

# ETHNIC CLEANSING AND GENOCIDAL INTENT: CONCEPTUALIZING DESTRUCTION OF LOCAL POPULATIONS

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## ABSTRACT

*Atrocities against an identifiable group may qualify as genocide even though most members of the group take flight and the group survives the campaign against it. This type of scenario, widely known as “ethnic cleansing,” may lead to an inference of genocidal intent because of the atrocities themselves, statements reflecting religious or ethnonational hatred, disruption of family and communal life, and other patterns involving the targeting of group members and discrimination against them. Drawing on political philosophy as well as seventy-five years of domestic and foreign jurisprudence, this article proposes a “lifeworld”-based approach to genocidal intent. This approach explains and justifies the outcome in several decisions over the past decade involving prominent accusations of genocide, namely in Darfur, Srebrenica, the municipalities of Bosnia and Herzegovina, and Cambodia. A lifeworld-based approach asks whether an ethnic cleansing campaign left the targeted group without a viable homeland in which to exist and thrive. If the accused’s actions are consistent with depriving the group of the means to perpetuate itself in the relevant locality, courts infer genocidal intent even if the entire group was not killed as soon as practicable, and even if a major component of the group was not killed.*

*As the ad hoc tribunals in The Hague and the hybrid tribunal in Phnom Penh wrap up their cases on genocide and other international crimes, it is an opportune time to revisit the social and legal concept of genocide.*

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*Contrasting several potential approaches to genocidal intent, the article illustrates why international criminal tribunals during the last decade have gravitated toward a broader view of an “intent to destroy” a group “in whole or in part.” Policies that persecute and discriminate against a group in a locality, such as a city, region, or province, may include one or more of the acts listed in the Article II of the UN Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute of the International Criminal Court. The text and drafting history of Article II of the Convention —as well as state practice in enforcing and implementing it— lead judges to conclude that genocidal intent may be inferred from such policies. Mass killing, infliction of trauma and fear prompting widespread flight of displaced persons, deprivation of homes and livelihoods, separation of families, and interruption of both physical and cultural reproduction justify inferences of genocidal intent. They are also the patterns of atrocity that exemplify ethnic cleansing.*

*The diplomats and jurists who abstractly defined the crime of genocide, as well as the prosecutors and judges who applied it to concrete cases, have clarified that genocide’s “intent to destroy” does not require a total genocide or whole-group targeting. This article surveys the relevant jurisprudence of, among other courts and tribunals, the International Criminal Court, the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the Extraordinary Chambers of the Courts of Cambodia, and the United States, German, Bosnian, and Iraqi courts.*

**Keywords:** *treaty interpretation, genocidal intent, intent to destroy, Genocide Convention, Rome Statute, United States Code, international criminal courts, ad hoc tribunals, hybrid tribunal*

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## I. INTRODUCTION

The scope of genocidal intent is an urgent question for courts, diplomats, and other government officials including heads of state, legislators, and citizens of the world. A finding of genocidal intent has contributed to U.N. or other arms embargoes or trade sanctions on several occasions.<sup>1</sup> Governments could be obligated to prosecute or extradite foreign heads of state or military officials who travel outside of their home country after committing, attempting, conspiring in, or becoming complicit in genocide.<sup>2</sup> Other governments might intervene, either as a matter of collective security under the authority of a United Nations Security Council resolution, or in individual self-defense, or on humanitarian grounds.<sup>3</sup>

Many countries have experienced civil wars and their militaries have gone into battle against ethnic, political, religious, or national insurgencies. When does a military effort that kills and displaces thousands or tens of thousands of civilians amount to genocide, or put another way, when do patterns of violence employed against civilians reflect an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,” as required by the Convention on the Prevention and Punishment of the Crime of Genocide?<sup>4</sup> The International Criminal Court’s (“ICC’s”) most prominent arrest warrant, and its first including a charge of genocide, arose out of massacres and mass displacements in the Darfur region of Sudan from 2004 through 2008.<sup>5</sup> The warrant intensified an existing debate about whether accusations of genocide were justified after the deaths of up to three hundred thousand members of victimized groups, mainly Fur, Masalit, and Zaghawa, who had perished from causes related to the 2004-2008 violence.<sup>6</sup>

This article focuses on the nature of the physical and biological destruction that characterizes genocide as opposed to ethnocide, persecution, or other related concepts. Ethnic cleansing is a pattern of atrocities that seems genocidal to many observers because it removes an

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1 See WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 526–34, 546–55 (2d ed. 2009).

2 See *id.* at 472–86, 647–48, 668–69.

3 See *id.* at 531–33.

4 Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

5 Claus Kreß, *The ICC’s First Encounter with the Crime of Genocide: The Case against Al Bashir*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 671, 680–81 (Carsten Stahn ed., 2016); KAREN E. SMITH, *GENOCIDE AND THE EUROPEANS* 221 (2010).

6 *Prosecutor v. Al Bashir*, ICC-02/05-157-AnxA, Application for a Warrant, annex A, ¶¶ 15, 18, 111 (Sept. 12, 2008).

ethnic or religious group from a locality or region as populations flee mass killings, sexual assaults, the bombing of towns or cities, and the destruction of religious institutions or other private property, but the cleansing's partial scope gives rise to arguments by those accused of genocide that legitimate governmental or military objectives rather than an unlawful "intent to destroy" a group motivated the underlying conduct.<sup>7</sup>

The present article analyzes not so much the nature of a "specific intent" to destroy a group (as opposed to another mental state that is known as "general intent"), but what it means to intend to "destroy" a group assuming that this is the purpose or aim of the accused, i.e. the accused's "specific intent."<sup>8</sup> It contrasts the crucial decision of the Pre-Trial Chamber I not to

<sup>7</sup> See, e.g., Rep. of the S.C., annex IV, at 17–19, U.N. Doc. No. S/1994/674/Add.2 (Dec. 28, 1994); cf. *Kadić v. Karadžić*, 70 F.3d 232, 250 n.10 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1340–41, 1354–55 (N.D. Ga. 2002); SCHABAS, *supra* note 1, at 221. Ethnic groups, or "ethnic" groups as the Genocide Convention, *supra* note 4, art. II, refers to them, could be racial, religious, national, cultural, or familial/tribal in nature, but have also been distinguished from racial groups as being more cultural, and from national or political groups as arising from status as a minority of some kind within a nation. See SCHABAS, *supra* note 1, at 143–47. Somewhat differently from how other countries ratified the Genocide Convention, the U.S. Congress decided to define an ethnic group as a group of members "whose identity as such is distinctive in terms of common cultural traditions or heritage," as opposed to a "racial" group, which Congress defined as being "distinctive in terms of physical characteristics or biological descent." 18 U.S.C. § 1093(2)–(3). For recent examples of alleged "ethnic cleansing" being explained away, at least in part, as an aspect of a legitimate policy, see Florence Carroll, *Narrative Analysis of Aung San Suu Kyi's Role in Relation to the Changing Politics of Myanmar*, 39 INT'L RELS. J. 17 (2020), Wendy Isaacs-Martin, *Political and Ethnic Identity in Violent Conflict: The Case of Central African Republic*, 10 INT'L J. CONFLICT & VIOL. 25 (2016) (cleansing in Central African Republic, regarded by U.N. rapporteur(s) as risking genocide, explained by "militias" and "warlords" as policy of to deprive rival combatant groups of resources including human resources i.e. "recruits"), and Perparim Isufi, *Decades on, Kosovo Massacre Village Awaits Justice*, BALKAN TRANSITIONAL JUST. (Jan. 15, 2019, 6:13 AM), <https://balkaninsight.com/2019/01/15/decades-on-kosovo-massacre-village-awaits-justice-01-14-2019/> (massacre in Kosovo explained by "Serbia" as result of combat with Kosovo Liberation Army, KLA).

<sup>8</sup> This question has been posed by some earlier articles. See, e.g., *infra* note 32. The present article differs from those by probing more deeply into conceptions of genocide that were prevalent at the time of the Genocide Convention's drafting, and bringing the analysis forward in time to incorporate the latest findings of the ICTY and ECCC. Compare Erin Jenne, *Ethnic Cleansing*, in THE ROUTLEDGE HANDBOOK OF ETHNIC CONFLICT 110 (Karl Cordell & Stefan Wolff eds., 2016); Olaf Jensen, *Evaluating Genocidal Intent: The Inconsistent Perpetrator and the Dynamics of Killing*, 15 J. GENOCIDE RSCH. 1 (2013); Claus Kreß, *The Darfur Report and Genocidal Intent*, 3 J. INT'L CRIM. JUST. 562, 572–76 (2005); Kleida Mulaj, *Forced Displacement in Darfur, Sudan: Dilemmas of Classifying the Crimes*, 46 INT'L MIGRATION 27 (2008); David Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Tribunals*, 37 TEX. INT'L L.J. 231 (2002); CLOTILDE PEGORIER, *ETHNIC CLEANSING: A LEGAL QUALIFICATION* (2013); Drazen Petrovic, *Ethnic Cleansing—An Attempt at Methodology*, 5 EUR. J. INT'L L. 342 (1994); William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287 (2001); William A. Schabas, *Cambodia: Was It Really Genocide?*, 23 HUM. RTS. Q. 470 (2001); William A. Schabas, *What Is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?*, 47 POLITORBIS 33 (2009); Micol Sirkin, Comment, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L.R. 489 (2010); Martin Steinfield, *When Ethnic Cleansing Is Not Genocide: A Critical Appraisal of*

issue a warrant for genocide in the Darfur, Sudan, situation—and the World Court judgment on genocide in Bosnia and Herzegovina which supported it—with other judgments issued since 2009.<sup>9</sup> International criminal courts and a hybrid domestic-international criminal tribunal have issued rulings that adopt much broader notions of “intent to destroy” a group.<sup>10</sup> This article identifies patterns of conduct that such tribunals classify as genocidal even though these patterns will not lead to the elimination of the entire affected group in the near term, such as selective massacres and assassinations of leaders, widespread sexual violence and mental trauma, and deprivation of the essentials of life by such techniques as deportation into inhospitable areas or devastation of homesteads.<sup>11</sup>

The text and context of the Genocide Convention justify a reading of Article II that covers a steadily intensifying, incomplete, and unpremeditated form of genocide, one that has physically and biologically destructive consequences without being a total or complete genocide.<sup>12</sup> This reading draws support from Article II’s list of genocidal acts, its contrasting use of intentional states, and its use of the phrase “destroy ... in part.” It is confirmed by the analysis and discussion of these textual aspects of Article II in the drafting history and in the judgments and orders of ad hoc, hybrid, and standing international tribunals.<sup>13</sup> This article, as the ad hoc international criminal tribunals in The Hague and Arusha close their doors and the hybrid tribunal in Phnom Penh is moving in the same direction, analyzes some of the last statements of these important institutions on how the ICC and the world should interpret the Genocide Convention and conceive of genocidal intent in complex fact patterns.<sup>14</sup>

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*the ICJ’s Ruling in Croatia v. Serbia in Relation to Deportation and Population Transfer*, 28 LEIDEN J. INT’L L. 937 (2015); Jennifer Trahan, *Why the Killing in Darfur Is Genocide*, 31 FORDHAM J. INT’L L. 990 (2007).

<sup>9</sup> See *infra* Part III.

<sup>10</sup> See *infra* Parts II–IV.

<sup>11</sup> See *infra* Parts II–V.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *id.*

<sup>14</sup> See *infra* Parts II, IV–V; see also S.C. Res. 2256 (Dec. 22, 2015); *As UN Tribunal on Rwandan Genocide Wraps Up Work, Security Council Cites Role in Fight Against Impunity*, UN NEWS (Dec. 22, 2015), <https://news.un.org/en/story/2015/12/518842-un-tribunal-rwandan-genocide-wraps-work-security-council-cites-role-fight>; Jonathan Birchall, *Concerns over Bid to Wrap Up Outstanding Investigations at Cambodia’s ECCC*, INT’L JUST. MONITOR (June 16, 2017), <https://www.ijmonitor.org/2017/06/concerns-over-bid-to-wrap-up-outstanding-investigations-at-cambodias-eccc/>; *Curtain Falls on UN Tribunal’s 24-Year History of Fighting Impunity in Former Yugoslavia*, UN NEWS (Dec. 20, 2017), <https://news.un.org/en/story/2017/12/640022-feature-curtain-falls-un-tribunals-24-year-history-fighting-impunity-former>; Ly Livsier, *Tug-of-War over ECCC Archives*, KHEMER TIMES (Sept. 12, 2019), <https://www.khmertimeskh.com/642432/tug-of-war-over->

New instances of ethnic and religious persecution have emerged and civilian communities have been devastated by militias, armies, and mobs in a number of countries. Therefore, the social and diplomatic concept of genocide has evolved. In 2018, Adama Dieng, U.N. Special Advisor of the Secretary-General on the Prevention of Genocide, opined that murders, rapes, and tortures in Rakhine state of Myanmar would reveal genocidal intent “to cleanse northern Rakhine state of Rohingya existence.”<sup>15</sup> The International Court of Justice, on application by The Gambia for provisional measures, seemingly accepted Dieng’s premise that genocidal acts and not simply persecutory or criminal acts would be committed if killings, rapes, and deprivation of life-sustaining resources took place during the “clearance” of the Rohingya from portions of Rakhine state on the scale alleged by The Gambia.<sup>16</sup> In 2016, Special Adviser Dieng warned of “potential for genocide” in South Sudan after noting a “risk” of ethnic “violence” there.<sup>17</sup> He also spoke of genocide and other crimes in the Central African Republic.<sup>18</sup> By way of contrast, in June 2014 and again in August 2014, Special Advisor Dieng characterized Islamic State of Iraq and Syria threats to religious minorities and attacks on civilians as war crimes and/or crimes against humanity but not genocide.<sup>19</sup> The U.S. State

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eccc-archives/ (reporting that “the UN-backed Khmer Rouge Tribunal is now slowly wrapping up their obligations, leading to concern over where its archives will be stored at the conclusion of the proceedings”). Despite the dates of these reports, activity continued at the ad hoc tribunals and the hybrid Cambodian tribunal after 2017, as described in part below.

15 U.N. Secretary General, Highlights of the Noon Briefing by Stéphane Dujarric, Spokesman for Secretary-General Antonio Guterres (Mar. 13, 2018), <https://www.un.org/sg/en/content/highlight/2018-03-13.html>; U.N. Secretary General, Highlights of the Noon Briefing by Stéphane Dujarric, Spokesman for Secretary-General Antonio Guterres, (Aug. 27, 2018), <https://www.un.org/sg/en/content/highlight/2018-08-27.html>.

16 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measure, 2020 I.C.J. 3 (Jan. 23). For an analysis of the genesis and implications of this order, see Gino Naldi & Konstantinos Magliveras, *Crimes Against Humanity and Int’l Courts: International Court of Justice Indicates Provisional Measures in the Rohingya Genocide Case*, 36 INT’L ENF’T L. REP. 49 (2020).

17 U.N. Secretary General, Highlights of the Noon Briefing by Farhan Haq, Deputy Spokesperson for Secretary-General Ban Ki-Moon (Nov. 11, 2016), <https://www.un.org/sg/en/content/highlight/2016-11-11.html>.

18 U.N. Secretary General, Note to Correspondents: Statement by Adama Dieng, UN Special Adviser on the Prevention of Genocide on the Situation in the Central African Republic (Nov. 25, 2016), <https://www.un.org/sg/en/content/sg/note-correspondents/2016-11-25/note-correspondents-statement-adama-dieng-un-special>.

19 Press Release, United Nations, Statement by Adama Dieng, Special Adviser on the Prevention of Genocide, and Jennifer Welsh, Special Adviser to the Secretary-General on the Responsibility to Protect, on the Situation in Iraq, (June 18, 2016), <https://www.un.org/en/genocideprevention/documents/media/statements/2014/English/2014-06-18-Special%20Advisors%20Statement%20on%20situation%20in%20Iraq.pdf>; Press Release, United Nations, Statement by Adama Dieng, Special Adviser on the Prevention of Genocide, and Jennifer Welsh, Special Adviser to the Secretary-General on the Responsibility to Protect, on the Situation in

Department, on the other hand, reached a conclusion that genocide had occurred during these threats and attacks in response to a 2016 request by Congress for such a formal finding, while the U.N. Office of the High Commissioner for Human Rights opined that the campaign against regional minorities “may” have been genocidal.<sup>20</sup> The Mapping Exercise on the Democratic Republic of the Congo (“DRC”) of the UN High Commissioner for Human Rights warned of genocide as a result of massacres and widespread sexual assault by rebels and invading armies in the eastern DRC, widely known as North and South Kivu.<sup>21</sup>

In developing a theory of genocidal intent that explains and justifies such diplomatic and intergovernmental findings, as well as indictments, such as those of former President al-Bashir of Sudan, this article explores concepts of genocidal intent. A narrower concept was employed by the ICC’s Pre-Trial Chamber I in a 2009 decision not to issue a warrant for genocide in Darfur and by the World Court in its 2007 judgment on state responsibility for genocide in Bosnia and Herzegovina (a judgment which supported the 2009 decision on the Darfur warrant). The International Criminal Tribunal for the Former Yugoslavia has employed broader conceptions of what it means to “destroy” a group, including in decisions on the Bosnian Serb leadership’s potential responsibility for genocide in the municipalities of Bosnia and Herzegovina. Similarly, the Extraordinary Chambers of the Courts of Cambodia in a 2018 decision on Khmer Rouge officials’ culpability for genocide against the Cham Muslims and Vietnamese in Cambodia employed a broader conception of “destroy.”

Part II analyzes the problem of genocidal intent in three aspects. First, it examines the distinction between specific intent and less purposive mental states, such as knowledge and recklessness. Second, it describes the ICC’s inferential approach to specific intent. Third, and most importantly, it investigates the meaning of intent to “destroy,” assuming that said intent

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Iraq (Aug. 12, 2014), <https://www.un.org/en/genocideprevention/documents/media/statements/2014/English/2014-08-12.Statement%20of%20the%20Special%20Advisers%20on%20Iraq.pdf>.

<sup>20</sup> *Secretary of State John Kerry Remarks on Daesh and Genocide*, U.S. EMBASSY & CONSULATES IN IRAQ (Mar. 17, 2016), <https://iq.usembassy.gov/secretary-state-john-kerry-remarks-daesh-genocide/>; Hum. Rts. Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, ¶¶ 16, 76, U.N. Doc. No. A/HRC/28/18 (Mar. 27, 2015).

<sup>21</sup> Brian Alan Kritz, *The Crime of the Knowing and Intentional Spreading of HIV/AIDS and the International Criminal Court*, 7 INTERDISC. J. HUM. RTS. 19 (2012); T.Y. Okosun & Naupess Kibiswa, *Human Rights Violations and Genocide in the Democratic Republic of the Congo*, 16 CONTEMP. JUST. REV. 482 (2013).

may be specific but may be inferred from relevant facts and circumstances. What it is to “destroy” a group emerges from the plain meaning of the word and the textual and historical context that governed the way in which it was inserted into the Genocide Convention. The plain meaning, the historical context, and the practical considerations of the drafters indicate that a purpose to do something other than to kill an entire group or major subset thereof can still be genocidal intent.

Part III sets forth the results of the ICC’s most important attempt to articulate the elements of the crime of genocide in three decisions on the al Bashir arrest warrant. After the Pre-Trial Chamber I interpreted “intent to destroy” as requiring a purpose to kill all members in the group within the accused’s power, rather than deporting or traumatizing the bulk of them, the Appeals Chamber and a second Pre-Trial Chamber decision adopted a broader view. As supported by the second Pre-Trial Chamber decision on this matter, a lifeworld-based approach to genocidal intent inquires into whether the accused aimed to leave the group without a viable habitat or land in which to exist and thrive. If the accused’s actions are consistent with depriving the group of the means to perpetuate itself in the relevant geographic zone, courts may infer genocidal intent even if the entire group was not killed as soon as practicable and even if a major component of the group was not killed.

Parts IV and V conceptualize genocidal intent in situations resembling ethnic cleansing as elaborated by decisions in the Bosnian Municipalities and Cambodian cases. My claim is that the emerging jurisprudence on ethnic cleansing adopts a more realistic and textually-supported conception of genocidal intent. The intent to destroy a group in whole or in part may be inferred from actions that destroy the foundations of group life in an important region for it, such as a town, province, or nation. Under this construction, even if most of a protected group survived acts defined as potentially genocidal in Article II, courts may find genocidal intent if the group’s homeland has been devastated.

