*Milenko Kreća, PhD**

DOI: 10.51204/Zbornik_UMKP_25101A
Originalni naučni rad

THE JURISPRUDENCE OF AD HOC TRIBUNAL FOR FORMER YUGOSLAVIA (ICTY) AND AD HOC TRIBUNAL FOR RWANDA (ICTR) AND INTERNATIONAL COURT OF JUSTICE (ICJ) ABOUT DESTRUCTION OF A PROTECTED GROUP IN LAW OF GENOCIDE

Abstract: Author analyses jurisprudence of ICTY, ICTR and ICJ, about destruction of a protective group as a vital element of a Crime of Genocide.

He is of opinion that it is clear that the jurisprudence of ICTY and ICTR as regards the destruction of protected group is incoherent to the level of contradiction. Such a legal situation is not surprising because both the tribunals essentially acted as auxiliary organs of Security Council. Consequently, in their traditional function, both tribunal relied on the Statutes and not on Genocide Convention.

It wandered between objective and subjective criteria for the identification of protected groups, and occasionally applied them simultaneously as objective/subjective criteria.

For its part jurisprudence of ICJ in that regard is characterized by dichotomy between general dictum in Bosnia case, based on positive definition on protected group and its specific determination in Bosnia and Croatia case which went well beyond the scope of the general dictum.

Regarding the destruction of a protected group the jurisprudence of the ICJ is essentially different in Bosnia case, on one hand, and in Croatia case on the other.

In the Bosnia case, the ICJ relied on the ICTY judgments in Blagojević and Krstić cases, accepted the concept of the destruction of the

* Full professor (retired) University of Belgrade – Faculty of Law; Former Judge ad hoc of ICJ and ECHR; former member of Venice Commission and Permanent Court of Arbitration; Member of the Executive Council of World Association for International Law (ILA); President of National Branch of ILA; President of the Association of the International Criminal Law in Serbia; Member of All Slavs Academy of Science and Arts (Moscow), mkreca@ius.bg.ac.rs.

protected group in social terms. However, in the Croatia case the Court stated expressis verbis that the Convention envisaged two types of genocide, physical and biological genocide.

The reason for contradictory statements in that regard lies in the uncritical reliance on the ICTY legal findings putting ICJ in the position of a mere verifier of.

1. DESTRUCTION OF THE PROTECTED GROUP IN TERMS OF GENOCIDE CONVENTION

Even a cursory look at the jurisprudence of the ICTY, ICTR and ICJ regarding the meaning of the expression "destruction of a protected group" shows significant differences in the interpretation of the relevant provisions of the Genocide Convention.

In such circumstances it is necessary to resort to the *travaux préparatoires* of the Convention in order to determine true meaning of the 'Conventions Provision'.[1]

The *travaux préparatoires* are official, written documents, being documentary evidence of the negotiation, discussion and drafting of a final treaty text.

The object of *travaux* is an investigation *ab initio* of the supposed intentions of the parties.[2] As such, *travaux préparatoires* are widely accepted by international tribunals, as well as States and international organizations for the purpose of confirming the interpretation of treaty in terms of so-called ordinary meaning or determining the red meaning of the treaty or its provisions.

The use of *travaux préparatoires* for the purpose of determining the real meaning of its Convention provision on destruction of a protected group is necessary in this case for two reasons. The first is due to the differences that exist in the jurisprudence regarding this vital element of the concept of genocide and the second is the extensive documentation in all stages of the drafting of the text of the Genocide Convention.

Under Article II of the Convention, the expression "to destroy" means the material (physical and biological) type of genocide. Physical genocide is addressed in subparagraphs (a), (b) and (c), whereas biological genocide is covered by subparagraph (d).

In subparagraphs (a) and (c) the matter seems self-evident. Whereas the act of killing is a clear *modus operandi* of physical genocide, the expression "physical destruction" employed in subparagraph (c) rules out the possibility of any

1 Article 32 of the Convention on the Law of Treaties provides, *inter alia*, that: Resource may be had to supplementary means work of treaty and the circumstances of its conclusion, in order to determine the meaning when the interpretation according to article 27:
a) Leaves the meaning ambiguous or obscure; or
b) Leads to a result which is manifestly absurd or unreasonable.

2 *Yearbook of the International Law Commission* 1966, vol. II, 233.

interpretation to the effect that infliction on the group of any conditions of life other than those leading to the physical destruction of the group may represent an act of genocide. The word "deliberately" was included there to denote a precise intention, i.e., premeditation related to the creation of certain conditions of life.[3] According to the *travaux préparatoires*, such acts would include putting of a group on a regime of insufficient food allocation, reducing required medical attention, providing insufficient living accommodation, etc.,[4] which results in slow death in contrast to immediate death under subparagraph (a) of Article II. The *differentia specifica* between the act of killing and the imposing of destructive conditions of life is, consequently, primarily expressed in the modalities of destruction – the latter case does not involve the temporal immediacy of killing as the means (*modus operandi*) of extermination but does result in extermination over time.

The legislative history of subparagraph (b) also demonstrates that the authors of the Convention understood "serious bodily or mental harm" to be a form of physical genocide. The expression "mental harm", on the other hand, has a specific meaning in subparagraph (b). It was included at the insistence of China. Explaining the proposal by reference to the acts committed by Japanese occupying forces against the Chinese nation through the use of narcotics, China pointed out that, although these acts were not as spectacular as mass murders and the gas chambers of Nazi Germany, their results were no less lethal.[5] Accordingly, not every bodily or mental injury is sufficient to constitute the material element of genocide, but, as stated by the International Law Commission, "it must be serious enough to threaten group destruction",[6] as destruction is understood in the Convention, i.e., physical and biological destruction.

Acts such as sterilization of women, castration, prohibition of marriages, etc., subsumed under "measures intended to prevent birth within the group", constitute biological genocide. The extreme gravity of measures imposed to prevent births within the group with a view to annihilating the group's national biological power is the criterion for differentiating between the genocidal act defined in subparagraph (b) and measures which may be taken against the will of members of a group within the framework of family planning and birth control programmes, measures which are sometimes descriptively called "genocide by another name" or "black genocide".[7]

Prima facie, only the act of forcible transfer of children of the group to another group does not fit into the concept of physical/biological genocide as defined in

3 A/C.6/SR.82. p. 3: N. Robinson, *The Genocide Convention: A Commentary,* New York, 1960, 16.

4 N. Robinson, *op. cit*., 18.

5 *Official Records of the General Assembly. Third Session. Pari I. Sixth Committee,* 69th meeting, pp. 59-60.

6 Draft Code of Crimes against the Peace and Security of Mankind, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10,* United Nations doc A/ 51/10 (1996), Art. 17.

7 M. Treadwell, "Is Abortion Black Genocide?", *Family Planning Perspectives*, 4/1986, 24.

the Convention. However, it should be emphasized that the act of forcible transfer of children has been included in acts constituting genocide with the explanation that it has physical and biological effects since it imposes on young persons conditions of life likely to cause them serious harm, or even death.[8] In that sense, it is of considerable importance that the proposal to include cultural genocide in the Convention also has been understood to cover a number of acts which spiritually destroy the vital characteristics of a group, as observed in particular in forcible assimilation. The proposal was rejected on a vote of 26 against and 16 in favor with 4 abstentions.[9] Hence, it appears reasonable to assume that the underlying rationale of subparagraph (e) is "to condemn measures intended to destroy a new generation, such action being connected with the destruction of a group that is to say with physical genocide".[10] Even if it is accepted that the act covered by subparagraph (e) constitutes "cultural" or "sociological" genocide, its meaning is *in concreto* of limited importance. *Primo*, as such it would be an exception to the rule regarding material genocide embodied in Article II of the Convention and, therefore, would be subject to restrictive interpretation. *Secundo*, the Applicant does not refer to "forcible transfer of children" as an act of genocide allegedly committed on its territory.

It follows that the difference between the act of killing members of the group and other acts constituting the *actus reus* of the crime of genocide is in the modalities rather than in the final effects.

There are two basic legal issues in the interpretation of the word "destruction":

(a) whether the destruction must take place in reality, i.e., be actual; and,

(b) the scope of destruction.

Regarding the actual nature of destruction, there is some degree of difference among the various acts enumerated in Article II of the Convention.

The act of "killing" implies actual destruction in terms of the proven result achieved. In that sense, the death of the victim is the essential element of the act of killing.

In contrast to killing, acts of serious bodily or mental harm, and acts of forcible transfer of children, do not imply actual destruction, but a corresponding result, expressed in grievous bodily or mental harm and transfer of children respectively, and leading to destruction. In other words, in these two acts, the required result has a casual connection, in which the effect is deferred, with destruction.

The infliction of destructive conditions of life and the imposition of measures to prevent births, however, do not require any proof of a result; they represent, themselves, the result. For the sake of balance, and of legal security, however, in

8 A/C.6/242.

9 *Official records of the General Assembly, Third Session, Part I, Sixth Committee,* 83rd meeting, p. 206.

10 *Study of the questions of the Prevention and Punishment of the Crime of Genocide*, prepared by N. Ruhashiankiko, Special Rapporteur (E/CN.4)/Sub.2/415, p. 25.

respect of such acts the intent requirement is more stringent, since they, unlike the acts for which a specific result is required, must be undertaken "deliberately" and must be "calculated", in the case of infliction of destructive conditions on the group, and must be "indeed" to prevent births, in the case of the imposition od measures.

