Note

Srebrenica as Genocide? The *Krstić* Decision and the Language of the Unspeakable

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In August 2001, a trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) handed down the tribunal's first genocide conviction. In this landmark case, Prosecutor v. Radislav Krstić, the trial chamber determined that the 1995 Srebrenica massacres—in which Bosnian Serb forces executed 7,000-8,000 Bosnian Muslim men—constituted genocide. This Note acknowledges the need for a dramatic expression of moral outrage at the most terrible massacre in Europe since the Second World War. However, this Note also challenges the genocide finding. By excluding consideration of the perpetrators' motives for killing the men, such as seeking to eliminate a military threat, the Krstić chamber's method for finding specific intent to destroy the Bosnian Muslims, in whole or in part, was incomplete. The chamber also loosely construed other terms in the genocide definition, untenably broadening the meaning and application of the crime. The chamber's interpretation of genocide in turn has problematic implications for the tribunal, enforcement of international humanitarian law, and historical accuracy. Thus highlighting instances where inquiry into motives may be relevant to genocide determinations, this Note ultimately argues for preserving distinctions between genocide and crimes against humanity, while simultaneously expanding the legal obligation to act to mass crimes that lack proof of genocidal intent.

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I. INTRODUCTION

Even those unfamiliar with the conflict that consumed the former Yugoslavia in the 1990s have heard of Srebrenica. If nothing else, the word "Srebrenica" carries a pall of tragedy. Uttered with a mixture of historical import and regret, it has become a euphemism for unspeakable events.

Only a court of law could provide the detachment necessary to examine the facts of what occurred near the small town in southeastern Bosnia-Herzegovina in July 1995. The United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 to prosecute serious violations of international humanitarian law in the region since 1991.[1] In an August 2001 decision, *Prosecutor v. Radislav Krstić*, one of the tribunal's three trial chambers set forth a comprehensive account of the tragedy. The chamber found that following the takeover of the town, Bosnian Serb forces executed between 7,000 and 8,000 military-aged Bosnian Muslim men.[2] In addition, the Serb forces transported away from the area nearly all the Bosnian Muslim women, children, and elderly.[3] Finding that these actions resulted in "the physical disappearance of the Bosnian Muslim population at Srebrenica,"[4] the trial chamber concluded that the Serb forces had committed genocide. For his involvement in the killings, Radislav Krstić, the Serb officer on trial, was sentenced to forty-six years imprisonment, one of the longest sentences imposed by the tribunal,[5] though the ICTY Appeals Chamber reduced the sentence to thirty-five years in April 2004.[6] Although the Genocide Convention came into force in 1948, this was the first-ever conviction by the ICTY for "the crime of crimes."[7] On April 19, 2004, the

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1. U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993).

2. Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Trial Judgement, ¶ 84 (Aug. 2, 2001) [hereinafter Krstić].

3. *Id.* ¶ 52.

4. *Id.* ¶ 595.

5. Krstić's sentence was the longest imposed by the ICTY up until July 2003, when another trial chamber sentenced Milomir Stakić to life imprisonment for crimes against humanity (extermination and persecution) and violations of the laws of war (murder). Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Trial Judgment, ¶ 253 (July 31, 2003).

6. The appeals chamber decreased Krstić's sentence to thirty-five years after determining that Krstić aided and abetted genocide rather than having functioned as a co-perpetrator, as originally determined by the Trial Chamber. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeal Judgment, ¶¶ 266 and 275 (Apr. 19, 2004) [hereinafter Krstić, Appeal Judgment].

7. Genocide was first identified as "the crime of crimes" in a 1998 case before the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Trial Judgment and Sentence, ¶ 16 (Sept. 4, 1998); *see also* Prosecutor v. George Rutaganda, Case No. ICTR-96-3-T, Trial Judgment and Sentence, ¶ 451 (Dec. 6, 1999); Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Trial Sentence, ¶ 15 (Feb. 2, 1999). The *Krstić* appeals chamber noted that "[a]mong the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium ... This is a crime against all humankind, its harm being felt not only by the group being targeted for destruction, but by all of humanity." Krstić, Appeal Judgment, *supra* note 6, ¶ 36. The first conviction for genocide by an international court was handed down on September 2, 1998, when an ICTR trial chamber found Jean-Paul Akayesu guilty of genocide and crimes against humanity. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 734

ICTY Appeals Chamber affirmed the trial chamber's finding that genocide occurred at Srebrenica.[8]

This Note concerns a court's effort to find words to confer meaning on unspeakable events. Naming the crimes and ascertaining criminal responsibility, as the *Krstić* trial chamber was tasked to do,[9] are important to allaying some of the survivors' enduring anguish and expressing international moral outrage. This process also seeks to generate legal precedent that will guide future conduct in war. As Judge Patricia Wald, a former ICTY judge, states, "It is only by accretion of case law interpreting ambiguous parts of treaties or 'customary law' that coherent, consistent and predictable norms of international humanitarian law are established that can govern the future behavior of leaders in war time."[10] By applying words to the unspeakable, to "events [that] . . . defy description in their horror,"[11] the *Krstić* decision, like all cases at the ICTY, sought to render justice to the victims, create precedent to deter similar events, and promote reconciliation in the former Yugoslavia.[12]

On close examination, however, the *Krstić* decision is problematic, suggesting that the good intentions behind prosecuting crimes of mass violence should be subject to certain constraints. While the conviction of Krstić himself invites a thorough study,[13] this Note primarily seeks to examine the court's legal finding that the Srebrenica massacres constituted genocide. This Note proposes that the trial chamber's application of genocide to the events at Srebrenica, while plausibly consistent with some aspects of genocide law, was flawed.

According to the International Law Commission, "the distinguishing

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(Sept. 2, 1998).

8. Krstić, Appeal Judgment, *supra* note 6, ¶ 38. While the appeals chamber acknowledged that the trial chamber "used imprecise language" and "should have expressed its reasoning more carefully" in some parts of its analysis, the appeals chamber nonetheless agreed with the trial chamber's finding that the Srebrenica massacres constituted genocide. *Id.* ¶¶ 22 & 38. It reached this holding on the basis that the "Trial Chamber based [its] conclusion on a number of factual findings, which must be accepted as long as a reasonable Trial Chamber could have arrived at the same conclusions." *Id.* ¶ 26. Since the appeals chamber's view on the genocide finding largely reaffirms the factual findings and legal analysis of the trial chamber, this Note will focus primarily on the trial chamber's reasoning. Where appropriate, appeals chamber analyses are discussed in the interests of further clarification.

9. Krstić, *supra* note 2, ¶ 2.

10. Patricia M. Wald, *Trying War Crimes in International Courts*, 31 INT'L J. LEGAL INFO. 278, 284 (2003). Judge Wald, former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, served as a judge at the ICTY from 1999-2001. She also served on the panel of three judges for the *Krstić* case.

11. Krstić, *supra* note 2, ¶ 2.

12. The ICTY's mission is defined on the tribunal's official website, The ICTY at a Glance, http://www.un.org/icty/glance/index.htm (last visited May 3, 2005). The tribunal's additional objective is "to bring to justice persons allegedly responsible for serious violations of international humanitarian law." *Id.*

13. *See, e.g.*, Patricia M. Wald, *General Radislav Krstić: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 445 (2003) (asking "does it offend basic notions of justice to convict and imprison a middle-level officer of war crimes while his superior—the principal offender—walks free because the court has no authority to secure the arrest of the top leader?").

characteristic"[14] of the crime of genocide is the element of specific intent, which requires that certain acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[15] By excluding consideration of the perpetrators' motives for killing the military-aged men, such as seeking to eliminate a military threat as the defense alleged, the *Krstić* chamber's standard for establishing specific intent to destroy the Bosnian Muslims, in whole or in part, was incomplete. In addition, stretching the meaning of certain terms in the definition, such as a group "in part" and "destroy," also suggests a misapplication of the word "genocide." In effect, adopting an interpretation of genocide that cannot and will not be universally applied, the chamber untenably broadened the meaning of the term. To the extent that this landmark finding influences modern interpretations of genocide, crimes against humanity, and war crimes, this Note proposes that limiting the finding to crimes against humanity—thus maintaining clearer distinctions between these sets of crimes—would have better served the authority of the international tribunal, the development of international humanitarian law, and the capacity of other states to comprehend and respond effectively to future instances of mass violence.

This Note is divided into five parts. Based on the factual findings of the trial chamber, the second Part contains a background description of the Yugoslav war and events leading up to the takeover of the southeastern Bosnian town of Srebrenica. The third Part critically analyzes the chamber's application of Article 4 to the events in Srebrenica in July 1995, arguing that the chamber's reasoning problematically distorts the meanings of intent, a group "in part," and "destroy" in the genocide definition. The fourth Part develops the implications of the genocide finding in *Krstić* for the international tribunal, humanitarian law, the security policies of international organizations and foreign governments, and broader concepts related to the nature of suffering and historical accuracy. Finally, in the fifth Part, this Note argues for a more restricted application of the genocide definition so as to preserve distinctions between genocide and crimes against humanity, thus encouraging standards of interpretation that may be more universally and fairly applied. Simultaneously, a legal obligation to act should be expanded to crimes against humanity. These distinctions, along with expanded obligations, will best serve the practical and principled goals of international criminal and humanitarian law.

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14. Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996).

15. Statute of the International Tribunal for the Former Yugoslavia, art. 4(2), *annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808*, U.N. GAOR, May 19, 1993, U.N. Doc. S/25704, *reprinted in* 32 I.L.M. 1159, 1193-97 [hereinafter ICTY Statute]. The ICTY Statute mirrors Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by U.N. Gen. Assembly* Dec. 9, 1948, S. Treaty Doc. No. 1, 81st Cong., 2d Sess., 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

II. BACKGROUND OF EVENTS AT SREBRENICA

In order to assess the chamber's application of law to the Srebrenica atrocities, it is important to situate the takeover of Srebrenica within the Yugoslav conflict. The war involved the breakup of the Socialist Federal Republic of Yugoslavia, which existed from 1945 until 1990. During this half-century, Yugoslavia was made up of six republics: Bosnia and Herzegovina (Bosnia), Croatia, Macedonia, Montenegro, Serbia, and Slovenia. While one ethnic group predominated in most of these republics—the Slovenes in Slovenia, the Croats in Croatia, and the Serbs in Serbia, for instance—Bosnia was distinctly multi-ethnic. Before the 1990s war, the republic was forty-four percent Muslim, thirty-one percent Serb, and seventeen percent Croat.[16] Though Muslims, Serbs, and Croats are all ethnic Slavs,[17] their religious and cultural differences, in addition to historical periods of inter-group strife (one of the most bitter of which came to pass during the Second World War[18]), have served to reinforce separate group identities.

The forty years of relative stability created by Marshal Tito's emphasis on state unity[19] began to crumble in the late 1980s, when an economic crisis, combined with the general decline of Eastern European communism, intensified nationalism and subsequent separatism among the republics, especially in Serbia, prompting other republics to declare independence. In spite of international recognition of the Yugoslav republics' newly drawn borders in 1991 and 1992, a struggle for territorial control ensued among the Muslims, Serbs, and Croats in Bosnia. Fighting was particularly fierce between the Bosnian Serb forces (VRS) and the Army of Bosnia-Herzegovina (ABiH) in the eastern part of the republic, close to Serbia.[20]

Srebrenica sits in the Central Podrinje region of eastern Bosnia, just fifteen kilometers from the Serbian border. This was an area of significant strategic importance for the Bosnian Serbs, who sought "to eliminate the Drina River as a border between 'Serb states.'"[21] As a military expert for the

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16. Krstić, *supra* note 2, ¶ 7 (citing Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 56-57 (May 7, 1997) [hereinafter Tadić]).

