14 Critiques on the Interpretation of Genocide by the International Criminal Tribunal for the Former Yugoslavia

Bartul Marušić, mag. iur., phD candidate, former teacher

Croatian Nobilty Association [1]

Zagreb, Teslina 13/1

Abstract : *The Srebrenica event during the war in Bosnia and Herzegovina has become one of the most famous. It has also brought the first verdict of the criminal offense of genocide before the international body after the Second World War. The purpose of this paper is not to attempt relativization of facts or to answer the question of whether it was truly genocide in a subjective sense, but rather to comment on judicial practice in those essential segments related to dubious questions and theses. The purpose is, of course, to understand the issues in order to understand and classify other terrible events in the recent war or current or future conflicts and trials more easily and correctly.*

Key words *: genocide in Srebrenica, ICTY, war crimes, international criminal law*

I. INTRODUCTION

The Srebrenica event at the end of the war in Bosnia and Herzegovina in 1995 is already widely known and is referred to as "genocide" or "massacre" and the ICTY has been the only one to classify it under the Institute and article of "genocide". Although this came into normal use in jargon and in public, after several repeated judgments, the actual debate is just beginning with the completion of the Hague Tribunal, and in domestic circles there is still insufficient or "fearful" interest in such topics important for the future. We will begin by finding the facts about the events that are equally accepted and quoted by the International Court of Justice (in 278 *Bosnia and Herzegovina's* judgments *against Serbia and Montenegro*) and the International Criminal Tribunal for the Former Yugoslavia or the ICTY (paragraph 1 of the First Instance Verdict *Krstić*) and then we will move on to those items that were disputed after the end of the Tribunal.

> "Events related to the occupation of Srebrenica, the UN's "security zone" in Bosnia and Herzegovina, carried out by Bosnian Serbs in July 1995, have become known around the world. Despite the UN Security Council resolution, which states that this enclave must be "without armed attacks or any other hostile act", the Bosnian Serb Army (VRS) units have started an assault and occupied the city. Over the course of a few days, around 25,000 Bosnian Muslims, mostly women, children and old people who lived in this area, were forced to move away and in the atmosphere of terror, Bosnian Serb forces pushed them into overcrowded buses and transported them over the lines of conflict to the territory held by the Bosnian Muslims. Srebrenica men, Bosnian Muslims fit for military service, have experienced another destiny. Thousands of them who tried to escape from this area were captured, imprisoned under inhumane conditions and then executed. More than 7,000 people have never been seen again."

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has incorporated into the Statute [2] the definition of genocide as outlined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, [3] the same one that is in the Statute of the International Criminal Court (ICC) and the one for Rwanda (ICTR). [4] This definition consists of two main and cumulative elements to be fulfilled, namely *mens rea* ("guilty mind") and *actus reus* ("guilty act").

2. CRITIQUES OF COURT JUDGEMENT CONCLUSIONS

2.1 In relation to actus reus the court accepted a) killing); and b) causing severe bodily and mental injury to members of a group as acts of genocide. The mass killings and injuries are no longer in dispute, but in dispute is the release of young and female members of the family, which is often interpreted as just "pleasing" the public. What is important is that the court not only does not determine the biological extermination of Bosniaks, but also exemplifies it as only "figurative" and emphasizes the survival of a large part of the "only in the biological sense and nothing more" [5] . This is at least contradictory, even contrary to their own acceptance of the attitude of bodily destruction of the group. Many courts, including the German court in the *Jorgić* case [6], have not accepted the consensus since the preliminary drafts that the destruction of the group must be merely physical. This mistake was corrected by the Hague Tribunal but in its explanations it was mostly led, as we will see, by cultural and social repercussions that the crime implies for the continuation of life of the Bosniak group. Lemkin (1944), who coined the term genocide, proposed a truly broader definition than the present one, but on the other hand, he did not mention either special intent or mental injury that we are writing about below.

2.2 In addition to killing and bodily injury, the court includes "expectation of execution" and "separation from the family" [7] in the mental injuries of genocide. Murray (2011 , 606) agrees that such an extensive interpretation of the definition of stress in the minds of the survivors is going too far. The same stress is also present in other forms of crimes and those actions that do not *per se* have a genocidal capacity cannot be considered ads genocidal acts.

2.3 Moving children from one group to another the Court does not recognize in turn as *the actus reus* but to the contrary repeats the thesis of the International Court of Justice in paragraph 80 of the judgment of B&H against Serbia that the persecution of women and children will "probably cause serious harm or even death" [8] . This thesis is not substantiated. It nowhere views the deportation of women and children as a humanitarian act but as prosecution even though the intent of this was not explicitly demonstrated in a single defendant in further cited judgments.

2.4 The Tribunal refused to interpret the separation of men from women and children as a "measure of preventing birth" [9] . This again contradicts its own explanation that "with respect to the birth of children women will no longer be able to get married until they hear what happened to the missing men" [10]. The designation of the Bosniak society as a "patriarchal" does not, on the other hand, prove the genocide or the essential difference, since other surrounding societies are patriarchal to a similar degree (as well as Southwick 2005, 201).

2.5 Conditions that are calculated to bring about the disappearance of the group are surprisingly not recognized in *Directive 7* of Radovan Karadzic, which explicitly states: "... to create conditions of total insecurity, intolerance and lack of prospects of further survival or life for the inhabitants of Srebrenica" [11] . These conditions could easily be recognized in the lack of humanitarian aid and the shelling of the city in 1993 [12] . Instead, the Tribunal insists on various contexts concerning deportation or ethnic cleansing.

