTY preferred to suggest, without explicitly saying so, that, just as Serbia was the nation-state of the Serbs and Croatia the nation-state of the Croats, Bosnia was the

nation-state of the Muslims, even though, as it admitted, it comprised only a little more than 40% of the republic's population. Having misread the 1963 Yugoslav constitution, the Krstic court felt able to make the next step in the argument and declare that the Bosnian Muslims qualified as the targeted national group for Genocide Convention and ICTY Statute purposes. "The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims."[49]

But there was no evidence that the Serbs were seeking to exterminate the republic's Muslims. Within days of the fall of Srebrenica, Bosnian Serbs forces captured the neighboring "safe area" of Zepa. There were no allegations of mass executions. Genocidal intent requires that members of the victim group be targeted wherever the victimizers have them in their sights. Yet here we have a genocide in one town only. It would be as if the Nazis had targeted the Jews of Lodz, but gave the Jews of Warsaw a free pass. Legal scholar William Schabas has expressed bafflement as to how the ICTY could claim that

> a single massacre perpetrated over a period of a few days was genocidal, when it is situated in the context of a three-year-long war that is…better described by the labels "crimes against humanity" and war crimes." It cannot even be argued that the mass killings at Srebrenica represented a more general change in policy by the Bosnian Serb leaders, because there is no suggestion of similar massacres taking place elsewhere in Bosnia and Herzegovina during or after the Srebrenica events. Genocide at Srebrenica appears to be both improvised and idiosyncratic, an aberration rather than an overarching feature of the wartime strategy.[50]

As a matter of fact, the Serbs weren't even all that thorough when it came to the military-aged men of Srebrenica. The Krstic court noted that Srebrenica's wounded men were permitted to receive medical treatment. The court immediately dismissed this as merely evidence of "a strategy on the part of the Bosnian Serbs to avoid attracting international suspicion, especially given that U.N. personnel were present in the enclave watching the treatment accorded to some of these wounded men in the first few days after the takeover of Srebrenica." The Bosnian Serbs were evidently eager to "show the media that non-combatants were properly treated." Whether this entirely speculative explanation was true or not, it undermined the genocide claim. The ICTY adopted its usual strategy: If the facts don't fit the theory, then so much the worse for the facts. "Except for the wounded, all the men, whether separated in Potocari or captured from the column, were executed, either in small groups or in carefully orchestrated mass executions," the court happily concluded. Why Serbs would undertake mass executions that were sure to be detected if they were so anxious not to draw international opprobrium remained unexplained.

Be that as it may, Srebrenica's military-aged constituted a very small percentage of the Bosnian Muslim population. The Krstic court estimated that at the time of the attack on Srebrenica the Muslim population of Bosnia was about 1.4 million (the court said that Muslims constituted 40% of the 1995 population of 3,569,000). Eight thousand executed Muslim men would constitute 0.57 percent of the Bosnian Muslim population.

The Krstic judges wouldn't be put off by such minor considerations. That killings took place in one area but not in another or that they involved a relatively small percentage of

the targeted group didn't mean that they couldn't count as genocide. As support, the court cited the 1982 murder of some 800 Palestinians at the Sabra and Shatila detention camps in Lebanon, "most of whom were women, children and elderly." The U.N. General Assembly passed a resolution in December 1982 calling the massacre an "an act of genocide." Genocide, therefore, does not require the destruction of the entire targeted group; it is enough if the perpetrators intend to destroy part of a group located in a small geographical area.

The ICTY was really reaching here. First, a U.N. General Assembly resolution has no legal force. Second, a number of key NATO powers, particularly the United States, had scornfully dismissed this resolution. Third, the difference between Sabra/ Shatilla and Srebrenica was evident even from the ICTY's own description: In one case, women and children were spared; in the other they weren't. Fourth, the Krstic court had forgotten the ICTY's own earlier warning not to set too much store by this resolution: It "is appropriate to look upon this evaluation with caution due to its undoubtedly being more of a political assessment than a legal one."[51]

An atrocity deserves the label genocide, the Krstic court explained, if "the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue."[52] This applied to Srebrenica. The Serbs had intended to destroy the Srebrenica Muslim community. They wanted to make sure that that community "would not return to Srebrenica nor…reconstitute itself in that region or indeed, anywhere else."[53] The claim is particularly nonsensical in light of such facts as that thousands of Muslims have returned to Srebrenica and that the current mayor of the town, Osman Suljic, is not only a Muslim but a member of political party of the Muslims, the SDA. Suljic, incidentally, was mayor of Srebrenica in July 1995.

The issue seemed to be not so much that the Muslim community of Srebrenica could not reconstitute itself in the region—that would only amount to ethnic cleansing. (Every national group had been subjected to ethnic cleansing. Serbs, Croats and Muslims, all had at one time or another been forced to uproot themselves and reconstruct their lives elsewhere.) What made Srebrenica different was that the town's Muslim community couldn't reconstitute itself "anywhere else" because of the loss of the men. The Bosnian Serbs, apparently, "could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory."[54]

The reasoning was more than a little foggy here. Preventing the Bosnian Muslims from mounting an effective campaign to recapture lost territory in eastern Bosnia was neither genocide nor even a war crime. On top of that, why would killing Srebrenica's men, even perhaps all of them, preclude the Muslims from recapturing the town? The Bosnian Muslims had 250,000 men under arms at that time. That would surely be more than enough to retake Srebrenica if this was such an important military objective.

To make the genocide charge stick, the Krstic court now made an extraordinary speculative leap. The loss of men meant the end of the group, it claimed. In "a patriarchal society, such as the one in which the Bosnian Muslims of Srebrenica lived," the court explained, "the elimination of virtually all the men has made it almost impossible for the Bosnian Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives."[55]

These women would have difficulties bearing children. What matters in a patriarchal society, it seems, is "clear marital status, whether widowed, divorced or married: a woman whose husband is missing does not fit within any of these categories. Moreover, on a psychological level, these women are unable to move forward with the process of recovery without the closure that comes from knowing with certainty what has happened to their family members and properly grieving for them."[56] In other words, women who remained uncertain as to what had happened to their husbands would be unable to remarry and produce more children.

The Krstic court's speculations made very little sense. The category of women the court was describing consisted only of a very small proportion of the women whom the Bosnian Serbs had evacuated to safety. It would refer only to those women who were still of child-bearing age and whose husbands remained unaccounted for. The court offered no estimate of the number of women involved, but one would have to assume that it was considerably smaller than 8,000.

The Bosnian Serbs "had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society," the Krstic court concluded. It is much more likely that the Bosnian Serbs were aware of the opposite: Women are more critical to the reproductive process than men; more than that of men, their physical survival ensures the continued existence of a people. Most important, their existing children as well as any further children they bear would be brought up as Muslims—hardly a desirable outcome if one's intent is to destroy a national group. Thus, if destruction of a group were one's objective, it would make a lot more sense to target the women.