17. Tadić, *supra* note 16, ¶ 56.

18. *See id.* ¶ 61-63. From 1941 to 1945, during Axis occupation, "[t]hree distinct Yugoslav forces each fought one another: the Ustasha forces of the strongly nationalist Croatian State, supported by the Axis powers, the Chetniks, who were Serb nationalist and monarchist forces, and the Partisans, a largely communist and Serb group." *Id.* ¶ 61. Muslims fought alongside both the Ustashas and the Partisans. The two Serb groups, the Chetniks and the Partisans, also opposed the German and Italian armies of occupation. Much of the fighting, in addition to violence against civilians, took place in Bosnia. While the Partisans killed prominent Muslims and Croats, the Ustashas of Croatia essentially engaged in an ethnic cleansing campaign against the Serbs in the Croatia-Bosnia border region. In 1941, some estimate that as many as a quarter million Serbs were killed. After the Croatian puppet army's surrender to the Allies, Marshal Tito of the Serb Partisans came to power and executed up to 100,000 Croatian soldiers.

19. *Id.* ¶ 66. *See also* Krstić, *supra* note 2, ¶ 8.

20. Krstić, *supra* note 2, ¶ 10.

21. *Id.* ¶ 12 (quoting General Sefer Halilović, Commander of the Main Staff of the Army of Bosnia-Herzegovina).

defense stated during the *Krstić* trial, "Without the area of Central Podrinje, there would be no Republic Srpska, there would be no territorial integrity of Serb ethnic minorities; instead the Serb population would be forced to accept the so-called enclave status in their ethnic territories."[22] In order to take over areas for the Republika Srpska, the Bosnian Serbs pursued a process of "ethnic cleansing," using military means to force non-Serb populations to flee.[23]

Throughout the course of fighting between ABiH forces and the VRS, the Srebrenica enclave "was never linked to the main area of Bosnian-held land in the west and remained a vulnerable island amid Serb-controlled territory."[24] In January 1993, in response to a Muslim attack on a Serb village, the Bosnian Serbs severed the link between Srebrenica and Zepa, a Muslim-held town south of Srebrenica, and thus dramatically reduced the Srebrenica enclave to 150 square kilometers. As rural Muslims sought refuge in Srebrenica town, the population swelled to as many as 60,000 people from its usual 37,000.[25]

In spite of a U.N. Security Council resolution declaring that "all parties and others treat Srebrenica and its surroundings as a 'safe area' that should be free from armed attack or any other hostile act,"[26] both parties violated the safe area agreement negotiated with the U.N. Protection Force (UNPROFOR), as the Bosnian Serbs disallowed international aid convoys into the enclave and ABiH soldiers refused to disarm.[27] The chamber also noted that "some ABiH soldiers [in Srebrenica] carried old hunting rifles or no weapons at all and few had proper uniforms."[28] In addition, while 1,000 to 2,000 VRS soldiers were deployed around the enclave, the ABiH soldiers outnumbered the Serbs and regularly carried out reconnaissance and sabotage activities against the Serb forces.[29] Despite these hostilities, the enclave was relatively stable for two years.[30]

In the spring of 1995, the Bosnian Serbs planned to attack Srebrenica definitively. Radovan Karadzić, President of Republika Srpska, issued a directive to the VRS forces to "complete the physical separation of Srebrenica from Zepa as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well-thought out combat operations, create an unbearable situation of total insecurity with

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22. *Id.* (quoting General Radovan Radinović). The "Republika Srpska" refers to the separate political entity Bosnian Serb deputies of the Bosnian Parliament sought to establish following the Bosnian republic's declaration of sovereignty in October 1991. Tadić, *supra* note 16, ¶ 78.

23. Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, U.N. GAOR, 54th Sess., Agenda Item 42, ¶ 19, U.N. Doc. A/54/549, Nov. 15, 1999 [hereinafter Secretary-General's Report]. *See also* Krstić, *supra* note 2, ¶ 562.

24. Krstić, *supra* note 2, ¶ 13 (citing Secretary-General's Report, ¶¶ 33-38).

25. *Id.* ¶ 14 (citing Secretary-General's Report, ¶ 37).

26. *Id.* ¶ 18 (citing U.N. SCOR, 3199th mtg. at 2, U.N. Doc S/RES/819 (1993)).

27. *Id.* ¶ 22-23.

28. *Id.* ¶ 21.

29. Krstić, *supra* note 2, ¶ 21.

30. *Id.* ¶ 25.

no hope of further survival or life for the inhabitants of Srebrenica."[31] This was an order to ethnically cleanse Srebrenica. Citing a Prosecution exhibit, the court suggested that the order was a reaction by Karadzić to international pressure to end the war and negotiate a peace agreement:[32] He sought to take the area while he still had time, before an agreement could be reached. In response to the Bosnian Serb capture of an observation post on May 31, 1995, Bosnian Muslim soldiers attacked a Serb village in late June.[33] This helped provide an excuse for the Bosnian Serb takeover of Srebrenica.

While the VRS soldiers closed in on the town, assistance to ABiH forces in the area from the Bosnian Muslim military and political authorities in Sarajevo was not forthcoming. By July 11, 20,000 to 25,000 residents had sought refuge at the U.N. compound at Potocari outside the town. Spreading terror through threats, rapes, and killings, the VRS soldiers compelled thousands of women, children, and elderly to board buses transferring them out of the enclave. From the morning of July 12, the soldiers held the military-aged men in separate locations. Some were killed in Potocari, while most were bused to detention sites.[34] On the evening of July 11, word spread through the community that "able-bodied men should take to the woods" so as to avoid death at the hands of the Bosnian Serbs.[35] A column of 10,000 to 15,000 men was formed and began marching towards Bosnian Muslim-held territory in the north. The VRS soon captured about one third of the column, comprising several thousand men. Some captives were killed immediately in summary executions, but most were put on buses going to detention sites.[36]

Nearly all the men captured following the take-over of Srebrenica were executed. As the trial chamber recounted:

> Most of the mass executions followed a well-established pattern. The men were first taken to empty schools or warehouses. After being detained there for some hours, they were loaded onto buses or trucks and taken to another site for execution. Usually, the execution fields were in isolated locations. The prisoners were unarmed and, in many cases, steps had been taken to minimise resistance, such as blindfolding them, binding their wrists behind their backs with ligatures or removing their shoes. Once at the killing fields, the men were taken off the trucks in small groups, lined up, and shot. Those who survived the initial round of gunfire were individually shot with an extra round, though sometimes only after they had been left to suffer for a time. Immediately afterwards, and sometimes even during the executions, earth

31. *Id.* ¶ 28 (citing Prosecution exhibit 425, at 10).
32. *Id.*
33. *Id.* ¶ 30 (citing Secretary-General's Report, ¶ 225).
34. *See* Krstić, *supra* note 2, ¶ 37-59.
35. *Id.* ¶ 60.
36. *Id.*

> moving equipment arrived, and the bodies were buried, either in the spot where they were killed or in another nearby location.[37]

Forensic evidence suggests that the victims were connected to Srebrenica and that the majority were killed in mass executions rather than combat. Approximately 17% of the bodies were between thirteen to twenty-four years old and 83% were more than twenty-five years of age.[38] The chamber found that the total number executed was probably between 7,000 and 8,000 men.[39]

III. CRITICAL ANALYSIS OF THE GENOCIDE FINDING

Among its legal findings, the trial chamber determined that the executions at Srebrenica constituted genocide. In order to reach this finding, the chamber had to accept that the atrocities were committed with the specific intent set down in Article 4(2) of the ICTY Statute, which mirrors the definition in the Genocide Convention.[40] This section of the article states:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, or religious group, as such:
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> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.[41]

The chamber found specific intent to destroy part of the Bosnian Muslim group because "[t]he Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children, and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica."[42] The chamber further found that "the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could

37. *Id.* ¶ 68.
38. *Id.* ¶ 74.
39. Krstić, *supra* note 2, ¶ 84.
40. Genocide Convention, *supra* note 15, art. II, 78 U.N.T.S. at 280.
41. ICTY Statute, *supra* note 15, art. 4(2), 32 I.L.M at 1172-73.
42. Krstić, *supra* note 2, ¶ 595.

ever re-establish itself on that territory."[43] The chamber concluded that these observations brought the Serb activities within the meaning of Article 4 of the Statute: Genocide had indeed taken place.

While the *Krstić* opinion appears detailed and considered, the chamber's conclusion as to genocide is problematic. The defense put forward substantial evidence that reasonably characterized the Srebrenica massacres not as genocide, but as a heinous effort to remove a military threat in one of the conflict's most hotly contested regions. As this Note demonstrates, the chamber reached its questionable conclusion because it applied an overly broad standard of intent. The chamber's analytical approach to intent is flawed in two ways. First, the chamber's factual determinations were based on an insufficiently rigorous examination of the defense's arguments concerning the VRS forces' intent in killing the men. More specifically, the chamber did not give adequate consideration to the possible motives underlying the executions. Second, as the defense asserted on appeal,[44] the chamber was too expansive in its interpretation of certain terms in the genocide definition, excessively broadening the circumstances under which genocidal intent may be inferred.

A. The Specific Intent Standard

The most significant point of disagreement between the defense and the chamber concerns the intent of the VRS forces in killing the military-aged men. The defense and the chamber appear to arrive at dissimilar findings of intent because they employ different standards. Stressing underlying reasons or motives for the executions, the defense seems to adopt a high standard of intent, whereas the chamber, relying almost exclusively on what the Serb forces must have known and thought regarding the consequences of the killings, applies a substantially lower standard of intent. Using a more fact-intensive approach, "[t]he Defence contend[ed] that the . . . VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat."[45] Furthermore:

> According to the Defence, had the VRS actually intended to destroy the Bosnian Muslim community of Srebrenica, it would have killed all the women and children, who were powerless and already under its control, rather than undertaking the time and manpower consuming task of searching out and eliminating the

43. *Id.* ¶ 597.

44. *See* Krstić, Appeal Judgment, *supra* note 6, ¶ 5 (summarizing the defense's "two-fold" contentions that "the Trial Chamber's definition of the part of the national group [Krstić] was found to have intended to destroy was unacceptably narrow" and that "the Trial Chamber erroneously enlarged the term 'destroy' in the prohibition of genocide to include the geographical displacement of a community").

45. Krstić, *supra* note 2, ¶ 593.

men of the column.[46]

The chamber, however, seemed to avoid examining motives, endorsing the prosecution's view "that the murder of all the military aged men would constitute a selective genocide, as the VRS knew that their death would inevitably result in the destruction of the Muslim community of Srebrenica as such."[47] In the chamber's final analysis:

> The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group . . . The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica . . . .
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> . . . By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory[48] . . . .
>
> The Chamber concludes that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide.[49]

Essentially, while the defense limited the Bosnian Serbs' intent in killing the men to the elimination of a military threat, the chamber construed the selective destruction of the men to reflect a broader intent to destroy in part the Bosnian Muslims. For the purposes of Article 4, the court found the Bosnian Muslims of Srebrenica to form "part of the protected group," [50] the Bosnian Muslims. Thus, according to the tribunal, by destroying the military-aged men, the VRS intended to destroy the community of the Bosnian Muslims of Srebrenica, which constituted part of the Bosnian Muslims in the former Yugoslavia.

1. The Debate over Motive

Prior to proceeding with a critique of the chamber's analysis, it is

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46. *Id.*
47. *Id.*
48. *Id.* ¶¶ 595, 597 (referring to testimony of Witness Halilović).
49. *Id.* ¶ 598.
50. *Id.* ¶ 560.

important to examine the uncertainty of the role of motive in the specific intent required for a genocide finding. As in domestic criminal law systems, motive and intent are distinct concepts. Concisely stated, "[s]everal individuals may intend to commit the crime, but for different motives."[51] Intent "explains what is being attempted without asking why."[52] While there is no consensus on the extent to which motive should be considered in a genocide determination, it is arguable that academic and judicial inclinations actually tend to lean against incorporating motive into the definition of genocide.[53] As this Note aims in part to show, this tendency is problematic for some genocide determinations.

