

Kjell Magnusson

## Genocide as a Concept in Law and Scholarship: A Widening Rift?

The war in Bosnia and Herzegovina 1992–1995<sup>1</sup> had a great impact on international public opinion. This was the first large-scale military conflict in Europe since 1945, and it occurred at a time which seemed to herald a new era of peaceful cooperation and European integration. Reports about the atrocities were met with consternation and horror, leading to condemnation and demands for justice. Fairly soon there was a tacit agreement that what had taken place in Bosnia and Herzegovina was a genocide.<sup>2</sup> This idea was to become dominant in the interpretation of the Bosnian war,<sup>3</sup> finally to be confirmed by the massacre in Srebrenica in July 1995.

In May 1993, a special court, the *International Criminal Tribunal for the former Yugoslavia*, ICTY,<sup>4</sup> was established in The Hague by the UN Secu-

<sup>1</sup> On the war in Bosnia and Herzegovina, see: Burg, Steven L. & Shoup, Paul S. 1999. *The War in Bosnia-Herzegovina. Ethnic Conflict and International Intervention*. Armonk, New York; London: M.E. Sharpe; Bougarel, Xavier. 1996. *Bosnie. Anatomie d'un conflit*. Paris: Éditions La Découverte; Woodward, Susan L. 1995. *Balkan Tragedy. Chaos and Dissolution after the Cold War*. Washington, D.C.: The Brookings Institution.

<sup>2</sup> Magnusson, Kjell. 2006. *Folkmord som metafor. Bilden av kriget i Bosnien och Hercegovina*. Uppsala: Programmet för studier kring Förintelsen och folkmord, Uppsala universitet.

<sup>3</sup> Typical examples of this view are the books: Cigar, Norman. 1995. *Genocide in Bosnia. The Policy of "Ethnic Cleansing"*. College Station: Texas A & M University Press; Rieff, David. 1995. *Slaughterhouse. Bosnia and the Failure of the West*. New York: Simon & Schuster;

<sup>4</sup> <http://www.un.org/icty/>

rity Council, in order to prosecute those responsible for violations of human rights, including genocide. The recent judgement of the *International Court of Justice*,<sup>5</sup> essentially confirmed the position of the ICTY, that is, while the war in Bosnia and Herzegovina, as such, cannot be considered genocide, the massacre in Srebrenica does constitute a case of genocide. This means that there is a growing divide between a scholarly understanding of the concept of genocide and what might be a new trend in international law, supported by politicians and media. This is unfortunate, since the present situation is obviously the result of a specific, unreflecting political culture, encouraging a superficial understanding of the world and a trivialization of serious moral problems.

Perhaps one may say that the ICJ had no choice, and that it could not really change the verdict passed by the ICTY. However, in the ICJ judgement there is an implicit but, in effect, strong criticism of the behaviour of the ICTY. For example, it is made clear that the often practiced plea bargaining is an indication that the allegations of genocide in most cases were not tenable.<sup>6</sup> The general public is hardly aware of these issues, which, nevertheless, deserve a serious discussion. In this text the purpose is to examine the arguments of the ICTY, and show that the idea of genocide in Srebrenica is far from self-evident.

### What is Genocide?

When the concept of *genocide* was proposed by Raphael Lemkin<sup>7</sup> during World War II, his intention was to draw attention to the fact that the crimes of the Nazi regime belonged to a category of atrocities which, in international law, should be classified as a crime *sui generis*. Genocide, according to Lemkin, is "the destruction of a nation or ethnic group" and the result of a conscious and systematic plan aiming to annihilate the group in question.<sup>8</sup> It differs, therefore, in character and motive, both from traditional

<sup>5</sup> *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement. International Court of Justice, 26 february, 2007. <http://www.icj-cij.org/docket/files/91/13685.pdf>

<sup>6</sup> Case Concerning the Application of the Convention, section 374.

<sup>7</sup> Lemkin, Raphael. 1944. *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington, D.C.: Carnegie Endowment of International Peace.

<sup>8</sup> By "genocide" we mean the destruction of a nation or of an ethnic group. ... It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. Lemkin, Raphael. 1944. *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of*

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

war crimes and other types of mass murder. This is a crime not against individuals, but against a group. In 1948 the United Nations adopted its convention on genocide, which in chapter two is defined in the following way:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>9</sup>

In international research<sup>10</sup> there has been an intense discussion on issues of definition. A common criticism has been that the genocide convention excludes crimes against humanity, such as the terror of the Soviet and Chinese regimes, or the mass murder in Cambodia.<sup>11</sup> Another controversial issue is the nuclear attacks on Hiroshima and Nagasaki, or the bombings of Dresden and Hamburg at the end of World War II. Some regard this type of military violence as genocide,<sup>12</sup> while others maintain, that even though the

---

*Government, Proposals for Redress*. Washington, D.C.: Carnegie Endowment of International Peace, p. 79.

<sup>9</sup> "Convention on the Prevention and Punishment of the Crime of Genocide." Office of the High Commissioner for Human Rights. <[http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm)>.

<sup>10</sup> For an overview of research on genocide, see Magnusson, Kjell. 1999. "Holocaust and Genocide Studies: Survey of Previous Research." *Research Agenda. The Uppsala Programme for Holocaust and Genocide Studies*, Uppsala University. Uppsala: Uppsala University, Centre for Multiethnic Research, pp. 8–54

<sup>11</sup> There was actually a formulation which included mass murder on political and other grounds: "any of the following *deliberate* acts committed with the *intent* to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members." It was, however, rejected by the UN. Kuper, Leo. 1981. *Genocide. Its Political Use in the Twentieth Century*. New Haven: Yale University Press, p. 32.

<sup>12</sup> Kuper, Leo. 1981. *Genocide. Its Political Use in the Twentieth Century*. New Haven: Yale University Press. Charny, Israel W. 1994. "Toward a Generic Definition of Genocide." In *The Conceptual and Historical Dimensions of Genocide*, ed. George Andreopoulos. Philadelphia: University of Pennsylvania Press.

number of killed was large, these were acts of war, not intended to destroy a certain group.<sup>13</sup>

It has also been pointed out that the convention, by its formulations has contributed to a certain lack of clarity, concerning when pogroms or massacres become genocide. It is interesting that the phrase *destroy ... in whole or in part* which was part of the original draft, was at first abolished, only to reappear in the final version.<sup>14</sup>

Most authors have accepted the convention<sup>15</sup> or chosen a somewhat wider definition which includes political and social groups.<sup>16</sup> Others have gone very far beyond the meaning of the convention and even defined unintended environmental effects as genocide.<sup>17</sup> According to the former, genocide is a process whereby a government, or other actor, consciously tries to destroy a group, while the latter abstain from defining victims or perpetrators, and, although excluding military violence, do not make a distinction between massacres and genocide.