2.6 As far as ethnic cleansing is concerned, the Court views compulsory displacement of women and children exclusively in the genocidal context [13]. It should be noted that the equalization of ethnic cleansing with genocide in *de lege lata* legal regulation is wrong, and in legal science we can find such

forms of interpretation only in embryonic development [14]. Nevertheless, in its resolution from 1992, the OUN emphasized that expulsions and crimes in B&H were part of a genocidal campaign and genocidal acts, so the Croatian Criminal Code of 1997 foresaw "forced displacement" as an act of genocide [15]. However, this item has been excluded in recent versions of the law [16] . Although some scientists have a hard time "distinguishing" the concepts of cleansing and genocide (Andreopoulos 1997 or Sterio 2017 , 295 versus Schabas 2001), these two concepts are distinct and the notion of ethnic cleansing has just got its scope in the nineties and in the work of the Hague tribunal in various variants or subdivisions of the crime. And if and when the ethnic cleansing is taken as the overture or the consequence of a genocide, it can never be genocide in itself (and Murray 2 0 11, 593 and Southwick 2005, 215). Verdict *Stakić* [17] denies that the ethnic cleansing is the actus reus of genocide, but the court again accepts the attitude of the International Court of Justice that "ethnic cleansing can be a form of genocide only if it falls under any of the categories of prohibited by Article 2 of the Genocide Convention". [18] Both courts are erroneously equating ethnic cleansing with expulsion, which does not include some of the crimes referred to in Article 2 of the Genocide Convention, and the error is evident from a grammatical reading of definitions and also from the preparatory acts of the conference. Judgment *Krstic,* as well as many other judgments, refers to the ethnic cleansing as a form of genocide, not taking into account the possibility of another context or other crimes which cover it. Also, persecution can be a crime for itself, it is clear. And among domestic authors Gagro and Škorić (2008 , 1413) claim that when satisfying certain (?) conditions ethnic cleansing can "grow" into genocide. Even if that was true, it does not affect the basic and precise distinction. And the Convention itself did not include ethnic cleansing for a reason in the definition although there were such proposals by states like Syria (Abtahi and Web 2008). It should not be easily equalized. The ICTY in the verdict *Blagojević* says "displacement in itself is not genocide except when it is a consequence of the destruction of a group" [20] . Such a thing is nowhere to be found in international law or convention, and the court has not even "proved" that the group as such has been destroyed, what we will show later. Since the Tribunal did not dare to submit it directly under the *actus reus* so it created a new term and explanation for putting families into buses. Namely, such expulsion is a part of an "*additional measure"* to ensure the effective realization of the genocidal plan [21]. Such, so-called, "*cumulative or combined effect* " is something entirely new in international criminal law that has emerged from its interpretation. The combination of "discriminatory laws and acts of violence" was mentioned only in the case of *Eichmann* in a context that did not even include genocide [22]. Looking at it logically, the displacement of these civilians, women and children in Srebrenica, would have equal or worse effect on them if they have been left in the city or have been abandoned. Thus they were returned i.e. taken to Kladanj, Tuzla and other places in the same Bosniak environment, since there are no "Srebrenica" but only Bosnian Muslims or Bosniaks. After exhumations, and without them, many of them will continue reproductive and social life. What also remains uncertain is the answer to the hypothetical question of why someone who is really directed towards the physical destruction of a group, sufficiently cold-blooded to kill more than 7,000 unarmed men and boys, cares about organizing transport for women, children and the elderly for evacuation (Schabas 2001 , 46)? Southwick (2005 , 203) also argues that the intent to destroy the group would be more apparent if the Serbian forces simply left women and children.

2.7 Burial in mass graves and relocation to other locations is wrongly assumed in all judgments as evidence of genocide. If anything it represents an "indication" to destroy a group, as claimed by Gagro and Škorić (2008, 1399), but that does not need to mean that, since other crimes are hidden in a similar manner in the case of mass murder, and the "impossibility" of burying the victims or the affliction of "great mental pain to the survivors" goes beyond the genocidal act and the context. This is another missed argument of the court that is repeated in many judgments [23] .

2.8 The " Hague " has rated the protected group as "Bosnian Muslims" , which is in accordance with international criminal law and constitutional right to a nation [24] . However, its narrowing of the geographic criterion , since *Jelisic's* verdict [25] , is not further accompanied by an adequate explanation of why the Srebrenica Muslims are distinct from others to exclude them from their total number in

Bosnia (or Europe). We have seen that the destruction of a group relates to the survival of Muslims of Srebrenica only related to the town of Srebrenica and not to their survival in the second area that remained unquestionable, since all the transported civilians arrived safely at their destination by bus to Kladanj or the surroundings. We will also see that numerically this was not an insignificant part, and among children there was a large number of male children, that is clear. Also, the discussion was about the distinction between Srebrenica and Eastern Bosnian Muslims [26] and the fact that Srebrenica displaced persons were not just Srebrenica natives was neglected. As for a substantial part of Muslims, the *quantitative criterion* therefore faces major difficulties. [27] Srebrenica was then made up of about 40,000 inhabitants, and to the number of people from the urban areas we should also add the surrounding areas and the refugees from the region of "Podrinje" (Drina river). The number of killed Bosniaks or Muslims makes less than 1% of the total Muslim population of BiH. Compared to the "Eastern Bosnian Muslims" they make about 5% of 170,000 in total. And in relation to Srebrenica with its surroundings, it is 20%, and, as the court itself says, only the "fifth" of the entire population. When it concludes that it must have been known that this "fifth would inevitably lead to the physical disappearance of Bosnian Muslims, the inhabitants of Srebrenica" [28] , it does not encourage the answer to the logical question: why would the fifth have radically influenced the survival of the whole group? The other four fifths are not just women and children. It is also necessary to count the men who managed to break through the corridor to Tuzla, of which there were several thousand, including the group that General Pandurević [29] let pass through the Corridor. It is true that among the victims there were also several younger than 12 and some older than 60. However, this cannot be taken as a systematic pattern because it is more of an exception than the rule. Also, the murder of the elderly cannot be motivated by reproductive implications.