## II. THE EVOLUTION OF GENOCIDAL INTENT

Genocide is a legal concept with multiple meanings, ranging from the attempted total destruction of a group to the selective detention, brutal beating, or cruel and humiliating treatment of its members.<sup>22</sup> In line with the narrower meaning, it is possible that genocidal intent only exists when an attempt is made to eradicate a group, leaving few or no survivors. International law supports a more flexible approach to genocidal intent, which extends to knowledge—rather than simply to premeditated scheming—and to more partial or local forms of ruining the lives of group members without killing them all. In this Part’s first section, the focus is on international tribunals’ approaches to the mental state required to convict for genocide, and the thesis is that the intent or knowledge to kill or otherwise destroy a substantial portion of a group is sufficient for a conviction. In the next section, the intent requirement’s origin and history are explored, and the thesis is that an “intent to destroy ... in whole or in part” cannot mean only an intent to kill all or most group members as a matter of etymology, the structure of genocide’s definition, and its drafting’s historical context. The final section includes an analysis of the decisions of the International Court of Justice (“ICJ”) on this issue and the claim that these decisions recognize that genocide may occur locally.

### *A. Genocidal Intent as Intentional Attempted Destruction*

Article II of the Genocide Convention differs in several respects from the conventional definition of genocide as group extermination. It distinguishes acts constituting genocide from the same acts that may qualify as other international crimes or as completely lawful by a mental state that is known as “intent” and aims at destruction. As with other domestic and international crimes, this intent may need to be inferred from the acts themselves and their historical and political context, at least in the absence of a confession.

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<sup>22</sup> See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1332–43, 1355 (N.D. Ga. 2002).

### 1. *Intent, Knowledge, and “Specific Intent”*

Judges, like other writers who aim to analyze genocidal intent, confront an interpretive dilemma in defining genocide. The conceptualization of the crime of genocide and of the obligation to prevent and punish it potentially rises to the level of high politics or geopolitical controversy. A social or linguistic concept of genocide as total extermination holds a certain intuitive appeal, and a broader concept than that threatens to reopen the vexing social questions of bloody national borders, conquest of indigenous peoples, and the claims of oppressed minorities.<sup>23</sup> Assuming that genocide must be total or that war and genocide or refugee flight and genocide are diametrically opposed concepts, judges inquire into whether the perpetrator state had any military aims and whether it intended to displace rather than kill certain populations in support of such aims.<sup>24</sup> This form of totalizing intent is sometimes called *dolus specialis* or specific intent to produce a specific circumstance, namely a “physical result” consisting of a group’s destruction in whole or in part.<sup>25</sup>

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23 See Kai Ambos, *Selected Issues Regarding the ‘Core Crimes’ in International Criminal Law*, in INTERNATIONAL CRIMINAL LAW: QUO VADIS?, at 237 (2004) (citing WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 179–89 (2000)); *Identification*, in ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 483 (Dinah Shelton ed., 2005) (“The defining feature of the crime of genocide is the deliberate destruction of a group.”); IRVING LOUIS HOROWITZ, TAKING LIVES: GENOCIDE AND STATE POWER 2, 10–17 (1980) (surveying social or sociological concepts of genocide as “systematic annihilation,” “mass destruction,” or an “effort over time to liquidate a national population, usually a minority,” and noting connection in view of “humankind” to “Auschwitz and other Nazi death camps”); SCHABAS, *supra* note 1, at 7, 12, 188, 566, 578 (raising intrinsic connection between genocide and human rights in general); Kai Ambos & Nicholas Wirth, *Genocide and War Crimes In the Former Yugoslavia Before German Criminal Courts (1994–2000)*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 769, 784–89 (Horst Fischer, Claus Kreß, & Sascha Rolf Lüder eds., 2001). The Genocide Convention nods at this significance of genocide charges by taking on—and rejecting—the possibility that genocide could be a “political crime[] for the purpose of extradition.” Genocide Convention, *supra* note 4, art. VII. A “political crime” or “political offense” is one which, like treason, sedition, organization of a coup d’etat, or elections law violations, might lead other states to extend political asylum to an alleged perpetrator in order to protect him or her from political persecution, as opposed to a serious non-political offense, which could result in the exclusion from or revocation of refugee status. Cf. Asylum Case (Colom./Peru), 1950 I.C.J. 266 (Nov. 20); U.N. High Commissioner for Refugees, Additional UNHCR Observations on Article 33(2) of the 1951 Convention in the Context of the Draft Qualification Directive (2012), <https://www.refworld.org/docid/437c6e874.html> (serious non-political crimes may result in denial of refuge).

24 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139, ¶¶ 277, 333–34 (Feb. 26) (intention to displace for settling a conflict rather than destroying the group would not be genocidal intent); see also Rep. of the Int’l Comm’n of Inquiry on Darfur to the United Nations Secretary-General, ¶ 513, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter ICID Report] (distinguishing forcible displacement for counterinsurgency warfare from genocidal intent).

25 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 498 (Sept. 2, 1998); see also Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 45 (Int’l Crim. Trib. for the Former Yugoslavia

At the ICC, intent may be general or specific.<sup>26</sup> Every element of the core crimes of genocide, crimes against humanity, and war crimes must be committed with “intent and knowledge.”<sup>27</sup> Genocide, however, requires a specific intent to destroy a group in whole or in part.<sup>28</sup> The other elements of genocide and other core crimes may be accompanied by the accused’s mere knowledge that the element would occur.<sup>29</sup> In French, the word used for genocidal intent, “*intention*,” is consistent with knowledge or awareness of committing the act.<sup>30</sup>

Specific intent is generally identified with a purpose or aim of bringing about a result, not merely knowledge or recklessness about whether the result may occur.<sup>31</sup> This raises the question whether the accused must be part of a system of organized genocidal attacks that aims to *and will probably* destroy the group, or must possess the *means* of destroying at least a considerable or qualitatively important part of the group. Most scholarship to date has focused on the hypothetical or real perpetrator of killings of protected group members who knows about other perpetrators but neither plans nor coordinates efforts with the other perpetrators to achieve a successful extermination.<sup>32</sup> While the case for a “knowledge-based”

July 5, 2001); ICID Report, *supra* note 24, at ¶ 491; Kreß, *supra* note 5, at 694–95; PEGORIER, *supra* note 8, at 80–84; Trahan, *supra* note 8, at 992–93.

26 See Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan, ¶ 139 (Mar. 4, 2009); Kai Ambos, *What Does ‘Intent to Destroy’ in Genocide Mean?*, 91 INT’L REV. RED CROSS 833, 833–37 (2009).

27 Rome Statute of the International Criminal Court art. 30(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see Ambos, *supra* note 23, at 834.

28 See, e.g., *infra* notes 46–47.

29 Cf. Ambos, *supra* note 23, at 838–40 (equating the “intent and knowledge” standard under the Elements of Crimes and Rome Statute Article 30 with “intent” in common-law systems and *dolus eventualis* in civil law systems particularly, e.g., in Germany, either of which standards is typically reducible to such a practical certainty of a result).

30 *Id.* at 842–43. Sometimes the French version is viewed as shedding light on the English one, although the English one is also authoritative. Genocide Convention, *supra* note 4, art. X; see also *infra* note 61 (analyzing French ‘killing,’ *meurtre*).

31 See Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 656 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); see also Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶¶ 45–50 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 102 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 15–45 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Ambos, *supra* note 23, at 834–38.

32 See Ambos, *supra* note 23, at 837–55 (citing, inter alia, Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT’L CRIM. JUST. 989, 992 (2005)); Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2276, 2259, 2265, 2288–89, 2292–93 (1999); John Jones, “Whose Intent Is It Anyway?” *Genocide and the Intent to Destroy a Group*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 467, 468–80 (Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Michael F. Graham, John Hocking & Nicholas Robson eds., 2003); Kreß, *The Darfur*

approach is compelling for many reasons—including text, drafting history, and practical considerations—it is not my focus here.<sup>33</sup>

The identification of specific intent with aim or purpose does not resolve the question of what the goal must be. For example, many judges, mostly in national courts but also in some international tribunals, acknowledge that the Genocide Convention was enacted in broad terms.<sup>34</sup> For judges and other jurists in this camp, systematic and widespread commission of acts listed in Article II of the Genocide Convention, especially if accompanied by derogatory rhetoric, will justify an inference of genocidal intent even in the absence of a confession by the accused perpetrator or the accused state that the extermination of the entire group was intended.<sup>35</sup> For example, in the absence of an organized killing system, mass rape of the victim group or abduction of its children might justify a finding of genocidal intent.<sup>36</sup> While the purpose in such cases may be destructive in one sense, the destruction does not result in death but rather a form of ruin, mental trauma, or damage to group bonds.

*Report*, *supra* note 8, at 572–76; Nersessian, *supra* note 8, at 265; SCHABAS, *supra* note 1, at 17, 259–64; Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT'L L. 399, 400–08 (2001); Elise van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. JUST. 184, 192–93 (2007); Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*, 4 J. INT'L CRIM. JUST. 239 (2006); Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. INT'L CRIM. JUST. 781, 785–97 (2007).

<sup>33</sup> See Ambos, *supra* note 23, at 840–43 (citing, *inter alia*, Greenawalt, *supra* note 32; Triffterer, *supra* note 32, at 404–06).

<sup>34</sup> See *infra* notes 193–259, 266–81, and accompanying text.

<sup>35</sup> David Scheffer, *The World Court's Fractured Ruling on Genocide*, 2 GENOCIDE STUD. & PREV. 123, 123–36 (2007).

<sup>36</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 698–734 (Sept. 2, 1998); *Jelisić*, Case No. IT-95–10-A, ¶¶ 37–93; Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004) (citing *Jelisić*, Case No. IT-95–10-A, ¶ 37); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, ¶¶ 158–59 (June 1, 2001); Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 791, 791–94 (2005); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to Go from Here?*, 13 EUR. J. INT'L L. 703, 703–04 (2002); Valerie Oosterveld, *Prosecution of Gender-Based Acts of Genocide Under International Law*, in PLIGHT AND FATE OF WOMEN DURING AND FOLLOWING GENOCIDE 205–15 (Samuel Totten ed., 2008); United Nations, Trial Chamber Summary of Judgment Case 002/19-09-2007/ECCC/TC (Nov. 16, 2018), [https://legal.un.org/ola/media/info\\_from\\_lc/mss/speeches/MSS-Phnom-Penh-November-2018-ECCC-2-2-summary-of-judgement.pdf](https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS-Phnom-Penh-November-2018-ECCC-2-2-summary-of-judgement.pdf); People of the Republic of Guat. v. Montt, C-01076-201-00015 (First Crim. Ct. of First Instance for Crim. Just., Drug Trafficking & Env't Crimes May 19, 2013); Juzgado de Instrucción No. 1, Audiencia Nacional, Auto Diligencias Previas 331/1999 (July 26, 2011) (Spain); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139, ¶ 300 (Feb. 26); Kate Doyle, *The Guatemala Genocide Ruling, Five Years Later*, NAT'L SEC. ARCHIVE (2018), <https://nsarchive.gwu.edu/briefing-book/guatemala/2018-05-10/guatemala-genocide-ruling-five-years-later>.

The World Court has linked the requirement of intent to destroy a group to the purpose of the Genocide Convention to protect groups rather than individuals.<sup>37</sup> This “very nature of the crime of genocide” gives rise to an intent to target a “significant enough” part of a group “to have an impact on the group as a whole.”<sup>38</sup> There has been uncertainty about whether the part targeted must be “important” to the group<sup>39</sup> or merely “considerable” numerically.<sup>40</sup> Killing a “very small” proportion of a targeted city would not reflect genocidal intent.<sup>41</sup> If one in ten of a subset of the group—say, those in a detention camp—were slain because they were leaders without whom a group might dissolve, genocidal intent might justifiably be inferred.<sup>42</sup> What is important about such conclusions for my purposes is that a destructive impact on the group is not at all the same as the actual destruction of the group or a major part of it.

## 2. *The Inferential Approach to Genocidal Intent*

The Elements of Crimes are legal principles which the States Parties to the Rome Statute of the International Criminal Court (“ICC”) intended for use in assisting the ICC in “the interpretation and application” of the crimes under its jurisdiction to the extent consistent with the Statute.<sup>43</sup> One of the Elements is that “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances.”<sup>44</sup> This interpretive or practical principle is important because it negates the implication that the articulation of mental states in the Rome Statute requires an admission from the accused as to his or her intent or knowledge, whether directly or through the testimony of a witness or interlocutor.<sup>45</sup>

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<sup>37</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 498, 518.

<sup>38</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007 I.C.J. at ¶ 198.

<sup>39</sup> Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶¶ 81–82, 91 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

<sup>40</sup> Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment, ¶ 97 (May 21, 1999).

<sup>41</sup> Prosecutor v. Sikirica, Case No. ICTY-95-8-T, Judgment, ¶ 73 (Sept. 3, 2001).

<sup>42</sup> See *Jelisić*, Case No. IT-95-10-T, ¶¶ 81–108. In this opinion, however, the Trial Chamber indicating that killing many dozen of even 100 members of the group would not be genocidal beyond a reasonable doubt if the trial indicated that the killings were carried out somewhat randomly. The Appeals Chamber emphasized that acquittal was warranted because the accused had acted arbitrarily rather than with a plan or policy to harm the group as a whole. Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶¶ 64, 75, 90, 93 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001).

<sup>43</sup> Rep. of the Prep. Comm’n for the Int’l Crim. Ct., Finalized Draft Text of the Elements of Crimes, at 5, U.N. Doc. No. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes].

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., DOUGLAS GUILFOYLE, INTERNATIONAL CRIMINAL LAW 193 (2016) (noting that

The inferential approach to intent is long-standing because “direct evidence” of a specific intent to destroy a group was often missing from the record before international criminal tribunals.<sup>46</sup> Accordingly, such tribunals typically concluded that genocidal intent may be inferred from evidence of acts and omissions, including the context of the acts which may have featured rising ethnic or racial tensions or animosities, large-scale acts affecting the same group, systematic victimization of a group by a series of acts, and planning or formalizing the targeting of group members.<sup>47</sup> A plan or policy is merely a factor to consider, not a requirement, in this conception of genocidal intent. In the case of Radovan Karadžić, discussed further below, the indirect evidence of specific intent included “genocidal and other culpable acts committed against Bosnian Muslims and Bosnian Croats throughout the Municipalities, such as killings, beatings, rape, and sexual violence, as well as evidence of the large scale and discriminatory nature of these acts.”<sup>48</sup> Likewise, the ICJ has found that Yugoslavia violated its obligation to prevent genocide because at Srebrenica, the conflict was likely to result in atrocities; thus, its “dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control. . . .”<sup>49</sup>

The ICC’s Elements of Crimes attempts to provide further guidance by clarifying that to charge or convict of genocide there must be a pattern, not one or two acts. For genocide, one element states: “The conduct [killing, causing serious bodily or mental harm etc.] took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”<sup>50</sup> Were it not for the word

otherwise, a prosecutor would have to reconstruct the accused’s thought process, presumably with admissible evidence); see also Valentin Bou, *Crimes Against Humanity in Contemporary International Law*, in *THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA* 547, 554–58 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

46 Elements of Crimes, *supra* note 43.

47 See Prosecutor v. Karadžić, Case No. IT-95-5-A, Judgment, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013) (Judgement as to Acquittal under Count 1 Pursuant to Rule 98 *bis* of the Tribunal’s Rules of Procedure and Evidence); *id.* ¶ 99 (citing *Jelisić*, Case No. IT-95-10-A, ¶ 47) (genocidal intent properly inferred this evidence of “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”); *id.* at 37–38 n.277 (discussing signs of animus); Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, ¶¶ 158–59 (June 1, 2001) (direct evidence of intent is rare, so it may be inferred); Lingaas, *supra* note 127, at 440 (contextual elements commonly used to infer intent).

48 *Karadžić*, Case No. IT-95-5-A, ¶ 99.

49 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139, ¶ 438 (Feb. 26).

50 Elements of Crimes, *supra* note 43, at 6–7; see also Assembly of States Parties to the Rome Statute of the Int’l Crim. Ct., *First Session: New York, 3–10 September 2002 Official Records*, en: Elements of Crimes, U.N. Doc. ICC/ASP/1/3, U.N. Sales No. E.03.V.2 (2002).

“or” in this element, prosecutors and accused suspects would know a lot more about what “genocide” is. The actus reus would have to occur at a scale or severity that the group could be destroyed as a result. Questions of a lone genocidal maniac, village or district genocide, and so on would vanish. The intent to destroy the group would have to be manifested in systematic destructive strategies that, while not necessarily all traceable to the accused, threatened the group’s actual survival.

The word “or,” however, introduces two types of genocide into the mix. Perhaps, it merely recognizes that two types of genocide already exist. First, there is the Auschwitz or Wannsee Conference model of planning a system of mass killing that will likely destroy the group.<sup>51</sup> Second, there is a looser, more chaotic type of genocide in which genocidal acts are part of a pattern of atrocities, but where this pattern may or may not be adequate to cause the destruction of the group by itself. For scholars, ethnic cleansing is often this type of genocide.<sup>52</sup> The Elements of Crimes seems to confirm this conception of genocidal intent by clarifying that acts of genocide need only be perpetrated against “one or more persons.”<sup>53</sup> The process that led to the Elements’ adoption indicated that a moderate number may be affected.<sup>54</sup>

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51 A Wannsee Conference model of genocide would concern total eradication within a large area. It is often written that at the Wannsee conference, a policy of Jewish emigration from the Reich was replaced with one of Jewish evacuation in the Reich. See, e.g., *United States v. Szebinskyj*, 104 F. Supp. 2d 480, 494 n.37 (E.D. Pa. 2000) (observing that “the term ‘Final Solution,’ which was intended to be classified, quickly found its way into ordinary German discourse after the infamous Wannsee Conference that Reinhard Heydrich, Himmler’s deputy and head of the Reich Security Main Office, convened on January 20, 1942”); Whitney Harris, *Tyranny on Trial: Trial of the Major German War Criminals at Nuremberg, Germany, 1945–1946*, in *THE NUREMBERG TRIALS INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 107–08 (Herbert Reginbogin & Christoph Safferling eds., 2006) (prosecutor of the Reich Main Security Office head Ernst Kaltenbrunner described evidence at Nuremberg tribunal as showing that Kaltenbrunner’s predecessor Reinhard Heydrich had told “high-ranking civil servants, meeting in a villa at Wannsee, Berlin, that the final solution of the Jewish question in Europe was to be, in fact, the annihilation of the Jewish race”; prosecutor also charged Gestapo and Nazi intelligence [SD] as organizations). This plan resulted in people like Fanny Aizenberg, born in Lodz, Poland in 1916, being arrested and sent to Auschwitz Concentration Camp, where hundreds of thousands of Jews and other persons were killed and where thousands survived on less than 1,000 calories per day in deplorable conditions as forced laborers. Complaint ¶¶ 12–15, *Grossman v. Int’l Bus. Mach. Corp.*, No. 1-01-794-SJ (S.D.N.Y. 2001) (citing U.S. HOLOCAUST MEMORIAL MUSEUM, *In Pursuit of Justice: Examining the Evidence of the Holocaust*, 34–35 (1997)).

52 See, e.g., Norman Naimark, *Ethnic Cleansing*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 23, at 302; Samuel Totten, *Documentation*, in *id.* at 267–68; Sirkin, *supra* note 8, at 515–24 (collecting sources).

53 Elements of Crimes, *supra* note 43, art. 6; see PEGORIER, *supra* note 8, at 84.

54 See PEGORIER, *supra* note 8, at 84.

*B. The Convention's Text and Context in Shaping Its Genocidal Intent Requirement*

Moving from the concept of intent to what a perpetrator's object or aim must be, an intent to "destroy" must be broader than an intent to kill for several reasons. First, the ordinary meaning of the term is broader as dictionaries attest and as a study of press and judicial mentions would no doubt indicate as well. Second, this intent requirement is prefatory to a list of acts, only one of which involves deliberation or premeditation and three of which do not involve killing. Third, the jurists and diplomats who framed the crime of genocide mentioned a variety of examples that did not involve attempted total extermination or annihilation of a group. Fourth, the diplomats who drafted and world leaders who ratified the Genocide Convention probably did not expect a repetition of events like the Holocaust in the era of the United Nations so they envisioned a broader scope for the crime of genocide. Fifth, member States of the United Nations, including the United States, have repeatedly recognized that an intent to destroy a protected group, at least in part, could exist in contexts considerably less grave and widespread than the Holocaust, such as in a more localized conflict.

