
ARTICLES

“WAS SREBRENICA A GENOCIDE?”

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On February 26, 2007, the International Court of Justice (“ICJ”) held that acts of genocide were committed in Srebrenica.¹ Long before the ICJ reached its holding, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) also held that Srebrenica was a genocide.² Before fully agreeing with the holdings of the ICJ and the ICTY, this paper will point out potentially problematic areas of the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”) and question how the ICJ and ICTY reached their holdings. Particularly, it will be proven that the scope of the enumerated protected groups is susceptible to abusive judicial discretion and that a determination of intent to destroy “in part” consequently redefines the established protected group. The objective of this paper is to try to dismantle the judicial reasoning of the ICJ and ICTY in order to dismiss the claim that Srebrenica was a genocide. In the end, however, the reasoning of both the ICJ and the ICTY is sound, and the holding of genocide is confirmed.

1. Brief History of the Term “Genocide”

The term “genocide” is relatively new to the English language and the international legal field. Created by Raphael Lemkin in response

¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 108, ¶ 297 (Feb. 26).

² See Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 599 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), available at <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

to the atrocities committed by the Nazis before and during World War II, genocide was intended by Lemkin to signify “the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”³ According to Lemkin, the Nazis used various techniques of genocide in eight distinct fields: political, social, cultural, economic, biological, physical, religious, and moral.⁴ Out of these eight fields, however, physical genocide, more specifically “endangering of health” and “mass killings,” received the most international attention.⁵

On December 9, 1948, the Office of the United Nations High Commissioner for Human Rights approved the Genocide Convention.⁶ The Convention defines genocide as:

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.⁷

States, lawyers, and commentators alike have criticized the narrowness of the definition and called for its modification since its ratification.⁸ Georg Schwarzenberger even stated that the Genocide Convention is “unnecessary when applicable and inapplicable when necessary.”⁹ The definition of genocide, however, has remained unchanged even though opportunity to modify it has been available.¹⁰

2. Scope of the Protected Groups

The scope of the enumerated protected groups is problematic, because it is susceptible to abusive judicial discretion. William Schabas argues that the four protected groups simultaneously overlap and de-

³ RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (2d ed. 2008).

⁴ *Id.* at 82-90.

⁵ *Id.* at 88-89.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁷ *Id.* art. II.

⁸ William A. Schabas, *Commentary on Paul Bognossian, ‘The concept of genocide’*, 12 J. OF GENOCIDE RESEARCH 91, 98 (2010) [hereinafter *Commentary*].

⁹ *Id.* at 98-99.

¹⁰ William A. Schabas, *Genocide Law In A Time Of Transition: Recent Developments In The Law of Genocide*, 61 RUTGERS L. REV. 161, 162-63 (2008) [hereinafter *Genocide Law*].

fine each other, while trying to define each term independently risks weakening “the overarching sense of the enumeration as a whole”¹¹ Schabas’ interpretation provides too much incentive to use judicial discretion to identify a group, because international judges can take various factual assertions about a group (national, ethnical, racial or religious), place them into a mixing bowl, and cook them into a single identifying trait.¹² This mixing bowl approach does not weaken the “overarching sense of the enumeration,” but there is potential that the judicially identified groups do not easily fit into any of the enumerated protected groups.¹³ The judicial use of objective and subjective criteria demonstrates this point.

The ICJ, ICTY, and International Criminal Tribunal for Rwanda (“ICTR”) use both objective and subjective criteria to determine whether or not a relevant protected group exists under the Genocide Convention.¹⁴ Under this approach, “stable and permanent” or objective traits of nationality, ethnicity, race, and religion seem to co-exist with how persecutors subjectively perceive their victims belonging to a group.¹⁵ A disturbing idea about this process, as William Schabas points out, is that it “seems to function effectively virtually all the time”¹⁶ But why is this process so effective, and should this process be so effective? William Schabas argues it does not matter whether the group existed objectively because indelible identifications distract the court from the “fundamentally subjective nature of group identification.”¹⁷ Thus, to Schabas, the persecutors’ subjective identification of the group should overshadow the court’s own objective identification of the group.¹⁸ A retreat from objective identification may be justifiable when religion, nationality, and ethnicity are not indelible.¹⁹ But total exclusion of objective identification may also distract courts from identifying a true group trait, if any exist.