William Schabas, a noted scholar on international humanitarian law, points out that while "[t]here is no explicit reference to motive in . . . the Genocide Convention [from which Article 4(2) of the ICTY statute is derived] . . . the words 'as such' are meant to express the concept."[54] Cécile Tournaye agrees, finding that without the element of motive, "the term 'as such' would otherwise have no meaning."[55] The lack of clear reference to motive in the Convention partially reflects the fact that "[d]omestic criminal law systems rarely require proof of motive, in addition to proof of intent, as an element of the offence."[56] However, omitting reference to motive was hotly debated in the drafting committees of the Genocide Convention. Some countries, like Norway, supported the view that "'it was the fact of destruction which was vital, whereas motives were difficult to determine.'"[57] On the other hand, many other delegates, "conced[ing] that under common law, motive is generally irrelevant to guilt . . . argued that genocide was a special case."[58] According to the Czech delegate, it would be "a grave mistake to omit the statement of motives, as the nature of the crime which it was intended to punish would be obscured."[59] For Egypt, eliminating reference to motive "would mean losing sight of the basic

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51. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 245 (2000).

52. *Id.* at 246.

53. *Id.* at 251-252; *see also* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 36 (1997) (stating that "most commentators agree that so long as the requisite intent is established, underlying motives are irrelevant").

54. SCHABAS, *supra* note 51.

55. Cécile Tournaye, *Genocidal Intent Before the ICTY*, 52 INT'L & COMP. L.Q. 447, 451 (2003).

56. SCHABAS, *supra* note 51.

57. U.N. GAOR 6th Comm., 3rd Sess., 69th mtg. at 11, U.N. Doc. A/C.6/SR.69 (1948), *quoted in* SCHABAS, *supra* note 51, at 248. Other countries that protested reference to motive included the United Kingdom, Venezuela, Panama, and Brazil. *See id.* at 4-8, 11.

58. SCHABAS, *supra* note 51, at 249.

59. U.N. GAOR 6th Comm., 3rd Sess., 76th mtg. at 5, U.N. Doc. A/C.6/SR.75 (1946). The Czech delegate further added that "the object . . . was to define genocide clearly and precisely." *Id.* at 14. Without reference to motive, "the scope of the Convention would . . . become too broad so that perfectly legal situations might be covered by it." *Id.* Noting the total nature of modern war, New Zealand observed that "there might be bombing which might destroy whole groups. If the motives for genocide were not listed in the Convention, such bombing might be called a crime of genocide; but that would obviously be untrue. It was, therefore, essential to include the enumeration of motives for genocide." U.N. GAOR 6th Comm., 3rd Sess., 75th mtg. at 14, U.N. Doc. A/C.6/SR.75 (1948).

conception of genocide."[60] While not present at these debates, it is noteworthy that Raphael Lemkin, the international jurist who created the word "genocide," expressly mentions motive: "Would mass murder be an adequate name for such a phenomenon? We think not, since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations."[61]

The Venezuelan delegate introduced the phrase "as such" as compromise text where motives could be implicitly rather than overtly included.[62] When put to a vote, the committee chair noted that "[the phrase's] interpretation would be a matter for the several Governments when ratifying and applying the convention."[63] The meaning of "as such," or the extent to which motive should form part of the genocide definition, thus seems to remain open to interpretation[64] and helps explain why the defense and the chamber in *Krstić* appear to employ different standards of intent.

Applying well-established rules of treaty interpretation, which only secondarily depend on the drafting history,[65] the *Krstić* chamber could conceivably have paid limited attention to motive and employed a common standard of intent in a genocide determination. In part because

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60. U.N. GAOR 6th Comm., 3rd Sess., 72nd mtg. at 6, U.N. Doc. A/C/.6/SR.72 (1948).

61. Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227, 227 (1946).

62. U.N. GAOR 6th Comm., 3rd Sess., 76th mtg. at 5-6, U.N. Doc. A/C.6/SR.75 (1946). Venezuela stated that the amendment "should give satisfaction to those who wished to retain an enumeration of motives; indeed, the latter were implicitly included in the words 'as such.'" *Id.*

63. U.N. GAOR 6th Comm., 3rd Sess., 77th mtg. at 6, U.N. Doc. A/C.6/SR.77 (1946).

64. SCHABAS, *supra* note 51, at 251-253 (citing NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION 60-61 (1949)). *But see* RATNER & ABRAMS, *supra* note 53, at 36:

> While the *travaux* are not entirely clear, it appears that a majority of the Sixth Committee interpreted the Venezuelan amendment either as eliminating any motive requirement or as implying a non-limitative description of motives. Under either view, the practical effect of the amendment would be to eliminate the need to establish a particular motive as an element of genocide.

Ratner and Abrams' conclusion that motive need not be established is a stretch considering that most states did not want to reject all reference to motive. Moreover, Ratner and Abrams note that "[t]he line between intent, a relevant factor, and motive, an irrelevant one, may . . . prove thin in practice." *Id.* at 42 (distinguishing between the intent to rape "solely as an act of vengeance or hostility toward the victim" and the intent to rape "as part of an effort to drive members of the victim's group into conditions which the attacker hopes will lead to their deaths" and identifying the latter as an example of genocidal intent). *See also* Tournaye, *supra* note 55, at 451 (citing the International Law Commission's Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, which in 1986, "characterize[d] genocide as a form of crime against humanity and presents 'the motive, *ie*, the intention to harm a person or group of persons because of race, nationality, religion or political opinions' as the characteristic common to all crimes against humanity").

65. *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331, 340. Article 31 provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Under Article 32, the "preparatory work of the treaty and the circumstances of its conclusion" are supplementary means of interpretation and are to be consulted when interpretation according to Article 31 "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable."

the Genocide Convention does not explicitly include motive, the "ordinary meaning"[66] of certain terms in the convention "in light of [the treaty's] object and purpose"[67] is rather imprecise,[68] and the drafting history does not supply definitive guidance. Neither does the ICTY's own jurisprudence. The suggestion in *Jelisić*, for example, to "infer [genocide] from a number of facts and circumstances"[69] is rather open-ended.

However, upon further examination, the chamber's method of reasoning in this case, by excluding considerations of motive, has strange and potentially negative consequences. To the extent that such results are inconsistent with the aims of the interpretive principles in the Vienna Convention on the Law of Treaties,[70] then the *Krstić* opinions are unsatisfactory, and an alternative, more workable understanding of intent for the crime of genocide must be identified and applied.

2. Problems with Excluding Motive

As mentioned, in finding specific intent, the chamber emphasized the consequences of the killings. But this is inadequate, for if findings of intent were based solely on results, then the interpretations of both the chamber and the defense would be plausible. Pursuant to the chamber's view, yes, the military-aged men who were executed were part of the Bosnian Muslim group; yes, they were destroyed; and yes, the community of Srebrenica, as it was in 1995, has ceased to exist.

On the other hand, as the defense pointed out, rather than killing the women, children, and elderly, the VRS transported them to other areas. By killing military-aged men—potential combatants—the VRS made certain that Srebrenica could not be defended and would remain "cleansed." Given that the consequences seem to sustain both characterizations of the facts, neither the chamber nor the defense can prove intent exclusively on these results. As Schabas points out, "[t]he crime of genocide does not require a result, and courts need not determine whether the actual method

66. *Id.* art. 31, 1155 U.N.T.S. at 340.

67. *Id.*

68. For example, two interpretations could be drawn from the "ordinary meaning" of "destroy a national, ethnical, or religious group, as such." On the one hand, including the modifiers "national, ethnical, or religious" to describe the group could suggest that "the attempt to destroy" be based on such discriminatory grounds. On the other hand, the modifiers could merely serve to delineate the characteristics members of the group must share in order for their destruction to qualify as genocide. The *Krstić* chamber appears to take this latter approach. In terms of the treaty's "object and purpose," ambiguity over the role of motive in turn creates uncertainty as to whether or not the convention specifically seeks to condemn discrimination (in which case motive is significant) or if its goal is to preserve national, ethnic, and religious diversity (in which case motive would seem less critical).

69. Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Chamber Judgment, ¶ 47 (July 5, 2001) (emphasis added) [hereinafter Jelisić, Appeal Judgment]; *see also* Rutaganda v Prosecutor, Case No. ICTR-96-3-A, Appeals Chamber Judgment, ¶ 528 (May 26, 2003) (cited in Krstić, Appeal Judgment, *supra* note 6, ¶ 34).

70. *See supra* note 65, art. 32(b), 1155 U.N.T.S. at 340.

was well chosen."[71] Put slightly differently, the fact that certain results came about does not necessarily prove that those results were intended when certain acts were committed. More evidentiary analysis may be required,[72] in addition to clarification of terminology used to characterize the acts' consequences.

While the chamber's approach is flawed in its dependence on results to show intent, its stress on what the VRS forces must have known about the impact of the killings on the general Srebrenica community is also thorny. Relying on the testimony of social science experts,[73] the chamber asserts that "the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society."[74] More specifically, the chamber interprets the mass executions' "lasting impact on the entire group" to have "effectively destroyed" the Srebrenica Muslims.[75]

However, what the Bosnian Serb forces knew about Bosnian Muslim societal structure is arguably incidental. Even if they knew that executing the men would have a lasting impact, it does not necessarily mean that such knowledge formed the basis of the perpetrators' intent, especially when considered in conjunction with the fact that conscious steps were taken to preserve the rest of the community by bussing its members to safer areas. Through this reasoning, the chamber is effectively equating knowledge, a lower level of intent, with purpose, the highest standard of intent, which, as Cecile Tournaye points out, inheres in genocide's intent requirements.[76]

Given that patriarchal structures are common to many societies, knowledge of the impact of the men's elimination is almost too obvious and facile an assertion. Killing any man who has dependents, for whatever reason, would likely have a lasting impact on his dependents. As the

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71. William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 47 (2001).

72. In a discussion of *mens rea* in criminal law, William Schabas observes that:

> Criminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the *mens rea* from proof of the physical act itself. . . .But the material act may not provide enough information to enable a court to conclude that the intent is specific, and not merely general. For example, if a victim is killed by an automobile, in the absence of other elements the likely conclusion will be that it was an 'accident'. . . .If the prosecution intends to prove that killing by an automobile is intentional, or even premeditated, considerably more evidence of intent is required.

SCHABAS, *supra* note 51, at 222.

73. Wald, *supra* note 10.

74. Krstić, *supra* note 2, ¶ 595.

75. *Id.* ¶ 597. *See also supra* note 44.

76. Tournaye, *supra* note 55, at 450 (citing Jelisić, Appeal Judgment, *supra* note 69, ¶ 46, which states that "specific intent requires that the perpetrator . . . seeks to achieve the destruction, in whole or in part of a national, ethnical, racial or religious group, as such" and Krstic, *supra* note 2, ¶ 561, which states that "[m]ere knowledge of the victims' membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such").

defense argued, "these consequences would remain the same, regardless of the intent underlying the killings and thus 'do not contribute to deciding and determining what the true intent of the killing was.'"[77] This is not to suggest that inquiring into the nature of societal structures is irrelevant to ascertaining genocidal intent; far from it. It is merely to assert that, in some cases, particularly where the victims are both male and potential combatants in an armed conflict, such an inquiry should not be as dispositive as it appears to be in *Krstić*.

3. The Intent to Eliminate a Military Threat

This reasoning applies to the military context, strengthening the defense's characterization of the intent to eliminate a military threat. When a soldier kills another in combat, the soldier who kills does not necessarily intend to have a "lasting impact" on the family of the deceased soldier even if the combatant may assume that such an outcome would result. If there were such intent to affect the family of the soldier who is killed, that intent is presumably secondary to the intent to defeat the enemy.

Similarly, one cannot assume that the killing of the military-aged men was necessarily or primarily intended to afflict the rest of the Srebrenica community even if the perpetrators were aware of such a result. In the context of an armed conflict over territory, it is logical to infer that the most immediate goal is to weaken or eliminate the military opponent. At the Nuremberg trials, American General Telford Taylor used a similar argument: "Berlin, London and Tokyo were not bombed because their inhabitants were German, English or Japanese, but because they were enemy strongholds."[78] While contrary to the laws of war, summarily executing all potential combatants could be viewed as an efficient tactic for achieving the primary objective to defeat an "enemy stronghold" like Srebrenica. William Schabas seems to suggest this analysis in his observation that:

> [T]he Prosecutor's contention that the intent in killing the men and boys of military age was to eliminate the community as a whole . . . seems a rather enormous deduction to make on the basis that men and boys of military age were massacred. Can there not be other plausible explanations for the destruction of 7,000 men and boys in Srebrenica? Could they not have been targeted precisely because they were of military age, and thus actual or potential combatants?[79]

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77. Krstić, *supra* note 2, ¶ 593.

78. Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses, in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 31, 33 (George J. Andreopoulos ed., 1994) (internal citations omitted).

79. Schabas, *supra* note 71, at 46.

It is important to note that all these characterizations of the VRS forces' "true intent" by both the defense and Schabas actually relate to the Bosnian Serbs' motives. They suggest that without inquiring into motives in an effort to find specific intent, the chamber's deductive reasoning based on the perpetrators' presumed knowledge of consequences, particularly when those consequences are not likely to bring about further physical destruction, is potentially too sweeping.

Indeed, the defense countered the genocide claim by building a case for alternative motives underlying the killings. The defense assembled facts to "prove that the VRS forces intended to kill solely all potential fighters in order to eliminate any future military threat."[80] For instance, "[t]he wounded men were spared. More significantly, 3,000 members of the column were let through after a general truce was concluded between the warring parties."[81] With respect to the claim that the VRS forces sought to destroy the Srebrenica community, the defense "points to the fact that the VRS forces did not kill the women, children, and elderly gathered at Potocari but transported them safely to Kladanj, as opposed to all other genocides in modern history, which have indiscriminately targeted men, women, and children."[82]

Schabas props up this analysis in asking, "Would someone truly bent upon the physical destruction of a group, and cold-blooded enough to murder more than 7,000 defenseless men and boys, go to the trouble of organizing transport so that women, children, and the elderly could be evacuated?"[83] If the alleged purpose was to destroy the group, transporting the women, children, and elderly to more secure areas does seem counterintuitive. The allegation that the Bosnian Serb forces intended physical destruction of the group might be stronger if the forces had simply abandoned the women and children, but this too may depend on other factual findings.

Other facts to which the chamber refers lend support to the Bosnian Serb forces' perception of the Bosnian Muslim men as a military threat. First, in the years prior to the takeover, ABiH soldiers outnumbered the Bosnian Serb forces in the area and regularly engaged in sabotage activities against them.[84] The chamber relates that "on the evening of July 11, 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the ABiH and attempt a breakthrough towards Bosnian Muslim-held territory."[85] While it may be true that "the young men were afraid they would be killed if they fell into Bosnian Serb hands in Potocari," these facts also carry military connotations that the chamber

80. Krstić, *supra* note 2, ¶ 593 (citing defense closing arguments).
81. *Id.* ¶ 593.
82. *Id.*
83. Schabas, *supra* note 71, at 46.
84. *See supra* note 29.
85. Krstić, *supra* note 2, ¶ 60.

seems to ignore.[86] The term "able-bodied" is often used to describe men capable of military service, though of course it may also have been employed to refer to those men who were merely able to march in a column; that is, those who were not wounded or sick. While the column may have been conceived as a method by which ABiH soldiers would protect civilian men as they escorted them to safety, the formation of a column, let alone a "breakthrough," sounds like a military maneuver.

The chamber consistently refers to the fact that Bosnian Serb forces failed to distinguish Bosnian Muslim soldiers from civilian men, but as the chamber also relates, the 28th Division of ABiH that remained in the enclave was disorganized. Many members of the 28th Division that remained in the enclave lacked weapons and "few had proper uniforms."[87] In light of these facts, if the Bosnian Serb forces were not at times confused as to which men were soldiers and which were not, there was some reason for them to suspect that most able-bodied Bosnian Muslim men could be combatants.

The chamber's consistent use of the term "military-aged" to describe the men also betrays an implicit understanding on the part of the chamber that the men could have participated in armed resistance, that they were in fact potential combatants. Of course, international law prohibits the targeting of civilians in conflict, such as "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms."[88] Recognizing that the executed men could easily be perceived as potential combatants, if not actual combatants, is thus not intended to expiate the VRS of having committed a horrendous atrocity. Rather, in suggesting that the VRS forces' motives were related primarily to the achievement of limited military objectives, the observation is intended to cast doubt on the VRS's genocidal intent to destroy the Srebrenica Muslims by killing the military-aged men.[89]

It is also important to highlight that nowhere is the allegation challenged that "[t]he offensive against the safe area aimed to ethnically cleanse the Bosnian Muslims" from the region.[90] The point over which the chamber and the defense differ concerns whether or not in pursuing that objective by killing the military-aged men, the VRS intended to destroy the Bosnian Muslims in part—and thereby commit genocide—or if the VRS's intent was restricted to taking the territory by ensuring the permanent removal of the Bosnian Muslims of Srebrenica to another area. In the context of ethnic cleansing, both characterizations comprise ethnic hatred of the other group. The question thus raised by the divergent views of the chamber and the defense concerns when ethnic cleansing, which may

86. *Id.*

87. *See supra* note 28.

88. Geneva Convention (IV) Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, art. 3(1), 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 137 [hereinafter GPW].

89. SCHABAS, *supra* note 51, at 254 (stating "where the defense can raise a doubt about the existence of a motive, it will have cast a large shadow of uncertainty as to the existence of genocidal intent").

90. Schabas, *supra* note 79, at 45-46 (quoting Krstić, *supra* note 2, ¶ 592).

comprise war crimes and crimes against humanity, may also constitute genocide.[91]

Though the defense pointed out the chamber's difficulties in establishing genocidal intent, such as over-reliance on the outcome of the takeover and Bosnian Serb forces' potential awareness of the effect of the men's disappearance on the community, and in spite of substantial evidence supporting the Bosnian Serbs' perception of the Srebrenica men as a military threat, the chamber persisted in finding that genocidal intent underlay the mass executions. The chamber responded:

> Granted, only the men of military age were systematically massacred, but it is significant that these massacres occurred at a time when the forcible transfer of the rest of the Bosnian Muslim population was well under way. The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group.[92]

Even if both the characterizations of the defense and the chamber seem plausible, ICTY and ICTR jurisprudence do not supply clear guidance on what to do when different inferences may be derived from facts surrounding the same events. Under such circumstances, discretion is ultimately left to the judges. When evidence contradicts or casts doubt on certain inferences, as the evidence put forward by Krstić's defense does, a court applying a standard of reasonable doubt should shy away from incrimination.

The opinion itself suggests that the defense is not required to prove the perpetrators' actual intent in order to counter a genocide claim. It merely has to establish a reasonable doubt that the Bosnian Serb forces' intent in killing the military-aged men was genocidal.[93] This also seems consonant with what one scholar identifies as "the well-established principle[] . . . of giving criminal defendants the benefit of the doubt in cases where the applicable law is unclear."[94] Instead, ambiguity in genocide's intent requirement, and a general sense that motives are not significant to a genocide determination, enable the chamber to avoid directly addressing the defense's arguments and reaffirm its initial approach. According to the *Krstić* appeals chamber, "as long as a reasonable Trial Chamber could have arrived at the same conclusions," based "on a number of factual findings," the trial chamber's determination "must be accepted."[95] As far as intent is

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91. Tournaye, *supra* note 55, at 447.

92. Krstić, *supra* note 2, ¶ 595.

93. *Id.* ¶ 593 (referring to Defense conclusion that "there is no proof and evidence upon which this Trial Chamber could conclude beyond all reasonable doubt that the killings were carried out with the intent to destroy").

94. David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 276 (2002).

95. Krstić, Appeal Judgment, *supra* note 6, ¶ 26.

concerned, the trial chamber's conclusion of genocide is arguably reasonable in light of the legal definition's ambiguities, but according to certain basic principles of legal interpretation, and as a matter of common sense, it is not.

B. Definitional Ambiguities

The second way in which the chamber's approach is flawed concerns the liberties the chamber took with other ambiguous elements of the genocide definition. The effect of this approach is to broaden the set of circumstances from which genocidal intent may be inferred.

1. "In Part"

One of the thorny elements of the genocide definition relates to the meaning of a group "in part." The court reasonably rejected the prosecution's attempt to define the targeted group as the "Bosnian Muslim population of Srebrenica."[96] The chamber recognized that "[a] group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits."[97] Thus, in order to define the targeted group, the chamber looked for "the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived . . . ethnical . . . or religious characteristics."[98] Not only did the 1963 Yugoslav Constitution recognize the Bosnian Muslims as a "nation," it is clear that "the highest Bosnian Serb political authorities and the Bosnian Serb forces operating in Srebrenica in July 1995 viewed the Bosnian Muslims as a specific national group."[99] The chamber observed that "[t]he only distinctive criterion would be [the Srebrenica Bosnian Muslims'] geographical location, not a criterion contemplated by the [Genocide] Convention."[100] The chamber thus "conclude[d] that the protected group, within the meaning of Article 4 of the Statute, must be defined . . . as the Bosnian Muslims. The Bosnian Muslims of Srebrenica . . . constitute a part of the protected group under Article 4."[101]

This reasoning is sound, but in the course of applying the finding that the Bosnian Muslims of Srebrenica represent part of a protected group, the court stretched the genocide definition in a problematic way. The chamber concluded that by killing the Bosnian Muslim men of military age, or part of the Muslim population at Srebrenica, the Bosnian Serb forces intended to destroy the Srebrenica Muslims, part of the Bosnian Muslim group. The

96. Krstić, *supra* note 2, ¶ 558.

97. *Id.* ¶ 557.

98. *Id.* (citing Prosecutor v. Nikolić, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 27 (Oct. 20, 1995) and Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Dec. 14, 1999) [hereinafter Jelisić]).

99. *Id.* ¶ 559.

100. Krstić, *supra* note 2, ¶ 559.

101. *Id.* ¶ 560.

court effectively stated that destroying part of a part of a group constitutes genocide. In so doing, the chamber seemed to echo reasoning from other ICTY jurisprudence, which suggests that targeting certain, significant segments of a group may constitute genocide. In *Prosecutor v. Jelisić*, the trial chamber stated that genocidal intent may manifest in "the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such."[102] This view was also put forward in a report by the Commission of Experts, which the Security Council established in 1992 to investigate violations of international humanitarian law in the former Yugoslavia. The Commission reported:

> If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others—the totality per se may be a strong indication of genocide regardless of the actual numbers killed. The character of the attack on the leadership must be viewed in the context of what happened to the rest of the group. If a group has its leadership exterminated and, at the same time or in the wake of that, has a relatively large number of the group members killed or subjected to other heinous acts (for example, deported on a large scale or forced to flee) the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.[103]

The Commission went on to report that, "[s]imilarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well."[104] Though the Expert Report stresses the significance of the group's leadership, it also increases the scope of the definition to include military personnel as a segment of the population significant enough to qualify for genocide, assuming the fate of the rest of the group involved other heinous acts. The Expert Report thus appears to buttress the *Krstić* chamber's analysis and conclusion of genocide at Srebrenica.

However, support from the Expert Report is of limited use since its reasoning is problematic and not wholly consistent with ICTY jurisprudence. First of all, events at Srebrenica are not consistent with the report's formulations, since while military-aged men were killed, "the vast

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102. Jelisić, *supra* note 98, ¶ 82.

103. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, ¶ 94, U.N. Doc. S/1994/674 (1994).

104. *Id.* ¶ 94.

majority of Muslim men who were of political or military importance in the . . . enclave successfully evaded capture [since] . . . as is so often the case in war, a person's importance . . . provided the best assurance of survival."[105] Leaders captured on both sides were exchanged.[106] In *Prosecutor v. Sikirica*, where killings at a concentration camp were at issue, the chamber observed that the "[victims] do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service."[107] For the *Sikirica* chamber, the common characteristic of military age was insufficient to constitute a significant segment because the number of victims was "limited"[108] and participation in armed resistance does not necessarily merit treatment as a community leader.[109] As the chamber said, "[a]cceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless."[110] The chamber thus rejected the genocide charge. In stressing that the numbers were "limited," the chamber faintly suggested that killing larger numbers of potential combatants may qualify as a significant segment because it would have a "significant impact on the survival of the Muslim population."[111] However, the chamber tempered this suggestion by stating that men of military age cannot all qualify as leaders. *Sikirica* thus creates some confusion as to when or whether military-aged men may count as a significant segment for a genocide determination.