As far as the quantitative analysis is concerned, it should be mentioned that since *Krstić* it was claimed that the concepts of protected groups and national minorities were "mostly synonymous" [30] . This is often prevalent but also controversial. Looking from the perspective of B&H , Serbs were actually a minority in comparison to Bosniaks. Although Srebrenica was an enclave, it was a part of the general Bosnian territory and the 28th Division of the Army of B&H was part of the general Army of B&H in the territory of Bosnia and Herzegovina. This includes the issues of the rights of the people, i.e. the state recognitions and changes of the international borders that have been divided into *de jure* and *de facto* borders, as confirmed in the verdict of *Stakić* [31] .

The ratio of military forces was also such that the number of divisions surpassed the number of surrounding forces of the Army of Republika Srpska (Souwthwick 2005 , 203).

2.9 In the *qualitative* analysis, the Tribunal defines the protected group as positive [32]. There is a problem of those groups and persons who enter under the unconventional negative criterion (non-Serbs), and they were also victims of crimes and intent of genocide that may be "generalized" by perpetrators [33]. Or is the question what if, for example, we could not discern who the victim is, would it still mean that it could also be qualified as genocide, despite the proven intent to destroy? With a positive criterion and this question it was not a good solution either hat the ICTY has taken the position that there needs to be no scientific results regarding the characteristics of the group and the fact who the victim was, in contrast to the International Tribunal for Rwanda (ICTR) that explained the identity of the group in the Rwandan conflict [34]. Therefore, with this the ICTY approaches the "subjective theory" about how it is important to look at the whole thing from the perspective of the perpetrator, although scientists have largely disagreed with it as well as prof. Schabas (2001 , 39) [35]. He considers it completely wrong, because there must be an objective criterion in such an important issue. The same opinion was given by Wagner (2008). Another problem in defining the group is because it is called in each instance "Muslims" instead of Bosniaks as the members are being perceived exclusively in the context of religion, which is wrong, because the civil nation called Bosniaks was introduced in the eve of the conflict and since then it bears this name. Many members of the nation were, of course, atheists (Wagner, 2008, 216).

Furthermore, the Court frequently emphasizes "the importance of the Muslim community of Srebrenica" [36] as well as "messages to the rest", not pointing out the difference between this community and all others, or why then such a "genocidal" status (because of arguments such as "message to the rest") would not be given to execution sites such as Škabrnja, Vukovar, the surroundings of Knin or Ahmići and so on? The tribunal itself in the proceedings of *Brđanin* stressed out the danger of "equivocation" if the target was reduced to municipalities. [37] As for the substantial portion of the destroyed group (since we certainly cannot talk about the destruction of the whole), it was wrong that the term "significant portion" [38] was used from the very beginning. Considering that a significant part of Srebrenica people was killed would mean putting *a significant part of a significant part of* Bosniaks killed in B&H under genocide . This is easily criticized by *Tournay* (2003). And the other term is also questionable.

Here we a problem of, as we would say, "dimensions within dimensions". The Tribunal implicitly confines itself to Bosnia and Herzegovina, and therefore the critics, such as Dr. Kreća, ask whether the group consists of the sum of the (sub) groups or not, what is the criterion that some group or place is distinct and significant and other is not etc. [39] Distinction to him therefore reduces the protection that the group enjoys as a whole, although the author thinks it can still be increased for the following more important reason. If we are to look at it this way, the court is logically and legally wrong when the protection of Bosniaks was reduced only in Bosnia and Herzegovina, and again reduced Srebrenica hastily and optically properly to a "portion" of the protected group. Bosniaks are not a group that lives only in B&H. There are a large number in Serbia and Sandžak (150,000), Croatia, southern Europe and beyond all over the world. The court was supposed to connect two things: a narrow geographic distinction in certain areas where it is likely that a deliberate genocide was committed, or may be committed, together with the protection of the group - a whole and everywhere. Nazi Germany tried to destroy the Jews throughout Europe, and did this remarkably successfully (1/3).I t has accomplished a complete genocide, though the figure is not "essential" to the principle. So Bosniaks can (but very hard or seldom) be the goal of absolute destruction, but in the larger or lesser area of the attack. Since nobody ultimately tries to destroy someone in the whole world or the universe, nor can they objectively do this, the geographic criterion is still necessary. But the other thing then to be connected with geographic "envelopment" is then the "non-envelopment" of groups. In Srebrenica, the target group was not a *part of Bosnian Muslims* ; in Srebrenica, the target group could only be - *Muslims i.e. Bosniaks* and that in their entirety. And the men who were killed are then allegedly *a significant part* of *Bosniaks in Srebrenica* (of all). Only in this case the court observations would be logical but even then the question remains of the number or significance of the fifth of people killed for such a big accusation.

2.10 In the case of the murder of religious and civil leaders, in the case of *Tolimir*, a great deductive error was made that the killing of these officials, and several months later, would take place under a genocidal act, although there were no genocide and mass murders in the Žepa itself [40]. It is happily corrected in the second stage [41] since no link was found between these murders and the survival or destruction of the group. On the other hand, in Srebrenica, the leaders of both sides were exchanged (Honig and Both 1996), and in it and around it there were mass murders. Although Srebrenica was a stronger base, however, the patterns are completely controversial.