Having engaged in frictionless speculation, the Krstic court now inferred that the Serbs had to have been aware that Bosnian Muslim women, unlike their Serb or Croat counterparts, live in a patriarchal society and are thus unable to reconstruct their lives without men. By killing military-aged men and forcibly transferring women and children, the Bosnian Serbs had to have known that this "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica."[57] The killings thus "effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever reestablish itself on that territory."[58]

With the "intent" requirement of Article 4 satisfied, the court could now conclude—beyond all reasonable doubt, needless to say—that the Bosnian Serbs had intended "to destroy in part the Bosnian Muslim group" and that General Radislav Krstic was guilty of "genocide."

This was all extraordinarily unimpressive and confusing. Even if the Serbs had intended to destroy Srebrenica's Muslims, why would this mean that they had intended the annihilation of the targeted group in question, namely, the Bosnian Muslims? After all, Srebrenica is today a Serb town in the Bosnian Serb republic and this hasn't led to the extinction of Bosnia's Muslims. Furthermore, even if the Krstic court were right and the Serbs had been aware of all of those consequences of their actions, this still wouldn't satisfy the intent requirement of genocide. Awareness is not intent, as World Court Judge Milorad Kreca pointed out in his separate opinion in the 2007 Bosnia genocide case. "Knowledge of the natural and foreseeable consequences of the acts performed is not per se sufficient to constitute the intent to destroy. It must be accompanied by the desire to destroy the groups," he wrote. The Serbs had to have willed just those consequences, and the Krstic court had produced no evidence of this.

What the Krstic court had described as having taken place in Srebrenica was ethnic cleansing—brutal no doubt, but not genocide. Applying traditional understanding of international law, the World Court in the Bosnia case said unambiguously that ethnic cleansing wasn't genocide:

> 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.[59]

To be sure, the World Court threw the genocide-enthusiasts at the ICTY a bone. Ethnic cleansing could constitute genocide, the court said, if the ethnic cleansing involves "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." However, such action has to be "carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region." But the Serbs had to have intended this. Yet, according to the Krstic court, the Serbs had not even intended to capture the whole town, let alone eliminate its population. The genocide idea just came to them as they went along.

ICTY appeals court to the rescue

The ICTY quickly realized that there were too many holes in its genocide finding. The Milosevic case was coming to the boil. In February 2004, prosecutors had finished presenting their case against the ICTY's most famous defendant. In March, the Milosevic amici filed a motion of acquittal, arguing that there was no evidence that Milosevic possessed the requisite genocidal intent. The Milosevic judges needed to counter their argument with something a little more convincing than speculations about patriarchy.

The ICTY appeals court duly stepped up to the plate. On April 19, 2004, the appeals chamber upheld the Krstic trial court's genocide finding, even though it ruled Krstic to be guilty only of aiding and abetting genocide and reduced his sentence to 35 years. The

Bosnian Serbs were still motivated by genocidal intent when they captured Srebrenica. And they still were aware that killing military-aged men would have a catastrophic impact on a traditional patriarchal society. However, the real issue now was not so much the killing of Srebrenica's men but the symbolic impact of the fall of Srebrenica on the Bosnian Muslims, the group targeted for genocide.

Continued survival of Srebrenica would frustrate Serb ambitions. Therefore, the capture of Srebrenica had to have been "of immense strategic importance to the Bosnian Serb leadership." Without Srebrenica, "the ethnically Serb state of Republica Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted. The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability." The Serbs manifested genocidal intent by targeting a part of the group that "is emblematic of the overall group, or is essential to its survival."

The issue now wasn't so much "the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community," as the Krstic trial court had it.[60]. The issue was the establishment of a Serb political entity in Bosnia. The removal of the Muslim enclaves in Eastern Bosnia would spell the end of the Muslim dream of a single, unitary Bosnian state. Such an outcome would not only be a defeat for the Muslims—here the ICTY appeals court made an extraordinary leap in logic—it would threaten the survival of the Bosnian Muslims as a whole.

> The capture and ethnic purification of Srebrenica would…severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia, as well as to the continued survival of the Bosnian Muslim people.

In other words, since, as the ICTY would have it, Bosnia is the nation-state of the Muslims, the partition of a unitary Bosnian state has to be seen as an attack on the survival of the Bosnian Muslim nation.

This reasoning made even less sense than the stuff about patriarchy. Why would the creation of a Serb entity in Bosnia endanger the survival of the Bosnian Muslim people? It would certainly undermine the territorial and political aspirations of the Bosnian Muslim political leaders. But there would still be a Muslim political entity in Bosnia; it just wouldn't encompass the entire territory of the republic. Following the Dayton Accords, that's exactly what took place. Bosnia was divided into two separate political entities: a Muslim-Croat federation and a Serb republic. Srebrenica belongs to the Serb republic. Yet the Bosnian Muslims survive as a people.

The appeals court tried another tack. The fall of Srebrenica was of symbolic import.

> Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. The town of Srebrenica was the most visible of the 'safe areas' established by the U.N. Security Council in Bosnia. By 1995 it had received significant attention in the international media….The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would have served as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb

> military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.

Of course to anyone who shares the ICTY's mind-set, any military setback for the Bosnian Muslims is seen to be a threat to their continued existence. *The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims*? Well, since the overwhelming majority of the Muslims of Srebrenica survived, then their fate was indeed emblematic of the fate of the Bosnian Muslims as a whole: The overwhelming majority of the Bosnian Muslims survived the war. That's clearly not what the appeals court wanted to suggest.

What's confusing is that that everything the court is talking about is supposed to be taking place in the minds of the Serbs. The ICTY was pursuing its mission to find genocidal "intent" very seriously and demonstrating an amazing ability to intuit the workings of the Serb mind. It wasn't saying that the fate of the Muslims of Srebrenica was actually "emblematic of that of all Bosnian Muslims." It was emblematic in the minds of the Serbs.

Free as they were of any need to look for corroborating facts, the ICTY's psychological speculations were in reality nothing more than projections of its own thinking. By 2004, Srebrenica had become immensely important to the humanitarian interventionists, to NATO, to the ICTY and, above all, to the Muslim political leaders in Sarajevo, the latter hoping that ceaseless reminders of their status as victims of war and genocide would lead to the abrogation of the Dayton Accords and an end to the hated Republika Srpska. The ICTY assumed that Srebrenica therefore had to have been just as important to the Serbs in 1995. However, in 1995, Srebrenica was largely seen as a sideshow. The key prize for both Serbs and Muslims was Sarajevo. It was, as the Dutch government report described it, "the pearl in the Bosnian crown. All other interests were subordinate." Sarajevo, in the words of the report, "was of greater strategic importance" than Srebrenica. The Muslims believed "that the decisive battle with the VRS" would be fought in Sarajevo:

> If the ABiH were to lose the fighting around Sarajevo, then there would be losses on all fronts. The ABiH would then be exhausted, and would have to give up on other fronts. In the backs of their minds, [the Bosnian Muslim] leaders still thought that in the battle for Sarajevo the enclaves could be attacked by the VRS, but they were counting on the fact that the international community and UNPROFOR would be able to protect the population.