This confusion is not surprising, for there are other problems with both the category of military-aged men and the significant segment approach more generally for genocide determinations. First, as suggested in the Expert Report, killing military-aged men would impact the survival of the community those men might be called to defend. But to include military-aged men in the set of segments of society that may be considered for a genocide finding would be inconsistent with the fact that destroying defenses, including military personnel (or those suspected of participating in the military), is inherent to warfare. While killing soldiers under certain circumstances in war is certainly criminal,[112] identifying as genocide the killing of men who may serve a military function treads too unrealistically on natural expectations of war. Can a military officer be expected to engage

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105. JAN WILLEM HONIG & NORBERT BOTH, SREBRENICA: RECORD OF A WAR CRIME 58 (1996).

106. *Id.*

107. Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶ 80 (Sept. 3, 2001) [hereinafter Sikirica].

108. *Id.* ¶ 81.

109. *Id; see also* Schabas, *supra* note 71, at 45.

110. Sikirica, *supra* note 107, ¶ 81.

111. *Id.*

112. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31, 32-34; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, 86-88; GPW, *supra* note 88, art. 3, 75 U.N.T.S. at 135-137.

in conflict if there is a concern that the killing of some combatants could be construed as genocide?

Schabas points out a second reason why the *Sikirica* chamber may have rejected military-aged men as a significant segment. Specifically, the "significant segment" argument itself is flawed because it could result in rather arbitrary "value judgments about how important one or another group may be to the survival of the community."[113] Women and children could arguably be a more logical target than community leaders or military aged men if the objective is to prevent the physical continuation of the group. Targeting community leaders and military-aged men may be a brutal means to the more restricted end of defeating the enemy and subduing it so that it will abide by a certain policy. Such objectives fall short of genocide. Moreover, preserving the lives of women and children could suggest that the enemy is operating under the assumption that the targeted group will live on.

A third flaw in the "significant segment" approach is that, by accepting that the destruction of a part of a part of a group may constitute genocide, it employs a logic that could stretch indefinitely. Say, for instance, that the Bosnian Serb forces only executed military leaders, but the chamber found that this act destroyed the remaining men's capacity to defend and care for their community, which in turn led to the population being forcibly transferred and never able to return to that territory, or carry out their way of life. Would this hypothetical destruction of a part of a part of a part of a group be genocide? The notion is hard to swallow. It dilutes the meaning of genocide.

2. "Destroy"

In addition to stretching the meaning of a "group, in part," the *Krstić* chamber problematically stretched the meaning of "destroy" in the genocide definition. Tournaye observes that "ICTY judgments have consistently found that the destruction referred to under the Genocide Convention only covers a physical or biological destruction."[114] The *Krstić* decision was among those that upheld this view,[115] citing the International

113. Schabas, *supra* note 71, at 45.

114. Tournaye, *supra* note 55, at 454 (citing Krstić, *supra* note 2, ¶ 580; Jelisić, *supra* note 98, ¶¶ 78-83; Sikirica, *supra* note 107, ¶¶ 63-86).

115. Krstić, *supra* note 2, ¶ 580 ("[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group."). The trial chamber was careful to indicate, however, that it reached this conclusion "with due regard for the principle of *nullum crimen sine lege*." *Id.* Recent developments, according to the tribunal, suggest a more liberal view of the meaning of "destroy." *Id.* ¶¶ 577-580. A 1993 General Assembly resolution, for instance, identified ethnic cleansing as a form of genocide. *Id.* ¶ 578 (referring to U.N. GAOR, 47th Sess., Agenda Item 143, U.N. Doc. A/Res/47/121 (1993)). The notion of destroy as implied by Raphael Lemkin, the originator of the word "genocide," also seems more open-ended. He writes, "genocide does not necessarily mean the immediate destruction of a nation. . . . It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." RAPHAEL LEMKIN, AXIS

Law Commission's analysis that "[a]s clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group."[116] This is consistent with the *Eichmann* case, where the District Court of Jerusalem distinguished between the Nazis' forcing Jews to flee and the "sense of total extermination" embraced by the Final Solution in 1941.[117]

While most of the men of Srebrenica were physically destroyed, the women, children, elderly, and wounded men survived. In concluding that genocide had occurred, the chamber thus viewed the destruction of the Srebrenica Muslims in a figurative sense, apparently contradicting its affirmation of the literal meaning of "destroy." The Prosecution stated that "what remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. It's a community in despair . . . it's a community that's a shadow of what it once was."[118] Summarizing the destruction of the Srebrenica community, the chamber stated:

> [T]he elimination of virtually all the men has made it almost impossible for the Bosnian Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives. . . . [They] have been forced to live in collective and makeshift accommodations for many years. . . . [The] vast majority of Bosnian Muslim refugees [and adolescent survivors] have been unable to find employment.[119]

In addition, the women continue to live with the trauma of their experience and the denial of "closure that comes from knowing with certainty what has happened to their family members."[120] The chamber also implies destruction of the community in asserting that the Bosnian Serb forces "eliminated all likelihood that [the community of Bosnian Muslims in Srebrenica] could ever re-establish itself on that territory."[121] Thus, for the chamber, the Srebrenica Muslims were destroyed in a metaphorical sense.

In addition to recognizing how the events at Srebrenica have

RULE IN OCCUPIED EUROPE 79 (1944). According to this definition, ethnic cleansing is not necessarily the same as genocide if the main purpose is to move a population elsewhere rather than annihilate the group. Even with this broader view, Lemkin suggests that the acts must ultimately be directed towards the physical or biological destruction of the group or part of the group.

116. Krstić, *supra* note 2, ¶ 576 (citing International Law Commission Draft Code, at 90-91).

117. *A-G Israel v. Eichmann* (1961), *in* 36 INTERNATIONAL LAW REPORTS 18, 104 (E. Lauterpacht ed., 1968).

118. Krstić, *supra* note 2, ¶ 592.

119. *Id.* ¶ 91.

120. *Id.* ¶ 93 (citing testimony of Jasna Zecivic, Director of Vive Zene, a non-governmental organization that provides psychosocial support for Srebrenica survivors).

121. *Id.* ¶ 597.

devastated the community, the chamber likens the fate of the survivors to physical destruction through certain turns of phrase. Instead of the events at Srebrenica leading to the physical *destruction* of the group, the chamber declares that the events resulted in the "physical *disappearance* of the Bosnian Muslim population at Srebrenica."[122] Similarly, use of the phrase "effectively destroyed" rather than the more direct and unmodified "destroyed" suggests an implicit acknowledgement by the chamber of its figurative approach to the meaning of "destroy." The chamber's description of families as having been "dismembered and irreparably rent"[123] also captures the ambiguity between physical and metaphorical destruction. Using subtle language, the chamber interprets the consequences of the Srebrenica massacres to fit a notion of "destroy" which Article 4(2) debatably embodies.

C. Summary

In summary, the chamber's reasoning in finding genocide has two problems. First, in excluding considerations of motive, the chamber's interpretation of facts to infer genocidal intent was overly selective since the facts as set forth by the defense presented a plausible alternative for the Bosnian Serb forces' underlying intent. Instead of seeking to destroy part of the Bosnian Muslims in killing the military-aged men of Srebrenica, the VRS may have primarily sought to eliminate a military threat in a hotly contested region. The transfer of the remaining inhabitants of Srebrenica may be viewed as part of a plan to remove one ethnic population and take over the area, but not to commit genocide.

The second problem in the chamber's reasoning relates to the way in which the chamber stretched the meaning of specific wording in Article 4(2). As shown, the meaning of a group "in part" does not permit us to conclude that the destruction of a "part of a part of a group" constitutes genocide. Related to this, the chamber also conveys that a group need not be physically destroyed to be "effectively destroyed." Through such broad reasoning, the chamber has promoted a problematic interpretation of genocide.

Problems with the chamber's approach suggest that in some cases, particularly those concerning efforts to destroy part of a group, ascertaining genocidal intent cannot be entirely divorced from inquiring into motives. Where a set of acts and their consequences may reasonably lead to a range of inferences and explanations, the exercise of determining genocidal intent should be subject to considerable rigor, perhaps requiring evaluation of further evidence and deeper examination of the parties' application of terminology. In cases where fewer facts challenge the inference of intent to physically destroy part or all of a protected group, inquiring into motives or ascertaining a discriminatory basis, may be less

122. *Id.* ¶ 595 (emphasis added).
123. *Id.* ¶ 90.

important. Such an approach to genocide's intent requirement is responsive to the Genocide Convention's dual aim to condemn ethnic and religious discrimination and to preserve ethnic and religious diversity.[124]

IV. NEGATIVE IMPLICATIONS OF SREBRENICA AS GENOCIDE

As the ICTY's first genocide conviction, the *Krstić* decision and the chamber's broad interpretation of genocide have significant implications for the international tribunal, for the development of international humanitarian law, and ultimately, for the willingness and capacity of foreign entities to prevent or mitigate mass violence. While some of these implications may be based on good intentions, this Part seeks mainly to highlight the potentially negative implications of the *Krstić* chamber's broad approach to genocide.

A. Implications for the ICTY

With respect to the reputation of the tribunal, an expansive view of the genocide definition may seem advantageous initially, but such a view might ultimately disserve the tribunal. On the one hand, the *Krstić* decision enables the ICTY to fulfill a "historic mission"[125] to prosecute the crime of genocide.[126] The conviction may be seen as the culmination of efforts over four decades (since the creation of the Genocide Convention) to establish an international court to prosecute serious violations of humanitarian law.[127] The tribunal may tout the genocide conviction as an accomplishment, as a way of satisfying the expectations generated by the media and international organizations during and soon after the war in the

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124. *See supra* note 68; *see also* Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2265 (arguing for a knowledge-based interpretation of genocidal intent so as to cover groups that fall "prey to discriminatory extermination in a campaign of persecution that lacks a clear objective to destroy the group in its collective sense"). Without endorsing Greenawalt's approach wholesale, his analysis lends support to the notion that a motive inquiry would be less important in cases involving the (threat of) physical destruction of a protected group on a large scale or of a significant proportion of that group. Such cases blur distinctions between knowledge and purpose to destroy.

125. *See* William Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1034 (2003). Schabas writes:

> [I]f it cannot be established that [Slobodan Milosevic,] the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity, and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit, we may well ask whether the Tribunal will have fulfilled its historic mission.

126. *See* Schabas, *supra* note 71, at 23.

127. *Id.* at 24 (stating that "[e]fforts to create. . .an international tribunal [to try persons charged with genocide] were launched immediately [in 1948] by the General Assembly, but nothing substantial came of them for more than four decades").

former Yugoslavia.[128] In the words of one former ICTY judge:

> What has the Tribunal accomplished in its nine years? . . . [S]everal other high-ranking military and civic leaders accused of war crimes or crimes against humanity . . . have been apprehended or voluntarily surrendered to the *Tribunal.* These include General Radislav Krstić, Commander of the Drina Corp[s,] who has been found guilty of genocide in the Srebrenica massacres of up to 8,000 young Muslim men.[129]

A genocide conviction for a tragedy of Srebrenica's magnitude helps establish the tribunal as an institution that has fulfilled its promise to express the international community's moral outrage at the atrocities that transpired in the former Yugoslavia during the early to mid-1990s. Commenting on the *Krstić* case, one expert observer of the ICTY from the Coalition for International Justice remarked that "[g]enocide is different from any other crime. For many surviving Bosnian Muslims, anything less than a genocide conviction could feel like a slap in the face."[130] In addition, a genocide conviction may be viewed as the international community's implicit apology to the victims for its lack of action to prevent the massacres. Aryeh Neier, President of the Open Society Institute, affirms that "the nations of the world that failed to act responsibly and effectively to stop genocide as it was taking place in Bosnia and Rwanda must also accept political responsibility."[131] Numerous other voices have reproached the international community for failing to act to prevent or stop the atrocities.[132]

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128. *Id.* at 24-25 (noting that "popular journalistic accounts repeatedly described the ongoing atrocities in Bosnia and Herzegovina as genocide" and referring, among others, to ROY GUTMAN, A WITNESS TO GENOCIDE: THE 1993 PULITZER-PRIZE WINNING DISPATCHES ON THE "ETHNIC CLEANSING" OF BOSNIA (1993); MICHAEL A. SELLS, THE BRIDGE BETRAYED, RELIGION AND GENOCIDE IN BOSNIA (1996); and NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING" IN EASTERN EUROPE (1995)).