2.11 The Court does not make the difference between civilians and soldiers, i.e. puts everyone under civilians, even though the International Court of Justice warns of mixing groups as potential targets of attack [42].This can certainly affect the motivation for shootings and military necessity, and especially of shelling.

2.12 The Court ignores the fact that the community of Bosniaks in Srebrenica has been renewed to date [43] although the court reiterates the conclusions about the certain breakdown and disappearance of the group to the end [44]. The group has not been destroyed biologically and its social consolidation can only be postponed or territorially separated from the Srebrenica municipality and in line with the demographic changes that have occurred everywhere since then. The Court implies mostly the sociological component of the existence of a collective, and membership of a particular group can be

attributed to other types of crime through discriminatory intentions. The group is socially determined but its survival must be limited to physical survival. To title a tragedy called genocide could make survivors of the group and make the recovery process more difficult. Women and children are a logical goal if one wants to destroy a group, rather than a military capable man and leaders, and their survival suggests that the group will continue to live (Southwick 2005 , 209). They have been closed to the public "perception" and this complicates the process of reconciliation and also extends the hostilities, said Southwick (2005, 218).

2.13 Existence of so-called "contradictory evidence" [45], such as letting a particular group that was making its way towards Tuzla through or negotiating exchange of prisoners, the court interprets exclusively in the context of a slight deviation from the genocidal plan or intent in accordance with the given combat conditions [46]. It does not take into account the other side of these phenomena, as well as the evidence of genocide and intent, mostly from statements that were often varied and charged with common hatred or reactions. The way Mladić talked with representative Ćamila Omanović [47] was interpreted in the context of his threats that they will all "survive or disappear", but actually it was a request for surrender of weapons and the consequences if it is not realized, but he also speaks that civilians could stay or go.

2.14 With regard to the most delicate part of the crime of genocide the Court Chambers are "thinnest" on the issue of *mens rea* or proof of intent of genocide. In the delicate and first judgment of *Krstić* already mentions only knowledge as a kind of intent. [48] This is closer to the second-order intent than to the direct special intent required by the "underlying" offense, and where the level of proof should also be the highest (Murray 2011 ,596). Not only does it accept *knowledge* as a criterion, but often required is only the "obligation of knowledge". The Bosnian Serb forces "knew ... should be aware ... be aware ... should know ... with full knowledge of the harmful consequences", is repeated in the judgment of *Karadžić* etc. [49]. Despite the incriminating statements of individual actors, for Radovan Karadžić who was in charge and responsible, not even this was implied, but it is only assumed that his conversation with commander Deronjić was about it. If they wanted to avoid his potentially opposite command subordinates could very easily wish to never even inform the President about the actual incriminating events. Indeed, the court should not have considered the guilt that was closer to the *dolus eventualis* or the *indirectus* than the *dolus directus* and *dolus specialis* as a fundamental feature of the genocide. This is also the case with Roxin (1973) and the UN Commission's report of experts highlighting the "special state of mind" (Schabas 2001 , 49). Dolus specialis is certainly the highest in the hierarchy and the court draws its conclusions from *dolus generalis* [50]. Just the knowledge of genocide sufficient for direct accountability is forseen by a very small number of authors (such as Greenwalt 1999 , 2288) and others as Wagner or Burns (2010 , 25) predict knowledge and *dolus indirectus* only as the criterion of guilt in accusations of "participation" in genocide. In the case of Krstić it was controversial whether he was a participant or a perpetrator, so his judgments differ in that regard. The most accurate approach is by authors such as Thompson, Quets or Degan (2008 , 81) who do not leave the doubtful legal fact that genocide must be intended for the highest and special intent, which is a cumulation of both the *intent* and *knowledge* [51]. The very *actus rei* in the definition of genocide are often conceived by the very high first-order characteristics of intent, as can be seen in reading of the listed works. The intention must be to destroy and nothing else, and knowledge can possibly be required only where the main perpetrator or the plan was proven. There is no proven plan for Srebrenica (before 12th of July 1995) and this is explicitly stated. [52] Despite Lemkin citing "a coordinated plan", the plan is not a separate offense nor a necessary constituent element of the crime of genocide, so the court most often wavers or phrases just that it exists at a "high level" [53]. The plan can only be "an important factor" [54]. The Trial Chamber in the *Popović* case *et al* [55]renounced Professor *Schabas* 's speculations that a widespread attack, as a result of a general plan or a state policy, constitutes a constituent element of genocide, and that it has, as such, been suppressed in court proceedings, since it is in itself undeniable. Therefore, no consensus about the plan has been established, but possibly only on the systematicity of the pattern.

Despite the fact that the court is not always consistent but tries to be convincing [56] , however, it is far more imprecise than the ICTR where in the case of *Akayes* [57] the conclusion was that the accused had "pure intent", and in *Bagilishema* it was said that genocide is a "knowing, deliberate and willing act and that an individual cannot commit it by accident or negligent" [58] . Neither laymen nor the experts cannot help but think that the sheer number of deaths in the short term influenced the impression, and it is also apparent that the court draws conclusions on intent from real or hypothetical consequences rather than to induce it the other way round, no matter how hard it is. It turns out that despite all the defense arguments it wanted to hold the genocide qualifications in the only remaining municipality at all cost. The genocide cannot be a sufficient conclusion "out of reasonable doubt" but should be "the only reasonable conclusion", although this is stated in the case of *Mladić* [59], though it cannot be the only one while there is a possibility that the crime was motivated purely by military goals and due to the sudden unexpected large number of prisoners. Neither did the Army of Republika Srpska expect such a easy victory and the lack of resistance by the international forces. [60]

With the intent, many authors even need to reconsider the introduction of motifs in the *de lege ferenda* definition and in general to look at it in the context of intent to know and interpret it correctly (Greenawalt 1999, Nersessian 2002 , 267, Tournay 2003 , 447, Lemkin 1944, Behrens, 2011).