<sup>13</sup> Chalk, Frank Robert, and Kurt Jonassohn. 1990. *The History and Sociology of Genocide. Analyses and Case Studies*. Ed. Frank Chalk & Kurt Jonassohn. New Haven: Yale University Press.; Fein, Helen. 1993. *Genocide. A Sociological Perspective*. London; Newbury Park; New Delhi: SAGE Publications.

<sup>14</sup> Kuper writes *inter alia*:

"I will assume that the charge of genocide would not be preferred unless there were a 'substantial' or an 'appreciable' number of victims. I would have no difficulty in applying the term to the slaughter of a stratum of the educated of a racial or ethnic group, a common enough occurrence, provided there are 'appreciable' numbers. In other cases, as for example the obliteration of a village or villages by the French in Algeria after the riots in Sétif in 1945, or the slaughter of fifty French hostages, the martyrs of Châteaubriant, or the destruction of Lidice and Ležáky as reprisals for the assassination of German officials in the Second World War, I will use the term 'genocidal 'massacre'." Kuper, Leo. 1981. *Genocide. Its Political Use in the Twentieth Century*, p. 32.

<sup>15</sup> Kuper, Leo. 1981. *Genocide. Its Political Use in the Twentieth Century*; Porter, Jack Nusan. 1982. "What is Genocide? Notes Toward a Definition." In *Genocide and Human Rights. A Global Anthology*, ed. Jack Nusan Porter. Washington, DC: University Press of America; Harff, Barbara, and Ted R. Gurr. 1987. "Genocides and Politicides Since 1945. Evidence and Anticipation." *Internet on the Holocaust and Genocide* 13:1-7.

<sup>16</sup> Horowitz, Irving Louis. 1982. *Taking Lives. Genocide and State Power*. Third edition (augmented). New Brunswick, NJ: Transaction Books, pp. 17-18; Chalk, Frank Robert, and Kurt Jonassohn. 1990. *The History and Sociology of Genocide*. Tal, Uriel. 1979. "On the study of the Holocaust and Genocide." In *Yad Vashem Studies*, vol. 13. Fein, Helen. 1990. "Genocide. A Sociological Perspective." *Current Sociology* 38(1)

<sup>17</sup> Charny, Israel W., 1988. Understanding the Psychology of Genocidal Destructiveness. *Genocide. A Critical Bibliographical Review*. Ed. Israel W. Charny. New York: Transaction Publishers.; Thompson, John L., and Gail A. Quets. 1990. "Genocide and Social Conflict. A Partial Theory and Comparison." In *Research in Social Movements, Conflicts and Change*, vol. 12, ed. Louis Kriseberg. Greenwood, CN: JAI Press.

### *Genocide as a Concept in Law and Scholarship: A Widening Rift?*

According to some authors, matters of definition are less important and even morally suspect,<sup>18</sup> whereas others stress the need for a well-founded conceptual apparatus,<sup>19</sup> since there is, otherwise, a risk of misuse. As Henri Destexhe, former secretary general of *Médecins sans Frontières* writes in his book on Rwanda, there is inflation in the use of the concept, which, in the end tends to mean persecution in general. Destexhe emphasises that what makes genocide different from war crimes is the intended destruction of a people:

Genocide is a crime on a different scale to all other crimes against humanity and implies an intention to completely exterminate the chosen group. Genocide is therefore both the gravest and the greatest of the crimes against humanity.<sup>20</sup>

In this perspective there were three genocides in the 20th century: the Armenian catastrophe, the murder of the Jews and Roma by the Nazis, and the genocide in Rwanda in 1994. Destexhe convincingly argues for a restrictive definition. If by genocide is meant anything from the persecution of minorities to individual massacres, the concept tends to lose its meaning, and instead becomes a general metaphor of evil.

The divergent views are probably to a large extent the result of misunderstanding. Since genocide is usually described as the most serious crime against humanity, it is easy to regard grave violations of human rights and repulsive criminal acts as genocide. We tend to concentrate on the brutality of the perpetrators, or the suffering of the victims, and try to classify events as “worse” than others. However, as pointed out by Yehuda Bauer, it is impossible to grade suffering,<sup>21</sup> and also beside the point, since this is no decisive criterion. It is not violence *per se*, however brutal it may be, which is of importance, but the fact that someone in all seriousness has taken measures to eliminate a whole people, men, women, children, from the face

<sup>18</sup> Charny, Israel W. 1994. “Toward a Generic Definition of Genocide.” In *The Conceptual and Historical Dimensions of Genocide*, ed. George Andreopoulos. Philadelphia: University of Pennsylvania Press.

<sup>19</sup> Fein, Helen. 1993. *Genocide. A Sociological Perspective*. London; Newbury Park; New Delhi: SAGE Publications.

<sup>20</sup> Destexhe, Alain. 1995. *Rwanda and Genocide in the Twentieth Century*. London; East Haven, Connecticut: Pluto Press; Destexhe, Alain. 1995. “Rwanda and Genocide in the Twentieth Century.” Pluto Press. <<http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html>>.

<sup>21</sup> Bauer, Yehuda. 2001. *Rethinking the Holocaust*. New Haven; London: Yale University Press.

of the earth. This has actually happened in our time, which gives the Holocaust its distinctive status in European history.<sup>22</sup>

When discussing the problem of genocide, it is impossible to escape the issue of numbers. The difference between the deliberate killings of a thousand dissidents and the millions of victims during large-scale terror is intuitively apparent. It says something important about the character of regimes using mass murder as a political method. In that sense, Hitler and Stalin do belong to the same category.

Whether mass murder should be characterized as genocide or not, is, however, not so much a matter of numbers, as of how large a part of a group is destroyed. Even though the number of deaths is approximately the same (about three million Poles and the same number of Polish Jews were killed in World War II) there is definitely a difference if ten or ninety per cent of a people are killed. One may, of course, question the need for a category of crime such as genocide, arguing, for example: "Why bother so much about destroying ethnic groups? Are we not all human beings, is not murder always murder, and was not, therefore, Stalin – or Mao – worse than Hitler?" It is true that genocide is a type of mass murder, and that it is perfectly possible to classify mass murders according to the number of victims. What makes genocide specific, though, is that a whole cultural group is targeted, not allowed to exist. If this happens, an individual belonging to the group has no chance of surviving, whereas it is hard to think of a mass murder, in a similar manner, directed against all members of a social category. If nothing else, a social or political affiliation is easier to conceal – or change – than one's linguistic, religious, or ethnic identity.