129. Patricia M. Wald, *Trying War Crimes in International Courts,* 31 INT'L J. LEGAL INFO. 278, 279-80 (2003).

130. Ashbel S. Green, *Portland Lawyer Takes On Case of War Crimes,* THE OREGONIAN, Dec. 26, 2003, *available at* http://alumni.princeton.edu/~cl1954/NormSepenuk.htm.

131. Aryeh Neier, *War Crimes Tribunals: The Record and the Prospects: Conference Adjournment,* 13 AM. U. INT'L L. REV. 1579, 1582-83 (1998).

132. *See, e.g.,* Walter Gary Sharp, Sr., *Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo,* 23 MD. J. INT'L L. & TRADE 295, 329 (1999) (stating that the international community "failed to act early enough to stop the killings" in Bosnia); Herman Reinhold, *Target Lists: A 1923 Idea with Applications for the Future,* 10 TULSA J. COMP. & INT'L L. 1, 31 (2002) (stating that doing nothing in the face of genocide "leads to criticism for failure to act, or failure to act sooner"); Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties,* 40 SANTA CLARA L. REV. 1053, 1059, n.15 (2000); Peter Kamerer, *A Balancing Act: While the Media's Spotlight Is Focused on Iraq, One UN Official Is Making Sure Other Issues Around the World Are Not Neglected,* S. CHINA MORNING POST, June 16, 2004, *available at* 2004 WL 79400094 (quoting Dr. Shashi Tharoor, U.N. Undersecretary-General for Communications and Public Information, as saying that the United Nations "is not perfect—it failed to act . . . in Bosnia or the genocide in Rwanda"); David Wastell, *Thatcher Accuses West,* SUNDAY TELEGRAPH (London), Aug. 6, 1995, at 2 (reporting that "Lady Thatcher

A genocide conviction also has implications for other cases before the tribunal and other institutions. Professor Michael Scharf points out that, "[o]n a practical level, if the court determines that Srebrenica does not fit the legal definition of genocide, it would be very difficult to make the charge stick against Milosevic."[133] He goes on to state that "it is crucial that [Milosevic] be convicted of genocide . . . [b]ecause if you can't convict Milosevic, then who can you convict of genocide in the modern age?"[134] For the Iraqi war crimes tribunal, *Krstić* "will be a vitally important decision, a vitally important doctrine of what constitutes genocide in Saddam's case."[135] Thus, for some international human rights activists and scholars, a conviction for "the crime of crimes" may be seen as a triumph for the development of international humanitarian law, especially as it increases the extent to which the definition may be applied to other cases.

These observations suggest that the ICTY had much to gain from characterizing Srebrenica as genocide: historic recognition, popular approval, validation of the Bosnian Muslims' suffering, and influential legal precedent. These gains may well serve to portray the genocide finding in *Krstić* as an achievement, but in the process of reaching this outcome, the *Krstić* chamber may have undermined the ICTY's credibility.

It is conceivable that the *Krstić* chamber recognized these gains prior to the final judgment, and it is not unreasonable to wonder whether these factors affected the chamber as it strained to interpret the events of Srebrenica within the terms of Article 4(2). As analysis in the previous section showed, the *Krstić* chamber appears to have heavily relied on general consequences to prove intent, to the exclusion of considering other plausible motives, and the chamber stretched the meaning of certain words within the genocide definition in expansive ways. Consideration of these pressures raises the question of the role political factors should play, if at all, in the creation of international criminal jurisprudence. While the ICTY should note the international community's moral outrage, the tribunal should also strive to avoid the impression that such institutions are susceptible to such pressures.

In other words, convicting Krstić for genocide (or at least, aiding and abetting genocide, as the Appeals Chamber found) could be viewed by some as an achievement for the prosecutors, but not for the chamber and not for the ICTY. Rather than by its outcomes, the chamber's success must be measured by the rigor of its legal analysis. This is the foundation of enduring relevance and wide acceptance of the law the chamber promotes.

The *Krstić* chamber's adoption of a more restrained approach to the

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has renewed her assault on the Western powers for failing to act more effectively over Bosnia, accusing the UN, and, by implication, Britain, of 'acquiescing in genocide'"); *see also* Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 257 (1995) (suggesting that some may view the Yugoslav tribunal as a "mere token response intended to absolve the civilized world of responsibility for inaction").

133. Green, *supra* note 130.

134. *Id.*

135. *Id.* (quoting Robert Donia, a visiting scholar at the University of California at San Diego who has testified for the prosecution in seven ICTY trials).

genocide definition would have enhanced the tribunal's authority since it would have integrated other approaches to international law, those with potentially wider appeal to states obligated to enforce the law.[136] From an activist's perspective, compromising with critics can weaken the basis of the critics' opposition and thus better serve one's goals in the long run. Moreover, whether foreign governments accept and internalize principles of international humanitarian law depends in part on whether ICTY jurisprudence is sound and realistic. To the extent that reputation and influence rest on credible authority rather than on what some might view as desirable outcomes, decisions like *Krstić* potentially undercut the tribunal's influence.[137] In light of these pressures, the genocide conviction in *Krstić* raises questions regarding the vulnerability of international tribunals to extra-legal considerations.

B. Implications for International Humanitarian Law

Since the ICTY is an instrument of international humanitarian law, the suggestion that the *Krstić* chamber's broad interpretation of Article 4(2) may have cost the tribunal legitimacy at some level also implies certain costs to the substance of and state adherence to international humanitarian law. Some problems arise from the fact that the *Krstić* decision broadens the applicability of the crime of genocide to the point where most instances of ethnic cleansing may be construed as genocide. The *Krstić* trial chamber is not the first entity to liken ethnic cleansing to genocide. In a separate opinion to a preliminary decision of the International Court of Justice, Judge Elihu Lauterpacht wrote that "forced migration of civilians, more commonly known as 'ethnic cleansing,' is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, or presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide."[138] In a 1992 resolution, the United Nations General Assembly equated ethnic cleansing

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136. *See, e.g.*, George J. Andreopoulos, *Introduction: The Calculus of Genocide, in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 1, 9 (George J. Andreopoulos ed., 1994) (supporting the "intentionality criterion" and the need for a definition which sheds light on the "feasibility of preventive measures against genocide"); Schabas, *supra* note 79, at 32-36, 47 (putting forward a narrow construction of genocide by suggesting that a policy or plan be an element of the crime and asserting "a world of difference between physical destruction of a group and 'a lasting impact' on a community"); *see generally* John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, 78 FOREIGN AFFAIRS 1, 157-164 (1999) (highlighting general problems of accountability and politicization in international institutions, in international criminal trials specifically).

137. *See* Nersessian, *supra* note 94, at 276 (suggesting an analogous effect by describing certain interpretations in the Rwandan tribunal's *Akayesu* decision as "well-intentioned but misguided" and asserting that "[o]ther judicial bodies hearing genocide cases certainly can and should strike a different balance").

138. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Request for the Indication of Provisional Measures (*Bosn. & Herz. v. Yugo.*) 1993 I.C.J. 3 (April 6) (separate reasons of Judge ad hoc Lauterpacht).

in Bosnia to genocide.[139] As Schabas points out, "[t]he view that the two terms are equivalent or that they overlap is widely held within the diplomatic and academic communities."[140] Yet such constructions of genocide uneasily tread on the requirement that destruction within the meaning of the genocide definition be physical.

The genocide interpretation in *Krstić*, however, is arguably even broader than equating ethnic cleansing with genocide. As noted in Part III, finding that the VRS forces "could not have failed to know . . . that this selective destruction of the group would have a lasting impact upon the entire group," the chamber suggests that most mass killings could effectively amount to genocide, since nearly all "selective destructions" will no doubt have an enduring effect on the group and most groups will have some sort of ethnic or national identity. Under such a construction, the bombings of Berlin and Tokyo in World War II could conceivably qualify as genocide, contrary to US General Telford Taylor's view.[141] Divorcing the crime from national, ethnic, and religious motives risks depriving the word of its unique expressive power in the same way that doing so in the domestic sphere would deny hate crimes their special significance.[142]

Without differentiation between genocide and ethnic cleansing, or between genocide and other forms of killing, the risk of distortion and relativism emerge, creating difficulties in the adherence to and enforcement of international humanitarian law.[143] Since loose application of the term "genocide" obstructs understanding of the dimensions of an ongoing conflict, then international actors may be hindered in crafting sound policy responses to the events. As George Andreopoulos asserts, "a good definition has a critical functional value: to assist in the detection of early signs of an impending crisis and, provided the appropriate mechanisms are in place, devise preventive measures."[144]

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139. G.A. Res. 121, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/121 (1993) ("the abhorrent policy of 'ethnic cleansing,' which is a form of genocide").

140. William A. Schabas, *Problems of Codification: Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 294 (2001).

141. *See supra* note 78.

142. *See infra* note 159.

143. Along these lines, Tournaye highlights the "rule of effectiveness," which, as stated by one ICTY chamber, "is an elementary rule of interpretation that one should not construe a provision . . . as if it were superfluous." Prosecutor v. Dusko Tadić, Case No. IT-94-I, Appeals Judgment, ¶ 284 (July 15, 1999). Another case asserts "the principle of 'normative economy,'" or the notion that

> a legal system cannot withstand the existence within its confines of two concepts or rules that fulfil essentially the same function or bear divergently on any one situation. The [ICTY should] assume the responsibility for the further rationalization of these categories [e. g., genocide and crimes against humanity] . . . from the perspective of the evolving international legal order.

Prosecutor v. Tadić, Case No. IT-94-1, Appeals Judgment, at 2 (October 2, 1995) (separate opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction). In other words, for a rule to be effective, its definition must be unique. *See* Tournaye, *supra* note 55, at 456.

144. Andreopoulos, *supra* note 136, at 4 (1994). Andreopoulos further explains that

In addition, broad applicability of the term genocide may place countries with larger scales of mass violence (or the threat of it) at a disadvantage, as it risks undervaluing the lives lost in those countries. It gives the impression that the loss of 8,000 lives (as in Srebrenica) is similar in gravity to the loss of 800,000 (as in Rwanda). Not only might this offend countries suffering greater losses, but among the myriad factors shaping an international response, application of the term could contribute to a disproportionate allocation of already scarce sympathy and assistance to countries experiencing or under threat of experiencing mass violence.

Increasing the applicability of the term "genocide" to a wide variety of events may discourage contracting states' willingness to enforce the Genocide Convention. One of the distinctive characteristics of the Genocide Convention is the obligation to act. In Article I of the Convention, contracting parties pledge to "undertake to prevent or punish" the crime.[145] Moreover, "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."[146] This obligation to act reflects the contracting parties' conviction that genocide is a crime that transcends the high bar of state sovereignty and interest. The Genocide Convention, however, does not specify who has the authority to determine whether or not genocide is taking place. The question may be submitted to the International Court of Justice,[147] but the absence of a straightforward process of determination suggests that states will act only if there is consensus that the definition of genocide has been amply met.