*1. The Original Meaning of the Term "Destroy"*

The phrase "intent to destroy in whole or in part" is believed to limit genocides to killings that have large or major impacts on group integrity, but "destroy" has a much broader and more flexible meaning than to kill or exterminate the entire group.<sup>55</sup> In the first half of the twentieth century, English dictionaries defined "destroy" as to ruin emotionally or spiritually, defeat utterly, devastate, neutralize, overthrow, spoil utterly, or unbuild as well as to kill or end the existence of a thing.<sup>56</sup> Synonyms for "destroy,"

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<sup>55</sup> Cf. Kress, *The Darfur Report*, *supra* note 9 (citing ICID Report, *supra* note 24); Trahan, *supra* note 8, at 1034–35 (citing Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006)); Milena Sterio, *The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide*, 31 EMORY INT'L L. REV. 271 (2016).

<sup>56</sup> See, e.g., *Destroy*, LEXICO, <https://www.lexico.com/en/definition/destroy> (last visited June 5, 2021) (defeat utterly, end the existence of something by damaging it, or ruin emotionally or spiritually, in addition to kill); RICHARD SOULE, A DICTIONARY OF ENGLISH SYNONYMS AND SYNONYMOUS EXPRESSIONS 148 (1938) (desolate, devastate, lay waste, overthrow, ruin, etc.); NOAH WEBSTER, WEBSTER'S COMMON SENSE DICTIONARY: LITERARY, SCIENTIFIC, ENCYCLOPEDIA, PRONOUNCING AND DEFINING 130 (1902) (ruin, devastate, or overthrow); WEBSTER'S ACADEMIC DICTIONARY: A DICTIONARY OF THE ENGLISH LANGUAGE ... ABRIDGED FROM WEBSTER'S INTERNATIONAL DICTIONARY 162 (1895) (unbuild, ruin, or kill); WEBSTER'S COLLEGIATE DICTIONARY 276 (3d ed. 1916) (first definition: to unbuild or break down the structure or organic existence of); WEBSTER'S DICTIONARY OF SYNONYMS 244 (1951) (demolish, *inter alia*); WEBSTER'S NEW INTERNATIONAL

other than “kill,” included “demolish, ruin, waste, consume.”<sup>57</sup> The Middle English origin of the term “*destroien*” included “ravage, devastate, or ruin (a country or city)” and “harass, . . . subject to hardship, . . . impair or ruin the welfare or well-being of (a person or country).”<sup>58</sup> Therefore, an intent to destroy is much broader than an intent to exterminate or kill.

## 2. *The Restriction of Physical Destruction to Two Forms of Genocide*

In the Genocide Convention, “extermination” and “annihilation” are not used to qualify the intent that must accompany the crime or for any other purpose.<sup>59</sup> This was a deliberate choice as the drafters knew that genocide was a term used at the Nuremberg tribunal to characterize the extermination of Jews, Poles, and other groups occupied and massacred by the Nazis and their local allies, especially in Eastern Europe.<sup>60</sup> Two forms of genocide, however, must arguably be purposeful and physical: genocide by deliberately inflicting on members of the group conditions of life calculated to destroy it in whole or in part, and genocide by killing members of the group.<sup>61</sup>

DICTIONARY OF THE ENGLISH LANGUAGE, BASED ON THE INTERNATIONAL DICTIONARY OF 1890 AND 1900 (1923), [https://archive.org/stream/webstersnewinter00unse\\_0/webstersnewinter00unse\\_0\\_djvu.txt](https://archive.org/stream/webstersnewinter00unse_0/webstersnewinter00unse_0_djvu.txt) (“break up the structure and organic existence of,” demolish, neutralize, pull down or tear down, “separate violently into its constituent parts,” spoil utterly, or unbuild, as well as: “To put an end to the existence of; to kill; slay”); WEBSTER’S NEW INTERNATIONAL DICTIONARY: SECOND EDITION, UNABRIDGED: WITH REFERENCE HISTORY 329 (1937) (defining “break” as to “destroy” in sense of “the firmness, spirit, or resiliency of” as well as “to separate into parts or fragments”); WEBSTER’S PRACTICAL DICTIONARY 103 (1910) (defining “destroy,” as, in addition to ruin or break the organic structure of, to end the beauty, prosperity, or the life of, *inter alia*); see also WEBSTER’S ACADEMIC DICTIONARY 74–75 (1898) (break is a synonym of “destroy” and has one meaning of “To sever by fracture; to divide violently”; another of “To . . . dissolve or terminate”; and a third of “To disorder; to shatter”).

57 THOMAS FENBY, A COPIOUS DICTIONARY OF ENGLISH SYNONYMS 65.7 (1864).

58 MIDDLE ENGLISH DICTIONARY, PART 3 1035–36 (Hans Kurath & Sherman M. Kuhn eds., Ann Arbor, MI: University of Michigan Press, 5th ed. 1998); see also LEXICO, *supra* note 56 (“Middle English from Old French *destruire*, based on Latin *destruere*, from de- (expressing reversal) + *struere* ‘build’.”).

59 See, e.g., Genocide Convention, *supra* note 4, art. II.

60 See 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 3, 979 (1950) (*United States v. Alstoeffer* (“The Justice Case”)); *Judgment and Sentences, International Military Tribunal at Nuremberg, reprinted in* 41 AM. J. INT’L L. 172 (1947).

61 See, e.g., Genocide Convention, *supra* note 4, art. II. While killing is a broad term in English that could include accidental deaths and involuntary manslaughter, the use in the French version of Article II of the word *meurtre* indicates to tribunals that intentional killing or murdering is the definition of “killing” that makes more sense in context. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 500 (Sept. 2, 1998); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A, Judgment, ¶ 1511

The Genocide Convention expressly covers infliction of mental harm and the stealing of children in Article II, even though these might be considered to be acts of cultural genocide rather than of physical genocide.<sup>62</sup> Partial genocide is explicitly covered; so is destruction rather than actual reduction to nothingness as described above.<sup>63</sup>

Article II(c) provides important context for the meaning of “destroy” in Article II. It introduces the notion of the “physical destruction” of a group through poor conditions of life as one genocidal act.<sup>64</sup> Genocidal intent, by contrast, does not require an intention to bring about a group’s “physical destruction.” Informed by Article II(c), Article II(b) creates a form of genocide characterized by “inflicting serious bodily or mental harm” on members of the group, which implies that the group members survive—especially when Article II(b) is read with II(a), which is the form of genocide that requires killing while II(c) covers letting-die.<sup>65</sup>

Moreover, only one form of genocide—commission by deliberately imposing conditions of life calculated to destroy the group in whole or in part—requires prior conceptualization on the part of the accused, or “premeditation.”<sup>66</sup> The other forms require intent to destroy but not premeditated destruction or destruction motivated by hatred or racial ideology.<sup>67</sup>

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(June 1, 2001).

62 See, e.g., Genocide Convention, *supra* note 4, art. II.

63 See, e.g., *id.* The preamble also confirms this principle by referring to genocides in times of peace and at all periods of history, not simply during the Nazi era or World War II, insofar as cases of total genocide in peacetime or prior to 1941 were not commonly recognized or at any rate not generally acknowledged as of 1948. See *id.* pmb1.

64 *Id.* art. II.

65 See, e.g., *id.*

66 See Ambos, *supra* note 23, at 230 (citing NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 60 (1960); SCHABAS, *supra* note 1, at 243). See generally *supra* note 32, *infra* note 151.

67 See Ambos, *supra* note 23, at 230–38 (citing, inter alia, Ambos & Wirth, *supra* note 23, at 791); see also *infra* note 151.

### 3. *The Historical Context of the Genocide Convention*

In 1946, the General Assembly resolution on genocide affirmed that genocide was a crime without setting forth a requirement of specific intent.<sup>68</sup> Earlier in 1946, the British prosecutor at Nuremberg had included the Belgians, Dutch, French, Norwegians, and Yugoslavs as victims when he used the term “genocide,” even though these groups were not subjected to an attempted total extermination but rather primarily local atrocities.<sup>69</sup> Raphael Lemkin, who coined the term and built support for a treaty on the topic, acknowledged with apparent approval in *American Scholar* that the indictment of major war criminals for genocide identified the victims as not only Jews but Poles (Slavs) and Roma.<sup>70</sup> In 1951, the United States described the Poles as an “outstanding example[] of the crime of genocide” in a memorandum to the World Court.<sup>71</sup> During the drafting the Genocide Convention,<sup>72</sup> China included its own nationals as victims of genocide, contributing to the enactment of Article II(b) as a result.<sup>73</sup>

Within the definition of genocide, the Genocide Convention includes five methods of carrying out an attempt, conspiracy, or campaign to destroy a group in whole or in part.<sup>74</sup> Only two methods require an intent to physically destroy group members: “killing members of the group,” and “conditions of life calculated to bring about the physical destruction of the group.”<sup>75</sup> Under Article II(c), the United States has recognized that genocide may occur by “destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions.”<sup>76</sup> In addition to Jews and Poles in camps

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68 G.A. Res. 96(I) (11 Dec. 1946).

69 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 497 (1948) (*France v. Goering*); SCHABAS, *supra* note 1, at 38; Dan Stone, *Raphael Lemkin on the Holocaust*, 7 J. GENOCIDE RSCH. 539, 544 (2005); William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RESRV. U. J. INT'L L. 42 (2007).

70 Raphael Lemkin, *Genocide*, AMERICAN SCHOLAR, Apr. 1946, at 227–230.

71 Written Statement of the Government of the United States of America, Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. PLEADINGS 23.

72 HIRAD ABTAHI & PHILIPPA WEBB, 1 THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 981–82 (2008).

73 *Id.* at 1358, 1478.

74 See Genocide Convention, *supra* note 4, art II; Elements of Crimes, *supra* note 43, at 2–4.

75 Genocide Convention, *supra* note 4, art. II(a).

76 William Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L.

and ghettos, victims of these tactics that have been cited by Lemkin and various courts include Guatemalan Mayans, aboriginal and indigenous peoples in European empires, Kurds in Iraq, and Cambodians.<sup>77</sup> In 1945, Lemkin wrote in support of his list of genocide victim groups that the Nazis granted French nationals about 30% less protein rations than Germans, Greek nationals received less than half as much as Germans, and Jews about 80% less than Germans, and Nazis took away or refused to distribute essential goods in wintertime to Jews and Poles, including warm clothes, blankets, and firewood.<sup>78</sup>

From October 13 to 14, 1948, as the drafters considered Sweden's proposal to add "ethnic" groups to the racial, national, and religious groups that could be affected by genocide, the drafters discussed their purpose of protecting group identity, cultural heritage, and common origin.<sup>79</sup> In this regard, the Soviet delegate recognized that genocides during foreign colonization would be prohibited even if the intention was to "subjugate" part of a population to establish "domination," rather than to kill all of it.<sup>80</sup>

Sometimes the drafting history and context are used in support of narrowing the scope of the "intent to destroy" in Article II. At times, Lemkin's work is cited in support of a narrow view of genocidal intent as requiring a large portion of a group be killed.<sup>81</sup> Lemkin's work points in another direction, however. His writings contain references to a number of genocides less complete than those in Poland or Yugoslavia in 1941-1945, such as anti-Christian massacres in the Ottoman Empire which left between a third to a half of relevant populations alive and the anti-Assyrian massacres in Iraq in 1933 although Assyrians in some regions other than

& PUB. POL'Y 36, 43 (2010).

77 Helen Fein, *Genocide by Attrition 1939-1993: The Warsaw Ghetto, Cambodia, and Sudan: Links Between Human Rights, Health, and Mass Death*, 2 HEALTH & HUM. RTS. 10 (1997); HELEN FEIN, HUMAN RIGHTS AND WRONGS: SLAVERY, TERROR, GENOCIDE, ch. 5 (2007); *infra* note 104.

78 Raphael Lemkin, *Genocide - A Modern Crime*, PREVENT GENOCIDE INT'L (June 1, 2000), <http://www.preventgenocide.org/lemkin/freeworld1945.htm> (making available online the same article first published in FREE WORLD, Apr. 1945, at 39, 39-43).

79 Sweden: Amendments to Article II of the Draft Convention, U.N. Doc. No. A/C.6/230 (Oct. 13, 1948); U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Seventy-Third Meeting, U.N. Doc. No. A/C.6/SR.73, at 97-98 (Oct. 13, 1948); U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Seventy-Fourth Meeting, U.N. Doc. No. A/C.6/SR.74, at 98-99 (Oct. 14, 1948); U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Seventy-Fifth Meeting, U.N. Doc. No. A/C.6/SR.75, at 115 (Oct. 15, 1948).

80 U.N. Doc. No. A/C.6/SR.74, *supra* note 79, at 104.

81 Kreß, *supra* note 5, at 693 (citing David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur and the UN Report*, 7 CHI. J. INT'L L. 303, 312 (2006)).

Simele were not affected.<sup>82</sup> Lemkin rejected the conception of genocidal intent where government officials do not harbor genocidal intent when they deport large numbers of people from their homes in a way in which the deaths of many of the deportees result from a lack of food, exhaustion or heat stroke, disease, and insecurity during the journey; thus, he included “the destruction of the Christians under the Ottoman Empire” and “the slaughter of the Christian Assyrians in Iraq in 1933” as genocides despite refugee flight, wars, and occupations.<sup>83</sup>

#### 4. *The Unlikelihood of Actual Destruction Being Caused Post-1945*

The decisive prelude to the Genocide Convention’s drafting was the establishment of the United Nations. After the Atlantic Charter was signed in 1941, twenty-six nations came together in 1942 to declare that they pledged “to employ [their] full resources, military or economic, against” Nazi Germany and their allies and adherents, with the general aim of protecting human rights and justice not only in those twenty-six nations but in “other lands” as well.<sup>84</sup> In October 1945, the United Nations formally came into being with ratification of the U.N. Charter by a majority of its fifty-one members, including the five permanent members of the U.N. Security Council, representing millions of men under arms and the victors in the war.<sup>85</sup> The United Nations asserted the authority to act collectively against any threat to the maintenance of international peace and security,

<sup>82</sup> Lemkin, *Raphael*, in *ENCYCLOPEDIA OF WAR CRIMES AND GENOCIDE* 277 (Leslie Alan Horvitz & Christopher Catherwood eds., 2006); see also Sargon George Donabed, *Iraq and the Assyrian Unimagining: Illuminating Scaled Suffering and a Hierarchy of Genocide from Simele to Anfal* (2010) (Ph.D. dissertation, University of Toronto). Armenians and Assyrians, as “ethnic and religious minority groups” living under the late Ottoman Empire--which entered World War I in October 1914 in alliance with Germany--fell victim to a “genocide[]-in-whole” on a “large scale” and “according to the UN Convention of 1948.” Christian Sherrer, *Ethnicity*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 23, at 306.

<sup>83</sup> Raphael Lemkin, *Genocide as a Crime under International Law*, 4 *UNITED NATIONS BULL.* 70 (1948).

<sup>84</sup> *The Washington Conference 1941–1942: The President’s Secretary (Tully) to the Secretary of State*, in *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT WASHINGTON, 1941-1942 AND CASABLANCA, 1943* (1968).

<sup>85</sup> United Nations, *UN Milestones 1941–1950*, UNITED NATIONS, <https://web.archive.org/web/20171027013705/http://www.un.org/en/sections/history/milestones-1941-1950/index.html> (last visited June 7, 2021) (choose “1941-1950” from bar of dates, then click on the arrows until “October 24, 1945” is reached). The Soviet Union alone had about six million individuals in its military forces in 1946. See U.S. LIBR. OF CONG., LEGIS. REFERENCE SERV., *COMMUNISM IN ACTION: A DOCUMENTED STUDY AND ANALYSIS OF COMMUNISM IN OPERATION IN THE SOVIET UNION* 103 (1946).

which could include the violation of human rights.<sup>86</sup> In 1946, an early resolution of the U.N. General Assembly announced that the organization viewed genocide as a crime under international law, which would presumably give the assembled nations the interest and justification to act collectively to combat this threat.<sup>87</sup> Indeed, the General Assembly recommended “speedy” prevention of this crime before the Genocide Convention was even drafted.<sup>88</sup>

The historical situation in which the Genocide Convention was drafted made it somewhat improbable that the definition was intended to apply only to total or actual extermination. The Axis powers had surrendered unconditionally and their armies and navies had been destroyed while the Allies had developed enormous occupation and defense forces that made a Nazi revival impossible in Europe, so there was no likelihood that the events of the 1940s would be repeated. The members of the United Nations anticipated preventing or mitigating events less extreme than the recent Holocaust. As the next section explains, the drafting history mentions conflicts in Greece, Bulgaria, and India and Pakistan, as well as pogroms in Russia.<sup>89</sup> Most groups that fell victim to complete destruction—as the Beothuk of Canada and the aborigines of Tasmania may have—suffered this fate well before the establishment of the United Nations.<sup>90</sup>

##### 5. *Observations as to the Intended Applications of the Genocide Convention during Its Drafting and Ratifications*

The drafters of the Genocide Convention mentioned, as being covered by its terms, both ongoing conflicts and long-past historical episodes that fell short of total genocides. Seeking ratifications in 1951, Lemkin pointed out that the convention might prevent episodes similar to pogroms against Jewish communities in Tsarist Russia, the massacres of Maronites in nineteenth century Ottoman Lebanon, or the crusades (which brought about massacres of Jews and Muslims by rampaging crusaders).<sup>91</sup> The form of

<sup>86</sup> See U.N. Charter arts. 2, 99.

<sup>87</sup> See G.A. Res. 96(I) (Dec. 11, 1946).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 37 (1981). The French representative, in raising pogroms, was discussing why the crime of genocide should aim at situations in which “no severe legal measures were taken against the perpetrators” of pogroms. *Id.* (quoting U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Seventy-Eighth Meeting, U.N. Doc. No. A/C.6/SR.78, at 704–05 (Aug. 26, 1948)).

<sup>90</sup> See Sharon O’Brien, *Beothuk*, ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, *supra* note 23, at 120–21; Russell McGregor, *Australia*, *in id.* at 103.

<sup>91</sup> Raphael Lemkin, *Genocide as a Crime Under International Law*, CTR. FOR JEWISH HIST., <https://web.archive.org/web/20160322010315/www.cjh.org/lemkin/conference.php> (last visited June 7,

genocide that became infliction of serious bodily or mental harm began as the form involving “mutilations and biological experiments for other than curative purposes.”<sup>92</sup> The abduction of Greek children by Bulgaria-based communist rebels after World War II was apparently part of what motivated the drafting of Article II(e).<sup>93</sup>

During the U.S. ratification process, the U.S. Senate and President Ronald Reagan recognized the wide scope of genocidal intent in terms of its potential application in criminal prosecutions.<sup>94</sup> The Senate noted that the United States was a “principal architect” of the Nuremberg tribunal, which first used the term “genocide” in a criminal context.<sup>95</sup> U.S. ratification was delayed by “isolationism and xenophobia flowing from [sic] the Korean War,” as well as McCarthyism, de jure racial segregation, and hostility to binding human-rights norms.<sup>96</sup> After a debate concerning whether the acts listed in Article II, if committed during a war, could reflect genocidal intent, the Senate adopted an understanding upon ratification of the treaty.<sup>97</sup> The understanding stated that while genocide may be committed in a war or during peacetime, Article II acts committed during a war would not “constitute genocide” unless accompanied by a restricted

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2021) (scroll down to the thumbnail of a portion of the article titled “*Genocide as a Crime under International Law, updated*”); cf. John Docker, Raphael Lemkin’s History of Genocide and Colonialism (U.S. Holocaust Mem’l Museum, Ctr. for Advanced Holocaust Stud., Paper, Feb. 26, 2004), <http://www.ushmm.org/confront-genocide/speakers-and-events/all-speakers-and-events/raphael-lemkins-history-of-genocide-and-colonialism> (citing Raphael Lemkin, *Revised Outline of Genocide Cases* (unpublished)); Raphael Lemkin & Roman Serbyn, *Lemkin on Genocide of Nations*, 7 J. INT’L CRIM. JUST. 123, 123–27 (2009); Dominik Schaller & Jurgen Zimmerer, *Raphael Lemkin: The “Founder of the United Nation’s Genocide Convention” as a Historian of Mass Violence*, 7 J. GENOCIDE RSCH. 447, 447–52 (2005).