A devaluation of the concept of genocide, ultimately related to a naive and hypocritical understanding of violence as a social phenomenon, means that one actually does not recognize its existence or moral implications. To exterminate a people will, however, remain a specific crime, even if, in the future, killings would be undertaken in a "humane" manner, as part of a gigantic project of euthanasia carried out by medical personnel.

We know that the annihilation of the European Jews represents a whole spectrum of brutality and violence. The perpetrators were thus guilty of a number of different crimes, which may be categorized according to law, and which also constitute mass murder. In addition, however, there was the

<sup>22</sup> In a European perspective what makes the Holocaust unique is the fact that it concerned a people, which for almost two thousand years, through its mere existence constituted a threat to the dominant religious tradition, and for this reason was severely persecuted, only to be the victim of genocide in a secularized Europe.

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

conscious intention to deliberately annihilate the Jews of Europe, and all memory of their existence.

Much of the discussion would be irrelevant if “crimes against humanity” were not treated as “almost” genocide,<sup>23</sup> but instead, as suggested by Destexhe, genocide is regarded as one of the crimes which may be committed against humanity, besides mass murder, deportation, serious war-crimes and other gross violations of human rights.

There is a significant property of genocide worth noting. Due to the requirement of intention and systematics, it is hard to see how others than political and military leaders can at all be prosecuted and sentenced for genocide. The intention of the individual perpetrator “in the field” does not matter much, as far as the implementation of genocide is concerned. Decisions and intentions belong to another level, and the ordinary soldier is hardly responsible for the bureaucratic organization needed to commit the crime. Neither is he able to instigate genocide on his own. If a conscript is charged with genocide and it is found that it was not his intention to exterminate the Jews of Poland, or, for that matter, the Muslims of Bosnia, is he then innocent?

On reflection, it is clear that there are already crimes pertaining to actions of individual soldiers during genocidal violence. One may speak, perhaps, of complicity in genocide, but the crimes committed by the perpetrators (murder, rape, torture, participation in summary executions) which, it should be remembered, may occur both during genocides and otherwise, are different from the responsibility of leaders who in cold blood have decided that the time has come to exterminate an ethnic group.

In sum, one must keep in mind that there is no particular action or method used when killing people, which would distinguish genocide from other crimes, although the Nazi death factories in a blasphemous way symbolize the industrial extermination of a people. Neither can individual massacres be defined as genocide; on the contrary, genocide is made up of a high number of single massacres, since otherwise one can hardly speak of the “destruction” of a people, whether “in whole or in part”.

Another problematic aspect is the blurring of the difference between genocide and “ethnic cleansing”. Often mentioned together (“genocide and ethnic cleansing”) they tend to be regarded as synonyms. Even though the

<sup>23</sup> In the judicial process at the ICTY, and elsewhere, there is an obvious scale. If someone is not prosecuted or sentenced for genocide, he may still qualify as a perpetrator of crimes against humanity, which is regarded as a milder crime. It seems unwise to use a generic concept for specific acts. One reason may be the difficulty to realize the specific nature of genocide, being a crime against a group.

deportation of a people is a serious crime, it should not be made equal to genocide. If that was the case, one of the most comprehensive acts of ethnic cleansing in 20<sup>th</sup> century Europe, the deportation of ethnic Germans from East and Central European countries in the aftermath of World War II would be treated as genocide.<sup>24</sup> Few would accept this.

If current tendencies to conceptual confusion continue, there will no longer be a common standard, and the idea of genocide may be evoked for purely political reasons, as has already been done. In that case, we would voluntarily succumb to a political culture where the distinction between fiction and reality is obscured.

### Genocide in Bosnia?

Those initially employing the concept of genocide in the Bosnian context were representatives of the Sarajevo government, and international journalists.<sup>25</sup> Few writers have had such an influence as the Pulitzer-Prize winner Roy Gutman, who, in his description of events in north-western Bosnia in the spring and summer of 1992, consciously invoked the parallel of the Nazi regime and the murder of the Jews.<sup>26</sup>

Pictures of emaciated men, or stories of deportations by train from Bosnia, were enough for us to see Auschwitz, and one may wonder if large parts of the educated public were really aware of what had happened during the Holocaust. In the Second World War the Germans methodically killed the Jewish population in large parts of Europe. It began with systematic executions of men, women, and children during the military campaign against the Soviet Union. It should be emphasised that this did not happen in the Balkan wars of the 1990s. There is *one* event during the Bosnian war, which, to some extent, is similar to the shootings on the Eastern front, namely Srebrenica.

The war in Bosnia was brutal, but in view of the character of military operations and the scale of violence, there is no indication that any of the actors involved had the intention to destroy a people, in the sense of the

<sup>24</sup> Hayden, Robert M. 1996. "Schindler's Fate: Genocide, Ethnic Cleansing, and Population Transfers." Comments by Carol s. Lilly, Susan Woodward, Paul Wallace. Reply Hayden. *Slavic Review* 55(4, Winter): 727–747.

<sup>25</sup> Kenney, George. 1995. "The Bosnia Calculation". *The New York Times Magazine* 23 April, 42–43. [see also "The Bosnia Calculation" [www.xuc.org./politics/myth/articles/042395.George\\_Kenney.html](http://www.xuc.org./politics/myth/articles/042395.George_Kenney.html)]

<sup>26</sup> Gutman, Roy. 1993. *A Witness to Genocide. The First Inside Account of the Horrors of "Ethnic Cleansing" in Bosnia*. Shaftesbury, Dorset; Rockport, Massachusetts; Brisbane, Queensland: Elements Books Ltd; Macmillan Publishing Company, USA.



### *Genocide as a Concept in Law and Scholarship: A Widening Rift?*

convention. However, there is abundant evidence, not the least from the court cases, that the goal was to expel the adversary, and that killings were used as one method to facilitate the process.