The intrinsic differences among the acts enumerated in Article II of the Convention in their relation to the destruction of the protected group as the ultimate *ratio leges* of the Convention require a particularly cautious approach in the determination of the actus reus of the crime of genocide.

In contrast to "killing", all other acts constituting an *actus reus* of genocide, falling short of causing actual destruction, merely have the potential capacity to a greater or lesser extent, to destroy a protected group. Legally, this makes them more akin to an attempt to commit genocide. In reality, these acts, therefore, may be seen more as evidence of intent than as acts of genocide as such. Of course, from the standpoint of criminal policy, genocide may be characterized as any form of denial of a group's right to survive; the 1948 Convention is indeed a Convention on the Prevention and Punishment of Genocide, but still it is a fact that the line between acts short of actual destruction and attempts to commit genocide may be invisible, especially at the decision-making time.

For the proper application of the Law on Genocide, as embodied in the Convention, acts of genocide, or more precisely the methods and means of execution of acts of genocide short of actual destruction, must be evaluated strictly, not only from the subjective but also from the objective standpoint. The last point of view concerns basically the capability of a particular action or actions to produce genocidal effects. In other words, the destructive capacity in terms of material destruction must be discernible in the action itself, apart from in tandem with the intention of the perpetrator.

As far as the required scope of a destruction is concerned there exists two criteria.

One implies the destruction of the group in terms of shear size of a group and its homogeneous numerical composition, the so-called quantitative approach. As a rule it is presented in the form of a "substantial part", which means "a large majority of group in question".[11] The criteria underlying the Convention is implemented in the ICTY jurisprudence. During Genocide campaign in Rwanda over 800.000 members of the Tutsi or 70% Tutsi population were killed.

The second criteria, however, contemplates the destruction of the elite of the leadership of the group, which are considered to be of a substantial importance for its existence. For this criteria, it is considered sufficient "if the destruction is related to a significant section of the group such as its leadership".[12]

The first criteria, quantitative one is characterized by objectivity, which derives from its very nature. According to the Law of Big Numbers, in its application, it

11 ICTY, *Prosecutor v. Jelišić*, Trial Judgment, para. 62.

12 ICTY, *Prosecutor v. Stakić*, Trial Judgment, para. 525; *Prosecutor v. Krstić*, Trial Judgment, para. 587.

includes, as a rule, the members of he group to which the qualitative criterion is applied as a parameter of the intent to destroy. It is also more appropriate to the spirit and letter of the Convention, which takes the group as such as the ultimate target or intended victim of the crime.

The second criterion, the criterion of "leadership" is ambiguous and subjective. It is not clear whether it applies to the political, military or intellectual elite, or whether it has a generic meaning. It also introduces through the back door the consideration that the leaders of the group, regardless of the type of leadership, are subject to special, stronger protection than the other members of the group, in whole or in part, that they constitute, which is in fact a distinct subgroup. Moreover, this criterion has element of the concealed promotion of the political group to the status of a protected object of the Convention – the subsequent division of the members of the group into elite and ordinary members in modern society gas an anachronistic and discriminatory connotation flagrantly at odds with the ideas, which represent the bases of the rights and liberties at odds with the ideas, which represent the bases of the rights and liberties of individuals and groups. Last but not least, comes understanding part of the group in terms of its leadership, of which there is no trace in the *travaux préparatoires* of the Convention.

2. DESTRUCTION OF A GROUP IN THE JURISPRUDENCE OF ICTY AND ICTR

As regards act constituting crime of genocide, the jurisprudence of ICTR and ICTY seems consistent about killing members of the group. Basically, those jurisprudence followed the letter and spirit of the Convention as expressed in the *travaux préparatoires*.[13]

Certain differences were manifested in relation to the term "killing" only. Trial Chamber in Akayesu case noted that the "French version of the Statute uses "*meurtre*" while the English version uses "killing". The Chamber found that "killing" was too general since it could... include both intentional and unintentional homicides whereas the term *'meurtre'*... is more precise". Thus, the Chamber held that "'meurtre' is homicide committed with the intent to cause death".[14]

However, the appeals Chamber in Kayishema and Ruzindana case took different position. The Chamber found that "[T]here is virtually no difference" between the terms "killing" and "*meurtre*" as either term is linked to the intent to destroy in whole of in part. Both should refer to intentional but not necessarily premeditated murder".[15]

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13 Draft Convention on the Crime of Genocide, Commentary, UN Secretary-General, UN Doc. E/447 (1947). Art. 1(II)(1)(a), at. 6.

14 *Prosecutor v. Akayesu*, Trial Chamber, 1998, pp. 500-501.

15 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-A (Appeals Chamber, June 1, 2001, para. 151. See also, *Musema*, (Trial Chamber (January 27, 2000, para. 155; Bagilishema (Trial Chamber), June 7, 2001, para. 57-58.

ICTY in some cases interpreted "seriuous" body or mental harm "in term of physical genocide". So, in *Delalić* case, Trial Chamber found that physical suffering or injury without lethal consequences falls within the ambit of crimes against humanity and torture.[16]

In its *Krstić* case ICTY Chamber gave an different perception of "serious bodily and mental harm". The Chamber construed that act in following terms: "Serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case-by-case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgment, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury".[17]

Further, the Trial Chamber in its *Krstić* Judgment ruled that "wounds and trauma suffered by those few individuals who managed to survive mass executions after the fall of Srebrenica enclave"[18] contributed to the serious bodily and mental harm within the meaning of the article 4(2)(b) of the ICTY Statute. Provided interpretation of the term 'causing serious bodily and mental harm' was not challenged on appeal.

ICTY jurisprudence does not require permanency and irremediably as an element of serious bodily and mental harm. In that regard the jurisprudence seems to be settled.[19]

Such inderstanding shares the ICTY.[20]

However, the judgment of the ICTR in *Semanza* case introduced dissonant tone in this agreement.[21]

Both tribunals included rape and sexual violence in the scope of "serious bodily and mental harm" as *actus reus* of genocide. An *Acayesu* case ICTR Trial Chamber stated, *expressis verbis*: "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are

16 *Prosecutor v. Delalić* et al, Trial Chamber, p. 511.

17 Prosecutor v. Krstić, Trial Judgment, para. 51.

18 *Ibid.*, para. 54.

19 *Akayesy*, (Trial Chamber), September 2, 1998, para. 502; The harm did not need to be "permanent and irremediable". *See alse Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108; *Rutaganda* (Trial Chamber), December 6, 1999, para 51; *Musema* (Trial Chamber), January 27, 2000, para. 156; *Bagilishema* (Trial Chamber), June 7, 2001, para. 59; *Semanza* (Trial Chamber), May 15, 2003, para. 320-322.

20 *Prosecutor v. Stakić*, Trial Chamber, 2003, para. 516.

21 *Prosecutor v. Semanza,* Trial Chamber, 2003, para. 321, saying that "Serious mental harm" means "more than minor of temporary impairment of mental faculties".

even, according to Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm".[22]

For its part, ICTY in *Stakić* case found that: "'Causing serious bodily and menial harm' in subparagraph (b) [of Article 4(2) of the Statute of the ICJY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats or death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable."[23]

In some judgments ICTR stated that: "Death threats during interrogation, infliction or "serious bodily or mental harm" inflicted on members of the group.[24]

Act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in the part was interpreted in the jurisprudence of the Tribunals in the frame of *travaux préparatoires* of the Convention.

So ICTR in *Akayesu* case proposed the following interpretation of the act: "The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction. For purposes of interpreting Article 2(2)(c) of the Statute [and Article II(c) of the Convention], the Chamber is of the opinion that the *means* of deliberate inflicting on die group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement".[25]

FR of Yugoslavia its change of genocide against NATO members in May 1999 based, *inter alia*, upon Article III(c). In the oral proceedings the agent of FR od Yugoslavia stated: "Continued bombing of the whole territory of the State, pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium inflicts conditions of life on the Yugoslav nation calculated to bring about its physical destruction...

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22 *Prosecutor v. Akayesu*, Trial Judgment, 2 September 1998, para. 731.

23 Trial Chamber Judgment, 31 July 2003, para. 516; See also, *Tolimir* case, Appeals Chamber, 2015, pp. 261-262.

24 *Kayishema and Ruzindana*, (Trial Chamber), 21 May, 1999, para. 108; *Akayesu*, Trial Chamber, 1998, pp. 711-712.

25 *Prosecutor v. Akayesu*, Trial Chamber, para. 505. The interpretation corresponds to that of the first commentary on the Genocide Convention by N. Robinson. Robinson stated that: "It is impossible to enumerate in advance the 'conditions of life' that would come within the prohibition of Article II; the intent and probability of the final aim alone can determine in each separate case whether the act of Genocide has been committed (or attempted) or not. Instances of Genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part". N. Robinson, *op. cit.,* 64.

It is well known that the radiation hazard materialized in the case of a large number of US soldiers participating in actions against Iraq. Serious health and environmental consequences have been detected in areas of Bosnia and Herzegovina exposed to effects of weapons containing depleted uranium. Far-reaching health and environmental damage is a matter of certain pre-knowledge of the Respondents, and that implies the intent to destroy a national group as such in whole or in part".[26]

It is clear that the jurisprudence of ICTY and ICTR as regards the destruction of protected group in incoherent to the level of contradiction. Such a legal situation is not surprising because both the tribunals essentially acted as auxiliary organs of Security Council. In their judicial function, both tribunals relied on their Statutes and not on the Genocide Convention.