The Muslim leaders' priority was to prevent the Serbs from sending reinforcements to the Sarajevo region. That was why the Muslims within the enclaves of eastern Bosnia launched attacks on neighboring Serbs and ran the risk of Serb retaliation. It "was precisely the importance that the Bosnian Muslims attached to Sarajevo that led to Srebrenica also being involved in the conflict," the Dutch report said. "The ABiH carried out diversionary manoeuvres outside the enclave territory, so as to tie up the VRS around the enclaves and to prevent them from sending reinforcements to Sarajevo. This focused the attention of the Bosnian Serbs on the Srebrenica enclave, which was deemed to be demilitarized, as they did not hesitate to emphasize because of the losses they suffered there." One must assume that the Serbs knew all about this and that it must have featured prominently in their thinking when they decided to attack Srebrenica.

The appeals court still had one problem to attend to. It had to explain why the genocidal Serbs hadn't killed on the basis of ethnic or national identity. The Serbs had after all

spared the women, children and old men of Srebrenica and shipped them to safety. The trial court had explained this in terms of the Serbs' calculation that in a patriarchal society men are more important than women and that therefore targeting men would be a more effective way of destroying the group. The appeals court wasn't entirely satisfied with this. So it upped the ante: The Bosnian Serbs had intended to kill the women and children and would have done so if they had the chance. They had to settle for "forcible transfer" because that was all they could get away with:

> The decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure. The international attention focused on Srebrenica, combined with the presence of the U.N. troops in the area, prevented those members of the VRS Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.[61]

As with their decision to allow wounded men to receive medical treatment, the Bosnian Serbs' reluctance to kill everybody was to be explained by reference to their "sensitivity to public opinion." As Michael Mandel has humorously observed, if what the appeals court was saying was true, it would only be further proof that there was no genocide in Srebrenica. "You know what it's called when you don't even try to commit a crime—even one that you want very badly to commit—because you don't think you can get away with it? It's called not committing the crime."[62] The ICTY's argument didn't even have the merit of consistency: It directly contradicted the theory that the Serbs had sought to destroy the Muslim community of Srebrenica precisely because international public opinion had deemed its continued survival so important.

The appeals court thus happily concluded that the Bosnian Serbs had indeed committed genocide in Srebrenica. As far as Radislav Krstic was concerned, the court had to admit that the trial court had manifestly failed to "supply adequate proof that [he] possessed the genocidal intent." That didn't get Krstic off the hook for genocide though. According to the ICTY, proof of genocidal intent isn't necessary for a complicity-in-genocide finding. Krstic was "aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings."[63] The appeals court therefore overturned the genocide conviction, but adjudged him guilty of complicity in genocide and reduced his sentence from 42 years to 35 years. The ICTY's ruling here was as dubious as any of its other rulings. The Genocide Convention stipulates that all of the prohibited acts it lists—including genocide, conspiracy to commit genocide and complicity in genocide—have to be informed by genocidal intent. In no time at all, though, this became ICTY law. Complicity in genocide "does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group." The prosecutor need only prove that "an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind; it need not show that an accused shared the specific intent of the

principal offender."[64] Quite how one is supposed to intuit the state of mind of someone in the absence of a plan or an agreement remained a mystery.

By the time it came to render its most recent genocide judgment in June 2010, the ICTY had decided that the targeted group in Srebrenica had been the "Muslims of Eastern Bosnia," identified as "part" of the Bosnian Muslim people. The Bosnian Serbs were seeking to destroy the Muslim population of eastern Bosnia. Again, the issue wasn't numbers, it was symbolism:

> [A]lthough the size of the Bosnian Muslim population in Srebrenica before its capture by the VRS was a small percentage of the overall Muslim population of BiH at the time, the import of the community is not appreciated solely by its size. The Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership because (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims.[65]

Return to Srebrenica

In January 2005, the ICTY returned to Srebrenica and came up with yet another rationale for its genocide finding. The issue now wasn't so much the killings, but the suffering inflicted on the inhabitants of Srebrenica following the capture of the town. The case involved Vidoje Blagojevic, commander of the Drina Corps' Bratunac Brigade, which had taken part in the attack on Srebrenica. The court pointed to the Genocide Convention's prohibition of acts "causing serious bodily or mental harm to members of the group." This was precisely what the Serbs inflicted. The "men who were separated, detained, abused and subsequently killed suffered serious mental harm in that they knew what their fate was: the last sight that many of the victims saw was killing fields full of bodies of the Bosnian Muslim men brought to the execution site before them."[66] The survivors also suffered. The "trauma and wounds suffered by those individuals who managed to survive the mass executions does constitute serious bodily and mental harm." Then there were the women, children and elderly who fled to Potocari. "Leaving their homes and possessions, the Bosnian Muslims did so after determining that it was simply impossible to remain safe in Srebrenica town. Upon arrival in Potočari, the Bosnian Muslim population did not find the refuge they were seeking: rather they found UNPROFOR unable to provide the assistance they needed."

The ICTY judgment now became extraordinarily colorful and imaginative in its description:

> After their husbands, fathers and sons were taken from them, the Bosnian Muslim women felt even more vulnerable and afraid—afraid not only for their own safety, but especially that of their loved ones. Having left Srebrenica to escape from the Bosnian Serbs, the Bosnian Muslim population saw that they must move farther than Potočari to be safe. As they boarded the buses, without being asked even for their name, the Bosnian Muslims saw the smoke from their homes being burned

> and knew that this was not a temporary displacement for their immediate safety. Rather, this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave to eliminate the Bosnian Muslim population from the enclave.[67]

This all sounded very strange. The Krstic court had already asserted that there were virtually no men at Potocari. Suddenly, the women's "husbands, fathers and sons" were being taken from them. Their homes were being burned. Why would Serbs burn houses in a town that was to become part of the Republika Srpska? As for boarding buses "without being asked even for their name," that's a lot better than getting killed. During Operation Flash and Storm, the Croatian forces did not provide transportation to the fleeing Serb women and children. In fact, they strafed them. Here is the description by Boutros-Ghali of what took place in May 1995, following Operation Flash:

> Following intensive negotiations in Knin and Zagreb, an agreement was reached on 3 May on a cessation of hostilities in all areas, including Sector West, and on arrangements to ensure safe passage from Sector West into Bosnian Serb-controlled parts of Bosnia and Herzegovina for those remaining Serb civilians and soldiers (with sidearms only) who wished to leave under UNCRO and UNHCR surveillance. However, at approximately 2 p.m. on 4 May, while UNCRO was attempting to negotiate the implementation of the agreement with some 600 Serb soldiers in Pakrac, the Croatian Army began to shell the Serb-inhabited part of Pakrac in response to alleged attacks on Croatian police and attempts by Serb soldiers to escape. As a result, the Serbs surrendered to the Croatian Army and police, who subsequently began to assemble the remaining Serb inhabitants, separating males and females. Males, mainly of military age but also including some young and very old individuals, were transported to three locations outside the Sector.[68]

The Blagojevic court concluded that there was "sufficient evidence to establish beyond reasonable doubt that in the circumstances of this case forcible transfer constituted 'serious mental harm' within the meaning of" the Genocide Convention.