The particular objective facts surrounding Srebrenica establish a relevant protected group without the need for any judicial strain. In *Prosecutor v. Krstic*, the ITCY held that Bosnian Muslims were a pro-

¹¹ *Id.* at 167.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 166.

¹⁵ *Commentary, supra* note 8, at 98.

¹⁶ *Genocide Law, supra* note 10, at 167.

¹⁷ *Commentary, supra* note 8, at 98.

¹⁸ *Genocide Law, supra* note 10, at 164-67.

¹⁹ *Commentary, supra* note 8, at 98.

tected group under the Genocide Convention because the “Bosnian Muslims were recognized as a ‘nation’ by the Yugoslav Constitution of 1963” and because Bosnian Serb politicians and military forces in Srebrenica viewed the Bosnian Muslims as such.²⁰ The ICJ simply accepted and restated the ICTY’s findings in *Krstic* to conclude that Bosnian Muslims were a protected national group.²¹ Thus, the objective criteria of constitutional recognition easily placed the Bosnian Muslims into an enumerated protected group, while subjective criteria only reinforced the finding. The strength of Bosnian Muslims’ national identity is undeniable, so the first aspect of the Genocide Convention is satisfied. But this objective-subjective criteria test is not always so predictable and could cause concern to future international courts applying the Genocide Convention.

Shockingly, the judicial weight of objective criteria seems to dissipate or even disappear when particular facts of a case do not easily fit within any of the enumerated protected groups. For example, in *Prosecutor v. Rutaganda*, the ICTR held that “membership [in an ethnic] group is . . . a subjective rather than an objective concept.”²² Furthermore, the International Commission on Darfur (“Commission”) held that persecuted tribes constituted a protected group under the Genocide Convention because the persecutors’ subjectively perceived the victims as a group.²³ This holding, however, is hard to understand when the Commission also found that:

[t]he various tribes that have been the object of attacks and killings . . . do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language . . . and embrace the same religion²⁴

These objective facts certainly provide an identity to the persecuted tribes, but because the objective-subjective criteria test seemingly failed, the Commission strained and found a protected group anyway. The concern with the objective-subjective criteria test is that, as evi-

²⁰ *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 559, (Int’l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001), available at <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

²¹ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 108, ¶ 296-97 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13687.pdf>.

²² *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 55 (Dec. 6, 1999), available at <http://www.unict.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf>.

²³ *Genocide Law*, *supra* note 10, at 165.

²⁴ *Id.* at 165-66.

denced above, it is not being consistently applied by international courts. Judicial discretion allows substantial weight to be placed on either objective or subjective criteria (or even allows subjective criteria to be the only determining factor on whether or not a relevant protected group exists).²⁵ Since the ICJ and ICTY could heavily rely on the objective fact of constitutional recognition of Bosnian Muslims in 1963, these courts' holdings escaped abusive judicial discretion. As a result, identifying the Bosnian Muslims as a relevant protected group is lawful and unquestionable.

Application of the objective-subjective criteria test by the ICJ and ICTY to identify a protected group is disconcerting when objective facts are missing to define a group. Let's return to the Srebrenica genocide. As a refresher, the ICJ held that genocide “requires an intent to destroy a collection of people who have a *particular group identity*.”²⁶ For the sake of argument, however, let's say the Bosnian Muslims were not constitutionally recognized as a nation in 1963. Application of the objective-subjective criteria test will now reach a different result, which might undermine the legitimacy of the ICJ's and ICTY's holdings. For example, in Sarah E. Wagner's book, *To Know Where He Lies: DNA Technology and the Search for Srebrenica's Missing*, the Islamic community subjectively identifies the victims of the Srebrenica genocide as a group of religious martyrs.²⁷ As a result, the group of victims could be labeled as a religious group under the Genocide Convention. In reality, however, this religiously labeled group was composed of individuals that did not actively practice religion or even considered themselves atheists.²⁸ If no objective facts are attributable to the Bosnian Muslims, and the group is composed of ethnically mixed and irreligious men as Wagner explained, then the ICTY and ICJ cannot reasonably find a distinct national, ethnical, racial, or religious group trait without completely abandoning the objective criteria of the test.²⁹ Thus, no protected group would exist, and the mass killings of Srebrenica would not be labeled as genocide. This is, however, not the case with Srebrenica, and this scenario is only used to plant seeds of uncertainty in the application of the objective-subjective criteria test.