3. PROTECTED GROUP IN THE ICTY AND ICTR JURISPRUDENCE

The object of destruction, as stated in Article II of the Genocide Convention, is a "national, ethnical, racial and religious group as such".

The qualification expresses the specific collective character of the crime. It lies within the common characteristics or the victims – belonging to national, ethnic, racial or religious group – as an exclusive quality by reason of which they are subjected to acts constituting *actus reus* of genocide. The genocide is directed against a number of individuals as a group or at them in their collective capacity and not *ad personam* as such (passive collectivity element). The International Law Commission expressed the idea by saying that:

"the prohibited [genocidal] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group... the intention must be to destroy the group 'as such', meaning as a separate and distinct entity, *and not merely some individuals because of their membership in a particular group*".[27]

The jurisprudence of ICTY an ICTR regarding the object of destruction could hardly be called consistent. It wandered between objective and subjective criteria for the identification of protected groups, and occasionally applied them simultaneously as objective/subjective criteria.

In Acayesu case the ICTR applied objective criteria for identification od protected group. The objective criteria of identification relies on the jurisprudence of Permanent Court of International Justice as expressed in Rights of Minorities in repper Silesia case and Nottebohm case.[28]

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26 *Legality of Use of Force (Yugoslavia* v. *Belgium et al.),* Verbatim Record, 10 May 1999 (Rodoljub Etinski).

27 Official Records of General Assembly, Fifty-first Session, Supp. No. 10, UN doc. a/51/10/1996, at p. 88. (emphasis added).

28 *Rights of Minorities in Upper Silesia (Germany v. Poland)*, P.C.I.J. Rep. Series A, No. 12, *Nottebohm (Lichtenstein v. Guatemala)* (Merits) [1995], I.C.J. Rep. 4.

It appears that the jurisprudence of ICTY and ICTR from Acayesu case turned to subjective criteria of identification of protected group as applied in *Jelišić* case with explanation that: "to attempt to define a national, ethnical, racial or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation".[29]

The inconsistency in the jurisprudence of both tribunals is also manifested, *inter alia*, that they occasionally applied, a mixes, eclectic criterion for group identification.

It is indication in this respect the judgment of ICTR in *Kayishema and Ruzindana* case stating that: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others)".[30]

Subjective way if identifying of protected group as a perpetrator-based was applied by ICTY in *Brđanin* case. The Trial Chamber noted that the protected group: "may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived (...) characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group".[31]

In *Semanza* case the Trial Chamber of ICTR found that: "The Statute of the Tribunal does not provide any insight into whether the group (...) is to be determined by objective or subjective criteria or by some hybrid formulation (...) [T] he determination (...) ought to be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria".[32]

Within subjective criterion of identification of a protected group, two definitions were simultaneously applied by both tribunals – positive and negative.

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29 *Prosecutor v. Jelišić*, Trial Judgement, 1999, para. 70. Also in Ruteganda case, 1999, para 55: „the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions hereof. Each of these concepts must be accessed in the light of a particular political, social and cultural context".

30 *Prosecutor v. Kayishema and Ruzindana* Trial Judgment, 1999, para. 98; Also, Prosecution v. Krstić, Tiral Chamber, paras. 550-560. It's noted *in concreto* that "the use of semicolons and word 'or' show that three distinct methods of identifying an ethnical group were deemed possible: an objective approach (common language and culture), a victim-based subjective approach (self-identification) or a perpetrator-based subjective approach (identification by others). C. Lingaas, *Defining the protected groups of genocide through the case law of International Courts*, 2015, 11.

31 *Prosecutor v. Brđanin*, 2004, p. 684.

32 *Prosecutor v. Semanza*, Trial Judgment, para. 317.

Exempli causa, in *Jelišić* case the ICTY stated that: "a group may be stigmatized (...) by way of positive and negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics".[33]

However, in *Stakić* case Appeals Chamber opted for positive definition: "The term "as such" has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics".[34]

4. PROTECTED GROUP IN THE JURISPRUDENCE OF ICJ

Prima facie, it seems that the general position of ICJ as regards the identification of protected group was consistent. In Bosnia case, the Court stated, *inter alia*, that "the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics – national, ethnical racial or religious – and not the lack of them. The intent must also relate to the group "as such". That means that the crime requires an intent to destroy a collection of people who have a particular group identity. It is a matter who those people are, not who they are not. The etymology of the word – killing a group – also indicates a positive definition" so that "The drafting history of the Convention confirms that a positive definition *must be used*".[35]

In the Croatia case the Court did not deal specifically with the issue of identification of protected groups. It is reasonable to assume that this position of the Court was essentially motivated by the principle of consistency of its jurisprudence, meaning in this specific case treating the issue in accordance with its action in Bosnia case.

The correct general *dictum* of the Court mentioned above on the necessity of positive definition of the protected group was not implemented in either the Bosnia case or the Croatia case.

In both cases the determination of protected groups went beyond the scope of its general *dictum*.

33 *Prosecutor v. Jelišić* case, Trial Jedgment, 1999, para. 71.

34 *The Prosecutor v. Stakić*, Appeals Jedgment, 2006, para. 20.

35 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 2007, Judgment, Merits, 2007, paras. 193–194. (emphasis added).

In its Application instituting proceedings before the Court, Bosnia and Herzegovina asked the Court to adjudge and declare that FR Yugoslavia (Serbia and Montenegro) "has breached, and is continuing to breach, *its legal obligations towards the People and State of Bosnia and Herzegovina* under Articles I, II(a), II(b), II(c), II(d), III(a), III(b), III(c), III(d), III(e), IV and V of the Genocide Convention" (emphasis added)."

The Memorial of Bosnia and Herzegovina the protected group has been defined as "national, ethnical of religious groups within the, but not limited to, territory of the Republic of Bosnia and Herzegovina, *including in particular the Muslim population*".[36]

In the Croatia case, that State as an Applicant in its Application instituting proceedings before the Court requested the Court to adjudge and declare that "(a) that the Federal Republic of Yugoslavia has breached its legal obligations *toward the people and Republic of Croatia* under Articles I, II(a), II(b), II(c), II(d), III(a), III(b), III(c), III(d), III(e), IV and V of the Genocide Convention".[37]

Relevant submission of the Memorial of Croatia was formulated in terms of "genocide on the territory of the Republic of Croatia, *including in particular against members of the Croat national or ethnical group* on the territory".[38]

For its part, Serbia in Counter Memorial requested the International Court of Justice to adjudge and declare "That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after the Operation Storm in August 1995, the acts with intent to destroy as such the part *of the Serb national and ethnical group living in the Krajina region* (UN Protected Areas North and South) in Croatia".[39]

As a matter of fact, the Court in Bosnia case, contrary to its general *dictum* in paras. 193-194. applied negative definition taken by ICTY, i. e. subjective way in the form of a self-identification or a perpetrator based identification.[40]

The Court passed the Judgment although Bosnia and Hercegovina in its final submission referred to the "non-Serb national ethnical and religious group including in particular Muslim population",[41] meaning an admixture of all individuals living in Bosnia and Herzegovina except Serbs. In addition, the expression "in particular Muslim population" accounts only a part of the non-Serb population, including Jews, Roma, Croats, Montenegrins and others.

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36 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR of Yugoslavia), ICJ Reports 2007, para. 65. Emphasis added.

37 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. FR Yugoslavia), ICJ Reports 2015, para. 36. Emphasis added.

38 *Ibid*., 27; emphasis addded.

39 *Ibid*., emphasis added.

40 *Prosecutor v. Brđanin*, Trial Judgment, para. 683; *Prosecutor v. Krstić*, Trial Judgment, para. 557; *Prosecutor v. Jelisić*, Trial Judgment, para. 70.

41 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR Yugoslavia), ICJ Reports 2007, paras. 66.

In contrast, in the Croatia case, the Court apparently supported the positive definition of the protected group by Croatia is incorrect in its vagueness.

In its Application Croatia stated as a protected group "the people of Croatia", suggesting that Croatia is a single national state, although the term "people of Croatia" included several ethnic and national groups, including the Serbs, who, according to the Croatian constitution of 1974, represented the constituent people.

A matter of special interest in Bosnia case related to the impact of geographic criteria on the group as identified positively.

The Court considered that three elements are relevant to the determination of "part of the group" for the purposes of Article II of the Convention.

The elements referred by the Court were: in the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema, Byilishema*, and *Semanza* there referred to.[42]

Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" (*ibid.*). The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT- 97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent (*dolus specialis*) at the national or State level as opposed to the local level – a submission which, in the view of the Court, relates to attribution rather than to the "group" requirement.

A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms: "The number of individuals targeted should be evaluated not only in absolute

42 *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17.

terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the "group" requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view".[43]

5. JURISPRUDENCE OF ICJ ON DESTRUCTION OF A PROTECTED GROUP

The jurisprudence of the International Court of Justice regarding the destruction of a protected group is essentially different in Bosnia case, on the one hand, and in Croatia case, on the other.

In Bosnia case, the ICJ, relying on the ICTY judgments in Blagojević and Krstić cases, accepted the concept of a destruction of the protected group in social terms.

In the *Krstić* case the Trial Chamber found, *inter alia*, that the destruction of a sizeable number of military aged men "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica, since their spouses are unable to remarry and, consequently, to have new children".[44] The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied "a broader notion of the term "destroy", encompassing also "acts which may fall short of causing death".[45] In fact, the Trial Chamber finds support in the Judgment of the Federal Constitutional Court of Germany, which held *expressis verbis* that "the statutory definition of genocide defends a supra-individual object of legal protection, i.e. social existence of the group (and that) the intent to destroy the group... extends beyond physical and biological extermination... The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of members of the group".

