Fiat iustitia, pereat mundus

The International Criminal Tribunals and the Application of the Concept of Genocide

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ABSTRACT

The concept of genocide is probably the most debated subject in Holocaust and genocide studies. The political implications to its usage, or resistance to do so, have also been lengthily discussed. Yet, when it came to the legal sphere of the concept it has been mostly descriptive, without much theorizing on the politicization of the convictions of genocide. This study investigates the relation between the International Criminal Tribunals for the former Yugoslavia and Rwanda application of the crime of genocide and how these judgements were informed. Through the court’s transcripts of a number of selected cases, the research will analyze the application qualitatively, identifying the key factors that determined its usage. The analyses rest on the legal and political aspects that influenced the chambers, evaluating which one explains best. The results indicate that there is no single explanation and that both legal and political reasonings merge in the international legal arena. The courts’ decisions have many inconsistencies that cannot be accounted by a solo description. Thus, matters of law interpretation, conflict’s ending, postcolonialism, and legitimacy all take a tool when convicting or acquitting someone for the crime of genocide.
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_Muito obrigada!_

Bruna
**GLOSSARY OF ACRONYMS**

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<tr>
<td>ETO</td>
<td>École Technique Officielle</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTs</td>
<td>International Criminal Tribunals</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>International Monetary Fund</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>JNA</td>
<td>Jugoslovenska Narodna Armija</td>
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<td>MRND</td>
<td>Mouvement Républicain National pour le Développement</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>RPF</td>
<td>Rwandan Patriotic Front</td>
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<td>RTLM</td>
<td>Radio Télévision Libre des Mille Collines</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNAMIR</td>
<td>United Nations Assistance Mission for Rwanda</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNHCR</td>
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<td>UNPROFOR</td>
<td>United Nations Protection Force</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>VRS</td>
<td>Vojska Republike Srpske</td>
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To know the law is not merely to understand the words, but as well their force and effect.

Justinian, Digest, Book 1, Title 3, 17
INTRODUCTION

The coining and codification of the definition of genocide is seen as a turning point for understanding mass atrocities; and, indeed, it was. Without the arduous work of Raphaël Lemkin to promote his concept, the world would still think that the Holocaust was a one-time occurrence. However, it felt incredibly short when it came to prevention and protection of groups threatened by genocidal actions. Until the tragedies in the Balkans and Rwanda in the 1990s, genocide was relegated to academic circles, highly avoided in the political environment due its imperative to act.

With the overflooding of images of mass graves and the shared sentiment of failure for not acting during the conflicts in the former Yugoslavia and Rwanda, the international community decided that it was needed to punish those responsible. Thus, in an innovative action from the Security Council, two international criminal tribunals were created in order to prosecute those suspects of crimes against humanity and genocide.

The importance of these tribunals for the overall process of justice and reconciliation is widely recognized. Despite their failures and the critics they constantly receive, both the ICTY and the ICTR have advanced the knowledge of what happened in many ways, helping victims and families to understand and move one. Yet, an even more important advancement of the ICTs is less recognized.

As stated, for a while the crime of genocide was a dead letter, alive only in the vividly academic discussions that flourished during the second half of the twentieth century. Still, with the absence of an international tribunal with the jurisdiction to prosecute individuals, genocide remained a law with no application. Only with the creation of the ICTY, and subsequently the ICTR, and their straightforward Statutes recognizing their competence to prosecute genocide, that the crime (in a legal sense) was put into practice.

The significance of legal precedents for Law, in the academic and practical fields, cannot be overestimated. Especially in countries that adopt the Common Law, but also
to the ones that follow the Civil Law proceedings, former courts’ decisions are one of the greatest sources of legal approaches, underpinning new cases and sentences alike; they are used as the basis for decisions and law creation or modification. Case laws, thus, are in the core of any judicial system. So, when it comes to genocide, a crime that is based in a single resolution, extremely litigious due its dubious terms and lack of clarification, jurisprudence works as an extension of the crime’s definition.

Nevertheless, the Chambers and judges from different cases presented diverse interpretations of the law. Although a common feature in national tribunals, when it came to these two specific Tribunals, with a restricted pool of crimes to judge, in similar backgrounds and *modus operandi*, touching on such a sensitive matter, the disparate interpretations created confusion on what constitutes a genocide, giving grounds to question the court’s validity.

The present thesis will analyze these diverse interpretations trying to single out the factors that influence in the courts’ sentences. Therefore, the main objective is to identify which factors, legally and politically, influence these decisions, pointing how they interplay and change the result of each case. More specifically, the thesis will evaluate the historical background of both conflicts in the former Yugoslavia and Rwanda and the sentencing history in the case law selected to understand how political interpretations engage with the legal assessments of each case.

Those differences are even greater when it comes to the sentencing of the two Tribunals compared. While the ICTR has a history of widening the explanation of what constitutes (acts of) genocide, the ICTY presents many constraints applying it, even among similar cases in Bosnia. It is argued then that matters of victor’s justice, peace agreement, postcolonialism, and legitimacy interact with the legal interpretation of the concept, sometimes expanding its application and other times hardening its comprehensiveness.

How the concept of genocide has been used since its inception changed considerably. The discussion over what constitutes a genocide is probably the most polarizing academically, with various diverse positions developing since the beginning of Holocaust and genocide studies. Hitherto, the discussions have focused primarily on the possibilities and necessities of expanding the meaning and, on the other hand, the need to keep it restricted as a way to maintain its reputation as the ultimate crime.
Independently, much has been considered of what should genocide mean, and not so much as on what constitutes that specific meaning.

Ultimately, this work aims to understand how the concept of genocide is applied and why it is applied in this way. Departing from a purely legalistic point of view to one that encompasses the political nuances, it seeks to fill the existing lacuna and explain what determines how the crime is applied in the International Criminal Tribunals.

**Literature Review**

The literature over the *ad hoc* International Criminal Tribunals is lengthy. Most debates focus on the narrow/widening problem of concept application, with analysis there are mostly descriptive. In a smaller scale, some authors pointed to the political aspects of these Tribunals, critically evaluating how some of their postures are influenced by diplomatic attitudes rather than legal ones.

The most important study on the international tribunals is by William A. Schabas. Schabas has conducted various works on genocide, international humanitarian law, and international criminal tribunals, in which he deals with the definition, classification, categorization of the crimes and international courts, as well as historical facts and background, drafting processes, jurisdiction, competence, and composition.¹ He is undoubtedly the principal authority of the field.

Schabas is quite critical on the proposed widening interpretations to the genocide Convention. He believes that the definition is adequate and appropriate, and though the exclusion of cultural genocide is to be regretted, in order to maintain genocide as the apex of the pyramid of crimes, it is important to keep its characterization restricted.² He also speaks about the differences between genocide and ethnic cleansing, the source of most discussions in courts and academia. Schabas defends that even though the UNGA passed several resolutions in the 1990s that condemned ethnic cleansing as an act of genocide, this line should not be blurred. Thus, whilst genocidaires do not permit

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the existence of the determined group in any other place, ethnic cleansers do not want
their presence in a determined territory.3

Another significant scholar of the international tribunals is Payam Akhavan. Though
less prolific in terms of publications than William Schabas, his works are more
analytical, presenting substantial critiques to the operation of the ICTs. One of his well
cited works is his article on the wrong assumption that justice may hinder peace
attempts in post conflict societies. Akhavan defends that a case analysis of international
and hybrid-tribunals show that impunity is a bigger disincentive to peace than
prosecutions. Indeed, judicial interventions, even when cannot be executed, are more
likely to prevent atrocities.4

Akhavan has also wrote a book on the application of the concept of genocide in the
courts of law. In his critical assessment, the author points that the ICTs made many
contributions to the development of international law, however, they have a tendency
to see genocide as a symbol, not a legal category. This way, they lack the emotionally
disconnected legal analysis the strictures of jurisprudence requests. Moreover, Akhavan
openly rejects the blind faith people have on the neutrality and objectivity of tribunals,
pointing the need for a critical consciousness of its inherit limitations, especially when
dealing with genocide.5

Other critical authors of the ICTs are Kingsley Moghalu, Klaus Bachmann and
Aleksandar Fatić. Moghalu’s study focus mainly on the international politics that
permeates the international criminal tribunals. In short, he argues that the political
nature and unfair justice these tribunals render is a consequence of them being created
by unequal hegemonic states. And once these same tribunals attack the fundamental
character of the international society – sovereignty – they are doomed to fail from its
inception. He advocates that legal justice is more appropriated to be exercised within

the sovereign state, acknowledging that international tribunals are necessary only when there is an absence if national justice.⁶

Bachmann and Fatić focus on the problems and inconsistencies the ICTs present, which eventually detract the impressions of professional serious and hinder their popular legitimacy. They believe that the political side of these Tribunals is natural and inevitable, the problem is, in fact, in the lack of admission of such compromise, openly seeking for constructive political outcomes instead of engaging in backstage politics.⁷

Most of these authors recognize that the Tribunals operate attending some political interests, and that they present inconsistencies in their procedures and sentences alike. And although their extensive work has contributed enormously to the field of genocide studies and international law, none to my knowledge have addressed specifically what establishes the application of the concept of genocide in the ICTs. In order to fill this lacuna, theories on law interpretation, conflict’s ending (victor’s justice and peace agreements), postcolonialism, and institutional legitimacy will be addressed in order to pursue possible explanations for the Courts’ contradictions. The above concepts will further explicate how the genocide is applied in the case law and why it is understood so differently throughout the Tribunals’ chambers.

Research Questions

Even with some many similarities, equally in its creation and in the historical cases analyzed, the Chambers, both Trial and Appeals from either ICTY and ICTR, had different understandings for what can be understood as genocide. Hence, this thesis seeks to answer what defines how a chamber from the ICTs charge a suspect with genocide. Its main question is: what determines how the genocide concept is applied in the International Criminal Tribunals?

In order to answer it, two subsidiary questions will be pursued: (1) how the genocide concept is applied in each case, and (2) why it is applied in that way. The intention is,

through an analysis of how the courts rule on the crime of genocide, added to possible legal or political explanations for its application, to find possible solutions for the research question, pointing the variables that may (or may not) influence the judges’ decisions.

Disposition

The present study is divided in six different sections: theory, methodology, background, case law, analysis, and conclusion. The first section deals with the theories used to explain the phenomenon researched, thus theoretical aspects on the concept of genocide, law interpretation, victor’s justice, peace agreements, peace versus justice dilemma, postcolonialism, and legitimacy will be examined. It concludes with a summary of the theoretical assumptions that are evaluated in this thesis. In methodology it is delineated how the research is arranged, hence it explains the methods chosen, the case selection and the research contributions and limitations. The background section presents the historical foundations that led to the coining of the word genocide as well as the codification of it as a crime under international law. It has also a contextualization of the conflicts in the former Yugoslavia and in Rwanda in the 1990s, along with the creation of the two International Criminal Tribunals that followed. In the fourth section there is a presentation of the five selected cases, highlighting the background of each accused, their indictments, their sentences concerning the crime of genocide, and the appeals decision. The analysis section addresses the theories and assumptions from the first section to the cases presented in order to evaluate what determines the application of the concept of genocide. Lastly, the conclusion section closes the thesis making a quick assessment of the research arguments and possibilities for future research.
THEORY

Law Interpretation

Any law, no matter how clear and precise it is, depends on being interpreted in order to be applied. It is only through its interpretation that the legal text gains meaning. Giuseppe Maggiore, Italian jurist, wrote in his book on the principles of criminal law (Principi di Diritto Penale) that without interpretation of the law, isolated in its abstraction and generality, it would be a dead letter; the interpretation gives life to the law.8

According to Karl Larenz, German legal philosopher, interpretation is an inquiry into the legal propositions. He quotes Friedrich Carl von Savigny, another exponent of German law, attesting that the interpretation is a creative knowledge, an art of the discovery of truths guided by determined methods.9 Yet, Larenz defends that the interpreter should in no way add to the law, only endeavor to understand it. In contemplation of legal security, the judges must interpret so that their interpretation is valid for all case laws that have the same type and species. Since there is no formal biding of courts, which allows decisions differ in its interpretations of the law, the modification should be done if there is a proper conviction that are better reasons to do so.10

Diversely, the libre recherché scientifique (free scientific research) school of thought, represented by French jurist François Gény, advocates that to interpret is to give an actual meaning to the norm regarding both what it is taken from the text and the social reality where it is applied. Interpretation, then, should be used to modernize the law,

10 Larenz, Metodologia da Ciência do Direito, 358.
without being restrained to dogmatic positions that prevent adequate solutions or revolutionary approaches that may abuse the judicial power.\(^\text{11}\) Nevertheless, these two schools of thought, as well as other theories, agree that there are several elements necessary to understand the legal norm, to a greater or lesser extent, depending on the approach.\(^\text{12}\) These elements are divided between five different techniques: grammatical (or literal), logical, systematic, historical, and sociological (or teleological).

The grammatical method is the first stage of interpretation. It consists on the literal analysis of the letter of the law, its semantic value, syntax, and punctuation, prevailing the technical sense.\(^\text{13}\) Still, the focus on literacy ends up impairing the *mens legis*\(^\text{14}\), as Celsus, the Roman jurisconsult, adverted: “*scire leges non hoc est verba earum tenere, sed vim ac potestatem*” (to know the law is not to know the words of the law, but its force and power).\(^\text{15}\)

The second stage, the logical approach, considers the *ratio legis*,\(^\text{16}\) the aim pursued by the law, its meaning and scope.\(^\text{17}\) This stage is divided between the external and internal logic. The internal logic considers the intelligence of the legal text, studied in its own unity of thought deduction, induction and categorical syllogism. It uses only elements that are given by the legislation. The external logic, on the other hand, observes the events that triggered the formation of the legal phenomenon, the *occasio legis*\(^\text{18}\) as well as the *ratio legis*. Louis Brandeis, American Supreme Court Judge, summarized the importance of logical – especially external logic – element in his famous passage: “No law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied”.\(^\text{19}\)


\(^{13}\) Gusmão, *Introdução ao Estudo do Direito*, 218.

\(^{14}\) The mind of the law, the spirit of the law.

\(^{15}\) Nader, *Introdução ao Estudo do Direito*, 276.

\(^{16}\) The reason or principle behind the law.


\(^{18}\) The reasons behind the laws’ elaboration.

\(^{19}\) Nader, *Introdução ao Estudo do Direito*, 277.
Third approach is the systemic. It proposes that any interpretation should be in consonance with the normative system (legal order) in which the law is entailed. Therefore, any given law must be understood in the set of laws it belongs, harmonious and interdependent. The historical element investigates the origins of the Law in a specific society, how its institutions and systems developed. This stage searches for the historical reasons that determined a specific law (occasio legis) using legal documents, like the travaux préparatoires, to finally uncover the meaning of the mens legis. In an interesting critique, Paulo Nader points that:

“As the purpose of modern interpretation is not to disclose the mens legislatoris, one should give only a relative importance to the discussions of the technical commissions of the Congress and the parliamentary debates. The older the preparatory work is, lesser is the value it has to offer, because it portrays facts from a more distant society.”

The fifth and last stage is the sociological or teleological. This approach objective is to adapt the purpose of the law to the new social requirements based on whatever the law intends to achieve and the social aspect it aims on protecting. However, this purpose is not immutable or previously imagined by the legislator, it is implicit in the message the law passes. It is an interpreter’s duty to reveal what the legal text has as a guarantor mission, harmonizing old principles (law coordination) with new facts (new social frame).

Regarding the interpretation methods applied at the international courts, William Schabas evaluates that a large part comes from the Vienna Convention on the Law of Treaties. The principles for the interpretation of treaties are outlined in articles 31 and 32 of the referred convention, in verbis:

**Article 31 – General rule of interpretation**

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.

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25 In these terms.
The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

There shall be taken into account, together with the context:

- any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- any relevant rules of international law applicable in the relations between the parties.

A special meaning shall be given to a term if it is established that the parties so intended.

**Article 32 – Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- leaves the meaning ambiguous or obscure; or
- leads to a result which is manifestly absurd or unreasonable.\(^{26}\)

Applying the five stages, as well as the guidelines brought by the Vienna Convention on the Law of Treaties, one may find that the results may not be always similar to the pure grammatical interpretation. Ascertaining that the *ratio legis* is broader than the formula employed by the legislator, making it necessary to enlarge the definition so it can correspond to the real meaning of the law.\(^{27}\)

**Victor’s Justice**

Right before his imprisonment, Slobodan Milošević voiced harsh critiques over the morality and legality of the ICTY. Milošević’s implication that the International Tribunal was in fact a victor’s tribunal rekindled the victor’s justice debate, resonating not only among Serbian nationalists, but also through scholars and lawyers that dissent American power over international institutions.\(^{28}\) Summarily, victor’s justice means


“an extreme form of selective prosecution which occurs when only members of the losing side are prosecuted.”

Victor’s justice is commonly attributed to the International Military Tribunals held in Nuremberg and Tokyo. Those Tribunals have been heavily criticized for judging only one side, neglecting war crimes and other atrocities perpetrated by the Allied forces and, therefore, breaching one of the fundamental principles of justice: impartiality. It is well known that one of the International Military Tribunal for the Far East judges voted for the acquittal of all defendants on the basis that they could not be judged whereas the European allies were not. Still, Judge Pal was a dissent, the only one that spoke on behalf of equality and impartiality of the prosecutions.

Consequently, post-war tribunals became closely associated to victor’s systems of punishing losers for the damage and suffering caused during war in academia, believed to lack the true commitment with the rule of law and to be tainted with the political interests of those who established them. This kind of selectivity is said to undermine the courts’ legitimacy, suggesting that those punished, besides the atrocities they have committed, are also convicted for being on the losing side. Victor’s justice and its resulting immunity for the winning side risks sending contradictory message of accountability which promotes a sense of impunity as long as you are the one claiming the victory.

Gary Bass states that there is a crucial distinction between the circumstances in which a tribunal is created and how decently and fairly it operates. In that case, even a victor’s tribunal can operate following the fairest and most impartial court procedures. In his words: “it is victory that makes justice possible but the fairness of the process is what makes justice.”