Moreover, the often mentioned figure of 250 000 deaths is clearly exaggerated, which was pointed out already during the war.<sup>27</sup> Two recent investigations, one made by the ICTY,<sup>28</sup> and the other by an independent research centre in Bosnia and Herzegovina,<sup>29</sup> estimate the number of killed at around 100 000. These victims belong to all national groups in Bosnia, and a large proportion was soldiers; in the first study 46 per cent, in the second 59 per cent. Finally, while during the Second World War 77 per cent of the Jews, 17 per cent of the Serbs, 9 per cent of the Muslims, and 6 per cent of the Croats on the territory of Bosnia and Herzegovina were killed,<sup>30</sup> in the war 1992–1995 about 2 per cent of the population lost their lives.<sup>31</sup> This means that the death-rates in Bosnia are very far from what has characterised genocides during the 20<sup>th</sup> century, and should be compared with other cases of ethnic conflict (e.g. Lebanon), or with what is going on at present in Iraq.

### **Professor Bassiouni and the Final Report**

Of great importance for subsequent legal developments related to the issue of genocide, was a commission appointed by the UN Security Council on 6 October 1992. Its task was to investigate war crimes and serious crimes against humanity committed in former Yugoslavia since 1991. Head of the commission was M. Cherif Bassiouni, professor at the Department of International Law of DePaul University in Chicago. The Final Report of the commission was presented to the Security Council on 24 May 1994 and discussed on 28 December the same year.<sup>32</sup> The report contains an introduction, a lengthy summary, and 12 annexes totalling some 3 300 pages. *The Final Report* was to become a crucial foundation of the work of the ICTY.

<sup>27</sup> "The Bosnia Calculation."

<sup>28</sup> Tabeau, Ewa & Bijak, Jakub. 2005. War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results. *European Journal of Population* (2005) 21:187–185.

<sup>29</sup> See the Norwegian financed *Research and Documentation Center* in Sarajevo, led by Mirsad Tokača: <http://www.idc.org.ba/aboutus.html>

<sup>30</sup> Dulić, Tomislav. 2005. *Utopias of Nation. Local Mass Killing in Bosnia and Herzegovina, 1941–1942*. Uppsala: Acta Universitatis Upsaliensis. *Studia Historica Upsaliensis* 218, p.317.

<sup>31</sup> Magnusson, Kjell. 2006. *Folk mord som metafor*, p. 85.

<sup>32</sup> Final Report of the United Nations Commission of Experts established pursuant to Security Council resolution 780 (1992). [http://www.ess.uwe.ac.uk/comexpert/REPORT\\_TOC.HTM](http://www.ess.uwe.ac.uk/comexpert/REPORT_TOC.HTM)

It both represented the archival basis for the judicial process and initially defined the cases which were later to result in prosecutions.

Of equal importance, however, was Bassiouni's understanding of the concept of genocide, which undoubtedly influenced the court proceedings, as well as the general public. His innovation was the idea of "local genocides".

In a hearing in the US Congress it was discussed whether what happened in Bosnia should be regarded as genocide or not. Bassiouni points out that on the basis of the Final Report there is no question that crimes against humanity were committed in Bosnia and Herzegovina, but that the situation is different as far as genocide is concerned, and that here the issue of definition is decisive.<sup>33</sup> If the UN convention is used as a standard, it is difficult to classify what happened in Bosnia as genocide, but if a "progressive" position is taken, i.e. that a genocide may be committed on the local level, the situation might be different:

The question of genocide is a little more complicated because of the way the convention is drafted in terms of requiring a specific intent in the way it was carried out, and as to whether or not the convention is to be interpreted as encompassing an entire group.

We at the Commission took a more progressive look at it and said that genocide should be interpreted not in light of an entire group, as was the interpretation that followed the Holocaust because that was the pattern that was taken by the Nazis, but rather to look at it in terms of more specific contexts. So that if you took, for example, the context of Prijedor, where 56,000 Bosnians are missing and a large number of them were killed, particularly the intellectual elite, the leadership, et cetera – if you took that context, that is, the Prijedor context, then you can find an intent to eliminate in whole or in part a particular group within that context.<sup>34</sup>

Apart from a strange reference to the Holocaust, it may be noted that Bassiouni's idea of "local genocide" rests on the (erroneous) assumption that his account of the situation in Prijedor is correct.<sup>35</sup> Further, he under-

<sup>33</sup> It is argued in the Final Report that the trials in The Hague will probably show that genocide has occurred.

<sup>34</sup> Bassiouni, M. Cherif. 1995. "Genocide in Bosnia-Herzegovina."

<sup>35</sup> Anyone reading the Final Report will, undoubtedly, believe that most of the 56 000 "dead or missing" were actually killed. This is, however, not the case, and is another example of the role played by rumours and unverified statements in a war situation. It also points to the weakness of the Final Report in terms of sources. While it was widely believed that 30–35 000 Bosnian Muslims had been killed in Prijedor, the number of estimated dead and missing is today around 3 000 people, of a total population of 112 000 in 1991. Magnusson, Kjell. 2006. *Folkmord som metafor*, pp. 81–82.

### *Genocide as a Concept in Law and Scholarship: A Widening Rift?*

mines his own argument, by stressing that the purpose of ethnic cleansing (!) was to create communicational links between Serb territories in Bosnia and Croatia, and Bosnia and Serbia:

You will see, from this complete documentation, an overall structure that is very methodical and very detailed. The policy of ethnic cleansing had a strategic logic, as well as a political logic, and it was carried out in a consistent pattern. The idea was simply to establish an area along the Drina and Sava Rivers, which would make contiguous the areas inhabited by Serbs in Bosnia, Serbia, Montenegro, and Croatia, to facilitate the contacts between those groups.<sup>36</sup>

Also, Bassiouni singles out non-regular troops as responsible for the most horrendous crimes. They were free to carry out their deeds, since there was a "breakdown in leadership and control". Still, he contends, there was a systematic and "planned chaos" which was repeated again and again. However, what Bassiouni in reality argues for is not genocide but ethnic cleansing:

The tactics were really very simple and rather simplistic. The tactics were simply to engage in the type of violence that would cause people to leave, after many had suffered and been killed, with the fear of what happened to them and with the terrorizing effect that it created.<sup>37</sup>

As we shall see, this misunderstanding, as well as other doubtful arguments used by Bassiouni, was to reappear in the documents of the ICTY.

