The ICTY Calls It ‘Genocide’

On August 2, 2001, Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that the events at Srebrenica in July 1995 constituted ‘genocide’.[1] For this and other crimes they sentenced General Radislav Krstic, in charge of one of the corps involved in the operation, to imprisonment for 46 years. On April 19, 2004, the ICTY Appeals Chamber reduced Krstic’s conviction to one of ‘aiding and abetting’ and his sentence to 35 years imprisonment, while re-affirming the legal characterization of Srebrenica as genocide.[2].

But if the Krstic case stands for anything, it stands for the fact that genocide did not occur at Srebrenica. And the Court’s conclusion that it did can only be considered a legal form of propaganda, solidifying the now dominant impression of the Tribunal as, in the words of one defendant, more a ‘political tool’ than a ‘juridical institution’.[3]

The Tribunal’s claim that genocide occurred at Srebrenica was not supported by the facts it found or by the law it cited. Even the Trial Chamber’s conclusion that ‘Bosnian Serb forces executed several thousand Bosnian Muslim men [with the] total number of victims … likely to be within the range of 7,000 -8,000 men’ was not supported by its explicit findings.[4] The number of bodies exhumed amounted to only 2,028, and the Chamber conceded that even a number of these had died in combat, in fact going so far as to say that the evidence only ‘suggested’ that ‘the majority’ of those killed had not been killed in combat: ‘The results of the forensic investigations *suggest* that the *majority* of bodies exhumed were not killed in combat; they were killed in mass

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[1] *Prosecutor v. Radislav Krstic,* IT-98-33 ‘Srebrenica-Drina Corps’ Trial Chamber Judgement (2 August 2001) <www.un.org/icty/krstic/TrialC1/judgement/index.htm>

[2] *Prosecutor v. Radislav Krstic* Appeals Chamber Judgement (19 April 2004) <www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.htm>

[3] *Prosecutor v. Slobodan Milosevic*, IT-02-54, ‘Kosovo, Croatia And Bosnia Herzegovina’, Transcript 30 August 2001, p. 25 <www.un.org/icty/transe54/020830IT.htm>.

[4] *Krstic,* Trial Chamber, paras. 84 and 426.

executions.'[5] The highest expert estimate before the court of those who went *missing* after the takeover of the enclave, and had not yet been accounted for was 7,475, and the Trial Chamber found that the evidence as a whole only '*strongly suggests* that well in excess of 7,000 people went missing following the take-over of Srebrenica.' The evidence was found only to 'support the proposition that *the majority* of missing people were, in fact, executed and buried in the mass graves.'[6] A *majority* of a *maximum* of 7,000–8000 would put the *maximum* executed closer to 4,000.

Of course the execution of even 4,000 or 2,000 or 200 men would have been a horrible crime, mass murder in fact, so on a purely legal basis it would be hard to understand the Trial Chamber's stretching of the numbers so far past what had been proved 'beyond a reasonable doubt.' It is a lot easier to understand as propaganda, though, because the high-end figure had the benefit of matching the official story both in quantity and, most importantly, in quality, with the horrifying qualification of 'genocide'

Literally, morally and in everyday usage, 'genocide' is to a people what homicide is to a person. The term was coined to mean precisely that by the Polish Jew Raphael Lemkin, who had in mind the Holocaust he had just escaped:

> By 'genocide' we mean the destruction of a nation or of an ethic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek work *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homocide, infanticide, etc.… It is intended … 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. [7]

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[5] Ibid., para. 75 (emphasis added). See also paragraph 76: 'Certainly, 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.'

[6] Ibid., paragraphs 81 and 82, emphasis added.

[7] Lemkin, Raphael, *Axis rule in occupied Europe: laws of occupation, analysis of government, proposals for redress.* (New York: H. Fertig, 1973 [originally published 1944]), p. 79.