One should note first that the suffering at Potocari, though real, lasted for only a few days while transportation was being organized. One should also recall that the women and children had been abandoned by the men—and armed men, at that—who had decided to flee to Muslim-held territory. Therefore, if the suffering of the women and children and elderly were to be the measure of genocide, then the contribution of the Muslim men to this suffering has to be factored into the equation. They caused the suffering by leaving them to the mercy of their enemies, the people against whom they had been conducting armed attacks for years. Indeed, it is hard to square the flight of the men with the ICTY's speculations about patriarchy.

The Blagojevic court then announced that "the term 'destroy' in the genocide definition can encompass the forcible transfer of a population. The Trial Chamber recalls that the specific intent for the crime of genocide must be to destroy the group as a separate and distinct entity."[69] No authority other than the ICTY's past decisions was cited as a basis for the claim that the term "destroy" encompasses "forcible transfer of population." Moreover, the Genocide Convention refers to the destruction of the group "as such," not to its continuing as a separate and distinct entity. Intermarriage could mean the

destruction of a group as a separate and distinct entity; the Genocide Convention omitted to list intermarriage as a prohibited act.

The Blagojevic court then announced that "the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group." The court explained that

> A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land. The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself….In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.[70]

The Blagojevic court's argument is as circular as any argument can get. Indeed, even the individual sentences are circular. Take this one, for example: "The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself." So, the physical or biological destruction of the group is the likely outcome of the physical or biological destruction of the group. Writing that is literally meaningless is usually an indication of reasoning that is meaningless.

The court reached a conclusion that was included in the premise. It defined a group as a distinct association of people, with a distinct tradition and rooted in a particular location. If any of these ingredients is missing then the group ceases to be that particular group. Therefore, it's been destroyed; therefore, it is the victim of genocide. Using such criteria, one could argue that just about everyone in the Balkans had been the victim of genocide.

The Blagojevic court's reasoning flies in the face of the understanding of genocide under international law. The drafters of the Genocide Convention had every opportunity to include all manner of suffering and loss under the rubric of "destruction." They chose however to limit the meaning of destruction to physical or biological destruction. As the International Law Commission argued in 1996,

> As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction," which must be taken only in its material sense, its physical or biological sense.[71]

The text of the convention that the U.N. General Assembly adopted did not include the concept of "cultural genocide," which was contained in two earlier drafts, "and simply listed acts which come within the category of 'physical' or 'biological' genocide."

The Blagojevic court further confused issues by changing the identity of the group that the Serbs had supposedly targeted for genocide at Srebrenica. The Krstic court had said that the Serbs were targeting the Muslims of Bosnia as a whole. The Blagojevic court decided that the Serbs' "targeted group was the Bosnian Muslims of Srebrenica—a

substantial part of the Bosnian Muslim group." The killing of the men combined with the forcible transfer of the women, children and elderly "were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica."

Furthermore, the Blagojevic court said that

> The manner in which the transfer was carried out—through force and coercion, by not registering those who were transferred, by burning the houses of some of the people, sending the clear message that they had nothing to return to, and significantly, through its targeting of literally the entire Bosnian Muslim population of Srebrenica, including the elderly and children—clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived.[72]

This was contrary to the record. Both the Blagojevic and the Krstic courts knew perfectly well that Srebrenica's women, children and the elderly were allowed to leave. They lived on, not in Srebrenica, but in Tuzla. So how could "the entire Bosnian Muslim population of Srebrenica" have been targeted? The "literally" is a priceless addition.

For the Blagojevic court, as for the Krstic trial and appeals courts, the issue wasn't so much the actual killings of the men, but its "impact on the Bosnian Muslim group." The killings were "a manifestation of this intent to destroy the group." It "sent a message to the remaining members of the group of their fate—that they were at the mercy of the Bosnian Serbs and that their lives, too, could be taken at any moment." The killings were a physical manifestation of the intent to destroy. Those who were not killed could discern in the killings the intent to kill. The Bosnian Serbs sought not just "the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group."[73]

This was very confusing. The court kept switching the identity of the group the Serbs were supposedly targeting. Sometimes it was the Bosnian Muslims as a whole; sometimes it was the Bosnian Muslims of Srebrenica; sometimes it was the Bosnian Muslims of Eastern Bosnia. Customary international law, as articulated by the International Law Commission is explicit on this point:

> The intention must be to destroy one of the types of groups covered by the Convention, namely, a national, ethnic, racial or religious group. Political groups were included in the definition of persecution contained in the Nurnberg Charter but not in the definition of genocide…because this type of group was not considered to be sufficiently stable.[74]

The Rwanda tribunal had said—correctly—that the Genocide Convention protects "stable groups"—groups "constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment."

The Muslim population of Srebrenica, on the other hand, was anything but stable. According to the Krstic court, the population of Srebrenica was 37,000 in 1991, of which 73% was Muslim and 25% Serb. Subsequently, "Bosnian Muslim residents of the outlying areas converged on Srebrenica town and its population swelled to between 50,000 and 60,000 people"—100% Muslim, incidentally. "Between March and April 1993, approximately 8,000 to 9,000 Bosnian Muslims were evacuated from Srebrenica

under the auspices of the UN High Commissioner for Refugees." In July 1995, at the time of the attack, "the population of Srebrenica was between 38,000 to 42,000." According to the Popovic court, "in mid-1995, the population in Srebrenica was approximately 42,000, 85 per cent of whom were internally displaced persons."[75] So, between 1991 and 1993, the Bosnian Muslim population of Srebrenica doubled. Between 1993 and 1995, the population went down by something like 25%.

Who then are the Bosnian Muslims of Srebrenica? Anyone who was a resident of Srebrenica in 1991 and was still a resident in July 1995? Or everyone who resided in Srebrenica in July 1995? Neither group qualifies as "stable" enough for Genocide Convention purposes. In fact, they resemble political groups. The Bosnian Muslim leaders had refused to permit the residents of Srebrenica to leave the town because its survival was crucial to their political and territorial aspirations. The Muslim strategy changed in 1995, and the survival of Srebrenica ceased to be a high priority. Judge Patricia Wald, one of the three Krstic trial court judges, admitted that the Bosnian Muslim leadership made the decision not to defend Srebrenica. "Muslim army generals, who later testified at the Hague, said the town could have been defended with reinforcements but a strategic decision was made at the highest levels of the Bosnian Muslim military and civil leadership not to do so because of other priorities."[76] Since the Serbs had every reason to believe that the Muslims would defend Srebrenica, it is hard to understand how they could have intended "to bring about the destruction of the Bosnian Muslims of Srebrenica."[77]

Watering genocide down

The ICTY now took the step that it had been threatening to take for some time. It determined that a genocide conviction can be secured under the theory of command responsibility. Command responsibility can refer to a commander's issuing an illegal order to a subordinate. But illegal orders are already covered by the provisions of the Geneva Conventions. Usually, command responsibility is understood to be a crime of omission—it arises from a failure to prevent or punish. Genocide, on the other hand, is most definitely a crime of commission, requiring as it does specific intent. But the ICTY wouldn't have any of this. It determined that a superior can indeed be guilty of genocide via failure to prevent and punish. He doesn't need to possess genocidal intent.