Since it is true that *gënocidaire* has unpredictable changes (Behrens 2011 , 681), the intent should be considered only in the time context of the *actus reus* , so "the salvation of one part of the group" is the greatest doubt, not the additional evidence of genocidal intent. This special intent is much harder to prove (Behrens 2011 , 679), and the question remains whether the motive (and intent) of the Srebrenica enterprise itself would simply be to eliminate the military danger of prisoners (Schabas 2001 , 46 and Southwick 2005 , 211)? *Krstić's* standard turned out to be incomplete and has extended the meanings of terms (Southwick 2005 ,191). The Court has obviously reduced its standard of intent by rigorous refusal of defense arguments and extensive expansions of circumstantial facts (Southwick 2005 , 196). Tournay (2003) also does not agree to lower the standard of intent, and the deduction from killing to genocide is even called by Schabas (2010) as "enormous". "The Council's conclusion on genocide is certainly reasonable in the light of the legal definition, but according to certain basic principles of legal interpretation and the meaning of common sense, it is not" (Southwick 2005 , 206).

III. CONCLUSION

Although for the victims, anything else than calling the Srebrenica massacre a "genocide" would be like a "slap in the face" (Southwick 2005 , 213), however, it must be said that the cruelty and acts of genocide and crimes against humanity are at least equal or equally painful (Murray 2011 , 591, Gagro and Škorić 2008 , 1415). Therefore, such a multitude of deductions, imprecision and rejections of arguments by the defense and theoreticians are a step backward in the specialization and exclusivity of the definition of genocide. According to Steir (2017) widening the definition instead of narrowing it goes even to revising the definition in two directions, merging intentions for different criminal offenses.

In the Municipalities of Prijedor, Kotor Varoš, Vlasenica, Foča and Sanski Most, the Trial Chamber, with the exception of the Chairman Orie, recognized the genocidal intent in the *Mladić* case and also the genocide itself in order to partially destroy the group. Where the test finally failed is the destruction of a "substantial" part because of a small percentage of the group in total. Because the Army of Republika Srpska forces could but did not destroy a larger number of national groups. [61] Therefore, they did not intend to destroy a "substantial part". This is an obvious example of equally respecting the subjective and objective criterion, which actually leads to the selectivity and relativity of genocide in itself. Justice Kreća was right when he pointed out that the ICTY created a "construction" based on indications and great deduction. Under the screen of the totality of the evaluation, "selective evidence" is exhausted in content (according to Southwick 2005, 11).

With regard to the evidence, the court is still not encouraging. Genocide is commonly the biggest crime that gained momentum and had its legal "birth" after World War II, but treating genocide to as the "crime of crimes", while lowering the threshold limits of proving *mens rea*, apparently is still unsatisfactory for a fair procedure (Murray 2011, 599) [62]. Development of legal standards through discretionary right and case-by-case analysis of the court has gone into extremes and there is suspicion that it is a realization of the political imperatives of the first application of the Article on genocide. While it is true that a larger number of victims contributes to a better and easier deduction that it is genocide (Schabas 2001, 40), however, we must take into account that even the number of victims in Srebrenica makes a relatively small number compared to the total number of victims in Bosnia and Herzegovina or elsewhere.

The Council mentions "destruction beyond physical elimination" and Milanović and Sterio (2017 , 272) recognize the obligation of knowledge, compliance and "complaint based on circumstances" in the last important processes such as *Karadžić* . Despite the echoing judgments, the controversial criteria have implications for withdrawal rather than opening of states to the process of confronting genocidal cases. Almost 30 years after the establishment of *ad hoc* courts, we have to ask one worrying question. And it is an obvious one, "is it possible that international tribunals will finish their work by continuing to debate about what constitutes genocide" (Asscheman 2012 , 2)? Katherine Southwick (2005 , 191) proposes limiting crimes against humanity in order to create the right distinction.

The court has primarily shown an inadequate guide for future cases and other types of crimes can be equally cruelly committed (Behrens 2011 , 676, Southwick 2005 , 205, Burns 2010 , 11). The more genocide is mentioned and applied, the more truth is hidden, and the truth is shown and proved by precise language (Southwick 2005 , 220). The purpose of the criminal justice itself is primarily the protection of individuals and their fundamental rights (of life, liberty and human dignity [63] or mental and physical integrity), as well as to individualize criminal offenses and perpetrators. [64] The final victim of genocide is - a group. This is simply wrong in a time when international law is directed at the fundamental and untimely violation of the rights of individuals (Murray 2011 , 612). Through the "joint criminal enterprise" and the term "genocide", the court has given rise to collective victims and collective guilty.

References

Books and articles:

[1.] Abtahi, Hirad and Webb, Philippa. 2008. *The Genocide Convention : The Travaux Préparatoires.* Leiden: Martinus Nijhoff Publishers

[2.] Andreopoulos, George J. 1997 *Genocide: Conceptual and Historical Dimensions* . USA: University of Pennsylvania Press

[3.] Ash, Robert H. 2013. " Was Srebrenica a Genocide? " *Elon Law Review* , 5: 261-269.

[4.] Asscheman, Lisa. 2012. " In Genocide: Defining Genocide at the ICTY " . *Research Seminar III* , 1-27 .

[5.] Behrens, Paul. 2011. *Elements of Genocide* . London: Taylor & Francis

[6.] Bojanic, Igor . and Djurdjevic, Zlata. 2008. " Permission to Use Evidence Obtained by Infringement of Fundamental Human Rights ". *Croatian Year of Criminal Law and Practice* . (15), 2: 973-1003.