Thus perceived the term "destruction" "in the genocide definition can encompass the forcible transfer of population".[46]

In Croatia case, however, the Court stated *expressis verbis* that:

43 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR Yugoslavia), 2007, Merits, paras. 198–200.

44 *Prosecutor v. Krstić*, Appeals Chamber, para. 28.

45 *Blagojević*, Trial Chamber Judgment, para. 662

46 *Prosecutor v. Blagojević*, Trial Judgment, para. 664.

"The Court notes that the *travaux préparatoires* of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context (see Report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Proceedings of the Economic and Social Council, Seventh Session, Supplement No. 6*, UN doc. E/794; and United Nations, *Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Eighty-Third Meeting*, UN doc. A/C.6/SR.83, pp. 193-207).

It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group (Report of the ILC on the Work of Its Forty-Eighth Session, *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, pp. 45-46, para. 12, quoted by the Court in its 2007 Judgment, *I.C.J. Reports 2007 (I)*, p. 186, para. 344)."[47]

Such an interpretation was applied to the physical acts enumerated in Article II of the Genocide Convention.

More precisely, findings of the Court were concerned the acts in subparagraphs (b), (c) and (d), given that the parties did not refer to subparagraph (e) – forcibly transferring children of the group to another group – and that in terms of the definition of killing they were in agreement.

The parties differed in terms of conditions that "serious bodily and mental harm" must met in order to constitute *actus reus* in terms of Article II(b) of the Convention.

Croatia argued that harm *per se* represent *actus reus* of genocide, while Serbia considered that the harm must be so serious that it threatens the group destruction in order to be recognized as *actus reus* of the crime.

The Court found that:

"in the context of Article II, and in particular of its *chapeau*, and in light of the Convention's object and purpose, the ordinary meaning of "serious" is that the bodily or mental harm referred to in subparagraph (b) of that Article must be such as to contribute to the physical or biological destruction of the group, in whole or in part. The Convention's *travaux préparatoires* confirm this interpretation".[48]

The Court relied on the *travaux préparatoires* of the Convention as well as on the Draft Code of Crimes Against the Peace and Security of Mankind.[49]

It also referred to the ICTY judgments in Krajišnik case and *Tolimir* case, saying that "particular in the *Krajišnik* case where the Trial Chamber ruled that the harm must be such "as to contribute, or tend to contribute, to the destruction of the group or part thereof'[50]."

47 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, Merits, 2015, para. 136.

48 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, ICJ Report 2015, para. 115.

49 Report of the ILC on the Work of Its Forty-Eighth Session, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 46, para. 14.

50 Judgment of 27 September 2006, para. 862; see also *Tolimir*, Trial Judgment of 12 December 2012, para. 738.

This reference does not seem correct, since "contribution to the physical and biological destruction" is one thing and "tend to contribute..." is another. It confused objective and subjective meaning of contribution, the later being relevant as an indicia of genocidal intent not necessarily materialized in physical and biological destruction.

In the context of meanings of Article II(b) two specific issues were raised:

i) rape and other acts of sexual violence as *actus reus* in term of the Article II(b); and
ii) informations about relatives of individuals who disappeared in the context of the Article.

As regards issue under (i), the Court concluded that "the rape and other acts of sexual violence are capable of constituting *actus reus* of genocide within the meaning of Article II(b) of the Convention (*I.C.J. Reports 2007 (I)*, p. 167, para. 300), citing in particular the judgment of the ICTY Trial Chamber, rendered on 31 July 2003 in the *Stakić* case, and p. 175, para. 319" meaning that those acts must be such as to contribute to the physical or biological destruction of the group.

As regards issue under (ii), Croatia argued that refusal od the competent authorities to provide relatives of individuals who disappeared with information in their possession is capable of causing phycological suffering in terms of Article II(b) of the Convention. The Court, however, concluded "that, to fall within Article II(b) of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part.[51]

In accordance with its understanding of "destruction of group" as physical or biological, the Court gave the answer as to whether forced displacement should be characterized as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" in the sense of Article (c) of the Convention.

The Court accepted the interpretation of Serbia referring to its judgment in Bosnia case from 2007 that stated:

"[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement" (*I.C.J. Reports 2007 (I)*, p. 123, para. 190; emphasis in original).

As for subparagraph (d) of Article II (Measures intended to prevent birth within the group), the Court found that "rape and other acts of sexual violence, which may also fall within subparagraphs (b) and (c) of Article II, are capable of constituting the *actus reus* of genocide within the meaning of Article II(d) of the

51 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ Reports 2015, para. 160.

Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II (d) of the Convention".[52]

However, in Bosnia case the Court did not engage in a substantial analysis of these acts, contented itself with stating the positions of the parties without its meritorious assessment, followed by *conclusio* that was not able "to find that those acts were accompanied by specific intent (*dolus specialis*) to destroy the protected group, in whole or in part"[53]– or that "no evidence was provided to support" the claim".[54]

Such approach opens the room for interpretation that, according to the Court, the opposing claims of the parties were well founded in the letter and spirit of the Convention.

For example, regarding act of causing serious bodily and mental harm, the Court stated that: "taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. *The requirements of the material element, as defined by Article II(b) of the Convention are thus fulfilled*".[55]

This reasoning about the act of causing serious bodily and mental harm as *actus reus* of genocide about which there are different understandings even in the jurisprudence of both tribunals,[56] is not easy to explain because the objective meaning of this reasoning of the Court is in the expansion of the concept of genocide to war crimes and crimes against humanity, thus creating a type of mega crime.

6. EVALUATION

6.1. Extrinsic Aspect

The jurisprudence of ICJ as regards the destruction of a protected group as vital element of the crime of genocide is unsettled and, even, in some aspects contradictory.

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52 *Ibid*., para. 166.

53 Article II(b): Causing serious Bodily and Mental Harm to Member of the Protected Group; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR Yugoslavia), Merits, ICJ Reports 2007, para. 319.

54 Article II(d): Imposing Measures to Prevent Births, within the protected group, *ibidem*, para. 355.

55 *Ibid*., para. 319. Emphasis added.

56 See, Akayesu, Trial Judgment, paras. 598, 698; Furundžija, Trial Judgment, paras. 182, 184. Schabas.

The reason for that lies in the uncritical reliance, on the ICTY legal findings putting the ICJ in the position od a mere verifier of.

Acted in this way, the Court has ignored the legal nature of ICTY and the consequences stemming from that on the judicial reasoning of ICTY.[57]

The ICTY was specialized, criminal tribunal established by resolution 827 of the Security Council, whose competence is limited in all relevant aspects – *ratione materiae*, *ratione personae* and *ratione loci* – representing, basically, an "*ad hoc* measure" aiming to "contribute to the restoration and maintenance of peace".[58]

The instrumental nature of the ICTY is not a subjective perception of the Tribunal itself, but derives from the act by which it has been established. Resolution 827 provides, *inter alia*, that the establishment of the Tribunal, "in the particular circumstances of the former Yugoslavia", as "an *ad hoc* measure by the Council".[59] Such perception of the nature of the Tribunal is also reflected in the timing of the establishment of the Tribunal by the Security Council. May 1993 was the apex of the conflict in the former Yugoslavia, so that the establishment of the Tribunal was a part of international peace operations backed by the authority and enforcement power of the Security Council. Therefore, it can be said that "the overall purpose of the tribunals [ICTY and ICTR] coincides with other forms of humanitarian intervention with respect to humanitarian concern for victims in conflict-ridden areas. The ICTY's relationship with peacekeeping forces in Bosnia-Herzegovina during the Bosnian war indicates a critical juncture of judicial organs with military forces".[60]

As such, the ICTY essentially represents a "non-military form of intervention by the international community".[61]

Such position of the ICTY was reflected in its judicial reasoning. In the interpretation of relevant legal rules, the Tribunal strongly, even decisively, relies on the respective interpretation of the Security Council and that of the chief administrative officers of the World Organization – the Secretary General of the United Nations.

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57 In detail, M. Kreća, "The relationship between ICJ and ICTY in the respect of adjudication of genocide", *Annuals of the Faculty Law in Belgrade*, 3/2015, 18–39.
In the light of that fact, the ICTY had been established as a subsidiary organ of the Security Council. The Appeals Chamber, in the *Tadić* case, concluded that "the establishment of the International Tribunal *falls squarely within the powers of the Security Council under Article 41*" (*Tadić*, IT-94-1, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 36; emphasis added).
The conclusion in *Tadić* has been substantiated in the *Milošević* case in which the Trial Chamber found that the establishment of the International Tribunal "is, in the context of the conflict in the country at that time, *pre-eminently a measure to restore international peace and security*" (*Milošević*, IT-02-54 Trial Chamber, Decision on Preliminary Motions of 8 November 2001 para. 7; emphasis added.

58 UN Security Council resolution 827, doc. S/RES/827, 25 May 1993, Preamble.

59 UN Security Council resolution 827, doc. S/RES/827, 25 May 1993, Preamble.

60 H. Shinoda, "Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals", *International Journal of Peace Studies*, 7/2002.

61 *International Journal of Peace Studies,* Vol. 7, 2002, 15.