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33 Peskin, “Beyond Victor’s Justice?,” 228.
Many authors believe that only within situations of military defeat countries are likely to hand over their accused citizens in order to be prosecuted.\textsuperscript{35} For instance, Nuremberg and Tokyo would never have happened without an Allied victory, Eichmann would never been tried if Israelis have not abducted him in Argentina, and South Africa’s reconciliation process was only possible because of the collapse of the apartheid system. It is remarkable, then, that even with all the possibilities of vengeance that a victor can infringe on his enemies, he chooses to legally prosecute them.\textsuperscript{36}

Another relevant argument on the subject deals exactly with these other possibilities of victor’s justice. Also addressed by Bass,\textsuperscript{37} he maintains that while the victor’s justice of international criminal tribunals is contested, it is primarily a liberal feature, being its counterpart, the “victor’s justice” of illiberal contenders, more gruesome and undesirable: the annihilation of the enemy or, in the best-case scenario, a rigged show trial. The author concludes that the manner in which a state chooses to punish its adversaries can be of great help in constructing a more stable world, as in the case of Germany after World War II, or, when poorly done, end in a disastrous form, as when Napoleon escaped his exile in Elba, making another round of Napoleonic Wars.\textsuperscript{38} “In other words, some victor’s justice can be substantively flawed.”\textsuperscript{39}

Consistently, William Schabas\textsuperscript{40} defends the IMTs criticisms. To begin with, the author acknowledges that proceedings followed the highest standards of the time, but, mostly, he points that equalizing the Tribunals victor’s justice with failure is an error. Though the Allied crimes were not assessed, they cannot be compared to the atrocities committed by the Axis. Thus, the judgments had their fair share of importance in the overall accountability of Second World War crimes.

The critiques over IMTs victor’s justice did not go unnoticed while creating the ICTs. The establishment of the Tribunals through the UN, a neutral body that was neither a party in both conflicts, could not configure a winner’s tribunal. More importantly, their mandates clearly stated that all serious violations of international law could be

\textsuperscript{36} Bass, “Victor’s Justice, Selfish Justice,” 1040.
\textsuperscript{37} Bass, “Victor’s Justice, Selfish Justice,” 1039.
\textsuperscript{38} Bass, “Victor’s Justice, Selfish Justice,” 1036.
\textsuperscript{39} Stanford Encyclopedia, “Transitional Justice.”
\textsuperscript{40} Schabas, “Victor’s Justice.”
prosecuted, no matter the side of the conflict.\footnote{Peskin, “Beyond Victor’s Justice?,” 214.} In the decision of \textit{Prosecutor v. Tadić}, the Tribunal addressed the matter stating that it was distinct from its Nuremberg and Tokyo precedents where only the vanquished were punished.\footnote{Schabas, “Victor’s Justice,” 537.}

Nevertheless, the negative comments remain in a large part of the post-conflict tribunals. The ICTs are compared to the IMTs in the sense that all of them were created by super powers. Whilst the IMTs where designed by the Allied victors (the great powers), the ICTs were established by UNSC Resolutions, which in many cases is understood as the permanent five’s will.\footnote{Schabas, “Victor’s Justice,” 537.} Ergo, the fear of this tribunals, as well as the ICC, becoming instruments in the hand of the victorious.\footnote{Peskin, “Beyond Victor’s Justice?,” 229.} Thus, the overall understanding reproduces the words of Hermann Göring: “the victor will always be the judge, and the vanquished the accused.”\footnote{Stanford Encyclopedia, “Transitional Justice.”}

**Peace Agreements & the Peace vs. Justice dilemma**

Cases with a clear and unchallenged victor have become increasingly scarce since the Second World War. More commonly are the situations where former contenders are granted the right to be part of the new government as a way of guaranteeing the peace settlement.\footnote{Donna Pankhurst, “Issues of justice and reconciliation in complex political emergencies: Conceptualising reconciliation, justice and peace.” \textit{Third World Quarterly} 20, no. 1 (1999): 241-242.} So, the peace agreements’ main objective is “to end violent conflict by designing frameworks that aim to accommodate the competing demands of the conflict’s contenders.”\footnote{Christine Bell, \textit{On the Law of Peace: Peace Agreements and the Lex Pacificatoria} (Oxford: Oxford University Press, 2008: 105.}

This condition creates a scenario for post-conflict justice that Akhavan\footnote{Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism.” \textit{Human Rights Quarterly} 31, no. 3 (Aug. 2009): 627.} calls the post-Nuremberg model: circumstances where the suspects of crimes retain some degree of power. Yet, achieving peace and obtaining justice sometimes are incompatible goals – whilst the end of the conflict depends on negotiating with the same leaders that are...
potential targets for indictments, the insistence on prosecutions can prolong the war, magnifying the numbers of crimes.49 As the international lawyer Anthony D’Amato stated:

“however desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities. This would surely be a paradoxical result, for the idea of war crimes accountability is to deter the commission of war crimes and not to serve as a barrier to discontinuing them.”50

This dilemma is rather irrelevant in contexts of victor’s justice where there is no need for balance among peace and justice.51 Still, in situations of peace agreements, where the deal needs the compliance of conflict leaders to restrain from violence, it is believed that a potential prosecution may impede or delay peace settlements and even prolong atrocities.52 The between peace vs. justice revolves around the dilemma of achieving peace and being able to promulgate justice.

The main contingency is whether the prospection of justice disincentives the implicated leaders in ending the war.53 Some authors argue that mass prosecutions can be seen as vengeance mechanisms, and besides being costly and time-consuming, they are also deemed counterproductive since they may stir old wounds in all the sides of the conflict.54 Differently, other scholars point that if prosecution is a disincentive for peace, automatically impunity would be an incentive.55 Contrary to this previous idea, though, the UN Commission on Human Rights has concluded that, in fact, impunity is one of the main reasons for the continuation of grave violations of human rights.56

In a defense for the importance of justice, it is supported that, though a cease-fire is crucial for short-term peace, only justice and reconciliation can prevent in the long-term the return of animosities. Bringing the culprits to justice restores the victims’ dignity while controlling possible desires of vengeance.\textsuperscript{57} The failure to punish involved leaders responsible for human rights violations encourages cynicism and distrust in the new political system and in the rule of law. Therefore, besides judging those who committed atrocities during the conflict, justice discourage future human rights abuse, deter vigilance justice, and reinforce respect for the law throughout the community. Hence why many experts believe there can be no reconciliation without justice.\textsuperscript{58} Yet, it is noted that partial or incomplete judicial processes can be worse than no process at all, triggering new cycles of resentment.\textsuperscript{59}

In that sense, another important debate is whether peace agreements function as a barrier for judicial accountability and vice versa. The main argument is that if there is a need for cooperation to broker peace, it is not realistic to expect a peace settlement at the same time that a tribunal is settled,\textsuperscript{60} thus they are less likely to have any kind of commitment to future prosecutions of war crimes.\textsuperscript{61} This positioning resembles Edward Luttwak’s defense of war in his seminal article \textit{Give War a Chance}. In the text, Luttwack defends that cease-fires and interventions prevent coherent outcomes of wars. The cessation of conflicts without a decisive victory forestall the exhaustion of means, permitting the sides to recover and engaging in battle again, thus intensifying and prolonging the conflicts in a cycle that never ends.

Totally opposed to this view, Payam Akhavan\textsuperscript{62} defends that they failed to prove that tribunals are an impediment for peace and stability, either during negotiations or in post-conflict peacebuilding. In fact, the author says, judicial interventions are more likely to prevent atrocities than impede peace. He maintains that the political and economic costs of even the threat of an indictment have a stabilizing effect that diminishes atrocities and the power of leaders. Even in genocidal conflicts, there is a

\textsuperscript{57} Pankhurst, “Issues of justice,” 239-240.
\textsuperscript{58} Scharf, “Trading justice for peace,” 250-252.
\textsuperscript{59} Pankhurst, “Issues of justice,” 240.
\textsuperscript{60} Scharf, “Trading justice for peace,” 248.
\textsuperscript{61} Pankhurst, “Issues of justice,” 248.
\textsuperscript{62} Akhavan, “Are International Criminal Tribunal.”
cost-benefit calculus that potentiate the impact of prosecutions on the leaders’ behavior. It is not a question of impunity, but rather a matter of the best timing to indict, prosecute and judge the suspects.  

Nonetheless, an equilibrium between peace and justice is the main goal and challenge in the process of internalizing accountability and bridging the gap that exists among human rights ideals and governance realities. Bearing in mind that the implementation of international law and values on societies that had no say in their design may be seen as a project of imperialistic oppression.

Postcolonialism

When the term post-colonial came into light it had a primarily sense of celebration, marking the end of the colonial period and the newly independent nation-states. Over time, notably during the 1980s, the term came to assume a critical meaning, reflecting the societies where, though the colonial rule had formally and legally ended, the colonial influence was still very much present. Postcolonialism became the “critical perspective that primarily seeks to expose Eurocentrism and imperialism of Western discourses (both academic and public).”

In a pool of diverse important scholars, two are regarded as foundational to the area of postcolonial studies: Frantz Fanon and Edward Said. Fanon’s revolutionary work challenged the Eurocentric assumptions and world views of the 1960s exposing the psycho-social effects of colonialism on both the colonized and the colonizer. The imperial representation and ideological domination, as put by Fanon, turned the colonized sense of self to nothingness.

Said’s thinking is better known by his seminal book Orientalism. Though he speaks on terms of West and Orient, his work relates to the binary construction of the West and

64 Akhavan, “Are International Criminal Tribunal,” 653.
the Other, including groups that are not necessarily Oriental, but were subjugated to the same process of colonization and misrepresentation in the Eurocentric discourse, like Latin American and African countries. As stated by the author, this Other represents precisely what Europe is not. Therefore, this Orient symbolism was a socially constructed idea by Western power which not only created the ‘truth’, but also consolidated its political and cultural dominance over the Other.

The conceptualization of the Other is critical in the postcolonial studies. The Other was created referencing back to attributes that the Western either lacked or rejected, it hence crafted an enduring division between the civilized West and the uncivilized “rest”. These Others became regarded as savages and barbarians, a defining exclusion that was essential to justify the whole imperialistic enterprise.

As Alpana Roy narrates, the postcolonial theory directly objects the view of an Otherness created by Western culture, exposing that even today the produced categories and images of non-Europeans – or Orientals, in Said’s vocabulary – are matched to the political, legal, economic or social convenience of Western countries. The binary relations, far from ceasing to exist once colonialism was deemed illegal, continued to be constantly renegotiated, reinforcing the relations of domination between the West and the Others.

As consequence, postcolonial studies nowadays do not correspond a state where a country left a colonial past behind, it portrays a critical view of the continuation of colonial consciousness of the former colonized and colonizers, as well as the institutions formed out of the imperialistic experience. Postcolonialism then creates an important analytical tool to reexamine those normalized Western narratives. They enable a form of resistance to the hegemonic Eurocentric views, challenging its

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70 Shome, “Postcolonial Interventions,” 43.
74 Otto, “Postcolonialism and Law?,” xii.
75 Pahuja, “The Postcoloniality of International Law,” 469.
discursive practices and aiming on the participation of all those that once were treated as subaltern, silenced by the dominant regimes.\textsuperscript{76}

Discursive practices legitimate the \textit{status quo} while subjugates the Other, reproducing the neocolonial patterns of intellectual domination.\textsuperscript{77} These discourses control the mode and the means of representation, usually through negative stereotypes that reveal a group unable to represent itself, a group in need of an outside ruler to guide it.\textsuperscript{78} Contemporary, this kind of postcolonial discourse is considered the primary mean of imperialism.\textsuperscript{79}

Though postcolonial theories are relatively meager in law when compared to other areas of social sciences, its contributions have been increasingly outlined by different authors.\textsuperscript{80} Roy\textsuperscript{81} considers how postcolonial theory in legal studies has a role on understanding the law as an integral part of the colonial, imperial and postcolonial projects, offering a different insight on what was previously as something natural. Sundhya Pahuja\textsuperscript{82} argues that law, mostly international law, was (and is still used) as a “cloak of legality” to continue the subjugation of the Other. Law, then, was/is used by those who held power in order to facilitate and reiterate practices of (neo)colonialism.

Postcolonialism in legal theory thus attempts to understand how international legal systems maintain and reproduce Eurocentric views.\textsuperscript{83} Antony Anghie\textsuperscript{84} maintains that international law shaped the foundations of colonized countries in the sense that it reinforced their subordinate role by the doctrines of sovereignty and international economy. More importantly for the purpose of the present study, are the ways in which international law continued to be used as a vehicle for the civilizing mission over the Others.\textsuperscript{85}

\textsuperscript{76} Shome, “Postcolonial Interventions,” 42; Otto, “Postcolonialism and Law?,” vii-ix.
\textsuperscript{77} Shome, “Postcolonial Interventions.”
\textsuperscript{79} Shome, “Postcolonial Interventions.”
\textsuperscript{80} Roy, “Postcolonial Theory and Law,” 315.
\textsuperscript{81} Roy, “Postcolonial Theory and Law,” 324.
\textsuperscript{82} Pahuja, “The Postcoloniality of International Law,” 459.
\textsuperscript{83} Otto, “Postcolonialism and Law?,” xviii.
\textsuperscript{85} Anghie, “The Evolution of International Law,” 750-751.
Even projects that are genuinely concerned with the universalization of legal institutions tend to reproduce the imperializing tendency of Otherness. Law has been playing “a constitutive role – along with other forms of knowledge – in defining the colonial subject.” Questioning this role played by legal discourse in continuing the colonial narrative of dominance and subordination is essential to raise awareness and take cognizance of the even subtle forms of domination that independence has not solved.

An illustrative example of how postcolonialism, and more specifically postcolonial discourse, affects the images of the Other in Western culture is Garth Myers, Thomas Klak and Timothy Koehl article in the news coverage of the conflicts in Bosnia and Rwanda. The conflicts had many parallels – the population density and geographic area of the countries, ethnic identities informing and fomenting the animosities, combatants’ strategies and tactics, as well as a long and destructive wars – which created an expectation that both civil wars would have a rather similar approach at the American media.

After the analysis of six major US newspapers from October 1st, 1990 to April 18th, 1994, it became clear that, though analogous situations, they had quite a divergent coverage. Firstly, the volume of reporting on the conflict was incredibly distinct, with a ratio of 25:1 of Bosnian news. More strikingly than the amount of coverage, is the language used in each case. While Rwandan conflict was mostly represented by terms such as savagery, terror, bloody and tribal, Bosnia’s fight was taken as “everyone’s war”, with applied strategies and tactics of warfare by leaders or commanders.

The discourse that the quantity and type of coverage gave to its American audience only reinforced Western racism, intolerance and indifference, maintaining the hegemonic representation of the African Other. Hence, mass media became an agent to support power relations through shaping the public perception. In the authors words:

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90 Myers, Klak, and Koehl, “The inscription of difference.”
91 Myers, Klak, and Koehl, “The inscription of difference.”
“By simplifying the Rwandan war and making it subscribe to the ready-made discourse of Africa’s difference, the US press "constructs social reality" for its readership in a manner which plays on their misunderstandings and reassures them that, indeed, Africa is as bad as they imagined.”

Legitimacy

The last decades have seen an increase of interest in international legitimacy. It is ascribed that this expansion is due to the growing authority and importance of international institutions. However, in order to correctly assess the idea of legitimacy in the ICTs, it is important to understand the difference between legitimacy and legality.

“By ‘legality’, one means the conformity or nonconformity of a body politic, or a national or international mechanism, with the legal rules that regulate its establishment.” Legality in international institutions ensure that its actions are directly related to what was determined by its constitutive treaty. Legitimacy, otherwise, is a mixture of the moral and psychological acceptance of this body by its constituency, it is fluid and depends on perceptions and outcomes.

Legality and legitimacy are not mutually dependent, though expected to go hand in hand; there can be illegal measures that are considered legitimate as well as illegitimate legal measures. Nevertheless, for the purposes of this study, the concept of legitimacy needs an in-depth analysis that goes beyond the contrasts between legality and legitimacy.

The modern understanding of legitimacy is highly influenced by Max Weber’s definition in which legitimacy is the “probability that a ruler’s decision be accepted and carried out without the need of coercion.” It is thus seen as an empirical fact and

93 Daniel Bodansky, “The Concept of Legitimacy in International Law.” In Legitimacy in International Law, edited by Rüdiger Wolfrum and Volker Röben (Berlin: Springer, 2008), 309.
95 Bodansky, “The Concept of Legitimacy,” 311.
analytical tool that resides on the belief of citizens about the rightfulness of political authority.\textsuperscript{99}

Despite the importance of Weber’s contribution, the many theory extensions that came afterwards have had a bigger impact on the concept, especially on the field of political science, where it is most applied.\textsuperscript{100} The first relevant distinction is between normative and social legitimacy.

Normative legitimacy has a moral and ethical approach, being highly informed by philosophy and political theory. In order to be normatively legitimate, an institution has to make biding decisions justified by objective means.\textsuperscript{101} Social legitimacy, on the other hand, has an empirical assessment measured by social science tools.\textsuperscript{102} In this sense, there is legitimacy when there is acceptance of its policies in the basis of appropriateness and worthiness.\textsuperscript{103} Though normative and social legitimacy are fundamentally different, they often inform each other, being conflated in a great part of the legitimacy literature.\textsuperscript{104}

The second and most acknowledged division is between input and output legitimacy. This distinction was first promulgated by Fritz Scharpf in the 1970s:\textsuperscript{105} input theories are concerned with the “participatory quality of decision-making process leading to rules and laws, whereas output legitimacy refers to the perceived efficiency of these rules and laws.”\textsuperscript{106} Both express the public evaluation of the institution, even though one focus on the design while the other on the institution performance.\textsuperscript{107}

\textsuperscript{102} Weiler, “In the Face of Crisis,” 826.
\textsuperscript{103} Lindgren and Persson, “Input and output legitimacy,” 451.
\textsuperscript{104} Bodansky, “The Concept of Legitimacy,” 313.
\textsuperscript{105} Steffek, “The output legitimacy,” 264.
\textsuperscript{106} Lindgren and Persson, “Input and output legitimacy,” 451.
Accordingly, input legitimacy relates to the institutional mechanisms and procedures, the machinery that allows citizens preferences to be linked with political decisions. Its combination of the decision-making process with the subjects’ preferences reflects the democratic dimension of legitimacy. To achieve input-oriented legitimacy, a degree of procedural fairness must be achieved, including neutrality, consistency, respect, accountability, and participation.

Output legitimacy, in a nutshell, refers to the constituency’s assessment of the institution’s performance relevancy and quality. In this sense, it is related to effective or efficient resolutions, a utilitarian thinking based on results. The capacity to solve problems and meet expectations is summarized through the need of competence by the institution.