[7.] Burns, Dana L. 2010 " *Dolus specialis* : The International Criminal Tribunal Interpretations of Genocidal Intent " . *School of International Service, American University SIS* , 1-61.

[8.] Degan, Vladimir Đuro . 2008 " Crime of Genocide in International Courts " . *Proceedings of the Faculty of Law in Zagreb* , (58), 1-2: 77-95.

[9.] Drumbl, Mark . 2004. " Case Note - Krstić " . *Melbourne Journal of International Law* , 5: 1-16.

[10.] Gagro, Sandra F . and Škorić, Marissabell . 2008 "The crime of genocide in the practice of international criminal *ad hoc* tribunals " . *Proceedings of the Faculty of Law in Zagreb* , (58), 6: 1387-1420.

[11.] Greenawalt, Alexander KA 1999. " Re-Thinking Genocidal Intent: The Case for a Knowledge-Based Interpretation " . *Columbia Law Review* , 99: 2280-2300.

[12.] Honig , Jan W and Both , Norbert . 1996. *Srebrenica: Record of a Crime.* Michigan: Penguin Books.

[13.] Lemkin, Raphael . 1944. *Axis Rule in Occupied Europe: Laws of Ocupation: Analysis of Gouvernment: Proposals for Redress* . Washington: CE of International Peace.

[14.] Marušić, Bartul . 2017. " Interpretation and application of the definition of genocide through ICTY judgments " . *Polemos* (20), 39-40: 53-82 .

[15.] Murray, Alexander RJ 2011. " Does International Criminal Law still require a" Crime of Crimes "? A Comparative Review of Genocide and Crimes Against Humanity . " *Goettingen Journal of International Law* , (3), 2: 589-615.

[16.] Nersessian, David L. 2002. " The Counter of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals " . *Texas International Law Journal* , 37: 231-276.

[17.] Roxin, Claus. 2012 *Kriminalpolitik und Strafrechtssystem* , Berlin: Walter de Gruyter.

[18.] Schabas, William A. 2001. " Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia " . *Fordham International Law Journal.* 1 (25) : 21-53.

[19.] Schabas, William A. 2010. " Commentary on Paul Bognossian, 'The concept of genocide'" . *Genocide Research,* 12: 90-110.

[20.] Southwick, Katherine G. 2005. " Srebrenica as Genocide? The *Krstić* Decision and the Language of the Unspeakable " . *Yale Human Rights & Development LJ* , 8: 188-227.

[21.] Sterio, Milena . 2017. " The Karadzic Genocide Conviction: inferences, intent, and the need to redefine genocide " . *Emory International Law Review,* 31: 271-298.

[22.] Steir, Lealand. 2017. *Is It OK to Laugh About It?* London: Mitchell publication

[23.] Tournaye, Cécile. 2003. " Genocidal Intent Before the ICTY " , *International and Comparative Law Q.* , 52: 440-460.

[24.] Vajda, Maja M. 2011. " Ethnic cleansing as a form of genocide? Croatian legislation and practice in the light of international sources " . *Proceedings of PFZG* , 6 (61) : 1921-1948.

[25.] Wagner, Sarah E . 2008. *To Know where he lies: DNA Technology and the Search for Srebrenica's Missing* . USA: University of California Press.

Judgments, regulations and newspaper articles on the website:

[26.] https://dnevnik.hr/vijesti/svijet/mladiceva-granata-mi-je-izbila-oci-ali-mislim-da-sam-imao-srece.html (30.1.2018)

[27.] https://www.oslobodjenje.ba/vijesti/bih/majke-srebrenice-primile-predsjednica-hrvatske-ona-je-nama-i-dalje-kraljica-balkana (30.1.2018)

[28.] https://www.sense-agency.com/dokumentarna_produkcija.30.html (30.1.2018)
Criminal Code (CC) NN 101/17 , available at: https://www.zakon.hr/z/98/Kazneni-zakon (30.1.2018)

[29.] *Criminal Code NN 110/97*, available at: https://narodne-novine.nn.hr/clanci/sluzbeni/1997_10_110_1668.html (30.1.2018)

[30.] *Convention on Punishment and Prevention of Genocide Crime* , available at: https://www.istra-istria.hr/fileadmin/dokumenti/upravna_tijela/UO_za_tal_nac_zaj/Instrumenti_zastite_ljudskih_prava/I.Multilateralni_odnosi/1.United_narodi/I-1.2Convency%20o%20sprjecavanje%20i%20inclusion% 20zlocina% 20genocida.pdf (30.1.2018)

[31.] *Roman Statute of MKS* , available at: https://narodne-novine.nn.hr/clanci/medunarodni/2001_04_5_42.html (30.1.2018)

[32.] *Statute of the International Criminal Tribunal for the former Yugoslavia* , available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf (30.1.2018)

[33.] Judgment *Jorgić* , Oberlandesgericht Düsseldorf, dated 26 September 1997 available at: www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_26-9-1997. *pdf* (30.1.2018)

[34.] ICTY *Krstić* IT-98-33 (www.icty.org ...)