<sup>92</sup> SCHABAS, *supra* note 1, at 159 (quoting U.N. Secretariat, Draft Convention on Genocide, U.N. Doc. No. E/623 (1948)).

<sup>93</sup> See, e.g., U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Eighty-First Meeting, at 176, U.N. Doc. No. A/C.6/SR.81; U.N. Econ. & Soc. Council, Continuation of the Consideration of the Draft Convention on Genocide, Eighty-Second Meeting, at 186–91, U.N. Doc. No. A/C.6/SR.82.

<sup>94</sup> President Reagan described the treaty as a promise to all the peoples of the world that events like not only the Holocaust but also “other horrors,” such as Cambodia, Ethiopia, and Ukraine, would be punished. Ronald Reagan, Remarks on Signing the Genocide Convention Implementation Act of 1987 (the Proxmire Act) in Chicago, Illinois (Nov. 4, 1988), <https://www.reaganlibrary.org/research/speeches/110488b>.

<sup>95</sup> GENOCIDE CONVENTION IMPLEMENTATION ACT OF 1987 (THE PROXMIRE ACT) DATES OF CONSIDERATION AND PASSAGE, S. REP. NO. 100-333, at 3 (1988).

<sup>96</sup> *Genocide Convention Implementation Act: Hearing Before the Subcommittee on Immigration, Refugees, & International Law, of the Committee on the Judiciary, U.S. House of Representatives, One Hundredth Congress, Second Session, on H.R. 807, the Genocide Convention Implementation Act, March 16, 1988*, 100th Cong. 80 (1988).

<sup>97</sup> See *id.* at 29, 84.

form of genocidal intent, which the Senate defined as “specific intent to destroy” and legislative history equated this form of intent with a purpose of destroying a group.<sup>98</sup> This legislative flourish implies that without the amendment of Article II to insert the word “specific” prior to “intent,” as codified in 18 U.S.C., the intent to destroy in Article II might have been fairly read as something other than specific intent, such as knowledge.<sup>99</sup> The word “destroy” still was not defined, but the Senate made clear its impression that a group could be destroyed during the prosecution of a war.<sup>100</sup> This is consistent with the plain meaning of “destroy” as covering the sense of “to defeat utterly.”<sup>101</sup>

The U.S. ratification also amended the Convention’s reference to part of a group in two ways: to require a “substantial” part and to require in the event of a destruction of a “part” that the “part” destroyed have an impact on the survival of the group as a whole.<sup>102</sup> Neither requirement is present in Article II. Grafting them onto the U.S. version of the crime of genocide reflects that as originally drafted, neither a substantial part of a group nor an impact on the group as a whole is needed for genocidal intent. Perhaps for this reason, U.S. federal courts have inferred genocidal intent from acts often deemed “ethnic cleansing” by scholars when deciding whether civil claims have been stated under international law.<sup>103</sup> Similarly, courts in

<sup>98</sup> *Id.* at 29.

<sup>99</sup> 18 U.S.C. § 1091(a) (1988).

<sup>100</sup> *Genocide Convention Implementation Act: Hearing Before the Subcommittee on International Law the Committee on the Judiciary, U.S. House of Representatives, One Hundredth Congress, Second Session, on H.R. 807, the Genocide Convention Implementation Act, March 16, 1988, 100th Cong., at 75-76, 80, 84.*

<sup>101</sup> LEXICO, *supra* note 56.

<sup>102</sup> 18 U.S.C. § 1093. The background to this language, and to the related language on specific intent, is that Senators were aware that past U.S. attacks on indigenous peoples, traumatic discrimination against African-Americans, and bombardment of Vietnamese cities, towns, and villages potentially fell within the treaty definition of genocide. LAWRENCE LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 6, 25, 50–51, 83, 86, 92–93, 96–97, 196 (1991); Zachary Pall, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 *INTERDISC. J. HUM. RTS.* 22 (2008); Jordan Paust, *Congress and Genocide: They’re Not Going to Get Away with It*, 11 *MICH. J. INT’L L.* 90 (1989).

<sup>103</sup> *See, e.g., Kadić v. Karadžić*, 70 F.3d 232, 236–37 (2d Cir. 1995) (holding that claim for genocide as an international tort was clearly stated by allegations that defendant “personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats”); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (holding that claim for genocide was stated by allegations that terrorist organizations planned to kill or drive out the Jews in Israel and Palestine by means of mass casualty bombings and other killings of civilians); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-19 (S.D.N.Y. 2003) (holding that a corporation was capable of aiding and abetting crime of genocide despite requirement of specific intent, where plaintiffs alleged that as “Christians and those practicing traditional indigenous religions” they had been victimized by “ethnic cleansing” including “intense persecution, including extrajudicial killing, kidnapping, rape,

Germany and other nations without reservations or understandings or declarations similar to the U.S. codification have convicted suspects of genocide after the perpetration of ethnic cleansing in the Balkans, the Baltic states, Ethiopia, and Iraq.<sup>104</sup>

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enslavement, and confiscation of property”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1340–1343 (N.D. Ga. 2002) (observing in dicta that ethnic cleansing campaign manifested an “intent and nature . . . [,] in [the town of] Bosanski Samac in particular, and defendant’s knowledge and willing participation in this plan, appears to support a finding that the defendant committed genocide under this definition”).

104 See, e.g., *Prosecutor v. Kristić*, Case No. IT-98-33-T, Judgment, ¶¶ 579–80 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 1290/99, ¶ (III)(4)(a)(aa), Dec. 12, 2000, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212\\_2bvr129099en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html)) (observing that Bosnian Serb perpetrator of killings in a district was convicted in Germany of genocide against Bosnian Muslims); *Al Anfal* [Iraqi High Tribunal, Appellate Chamber], decision of Sept. 4, 2007, pp. 13–27 (upholding judgment against and sentence of five Iraqi officials for genocide against the Kurds during Iraq’s “Anfal” campaign targeting Kurdish villages and farmlands); *Al Anfal* [Iraqi High Tribunal, Second Criminal Court], decision of June 24, 2007, pp. 47–55, [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal\\_verdict.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal_verdict.pdf) (trial decision concluding genocide was committed during destruction of Kurdish villages and flight or relocation of their inhabitants to surveilled camps and compounds); Lauri Mälksoo, *Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law*, 14 LEIDEN J. INT’L L. 757, 773–85 (2001) (describing convictions for genocide of officials who deported ethnic and national Latvians and Lithuanians, and potentially Estonians as well depending on how certain decisions are read, even though these Baltic peoples were not actually destroyed and became independent from Soviet Union post-genocide); DAVID NERSESSIAN, *GENOCIDE AND POLITICAL GROUPS* 119–20 (2010) (former government officials of communist regime in Ethiopia were convicted in 2004 of genocide against Amhara minority group and sentenced to death); SCHABAS, *supra* note 1, at 422, 436–38 (describing genocide convictions of Sretko Damjanović and Borislav Herak by military court of Bosnia and Herzegovina, those convictions being upheld by Supreme Court of that country, conviction of a man identified only as M.H. by a court hearing his case in Croatia arising out of ethnic cleansing operations in a village known as Branjina, and convictions of Nicolai Jorgić and Maksim Sokolovic by higher regional courts in Germany due to ethnic cleansing operations in 1992 in Bosnia, prior to Srebrenica massacre, and of Miroslav Vuckovic by a panel of a district court of a Kosovo region although genocide conviction was reversed on appeal); see also *Mugesera v. Canada* (Minister of Citizenship and Immigration); *Mugesera v. Canada*, [2005] 2 S.C.R. 100, ¶¶ 76–99 (Can.) (incitement to genocide could be committed without “a direct call to murder” where politician referred to an ethnic minority as a threat, murderers, and infiltrating cockroaches, in context of war in which two thousand had died); *R. v. Munyaneza* [2009] Q.C.C.S. 2201, ¶¶ 2058–75 (Can. Que.) (leader of Rwandan paramilitary organization properly convicted of genocide for committing and encouraging and helping others to commit selective killings, sexual assaults, and plunders of the property of ethnic minority in Rwanda).

*C. Partial or Local Genocidal Intent in the Decisions of the  
International Court of Justice (“ICJ”)*

The only independent and effective remedy stated by the Genocide Convention is recourse to the ICJ to hear disputes concerning its interpretation and application.<sup>105</sup> The other provisions depend on the Security Council, other states’ perceptions and decisions as to how to prevent and punish genocide, and whether other states to agree to establish an international criminal court.<sup>106</sup> Prior to 2007, the ICJ heard at least six significant disputes relating to genocide: the reservations case, Bosnia’s case against Serbia and Montenegro (Yugoslavia), the nuclear weapons advisory opinion, the case by the Democratic Republic of Congo against Rwanda, cases by Serbia and Montenegro against the main countries of the North Atlantic Treaty Organization for bombing civilians and reducing the country to poverty and hunger, and cases between Croatia and Serbia/Yugoslavia.<sup>107</sup> In four of these decisions, the ICJ suggested that genocide might take place by partial killings, devastation of cities by nuclear weapons, military aggression, or the activities of undisciplined armed bands sponsored or armed by a state.<sup>108</sup>

There is an arguable split of legal authority as to whether one may legitimately refer to a Bosnia-wide genocide in 1992-1995. Although the Security Council certainly suspected a genocide prior to Srebrenica and the General Assembly voted to pass a resolution that genocide had been committed by ethnic cleansing, courts and tribunals reached varying

<sup>105</sup> Genocide Convention, *supra* note 4, art. IX. However, a state may be able, according to some jurists, to evade both the plain meaning of art. IX and of the Statute of the International Court of Justice by executing a reservation excluding the I.C.J. from exercising jurisdiction over its alleged genocides or complicity therein. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, ¶ 60 (Feb. 3).

<sup>106</sup> Genocide Convention, *supra* note 4, arts. I, VIII.

<sup>107</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3 (Feb. 3); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. Rep. 43 (Feb. 26); Armed Activities on the Territory of the Congo, 2006 I.C.J. Rep. 6; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Provisional Measures, 1993 I.C.J. 325 (Sept. 13); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serbia), Preliminary Objections, 2008 I.C.J. 412 (Nov. 18); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legality of the Use of Force (Yugoslavia v. U.S.), Provisional Measures, 1999 I.C.J. 916 (June 2); Legality of the Use of Force (Yugoslavia v. Spain), Verbatim Record, (May 10–12); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

<sup>108</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Provisional Measures, 1993 I.C.J. 3, 4–5, 8, 24 (Apr. 8).

conclusions.<sup>109</sup> The division results from judgments issued from two buildings a short distance from one another in The Hague: the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the ICJ. The latter declared in 2007:

The Applicant’s argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership—to create a larger Serb State, by a war of conquest if necessary—did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful....

Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The ... specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.<sup>110</sup>

The ICJ, therefore, disregarded evidence alleged to exist by the ICTY’s prosecutors—and additional evidence reviewed in Bosnia’s memorial—that a broad genocide took place as detailed in the indictments of Radovan Karadžić, Ratko Mladić, and Slobodan Milošević for genocide outside of Srebrenica, including in other Bosnian towns and cities.<sup>111</sup> One judge argued, in response to such indictments, that ethnic cleansing “presupposes

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109 See S.C. Res. 955 (Nov. 8, 1994) (establishing tribunal to prosecute, inter alia, “Genocide”); S.C. Res. 935 (July 1, 1994) (referring to “evidence of possible acts of genocide” in Bosnia and Herzegovina); S.C. Res. 827 (May 25, 1993) (citing Rep. of the S.C., annex, U.N. Doc. S/25704 (1993)) (adopting statute of an ad hoc tribunal for “former Yugoslavia” which conferred jurisdiction over, inter alia, “the crime of genocide”); G.A. Res. 47/121 (Dec. 18, 1992) (condemning ethnic cleansing as form of genocide). The non-judicial organs of the United Nations are empowered by Articles I and VIII of the Genocide Convention to prevent and perhaps non-judicially punish the crime. Genocide Convention, *supra* note 4, arts. I, VII; see also SCHABAS, *supra* note 1, at 539–54.

110 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139, ¶ 372–73 (Feb. 26).

111 *Id.* ¶ 374.

the survival of the group while genocide seeks its disappearance.”<sup>112</sup> After the ICJ’s decision, Karadžić and Mladić sought to have their ICTY genocide charges dismissed, contending that their failure to kill all Bosnian Muslims under their power prevented a judicial finding of “the plan requirement as an element of the crime of genocide,” because “it is nearly impossible to imagine genocide that is not planned or organized either by the State itself or a state like entity or by some clique associated with it.”<sup>113</sup> However, the ICJ’s judgment was equivocal on this point:

[The court] said that ethnic cleansing can only be a form of genocide within the meaning of the Genocide Convention if it corresponds to or falls within one of the categories of acts prohibited by Article II: . . . The court acknowledged that certain acts described as “ethnic cleansing” could correspond to prohibited acts under the Genocide Convention, giving as an example the direct infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, “that is to say with a view to the destruction of the group, as distinct from its removal from the region.” . . .

Thus, it is argued, “ethnic cleansing” may involve some of the acts prohibited by Article II of the Genocide Convention. To the extent these are perpetrated with a genocidal intent, they constitute acts of genocide. This line of reasoning is not very productive, however, because essentially the same thing can be said about other violations of international law, such as apartheid, or aggressive war, or colonialism, or the use of weapons of mass destruction. Any of these phenomena might involve “killing,” “causing serious bodily or mental harm,” and even preventing births within a group.<sup>114</sup>

Characterized in this way, genocidal intent is a puzzle. Acts listed in Article II could be the main evidence of genocidal intent if ethnic cleansing can be a form of genocide, as the World Court stated. However, removal of an entire group from a region would tend to rebut an allegation of genocidal intent, because it presupposes the group’s perpetuation in another location. It is difficult to imagine, however, that absent a highly humane and subsidized relocation as in a hurricane evacuation or exercise of eminent domain, an entire group would depart from a broad region without the acts

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112 *Id.* ¶ 84 (Mahiou, J. ad hoc, dissenting) (emphasis added) (citing SCHABAS, *supra* note 23, at 199, 201).

113 Defendant’s Pre-Trial Brief at ¶ 84, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT ( Int’l Crim. Trib. for the Former Yugoslavia June 29, 2009).

114 William Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 177, 177–78 (2008).

listed in Article II having been committed against it at scale. Certainly no such relocation operations have been plausibly argued to have taken place in Bosnia or Darfur. Another way of restating the dilemma is to claim that mass deportations or expulsions do not reflect genocidal intent *unless* the deaths of part of the displaced ensue; such deaths seem inevitable.<sup>115</sup>

### III. TOWARD A REASONABLE INFERENCE OF GENOCIDAL INTENT AFTER THE DARFUR SITUATION

This Part analyzes the question of genocidal intent at the ICC. The first section describes an attempt to exclude an inference of genocidal intent after the massacres and deportations in and from Sudan's Darfur region. The second section explains how the Court broadened the permissible bounds of genocidal intent beyond what the Pre-Trial Chamber I had decided and permitted such an inference of intent in the Darfur case. The last section justifies this correction of the Pre-Trial Chamber I's overly narrow conception because the destruction that genocidal intent requires can be destruction of a lifeworld, not only of lives.

#### A. Conceptualizing Genocidal Intent as Total

##### 1. Excluding Counterinsurgency in the Darfur Case

The Security Council referred the situation in Darfur, Sudan to the ICC on March 31, 2005.<sup>116</sup> By 2013, the situation was one of seven being investigated by the Office of the Prosecutor.<sup>117</sup> Ahmad Harun and Ali Kushayb joined Sudan's president Omar al-Bashir as suspects.<sup>118</sup>

The al-Bashir arrest warrant decision was nearly four years in the making. It was rather late in coming compared to the warrant decision in the Libya cases, for example.<sup>119</sup> The Darfur decision dealt with atrocities

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115 Kreß, *supra* note 5, at 688.

116 Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to ICC Prosecutor, U.N. Press Release SC/8351 (Mar. 31, 2005).

117 Dawn Rothe & Victoria Collins, *The International Criminal Court: A Pipe Dream to End Impunity*, 13 INT'L CRIM. L. REV. 191 (2013).

118 *Harun Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/darfur/harun> (last visited June 15, 2021); *Al Bashir Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/darfur/albashir> (last visited June 15, 2021).

119 *The Office of the Prosecutor Will Request an Arrest Warrant Against Three Individuals in the First Libya Case. Judges Will Decide.*, RELIEFWEB (May 4, 2011), <https://reliefweb.int/report/libya/office-prosecutor-will-request-arrest-warrant-against-three-individuals-first-libya>. The first Darfur warrant was prepared in April 2007, and al-Bashir's in July 2008, between four to five years after the alleged crimes began, compared to mere weeks or months after

committed from 2004 through 2008.<sup>120</sup> Genocide would not be included in the warrant if al-Bashir or the other named suspects lacked an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>121</sup> The prosecutor’s application for a warrant included statistical allegations, which were perhaps not necessary but which were helpful. These allegations suggested that 115,000 to 300,000 members of non-Arab “target groups” had perished in the applicable years as a direct or indirect effect of al-Bashir’s and Harun’s policies, and that 2.7 million—nearly half of Darfur’s population—had survived as internally displaced persons (IDPs).<sup>122</sup> The hundreds of thousands of deaths were blamed on devastation of villages and agricultural livelihoods, denial or postponement of humanitarian aid, and direct killings.<sup>123</sup>

Years later, the warrant decision in 2009 is still called the “most important engagement of an ICC Chamber with the definition of the crime of genocide.”<sup>124</sup> The Pre-Trial Chamber I emphasized a passage of the drafting history in which forcing a population to leave a place by means of threatening violence was not regarded as indicative of genocidal intent.<sup>125</sup> It confirmed many counts of crimes against humanity and war crimes in the warrant, but not the genocide count.<sup>126</sup>

Articles 6, 7, and 8 of the Rome Statute define the ICC’s core crimes of genocide, crimes against humanity, and war crimes, largely restating them from existing sources as did Article 3, 4, and 5 of the ICTY Statute. The ICC’s Elements of Crimes explanatory material set forth additional substantive parameters to guide prosecutors by establishing or emphasizing certain elements relating to act, intention, and consequence or

they began in Libya, while the decision of Pre-Trial Chamber I on al-Bashir’s warrant came two years later. Prosecutor v. Harun, ICC-02/05-01/07, Second Warrant of Arrest for Ali Muhammad Ali Abd-Al-Rahman, ¶ 1 (June 11, 2020) (first warrant was issued on April 27, 2007); Prosecutor v. Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter 2009 Warrant Decision]; Nsongurua Udombana, *Who Blinks First? The International Criminal Court, the African Union and the Problematic of International Criminal Justice*, in LAW, POLITICS AND RIGHTS: ESSAYS IN MEMORY OF KADER ASMAL 92–93 (Tiyanjana Muluwa ed., 2014); cf. John Hagan, Winona Rymond-Richmond & Parker, *The Criminology of Genocide: The Death and Rape of Darfur*, 43 CRIMINOLOGY 525 (2005); GERARD PRUNIER, DARFUR: A 21ST CENTURY GENOCIDE (2d ed. 2008).

<sup>120</sup> SMITH, *supra* note 5, at 221.

<sup>121</sup> 18 U.S.C. § 1091.

<sup>122</sup> Prosecutor v. Al Bashir, ICC-02/05-157-AnxA, Application for a Warrant, ¶¶ 15, 18 (2008).

<sup>123</sup> *Id.* ¶ 34.

<sup>124</sup> Kreß, *supra* note 5, at 670.

<sup>125</sup> 2009 Warrant Decision, *supra* note 119; see also Alex De Waal, *The ICC vs. Bashir: Debating Genocidal Intent*, AFR. ARGUMENTS (Feb. 10, 2009), <http://www.africanarguments.org/2009/02/10/the-icc-vs-bashir-debating-genocidal-intent>.