The best example through analogy between input and output legitimacy is set forth by Jens Steffek. Taking from Abraham Lincoln’s proverbial definition of democracy as a government of the people, by the people, and for the people, Steffek explains that ‘by the people’ would be the input side of democracy, where citizens are able to select political office holders and hold them accountable. Likewise, ‘for the people’ would be contained in the output legitimacy domain, implying that the decisions taken should benefit all citizens.

In the context of (international) court’s legitimacy, the work of Klaus Bachmann and Aleksandar Fatić has great significance. According to the authors, the jurisdiction that empowers courts and tribunals to decide over the wrongdoer’s fate also entitles it

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110 Boedeltje and Cornips, “Input and output legitimacy,” 2.
112 Potter, “Two Concepts of Legitimacy.”
113 Lieberherr, “The role of throughput,” 3.
114 Steffek, “The output legitimacy,” 266; Boedeltje and Cornips, “Input and output legitimacy.”
116 Bachmann and Fatić, The UN International Criminal Tribunals.
to enjoy, or not, some degree of legitimacy in which verdicts, judgements, and decisions play a large role undermining or strengthening it.\textsuperscript{117}

“The effectiveness of a criminal court’s mission, especially when it is conceived as general prevention/deterrence, depends on the perception of that mission be those concerned. A key element of that perception is the mission quality in terms of the legitimacy and the clarity of the court’s conceptualization of what is criminally culpable and why. Once the clarity of moral and legal norms is ensured, a consistent action by the court might hopefully lead to some (it is questionable how many?) preventive results.”\textsuperscript{118}

It is important to note that, even if their decisions affect directly only a small group of people – the accused, the defense and the prosecution team – the legitimacy is accredited by the wider public.

This wide evaluation of legitimacy does not necessarily accompany beneficial decisions. If one is considered guilty of a crime by the public, its condemnation is more likely to bring a legitimate attribute for the court.\textsuperscript{119} Using the parallel between input and output legitimacy, if the court’s constituency believe in a specific verdict (output legitimacy) they tend to ignore or forgive if the conviction did not follow all the rules of impartiality and fairness it was expected to (input legitimacy).

This focus in output legitimacy also entails the prospection that court’s rulings will rest on functional goals, such as reconciliation and restoration of trust, and not exclusively on legal reasoning and procedure.\textsuperscript{120} Bachmann and Fatić point to the problem that legitimacy based on expected results of courts that were supposed to be impartial may bring:

“Under certain circumstances, a lack of input-legitimacy may even make such a court more receptive to the wishes of its audience and diminish the level of independence of the institution and the autonomy of the trial chambers and judges. One could be tempted to claim that courts, even if perceived as imposed or illegally established, may gain legitimacy by making the ‘right’ decision, one that is a publicly acceptable and expected.”\textsuperscript{121}

\textsuperscript{117} Bachmann and Fatić, The UN International Criminal Tribunals, 28.
\textsuperscript{118} Bachmann and Fatić, The UN International Criminal Tribunals, 38.
\textsuperscript{119} Bachmann and Fatić, The UN International Criminal Tribunals, 28.
\textsuperscript{120} Bachmann and Fatić, The UN International Criminal Tribunals, 29.
\textsuperscript{121} Bachmann and Fatić, The UN International Criminal Tribunals, 29.
Therefore, in order to achieve broader (output) legitimacy, the court itself can give up its input legitimacy.

The authors also make a third distinction of legitimacy, what they call the elitist concept of output legitimacy. To add a third dimension into legitimacy isn’t something innovative, being the throughput legitimacy one of the most noted additions. Still, in the analysis of this study, we will stick with Scharpf’s original two-dimensional concept of legitimacy.

**Theoretical Approach**

In order to answer the research question of what determines the diverse application of the concept of genocide in the jurisprudence of the International Criminal Tribunals, a set of assumptions will be evaluated under the analyzed case-law. The first assumption infers that the courts’ usage of the concept of genocide is not strictly legal, one that follows established interpretive procedures and juridical reasoning; it goes beyond the legal realm and into the political sphere.

The second assumption regards the differences in the termination of the conflicts. In this sense, it is supposed that there is an intrinsic difference on charging crimes, especially highly stigmatized ones such as genocide, when the violence ends with a victor (victor’s justice) and when it was the result of a compromise between all the parties (peace agreement). Another assumption concerns the possibility of postcolonial attitudes when charging an accused. Accordingly, a judge would be more prone to sentence an indicted individual from Africa with graver crimes than a European counterpart, even if their deeds were similar in nature.

The second and third suppositions – conflict ending and postcolonial approaches to the accused – explain the differences between the two Tribunals but are insufficient when it comes to clarify possible divergences of interpretation in the same tribunal, thus the need for the last variable. The fourth and last assumption explicates the charging of genocide from the perspective of legitimacy. Therefore, when sentencing a case the

123 Steffek, “The output legitimacy;” Lieberherr, “The role of throughput.”
Chamber considers not only the facts and legal reasoning of the case, but it would also assess the popular expectancy over that conviction.

The hypothesis defended is that, though the ICTs have a high standard of moral validity and seriousness, their decisions are still heavily influenced by political factors that should not have a role in courts’ proceedings. Consequently, the pronounced sentences, especially when considering how the crime of genocide is constituted, have disparities that go beyond law interpretation, considering the political aspects of the conflict, the geographical localization of the massacres, and, most importantly, the expectations created over specific cases. Thus, there is no single explanation, but an overlap of the aforementioned assumptions when applying genocide in the ICTs cases.
METHODOLOGY

Because this research seeks a deep understanding of the application of the crime of genocide in two different Tribunals, the method adopted will be a qualitative comparative case analysis. Case comparison is a fundamental tool of analysis as it helps the description and concept-formation while highlighting possible similarities and contrasts among the cases. The main objective is to collect in-depth information on the different forms the concept was applied, making possible to further reflections, critics and conclusions over the research object, thus transcending from the descriptive to an interpretative examination.

Borrowing from Theda Skocpol and Margaret Somers terminology, this study will use the third type of comparison, the contrast of contexts, in which two or more cases are assessed based on their differences in order to establish “a framework for interpreting how parallel processes of change are played out in different ways within each context.” Because in the contrast of contexts the idea is to examine more carefully the meaning of the differences among the cases, it is believed that generally it can be best and deeper explained if the inquiry is restricted to a small number of cases.

In order to enable the research, this thesis will be based on two types of research: bibliographical and documental. The bibliographic research, through books and articles, will provide the academic background to inform both the theoretical and historical sections of the work. They are intended to give the critical assessment necessary to a scientific production. The documental research, on the other hand, will concentrate on the Courts’ records regarding the prosecution and sentencing of persons accused of genocide, allowing a first-hand evaluation of these judgements.

As the study focuses on the jurisprudential decisions of the courts for the former Yugoslavia and Rwanda and what determines them, the main method of research will be the documental/primary sources. In the analysis of the courts’ rulings, special distinction is given to the Trial Chamber’s and the Appeals Chamber’s trials. Although they refer to the same case, they are composed by varied body of judges, in which may create a diverse understanding of the same case.

An important acknowledgement and explanation is the absence of the International Criminal Court in this study. Irrespective of its importance as the main international criminal court for individuals of our time, it has not had a conviction on the grounds of genocide. Even with the notorious indictment and arrest warrant for Omar Al Bashir on multiples counts, including genocide, he has not been convicted yet because of the ICC’s policy of judging only in the presence of the accused. Consequently, convictions of genocide in international courts for persons are still restricted to the ICTY and the ICTR.

It is also crucial to recognize that using court’s records as a source of research has plenty of downfalls and should be handled with caution. As Tomislav Dulić explained, legal documents portray a battle to prove one’s point between prosecution and defense, not necessarily informing the facts, but rather trying to achieve their goal. Nevertheless, the present work intends to identify precisely what these court’s records describe, so there is no dilemma over whether they reflect the truthfulness of what happened or not, since they are the “truth” that is being evaluated.

Case Selection

As the thesis relies on a qualitative case-comparison, and also because of time and space constraints, a limited number of case law could be evaluated. In total five cases were

considered: three from the ICTY (Krštić, Jelisić, and Stakić) and two from the ICTR (Akayesu and Rutaganda).

The case of Jean-Paul Akayesu was chosen due to its historical and paradigmatic importance. Akayesu was the first individual to be convicted for genocide, and his trial is widely appraised because it has settled rape and other sexual violence as acts of genocide\textsuperscript{131}. Besides, Akayesu’s case has informed many other ICTs decisions, thus being the most important precedent the ICTR produced.

Similarly, the Krštić case was groundbreaking when the Trials Chamber convicted General Radislav Krštić for genocide on the killings of Srebrenica men and boys of military age, recognizing that a genocide can occur in specific localities and target a restricted parcel of the group. Krštić’s sentence is widely contested, not only by his lawyers, but also by scholars alike who disagree that the Srebrenica massacre was an instance of genocide. Nevertheless, the fall of Srebrenica’s safe heaven attracted too much attention from the international community, which automatically brought emphasis to any judicial case dealing with it.

It is true that other important cases that have not been assessed in this research have equally dealt with Srebrenica and the situation of Bosnia Herzegovina in general. It is worth mentioning that the ICTY prosecuted important figures like Slobodan Milošević, Radovan Karadžić, and Ratko Mladić. However, Milošević died in custody before he was judged, and both Karadžić and Mladić are still awaiting their appeal to be adjudicated by the Mechanism for International Criminal Tribunals. Thus, they would offer only a partial picture of what this study proposes to analyze, not being the most fit cases at the time.

Jelisić and Stakić processes have been chosen for the historical backgrounds concerned. Although Brčko and Prijedor had similar circumstances to Srebrenica, they also had quite different developments, demonstrating that there is a great divergence in the application of the crime of genocide even in the same Tribunal.

Lastly, Rutaganda was chosen for his prominent role in the Rwanda’s genocide. Whilst Akayesu has not been known for the wider public until his sentence, Rutaganda’s ICTR trial was not praised as much, but his actions have been known worldwide, specially through the movies depicting the violence that occurred in Rwanda in 1994.

Research Contributions

Due to the fact that these Tribunals are a novelty in the international community, first of its kind on the prosecution of individuals, every step they take is a lesson for future courts, especially the ICC. Much has been studied about the ICTY and the ICTR, predominantly on their legal applications and proceedings. The critics that arouse are mostly brought forward by the accused or by people of the court’s interest, lacking the degree of impartiality needed for academic conclusions.

The first contribution this research brings is, obviously, to complement the existing work on the application of the concept of genocide. What constitutes genocide is probably the most debated subject in the genocide and Holocaust field. This way, the analysis of the legal findings of the two ad hoc Tribunals with a focus on the political motivation behind them adds new variables to the discussion of how the concept is interpreted and applied.

Another contribution is precisely shedding light on the political motivations that underpin judicial decisions. Although an absolute impartiality is known to be impossible, it is expected that judges that are selected in such restrictively manner do their most to leave personal convictions and social pressures out of the court. Thus, the research shows how political interests and identifications can sometimes be stronger and louder than the legal basis, even in high estimated courts of justice.

Lastly, and maybe the most important of the contributions this research can bring, when pointing to a set of problems that an international tribunal of this type had, it creates a foundation of knowledge on the possible setbacks that other tribunals might have. This knowledge base makes prevention (or solution) of eventual problems easier, improving the effectiveness of these institutions.
The intention of the thesis is to present otherwise disregarded issues instead of giving possible solutions. But these issues portray an overall tendency, and in politics every trend has a significance, especially the absence of one.

**Research Limitations**

In this study it is argued that political factors, rather than strictly legal aspects, influence on the ICTY and ICTR decisions, especially when it comes to convict an individual for genocide. Above all, it is imperative to concede that every research has its intrinsic limitations: there is no objective truth, and the conclusions one might find are highly influenced by his or her perspective of reality, accounting for the cultural, social, economic, and political contexts in one live in.\(^{132}\)

Besides these common restraints, the present thesis presents two major limitations. The first refers to the number of cases analyzed. As in any qualitative research of this size, it is understandable that a few cases must be chosen, and they will comprise only a part of the evidence. Yet, it is important to recognize that the more cases examined, the more consistency the results will have. Therefore, to widen the scope of analysis is a further possibility to deepen the present thesis subject.

Another important limitation of the study is the fact that the conclusions achieved are based on subjective inferences, which cannot be scientifically proved and are susceptible to denial from judges and tribunals alike. This is a common limitation in the field of social sciences, and one must be aware of the restrictions his conclusions might have. However, differently from the courts of justice where every charge has to be proven beyond reasonable doubt, the researcher only needs to make plausible assertions.\(^{133}\)

\(^{132}\) Dulić, “Peace Research and Source Criticism,” 35.

\(^{133}\) Dulić, “Peace Research and Source Criticism,” 44.
BACKGROUND

Lemkin’s Word

“When is the killing of a million a lesser crime than the killing of a single individual?”

This was the question that drove the young Raphaël Lemkin (1900-1959) in a quest to make genocide a crime under international law. However, when Lemkin began, genocide did not exist as a word, let alone was a matter of international concern.

Lemkin was a Polish jurist of Jewish descent. Even before his training as a lawyer, Lemkin was interested in episodes that targeted specific groups, like the massacre of Christians in Rome, the targeting of French Huguenots, or the persecutions of Armenians in the Ottoman Empire. It was precisely the killing of Talaat Pasha in Berlin by the Armenian survivor Soghomon Tehlirian that made Raphaël Lemkin reflect upon the need of a specific law. He questioned, above all, how Talaat, one of the orchestrators of the Armenian genocide, if he had not suffered the attack, would be free walking along European capitals, and Tehlirian, for revenging the suffering of his people, was convicted in the blink of an eye.

Later in 1930s, Lemkin drafted a paper that accounted for the crimes Talaat Pasha committed, as well as brought attention to the recent Hitler’s ascension. In his project, Lemkin described the linked crimes of barbarity and vandalism, proposing a universal jurisdiction to ban them. Accordingly, the crime of barbarity would be the conceiving of “oppressive and destructive actions directed against individuals as members of a national, religious, or racial group,” whilst vandalism encompassed the “malicious destruction of works of art and culture because they represent the specific creations of

the genius of such groups.” Lemkin’s intention was to preserve both the physical and the cultural existence of groups. He presented his proposal in legal forums around Europe, without acceptance, whatsoever.

Before most people, Lemkin understood the danger that came with the Nazi regime, especially for people of Jewish ascendancy, like him. Hence, in 1939, a few days after the invasion of the Wehrmacht, Lemkin fled Poland. He lived in Lithuania and Sweden before being finally able to leave Europe to the United States, in 1941. In the United States, he worked in important law schools, like Yale and Duke University. Already during the war, Lemkin published his most famous book: *Axis Rule in Occupied Europe*. Besides extensively detailing the atrocities that were being committed by the Nazis in the European continent through its occupation policies, it was the first time Lemkin published the word that would become the synonym of the most horrific crime the human kind has ever witnessed: genocide.

The term genocide was coined by the union of two radicals: the Greek *genos*, meaning tribe or race, and the Latin *cide*, meaning killing. The author acknowledged that, though he was the one who coined the word, it denoted an old practice in its modern development. In Lemkin’s words, genocide as the destruction of a nation or an ethnic group, had in the group’s extermination only one of the means to achieve it, a part of a larger concept. Thus, a group did not need to be physically exterminated in order to suffer genocide, genocide could destroy a culture instantly.

“Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members 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.

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143 Jones, *Genocide*, 12.
The objectives of such a plan would be the disintegration of the political and social institutions, culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”

Besides creating a new term for an existing crime, Raphaël Lemkin proceeded to define what kind of actions were encompassed by it. For instance, he divided genocide into eight fields of action: political, social, cultural, economic, biological, physical, religious, and moral. Though he uses examples from Nazi policies to illustrate his explanation, Lemkin did not want to genocide be attached to Hitler’s Final Solution – as stated, it is a crime that goes beyond Hitler’s actions.

As follows, genocide is a composite of different acts of persecution or destruction that could happen in times of both peace and war. Groups, according to Lemkin, should be protected not as an interest of each country, but as of humanitarian significance. He emphasized the international character of the violation, being a delicta juris gentium.

“The practices of genocide anywhere affect the vital interests of all civilized people. Its consequences can neither be isolated nor localized. Tolerating genocide is an admission of the principal that one national group has the right to attack another because of its supposed racial superiority. This principle invites an expansion of such practices beyond the borders of the offending state, and that means wars of aggression. The disease of criminality if left unchecked is contagious. Minorities of one sort or another exist in all countries, protected by the constitutional order of the state. If persecution of any minority by any country is tolerated anywhere, the very moral and legal foundations of constitutional government may be shaken.”

146 Lemkin, Axis Rule in Occupied Europe, 79.
147 Lemkin, Axis Rule in Occupied Europe, 82-90.
149 Lemkin, Axis Rule in Occupied Europe, 92-94.
150 Wrong against the law of nations.

Raphaël Lemkin did not stop with the publication of his book. After he spread the word about the Nazi crimes in Europe and how they constituted this ancient crime with a new name, Lemkin went on a quest to establish the crime of genocide under international law.152

With the end of the war and the revelation of the scale of Nazi’s atrocities, Lemkin tried to file genocide in the Nuremberg Tribunal. The Tribunal, however, favored to indict over crimes against humanity, but already in December 1946, only a year after the armistice that ended the war, the United Nations General Assembly (UNGA) passed the Resolution 96(I) in which they condemned genocide as:153

“the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred, when racial, religious, political and other groups have been destroyed entirely or in part. 

(...)

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilized world condemns.”154

Beyond the recognition, the UNGA requested the competent committee to take the necessary studies to draw a draft convention on the crime of genocide. Three legal experts were consulted on the drafting process: Henri Donnedieu de Vabres, Vespasian V. Pella, and Raphaël Lemkin155. Thusly, Lemkin not only coined the term and defined the crime, he also participated in its codification.

152 Totten and Bartrop, The Genocide Studies Reader, 3-4.
Lemkin was favorable on the exclusion of political groups as part of the protected collectivities. He believed that they lacked the stability factor, essential to the definition. On the other hand, he defended eagerly the permanence of cultural destruction as one of the acts that constituted genocide.\textsuperscript{156} Still, both would be later excluded from the final draft.