[35.] ICTY *Blagojević and Jokić* IT-02-60

[36.] ICJ Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro* of 26.2.2007

[37.] ICTY *Popović et al.* IT-05-88

[38.] ICTY *Tolimir* IT-05-88 / 2

[39.] ILR5 36 *Eichmann* , *District Court Judgment in Jerusalem 1962.*

[40.] ICTR *Akayesu* ICTR-96-4

[41.] ICTY *Stakić* IT-97-24

[42.] ICTY *Karadzic* IT-95-5 / 18-T

[43.] ICTY *Brđanin* IT-99-36

[44.] ICTY *Jelisić* IT-95-10

[45.] ICTR *Kayishema* ICTR-95-1

[46.] ICTY *Sikirica* IT-95-8

[47.] ICTY *Mladic* IT-09-92

[48.] ICTR *Bagilishema* ICTR-95-1A

[49.] ICTY *Borovčanin* IT-02-64

[1] The views of the author are not at the same time the attitudes of the member association. He is also a Ph.D. student at the joint doctoral study of "International Relations" at the University of Zadar and Libertas University in Zagreb.

[2] Statute of the International Criminal Tribunal for the former Yugoslavia, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_bcs.pdf (30.1.2018)

[3] Convention on Punishment and Prevention of Genocide Crime, available at: https://www.istra-istria.hr/fileadmin/dokumenti/upravna_tijela/UO_za_tal_nac_zaj/Instrumenti_zastite_ljudskih_prava/I.Multilateralni_odnosi/1.United_narodi/I-1.2Convencija%20o % 20express% 20i% 20inclusion% 20zlocina% 20genocida.pdf (30.1.2018)

[4] Genocide

Genocide represents any of the following acts, committed with the intent to destroy in whole or in part some national, ethnic, racial or religious groups as such:

(a) killing members of that group;

(b) causing serious bodily or mental injury to the members of that group;

(c) deliberately imposing on members of that group of living conditions that are calculated to lead to its total or partial physical destruction;

(d) the introduction of measures aimed at preventing birth within that group;

(e) forcibly moving children from one group to another

The following offenses are punishable: (a) genocide; (b) association for the purpose of genocide; (c) direct and public incitement to genocide; (d) an attempt to commit genocide; (e) participation in genocide.

[5] ICTY *Krstić* IT-98-33, para. 592nd

[6] Judgment *Jorgić* , Oberlandesgericht Düsseldorf, of 26 September 1997, www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_26-9-1997. *pdf* (30.1.2018)

[7] ICTY *Krstić* IT-98-33, para. 543 . and ICTY *Blagojević and Jokić* IT-02-60, para. 644-654 .

[8] ICTY *Krstić* IT-98-33, para. 590-600 . In the case of extinction of children, which did not occur, this could potentially be considered a genocidal act.

[9] ICTY *Popović et al.* IT-05-88, para. 854 .

[10] ICTY *Krstić* IT-98-33 , para. 595th

[11] http://www.justice-report.com/en/articles/karadzic-indictee-signed-directive-no-7 (1.2.2019.)

At ICTY *Blagojević and Jokić* IT-02-60, para. 662 . and ICTY *Tolimir* IT-05-88 / 2, para. 741 the long-term nature of the creation of conditions was not recognized although the siege lasted for three years and the conditions, as the court says, must not result in death or disappearance. The court has preferred to resort to other more slick interpretations of genocide.

[12] https://dnevnik.hr/vijesti/svijet/mladiceva-granata-mi-je-izbila-oci-ali-mislim-da-sam-imao-srece.html (30.1.2018)

[13] And Mladić nodded his head the most in the courtroom at the prosecution's finding that resettlement had been performed forcibly

[14] See: Vajda 2011

[15] Criminal Code OG 110/97 available at: https://narodne-novine.nn.hr/clanci/sluzbeni/1997_10_110_1668.html (30.1.2018)

[16] See Criminal Code NN 125/11 , 144/12 , 56/15 , 61/15 , 101/17 , 118/18 available at: https://www.zakon.hr/z/98/Kazneni-zakon (07.12.2018.)

[17] ICTY *Stakić* IT-97-24, para. 519 .

[18] ICJ Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro* of 26 February 2007, para. 190. And so does the report of the UN Commission of Experts from 1993.

[19] 260th UN Resolution 9.12.1948.