<sup>126</sup> See 2009 Warrant Decision, *supra* note 119.

circumstance.<sup>127</sup> Definitions are to be construed in favor of lenity and for the benefit of the person being charged.<sup>128</sup> However, Article 25 expands the potential scope of criminal responsibility, at least compared to some other tribunals' rulings, by providing for joint commission through another person rather than individually; ordering, inducing, or soliciting the commission of a crime even if it is merely attempted subsequently; aiding, abetting, or assisting the attempted commission of such a crime for the purpose of encouraging it or making it easier; and for situations in which a person in "any other way [intentionally] contributes [e.g., by direct/public incitement] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."<sup>129</sup> Contributing to group commission of a crime removes the accused from direct perpetration even further than does attempt liability, for example.<sup>130</sup>

The ICC prosecutor thought it was apparent that there had been a genocide, despite the 2003-2004 Sudan Liberation Army insurgency in Darfur, due to the massacres and widespread village destruction and other atrocities in Darfur, which left 2.7 million victims of government and allied militia actions in camps, other towns, or open fields as refugees or IDPs.<sup>131</sup> Critics of prosecutor Luis Moreno Ocampo blasted him for charging an avowed dictator and recidivist war criminal with one of the few crimes of which he was actually innocent.<sup>132</sup>

However, the Pre-Trial Chamber I's reasoning was flawed. Even though it has been described as "scrupulous," the decision rested on a requirement of a "concrete and real" "threat against the existence of the targeted group, or part thereof"; yet, this element of genocide is not listed in Article II of

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127 Rome Statute, *supra* note 27, art. 22; Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes against Humanity, Genocide, and War Crimes*, 38 COLUM. J. HUM. RTS. 77, 77-78 (2006); Carola Lingaas, *The "Contextual Elements" of the Crime of Genocide*, 4 NORDIC J. HUM. RTS. 439 (2018) (analyzing article 22 of Rome Statute).

128 Rome Statute, *supra* note 27, arts. 7-9, 22; *see also id.* art. 66 ("1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused.")

129 *Id.* art. 25.

130 Attempt is one mode of liability and form of participation in an international crime. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 640 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001). Other modes include joint criminal enterprise, etc.

131 Prosecutor v. Al Bashir, ICC-02/05-157-AnxA, Application for a Warrant, ¶¶ 15, 18, 34 (2008); Prosecutor v. Al Bashir, ICC-02/05-10/09-0A, Decision on the Prosecution's Application for a Warrant of Arrest (Feb. 3, 2010).

132 *See, e.g.,* Udombana, *supra* note 119, at 93 n.10 (citing Alex de Waal, *Moreno Ocampo's Coup de Theatre*, MONTHLY REV. ONLINE (July 30, 2008), <https://mronline.org/2008/07/30/moreno-ocampos-coup-de-theatre/>).

the Convention or the Rome Statute's Elements of Crimes.<sup>133</sup> According to the majority on the Pre-Trial Chamber I, if a government permits those who are not resisting it to flee, so that they are not killed, there cannot be a genocide as a result of its intentional acts against those members who were killed.<sup>134</sup> The majority defended this contextual or circumstantial element, because it is not "contrary" to Article 6 of the Rome Statute, covering genocide, and because it comports with notions (again not listed in the statute's definition) that genocide is the "crime of crimes" (actually aggression might qualify as this too because from it all crimes flow).<sup>135</sup>

Kreß defends this "threat" requirement not as a contextual element but as an elaboration of what genocidal intent means.<sup>136</sup> That is fair enough, but even Kreß regards a requirement of a "concrete" threat in the elaboration of the genocidal intent element as being too strict. If the threat need not be "concrete" but merely "real," and if it may affect only a "part" of the group, then it is not clear what this elaboration adds to the general conception of a group-related pattern.<sup>137</sup> As discussed below, there is ample support from other courts, diplomats, and jurists for adopting a conception of genocidal intent that requires such a pattern of atrocity, but which does not call for an intended *total* genocide or Holocaust-like plan, which Article II rejects with the words "in part" as well as the words "ethnic" and "religious," among others. Such authority provides scholars with cause to criticize the notion, articulated in the Elements of Crimes covering genocide, that a perpetrator attempting to commit genocide alone must have or acquire the means of bringing about the actual destruction of the targeted group in whole or in part. If this element is construed or misconstrued as requiring the means of exterminating the entire group or some major quantum thereof, it conflicts with Article II and most case law.<sup>138</sup> The Genocide Convention contains no

133 2009 Warrant Decision, *supra* note 119, ¶ 124.

134 *See id.*

135 *Id.* ¶ 133.

136 Kreß, *supra* note 5, at 674 (citing 2009 Warrant Decision, *supra* note 119, ¶¶ 124, 133). Kreß also compares this elaboration, and defends it as being needed in view of, the requirement of an armed conflict for war crimes (to distinguish riots and police brutality, for example) and a widespread and systematic attack on a civilian population for crimes against humanity (to distinguish, one assumes, serial killers, mass shooters, and the like). Kreß, *supra* note 5, at 676.

137 The term "real" then might serve the same function as a requirement that an attempted genocide not be merely conjectural, hypothetical, or fantastical, or that it present a "dangerous probability of success" in the Anglophone common-law phrase.

138 Although my point goes beyond one concerning the technical status of Elements of Crimes, Article 9 of the Rome Statute provides that these Elements shall be consistent with the Statute's articles, implying that if the Elements are inconsistent, the articles shall prevail. Insofar as Article 6 tracks the Genocide Convention, if the Elements graft new requirements not found in article II onto this article or onto the convention as a whole, they would be inconsistent and void. *Cf.* Kreß, *supra* note 5, at 676; Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 223 (Int'l Crim. Trib. for the Former Yugoslavia

element of widespread or systematic attack on a group, let alone an attack so vast and successful as to threaten the existence of the entire group.<sup>139</sup>

Kreß argues that history warns against a broad interpretation of Article II.<sup>140</sup> As argued above, however, an overview of the historical materials indicates that a broad reading of Article II was expected. One might add that the positions of Mr. Ocampo and the Appeals Chamber of the ICC are part of that history.

## 2. *Ruling Out Selective Genocide*

Another potential flaw in the reasoning of the Pre-Trial Chamber I was its stringent application of a purported requirement that a “substantial” part and not merely a “part” of a group be destroyed. This meant genocide charges were ruled out for Darfur, because there were survivors who had not fled.<sup>141</sup>

Ruling out selective genocide in Darfur was inconsistent with analogous cases of ethnic cleansing before the ICTY. ICTY judges concluded that killing eight thousand and displacing tens of thousands out of more than a million Bosnian Muslims from Srebrenica revealed someone’s genocidal intent<sup>142</sup> and that killing one thousand Bosnian Muslims, in the six or seven municipalities covered by the non-Srebrenica genocide charges against Bosnian Serb suspects, could reveal such an intent.<sup>143</sup> With respect to the Darfur situation, it was apparent from the materials tendered in support of the warrant that thousands of persons belonging to distinct ethnic groups were killed and that hundreds of thousands of persons were deprived of their homes and livelihoods and made dependent on whatever food and shelter were made available at IDP camps (the Pre-Trial Chamber I incorrectly discounts the possibility they that were members of distinct racial groups, but that is beyond the scope of this article).<sup>144</sup> It was known long before

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Apr. 19, 2004).

139 *Krstić*, Case No. IT-98-33-A, ¶ 223.

140 Kreß, *supra* note 5, at 676.

141 2009 Warrant Decision, *supra* note 119; *see also* SANGKUL KIM, A COLLECTIVE THEORY OF GENOCIDAL INTENT 171–227 (2016); Mulaj, *supra* note 8.

142 Kreß, *supra* note 5, at 693 (citing *Krstić*, Case No. IT-98-33-A, ¶ 223).

143 *See infra* notes 193–259 and accompanying text.

144 *See* 2009 Warrant Decision, *supra* note 119. As Schabas explains, at least one prominent dictionary defines racial groups to include ethnic groups, and treaties on racial discrimination define it as including ethnic discrimination. *See* SCHABAS, *supra* note 1, at 140–42, 145. There is little doubt that the Fur, Masalit, Zaghawa, and other groups affected in Darfur manifest ethnic distinctiveness, specifically being less likely to use Arabic as their sole language, more likely to use Nilo-Saharan

2009 that tens of thousands had died within a year as refugees or IDPs and hundreds of thousands were doomed to die from these conditions.<sup>145</sup> However, the Pre-Trial Chamber I apparently believed that this did not affect a “substantial” part of the groups affected.<sup>146</sup>

A major defect of the substantiality discussion by the Pre-Trial Chamber I was the decision to downplay large-scale killing of non-Arab groups in and near Darfur and the derogatory rhetoric used against them. The decision did not credibly apply social science estimates of the extent and causes of mortality in Darfur to the language and history of Article II of the Genocide Convention, as two sociologists did in a book published the year of the decision.<sup>147</sup> It also does not provide a fair sampling of derogatory rhetoric used against non-Arab groups during the course of the massacres and other atrocities in Darfur.<sup>148</sup> Nor does it make fulsome use of evidence that one might think would be vital to such a decision, namely evidence that a minister of government in Sudan referred to genocide in Darfur in a public appeal.<sup>149</sup> Finally, dismissing the fate of the majority of Darfur’s population that had been forcibly displaced as unworthy of attention during discussion of a count of genocide—based on one part of the drafting history of the

languages, and more likely to practice pre-Islamic traditional religions in addition to or instead of Islam. See Julie Flint, Jemera Rone & Leslie Lefkow, Hum. Rts. Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, at 5–6 (May 2004), <https://www.hrw.org/sites/default/files/reports/sudan0504full.pdf>; PRUNIER, *supra* note 119; *A Closer Look: Sudan the Peoples of Darfur*, CULTURAL SURVIVAL Q. MAG. (Sept. 2004), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/closer-look-sudan-peoples-darfur>. Color, as an aspect of ethnicity, is also a factor in Darfur, with interviewees who spoke to Human Rights Watch distinguishing “black people” in Darfur from “Arabs.” Flint et al., *supra*, at 13, 30. Sudan’s Minister for Humanitarian Affairs echoed this distinction in May 2004. See *id.* at 43. As with other racial and ethnic groups, there are subtle distinctions, mixed families, and an interplay with climates of polarization or depolarization. See *id.* at 5.

145 Indeed, probably three-hundred thousand to five-hundred thousand had died by 2005–2006. See Prosecutor v. Al Bashir, ICC-02/05-157-AnxA, Application for a Warrant, ¶¶ 15, 18 (2008); see also Hagan & Rymond-Richmond, *supra* note 119; PRUNIER, *supra* note 119.

146 2009 Warrant Decision, *supra* note 119, ¶¶ 35–38, 146 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139 (Feb. 26)); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 523 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); Kreß, *supra* note 5, at 689–90, 692–93.

147 JOHN HAGAN & WENONA RYMOND-RICHMOND, *DARFUR AND THE CRIME OF GENOCIDE* (2009). For more recent treatments, see Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. INT’L L. 917, 938–40 (2016), and Kreß, *supra* note 5, at 693–94.

148 Compare, e.g., 2009 Warrant Decision, *supra* note 119, with *id.* ¶¶ 22, 25, 55 (Usacka, J., partly dissenting), Flint et al., *supra* note 144, at 14–15, 15 n.29, 18, 20, 29–30, Hum. Rts. Watch, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, at 17, 17 n.35, 28, 31 (Dec. 2005), ICID Report, *supra* note 24, at ¶¶ 52, 245, 511, and Trahan, *supra* note 8, at 1012–17.

149 Flint et al., *supra* note 144, at 43 n.122; see also Deutsche Presse Agentur, *Sudanese Government, U.N. Call on Donors to Help Darfur*, SUDAN TRIB. (May 2, 2004), <https://sudantribune.com/spip.php?article2761>.

Genocide Convention while many other pertinent parts are ignored—is not very thorough.<sup>150</sup>

### B. *Broadening the Reasonable Inference Standard*

Ultimately, the Appeals Chamber reversed the Pre-Trial Chamber I decision that there were no reasonable grounds to infer genocidal intent from the genocidal acts in Darfur.<sup>151</sup> The Appeals Chamber decision is tremendously important to the future of the ICC as it clarified that the standard for issuing an arrest warrant for genocide is not equal to either evidence of genocidal intent beyond a reasonable doubt or evidence tending to exclude any reasonable inference as to intent other than intent to physically destroy the group.<sup>152</sup> There was no reason to raise the “reasonable grounds” threshold towards or above the threshold for confirming the evidentiary foundation of charges after an ICC investigation—“substantial grounds to believe.”<sup>153</sup>

### C. *Ruining the Lifeworld as Genocidal Intent*

In its second decision, the Pre-Trial Chamber I used the evidence of mass killings and forcible transfer out of their communities of group members along with the destruction of water pumps to spread disease to find that there were reasonable grounds to infer Al-Bashir’s genocidal intent.<sup>154</sup> Physical destruction by means other than immediate killing is expressly covered by both Article II(c) and the several physical injury provision of Article II(b).<sup>155</sup> For this reason among others, forcible transfer of more than two million persons was itself evidence from which genocidal intent could be inferred

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<sup>150</sup> Prosecutor v. Al Bashir, ICC-02/05–10/09–0A, Decision on the Prosecution’s Application for a Warrant of Arrest (Feb. 3, 2010).

<sup>151</sup> For discussions of other parts of the drafting history (and of the Convention), see, for example, Hannibal Travis, *On the Original Understanding of the Crime of Genocide*, 7 GENOCIDE STUD. & PREV. 30 (2012); Kathleen Cavanaugh, *Forced Impregnation and Rape as a Means of Genocide*, 8 NEW ENG. J. INT’L & COMPAR. L. 1 (2002); Engle, *supra* note 36; SONJA GROVER, CHILD SOLDIER VICTIMS OF GENOCIDAL FORCIBLE TRANSFER 36–37, 139–40, 153–57, 173–74, 201–02 (2012); Nema Milannia, *Understanding Serious Bodily or Mental Harm as an Act of Genocide*, 51 VAND. J. INT’L L. 1381, 1386–94 (2018).

<sup>152</sup> See, e.g., Michael Ramsden & Cecilia Chung, ‘Reasonable Grounds to Believe’: An Unreasonably Unclear Evidentiary Threshold in the ICC Statute, 13 J. INT’L CRIM. JUST. 555 (2015).

<sup>153</sup> Rome Statute, *supra* note 27, arts. 58(1), 61(7). Even further removed from a reasonable grounds to believe, which in literal terms is similar to a genuine issue of material fact in U.S. jurisprudence, is belief beyond a reasonable doubt. See *id.*, art. 66(3).

<sup>154</sup> Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, Second Decision on the Prosecution’s Application for a Warrant of Arrest, ¶¶ 37–38 (July 12, 2010).

<sup>155</sup> Genocide Convention, *supra* note 4, art. II; see also Trahan, *supra* note 8, at 1020.

according to the Elements of Crimes and the ICTY's Srebrenica case law, which is discussed below.<sup>156</sup> The hundreds of thousands of persons attacked, injured, or traumatized into leaving their homes and regions then faced conditions of life characterized by a lack of adequate food, water, shelter, and medicine.<sup>157</sup> As set forth below, the intent of the Bosnian Serb political and military leadership was potentially to displace Bosnian Muslims into a viable state alongside the Bosnian Serb Republic or Greater Serbia, which raised a reasonable doubt concerning genocidal intent. In other words, the Bosnian Muslims might have had a lifeworld to inhabit as a people after the atrocities against some of their members, which the "Nuba" of Darfur were unlikely to have.<sup>158</sup>

A lifeworld is a social structure that supports civilized life in relationships as opposed to a bare life that exists without a humane context.<sup>159</sup> The concept of "lifeworld" was originally used to refer to a horizon of understandings and worldviews that was relatively unmediated by the legal system, marketplace, or institutions like schools.<sup>160</sup> Since its articulation, however, the concept has been extended to family life and shelter in practical terms, which may be disrupted by such events as climate change, government intervention, or private power.<sup>161</sup> Thus, loss of a

156 Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 37–38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (citation omitted) ("The Trial Chamber . . . was entitled to conclude that the evidence of the transfer [of Srebrenica-origin civilians within Bosnia-Herzegovina] supported its finding that some members of the [Bosnian Serb military's] Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of [genocidal] intentions . . . . The genocidal intent may be inferred, among other facts, from evidence of 'other culpable acts systematically directed against the same group.'").

157 See Trahan, *supra* note 8, at 1020–21 (citing Flint et al., *supra* note 144, at 40–59; Hum. Rts. Watch, *Darfur 2007: Chaos by Design*, at 17 (2007), <https://www.hrw.org/reports/2007/sudan0907/sudan0907webwcover.pdf>).

158 A common refrain among attackers in Darfur was "kill [all] the Nuba!" Trahan, *supra* note 8, at 1012–13, 1030–31.

159 See, e.g., Mark Burton & Carolyn Kagan, *Rethinking Empowerment: Shared Action Against Powerlessness*, in *PSYCHOLOGY AND SOCIETY: RADICAL THEORY AND PRACTICE 197–208* (Ian Parker & Russel Spears eds., 1996) (citing 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., rev. ed. 2006)).

160 See Jürgen Habermas, *The Tasks of a Critical Theory of Society*, in HABERMAS, *supra* note 159, at 374; Dermot Moran, *Everydayness, Historicity and the World of Science: Husserl's Life-World Reconsidered*, in *THE PHENOMENOLOGICAL CRITIQUE OF MATHEMATISATION AND THE QUESTION OF RESPONSIBILITY: FORMALISATION AND THE LIFE-WORLD 107–31* (L'ubica Unčik, Ivan Chvatík & Anita Williams eds., 2015).

161 See Burton & Kagan, *supra* note 159 (noting loss of lifeworld experienced by those targeted for deprivation of power and human agency); David Hayes & Stan Houston, "Lifeworld," "System" and Family Group Conferences: *Habermas's Contribution to Discourse in Child Protection*, 37 BRIT. J. SOC. WORK 987 (2007) (similar); Paul Hegarty, *Giorgio Agamben (1942–)*, in *AGAMBEN TO ŽIŽEK: CONTEMPORARY CRITICAL THEORISTS 14, 22* (Jon Simons ed., 2011) (for Agamben, in mass killings or

“lifeworld” is one way of capturing the fate of those subjected to acts committed with a genocidal intent and who confront the destruction of their way of life and reduction to “bare” life.<sup>162</sup>

#### IV. CONCEPTUALIZING GENOCIDAL INTENT BROADLY AFTER THE ICTY’S DECISIONS IN THE BOSNIAN MUNICIPALITIES GENOCIDE CASES

This Part explores a dilemma faced during the Bosnian Muslim genocide trials. Genocidal intent might only be inferred where no survivors were left in an area or might be inferred despite the presence of survivors because substantial numbers were killed on the basis of an ethnic or religious animus, not because they posed a genuine military or paramilitary threat. In the Srebrenica decisions, the ICTY’s decisions inferred the requisite intent to destroy even though women and children of Srebrenica survived for the most part. In the Bosnian Municipalities decisions, some decisions also concluded that genocidal intent could be inferred from widespread and systematic commission of Article II acts even though the massacres outside of Srebrenica were smaller and acts other than killing outright were more prominent.

##### A. *Text and Context in Defining Genocide at the ICTY*

In February 1993, the Security Council convened a tribunal to prosecute “genocide” among other crimes in Bosnia and Herzegovina as well as Croatia and potentially, the rest of the former Yugoslavia.<sup>163</sup> It was the first special tribunal assembled by the Security Council in a genocide case.<sup>164</sup> The Western powers, some Middle Eastern states, and their allies called for

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other “biopolitical” moments, human beings are reduced to objects, to “bare life” and the process of exclusion from the category of a political *subject*); Andrew Woolford, *Ontological Destruction: Genocide and Canadian Aboriginal Peoples*, 4 GENOCIDE STUD. & PREVENTION 81, 91–92 (2009) (arguing that changes to Aboriginal Canadian or Australian lifeworlds may be genocidal even when intentions of some colonial administrators may have contained a mixture of benevolent and malevolent motives).