The case involved Radoslav Brdjanin, a minister in the government of the Republika Srpska Krajina and a president of its crisis staff. The ICTY had indicted him for genocide in December 1999. However, the prosecutors had failed to adduce any evidence of genocide. Their case consisted of the usual litany of wartime atrocities: killings of civilians during military operations and torture of detainees. In its Sept. 1, 2004 judgment, the trial court acknowledged that "Superior criminal responsibility is a form of criminal liability that does not require proof of intent to commit a crime." Therefore, it might be thought contrary to the letter and spirit of the Genocide Convention and to the preparatory work of the drafters to find someone guilty of genocide in the absence of requisite genocidal intent. Not so, the Brdjanin court explained: Just because the Genocide Convention makes no reference to superior criminal responsibility, that doesn't

mean that it doesn't apply to genocide under customary international law. This is so because there may have been "a play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument."[78] No evidence was cited for this interesting piece of observation.

There was no reason to think that command responsibility liability "should apply differently to the crime of genocide than to any other crime in the Statute," the Brdjanin judgment went on. A prosecutor has to show that a superior must have known or had reason to know of a subordinate's specific genocidal intent. The *mens rea* requirement of the crime of genocide has nothing to do with "the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused." Therefore, "If the elements dictated by Article 7(3) [which pertains to command responsibility] are fulfilled, there is no reason why superiors should not be convicted pursuant to Article 7(3) for genocide; genocide is, after all, the crime with which the superiors associated themselves, through the deliberate failure to carry out their duty to exercise control."[79] Thus, "the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent."

Command responsibility wasn't the only indirect route to a genocide conviction. A year earlier, in the same case, the ICTY appeals court had determined that conviction for genocide via the third category of joint criminal enterprise was also possible. On Aug. 22, 2003, even before prosecutors had finished presenting their case, Brdjanin's defense attorneys filed a motion for judgment of acquittal on the charge of genocide. They pointed to the prosecutors' failure to offer any evidence of genocidal intent on the part of Brdjanin himself or on the part of the Bosnian Serb authorities. Brdjanin's lawyers protested that, in the absence of direct evidence linking Brdjanin to genocide, prosecutors were trying to prove genocide indirectly via the so-called category three form of the joint criminal enterprise. According to the prosecutors, even if there was no evidence that Brdjanin harbored genocidal intent, he was nonetheless guilty of genocide on account of his supposed membership of a joint criminal enterprise to commit some crime other than genocide, but the foreseeable consequence of which would be genocide. Brdjanin, the prosecutors alleged, had engaged in a campaign of "deportation or forcible transfer" of the non-Serb population. The "natural and foreseeable consequence" of this policy was genocide.

The trial court agreed with the Brdjanin defense. Category three JCE did not apply to genocide. On Nov. 28, 2003, the court dismissed the genocide count in the indictment, ruling that a conviction for genocide must be based on specific intent. And specific intent "is incompatible with the notion of genocide as a natural and foreseeable consequence of a crime other than genocide agreed to by the members of the JCE." However, the trial court refused to dismiss the charge of complicity in genocide. A complicity-in-genocide conviction, the court said, requires only evidence that a defendant "knew that his own acts assisted in the commission of genocide by the principal offender and was aware of

the principal offender's state of mind." There was no need to "show that an accused shared the specific intent of the principal offender."[80]

The damage was done. The trial court had conceded too much to common sense. Prosecutors appealed, demanding reinstatement of category three JCE liability for genocide. The trial court's insistence that genocide requires evidence of "specific intent" was inconsistent with ICTY "jurisprudence." There was no justification for treating genocide any differently from other "specific intent" crimes. Liability does not require proof of intent. Prosecutors drew a distinction between specific intent and the mental state required to establish liability. JCE III is a mode of liability, applicable to all crimes in which a defendant neither physically perpetrates the offense nor plans it but is nonetheless responsible for it.

On March 19, 2004, the ICTY appeals court overturned the Brdjanin trial court's decision and declared that someone can indeed be guilty of genocide even if he neither intended genocide nor aided and abetted in the perpetration of genocide nor desired any other person to commit genocide. Repeating the prosecutor's brief almost word-for-word, the appeals court said that in order to convict someone under JCE III, a court doesn't need evidence that the person

> intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that the accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.

All of this was a little baffling. How can one foresee that other members of the joint criminal enterprise will commit some other crime when one doesn't know who those other members are and what they may be up to? As William Schabas has pointed out, "Several individuals may participate in a common plan, but this does not necessarily mean that they all share the same specific intent."[81] Indeed, one doesn't even know that one is oneself a member of this joint criminal enterprise. To qualify for membership of an alleged joint criminal enterprise, one only needs to share the same intent to commit a crime as other purported members.

JCE III liability, the court explained, is a "mode of liability through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence." There is no requirement to prove "intent to commit a crime on the part of an accused before criminal liability can attach." It is no different from command responsibility liability. To establish command responsibility liability, a prosecutor need only show "that a Commander knew or had the reason to know of the criminality of subordinates"; there is no requirement to prove that he shared the criminal intent of subordinates.

To convict someone of genocide under JCE III, a prosecutor need only prove "that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent." If some members of a joint criminal enterprise had committed a crime, the supposedly foreseeable consequence

of which was genocide, the appeals court said, then any member of this enterprise to commit this other crime would be guilty of genocide. If the crime is forcible transfer of population, say, then if prosecutors

> can establish that the direct perpetrator in fact committed a different crime, and that the accused was aware that the different crime was a natural and foreseeable consequence of the agreement to forcibly transfer, then the accused can be convicted of that different offence. Where that different crime is the crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that [genocide] would be committed.[82]

All prosecutors need to show is that genocide is a "natural and foreseeable consequence" of forcible transfer of population and the defendant who is guilty of forcible transfer of population can be found guilty of genocide too. Indeed, the defendant may—and probably will be—guilty of forcible transfer only via his inferred membership of a joint criminal enterprise of which he was not even aware. Note that the court is talking about actual perpetration of genocide here, not the aiding and abetting of genocide or complicity in genocide through omission. One could be guilty of genocide even if one neither intended genocide nor knew genocide was taking place nor wanted anyone else to commit genocide.