This in turn weakens the main policy argument for the *Krstić* chamber's broad approach to genocide, which maintains that increasing the instances in which states are legally obligated to act pursuant to a genocide determination will help induce action in situations where the international community might otherwise stand by. This argument would be compelling if the finding of genocidal intent in *Krstić* had been more convincing. Will contracting parties feel compelled to act when the method of determination involves stretching the meaning of certain words in the Convention, particularly in ways that dilute the intent requirement and confuse what constitutes "a quantitatively substantial part of the protected group"?[148] The fact that the international community would not ratify the

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> [A] good definition can be instrumental in the creation of an early warning system for the detection of genocide-prone situations.... [A] proper conceptual framework should be able to explain nonevents: In particular, it should provide insights into why genocide-prone situations did not develop into full-scale genocides, and why societies that had witnessed large-scale genocidal massacres in the past managed to achieve relative stability without any structural changes in the perpetrator regime.

Id.

145. Genocide Convention, *supra* note 15, art. I, 78 U.N.T.S. at 280.

146. *Id.* art. VIII, 78 U.N.T.S. at 282.

147. *Id.* art. IX, 78 U.N.T.S. at 282.

148. Krstić, *supra* note 2, ¶ 586; *see also* Prosecutor v. Ignace Bagilishema, Case No. ICTR-

Convention if the crime was not defined strictly implies that the answer is no. Therefore, identifying genocide as the chamber does in *Krstić* would actually weaken the effectiveness of the Convention because states would simply not be willing to enforce it. As Schabas observes, "enhancing the obligations states are prepared to assume when faced with genocide, up to and including military intervention, will never be achieved if they are unsure about the crime's parameters."[149] Thus, strict definition of the crime "remains the price to be paid for recognition of a positive duty to act in order to prevent genocide."[150]

Furthermore, if contracting parties are unwilling or unable to act on overly broad interpretations of genocide, the standing of those states may be unduly tarnished, which may in turn negatively impede their effectiveness in identifying and responding to clearer cases of genocide in the future. Similarly, if states feel that international law will judge their action or inaction unfairly, then state support for the rule of international law more generally may falter.

C. Implications for the Meaning of Suffering and Historical Accuracy

Just as relativism in genocide interpretation can negatively influence enforcement, it can also obstruct international tribunals' efforts to bring justice to victims and establish the facts of devastating events. Specifically, a broad approach to genocide may have negative effects on the meaning of suffering and historical accuracy.

The problem of relativism arises in the *Krstić* chamber's figurative interpretation of the word "destroy" in the genocide definition. By extending the notion of "destroy" beyond physical elimination, the chamber places itself in the awkward position of defining what it means to survive. Taking note of the Srebrenica massacres' devastating effects on the remaining members of the community, the court is without doubt acknowledging their suffering which may in turn be significant to their healing. Perversely, however, labeling the tragedy as "genocide" and defining the surviving group as "destroyed" may stultify the living victims' process of recovery. It also serves to weaken the survivor's capacity to redefine his or her destiny. By adopting a figurative interpretation of "destroy," in some sense, the chamber is effectively saying that where there is life, there is no hope, which contradicts the connotations of "surviving," such as prevailing or overcoming.

This figurative interpretation of "destroy" could lead to other perverse results. Say, for instance, a similar fate befell another community, except that the survivors—through aid, determination, or luck—managed to

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95-1A-T, Judgment, ¶ 64 (June 7, 2001) ("[T]he intention to destroy must target at least a substantial part of the group."); Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-I-T, Judgment and Sentence, ¶ 97 (May 21, 1999) (requiring "the intention to destroy a considerable number of individuals who are part of the group").

149. Schabas, *supra* note 139, at 302.

150. *Id.*

rebuild their lives in some discrete yet significant ways. It could be awkward to conclude that that community had been destroyed, for to do so would belittle their progress. The chamber then would not necessarily label the ordeal they had endured as genocide. The suffering endured by the community that did not recover as well (or at least perceived to have not recovered as well) would thus be "rewarded" with the more robust, expressive word. This analysis also relates to perceptions of displaced and refugee communities in other parts of the world, such as Africa, for which international observers seem less inclined to employ the word "genocide." Though the conditions of displacement are often worse than in Bosnia, these communities are not typically described as "destroyed." Of course, given the "in part" language of the genocide definition, genocide can have survivors, but a more literal interpretation of "destroy" avoids the difficulties of passing judgments on the status of survivors.

Still, while the suggestion that the remaining community of Srebrenica was destroyed as a result of deportation and the mass executions of the men may in some way inhibit that community from helping itself, perhaps the genocide label will encourage others to help that community: to contribute international aid, for example. Yet the fact that such assistance would come as a response to misleading assertions raises ethical dilemmas. These observations on the *Krstić* chamber's figurative interpretation of "destroy" suggest that such an approach encourages an understanding of genocide that may perpetuate feelings related to victimization, as survivors are effectively locked into a perception that they have been destroyed, which may in turn prolong hostilities between rival groups.[151] Contrary to the ICTY's mission to promote reconciliation in the former Yugoslavia, this may be a tendency international humanitarian law does not wish to advance.

The relativism brought about by rendering international crimes less distinct, as the *Krstić* decision seems to do, also has implications for historical truth. If the extermination of 8,000 Bosnian Muslim men is characterized in the same way as the slaughter of 800,000 Rwandan Tutsis, historical understanding of the impact of such events on their respective ethnic groups and countries is obscured. Learning that genocide occurred in a certain country immediately invites thoughts of massive and traumatic devastation. However, there are numerous differences between mass killings in the context of territorial conflict which result in the loss of 0.3 percent of a population (as in Srebrenica) and mass killings principally motivated by ethnic hatred that result in the loss of nearly ten percent (as in Rwanda). Since these differences are not captured in the genocide label,

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151. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING GENOCIDE AFTER GENOCIDE AND MASS VIOLENCE 11 (noting that "memories, or propaganda-inspired illusions about memories, can motivate people who otherwise live peaceably to engage in torture and slaughter of neighbors identified as members of groups who committed past atrocities" and that "mass killings are the fruit of revenge for past harms"). Minow's analysis of how certain constructions of the past can perpetuate violence might be applied to judicial determinations which take expansive approaches to the definition of a crime such as genocide.

application of the term to both sets of events obstructs an accurate portrayal of each nation's history and the experience of its people.

Discounting such motives creates confusion in social science scholarship, which lessens its usefulness to policy-makers. As Frank Chalk asks, "If we include every form of war, massacre, or terrorism under genocide, then what is it that we are studying?"[152] Moreover, if a broader approach does not go as far as Chalk imagines and still maintains some distinctions between different forms of mass killing, the risk that those distinctions appear to have been drawn arbitrarily increases. The effect is twofold: It discounts those killings that did not fit the definition (for whatever reason) and cheapens the scale and intensity of the horrors of unmistakable genocides such as those of the Armenians, the European Jews, and the Rwandan Tutsis.

The significance of recognizing ethnic and religious discrimination (and arguably other forms of discrimination) as inherent in genocide is also important to historical accuracy for the purposes of reconciliation and political administration. Given the challenges presented in some countries by ethnic and religious diversity, the word "genocide" forms an important part of the vocabulary that encourages policies and practices that promote ethnic and religious tolerance. More broadly, denying the relevance of ethnically or religiously discriminatory motives to genocide seems counterintuitive to attempts over the past century to eradicate discrimination on these grounds. Of course, the language of genocide is also important to policies responding to the destruction of protected groups which, though not clearly based on discriminatory motives, nonetheless brings about ethnic or religious polarization.

In their search for justice, courts are able and expected to privilege truth. This privilege may be misused when a court applies existing law that simply encompasses too much. The more widely a word such as "genocide," with its powerful and specific connotations, may be applied to a set of historical facts, the more truth is hidden. By contrast, truth is best revealed when language is precise. Thus, in the interests of plain truth, of being able to distinguish one nation's tragic past from another, and in light of truth's direct connection to justice, clear distinctions between such crimes should be preserved.

V. ALTERNATIVE APPROACHES

Taking the negative implications discussed in the previous Part into account, this Part proposes an alternate view of how the *Krstić* chamber should have characterized the massacres at Srebrenica and how genocide law should develop. In short, the Srebrenica killings are best characterized as crimes against humanity, and genocide should be construed more narrowly than the approach adopted in *Krstić*, so as to preserve a

152. Frank Chalk, *Redefining Genocide*, *in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 47, 60 (George J. Andreopoulos ed., 1994).

distinction between genocide and crimes against humanity. These distinctions should be accompanied, however, by efforts to expand states' obligations to act beyond the confines of the genocide definition.

A. Srebrenica as Crimes Against Humanity

In light of the problems the *Krstić* genocide finding creates for both law and policy, categorizing the Srebrenica massacres as crimes against humanity would have been more appropriate. Article 5 of the ICTY Statute defines crimes against humanity as certain violent acts "committed in armed conflict . . . and directed against any civilian population."[153] Such crimes include murder, extermination, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts.[154] Unlike genocide, in ethnically motivated crimes against humanity or persecutions, the perpetrator "selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such."[155] By including persecution, yet stating that crimes may be "directed against any civilian population," the definition of crimes against humanity criminalizes acts committed with a mixture of motivations.

This is similar to the intent requirement of extermination, which does not require that the acts be committed on discriminatory grounds.[156] Since it is uncertain whether the military-aged men of Srebrenica were exterminated because they were potential combatants or because they were members of the Bosnian Muslim group, the crimes committed fit more easily into the category of crimes against humanity. As noted by the International Law Commission, "where the specific intent of genocide cannot be established, the crime may still meet the conditions of the crime against humanity of 'persecution.'"[157] In addition, persecutorial intent may be more plausible than genocidal intent since, in transferring the women, children, and elderly, and in sparing the wounded men, it may be inferred that the Bosnian Serb forces did not seek to destroy the group even though the individuals may have been targeted in part by virtue of their group membership. Indeed, both *Krstić* chambers found that the events at Srebrenica constituted crimes against humanity under Article 5 as persecution and extermination.[158] By insisting on an additional genocide

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153. ICTY Statute, *supra* note 15, art. 5, 32 I.L.M. at 1173.

154. *Id.* 32 I.L.M. at 1173-74.

155. Krstić, *supra* note 2, ¶ 553 (citing Prosecutor v. Zoran Kupreskić, et al., Case No. IT-95-16-T, Judgment, ¶ 636 (Jan. 14, 2000) and Jelisić, *supra* note 98, ¶ 79).

156. *Id.* ¶ 500 ("[E]xtermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnical, racial or religious grounds has been demonstrated").

157. SCHABAS, *supra* note 51, at 219 (quoting *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. GAOR Int'l Law Comm., 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996)).

158. Krstić, *supra* note 2, ¶¶ 538 and 505. Consistent with the elements of extermination, the chamber found that "a particular population was targeted and that its members were

finding when the facts correspond so closely to crimes against humanity, the trial and appeals chambers blurred the distinctions between the two types of crimes.

B. Moving Forward: Maintain Hierarchy and Expand Obligation to Act

Given the problems highlighted in previous sections concerning the *Krstić* chamber's application of a broad standard of intent, developments in humanitarian law should strive to maintain a hierarchical distinction between genocide and crimes against humanity, with genocide retaining its status as the "crime of crimes." In order to differentiate the crimes, genocide should require a higher standard of intent, specifically taking into account underlying motives in certain cases, in an effort to ascertain whether certain acts were carried out with the purpose to destroy a national, ethnic, or religious group.[159] Here the focus should be on what Schabas has called the "collective motive,"[160] or the aims of the planners and organizers, rather than the "personal motive" of individual participants, which could range from financial gain to political ambition.[161] This distinction helps avoid the evidentiary obstacles of applying such a high standard on an individual basis, a problem noted by certain delegations during the drafting of the Convention.[162]

The motive inquiry would, however, be less significant in cases where inferences of genocidal intent may be less equivocally deduced from the facts, circumstances, and consequences relating to a protected group's destruction. While upholding such a hierarchy of crimes is ultimately sensible in principle, flexibility would still be necessary in practice due to

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killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population." *Id.* ¶ 503. In spite of these findings, however, the trial chamber did not enter cumulative convictions for the executions under Articles 4 and 5, finding it "impermissible to convict the accused . . . of extermination and genocide based on the same conduct." *Id.* ¶ 685. Genocide, being "the most specific crime," was retained. *Id.* The appeals chamber nevertheless allowed the cumulative convictions, finding that elements of extermination, persecution, and aiding and abetting genocide were "materially distinct" and that Krstić possessed the requisite intent for each. *See* Krstić, Appeal Judgment, *supra* note 6, ¶¶ 218-29.