The literal and everyday meaning of the term are also the same, as witness the opposition to its use of even so ardent an advocate of NATO's military interventions in the Balkans as Elie Wiesel:

> In my view genocide is the intent and desire to annihilate a people.… The Holocaust was conceived to annihilate the last Jew on the planet. Does anyone believe that Milosevic and his accomplices seriously planned to exterminate all the Bosnians, all the Albanians, all the Muslims in the world?[8]

The Trial Chamber in *Krstic* actually determined the opposite of this, namely that the killing of the men of Srebrenica was *not* part of a plan to kill even all the Muslims of *Srebrenica*. Despite the sinister connotations of separating the men from the women, the children and the elderly, the Trial Chamber confirmed that this was done (see below) *so that the women, the children and the elderly could be removed to safety.* In other words, the opposite of Auschwitz-Birkenau, not a repeat of it. Similarly, the Trial Chamber found that the 'plan' to kill the men did not even pre-exist the takeover of the enclave (three years into the Bosnian civil war) and was only 'devised' and implemented in the few days after the fall of Srebrenica: 'Following the take-over of Srebrenica, in July 1995, Bosnian Serb forces devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave.'[9]

It's true that the definition of 'genocide' in the statute of the ICTY (which merely repeats the terms of the UN *Genocide Convention* of 1948) is much looser than the literal or ordinary meaning of the term and includes killing or even 'causing serious bodily or mental harm to members of the group' when this is done 'with intent to destroy, in whole *or in part*, a national, ethnical, racial or religious group, as such.' Literally, this could mean any racist killing, and the American Senate feared in 1950 that it would cover 'casual' Southern lynchings.[10] But there was a long-standing legal understanding, accepted by the ICTY, that the definition was not to be applied literally, and the word 'part' was to be modified by 'significant' or 'substantial'. Naturally this left some room for equivocation, but the traditional line of thinking was that, in line with the original and ordinary meaning of the concept, the part destroyed would have to be significant enough to mean the effective destruction the whole. Lemkin put it this way to the American Senate to help it solve its doubts about lynchings:

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[8] Elie Wiesel, 'The Question of Genocide,' *Newsweek*, 12 April 1999, p. 37.

[9] *Krstic,* Trial Chamber, para. 87.

[10] United States Senate, Committee on Foreign Relations, Subcommittee on Genocide Convention, April 12, 1950, in Executive Sessions of the Senate Foreign Relations Committee, Historical Series (1976), Vol. 2, p.361.

> The emphasis is on destruction, which means that the destruction must be of such a kind as to affect the entirety. Let us compare the destruction of a race with the destruction of a house. To destroy a house means to effect such changes in the house that it can no longer be considered as a house. This is the meaning of the words 'as such' in the convention. When the 1,200,000 Armenians were destroyed in Turkey in 1915, not all Armenians living in Turkey were killed, but this great destruction affected the very existence of the Armenian religious groups. The same applies to the Jews in Germany and other parts of Europe.[11]

Now nobody even argued that the (improvised) plan to kill all the men of Srebrenica (vigorously denied by the Defence) was part of a plan to kill all the Muslims of Bosnia. And everybody agreed that it was the Muslims of *Bosnia* who were the 'group' for the purposes of the law. Nobody argued that the Muslims of *Srebrenica* constituted an entire 'national, ethnical, racial or religious group, as such.' The Trial Chamber just ignored this problem and decided that an intent to destroy the Muslims of Srebrenica was an intent to destroy a significant part of the Bosnian Muslims as a whole, without any attempt whatever to demonstrate the impact this would have on the whole group.

But that was not even the biggest hole in the Trial Chamber's reasoning, because there was also no evidence that the killing of the men was part of an attempt to physically annihilate even all the estimated 40,000 people of Srebrenica. Hence the removal of the women and children to safety. The Trial Chamber's solution was to substitute real destruction of the community for its *geographical* 'destruction' viz. its *displacement* from Srebrenica – viz. to equate, 'ethnic cleansing' with genocide, precisely the way the Western propagandists had ('As a result, there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'"[12]).

According to the Tribunal, there was sufficient genocidal intent if what was sought was to kill all the people of a given group *in one area*, even though it wasn't part of any plan to kill them all elsewhere. For this they relied mainly on their own dubious previous judgments and – something not likely to please Ariel Sharon – a 1982 UN General Assembly Resolution that the murder of at least 800 Palestinians in the Sabra and Shatila refugee camps that year was 'an act of genocide.'[13] According to the Tribunal,

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[11] Ibid. page 370.

[12] *Krstic*, Trial Chamber, para. 562

[13] Ibid., para. 589, note 1,306 citing UN Doc. AG/Res.37/123D (16 December 1982).