The ICTY needed to come up with something like this because it had failed to find any evidence of a Serb genocidal plan. Since the ICTY only had ethnic cleansing to play with, it had to undertake a deft maneuver to equate ethnic cleansing with genocide. This Brdjanin genocide decision, needless to say, had no basis in international law. It made nonsense of the intent requirement for genocide. In fact, the drafters of the Genocide Convention had explicitly rejected a proposal to designate ethnic cleansing as a prohibited genocidal act. During debate at the 6th Committee of the U.N. General Assembly in October 1948, the Syrian delegate had proposed amending Article 2 by labeling as genocidal "any measures directed towards forcing members of a group to leave their homes should be regarded as constituting genocide." Ironically, Yugoslavia supported the proposal, arguing that during World War II, the "Nazis had dispersed a Slav majority from a certain part of Yugoslavia in order to establish a German majority there. That action was tantamount to the deliberate destruction of a group. Genocide could be committed by forcing members of a group to abandon their homes." The U.S. delegate strongly objected to the Syrian amendment, arguing that it "deviated too much from the original concept of genocide."[83] The U.K. and the USSR delegates also expressed strong opposition; the amendment was rejected 29 votes to four, with eight abstentions.

By reintroducing the idea that ethnic cleansing amounted to genocide, the ICTY was not only unilaterally amending the Genocide Convention, it was explicitly violating the will of the convention's drafters. The Statute of the ICTY, which follows the Genocide Convention word-for-word, does not list ethnic cleansing as an act constituting genocide. Neither does the Rome Statute of the International Criminal Court. In its 2007 ruling, the World Court also rejected the ethnic cleansing equals genocide equation:

> 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.[84]

It was striking that the ICTY appeals court was unable to cite any supporting legal authority for this finding other than its own dubious jurisprudence. The ICTY even contradicted its sister-tribunal, the ICTR, which, in 1998, had ruled that complicity in genocide must be a knowing, not inadvertent, complicity. To be complicit in genocide one needs to know that one's acts will aid and abet genocide. Or, rather, one needs to know that one's acts will aid and abet another who is acting with genocidal intent. That would suffice for a complicity in genocide—though not a genocide—conviction. In its judgment in the case of Jean-Paul Akayesu, the ICTR said that "when dealing with a person Accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas, as stated *supra*, the same requirement is not needed for complicity in genocide."[85]

The Brdjanin decision was contrary even to the ICTY's own 2003 ruling in the case of Milomir Stakic. Stakic, a Bosnian Serb, had been president of the Prijedor municipal assembly in Bosnia. He was charged with genocide. What was unusual about the case was the court's attempt to distinguish joint criminal enterprise as a mode of liability from the crime itself. The court said that "the application of a mode of liability can not replace a core element of a crime." The prosecution had "confuse[d] modes of liability and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished." For genocide to occur "the elements of that crime, including the *dolus specialis* must be met." The notion "escalation" to genocide or genocide as a "natural and foreseeable consequence" of an "enterprise not aimed specifically at genocide [is] not compatible with the definition of genocide" under the Genocide Convention and the ICTY Statute.[86]

The Stakic court concluded that prosecutors had failed to prove that Stakic or even the people above him had the requisite intent to commit genocide. The court said it had "not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakic to enable it to draw the inference that those perpetrators had the specific genocidal intent."[87]

Standard ICTY practice is to say that the state of mind can be inferred from the circumstances. This is what the Krstic appeals court had argued: "Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime." And, it went on, genocidal intent can be inferred even if the court doesn't know who the perpetrators were and therefore can have no insight into their state of mind. "The inference that a particular atrocity was motivated by genocidal intent may be drawn…even where the individuals to whom the intent is attributable are not precisely identified."

That the Krstic trial court did "not attribute genocidal intent to a particular official within the Main Staff…does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims."[88] This was certainly a novel legal innovation: the attribution of criminal intent, and not of any old intent but genocidal intent, to a perpetrator who remains unidentified, indeed unknown. There was no genocidal plan, yet there was genocidal intent, an intent that apparently even Krstic himself didn't share. The Krstic appeals court had determined that the trial court had failed "to supply adequate proof that Radislav Krstić possessed the genocidal intent." There was no proof therefore that Krstic, the defendant on trial, possessed genocidal intent; no one on the VRS Main Staff had been named as possessing genocidal intent; there was no evidence of a genocidal plan; yet the ICTY can conclude that genocide had taken place at Srebrenica.

The Stakic court, on the other hand, had insisted on the need for a genocidal plan to exist. Individual criminal responsibility pursuant to a joint criminal enterprise must be based on proof of "existence of a common criminal plan between two or more persons in which the accused was a participant."[89] The court added that a plan doesn't have to be spoken about or written down. "The existence of the agreement or understanding need not be express, but may be inferred from all the circumstances. The participation of two or more persons in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act." *An unspoken understanding*—the Serbs are well known masters of the technique of telepathic communication.

The Stakic decision was unusual. ICTY practice is to discount the significance of plans. In July 2001, the ICTY appeals court announced that "the existence of a plan or policy is not a legal ingredient of the crime." The case involved Bosnian Serb Goran Jelisic. In October 1999, the trial court had thrown out the genocide charges against him on the ground that the prosecution had failed to provide evidence that "there existed a plan to destroy the Muslim group in Brcko or elsewhere within which the murders committed by the accused would allegedly fit."[90] The appeals court overturned the trial court. Prosecutors should not worry unduly over the lack of evidence of a plan, the "higher" court said. Genocide can take place without a plan to commit genocide. To be sure, the appellate judges explained, evidence for the existence of such a plan may be very helpful. In "the context of proving specific intent, the existence of a plan or policy *may* become an important factor in most cases. The evidence *may* be consistent with the existence of a plan or policy, or *may* even show such existence, and the existence of a plan or policy *may* facilitate proof of the crime (my italics)."[91]

The Jelisic appeals court left unexplained how the members of the joint criminal enterprise to commit genocide understand, and communicate with, one another in the absence of a plan. In a hierarchical military organization such an absence would surely be keenly felt. Having overturned the trial court's dismissal of the genocide charges, the appeals court declared that, given the severity of Jelisic's sentence—40 years—a new trial for genocide wasn't warranted. This was not at all to the liking of former D.C. Circuit Court Judge Patricia Wald, who was one of the Jelisic appeals court judges. She wrote a dissent demanding a new, genocide trial for Jelisic. It wasn't true, she said, that a

new trial would "not affect the sentence ultimately imposed upon the accused. Although the sentence of 40 years imprisonment for crimes against humanity and violations of the laws or customs of war…is substantial, it might have been even more substantial had the accused also been convicted of genocide." Happily for Wald, she didn't have to wait long for a genocide conviction and for the imposition of an even more substantial sentence. Less than a month later, she, along with two trial court judges, ruled that Radislav Krstic was guilty of genocide, and sentenced him to 42 years' imprisonment.

[1] Michael P. Scharf, "Indicted for War Crimes, Then What?" *Washington Post*, Oct. 3, 1999.

[2] The "Chamber is satisfied that the acts of rape and sexual violence…were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public….These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them." Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment, Sept. 2, 1998.

[3] From *Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944). http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm.

[4] "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide," E/CN.4/Sub.2/1985/6.

[5] Report of the International Law Commission on the Work of Its 48th Session, May 6-July 26, 1996, U.N. doc. A/51/10, art. 17, commentary 5 (1996).