The case against political groups was advanced along the same lines as Lemkin’s by countries such as the Soviet Union, Poland, and Venezuela. It was held that the protected groups should be limited to those permanent and easily recognizable ones, adding mutable groups, as political ones, would weaken the convention.\textsuperscript{157} As for cultural genocide, “consisting in the destruction by brutal means of the specific characteristics of a human group, that is to say, its moral and sociological characteristics,”\textsuperscript{158} was reduced to a paragraph regarding the forcible transfer of children.

On 9 December 1948, the General Assembly plenary adopted the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. It was adopted a day before the acclaimed Universal Declaration of Human Rights, thus being the first human rights treaty to ever be adopted by the UN.\textsuperscript{159} The Convention establishes that:

\textit{Article I}

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

\textit{Article II}

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

\begin{itemize}
  \item[(a)] Killing members of the group;
  \item[(b)] Causing serious bodily or mental harm to members of the group;
  \item[(c)] Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  \item[(d)] Imposing measures intended to prevent births within the group;
  \item[(e)] Forcibly transferring children of the group to another group.
\end{itemize}

\textit{Article III}

\textsuperscript{157} Jones, \textit{Genocide}, 19; Totten and Bartrop, \textit{The Genocide Studies Reader}, 4.
\textsuperscript{158} Schabas, \textit{Genocide in International Law}, 70-71.
\textsuperscript{159} Power, “\textit{A Problem from Hell},” 60.
The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article IV
 Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.160

Article I defines genocide as a crime under international law in times of war or peace, shifting from the IMTs that only accounted for those crimes committed during warfare. Articles II e III stipulates in *numerus clausus*161 which elements are considered in the conviction of the crime of genocide, like the protected groups, the mental element (*mens rea*) of intent, and the specific acts (*actus reus*) that can be charged.162 Article IV extinguishes the possibility of defense based on the premise that the person was following orders, making every participant equally punishable.

The Convention was an alibi for the inaction of Western nations during the Holocaust. As Lemkin defended, it put genocide as a crime no matter the circumstances, if there is a war or there is peace, if the perpetrator is a commandant or a mere subordinate. For a while it seemed that finally the world would be preserved from the “crime of crimes”163 as the international community had the legal background to act. However, even with all the debates regarding what constitutes genocide and whether it is applicable to a particular case, and as it would become clear later in the century, “the trouble was not a shortage of knowledge, or understanding, but a shortage of will.”164

**Yugoslav War**

Yugoslavia, as a federation of Slav states, came together after the First World War and the disintegration of the Ottoman Empire. Its first crisis came already at the Second World War, when animosities between the fascist and nationalist elites arouse with the

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161 Closed numbers, meaning that the elements are limited, not examples.


163 Schabas, *Genocide in International Law*.

invasion of Nazi forces. In Serbia there was a violent German occupation, in Croatia it was installed a fascist and anti-Serb government, the Ustashe, and the Bosnian Muslims largely collaborated with the Nazis. The discrepancy between the ways in which each community dealt with the Nazi invasion naturally created a sense of enmity, especially for the Serbs, that were persecuted throughout the federation. At the latter stages of the war, the partisan movement led by Josip Broz “Tito” took power and installed a socialist state that promoted the ethics of brotherhood and unity, ensuring that no ethnic group dominated the federation. Yugoslavia became a renowned pluralistic multinational society under his rule.

In 1980, however, Tito died, leaving a vacuum in power that prove quite dangerous. The lack of a strong leadership to take Tito’s place left space for ethnonationalistic politicians to emerge, like Slobodan Milošević in Serbia, Franjo Tudjman in Croatia, and Alija Izetbegović in Bosnia-Herzegovina. While Tudjman revived Ustashe symbolism and rhetoric, harassing Croat Serbs from the Krajina region, Milošević took Serbia’s presidency, increasing its dominance over the region, and initiated an offensive over Kosovo’s region and Izetbegović mobilized Bosnian Muslims along religious ties, with ideas of creating an Islamic republic in Bosnia.

The war was installed in 1991, with the declaration of independence from Slovenia and Croatia. Serbia, the dominant republic, responded violently in an attempt to unify those Yugoslav territories and regions populated by ethnic Serbs in one state. After only ten days, the claim over the territory of Slovenia was dismissed and the Yugoslav National Army (JNA) withdrawn from the region. Croatia, however, had a sizable Serbian minority and a lucrative coastline. The fight over the heavily Serbian

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166 Jones, Genocide, 432-433.
168 Jones, Genocide, 433.
170 Jones, Genocide, 433.
170 Jones, Genocide, 433.
populated region of Krajina lasted months, until the Serbs of the region declared their independence from Croatia to integrate Milošević’s Greater Serbia.\footnote{Jones, \textit{Genocide}, 434; The Prosecutor v. Milomir Stakić, 2003, 6.}

The conflict intensified with the referendum and subsequent declaration of independence from Bosnia-Herzegovina in the beginning of 1992.\footnote{The Prosecutor v. Milomir Stakić, 2003, 6.} Bosnia was the most pluralistic and heterogeneous of all federation’s nations, divided among 44% Muslims, 31% Orthodox Serbs, and 17% Roman Catholic Croats.\footnote{The Prosecutor v. Radislav Krstić, 2001, 3.} With the escalation of war tensions and separatist intentions, each group sought safety within ethnicity lines in the image of national leaders, such as Tudjman and Milošević.\footnote{Jones, \textit{Genocide}, 435.}

Bosniaks (Bosnian Muslims), for instance, were the most vulnerable of all groups as they did not have a parent protector in the neighborhood,\footnote{Power, “\textit{A Problem from Hell},” 248.} although there was a high expectancy from the political elites that the US and Turkey would intervene in favor of Bosnia if Serbian forces started a war.\footnote{David Binder, “U.S. Policymakers on Bosnia Admit Errors in Opposing Partition in 1992,” New York Times, August 29, 1993, \url{https://www.nytimes.com/1993/08/29/world/us-policymakers-on-bosnia-admit-errors-in-opposing-partition-in-1992.html}.}

Bosnia-Herzegovina, and specially its capital, Sarajevo, became the epitome of the warfare in the Balkans. Serbians and Croatians alike fought viciously in Bosnian territory, both searching territorial gains, resorting to mass killings and minority expulsions.\footnote{Totten and Bartrop, \textit{The Genocide Studies Reader}, 439.} However, the destructiveness of the Croatian assault was in no way comparable to the Serbian. In an UN report, it was ascribed 90% of the total atrocities in Bosnia to the Serbs, with the remaining 10% divided between Croats and Muslims.\footnote{Jones, \textit{Genocide}, 437.}

The Yugoslav Army sieged and bombarded Sarajevo. They purposely destructed all major cultural institutions that remitted the Bosnian Muslims including libraries and religious landmarks. Meanwhile, outside the capital, even greater killing sprees were taking place: mass executions, a widespread rape campaign of Muslim women, and the existence of concentration camps for Bosniaks. These attracted the international attention and pressure for Serbian forces to leave Bosnia. Upon leaving, the JNA left
behind all of its weapons to Bosnians Serbs, who raised an army of approximately 80,000.\(^\text{184}\)

The Bosnian Serbs continued the Serb strategy of ethnic cleansing. Concentration, decapitation, separation, evacuation, and liquidation were the main methods used to achieve not only military victory, but also to erase the memory of any other ethnic group from the region they started calling Republika Srpska.\(^\text{185}\) Lists of preeminent people from both Bosnian Croats and Muslims were compiled, guiding those that should be rounded up and executed first.\(^\text{186}\) This strategy became known worldwide after the fall of Srebrenica.

Srebrenica, like Sarajevo, was surrounded by Bosnian Serbs forces since the beginning of the war. It was one of the six most heavily populated parts of Muslim territory that had a small unit of UN peacekeepers to protect it, acquiring the status of an UN safeheaven.\(^\text{187}\) After Bosnian Muslim forces from Srebrenica raided Sarajevo, Bosnian Serbs’ positions from behind, Bosnian Serbs decided to implement their “endgame” and eliminate the enclave. UN troops witnessed it without firing a single shot to prevent the slaughter of Srebrenica’s last habitants,\(^\text{188}\) they even ordered the Bosniak civilians to surrender to Serbian troops and helped to load the trucks that would ultimately lead those people to the execution sites.\(^\text{189}\)

Samantha Power described not only the intentions but also the ferocity of Bosnian Serbs assaults:

“Serb gunmen knew that their violent deportation and killing campaign would not be enough to ensure the lasting achievement of ethnic purity. The armed marauders sought to sever permanently the bond between citizens and land. Thus, they forced fathers to castrate their sons and molest their daughters; they humiliated and raped (often impregnating) young women. Theirs was a deliberate policy of destruction and degradation: destruction so this avowed enemy race would have no homes

\(^{184}\) Jones, Genocide, 435-437.

\(^{185}\) Jones, Genocide, 438; Power, “A Problem from Hell,” 249.

\(^{186}\) Power, “A Problem from Hell,” 249.


\(^{188}\) Jones, Genocide, 441.

\(^{189}\) Bachmann and Fatić, The UN International Criminal Tribunals, 37.
to which to return; degradation so the former inhabitants would not stand tall – and thus would not dare again stand – in Serb-held territory.”

The war on Bosnia lasted until November 1995, when an US-sponsored and UN-supported agreement was signed in Dayton. The treaty divided the Bosnian territory into three segmented ethnic pure areas to be supervised by NATO. With the signature of Dayton Agreement, it was hoped that peace would finally settle in the Balkans. Nevertheless, in 1998, under the leadership of Slobodan Milošević, violence erupted once again in Kosovo’s territory. This time, NATO intervened earlier in the conflict bombing the region. Though these bombings actually exacerbated the conflict influencing the occurrence of most of the massacres against the Kosovars (ethnic Albanians), they helped to end it rapidly, finishing the fight in about six months.

It was the discovering of concentration camps that revived European memory of Nazi-era camps and brought the first instances of use of the word genocide for the Balkans; the unrestrained violence that took place in Bosnia-Herzegovina during the three-year war claimed about 250,000 civilian victims. Yet, it was the fall of Srebrenica and the mass murder of approximately 8,000 Bosnian Muslim men and boys in July 1995 that gained recognizance as the ultimate genocide site in the former Yugoslavia. Because of its localized factor, it is still much debated if one can label the Yugoslav war as a genocide.

Some authors argue that what happened in Bosnia, and more specifically in Srebrenica, was a barbaric campaign of ethnic cleansing, but it did not constitute a genocide. Kjell Magnusson makes a compelling case against the genocide assumption in the Balkans. The author notes that deportations are different from the crime of genocide, and even in Srebrenica there was no evidence of the intention of the perpetrators to destroy the Bosniaks, but rather expel them from the area.

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192 Totten and Bartrop, The Genocide Studies Reader, 439; Jones, Genocide, 442.
193 Jones, Genocide, 437-439.
195 Magnusson, “Genocide as a Concept,” 164-165.
Others, like Adam Jones,196 defend that it was not only a genocide but also the ultimate instance of gendercide (roughly, genocide based on the targets’ gender). Though gender is not one of the groups protected under the Genocide Convention, it is understood that focusing on a specific gender can have lasting consequences for the community as a whole.

Accordingly, Helsinki Watch, the organization that preceded the famous Human Rights Watch, published a report earlier in the war in which it concluded that the systematic executions, expulsions, and indiscriminate attacks offered, *prima facie,* an evidence that a genocide was taking place in the Balkans. They were the first organization to request the UN to set up an international war criminal in order to prosecute those responsible for the aforementioned atrocities197.

Nevertheless, it is undisputed that a policy of ethnic cleansing was conducted in the region. The term, ethnic cleansing, in this case, meant “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area,” “carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removals, displacement and deportation of civilian population, deliberate military attacks and threats, and destruction of property.”198

**International Criminal Tribunal for the former Yugoslavia (ICTY)**

Following the disintegration of the former Yugoslavia and start of conflicts between its former members in 1992, the UN Security Council (UNSC) adopted a series of strong-worded resolutions that either reaffirmed the complicity with international humanitarian law (S/RES/764), demanded the immediate cessation of all breaches in international humanitarian law (S/RES/771), or requested the establishment of an impartial commission of experts to evaluate if humanitarian law violations were being committed in the former Yugoslavia (S/RES/780).199 This commission released its report in February 1993 where it was stated that humanitarian law violations were being

196 Jones, Genocide.
199 Akasar, Implementing International Humanitarian Law, 16-17.
committed in the former Yugoslavia\textsuperscript{200} and it would be for the United Nations to establish a tribunal in relation to these events.\textsuperscript{201}

Successively, the Security Council adopted the Resolution 808 (S/RES/808) where it was decided to, in principle, institute an international tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”\textsuperscript{202} In May 25 1993 it adopted unanimously the renowned Resolution 827 (S/RES/827), in which it was decided that the Tribunal (and its Statute) was to be installed in the Hague as a response to the extreme violence it was unveiled in the region\textsuperscript{203}.

The ICTY was set up based on Chapter VII of the United Nations Charter, since the continuous reports of widespread violations of humanitarian law, mass killings, rape, and ethnic cleansing constituted a threat to international peace and security.\textsuperscript{204} It was the first time a judicial organ was established by an UNSC Resolution, an innovative and broadening precedent of the UN Charter that would serve as basis for its sister Tribunal, the ICTR.\textsuperscript{205} When the Dayton Peace Agreements were formulated, the acceptance of the ICTY was an essential part of it, and the ratification of the Federal Republic of Yugoslavia can be considered the first official recognition of the Tribunal’s legitimacy and jurisdiction.\textsuperscript{206}

The fact that the Yugoslav war of the 1990s did not have a winner supports the impartiality aspect of the ICTY.\textsuperscript{207} Hitherto, some experts claim that, while there was


\textsuperscript{201} Akasar, Implementing International Humanitarian Law, 17.


\textsuperscript{203} Totten and Bartrop, The Genocide Studies Reader, 439; Jones, Genocide, 440.


\textsuperscript{205} Akasar, Implementing International Humanitarian Law, 18-22; Beigbeder, International Criminal Tribunals, 54.


no winner between Serbs, Croats, and Bosniaks, there is a kind of victor’s justice. It is maintained that NATO’s and UN peacekeeping forces’ interventions in the region committed many crimes, actually aggravating the conflict, yet none of the Western powers was indicted in the ICTY.208 Other observers argue that, although all sides have a partiality of guilt, the tribunal has become biased its majority, 70% or more, of convictions are of Serbs, demonstrating a clear imbalance and a tendency to blame almost exclusively Bosnian Serbs.209

**Rwanda**

Rwanda, a tiny Central African country, gained international cognizance in 1994, after the massacre that killed approximately 1 million Rwandans. Though the genocide brought Rwanda to the limelight, most of the public still simplify it as a frenzy of tribal hatred. To better understand the massacres that took place in Rwanda in 1994 and its implications to the ICTR, it is necessary to comprehend Rwandan history and how it amounted to build the tense climate that culminated in the 90s.

In its pre-colonial period, what we nowadays known as the territory of Rwanda and Burundi was a unified Kingdom. The Kingdom of Rwanda-Urundi was a well-established monarchy, centralized under the image of the king. It was the wealth distribution, mostly land and cattle, which defined the social relations between the court’s sub chiefs and servants.210 In this sense, the names Tutsi, Hutu, and Twa were indicatives of status, elements of a single social structure, representing fluid terms, variable according to the type of relation in question.211 There was no determinism over the nomenclature, being a paradigmatic relation based in serfdom ties.212

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First with the Germans and later by the Belgians, the colonial power used the well-structured Tutsi aristocracy and the racial theories that were on the rise in Europe to favor the Tutsi population. Although the ethnic distinction between Tutsis and Hutus were a colonial fabrication, over time and continuous repetition it became the truth among the Rwandans, culminating in the implementation of identity cards that indicated the racial origin of the individual. Due to their proximity with the colonial power and the politics of repression and economic exploration implemented by the Rwandan elite, Tutsis began to be identified as the real agents of colonization, thus enhancing the ethnic cleavage between the “civilized elite” Tutsi and the Hutu “peasantry.”

However, with the independence movements that flourished in Africa and Asia in the 50s and the 60s, the Belgian administration shifted its support to the less educated and organized Hutus. With the backing of the colonial administration, a small group of extremist Hutus was able to overthrow Tutsi monarchy and control Rwanda government. Hence, they declared independence in 1961 and became the dominant power.

Between 1959 and 1962 it was the first time that there was a policy of systematic violence against the civilian Tutsi population, which led many Tutsis to fled to neighboring countries, like the DRC, Burundi and mostly Uganda. In 1972, the regional and internal political conjuncture was not favorable, and once again anti-Tutsi sentiments surfaced, leading to a new spree of persecutions and killings, with houses burnt and belongings stolen. President Kayibanda was overthrown in a coup d’état.
led by his Minister of Defense, Major Juvenal Habyarimana, in 5 July 1973. Habyarimana governed under the precepts of peace and ethnic equilibrium, ending the open threats and recurrent violence against Tutsis.222

This relatively peaceful scenario lasted until 1990s, when once again political and economic disturbances started to weight on the government. Hutus from North and South ignited a dispute for influence, the World Bank and the IMF started pressing the government to have stricter economic policies as other international agencies started to demand more democracy and openness in the government, the coffee prices dropped considerably, affecting the country’s exportation revenue, and the mortality rate was incredibly high with an outbreak of malaria. Added to that, there was the invasion of the Rwandan Patriot Front (RPF) in October 1990.223

The RPF was a group of Tutsi refugees based in Uganda whose goal was to overthrow Habyarimana’s government and ensure that there would be democratic elections where Tutsis and Hutus could participate equally.224 The invasion inflated the sentiment of insecurity among the citizens, especially the Hutus, who viewed the presence of the RPF as an existential threat to their existence. The Tutsis civilians were one more time used as scapegoats and the Hutu militia, the Interahamwe, initiated another campaign of widespread persecution.225

The animosities between the government and the RPF intensified to the point it became a civil war. The civil war attracted international attention, which pledged for a cease-fire and a peace accord. The Arusha Peace Accords took place in Arusha, Tanzania, in August 1993. When it seemed that the Accords could finally be implemented, with the major parts compromising and with the presence of the UN through its UNAMIR mission, Habyarimana's plane was shot down close to Kigali airport,226 initiating the most chaotic 100 days the world have ever witnessed.