> … the killing of all members of the part of a group located within a small geographical area … would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.[14]

The court then went the final step and dispensed with the 'annihilation' element altogether, finding genocidal intent in killing to achieve the permanent removal of a group *from one area to another*. To link this to the killing of the men ('killing … with intent to destroy … a group') and not just the removal of the women and children, the Court relied partly on the patriarchal nature of Bosnian Muslim society and the ancient ideology of patriarchy, which made men more important than women. But the Serbs weren't found to have been trying to kill all the males, only the military aged ones; so the court was driven to a *military* rationale, which was the precise argument made by the defence to deny genocide: military-aged men were a *military threat* because they might re-take the area:

> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. *Their death precluded any effective attempt by the Bosnian Muslims to recapture the territory.* Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population *at Srebrenica*.…[15]

Now the Appeals Chamber --led by American Judge Theodor Meron (presiding over a court composed of the nominees of four NATO countries, one of which was

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[14] Ibid., paragraph 590.

[15] Ibid., paragraphs 593, 595, emphasis added.

Muslim Turkey, and one Muslim judge from predominantly Christian Guyana)[16] -- was clearly embarrassed by the findings of the Trial Chamber: 'It must be acknowledged that in portions of its Judgment, the Trial Chamber used imprecise language which lends support to the Defence's argument. The trial Chamber should have expressed its reasoning more carefully'.[17] So they set about rescuing the genocide designation by seriously massaging the findings of the Trial Chamber:

Naturally, all qualms about the number of victims had to be buried once and for all. Now it was simply: 'between 7,000-8,000 Bosnian Muslim men were systematically murdered.'[18] The focus of the trial chamber had to be redirected from displacement to destruction: 'The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group.'[19] And the military motive had to be suppressed: 'the extermination of these men was not driven *solely* by a military rationale'.[20]

But the only other 'rationale' available was the one about patriarchy. So the task was somehow to weave this into something affecting not merely the Muslim presence *in Srebrenica* but the existence of the group:

> The Trial Chamber was also entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community. In examining these consequences, the Trial Chamber properly focused on the likelihood of the community's physical survival. As the Trial Chamber found, the massacred men amounted to about one fifth of the overall Srebrenica community. The Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would 'inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.[21]

By itself this wouldn't go beyond displacement ('*at Srebrenica'*) so the Appeals Chamber now deployed the fact, elsewhere suppressed, that proof of death of those listed as missing was inconclusive, in fact evidently not strong enough to convince the community itself:

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[16] The Trial Chamber judges were from 2 NATO countries and one Muslim country.

[17] *Krstic*, Appeals Chamber, para. 22.

[18] Ibid., para 2.

[19] Ibid., para. 25.

[20] Ibid., para. 26.

[21] Ibid., para 28.

> Evidence introduced at trial supported this finding, by showing that, with 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.[22]

Of course, what was going to be (potentially) 'extinguished' was not the actually existing 80% of the inhabitants of Srebrenica who survived the genocide -- note this wasn't even said to be an *attempted* genocide, but an actual one -- or even the future offspring of the survivors. Do the math: a lot fewer than another 20% of the inhabitants would have been dead men's spouses with children yet to bear. The community that would be extinguished was a virtual one, an abstraction that by convenient definition included the dead men and their unborn children.

This bizarre rationale had many problems of its own. In the first place, according to the jurisprudence, genocide required a 'specific intent,' that is this very complicated goal had to be the conscious object of the killers. It wasn't enough that they killed the men for military advantage (after three years of civil war), for reprisal, for terror or out of sheer hatred. It had to be for reasons of extinction of the community itself. Now the Trial Chamber had only gone so far as to conclude that those responsible *knew* this would be the result. And even that was purely inferential, based not on any direct testimony, but a deduction that since this highly complicated result would be only too obvious to anyone that this would be the result, the killers had to be aware and therefore *were* aware: '…the Bosnian Serb forces *had to be aware* of the catastrophic impact…The Bosnian Serb forces *knew, …*'[23]

But knowledge is still short of purpose, the 'specific intent' of genocide, so the Appeals Chamber had to stretch things out a bit more and claim that it was a fair inference from their (presumed) knowledge that this was their purpose:

> The Trial Chamber found that the Bosnian Serb forces were aware of these consequences when they decided to systematically eliminate the captured Muslim men. The finding that some members of the VRS Main Staff devised the killing of the male prisoners with full knowledge of the detrimental consequences it would have for the physical survival of the Bosnian Muslim

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[22] Ibid.