[6] Final Report of the Commission of Experts Established Pursuant to Resolution 780 (1992), May 27, 1994, S/1994/674

[7] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Feb. 26, 2007, paragraph 187.

[8] *Prosecutor v. Delalic*, IT-96-21-A, Appeals Judgment, Feb. 20, 2001, paragraph 266.

[9] *Delalic*, paragraph 197.

[10] *Washington Post*, Aug. 29, 2004.

[11] A key prosecution witness during the Milosevic trial was Renaud de la Brosse, described as an "expert in the use of propaganda in the media." De la Brosse, a professor at the University of Reims, prepared a report entitled "Political Propaganda and the Plan to Create a State for All Serbs." His thesis was that anytime any Serb complains of violence directed at Serbs he is stigmatizing some other national group.

[12] The Associated Press, July 3, 1996. (According to the AP account, "Jean-Rene Ruez, a French policeman who interviewed witnesses, gave a numbing litany of atrocities Bosnian Serb forces allegedly committed against Muslim refugees following the fall of the U.N. safe haven in July 1995….Ruez cited an incident in the indictment where a man was forced by a soldier to cut open his grandson's stomach and eat part of his liver. 'He took the old man and put a knife in his hand…and cut open the stomach of the little boy and then with the tip of his knife took out an organ from the inside of the child's stomach and he forced the man to eat that part,' Ruez told the court.")

[13] ICTY Press Realease, Aug. 2, 2001.

http://www.icty.org/x/cases/krstic/tjug/en/010802_Krstic_summary_en.pdf.

[14] Prosecutor v. Vujadin Popovic et al, IT-05-88-T, Judgment, June 10, 2010, paragraph 782.

[15] "Situation of human rights in the territory of the former Yugoslavia: Final periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 42 of Commission resolution 1995/89," Aug. 22, 1995, E/CN.4/1996/9, paragraph 32, footnote 3.

[16] Prosecutor v. Radislav Krstic, IT-98-33-T, Judgment, Aug. 2, 2001, paragraph 165.

[17] Krstic, paragraph 546.

[18] http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7609D560283849CFC1256B6600595006.

[19] Krstic, paragraph 73.

[20] Prosecutor v. Vujadin Popovic et al, IT-05-88-T, Judgment, June 10, 2010, paragraph 616.

[21] Ljubisa Simic, "Analysis of Srebrenica Forensic Reports Prepared by ICTY Prosecution Experts," in Stephen Karganovic, *Deconstruction of a Virtual Genocide: An Intelligent Person's Guide to Srebrenica* (The Hague: Srebrenica Historical Project, 2011), p. 76.

[22] Krstic, paragraph 165.

[23] Patricia M. Wald, "Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal," 5 Yale H.R. & Dev. L.J. 217.

[24] Prosecutor v. Goran Jelisic, IT-95-10, Judgment, Dec. 14, 1999.

[25] Milosevic Trial Transcript, Aug. 25, 2003, pp. 25210-25212.

[26] "War Criminals in the U.S.," *Newsday*, March 12, 2006.

[27] Prosecutor v. Erdemovic, IT-96-22-T, Nov. 19, 1996, p. 210.

[28] "The Ghosts of Srebrenica," *Boston Globe*, May 19, 1996.

[29] "Peabody Man Won't Face Tribunal," *Boston Globe*, Aug. 28, 2004.

[30] "Former Bosnian Serb Soldier Jailed Over Srebrenica Massacre," Agence France Presse, July 19, 2010.

[31] "Bosnian Serb Pleads Guilty to Srebrenica Atrocities," BBC Worldwide Monitoring, July 19, 2010.

[32] Prosecutor v. Vujadin Popovic et al, IT-05-88-T, Judgment, June 10, 2010, paragraphs 1134 and 1135.

[33] Prosecutor v. Krstic, IT-98-33-T, Judgment, Aug. 2, 2001, paragraph 243.
[34] Milosevic Trial Transcript, Feb. 12, 2004, p. 31975.
[35] Ibid., pp. 3167-3168.
[36] Witness Statement of Francis Roy Thomas, Nov. 16, 17 and 18, 1997, ICTY Legal Library.
[37] Krstic, paragraph 121.
[38] Krstic, paragraph 120.
[39] Krstic, paragraph 130.
[40] Srebrenica Trial Video, ICTY Legal Library.
[41] The ICTY doesn't have a full transcript of the Hotel Fontana meeting on its Web site. There is only a heavily edited, compressed version. It has Mladic saying, "[T]here is no need for your people to get killed….all you have to do is say what you want. As I told the gentleman last night: you can either survive or disappear….For your survival I request: that all your armed men who attacked and committed crimes—and many did—against our people, hand over weapons….on handing over weapons you may…choose to stay in the territory…or, if it suits you, go where you want. The wish of every individual will be observed, no matter how many of you there are." Given the enormous importance the ICTY attaches to this meeting the absence of a full transcript is extraordinary.
[42] Prosecutor v. Radovan Karadzic and Ratko Mladic, IT-95-5-R61 and IT-95-18-R61, July 4, 1996, pp. 647-649.
[43] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, May 27, 1994, paragraph 93.
[44] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, May 27, 1994, paragraph 94.
[45] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/1994/674, May 27, 1994, paragraph 96.
[46] Prosecutor v. Goran Jelisic, IT-95-10, Judgment, Dec. 14, 1999, paragraphs 70 and 71.
[47] Krstic, paragraph 557; Blagojevic, paragraph 667.
[48] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment, Sept. 2, 1998, paragraph 511.
[49] Krstic, paragraph 560.
[50] William A. Schabas, "State Policy as an Element of the Crime of Genocide," Expert Witness Report, May 1, 2008, ICTY Legal Library.
[51] Prosecutor v. Goran Jelisic, IT-95-10-T, Judgment, pargraph 63. To be sure, the Jelisic court nonetheless determined that "In view of the object and goal of the Convention and the subsequent interpretation thereof, the Trial Chamber thus finds that international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone." Yet the only authority the court cites besides the U.N. General Assembly resolution is a 1949 book by Nehemiah Robinson, *The Genocide Convention*. The court quotes this author as saying "the intent to destroy a multitude of persons of the same group must be classified as Genocide even if these persons constitute only a part of a group either within a country or within a region *or within a single community* (ICTY italics)." Leave aside the question of why the ICTY should have selected this author as the defining authority on the matter rather than other better-known authors. What's most striking is that the ICTY deliberately misquotes him. What Robinson said was that "the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only part of a group either within a country or within a region or within a single community, *provided the number is substantial; the Convention is intended to deal with action against large numbers, not individuals even if they happen to possess the same group characteristics* (my italics)." The ICTY had carefully avoided quoting the second half of the sentence in which the author explains what he meant in the first half. Destruction of only a part of a group can count as genocide "provided the number is substantial." That's the key point, one that the ICTY was anxious for obvious reasons to elide.
[52] Krstic, paragraph 590.
[53] Krstic, paragraph 592.
[54] Krstic, paragraph 595.
[55] Krstic, paragraph 91.
[56] Krstic, paragraph 93.