²⁵ *Id.* at 166.

²⁶ *Id.* at 168 (emphasis added).

²⁷ SARAH A. WAGNER, *TO KNOW WHERE HE LIES: DNA TECHNOLOGY AND THE SEARCH FOR SREBRENICA'S MISSING* 216-17 (2008).

²⁸ *Id.* at 216.

²⁹ *Id.*

The enumerated protected groups seem cumbersome and narrow, and the lack of modification has resulted in the ICJ, ICTY, and ICTR adopting the objective-subjective criteria test.³⁰ This test, taken in whole (or in part by some courts), is flexible enough to find a protected group even though a group trait may not exist.³¹ Thus, as Paul Boghossian argues, the public should resist capturing all human atrocities in “one neat word (genocide),” and the public should also resist capturing all group traits within four neat words.³² The ICJ and ICTY were able to capture the Bosnian Muslims identity within a specific national group, so there is no denying their findings are valid and enduring. But it must be stressed that “intent to destroy, in whole or in part, as such,” the second element of the Genocide Convention, should not be the only safeguard against unjust persecution. Thus, the list of enumerated protected groups must be modified so that the ICJ, ICTY, and ICTR do not apply various concepts of the objective-subjective criteria test.

3. A Finding of “Intent to Destroy . . . in Part,” and its Effect on the Scope of the Protected Groups

“[I]n whole or in part” is included in the Genocide Convention definition to explain the intent of the persecutor and not the result of the persecutor’s actions.³³ The “in part” segment is applicable to the Srebrenica genocide because the Bosnian Muslim group was not totally destroyed.³⁴ “In part,” however, is too narrow for immediate judicial application, just like the enumerated protected groups. As a result, the ICJ, ICTY, and ICTR have interpreted the scope of “in part” and developed three distinct approaches to define it further.³⁵ Only two approaches will be discussed in this paper.

The first approach is to modify “in part” to include “substantial,” which indicates a numerical significance.³⁶ The second approach adds a geographic element, which indicates genocide can be committed within a limited geographical area.³⁷ Although “in part” speaks to the intent of the persecutors, it also has the separate effect of redefining

³⁰ *Genocide Law*, *supra* note 10, at 166.

³¹ *Id.* at 164-67.

³² Paul Boghossian, *The Concept of Genocide*, 12 J. GENOCIDE RES. 69, 80 (2010).

³³ *Genocide Law*, *supra* note 10, at 179.

³⁴ *Id.* at 182.

³⁵ *Id.* at 179.

³⁶ *Id.* at 180.

³⁷ *Id.* at 183.

the already determined national identity of the Bosnian Muslim. Therefore, due care must be given in order to find “intent to destroy.”

The definition of “substantial part” varies with each international court applying the Genocide Convention. The ICTR has held “substantial part” to mean considerable numbers.³⁸ The ICTY has held “substantial part” to mean “reasonably substantial number relative to the group as a whole,” but “not necessarily a very important part.”³⁹ What is puzzling about these holdings is that there is no definition of considerable or substantial numbers.⁴⁰ Commonsense cannot direct us to a threshold number to determine whether or not genocide has been committed. So, as Paul Boghossian points out, an identifiable protected group simply might not have the numbers to constitute genocide, even though the persecutors deliberately attacked victims for being a part of the group.⁴¹ As a result, substantial numbers, or lack thereof, has a profound consequence on the notion of the group. Either identity is sustained because of substantial numbers, or identity can be redefined as relatively unimportant or even nonexistent. If the later is true, then genocide cannot be found to have occurred. Lack of substantial numbers, however, will not redefine group identity and prevent a finding of genocide at Srebrenica, because around 8,000 Bosnian Muslims were murdered, which constituted a high percentage of the population in Srebrenica.⁴² Therefore, the holdings of the ICJ and the ICTY continue to remain valid, but there is a troubling second element of the “substantial part” test that could prove factually fatal to those holdings.