[23] Krstic Trial Chamber, para. 595, quoted fully above.

> community in Srebrenica further supports the Trial Chamber's conclusion that the instigators of that operation had the requisite genocidal intent.[24]

Another intent problem was the one raised by the Defense at trial: if they meant to physically destroy the community, why not kill the women, children and elderly too? The Court of Appeal sought to counter any suggestion of humanity in this by turning it into a cynical public relations ploy:

> 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 UN 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 that would allow them to implement the genocidal design while minimizing the risk of retribution. [25]

But this proves just a little too much as they used to say at Oxford (and maybe still do), because the way they were forced to implement the plan (that they were *deemed* to have devised) was a way that did not amount to genocide. Which only amounts to saying (not, naturally, proving beyond a reasonable doubt) no more than that they would have done it, or tried to do it, if they thought they could get away with it. But 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.

The Appeals Chamber had still more work to do, because it remembered what the Trial Chamber had forgotten: that somehow, the genocide had to be aimed at the destruction of the group as a whole: 'The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole…the act must be directed toward the destruction of a group.'[26]But, once again, everybody admitted that the Muslims of Srebrenica did not constitute an entire 'national, ethnical, racial or religious group': 'The targeted group identified in the Indictment, and accepted by the Trial

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[24] *Krstic*, Appeals Chamber, para. 29.

[25] Ibid., paras. 31 and 32.

[26] Ibid., para. 8.

Chamber, was that of the Bosnian Muslims.'[27] How could even the actual (let alone 'potential') destruction of the Muslims of Srebrenica, let alone their displacement-- be aimed at the destruction of the Bosnian Muslims as a whole?

Here the court relied on a political version of the military rationale it rejected elsewhere in the judgment, emphasizing the strategic importance of Srebrenica to a viable Bosnian Serb state.

> Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size. As the Trial Chamber explained, Srebrenica (and the surrounding Central Podrinje region) were 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, 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. Because most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population. [28]

Why an ethnically cleansed Srebrenica should be a threat to the very existence of the Bosnian Muslims, as opposed to their territorial ambitions, is impossible to understand. It's as if any gain by the Serbs was not only a loss to the Muslims, but the death knell of their entire community. In fact the semi-autonomous Serb Republic that came out of Dayton includes Srebrenica, and the Bosnian Muslims have neither disappeared from the face of the earth nor from Muslim Bosnia.

Similarly with the Court's final rationale: that Srebrenica would be a lesson to all Muslims and therefore 'emblematic' of their fate:

> In addition, 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 UN

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[27] Ibid., para. 6.

[28] Ibid., para. 15.

> Security Council in Bosnia. By 1995 it had received significant attention in the international media. In its resolution declaring Srebrenica a safe area, the Security Council announced that it 'should be free from armed attack or any other hostile act.' This guarantee of protection was re-affirmed by the commander of the UN Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops.30 The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve 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.[29]

'Emblematic' of what fate, though? It was conceded in the same breath that the Bosnian Serbs did not want to kill all the Muslims of Bosnia. The Muslims of Srebrenica were sure emblematic in this sense, because they didn't want to kill all of them either. What they were emblematic of was the fact that this was a brutal struggle over territory, and Srebrenica was right in the middle of it. But there was no evidence inside or outside the court that the Bosnian Serbs had any designs on the survival of the Bosnian Muslims in any other part of Bosnia. According to the 'genocidal plan' they would remain physically and culturally intact, in most of their traditional homeland, very much the way the Dayton Agreement imposed by the Americans provided.

In the end this tangled web of argument could serve only to underline the fact that no genocide, not even any acts of genocide, took place at Srebrenica. What took place were horrible acts of war, no more or less horrible for being legal or illegal. But for these the responsibility has to be spread around a lot more widely than the court wanted to suggest by the notion of genocide, well beyond the immediate perpetrators and indeed all the local actors, to include the others responsible for the war in Bosnia: the Europeans who for reasons of pure self-interest lit the match to the 'former Yugoslavia' by underwriting its dissolution and the Americans who for similar reasons fanned the flames and made sure that nobody was allowed to put out the fire until their bombers could do the job. And as aiders and abetters we should not leave out the ICTY itself for providing the propaganda cover for all this violence in cases like *Krstic* and the many that preceded and followed it.

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[29] Ibid., para. 16.