So, in the *Blaškić* case, the Tribunal found the decisive argument relating to "existing international humanitarian law" in the assertions of the Security Council and the Secretary-General of the United Nations. The Tribunal stated *inter alia*:

"It would therefore be wholly unfounded for the Tribunal to now declare unconstitutional and invalid part of its jurisdiction which the Security Council, with the Secretary-General's assent, has asserted to be part of existing international humanitarian law".[62]

The Tribunal found that in cases where there is no manifest contradiction between the Statute of the ICTY and the Report of the Secretary- General "the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute".[63]

The Tribunal was inclined to attach decisive weight to interpretative declarations made by Security Council members:

"In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations 'they can be regarded as providing an authoritative interpretation' of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret 'when committed in armed conflict' in Article 5 of the Statute to mean 'during a period of armed conflict'. These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5".[64]

Uncritical acceptance of the legal findings of the ICTY, essentially its verification, could result in compromising the determination of the relevant rules of the Genocide Convention by the Court, including destruction of a protected group.

There exists a reason of an objective nature which produced, or might produce, a difference between the law of genocide embodied in the Genocide Convention and the law of genocide applied by the *ad hoc* tribunals.

The law applied by the ICTY as regards the crime of genocide cannot be considered equivalent to the law of genocide established by the Convention. In this regard, the jurisprudence of the ICTY can be said to be a progressive development of the law of genocide enshrined in the Convention, rather than its actual application. Article 4 of the ICTY is but a provision of the Statute as a unilateral act of one of the main political organs of the UN which does not contain any *renvoi* to the Genocide Convention, the provision cannot change its nature simply by reproducing the text of Article II of the Convention.

The ICTY's Judgment in the *Krstić* case was based, as the Tribunal stated *expressis verbis*, on "customary international law at the time the events in Srebrenica took place".[65]

62 *Blaškić*, IT 95 14 Trial Chamber, Decision on the defence motion to strike portions of the amended indictment alleging "failure to punish" liability, 4 April 1997.

63 *Tadić*, IT 94 1, Appeal Judgment, 15 July 1999, para. 295.

64 *Tadić*, IT 94 1, Trial Judgment, 7 May 1997, paras. 630–631.

65 (Krstic, IT-98-33 Trial Chamber, Judgment, 2 August 2001, para. 54I).

It appeals that the Court, having found that it "sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber"[66] in the *Krstić* and the *Blagojević* cases, has, in light of its pronouncement in paragraphs 87 and 88 of the Judgment, exceeded its jurisdiction, since Article IX confers jurisdiction *only* with respect to the "interpretation, application or fulfilment of the Convention... [and] the jurisdiction of the Court *does not extend to allegations of violation of the customary international law on genocide*",[67] so that "Article IX *does not afford a basis* on which the Court can exercise jurisdiction over a *dispute concerning alleged violation of the customary international law obligations regarding genocide*".[68]

Apart from individual issues of whether the cogent rules of the Convention can be modified by customary law at all,[69] it should be emphasized that perception of customary law by the ICTY is highly problematic.

According to the well settled jurisprudence of the ICJ, which follows the provision of its Statute referring to "international custom, as evidence of a general practice accepted as law" (Art. 38, para. 1 (b)), custom is designed as a source based on two elements: general practice and *opinio iuris sive necessitatis*. As it pointed out in the Nicaragua case: "[b]ound as it is by Article 38 of its Statute... the Court may not disregard *the essential role played by general practice*".[70]

The jurisprudence of the ICTY generally moves precisely in the opposite direction, giving the predominant role to *opinio juris* in the determination of custom[71] and, thus, showing a strong inclination towards the single element conception of custom!

In doing so, it considers *opinio juris* in a manner far removed from its determination by the Court. For, in order "to constitute the *opinio juris*... two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[72]

Opinio juris cannot be divorced from practice because "[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice".[73]

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66 2007 Judgment, p. 166, para. 296.

67 Judgment, para. 87; emphasis added.

68 *Ibid*., para. 88; emphasis added.

69 M. Kreća, "Some general reflexions on Main Features of ius cogens as nation of International Public Law", *New Directions in International Law, Essays in Honour of W. Abendroth*, Campus Verlag, Frankfurt, New York, 1982, 19–27.

70 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 97–98, para. 184; emphasis added).

71 G. Mettraux, *International Crimes and the ad hoc Tribunals*, 2005, 13, fn. 4.

72 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

73 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits. Judgment, I.C.J. Reports 1986*, p. 98, para. 184.

The ICTY has often satisfied itself with "extremely limited case law" and State practice.[74]

A large part of law qualified by the ICTY as customary law is based on decisions of municipal courts,[75] which are of a limited scope in the jurisprudence of the Court.[76] In the case concerning Certain German Interests in Polish Upper Silesia, the Permanent Court stated that national judicial acts represent "facts which express the will and constitute the activities of States".[77]

The perception of customary law developed by the ICTY is highly destructive as regards the normative integrity of international law. Being essentially a subjective perception of customary law divorced from its deeply rooted structure which derives from the Statute of the Court as part of the international *ordre public*, actually a judicial claim of custom contradictory not only *per se* but also *in se*, it generates diversity in the determination of customary law, including the rules of *ius cogens* of a customary nature.

The establishment of customary law in the ICTY resembles in many aspects a quasi-customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles. As can be perceived "many a Chamber of the *ad hoc* Tribunals have been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion".[78] This has resulted injudicial law-making through purposive, adventurous interpretation,[79] although, according to the Secretary-General, on the establishment of the ICTY, the judges of the Tribunal could apply only those laws that were beyond doubt part of customary international law.[80] Being in substantial conflict with custom, as perceived by the ICJ, the ICTY perception of custom, applied in its jurisprudence, opens the way to a fragmentation of international criminal law and, even, general international law.[81]

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74 A. Nollkaemper, "The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia", *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems* (eds. T. A. I. A. Vandamme, J. H. Reestman), 2001, 17.

75 A. Nollkaemper, "Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY", *International Criminal Law Developments in the Case Law of the ICTY* (eds. G. Boas, W. A. Schabas), 2003, 282.

76 H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, 1/2013, 248.

77 *Merits. Judgment No. 7, 1926, P C.I.J., Series A, No. 7*, p. 19.

78 G. Mettraux, *op. cit.,* 15.

79 M. Swart, "Judicial Law-Making at the *Ad Hoc* Tribunals: The Creative Use of Sources of International Law and 'Adventurous Interpretation'", *Heidelberg Journal of International Law*, 70/2010, 463–468, 475–478.

80 UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993)*, United Nations doc. S/25704, 3 May 1993, para. 34.

81 See G. Mettraux, *op. cit.*, 15 citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3).

6.2. Intrinsic Aspect

The issue of the object of destruction was wrongly treated by the Court from the very beginning of both cases.

In the Bosnia case, the matter started already from the Application and Memorial[82] and continued in two requests for indication of provisional measures.[83]

The Court issued Orders an provisional measures although the claims of Bosnian and Herzegovina were not properly formulated, and as such had not direct connection with the object of protection under the Convention.

The Genocide Convention extends protection to a "national, ethnical, racial or religious group" (Art. II), which in practical terms means that the "respective rights" in terms of Article 41 of the Statute are *in concreto* the right of a "national, ethnical, racial or religious group, as such to be protected from acts committed with intent to destroy it, in whole or in part".

As can be seen from the wording of paragraph (c), it does not relate to rights of "national, ethnical, racial or religious groups, as such" but to "the right of the People and State of Bosnia-Herzegovina". Broadly speaking, the term "people" could, in principle, be related to "national or ethnical groups" as the object of protection of the Genocide Convention. To say "in principle", since in this specific instance there are no reasonable grounds for such an interpretation. The expression "people" in this case does not refer to an actual homogeneous national, ethnic, or religious entity, for the phrase "People of Bosnia and Herzegovina" used by the Applicant, in fact, covers at least three ethnic communities. Therefore, a broad interpretation of the term "people" according to which it would extend to or imply "a national, ethnical, racial or religious group" in terms of the Genocide Convention, especially in the view of the content of the Applicant's requests for provisional measures, would in this case lead to an absurd outcome accusation of FR Yugoslavia (Serbia and Montenegro) for autogenocide since Serbs and Montenegrins were "and still are, ethnic and national group in Bosnia and Herzegovina beside others.

It was repeated in an almost identical way in Croatia case.[84]

The Bosnia and Herzegovina, as the Applicant, asserted that in the case protected groups under the Genocide Convention are – the "Bosnian people" (Application, Memorial of Bosnia and Herzegovina, 2.2.1.2), "mainly Muslim" (*ibid*., 2.2.2.1), "Muslim population" (*ibid*., 2.2.5.13), "national, ethnical or religious groups (within, but not limited to, the territory of the Republic of Bosnia and Herzegovina), including in particular the Muslim population" (*ibid*., Submission under (1), non-Serb population (Reply of Bosnia and Herzegovina, 7); the "People and State of Bosnia and Herzegovina".[85]

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82 See, Supra pp. 12–13.

83 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR Yugoslavia), Orders of 8. IV and 13. IX, ICJ Reports, 1993.

84 See, supra pp. 12–13.

85 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 8 April 1993,*

As the protective object of genocide, "national, ethnical, religious or racial" groups must be precisely determined. The determination requirement is of overall significance both in the procedural and in the substantive sense.