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226 Taylor, *Sacrifice as terror*, 50; Berry and Berry, *Genocide in Rwanda*, XX-XXI.
Almost immediately after the plane crash, roadblocks were erected along the streets of the capital. These “security points” checked the identity cards of everyone who wanted to pass; the Tutsis most of the time were not allowed to go anywhere. The arming of the Hutu population, mainly its militiamen, was intensified, and lists of all those who should be handed to the army were disclosed. These lists comprised names of Tutsis and “Tutsi defenders” from each locality and were largely transmitted by the RTLM (Radio Télévision Libre des Mille Collines), the extremist Hutu radio.

The massacres did not take long to begin. They started by targeting the prominent politicians that were against the extremist Hutu regime, like the paradigmatic case of Rwandan Prime Minister Ágathe Uwilingiyimana, tortured and murdered by Rwandan army soldiers. Then they started murdering important Tutsis, businessmen and intellectuals, and soon the widespread campaign of killing every Tutsi in Rwanda was at full steam.

From April 6th, when Habyarimana was killed, until the end of June, when the RPF finally took control over Kigali, it is accounted to have had approximately 1 million deaths in Rwanda. Around ten to one hundred Hutus were among the victims, with the vast majority comprising of Tutsis. The international community explained the killings as a result of tribal conflicts and ethnic violence, common to the African neocolonialist logic. By the time the genocide was over, most of the commandants of the genocide have fled to the Zaire; together a mass of Hutu civilians followed fearing the new Tutsi government.

**International Criminal Tribunal for Rwanda (ICTR)**

The barbaric violence dully recorded and transmitted around the world created an overwhelming clamor for justice. As with the ICTY, after a series of resolutions, a

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228 Taylor, Sacrifice as terror, 72-84.
230 Hamburg, Preventing genocide, 65.
commission of experts was created to assess the situation in Rwanda.\textsuperscript{233} It concluded that during the period of 6 April and 15 July 1994 both sides of the conflict have committed serious breaches of international humanitarian law and crimes against humanity, and that the mass extermination perpetrated by Hutu elements constituted the crime of genocide as described in the 1948 Convention.\textsuperscript{234}

On the aftermath of the war, the newly-created Rwandan government requested the Security Council the creation of an international tribunal to prosecute those responsible for the genocide in Rwanda. There was a widespread believe that only a truly impartial and fair justice could halt the culture of impunity common throughout Rwanda’s history.\textsuperscript{235} Added to that there was the fact that, the Rwandan judiciary system was eradicated during the genocide; those that have not collaborated with the violence, were killed by it. There was a deficit of humane conditions for both the incarceration and the prosecution of genocide suspects.\textsuperscript{236} Besides, the refusal to create a tribunal for Rwanda whilst there was one for the former Yugoslavia endorsed an overall fear of the UN being considered racist or Eurocentric, favoring a European country over an African.\textsuperscript{237}

In that sense, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January 1994 and 31 December 1994 was created under the UNSC Resolution 955 (S/RES/955). Its aims, besides judging those who were suspects of committing genocide and other violations of international humanitarian law, were to contribute to the process of national reconciliation, ensure that that the violations committed were effectively redressed, and strengthen the Rwandan judicial system.\textsuperscript{238}

Differently from the Balkans conflict, Rwanda’s civil war had a clear victor. The RPF expelled the former Hutu government and formed a Tutsi government with General

\textsuperscript{233} Akasar, Implementing International Humanitarian Law, 15. 
\textsuperscript{234} Beigbeder, International Criminal Tribunals, 88-98. 
\textsuperscript{235} Beigbeder, International Criminal Tribunals, 88. 
\textsuperscript{236} Bachmann and Fatić, The UN International Criminal Tribunals, 48. 
\textsuperscript{237} Jones, Genocide. 
(now President) Paul Kagame in charge. Though there is little discussion over the importance of RPF’s advance to end the genocide, it is well debated whether they were also responsible for several massacres against the Hutu population during the conflict.\textsuperscript{239}

Interestingly, though it was the first to propose the creation of the Tribunal immediately after the genocide ended, the Rwandan government voted against the resolution that created it. Rwanda’s objections were related to the absence of capital punishment, its location in Arusha, Tanzania, instead of in the territory of Rwanda, and the restrictive composition and structure, intrinsically connected to the ICTY.\textsuperscript{240} The Rwandan government was looking for a more hybrid-like tribunal, where it could work in close cooperation with the UN.\textsuperscript{241} Thereby, the Tribunal initiated its activities in an unfriendly climate with the Rwandan government that blamed the UN for its inaction during the genocide and constantly criticized the ICTRs actions and judgments.\textsuperscript{242}

**The ICTs: Statutes, Competence, and Jurisdiction**

As in 1945, it took the international community to passively witness the mass atrocities in Rwanda and former Yugoslavia to act and create the International Criminal Tribunals to try those individuals charged with violations of international humanitarian law.\textsuperscript{243} The ICTs were set up as temporary – *ad hoc* – Courts. Whilst the ICTR finished its operations in December 31, 2015, the ICTY closure was on 31 December 2017,\textsuperscript{244} with the reminiscent trials redirected to the International Residual Mechanism for Criminal

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\textsuperscript{240} Beigbeder, *International Criminal Tribunals*, 88.

\textsuperscript{241} Bachmann and Fatić, *The UN International Criminal Tribunals*, 46.

\textsuperscript{242} Beigbeder, *International Criminal Tribunals*, 93.

\textsuperscript{243} Akasar, *Implementing International Humanitarian Law*, 7.

Tribunals, the tribunal’s residual mechanism, responsible for a rage of judicial acts, including holding criminal trials when necessary.245

Mutatis mutandis,246 the ICTs have their competence delimited in their respective article 1. While the ICTR has a defined date but a larger geographical application (from 1 January to 31 December 1994 in the territory of Rwanda and neighboring countries), the ICTY has a delimited area, yet there is no outer temporal limit247 (violations committed in the territory of the former Yugoslavia since 1991).248 Both Tribunals were created by a UNSC Resolution that nested its competence under the Chapter VII of the UN Charter: they were established on behalf of the international community as a way to restore and maintain the international peace and security.249 Their incomes are provided by the UN budget, subject to the approval of the UNGA250.

The Tribunals have an identical composition, formed by three organs: The Chambers, the Prosecutor’s Office and the Registry. The Chambers were originally divided between two Trial Chambers and one Appeal Chamber, but later, because of the high amount of cases, a third Trial Chamber was created. The Chambers are composed by permanent and ad litem251 judges from different nationalities that are elected through the UN General Assembly from a list submitted by the UN Security Council for a four-year appointment (eligible for reelection). They are expected to be persons of “high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices,”252 with experience in criminal and international law.

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246 Making the necessary alterations without affecting the main point.
249 Akasar, Implementing International Humanitarian Law, 8.
250 Akhavan and Johnson, “International Criminal Tribunal.”
251 Appointed for the purposes of legal action.
Different from the Trial Chambers, where each Tribunal has its own set of chambers, the Appeals Chamber is the same for both, with its seats divided between the judges from the ICTY and the ICTR. It accepts appeals from the convicted and from the Prosecutor in matters regarding an error on a question of law that invalidates the decision or regarding error of fact that occasioned in a miscarriage of justice.\(^{253}\) The Appeals Chamber may affirm, reverse, or revise the Trials Chamber decisions, either making a new sentence or referring back to it.

The Prosecutor’s Office, the second organ, is nominated by the Secretary General and appointed by the Security Council. It is a separate and independent organ that must not seek or receive any instruction from a government or any other source.\(^{254}\) Its task is to conduct the investigations in order to indict and present the charges before the Chambers. Since its inception, the Prosecutor’s Office was the same for both the ICTY and the ICTR. It received many critics, especially from the ICTR, which alleged that the Prosecutor’s overload of work ended up relegating the Court in Arusha. As for 2003, the Resolution 1503 established a separate position for the ICTR Prosecutor.\(^{255}\)

The Registry is the administrative organ of the Tribunal. It is responsible for the administration and judicial support services, such as translation of documents, interpretation of court’s proceedings, organization of hearings, provision of assistance and protection to the witnesses, management of Detention Unit, among others. The Registry is in charge of all communications and diplomatic functions of the Tribunal.\(^ {256}\)

The ICT’s penalties are limited to life imprisonment; the capital punishment is excluded. Imprisonment process is served in one of the partner States that signed an agreement accepting convicted persons. The Tribunals have concurrent jurisdiction with the national courts and can refer a case to a State for trial, like the war crimes chamber of the court of Bosnia Herzegovina, the Croatian courts, the Serb war crimes chamber, and the Rwandan judiciary system, but they still have primacy and can request the deference of investigations.\(^ {257}\)

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\(^{254}\) UN Security Council, Resolution 955; UN ICTY, Updated Statute.


\(^{256}\) Beigbeder, *International Criminal Tribunals*, 56.

The jurisdiction of the ICTs extends to genocide (article 4 – ICTY; article 2 – ICTR), crimes against humanity (article 5 – ICTY; article 3 – ICTR), and grave breaches of the Geneva Conventions of 1949 (article 2 – ICTY; article 4 – ICTR), though the ICTY still covers the crime of violations of the laws or customs of war (article 3). The Statutes specifically incorporate the definitions in toto\textsuperscript{258} from the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, and the other crimes are based on the London Charter of the International Military Tribunal and the Geneva Conventions of 1949.\textsuperscript{259}

Differently from genocide, crimes against humanity do not require the mental element (\textit{dolus specialis}), the intent to destroy in whole or in part a definable group as such. In contrast, a crime against humanity need to be part of a widespread or systematic attack against any civilian population.\textsuperscript{260} Because of the difficulties to prove the intent of the accused, prosecutors tend to prefer indictments on the charges of crimes against humanity compared to genocide, since they will likewise render long sentences. Yet, in the ICTs, especially in the ICTR, genocide is the central crime for the majority of the indictments.\textsuperscript{261}

Neither Statues restrict its competence based on the identity of whom can be investigated and prosecuted under the Tribunal’s jurisdiction, in contrast with the IMTs where only Axis members could be tried.\textsuperscript{262} Yet, as happened with Prosecutor Louise Arbor that had her assessment on the violations of NATO political and military figures prevented,\textsuperscript{263} the RPF crimes were researched by Chief Prosecutor Carla Del Ponte. In a well-known quarrel between the Prosecutors Office and the RPF Government, the attempts to prosecute alleged criminals were constantly criticized and blocked by Rwandan Government.\textsuperscript{264} Rwanda’s political influence on matters concerning the genocide, as well as the need for its cooperation in order to further the Tribunal’s

\textsuperscript{258} As a whole.
\textsuperscript{260} Jones, \textit{The Courts of Genocide}, 136.
\textsuperscript{261} Jones, \textit{The Courts of Genocide}, 133.
\textsuperscript{262} Bachmann and Fatić, \textit{The UN International Criminal Tribunals}, 36-40.
\textsuperscript{263} Beigbeder, \textit{International Criminal Tribunals}, 71.
\textsuperscript{264} Hauschildt, “ICTR.”
work, manage to withdraw Carla Del Ponte from the ICTRs prosecution’s command.

More than Del Ponte’s defeat, the failure to prosecute RPF for its crimes also turned into a defeat for the Tribunal itself. Aside from the confirmation of ICTR being a victor’s justice instrument, it opened space for questionings about the partiality and fairness of the Tribunal. The one-sidedness of ICTRs indictments may even hinder the reconciliatory process in Rwanda, continuing a history of impunity that led to the 1994’s genocide. Relatively, the ICTY has proven to be more unbiased as it has successfully indicted Serbs, Croats, Bosniaks and Kosovars – irrespective of the proportional discrepancies – while the ICTR was constantly blocked from charging any crimes regarding the RPF members.

265 Beigbeder, International Criminal Tribunals, 94.
268 Hauschildt, “ICTR.”
CASE LAW

In this chapter, the judgments of some cases from both the ICTY and the ICTR will be described. The cases are disposed in chronological order, from the earlier sentence to the latest, and they intend to show, primarily, how each Chamber, Trial and Appeals, from each case interpreted and applied the concept of genocide. Every case has a brief background explanation for both the accused and the historical facts involving the charges, as well as the Prosecution’s main arguments in the indictment. Unless otherwise disclosed, all the affirmations here exposed were deemed true by the respective Chambers. In order, the cases are:

- *The Prosecutor v. Jean-Paul Akayesu*
- *The Prosecutor v. Georges Rutaganda*
- *The Prosecutor v. Goran Jelisić*
- *The Prosecutor v. Radislav Krstić*
- *The Prosecutor v. Milomir Stakić*

Jean-Paul AKAYESU

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a) **Background**

The territory of Rwanda is divided into 11 prefectures that are governed by its prefect. Each prefecture is subdivided into communes that are placed under the authority of the bourgmestre. The bourgmestre is a position appointed by the President of the Republic,
upon the recommendation of the Minister of the Interior. This position is highly significant, having a distinct power within its community.\textsuperscript{271}

Jean-Paul Akayesu was the bourgmestre of Taba commune, Prefecture of Gitarama at the time of the genocide. As bourgmestre, the Accused performed:

\begin{quote}
“executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.”\textsuperscript{272}
\end{quote}

In short, the bourgmestre is the one responsible for the total life of the commune, including economy, infrastructure, markets, medical care, and overall social life.\textsuperscript{273}

b) Indictments

As the bourgmestre of Taba commune, it was the Accused’s duty to maintain law and order, nevertheless, about 2,000 Tutsis were killed between April 7\textsuperscript{th} and the end of June 1994. The Prosecution charged Jean-Paul Akayesu for knowing that there were widespread killings at Taba and never attempting to prevent the violence, either personally or by calling for assistance. Akayesu was also indicted for ordering the detainment and subsequent killing of numerous victims and for ordering the killings of intellectuals and influential people on April 19\textsuperscript{th}.\textsuperscript{274}

The best-known part of the judgment of Akayesu is related to sexual violence crimes. For acts of sexual violence, the Prosecution included “forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.”\textsuperscript{275} The Prosecution acknowledged that during the genocide many civilians sought refuge at the bureau communal. The female refugees were regularly taken and were subject to sexual violence, many times committed by more than one assailant. It states \textit{in toto}:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{271} Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, 5.
\item \textsuperscript{272} Prosecutor v. Jean-Paul Akayesu, 1998, 6.
\item \textsuperscript{273} Prosecutor v. Jean-Paul Akayesu, 1998, 23.
\item \textsuperscript{274} Prosecutor v. Jean-Paul Akayesu, 1998, 7.
\item \textsuperscript{275} Prosecutor v. Jean-Paul Akayesu, 1998, 6.
\end{itemize}
\end{footnotesize}
“Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.”

Akayesu not only knew of the occurrence of acts of sexual violence, beatings, and murders, but was present at times they were happening. The Prosecution argued that he even facilitated its commission. For his presence and failure to prevent, he encouraged it.

Moreover, Jean-Paul Akayesu was accused of urging the population to eliminate RPF accomplices, which was commonly understood as Tutsis, during a meeting attended by more than 100 people. After the meeting on April 19 the killing of Tutsis in Taba began.

According to the Trial Chamber, it was established beyond reasonable doubt that Jean-Paul Akayesu knew of the widespread killings and, although he did try to prevent the violence before April 18, after it he started collaborating with the Interahamwe, knowing, witnessing, ordering, and even participating in the killings. Among these killings, it was proven that Akayesu ordered the killings of intellectual people, including the teachers from Taba community. The Prosecution did not provide enough evidence to verify that the Accused ordered the killing of influential people.

As it was confirmed by the Accused, that he was present at the meeting of April 19. On the occasion, it has been proved, Akayesu urged the crowd to eliminate their sole enemy, the accomplices of the RPF, and that the population understood this call as a

call to kill the Tutsis. Akayesu was aware of the impact of his call on the crowd, and himself confirmed that there is a casual link between his statement and the ensuing widespread killings in Taba.  

Akayesu’s Defense tried to contest the indictment on sexual violence as it was added by an amendment. It alleged that it was amended in response to public pressure concerning the prosecution of sexual violence. The Trial Chamber accepted the amendment and the indictment, and after careful review, found that there was sufficient credible evidence to establish that Tutsi girls and women were subjected to sexual violence, beatings, and killings in the commune of Taba. These episodes took place publicly, near the premises of the bureau communal, and evidence shows that the Accused ordered, instigated, and otherwise aided and abetted the sexual violence.

Furthermore, the Chamber concluded that the proven crimes were committed because the victims were Tutsi. “In the opinion of the Chamber, all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted. Clearly, the victims were not chosen as individuals but, indeed, because they belonged to said group; and hence the victims were members of this group selected as such.”

c) Genocide

Firstly, the Trial Chamber states that, even though the crime of genocide is intended to protect certain groups from (attempted) extermination, there is no hierarchy among the other crimes foreseen by the Statute. And “(w)hile genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all circumstances” lesser offences.

In their interpretation of the Genocide Convention and the Article 2(2)(a) through 2(2)(e) of the ICTR Statute, the Chamber notes that, in order to a crime to genocide be committed, it does not need to have the total extermination of the group, sufficing the intention to destroy in whole or in part a national, ethnical, racial, or religious group.

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With regard to determine the intent, because it is basically a mental factor and thus difficult to be established, in the absence of a confession from the accused, it can me inferred from a number of presumptions. Facts such as the general context of the crime, other culpable acts systematically directed at the same group, scale of atrocities, general nature, if the crime was committed within a specific region or country, or if the victims targeted are accounted because of their membership in a specific group, enable the inference of the genocidal intent of a particular act.286

As for the group membership, the Trial Chamber follows the Nottebohm decision rendered by the International Court of Justice in which:

“a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.
An ethnic group is generally defined as a group whose members share a common language or culture.
The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.
The religious group is one whose members share the same religion, denomination or mode of worship.”287

On the interpretation of “means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction” (Article 2(2)(c), the Trial Chamber recognizes that it includes, among other things, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.288 It states that “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm.”289

As for the interpretation of Article 2(2)(d), measures intended to prevent births within the group, sexual mutilation, sterilization, forced birth control, separation of the sexes, and prohibition of marriages are acts that entail the definition. Specially in patriarchal societies, “where membership of a group is determined by the identity of the father, an example of a

measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.”

To be convicted on direct and public incitement of genocide, one must provoke directly the perpetrators, either through speeches, shouting or threats in public spaces or gatherings, or even through sale or dissemination, public displays, or any other means of audiovisual communication.

The Chamber then proceeds to establish that it is clear that the massacres which occurred in Rwanda were part of a genocidal campaign: they had the specific intent of exterminating the people of Tutsi origin, and the Tutsis constituted a group defined as ethnic, with the identity cards already referring to the ethnic group of the individual.