159. In inquiring into motives, a chamber should ask whether the intent to destroy was based on discriminatory grounds. One domestic analogy is the distinction between hate crimes and parallel crimes not motivated by bias. Hate crimes contain a motive element in that they must be motivated by hatred based on some group characteristic such as race, ethnicity, or sexual preference. Some statutes enhance the penalties for hate crimes, intending to send the message that crimes motivated by such biases are "inherently worse" and "worthy of special punishment." David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 449-50 (2004). *See generally* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999).

160. SCHABAS, *supra* note 51, at 255.

161. *Id; see also* Greenawalt, *supra* note 124, at 2288 (arguing that genocidal intent should apply to individuals insofar as they are aware that their actions are in furtherance of a campaign where the "manifest effect" is the destruction of a protected group in whole or in part).

162. *Id.* The United Kingdom, among other states, raised the evidentiary problems with incorporating motive.

the unique circumstances of different cases. This flexibility, however, should not be with respect to applying the term "genocide" to a broad range of circumstances, but with regard to recognizing an obligation to act with less attention to how certain atrocities are labeled.

The notion of a hierarchy for genocide and crimes against humanity may be critiqued on two related grounds. First, as mentioned earlier, there is a policy argument for broad application of the genocide label: Because states are obligated to act under the Convention, applying the term more broadly may help induce action in instances where the international community might otherwise stand by. The problem with this approach is that seeking to legitimate a desire or sense of obligation to act cannot be the primary determinant as to whether or not certain events constitute genocide. As Andreopoulos points out, such labeling is "indicative of moral outrage at the outcome, rather than of an analytical perspective on the process."[163]

The second possible critique of the notion of a hierarchy also derives from a sense of moral disgust, specifically at what Israel Charny calls "definitionalism," where preoccupation with precise definitions becomes so excessive that it demeans the subject matter.[164] Just as it may be offensive to equate the massacres at Srebrenica with the Holocaust, it is equally distasteful to suggest that some forms of mass killing are uniquely worse than others. Accordingly, Charny proposes:

> [I]nstead of expressing our dubious zeal for excluding categories of mass deaths from the realm of genocide, we put together the whole rotten record of all types of mass murder committed by man . . . and thereby generate an even more powerful force that will protest, intervene, and seek to reduce and prevent any and all occurrences of mass destruction of human lives.[165]

Charny's frustration is understandable. In the context of mass destruction, perhaps we are dealing with crimes where the horror of the acts and their consequences is so great that it eclipses the significance of intent. For the purposes of practical application, however, it remains important to retain analytical perspective, to draw distinctions for the protection of the accused, to help ensure enforcement, and to maintain historical accuracy. Ultimately, maintaining clarity creates the greatest scope for saving lives.

Underlying these possible critiques of preserving a hierarchy between genocide and crimes against humanity is the desire to instill within the

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163. Andreopoulos, *supra* note 136, at 6.

164. Israel W. Charny, *Toward a Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 91 (George J. Andreopoulos ed., 1994). Charny defines definitionalism as "a damaging style of intellectual inquiry based on a perverse, fetishistic involvement with definitions to the point at which the reality of the subject under discussion is 'lost.'" *Id.* at 91.

165. *Id.* at 92.

international community an obligation to act to prevent or stop various forms of mass killing. The proposal for a hierarchy of crimes may accommodate this inclination by urging that humanitarian law develop so that the legal obligation to act is not exclusive to genocide. The current confusion created by the Genocide Convention's definition of genocide reflects in part one of the drawbacks of creating international treaties for particular types of violations. Specifying situations where states are obligated to act can in some ways diminish the impulse to act in instances in which there is no explicit legal obligation. Where war crimes and crimes against humanity are taking place, states may act if—pursuant to Chapter VII of the U.N. Charter—the Security Council identifies such acts as a "threat to the peace, breach of the peace, or act of aggression."[166] Such open-ended concepts do not lend themselves to clear and consistent interpretation, and even where such acts are not construed as threats to peace, action may still seem justifiable on moral, humanitarian grounds.

This elusive sense of obligation was arguably visible with respect to events in Darfur, Sudan, where the central government in Khartoum, using regionally based militias, sought to crush rebel groups through mass killing, rape, and forced displacement of civilians. Similar to the killings in Rwanda, the question underlying the debates as to whether or not the atrocities amounted to genocide concerned the scope of the international community's obligation to act. Currently, a conclusion of genocide would generate a greater expectation of international action than a determination of crimes against humanity.

With or without a genocide determination, the sense that the world must do *something* in Sudan arguably remains. Just as the Genocide Convention was created to match moral outrage with a legal obligation to act, new legal obligations should arise as the world confronts with greater frequency the devastating effects of various forms of conflict. Such an approach would help liberate advocates of intervention (military or otherwise) from the need to prove that various types of atrocities constitute a specific form of mass killing, i.e., genocide. Similarly, states' sense of obligation to act might actually be enhanced if public discourse on such matters emphasized candor rather than subjective views of vaguely worded legal definitions. Enhancing the obligation to act in response to other crimes would not unduly diminish the distinctiveness of the crime of genocide and it would acknowledge the inclinations of international courts, world opinion, and some states to recognize international obligations with respect to such forms of human destruction.

Efforts to develop other duties to act are suggested in the comprehensive 2000 report, *Responsibility to Protect*, submitted to the United Nations community by Canada's independent International Commission on Intervention and State Sovereignty in response to the U.N. Secretary-General's open challenge to reassess the doctrine of

166. U.N. CHARTER, art. 39.

humanitarian intervention.[167] The report's central concern is that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe . . . but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[168] "Avoidable catastrophe" presumably extends beyond genocide. Of course, the report is merely advisory and intended to serve as a precursor to more formal development of international consensus on these issues. One possible development could be a U.N. declaration on the "Principles of the Responsibility to Protect," similar in approach to the Guiding Principles on Internal Displacement. Developed by international legal experts in consultation with states and non-governmental actors, such an instrument could be rooted in both existing law and evolving norms, yet avoid the time-consuming tasks of drafting and ratifying a whole new international treaty.

There are ways for courts like the ICTY to help build momentum in this direction. A chamber should not seek to impart gravity to crimes against humanity by straining to identify such crimes as genocide, but could rather express the international community's outrage and enhance international obligations through language in its opinion, strict sentences,[169] and overt encouragement of other entities to contribute to the recognition and redress of the victims' ordeal. In addition, international advocates should refine their ability to identify the symptoms of a looming genocide and, on the basis of prevention, invoke the Genocide Convention's obligation to act. Even if war crimes and crimes against humanity do not clearly foreshadow genocide, advocates may appeal to the report of the International Commission on Intervention and State Sovereignty[170] and the U.N. Charter, which, as mentioned, can mandate action by the international community once a threat to international stability has been identified.[171] While such methods may be imperfect, the effect of their continued invocation can contribute to the progression of effective

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167. Gareth Evans & Mohamed Sahnoun, *Foreward to the Report of the International Commission on Intervention and State Sovereignty*, INT'L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at VII (2001), *available at* http://www.iciss.ca/report-en.asp.

168. *Id.* at VIII.

169. For instance, in *Prosecutor v. Stakić*, though the trial chamber rejected the genocide charges, the chamber still sentenced Milomir Stakić to life imprisonment for war crimes and crimes against humanity. *See supra* note 5 and accompanying text.

170. Gareth Evans, *The World Should Be Ready to Intervene in Sudan Darfur*, INT'L HERALD TRIB., May 15, 2004, *available at* 2004 WL 77529057.

171. As outlined in the Charter, the purpose of the United Nations is to "maintain international peace and security, and . . . take collective measures for the prevention and removal of threats to peace." U.N. CHARTER, art. 1, para. 1. In the history of the United Nations, "threats to peace" have included civil wars in El Salvador, Guatemala, and Mozambique, violence in East Timor, and terrorist attacks in the United States. While genocide did not take place in these instances, alleged war crimes and crimes against humanity helped motivate concrete action on the part of the international community. For a brief overview of U.N. efforts to address conflict, see UNITED NATIONS DEPT. OF PUB. INFO., THE U.N. IN BRIEF: WHAT THE U.N. DOES FOR PEACE (2002), *available at* http://www.un.org/Overview/brief2.html.

international law.

VI. CONCLUSION

In the landmark *Krstić* decision, the trial chamber illustrates the importance of words in conferring meaning on unspeakable events. Constituting "a massacre on a scale unprecedented in Europe since the Second World War,"[172] the tragedy at Srebrenica merits a dramatic expression of moral outrage on the part of the international community. In characterizing the massacre of 8,000 military-aged Bosnian Muslim men as genocide, the chamber used the most potent expression possible. However, in order to do this, the chamber stretched the meaning of several components of the genocide definition, declining to limit the characterization of the events to crimes against humanity. By applying a broad standard of intent, extending the meaning of a group "in part," and adopting a figurative interpretation of "destroy," the trial chamber enabled wider application of the term "genocide."

While the intentions in categorizing Srebrenica as genocide may have been good, the finding may encourage negative tendencies in international humanitarian law. In diluting the meaning of genocide as it does, the trial chamber may have reduced the authority of the international tribunal and weakened the distinctions between genocide and crimes against humanity, consequently reducing the capacity of the word "genocide" to evoke a unique form of devastation. This effect offends the memory of extreme instances of genocide, affects perceptions of survivors, distorts history, and complicates attempts to prevent or mitigate genocide through effective policy-making. While words to describe the horrors of events like those at Srebrenica should be powerful, to guard against the negative consequences just described, those words should also be precise and carefully applied. Limiting the circumstances under which the genocide label may be applied exposes the disparity between moral outrage at horrible atrocities and an inability to compel action. This gap can be filled through the enhancement of international legal obligations to act in the face of mass crimes lacking proof of genocidal intent.

Still, the effort to reveal truth and classify facts in the best, most practical way is haunted by Charny's frank disgust at the enterprise. Indeed, this paradox in international humanitarian law—the need to systematize offenses set against the absurdity of differentiating the appalling from the horrific—exposes the limits of law in doing justice to the suffering such events cause.[173] When Winston Churchill referred to the

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172. Wald, *supra* note 13, at 445 (quoting Press Release SG/SM/7489, Secretary-General Kofi Annan, United Nations, Srebrenica Tragedy Will Forever Haunt United Nations History, Says Secretary-General on Fifth Anniversary of City's Fall (July 10, 1995), *at* http://www.un.org/News/Press/docs/2000/20000710.sgsm7489.doc.html).

173. *See* Letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), *in* HANNAH ARENDT-KARL JASPERS CORRESPONDENCE, 1926-1969, at 51, 54 (Lotte Kohler & Hans Saner eds., 1992) (stating that the Nazi crimes "explode the limits of law .... For these crimes, no punishment

Nazis' large-scale exterminations as "a crime without a name,"[174] Raphael Lemkin considered the comment an invitation to create a word. Yet Churchill's statement also implies that such acts constitute a crime beyond words. Rather than using words, another way to find justice for the victims of Srebrenica, living and dead, or for the victims of any unspeakable horror, is simply to act.

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is severe enough . . . . That is, the guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems"); *see also* Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712, 721 (2003).

174. SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 29 n.32 (2002) (citing Winston S. Churchill, 3 THE CHURCHILL WAR PAPERS: THE EVER-WIDENING WAR: 1941, at 1099-1106 (Martin Gilbert ed., 2000) and noting that "the line that Lemkin found so memorable was not meant to refer to the extermination of Europe's Jewry . . . but to the Germans' 'methodical, merciless butchery' of the Russians").