### **The Hague Tribunal and the Issue of Genocide**

One would have expected the Tribunal in The Hague to show a high degree of integrity and intellectual precision. Regrettably, it has not been fully equal to its task. The prosecutors seem to have been influenced by a political and media climate, which, more or less explicitly, identified what happened in the Balkans with the atrocities of the Second World War. Consequently, the image of a carefully planned and well organized genocide lives on in the eyes of the public, at the same time as the trials, with the exception of the Srebrenica case, concern events in which relatively few people were killed.

In the interest of judicial procedure, it would have been more reasonable to abstain from general judgements on what happened, not the least since our knowledge of the war is still only partial. In that perspective it would have been natural to treat individual cases of gross violations of human

<sup>36</sup> Bassiouni, M. Cherif. 1995. "Genocide in Bosnia-Herzegovina."

<sup>37</sup> Bassiouni, M. Cherif. 1995. "Genocide in Bosnia-Herzegovina."

rights with an unprejudiced mind, in order to find out what had really occurred. Instead, through the presumed analogy with the Nazi genocide, a view has been fostered, especially in the Balkans, that certain groups are always victims and others are always perpetrators, and that whatever may have happened in self defence can never be regarded a war crime. The end result is that no group recognizes the legitimacy of the court, and obviously, reconciliation will not, as expected, be a result of the trials.

It is easy to agree with the prominent historians of the Balkans, Stephen Burg and Paul Shoup in their view that the court has failed to discuss what criteria must be fulfilled in order to speak about genocide, and how this crime differs from massacres or war-crimes. Although Burg and Shoup have differing opinions on the Bosnian case, both would like to see a discussion on this important issue, to a much greater extent based on matters of principle:

Whichever argument one wishes to make, the gravity of the accusation of genocide demands precise charges and precise evidence. Up to now, although the International Criminal Tribunal for Yugoslavia at The Hague has indicted the Serb leaders for genocide, it has not identified the difference between acts of genocide and crimes against humanity in its indictments. Nor has it grappled with the problem of threshold and intent. It is precisely in this regard that The Hague Tribunal can make an important contribution to understanding. By compelling prosecutors and their expert witnesses to define thresholds and present evidence of intent – and providing judgments as to their validity – the Tribunal can build a basis for deciding why certain crimes must be considered genocide, while others should not. By doing so, the judges of the Tribunal will move the process of determining whether genocide has taken place in Bosnia-Herzegovina to firmer ground.<sup>38</sup>

As it turns out, the interpretations of the Tribunal are sometimes overly literal, and strangely sophistic, especially when it comes to the understanding of the crucial formulation: "destroy a group ... in whole or in part". Here, the prosecutors have concentrated on the concept "part" instead of "destroy", which is hardly self-evident. There is an apparent risk that a situation is characterized as genocide if the perpetrator "killed members of a group, just because they were members of this group" regardless of scale, systematics, or intent.<sup>39</sup> In cases like Bosnia and Herzegovina, what was earlier referred to as civil war or ethnic conflict, is now more or less automatically classified as genocide. Meanwhile, it is forgotten that the murder of the European Jews was not part of an ethnic conflict.

<sup>38</sup> Burg, Stephen L., and Paul S. Shoup. 1999. *The War in Bosnia-Herzegovina*, p. 185.

<sup>39</sup> For an innovative theoretical model on genocide, using these dimensions, see Dulić, Tomislav. 2005. *Utopias of Nation*.

### **The Krstić Case**

So far, the only person to be sentenced by The Hague Tribunal for (complicity in) genocide is the Serbian general Radislav Krstić.<sup>40</sup> Towards the end of the events in Srebrenica, forces under his command participated in the executions of Bosniak soldiers and male civilians taking place between 14 and 17 July, 1995.

The judgement is interesting, both in terms of its way of thinking on the question of guilt, and in its view on how fundamental aspects of the genocide convention should be interpreted. The court finds, for example, that general Krstić did not plan the killings in Srebrenica, neither did he himself participate in the massacres, nor did he bear responsibility for what happened during the early phase.<sup>41</sup> Moreover, the court argues that, initially, there was no intention to murder all men capable of bearing arms, or even to deport the Bosniak population. It is also stated that some victims were killed in battle, although no figures are given. The total number of victims has not been ascertained, but is, according to the court, probably somewhere between 7 000 or 8 000 individuals.

However, at some point during the chain of events, a decision was made – unclear by whom – to kill all men in Srebrenica. Although general Krstić was not part of the decision, as a commander he was responsible for the behaviour of his troops, and he should have been aware of what took place and the consequences this would have for the Bosniak population of Srebrenica.

The most interesting issue is how the court interprets the definition of genocide, and how the concept should be applied in a trial. At first, it is made clear that Bosnian Muslims constitute a national group as understood by the convention, and it is pointed out that they were recognized as a people in the 1963 Constitution (which happens to be incorrect).<sup>42</sup> Second, they were, without any doubt, regarded by the Serbs as a national group.

<sup>40</sup> Judge Almiro Rodrigues, Presiding, Judge Fouad Riad, and Judge Patricia Wald. 2001. "In the Trial Chamber: Prosecutor v. Radislav Krstic. Judgement." International Criminal Tribunal for the former Yugoslavia. <<http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>>.

<sup>41</sup> Additionally, the evidence presented to the Trial Chamber does not support the notion that General Krstić himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population. Rather, General Krstić appears as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995. Left to his own devices, it seems doubtful that General Krstić would have been associated with such a plan at all. [Judgement]

<sup>42</sup> The Bosnian Muslims were given the status as a (state) nation in the 1974 constitutions of Yugoslavia and Bosnia and Herzegovina (not in 1963), but were actually regarded, under the name *Muslims*, as a South Slavic Nation on the same level as Serbs, Croats, Slovenes,

Since the prosecutors in The Hague have not maintained that the war in Bosnia as such constitutes a genocide, the most important question concerns the meaning of the wording "in whole or in part". The issue is unnecessarily obscured by the astonishing fact that the prosecutor, in his account of the crime, essentially argues that the Muslims in Srebrenica may be regarded as a specific sub-group of the Bosniak people, to which the convention's concept of group should be applied. In the indictment the population was alternatively referred to as the "Bosnian Muslim population of Srebrenica", "Bosnian Muslims of Srebrenica", or "Bosnian Muslims of Eastern Bosnia", and it was stressed that, through their patriarchal culture, they differed from other Muslims in Bosnia, thus constituting a separate [national, ethnic, religious?] group. The defence, on the other hand, argued that the only reasonable interpretation was to regard the Muslims in Srebrenica as part of the Muslim people in Bosnia.<sup>43</sup>

Unfortunately, the position of the court is not quite clear. While the court does regard the Muslims of Srebrenica as part of the Bosniak population of Bosnia as a whole, when discussing the consequences of the executions, it is maintained that the Muslims of Srebrenica as a group belonged to a characteristic patriarchal culture where the death of men would have more serious consequences than otherwise.<sup>44</sup>

---

Macedonians, and Montenegrins, after a meeting with the Central Committee of the League of Communists of Bosnia and Herzegovina in February 1968, where it was decided that Bosnian Muslims constitute a nation of their own. Their new status was confirmed in the census of 1971, where, under the label nationality, they were able to declare themselves as *Muslimani*. Purivatra, Atif & Muhamed Hadžijahić. 1990. *ABC Muslimana*. Muslimanska biblioteka. Sarajevo: Bosna, p. 41.