“In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi.”

“Consequently, the Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the Chamber, this genocide appears to have been meticulously organized.”

The Trial Chamber concluded that, regarding the speeches Akayesu made in public and in public spaces were intended to create a particular state of mind of his audience that will lead to the massacres of the Tutsis as a group. He has been then convicted in the direct and public incitement to commit genocide, which was aggravated by the fact that his incitements were successful and lead to the destruction of a great number of Tutsis in Taba.

For the acts discussed in the Indictment session, the Chamber found Akayesu individually criminally responsible for genocide. The Trial Chamber was satisfied beyond reasonable doubt that his actions were committed with the specific intent to destroy the Tutsi group as

such. Particularly regarding the rapes and sexual violence, the Chambers was of the opinion that they were also committed with the intent to destroy, in whole or in part, a particular group. As they were committed against only Tutsi women, resulting in their physical and psychological destruction, having lasting impacts as well on their families and communities, it was an integral part of the process of genocide.

In its verdict, the Chamber found unanimously, among other crimes, Jean-Paul Akayesu guilty of genocide and direct and public incitement to commit genocide, sentencing him to life imprisonment.

**d) Appeal**

The Appeals Chamber unanimously dismissed all the grounds of appeal raised by Jean-Paul Akayesu and affirmed the verdict of guilty rendered by the Trial Chamber, maintaining his life imprisonment sentence.

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**Georges RUTAGANDA**

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**a) Background**

Georges Rutaganda is an ethnic Hutu originally from Masango, Gitarama prefecture. He was trained as an agricultural engineer and worked as a businessman, being the general manager and proprietor of Rutaganda SARL and one of the shareholders of the

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RTLM. Rutaganda was a member of the Mouvemen Républicain National pour le Développement (MRND) and, as for April 6 1994, he was serving as the second vice president of the National Committee of the Interahamwe, MRND youth militia.300

b) Indictments

The Accused was charged by the Prosecution for several deeds throughout the genocide. Rutaganda was accused for distributing guns and other weapons to Interahamwe members in Kigali and for stationing them at a roadblock near his office. This roadblock, as many others that were formed in Rwanda, mostly at the capital, served as checkpoints to verify the identity cards of those who were passing, singling out the ones of Tutsi origin and, ultimately, killing them. It was argued that, in some cases, Rutaganda himself gave the orders to kill the people.301

Rutaganda was also accused for his role in the attack of the École Technique Officielle (ETO school). The ETO school was considered a safe haven due to the presence of Belgian peacekeepers. However, immediately after the Belgian forces withdrew, members of the Rwandan armed forces, the gendarmerie, and militia, including the Interahamwe, attacked the school, killing all the Tutsis present.302 This attack became worldwide famous when it was portrayed in the movie Shooting Dogs, by director Michael Caton-Jones.303

The Prosecutor also charged Rutaganda for conducting house-to-house searches in order to find Tutsis and their families. Rutaganda was said to have instructed the Interahamwe men to track the Tutsis and throw them into the river. And, by the end of the genocide, in June 1994, Rutaganda would have ordered people to bury the bodies of the victims to conceal his crimes from the international community.304

300 Prosecutor v. Georges Rutaganda, Case No. ICTR-96-3-T, Trial Judgement and Sentence, 6 December 1999, 4.
For the acts related to the events described in the Indictment, the Prosecution charged Georges Rutaganda for the crime of genocide, punishable by the Article 2(3)(a) of the Statute of the Tribunal.\(^{305}\)

The Trial Chamber established that it was proven, beyond reasonable doubt, that the Accused arrived in different sites in a pick-up truck with guns, and that after the distribution of these weapons killings would follow.\(^{306}\) Though the roadblocks and identity checks indeed happen, it has not been proved that Rutaganda was the one stationing them or ordering the killings.\(^{307}\) Yet, it has been shown by the Prosecution that the Accused has ordered some detentions in his office, and that these detainees were later killed and his bodies thrown into a hole.\(^{308}\)

In the episode of the ETO school, the Chamber found that Rutaganda was present and participated in the attack at the school and, principally, the events the followed the takeover, such as the rape of women, forced march of the survivors and the abuses, threats, and killings they endured.\(^{309}\) It has not been established that Rutaganda conducted searches for Tutsis families and ordered them to be thrown in the river. Although it has been proved that he has ordered the burial of bodies to conceal the dead from foreigners, it has not been satisfied that he wanted to conceal his crimes from the International Community.\(^{310}\)

c) **Genocide**

The Trial Chamber openly adheres to the definition of the crimes of genocide advanced in the Prosecutor v. Akayesu case. Hence, bodily or mental harm encompasses bodily and mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution, though the effects of the harm have no need to be permanent or irremediable.\(^{311}\)

\(^{305}\) Prosecutor v. Georges Rutaganda, 1999, 8.
\(^{306}\) Prosecutor v. Georges Rutaganda, 1999, 82.
As for the Article 2(2)(c), “inflicting in the group conditions of life calculated to bring about its physical destruction”, the Chamber understands that those can be methods that not necessarily intend to kill immediately the members of the group, but are, ultimately, aimed at their physical destruction. It includes subjecting a group of people to a subsistence diet, systematic expulsion from their homes, and deprivation of essential medical supplies below a minimal vital standard.\textsuperscript{312}

With respect to “measures intended to prevent births within the group”, the Trials Chamber asserts that it includes, but are not subscribed to, sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. The measures can be both physical and mental.\textsuperscript{313}

Regarding the definition of the protected groups within the Statute, the Trial Chamber notes:

\begin{quote}
“that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally or internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.”\textsuperscript{314}
\end{quote}

Consistently, the Trial Chamber found Georges Rutaganda individually criminally responsible by reason of the acts aforementioned for having, ordered, committed, aided, and abetted in the preparation for and perpetration of killings of members of the Tutsi group and for having caused serious bodily or mental harm to members of said group.\textsuperscript{315}

The Chamber also noted that, due to his position of authority in the society and in the militia, as well as his family’s reputation, the Accused ordered and abetted the commission of crimes against Tutsis because they belonged to the said group. Therefore, Rutaganda had the intent to destroy the Tutsi group as such.\textsuperscript{316}

\begin{footnotes}
\item \textsuperscript{312} Prosecutor v. Georges Rutaganda, 1999, 26.
\item \textsuperscript{313} Prosecutor v. Georges Rutaganda, 1999, 26.
\item \textsuperscript{314} Prosecutor v. Georges Rutaganda, 1999, 27.
\item \textsuperscript{315} Prosecutor v. Georges Rutaganda, 1999, 144-147.
\item \textsuperscript{316} Prosecutor v. Georges Rutaganda, 1999, 148-149.
\end{footnotes}
“In the light of the foregoing, the Chamber is satisfied beyond reasonable doubt; firstly, that the above-mentioned acts for which the Accused incurs individual responsibility on the basis of the allegations under paragraphs 10, 12, 13, 14, 15, 16 and 18 of the Indictment, are constitutive of the material elements of the crime of genocide; secondly, that such acts were committed by the Accused with the specific intent to destroy the Tutsi group as such; and thirdly, that the Tutsi group is a protected group under the Convention on genocide. Consequently, the Chamber finds that the Accused incurs individual criminal responsibility for the crime of genocide.”

d) Appeal

The Appeals Chamber unanimously affirmed the conviction of Georges Rutaganda on the crime of genocide. Yet, it is interest to notice that, while evaluating the sentencing method applied at the Trial Chamber, the Appeals Chamber regarded that, at the first instance, genocide was found as “the crime of crimes”, understanding that the Appeals Chamber does not follow, since there is no such thing as a hierarchy of crimes under the Statute. It thus considers the extreme gravity of the crime as a first aggravating circumstance and maintains the conviction as well as the life imprisonment sentence.

Goran JELISIĆ

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318 Prosecutor v. Georges Rutaganda, Case No. IT-96-3-A, Appeal Judgement, 26 May 2003, 173
a) Background

Goran Jelisić is a Bosnian Serb originally from Bijeljina, Bosnia-Herzegovina, current part of Republika Srpska. On 1st of May 1992, Jelisić left Bijeljina and went to Brčko. The trial was about the events which occurred in May 1992 in the municipality of Brčko, a town in the extreme north-eastern part of Bosnia-Herzegovina, close to the border with Croatia.

On April 30th, 1992, two explosions destroyed two bridges in Brčko. These explosions are considered the beginning of hostilities by the Serbian forces in the region. Following suite, radio broadcasts ordered Muslims and Croats to surrender their weapons while Serbian forces deployed within the town. Later, the inhabitants of Brčko were evacuated. Those men of Serbian origin were enrolled in the Serbian forces, whilst Muslim and Croatian men between sixteen and sixty years old were detained in collection centers to be transferred and incarcerated in Luka camp.

b) Indictments

The Prosecution indicted Goran Jelisić for “intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group” systematically killing Muslim detainees at the Brčko police station and Luka camp. Accordingly, he introduced himself as the “Serb Adolf,” and said that he had come to Brčko to kill Muslims, often informing the detainees and others of the numbers of Muslims he had killed.

On 29 October 1998, Jelisić admitted committing thirteen murders, inflicting bodily harm on four persons, and having stolen money from detainees at Luka camp. He pleaded guilty to war crimes and crimes against humanity, pleading not guilty, however, for the crime of genocide.

“The accused has not denied that his acts formed part of the attack by the Serbian forces against the non-Serbian population of Brčko. The Trial

Chamber moreover notes that, despite remaining uncertainties regarding his exact rank and position, the accused was part of the Serbian forces that took part in the operation conducted against the non-Serbian civilian population in Brčko. It was indeed in anticipation and in the service of the attack that the accused, who comes from Bijeljina, was given police duties in the municipality of Brčko. As one of the active participants in this attack, Goran Jelisić must have known of the widespread and systematic nature of the attack against the non-Serbian population of Brčko.”

c) Genocide

The Trial Chamber established that, in order to characterize genocide, two legal ingredients are indispensable according to the terms of Article 4 of the Statute: the material element of the offence (one or several of the acts enumerated), and the mens rea, the special intent to destroy, in whole or in part, a group as such. The material element has been sufficiently satisfied, with the Accused assuming the acts he committed.

In order to evaluate the mens rea, the Chamber analyzes two elements: the identified group and the actions of the perpetrator as part of a wider plan to destroy such group. On behalf of the group identification, the Trial Chamber follows the position adopted in the Prosecutor v. Nikolić case in which what determines if the targeted group constitutes a national, ethnical or racial group is the perpetrators understanding. As follows, the attacks against the civilian population of Brčko was directed mainly against the Muslim population. The Accused have not only been part of the offensive, as well demonstrated that he was fully aware and supportive of the discriminatory nature of the operation.

Regarding the second element, the necessity of the crime to be part of a wider plan on the destruction of the group as such, the Court acknowledges that it does not to be directed at the whole group, being the destruction of a significant portion of the group sufficient. The intention thus has to affect either a major part of the group or a representative fraction, such as its leadership.

“The character of the attack on the leadership must be viewed in the context of the fate or 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 members of the group 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."329

Furthermore, in consonance with the UNGA characterization of the massacres at Sabra and Shatila and the position adopted at the Nikolic case, the Trial Chamber accepts that a genocide can be perpetrated in a limited geographic zone. “In view of the object and goal of the Convention and the subsequent interpretation thereof, the Trial Chamber thus finds that international custom admits the characterization of genocide even when the exterminatory intent only extends to a limited geographic zone.”330

However, it was concluded that it was not possible to assert, based on the evidence presented and beyond reasonable doubt, that the choice of the victims came from a precise logic to destroy and/or threat the survival of the Muslim community in Brčko.331 In addition to it, the attitudes and words of the Accused were interpreted of as from a disturbed personality:

“Goran Jelisić led an ordinary life before the conflict. This personality, which presents borderline, anti-social and narcissistic characteristics and which is marked simultaneously by immaturity, a hunger to fill a “void” and a concern to please superiors, contributed to his finally committing crimes163. Goran Jelisić suddenly found himself in an apparent position of authority for which nothing had prepared him. It matters little whether this authority was real. What does matter is that this authority made it even easier for an opportunist and inconsistent behaviour to express itself.”332

Finally, the Trial Chamber concluded that the behavior of Jelisić indicated, beside the discrimination of Muslims, an arbitrary killing rage, rather than a clear intention to destroy a group. Since the benefit of the doubt must always favor the accused, Goran Jelisić was found not guilty on the count of genocide.333 For the other crimes he was founded guilty of, Jelisić was sentenced 40 years of imprisonment.334

d) Appeal

The Prosecution appealed on the ground that the Trial Chamber erred when judging that the evidence presented was not sufficient to establish beyond reasonable doubt that there was in fact an existing plan to destroy the Bosnian Muslims of Brčko. Also, they contended that the Trial Chamber would have erred when considering that the acts of Goran Jelisić were not the “physical expression of an affirmed resolve to destroy in whole or in part a group as such, but rather, were arbitrary acts of killing resulting from a disturbed personality.”

The Appeals Chamber understood that, to prove the specific intent needed for the crime of genocide, in the absence of direct explicit evidence, it could be inferred from a number of facts and circumstances, such as general context, culpability of other acts against the same group, and the scale of atrocities. It also emphasized the distinction between intent and motive. The Appeals Chamber then pointed that it could not validate the Trial Chamber’s conclusion that there was not sufficient evidence to sustain a conviction of genocide. It understood that the Trial Chamber erred when assuming that there was the theoretical possibility of the Accused committing genocide as the sole perpetrator, but it lacked enough proof to convict him. Consequently, the Appeals Chamber sustained the Prosecution’s appeal on this ground.

Notwithstanding, due to the time and personal constraints of the ad hoc Tribunal, the Appeals Chamber decided by majority not to remit the case for further proceedings, declining to reverse the acquittal.

“The Appeals Chamber recognizes the prosecution’s right to request a retrial as a remedy on appeal. However, as has been stated above, whether or not such a request is granted, lies within the discretion of the Appeals Chamber based on the facts of the case before it. It is not obliged, having identified an error, to remit for retrial. Considering the exceptional circumstances of the present case, the Appeal Chamber considers that it is not in the interests of justice to grant the prosecution’s request and accordingly declines to reverse the acquittal entered by the Trial Chamber and remit the case for further proceedings.”

Radislav KRSTIĆ

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a) Background

Before the war in Bosnia, General Radislav Krstić was a Lieutenant Colonel in the JNA. He joined the Bosnian Serb Army (Vojska Republike Srpske – VRS) in July 1992, becoming the Chief of Staff/Deputy Commander of the Drina Corps effectively in 15 August 1994. In 13 July 1995, General Krstić was appointed by General Mladić as the Commander of the Drina Corps.339

The case deals mostly with the events that happened in the town of Srebrenica between July and November 1995. Srebrenica is a town in eastern Bosnia, about fifteen kilometers from Serbian border. As in many other parts of Bosnia, members of different ethnic groups coexisted peacefully together, with 73% Muslim and 25% Serbs, according to a 1991 census. During the conflict, however, the Central Podrinje region, which includes Srebrenica, had a strategic importance for Bosnian Serbs in order to achieve a coherent political entity in Bosnia.340

By 1993 the town was sieged by both Serbian and Bosnian forces. Between March and April approximately 8,000 and 9,000 Bosnian Muslims were evacuated from the town by the UNHCR. Srebrenica was then declared a “safe area” in a UNSC resolution, free from any form of armed attack or hostile act, with the deployment of the first UNPROFOR peacekeepers.341

On 6 July 1995 the VRS offensive on Srebrenica began, the enclave started to fall through its southern part. On the 9th of July the VRS Drina Corps had already gained 4 kilometers deep in the enclave. With the lack of resistance from the Bosnian Muslim population and the absence of a significant reaction from the international community, President Radovan Karadžić issued orders authorizing the capture of Srebrenica. Not long after, on 11 July 1995, General Mladić, accompanied by General Krstić and others VRS officers, made a triumphant walk through the town’s empty streets.342

With the fallen of the enclave, thousands of Bosnian Muslim residents fled to the neighbor village of Potočari. It is estimated that approximately 20,000 to 25,000 Bosnian Muslims sought refuge in Potočari. On July 12, the women, children, and the elderly were bussed by VRS forces out of Potočari to a Bosnian Muslim held territory near Kladanj; the evacuation was completed on the night 13th of July. The men, on the other hand, were taken to the Bratunac detention site. They were joined by the mens that were captured in other sites around Srebrenica.343

Almost all of the men captured following the takeover of Srebrenica were executed. Most of the executions followed a well-established pattern of mass execution, as described in the trial judgement:

“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 minimize 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 moving equipment arrived and the bodies were buried, either in the spot where they were killed or in another nearby location.”344

The Trial Chamber concluded that after the takeover of Srebrenica, in July 1995, Bosnian Serb forces executed approximately 7,000 to 8,000 Bosnian Muslim men.

These executions were the consequence of a concerted effort to capture all Muslim men, mostly of military age, but also some boys below age and elderly men above that age. The impact of these killing goes beyond the dismemberment of families, as for a patriarchal society, “such as the one in which the Bosnian Muslims of Srebrenica lived, the 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.”

As for the role of the Drina Corps in the takeover of Srebrenica, the Chamber found that they were instrumental in the shelling of Srebrenica and in arranging the transportation out of Potočari. Though the participation of the Drina Corps in many of the crimes committed all along, they fact that they were aware of the atrocities that were happening was ruled certain.

“due to their massive nature and the level of co-operation and co-ordination required, the executions could not have been accomplished in isolation from the Drina Corps Command. The Trial Chamber is satisfied that, following the take-over of Srebrenica, the Drina Corps Command continued to exercise command competencies in relation to its subordinate Brigades and that this command role was not suspended as a result of the involvement of the VRS Main Staff, or the security organs, in the Srebrenica follow-up activity.”

b) Indictments

In its Indictment, the Prosecution alleges:

“In July 1995, at the time the atrocities occurred, General Krstić was first the Chief of Staff and, subsequently, the Commander of the Drina Corps, a formation of the Bosnian Serb Army (hereafter “VRS”). All of the crimes committed following the take-over of Srebrenica were committed in the zone of responsibility of the Drina Corps. The Prosecution has charged General Krstić with genocide (or alternatively, complicity to commit genocide). General Krstić is further charged with crimes against humanity, including extermination, murder, persecution and deportation (or alternatively, inhumane acts (forcible transfer)) and murder, as a violation of the laws or customs of war. The Indictment charges General Krstić with responsibility for these acts, as a result of his individual participation (pursuant to Article 7 (1) of the Statute). The Prosecution also seeks to attribute criminal responsibility to General Krstić for these acts, pursuant to the doctrine of command responsibility (under Article

7(3) of the Statute) because, allegedly, troops under his command were involved in the commission of the crimes.”