In *Prosecutor v. Krstic*, the ICTY states, “[a]lthough the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they *must view the part* of the group they wish to destroy as a *distinct entity* which must be eliminated as such.”⁴³ This holding seems to indicate that not only does there need to be a substantial number of victims, but that the “part” of the group destroyed must be distinct from the “whole” of the group. Therefore, in order to properly fulfill the ICTY’s own directive to find intent to destroy “in part,”

³⁸ *Id.* at 180-81.

³⁹ *Id.* at 181.

⁴⁰ *Id.* at 180-82.

⁴¹ Boghossian, *supra* note 32, at 75-76.

⁴² *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 592, (Int’l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

⁴³ *Id.* ¶ 590 (emphasis added).

group identification must be narrowed and redefined to become “distinct.” The ICTY in *Krstic* makes no attempt to articulate how the Bosnian Muslims in Srebrenica are distinct from the general population of Bosnian Muslims living within Bosnia and Herzegovina.⁴⁴ Moreover, when the Prosecution in *Krstic* attempted to label the distinct “part” Bosnian Muslims of Srebrenica or of Eastern Bosnia, the ICTY reaffirmed the correct group identification is simply Bosnian Muslims.⁴⁵ This new requirement, however, may not be problematic to the ultimate finding of genocide in Srebrenica when the “geographic” approach is applied in conjunction with the “substantial part” approach. But this reasoning would mean the defining factor of the partial group is landownership or residency, group traits not encompassed in the enumerated protected groups.⁴⁶ Therefore, intent to destroy must be found elsewhere.

The “geographic” approach resurrects the findings of intent to destroy and establishes beyond a doubt that genocide occurred in Srebrenica. Under this approach, intent to destroy “in part” is satisfied when all members of a protected group within a recognizable and defined area are killed or transported out of the area.⁴⁷ Moreover, partial destruction should be considered in “relation to the factual opportunity of the accused to destroy a group” in the specific area.⁴⁸ In *Krstic*, the ICTY held that “killing members of the part of the group located within a small geographic area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in small geographical area.”⁴⁹ It seems that the ICTY has abandoned the “distinct” requirement of the “substantial part” approach in order to find intent to destroy through the “geographic” approach. But the ICTY’s finding of intent seems strained given the fact that it acquitted various Bosnian Serb war criminals including Krstic on the charge of genocide.⁵⁰ Furthermore, even though the ICJ found genocide occurred in Srebren-

⁴⁴ *Id.* ¶ 591.

⁴⁵ *Id.*

⁴⁶ See *Genocide Law*, *supra* note 10, at 163.

⁴⁷ *Id.* at 183.

⁴⁸ *Id.* at 184.

⁴⁹ *Krstic*, Case No. IT-98-33-T, ¶590.

⁵⁰ Vojin Dimitrijevic & Marko Milanovic, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT’L L. 65, 88 n. 115 (2008).

ica, it could only find Serbia guilty for failing to prevent and punish genocide, not guilty of genocide itself.⁵¹

I believe Srebrenica was a genocide because the facts surrounding the atrocities occurring in Srebrenica around July 1995 indicate that Bosnian Muslims were killed out of racial and national spite.⁵² Moreover, only a finding of genocide can truly illustrate to the international community that the right to life must be protected at all costs.⁵³ The label of genocide is also appropriate for Srebrenica because “crimes against humanity,” another charge available to the Prosecution, falls short of total physical destruction, which occurred in Srebrenica.⁵⁴ Even though I tried to point to uncertain application of the Genocide Convention and used hypothetical results, I cannot think of Srebrenica as anything less than genocide. A relevant protected group existed, and both the ICTY and ICJ found the requisite specific intent. The inquiry of this paper was whether or not Srebrenica was a genocide, which I believe was answered in the affirmative. If the inquiry was whether the Genocide Convention is the best way to bring justice upon the individuals perpetrating the genocide, then my answer would be very different.

⁵¹ *Id.* at 84.

⁵² *Id.* at 71.

⁵³ *Genocide Law*, *supra* note 10, at 192.

⁵⁴ *Id.*