[20] ICTY *Blagojević and Jokić* IT-02-60 , para. 660 . which also quotes *Borovčanin* IT-02-64
[21] After *Krstic* and *Brđanin* also in the ICTY *Blagojević and Jokić* IT-02-60 , para. 677. The plan was not proven.
[22] *Eichmann* , 36 ILR5 District Court Judgment in Jerusalem, para. 80. - 100. More on the combined effect Marusic, 2017.
[23] See Marušić, 2017.
[24] From the 1968 SFRY Constitution. But it is "afraid " to distinguish the terms Muslim and Bošnjak.
[25] ICTY *Jelisić* IT-95-10
[26] ICTY *Krstić* IT-98-33 , para. 590.
[27] "The listed protected groups are subject to the abuse of judicial discretion and the determination of *intent* to destroy a" *part* "of the group redefines the established protected groups." Ash 2013, 261. The difference is also between the "partial target " of the destruction and the partial group. (Italic added)
[28] ICTY *Krstić* IT-98-33 , Appeal Judgment, para. 28-33 .
[29] http://mondo.ba/a612818/Info/BiH/Vinko-Pandurevic-Srbin-spasao-hiljade-srebrenickih-Bosnjaka.html (31.1.2019.)
[30] ICTY *Krstić* IT-98-33 , para. 555th
[31] ICTY *Stakić* IT-97-24 , para. 679th
[32] For example, in ICTY *Karadzic* IT-95-5 / 18-T, para. 541st
[33] "In Srebrenica Muslims, Roma and Croats were killed, only Serbs were excluded." See: https://www.oslobodjenje.ba/vijesti/bih/majke-srebrenice-primile-predsjednica-hrvatske-ona-je-nama-i-red-queen-balkan (30.1.2018)
[34] *Akayesu* ICTR-96-4, para. 510-516 .
[35] Chalk or Jonassohn's advocates are more subjectively-objective principles, so they do not consider Schabas as legally inadmissible to define a crime by perpetrators, but there is no consensus.
[36] Thus, ICTY *Krstić* IT-98-33, Appeal Judgment, para. 15 .
[37] ICTY *Brđanin* IT-99-36, para. 966. Kreća recognizes this as "*selective genocide* " which in its essence is not a genocide (but *contradictio in adiecto*).
[38] In the case of ICTY *Sikirica* IT-95-8 , para. 81, it is said that only an attribute of "military capability" of a men does not mean in itself "significant segment", if not in the context of numbers. A "significant percentage" is the paradigm used by the council and in the case of *Karadžić* IT-95-5/18, par. 5813, and not before (in *Krstić*, nor *Karadžić himself* , since he mentioned one term in one place (para 5669) and another in another (para 5671).
[39] There were also a significant number of 120 people killed in Ahmići, and not just men. Similarly, it was also in Škabrnja.
[40] The destruction of intelligence or leadership in itself can be under the scope of genocide, according to the *Report of the Commission of Experts of the Security Council no. 780 from 1992.*
[41] ICTY *Tolimir* IT-05-88 / 2-T, Appeal Judgment
[42] "... conflict where the difference between civilians and soldiers was unclear" (" general defense "), ICJ Verdict of *Bosnia and Herzegovina v. Serbia and Montenegro* of 26/02/2007., Part 2, chapter l . 8, ch. 10
[43] See ICJ Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro* of 26 February 2007 and opinion of Judge Kreća, par. 147 as well as the census of 2011 and the electoral system of RS.
[44] "... it can not be said with certainty that the group will never be renewed on a given territory" (Behrens 2011, 681)
[45] The truths are for the first time discussed in the ICTR *Kayishema* ICTR-95-1, par. 72 . and then in Jelisić regarding the allowance of random passing through that can be seen as emotional deviation from the goal. But the court did not accept it as well as the theory of "individual genocide", so genocide was not ruled for Jelisić.
[46] ICTY *Krstić* IT-98-33 , Appeal Judgment, par. 13. They repeat other judgments (Beara).
[47] https://www.sense-agency.com/dokumentarna_produkcija.30.html (30/01/2018)
[48] ICTY *Krstić* IT-98-33 , par. 29, 595.

[49] See Drumble, 2004 and Sterio, 2017. In *Karadzic* it is repeated that genocide can be under the joint criminal venture (*predictable consequence*) , which completely subordinates the special intention of genocide. And when it comes to destruction, it speaks of the "degree of opportunity" (par 544 of the Appellate Verdict) , and not the need for pure evidence. Judge *de Prada* in his separate opinion of the same verdict is also opposed to extending the prison sentence to Karadžić for neglecting the purpose of punishment such as re-socialization and rehabilitation versus retribution. It also advocates the "objectification" of the crime of genocide versus other opposing tendencies. The final verdict is a typical example of "*circumstantial evidence* " of holistic treatment, and not directly proven guilty in regards to killing and intent, which is very sensitive , despite the high position of the accused. The prosecution is dissatisfied with the "too narrow" definition of genocide in other municipalities. They will never be all satisfied.

[50] ICJ Judgment of *Bosnia and Herzegovina v. Serbia and Montenegro* of 26 February 2007, Judgment of the Judge Kreća, para. 140- 1 6 0.

[51] More about it Andreopoulos (1997), and Sterio (2017, 295) is reluctant to equate genocide and ethnic cleansing.

[52] ICTY *Krstić* IT-98-33 , Appeal Judgment, par. 90 , A and " there is no evidence that Krstić has ordered it... but rather than he knew that the Several Headquarters uses his staff and resources ..." ICTY *Krstić* IT-98-33 , Appeal Judgment, par. 144th

[53] ICTY *Stakić* IT-97-24 , par. 530 . -550 . , ICJ *Brđanin* IT-99-36, para. 980 . , ICTY *Krstić* IT-98-33, para. 546 . There was no meeting as in the "final Jewish solution".

[54] ICTY *Jelisić* IT-95-10 , par. 48 .

[55] ICTY *Popović et al* IT-05-88, from par. 850.

[56] As in ICTY *Blagojević and Jokić* IT-02-60, par. 677 where he argues that the forces not only "knew" but also "clearly intended to physically destroy this group through these acts" but does not substantiate it with evidence.

[57] *Akayesu* ICTR-96-4, from par. 595 further.

[58] ICTR *Bagilishema* ICTR-95-1A , par. 58th

[59] ICTY *Mladić* IT-09-92

[60] UN document A / 54/549

[61] See also ICTY Judgment *Brđanin* IT-99-36, par. 978 .

[62] The threshold is also going down for the purpose itself and it is forgotten that genocide came from crimes against humanity and not vice versa. Murray also "favors" the application of the definition of "extermination" in some form or without this intention, as less rigorous and effective, and even asks whether a special crime of genocide is even needed today. Even, on the contrary, the crime against humanity offers better protection in cases of ethnic cleansing than genocide. Only the preventive obligations should be increased. Although the court recognized cleansing as an "intelligent act of genocide", it all resembles *contradictio in adjecto, ultra vires, nulla crimen* and *ne in dubio pro reo.*

[63] See Bojanić and Djurdjević, 2008

[64] "individualized guilt ... Such a concept of crime is a common heritage of contemporary criminal law." ICJ 2007 BIH versus Serbia. Ed. Kreća, para. 152. In *Brđanin* , however, the protection of individuals and not just groups is mentioned . But circumstantial evidence may not be sufficient even when determining the JCE as the "underlying" intent of crime and genocide, which in some theory can be conceived as a means or a tool of ethnic political cleansing.