<sup>43</sup> Whereas the indictment in this case defined the targeted group as the Bosnian Muslims, the Prosecution appeared to use an alternative definition in its pre-trial brief by pleading the intention to *eliminate* the "*Bosnian Muslim population of Srebrenica*" through *mass killing and deportation*. In its final trial brief, the Prosecution chose to define the group as the *Bosnian Muslims of Srebrenica*, while it referred to the *Bosnian Muslims of Eastern Bosnia* in its final arguments. The Defence argued in its final brief that *the Bosnian Muslims of Srebrenica did not form a specific national, ethnical, racial or religious group*. In particular, it contended that "one cannot create an artificial 'group' by limiting its scope to a geographical area". According to the Defence, the Bosnian Muslims constitute the only group that fits the definition of a group protected by the Convention. [Judgement]

<sup>44</sup> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory. Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

It is unsatisfactory that the court, in its judgement, at the same time as it refers to the wording of the convention, and mentions important issues of principle, such as the difference between genocide and persecution, still remains vague. In particular, it is remarkable that the court does not speak of the destruction of a part of the Bosnian Muslim *group*, but of the destruction of the Bosnian Muslim *society* in Srebrenica.<sup>45</sup> By not using the terminology of the convention, the court avoids any discussion of whether the number of dead might be regarded as a substantial part of the population. Neither does the court address the fact that the Serb troops did not kill women and children, which may speak against genocide.<sup>46</sup> Above all, however, the judgement is a very doubtful departure from the text and meaning of the convention.

The discussion of group affiliation is also problematic from the point of view that the court itself states that a majority of those living in Srebrenica at the time were actually refugees from other localities.<sup>47</sup> In other words, this is a group different from the one defined as inhabitants of Srebrenica according to, for example, the census of 1991. Moreover, among those killed were members of regular units of the Bosnian army. This means, in fact, that it is impossible to relate the number of dead to the population figures of Srebrenica. Therefore, it would be natural to define the victim group as members of the Bosniak people, or, possibly, as Muslims of Eastern Bosnia. Had this been done, the percentage of victims would have made it difficult to fulfil reasonable requirements that an ethnic group had been destroyed "in whole or in part". Neither has the court shown that the purpose was to destroy the Bosniak people as such, even in Srebrenica, but instead concentrates on its disappearance from a geographical area. In addition, the whole argument is embedded in an analysis of the fighting taking place, including Bosniak human-rights violations in and near Srebrenica, as well as the stra-

---

men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. [Judgement]

<sup>45</sup> The Trial Chamber concludes from the evidence that the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community... the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica ... Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. [Judgement]

<sup>46</sup> Burg, Stephen L. and Paul S. Shoup. 1999. *The War in Bosnia-Herzegovina*, p. 183.

<sup>47</sup> Indeed, most of the Bosnian Muslims residing in Srebrenica at the time of the attack were not originally from Srebrenica but from all around the central Podrinje region. [Judgement]

tegic goals of the adversaries. In other words, with this approach one would expect a sentence concerning deportation and serious war-crimes, but not genocide.

### The Sikirica Case

Another important trial was that of Duško Sikirica, in charge of the camp in Keraterm and indicted, *inter alia*, for genocide. According to the court in order to establish that genocide has taken place, one has to make clear the intention, which is a necessary precondition to be able to distinguish between genocide and other crimes belonging to the same category, i.e. crimes against humanity.<sup>48</sup>

In this case, therefore, one must show that the intention was to destroy, in whole or in part, the Bosnian Muslim or the Bosnian Croat group in the town of Prijedor. Second, it has to be established that the intention was the destruction of the group as such. The judges observe that the UN expert group on genocide defines the concept "in part" as "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership". The court argues that the formulation "reasonably substantial" should be used, rather than "reasonably significant" when discussing numbers. If it is found that this criterion is not applicable, one may still sentence for genocide if "a significant section", for example the leadership, has been killed.

The court criticizes the prosecution for regarding the inmates of Keraterm a group. One cannot compare the number of killed prisoners with the total number of prisoners. Instead, a comparison must be based on what the convention considers a group, namely, the Bosniaks of Bosnia and Herzegovina – or, if one, as the court does, accepts the idea of local genocides – the Bosniak population of Prijedor.

In this case, reasons the court, victims are the total number of prisoners in Keraterm, about 1 000–1 400 individuals. They constitute 2, respectively 2, 8 percent of the Muslim population of Prijedor and "would hardly qualify as a 'reasonably substantial' part of the Bosnian Muslims group in Prijedor." In fact, the number of victims is "negligible". It is concluded "that this

<sup>48</sup> Judge Patrick Robinson, Presiding, Judge Richard May, and Judge Mohamed Fassi Fihri. 2001. "In the Trial Chamber: Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija. Judgement." International Criminal Tribunal for the former Yugoslavia. <[http://www.un.org/icty/sikirica/judgement/index\\_2.htm](http://www.un.org/icty/sikirica/judgement/index_2.htm)>. The following quotes are from this text.



*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred”.

The court continues by noting that, even though the prosecutor maintains that it was Sikirica’s intention to murder the Muslim leadership in Prijedor, no evidence that this would be the case has been submitted:

Notwithstanding that submission, very little evidence has been adduced as to the leadership status of those who were detained in Keraterm. There is evidence that among those detained were taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners. But there is no specific evidence that identifies them as leaders of the community. Indeed, they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service.