The expression "non-Serbs" in the ethnic, national or religious environment of Bosnia and Herzegovina has a rather broad and vague meaning, incapable of being incorporated into the frame of "national, ethnical, religious or racial" group as defined by the Genocide Convention. As a general expression encompassing different groups, it runs counter to the essential requirement for the protected group to constitute a separate and distinct entity. Besides Muslims and Croats, the expression necessarily comprises other groups. Not only Yugoslavs, Jews and Roma, but also Montenegrins who were represented in the ethnic and national make-up of Bosnia and Herzegovina as well. As Montenegrins are the leading ethnic community in Montenegro, a former federal unit of the Respondent, it follows that the expression "non-Serb" implies that the Respondent is also charged with alleged auto-genocide. Moreover, the expression includes Serbs in BiH, the relatively largest number of whom declared themselves as Yugoslavs.

The expression "Bosnian people" is based on individuals' citizenship link with the State of Bosnia and Herzegovina as the objective criterion for the determination of the "national group". However, the term "Bosnians" does not exist in terms of the "national, ethnic, racial or religious" group, because it reflects the notion of a "national group" in the "political-legal" sense,[86] inapplicable to the rights of States such as Bosnia and Herzegovina which make a distinction between the notions of "nationality" and "citizenship". In that regard, the characterization "Bosnian people" nullifies the existence of different ethnic, national and religious groups in Bosnia and Herzegovina and as such might be characterized as a discriminatory one. The same applies *mutatis mutandis* to the "Bosnian population".

The formulation "mainly Bosnian Muslims", whether conceived as a "people" or "population" is closest to the notion of "national, ethnic, racial or religious" group in terms of the Genocide Convention although it does not correspond *in toto* to the strict requirements of the Convention's formulation of "a national, ethnic, racial or religious group *as such*" (emphasis added). The term "as such" clearly indicates that the destruction of a group as a distinct and separate entity is the object of genocide. The plain and natural meaning of the formulation "mainly Bosnian" is that the object of the alleged genocide was not Bosnian Muslims as such, as a distinct and separate entity. Furthermore, it means that acts committed against individuals were not directed at them as the personification of a relevant group, in their collective capacity, which is the true, intrinsic, characteristic of genocide. Short of that condition, the criminal intent cannot be characterized as genocidal, in the normative milieu of the law on genocide, as *jus strictum*.

I.C.J. Reports 1993, p. 4, para. 2; *Ibid, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 332.

86 N. Ruhashyankiko, Special Rapporteur, doc. E/CN.4, Sub. 2/416, 4 July 1978. paras. 56-61.

It appears that none of the determinations of the protected group given by the Bosnia and Herzegovina meets the requirements embodied in the formula "national, ethnic, racial or religious group as such" at least in the proceedings before the International Court of Justice characterized, *inter alia*, by the fundamental principle of *non ultra petita*. As the Court stated in the *Asylum* case:

"One must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions".[87]

In addition, it should be noted that the Bosnia and Herzgovina, in its submissions in the Memorial, subsumes under protected groups "national, ethnical or religious groups within, *but not limited to the territory of Bosnia and Herzegovina*... (Memorial, Part 7, Submission under (1)). In its final submission the Applicant requested the Court to adjudge and declare that Serbia and Montenegro

"has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying *in part the non-Serb national, ethnical or religious group within, but not limited* to, the territory of Bosnia and Herzegovina, *including in particular* the Muslim population" (Agent Softic, CR 2006/37, p. 59, para. 1; emphasis added).

As regards its procedural significance, the Application, as stated in Article 38, paragraph 2, "shall... specify the precise nature of the claim". The determination of the group protected is, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the relevant part of the claim as a whole.

In the substantive sense, the protection of the "national, ethnic, racial or religious" group is *ratio legis* of the Convention. An improper determination of the group protected may have far-reaching consequences in the proceedings before the Court. In contrast to the criminal court, this Court in the performance of its judicial function, is subject, *inter alia*, also to the fundamental principle of *non ultra petitum*. Accordingly, the Court not being in a position to substitute itself tor the party, in the adjudication of the matter is bound by the determination of the protected group given by the Applicant (*P.C.I.J., Series A, No.7*, p. 35; *Nuclear Tests (Australia v. France), Judgment, I. C.J. Reports 1974*, pp. 262-263, paras. 29-30; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, pp. 466-467, paras. 30-31).

The intent to destroy a group "as such" means the intent to destroy group as a separate and distinct entity. It follows from the fact that the act of genocide constitutes not just an attack on an individual, but also an attack on the group with which the individual is identified.

The group in terms of a separate and distinct entity may, as a matter of principle, be determined either in a positive or a negative manner.

The jurisprudence of the ICTY is generally against the so-called negative criteria. The negative definition of the group, based on the exclusion formula,

87 *Judgment, I.C.J. Reports 1950*, p. 402.

has inherent limits in its application. In principle, it is suitable for determining the protected group in terms of a separate and distinct entity in bi-ethnic or, under certain conditions, in tri-ethnic communities, although the question remains open as to whether the negative definition as such is the proper form for the legal determination of matters which belong to *jus strictum* or rather simply a descriptive one. *In multi-ethnic communities consisting of more than three national, ethnic or religious groups, the negative definition is totally incapable of properly determining the protected group under the Convention.* The exclusion principle as the operative principle of the negative definition is clearly powerless to determine the protected group as a distinct and separate group.

The words "as such" are, regarding a "national, ethnic, racial or religious" group in terms of the Genocide Convention – a qualification of a characterization. They establish another aspect of the requirement of intent – that the intent to destroy be directed at the group as a protected group.[88]

The group itself is the ultimate target or intended victim of the crime of genocide. But in order to achieve the overall objective of destroying the group, it is essential for the act to be committed against individuals constituting the group as the direct victims. The fact that the individuals constituting the group are intentionally subject to acts which constitute the *actus reus* of genocide is, however, not sufficient *per se* in the light of the qualification 'as such'". As the Trial Chamber stated in the *Krstić* case: Mere knowledge of the victims' membership in a distinct group on the part of perpetrators is not sufficient to establish an intention to destroy the group as such".[89]

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

The qualification "as such" serves also as *differentia specifica* between discriminatory intent as suggestive of an element of the crime of persecution, which also may have, as its target for genocidal intent, a racial, excluding ethnic, group.[90]

As a consequence, if prohibited acts under Article II of the Convention targeted a large portion of a protected group such acts would not constitute genocide if they were a part of a random campaign of violence or general pattern of war.

In the *Krstić* case, the Prosecution referred, in its final arguments to 'Bosnian Muslims of Eastern Bosnia" as the targeted group. The Trial Chamber did not accept such a qualification finding that the protected group "within the meaning of Article 4 of the Statute, must be defined in the present case, as the Bosnian

88 Lipman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later". *Temp. Int. Law and Comp. Law Journal*, 7-9/1994. 22–24. note 38.

89 Prosecutor v. Krstić, Trial Judgment, para. 561.

90 Prosecutor v. Brđanin, Trial Judgment, para. 992; Prosecutor v. Krnojevac, Appeal Judgment, para. 185.

Muslims".[91] In the correct exposition of the idea underlying the provision of Article II of the Genocide Convention the Trial Chamber held that "[t]he Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4 (of the Statute literally reproducing Article II of the Genocide Convention – M. K.)".[92] It should be noted however, that the Chambers also found that "no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention".[93]

The Trial Chamber determined Bosnian Muslims in general terms as the protected group without seeking national, ethnic, religious or racial basis for its qualification of a distinct and separate entity. For, the Trial Chamber interpreted *travaux préparatoires* of the Convention in the sense "that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the Second World War, as 'national minorities', rather than to refer to several distinct prototypes of human groups".[94]

The interpretation should be understood in the sense that it is sufficient if it is a group recognizable in its generic substance and that it is not necessary to "differentiate each of the named groups on the basis of scientifically objective criteria... inconsistent with the object and purpose of the Convention".[95] The establishment of scientifically objective criteria is in itself desirable and can only contribute to sound administration of justice on the matter, in particular in relation to the element of genocidal intent. Moreover, in certain cases it is not an unattainable goal, as also demonstrated by the jurisprudence of the ICTR.[96] The search for "scientifically objective criteria" could, however, run counter to the object and purpose of the Convention if it were to leave without protection a human group not distinguishable on the basis of national, ethnic, religious or racial criteria taken individually, but which, in a general and generic sense, satisfies the conditions to be taken as a distinct and separate group in the light of the Genocide Convention.

The determination of "part of the group" by ICJ was highly controversial also. The word "part" in the frame of Article II of the Convention does not mean any part of the protected group, but a qualified part. If a part of a group were to be understood as *any* part, "the intent underlying the *actus reus* and the *mens rea* specific to the crime of genocide would overlap, so that the genocidal intent, which constitutes the distinguishing feature of genocide, would disappear".[97]

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91 ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 560.

92 *Ibidem.*

93 *Ibid,* para 559; emphasis added.

94 ICTY, *Prosecutor v. Krstić*, *Trial Judgment*, para 556.

95 *Ibidem.*

96 ICTR, *Prosecutor v. Akayesu, Trial Judgment*, paras. 510–516.

97 C. Tournaye, "Genocidal Intent before the ICTY", *International and Comparative Law Quarterly*. Vol. 52, April 2003, 459.

Within "Bosnian Muslims" as the protected group under the Convention, the Trial Chamber identified the "Bosnian Muslims of Srebrenica" or the "Bosnian Muslims of Eastern Bosnia" as a part of the protected group".[98]

Can the "Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia" be considered as a substantial part of Bosnian Muslims?