162 See GIORGIO AGAMBEN, *THE OMNIBUS HOMO SACER* 10–11, 56, 146–49 (2017) (“bare life” is life that is licit to take but that need not be immediately taken, depending on circumstances); GIORGIO AGAMBEN, *REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE* 69, 133 (Daniel Heller-Roazen trans., 1999) (noting that the survivor of inhuman attacks has been reduced to “bare life,” many times); Hegarty, *supra* note 141, at 22; see also ILSUP AHN, *RELIGIOUS ETHICS AND MIGRATION: DOING JUSTICE TO UNDOCUMENTED WORKERS* 143 (2013) (noting that “bare life[] is a life which has no position in political structure.”).

163 See B.J. Cutler, *Prosecution Is Secondary Goal of Proposed War-Crimes Tribunal*, DESERET NEWS (Feb. 23, 1993, 12:00 AM), <https://www.deseret.com/1993/2/23/19033713/prosecution-is-secondary-goal-of-proposed-war-crimes-tribunal>.

164 See *id.*

intervention and a tribunal for Bosnia because ethnic cleansing, to them, was tantamount to genocide.<sup>165</sup> Turkey's draft on human rights in Bosnia explained that "ethnic cleansing is aimed at the dislocation or destruction of national, ethnic, racial or religious groups" and that "two and a half million refugees and displaced persons" fled rather than die in their homes or towns.<sup>166</sup>

On November 1, 1994, many countries signed on to a draft resolution on Bosnia, which was a comprehensive plan for civilian protection in a manner that could intrude upon the territorial integrity of Yugoslavia, which had been a member of the United Nations since its early days. The resolution reaffirmed the UN's "determination to prevent acts of genocide and crimes against humanity and other violations of international humanitarian law" and demanded that Yugoslavia halt ethnic cleansing and "relinquish" ill-gotten homes and lands "in conformity with norms of international law."<sup>167</sup> A Commission of Experts and Special Rapporteur to the Human Rights Commission also spent several years documenting the ethnic cleansing in Bosnia-Herzegovina.<sup>168</sup> The U.S. representative to the Human Rights Commission equated atrocities in Bosnia with the Holocaust.<sup>169</sup> For these reasons, the situation in Bosnia-Herzegovina was perhaps farther along in diplomatic circles towards a genocide conclusion

<sup>165</sup> See REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, en: Chapter VIII: Consideration of Questions Under the Responsibility of the Security Council for the Maintenance of International Peace and Security 780 (Supp. 12, 1993-1995), [https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/93-95/Chapter%208/EUROPE/93-95\\_8-21-YUGOSLAVIA.pdf](https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/en/sc/repertoire/93-95/Chapter%208/EUROPE/93-95_8-21-YUGOSLAVIA.pdf); Reuters, *Christopher Confirms U.S. to Examine Air Attacks on Bosnian Serbs*, THE DAILY HERALD/WESTLAWNEXT (Jan. 28, 1993), 1.next.westlaw.com (subscription required); Elaine Sciolino, *Conflict in the Balkans; Allies Announce Strategy to Curb Fighting in Bosnia; U.S. Offers Planes, Not Men*, N.Y. TIMES (May 23, 1993), <http://www.nytimes.com/1993/05/23/world/conflict-balkans-allies-announce-strategy-curb-fighting-bosnia-us-offers-planes.html>; Comm'n on Hum. Rts., Econ. & Soc. Council, Rep. on the Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. Doc. E/CN.4/1992/S-2/L.2 (Nov. 30, 1992); Anthony Lewis, *Abroad at Home; The Clinton Doctrine?*, N.Y. TIMES (Jan. 22, 1993), <http://www.nytimes.com/1993/01/22/opinion/abroad-at-home-the-clinton-doctrine.html>; *Why America Chose to Confront Serbs*, DAILY NEWS (KENTUCKY), May 14, 1993.

<sup>166</sup> Rep. on the Situation of Human Rights in the Territory of the Former Yugoslavia, *supra* note 165. The Commission on Human Rights adopted a similar draft resolution on February 23, 1993, and prior to that stated that ethnic cleansing in Bosnia approached genocide. See Commission on Human Rights Res. 1993/7 (Feb. 23, 1993); *NATO Should Undertake Military Role in Bosnia*, THE STATE (SOUTH CAROLINA), Dec. 12, 1992.

<sup>167</sup> G.A. Res. 49/10, Situation in Bosnia and Herzegovina (Nov. 8, 1994) (emphasis added).

<sup>168</sup> Elisabeth Rehn (Special Rapporteur), Rep. on Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. Doc. A/51/652 (Nov. 4, 1996); Elisabeth Rehn (Special Rapporteur), Rep. on Situation of Human Rights in the Territory of the Former Yugoslavia, Special Rep. on Minorities, U.N. Doc. E/CN.4/1997/8 (Oct. 25, 1996).

<sup>169</sup> Associated Press, *UN Panel Agrees to Review Yugoslavian Rights Problems*, KY. NEW ERA, Aug. 11, 1992, at 12B.

than Darfur was when the ICC took the case.<sup>170</sup>

### *B. Genocidal Intent at Srebrenica*

In the early twenty-first century, the ICTY adjudicated genocide charges in connection with the massacres in the Srebrenica region of Bosnia and Herzegovina—a site of conflict between the Army of Bosnia and Herzegovina and the Bosnian Serb Republic and where prosecutors alleged five thousand to eight thousand lives were lost in the conflict.<sup>171</sup> Srebrenica became a famous example of genocide and is commemorated more than most other genocides even though large numbers of Bosnian Muslims remained in the area.<sup>172</sup>

The ICTY put on one of the first international trials of a military officer for genocide—the trial of Radislav Krstić for actions at Srebrenica and elsewhere in Bosnia-Herzegovina.<sup>173</sup> Mr. Krstić did not admit to a Wannsee Conference-like plan to kill all Muslims and the prosecutor did not seem to uncover evidence of such a plan, and the Trial Chamber found that “the number of Bosnian Muslim men killed by Bosnian Serb forces” at Srebrenica was not known.<sup>174</sup> Still, the Trial Chamber concluded that genocide had occurred at Srebrenica because massacres had claimed the lives of about seven thousand men, mostly of combat age.<sup>175</sup> The tribunal

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170 Rep. of the S.C., U.N. Doc. A/61/2 (2006) (in 2005, Security Council recommended “peace talks” for Darfur despite a “deteriorating situation” and “impunity,” and in mid-2006 it still recommended “peace talks” despite a Sudanese incursion into Chad while “violence in Darfur had intensified, and . . . insecurity in Chad was growing.”).

171 Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 83–84 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); cf. Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶¶ 657–665 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 37–38 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

172 Christian Moe, *Bosniaks*, in MODERN GENOCIDE: THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION 226 (Paul R. Bartrop & Steven Leonard Jacobs eds., 2014); see also Ewa Tabeau & Jakub Bijak, *War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results*, 21 EURO. J. POPULATION 187, 193 (2005); Jan Zwierchowski & Ewa Tabeau, *The 1992–95 War in Bosnia and Herzegovina: Census-Based Multiple System Estimation of Casualties’ Undercount* 20 (Households in Conflict Network & German Inst. for Econ. Rsch., Conference Paper, Feb. 1, 2020). See generally Popis Stanovništva, Domaćinstava I Stanova U Bosni I Hercegovini, 2013; Rezultati Popisa [Census Of Population, Households And Dwellings In Bosnia And Herzegovina, 2013 Final Results] (2013), <http://www.popis2013.ba/popis2013/doc/Popis2013prvoIzdanje.pdf> (reflecting estimate of nearly 8,000 Bosniaks or Bosnian Muslims by heritage in Srebrenica municipality in 2013).

173 Edward Wong, *Saddam Charged with Genocide of Kurds*, N.Y. TIMES (Apr. 5, 2006), <https://www.nytimes.com/2006/04/05/world/05iht-saddam.html>. It was the first conviction not made in absentia, anyway.

174 *Krstić*, Case No. IT-98-33-T, ¶¶ 80–84.

175 See *id.*

found that:

[T]he intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterised as genocide.... The Jelisić Judgement [of the ICTY] held that genocide could target a limited geographic zone . . . . In a Judgement against Novislav Djajic on 23 May 1997, the Bavarian Appeals Chamber similarly found that acts of genocide were committed in June 1992 though confined within the administrative district of Foca.<sup>176</sup>

Under this broader conception of genocide as being imaginable even in a city or district, the tribunal focuses on “widespread and systematic killings” and “their perpetration.”<sup>177</sup>

The Trial Chamber of the ICTY has also analyzed dissolution of groups by means other than immediate mass killing, again under the rubric of genocidal intent. In 2005, it declared that “the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.”<sup>178</sup> At Srebrenica, getting “rid the Srebrenica enclave of its Bosnian Muslim population . . . through force and coercion,” was a form of genocidal intent as it embodied “a means to eradicate the Bosnian Muslim population from the territory where they had lived.”<sup>179</sup>

The district or municipal level is an appropriate focus given the use of the words “in part” in the Genocide Convention as well as given the listing of a variety of acts in Article II that presuppose the continued survival of some or all group members, such as inflicting mental harm.<sup>180</sup> Whether the intent must be to “eradicate” the group within such a limited geographical area, or merely to ruin or devastate it as the word “destroy” comprehends, is another matter. The listing of acts other than killing in Article II(b)-(e) presents a major challenge to an “eradication” element, whether as a contextual or circumstantial element or an elaboration of mens rea. The inclusion of municipalities in Bosnia-Herzegovina in genocide judgments, even though most or all group members were not killed in those towns or

<sup>176</sup> *Id.* ¶ 589.

<sup>177</sup> *Id.* ¶ 633.

<sup>178</sup> Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶¶ 666 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

<sup>179</sup> *Id.* ¶ 675.

<sup>180</sup> See Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 523 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (endorsing this as “jurisprudence” of both ICTY and ICTR on genocidal intent in a “geographical area”).

villages, could be important here. In particular, acts listed in Article II(b) and (c) were widespread in Bosnia and Herzegovina, but only a small minority of the Bosnian Muslim population was killed. If genocidal intent could nevertheless be inferred, the equation of this element with total extermination would be an error.

### *C. Genocidal Intent in the Bosnian Municipalities Cases*

The ICTY repeatedly found that there was sufficient evidence for a genocide conviction to be entered at trial as to the Bosnian Serb leadership's acts in Bosnian municipalities outside of Srebrenica, and some of these findings were entered by the ICTY Appeals Chamber.<sup>181</sup> The ICTY, however, did not accept the argument that the ICJ's judgment exonerating the Federal Republic of Yugoslavia or even the Bosnian Serb Republic as a whole of the charge of genocide in the towns and villages outside of Srebrenica should result in the acquittal of Karadžić and Mladić on charges of genocide outside of Srebrenica. It ruled instead that selective killings of Bosnian Muslims in Srebrenica and other Bosnian municipalities, along with the detention and cruel and inhumane treatment of other Muslims outside of Srebrenica and the acts of rape and other acts of sexual violence against other Muslims, were evidence of genocidal intent under Article II(a)-(c).<sup>182</sup> This was despite evidence of extensive combat between the forces of the accused and the Bosnian Muslim army in a number of Bosnian cities including Srebrenica.<sup>183</sup> The ICTY ruled in another judgment that the Bosnian Serb leadership could have genocidal intent without "direct proof" of a plan to exterminate, because "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities

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<sup>181</sup> Prosecutor v. Mladić, Case No. IT-95-5/18-T, Decision on Motion for Dismissal of the Indictment Under Rule 98bis (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2014).

<sup>182</sup> See *id.*

<sup>183</sup> See *id.* It was also despite the fact that the Bosnian Serb defendants argued that "the 2007 ICJ Judgment and certain other cases at the Tribunal in which judgments of acquittal were entered involved allegations or evidence that overlap in whole or part with the allegations and evidence related to Count 1 of the Indictment [for genocide] in his case." Prosecutor v. Karadžić, Case No. IT-95-5-A, Judgment, ¶ 92 n.251 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 2013). Perhaps influenced by the ICJ judgment, the Trial Chamber of the ICTY acquitted Karadžić of genocide by infliction of serious bodily or mental harm in detention or concentration camps, because it "concluded that the evidence before it, taken at its highest, could not support the conclusion that the conditions in the scheduled detention facilities 'reached a level which could support an inference that Bosnian Muslims and/or Bosnian Croats were detained in conditions of life calculated to bring about their physical destruction.'" *Id.* at para. 40.

committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy.”<sup>184</sup> A plan or policy is merely a factor to consider, not a requirement, in this conception of genocidal intent.

International tribunals, as noted, may infer genocidal intent from the “indirect evidence.”<sup>185</sup> At the ICTY, this evidence included “genocidal and other culpable acts committed against Bosnian Muslims and Bosnian Croats throughout the Municipalities, such as killings, beatings, rape, and sexual violence, as well as evidence of the large scale and discriminatory nature of these acts.”<sup>186</sup> Without a smoking gun demonstrating genocidal intent directly, an inference could be made. Likewise, the ICJ found that Yugoslavia had violated its obligation to prevent genocide, because the conflict’s “dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.”<sup>187</sup> Even absent a clear plan to commit genocide, Yugoslavia seemingly could be liable for it because there was a serious risk of Article II acts.

The International Criminal Tribunal for Rwanda reached similar conclusions as the ICTY on most issues related to the appropriate scope of inferences in determining genocidal intent. For example, as early as 1998, it utilized the approach of inferring genocidal intent from patterns of genocidal acts, as in the below-mentioned cases against Bosnian Serb leaders.<sup>188</sup> The pattern need only reveal an intent to persecute a group in a specific area or region rather than nationwide or globally.<sup>189</sup> In doing so, it rejected the social (and sometimes the dictionary) concept of genocide as systematic annihilation, total extermination, actual and deliberate destruction, and the like.<sup>190</sup> This tribunal in Arusha even declined to adopt

184 *Karadžić*, Case No. IT-95-5/18-T, ¶ 80.

185 Elements of Crimes, *supra* note 43. *See generally* Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, ¶ 158–59 (June 1, 2001) (direct evidence of intent is rare, so it may be inferred); Lingsaas, *supra* note 127, at 440 (contextual elements commonly used to infer intent)

186 *Karadžić*, Case No. IT-95-5-A, ¶ 99.

187 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 139, ¶ 438 (Feb. 26).

188 *See supra* notes 25, 36, 37, 61, 185.

189 *See supra* note 25, 31, 36, 37, 55, 146, 180.

190 *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment, ¶ 366 (2001) (no widespread or systematic attack required); *see also* Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶¶ 223 et seq. (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001) (same). *See generally* *Genocide*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/genocide> (last visited June 16, 2021).

an approach, defended by prominent scholars, that a plan or policy of destroying the group must be shown to establish genocidal intent.<sup>191</sup> One early decision by that tribunal identified the destruction of a “considerable” but not necessarily a majority of a group as manifesting genocidal intent.<sup>192</sup>

The ICTY prosecutors’ briefs mentioned revenge as a motive for anti-Muslim atrocities in Bosnia-Herzegovina.<sup>193</sup> ICTY Outreach explained that revenge “is a barbaric concept, and the law exists precisely to prevent it. Those who act out of revenge, or call on it in order to justify crimes, are dealing a blow to the rule of law, and thus to civilization itself.”<sup>194</sup> Alan Tieger of the Office of the Prosecutor at the ICTY argued that anti-Croat and anti-Muslim “animus” had revived in 1991-1992 against the “villains of World War II.”<sup>195</sup> The Bosnian Serb government issued a report in 2002 stating that while about two thousand Bosnian Muslims may have been killed at Srebrenica, one thousand eight hundred were rebel soldiers attempting to flee government forces, one hundred “died of exhaustion,” and about one hundred more lost their lives to “Serb forces out of revenge or unfamiliarity with international law.”<sup>196</sup> Despite the war, the ICTY looked at several sources of evidence for genocidal intent: individual

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191 See, e.g., Prosecutor v. Simba, ICTR-01-76-A, Judgment, ¶ 260 (Nov. 27, 2007); Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgment, ¶ 260 (May 20, 2005); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 94 (May 21, 1999) (no plan to destroy group required); see also Prosecutor v. Popović, Case No. IT-05-88-A, Judgment, ¶¶ 436–40 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (same, collecting decisions); Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶¶ 100–01 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (same); R. v. Munyaneza, [2014] Q.C.C.A. 906, ¶ 179 (Can. Que.) (same); cf. Bagosora v. Prosecutor, Case No. ICTR-98-41-A, Judgment, ¶¶ 382–86 (Dec. 14, 2011) (discussing law of genocidal intent). For scholarly defenses of a plan or policy of extermination concept of genocidal intent, see, for example, SCHABAS, *supra* note 1, at 246–65; William Schabas, *Fragmentation or Stabilisation? Recent Case Law on the Crime of Genocide in Light of the 2007 Judgment of the International Court of Justice*, 2017 NIGERIAN Y.B. INT’L L. 213–38; William Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide*, 27 CARDOZO L. REV. 1703 (2005); William Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2007).

192 *Kayishema*, Case No. ICTR-95-1-T, ¶ 97.

193 Redacted Version of Prosecution Appeal Brief at 18, Prosecutor v. Mladić, Case No. MICT-13-56-0168/2 (Aug. 7, 2018); see also Prosecutor v. Popović, Case No. IT-02-57-I, Indictment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 26, 2002); Prosecutor v. Tolimir, Case No. IT-04-80-I, Indictment, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 8, 2005); Judgment Summary for Zdravko Tolimir, Int’l Crim. Trib. for the Former Yugoslavia, at 4–6, 9 (Dec. 12, 2012), [https://www.icty.org/x/cases/tolimir/tjug/en/121212\\_summary.pdf](https://www.icty.org/x/cases/tolimir/tjug/en/121212_summary.pdf).

194 Int’l Crim. Trib. for the Former Yugoslavia Outreach Programme, *The Facts About Srebrenica*, at 6 (2005), [http://www.icty.org/x/file/Outreach/view\\_from\\_hague/jit\\_srebrenica\\_en.pdf](http://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf).

195 Prosecutor v. Karadžić, Case No. IT-95-5/18, Verbatim Record, 11 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 17, 2013), <http://www.icty.org/x/cases/karadzic/trans/en/130417IT.htm>.

196 Int’l Crim. Trib. for the Former Yugoslavia Outreach Programme, *View from the Hague: The Truth Always Finds a Way to Reveal Itself*, at 1 (July 21, 2004), [http://icty.org/x/file/Outreach/view\\_from\\_hague/balkan\\_040721\\_en.pdf](http://icty.org/x/file/Outreach/view_from_hague/balkan_040721_en.pdf).

massacres, derogatory language relating to the defeat or disappearance of the Bosnian Muslims, and war crimes, such as rape, abusive detention of civilians, forced labor, and torture or abuse.<sup>197</sup>

1. *Partial Genocidal Intent in Prosecutor v. Karadžić*

On July 11, 2013, the president of the ICTY, Theodor Meron, announced the opinion of the Appeals Chamber that if Karadžić had planned to kill one-third of the Bosnian Muslims and get rid of the rest by deportation or military defeat, then that would qualify as genocidal intent.<sup>198</sup> About a year before that, the Trial Chamber had dismissed genocide charges against Karadžić to the extent that they were based on killings of civilians, rapes, abusive treatment, starvation, and disease in Bosnian Serb detention camps and during military operations in Foča, Prijedor, and other cities.<sup>199</sup> The presiding judge, O-Gon Kwon, reasoned that there were many survivors of Bosnian Serb detention camps and that “rhetorical warnings of the disappearance, annihilation or extinction of Bosnian Muslims in the event that war broke out” were insufficient to show genocidal intent.<sup>200</sup> Defense adviser Peter Robinson argued that, as Judge Kwon had found, “in village after village, town after town, [and] in these detention facilities, Bosnian Serbs would have tens of thousands of Bosnian Muslims in their custody and control; they had the opportunity and means to destroy them, and let the overwhelming majority of them go,” so “there was no genocide in the municipalities . . . .”<sup>201</sup>

In 2012, Karadžić went to trial on charges of using artillery, mortars, and snipers in the Sarajevo region in campaigns that left an estimated twelve thousand people dead, including two mortar strikes that killed one hundred.<sup>202</sup> The accused argued that he did not want civilians to be killed in Srebrenica or elsewhere and that he agreed to limit snipers and other

<sup>197</sup> *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, ¶ 47 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001).