Also, the court rejects the allegations of the prosecutor that those who took arms to defend Prijedor served as role models for their countrymen, and should therefore be defined as leaders. Such an argument would make the definition of leadership meaningless:

The Chamber rejects the submission that all those Bosnian Muslims, whether from the Brdo area or elsewhere, and who were active in the resistance of the take-over of their villages, should be treated as leaders. Acceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless.

Of interest is what the court has to say about the general situation in Prijedor, and to what extent the population was subject to systematic violence. The judges observe that nothing supports the notion that the Serbs were targeting a specific category, or that the victims of persecution were vital for the continued existence of the group:

There is, further, little evidence as to the targeting of specific individuals within the Prijedor area, apart from those who were brought and placed in Keraterm.

With regard to the situation outside the Keraterm camp, no evidence has been led to show that the disappearance of those who were targeted by Bosnian Serbs would have a significant impact on the survival of the population in Prijedor to which they belonged by reason of their leadership status or for any other reason.

In light of the foregoing, the Chamber does not consider that there is a sufficient evidential basis for inferring an intention to destroy a significant section of the Bosnian Muslim or Bosnian Croat population, such as its leadership, whether in or outside the Keraterm camp.

In sum, the court is of the opinion that the prosecutor has neither shown that a substantial part of the Muslim population in Prijedor, nor its leadership has been killed. This, by itself, would be sufficient to reject the indictment of genocide, but the court also discusses the issue of what is meant by "a national, ethnical, racial or religious group as such". It emphasises that in genocide victims are chosen, not because of their individual identity, but as members of a group, which, as such, is the object of criminal action. The judges point to the decisive difference between genocide and persecution of an ethnic group:

In particular, it wishes to emphasise that it is the mental element of the crime of genocide that distinguishes it from other crimes that encompass acts similar to those that constitute genocide. That is the significance of the phrase "as such" in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution ... in the case of persecution; the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that establishes a demarcation between genocide and most cases of ethnic cleansing.

It is further stated that there is no difference between the cases of ethnic cleansing already being handled by the court, and the Sikirica case.<sup>49</sup> Moreover, there is no evidence that the intention behind the persecutions in Prijedor would be the destruction of a group as such:

While the general and widespread nature of the atrocities committed may be evidence of a plan of persecution, the Chamber holds that, in the circumstances of this case, it is not sufficient to satisfy the specific intent required for the crime of genocide.

Neither is the number of dead within and outside the camps, in proportion to the population, of such a magnitude, or the degree of systematics such that one may speak of genocide:

<sup>49</sup> Practically every case prosecuted before the International Tribunal has involved ethnic cleansing, in which particular groups have been specifically targeted for various kinds of abuse and mistreatment, including murder and detention. However, it is noteworthy that in none of the other cases involving the detention of persons in camps in the Prijedor municipality (with which this case is concerned), has the Prosecution alleged genocide ... the Chamber sees no essential difference between this case and the other trials for ethnic cleansing in the Prijedor municipality. [Judgement]

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

As for the scale of the actual or attempted destruction ... that it was only a small percentage of the Bosnian Muslim or Bosnian Croat group that were victims within the terms of Article 4(2)(a), (b) and (c) of the Statute. The Chamber is unable to infer from this evidence intent to target a substantial number of Bosnian Muslims or Bosnian Croats.

The evidence does not support the conclusion that there was any particular system in disposing of bodies. Indeed, apart from the Room 3 massacre, the killings appear to have been sporadic. The Room 3 massacre of about 120 people is an episode, which, by itself, would not necessarily signify a particular system of killing.

Finally, the court concludes that nothing shows that the events were preceded by an ideological or political campaign, with the purpose to incite genocide:

While the Prosecution has adduced evidence which might suggest that the Bosnian Serb authorities' general political doctrine gave rise to a campaign of persecution against the non-Serb population of Prijedor, there is no evidence that this doctrine sought to promote genocide.

The verdict is of great significance, both on grounds of principle and as an account of what happened in the town of Prijedor in the spring and summer of 1992. The court has in far more detail and depth, than in the case of Krstić, discussed how the concept of genocide should be interpreted in a legal context. In that sense, it has tried to answer the questions posed by Burg and Shoup. On the other hand it does not touch upon the issue referred to above, that is, to what extent a single individual not belonging to the highest decision making bodies could really be tried for genocide.

As far as the developments in Prijedor in 1992 are concerned, it is clear that the view of the court is radically different from the UN Final Report, as well as from the dominant position in international media. It is not the case that the judges, due to lack of evidence, are unable to sentence a certain individual; instead they come to the conclusion that there was no genocide in Prijedor. One would have expected that the reasoning of the court should have had important consequences for the general understanding of the war, since what happened in Prijedor is regarded as the worst example of violence besides Srebrenica.

### **Prijedor and Srebrenica**

In two trials where genocide was part of the indictment, the Tribunal has, thus, come to completely different conclusions.<sup>50</sup> This is not unusual in legal praxis; there is always an interpretation of existing law. In this case, however, there is no higher level in the ordinary sense, and it is worrying that the court reasons quite differently on fundamental matters of principle. It may also be noted that the sentence of Sikirica is in a class of its own, in view of its stylistic qualities and logical stringency. Although rather briefly, the judges have actually discussed the arguments of the parties in relation to law and other documents. This did not happen in the Krstić case, in which doubtful arguments of the prosecutor are left uncommented, even though they go against the reasoning of the court itself. This may be due to a basic lack of clarity in the use of concepts, where, although relevant documents are quoted, the arguments used are against their meaning. Here, only two such questions will be dealt with, the meaning of "a group as such" and the interpretation of the qualification "in part".

When the latter issue is discussed in the sentencing of Krstić, the court, in fact, uses a two-step procedure. At first, the court decides that "in part" would mean that the destruction of the population in a single town would fulfil the criteria. Having done, this, however, the court again starts from the beginning, asking what would be required to fulfil the criterion of "in part" *within* such a partial group. Here the court, without any objection follows the reasoning of the prosecutor:<sup>51</sup>

Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. [Judgement]

<sup>50</sup> The indictment of genocide concerning Sikirica was rejected. Judge Patrick Robinson, Presiding, Judge Richard May, and Judge Mohamed Fassi Fihri. 2001. "In the Trial Chamber: Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija. Judgement." International Criminal Tribunal for the former Yugoslavia. <[http://www.un.org/icty/sikirica/judgement/index\\_2.htm](http://www.un.org/icty/sikirica/judgement/index_2.htm)>. and Jelusic Judge Claude Jorda, Presiding, Judge Fouad Riad, and Judge Almiro Rodrigues. 1999. "In the Trial Chamber: Prosecutor v. Goran Jelusic. Judgement." International Criminal Tribunal for the former Yugoslavia. <<http://www.un.org/icty/brcko/trialc1/judgement/index.htm>>., but confirmed in the case of Krstić Judge Almiro Rodrigues, Presiding, Judge Fouad Riad, and Judge Patricia Wald. 2001. "In the Trial Chamber: Prosecutor v. Radislav Krstić Judgement." International Criminal Tribunal for the former Yugoslavia. <<http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>>.