The Trial Chamber was convinced that, giving his position, General Krstić was fully informed of the operation to takeover Srebrenica and that those activities are calculated in order to trigger a humanitarian crisis. He was also well aware that the shelling of Srebrenica would lead thousands of Bosnian Muslims to flee the town, and that it was part of the VRS territorial goals in the enclave. General Krstić knew of the precarious humanitarian conditions the refugees in Potočari were enduring and he was the one who ordered the procurement of buses to transport those people. Lastly, the Chamber was satisfied that, due to the massive scale of the executions, as well as his presence in important meetings, General Krstić was aware that the segregated men were being detained under terrible conditions and that there was a plan to execute Bosnian Muslim men of military age.

c) Genocide

The Accused main charge is with the crime of genocide and, alternatively, with complicity in genocide regarding the mass executions of Bosnian Muslim men in Srebrenica between 11 July and 1 November 1995.

The Trial Chamber has established that it was proven, beyond reasonable doubt, that murders and serious bodily and mental harm were committed with the intention to kill all Bosnian Muslim men of military age at Srebrenica. These executions were systematic and targeted men regardless if they were soldiers or civilians.

Concerning the requisite for the crime of genocide of the intent to destroy a group as such, the Court stated that the protected group in the present case is the Bosnian Muslims. The Bosnian Muslims of Srebrenica (or of Eastern Bosnia) constitute a part of the protected group, as described in Article 4 of the Statute.

“The Trial Chamber is thus left with a margin of discretion in assessing what is destruction “in part” of the group. But it must exercise its discretionary power in a spirit consonant with the object and purpose of the Convention which is to criminalise specified conduct directed against

the existence of protected groups, as such. The Trial Chamber is therefore of the opinion that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area. Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue. In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.

The Chamber also noticed that, though the physical destruction is the most obvious methods for committing genocide, it is also possible to destruct a group through its purposeful eradication of culture and identity which ultimately results in the extinction of the group as a distinct entity. It recognizes that customary international law limits the definition for those acts that seeks the physical or biological destruction of the group, yet, the Trial Chamber asserts that these kinds of destruction are often accompanied by simultaneous attacks on cultural and religious property and symbols, attacks that may be legitimately considered evidence of the intent to destroy the group.

Thus, the Trial Chamber concluded that the evidence presented was satisfactory in proving that “the VRS forces sought to eliminate all of the Bosnian Muslims in Srebrenica as a community.” The military aged men who were systematically executed had a bigger and lasting impact on the community as a whole which the Bosnian Serbs were aware of. “Furthermore, the Bosnian Serb forces had to be aware

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of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society,” as described before. 354

“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. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potočari and the principal mosque in Srebrenica soon after the attack.” 355

“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.

The Trial Chamber has thus concluded that the Prosecution has proven beyond all reasonable doubt that genocide, crimes against humanity and violations of the laws or customs of war were perpetrated against the Bosnian Muslims, at Srebrenica, in July 1995.” 356

Regarding the criminal responsibility of General Krstić, the Trial Chamber finds him guilty as a member of a joint criminal enterprise whose objective was to forcibly transfer Bosnian Muslim women, children, and elderly, that he at least subscribed to the creation of a humanitarian crisis as a prelude to these forcible transfers, that he incurred in liability for murders, rapes, beatings, and abuses committed in the execution of this criminal enterprise, and, lastly, that those crimes were related to a widespread and systematic attack directed against the Bosnian Muslim civilian population of Srebrenica. He is liable for inhumane acts and persecution as crimes against humanity. 357

The Chamber also concluded that General Krstić participated in a joint criminal enterprise to kill Bosnian Muslim military-aged men from Srebrenica. Even if the General have not planned the killings, or even participated in the initial decision to forcible transfer the Muslims of Srebrenica, he learned of the widespread and

355 Prosecutor v. Radislav Krstić, 2001, 211-212
356 Prosecutor v. Radislav Krstić, 2001, 212
systematic killings, becoming clearly involved in their perpetration, sharing the genocidal intent to kill them.\textsuperscript{358}

As an essential participant in the genocidal killings, General Krstić was considered the principal perpetrator of these crimes, thus being convicted as guilty of genocide pursuant to Article 4(2)(a).\textsuperscript{359}

“on the basis of the killing of the military aged Muslim men from Srebrenica and the causing of serious bodily and mental harm to the men surviving the massacres: General Krstić incurs responsibility under Article 7(1) and Article 4(3)(a) for genocide (count 1), General Krstić also incurs responsibility under Article 7(1) for the killings as extermination (count 3), murder (count 4) and persecution (count 6) as crimes against humanity, and murder as a violation of the laws or customs of war (count 5).”\textsuperscript{360}

\textbf{d) Appeal}

Radislav Krstić’s Defense appealed the conviction alleging that the Trial Chamber misconstrued the legal definition of genocide, erring the application of “part of a group” as well as enlarging the term destroy to include geographical displacement. The Defense also alleged that it was an error to find that the Appellant shared the genocide intent of a joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica.\textsuperscript{361}

In regard to the issue of definition of part of a group, the Appeals Chamber determined that the Trial Chamber’s understanding as the Bosnian Muslims of Srebrenica as a substantial part of the protected group was correct. It adduces the fact that Srebrenica had a prominence for both the Bosnian Muslim community as whole and for the international community because of its status of safe area. Their execution would serve as a potent example of the Bosnian Muslim’s vulnerability and defenselessness facing the Serb military force.\textsuperscript{362}

\textsuperscript{359} Prosecutor v. Radislav Krstić, 2001, 228-229.  
\textsuperscript{360} Prosecutor v. Radislav Krstić, 2001, 232.  
They also pointed that, historically, other genocides proved to be delimited to the geographical area which the perpetrator has power over:

“The historical examples of genocide also suggest that the area of the perpetrators’ activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country’s borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis.”

On the matter of the concept of destruction, the Appeals Chamber remembered that the Trial Chamber acknowledged that the prohibition is limited to physical and biological destruction. It also, conversely, considered the long-term impact that the elimination of seven to eight thousand men would have on the survival of the community, and explained how the forcible transfer could add to ensure the physical destruction, once they were transferred they would eliminate the lasting possibility of that community to reconstitute itself. Therefore:

“The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.”

Finally, the Appeals Chamber concluded that the Trial Chamber failed in demonstrating adequate proof that General Krstić possessed genocidal intent. Then, he could not be guilty of genocide as the principal perpetrator. Nevertheless, because of his position of command in the Drina Corps, his responsibility is accurately characterized as aiding and abetting genocide, under Article 7(1) of the Statute. The Appeals Chamber decided to adjust the sentence finding Radislav Krstić responsible as an aider and abettor to genocide, reducing his sentence to 35 years.

a. Background

Milomir Stakić is a Bosnian Serb from the village of Marička, in the Municipality of Prijedor. He had a career as a physician before he became actively involved in politics. He was elected to the Prijedor Municipal Assembly in November 1990, becoming its Vice-President in January 1991. In January 1992 he became the President of the self-proclaimed Assembly of the Serbian People of the Municipality of Prijedor.367

The Municipality of Prijedor is located in the north-western region of Bosnia Herzegovina known as the Bosnian Krajina, nowadays part of the Republika Srpska. The region was inhabited by Serbs, Muslims, and Croats, each forming a majority in different areas of the municipality. The coexistence was peaceful between the ethnic groups, however, during the Second World War, the region was the stage for many massacres of Serbs by the Nazis and the Ustashe, with the help of a segment of the Muslim population. The politics of ethnic integration brought my Marshal Tito reestablished the tolerance and friendship between the groups, lasting until de 90s.368

With the secession of Slovenia and Croatia form Yugoslavia, there was a return of the animosities. The non-Serb population felt insecure and fearful with the increase of pro-Serb propaganda, the Serb population, on the other hand, decided to join the Autonomous Region of Bosnia Krajina. By the end of April 1992, the Prijedor Municipality was taken over by the Serbs.369 As concluded by the Trial Chamber:

“In conclusion, this Trial Chamber regards the takeover by the SDS as an illegal coup d'état, which was planned and coordinated a long time in advance with the ultimate aim of creating a pure Serbian Municipality. These plans were never hidden and they were implemented in a coordinated action by the police, the army and politicians. One of the leading figures was Dr. Stakić, who came to play the dominant role in the political life of the Municipality. In fact, it was Dr. Stakić himself who finally triggered this coup d'état by convening the meeting in the afternoon of 29 April.”

After the takeover, the situation for the non-Serb population deteriorated considerably. First, they were dismissed from their jobs, then they were required to demonstrate their loyalty to the Serbs, and finally to surrender any weapons they might possess. Security checkpoints were established, especially in predominantly Muslim areas, like Hambarine and Kozarac. Hambarine and Kozarac endured shelling and attacks from the Serbs, having its houses set on fire after the inhabitants flew the place. Following the attacks in Kozarac, Dr. Stakić said in an interview that there was still “cleaning” going on in the region, since there were still some individuals left there.

Those who chose to surrender were put in convoys; women were separated from men and taken to Trnopolje, and the men to Omarska and Keraterm camps. The Trial Chamber found that hundreds of detainees were killed or disappeared in the Omarska and Keraterm camps, and though in a lesser scale, there were also killings in the Trnopolje camp.

“Crimes were committed on a massive scale throughout the municipality of Prijedor during the time period covered by the Fourth Amended Indictment, i.e. from 30 April 1992 to 30 September 1992. As set out in the Trial Chamber’s factual findings, killings occurred frequently in the Omarska, Keraterm and Trnopolje camps and other detention centres. Similarly, many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place. The thousands of persons who were detained in the camps were subjected to inhuman and degrading treatment, including routine beatings. Moreover, rapes and sexual assaults were committed at some of these facilities. Detainees were given little more than a subsistence diet. In addition, Bosnian Muslims who had lived their whole lives in the municipality of Prijedor were expelled from their homes. Bosnian Muslims were discriminated against in employment, e.g. by arbitrary

dismissals, their houses were marked for destruction, and in many cases were destroyed along with mosques and Catholic churches.”\footnote{Prosecutor v. Milomir Stakić, 2003, 154-155.}

b. Indictments

The Prosecution alleged that in the camps discussed above the detainees of non-Serb origin were subjects to physical and mental abuse, including torture, beatings with weapons, sexual assaults, murders, and the infliction of serious bodily and mental harm. In its Indictment, the Prosecution stated that the Accused, Dr. Stakić, participated in the campaign of persecution against the non-Serb population in the Municipality of Prijedor, including its destruction, willful damage and looting of residential and commercial properties in the areas inhabited predominantly by non-Serbs. Dr. Stakić was also indicted for his participation in the destruction of Bosnian Muslim and Croat religious cultural buildings\footnote{Prosecutor v. Milomir Stakić, 2003, 68-84.}.

The Trial Chamber concluded that it was proved, beyond reasonable doubt, that the detainees were constantly and systematically mistreated because of their ethnicity, being subject to abuse, sexual violence, and beatings. It was also established that houses and businesses that belonged to Muslim residents were damaged, looted, and destructed as part of a systematic attack against the non-Serb population. Although there was a lack of evidence on cultural buildings that were destroyed, there was enough evidence on religious buildings that were wrecked by the Serbs.\footnote{Prosecutor v. Milomir Stakić, 2003, 69-86.}

As for the role of the Accused in the alleged crimes, the Trial Chamber concluded that, because of his prominent position in the Prijedor political arena, he was aware of all the facts. He was also well-aware of the crimes as a direct consequence of the removal of Muslims from Prijedor.

“In conclusion, this Chamber is convinced that also Dr. Stakić knew all these facts, also he was President of the Crisis Staff, the National Defence Council, the War Presidency and the Municipal Assembly in Prijedor and, since he was permanently together with representatives of both police and the military, he cannot have been unaware of what was common knowledge around the town, the Municipality and even further afield.”\footnote{Prosecutor v. Milomir Stakić, 2003, 54.}
“The Trial Chamber is convinced that Dr. Stakić and his co-perpetrators acted in the awareness that crimes would occur as a direct consequence of their pursuit of the common goal. The co-perpetrators consented to the removal of Muslims from Prijedor by whatever means necessary and either accepted the consequence that crimes would occur or actively participated in their commission. The fact that Dr. Stakić felt it necessary to replace Professor Čehajić and others who clearly would not have participated in the implementation of the common goal demonstrates Dr. Stakić’s awareness that without his acts and the acts of the other co-perpetrators, the ultimate goal of the creation of a Serbian state could not be realised.”

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c. Genocide

For the crimes of killing, causing serious bodily or mental harm, and bringing about conditions calculated to promote the physical destruction of Bosnian Muslim and Bosnian Croat non-combatants, the Prosecution indicted Milomir Stakić for “acting individually or in concert with other others in the Bosnian Serb leadership, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation, or execution” in a genocidal campaign designed to destroy non-Serbs in Prijedor Municipality.

The Trial Chamber in Stakić case adopts a dissenting opinion from other Chambers here analyzed, as it understands genocide as “the crime of crimes”. It also does not follow the methodology brought by the Trial Chamber in the Jelisić case whether a group could be singled positively, eg. Bosnian Muslim and Bosnian Croat, or negatively, eg. non-Serb. Therefore, in the case of Prijedor Municipality, each group must be considered separately.

Regarding the intent to destroy a group or part of it, the Chamber marks that there is a distinction between a “part of a group” and an accumulation of isolated individuals within it. Following the Jurisprudence of the ICTY, it concurs that a part must be related to a significant section of the group, such as its leadership.

377 Prosecutor v. Milomir Stakić, 2003, 139-140.
In this sense, it concluded that a comprehensive pattern of atrocities against Bosnian Muslims was proved. However, though similar crimes were committed against Bosnian Croats, its number was too limited, and the evidences were insufficient to determine it as a group separately targeted.\textsuperscript{381}

The Trial Chamber points that “it does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not suffice for genocide.”\textsuperscript{382} Additionally, it does not accept the notion of “escalation to genocide” or “genocide as a natural and foreseeable consequence”, thus being extremely necessary the intent, the \textit{dolus specialis}, to physical destruct the group.\textsuperscript{383}

The Chamber, then, concludes that in this concrete case a genocidal intent has not been proved beyond reasonable doubt. The crimes committed – killings, serious bodily and mental harm, and conditions of life that bring about the physical destruction – had not the intention to destroy the Muslim group. Plus, the deportation of the group, without methods that seek its physical destruction, is insufficient to characterize the action as genocide. Therefore, the Trial Chamber acquitted Dr. Molimir Stakić for the crime of genocide. Because a genocide in the Municipality of Prijedor was not proven beyond reasonable doubt, Dr. Stakić was also acquitted for complicity in genocide.\textsuperscript{384}

Nevertheless, the Trial Chamber found that deportations of non-Serb population were carried out in a massive scale, being the Accused instrumental in the plan to expel this population from Prijedor.\textsuperscript{385} Besides, rape and other sexual assaults were committed in the camps based on discriminatory intent.\textsuperscript{386}

\textbf{d. Appeal}

The Prosecutor’s Office appealed on the basis of understanding a genocide against the non-Serbs of Prijedor Municipality as well as the existence of the \textit{dolus specialis} on the genocidal destruction of Bosnian Muslims. Both grounds were dismissed by the

\textsuperscript{381} Prosecutor v. Milomir Stakić, 2003, 155.
\textsuperscript{382} Prosecutor v. Milomir Stakić, 2003, 147.
\textsuperscript{383} Prosecutor v. Milomir Stakić, 2003, 150.
\textsuperscript{384} Prosecutor v. Milomir Stakić, 2003, 156-160.
\textsuperscript{386} Prosecutor v. Milomir Stakić, 2003, 212.
Appeals Chamber as they understood that, first, the Trials Chamber did not err in law when defining separately Bosnian Muslim and Bosnian Croats as targeted group, and second that the evidence provided by the Prosecution was not unambiguous, so it could not be inferred beyond reasonable doubt that necessarily a genocidal intent was in place\textsuperscript{387}.

\textsuperscript{387} Prosecutor v. Milomir Stakić, 2006, 14-21.
ANALYSIS

As mentioned before, the Akayesu trial is a paradigmatic one because it was the first time a person was convicted of genocide. In this sense, the Trial Chamber’s assertions were used or contested in most of the other trials that occurred in both the ICTR and ICTY. The Trials Chamber stated that genocide needs only to be demonstrated by the perpetrators intention, not being necessary the complete extermination of the group for the crime to be committed. Thus, the intention can be inferred by a number of presumptions regarding the place, scale, general nature, and victimized group.

The Court innovated when it considered systematic expulsion from homes and sexual violence (here englobing rape) as a form of condition that bring about the physical destruction of the group. While the first one, the systematic expulsion, received little attention from newspapers and the international community, the later became the flagship of the case, being also considered a form to prevent births. It is understandable that, in Rwanda, the systematic expulsion may not have been an important factor since upon the eviction most people were killed. Yet, when the Trial Chamber fixed it as a form of actus reus\(^{388}\), it opened the door for its application in other cases.

The Chamber stated that there is no distinction on the gravity and importance between genocide and other crimes, but it stablished that Rwanda was indeed an episode of genocide. It then convicted Jean-Paul Akayesu of genocide and direct and public incitement to commit genocide for his public speeches, some degree of command, and lack of action to impede the atrocities in Taba community.

Following, the Trials Chamber in Rutaganda openly adhered to the definition of genocide advanced in Akayesu. Thus, bodily and mental harm encompassed acts that, otherwise, would not take part in the genocide definition, such as rape and persecution. The recognition of sexual violence and systematic expulsion as deeds that bring conditions of life prone to physical destruction of the group was maintained. Furthering, Rutaganda acknowledged that these actions did not need to intend the immediate killing

\(^{388}\) Action constituent element of a crime, different from the mental state (mens rea – the intent), referred to the actions that constitute genocide.
of the group members to be considered a genocide, hence the measures admitted constituting the crime do not have to present a permanent effect and could be either physical or mental.