As a preliminary remark it can be said that, contrary to the diction of the formulation, the expressions "Bosnian Muslims of Srebrenica" and "Bosnian Muslims of Eastern Bosnia" cannot be perceived as synonymous. Although the Muslim population in Srebrenica considerably increased in numbers in the relevant period, it was numerically far from the Muslim population of Eastern Bosnia, which numbered over 170,000.

Bearing in mind that in the critical period some 40,000 Bosnian Muslims were concentrated in Srebrenica, and if we would accept as proven that some 5,000-7,000 people were massacred, then, according to quantitative criterion, they could hardly represent a "substantial part" of the community. Besides, the Trial Chamber, in fact, qualified the targeted group in precise terms as "Bosnian Muslims in Srebrenica or Bosnian Muslims of Eastern Bosnia...".

According to the data from the last census in Bosnia and Herzegovina, in 1991, there were, in Eastern Bosnia, over 170,000 Muslims (26,316 in Gorazde, 18,699 in Vlasenica, 21,564 in Bratunac, 4,007 in Cajnice, 30,314 in Bijeljina, 48,208 in Zvornik, 13,438 in Visegrad, 4,140 in Bosanski Brod and 2,248 in Bosanski Samac).

As regards the question whether the "Bosnian Muslims" of Srebrenica or the "Bosnian Muslims of Eastern Bosnia" could be qualified, according to the quantitative criterion, as a substantial part of the Bosnian Muslims and the protected group under the Convention, one should keep in mind that the Muslim community in Bosnia and Herzegovina, on the basis of data from the last census in Bosnia and Herzegovina in 1991, numbered over 1,900,000.[99]

Regarding the qualitative criterion, the Judgment does not give any specific characterization of leadership who were massacred. It is not clear what leadership is in question – political, military, or intellectual.

It comes out from the *dictum* of the Trial Chamber, as well as its general reasoning, that the leadership, in fact, consists of the military aged men. For, the military leadership as well, as it is well known, headed by the commander of the division Naser Oric, left the town a couple of days before its fall.

In Srebrenica, in the relevant period, there were about 40,000 Bosnian Muslims, including the members of the Bosnia and Herzegovina Army. In view of quantitative criteria of the determination of a substantial part of a protected group, it seems obvious that, compared to more than one million and hundred thousand Bosnian Muslims, the Bosnian Muslims located in Srebrenica could not have constituted its substantial part. The same conclusion imposes itself also

98 ICTY, *Prosecutor v. Krstić*„ Trial Judgment, para. 560.

99 See www.FZS.ba.

in the case of the application of the alternative, qualitative criterion, because the political and intellectual elite of the Bosnian Muslims was located in Sarajevo.

The number of massacred military aged men in Srebrenica was never precisely determined. Moreover, that number might be significantly smaller than the number used by the Tribunal in the *Krstić* case.

Namely, the Tribunal equalized the missing and the killed military aged men in Srebrenica. Such an equalization does not look questionable only from the legal standard accepted in the jurisprudence of the Tribunal (para. 88 above) but also in the light of some indications not considered at all either by the ICTY or by the Court *exempli causa*. If one compares the Final voters' register of the Srebrenica municipality, prepared by the Organization for Security and Co-operation in Europe (OSCE), and the List of identified bodies of the people buried in the Memorial Complex "Srebrenica – Potocare" (The "Srebrenica Potocare Memorial and Mezaje", Srebrenica, September 2003); Order of burials at JKP "City Cemeteries", Visoko[100] it comes out that over a third of names are present in both documents.

In addition, a number of soldiers of the Bosnia and Herzegovina Army buried in the Memorial Complex "Srebrenica-Potocare" were, according to the Army's documents, killed in battles before the events in Srebrenica. For instance, the suggestion and justification of the Command of the 28th division of the Bosnia and Herzegovina Army.[101]

However, in regard to the special intent, the Trial Chamber introduced another notion of "part" of the protected group based on geographical area criteria. The Trial Chamber held that: "the intent to destroy a group, even if only in part, means seeking to destroy a *distinct part of the group* as opposed to an accumulation of isolated individuals within it. Although 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... *the killing of all members of the part of a group* located within a small geographical 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 this small geographical area".[102]

Such an interpretation could be considered expansionist i.e., in relation to the determination made in Article II of the Genocide Convention; going far beyond its actual meaning.

Moreover, it seems that the Trial Chamber intentionally went beyond the scope of the Convention because it held that "[t]he only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention".[103]

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100 See www.gradska.groblja.co.br.srebrenica.html.

101 No. classified 04-16/95 of 30 March 1995, for the award of the order "Golden Lily", Addendum in the "Guide of the Chronicle of the Bosnia and Herzegovina Army"; M. Ivanisevic, "Srebrenica, July 1995, Looking for the Truth in the Press".

102 ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 590; emphasis added.

103 ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 559.

Reduction of the "targeted part" to the municipalities could have a distorting effect as held by the Trial Chamber in the *Brđanin* case[104] primarily because the intention to destroy a group in part means seeking to destroy a "distinct part" of the group. It is, however, difficult to see how the Bosnian Muslims in Srebrenica constitute a distinct part as opposed to the Bosnian Muslims as a whole. In terms of the Convention, a national, ethnic, or religious group is not an entity comprised of distinct parts, but a distinct entity by itself. The protection provided by the Convention to the group in part is, in fact, protection of the group in its entirety. In that regard, recognition of the part of a group on the basis of its geographical location as a distinct part of the group would diminish the effectiveness of the protection that the group enjoys as a whole. If, however, parts of a group differ in respect of the characteristics which constitute *genus proximus* of the group (for instance, the Sunnites and the Shiites among the Muslims), it is possible to speak about sub-groups which make up an aggregation in contrast to homogeneous groups to which Bosnian Muslims most certainly also belong.

In effect, such interpretation amounts to a transformation of a part of the group into a "sub-group", being Bosnian Muslims in Srebrenica, on the basis of its alleged perception as a distinct entity by the perpetrators. Consequently, the intent to destroy the Bosnian Muslims in Srebrenica, as a "sub-group", constitutes an intent to destroy a substantial part of the Bosnian Muslim group.

Moreover, the Trial Chamber used the substantial criteria twice successively, with the result that: "The genocidal intent proved in the *Krstić* case is an intent to destroy *a substantial part of a substantial part*",[105] not, as required, a substantial part of the protected group. Namely, in addition to the qualification of the Bosnian Muslims in Srebrenica as a substantial part of the Bosnian Muslims as the protected group, the Trial Chamber held that the intent to destroy the military aged men within the sub-group means an intent to destroy a substantial part of this subgroup, not only from a quantitative viewpoint (Trial Judgment, para. 594) but also from a qualitative one (Trial Judgment, para. 595). In fact the determination of a group "in part" as able-bodied, military aged Muslim men of Srebrenica is based on triple qualification – the sex of victims (men only), their age (only or mostly military aged) and their geographical origin – Srebrenica and surrounding areas.[106] The term itself therefore well exceeds the meaning of the "group in part" as contemplated by Article II of the Trial Chamber itself.[107]

The ICTY formulated an innovative interpretation of a group "in part" in terms that relevant is also prominence of the allegedly part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may

104 ICTY, *Prosecutor v. Brđanin*, Trial Judgment, para 966.
105 Tournaye, *op. cit.*, 460; emphasis added.
106 *Prosecutor v. Krstić*, Trial Judgment, p. 594.
107 *Ibidem.*

support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]".[108]

Tolimir was the first case in which an international court found that the selective killings of the most prominent members of a protected group constituted genocide. The Trial Chamber found that three leaders of Žepa's Muslim community–namely, the mayor, the head of civil protection, and the commander of the local Bosnian-Army brigade, all members of War Presidency Council – were killed because of the impact of their disappearance on the survival of the local community. Thus, held the Trial Chamber, these isolated killings were genocidal.

The Appeals Chamber, in turn, acknowledged that genocide may be committed through selective attacks on the leaders of a group, targeted because of their significance for the group's survival, but stressed that such acts should be assessed "in the context of... what happens to the rest of the group... at the same time or in the wake of" the attacks.

The Appeals Chamber's ruling expands the definition of genocide (and the stigma associated with it) to cover methods of destruction that do not target protected groups *en masse* and could have otherwise escaped severe punishment.[109]

In the Bosnia case the Court accepted that interpretation, saying that "establishing the 'group' requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone.[110]

The position of the Court in Croatia case was slightly different. The Court in Croatia vase was slightly different. The Court stated, citing the aforementioned paragraph in Bosnia judgment, that "It follows that in evaluation whether the allegedly targeted part of a protected group is substantial in elation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group".[111]

The Court constructed the notion of group destruction by combined effects of three things:

i) "massacre... of all men of military age from that commentary (Srebrenica – M. K.), which is determined as 'selective genocide'";[112]

ii) procreative implications of killing of men in Srebrenica Muslim community;[113]

108 *Prosecutor v. Krstić,* Appeal Judgment, para. 12. An extreme variant of this interpretation was applied in *Tolimir* case.

109 C. Ravanides, *Srebrenica at 20*: The ICTY Issues Long-Due Final Convictions, Volume: 20, Issue 6. Date: March 10, 2016.

110 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR Yugoslavia), ICJ Reports 2007, para. 200.

111 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ Reports 2015, para. 142.

112 ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 559.

113 *Ibid.,* para 27.

iii) transfer of women, children and elderly people within their (Bosnian Serb) to other areas of Muslim controlled Bosnia.