<sup>198</sup> *Karadžić*, Case No. IT-95-5-A, Judgment, ¶ 96–101 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013).

<sup>199</sup> See Int’l Crim. Trib. for the Former Yugoslavia, *98bis Judgement - Karadžić - 28 June 2012*, YOUTUBE (June 29, 2012), <http://youtu.be/ZYLZhyZpd14>; Press Release, United Nations Int’l Crim. Trib. for the Former Yugoslavia, Tribunal Dismisses Karadžić’s Motion for Acquittal on 10 of 11 Counts of the Indictment (June 28, 2012), <https://www.icty.org/en/sid/10994>.

<sup>200</sup> *98bis Judgement - Karadžić - 28 June 2012*, *supra* note 199; Tribunal Dismisses Karadžić’s Motion for Acquittal on 10 of 11 Counts of the Indictment, *supra* note 199.

<sup>201</sup> *Karadžić*, Case No. IT-95-5-AR98bis.1, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013).

<sup>202</sup> *Karadžić*, Case No. IT-95-5, Verbatim Record (Int’l Crim. Trib. for the Former Yugoslavia Oct. 16, 2012), <http://www.icty.org/x/cases/karadzic/trans/en/121016ED.htm>.

military operations.<sup>203</sup> A company commander in the army serving under Karadžić argued that Bosnian Serb forces had to “return fire to save their lives” otherwise they “would either have to withdraw or . . . would have all been killed.”<sup>204</sup> A member of the board of the Bosnian Institute for Missing Persons testified that between 350 and 380 Bosnian Serb civilians died in Sarajevo, while “some non-government organisations put the number closer to 450” and Karadžić put it at 5,500.<sup>205</sup> Karadžić claimed that evidence or statements originating from a former U.N. military observer in Bosnia showed that there was a “strategy of the Bosnian government to obtain international intervention on their side of the civil war” and that the Bosnian side therefore fired at targets on its own side of the line and used civilian buildings for military purposes.<sup>206</sup>

Two cities or towns that received particular attention were Srebrenica and Zepa. The 12,000 people killed in the siege of Sarajevo and the (up to) 8,021 killed in the Srebrenica and Zepa massacres represented about four percent of the 481,109 Muslims living in the municipalities covered by the ICTY’s indictment against Karadžić, according to the 1992 census.<sup>207</sup> The ICTY’s experts were unable to confirm that more than 2,500 distinct bodies were buried in the mass graves in the Srebrenica region.<sup>208</sup> The Bosnian Serb forces under Karadžić and Mladić transported most of the 25,000 to 30,000 Bosnian Muslims in buses rather than on foot with the ICTY estimating that 4,970 to 6,000 men and boys died in a series of massacres.<sup>209</sup> The ICTY Appeals Chamber has ruled that the transported family members were also victims of genocide by suffering serious mental harm from loss of their loved ones during transfer.<sup>210</sup>

In upholding the genocide charge against Karadžić for actions of the Bosnian Serb army outside of Srebrenica, the ICTY Appeals Chamber and

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203 *See id.* at 28860, 28874–75, 28877.

204 *Karadžić*, Case No. IT-95-5, Verbatim Record, 30274 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 14, 2012), <http://www.icty.org/x/cases/karadzic/trans/en/121114ED.htm>.

205 Dzenana Halimovic, *Karadzic Disputes Victim Numbers*, INST. FOR WAR & PEACE REPORTING (Apr. 16, 2012), <http://iwpr.net/report-news/karadzic-disputes-victim-numbers>.

206 *Karadžić*, Case No. IT-95-5, Verbatim Record, 29967–68, 29990 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2012), <http://www.icty.org/x/cases/karadzic/trans/en/121108IT.htm>.

207 *Karadžić*, Case No. IT-95-5, Verbatim Record, 28331 (Int’l Crim. Trib. for the Former Yugoslavia May 2, 2012), <http://www.icty.org/x/cases/karadzic/trans/en/120502IT.htm>.

208 *The Facts About Srebrenica*, *supra* note 194, at 6.

209 Judgment Summary for Zdravko Tolimir, Int’l Crim. Trib. for the Former Yugoslavia, *supra* note 193, at 4–6, 9.

210 *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, ¶ 216 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

Judge Meron referred to about 664 deaths, including as 300 in Sanski Most, 200 in Prijedor, 68 in Bratunac, and 36 in Zvornik as well as an unspecified number of other deaths.<sup>211</sup> They found that the evidence reflected “signs of religious and national animus.”<sup>212</sup> Moreover, the judges referred to sub-standard living conditions, including “cruel and inhumane treatment, torture, physical and psychological abuse, rape and sexual violence, inhumane living conditions, forced labour, [and] failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities.”<sup>213</sup> At the motion for judgment of acquittal stage, the opinion did not survey precise numbers regarding assaults or abuses in detention, gender-based or otherwise.<sup>214</sup> They declared that the necessary specific intent to commit a genocide count could be inferred from facts indicating “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”<sup>215</sup> Similarly, in the 2004 *Milosević* decision on motion for an acquittal of genocide counts under Rule 98 *bis*, it was found that the total or actual destruction of a group is not required for genocide.<sup>216</sup> Two other ICTY judgments have stated that a low number of victims is not inconsistent with genocidal intent.<sup>217</sup> Another judgment deemed genocidal intent to be present if the accused wanted to “create a unified Serbian state by destroying other ethnic groups.”<sup>218</sup>

## 2. *Partial Genocidal Intent in Prosecutor v. Mladić*

On April 16, 2014, Judge Orić of the Trial Chamber of the ICTY refused to enter a judgment of acquittal on two counts of genocide against Ratko Mladić.<sup>219</sup> Judge Orić found that in video footage from the Srebrenica area,

<sup>211</sup> *Karadžić*, Case No. IT-95-5/18-AR-98bis.1, at 37–38, n. 277 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* ¶ 34.

<sup>214</sup> *Id.* ¶¶ 35–36.

<sup>215</sup> *Id.* ¶ 99 (quoting *Jelisić*, Case No. IT-95-10-A, ¶ 47).

<sup>216</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 125 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004).

<sup>217</sup> *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 28, 2003); *Prosecutor v. Šikirica*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 3, 2001).

<sup>218</sup> *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 547 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003) (quoting *Milošević*, Case No. IT-02-54-T, ¶ 89).

<sup>219</sup> *Prosecutor v. Mladić*, Case No. IT-95-5/18-T, Decision on Motion for Dismissal of the Indictment Under Rule 98 *bis* (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2014); *see also*

Mladić had declared that the “time ha[d] come to take revenge on the Turks.”<sup>220</sup> He concluded that “a reasonable trier of fact could be satisfied beyond a reasonable doubt that during the period relevant to the indictment there existed a JCE [joint criminal enterprise] composed of members of the Bosnian Serb leadership and the Bosnian Serb Army, including [Bosnian Serb president] Radovan Karadzic and the accused, the purpose of which was to permanently remove Bosnian Muslims and/or Croats from Serb claimed territories in Bosnia Herzegovina through the commission of crimes charged in the indictment.”<sup>221</sup>

Arrested in late May 2011, Mladić faced charges among the most grave of which were contributing to twelve thousand deaths at Sarajevo, responsibility for the seven thousand men and boys massacred at Srebrenica, and leading forces that interned thousands in terrible conditions and forcibly displaced tens or hundreds of thousands.<sup>222</sup> In addition, Judge Orić focused on a massacre of up to two hundred inmates at the Keraterm detention camp in 1992, the beating and rape of an unknown number of Bosnian Muslim girls and women at a house in or near Foča in 1992, and a telephone conversation in 1992 in which Mladić said that “the whole of Bosnia will burn if I start to speak [sic], not just Sarajevo.”<sup>223</sup> Despite this conversation, which was phrased conditionally in any event, Mladić’s lawyer had argued that “it was entirely justified and legitimate for those opposed to the tyranny of the [party of Bosnian Muslim leader Alija Izetbegović] and opposed to the influx of mujahedin and jihadists to organize themselves to defend against this planned *jihad* and defend their homes and lives from those in the [party of Izetbegović] who sought to forcibly and illegally abolish the constitutional order and assert their control . . . .”<sup>224</sup> He maintained that counterinsurgency operations did not reflect

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Rachel Irwin, *Mladić Acquittal Request Denied*, INST. FOR WAR & PEACE REPORTING (Apr. 17, 2014), <http://iwpr.net/report-news/mladic-acquittal-request-denied>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., Int’l Crim. Trib. for the Former Yugoslavia, *Rule 98 bis Judgment Summary in the Case of Ratko Mladić* (Apr. 15, 2014), [www.icty.org/x/cases/mladic/tjug/en/140415-summary.pdf](http://www.icty.org/x/cases/mladic/tjug/en/140415-summary.pdf); Bruce Zagaris, *ICTY Finishes Last Trial with Conviction of Mladić for Genocide, War Crimes, and Crimes Against Humanity*, 33 INT’L ENF’T L. REP. 462 (2017) (citing Prosecutor v. Mladić, Case No. IT-09-92-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017))

<sup>223</sup> Prosecutor v. Mladić, Case No. IT-09-92, Transcript of Decision on Request for Acquittal pursuant to Rule 98 bis, at 20947 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2014), [www.icty.org/x/cases/mladic/trans/en/140415IT.htm](http://www.icty.org/x/cases/mladic/trans/en/140415IT.htm); see also Irwin, *supra* note 219; Udombana, *supra* note 119, at 106.

<sup>224</sup> Defense Pre-Trial Brief at 13, Prosecutor v. Mladić, Case No. IT-09-92-PT (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2012).

genocidal intent unless a participant in a specific massacre encouraged, participated in, or knowingly aided them, under a decision “overturning a conviction for complicity in genocide on the ground that the accused had no knowledge of the mass executions . . . .”<sup>225</sup>

The Prosecution Exhibits and Trial Transcripts of the ICTY from about the time of the 2011-2012 hearings concerning the Bosnian municipalities are worthy of some attention. Several of them involve evidence of religious or ethno-national animus and “slurs” expressed at Prijedor, Zvornik, Ključ, and a village in Vlasenica.<sup>226</sup> Others involved massacres: 200 killed in Prijedor, 43 in Zvornik, 144 in Ključ, 60 Vlasenica, and 68 at a village near Bratunac.<sup>227</sup> Still others contained evidence of deprivation of essentials of life, beatings and torture, assault, or forced labor.<sup>228</sup> Similarly, the Appeals Chamber in *Karadžić* relied upon evidence of the Bosnian Muslim and/or Bosnian Croat detainees being subjected to “malnutrition, starvation, and severe weight loss”; of said detainees sometimes being denied water; and of said detainees being deprived of “access to proper toilet or bathing facilities, leading to the spread of disease.”<sup>229</sup> Such a pattern of atrocities, in light of the threat to “burn” and the motive of “revenge,” could support a conviction

<sup>225</sup> *Id.* at ¶ 81 (citing *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶¶ 122–24 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007)).

<sup>226</sup> *Mladić*, Case No. 09-92-T, Prosecution Ex. AF935 (Ključ); *Mladić*, Case No. 09-92-T, Prosecution Ex. AF1110 (Prijedor); *Mladić*, Case No. 09-92-T, Prosecution Ex. 70, at 11–23 (Zvornik); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3672, at 7–8 (Prijedor); *Mladić*, Case No. 09-92-T, Verbatim Record, at 18133–35 (Sept. 1, 2011) (village in Vlasenica).

<sup>227</sup> *Mladić*, Case No. 09-92-T, Prosecution Ex. 64, at 3–5 (Zvornik); *Mladić*, Case No. 09-92-T, Verbatim Record, at 17637–38 (August 22, 2011) (village near Bratunac); *Id.* at 18133–35 (village in Vlasenica); *id.* at 19012–15 (Sept. 16, 2011) (village in Ključ); *id.* at 20308–17 (Oct. 20, 2011) (Prijedor).

<sup>228</sup> *Mladić*, Case No. 09-92-T, Prosecution Ex. 70, at 11–23 (beatings, sexual assaults, and forced labor in Zvornik); *Mladić*, Case No. 09-92-T, Prosecution Ex. 674, at 14–35, 71–74 (destruction of a mosque in a village in Prijedor); *Mladić*, Case No. 09-92-T, Prosecution Ex. 703, at 26–30 (beating of Bosnian Muslims and Bosnian Croats in a village in Prijedor); *Mladić*, Case No. 09-92-T, Prosecution Ex. 718, ¶¶ 36, 72, 77–81, 84–85 (beatings of civilians in villages in Sanski Most and town of Sanski Most); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3212, at 21–23, 33–38 (living conditions in Vlasenica); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3263, ¶¶ 10–28 (detention of Muslims from Bratunac); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3380, at 33–36 (detention of Muslim men in Zvornik); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3528, ¶¶ 25–33, 43–51 (beatings and poor conditions at detention camp for Muslims in Prijedor); *Mladić*, Case No. 09-92-T, Prosecution Ex. 3568, at 16–18, 53–63, 111–19 (beatings of Muslim detainees in Foca); *Mladić*, Case No. 09-92-T, Verbatim Record at 18907–08 (Sept. 15, 2011) (beatings, forced labor, and “sub-standard living conditions” in Foca); *id.* at 17869–70 (Aug. 25, 2011) (detention of Muslims from Bratunac, and beatings/stabbings of some of them); *id.* at 18133–35 (Sept. 1, 2011) (detention and beatings of non-Serbs from or in a village in Vlasenica, and failure to feed them); *id.* at 18430–33 (Sept. 6, 2011) (rape in a village in Vlasenica); *id.* at 27175 (Mar. 29, 2012) (detention of Muslim civilians in Zvornik).

<sup>229</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5-A, Judgment, ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013).

for genocide even though there was no Holocaust-like plan.

3. *The Trial Chamber Acquittal of Karadžić on Genocide Charges*

In the trial judgment in his case, Karadžić was not convicted of genocide in the municipalities other than Srebrenica in what was described as a failure of evidence rather than an *a priori* inconsistency of the events of the municipalities with the crime of genocide.<sup>230</sup> Still, the judgment provides some retrospective support for the ICC Pre-Trial Chamber I's 2009 warrant decision in not inferring genocidal intent from evidence of a policy of forcible transfer of Bosnian Muslims; a policy of murdering and attacking civilians in the Bosnian Muslim population center of Sarajevo; a policy of extensive destruction of sacred sites of Catholics and Muslims in Bosnia-Herzegovina and the looting and destruction of other civilian property; or a pattern of serious physical and mental harm being inflicted in the municipalities during sexual assault, torture, and deplorable living conditions in detention facilities and in the municipalities where Muslims and Croats lived.<sup>231</sup>

The trial judgment in Karadžić is arguably inconsistent with the non-acquittal judgment and with itself. It is inconsistent with the non-acquittal judgment, because it did not conclude that the only reasonable inference from the facts was genocidal intent, even though most of the actions classified in the non-acquittal judgment as reflecting genocidal intent were actually found to be committed in the trial judgment finding no genocidal intent.<sup>232</sup> The difference may reflect the distinction between one possible inference and the only possible inference with the trial being needed to eliminate the other possible inferences in existence at the pretrial stage.

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<sup>230</sup> Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

<sup>231</sup> *Id.* at 1–9, 13. Many of the municipalities discussed were the same as those in the non-acquittal decision, including Bratunac, Foča, Prijedor, Sanski Most, and Zvornik. *Id.*

<sup>232</sup> Analogously, but from the opposite perspective, Kreß observes *à propos* of the second ICC pre-trial decision on genocidal intent as to al-Bashir that there was no basis for reversing the decision relating to reasonable grounds to infer genocidal intent after the Appeals Chamber intervened, at least without finding additional acts or expressions of totalizing killing purposes. He seeks—and does not find—evidence that the prosecutor's indictment or warrant evidence demonstrated al-Bashir's intent "to ultimately eliminate the human beings concerned or at least to cause them serious bodily or mental harm." Kreß, *supra* note 5, at 701–03. Given the evidence of massive killings and traumas inflicted either during abuses and attacks or after reduction to destitution and homelessness, it seems that Kreß is seeking something like a Sudanese Final Solution and death camp system, involving the elimination of substantially *all* of the targeted human beings.

Evidence at trial, including the accused's belated attempts to halt some atrocities and reach a deal with international negotiators and eventually give up power, may have made some inferences, such as the creation of a homogeneous Serb state with some Bosnian Muslim and/or Bosnian Croat municipalities or living alongside Muslim or Croat states, more persuasive.<sup>233</sup> The decision is arguably inconsistent with itself, however, in finding that mass killings or ejection of civilians from their homes could be genocidal in some cities and towns, but not in others—notably, the same military units under Mladić, Tolimir, and Karadžić were active in Zvornik, or in other municipalities, but their actions in Srebrenica were conceptualized differently.<sup>234</sup> Karadžić declared a “state of war” in Srebrenica as there was in Bratunac, Zvornik, and others.<sup>235</sup> Moreover, targeting Bosnian Muslim males was deemed to be genocidal in Srebrenica, but committing killings and other Article II acts with discriminatory intent in other towns was not, while the intent of the accused at Srebrenica was found to be very similar as at other towns.<sup>236</sup>

The critical distinction appears to be that Karadžić tacitly approved, assumed the existence of, failed to halt, and lent his authority to a plan to kill *every* able-bodied male at Srebrenica.<sup>237</sup> The Trial Chamber opined that this could lead to the group's destruction, because the women and children would not be able to procreate (the eventual aging of the boys forcibly transferred from Srebrenica, and the town's fate under the various peace proposals and international negotiations, was not discussed).<sup>238</sup> The organized and totalizing plan at Srebrenica then meant that the only reasonable inference was genocidal intent, whereas the complex or uneven planning at other sites led to more than one inference or even a contrary one. The problem with this ultimate finding is threefold: first, genocide does not

233 The Bosnian Serb Republic's founding documents suggested this. *See, e.g., Karadžić*, Case No. IT-95-5, Prosecution Ex. P431 (May 12, 1992) (Minutes of the 16th session of the Bosnian-Serb Assembly); *Karadžić*, Case No. IT-95-5, Prosecution Ex. P3050 (Decision on the strategic objectives of the Serbian people in Bosnia-Herzegovina, 12 May 1992); *Karadžić*, Case No. IT-95-5, Prosecution Ex. P2003 (Decision on strategic objectives for the Serbian People in Bosnia-Herzegovina of 12 May 1992, published on 26 November 1993 in the official gazette of the Bosnian-Serb Republic).

234 *Karadžić*, Case No. IT-95-5/18-T, at ¶¶ 17–94, 1000–15, 2048–342, 2441–44.

235 *See id.* ¶¶ 1162, 1384, 2438.

236 The intent at Srebrenica was to permanently and forcibly remove the Muslim population, while the preceding pages describe a similar intent more broadly realized in other towns. *See id.* ¶¶ 224–556, 2061–80.

237 The trial chamber conceded as much by stating that the absolute number of group members affected need not be all of them, but merely enough to have “an impact” on the group as a whole. *Id.* ¶ 5669 (emphasis added). Milaninia persuasively rebuts the presumption that genocidal intent must be not only total but “physical.” Milaninia, *supra* note 151, at 1410; *see also* Travis, *supra* note 151.