Another addition brought by this Trials Chambers was the recognition that the groups protected by the Convention have not a precise definition. The membership of the victim is rather a perpetrator’s construction than an actual belonging. Such an understanding presents a shift or enlargement of genocide from the original definition. In the *travaux préparatoires* it became clear that the groups mentioned in the Convention – racial, ethnical, national, and religious – where chosen because of their precision and stability. Still, it is a possible explanation considering the advancements in the social and anthropological sciences where the existence of such delimited groups became widely contested and rare.

Overall, these two Rwandan cases denote a holistic interpretation of the concept. They did not only widen the grasp of the groups protected, turning it into something more fluid and socially constructed, but they also added a few types of acts that can be considered genocide. This shift could have changed the understanding of many cases in the former Yugoslavia, making possible a comprehensive application of the crime of genocide.

*Jelisić* was an interesting case for its inherent contradictions. As in *Rutaganda*, the Trials Chamber understood that is the perpetrators who define the victims as part or not of a group. It also established that in order to genocide be committed, or tried, the destruction of a significant portion of the group is sufficient, that is, a considerably part numerically or a representative fraction. Likewise, genocide can be committed in a limited geographic zone. Ergo, the Chamber gave a distinctive interpretation of what constituted “in part” of a group.

However, even with the Accused’s acquiescence that the attacks in the Brčko region and in Luka camp were part of a widespread and systematic campaign by Serbian forces against the non-Serb population, the Chamber concluded that there was no compelling evidence that the choice for those victims was part of a logic to destroy that community,

389 Preparatory works
specifically the Muslim community. Therefore, the atrocities in Brčko were not considered genocidal. Plus, Jelisić was considered a person with mental health issues, not portraying a particular intent to destroy the Muslims.

The case inconsistencies went beyond the conclusions of the Trials Chamber. During the appeal, it was determined that there was indeed a genocide. Yet, the Appeals Chamber decided to keep the same sentence – though the legal proceeding was admittedly to remit the case for retrial – with the allegations that it had already served the “interests of justice.”

The Appeals’ decision in Jelisić is particularly problematic because it decided to go contra legem\(^{391}\) in the interest of justice. The question is: whose justice? The Accused who pledged guilty for every crime except genocide? Certainly not for the victims and their families that constantly seek to have their history recognized with the stigma of the crime of genocide. The only interest certain to be achieved with the maintenance of a decidedly wrongful condemnation was the Court’s sponsors, who wanted it to have faster results. There were no fairness and equity in keeping the Trials Chamber judgment, there was a political calculus of what would be better for the Tribunal as an institution.

Krstić was of particular importance because it dealt with the Srebrenica massacre. Confirming Jelisić’s interpretation that the group can be relative to a specific geographical area, the Trials Chamber settled the targeted group as the Bosnian Muslims from Eastern Bosnia. Though the murders were predominantly against men and boys of military age, it was considered that the lasting impact of these killings on the community made it virtually impossible for it to be reconstructed.

Nonetheless, the Trials Chamber’s most widening interpretation was the acceptance that genocide did not need the physical and biological destruction of the group. Rather, campaigns that attempt to eradicate a group’s culture and identity can also be considered genocide. This is undoubtedly the closest interpretation to Lemkin’s original idea of genocide. However, it goes directly against the mens legislatoris\(^{392}\) the

\(^{391}\) Something directly against the law.
\(^{392}\) The intention of the law maker, referred to what was intended during the drafting process of the UN Genocide Convention.
intentions while drafting the Convention – a consistent critic of the Court’s interpretation that should be weighted with the problems of being overly attached to the laws origins. As William Schabas once wrote, to put too much importance on the legislative history of the law, focusing on its drafting history, tends to “freeze the provision, preventing it from evolving so as to take into account historical developments and changed attitudes.”

Ultimately, the Trials Chamber found General Krstić guilty of genocide as the principal perpetrator due his prominent position in the VRS and the knowledge he had of the massacres that were taking place.

When the Appeals Chamber faced the Appellant’s plea over the error in the interpretation of genocide, it confirmed the Trials Chamber judgement adducing to the fact that Muslims of Srebrenica where a prominent and substantial part of the Bosnian Muslim community. Once they acknowledged that genocide can occur in a limited geographical area, they also recognized that genocide occurs in the areas that the perpetrator had control or could reach. Thus, the scale of atrocities is determined not by the intent to exterminate the group, but rather to exterminate that group from that specific location. This can be quite a problematic distinction since it is the same difference that some authors point between genocide and ethnic cleansing, which, in the context, was definitely used as a part of the same crime.

Notwithstanding, the Appeals Chamber found that Krstić’s knowledge and command were not sufficient to demonstrate he had the intent to destroy the Muslim group. The charges were changed from guilty of genocide to aiding and abetting genocide. Though this is a possible legal thesis, it represents a complete shift on the understanding of command and knowledge as a factual demonstration of intent. When compared to Akayesu case, the Accused was charged with genocide mostly on the base of his position of bourgmestre and how it ensured him the information and the obligation to deter the violence; two types of conviction for similar grounds of command.

To Stakić’s Trial Chamber, genocide is indeed the ultimate crime. Still, the groups targeted must be singled out, separating non-Serbs into Bosnian Muslims and Bosnian

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394 Schabas, *Genocide in International Law*, 233-234.
Croats. In that sense, the Court concluded that a comprehensive pattern of atrocities was committed against the Muslim community, but the same was not proven for the Croats because of its limited number. Like this, the part of a group in the definition of genocide must be a significant section of the group.

Differently from the other Chambers, in Stakić’s first instance, deportation of the targeted groups was considered insufficient to constitute genocide, having a significant difference between destruction and dissolution of a group. So, deportations without the addition of methods to seek the groups physical destruction are insufficient to characterize genocide.

It concluded that the intent, extremely necessary in the constitution of the crime, was not proven, that the atrocities committed (killings, bodily and mental harm, infliction of harsh conditions of life) had not the intention to destroy the Muslim group. Dr. Stakić was acquitted for the crimes of genocide and complicity in genocide, even after it was found that deportations and sexual violence were carried out in bulk based on a discriminatory intent.

The description of the violence in Prijedor is probably the most similar to Srebrenica. Nevertheless, while Srebrenica was ruled and confirmed as a clear case of genocide, Prijedor failed to prove the genocidal intent of the perpetrators. Besides, when analyzing the Trials Chamber description of the actions carried out by Serbian forces in the region of Prijedor, it falls squarely at the definition of genocide rendered by the Trials Chamber in Prosecutor v. Akayesu. Yet, Stakić was acquitted in all charges that included genocide and the ICTs showed, once again, incongruity in their judgments.

The first and obvious conclusion is that there is no pattern or followed tendency in the ICTs judgements. Each case and each chamber evaluate differently, which in itself would already be problematic in jurisprudential terms. While some chambers emphasize the historical interpretation keeping attached to what was discussed, decided, and deliberately excluded from the definition, other focus on the logic behind it, thus observing the reasoning behind the norm creation. Still, when describing what may or may not constitute genocide, come chambers had a very similar understanding, but a completely different outcome in the accused’s charge.
The biggest distinction probably relies on how the ICTY imposed many obstacles to charge the crime of genocide while the ICTR demonstrated no restrictions on widening the definition. Whereas some would argue that this imbalance would be expected once the Yugoslav wars were an instance of ethnic cleansing and Rwanda was an obvious case of genocide.\footnote{Claus Kreß, “The Crime of Genocide under International Law,” \textit{International Criminal Law Review} 6 (2006): 461-502; Magnusson, “Genocide as a Concept in Law and Scholarship.”} However, the fact that Srebrenica was promptly recognized as a genocide, that the Appeals Chamber in \textit{Jelisić} ruled that Brčko was too a case of genocide, and that Prijedor was not at all contemplated with the same denomination, shows that there is a discrepancy of understanding that goes beyond the historical and legal interpretation of the facts.

The first assumption explains why there is such difference. It points that the ICTs rulings are not solely based on the legal reading of the case, also adhering to the political issues involved. Though the politicization of international criminal tribunals is not a new assertion, it is often concerned with the Tribunals’ work in general, not a particular aspect of the sentence like the condemnation of genocide. Therefore, the following assumptions were made as an attempt to explain what kind of political factors influence on the courts’ application of the crime of genocide.

The first hypothesis concerns how the conflicts ended. The underlying point is to evaluate whether the manner in which the animosities came to a halt influence how the courts apply the genocide concept. The former Yugoslavia and Rwanda compass the two major forms of conflict resolution: having a one side victorious or having the parties to agree over a cease fire. It is expected that the way the war was dissolved would have greater implications for the national courts, as they would be ultimately controlled either by a one side government or by a set of people that eventually would answer to their respective sides. Either way, it is predictable and somewhat acceptable that the courts have at least some degree of compromise.

Precisely because of that compromise the ICTs were created. These international tribunals were to respond to the gross violations of humanitarian law in the respective territories without conceding to the political forces of the remaining sides. Despite the rationale behind their creation, it was also put as an aim to contribute to the restoration
and maintenance of peace. Once the objectives of a court of justice are no longer just to prosecute suspects and begin to encompass matters of peace and security it becomes subject to considerations on peace and justice.

The peace versus justice dilemma rarely affects places where there is a victor for the conflict. In these cases what is enforced is the victor’s justice, which means that justice will be exactly what the winning side wants it to be, as peace has been already secured by their victory. On the other hand, instances where the conflict was subject to peace agreements and cease fires need to address all the parts interests in order to maintain whatever has been achieved. Thus, justice becomes subordinate to a balance of multiparty interests that commonly put it as the least important subject.

Despite some authors argue that the peace vs. justice dilemma is a fallacy as judicial interventions are more likely to help prevent atrocities than impede peace, it is still the shared perception that justice may impair peace. Because in politics perceptions are more powerful than the actual truth, the impasse between justice and peace remains a relevant factor for international tribunals.

Rwanda was a typical example of victor’s justice. In fact, many critics were articulated on behalf of the excess of control the Rwandan government had, which permitted it to hijack the ICTR and impede the prosecution of individuals it did not want to, especially the cases against the RPF. Even the ICTY has faced some degree of victor’s justice critics. Though the former Yugoslavia did not have a winner among the conflicting parties, the lack of indictments of NATO members was subject to serious critics over a victorious posture of the western countries. In any case, when it came to the sentencing of the accused, there was a clear distinction between the victor’s justice of Rwanda and the peace agreement of the former Yugoslavia.

Because the Rwandan government wanted to have all the suspects condemned for genocide, the ICTR did not suffer with a shortage of information on the defendants’ past. More importantly, there was no pressure to acquit or dismiss the charges of genocide. In fact, the pressure the Tribunal endured was precisely to convict with the highest sentences and worst of crimes, independently of the due process of law. This was particularly visible when the Appeals Chamber released Jean-Bosco Barayagwiza 396 Akhavan, “Are International Criminal Tribunals,” 625.
for the violation of rights due to his exaggerated unjustified pre-trial detention. After the accused was set free, Rwandan authorities threatened the ICTR to cease any cooperation. The verdict was reversed, and the trial restarted.397

In a different manner, the ICTY cases were always evaluated with extreme caution in order not to risk offending Serbians, Croats, or Muslims with labels of genocidaires. This care did not impede that leader such as Milošević and Tudjman voiced against the Tribunal, while it also brought too much caution into the whole judicial process.

Therefore, it is possible to infer that, in cases where victor’s justice is present, the tribunal is prone to apply the crime more loosely, widening considerably the concept, as there is a great expectation from victorious governments that the convicted are charged with the most severe sentences at the same time their cohorts are shielded from any attempt of prosecution. Meanwhile, when there are negotiations to implement peace, the tribunal need to account for the possible upheavals that some condemnations might bring, tending to present greater limitations on all its decisions, notably to its discretion in judging the crime of genocide.

The conflict ending factor enlightens some of the differences the ICTs had while adjudicating the crime of genocide. Yet, it is not enough to account for so many discrepancies in the judgements. The second assumption brings another possible factor of explanation: the postcolonial sentiments.

Postcolonial studies have argued all along that western countries still portray former colonies as third world countries, with underdeveloped nations and cultures. Thus, countries outside Europe and North America, especially those in Africa and Asia, are expected to have less civilized behaviors since they do not have the same intellectual and cultural capacity as the first world. Obviously, this vision is not openly shared like in the XIX and XX centuries, it is intrinsic in the ways of referring and acting regarding these “inferior” nations.

When it comes to the sentencing process of the ICTs, postcolonial sentiments are deduced from the judges’ reluctance to condemn a European, a person that inspires proximity to the West own image, in committing a crime as stigmatized as genocide.

397 Bachmann and Fatić, The UN International Criminal Tribunals, 194.
Withal, in the ICTR, when trying Africans whose violence is commonly (and wrongfully) depicted as tribal, such reluctance is not present. Consequently, there are considerably more sentences charging a criminal with genocide in the ICTR than in the ICTY.

The postcolonialism hypothesis, as the conflict ending, help to explain only partially what determines the ICTs application of the crime of genocide. Notwithstanding their good reasoning for the contrasts between the two Tribunals’ sentences, they are insufficient to establish a motive for the distinctions presented in the same Tribunal. Therefore, the need for a third possible explanation.

Legitimacy is divided into input and output aspects. Input legitimacy, the assessment of institutional mechanisms and procedural fairness, has been vastly debated in the ICTs literature. It has drawn attention to various shortcomings: from the shared Prosecutor’s Office and the far location of the Chambers (the Hauge and Arusha), to the problematic tendency of always interpret the rules to the disadvantage of the accused. Yet, though the courts’ proceedings are of extreme relevance to the judicial system, when it comes to the sentencing process it is the output legitimacy that takes a tool on the judges’ decision-making.

To think in terms of output legitimacy is to go completely against the due process of law. The judicial process is objective, neutral, and unbiased, working in accordance to a set of legal rules. If a ruling account for the effectiveness or the efficiency of a sentence it shifts completely from the absolutely legal task of the court. As set before, the ICTs are not purely legal institutions, they have a reformative influence and aim that is above all political. Hence the reason why legitimacy output has such an influence in their judges’ reasoning.

Consequently, when deciding over the defendant’s charges, the ICTs judges also contemplate what is expected to be sentenced. Of course, the responsible for that expectancy is subjective, having different personifications form case to case, tribunal to tribunal. Overall, it is settled in the Western governments opinions. Undoubtedly, the populace views are also accounted for, but the governments, as the sponsors, voters and supporters of the Tribunals via UN are the ones that ultimately matter.
Thus, when there was a complaint that cases were taking too long to be solved, the Appeals Chamber decided to keep an unlawful decision, as seen in *Prosecutor v. Jelisić*. When it came to condemn the fall of a UN safe-heaven, a territory that the West took as their protectorate, there was no questioning whether it was a genocide or not. However, applied same circumstances, methods, and actors in a different location, genocide intent was not so obvious, and it was settled for ethnic cleansing. Equivalently, when confronted with the Western failure to prevent the violence in Rwanda and the public pressure to finally act on behalf of the Rwandese people, the ICTR and Appeals Chamber did not hesitate in sentencing the vast majority of the defendants with charges related to genocide.

Therefore, both ICTY and ICTR seek in their processes to respond to social aspirations. Genocide, then, is applied or withdrawn based on what it is expected for the case. Interestingly, output legitimacy is better understood when applied with the other two assumptions: conflict’s ending and postcolonialism.

In order to assess what those expectations are, besides the historical and political background of the case, it is important to have in mind the consequences brought by the way the animosities were stopped and how postcolonial sentiments still impact international politics. Accordingly, it is not prudent to elect one possible explanation for what, in fact, determines the application of the concept of genocide in the International Criminal Tribunals. It is a set of legal and political factors that permeates theories of law interpretation, conflict’s ending, postcolonialism and the pursuit for the Tribunal’s legitimacy.
CONCLUSION

What constitutes a genocide has been thoroughly discussed, yet, we can no longer assert that there is a single answer. What Lemkin originally envisioned and conceived was superseded the moment the UN Convention was promulgated. Equally, what was defined in the UNGA back in 1948 evolved with time, gaining new connotations.

The genocide concept, today, apart from academic discussions, lives through the respective judicial decisions. Whether in national or international courts, it is these trials that ultimately define what constitutes a genocide. Hence the importance in evaluating how the biggest ad hoc criminal tribunals (after the Convention came into force) used the concept in their cases.

However, as shown throughout this work, the ICTs rulings on the crime of genocide do not follow a purely legalistic approach, considering also political factors normally unrelated to judicial proceedings. In this study, it was considered three essential factors to the decision-making process: the way the conflict ended, postcolonial sentiments, and output legitimacy.

The Tribunals’ concern with its legitimacy is possibly the hypothesis that best explains the incongruencies present in the analyzed sentences. Still, this analysis is better comprehended when added the two other variables. Thus, the expectations sought to be maintain the Courts’ legitimacy are informed by the weight of being a former colony with a victorious ruling elite, or by the consequences of having a peace agreement at the outskirts of Europe. These explanations are interesting and satisfactory for a first analysis of the subject. The idea of this thesis was precisely to draw attention to the political aspects that inform how genocide is portrayed.

Respectively, there are several possibilities to continue and enlarge the current research. First and foremost, to do this same study with a bigger number of considered case law will certainly help to reinforce the conclusions found here. Another possibility is to wait until the ICC have its first convictions that include genocide and compare how these two types of tribunal make the assessment. This is actually a quite interesting topic.
since the ICC, as a permanent tribunal established in the traditional way by means of a multi-party treaty, has a greater potential for autonomy and neutrality in its decisions.

It is always possible that new variables determine how the concept of genocide is applied. Those here assessed were the ones the author considered most fit and relevant for the sentencing process of an international criminal tribunal such as the ICT and the ICTR. Overall, what must be always kept in mind is that criminal tribunals are made above all else to the victims. To let political attributions and limitations hijack such an important feature, threatening to damage the ideals of justice they entail, is extremely problematic. As Payam Akhavan brilliantly noted:

“In contrast to the weighty pronouncements of theorists and bureaucrats, the pithy speculations of pundits and policymakers, it is the voices of the survivors, reflecting intimate horrors of genocide, that most forcefully remind us that justice is not a mere utilitarian abstraction.”

398 Akhavan, “Are international Criminal Tribunals a Disincentive,” 653-654.
BIBLIOGRAPHY

Primary sources


Secondary sources


Weiler, J.H.H. “In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration.” *Journal of European Integration* 34, no. 7 (2012): 825-841.