The Krstic court's speculation was but the latest manifestation of the strange sexual preoccupations that animated Western involvement in Yugoslavia during the 1990s. Recall how at the height of the war in Bosnia, the media gave vent to wild, unsubstantiated allegations about Serbs raping Muslim women en masse. This was no run-of-the-mill wartime atrocity. The Serbs had an agenda: They wanted Muslim women to "carry Serbian seed." According to an oft-cited book from those days, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* by Beverly Allen, the Serbs would keep in captivity women they had impregnated until such a time as they could no longer terminate the pregnancy. "Genocidal rape aimed at enforced pregnancy would seem to be a peculiarly Serb contribution to the history of atrocity," Allen wrote.

The proponents of the genocide-by-mass-rape hypothesis had no more evidence to back up their claims than the Krtsic court had. But, as with everything else in the wars in Yugoslavia, it was not enough to take note of atrocities; there had to be a very complicated theory to explain their meaning. On the face of it, the mass rape hypothesis makes little sense. By helping Muslim women to have more babies, the Serbs would only be accelerating the growth of the Muslim population and thereby facilitating eventual Muslim control of Bosnia.

By hypothesizing that the Bosnian Serbs wanted to reduce the rate of growth of the Muslim population, the Krstic court seemed to be on more solid ground even though it was unable to offer a scrap of evidence that Bosnian Serb leaders entertained such thoughts at the time of the attack on Srebrenica.

[57] Krstic, paragraph 595.
[58] Krstic, paragraph 597.
[59] Genocide case, paragraph 190.
[60] The appeals court fully endorsed the trial court's speculations about the procreative habits of Muslim women.

> [W]ith the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction.

Prosecutor v. Krstic, Appeals Chamber Judgment, April 19, 2004, paragraph 28.
[61] Krstic, Appeals Chamber, pargraphs 31 and 32.
[62] Michael Mandel, "The ICTY Calls It Genocide," chapter in forthcoming book, *Srebrenica and the Politics of War Crimes*. http://www.srebrenica-report.com/icty.htm#_edn11.

At the ICTY, assumption of collective Serb guilt is so deeply ingrained that any evidence of non-commission of crimes by Serbs has to be discounted by means of laughably convoluted explanations. One absurd example among many occurred during the testimony of Michael Williams, former director of information for Yasushi Akashi, who served as special representative of the secretary-general in Yugoslavia. During cross-examination, Milosevic pointed to numerous letters written to him by Akashi, Williams' boss, thanking Serbia's leader for his efforts to end the war in Bosnia. Embarrassed, the ICTY prosecutors rushed to explain that Milosevic wasn't really interested in bringing the war to an end in Bosnia. No, his sole aim was to get sanctions against Yugoslavia lifted. During re-examination, the prosecutor asked Williams: "Did Mr. Milosevic introduce the connection between the sanctions that were imposed on Serbia and the cessation of hostilities in Bosnia?" Williams, predictably enough, responded: "Yes, he did….I mean, clearly he was not a disinterested intermediary." Triumphantly, the prosecutor pressed on: "Was this the only occasion in which he linked the two, the sanctions with cessation of hostilities in—or peace in Bosnia?" No, Williams replied, "I don't believe it was the only occasion, but I can't off the top of my head cite directly a date and place for another occasion." (Milosevic Trial Transcript, June 25, 2003, p. 23071.)

But why would Milosevic act as a "disinterested intermediary"? Why would his first priority not be getting sanctions against his country lifted? The ICTY has thus blazed yet another trail in international jurisprudence. Political leaders will henceforth be deemed culpable for pursuing their nations' interests rather than the supposedly disinterested goals of the international humanitarians.
[63] Prosecutor v. Krstic, Appeals Chamber Judgment, April 19, 2004, paragraph 134.
[64] Prosecutor v. Radoslav Brdjanin, IT-99-36-T, Trial Judgment, Sept. 1, 2004, paragraph 730.
[65] Prosecutor v. Vujadin Popovic et al, IT-05-88-T, Judgment, June 10, 2010, paragraph 865.
[66] Prosecutor v. Vidoje Blagojevic, IT-02-60-T, Jan. 17, 2005, paragraph 649.
[67] Blagojevic, paragraph 651.
[68] Report of the Secretary-General Submitted Pursuant to Security Council Resolution 994 (1995), S/1995/467, June 9, 1995, paragraph 6.
[69] Blagojevic, paragraph 665.
[70] Blagojevic, paragraph 666.
[71] Report of the International Law Commission on the Work of Its 48th Session, May 6-July 26, 1996, U.N. doc. A/51/10, art. 17, commentary 12 (1996).
[72] Blagojevic, paragraph 675.
[73] Blagojevic, paragraph 677.
[74] Report of the International Law Commission on the Work of Its 48th Session, May 6-July 26, 1996, U.N. doc. A/51/10, art. 17, commentary 9 (1996).
[75] Prosecutor v. Vujadin Popovic et al, IT-05-88-T, Judgment, June 10, 2010, paragraph 923.

[76] Patricia M. Wald, "General Radislav Krstic: A War Crimes Case Study," *Georgetown Journal of Legal Ethics*, Spring 2003.
[77] Blagojevic, paragraph 674.
[78] Prosecutor v. Radoslav Brdjanin, IT-99-36-T, Trial Judgment, Sept. 1, 2004, paragraph 712.
[79] Brdjanin, Trial Judgment, paragraph 720.
[80] Prosecutor v. Radoslav Brdjanin, IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 bis, Nov. 28, 2003, paragraph 66.
[81] William A. Schabas, "State Policy as an Element of the Crime of Genocide," Expert Witness Report, May 1, 2008, ICTY Legal Library.
[82] Prosecutor v. Radoslav Brdjanin, No. IT-99-36-A, ICTY Appeals Chamber, Decision on Interlocutory Appeal, March 19, 2004.
[83] Sixth Committee of the U.N. General Assembly, 82nd meeting, Oct. 23, 1948, U.N. doc. A/C.6/SR.82.
[84] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, Feb. 26, 2007, paragraph 190.
[85] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment, Sept. 2, 1998, paragraph 485.
[86] Prosecutor v. Milomir Stakic, IT-97-24-T, Trial Judgment, July 31, 2003, paragraph 530.
[87] Prosecutor v. Milomir Stakic, IT-97-24-T, Trial Judgment, July 31, 2003, paragraph 547.
[88] Prosecutor v. Krstic, Appeals Chamber Judgment, April 19, 2004, paragraph 34 and 35.
[89] Prosecutor v. Milomir Stakic, IT-97-24-T, Trial Judgment, July 31, 2003, paragraph 435.
[90] Prosecutor v. Goran Jelisic, IT-95-10-T, Trial Judgment, Dec. 14, 1999, paragraph 98.
[91] Prosecutor v. Goran Jelisic, IT-95-10-A, Appeals Judgment, July 5, 2001, paragraph 48.