The Tribunal's conclusion according to which the killings of men in Srebrenica bear serious procreative implications for the Bosnian Muslim community, since that destruction "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica"[114] through the fact that "their spouses are unable to remarry and, consequently, to have new children"[115] seems highly doubtful from the legal standpoint.

It might also be said that "the physical disappearance of the Bosnian Muslim population at Srebrenica"[116] by itself does not and can not mean physical destruction. This is independently of the legal arguments, that is, as witnessed by the undeniable fact of life – that the Bosnian Muslim community in Srebrenica reconstituted itself after the conclusion of the Dayton Agreement.

As regards the transfer of women, children and older persons, the evidence of the transfer cannot serve as a proper basis for the inference of genocidal intent, since, according to the finding of the Tribunal itself, it "does not constitute in and of itself a genocidal act.[117] True, the Trial Chamber treated the transfer as supporting its finding that "some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica".[118] On this point, the general approach of the Tribunal seems expansionist in comparison with the spirit and text of the Genocide Convention. The factual basis for the inference of genocidal intent should, in principle, consist of physical acts which are capable, objectively, of producing genocidal effects. The physical acts which do not have this capacity, such as, *exempli causa* the act of transfer, may only support the inference of genocidal intent already made or confirm its existence. Otherwise, the evidence of transfer should be implicitly treated as evidence of the destruction of the targeted parts of the protected group, which would in fact mean admitting – although by the back door – forcible transfer as an underlying act under Article II of the Genocide Convention. *In concreto*, and bearing in mind the killings of predominantly military aged men in Srebrenica, this does not permit the inference of genocidal intent as the only reasonable inference, relying on the evidence of transfer which transcends the permitted limits of supportive evidence tending to cure its evidential shortcomings for the purpose of inferring genocidal intent or, even, as a substitute for it.

Physical acts which *per se* are not capable of producing genocidal effects, even if motivated by the intent to destroy a protected group, legally represent no more than an improper attempt distinguishable from the attempt to commit genocide in terms of Article III of the Convention and which may be understood

114 ICTY, *Prosecutor* v. *Brđanin,* Trial Judgment, paras. 978-979.

115 ICTY, *Prosecutor* v. *Krstić,* Appeals Judgment, para. 28.

116 ICTY, *Prosecutor* v. *Krstic,* Trial Judgment, para. 595.

117 ICTY, *Prosecutor* v. *Stakić,* Trial Judgment, para. 519; ICTY, *Prosecutor* v. *Krstić*, Appeals Judgment, para. 33.

118 ICTY, *Prosecutor* v. *Krstić,* Appeals Judgment, para. 33

as "action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions".[119]

These means may not be placed on a par with the act of "serious bodily or mental harm" in the sense of Article II of the Convention. Being different by their very nature – some of them including the *actus reus* of the crimes against humanity (inhuman treatment, deportation) while others are distinct international offences (torture, rape) – they are methods which may produce "serious bodily or mental harm" rather than an act in the normative sense. In that respect, "serious bodily or mental harm" appears as a result of the methods or means applied, and not as an act *per se*. In other words, it should be viewed "on the bases of intent and the possibility of implementing this intent by the harm done".[120]

The construction of genocide as regards the Srebrenica massacre made by the ICTY in the *Krstić* and the *Blagojević* cases, is based on erroneous reasoning.

In the case of Srebrenica it has not been proved that there existed a genocidal plan, either local or regional, that would be considered effected by the committed massacre. Therefore, the Trial Chambers attempted to find alleged genocidal intent in the form of inference from the facts presented.

It appears, however, that the procedure of inference has not been followed *lege artis*, by respecting inherent requirements which inference as such necessarily implies. The substratum from which special intent may be inferred must satisfy with respect to its components the relevant standards, both quantitative and qualitative.

As far as qualitative conditions are concerned, the inferential substratum must consist of acts capable in objective terms of producing genocidal effects or being constitutive of genocide.

It seems obvious, even in the jurisprudence of the Tribunal, that transfer of women, children and elderly *per se* does not possess such genocidal capacity. In fact, the transfer has served to the Trial Chamber as a subsidiary source for inference of genocidal intent, as the result of the fact that "killings" as primary source of inference have not been sufficient and credible source in that regard. Namely, it appears that both the scope and the object of killing allow only the interpretation expressed in the *Krstić* case that "selective genocide" took place, a notion which, in the light of the requirements established in Article II of the Convention, represents no more than *contradictio in adjecto*.

"Selective genocide", being essentially non-genocide, has been turned into genocide by means of construction of the genocidal intent from sources other than killings, i.e., those consisting of acts which are not constitutive of genocide.

Thus constructed, genocidal intent is then taken as determinable as regards the nature of acts like forced displacement and the loss suffered by survivors[121]

119 Article 25 (3) (f) of the Statute of the ICC.

120 N. Robinson, *op. cit.*, 18.

121 *Krstić*, Trial Judgment, para. 543; *Blagojević*, Trial Judgment, paras. 644, 654.

which the majority takes as "the *actus reus* of causing serious bodily or mental harm", as defined in Article II (b) of the Convention.[122]

Such a procedure may be considered as impermissible. Deduction of genocidal intent from acts which *per se* cannot have genocidal effects and, as such, cannot be considered as acts in terms of Article II of the Convention, inevitably leads to the watering down of the notion of genocide as established by the Convention.[123]

Acts incapable of producing genocidal effects may have only confirmatory or supportive effects in relation to the already established genocidal intent.

As regards the Srebrenica massacre, the ICTY has, in effect, by inferring alleged genocidal intent from an improper substratum, transformed possible confirmatory or supportive effects of inference from such a substratum into constitutive effects. In a word, the ICTY resorted to a construction instead of inference of genocidal intent.

Even if, hypothetically, genocidal intent in Srebrenica were proved, it would be possible to speak rather of an attempt to commit genocide than of genocide itself.

It appears that the Trial Chamber proceeded from the distinction that is untenable as regards the nature of ethnic cleansing. Even though it holds *expressis verbis* that ethnic cleansing cannot be equated with genocide, it uses it as a substratum for inference of genocidal intent.

The third thing – "transfer of women, children... to other areas of Muslim controlled Bosnia" relates in fact to so-called ethnic cleansing.

However, acts constituting the *actus reus* of genocide are listed a limine in Article II of the Convention. Article II of the Convention does not include "ethnic cleansing" as an act of genocide.[124]

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122 Judgment, para. 290.

123 W. A. Schabas, "Was Genocide Commited in Bosnia and Herzegovina? First Judgment of the International Criminal Tribunal for the Former Yugoslavia", 25 *Fordham International Law Journal*, 2001, 45–46.

124 In detail: Крећа М., *Етничекаја чистка в свете Конвециио Геноциде, Уголовное право, Исток, реалии, Перейхф к устонцивому развитиино*, Мосцов, Ломоносов, 2011.
The District Court of Jerusalem, in its judgment in the Eichmann case, offered a subtle legal explanation of the difference between "ethnic cleansing" and genocide.
Considering the Nazis anti-Semitic policy, the Court found that until 1941 that policy, a combination of discriminatory laws and acts of violence, such as Kristalnacht of 9-10 November 1938, substantially corresponded to what is nowadays called "ethnic cleansing". Until that time, the Nazi policy towards Jews, although based on various forms of persecution, did not qualify as a genocidal one, given that it allowed emigration from Germany, albeit under discriminatory conditions.
From mid-1941 onwards, that policy, according to the Court's finding, took the form of the "Final Solution" in the sense of total extermination, connected with the cessation of emigration of Jews from territories under German control. Eichmann was acquitted of genocide for acts committed prior to August 1941, since there remained a doubt as to whether there was the intention to exterminate before that date. And the acts committed against Jews until that date were subsumed by the Court under the heading crimes

All in all, the ICJ, as the Guardian od legality in the international community, was unfortunately not to its task in so-called Genocide cases, especially in dispute between Bosnia and Herzegovina and FR of Yugoslavia, regarding the destruction of a protected group as a vital element of the Crime of Genocide.

Relying on the legal findings of the ICTY in *Krstić* and *Blagojević* cases the Court not only created contradictory decisions in two successive cases of genocide – disputes between Bosnia and Herzegovina and FR of Yugoslavia, and between Croatia and Serbia – as regards to destruction of the protected group as vital element of the crime of genocide, but at the same time contributed to its trivialization bringing the genocide closer and, even, combining it with crimes against humanity and war crimes. No need to say, the such legal action of the Court also fragmented the law on genocide as a part of *iuris cogentis*.

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against humanity in contrast to the acts committed after that date, characterized by the Court as genocide. A. G. Israel v. Eichmann 1968, 36 ILR5 (District Court of Jerusalem), para. 80. *Ibid*., para. 186–187.

In the course of the drafting of the Genocide Convention, there were proposals, it is true, to place the subsumed acts under the heading ethnic cleansing as the sixth act of genocide. But these proposals were not accepted. Syria submitted an amendment (United Nations doc. A/C.6/234.) to include the imposition of "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" as an *actus reus* of genocide. The amendment was supported by the Yugoslav representative, Bartos, citing the Nazi displacement of the Slav population from a part of Yugoslavia as an action "tantamount to the deliberate destruction of a group". He added that "genocide could be committed by forcing members of a group to abandon their homes" (United Nations doc. A/C.6/SR.82).

The amendment was, however, rejected by a clear majority of 29 votes against and 5 in favor with 8 abstentions, (*Ibid*) the explanation having been offered that it deviated too much from the concept of genocide Maktos (United States of America), Fitzmaurice (United Kingdom).

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