<sup>51</sup> " Judge Almiro Rodrigues, Presiding, Judge Fouad Riad, and Judge Patricia Wald. 2001. "In the Trial Chamber: Prosecutor v. Radislav Krstic. Judgement." International Criminal Tribunal for the former Yugoslavia. <<http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>>.

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

The intent to destroy a multitude of persons because of their membership in a particular group constitutes genocide even if these persons constitute only part of a group either within a country or within a region or within a single community. [Prosecution]

Even if the convention does not specify the meaning of the concept "in part", this, still, seems to be an overly sophisticated argument, which tends to abolish the difference between genocide and other crimes against humanity. To this should be added the already mentioned fact that the meaning of the concept of "destruction" (killing) is changed into representing deportation from a certain area. Nothing comparable is to be found in the trial against Sikirica.

The other point is equally important. The judges express themselves in an ambiguous manner, and show a surprising lack of legal awareness and knowledge, when discussing the crimes of persecution and genocide:

The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought.

Since the crimes of persecutions and genocide do not have a mutually distinct element, it is not possible to cumulate convictions for both.<sup>52</sup>

To define a situation as genocide, it is not enough to say that people are killed because of their membership in a particular group. If this were true, any civil war would be genocide. Moreover, if the judges are to be taken literally, they argue that there is no difference between genocide and ethnic cleansing ("persecution"). In contrast, in the verdict on Sikirica these matters are discussed at length, and the judges try to explain the crucial difference between different crimes against humanity. It is emphasised that the crime of genocide must be directed against the group as such, not against individual members of the group. This means that there is a qualitative and important difference between persecution on ethnic grounds, directed against individuals, and genocide, where the intention is to destroy an ethnic group:

Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that

<sup>52</sup> Judge Almiro Rodrigues, Presiding, Judge Fouad Riad, and Judge Patricia Wald. 2001. "In the Trial Chamber: Prosecutor v. Radislav Krstic. Judgement."

establishes a demarcation between genocide and most cases of ethnic cleansing.<sup>53</sup>

It is remarkable that the arguments used in the trial against Krstić are contrary to the distinction between persecution and genocide, made in the trial of Sikirica. A valid question is, therefore, what would have happened if the judges in the Sikirica trial had sentenced Krstić, or vice versa, if the latter judges had sentenced Sikirica?

On 19 April, 2004, the appeals chamber of the Tribunal found Krstić guilty of complicity in genocide. Reading the elaboration shows that on the important point of how to define genocide and the target group, the first verdict is followed. Further, the objections of the defence are rather summarily dismissed. At the same time, the court undermines its own argument by stressing the military-tactical background of the events.<sup>54</sup>

Thereby, The Hague Tribunal has decided that genocide has, indeed, occurred if *a part of a part of an ethnic group* has been killed. This is a trivialization of the concept of genocide, and we may expect innumerable cases in ongoing and future conflicts. A reasonable question is in what sense there are common properties of the genocide in Srebrenica and the genocide in Rwanda or the Holocaust?

It is difficult to reach any other conclusion than that the court has not fulfilled its objective, and this casts a shadow on its integrity. To the many strange aspects of the proceedings in The Hague, incidentally, belongs the case of Biljana Plavšić, former president of Republika Srpska. How is it possible to prosecute someone for genocide and then withdraw the accusation as a reward for confession of a minor offence? One would think that a crime of this magnitude, if the indictment was seriously meant, must be tried in court.

## Conclusion

With the verdicts of the ICTY, and the ICJ, we find ourselves in the rather baffling situation that a key concept in international law is used contrary to common logic and the intentions of the convention to which it was sup-

<sup>53</sup> Judge Patrick Robinson, Presiding, Judge Richard May, and Judge Mohamed Fassi Fihri. 2001. "In the Trial Chamber: Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija. Judgement." International Criminal Tribunal for the former Yugoslavia. <[http://www.un.org/icty/sikirica/judgement/index\\_2.htm](http://www.un.org/icty/sikirica/judgement/index_2.htm)>.

<sup>54</sup> In the Appeals Chamber. Prosecutor vs. Radislav Krstic. Judgement. Case No: IT-98-33-<http://www.un.org/icty/krstic/appeal/judgement/index.htm>

*Genocide as a Concept in Law and Scholarship: A Widening Rift?*

posed to apply. This means that a single event has the same status as all those instances of murder which together make up the Holocaust. It is immediately clear that nothing is gained from this change in the meaning of the concept of genocide. On the contrary, it prevents us from understanding the real nature of genocide.

It is very hard to escape the feeling that this confusion is due to a specific political atmosphere surrounding the wars in Bosnia and Kosovo. What makes the war propaganda of the US, and partly Great Britain, especially offensive is the fact that exactly those politicians who were responsible for a distorted image of what was taking place in the Balkans, did all in their might not to characterise what happened in Rwanda as genocide.

It is interesting, that the Final Report by Bassiouni, which may be criticised for being incomplete and based on rather thin sources, was to become the major foundation of charges of genocide. Furthermore, without Bassiouni's innovation of "local genocides", it would have been impossible to sentence anyone for genocide in Bosnia. What is, after all, a local genocide? There is nothing in the convention or in ordinary language use that would lead to such an interpretation of the phrase "in part". If, for example, the Jews of Thessaloniki are killed, then we would speak of the genocide of the Greek Jews, a partial genocide of the Sephardic Jews, or, again, of a single event in the murder of the European Jews.

The example shows that genocide can only occur "locally" if a large part of a given population is already geographically concentrated. If this is so, the innovation is not needed. To refer to local genocides the way the Tribunal has done, means that the most important aspect of the legal and scholarly definition of genocide, i.e. the destruction of a people, is not taken seriously. This makes sense, only if one, at any cost, wants to use the symbolically loaded concept of genocide in a context where it does not belong. Once you do this, however, the word loses its meaning, which should have been clear to the judges in The Hague.