238 *See Karadžić*, Case No. IT-95-5/18-T, ¶ 5669.

require “physical destruction” under every disjunctive prong of Article II (as discussed above); second, its treaty-based definition expressly includes mixed motives or partial intents (intents to destroy partially) by not requiring destruction-in-whole; and third, it is very much possible (but not addressed at all) whether other municipalities were rendered even less populous than Srebrenica by killings and other acts when a battle or the war was over (say, when absorbed into a Serbian state).<sup>239</sup>

The Appeals Chamber affirmed the acquittal on genocide charges relating to the municipalities.<sup>240</sup> It rejected the prosecution argument that a “‘narrow’ conception of genocidal intent” had been applied, clearly approving of a broader conception.<sup>241</sup> The judges, one dissenting on some points, apparently believed that the Trial Chamber was correct in finding that even though some Bosnian Serbs shared an intent to displace some Bosnian Muslims and Bosnian Croats from their homes, Karadžić personally lacked a genocidal intent.<sup>242</sup> They endorsed the trial chamber’s refusal to equate genocidal intent with genocidal motive and quoted a prosecution exhibit in which Karadžić stated that his plan was to extend equal rights to Bosnian Muslims and Croats who surrendered their weapons and did not threaten Bosnian Serbs.<sup>243</sup>

The Appeals Chamber judgment and even the Trial Chamber judgment may have omitted certain important contextual facts that justify their findings but that arguably undermine in some ways the world’s nearly thirty-year focus on Karadžić at the expense of other suspected international criminals. In July 1990, Mr. Karadžić announced that a Yugoslav federation with “equal ... ethnicities...” would be acceptable to him.<sup>244</sup> That

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239 As noted, genocide’s destruction needs to rise only to the level of “an impact” on the group as a whole. *Id.* ¶ 555 (emphasis added). The ICTY points to a solution to this quandary by suggesting that by being more symbolic and strategic than other Muslim towns were, Srebrenica was more substantial a part of the Muslim group, but it does not address in this connection whether Sarajevo, Prijedor, Zvornik, or other towns were symbolic. *Id.* ¶ 5672. These, like Srebrenica, were newly established Serbian municipalities whose operations were seen as urgent by 1992. *Id.* ¶ 136. Dr. Tabeau, who testified on several occasions before the ICTY, believed as of 2012 that in Prijedor, for example, the Muslim population fell to less than one percent, while the Serb share more than doubled. See Velma Šarić, *Demographics of Bosnian War Set Out*, INST. FOR WAR & PEACE REPORTING (May 4, 2012), <https://iwpr.net/global-voices/demographics-bosnian-war-set-out>.

240 See *Prosecutor v. Karadžić*, Case No. MICT-13-55-A, ¶ 741 Judgment (Int’l Residual Mechanism for Crim. Tribs. Mar. 20, 2019).

241 See *id.*

242 *Id.* ¶ 719.

243 *Id.* ¶ 722.

244 Karadžić Pre-trial Brief at 83–84, *Karadžić*, Case No. IT-95–5/18-PT (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2009).

November, he proclaimed that he wanted ethnicities in Bosnia to peacefully coexist.<sup>245</sup> He claimed to have instructed a colleague or follower that “we shall avoid the war in Bosnia...”<sup>246</sup> In a telephone conversation used by an ICTY prosecutor to establish his intent to destroy Bosnian Muslims and/or non-Serbs, he remarked that “our Muslim partners” are “preparing for war,” but the Serbs had twenty thousand armed men near Sarajevo who would cause three hundred thousand Muslims living there to “disappear” in a “cauldron” of “war”; he added, however, that “our ambition is not to kill them [because] the army treats civilians properly.”<sup>247</sup> In a telephone conversation, he noted that Muslims were “attacking Serbian villages” and warned that they would “disappear” if there was “catastroph[ic]” war.<sup>248</sup> In April and again in June 1992, he said that he banned the devastation of enemy towns by artillery fire, urged his forces to abide by international humanitarian law, and ordered the arrest of looters.<sup>249</sup> He said that his government convicted more than 250 and judged about 300 persons for crimes against Muslims or Croats in Bosnia. The Bosnian Serb military courts took up more than 12,000 cases in a few years while the ICTY investigated 161 cases in its first 21 years.<sup>250</sup> Up to 103,000 of Bosnia’s wartime dead were estimated to be Serbs or “Yugoslavs.”<sup>251</sup> Some of this evidence suggests an intention to wage a civil or international war with a degree of compliance with the laws and customs of war rather than to destroy civilians *en masse*.

#### 4. *The Trial Chamber Acquittal of Mladić on Genocide Charges*

In the trial judgment in his case, the judges found that Mladić may not have committed genocide in the municipalities excluding Srebrenica, because the evidence did not tend to show that the genocidal acts could achieve the destruction of the group in the municipality.<sup>252</sup> As with Karadžić, the judges found it to be a reasonable inference that ethnic cleansing would result in viable Bosnian Croat and/or Bosnian Muslim states alongside the Bosnian Serbs rather than physical destruction of the non-Serbs.<sup>253</sup> Had the Bosnian Serb defendants intended to send the various

<sup>245</sup> *See id.*

<sup>246</sup> *Id.*

<sup>247</sup> *See id.* at 85–88.

<sup>248</sup> *See id.* at 92–93, 96.

<sup>249</sup> *See id.* at 96, 158.

<sup>250</sup> *See id.* at 218–22, 251–52.

<sup>251</sup> *See* Zwierzchowski & Tabeau, *supra* note 172, at 2.

<sup>252</sup> Prosecutor v. Mladić, Case No. IT-09-92-T, Judgment, ¶¶ 3540, 4235 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017).

<sup>253</sup> Thus, Mladić, like his political leader, “intimated that conciliation and compromise were

Bosnian Muslim populations into nonviable IDP camps, rather than into an effective state of their own, the inference from the Article II acts may have been quite different.

The Office of the Prosecutor of the International Residual Mechanism for Criminal Tribunals has appealed the *Mladić* trial judgment.<sup>254</sup> An appeal may present the question of whether the intention to destroy the Bosnian Muslims in three to five municipalities could constitute genocidal intent with respect to the Bosnian Muslim group or a substantial part of it.<sup>255</sup> The Office of the Prosecutor reviews many of the thousands of genocidal acts in the municipalities that were discussed above, and anti-Muslim statements made during those years.<sup>256</sup> It argues that 161,700 Bosnian Muslims in the municipalities were targeted—a scale of atrocity that the appeal brief characterizes as quite comparable to events in Srebrenica.<sup>257</sup> At the appeals hearings in August 2020, prosecutor Laurel Baig maintained that genocidal intent is not reducible to a number as the distinction between Srebrenica and Foca or Prijedor would suggest, adding that Mladić referred to Bosnian Muslims as the “worst scum” and his supporters massacred Muslims in a number of local areas in creating a more “Serbian” state.<sup>258</sup>

## V. GENOCIDAL INTENT AT A HYBRID TRIBUNAL

Like the ICC and the ICTY, a hybrid tribunal convened to hear charges of genocide under the Khmer Rouge in the Democratic Republic of Kampuchea and considered how to apply the requirement of genocidal intent. The United Nations and some members like the United States recognized the Cambodian genocide in the late 1970s even though it was partial. The hybrid UN-backed tribunal inferred genocidal intent from

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possible, such as on 8 January 1992 and 12 May 1992, when it came to the strategic goals of living in ethnically separate states.” *Id.* ¶ 4235. Sarajevo, for example, was to be partitioned into sections with an “effective state authority” in the Muslim section, which would survive. *Id.* ¶ 3707.

254 Prosecutor v. Mladić, Case No. MICT-13-56-A, Decision on a Consolidated Request for an Extension of Time to File Replies Concerning Motions Brought Pursuant to Rule 142 of the Rules, at 2 (Int’l Residual Mechanism for Crim. Tribs. June 7, 2019).

255 Prosecutor v. Mladić, Case No. IT-09-92, Verbatim Record, at 44913 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017); Redacted Version of Prosecution Appeal Brief, Prosecutor v. Mladić, Case No. MICT-13-56-0168/2 (Int’l Residual Mechanism for Crim. Tribs. Aug. 7, 2018).

256 Redacted Version of Prosecution Appeal Brief, *Mladić*, Case No. MICT-13-56-0168/2, at 12–19.

257 *See id.* at 4.

258 *See* Haris Rovcanin & Emina Dizdarevic, *Hague Prosecutors Urge Second Genocide Conviction for Ratko Mladic*, BALKAN TRANSITIONAL JUST. (Aug. 26, 2020, 6:30 PM), <https://balkaninsight.com/2020/08/26/hague-prosecutors-urge-second-genocide-conviction-for-ratko-mladic>.

similar patterns of civilian killings and discriminatory policies as international tribunals had found in Darfur and in Bosnia-Herzegovina.

#### A. *The Initial Recognition of the Cambodian Genocide*

President Jimmy Carter declared in 1979 that the Cambodian communists' executions, forced transfers, and devastation of the economic and food systems had amounted to a "genocidal" scheme, and in 1994, the Congress passed and President Bill Clinton signed legislation recognizing a Cambodian Genocide and promising to fund trials.<sup>259</sup> It could be that a quarter of Cambodia's population was lost.<sup>260</sup> The original population was seven million, and one million became refugees.<sup>261</sup> Cambodia requested UN assistance in convening trials, and enacted a draft law and treaty with the UN in the 2000s.<sup>262</sup>

#### B. *Partial Genocidal Intent in Cambodia*

From 2014 to 2017, the Extraordinary Chambers of the Courts of Cambodia held extensive evidentiary hearings on allegations of genocide and other crimes being committed by Nuon Chea and Khieu Samphan.<sup>263</sup> In 2018, the judgment convicting the two men—of genocide and other crimes against the Vietnamese nation or ethnicity in Cambodia—was released.<sup>264</sup> Chea was deputy secretary of the Cambodian Communist Party.<sup>265</sup> He spent a year as Interim Prime Minister (late 1976-late 1977) and was a member of the party's governing structures.<sup>266</sup> Samphan was deputy prime minister, Minister of Defense, and commander in chief of the Cambodian People's National Liberation Armed Forces.<sup>267</sup>

<sup>259</sup> Cambodian Genocide Justice Act, Pub. L. 103-236, 108 Stat. 486 (1994); Associated Press, *Cambodian Famine "Genocidal Tragedy"*, MIAMI NEWS, Oct. 25, 1979, at A6.

<sup>260</sup> Robert Cribb, *Political Genocides in Postcolonial Asia*, in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 183 (Donald Bloxham & A. Dirk Moses eds., 2010) (citing Bruce Sharp, *Counting Hell: The Death Toll of the Khmer Rouge Regime in Cambodia* (2005), <http://www.mekong.net/cambodia/deaths.htm>).

<sup>261</sup> GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 47, 69, 147, 311, 333, 350, 463, 484, 519–21 (Howard J. De Nike, John Quigley & Kenneth J. Robinson eds., 2011). *But see id.* at 424 (one to two million died).

<sup>262</sup> Tomas Hamilton & Michael Ramsden, *The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers of the Courts of Cambodia*, 14 INT'L CRIM. L. REV. 141, 141–43 (2014).

<sup>263</sup> *See* Prosecutor v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Case 002/02 Judgment (Extraordinary Chambers in the Cts. of Cambodia Mar. 27, 2019).

<sup>264</sup> *See id.*

<sup>265</sup> *See id.* at 305–41.

<sup>266</sup> *See id.*

<sup>267</sup> *See id.*

Samphan encouraged and abetted mass murders at worksites and security centers including the infamous S-21 killing field.<sup>268</sup> At S-21, the ECCC estimated that Khmer Rouge officials and the armed forces killed more than 11,742 prisoners in or near S-21 and Choeung Ek, including Vietnamese soldiers and civilians but also Community Party members and other Cambodian soldiers<sup>269</sup> as the movement consumed itself in ways which gave rise to references to an “auto-genocide.”<sup>270</sup> Buddhists and former monarchist or military (Nol) regime officials were also targeted according to the ECCC co-prosecutors.<sup>271</sup>

The Party prepared detailed lists and dossiers on Vietnamese persons and their families, attempted to spare ethnic Khmers while killing Vietnamese Cambodians, and killed large numbers at the S-21 site while large numbers were also killed (agency unknown) at five other sites in 1977 and 1978, including at two sites while Chea was the Interim Prime Minister.<sup>272</sup> In a passage with some pertinence to Darfur as well as the Bosnian (and Croatian) municipalities affected by ethnic cleansing, the Party implemented a policy to “destroy” those of Vietnamese heritage in Cambodia first by expelling them to Vietnam “by foot, train and boat” and then “with mass targeted killings” of them.<sup>273</sup>

That was basically the focus of the evidence of genocidal intent regarding the Vietnamese at the ECCC. Scholars and advocates for victim groups as well as NGOs, however, have compiled large numbers of derogatory and eliminationist statements against the Vietnamese in Cambodia and even those in Vietnam with which Cambodia was at war.<sup>274</sup>

### C. *The Cham Muslim Genocide in Cambodia*

The evidence of genocidal intent against the Cham was arguably weaker

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268 *See id.* at 330-31, 659-64, 1089-90, 1095, 1748-1782.

269 *See id.* at 2017.

270 HELEN FEIN, GENOCIDE: A SOCIOLOGICAL PERSPECTIVE 20 (1993).

271 *See Nuon*, Case No. 002/02, at 1599–1600.

272 *See id.* at 1711–42.

273 *Id.* at 1699; *see also Trial Chamber Summary of Judgement Case 002/02*, *supra* note 36 (describing Judgment as finding a “nationwide policy to expel people of Vietnamese ethnicity living in Cambodia,” a policy with which “Vietnamese authorities” authorities may have been complicit or at least unable to prevent, as “Khmer Rouge cadres organised and monitored the transportation of Vietnamese people to the border with Vietnam, including by boats and by trucks.”).

274 Case No. 002/19-09-2007/ECCC/OCIJ, Civil Parties’ Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, at 20–21, 43–45 (Apr. 12, 2009) (collecting sources).

than that against the Vietnamese, because it was not even necessarily known to the ECCC judges with a high degree of confidence that hundreds of them—let alone thousands—had been killed.<sup>275</sup> The judgment did find that a “great number” of Cham were killed in the context of suppressing the Muslim religion and breaking up their communities and conscripting Cham for work.<sup>276</sup> Oddly, the ECCC did not find that Samphan, as Minister of National Defense and a member of the governing party’s ruling committee, had superior responsibility for or the ability to prevent massacres of the Cham Muslims in Cambodia, perhaps because he seemed a figurehead.<sup>277</sup> In contrast, Chea was liable as a superior for ordering government policy and deciding on it.<sup>278</sup>

The ECCC judgment against Chea and Samphan supports the decision of the Appeals Chamber of the ICC to permit the genocide charges against al-Bashir to proceed. It confirms that while removing a group from its habitual residences might not be genocide standing alone, doing so in the context of a great number of killings and actions against its religion would.

## VI. CONCLUSION

The conceptual history of “genocide” undermines an approach to genocidal intent that would require total or near-total physical destruction as an aim. Such an approach, by ruling out an inference of genocidal intent in some cases of brutal counterinsurgency warfare characterized by numerous massacres and the displacement of large segments of a group into non-viable lands, conflicts with plain meaning, drafters’ intent, and decisional law as to what “genocide” means.

Over time, a genocide “canon” has emerged, to include the Holocaust, Cambodia, Srebrenica, Rwanda, and perhaps the Ottoman Armenians and “Nuba” of Darfur.<sup>279</sup> Most of these cases—and, I would suggest, all of

<sup>275</sup> See *Nuon*, Case No. 002/02, at 1601–88.

<sup>276</sup> *Id.* at 1688.

<sup>277</sup> See *id.* at 2230–31.

<sup>278</sup> See *id.* at 1099, 1118, 1307, 2111–16, 2169–71, 2230. Chea was the direct superior of officers stationed at S-21. See *id.* at 1099, 1118, 1307. The Judgment against Chea was not nullified even though his appeal and the entire proceeding were terminated upon his death in 2019. See *Nuon*, Case No. 002/19-09-2007-ECCC/SC, Decision on Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Prior to the Appeal Judgement (Extraordinary Chambers in the Cts. of Cambodia Nov. 22, 2019).

<sup>279</sup> See, e.g., United States Holocaust Memorial Museum, *US Secretary of State Clinton on Meeting the Challenge of Genocide*, YOUTUBE (July 25, 2012), [https://www.youtube.com/watch?v=yVWpMq3h3aI&ab\\_channel=UnitedStatesHolocaustMemorialMuseum](https://www.youtube.com/watch?v=yVWpMq3h3aI&ab_channel=UnitedStatesHolocaustMemorialMuseum); see also U.S. President Barack Obama, Remarks by the President in Address to the Nation on Libya at National Defense University, Washington, D.C. (Mar. 28, 2011),

them—involved partial genocidal intent at several key moments during which decisions were made. In each of these cases, massacres were preceded or accompanied by the displacement of survivors into frequently, but not always, deadly conditions. As the Genocide Convention took shape, Western countries anxiously attempted to construct an “anti-canon” of genocide cases by delaying ratification of it or by attaching reservations, understandings, and declarations to it as in the case of the United States; this “anti-canon” might include widespread bombardment and population displacement during the Vietnam War, other war crimes including those committed in civil wars, exploitation of Native American lands including their sacred sites, and mental harm due to Jim Crow segregation laws and discriminatory acts against African-Americans.<sup>280</sup> With the “memory boom” and social/transitional justice movements, other voices are increasingly heard, and the canon is evolving.<sup>281</sup> The popular understanding of the crime will change alongside the canon of cases that nations memorialize.

The plain meaning, the historical context, and subsequent judicial approaches to the Genocide Convention indicate that genocidal intent does not require total or whole-group targeting. Both the text and the drafting history of the Genocide Convention recognize forms or techniques of genocide that do not manifest a plan of instant or complete group destruction. The language of Article II and the process that adopted it indicate that genocide can occur without a concrete or practical plan or program to actually destroy the group. The subsequent enforcement and diplomatic construction of the Genocide Convention are also far removed from a conception of genocidal intent that would require killing every group

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<https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

<sup>280</sup> See, e.g., Orrin G. Hatch, Opinion, *Reject the Genocide Convention*, N.Y. TIMES (Apr. 23, 1985), <https://www.nytimes.com/1985/04/23/opinion/reject-the-genocide-convention.html>; LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 6, 25, 50–51, 83, 86, 92–93, 96–97, 196 (1991); Zachary Pall, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. 22 (2008): 22; Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away with It*, 11 MICH. J. INT'L L. 90 (1989).

<sup>281</sup> In response, the term “Shoah” is being redeployed from an original meaning as a nonspecific tragedy or problem into a total extermination of the Jews as opposed to mere Nazi persecutions, genocides, or war crimes against Slavs, Greeks, communists, socialists, democrats, Catholics, Protestants, Jehovah's Witnesses, homosexuals, and Roma/Si/nti people. See, e.g., ANDREA FRÖCHTLING, EXILED GOD AND EXILED PEOPLES: MEMORIA PASSIONIS AND THE PERCEPTION OF GOD DURING AND AFTER APARTHEID AND SHOAH 13 (2002); Dan Michman, *The Holocaust and the State of Israel: A Historical View of Their Impact on and Meaning for the Understanding of the Behavior of Jewish Religious Movements*, in THE IMPACT OF THE HOLOCAUST ON JEWISH THEOLOGY 263, 264–65 (Steven T. Katz ed., 2007).

member who had not already fled.<sup>282</sup> As others have noted, the Genocide Convention does not even require a plan or policy of genocide or a widespread or systematic “attack,” because genocide may occur in times of peace and at levels of authority considerably lower than the top echelon of military leaders.<sup>283</sup>

It is important in practice to request and produce evidence that a group was threatened in whole or in part during a genocide. To prove genocidal intent, a “substantial” part of a group must be threatened with death by the acts alleged to carry out a genocide. It is wrong, however, to suggest that a military and political leader does not commit genocide by sending hundreds or thousands of attackers at identifiable and known groups, leading to the deaths of tens of thousands of them within a year and the displacement of many if not most of the survivors into conditions that will certainly kill hundreds of thousands more in a few years’ time.

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<sup>282</sup> Mulaj, *supra* note 8.

<sup>283</sup> See, e.g., *infra* notes 190–91 and accompanying text; I GUÉNAËL METTREAUX, INTERNATIONAL CRIMES: LAW AND PRACTICE: GENOCIDE 154–56 (2019) (same); Daniel Bodansky & Kevin Jon Heller, *Prosecutor v. Karemera, Ndirumpatse, & Nzirorera. Case No. ICTR-98-44-AR73 (C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice*, 101 AM. J. INT’L L. 157 (2007) (no widespread/systematic attack required) (citing *Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Appeals Chamber, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice* (June 16, 2006)); Kreß, *supra* note 5, at 672 (same); Vincent Sautenet, *Le Tribunal pénal international pour l’ex-Yougoslavie*, 17 REV. QUÉBÉCOISE DE DROIT INT’L ANNÉE 255, 263–64 (2004). See generally Genocide Convention, *supra* note 4, pmb1. (time of war or peace); *id.* art. II (no motive requirement); *id.* art. IV (no requirement that perpetrator be a head of state or even a government official at all).